NATIONAL PROSECUTION OF INTERNATIONAL CRIMES IN AFRICA

Law and Practice from Kenya, Rwanda and Uganda

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By

Gift Joseph Kweka

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CERTIFICATION

The undersigned certifies that he has read and hereby recommends for acceptance and examination by the University of Dar es Salaam a thesis titled: "***National Prosecution of International Crimes In Africa: Law and Practice from Kenya, Rwanda and Uganda"***, in fulfilment of the requirements for the Degree of Doctor of Philosophy (PhD) of the University of Dar es Salaam.

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Dr. Benedict T. Mapunda
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DEDICATION

This thesis is dedicated to my late father Mr. Joseph Julian Kweka (1954-2014).

ABBREVIATIONS AND ACRONYMS

ACDEG	African Charter on Democracy, Election and Good Governance
ACHPRs	African Court of Human and Peoples' Rights
ACJHRs	African Court of Justice and Human Rights
ADF	Allied Democratic Forces
AU	African Union
AUC	African Union Commission
CAP	Chapter
CAR	Central African Republic
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CID	Criminal Investigation Department
CIPEV	Commission of Inquiry into the Post-Election Violence
CRIM.	Criminal
DP	Democratic Party
DPP	Director of Public Prosecution
DRC	Democratic Republic of Congo
EAC	East African Community
EACJ	East African Court of Justice
ECOWAS	Economic Community for West African States
EU	European Union
FORD	Forum for the Restoration of Democracy
ICC	International Criminal Court

ICCPR	International Covenant on Civil and Political Rights
ICD	International Crimes Division
ICGLR	International Conference on the Great Lakes Region
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
ILC	International Law Commission
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
IOCD	International and Organized Crimes Division
JSC	Judicial Service Commission
KADU	Kenya African Democratic Union
KANU	Kenya African National Union
KNCHR	Kenya National Commission on Human Rights
LDP	Liberal Democratic Party
LRA	Lord's Resistance Army
NAC	National Alliance for Change
NAK	National Alliance (Party) of Kenya
NARC	National Rainbow Coalition
NDP	National Development Party
NGO	Non-Governmental Organization
NPK	National Party of Kenya
NRA	National Resistance Army

NURC	National Unity and Reconciliation Commission
Misc.	Miscellaneous
OAS	Organisation of American States
OAU	Organization of African Union
ODM	Orange Democratic Movement
OHCHR	Office of the High Commissioner for Human Rights
PNU	Party of National Unity
R.E	Revised Edition
RECs	Regional Economic Communities
RES	Resolution
RPF	Rwandese Patriotic Front
SADC	Southern African Development Community
SADCC	Southern African Development Co-ordination Conference
SCSL	Special Court for Sierra Leone
TJRC	Truth, Justice and Reconciliation Commission
UDHR	Universal Declaration of Human Rights
UHRC	Uganda Human Rights Commission
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UPC	Uganda People’s Congress
UPDM	Uganda People's Democratic Movement
WPVA	Witnesses and Victims Protection and Assistance Unit
WWI	World War I
WWII	World War II

ABSTRACT

This thesis investigates the national prosecution of international crimes in Africa with specific focus on Rwanda, Uganda and Kenya. The study has traced the prosecution of international crimes in Africa from the period international criminal justice was incepted to date. The study engaged doctrinal and empirical legal research in collection of data. The thesis gives an account of African position in different eras of the development of international criminal justice. On the basis of this account, it has been concluded that, historical factors have played part in the passiveness of African countries towards the prosecution of international crimes in domestic courts. The thesis further provides an analysis of the existing legislative framework for the prosecution of international crimes at regional, sub-regional and country level in Africa. This analysis provides the substantive law that exists in the area of international criminal justice as it stands today. The laws have improved over the years and it is concluded that there is a reasonable legal framework addressing core international crimes in selected countries. Being anchored in two parameters namely legislative framework and practice; the study also provides the practice of Africa in prosecuting international crimes at regional, sub regional and country level. There is more emphasis on the practice of selected countries which leads to the conclusion that, domestic courts could offer viable venue for the prosecution of international crimes where identified challenges are addressed. With this flow, the study gives a conclusion on the legislative framework and practice in national prosecution of international crimes in Africa with particular focus on Kenya, Rwanda and Uganda.

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International Court of Justice

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), International Court of Justice, Judgment of 26 February 2007.

Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), International Court of Justice, Judgment of 14 February 2002.

Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta), International Court of Justice, Judgment of 3 June 1985.

Case Concerning The Military And Paramilitary Activities In And Against Nicaragua (Nicaragua v. United States of America) (Merits), International Court of Justice, Judgment of 27 June 1986.

Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), International Court of Justice, Judgment of 3 February 2012.

North Sea Continental Shelf Cases, International Court of Justice, Judgment of 20 February 1969.

Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal) International Court of Justice, Judgment of 20 July 2012.

Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, International Court of Justice, Advisory Opinion of 28 May 1951.

International Criminal Court

Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Case No. ICC-01/09-19, 31 March 2010.

Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ICC Appeals Chamber, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", Case No. ICC-01/09-02/11-274, 30 August 2011.

Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb"), Case No. ICC-02/05-01/09.

Prosecutor v. William Samoei Ruto and Joshua Arap Sang, Case No. ICC-01/11-01/11.

Prosecutor v. Bahar Idriss Abu Garda, Case No. ICC-02/05-03/09.

Prosecutor v. Abdallah Banda Abakaer Nourain, Case No. ICC-02/05-01/12.

Prosecutor v. Abdel Raheem Muhammad Hussein, Case No. ICC-01/09-01/11.

Prosecutor v. Saif Al-Islam Gaddafi, Case No. ICC-02/11-01/11.

Prosecutor v. Laurent Gbagbo, Case No. ICC-02/11-02/11.

International Criminal Tribunal for Rwanda

Prosecutor v. Jean Kambanda, Judgement and Sentence, Case No. ICTR -97-23-S, 4 September 1998.

Prosecutor v. Michel Bagaragaza, , Decision on the Prosecution Motion for Referral to the Kingdom of Norway, Case No. ICTR-2005-86-R11bis ,19 May 2006.

Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze Appeal Judgment and Sentence, Case No. ICTR-99-52-T, 3 December 2003,

Prosecutor v. Fulgence Kayishema, Prosecutor's Request for the Referral of the Case of Fulgence Kayishema to Rwanda pursuant to Rule 11bis of the Tribunal's Rules of Procedure and Evidence, Case No. ICTR-2001-67-I, 11 June 2007.

Prosecutor v. Gaspard Kanyarukiga, Prosecutor's Request for the Referral of the Case of Gaspard Kanyarukiga to Rwanda pursuant to Rule 11bis of the Tribunal's Rules of Procedure and Evidence, Case No. ICTR-2002-78-I, 7 September 2007.

Prosecutor v. Yussuf Munyakazi, Prosecutor's Request for the Referral of the Case of Yussuf Munyakazi to Rwanda pursuant to Rule 11bis of the Tribunal's Rules of Procedure and Evidence, Case No. ICTR-97-36-I, 7 September 2007.

Prosecutor v. Ildephonse Hategekimana, Prosecutor's Request for the Referral of the Case of Idelphonse Hategekimana [sic] to Rwanda pursuant to Rule 11bis of the Tribunal's Rules of Procedure and Evidence, Case No. ICTR-00-55-I, 7 September 2007.

Prosecutor v. Jean-Baptiste Gatete, Prosecutor's Request for the Referral of the Case of Jean-Baptiste Gatete to Rwanda pursuant to Rule 11bis of the Tribunal's Rules of Procedure and Evidence, Case No. ICTR-2000-61-I, 28 November 2007.

Prosecutor v. Yussuf Munyakazi, Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda, Case No. ICTR-97-36-R11bis, 28 May 2008.

Prosecutor v. Gaspard Kanyarukiga, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, Case No. ICTR-2002-78-R11bis, 6 June 2008 .

Prosecutor v. Ildephonse Hategekimana, Decision on Prosecutor's Request for the Referral of the Case of Ildephonse Hategekimana to Rwanda, Case No. ICTR-00-55B-R11bis, 19 June 2008.

Prosecutor v. Jean-Baptiste Gatete, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, Case No. ICTR-2000-61-R11bis, 17 November 2008.

Prosecutor v. Yussuf Munyakazi, Decision on the Prosecution's Appeal against Decision on Referral under Rule 11bis, Case No. ICTR-97-36-R11bis, 8 October 2008.

Prosecutor v. Gaspard Kanyarukiga, Decision on the Prosecution's Appeal against Decision on Referral under Rule 11bis, Case No. ICTR-2002-78-R11bis, 30 October 2008.

Prosecutor v. Ildephonse Hategekimana, Decision on the Prosecution's Appeal against Decision on Referral under Rule 11bis, Case No. ICTR-00-55B-R11bis, 4 December 2008.

Prosecutor v. Yussuf Munyakazi, Oral Hearing on Rule 11bis, Case No. ICTR-1997-36-I, 24 April 2008.

Prosecutor v. Jean-Bosco Uwinkindi, Prosecutor's Request for the Referral of the Case of Jean-Bosco Uwinkindi to Rwanda Pursuant to Rule 11bis of the Tribunal's Rules of Procedure and Evidence Case No. ICTR-2001-75-I,, 4 November 2010.

Prosecutor v. Fulgence Kayishema, Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda, Case No. ICTR-01-67-R11bis, 16 December 2008.

Prosecutor v. Fulgence Kayishema, Prosecutor's Request for the Referral of the Case of Fulgence Kayishema to Rwanda pursuant to Rule 11bis of the Tribunal's Rules of Procedure and Evidence, Case No. ICTR-01-67-I, 4 November 2010.

Jean Uwinkindi v. the Prosecutor, Decision on Uwinkindi's Appeal against the Referral of his Case to Rwanda and Related Motions, Case No. ICTR-01-75-AR11bis, 16 December 2011.

Prosecutor v. Kayishema Judgment, Trial Chamber II, Case No .ICTR-95-1-T,21 May 1999.

Prosecutor v. Charles Sikubwabo, Prosecutor's Request for the Referral of the Case of Charles Sikubwabo to Rwanda pursuant to Rule 11bis of the Tribunal's Rule of Procedure and Evidence, Case No. ICTR-95-1D-I & ICTR-96-10-I, 4 November 2010.

Prosecutor v. Akayesu Judgment, Case No. ICTR-96-4 –T 2, September 1998.

Prosecutor v. Rutaganda Trial Chamber I, Case No. ICTR 96-3, 6 December 1999.

Prosecutor v. Musema Trial Chamber I, Case No. ICTR 96 13-A, 27 January 2000.

International Criminal Tribunal for the Former Yugoslavia

Prosecutor v. Dusko Tadic, Decision of the Appeals Chamber on the Defence Motion for Interlocutory Appeal on Jurisdiction, International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber Case No. IT-94-I, 2 October 1995.

Prosecutor v. Kristic Trial Chamber Judgement, Case No. IT-98-33-T, 2 August 2001.

Prosecutor v. Hadzihasanovic, Trial Chamber Judgment, Case No. IT-01-47-T,15 March 2006.

Prosecutor v. Mile Msksic, Miroslav Radic, and Veselin Sljivancanin, Case No. IT-95-13-R6, 3 April, 1996.

Prosecutor v. Dario Kordić and Mario Čerkez Appeal Judgment,Case No. ICTY-95-14/2-A, 17 December 2004.

Prosecutor v. Tadić, Appeals Chamber, Judgment, ICTY Case No.IT-94-1-A, 15 July 1999.

Special Court for Sierra Leone

Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu, Case No. SCSL-04-16-T. 20 June 2007.

Prosecutor v. Norman, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Case No.SCSL-2004-14-AR72(E), 31 May 2004.

Prosecutor v. Charles Ghankay Taylor, Judgment Summary,Case No. SCSL-03-1-T, 26 April 2012.

Prosecutor v. Morris Kallon and Another, Summary Of Decision on Preliminary Motion Based on Lack of Jurisdiction/ Abuse of Process: Amnesty Provided by the Lomé Accord, Case No.SCSL-2004-16-PT, and 15 March 2004.

Other Jurisdictions

Attorney General of Kenya v. Independent Medical Legal Unit 15 March 2012, EACJ Appellate Division, Appeal No. 1 of 2011.

Hisse'ne Habre v. Republique du Senegal, La Cour de Justice de la Communaute Economique des Etats de l'Afrique de l'Ouest, ECW/CCJ/JUD/06/10, Judgment of 18 November 2010.

Juridical Condition and Rights of Undocumented Migrants, IACtHR, Advisory Opinion OC-18/03 of 17 September 2003.

*Okello v. Uganda (*Criminal Misc. Application No. 006 of 2012) [2012] UGHC 119 (3 July 2012).

Uganda v. Kwoyelo Constitutional Appeal No. 01 of 2012. Decision of 8th April, 2015

Uganda v. Kwoyelo HCD-00-ICC Case No. 02/2010 (2011).

Uganda v. Sekabira & 10 Others (H.C. Cr. Case No. 0085 OF 2010) [2012] UGHC 92 (14 May 2012).

Rwanda

Bujeje Alfred v. Prosecutor RPAA 0032/Gén/06/CS, 2007.

Dr Zirimwabagabo Charles v. Prosecutor RPAA 0002 GEN/10/CS, 2002.

Général Major Laurent Munyakazi v. Prosecutor RPAA 0008/Gén/07/CS 2009.

Munyakayanza Cyprien v .Prosecutor RPAA 0034 /Gén/06/CS, 2006.

Murenzi Félicien v. Prosecutor RPAGEN0002/14/TGI/MHG, 2015.

Murindangabo Joseph v. Prosecutor RS/INCONST/GEN 0001/08/CS, 2009.

Niyonzigira Samson v. Prosecutor RP GEN 0003/14/TGI/MHG, 2015.

Nsengiyumva Alphonse v. Prosecutor RS/REV/GEN 0007/09/CS, 2011.

Prosecutor v .Baziruwiha Damascène RPA 0186/10/HC/MUS of 27/05/2011.

Prosecutor v. Byiringiro J.P. Tribunal de Premiere Instance de Kibungo, Judgment of 21 October 1998.

Prosecutor v. Hazikimana Appolinaire and other Tribunal de Première Instance de Gitarama, Judgment of 24 August 1998.

*Prosecutor v. Kabagwira Rosalie*N° RP0291/09/TGI/RSZ of 29/04/2010.

Prosecutor v. Kanyamahanga François RP 0836/09/TGI/NYGE of 2011.

Prosecutor v.Muransgira Jean Baptiste Tribunal de Première Instance de Nyamata, Judgment of 30 March 1998.

Prosecutor v.Murara Emmanuel 0557/09/TGI/NYGE of 29/01/2010.

Prosecutor v. Nshogoza Anastas and others Tribunal de Première Instance de Byumba, Judgment of 30 November 1999.

Prosecutor v. Semukanya Vincent and others Tribunal de Première Instance de Kibungo, Judgment of 17 July 1998.

Kenya

International Commission of Jurists-Kenya v. Attorney General & Another Misc. Crm. Application No.685 of 2010 [2011] eKLR

R v. Peter Kipkemboi Ruto [2010] eKLR

R v. John Kimita Mwaniki Criminal Case No. 116 of 2007, [2011] eKLR.

R v. James Omondi and 3 others Criminal Case No. 57 of 2008 [2015] eKLR.

*R v. Edward Kirui Crim*inal Appeal No. 198 of 2010 [2014] eKLR.

R v. Joseph Lokuret Nabanyi Criminal Case No. 40 of 2008 [2013] eKLR.

R v. James Omondi and 3 others Criminal Case No. 57 of 2008 [2015] eKLR.

Republic v. Stephen Kiprotich Leting & 3 Others Nakuru HCCR No. 34 of 2008.

Republic v. Mosobin Sot Ngeiywa and Japheth Simiyu Wekesa, Kitale HRCC No. 19 of 2008.

Republic v. Ben Pkiech Loyatum, Eldoret HRCC No. 5 of 2008.

Republic v. Andrew Mueche Omwenga Nakuru HRCC No. 11 of 2008.

South Africa

Southern Africa Litigation Centre v. Minister of Justice and Constitutional Development & 11 Others High Court of South Africa (Gauteng Division, Pretoria) Case Number: 27740/2015.

LIST OF TREATIES

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International Conventions and Declarations

Agreement between the UN and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 2000, contained in Report of the Secretary General on the Establishment of a Special Court for Sierra Leone, UN Doc S/2000/915 (4 October 2000).

Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 1945.

Charter of the International Military Tribunal, 1945.

Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, December 20, 1945, 3 Official Gazette Control Council for Germany 50-55 (1946).

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,1984.

Convention on the Prevention and Punishment of the Crime of Genocide, 1949.

Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 1968.

Convention with Respect to the Laws and Customs of War on Land, 1899.

Convention Respecting the Laws and Customs of War on Land, 1907.

Convention for the Suppression of Unlawful Seizure of Aircraft [Hijacking Convention], 1970.

Declaration on the Granting of Independence to Colonial Countries and Peoples Adopted by General Assembly resolution 1514 (XV) of 14 December 1960.

Declaration Renouncing the Use in times of war of explosive objectives under 400 Grammes weight of 29 November, 11 December 1868 (St Petersburg Declaration) and The Hague Regulations of 1899 and 1907.

Draft Code of Offences Against the Peace and Security of Mankind U.N. Doc.A/1858 1951.

Draft Code of Offences Against the Peace and Security of Mankind of 1996 Report of the International Law Commission, U.N. Doc. A/51/10 (1996).

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949.

Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949.

Geneva Convention relative to the Treatment of Prisoners of War, 1949.

Geneva Convention relative to the Protection of Civilian Persons in Time of War, 1949.

United Nations Convention on the Law of the Sea, 1982.

United Nations Convention relating to the Status of Refugees, 1951.

ILC Draft Articles on State Responsibility with Commentaries thereto Adopted by the International Law Commission, Supplement No. 10 (A/56/10).

International Convention on the Elimination of All Forms of Racial Discrimination, 1963.

International Covenant on Civil and Political Rights, 1966.

International Covenant on Economic, Social and Cultural Rights, 1966.

Rules of Procedure and Evidence, International Criminal Tribunal for Rwanda, 1995.

International Criminal Tribunal for the former Yugoslavia, Rules of Procedure and Evidence, 14 March 1994.

International Criminal Court, Elements of Crimes, (2000).

International Criminal Court, Rules of Procedure and Evidence, 2000.

International Military Tribunal for the Far East Charter, Treaty Series 1589, 19 January 1946.

Lieber Code of Armed Forces of the United States of America, 1863.

Nuremberg Rules, in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 1945.

Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, 2000.

Optional Protocol to the International Covenant on Civil and Political Rights, 1966.

Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity, 1973.

Protocol Relating to the Convention on the Status of Refugees, 1967.

Rome Statute of the International Criminal Court United Nations, 1998.

Statute of the International Criminal Tribunal for Rwanda, 1994.

Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, 1993.

United Nations Charter, 1945.

Universal Declaration of Human Rights, 1948

Vienna Convention on the Law of Treaties, 1969

Vienna Declaration and Programme of Action Adopted by the World Conference on Human Rights in Vienna on 25 June 1993.

Regional and sub-regional Instruments

America and Europe

American Convention on Human Rights, 1978.

American Declaration of the Rights and Duties of Man, 1948.

European Convention for the Protection of Human Rights and Fundamental Freedoms, 1953.

Africa

African Charter on Democracy, Elections and Governance, 2007.

African Charter on Human and People's Rights, 1986.

African Union (Draft) Model Law on Universal Jurisdiction on International Crime, 2012.

Constitutive Act of the African Union, 2001.

Declaration establishing within the OAU, a Mechanism for Conflict Prevention, Management and Resolution adopted by the Assembly of Heads of State and Government of the OAU in Cairo (Egypt) in June 1993.

Declaration on the Political and Socio Economic Situation in Africa and the Fundamental Changes Taking Place in the World, 1990.

Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination, 2006.

Protocol on Amendment to the Protocol to the Statute of the African Court of Justice and Human Rights, 2014.

Protocol to the Statute of the African Court of Justice and Human Rights, 2008.

Statute of the Extraordinary African Chambers within the Senegalese judicial system for the prosecution of international crimes committed on the territory of the Republic of Chad during the period from 7June 1982 to 1 December 1990.

TABLE OF NATIONAL CONSTITUTIONS AND LEGISLATION

Rwanda

Constitution of Rwanda 2003

Law No 02/2013/OL of 16/06/2013 Organic Law modifying and complementing Organic Law No. 51/2008 of 09/09/2008 determining the organization, functioning and jurisdiction of courts as modified and complemented to date.

Law No. 18/2008 of 23/07/2008 Relating to the Punishment of the Crime of Genocide Ideology, 2008.

Organic Law No. 03/2009/OL modifying and complementing the Organic Law No. 11/2007 of 16/03/2007 concerning the Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from Other States, Official Gazette of the Republic of Rwanda, 26 May 2009.

Organic Law No. 03/2012/OL of 13 June 2012 determining the organization, functioning and jurisdiction of the Supreme Court, Official Gazette of the Republic of Rwanda, 9 July 2012.

Organic Law No. 08 of August 30 1996on the Organization of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity committed since October 1, 1990.

Organic Law No. 33*bis* on Repressing the Crime of Genocide, Crimes Against Humanity and War Crimes of 6 September 2003.

Organic Law No. 47/2013 of 16 June 2013 relating Transfer of Cases to Republic of Rwanda, Official Gazette of the Republic of Rwanda, 16 June 2013.

Organic Law No. 66/2008 of 21 November 2008 modifying and complementing Organic Law No. 31/2007 of 25/07/2007 relating to the Abolition of the Death Penalty, Official Gazette of the Republic of Rwanda, 1 December 2008.

Organic Law No.01/2012 of 2 May 2012 instituting the Penal Code, Official Gazette of the Republic of Rwanda, 14 June 2012.

Uganda

Amnesty Act, Cap 294 of 2000.

Extradition Act Cap 117 of 1964.

Geneva Conventions Act Cap 363 of 1964.

International Criminal Court Act No. 11 of 2010.

Magistrate Courts Act Cap 16 of 1971.

Penal Code Cap 120 of 1950.

Prisons Act Cap 304 of 1958.

Ratification of Treaties Act Cap 204 of 1998 .

The Anti-Terrorism Act of 2002.

The Constitution of Uganda of 1995.

Trial on Indictment (Amendment) Act, 2008.

Trial on Indictments Cap 23 of 1971.

Uganda Citizenship and Immigration Control Act Cap 66.

Kenya

Extradition (Contiguous and Foreign Countries) Act Chapter 76 R.E. 2014.

International Crimes Act No. 16 of 2008 Revised Edition 2012.

The Constitution of Kenya, 2010.

The Geneva Conventions Act, Chapter 198 of 1968.

The Penal Code, Chapter 63 R.E 2012.

The Witness Protection Regulations, Legal Notice No. 99 of 2011.

Truth, Justice and Reconciliation (Amendment) Act, No. 44 of 2013.

Truth, Justice and Reconciliation Commission Act, No. 6 of 2008.

Witness Protection Act, Chapter 79, 2006.

Witness Protection (Amendment) Act, No. 2 of 2010.

Witness Protection Regulations, Legal Notice No. 99, 2011.

Witness Protection Rules Legal Notice No. 224, 2015.

Witness Protection (Amendment) Act, No. 45 of 2016.

South Africa

Constitution of South Africa, 1996.

Extradition Act, No. 67 of 1962.

Implementation of the Rome Statute of the International Criminal Court Act, No. 27 of 2002.

The Implementation of the Geneva Conventions Act, No. 8 of 2012.

Malawi

Constitution of the Republic of Malawi 1994.

Penal Code (Amendment) Act, No. 1 of 2011.

Extradition Act, Chapter 8:03 of 1972.

Geneva Convention Acts, Chapter 12:03 of 1967.

Mozambique

The Law on Military Crimes No. 17of 21 December 1987.

Botswana

Extradition Act, Chapter 09, 2005.

Geneva Conventions Act No. 28, 1970.

Tanzania

Extradition Act Cap.368 R.E 2002.

Geneva Conventions Act (Colonial Territories Act) Order 1959.

Democratic Republic of the Congo

Military Penal Code Loi No. 024/2002.

Ethiopia

Criminal Code of the Federal Democratic Republic of Ethiopia Proclamation No. 141 of 2004.

Penal Code of Ethiopia Proclamation No. 158 of 1957.

Mauritius

Geneva Conventions Act No. 59 of 1970.

The International Criminal Court Act No. 27 of 2011.

Namibia

Geneva Conventions Act No. 15 of 2003.

Nigeria

The Geneva Convention Act No. 54 of 1960.

Zimbabwe

Geneva Conventions Act, Chapter 11:06 of 1981.

Extradition Act, Chapter 9:08 of 1982.

Genocide Act, Chapter 9:20 of 2000.

CHAPTER ONE

INTRODUCTION

1.1 General Introduction

When one reads literature on international criminal justice, such a person may be tempted to draw a conclusion that prosecution of international crimes is mainly done before international courts or tribunals.[1] To the contrary, national courts are primarily vested with the obligation of prosecuting international crimes perpetrated in a territory.[2] When reference is made to the term international crimes in this thesis, the meaning is limited to the core international crimes under article 5 (1) of the Rome Statute of the International Criminal Court (ICC).[3] These are: crime of genocide,[4] war crimes,[5] crimes against humanity[6] and the crime of aggression.[7]

Historically, European countries have been forthcoming in carrying out prosecution of international crimes in domestic courts with particular focus on prosecuting international crimes perpetrated outside their territories by persons who are not their citizens.[8] Universal jurisdiction has therefore been used successfully.[9] Cases like

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1 There has been a thorough analysis of the historical development under chapter three of the thesis which illuminates the dominance of international tribunals in the prosecution of international crimes.

2 This reasoning has been derived from the Rome Statute of the International Criminal Court United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court U.N. Doc. A/Conf.183/9 where in its preamble recognizes the inherent obligation placed upon states to ensure that prosecution of international crimes is carried out. The primacy has also been elaborated under chapter 4 of the thesis.

3 *Ibid*.

4 *Ibid*., article 5(a).

5 *Ibid*., article 5(b).

6 *Ibid*., article 5(c).

7 *Ibid*., article 5(d).

8 From available information it is evident that the prosecution before domestic courts in Europe has not centered on prosecuting Europeans for perpetrating international crimes but rather the focus has been on other nationals that have perpetrated international crimes outside Europe. Germany

P*inochet*[10] and the Prosecutions in Belgium of Rwandese for the 1994 genocide famously referred to the Butare four (*Vincent Ntezimaro, Alphonse Higaniro, Consolata Mukangango* and *Julienne Mukabutera)*[11] are classic examples. The arrest of General Karanzi Karake of Rwanda is another exercise of jurisdiction (universal or passive personality) by European countries on African indicted officials.[12] The prosecution of international crimes under the universality principle in Europe was facilitated by the presence of legislative framework authorizing national courts to prosecute international crimes under the principle.[13]

On the other hand, prior to the 1990s impunity for international crimes committed in the African continent prevailed.[14] No accountability was sought until in the mid-1990s when Ethiopia prosecuted perpetrators of international crimes during the

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and Former Yugoslavia are the exception to this general conclusion because domestic prosecution of international crimes perpetrated in those territories has been evident.

9 Kaleck W., "From Pinochet to Rumsfeld: Universal Jurisdiction in Europe," *Michigan Journal of International Law*, 2009, pp. 931 – 958. The author assessed the practice of applying universal jurisdiction in European countries particularly Belgium, France, Switzerland, United Kingdom, The Netherlands, Scandinavia, Germany, Austria and Spain.

10 *R. v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte* (No. 3), 2 All E.R. 97 (H.L. 1999).

11 Reydams L., "Belgium's First Application of Universal Jurisdiction: The Butare Four Case," *Journal of International Criminal. Justice*, 2003, pp. 428 – 436. The author has given a background of the cases, summary of the trial and assessed the merits and shortcomings of the cases.

12 Wilkinson T., "Spain indicts 40 Rwandan officers Jurist charges officials in massacres after 1994 genocide. President Kagame is accused, but he has immunity," February 07, 2008, available at http://articles.latimes.com/2008/feb/07/world/fg-rwanda7 [Accessed 20 July 2015]; Audiencia Nacional (Central Examining Magistrate No 4) (Spain) 6 February 2008. The courts in UK have dismissed the request to extradite and surrender General Karanzi.

13 Cryer R. and Bekou O., ' International Crimes and ICC Cooperation in England and Wales, *Journal of International Criminal Justice*, 2007, No. 5, p. 441; Sluiter G., 'Implementation of the ICC Statute in the Dutch Legal Order', *Journal of International Criminal Justice*, 2003 No. 2, p. 158; Hay J., 'Implementing the ICC Statute in New Zealand', *Journal of International Criminal Justice*, 2003, No. 2, p. 191.

14 A detailed analysis of this has been provided for under chapter three of the thesis and amplified in country specific chapters that are chapter 6, 7 and 8.

period General Haile Mariam Mengistu was in power.[15] Recently, the African continent has witnessed the trials of international crimes perpetrated in the 1980s in Chad.[16] The recourse that was taken in 1990s was to extradite the perpetrators to European countries or surrender them before international courts namely the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL)[17] coupled with domestic prosecutions of low level perpetrators. The domestic prosecutions emanating from this practice have been the most successful encounters of prosecution of international crimes before domestic courts in Africa.[18]

After the International Criminal Court (ICC) was established, Africa has been setting a trend by not fulfilling their primary duty and surrendering cases to the ICC or the ICC prosecutor and the Security Council taking such cases before the Court. For example, Uganda was the first country to refer cases before the ICC.[19] Since the referral was made, only one case has been on trial before the Ugandan courts and an extradition of a rebel Jamil Mukulu has been successfully sought following the

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15 Tiba F., 'The Trial of Mengitsu and other Derg members for Genocide, torture and summary executions in Ethiopia' in Murungu C. and Biegon J., (eds), *Prosecuting International Crimes in Africa*, *op. cit*, pp. 163-184.

16 The trials of Hissene Habre before the Extra ordinary Chambers in Senegal have been discussed in chapter 5 of the thesis.

17 Blakesley C.L., 'Extraterritorial Jurisdiction' in Bassiouni M.C., (ed) *International Criminal Law: International Enforcement*, 3rd edition, Laiden, The Netherlands , 2008, p 85; Bangamwabo F., International Criminal Justice and the Protection of Human Rights in Africa, p. 105 at 106; Statute of the International criminal Tribunal for Rwanda, U.N. Doc. S/RES/955 (1994) Available at http://www.un.org/ictr/statute.htm[Accessed 24 February 2013]; UN Security Council Resolution 1325 (2000) 14 August 2000 in Kai Ambos and Mohamed Othman (Eds) *The new approaches in international criminal justice Kosovo, East Timor, Sierra Leone and Cambodia* (2003) at 250.

18 Chapter 6 of the thesis has provided in detail how Rwanda serves as a good example of domestic prosecution of international crimes in Africa.

19 *Prosecutor v Joseph Kony, Vincent Otti, Okot Othiambo and Dominic Ongwen* ICC-02/04-01/05. Information available at http://www.icccpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200204/Pages/situation%20index.aspx [Accessed 7 November 2013].

decision of Resident Magistrate at Kisutu Resident Magistrate Court in Dar es Salaam.[20] In Kenya the call for prosecution of perpetrators of post-election violence was not welcomed politically.[21] Efforts to establish a local tribunal that would prosecute the perpetrators were turned down by Kenya's political organ even after the legis1ative framework was in place.[22] This scenario is what led the ICC prosecutor to invoke the *proprio motu* powers. Therefore, this thesis examines the law and practice of national prosecution of international crimes in Africa. Throughout the thesis, the words national and domestic are used interchangeably to mean the same thing.

1.2 Background to the Study

Africa has been plagued by mass violence as a result of non international armed conflicts and generalized violence. It is suggested that almost half of the countries in the continent have experienced or still experience conflicts.[23] At least 20 countries South of Sahara have experienced civil war.[24] In general, the conflicts in African countries have been characterized by serious human rights violations. These range from wide spread murder, rape, mutilation of civilians and recruitment of child

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20 The accused has been remanded in custody in Uganda awaiting trial.

21 Parliament Rejects a Local Special Tribunal "The Bills were, however, rejected by 101 – 93 votes. 145 votes being two thirds of the 222 legislators were required for the constitutional amendments." Information available at http://www.statehousekenya.go.ke/news/feb09/2009120201.htm [Accessed 30 October 2013].

22 The Constitution of Kenya (Amendment) Bill of 2009 available at www.kenyalaw.org [Accessed 30 October 2013].

23 Gettleman J., 'Africa's Forever Wars Why the continent's conflicts never end,' Available at http://www.foreignpolicy.com/articles/2010/02/22/africas_forever wars [Accessed 5 February 2014].

24 Elbadawi I. and Sambanis N., "Why are there so many civil wars in Africa? Understanding and Preventing Violent Conflicts" *Journal of African Economies* 2000 page 1-31 at 1.

soldiers[25] to name just a few. Evidence of these violations are visible from country reports of various African states including Sierra Leone,[26] Rwanda,[27] Mali,[28] Central Africa Republic (CAR),[29] Kenya, Uganda, Chad,[30] Sudan,[31] South Sudan,[32]

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25 As of 2012 child soldiers recruitment has been documented in countries like Chad, Human Rights Watch, 'Early to War: Child Soldiers in the Chad Conflict17 July 2007', Available at http://www.hrw.org/reports/2007/07/16/early-war [Accessed 5 February 2014]; Somalia see Human Rights Watch, 'No Place for Children: Child Recruitment, Forced Marriage and Attacks on Schools in Somalia 20 February 2012'; Central African Republic, Democratic Republic of Congo, South Sudan, Mali and Sudan see Human Rights Watch, 'Child Soldiers World Wide 12 March 2012,' Available at http://www.hrw.org/news/2012/03/12/child-soldiers-worldwide [Accessed 5 February 2014].

26 Human Rights Watch "We will kill you if you cry" Sexual Violence in the Sierra Leone Conflict 17 January 2003. Available at http://www.hrw.org/en/reports/2003/01/16/well-kill-you-if-you-cry [Accessed 5 February 2014]; further reports indicated massive mutilation of civilian limbs and murder see Human Rights Watch Shocking war crimes in Sierra Leone: New Testimonies on mutilation, rape of civilians 25 June 1999 Available at http://www.hrw.org/news/1999/06/24/shocking-war-crimes-sierra-leone [Accessed 5 February 2014].

27 Human Rights Watch, 'Genocide in Rwanda 1 May 1994', Available at http://www.hrw.org/reports/1994/05/01/genocide-rwanda [Accessed 5 February 2014].

28 Human Rights Watch Mali, 'War crimes by Northern Rebels Armed; Groups Commit Rape, use Child Soldiers' 30 April 2012, Available at http://www.hrw.org/news/2012/04/30/mali-war-crimes-northern-rebels [Accessed 5 February 2014].

29 Human Rights Watch Central African Republic, 'War Crimes by Ex-Seleka Rebels Hold Commander Accountable for Attack on Town 25 November 2013', Available at http://www.hrw.org/news/2013/11/24/central-african-republic-war-crimes-ex-seleka-rebels [Accessed 5 February 2014]. Human Rights Council Special session of Human Rights Council appoints Independent Expert on situation of human rights in Central African Republic Available at http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=14186&LangID=E [Accessed 6 February 2014]. Amnesty International Central African Republic: More than 50 Muslims killed in two attacks 24 January 2014 Available at http://www.amnesty.org/en/news/car-50-muslims-killed-2014-01-24 [Accessed 6 February 2014].

30 Henry J., 'Digging up Mass Graves in Chad The Habré Trial: 23 Years on12 December 2013', Available at http://www.hrw.org/news/2013/12/12/digging-mass-graves-chad [Accessed 6 February 2014].

31 Letter to Human Rights Council on the Human Rights Situation in Sudan August 23, 2013 Available at http://www.hrw.org/news/2013/08/23/sudan-letter-human-rights-council-human-rights-situation-sudan-0 [Accessed 6 February 2014] which revealed that about 300,000 people were displaced from Darfur region and there are evidence of large scale attacks in Salmat villages in April 2013.

32 Wheeler S., 'Counting the Dead in South Sudan 30 January 2014', Available at http://www.hrw.org/news/2014/01/30/dispatches-counting-dead-south-sudan [Accessed 6 February 2014]; Henry J., 'Justice Cannot Wait in South Sudan' 31 January 2014 Available at http://www.hrw.org/news/2014/01/31/justice-cannot-wait-south-sudan [Accessed 6 February 2014]. Human Rights Watch South Sudan: 'Ethnic Targeting, Widespread Killings Civilian Protection, Independent Inquiry Needed January 16, 2014', available at http://www.hrw.org/news/2014/01/16/south-sudan-ethnic-targeting-widespread-killings [Accessed 6 February 2014].

Zimbabwe,[33] Democratic Republic of Congo (DRC),[34] and Ivory Coast.[35] Reports have indicated the number of victims of generalized violence and internal armed conflict in Africa is increasing at alarming rate. Some of the victims are dead and others internally displaced or have become refugees in other countries.

To just give a rough picture of the brutality of the civil wars and internal unrests in Africa, a snippet survey of the number of victims indicates that during the Sierra Leone civil war, more than 50,000 people died and thousands suffered mutilations. During the Rwanda genocide, 800,000- 1,000,000 people were killed and 2 million people became refugees.[36] During the Uganda civil war, it is estimated that around 100,000 victims were killed.[37] For the duration of the Kenyan post-election violence, more than 1,200 people were killed and about 600,000 internally displaced.[38] Things are even worse in the Democratic Republic of Congo. It is reported that 5,400,000 people have died since 1998.[39] All these human rights violations form part of one or more prohibited conduct under international law known as international crimes.

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33 Perpetual Fear Impunity and Cycles of Violence in Zimbabwe March 8, 2011 available at http://www.hrw.org/node/96946 [Accessed 6 February 2014].

34 Human Rights Watch Condemns Security Council's Inaction in face of Evidence of Crimes Against Humanity in the Democratic Republic of the Congo July 15, 1998 Available at http://www.hrw.org/news/1998/07/14/hrw-condemns-security-councils-inaction-face-evidence-crimes-against-humanity-democr [Accessed 6 February 2014].

35 Human Rights Watch Ivory Coast: Call for the protection of civilians and respect of the population's fundamental rights December 16, 2010 Available at http://www.hrw.org/news/2010/12/16/ivory-coast-call-protection-civilians-and-respect-population-s-fundamental-rights [Accessed 6 February 2014].

36 Information available at http://worldwithoutgenocide.org/genocides-and-conflicts/rwandan-genocide [Accessed 6 February 2014].

37 Webb M., 'Uganda civil war victims laid to rest Many human remains being buried by loved ones with the dignity not possible during country's long conflict 31 Dec 2013'. Available at http://www.aljazeera.com/video/africa/2013/12/uganda-civil-war-victims-laid-rest-20131231165326901995.html [Accessed 6 February 2014].

38 Information available at http://www.irinnews.org/in-depth/76116/68/kenya-s-post-election-crisis [Accessed 6 February 2014].

39 Information available at http://www.rescue.org/special-reports/special-report-congo-y [Accessed 6 February 2014].

International crimes are conduct which are so serious and grave that they bring about concern to the community of states in general.[40] A comprehensive understanding of what the term entails has been discussed in chapter two. However, it is important to point out that, the understanding of international crimes for the research is limited to those crimes listed under article 5(1) of the Rome Statute of the International Criminal Court (ICC).[41] These are: crime of genocide,[42] war crimes,[43] crimes against humanity[44] and the crime of aggression.[45] There are other crimes that have been recognized as international crimes within the African regional block.[46] A comprehensive list has been provided for in later chapters of the thesis.

In the event international crimes are committed, territorial states become under an obligation to ensure the perpetrators are prosecuted and thus bringing justice to the victims. The obligation placed on states to prosecute perpetrators of human rights abuses is not a recent development. It can be traced from treaties which date back to the 19thC. The duty to prosecute at national level is well enshrined under the body of

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40 Rome Statute of the International Criminal Court United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court U.N. Doc. A/Conf.183/9. The characterisation of a conduct as international crime takes aboard two things. These are the nature of general interest being protected by international community and the extent of conduct that violates the general interest. This enables the limitation of conduct that would amount to international crime to those which serious affect the general interest of the international community.

41 *Ibid*.

42 *Ibid*., article 5(a).

43 *Ibid*., article 5(b).

44 *Ibid*., article 5(c).

45 *Ibid*., article 5(d).

46 The adoption of the Protocol on the Amendment to the Protocol to the Statute of the African Court of Justice and Human Rights. The Annex Statute of the African Court of Justice and Human and Peoples' Rights under article 28A has expanded the list of crimes that are recognized as international crimes by the African Union. The list provided under this article underscores the inclusion of crimes with an international element and also crimes such as piracy, terrorism and trafficking of Hazardous Wastes. Further, other crimes recognized purely rest within domestic sphere such as unconstitutional change of government and corruption.

international humanitarian law (IHL).[47] Other treaties like the Genocide Convention[48] and the Convention Against Torture[49] impose a similar obligation on member states. The permanent International Criminal Court's (ICC) founding document[50] has also endorsed an understanding of the customarily imposed duty[51] on national states to prosecute international crimes. Hence, national courts are given primacy in prosecuting core international crimes. As such, the ICC only takes cases when national courts are not prosecuting.[52]

Apart from international treaties which African countries are party to, African continent under the African Union (AU), has in a number of occasions expressed its commitment to end impunity to international crimes. This is evidenced in the African Union Constitutive Act,[53] the Protocol for the Prevention and Punishment of the Crime of Genocide, War crimes and Crimes against Humanity and all forms of

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47 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31 entered into force Oct. 21, 1950; article 49; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 U.N.T.S. 85, entered into force Oct. 21, 1950 article 50; Geneva Convention relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, *entered into force* Oct. 21, 1950 article 129; and Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, entered into force Oct. 21, 1950 article 146.

48 The Convention on the Prevention and Punishment of crime of Genocide, 78 U.N.T.S. 277 (1951) articles 1, 4, 5 and 6.

49 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987 articles 4 5 and 7.

50 Rome Statute; Naqvi Y., "Amnesty for War Crimes: Defining the Limits of International recognition," *International Review of the Red Cross*, 2003, Vol 85, No 851, p. 583 and 599.

51 Bassiouni M.B., *Crimes Against Humanity in International Criminal Law*, Martinus Nijhof Publishers, The Hague, Netherlands, 1999, p. 209. UN Commission on Human Rights Resolution 1999/1ECN para 2; UN Commission on Human Rights Report of the Independent Expert to update the set of principles to combat impunity 2005.

52 Paper on some policy issues before the Office of the Prosecutor, ICC-OTP-2003, September 2003, available at http://www.icc-cpi.int/nr/rdonlyres/policy_paper.pdf [Accessed 2 June 2013] at 4.

53 Article 4(h) which gives member states rights to intervene in cases of war crimes, crimes against humanity and genocide.

Discrimination (relevant to the Great Lakes Region member states),[54] The envisioned extension of the mandate of the East African Court of Justice[55] and the African Court of Human and Peoples' Rights[56] to have jurisdiction on international crimes and the efforts of the African sub regional organizations in urging states to fulfil their obligations in order to end impunity to international crimes.[57]

Following these treaties and customarily imposed obligations, African states are on the spotlight. It is expected that states will carry out the prosecution of international crimes at domestic level. In the event that they are unable or unwilling to do so, other recourses can be taken. This is either to extradite the perpetrators to a third state or surrender the accused before an international court. This research aimed at bringing to the fore African practice in relation to the discharge of obligations placed upon member states by the above treaties and the role played by individual states to fulfill such obligation.

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54 International Conference on the Great Lakes Region of 26th November, 2006. The Protocol is part of the Great Lakes Pact and came into force in 2008. Available at http://www.icglr.org/index.php/en/genocide-prevention[Accessed 6th January 2014]. It is with emphasis that the relevant provisions imposing a duty to prosecute international crimes are given an elaborate discussion in chapter three of the thesis. Further, the country study chapters i.e. 6,7 and 8 provide an overview of the treaties to which a country is a party to.

55 Communique of the 15th Ordinary Summit of the EAC Heads of States Kampala Uganda 30th November, 2013 available at http://www.eac.int/news/index.php?option=com_docman&task=doc_download&gid=353&Itemid=73. [Accessed 6th January 2014].

56 See information available at http://www.african-court.org/en/index.php/2-home?start=3 [Accessed 13th January 2014].

57 See the Windhoek Plan of Action on ICC Ratification and Implementation in SADC May 2001.

1.3 Statement of the Problem

In Africa, the ICC has intervened in nine (9) accounts to end impunity to international crimes in the continent.[58] This has led to the concentration of ICC cases emanating from Africa a practice that has fuelled discontent from African leaders.[59] The position supported by African leaders is that the ICC is biased specifically targeting African leaders.[60] The question that remains unanswered is whether the contention is founded. Noteworthy is the fact that only 10 countries out of 34 African member states to the Rome Statute have legislation addressing core international crimes. In other counties there is very sketchy legislative framework rendering the prosecution of international crimes as such difficult.

Further, when surveying the cases before the ICC, it is notable that, domestic courts have not been active in prosecuting the perpetrators. This is a condition precedent for passing of admissibility test before the ICC. Can one talk of bias without fulfilling the primary duty to prosecute international crimes? Why then have African countries been reluctant or unable to prosecute international crimes before their domestic courts? These questions brought a need to investigate why African states have not been forthcoming in prosecuting international crimes at domestic level by examining the law and practice. A selection of three countries i.e. Kenya, Uganda and Rwanda was made.

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58 See information available at https://www.icc-cpi.int/pages/situations.aspx [Accessed 10 August 2016].

59 Kimenyi M.S., "Can the International Criminal Court Play Fair in Africa?," 17 October 2013, Available at http://www.brookings.edu/blogs/africa-in-focus/posts/2013/10/17-africa-international-criminal-court-kimenyi Accessed 21 October 2013.

60 *Ibid*.

1.4 Objectives of the Study

1.4.1 General Objective

The main objective of this study was to examine why African countries have been passive in prosecuting international crimes.

1.4.2 Specific Objectives

The following specific objectives accompanied the main objective.

a. To examine the legislative framework that is available in selected African states and assess whether they offer a tool for the realization of prosecution of international crimes at municipal level.
b. To analyze the practice of national courts in dispensing justice to the victims of international crimes.

1.5 Significance of the Study

The study has answered the question why African countries have been passive towards prosecuting international crimes at domestic level. This has given an understanding of the practice of Africa and reasons behind it which is paramount in enhancing national prosecution of international crimes as envisioned by the Rome Statute and prosecutorial policies of the ICC prosecutor. The study will therefore help African countries to know which areas (including investigation, prosecution and witness protection) need strengthening in order to achieve optimal results as they strive to bring about accountability in the continent.

Drawing from a comparative analysis of existing laws, it has put forth a review of what the continent is offering thus far in terms of the body of domestic legislation

criminalizing international crimes. The legal framework has been deduced from the AU level to the countries under study. The thesis has highlighted the strengths of the current framework and has proposed areas of improvements where necessary. The thesis is therefore a benchmark in what Africa is offering and what other African states need to do in order to have comprehensive legal framework for domestic prosecution of international crimes.

Finally, the study shall enable Africa to know how best it can achieve the prosecution of international crimes purely at domestic level as stated in chapter 9. This has been done from analyzing the current domestic prosecutions, highlighting the challenges faced and proposed ways on how to overcome those challenges.

1.6 Literature Review

The literatures reviewed have been broken down into sections to give an easy coverage and understanding of the content that has been analyzed. They have covered an array of issues pertaining to international criminal law and justice. Therefore, despite the fact that writers have been grouped in one cluster, they may have partially written something concerning a cluster to which they have not been included. The sections should therefore not be construed to totally limit coverage of the works of the authors reviewed.

Werle,[61] Smeulers and Grunfeld,[62] McGoldrick,[63] Sunga,[64] Bantekas and Nash,[65]Bassiouni[66] Belleli[67]and Cassese[68] have comprehensively covered a general understanding of international criminal law. They have traced its origin from the Nuremberg and the Tokyo trials held after the Second World War. Thereafter, reference has been made to the ICTR and the ICTY and subsequently the national cum internationalised courts in Cambodia, Kosovo, East Timor and Sierra Leone. The era we live in today is the icing of international criminal law which is marked by the establishment of the Permanent International Criminal Court. This approach gives an understanding of jurisdictional relationship between international courts and domestic courts, developed from primacy of international courts to complementarity under the ICC.

The authors have further covered the general principles of international crimes. This set of literature is limited as it does not bring African practice in relation to prosecution of international crimes at domestic level. Further, in all historical

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61 Werle G. and Burghardt B., "Do Crimes Against Humanity Require the Participation of a State or a 'State-like' Organization?," *Journal of International Criminal Justice*, 2012, No. 10, pp. 1151-1170.

62 Smeulers A. and Grunfeld F., *International Crimes and Gross Human Rights Violations: A multi and Interdiscplinary textbook*, Martinus Nijhoff Publishers, Laiden, The Netherlands, 2011.

63 McGoldrick D., *The Permanent International Criminal Court*, Hart Publishing, Portland, United States of America, 2004.

64 Sunga L.S., *The Emerging System of International Criminal Law: Developments in Codification and Implementation*, Kluwer Law International, The Hague, The Netherlands, 1997.

65 Bantekas I. and Nash S., I*nternational Criminal Law*, Cavendish Publishing Limited, London, The United Kingdom, 2003.

66 Bassiouni M.C., *Crimes Against Humanity in International Criminal Law*, Kluwer Law International, The Hague, The Netherlands, 1999.

67 Belleli R., 'The Establishment of the System of International Criminal Justice' in Belleli R., (ed) *International Criminal Justice Law and Practice: From the Rome Statute to its Review*, Ashgate Publishing Limited, Farnham, United Kingdom, 2010 pp. 5-62.

68 Cassese A., 'From Nuremberg to Rome: International Military tribunals to The International Criminal Court' in Cassese A., Gaeta P. and Jones R.W.D.J., *The Rome Statute of the International Criminal Court: A Commentary*, 2008, vol 1, pp. 1-18; Cassese A., *International Criminal Law*, Oxford University Press, Oxford United Kingdom, 2008.

account of the development of international criminal law there has not been a thorough analysis of where Africa stood and the role played if any in the development of international criminal law. Example, international crimes committed during the colonial period and cold war period in Africa have not been pointed out. Further, the lack of accountability during that time and how it has affected African practice in relation to the prosecution of international crimes has also not been articulated. The researcher bridged an understanding on the developments of international criminal law by placing Africa and the practice of prosecuting international crimes during colonial period and decades after independence.

Another cluster of literature is from Cryer, Friman, Robinson, Wilmshurst,[69] Werle,[70] Pocar,[71] Mose,[72] Schabas[73] and Winter[74] who have accounted for prosecution of international crimes before international courts; the Nuremberg, Tokyo tribunals, ICTY and the ICTR. The tribunals' jurisprudence is both ground breaking and innovative. The criminalization of rape as a conduct amounting to genocide,[75] the incitement of genocide by the media and the categorization of recruitment of child

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69 Cryer R., et al, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, New York, The United States of America, 2010.

70 Werle G., *Principles of International Criminal Law,* TMC Asser Press, The Hague, The Netherlands, 2005.

71 Pocar ., 'The Experience of the UN Tribunals and their Completion Strategies' in Belleli R., (ed), *International Criminal Justice Law and Practice: From the Rome Statute to its Review, op. cit,* pp. 67-77.

72 Mose E., 'The International Criminal Tribunal for Rwanda' Justice' in Belleli R., (ed), *op. cit*, pp. 79-99.

73 Schabas W.A., *The United Nations International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone,* Cambridge University Press, Cambridge, United Kingdom; Schabas W.A., *An Introduction to International Criminal Court,* Cambridge University Press, Cambridge, The United Kingdom, 2011.

74 Winter R., 'The Special Court for Sierra Leone' in Belleli R., (ed), *International Criminal Justice Law and Practice: From the Rome Statute to its Review, op. cit*, pp. 101-121.

75 *Prosecutor v Akayesu Judgement ICTR-96-4 –T.*

soldiers as a crime under international law[76] are a legacy of the Courts. Other achievements include the realization and continuation of international efforts to end impunity to international crimes.

Roy lee,[77] Ocampo,[78] Barnes[79] and Guariglia[80] have added on an understanding of the prosecutions at the ICC. The ICC thus far has been characterized by a practice referred to as `self-referral and its cases are concentrated in Africa. The ICC has however been crippled by ineffective enforcement mechanism. Since the cluster of literature was not envisioned to cover domestic prosecution of international crimes, it aided the researcher in the historical account chapters where prosecutions were mainly centred before international tribunals. Further, the thesis has then made an expansion by bridging an understanding of domestic prosecution of international crimes in Africa.

The prosecution of international crimes under universal jurisdiction is based on the universality principle. Noteworthy, the previous writers who wrote on the prosecution of international crimes under international courts have briefly touched on

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76 *The Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor KanuSCSL-04-16-T.*

77 Lee R., *The International Criminal Court: The Making of the Rome Statute--Issues, Negotiations, and Results,* Kluwer Law International, The Hague, Netherlands, 1999.

78 Ocampo L.M., 'The International criminal Court in Motion' in Stahn C. and Sluiter G., *The Emerging Practice of the International Criminal Court,* Martinus Nijhoff Publishers, Laiden, The Netherlands, 2009 p. 13.

79 Barnes G.P., "The International Criminal Court Ineffective Enforcement Mechanisms: The Indictment of President Omar Albashir," *Fordharm International Law Journal,* 2011, vol 34, No. 6, pp. 1584-1619.

80 Guariglia ., 'The Selection of Cases by the Office of the Prosecutor of the International Criminal Court' in Stahn C. and Sluiter G., *The Emerging Practice of the International Criminal Court, op. cit,*p. 209.

the subject. However, writers like Cassese,[81] Blakesley,[82] Lafontaine,[83] O'Keefe,[84] Bassiouni,[85] Inazumi[86] and Orentlicher[87] have generously covered the topic. The prosecution of international crimes under this heading stems from the understanding of principles codified in the Princeton Principles on Universal Jurisdiction.[88] The literature serves as first glimpse in understanding prosecution of international crimes at domestic level. However, the understanding here is centred on prosecutions held by European countries. It does not cover African practice in relation to the prosecution of international crimes under the universality principle. No reasons have been adduced to answer the question as to why countries that could prosecute war crimes under the universality principle have not done thus far in Africa. To this effect, the research has closed the gap by advancing such reasons. Moreover, the research has given the current practice in the exercise of universality principle in Europe and how the affected African countries have reacted.

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81 Cassese A., *The Oxford Companion to International Criminal Justice,* Oxford University Press, Oxford United Kingdom, 2009.

82 Blakesley C.L., 'Extraterritorial Jurisdiction,' *op. cit.*

83 Lafontaine F., "Universal Jurisdiction-The Realistic Utopia," *Journal of International Criminal Justice,* 2012, No.10, pp. 1277-1302.

84 O'Keefe R., "Universal Jurisdiction Clarifying the Basic Concept," *Journal of International Criminal Justice* 2004, No. 2, pp. 735-76.

85 Bassiouni M.C., 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice' in Bassiouni M.C.,(ed) *International Criminal Law: International Enforcement,* 3rd edition, Laiden, The Netherlands, 2008, p. 153; Bassiouni M.C., 'The History of Universal Jurisdiction and its Place in international Law' in Macedo S., (ed*) Universal Jurisdiction, National Courts and the Prosecution of Serious Crimes under International Law,* University of Pennsylvania Press, Pennsylvania, United States of America, pp. 39-63;

86 Inazumi I., *Universal Jurisdiction in Modern International Law: Expansion of national Jurisdiction for prosecuting Serious crimes Under International Law*, Intersentia, 2005.

87 Orentlicher D.F., 'Universal Jurisdiction A Pragmatic Strategy in Pursuit of a Moralist's Vision' in Sadat L.N. and Scharf M.P., (eds) *The theory and Practice of International Criminal Law Essays in Honour of M Cherrif Bassiouni,* Martinus Nijhoff Publishers, Laiden, The Netherlands, 2008, p. 127.

88 Principle 1.

The prosecution of international crimes by national courts based on the complementarity principle is subdivided into three groups. These include; general understanding of the principle of complementarity, the implementation of the Rome Statute and actual practice in prosecuting international crimes under the complementarity principle in Africa.

Stigen,[89] Kleffner[90] and Jurdi[91] have comprehensively covered the principle of complementarity. Complementarity deals with an understanding that the ICC is a court of complementary jurisdiction with national courts being given primacy in prosecuting international crimes. Therefore, the literature is the benchmark for contemporary international criminal law. However, the nature of literature itself is centered on bringing an understanding to what the principle entails. This work has therefore not laboured in underscoring the practice of Africa in relation to national prosecution of international crimes nor has it gone a step to stating why the practice of Africa is what it is. The current thesis has therefore provided for this understanding.

Another aspect is the implementation of the Rome Statute. Writers like, Kred and Lattanzi[92] have dealt with implementation of the Rome Statute largely covering

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89 Stigen J., *The Relationship Between the International Criminal Court and National Jurisdictions: The Principle of Complementarity,* Martinus Nijhoff Publishers, Laiden, The Netherlands, 2008.

90 Kleffner J.K., *Complementarity in the Rome statute and National Criminal Jurisdictions,* Oxford University Press, New York, 2008.

91 Jurdi N.N., 'Some Lessons on Complementarity for the International Criminal Court Review Conference' *South Africa Year Book of International Law,* 2010; Philippe X., 'The Principles of Universal Jurisdiction and Complementarity: How do the two principles intermesh?', *International Review of the Red Cross*, 2006, Vol 88, No. 862, pp. 375-398;

92 Kreb C. and Lattanzi F., (eds) *The Rome Statuteand Domestic Legal Orders Volume 1: Constitutional Aspects and Constitutional Issues* Italy 2000.

European countries. On the other hand, Stone,[93] Bekou,[94] Okuta,[95] Niang,[96] and Plessis[97] have independently assessed the legislation that have been enacted to implement the Rome Statute in Kenya,[98] Senegal,[99] South Africa[100] and Uganda.[101] The analysis of the laws has not been done on a comparative analysis with a view to establishing a pattern or trend which the researcher achieved under the current thesis. Further, the authors have not captured other relevant laws in the prosecution of international crimes that exist apart from the Rome Statute Implementing legislation for example, example witness protection, laws something that has been covered here.

Also, Nkhata[102] has analysed Malawi and Zambia which are yet to pass an implementing legislation on the Rome Statute. The writer has identified the criminal regime that exists in the two countries. The author's work is limited to the two countries. The researcher has provided an assessment of the slow pace in enacting implementing legislation in other parts of the region and has also given reasons why this may not change in the near future. Other recourse has been proposed to enable

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93 Stone L., 'Implementation of the Rome Statute in South Africa' in Murungu C. and Biegon J., (eds) *Prosecuting International Crimes in Africa*, Pretoria University Press, South Africa, 2011 pp. 305-330.

94 Bekou O., 'Crimes at Crossroads: Incorporating International Crimes at National Level' *Journal of International Criminal Justice* 2012, vol10, pp. 677-691.

95 Okuta A., 'National Legislation for Prosecution of International Crimes in Kenya,' *Journal of International criminal Justice*, 2009, vol 7, pp. 1063-1073.

96 Niang M., 'The Senegalese Legal Framework for the Prosecution of International Crimes,' *Journal of International Criminal Law*, 2007 ,Vol 7, pp. 1047-1082.

97 Plessis M., "South Africa's Implementation of the ICC Statute," *Journal of International Criminal Justice*, 2005, Vol 5, pp. 460-479

98 International Crimes Act 2008.

99 Modifiant le Code de Procedure penale 2007.

100 The International Criminal Court Act 27 of 2002.

101 The International Criminal Court Act 2010.

102 Nkhata M., 'Implementing the Rome Statute in Malawi and Zambia: Progress, Challenges and Prospects' in Murungu C. and Biegon J., (eds), *Prosecuting International Crimes in Africa*, *op. cit*, pp. 227-302.

African countries to have comprehensive legislative framework for the prosecution of international crimes.

The last group of literature is on the prosecution of international crimes at domestic level in Africa. This cluster has been centred on prosecutions completed in Ethiopia and those underway in Senegal, Libya, Uganda and DRC. Kenya poses an interesting and different catch as no prosecutions are yet to commence and maybe there is little prospect for that. Mbazira,[103] Greenawalt,[104] Olugbuo,[105] Ferdinandusse,[106] Tiba,[107] Namwase[108] and Neldjingaye,[109] have dominated this group each tackling a specific context as evidenced in the works referred to here. A general conclusion is that, prosecutions are underway in the countries explored by the authors. However, no reference has been made as to why it took a long time before national courts started to prosecute. Further, the works have not stated why we are witnessing a mixed scenario where some cases are surrendered before the ICC and few prosecuted before national courts. Therefore, the thesis has closed in the gaps in the country study chapters.

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[103] Mbazira C., 'Prosecuting International Crimes Committed by the Lord's Resistance Army in Uganda' in Murungu C. and Biegon J., (eds), *Prosecuting International Crimes in Africa*, *op. cit*, pp.197-220.

[104] Greenawalt, A. K. A., 'Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court,' *Virginia Journal of International Law*, 2009, vol 50, pp. 107 – 162;

[105] Olugbuo B., 'Positive Complementarity and the Fight Against Impunity in Africa' in Murungu C. and Biegon J., (eds), *Prosecuting International Crimes in Africa*, *op cit*, pp. 249 – 275.

[106] Ferdinandusse W., 'The Prosecution of Grave Breaches in National Courts' *Journal of International Criminal Justice*, 2009, No. 7, pp. 723 – 741.

[107] Tiba F., 'The Trial of Mengitsu and other Derg members for Genocide, torture and summary executions in Ethiopia' in Murungu C. and Biegon J., (eds), *Prosecuting International Crimes in Africa*, *op. cit*, pp. 163-184.

[108] Namwase S., *The Principle Of Legality and The Prosecution of International Crimes In Domestic Courts: Lessons From Uganda*, Lap Lambert Academic Publishing, Saarbrucken Germany, 2012.

[109] Neldjingaye K., 'The trial of Hissene Habre in Senegal and its contribution to International Criminal Law' in Murungu C. and Biegon J., (eds), *Prosecuting International Crimes in Africa*, *op. cit*, pp.185-196.

In general, the literature reviewed has not covered the parameters that the thesis has extended on. Little has been said in relation to the practice of Africa on prosecution of international crimes at domestic level especially reasons behind it. The historical account of the minimum role played by Africa in the development of international criminal law and its impact in the practice has not been explored. Further, the legislative regime on prosecution of international crimes in Africa has not been explored to give reasons for reluctance to ratify or indeed domesticate the Rome Statute by some African countries. Further, the reviewed legislation have not been done with a view of establishing a pattern or trend to which African countries offer in terms of laws available for prosecuting international crimes from regional, sub-regional to domestic level. These are the gaps that the author has filled in order to have a clear understanding of the existing state of affairs in Africa and be able to provide a more supportive environment for effective prosecution of international crimes.

1.7 Hypothesis

The researcher proceeded under the following tentative conclusions:-

Main Hypothesis

That, African countries have been passive in prosecuting international crimes at domestic level.

The Elements

a. That, African countries do not have adequate legal framework to prosecute international crimes.
b. That, there is lack of priority and political will to ensure international crimes

are prosecuted at the domestic level in Africa.

1.8 Research Methodology

The researcher employed an explanatory study based on the observation of historical and contemporary facts on African practice and the law that exists. Therefore, this research was not limited to what the law is.[110] In order to attain the main objective of the study, consideration of sociological factors and how they impact the existing law and practice was inevitable. Therefore, because no particular design is mutually exclusive, one is expected to find elements of description and explanation of the phenomenon and how variables relate to one another in this thesis.[111]

1.8.1 Doctrinal Legal Research

Authorities define doctrinal or theoretical legal research as research which asks what the law is in a particular area.[112] Here the researcher collected and analysed a body of case law together with any relevant legislation (so-called primary sources).[113] This was from a historical perspective and included secondary sources such as journal articles or other written commentaries on the case law and legislation.[114] Under doctrinal research, the researcher's principle or even sole aim was to describe a body of law and how it applies.[115] This was necessary in order to provide the legislative framework and the evolving practice that exists in Africa for the prosecution of international crimes. Moreover, the researcher has also provided an analysis of the law to demonstrate how it has developed in terms of judicial reasoning and

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[110] Dobinson I. and Johns F., 'Qualitative Legal Research' in Mc Conville M. and Chui W.H, *Research Methods for Law* Edinburg University Press, Edinburgh, Great Britain, 2007, p. 16.
[111] Chui W.H., 'Quantitative Legal Research' in Mc Conville M. and Chui W.H., *Research Methods for Law* Edinburg University Press, Edinburgh, Great Britain, 2007, p. 46.
[112] Dobinson I. and Johns F., 'Qualitative Legal Research,' *op. cit*, pp.18-19.
[113] *Ibid*.
[114] *Ibid*.
[115] *Ibid*.

legislative enactment.[116]

Also, relevant international instruments have been analyzed. This has ranged from international treaties to the body of customary international law. Where necessary specific cases to advance the understanding of the relevant provisions were also discussed. Moreover, regional international law has been analyzed. This is with specific reference to treaties adopted under the ambit of the African Union and other sub regional integrations. For country study, domestic legislation were analyzed and decided cases examined to support the arguments in furtherance of establishing the law and practice of domestic prosecution of international crimes.

In obtaining the relevant legislation, international instruments and scholarly writings, the researcher made use of the University of Dar es salaam Law Library, The ICTR library, The African Court of Human and Peoples' Rights library, the United Nations Economic Commission for Africa library, the University of Geneva Library and the United Nations Office in Geneva (UNOG) library. Online resources including journals were also accessed.

1.8.2 Empirical Legal Research

Baldwin and Davis argue, "it is important to note that empirical legal scholarship is complementary to doctrinal research and both methodologies can be used simultaneously to examine legal issues." [117] Thus, in order to overcome the

[116] *Ibid*.

[117] Baldwin, J. and Davis, G., 'Empirical Research in Law' in P.Cane and M. Tushnet (eds), *The Oxford Handbook of Legal Studies*, Oxford University Press, 2003, p.881 cited in Chui W.H. and McConville M., (eds), *Research Methods for Law*, Edinburgh University Press, 2010, p.6.

limitations of the doctrinal exposition which studies the law as it is, the present researcher engaged empirical legal research. This was based on the examination of how the problem exists, is perceived and dealt with in the world through the utilization of different methods.

1.8.2.1 Methods

(a) Interviews

This method was used in order to get relevant information from the respondents. The researcher did a proper planning of the interviews but did not limit them to structured interviews. This enabled the respondents to give out knowledge beyond what the researcher could have anticipated from a structured interview. The researcher conducted face to face interviews and in some other instances, cell phones and Skype were used to conduct interviews. The researcher limited the interviews to 12 experts in the field of international criminal justice and international law. The experts include Prof. Dire Tladi,[118] Prof. Boisson de Chazournes,[119] Prof. Sean Murphy,[120] Prof. Vincent O. Nmehielle,[121] Prof. Adeladius Kilangi,[122] Prof. Makane Moise Mbengue,[123] Concepcion Escobar Hernandez,[124] S. Amos Wako,[125] Shinya

[118] Professor of international law from Pretoria University in South Africa and member of International Law Commission.
[119] Professor of international law from University of Geneva.
[120] Professor of international law from George Washington University Law School and member of International Law Commission.
[121] Legal Counsel & Director for Legal Affairs of the African Union.
[122] Professor of international law from St. Augustine University and member of the African Commission on International Law.
[123] Professor of international law from University of Geneva.
[124] Member of the International Law Commission and Special Rapporteur on the topic Duty to Prosecute or Extradite.
[125] Former Attorney General of Kenya and Member of the International Law Commission.

Murase,[126] Judge Fatsah Ouguergouz,[127] Judge Abdulqawi Ahmed Yusuf[128] and Dr. Yitiha Simbeye.[129] This limit was necessary taking into account the difficulty that was anticipated in getting the experts to devote time for interviews. Interviews were also conducted to a total of 25 interviewees involved in the prosecution of international crimes at domestic level in Rwanda, Kenya and Uganda (6 officers from witness protection units, 6 from DPP Office, 5 from the Investigation units and 8 from the judiciary). The remaining number of sample that is 23 was therefore expected to be reached through questionnaires.

(b) Questionnaires

This tool was used to collect data from the selected sample. The researcher employed a structured questionnaire which consisted of very clipped and pre planned questions gearing at eliciting information about the problem under research to which the respondents will complete and return to the researcher.[130] Most of the questions were open ended. This method did not however yield the result anticipated due to the low return of questionnaires. Out of 23 questionnaires submitted, only 13 were returned.

1.9 Study Area and Justification

The research as the title suggests was focused on selected East African countries because of the inability to cover the entire continent. Countries that were chosen include Uganda, Kenya and Rwanda. The basis for reflecting these countries is the presence of international crimes committed and proximity of the countries. Further,

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126 Member of the International Law Commission.
127 Judge of the African Court of Human and Peoples' Rights.
128 Judge of the International Court of Justice.
129 Founder of the International Criminal Law Centre of the Open University of Tanzania.
130 Marke J.J., Sloane R and Ryan M., *Legal Research and Law Library Management* Law Journal Press, New York, USA, 2005 at p.29.

the countries offered a good study in relation to the prosecution of international crimes.

The three countries were not all at the same stage in prosecuting international crimes. Example, Rwanda had finished the prosecution of international crimes for most cases and it was now concentrating on transferred cases. Uganda on the other hand, had commenced the prosecution of one case before its International Crimes Division. Kenya was still struggling to have in place the infrastructure necessary for the prosecution of international crimes. Prosecution thereof was deduced from the ordinary crimes approach. This offered a point for comparative analysis assessing why one has been more successful than the other and how they offer lessons for future practice. Moreover, in the thesis other countries that have not been the focus of the study have provided input for a wider understanding of the researched problem.

1.10 Sampling Design and Sample Size

This research engaged purposive sampling. It is a form of non-probability sampling in which decisions concerning the individuals to be included in the sample are taken by the researcher, based upon a variety of criteria which may include specialist knowledge of the research issue, or capacity and willingness to participate in the research.[131] Given the nature and complexity of the subject studied, as well as the objectives of the research, purposive sampling was preferred to random sampling. A sample of 60 respondents was selected. This included persons from the justice departments, investigation units, Attorney General's Chambers, witness protection

[131] The SAGE Dictionary of Social Research Methods, DOI: Available at http://dx.doi.org/10.4135/9780857020116 [2 October 2013].

sections and the established Special Divisions of the High Court in the countries under study. Other respondents from the African Union were involved in providing information on key issues presented in this thesis. These were experts in the AU office of the Senior Legal Counsel, a judge from the African Court of Human and Peoples' Rights and experts from the African Commission of International Law. The rest of the respondents were international experts including members of the International Law Commission, Professors in the field of international criminal justice and practitioners.

1.11 International and Comparative Legal Research

It is conventional that any study of international law and how it relates with national law must involve international and comparative legal research. This is because of the increasing influence of international and supra-national legal materials, and the increasing need for legal scholars to refer to materials from a variety of jurisdictions and the need to engage in critical thinking.[132] Since the study focused on national prosecution of international crimes, international and comparative legal research was used. Therefore, data collected have been compared between international and national law and practice and between countries studied.

1.12 Data Analysis

The classical content analysis was used to analyze data for this research. This method is used to analyze research-generated texts such as interview transcripts or other

[132] Chui, W.H. and McConville, M., *Research Methods for Law,* Edinburgh University Press, 2010, p.6.

documents, newspaper articles, case reports.[133] The researcher employed the daily interview analysis where at the end of the day information from the respondents was interpreted to see how it related to the main and specific objectives. The analysis looked at the cause of the pattern that exists in Africa in relation to the passiveness towards the prosecution of international crimes at domestic level and found explanation as to why the identified factors have led to this particular outcome. The interview transcripts and open ended questionnaires were therefore analyzed by descriptive method.

[133] Webley, L., 'Qualitative Approaches to Empirical Legal Research' in Cane, P and Kritzer, H.M., *The Oxford Handbook of Empirical Legal Research*, Oxford University Press, New York, 2010, pp. 926-950, at p.941.

CHAPTER TWO

CONCEPTUAL AND THEORETICAL FRAMEWORK

2.1 Introduction

The introductory chapter articulated the need to undertake research on the legislative framework and the practice of African countries in prosecuting international crimes. In as much as the research is centered on the prosecution of international crimes before domestic courts in selected African countries, the objectives cannot be achieved without having a clear understanding of the concepts underlying the thesis. This chapter therefore, gives a definition of concepts and lays down the theoretical framework for domestic prosecution of international crimes. The main objectives of the chapter are first, to provide a clear understanding of the term international crimes. Further, since the research is limited to the core international crimes i.e. war crimes, crimes against humanity, genocide and the crime of aggression the chapter also gives an understanding of each. Secondly, the chapter provides for different theories which articulate the practice of prosecuting international crimes at domestic level. This will yield results when analyzing the practice of prosecuting international crimes at domestic level that has been adopted by countries sampled.

2.2 Understanding the Term International Crime

The term "international crime" has not been clearly defined in terms of having a particular document that provides for what it entails. Understanding international crimes therefore goes in line with an understanding of the body of international criminal law whose sources can be discerned from article 38 of the International Court of Justice Statute. Article 21 of the Rome Statute also provides for the specific

sources of international criminal law which the ICC applies. These sources[134] when analyzed together, will give an understanding of the meaning of the term "international crimes."[135]

Efforts to have a definition of what amounts to an international crime were codified by the International Law Commission (ILC). The 1954 Draft Code of Offences Against Peace and Security of Mankind[136] and the first Draft Articles on State Responsibility, particularly article 19 gives an overview of what international crimes are.[137] Article 19 provides that international crime is,

> 2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime to that community as a whole constitutes an international crime.
>
> 3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, inter alia, from:
> (a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;

The above definition on international crime is based on the concept of state responsibility. The definition therefore makes reference to obligations owed by a state to the international community and the breach of such obligations. Despite the fact that this definition does not refer to individuals, it is still vital in understanding international crimes for the purpose of this thesis. While states bear responsibility for the commission of international crimes as stated in the above definition, when

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134 Cassese A., *Cassese's International Criminal Law,* Oxford University Press, United Kingdom, 2013, p. 10. The sources of international criminal law are the same rules that are applied by national courts based on whether they adhere to the monist or dualist approach.

135 Damgaard C., *International Criminal Responsibility for Core International Crimes,* Springer – Verlag, Berlin, German, 2008, p. 57.

136 Adopted by the International Law Commission in 1954.

137 ILC Draft Articles on State Responsibility with Commentaries Thereto Adopted By The International Law Commission On First Reading Available at legal.un.org/ilc/texts/instruments/english/commentaries/9_6_1996.pdf [Accessed 24 March 2014].

casting an eye further, these conduct are committed by human beings and therefore holding the individuals accountable for their violation is different from holding a state responsible.[138]

The definition professes the presence of two elements which represent the nature of international crimes. These elements include: - (i) the nature of general interest being protected by international community and (ii) the gravity of conduct that violates the general interest.[139] These two elements have influenced the contemporary definition of core international crimes. In line with article 5 (1) of the Rome Statute, core international crimes are limited to such conduct which are so serious and grave that they bring about concern to the international community in general.[140] The definition under the Rome Statute has not departed from the one provided by the International Law Commission (hereinafter to be referred to as the ILC).

International crimes therefore arise from conduct which are so grave and serious. These conduct must violate the general interest of the international community as a whole (*erga omnes* obligation).[141] The referred general interest of international

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138 Werle G., "Individual Criminal Responsibility in article 25 ICC Statute," *Journal of International Criminal Justice,* 2008, No. 5, pp.1-18; Antonio Cassese, *International Criminal Law*, 2nd ed., Oxford University Press, Ox-ford, UK, 2008, p. 11.

139 Abi-Saab G., 'The Concept of "International Crimes" and its Place in Contemporary International law' in Cassese A., Weiler J.H.H. and Spinedi M., (eds) *A Critical Analysis of the ILC'S Draft Article 19 on State Responsibility,* Walter de Gruyter & Co, Berlin, German, 1988, p. 141 at 147.

140 Rome Statute.

141 The concept of *erga omnes* obligations was expended by the ICJ in the case of *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* of 28 May 1951; *Barcelona Traction, Light and Power Company Limited (Belgium v. Spain*), p. 32, para. 33; *Legality of the Threat or Use of Nuclear Weapons,* ICJ Reports 1996, para 79. The term *erga omnes* means obligations flowing to all that is obligation owed to the international community as a whole as opposed to bilateral obligations between certain states.

community is well enshrined in the body of human rights laws.[142] The recognition by the international community that there are basic human rights which are so vital that their derogation is not permitted and their infringement must be sanctioned[143] is the basis for individual criminal liability under international law.[144] The serious nature of the conduct has been linked to conduct that shock the "conscience of humanity."[145]

The *erga omnes* nature of international crimes gives responsibility to states to prevent the commission of such crimes.[146] In the event that international crimes have been perpetrated, territorial states or states where the perpetrators appear to have sought refuge have an obligation of carrying out prosecutions against such perpetrators. On the other hand, the international community has the right to prosecute the perpetrators of international crimes committed anywhere in the globe. This ability is made possible by the use of universal jurisdiction[147] which has been

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142 Universal declaration of Human Rights UN General Assembly Resolution 217 A(III) 10 December 1948; International Covenant on Civil and Political Rights, UN General Assembly Resolution 2200 A(XXI) 16 December 1966; African Charter on Human and People's Rights, OAU Doc. CAB/LEG/67/3 rev. 5 (1986); American Convention on Human Rights, O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123 (1978); American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX (1948) and European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222 (1953).

143 Vienna Declaration and Programme of Action Adopted by the World Conference on Human Rights in Vienna on 25 June 1993.Available at http://www2.ohchr.org/english/law/vienna.htm [Accessed 3 March 2013].

144 Cassese A, *Cassese's International Criminal Law, op. cit*, p. 9.

145 Einarsen J., *The Concept of Universal Crimes in International Law,* Torkel Opsahl Academic E Publisher. Oslo, 2012, p. 23 The reasoning for the use of the term consciousness of humanity has been grounded on both moral and philosophical considerations.

146 This can also be understood in line with the developed doctrine of responsibility to protect.

147 United Nations General Assembly (UNGA) Resolution A/RES/64/L117 on the Scope and Application of the Principle of Universal Jurisdiction adopted on 16th December 2009; Cassese A., *The Oxford Companion to International Criminal Justice,* Oxford University Press, Oxford United Kingdom, 2009; Lafontaine F., 'Universal Jurisdiction-The Realistic Utopia' *Journal of International Criminal Justice,* 2012, No.10, pp.. 1277-1302; O'Keefe R., "Universal Jurisdiction Clarifying the Basic Concept," *op. cit*, pp.735-76; Bassiouni M.C., 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice' in Bassiouni M.C.,(ed.) *International Criminal Law: International Enforcement,* 3rd edition, Leden, The Netherlands, 2008, p. 153; Bassiouni M.C., 'The History of Universal Jurisdiction and its Place in international

supported by the desire to ensure that there is no impunity to the commission of international crimes. International crimes are prohibited even where there is no national penal law providing for such offences.

Based on the above elements, the definition of international crimes is limited for the current research to those crimes listed under article 5 (1) of the Rome Statute.[148] These are: crime of genocide,[149] war crimes,[150] crimes against humanity[151] and the crime of aggression.[152] This limit is also consonant with the ILC which has restricted its definition of international crimes in the Draft Code to those offences which have the ability to disturb or interfere with international peace and security.[153] As such other international crimes like the crimes of piracy[154] and terrorism have been left out from the purview of "core international crimes" at international level.[155] This is different when the term international crimes is defined under regional instruments like the Protocol on Amendment to the Protocol to the Statute of the African Court of

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Law' in Macedo S., (ed.*) Universal Jurisdiction, National Courts and the Prosecution of Serious Crimes under International Law,* pp. 39-63.

148 Rome Statute.

149 *Ibid*., article 5(a).

150 *Ibid*., article 5(b).

151 *Ibid*., article 5(c).

152 *Ibid*., article 5(d).

153 The Work of the International Law Commission 7th edition, volume I, 2007, p. 96.

154 High Seas Convention of 1958; United Nations Convention on the Law of the Sea. Sundberg J.W.F., "The Crime of Piracy," in Bassiouni M.C., *International Criminal Law: Sources, Subjects and Contents,* Vol I, 3rd ed, Koninklijke Brill NV, Laiden, The Netherlands, 2008, p. 813. Although the crime of piracy is one of the oldest crimes recognized under international law, the attitude by main actors in international law made it difficult for it to be categorized as a crime of international concern that requires a special mechanism to have it addressed. There exists a difference of views between the British who wanted international law and its mechanism to address it and the Scandinavians who wanted the normal criminal procedure to address brought a drift. Therefore piracy has remained a crime under international law mainly dealt with the criminal law of states.

155 Werle G., *Principles of International Criminal Law, op. cit*. The scope of the term international crimes is different when elaborated under regional instruments like the Protocol on Amendment to the Protocol to the Statute of the African Court of Justice and Human Rights (Protocol Amendment) which has an expansive definition as shown in chapter four of the thesis.

Justice and Human Rights (Protocol Amendment) which has an expansive definition as shown in chapter five of the thesis.[156]

2.3 International Crimes and Peremptory Norms of International Law

International law unlike domestic law has no hierarchy of sources. All the sources under article 38 of the International Court of Justice (hereinafter referred to as the ICJ) Statute are at par although the ICJ has from time to time asserted that norms which have attained the character of *jus cogens* are higher than other rules of international law.[157]

Jus cogens or peremptory norm of general international law is

> …a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[158]

The above definition was adopted with reference to treaty law. After accepting this definition, there have been divergent views as to the criteria for elevating certain norms to become norms of international law having the character of *jus cogens* and

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156 Adopted by the Twenty-Third Ordinary Session of the Assembly, Held in Malabo, Equatorial Guinea 27th June 2014 Article 3 (1). *Ibid* Article 28a (4)-(13).

157 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*.Merits.Judgment.I.C.J. Reports 1986, p. 14, para. 193; *Legality of the Threat or Use of Nuclear Weapons*, I.C.J., Reports 1996, p. 226, para. 79; *Juridical Condition and Rights of Undocumented Migrants,* IACtHR, Advisory Opinion OC-18/03 of 17 September 2003, para. 101; *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities,* Case No. T-315/01, Reports 2005, p. II-3649, para. 226; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* Judgment on Preliminary Objections to Jurisdiction, I.C.J. Reports 2008; *Saadi v. Italy [GC],* No. 37201/06, p. 127, ECtHR 2008; *Questions Relating to the Obligation to Prosecute Or Extradite (Belgium v. Senegal)* Judgment Of 20 July 2012, p. 457, para. 99 and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* I.C.J. 2015, para. 87.

158 Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 22 May 1969, article 53.

the impact for such elevation.[159] The ILC has commenced an undertaking of putting a settled position on different legal issues pertaining to the concept including; "the nature of *jus cogens,* requirements for the identification of a norm as *jus cogens,* an illustrative list of norms which have achieved the status of *jus cogens* and consequences or effects of *jus cogens.*"[160] Once the task is completed, the report that will emanate there from will have great impact in the understanding of *jus cogens.*

Despite such divergence, the prohibition against the commission of the core international crimes is agreed to have attained the status of *jus cogens.*[161] It must be noted that core international crimes have roots in both customary international law and the body of multilateral treaties of universal nature.[162] This feature is one of the criterions that identify the generality of a norm of international law for the purpose of elevating it to the status of *jus cogens.* Further, the prohibition on the commission of

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[159] Bassiouni C.M., "International Crimes: "*Jus Cogens*" and "Obligatio *Erga Omnes*" *Law and Contemporary Problems*, Vol. 59, No. 4, Accountability for International Crimes and Serious Violations of Fundamental Human Rights, 1996, pp. 63-74.

[160] Tladi D., *Jus Cogens*, Annex of the Report of the International Law Commission, A/69/10, p. 280.

[161] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* International Court of Justice, Advisory Opinion of *28 May 1951,* p. 15, p. 23. "The origins of the Convention shows that it was the intention of the United Nations to condemn and punish genocide as "a crime under international law" involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (1) of the General Assembly, December 11th 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation." See also Criddle, E.J. and Fox-Decent, E., "A Fiduciary Theory of *Jus Cogens*", *The Yale Journal of International Law*, vol. 34 (2009), pp. 331-387; Hameed, A., "Unravelling the Mystery of *Jus Cogens* in International Law", *British Yearbook of International Law*, vol. 84 (2013), pp. 52-102; andWeatherall, Th., *Jus Cogens: International Law and Social Contract*, Cambridge University Press, Cambridge, 2015, p. 7. Draft Articles on State Responsibility, Commentary on Article 26, para. 5, in *Official Records of the General Assembly, Fifty-sixth Session*, U.N. Doc. A/56/10, p. 283 (2001).

[162] Hannikainen, L., *Peremptory Norms (Jus Cogens) in International Law – Historical Development, Criteria, Present Status*, Lamikiesliiton Kustannus, Helsinki, 1988, p. 208.

the core international crimes attracts no derogation. The ICTY when affirming that prohibition against torture has attained the status of *jus cogens* stated that:-

> Prohibition of torture has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even "ordinary" customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force.[163]

Therefore, the rules of *jus cogens* to which the prohibition against the commission of core international crimes fall into as contained under the relevant treaties and the body of customary international law do not allow states to derogate from.[164] The rules protect fundamental interest of the community of states.[165]

2.4 An Overview of the Core International Crimes

This part gives an overview of the crimes which are categorized as core international crimes. It is not intended to make a meticulous and detailed discussion of the crimes. What is sought at this juncture is just an understanding of what each crime entails so as to be able to have a general picture of what is referred throughout the thesis by the use of the term international crimes. This is important because all subsequent chapters revolve around the concept of international crimes. On this account, a brief discussion of what genocide, war crimes, crimes against humanity and the crime of aggression is provided hereafter. It must be noted from the onset that, the

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[163] *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-T, ICTY, Judgment of 10 December 1998, para.144.

[164] Mik, C., "*Jus Cogens* in Contemporary International Law", *Polish Yearbook of International Law*, vol.XXXIII (2013), pp. 43-44.

[165] Christenson, G.A., "*Jus Cogens*: Guarding Interests Fundamental to International Society", *Virginia Journal of International Law*, vol. 28 (1987-1988), p. 593; *Draft Articles on the Law of Treaties, with commentaries*, 1966 (Commentary to draft article 50, para.3);

jurisprudence of the ad hoc tribunals and subsequently the adoption of the Rome Statute and the elements of crimes to the Rome Statute have put in place a settled position as to what each crime entails.

2.4.1 Genocide

The crime of genocide was first enshrined under the 1948 Convention on the Prevention and Punishment of crime of Genocide.[166] Prior to 1948, acts that amounted to genocide documented during World War II were never articulated as crimes of genocide in the International Military Tribunal (hereinafter referred to as IMT) and International Military Tribunal for the Far East (hereinafter referred to as IMTFE).[167] Instead, these conduct formed part of crimes against humanity and their prosecution was limited to that. However, after the adoption of the 1948 Genocide Convention, subsequent instruments such as the ICTR Statute,[168] ICTY Statute[169] and the Rome Statute[170] in the 1990s specifically enshrined the crime of genocide independent and separate from crimes against humanity. The definition that is contained in these statutes is derived from that enshrined under the Genocide Convention. Therefore, the crime of genocide is any conduct

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166 The Genocide Convention. The term was first introduced by a Polish jurist of international law Dr Raphael Lemkin (1900- 1959). See Lemkin, R., *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, and Proposals for Redress*. Washington, D. C. Carnegie Endowment for International Peace, 1944.Chp. IX

167 Charter of the International Military Tribunal. London, 8th August 1945. Available at http://www.icrc.org/ihl.nsf/INTRO/350?OpenDocument [Accessed on 1January 2013]; International Military Tribunal for the Far East Charter (IMTFE Charter) 19th January 1946. Available at http://www.jus.uio.no/english/services/library/treaties/04/4-06/military-tribunal-far-east.xml [Accessed 1 January 2013].

168 Statute of the ICTR.

169 Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/RES/827 (1993) article 4.

170 Rome Statute, article 6.

> Committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) killing members of a group (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.[171]

From the above quoted definition, it is apparent that the crime of genocide is very unique. It requires the presence of specific mental element (*mens rea*) known as *dolus specialis.*[172] This is the intention to destroy in whole or part a national, ethnical, racial or religious group. In absence of this specific element possessing the highest degree of *mens rea* (intention), the conduct falls short of it being characterized as genocide.[173] Therefore, the crime of genocide is geared towards a group and not an individual. The individual must be targeted not in his/her own right but because he/she belongs to a group as recognized by the Convention and the Statutes.[174] The group is limited to national, ethnical, racial or religious group. Nothing is stated with reference to political groups. This is a reflection of the time/era in which the Genocide Convention was adopted. The definition given limits the nature of conduct that would amount to genocide.

Apart from the mental element specified in the definition, the definition also contains the forms which genocide conduct can take. These have been elaborated under the Elements of Crimes of the International Criminal Court (hereinafter referred to as the ICC Elements of Crimes)[175] and widely interpreted in the jurisprudence of the ICTR

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171 Genocide Convention, article 1; Rome Statute, article 6; ICTR Statute and ICTY Statute.

172 *The Prosecutor v. Kayishema* Judgment, Trial Chamber II, Case No .ICTR-95-1-T,21 May 1999, at 91*; The Prosecutor v. Musema* Trial Chamber I, Case No. ICTR 96 13-A, 27 January 2000, at 151, 164,166.

173 See *Prosecutor v. Jean Kambanda* ICTR -97-23-S Judgement and Sentence 4 September 1998; *Prosecutor v. Kristic* No. IT-98-33-T Trial Chamber Judgement 2 August 2001, para 699.

174 *The Prosecutor v. Akayesu* Judgment, Case No. ICTR-96-4 –T 2, September 1998.para. 521.

175 ICC-ASP/1/3 (Part II-B).

and the ICTY.[176] Therefore, the following conduct when coupled with the specific intent stated above will amount to genocide. These are acts of torture, rape, sexual violence, inhuman and degrading punishment, purposeful denial of resources vital for survival example food and medical services or systematic removal from homes, physically forcing or threatening people with effect of transferring children from the targeted group to another and the imposition of measures aimed at preventing birth.[177]

2.4.2 War Crimes

The Laws of war are the oldest set of rules internationally recognized.[178] The adoption and subsequent development of these rules has also influenced the development of the prohibition of conduct that violates the rules. When reference is made to war crimes, it is therefore confined to serious violations of a body of international humanitarian law (IHL) either treaty based rules[179] or rules contained in

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[176] Akhavan, P., 'The Crime of Genocide in the ICTR Jurisprudence', *Journal of International Criminal Justice*, 2005, No. 3, pp. 989–1006; Askin, K. D., 'Gender Crimes Jurisprudence in the ICTR—Positive Developments', *Journal of International Criminal Justice*, 2005, No. 3, pp. 1007–1018; Kim, P., 'The Law of Genocide in the Jurisprudence of ICTY and ICTR in 2004', *International Criminal Law Review*, 2005, No. 5, pp. 431–446; Szpak, A., 'National, Ethnic, Racial, and Religious Groups Protected against Genocide in the Jurisprudence of the Ad Hoc International Criminal Tribunals', *European Journal of International Law*, 2012, No. 23, pp.155–173; Williams, S., 'Genocide—The Cambodian Experience', *International Criminal Law Review*, 2005, No. 5, pp. 447–62 and Mukimbiri, J., 'The Seven Stages of the Rwandan Genocide', *Journal of International Criminal Justice*, 2005, No. 3, pp. 823–836.

[177] ICTR Element of Crimes, article 6(a)-(e); *Prosecutor v. Akayesu* at para 500-507 and *Prosecutor v. Kristic* para 513.

[178] Lieber Code of Armed forces of the United States of America; Declaration Renouncing the Use in times of war of explosive objectiles under 400 Grammes weight of 29 November, 11 December 1868 (St Petersburg Declaration) and The Hague Regulations of 1899 and 1907.

[179] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Geneva Convention relative to the Treatment of Prisoners of War; and Geneva Convention relative to the Protection of Civilian Persons in Time of War.

the body of customary international law which calls for individual responsibility.[180] The body of international humanitarian law requires those actively participating in armed conflict to do so while observing basic principles including; distinction between military objects and civilian objects, proportionality between military advantage and damage to civilian population and protection of persons captured by a party to a conflict.[181]

Unlike genocide, war crimes were articulated in the IMT and the IMFT Charters.[182] Further, the tribunals that were established after the first set in 1945 equally deal with war crimes.[183] It can therefore be seen that from Nuremberg trials to date a, number of persons have been prosecuted and convicted on counts of war crimes.[184] The definitions contained in these documents have affirmed the customary nature of the prohibitions under the Geneva Conventions and Additional Protocols.[185]

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180 Henckaerts J. and Doswals-Beck L., *Customary International Humanitarian Law Volume 1: Rules* International Committee of the Red Cross, Cambridge University Press, New York, United States of America, 2005.

181 International Criminal law and Practice training manuals: war crimes ICLS – OSCE-ODIHR.

182 Charter of the International Military Tribunal, article 6(d) and IMTFE Charter.The prohibition and punishment of war criminal can be deduced from article 229(2) of the Treaty of Versailles of 28 June 1919.

183 Statute of the International criminal Tribunal for Rwanda, article 4 deals with violations of Article 3 common to the Geneva Conventions and Additional Protocol II; Statute of the International Tribunal for the Former Yugoslavia, article 2 deals with grave breaches of the Geneva Convention of 1949.

184 Example cases such as the *Prosecutor v. Tadic; Prosecutor v. Akayesu*; *Prosecutor v Furundzja; Prosecutor v. Kayishema; Prosecutor v. Musema ; Prosecutor v. Norman and Prosecutor v. Thomas Lubanga.*

185 Alamuddin, A. and Webb, P., 'Expanding Jurisdiction over War Crimes under Article 8 of the ICC Statute', *Journal of International Criminal Justice*, 2010, No.8, pp. 1219– 1243; Momtaz, D., 'War Crimes in Non-International Armed Conflicts under the Statute of the International Criminal Court', *Yearbook of International Humanitarian Law*, 1999, No. 2, pp.177–192;

Consequently, conduct amounting to war crimes are grouped into two categories.[186] These are; (i) War crimes committed in non -international armed conflict basically dealing with violations of article 3 common to the Geneva Conventions[187] and (ii) war crimes committed in an international armed conflict.[188] It can be deduced from this therefore that war crimes mean;

> Grave breaches of the Geneva Conventions of 12 August 1949, namely any of the listed acts against persons or property protected under the provisions of the relevant Geneva Convention and other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law.[189]
>
> In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions o 12 August 1949, namely any of the acts committed against persons taking no active part in 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. Also, other serious violations of the laws and customs applicable in armed conflicts not of international character, within the established framework of international law.[190]

The list of such conduct has been exhaustively covered under the relevant cited articles of the Rome Statute which has not been quoted here. It is noteworthy that article 8 (2) (b) (xx) of the Rome Statute makes mention of an annex which has never been annexed to the Statute to date. As the title suggests, a nexus must exist between a conduct and an armed conflict for it to amount to war crime.[191] This was affirmed by the ICTY in the case of *Prosecutor v. Aleksovski* where the court stated; "It is necessary to conclude that the act which could well be committed in the absence of a conflict was perpetrated against the victim because of the conflict at issue."[192] Further, the International Criminal Court Elements of Crimes under article 8 (2) (a)

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186 Beco, G. de., 'War Crimes in International Versus Non-International Armed Conflicts—"New Wine in Old Wineskins"?', *International Criminal Law Review*, 2008. No. 8, pp. 319–30.

187 Rome Statute, article 8 (2) (a) and (b). There are 12 types of crimes.

188 *Ibid*., article 8 (2) (c), (d) and (e). There are 26 types of war crimes.

189 *Ibid*., article 8 (2) (b).

190 *Ibid*., article 8 (2) (b) and (c).

191 Van der Wilt, H., 'War Crimes and the Requirement of a Nexus with an Armed Conflict,' *Journal of International Criminal Justice*, 2012, No.10, pp.1113–1128;

192 ICTY Trial Chamber Judgement 25 June 1999 para 45.

to (e) affirms that in all conduct that are characterized as war crimes, the conduct must have taken place in the context of and was associated with an international armed conflict or an armed conflict not of an international character. The mental element of war crime is established where the perpetrator was aware of the circumstances establishing the presence of an armed conflict.

2.4.3 Crimes Against Humanity

The term "crimes against humanity" emerged first as a clause in the laws and customs of war in 1899 and 1907.[193] However, there was no reference of it in any international instrument until after WWII. When the first international tribunals were established in 1945, article 6(c) of IMT Charter[194] and article 5 (e) of IMFTE Charter[195]made reference to crimes against humanity. These provisions associated crimes against humanity with an armed conflict specifically that of international character. However, the ILC clarification on its commentary stated that such a nexus was not necessary.[196]

Unlike genocide and war crimes which are contained in treaties specifically designed for such offences, crimes against humanity do not have a specific convention to cater

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193 Convention respecting the Laws and Customs of War on Land, Oct. 18, 1907, preamble, 36 Stat.2277, 187 Consol. T.S. 227.

194 Charter of the International Military Tribunal; Clark, R. S., 'Crimes against Humanity at Nuremberg', in Ginsburgs, G. and Kudriavtsev, V. N., (eds), *The Nuremberg Trial and International Law*, Dordrecht, Nijhoff, 1990.

195 IMTFE Charter.

196 *Principles of International Law Recognized in the Charter of the Nürernberg Tribunal and in the Judgment of the Tribunal, with Commentaries*, Report of the International Law Commission on the Work of its Second Session, U.N. GAOR, 5thSess., Supp. No. 12, principle 6(c), U.N. Doc. A/1316(1950); *Prosecutor v. Tadić*, Appeals Chamber, Judgment, ICTY Case No.IT-94-1-A, paras. 249-51 (July 15, 1999).

for them[197] except the Draft Code of Offences Against the Peace and Security of Mankind.[198] They have therefore developed under the body of customary international law. However as of 2013, the ILC decided to place the topic crimes against humanity under a long term programme of action.[199] In 2014 the ILC decided to include the topic of crimes against humanity under its current work .The process of the codification of rules of customary international law addressing crimes against humanity commenced under the Special Rapporteur Prof. Sean Murphy.[200]

The process of the codification of rules of customary international law addressing crimes against humanity commenced under the Special Rapporteur Prof. Sean Murphy.[201] As of 2015 July session, the ILC adopted four articles including the definition article[202] while in 2016[203] it adopted 6 articles making a total of ten articles all of which are envisioned to form part of the Convention on the Prevention and Punishment of Crimes Against Humanity.[204] It is important to point out that, Draft article 5 has categorically imposed an obligation on states to ensure crimes against

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197 Hwang P., 'Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court' *Fordham International Law Journal,* 1998, No. 22,Vol. 2, pp.. 457-504.

198 Draft Code of Offences Against the Peace and security of mankind U.N. Doc .A/1858 1951; Draft Code of Offences Against the Peace and security of mankind of 1996 Report of the International Law Commission, U.N. Doc. A/51/10 (1996).

199 See Report of the International Law Commission on the Work of Its Sixty-Fifth Session, U.N. GAOR, 68th Sess., Supp. No. 10, U.N. Doc. A/68/10, at 116, para. 170 and Annex B (2013).

200 See information available at http://legal.un.org/ilc/guide/7_7.shtml [accessed 2 July 2015].

201 See information available at http://legal.un.org/ilc/guide/7_7.shtml on 2 July 2015.

202 Text of draft articles 1 to 4 were provisionally adopted by the International Law Commission during the Sixty-seventh session, Geneva, 4 May-5 June and 6 July-7 August 2015, Seventieth Session, Supplement No. 10, A/70/10, paras. 110-117.

203 Text of Draft Articles 5 to 10 were provisionally adopted during the sixty-eighth session 2 May-10 June and 4 July-12 August 2016, Seventy-first session Supplement No. 10 A/71/10, paras. 82–85

204 Murphy SD, Special Rapporteur First report on crimes against humanity, International Law Commission Sixty-seventh session Geneva, 4 May-5 June and 6 July-7 August 2015, A/CN.4/680; Murphy, Special Rapporteur Second report on crimes against humanity International Law Commission Sixty-eighth session Geneva, 2 May-10 June and 4 July-12 August 2016 A/CN.4/690.

humanity form part of offences under domestic penal laws.[205] This is a milestone in international criminal justice. It is envisioned if adopted to close in the gap that has existed over the years on the lack of international convention specifically addressing this category of international crimes. It is argued here that, when the convention is adopted, it is more likely to attract ratifications from states which were skeptical about becoming parties to the Rome Statute (the only multilateral treaty containing all the four categories of international crimes).

Besides most current developments, in the 1990s, the ICTR[206] and ICTY[207] Statutes were passed with provisions on crimes against humanity having additional elements in the definition. These additional elements have been removed by the Rome Statute. The Statute has adopted what the jurisprudence of the courts established over the years.[208] Thus, the Rome Statute defines crimes against humanity as follows;

> "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime

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205 Murphy SD, "Special Rapporteur First report on crimes against humanity", The article captures liability of military commanders for conducts of persons under his/her effective control and command.

206 Statute of the International criminal Tribunal for Rwanda, article 3. The article required a discriminatory element for the definition of crimes against humanity which was dispensed with under the jurisprudence of the court. See Mettraux, G., 'Crimes against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda', *Harvard International Law Journal*, 2002, No. 43, pp. 237–316.

207 Statute of the International Tribunal for the Former Yugoslavia, article 5. The definition under the statute required the nexus between crimes against humanity and armed conflict which was dispensed with under the jurisprudence of the court. See also *Prosecutor v. Tadić*, Appeals Chamber, Judgment, ICTY Case No. IT-94-1-A, paras.249-51, 15 July 1999.

208 Rome Statute, article 7.

> of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health. [209]

From the quoted definition of crimes against humanity, it is evident that it contains a long list of conduct. The same list has been adopted by the ILC under article 3(1) of the text on draft articles on crimes against humanity.[210] It is therefore the most progressive development under international law with regard to conduct that would amount to international crimes.

In order to establish that Crimes against humanity have been committed, one is not required to establish a nexus between the conduct and the armed conflict.[211] It is submitted therefore that, unlike war crimes, crimes against humanity can be committed in times of peace. The best example of this is what happened during the

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[209] Rome Statute, article 7. For elaboration on enslavement see Slavery Convention 1926; for elaboration on deportation or forcible transfer of population see Zayas, A. M., 'International Law and Mass Population Transfer', *Harvard International Law Journal,* 1975, No.6, pp. 207–59; for elaboration on torture see *Akayesu*, the definition of torture for the purpose of establishing a crime against humanity goes beyond article 1 of the Convention Against Torture; for elaboration on Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity see Oosterveld, V., 'Gender Jurisprudence of the Special Court for Sierra Leone—Progress in the Revolutionary United Front Judgment', *Cornelius International Law Journal,* 2011, p. 44 at 49–74; Schomburg, W. and Peterson, I., 'Genuine Consent to Sexual Violence Under International Criminal Law', *American Journal of International Law*, 2007, p. 101 at 121–141; Askin K.D., "Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals," *American Journal of International Law*, 1999, p. 93 at 97; for elaboration on enforced disappearance of persons see Modolell G. J. L., "The Crime of Forced Disappearance of Persons according to the Decisions of the IACtHR," *International Criminal Law Review*, 2010, No. 10, pp. 475–489.

[210] Text of draft articles 1, 2, 3 and 4 provisionally adopted by the Drafting Committee on 28 and 29 May and on 1 and 2 June 2015, International Law Commission Sixty-seventh session Geneva, 4 May–5 June and 6 July–7 August 2015, A/CN.4/L.853. Article 3 (2) provides for an elaboration of what each conduct from article 3 (1)(a)-(k) entails; Text of Draft Articles 5 to 10 were provisionally adopted during the sixty-eighth session 2 May-10 June and 4 July-12 August 2016, Seventy-first session Supplement No. 10 A/71/10, paras. 82–85

[211] Chesterman, S., "An Altogether Different Order: Defining the Elements of Crimes against Humanity," *Duke Journal of Comparative and International Law*, 2000, No. 10, p. 307–343; *Prosecutor v. Dusko Tadic*, Decision of the Appeals Chamber on the Defence Motion for Interlocutory Appeal on Jurisdiction, International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber Case No. IT-94-I-AR72, 139 (1995).

Kenyan post-election violence where crimes against humanity were committed in the absence of an armed conflict.

Further, crimes against humanity must be conduct that are systematic or widespread committed in furtherance to a state or institution policy. This is the contextual element that elevates ordinary crimes under a domestic system to the level of one of the core international crimes. Hence, conduct that amount to crimes against humanity must not be isolated acts.[212] However, the requirement for systematic or widespread conduct is to be considered "disjunctively."[213] This position makes it easy to limit crimes against humanity only to conduct that call for the attention of international community and not every day criminal conduct within a state. According to Cassese, crimes against humanity possess common features which include: "the seriousness and degrading nature of such offences to human dignity, the continuous and the linkage of conduct with a policy or plan, the non -requirements of nexus with an armed conflict and victims for such crimes are civilians or persons no longer taking part in hostilities."[214]

2.4.4 The Crime of Aggression

The term aggression is defined under the United Nations General Assembly Resolution 3314 (XXIX) of 1974. The Resolution has adopted the United Nations

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212 Werle, G. and Burghardt, B., "Do Crimes Against Humanity Require the Participation of a State or a 'State-like' Organization?," *op. cit*.

213 Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya; Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Pre-Trial Chamber,ICC-01/09, 31 March 2010, para. 94.

214 Cassese A., *Cassese's International Criminal Law, op. cit*., p. 64.

Charter definition of prohibition on the use of force without inclusion of the threat to use force.[215]The Rome Statute has subsequently adopted the same qualification under Article 8*bis* for the definition of crime of aggression and acts of aggression.[216] Therefore, the crime of aggression is defined as;

> "the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations."[217]

On the other hand, an act of aggression means "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations..."[218] In that regard, the perpetrators of the crime of aggression are limited to political and military leaders. From the wording of the relevant provisions, the crime of aggression is directed against a state by a state. Terrorism and other irregular attacks which may be equal to the crime of aggression are exempted from this definition.

For an easy understanding of the material elements of the crime, both the Rome Statute and UNGA Resolution 3314 provide a long list of acts that qualify as 'acts of aggression.' These acts include;

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215 UN Charter 1 UNTS XVI 24 October 1945 article 2.

216 Rome Statute.

217 *Ibid*. see also Paulus A., 'Second Thoughts on the Crime of Aggression," *European Journal of International Law,* Vol. 20, No. 4, 2010, pp. 1117-1128. The definition shows that the crime of aggression is limited to persons who are in a leadership position that is those who are responsible in the planning of the execution of the acts. The definition of the crime also attracts a qualification of the character, scale and gravity of the conduct to amount to violation of the prohibition of the use of force under the UN Charter.

218 United Nations General Assembly Resolution 3314 (XXIX) of 1974.

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof,
(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
(c) The blockade of the ports or coasts of a State by the armed forces of another State;
(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.[219]

The crime of aggression existed prior to its inclusion in the Nuremberg and Tokyo Charter. In this regard, reference has been made to a number of instruments.[220] The prosecution of individuals for the commission of the crime of aggression has not been made since the conclusion of the trials before the Nuremberg and Tokyo tribunals. Further, from the wording of the Rome Statue no one can be tried for the crime of aggression before the ICC until jurisdiction is conferred in 2017.

Under the Statute, the Security Council has the mandate to decide whether the crime of aggression has been committed. Once the Security Council has decided that the crime of aggression has been committed it will automatically trigger the referral of the situation.[221] Although the Rome Statute gives the ability for *proprio motu* exercise of jurisdiction or state referrals, these two are curtailed by the Security

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219 United Nations General Assembly Resolution 3314 (XXIX) of 1974 and the Rome Statute article 8*bis.*

220 These include; General Treaty for the Renunciation of war 1928 (The Kellogg-Briand Pact), Draft Treaty of Mutual Assistance sponsored by the League of Nations and League of Nations Protocol for the Pacific Settlement of International Disputes available in United Nations Historical Review of Developments Relating to Aggression at 30-31 and 170.

221 Rome Statute, article 15 *bis* (7)and 15 *ter*.

Council's power to defer a situation for a period of 12 months which is extendable.[222] Further, states have the power to opt out of the jurisdiction of the ICC over the crime of aggression by making a declaration.[223]

2.5 Theories on the Domestic Prosecution of International Crimes

International crimes have received the attention of international community initially through the use of international institutions and international law. However, the same international crimes have not been left outside the purview of domestic legal system. It is from this position that the current research was undertaken.

International criminal justice can therefore be realized before two systems i.e. international and domestic. The two systems work together to achieve the same end result which is to end of impunity to international crimes.[224] This has been affirmed under different instruments that explicitly provide for states' duty to prosecute international crimes.[225] The icing is seen on the establishment of an international court that complements domestic courts in prosecuting international crimes.[226]

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222 *Ibid*., article 16. Giving such power to the Security Council defeats the purpose of such provision. The SC has been famous in the use of veto power to shield their political interests. Will they ever arrive at the decision that the crime of aggression has been committed if it involves one of the permanent members?

223 *Ibid*., article 15 *bis* (4).

224 Drumbl M. A., 'A Hard Look at the Soft Theory of International Criminal Law,' in Sadat L.N. and Scharf M.P., (eds) *The theory and Practice of International Criminal Law Essays in Honour of M Cherrif Bassiouni*, Martinus Nijhoff Publishers, Laiden, The Netherlands, 2008, p. 1 at 1-15.

225 See explanation given under 3.4; 3.4.1; 3.4.2; 3.4.4 and 3.4.5 of the current thesis.

226 Prosecutorial Strategy, 2009–2012, 1 February 2010, The Hague, 4. Available at http://www.icccpi.int/NR/rdonlyres/66A8DCDC36504514AA62D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf. [Accessed 2 July 2014].

Domestic prosecution of international crimes therefore has been assessed on the basis of two theories. Authors have tried to explain the practice of prosecuting international crimes through the advancement of theories in explaining the trend that has developed. Hard mirror theory and the soft mirror theory are important in explaining the efficacious way of achieving complementarity under the Rome statute. This sub part gives an outlook on these theories so as to be able to understand which theory the countries under study have adhered to as they discharge their duty of prosecuting international crimes.

2.5.1 Hard Mirror Theory on Domestic Prosecution of International Crimes

Hard Mirror Theory is based on the basis that all domestic prosecutions of international crimes must be analogous to their prosecution as piloted before international courts.[227] This position requires the provisions criminalizing international crimes at national level to be the same as those under international law. There is no room for using any existing laws that fall short of what international instruments have prescribed in terms of the definition of the core international crimes.[228]

The theory is based on the presumption that every state has incorporated or transformed international instrument to become part of domestic law.[229] Countries that adhere to the monist approach (especially in case of self-executing treaties), this

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[227] Heller K.J., "A Sentence-Based Theory of Complementarity," *Harvard International Law Journal*, Volume 53, Number 1, 2012, p. 85 at 88.

[228] Xavier P., *The Principles of Universal Jurisdiction and Complementarity: How Do the Two Principles Intermesh?*, 88 International Review of the Red Cross 2006, p. 375 at 390.

[229] Heller K.J., "A Sentence-Based Theory of Complementarity," *op. cit*., p. 89.

may not be an issue because a treaty becomes part of domestic law without the need for passing an Act of parliament.[230] For dualist countries, the lack of special status to international treaties poses difficulty to the theory. Treaties are required to be incorporated or being made part of domestic law before they can be invoked before a domestic court. In case a country has not passed the necessary legislation incorporating a treaty, such treaty cannot be used before domestic court.[231] States will therefore be unable to adhere to the strict requirement of the theory.[232]

While the theory has been advanced to explain the admissibility test under article 17 of the Rome, it can be used to generally advance arguments to explain the practice prevalent in domestic prosecution of international crimes. The theory gives rise to the question whether impunity can successfully be addressed where states are precluded from prosecuting international crimes because existing laws do not conform to the definition under international instruments.

With this question in mind, it is therefore correct to say that this theory is ideal in encouraging states to have implementing legislation. It places the domestic prosecution of international crimes more uniform to the existing international instruments. The theory however does not take on board the reality that most states especially in Africa do not necessarily have existing legislative framework on

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230 Aust A., *Modern Treaty Law and Practice*, Cambridge, United Kingdom, Cambridge University Press, 2013, p. 163; Mapunda B.T., *Treaty Making and Incorporation in Tanzania,* East Africa Law Review, Vol 28-39, 2003, pp. 156 – 170.

231 *Ibid*.

232 Materu F.S., *The Post-Election Violence in Kenya: Domestic and International Legal Responses*, The Hague, Netherlands, T.M.C Asser Press, 2014, p. 91. The use of ordinary criminal law to prosecute international crimes is argued to be an indication of inability and unwillingness of states to prosecute international crimes thereby triggering the admissibility of cases before the ICC.

international crimes.[233] It is only now that laws are being passed to incorporate international crimes in domestic penal laws.[234] If they are to adhere to this theory, no international crime that has been perpetrated prior to the enactment of the laws can be prosecuted since the laws invoked do not reflect international crimes as spelt out in international instruments. To close this gap, a more embracing theory has been advanced, that is, the soft mirror theory.

2.5.2 Soft Mirror Theory on the Domestic Prosecution of International Crimes

The soft mirror theory is more relaxed compared to the hard mirror theory. It recognizes the domestic prosecution of international crimes under what is referred to as the "ordinary crime approach."[235] The ordinary crime approach is the tactic of prosecuting international crimes in domestic courts using the existing penal laws which have not incorporated international crimes.[236] Here, the prosecution of such crimes does not make reference to international crimes. The conduct being prosecuted under the ordinary crime approach is analogous to the one prohibited under international instruments.[237] The main difference is on the caption of the crime in question, and the elements that need to be proven to establish guilt or innocence of the accused. Example, instead of mass murder being prosecuted as crime against

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233 Reference is made to table 1 under chapter five of the thesis.

234 *Ibid*.

235 Heller K.J., "A Sentence-Based Theory of Complementarity," *op. cit*, at 97 and 98.

236 Materu F.S., *The Post-Election Violence in Kenya: Domestic and International Legal Responses, op. cit*. p. 91.

237 Stahn C., 'Sentencing Horror or Sentencing Heuristic'? A Reply to Heller Sentence Based Theory of Complementarity,' in Schabas W.,McDermott Y. and Hayes N., (eds) *The Ashgate Research Companion to International Criminal Law: Critical Perspectives*, Routledge, New York, USA, 2016, p. 358. The aim of having complementarity regime under the ICC is not for the ICC to change national justice systems to reflect that of the ICC. The principle recognizes that the ICC and national criminal justice systems have a shared obligation to which the latter has the primary position to discharge.

humanity, under the ordinary crime approach, prosecution of such conduct would be brought under the charges of multiple counts of murder.[238]

International tribunals have supported this approach.[239] It has to be noted that the sentences handed down upon conviction on the ordinary crime approach may be equivalent or higher than the one contained in an international instrument.[240] What is clearly lacking when using the soft mirror theory is the labelling of the crime as one belonging to a special group of core international crimes. To this effect, the moral guilt that is normally attached to international crimes is absent. Hence, for as much as the theory allows the prosecution of international crimes as ordinary crimes, it is still desired that states adopt legislative framework to enable them prosecute international crimes as such.[241] This is the only way in which all the objectives of having international criminal justice in place and indeed complementarity regime under the Rome Statute can be achieved. Otherwise, it would be meaningless to talk of international crimes before domestic courts if all prosecutions past and future reflect only ordinary crimes.

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238 *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58, 10 February 2006, p. 37. The ICC has stated that the conduct must be substantially the same as the one to be prosecuted before the ICC.

239 The ICTY has affirmed that there is neither treaty obligation nor norms of customary international law that prohibit the prosecution of war crimes as ordinary crimes. See Materu F.S., *The Post-Election Violence in Kenya: Domestic and International Legal Responses*, The Hague, Netherlands, T.M.C Asser Press, 2014, p. 93.

240 *Ibid*, Materu F.S., *The Post-Election Violence in Kenya: Domestic and International Legal Responses*, *op. cit*, p. 93.

241 Heller K.J., "A Sentence-Based Theory of Complementarity," *op. cit*, p. 98. "incorporating the Rome Statute into domestic law is necessary to avoid "impunity gaps": situations in which effective prosecution is impossible, because a state's national criminal law fails to include an ordinary equivalent to an international crime, contains an inadequate range of modes of participation, or makes available overly broad defences. Others offer a more conceptual argument, claiming that the greater expressive value of a conviction for an international crime justifies, encourages states not to prosecute ordinary crimes even if the practical consequences of the two prosecutions would be the same."

This theory therefore does not do away with the need to have legislative framework in place. It recognizes the existing gaps in practice by allowing states to deal with the issue of impunity albeit through the use of existing penal laws (which make no reference to the label of the core international crimes) while insisting that they still reform the laws so that any future international crimes can be prosecuted as such.[242]

2.6 Conclusion

The chapter has provided a definition of what the term international crime is limiting such definition to grave conduct that violate the common shared interest of the community of states. Such definition has been derived from the understanding based on the regime for state responsibility and that of individual criminal responsibility before international tribunals or courts. Therefore, international crimes for the purpose of this study are limited to the core international crimes as spelt out under the Rome Statute. These include the crime of genocide, war crimes and crimes against humanity.

Moreover, the chapter has provided theoretical framework for the prosecution of international crimes. The identified theories include the Hard Mirror Theory and the Soft Mirror Theory. These two theories shall be used to explain the practice of prosecuting international crimes in Rwanda, Uganda and Kenya as shall be assessed under chapter 6, 7 and 8 of the thesis.

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[242] Kleffner, "The Impact of Complementarity on National Implementation of Substantive International Criminal Law," *Journal of International Criminal Justice*, 2003, No.1, p. 86 at 91.

CHAPTER THREE

DEVELOPMENT OF INTERNATIONAL CRIMINAL JUSTICE

3.1 Introduction

Chapter two laid the theoretical foundation on the domestic prosecution of international crimes. The chapter also provided for the meaning of international crimes which the thesis addresses. With such an understanding, the need to know how international criminal justice developed becomes critical. This chapter therefore focuses on the development of international criminal justice through a historical account of events that have shaped international criminal law as we know it today. The objective of the chapter is to bring African position in the development of international criminal justice and articulate the argument that historical factors have somehow played part in the practice of African countries in prosecuting international crimes before domestic courts. The first part starts with the development of international criminal justice as instigated by European, other Western countries and Japan.[243]

3.2 The Inception of International Criminal Justice

Traces of international criminal justice can be found prior to the formal inception of contemporary international criminal justice. The historical trail of events relevant in the prosecution of violation of laws of war is evident in various countries where soldiers were prosecuted domestically.[244] Such prosecutions are indicative of the

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[243] Cryer R., *Prosecuting International crimes: Selectivity and the International Criminal Law Regime*, Cambridge University Press, Cambridge, United Kingdom, 2005, p. 11.

[244] Cryer R., *An Introduction to International Criminal Law and Procedure*, *op. cit*.

presence of international criminal justice in the early days.[245] After World War I, a number of European states concluded the Versailles Treaty. Article 227 of the treaty reveals the desire by states parties to have an international tribunal to prosecute persons responsible for violating public morality and the sanctity of treaties. The need for an international tribunal never came to fruition until the world was hit with events that caused the gross human rights violations that no eye could be closed against; this was the Second World War.

3.2.1 The Establishment of the Nuremberg and Tokyo Tribunals after WWII

World War II (1939-1945) is the biggest war known to mankind which has impacts running to this date. It is a war that involved many countries with the axis powers composed of Nazi Germany, fascist Italy and Japan while the allied powers were comprised of Great Britain, France, China, Soviet Union and the United States.[246] The death toll of both civilians and army combatants was at the highest level ever recorded in human history. It is estimated that between 50 to70 million people died.[247] The Nazi holocaust against the Jewish population is one of the worst carried out national policy in human history where there was mass extermination of Jews in specially created gas chambers.[248]

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245 Schwarzenberger G., *International Law As Applied by Courts and Tribunals,* Stevens, London, United Kingdom, 1968 pp. 462–66 cited in Bantakis I. and Nash S., *International Criminal Law, op. cit*,p. 325. "In Naples in 1268, Conradin von Hohenstafen, Duke of Suabia, was tried, convicted and executed for initiating an unjust war. In 1474, Peter von Hagenbach was convicted of crimes against 'the laws of God and man', including murder and rape, by an international tribunal comprising of judges from Alsace, Austria, Germany and Switzerland in respect of offences committed during his occupation of Breisach on behalf of Charles, the Duke of Burgundy."

246 Beevor A., *The Second World War*, Little, Brown, 2012.

247 Information available at http://worldwar2.org.uk/world-war-2-facts [Accessed 8 April, 2014].

248 Information available at http://www.historyplace.com/worldhistory/genocide/holocaust.htm[Accessed 8 April, 2014].

During this war, Japan committed a number of crimes in its effort to control the far East.[249] The worst atrocities committed by Imperial Japan included the rape of Nanking. During the invasion, civilians and prisoners of war were massacred, there was also massive destruction of property, sexual slavery and rape.[250] Further, the attack on Pearl Harbour marked the highest peak of the Japanese war of aggression.[251] All the carnage committed in Europe and Asia shocked the allied countries. Not to be outdone, the gravest war crimes were committed by the USA through the use of atomic bomb on Nagasaki and Hiroshima. This was unprecedented in any war. It is however incomprehensible to note that, the actions of the USA in this regard have never been viewed as conduct that violated the laws and customs of war fare instead they have been taken to be heroic acts that marked the end of WWII.[252]

The allied powers vowed that the perpetrators of the massacre would not go unpunished.[253] An agreement was therefore reached that the Axis leaders and the

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249 Bantakis I. and Nash S., *International Criminal Law*, *op. cit*, p. 334.

250 Information available at http://www.historyplace.com/worldhistory/genocide/nanking.htm [Accessed 8 April, 2014].

251 Bantakis I. and Nash S., *International Criminal Law*, *op. cit*, p. 334.

252 Ward K., *History in the Making: An Absorbing Look at how American History has Changed in the Telling over the Last 200 Years*, New York, The New Press, 2006, 289- 292; Enge M.C., "Relearning Hiroshima and Nagasaki: The Pedagogy of Accountability," Westminster College, April 2009.

253 Overy R., 'The Nuremberg trials: International Law in the making' in Sands P., (ed) *From Nuremberg to the Hague: The Future of International criminal Justice,* Cambridge University Press, New York, USA, 2003, p. 3. Initially leaders like Churchill and Roosevelt thought it would be best served justice if the perpetrators of the atrocities during WWII were killed. The reason for such extreme position lied with the belief that the guilt of such perpetrators could not be captured within the parameters of a judicial justice process. This position did not find favour with the Soviet Union which had a desire for public trial which became the position supported by Harry Truman.

most responsible perpetrators must face trial for crimes committed during the war.[254] These trials were initiated and prosecuted by the allied powers who won the war. This power of a few during the inception of individual criminal responsibility under international law is a feature which still characterizes international criminal law to this day. Notably, international crimes committed by allied powers were never prosecuted by these tribunals due to the nature of jurisdiction conferred upon them.[255] It must also be noted that, the principles used by Tokyo and Nuremberg tribunals were affirmed by the United Nations General Assembly and they form the basis in holding individuals accountable for the violations of international law principles.[256]

3.2.2 International Military Tribunal (The Nuremberg Tribunal)

The Nuremberg tribunal was established with a clear and sole purpose of bringing before trial the most responsible war criminals of the European Axis. The crimes that were committed by these individuals could not be grounded within specific domestic legislation. As a result, the crimes spread beyond what the domestic laws prohibited at that time. In order to cater for this, a tribunal was established by the allied powers after an agreement was reached in 1945 to prosecute the perpetrators based on international law and the understanding of natural law philosophers and their doctrine of inherent rights.[257]

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254 *Ibid*., p. 8. It must be noted that the leaders of the axis powers (Hitler, Himmer, Goebbeles and Mussolin) all died prior to commencement of the trials.

255 Schabas W., *Unimaginable Atrocities: Justice, Politics and the Rights at the War Crimes,* Oxford University Press, Oxford , United Kingdom,2012, p. 94.

256 General Assembly Resolution 95 (I).

257 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, United Nations, Treaty Series Vol. 82 p. 284. The London agreement of 1945 provided for

The Nuremberg tribunal had jurisdiction to prosecute and punish major war criminals of the European Axis[258] for war crimes, crimes against peace and crimes against humanity.[259] Since the tribunal could not prosecute every perpetrator, military courts in Germany took charge as well. Thus, in order to have uniformity in the prosecution of international crimes in Germany domestic courts, Control Council Law No. 10 was passed.[260] These prosecutions marked the first time in human history where individuals were held criminally liable for violation of international law; a position that changed the traditional belief that international law bound states and states alone.

In this regard, the Nuremberg trials set a firm foundation for the development of individual criminal liability under international law[261] although some legal scholars and commentators have questioned the "political legitimacy and legal foundation" of the tribunal. The fact that the tribunal was established by victorious powers to judge

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the establishment of a tribunal after consultation with Control Council for Germany. With the agreement there was an annexure of the Nuremberg Charter.

258 Charter of the International Military Tribunal, article 1.

259 *Ibid*, article 6.The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes. The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) Crimes against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a Common Plan or Conspiracy for the accomplishment of any of the foregoing;

(b) War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity;

(c) Crimes against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war,14 or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated.

260 Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, December 20, 1945, 3 Official Gazette Control Council for Germany 50-55 (1946).

261 Tomuschat C., 'The Legacy of Nuremberg,' *Journal of International Criminal Justice*, 2006, No. 4, pp. 830-844.

those who lost the war raises issues as to whether such an act was legitimate (Victors' justice). On the other hand, the lack of already existing laws criminalising some of the crimes prosecuted by the tribunal made many people question the adherence to the principle of non-retrospectivity - *Nullum crimene sine lege, nullum poena sine lege.*[262] The principles enumerated under the Nuremberg Charter and developed by the judgments issued by the tribunal have set foundation for subsequent trials.

3.2.3 International Military Tribunal for the Far East (Tokyo Tribunal)

Apart from the Nuremberg trials, it was thought fit to prosecute those responsible for committing war crimes and related offences in the Far East.[263] The call for prosecution was done through a proclamation by General Douglas MacArthur in fulfillment of the Potsdam Declaration which outlined the terms of surrender for the Empire of Japan.[264] Following this, the Tokyo tribunal was established with jurisdiction to try and punish persons responsible for the commission of crimes against peace, war crimes and crimes against humanity in the Far East.[265] This tribunal was a replica of the Nuremberg tribunal. It convicted all the defendants[266]

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262 Werle G., *Principles of International Criminal Law*, *op. cit*, pp. 9-11.

263 Cassese A., *Cassese's International Criminal Law, op. cit*, at 7.

264 Proclamation Defining Terms for Japanese Surrender issued, at Potsdam, July 26, 1945 article 10 'We do not intend that the Japanese shall be enslaved as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners. The Japanese Government shall remove all obstacles to the revival and strengthening of democratic tendencies among the Japanese people. Freedom of speech, of religion, and of thought, as well as respect for the fundamental human rights shall be established.'

265 IMTFE Charter, article 1 and 5. The definition of crimes against peace under the Charter differed a bit from the definition contained in the Nuremberg Charter. The Tokyo Charter made use of the term 'a declared or undeclared war of aggression." This has later been affirmed to be just a grammatical choice with no effect on the substance of the alleged crime.

266 Haley J.O., 'The Tokyo International Military Tribunal: A Reappraisal, and: The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II (review)' *Journal of Japanese Studies,* 2009, Vol. 35, No 2, pp. 445-451.

but it has not received the attention of international law scholars and commentators as the one received by its counterpart the Nuremberg tribunal.

The two tribunals namely the Nuremberg and Tokyo tribunals marked the first international effort to ensure that individuals who violate the common shared interest of international community through the commission of international crimes are brought to justice. The tribunals had primacy over any national court in prosecuting those bearing the most responsibility in the commission of crimes listed under the Charters.[267] Subsequently, national courts were to deal if they chose to, with the residual of what the tribunals did not consider to be most responsible perpetrators.[268]

This era of development in international criminal law slowly watered down positivists' understanding of state sovereignty. The absolute state sovereignty came to be limited to the extent that what happens within a state does not violate the principles of international law in relation to mass massacre. Further, defence such as superior command/orders was formally rejected and precedent set to establish complete individual liability under international law.[269]

Nuremberg and Tokyo tribunals were the first international tribunals to hold individuals accountable for violation of international law. The adoption of necessary

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[267] Law Council No. 10 was enacted to ensure "uniform legal basis in Germany for the prosecution of war criminals." Article IV provides for primacy of the International Military Tribunal in issues of surrender of accused persons. See also Malaguti M.C., "Can the Nuremberg Legacy Serve any Purpose in Understanding the Modern Concept of 'Complementarity," in Politi M., and Gioia F., (eds) *The International Criminal Court and National Jurisdictions,* Ashgate Publishing Limited, Hampshire, England, p. 113 at 121. Concurrent jurisdiction was the basis for jurisdiction between a domestic court and an international tribunal.

[268] Prosecution of international crimes in Germany was done through Law Council No. 10

[269] Ball H., *War crimes and Justice: A Reference Handbook,* ABC-CLIO, California, 2012.

instruments for the establishment of the tribunals was necessitated by the victorious powers of WWII. Thus, other countries particularly African countries never took part in the process. The following part gives an overview of the position of African countries during the early developments of individual criminal liability under international law.

3.3 Africa and the Inception of International Criminal Justice

As stated earlier, international criminal justice came to be formally recognized after WWII with the Nuremberg and Tokyo tribunals. Prior to this time, Africa had traces of courts with elements of internationalization aimed at prosecution of slave traders which was one of the prominent forms of international crime in the 19th C.[270] However, during the formal inception of international criminal justice after WWII; it is noteworthy that Africa did not participate as such. The masterminds of the prosecutions were the victorious powers of WWII. Other countries affirmed the principles contained in the Charters of the two tribunals under the United Nations General Assembly.[271] The only African countries that affirmed the Nuremberg and

[270] Blattmann R., 'International Criminal Justice in Africa: Specific Procedural Aspects of the First Trial Judgment of the International Criminal Court,' in Werle G., Fernandez L. and Vormbaum M., *Africa and the International Criminal Court,* International Criminal Justice Series, Volume 1, Asser Press, The Hague, The Netherlands, 2014, p. 35 at 36-37.

[271] General Assembly Resolution 95 (I).

Tokyo principles were Ethiopia, Egypt, Liberia and Union of South Africa.[272] The rest of the continent was subservient to colonial domination.[273]

Colonial domination in Africa began during the 19th Century with the scramble for and partition of Africa.[274] Colonialism not only exploited the resources of African countries but further extended to exploiting the indigenous population.[275] The justifications of colonial domination were the belief that Europeans were superior to other nations therefore dominating the so called inferior nations was justifiable. This was however not in line with the very principles enshrined under the M*agna Carter* 1215 (The Great Charter), French Declaration of Rights of Man 1789 and the United States Bill of Rights 1791.[276]

Colonialism in Africa proved to be a painful experience. On top of having no voice in international matters, most people in Africa were subjected to various forms of human rights violations including conduct that formed crimes against humanity, war crimes and genocide.[277] After WWII there was no desire to address the violations in

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[272] See information available at http://www.un.org/en/members/growth.shtml [Accessed 7 July 2015]. "Egypt and Syria were original Members of the United Nations from 24 October 1945. Following a plebiscite on 21 February 1958, the United Arab Republic was established by a union of Egypt and Syria and continued as a single Member. On 13 October 1961, Syria, having resumed its status as an independent State, resumed its separate membership in the United Nations. On 2 September 1971, the United Arab Republic changed its name to the Arab Republic of Egypt. In 1961, the Union of South Africa changed its name to South Africa.

[273] Liberia and Sierra Leone were colonial out posts made up of returned slaves from America and Britain.

[274] Duignan P. and Gann L. H., *Colonialism in Africa 1870-1960,* New York, USA, Cambridge University Press, 1975.

[275] *Ibid*.

[276] Rathbone M., 'The Human Rights Act: a Magna Carta for the twenty-first century?,' Political Studies Association, May 2014.

[277] Klose F., *Human Rights in the Shadow of Colonial Violence: The Wars of Independence in Kenya and Algeria,* Philadelphia, USA, University of Pennsylvania, 2013, p. 2-6; Wadunge S.D., "Trans-Atlantic Slavery by British colonial rulers" Available at; Pierre J., 'Colonial War crimes

Africa let alone bring colonial domination to an end. Example, as the allied powers were seeking to free other Europeans from the horrors of Nazi German, the principles for such a move were not viewed by colonialists to be of universal application. One must make reference to the Atlantic Charter of 1941 which enumerated a number of rights to be taken as of universal application but the concept was rejected by Britain as being inapplicable to their colonies.[278] This biasness was recognized by Mahatma Gandhi, who stated that,

> I venture to think that the Allied declaration, that the Allies are fighting to make the world safe for freedom of the individual and for democracy sounds hollow, so long as India and for that matter, Africa are exploited by Great Britain and America has the Negro problem in her home. But in order to avoid all complication, in my proposal I have confined myself only to India. If India becomes free the rest must follow, if it does not happen simultaneously.[279]

The above point underscored by Gandhi began to take root in 1942 following the fear that the colonies had the possibility of providing supporters to the Axis powers.[280]

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in Africa,'5 November, 2011. Available at http://blackagendareport.com/content/colonial-war-crimes-africa [Accessed 20 November 2014]; Sandbrook D., 'Stop saying sorry for our history: For too long our leaders have been crippled by a post-imperial cringe,'2 August 2010. Available at http://www.dailymail.co.uk/debate/article-1299111/Stop-saying-sorry-history-For-long-leaders-crippled-post-imperial-cringe.html [Accessed 20 November 2014]; Monbiot D., 'Deny the British empire's crimes? No, we ignore them,' 23 April 2012. Available at http://www.theguardian.com/commentisfree/2012/apr/23/british-empire-crimes-ignore-atrocities [Accessed 20 November 2014]; Elkins C., 'My critics ignored evidence of torture in Mau Mau detention camps,' Available at http://www.theguardian.com/commentisfree/2011/apr/14/torture-mau-mau-camps-kenya [Accessed 20 November 2014]. While prior to 1945, the use of force to conquer was considered legal, the change of events in WWII changed the state of affairs in Europe but not the state of affairs in Africa. What was apparent an international crime in their territories was not considered to be as such in Africa.

278 Document available at http://www.un.org/en/aboutun/history/atlantic_charter.shtml [Accessed 9 September 2014]. The Charter contained 8 principles. Principle 2 made reference to aspects of self-determination, principle 3 spoke about democratic government and principle 8 called upon nations to abandon the use of force in order to attain a lasting peace.

279 Onion R., 'Gandhi's 1942 Letter to FDR, Asking For Support For Indian Independence,' available at http://www.slate.com/blogs/the_vault/2014/07/23/gandhi_and_fdr_history_letter_from_indian_leader_to_roosevelt_in_1942.html [Accessed 9 September 2014].

280 Klose F., *Human Rights in the Shadow of Colonial Violence: The Wars of Independence in Kenya and Algeria*, op.cit, p. 18.

Britain reviewed its Colonial Charter to underscore the importance of colonies participation in the war fighting alongside the allied powers as a prerequisite for the grant of independence.[281] Upon the end of WWII, international criminal justice was officially introduced by the allied powers.

What is striking is that no one bothered to ensure that those responsible for analogous crimes during colonial domination in Africa were brought to justice. If the allied powers and eventually the members of the UN saw the need to prosecute human rights violations committed during WWII, was it not to be envisioned that even other human rights violations which amounted to international crimes around the globe should equally be prosecuted? However, even as one would wish the answer to this question to be in affirmative with supporting practice, to our dismay, international justice was not viewed as justice for all.[282] Only where the victorious powers were affected and were not the perpetrators could you talk of justice. But if the tables were turned, one will find justifications to shelter some from prosecution. Colonial masters insisted that independence was to be given in their own terms namely adoption of colonial legislative framework and form of justice.[283] This meant

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[281] *Ibid*, pp. 20 - 26. Colonies engaged actively in the supply of raw materials, human resources and agricultural products throughout WWII. Mazrui A.A. and Wondji C., *Africa Since 1935*, Volume 8, p. 107. The struggle for independence in Africa had four phases including the first phase prior to WWII, the second phase was the active participation of Africans in the struggle against Nazism and fascism, the third phase is the non-violent struggle for independence after WWII and the fourth phase is the armed struggle for independence in the 1960s.

[282] Sarkin J., *Colonial Genocide and Reparations Claims in the 21st Century: The Socio-Legal Context of Claims under International Law by the Herero against Germany for Genocide in Namibia, 1904-1908*

[283] Birmingham D., *The Decolonization Of Africa,* London, UK, University College London Press, 1995. The author has made analysis of the post-independence African states which maintained the colonial rules and he goes on to say that the elite preferred the colonial culture to their own. The author affirms that political decolonization was quickly while the transformation of African mind was and still is a slow progress. See also, Hargreaves J.D., *Decolonization in Africa,* New York, USA, Routledge, 1996.

that no colonialist was prosecuted by the independent states for any crime committed during colonial domination.

In Africa, impunity prevailed and Africans suffered in their own countries. Crimes were committed by colonial powers who claimed to profess and embrace human rights principles for all and they got away with mass murder, torture and other forms of human rights violations.[284] This culture is what African countries inherited; a culture of impunity and is what triumphed for many years after decolonization. Moreover, even after the decolonization process in Africa, the participation of African countries in the development of international criminal justice during cold war era was non-existent due to the nature of events that surrounded the period.

3.4 The Cold War Period: A Cold Era for the Development of International Criminal Justice

The cold war was a period which began immediately after the end of WWII.[285] It was marked by political ideological differences between the East and West which inevitably affected the common ground for the development of international criminal law and justice.[286] As noted from the preceding discussion, international criminal justice developed with the will of the players in international politics (the rich,

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[284] Gevers C., "Making ICL History: On the Need to Move Beyond Pre-fab Critiques of ICL, in Schwöbel C., ed., *Critical Approaches to International Criminal Law: An Introduction*, New York, USA, Routeledge, 2014, p. 226 and 227.

[285] Gann H.L. and Duignan P., *World War II and the Beginning of the Cold War*, Leland, Stanford Junior University, United States of America, 1996. See also information available at http://www.todayifoundout.com/index.php/2013/11/cold-war-start-end/ [Accessed 19 May 2014]. "The Cold War was the geopolitical, ideological, and economic struggle between two world superpowers, the USA and the USSR, that started in 1947 at the end of the Second World War and lasted until the dissolution of the Soviet Union on December 26, 1991."

[286] Reisman, W. M., 'International Law after the Cold War' *American Journal of International Law,* 1990, No.84, p. 859 at 860.

powerful and victorious countries of WWII). As such, during the cold war, the relationship among the key players was sour. This also affected the development of international criminal justice. National states embraced the traditional understanding of international law which favoured the notion of absolute state sovereignty and non-interference in the internal affairs of states.

States did not have an international body which was mandated to prosecute international crimes thus prosecution of any international crime was left at the mercy of national justice mechanism.[287] As a result, very few prosecutions were made by states. Evidence of prosecution of international crimes were witnessed in cases such as the 1961 *Attorney General of the Government of Israel v. Adolf Eichmann,*[288] 1987 *Klaus Barbie* trial[289] and Polyukovich *v. The Commonwealth.*[290]

Due to this state of affairs, the foundation which was laid down by the Nuremberg and Tokyo trials was never carried forward despite the revealing evidence of human rights violations amounting to crimes enshrined under the Nuremberg principles. During the cold war period many states witnessed genocide, crimes against humanity and war crimes[291] within their jurisdiction but accountability was not emphasized in

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[287] Inazumi M., *Universal Jurisdiction in Modern International Law: Expansion of national Jurisdiction for prosecuting Serious crimes Under International Law, op. cit,* p.35.

[288] Case records available at http://www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/Sessions/ [Accessed 20 May 2014].

[289] Information available at http://www.jewishvirtuallibrary.org/jsource/Holocaust/Barbie.html [Accessed 20 May 2014]. *Barbie Case*, 78 I.L.R. 125 (1988); 100 I.L.R. 331 (1995) (French Court of Cassation);

[290] [1991] HCA 32; (1991) 172 CLR 501,

[291] Kieh G.K., 'Humanitarian Intervention in Civil Wars in Africa,' in Valls A., Ethics in International Affairs: Theories and Cases Rowman and Littlefield Publishers, Oxford, England,

the daily operations of a state.[292] In Africa, many states suffered civil wars commonly referred to as liberation wars.[293] The United Nations made an explicit recognition of the threat the liberation wars posed to world peace.[294] Countries like Kenya, Algeria, Angola, Guinea Bissau, Mozambique, Zimbabwe and Namibia suffered violent civil wars.[295] Other civil wars which were directly fuelled by the interests of the super powers during the cold war were evident in Chad, Nigeria, DRC, Sudan, Senegal and South Africa.[296] Somalia and Ethiopia suffered an inter-state war.[297] In countries like Uganda, crimes against humanity were also witnessed during the first two regimes that of Milton Obote and Iddi Amini.[298] However, accountability for atrocities committed was not immediate in some cases and in other cases victims may never see the perpetrators brought to justice for crimes committed.

Despite the fact that no prosecutions were made during the peak of the cold war period, accountability has been sought (in some cases) for international crimes perpetrated during that time many years after the end of the cold war. The vivid examples of late prosecution of international crimes committed during the cold war period include cases such as; 1994 *Special Prosecutor v. Colonel Mengistu Haile-Mariam & Others* which dealt with crimes committed between 1974-1980 (the trials

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2000, p. 135 at 135. example the crimes against humanity committed in Israel, Cambodia, Northern Korea to mention just a few.

292 Inazumi M., 2005, at 36.

293 Francis D.J., *Uniting Africa: Building Regional Peace and Security,* Ashgate Publishing Limited, Hampshire, England, 2006, pp. 72-73

294 Declaration on the Granting of Independence to Colonial Countries and Peoples Adopted by General Assembly resolution 1514 (XV) of 14 December 1960

295 *Ibid*.

296 *Ibid*.

297 Kieh G.K., 'Humanitarian Intervention in Civil Wars in Africa,' *op. cit*, p. 173.

298 See information available at http://news.bbc.co.uk/2/hi/africa/4328834.stm [Accessed 23 March 2013].

were held in absentia of the principal offenders),[299] the trials being held in the Extra Ordinary Chambers in the Courts of Cambodia for crimes committed between 1975-1979[300] and the Extraordinary African Chambers that has prosecuted Hissène Habré for international crimes committed between 1982-1990.[301]

Despite the above set back, there was notable positive influence in the codification of international criminal law principles. Many conventions were enacted affirming the prohibition of certain conduct under international law. These include; the 1949 Geneva Conventions and Additional Protocols[302] 1948 Genocide Convention,[303] the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,[304] the 1970 Hague Convention for the Suppression of Unlawful

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299 Tiba K. F., 'Mass Trials and Modes of Criminal Responsibility for International Crimes: The Case of Ethiopia' in Heller K. and Simpson G., *The Hidden Histories of War Crimes Trials*, Oxford University Press, Oxford, United Kingdom, p. 306. The Derg committed a number of human rights violations from the mid-1970s to 1980s in Ethiopia. These human rights violations amounted to the crime of genocide and crimes against humanity. Ethiopia being one of the exceptional countries in Africa it had legislative framework providing for the prohibition of international crimes in its 1957 Penal Code article 281-286. The Ethiopian prosecution team issued charges for the violation of international interest as provided under the penal code. The top official having been charged for committing genocide among other charges. 5, 119 persons were tried. Mengitsu was tried in absentia while 33 indicted officials appeared before the Federal High Court of Ethiopia to answer charges brought against them. The court sentenced most of them to life in prison while Mengitsu got a death penalty.

300 Information available at http://www.eccc.gov.kh/en [Accessed 14 May 2014]. Popa R., *The Contribution of the Extraordinary Chambers in the Courts of Cambodia to the Establishment of Hybrid Tribunals*, Norderstedt, Germany, Grin Verlag, 2009. The tribunal was established to deal with international crimes including the crime of genocide committed during the ruling of Khmer Rouge. Its jurisdiction is limited to crimes perpetrated between 17 April 1975 and 6 January 1979. It is further limited to two categories of perpetrators namely; 1) Senior leaders of Democratic Kampuchea; and 2) Those believed to be most responsible for grave violations of national and international law. The tribunal is a hybrid court established with the help of the UN upon the request by the government of Cambodia. The court was established by an Act of parliament in 2001. There are four cases before the Chambers.

301 Information available at http://www.hrw.org/news/2012/08/22/senegal-new-court-try-chad-ex-dictator-senegal [Accessed 14 May 2014]. This chamber has been adequately explained in the subsequent chapters of the thesis.

302 The Four Geneva Conventions.

303 The Genocide Convention.

304 Convention Against Torture.

Services of Aircraft[305] and the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.[306] It is notable that during the 1970s, most African countries had attained independence. Some African states participated in the development of substantive rules relevant to international criminal justice including the Convention Against Torture.[307]

Regardless of the flourishing codification during the cold war period of the principles that were initially enshrined in the Nuremberg and Tokyo charters, the application of the principles was almost nonexistent. The absence of prosecution of international crimes at international level coupled with very few national prosecutions as stated in the previous paragraphs, made the cold war period obsolete in the realization of international criminal justice. A new era was however ushered in at the end of the cold war as shall be seen in the following sub part.

3.5 The 1990s: Rebirth of Prosecution of International Crimes

The end of the cold war marked a new beginning in international politics and this in turn gave impetus to the development of international criminal law.[308] The end of the cold war was necessitated by factors such as: - "the rapid demise of communism in Eastern Europe, the reunification of divided Germany, disintegration of the Soviet

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305 Hijacking Convention 860 U.N.T.S. 105, entered into force Oct. 14, 1971.

306 974 U.N.T.S. 178, entered into force January 26, 1973.

307 Information available at https://treaties.un.org/Pages/ViewDetails.aspx?src=treaty&mtdsg_no=iv-9&chapter=4&lang=en [Accessed 28 August 2014]. The following countries signed the Convention Against Torture few years after it was opened for signature. These include: Egypt 1986; Gambia 1985; Gabon 1986; Morocco 1986; Nigeria 1988; Senegal 1985; Togo 1987 and Tunisia 1987.

308 Steel R., 'The End and the Beginning' in Hogan J.M., *The End of the Cold War: Its Meaning and Implications,* Cambridge University Press, Cambridge, United Kingdom, 1992, p. 103.

Union , economic stagnation of the Soviet and the conclusion of Helsinki Final Act which bridges East –West tensions in Europe."[309]

The decline of cold war meant that key players in international arena were once again united in common ground to protect the general interest of the international community. The United Nations was once more an international organization which could function to implement the core principles contained in its Charter because the five permanent members of the Security Council were not in an antagonist relationship. This unity of effort could be seen in the peacekeeping missions of the United Nations around the globe.[310]

As pointed out earlier, international criminal justice developed with the role of the victorious powers of WWII, a scenario which, after a pose during the cold war period has continued to shape international criminal justice. The victorious power of WWIIs, as permanent members of the United Nations Security Council (hereinafter referred to as UNSC), hold key and influential position in the world's security organ and have remained key players in international politics.[311] For this reason, they continued to play a crucial role in the development of international criminal justice in

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309 Snyder S.B., *Human Rights and the End of the Cold War: A Transnational History of the Helsinki Network*, Cambridge University Press, New York, USA, 2011, p. 15.

310 Information available at http://www.un.org/en/peacekeeping/operations/surge.shtml [Accessed 14 May 2014]. It must be noted that between 1989 and 1994, the Security Council authorized a total of 20 new operations around the globe more than twice the number of peacekeepers deployed between1956 and 1988.

311 United Nations Charter, article 23.

the 1990s. In this regard, they have taken a deliberate decision to end impunity to international crimes.[312]

3.5.1 International Crimes in Yugoslavia and Establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY)

In the wake of the 1990s the international community was shocked by events that brought back memories of the past holocaust. In 1991, there was evidence of massacre in the Republic of Bosnia-Herzegovina.[313] The massacre was a result of a conflict between ethnic groups in the territory namely; the Serbs, Croats, and Bosnian Muslims.[314] The United Nations Security Council which was concerned about the events that were unfolding in the region[315] made several efforts to establish how grave the situation was on the ground.[316] The reports compiled revealed grave breach of international humanitarian law coupled with the commission of the crime of genocide.[317]

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312 The recent desire to establish a Tribunal for Ukraine over the shooting of Flight MH17 has put a question mark on the role of the Security Council in ending impunity to International crimes. Some have even suggested that the cold war period has come back with a different face.

313 See information available at http://www.historyplace.com/worldhistory/genocide/bosnia.htm[Accessed 14 May 2014]. Reports revealed the massacre of many people and various forms of violations of humanitarian law. There was direct evidence of various forms of sexual violence including rape committed against civilian population, torture, mass expulsion of civilians from their homes.

314 Okey R., 'The Legacy of Massacre: The Jasenovac Myth and the Breakdown of Communist Yugoslavia,' in Levene M. and Roberts P., (eds), *The Massacre in History*, Berghahn Books, New York ,United States of America, 1999, p. 263.

315 Security Council Resolution 764 on Bosnia and Herzegovina S/RES/764 13th July 1992; Security Council Resolution 771 on the Former Yugoslavia S/RES/771 13th August 1992.

316 Security Council Resolution 780 on the Establishment of a Commission of Experts for the former Yugoslavia S/RES/780 6 October 1992; Report of the Secretary General on the Establishment of the Commission of Experts Pursuant to paragraph 2 of the Security Council Resolution 780 (1992) S/24659 14th October 1992.

317 Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) S/25274 11Th February 1993; Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) S/1994/674 27th May 1994.

The Security Council after reading the reports and making a determination that the situation in the Former Yugoslavia constituted a threat to international peace and security, it decided to establish a tribunal for prosecution of persons responsible for the commission of international crimes in the region.[318] The task was handed over to the United Nations Secretary General to come up with effective means of establishing a tribunal.[319] The Secretary General came up with a report and a statute which was adopted by the Security Council Resolution 827 acting under chapter VII of the United Nations Charter.[320] The Resolution therefore, established the International Criminal Tribunal for the Former Yugoslavia.[321]

The ICTY was established with subject matter jurisdiction on four categories of international crimes. These include grave breaches of 1949 Geneva Conventions,[322] violations of laws and customs of war,[323] genocide[324] and crimes against humanity.[325] It has temporal and territorial jurisdiction for crimes committed in the Former Yugoslavia since 1991.[326] Therefore, this limits the jurisdiction of the court to events that unfolded from 1991 and committed only within the Former Yugoslavia. It cannot stretch to prosecute crimes committed elsewhere even if they were committed

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318 Security Council Resolution, 808 1993 S/RES/808 22nd February 1993.
319 *Ibid*.
320 S/RES/827 25th May 1993. When the UNSC gives decisions under Chapter VII of the Charter such resolutions are binding to member states of the UN.
321 *Ibid*. Paragraph 2 states that, the Security Council "[d]ecides hereby to establish an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace and to this end to adopt the Statute of the International Tribunal annexed to the above-mentioned report."
322 ICTY Statute, article 2.
323 *Ibid*., article 3.
324 *Ibid*., article 4.
325 *Ibid*., article 5.
326 *Ibid*., article 8.

within the stated time frame. Therefore, the ICTY was formed for a specific purpose and target.

It is worth mentioning that the court is not obliged to prosecute every perpetrator as it has concurrent jurisdiction with national courts.[327] This feature empowers national courts to equally exercise jurisdiction in ending impunity to international crimes.[328] What is of interest, however, is the primacy clause that makes the ICTY a superior court in prosecuting international crimes. National courts are left with jurisdiction over those cases that the ICTY has chosen not to prosecute. Article 9 of the Statute provides that;

> The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.[329]

From the above quotation, it is clear that the Court is at liberty to call on cases to its ambit when they are already being prosecuted by national courts. The procedure for this is well covered under the ICTY Rules of Procedure and Evidence. It should also be noted that reference to national courts in article 9 does not refer to national courts of the Former Yugoslavian only.[330] The primacy of the ICTY can be assumed if three conditions present themselves in any criminal proceeding before national court for crimes which the ICTY has jurisdiction. These conditions include situations where:-

1. The act being investigated or which is the subject of those proceedings is

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327 *Ibid*., article 9.

328 "Since 2003 the court has worked closely with local judiciaries and courts in the former Yugoslavia, working in partnership as part of a continuing effort to see justice served." Information available at http://www.icty.org/en/about [Accessed 22 November 2013].

329 *Ibid*.

330 International Criminal Tribunal for the former Yugoslavia, Rules of Procedure and Evidence, IT/32/Rev.7 (1996), 14 March 1994 Rule 8.

> characterized as an ordinary crime;
> 2. There is a lack of impartiality or independence, or the investigations or proceedings are designed to shield the accused from international criminal responsibility, or the case is not diligently prosecuted; or
> 3. What is in issue is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the Tribunal.[331]

Thus, if any of the above conditions is established, the Prosecutor of the ICTY may propose that a formal request be made to defer the cases undertaken by the national courts to the aptitude of the Tribunal. The third condition puts any proceeding in national courts at the mercy of the Tribunal. This shows the continued reliance on international justice mechanism than national courts in dispensing justice to the victims of international crimes. This position was supported by the Tribunal in the case of *Tadic* where it stated that:

> When an international tribunal such as the present one is created, it must be endowed with primacy over national courts. Otherwise, human nature being what it is, there would be a perennial danger of international crimes being characterised as 'ordinary crimes' or proceedings being 'designed to shield the accused', or cases not being diligently prosecuted. If not effectively countered by the principle of primacy, any one of those stratagems might be used to defeat the very purpose of the creation of an international criminal jurisdiction, to the benefit of the very people whom it has been designed to prosecute.[332]

The Court is currently implementing its completion strategy so as to wind up the docket of cases before it. As of May 2016, the Court had "concluded proceedings against 151 of the 161 individuals it had indicted, and had concluded contempt proceedings against 25 persons."[333]

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331 *Ibid*., Rule 9.

332 *Prosecutor v. Tadic*, Case No IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras.58–59.

333 ICTY Progress Report of 17 May 2016, S/2016/454 available at http://www.icty.org/sites/icty.org/files/documents/160517_icty_progress_report_en.pdf [Accessed 30 July 2016].

3.5.2 International Crimes in Rwanda and Establishment of the International Criminal Tribunal for Rwanda (ICTR)

In 1994, the international community witnessed yet another horrendous scene. This scene was characterised by mass murder, rape, torture, various forms of sexual violence and other inhuman acts directed against a group of individuals based on their ethnicity.[334] This was the genocide in Rwanda. It is estimated that about ten per cent of Rwandan population was massacred during the genocide.[335] The genocide in Rwanda happened immediately after the massacre in the former Yugoslavia. Following the shape that international criminal justice took in ending impunity to international crimes in the former Yugoslavia, the use of international courts was given prominence as the best avenue to dispense justice to the victims of mass crimes. This view was subscribed to in a letter from the Permanent Representative of Rwanda addressed to the President of the Security Council.[336]

Just like the scenario in the former Yugoslavia, the situation in Rwanda caught the attention of the Security Council. With resolution 935, the Security Council instructed the Secretary General of the United Nations to establish how grave the situation in Rwanda was.[337] Following the reports tendered to the Security Council, it decided to establish the International Criminal Tribunal for Rwanda (ICTR).[338] The establishment of the ICTR was modelled along the lines of the ICTY. The ICTR was

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334 Degni – Sequi R., Report of the Situation of Human Rights in Rwanda UN ESCOR Commission on Human Rights UN DOC E/CN 4/1995/7.

335 Morris M.H., "The Trials of Concurrent Jurisdiction: The Case of Rwanda," *Duke Journal of Comparative and International Law*, 1997, No 7, p. 349.

336 Letter dated 28 September 1994 S/1994/115 (1994).

337 S/RES/935 (1994). This was achieved through the establishment of the Commission of Experts which was established pursuant to resolution 935.

338 Resolution 955 Adopted 8 November 1994 S/RES/955 (1994) Available at http://www.un.org/ictr/english/Resolutions/955e.htm [Accessed 1 March 2014].

established with jurisdiction over the crime of genocide,[339] crimes against humanity[340] and violations of article 3 common to the Geneva Conventions and Additional Protocol II.[341]

The ICTR's temporal jurisdiction is limited to events that occurred between 1 January 1994 and 31 December 1994.[342] Further, unlike the ICTY, the ICTR has jurisdiction over persons who committed crimes in the territory of Rwanda and over Rwandan citizens who committed crimes under the jurisdiction of the tribunal in the territory of neighbouring States.[343] Similar to the ICTY, the ICTR has concurrent jurisdiction with national courts and is also endowed with primacy over national court proceedings.[344]

The move by the Security Council to establish ad hoc tribunals[345] mirrored the early days of the development of international criminal law. Unlike their predecessors which were established by a treaty and proclamation, the two tribunals ICTY and ICTR were a feature of the Security Council acting under chapter VII of the United Nations Charter.[346] This part of the UN Charter gives the Security Council the mandate to give binding resolutions in quest of enforcement of international peace and security. This ability to make decisions which reflect a unity of thoughts was

339 ICTR Statute, article 2.
340 *Ibid*., article 3.
341 *Ibid*., article 4.
342 *Ibid*., article 1 and article 7.
343 *Ibid*.
344 *Ibid*., article 8; International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, ITR/3/REV.1 (1995) 29 June 1995. Rule 8, 9, and 10.
345 This term has been used to denote a tribunal that was established by the UN to deal with specific crimes committed at specific time and within specific locale.
346 UN Charter.

made possible because of the end of the cold war. The ad hoc tribunals were created as subsidiary organs of the Security Council[347] and have been situated in countries other than the country where the crimes were committed. Importantly, the tribunals have left a lasting legacy in the jurisprudence and development of international criminal law as we know it today.

The ICTR serves as the first example of an African country being actively involved in the development of retributive international criminal justice at the international level.

3.6 The Permanent International Criminal Court

The rebirth of prosecution of international crimes in the 1990s did not only witness the resurrection of old ideas and modes of carrying out international justice but also witnessed the culmination of efforts to establish a permanent international criminal court that bears fruits. Both the ICTY and the ICTR were tribunals with limited jurisdiction; temporal, personal and territorial. The need to have an institution at international level that was not as limited as these two was a long overdue goal.

The ILC was given the task to prepare a Draft Code of Offences Against Peace and Security of Mankind in 1947.[348] However, a draft was not adopted until 1996.[349] This

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347 *Ibid*., article 29.

348 United Nations General Assembly Resolution 117 (II) of 21st November 1947. The desire of states to have an international court was conceived in 1937 but efforts to establish one started after the end of the Nuremberg trials.

349 Yearbook of International Law Commission 1996 Vol II (Part two) para 45 and 50. The draft Code was presented in 1954 but there was no agreement on the definition of the crime of

draft was mainly aimed at having a document that addresses international crimes substantively. Nevertheless, having a substantive document was not thought to be enough. The ILC considered it proper to devise mechanism for implementing the draft code. This idea was conceived in 1983.[350] In 1989, the idea of having an international criminal court gained the support of the United Nations General Assembly[351] which formally charged the ILC with the task of seeing to it that the idea came into being. The ILC worked on the task from 1990 to 1994 when it finally adopted a draft statute for the International Criminal Court.[352]

In 1997, the General Assembly decided to convene the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court.[353] The Conference took place from June 15th to July 17th 1998 with a delegation of 160 state participants.[354] The Conference positively adopted the Rome Statute of the International Criminal Court which came into force on 1st July, 2002. This period marked a milestone in the development of international criminal justice. It marked a period where states from every part of the globe participated without the limitation of a few victorious powers akin to the period when international criminal justice originated. The ICC is therefore a creation of states through the adoption of a multilateral treaty, the Rome Statute. The Court is therefore not a product of the Security Council, an organ of the UN with limited representation of member states.

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aggression. This factor coupled with other factors such as the cold war delayed the adoption of the draft code.

350 Yearbook of International Law Commission 1983 Vol II (Part One) A/CN.4/364.

351 UNGA Resolution 44/39 of 4th December 1989.

352 Yearbook of International Law Commission 1994 Vol II (Part two) para 88 and 91.

353 United Nations General Assembly Resolution 52/160 15 December 1997.

354 Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome 15 June -17 July 1998, Vol 1 A/CONF.183/9.

It is important to note that most African states played a key role prior to[355] and during the negotiations of the Rome Statute.[356] Thirty four (34) African States are member states to the Rome Statute.[357] Africa is the continent with the biggest number of members. This shows the consciousness and the desire by African states to end impunity to international crimes committed in the continent. Further, the large number of African participants is a clear gesture of independent African states participating in the development of international criminal justice with a clear sight of the obligation placed upon them by the treaty establishing the ICC. This is clear testimony that African countries are no longer in the shadow. The ICC is vested with jurisdiction to prosecute perpetrators of international crimes around the globe subject to rules of admissibility.[358]

Thus, unlike the other tribunals established under the UN which are based on concurrent jurisdiction with primacy clause, the ICC is based on the principle of complementarity.[359] The Court is not established as a court of first resort but rather a

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355 Coalition for the International Criminal Court, 'Dakar Declaration for the Establishment of the International Criminal Court in 1998' (Declaration, 2 February 1998) Available at http://www.iccnow.org/documents/DakarDeclarationFeb98Eng.pdf [Accessed 25 September 2014].

356 Coalition for the International Criminal Court, 'Africa and the International Criminal Court' (Fact Sheet, 25 May 2009). See also International Law Commission, Report of the International Law Commission on the Work of Its 46th Session, UN GAOR, 49th sess, Supp No 10, UN Doc A/49/10 (1994) ch II(B)(f). 800 African civil societies were actively involved in the process leading to the adoption of the Rome Statute.

357 Coalition for the International Criminal Court 'States Parties to the Rome Statute' available at http://www.iccnow.org/documents/RATIFICATIONSbyRegion_2Arpil2012_eng.pdf [Accessed 6th January 2014].

358 See Rome Statute, article 13. The Court may exercise jurisdiction in three scenarios. 1. Where a state party refers the situation to the Court 2. Where the Security Council refers the situation to the Court and 3. Where the prosecutor exercises the *proprio mutu* powers.

359 *Ibid*. This concept is found under paragraph 4 and 10 of the preamble to the Rome Statute also inferred under article 1, 17, 18, and 19 of the Statute.

court of last resort. The former prosecutor of the ICC underscored this position by stating that;

> As a consequence of complementarity, the number of cases that reach the Court should not be a measure of its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.[360]

The above statement shows the importance of the principle under which the ICC is based. Therefore, the trend that flourished with the ad hoc tribunals of having primacy jurisdiction over national courts has been entirely reversed with the coming into force of the Rome Statute.

The Rome Statute recognizes the inherent duty placed on states to prosecute international crimes committed within their territory.[361] In order to effectively fulfill the duty, states are given positive obligation to make sure that national justice system is well equipped to prosecute international crimes. This ranges from having proper legislative framework and skilled man power for investigation and prosecution of international crimes.[362] It is with this line of reasoning that state sovereignty is maintained and not hampered by the establishment of the permanent International Criminal Court.[363]

The ICC will therefore take matters based on article 17 of the Rome Statute which deals with admissibility of cases. On this note, the ICC will only take cases when

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360 Information available at https://www.icc-cpi.int/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED /281984/complementarity.pdf [14 May 2013].

361 *Ibid*, preamble paragraph 6.

362 Judge Sang-Hyun Song President of the International Criminal Court Keynote remarks at ICTJ retreat on complementarity Greentree Estate, New York 28 October 2010, p. 3.

363 Yang L., "On the Principle of Complementarity in the Rome Statute of the International Criminal Court," *Chinese Journal of International Law*, 2005, Vol. 4, No. 1, p. 121 at 122.

states are unable[364] or unwilling[365] to fulfill their primary duty of prosecuting international crimes at domestic level. The unwillingness of states is determined before or after prosecution is commenced.[366] This determination is made with reference to the way the proceedings are conducted especially the reasons behind such proceedings. On the other hand, inability is determined from the absence of prosecutions at national level. The test of admissibility was rightly stated by the Court in the case of *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali.* The court stated that,

> the defining elements of a concrete case before the Court are the individual and the alleged conduct. It follows that for such a case to be inadmissible under article 17(1) (a) of the Statute, the national investigation must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court…. For assessing whether the State is indeed investigating, the genuineness of the investigation is not at issue; what is at issue is whether there are investigative steps.[367]

Thus, when national justice systems are actively and genuinely investigating and prosecuting international crimes committed in their territories, the ICC will not step

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[364] Rome Statute, article 17 (3). The inability of a state to prosecute is established when "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 otherwise unable to carry out its proceedings."

[365] *Ibid*., Article 17 (2).

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

(b) There has been an unjustified delay in the proceedings which in the circumstances, is inconsistent with an intent to bring the person concerned to justice;

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with intent to bring the person concerned to justice.

[366] *Ibid*.

[367] ICC-01/09-02/11 OA see para 39 and 40

in.[368] It will just be vigilant to ensure that prosecutions are genuine and justice is served.[369]

The principle of complementarity is the ultimate realization of the limitation placed upon international courts. This mirrors the prosecutorial strategy which limits cases to those bearing the greatest responsibility.[370] With the principle of complementarity, national justice systems are expected to step in and investigate and where appropriate, prosecute persons accused of committing international crimes. Failure by national courts to make the principle of complementarity work, may risk impunity. This is evident in the cases that are before the ICC which is just a drop of the perpetrators of international crimes in the countries concerned.

3.7 Specialized National Courts

Due to the temporal limitation of the ICC which is limited to crimes committed after the Rome Statute came into force, international crimes committed prior to that Statute do not fall within its temporal jurisdiction. Therefore, states resorted to the creation of domestic courts with an international element in order to end impunity to international crimes.[371] These include the Special Court for Sierra Leone,[372] the East

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[368] Philippe X., "The Principles of Universal Jurisdiction and Complementarity: How do the Two Principles Intermesh?," *International Review of the Red Cross,* Vol. 88, No.862, 2006, p. 375 at 381-382.

[369] Kleffner J.K., "The Impact of Complementarity on National Implementation of Substantive International Criminal Law," *Journal of International Criminal Justice,* 2003, No. 1, p. 86 at 87.

[370] Brubacher M.R., 'Prosecutorial Discretion within the International Criminal Court' *Journal of International Criminal Justice,* 2004, No. 2, pp. 71-95; Nsereko D.D.N., "Prosecutorial Discretion before National Courts and International Tribunals," *Journal of International Criminal Justice,* 2005, No. 3, pp. 123-144.

[371] Pocar F,'The Proliferation of International Criminal Courts and Tribunals: A Necessity in the Current International Community,' *Journal of International Criminal Justice,* 2004, No. 2, pp. 304-308.

Timor Special Panels for Serious Crimes,[373] the Kosovo courts[374] and the Extraordinary Chambers of Cambodia (Khmer Rouge Tribunal).[375] It is also envisioned that a Special Court shall be established in Central African Republic.[376]

These courts operate under the realm of domestic law but receive support and assistance from the United Nations. They are established by an agreement between the UN and the country in question. The technical staffs are also a mixture of local and international personnel. Unlike the ad hoc tribunals, these courts are primarily domestic. This reveals the common shared ground by member states of the UN to end impunity to international crimes in whatever means employed. It is further a solidification of the important role domestic courts play in bringing justice to the victims of international crimes.

3.8 Conclusion

International criminal justice has evolved from a period where reliance was given to the creation of ad hoc tribunals to a period where a permanent International Criminal Court was created. Further, the jurisdictional relationship between international

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372 Draft Agreement between the UN and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 2000, contained in Report of the Secretary General on the Establishment of a Special Court for Sierra Leone, UN Doc S/2000/915 (4 October 2000), p 15; UN Security Council Resolution 1325 (2000) 14 August 2000 in Kai Ambos and Mohamed Othman (Eds) *The new approaches in international criminal justice Kosovo, East Timor, Sierra Leone and Cambodia* (2003) at 250; Special Court Agreement (Ratification) Act 2002 C. Tofan (ed) *The Sierra Leone Special Court Collection. Basic Documents (2008)1* at 11.

373 They were created by the United Nations Transitional Administration in East Timor (UNTAET) in 2000 and are operational in Dili East Timor dealing with crimes committed in 1999.

374 See information available at http://www.hrw.org/news/2014/04/24/kosovo-approval-special-court-key-step-justice [Accessed 20 June 2014].

375 See information available at http://www.eccc.gov.kh/en [Accessed 20 June 2014].

376 See Loi Organique No 15, 003 Portant Creation, Organisation et Founctionnement De Law Court Penal Special (Organic Law on the Establishment of the Special Criminal Court, No 15, 003).

tribunals and national justice mechanism has considerably changed over time. In the early and formative stages of international criminal justice, reliance was given more on international tribunals as courts of first resort endowed with concurrent jurisdiction with national courts but having primacy over national courts. Now with the coming into force of the Rome Statute, there has been a realization that national courts must be given primacy in prosecuting international crimes. As such, the Rome Statute has created a Court of complementary jurisdiction to national courts.

On another note, the role of the victorious powers of WWII who were central in the inception of international criminal justice has somehow been maintained throughout the development of international criminal law. In the 1990s, the five permanent members of the Security Council played a major role in the status international criminal law had during that phase. Further, the Rome Statute has given the Security Council power to refer cases to the Court. This feature is what has maintained the power of a few in the realisation of international justice. The peculiar thing about this is that, some of the permanent members who have been given such power are not even parties to the Rome Statute. This is an irony and therefore a loophole for the interplay of international politics of the rich and powerful in dispensing international justice.

As noted in this chapter, the colonial domination of African countries and the lack of accountability for crimes perpetrated by colonialists' negatively impacted accountability for international crimes committed on the continent. A culture of impunity that was built continued to exist even after independence.

CHAPTER FOUR

INTERNATIONAL CRIMINAL JUSTICE IN NATIONAL COURTS

4.1 Introduction

The previous chapter outlined the different phases international criminal justice has passed. It is apparent from the previous chapter that international courts have played a big role in dispensing justice and ending impunity to international crimes. Although the term international criminal justice may give inference to justice dispensed by international courts, the complementarity principle and the duty placed on states to prosecute international crimes prove otherwise.

This chapter brings to light the important role played by national courts in ending impunity to international crimes although it must be acknowledged that national courts have not received centre stage like their counterpart i.e. international courts and tribunals. It is therefore argued here that, apart from the discretion and right every state has to prosecute international crimes committed within its territory, there is an imposed duty on states by treaties obliging them to carry prosecutions of international crimes. Further, the chapter rests on the argument that when compared to international courts and tribunals, national courts offer considerable advantage to international courts and therefore, a viable venue to prosecute international crimes.

4.2 Duty to Prosecute International Crimes

The prosecution of international crimes before national courts is not only an intrinsic right of states, there is also an inherent legal duty placed upon states to prosecute

international crimes committed in their territory.[377] By setting in motion the prosecution process, states are fulfilling their primary duty. Whether the cases proceed for trial or not, is a matter of evidence.

Thus, apart from a right that every state has with regard to prosecutions within its borders, international law, in different treaties and under customary international law has imposed a duty on states to prosecute international crimes perpetrated in their territories or where the perpetrators are found to be in their territory.[378] It must be emphasized that this duty is mostly read with reference to the duty to prosecute or extradite. However, the analyzed treaties reveal that the latter duty has not been framed in a mandatory way due to the use of the word "may" in different treaties.[379]

Therefore, this part seeks to show why states ought to be proactive in prosecuting international crimes committed in their territories because in doing so, they will be fulfilling the duty placed upon them under international law. Therefore, the duty discussed here is with reference to the duty placed on a state where international crimes were perpetrated. This limited focus falls outside the scope of the duty to prosecute any other crime or a duty placed on states to prosecute in relation to the principle *aut dedere aut judicare*.

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377 *Belgium v. Senegal*, para, 94. The court addressed itself on the duty to prosecute international crimes in relation to the obligations arising from the Convention Against Torture.

378 Reference has been made to treaties such as the four Geneva Conventions. The Convention Against Torture, The Rome Statute and the Genocide Convention.

379 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Geneva Convention relative to the Treatment of Prisoners of War; and Geneva Convention relative to the Protection of Civilian Persons in Time of War.

4.2.1 The Genocide Convention of 1948

The crime of genocide is one of the core international crimes having a separate Convention which addresses it specifically. The duty to punish the crime of genocide is well enshrined under the specific Convention article I, V and VI.[380] There is a direct undertaking by state parties in the event that the crime of genocide is committed to punish the perpetrators of the crime of genocide.[381] Article IV of the Convention further solidifies the mandatory obligation to punish the perpetrators of the crime of genocide irrespective of their position in the society.

The duty, just like anyone would have envisioned, is tripartite. It involves the passing of legislation,[382] the prosecution and punishment upon conviction.[383] The wording of the article imposing such an obligation is framed to the affirmative by the use of the word "shall" which leaves no discretion in the execution of such an obligation. It therefore follows to state that, no one would argue against the requirement that states party to the Genocide Convention are required to equip national machinery with

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380 Genocide Convention. When reading the relevant provisions it is notable that state parties have undertaken to punish those who perpetrate the crime of genocide. As such, the territorial principle of jurisdiction gives inherent duty on state parties to punish the crime of genocide perpetrated in its territory.

381 Schabas W.A., *Genocide in International Law: The Crime of Crimes*, Cambridge University Press, Cambridge, United Kingdom, 2000, pp. 355-360; Steven L.A., "Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of its International Obligations," *Virginia Journal of International Law*, 1999, No. 39, p. 425, at 442; Ben-Naftali O. and Sharon M., "What the ICJ did not say about the Duty to Punish Genocide: The Missing Pieces in a Puzzle,"' *Journal of International Criminal Justice*, 2007, No. 5, p. 875.

382 Genocide Convention, article V.

383 *Ibid*., article VI. "[p]ersons charged with genocide […] shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction;" *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *I.C.J. Reports 2007*, paras, 442, 449.

necessary tools to enable them prosecute the crime of genocide committed in their territory.

Further, the provisions of prohibiting the commission of the crime of genocide under the Genocide Convention are said to have attained the status of customary international law. This was the reasoning of the ICJ[384] and further support by different writers.[385] With this elevated status the obligations contained therein are therefore not restricted to state parties but overflow to non-state parties as well.

4.2.2 The Geneva Conventions of 1949 and the Additional Protocols 1977

The Geneva Conventions and their Protocols form the basic treaty documents on international humanitarian law. The conduct criminalized in the four Geneva Conventions and Additional Protocol I, especially those commonly referred to as the grave breaches have formed part of the core international crimes (war crimes) dealt with by international criminal law.[386] The treaties frame the duty to prosecute

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384 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, International Court of Justice*" The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required 'in order to liberate mankind from such an odious scourge.' The Genocide Convention was therefore intended by the General Assembly and by the contracting parties to be definitely universal in scope." See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* International Court of Justice, 26 February 2007, available online at: http://www.icj-cij.org/docket/files/91/13685.pdf'[Accessed 21 August 2014].

385 Quigley J., *The Genocide Convention: An International Law Analysis,* Ashgate publishing Limited, Hampshire, England, 2006; Lepard B.D., *Customary International Law: A New Theory with Practical Application,* Cambridge University Press, New York, United States of America, 2010.

386 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, article 49; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, article 50; Geneva Convention relative to the Treatment of Prisoners of War, article 129 and Geneva Convention

international crimes in the affirmative through the use of the word "shall".[387] The Geneva Conventions are one set of international treaties that give states an obligation to enact legislation which is key element in ensuring the prosecution of international crimes.[388]

The four Geneva Conventions provide for an identical mode of accountability. This duty is stretched to cover all aspects relevant in prosecution of war crimes. These include the search of accused persons (investigations) and the prosecution (trial before national courts).[389] Therefore, states are obliged to uphold individual criminal responsibility for conduct stipulated therein. It must be noted from the wording of the Conventions that these obligations are limited to grave breaches. Grave breaches apply to international armed conflict as opposed to internal armed conflicts. This limitation makes the obligations inapplicable in events where war crimes have been perpetrated in an internal armed conflict.[390] However, does the limit of this obligation to grave breaches exclude other forms of war crimes?[391] Rule 158 on customary International Humanitarian Law provides for the duty to prosecute war crimes to cover both international and internal armed conflicts.[392]

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relative to the Protection of Civilian Persons in Time of War, article 146. Additional to the Geneva Conventions of Aug. 12, 1949 and Relating to the Protection of Victims of International Armed Conflicts, opened for signature 12 December 1977 (Protocol I), article 85.

387 *Ibid*.

388 *Ibid*.

389 *Ibid*.

390 It must be noted that none of the Geneva Conventions contain a provision on grave breaches in an internal armed conflict.

391 The Rome Statute article 8 (2) provides for the applicability of war crimes provisions to both international and internal armed conflicts.

392 Information available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule158 [Accessed 4 December 2014].

4.2.3 The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984

The Convention Against torture and other Cruel, Inhuman or Degrading treatment or Punishment (hereafter referred to as CAT) is one treaty that provides unquestionable duty on states[393] to prosecute or extradite persons alleged to have committed the crime of torture[394] which forms part of prohibited conduct amounting to international crimes.[395] The duty is framed in the affirmative by the use of the word "shall". This has further been elaborated by the ICJ in the *Belgium v Senegal* case where the Court detailed that "[e]xtradition is an option offered to the State by the Convention, whereas prosecution is an international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the State."[396]

In order to fulfill these duties, states are required to have provisions under their domestic law criminalizing conduct amounting to torture.[397] This will enable states to assume jurisdiction and to have substantive law to act on both for extradition and prosecution. This was affirmed by the ILC in its report where it articulated that:

> The effective fulfillment of the obligation to extradite or prosecute requires undertaking necessary national measures to criminalize the relevant offences, establish jurisdiction

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393 CAT, article 7. *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, the ICJ Judgment, of 20 July 2012, para.50, 68, 74 and 75. Extradition and prosecution are ways of dealing with impunity through the implementation of one or the other.

394 *Ibid*, article 1. "For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

395 Rome Statute, article 7 (f).

396 Para 95. A state who gives refuge to the perpetrator of the crime of torture is under an obligation to prosecute the perpetrator or extradite to a third state willing to do so.

397 CAT, article 4.

> over the offences and the person present in the territory of the State, investigate or undertake primary inquiry, apprehend the suspect, and submit the case to the prosecuting authorities (which may or may not result in the institution of proceedings) or extradition, if an extradition request is made by another State with the necessary jurisdiction and capability to prosecute the suspect.[398]

Therefore, for those states which are parties to the CAT are duty bound to prosecute when acts are committed within their territories to prosecute. They are also entitled to exercise universal jurisdiction for acts of torture committed outside their territory. It is from this premise that there exists a duty to prosecute an aspect of international crime (torture) that existed prior to the coming into force of the Rome Statute.

4.2.4 The Rome Statute of the International Criminal Court 1998

The Rome Statute is the most comprehensive piece of treaty on international criminal law. It contains the different categories of international crimes[399] unlike the Geneva Conventions which are limited to war crimes.

When reading the Rome Statute from the preamble and some of its articles, there is an inference of a duty to prosecute international crimes.[400] The express stipulation of an existing duty to prosecute international crimes is found under the Preamble of the Statute. It specifically recalls that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."[401] The use of the word

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398 Report of the Working Group on the Obligation to Extradite or Prosecute (*aut dedere aut judicare*)A/68/10 para 23.

399 Rome Statute, article 5. Lists crimes within the jurisdiction of the court to include the crime of genocide, war crimes, crimes against humanity and the crime of aggression

400 Newman, Dwight G. "The Rome Statute, Some Reservations Concerning Amnesties, and a Distributive Problem," *American University International Law Review*, 2005, Vol.20, No. 2, pp. 293-357.

401 Rome Statute, para 6.

"recalling" shows that there has always been an existing duty to prosecute international crimes. What the Rome Statute does is reiterate the said duty. It does not establish it but solidifies it because the duty stated is on the preamble and not the provisions of the Statute.[402]

An inference to the duty placed on states to prosecute international crimes is seen on the fact that the International Criminal Court has been established as a court of complementary jurisdiction to national criminal jurisdictions.[403] The Rome Statute ascribes the primary responsibility to prosecute international crimes to national states and the submission to the ICC when there has been a failure to fulfill the primary obligation.[404]

Therefore, in no way could the Rome Statute affirm that "[t]he effective prosecution of the most serious crimes of concern to the international community be ensured by taking measures at the national level"[405] if there is no existing duty placed on states to prosecute international crimes at least in relation to states where international crimes were perpetrated.[406] It is with this reference that there is a firm requirement of making sure there is a favourable environment at national level to fulfill this primary

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402 Cryer R., *Prosecuting International crimes: Selectivity and the International Criminal Law Regime, op. cit*., p. 144.

403 Rome Statute, preamble para 10.

404 *Ibid*., article 17.

405 *Ibid*., preamble para 4.

406 Seibert-Fohr A., *Prosecuting Serious Human Rights Violations*, New York, USA, Oxford University Press, 2009, p. 251. The limiting of the duty as expressed under the Rome statute avoids the extension of such duty to other states where crimes have not been perpetrated.

obligation. This does not imply that the Rome Statute has given obligation on states to implement the Rome Statute.[407]

4.2.5 Existing Duty to Prosecute International Crimes under Customary International Law

As stated in chapter two, international crimes for the purpose of current thesis are limited to crimes against humanity, war crimes, genocide and the crime of aggression. Therefore, when reference is made to the duty to prosecute international crimes, it must be framed within the limits of international crimes covered. While in the previous parts it has been established that genocide and war crimes have separate treaties that give an inference to that obligation, the duty to prosecute international crimes in their collective nature is inferred under the Rome Statute.[408] Further since there is no one convention addressing crimes against humanity,[409] one aspect of crime against humanity "torture" is also covered under a separate Convention and a duty to prosecute provided therein?

Treaties are just one source of international criminal law. Another source of international criminal law are customs which have a higher binding capacity than treaties because they can bind other states provided they have not persistently been

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407 Nouwen S.M.H., "Fine-tuning Complementarity," in Brown B.S., ed., *Research Handbook on International Criminal Law,* Cheltenham, UK, Edward Elgar Publishing Limited, 2011, p. 206 at 214.

408 As stated in 4.2.4 the duty is stated as recalling an existing duty and the complementarity nature of the ICC gives an inference on the inherent obligation states have to fulfill the primary duty of prosecuting international crimes.

409 As of 2014 the ILC embarked on the process of codifying customary rules of international law governing the prohibition on the commission of crimes against humanity.

objected.[410] The identification of customary international law presupposes the scrutinization of two elements i.e. state practice and *opinion juris.*[411] As such, it has been controversial over the years whether the duty to prosecute international crimes is found under customary international law.[412]

Steenberghe R. has adequately analysed, and it is hereby supported that, there is no need to question that customary international law prescribes the duty to prosecute international crimes or extradite.[413] States have from time to time demonstrated in their practice the desire to ensure that international crimes do not go unpunished and hence inevitably ascribe individual states where international crimes were committed the duty to prosecute the crimes in their national courts.[414] State practice together with *opinion juris* has been deduced from UNGA resolutions, Security Council Resolutions, national judicial decisions and implementing legislation and declarations.[415] Therefore, states where international crimes have been committed are

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410 Michael Wood, Special Rapporteur Second report on identification of customary international law International Law Commission Sixty-sixth session Geneva, 5 May-6 June and 7 July-8 August 2014, A/CN.4/672.

411 *Ibid*., pp. 15-42.

412 Steenberghe R., "The Obligation to Extradite or Prosecute Clarifying its Nature," *Journal of International Criminal Justice,* 2011, No. 9, pp. 1089 - 1116. The controversy has been ascribed to the practice of states to grant amnesties to perpetrators of international crimes.

413 *Ibid*.

414 *Ibid*. The practice of granting amnesties that prevailed in the period prior to the establishment of the ad hoc tribunals in 1993 and 1994 has subsequently been changed. States are now more at ease in limiting the grant of amnesties for commission of international crimes. Example in Rwanda, Sierra Leone and Uganda.

415 UNGA Resolutions 2840 (XXVI)100 and 3074 (XXVIII)101 statements from Sweden, speaking on behalf of the Nordic countries (UN Doc. A/C.6/62/SR.22, 31 October 2007, at 7); Congo (UN Doc. A/C.6/62/SR.24, 13 December 2007, at 7); Brazil (UN Doc. A/C.6/62/SR.26, 13 December 2007, at 3); Uruguay (UN Doc.A/C.6/63/SR.25, 19 November 2008, at 4); Sri Lanka (UN Doc.A/C6/64/SR.21, 30 October 2009, at 8); South Africa (UN Doc.A/C6/SR.22, 2 November 2009, at 15); Cuba (UN Doc.A/C6/SR.23, 3 November 2009, at 8) Belgium (UN Doc.A/CN.4/612, 26 March 2009, at 10). According to the Special Rapporteur, the obligation to extradite or prosecute was not challenged by states (see UN Doc. A/49/10, 2004, at 79). Principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity. A Res. 3074 (XXVIII), 3 December

mandatorily required to prosecute international crimes or extradite when they are unable to do so. The question that remains outside the scope of this duty is the requirement to prosecute all or part of international crimes perpetrated in the territory of a state.[416] At least, it is thus far settled that those most responsible in the commission of international crimes ought to be prosecuted.[417]

4.3 Purpose of International Criminal Justice

There has been a generous reference to international criminal justice in the previous chapters that it is now vital to understand why there is international criminal justice in place. International criminal justice is applicable to individuals who commit crimes in aberrant circumstances as stipulated in the relevant treaties or national legislation.

It must be noted from the onset that, modes of accountability for atrocities embrace both formal justice mechanisms and informal ones.[418] These therefore range from international courts and national courts which prosecute, try and punish perpetrators of international crimes to Truth and Reconciliation Commissions.[419] International

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1973. The list of national legislation criminalizing international crimes in Africa has been provided for under Table 1 of the thesis.

416 Newman, Dwight G., "The Rome Statute, Some Reservations Concerning Amnesties, and a Distributive Problem," *op. cit*. International law has over the years accepted alternative means of transitional justice such as TRCs and amnesties. Therefore, whichever means is taken by a country to bring about accountability for international crimes perpetrated, it can be considered in the light of the existing duty to prosecute.

417 This is evidenced on both international and national efforts that have been made since 1945 to prosecute those most responsible in the commission of international crimes.

418 Findlay M., Boon Kuo L. and Si Wei L., *International and Comparative Criminal Justice: A Critical Introduction,* New York, USA, Routledge, 2013, pp. 17 – 19; Robinson D., "Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court," *European Journal of International Law,* 2003, pp. 481- 505.

419 Schabas W.A., "A Synergistic Relationship: The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone," *Criminal Law Forum*, 2004, Vol 15, No. 3.

criminal justice is a system that is geared towards ensuring that individuals who commit international crimes are held accountable for their actions through their prosecution before international[420] or national courts.[421] The Rome Statute has left out the inclusion of legal persons/corporations as possible perpetrators of international crimes.

Responsibility is therefore, limited to individuals. This has always been the trend since international criminal justice was first introduced in 1945 as stated in chapter three of this thesis. The repercussion of holding these individuals accountable runs further than just the finding of the accused guilty but sends a deeper reaching message to the unindicted persons.[422] Thus, international criminal justice is important not only to the community affected but also to the rest of the world. The importance or purpose of international criminal justice is closely linked to the importance of criminal justice generally, however there is a purpose served by international criminal justice that may not necessarily be found in the national criminal justice. The importance of international criminal justice ranges from acting as a deterrence tool to punishing perpetrators as shown in the following part.

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[420] Rome Statute, article 25. The article gives the ICC jurisdiction on natural persons. Other international tribunals such as Nuremberg, Tokyo, ICTY and ICTR had similar jurisdiction.

[421] National courts have over the years played part in ending impunity to international crimes. This has been witnessed in all phases of the development of international criminal justice. The thesis has made a specific focus in Africa as shown in subsequent chapters.

[422] Damaska M., "Individual Criminal Responsibility in a World of States: Unacknowledged Presence in International Criminal Justice," *Journal of International Criminal Justice*, 2011, No. 10, p.1239 at 1239.

4.3.1 Punish the Perpetrators of International Crimes

The common understanding of the important role played by international criminal justice is the punishment of the perpetrators of international crimes. This is similar to the understanding of the nature and purpose of any criminal justice system which is centred on the investigation, prosecution and where appropriate, conviction and punishment of accused persons. Many international law experts have agreed that the punishment of perpetrators of international crimes is central to the attainment of justice to the victims.[423] When making reference to the Rome Statute preamble, a similar understanding is found. States have affirmed that crimes of concern to the international community must be punished by ending impunity to international crimes.[424] This position is grounded on the belief that public trials not only deliver justice but also make the victims see that justice is indeed done. This has been supported by authors like Antonio Cassese who reiterated that;

> [O]ne should not be blind to the fact that, from the victim's point of view, what matters is that there should be public disclosure of the inhuman acts from which he or she has suffered and that the actual perpetrator of the crime be tried and, if found guilty, punished. For the victims (or relatives of victims) of rape, ethnic cleansing, torture, genocide or wanton destruction of property, the punishment of the authors of those barbarous acts by an impartial tribunal can be a means, at least in part, of alleviating their suffering and anguish.[425]

As stated above, the punishment of perpetrators of international crimes can be attained before a tribunal. Reference to a tribunal here means it can either be an international court or domestic court (provided the conditions are right that is, there

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423 Spinga V., "No Redress without Justice: Victims and International Criminal Law," *Journal of International Criminal Justice,* 2012, No. 10, pp. 1377-1394; Hudson A. and Taylor A.W., "The International Commission against Impunity in Guatemala: A new Model for International Criminal Justice Mechanism," *Journal of International Criminal Justice,* 2010, No. 8, pp. 53-74.

424 Rome Statute.

425 Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations Of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, UN Doc. A/49/342S/1994/1007, 29 August 1994, pp, 50-51.

is an impartial court to administer justice). It must be stressed that, the punishment of individuals for committing international crimes is a core achievement both in the world of international criminal law and human rights law. It transcends the traditional understanding of international law.[426] Therefore, individualized guilty brings about individual accountability for crimes committed and thus limits the victims' desire to avenge the atrocities committed to them or those close to them.

4.3.2 Deterrent Tool for Committing Similar Crimes in the Future

International crimes are those crimes that deeply concern the member states of the UN in general. They violate the common shared moral values of the community of nations in the most appalling ways.[427] As such, international criminal justice is a tool devised to deter the commission of such crimes.[428]Authors have referred to general deterrence as opposed to specific deterrence when dealing with international criminal justice.[429] Therefore, if the perpetrators of international crimes are punished today, then the behaviour of potential offenders will be shaped.[430] At the international level,

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426 Jessberger F. and Geneuss J., "The Many Faces of the International Criminal Court," *Journal of International Criminal Justice*, 2012, No.5, pp. 1081-1094. Retributive theory of penology will attract an understanding that, a person who commits a crime deserves punishment as a reflection of the crime committed. Therefore punishment of international crimes reflects the continual disapproval by the society of the conduct prohibited.

427 Rome Statute, preamble makes reference to the shocking nature of international crimes committed in the last century which continue to be committed to date.

428 Chautauqua Declaration, signed by the prosecutors of the Nuremberg International Military Tribunal, the International Criminal Court, the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the Sierra Leone Special Court and the Extraordinary Chambers of the Courts of Cambodia, Available at http://www.asil.org/chaudec/index_files/frame.htm. [Accessed 2 August 2014].

429 Findlay M., Boon Kuo L. and Si Wei L., *International and Comparative Criminal Justice: A Critical Introduction, op. cit*, pp. 104-105. General deterrence refers to the shaping of behavior of potential offenders while specific deterrence addresses the future behavior of the convicted offender.

430 Akhavan P., "Beyond Impunity: Can Internationals Criminal Justice Prevent Future Atrocities?," *American Journal of International Law,* Vol. 95, No. 1, Jan., 2001, pp. 7-31. "Punishment of unlawful conduct can be directed against leaders who actually contemplate or are engaged in the

the international courts have worked towards sending a similar message. Even though there is lack of empirical data as to how much international prosecutions have shaped the behaviour of individuals,[431] much can be learnt on how leaders have responded to the indictments before the International Criminal Court. This clearly shows that prosecutions of this nature generate fear among would be perpetrators of international crimes. Whether such prosecutions truly deter future offenders, it has remained an issue under controversy.[432]

The prosecution of international crimes for deterrence purposes must be understood to mean their punishment in the same manner reflecting a similar moral guilty. While the prosecution of international crimes as ordinary crimes does not reflect the "inherent moral value" of international crimes, in circumstances that limit the application of international crimes, the prosecution of international crimes as ordinary crimes may be used as a tool to deter future conduct. This will in turn aid in ending impunity to international crimes in a way as supported by international law which recognizes the prosecution of international crimes as ordinary crimes.[433] Consequently, should national justice systems work in similar accord to that of international courts, then there is a great possibility of shaping the future behaviour of individuals by largely deterring the commission of similar conduct amounting to international crimes.

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pursuit of criminal policies and, generally against other leaders who might be tempted absent a credible threat of punishment."

431 Jessberger F. and Geneuss J., "The Many Faces of the International Criminal Court," *op. cit.*

432 Findlay M., Boon Kuo L. and Si Wei L., *International and Comparative Criminal Justice: A Critical Introduction, op. cit*, p. 105.

433 *Prosecutor v Hadzihasanovic Judgment, (IT-01-47-T),Trial Chamber, 15 March 2006, at 260.* 'there is no rule, either in customary or in positive international law, which obligates States to prosecute acts which can be characterised as war crimes solely on the basis of international humanitarian law, completely setting aside any characterisations of their national criminal law.'

4.3.3 Supportive Tool in the Peace Building Process

Peace building and accountability in cases of international crimes are two sides of the same coin.[434] They work together and not apart. Thus, even though there may be instances where there is a strain between the two, there is an undeniable truth that they do harmonize each other.[435] It is also important to note that, the UN Security Council has also supported the positive role played by international criminal justice in responding to situations that threaten international peace and security.[436] With this regard, reference is made to the establishment of the ICTR and ICTY where the Security Council was clear that international criminal justice is used as a tool to address situations that threaten international peace and security.[437]

Furthermore, the Security Council has been given power under the Rome Statute to make referrals of situations to the Court as it addresses situations that threaten international peace and security.[438] It has done so with reference to Sudan and Libya.[439] This solidifies the crucial role that international criminal justice plays in enhancing peace building in post conflict situations.[440] Therefore, the community of

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[434] Roht-Arriaza N., 'The New Landscape of Transitional Justice', in Roht-Arriaza N. and Mariezcurrena J., (eds), *Transitional Justice in the Twenty-First Century: Beyond Truth and Justice,* Cambridge University Press, 2006, p. 1 at 2; Kerr R. and Mobekk E., *Peace and Justice: Seeking Accountability after War,* Polity Press, 2007, p. 3.

[435] Simpson G., 'One among Many: The ICC as a Tool of Justice during Transition' *Courting Conflict? Justice, Peace and the ICC in Africa,* p. 73 at 74.

[436] Triffterer O., 'The Preventive and Repressive Function of the Permanent International Court', in Politi M. and Nesi G., (eds), *The Rome Statute of the International Criminal Court: A Challenge to Impunity,* Ashgate, 2001) 143–175, at 165

[437] Reference is made to UNSC Res827 of 1993 establishing the ICTY and Res 955 of 1994 establishing the ICTR.

[438] Rome Statute, article 13 (b).

[439] Security Council Resolution 1593, UN Doc S/RES/1593 (31 March 2005); Security Council Resolution 1970, UN Doc S/RES/1970 (26 February 2011).

[440] Report of the Secretary-General, "The rule of law and transitional justice in conflict and post-conflict societies," S/2004/616, 23 August 2004, para 39. Criminal trials can play an important role in transitional contexts. They express public denunciation of criminal behaviour. They can

states has inclined towards creating a favourable environment for prosecuting alleged perpetrators of international crimes and even imposing a duty on states to carry such prosecutions. Consequently, measures such as amnesties that do not foster prosecution have been opposed by the UN.[441]

However, some scholars and those involved in post conflict peace building have in certain circumstances viewed justice as a threat to peace and therefore forgo the pursuit of justice in order to attain peace.[442] In his article, Scharf states that,

> [A]chieving peace and obtaining justice are sometimes incompatible goals-at least in the short term. In order to end an international or internal conflict, negotiations often must be held with the very leaders who are responsible for war crimes and crimes against humanity. When this is the case, insisting on criminal prosecutions can prolong the conflict, resulting in more deaths, destruction, and human suffering.[443]

From the above, Scharf does not conclude that justice should never be pursued in circumstances where peace is at stake. Rather in the short time, justice can be postponed akin to the inspiration under article 16 of the Rome Statute.[444] When circumstances are right, justice is an integral part of peace process. The Human

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provide a direct form of accountability for perpetrators and ensure a measure of justice for victims by giving them the chance to see their former tormentors made to answer for their crimes. Insofar as relevant procedural rules enable them to present their views and concerns at trial, they can also help victims to reclaim their dignity. Criminal trials can also contribute to greater public confidence in the State's ability and willingness to enforce the law. They can also help societies to emerge from periods of conflict by establishing detailed and well-substantiated records of particular incidents and events. They can help to de-legitimize extremist elements, ensure their removal from the national political process and contribute to the restoration of civility and peace and to deterrence.

441 *Ibid*., para 64 (c).

442 Clark J.N., "Peace, Justice and the International Criminal Court Limitations and Possibilities*,"* *Journal of International Criminal Justice*, 2011, No. 9, p. 521 at 539. There has been reference to the granting of amnesty in Argentina and the Truth and Reconciliation Commission of South Africa as alternative to justice in order to attain lasting peace.

443 Scharf M.P., "From the Exile Files: An Essay on Trading Justice for Peace," *Washington and Lee Law Review*, 2006, Vol 63, No. 1 p. 339 at 342.

444 The article deals with deferral of investigations or prosecutions for a period of 12 months (renewable) as requested by the Security Council pursuant to a decision made under chapter VII of the UN Charter. It must be noted that, the article has never been invoked by the Council despite requests from the AU.

Rights Watch Director of International Justice Programme concludes that, "[a] peace worth having cannot rest on impunity."[445]

It is acknowledged that international crimes are committed in most volatile situations which require much effort to bring the societies together once the conflicts have ceased. As stated during the introductory part of this chapter, post conflict justice can be attained through judicial process or reconciliation process such as Truth and Reconciliation Commissions or both. Consequently, be it judicial or non-judicial processes, post conflict justice works to promote the process of bringing peace to a divided society where victims yearn for peace and look forward to seeing justice and accountability in the process.[446]

Benita Ferrero-Walden, European Commissioner for External Relations and European Neighbourhood Policy, underscored the point that addressing gross human rights violations in post conflict situations is a practical way of reconciling the society and building a lasting peace.[447] Examples have been drawn from post conflict justice in a country like Sierra Leone where both retributive and restorative justices were employed to furnace a lasting peace in the country.[448] Also, Rwanda serves as a

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445 Dicker R., "Trading Justice for Peace in Uganda Won't Work," May 2, 2007, Published in Uganda Daily Monitor, available at https://www.hrw.org/news/2007/05/02/trading-justice-peace-uganda-wont-work [2 January 2016].

446 *Ibid*., p. 76. See also Grono N. and O'Brien A., 'Justice in Conflict? The ICC and Peace Processes, 'in Clark P. and Waddel N., *Courting Conflict? Justice, Peace and the ICC in Africa*, London, 2008, p. 16 at 18-19. The authors have demonstrated how the intervention by the ICC in the Northern Ugandan conflict moved the perpetrators to the negotiating table.

447 European Commission supports additional assistance for reconciliation of societies affected by human rights abuses IP/08/1057 Brussels, 1 July 2008.

448 Friedman R., 'Restorative Justice in Sierra Leone: Promises and Limitations,' in Ainley K., et al Eds., *Evaluating Transitional Justice: Accountability and Peace –building in Post Conflict Sierra Leone*, Hampshire, UK, Palgrave Mcmillan, 2015, pp. 55 at 56 and 62. "TRC contributed to

good example where the pursuit of justice has reunited an otherwise divided society.[449]

On the one hand, the prosecution of perpetrators usually involves the taking away of persons who are at variant with the peace building process[450] and thus enables the society to promote rule of law and accountability.[451] While on the other hand, the truth and reconciliation programmes and other measures of transitional justice work to bring the societies together and help them see past the mishaps that drifted them apart in the first place.[452] In promoting peace, international criminal justice cannot be taken in isolation, all the different transitional justice mechanisms work together to achieve a lasting peace in the society.[453]

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peace and accountability through non punitive and educational process which promoted democracy and social justice." See also Herman J., 'Peace building and Transitional Justice in Cambodia: Attempts at DDR and the Rise of Victim-centered Justice,' in Sriram C.L., et al Eds, *Transitional Justice and Peacebuilding on the Ground: Victims and Ex combatants,* New York, USA, Routledge, 2013, p. 101.

449 Reference is made to chapter six of the thesis which has demonstrated how Rwanda has employed both international and domestic prosecutions coupled with traditional modes of dispute settlement to bring justice to the victims of international crimes perpetrated in the country.

450 Open Society Foundation "International Crimes, Local Justice: A Handbook for Rule-of-Law Policymakers, Donors and Implementers" (2011), 22 available at http://www.opensocietyfoundations.org/sites/default/files /international-crimes-local-justice-20111128.pdf. [Accessed 12 June 2014]. Indicting and ultimate prosecuting leaders responsible for the commission of international crimes sometimes bring the opposing parties close to the peace talks. However, the situation in Uganda has shown the indictment to have negative impact of pushing the peace talks away from yielding results.

451 Stromseth J., "Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?" *Georgetown Law the Scholarly Commons*, 2009, p. 87, 96.

452 Akhavan P. "Beyond Impunity: Can Internationals Criminal Justice Prevent Future Atrocities?," *op. cit*, p. 8; Eser A., "Transnational Measures against Impunity of International Crimes," *Journal of International Criminal Justice,* 2012, pp. 621-634.

453 Lafontaine F. and Tachou-Sipowo A., "The Contribution of International Criminal Justice to Sustainable Peace and Development," in Jodoin S. and Segger M., *Sustainable Development, International Criminal Justice, and Treaty Implementation*, New York, USA, Cambridge University Press, 2013, p. 212. International criminal justice can only work where there is a political will. Lack of political will to prosecute perpetrators of international crimes creates a favourable environment for impunity.

4.4 Importance of National Prosecution of International Crimes

Following the important role played by international criminal justice in a post conflict society, the realization of its fruits is not limited to one arena. International criminal justice can be attained at international or national level. Different literature has over the years given much prominence and attention to international criminal justice discharged by international courts[454] as clearly shown in chapter three of this thesis. This does not mean that, over the years, national courts have not played any role in the realization of international criminal justice.[455] To the contrary, the period when international criminal justice was not achieved at international level (particularly during the cold war era); national courts played a significant role to prosecute international crimes under the universality principle[456] and in different military courts.[457] Therefore, the importance of national justice machinery in dispensing international criminal justice cannot be overlooked. It is a matter that has gained the attention of the community of states in the contemporary world following the adoption of the Rome Statute.

Accordingly, when compared to prosecution of international crimes in international courts, the national prosecution of international crimes offers a comparable advantage to the former in a number of ways. These include:-

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454 D'Amato A., 'National Prosecution of International Crimes,' *op. cit*, at 285.

455 Gaeta P., 'Internationalization of Prohibited Conduct' in Cassesse A., *The Oxford Companion to International Criminal Justice,* 2009, p. 64; Jessberger F., 'International v National Prosecutions of International Crimes' in Cassese A., *The Oxford Companion to International Criminal Justice,* p. 208.

456 O'Keefe R., "Universal Jurisdiction: Clarifying the Concepts," *op. cit*, p. 735.

457 D'Amato A., 'National Prosecution of International Crimes,' *op. cit*.

First, national courts can prosecute large number of perpetrators. Taking the nature of international criminal proceedings, only a limited number of persons can be prosecuted.[458] If one gives a track of number of persons prosecuted before the ICTY[459] and the ICTR[460] compared to the alleged perpetrators of international crimes during the conflicts,[461] the conclusion derived is that the courts managed to prosecute only a segment of them. Even with the coming into operation of the permanent International Criminal Court, the conclusion is similar. The ICC can only prosecute a small number of perpetrators as shown on the cases it has thus far before it. This is influenced by the prosecutorial policy of the Court.[462]

National courts on the other hand offer an avenue where perpetrators can be brought to justice in large numbers.[463] The fact that cases before international criminal courts are limited to the most responsible offenders, national courts are best placed to ensure that there is no impunity gap for cases that fall outside the purview of

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[458] Dickinson L.A., 'The Dance of Complementarity: Relationships among Domestic, International and Transnational Mechanisms in East Timor and Indonesia', in Stromseth J.E. ed., *Accountability for Atrocities: National and International Responses*, 319, pp. 361-362.

[459] 161 people were indicted by the ICTY. Information available at http://www.icty.org/sid/324[Accessed 13 August 2014].

[460] In the ICTR the statistics reveal that "92 people [were] indicted, Ongoing proceedings in 1 case (trial) with 17 pending appeal – 16 cases are actively on appeal, 72 concluded cases – 45 people have been convicted and sentenced, 10 acquitted, 4 have been referred to national jurisdictions (France and Rwanda) for trial, 2 indictments are withdrawn, 2 people died while in detention (one before trial and one during) and 9 indicted individuals remain at large. Information available at http://worldwithoutgenocide.org/genocides-and-conflicts/rwandan-genocide/ictr[Accessed 13 August 2014].

[461] see information available at http://www.un.org/en/preventgenocide/rwanda/about/bgjustice.shtml [Accessed 13 August 2014].

[462] The court has only indicted the most responsible offenders and in each situation it does not have a lot of cases. If there is no alternative to the ICC, there is a high risk of creating impunity gap between those most responsible and other perpetrators.

[463] In Rwanda, the national courts had tried around 10,000 genocide suspects by 2006 while the traditional courts *Gacaca* had tried 1.2 million suspects by the time they closed in 2012. This number is considerably high when compared to the number of suspects tried before the ICTR which is just 92.Information available at http://www.un.org/en/preventgenocide/rwanda/about/bgjustice.shtml [Accessed 13 August 2014].

international courts.[464] This in turn ensures accountability for "all". When reference is made to "all" it does not mean that every perpetrator can be prosecuted before national courts. The capacity to do that is not there. Hence, what national courts do is to prosecute a greater number of perpetrators than the one achievable before international courts.[465] With the aid of other transitional justice mechanisms accountability for all can be attained at domestic level.

The limits of international courts are also known to the perpetrators of international crimes. Some have even dared to boast on the fact that they will never be held accountable because the ICC radar has evaded them. Therefore, prosecutions before national courts have altered this belief. In fact, those who thought would never face justice have been held accountable before national courts.[466] Consequently, while prosecution alone does not set national prosecution of international crimes at any different level from that before international tribunals or courts, the ability to prosecute perpetrators in large number before national courts (including those not considered to be the most serious offenders by international prosecutorial strategy) does.

[464] The failure of the SCSL to prosecute lower ranking officials have been perceived by victims as falling short of justice because the people who perpetrated international crimes are still living amongst them with impunity. This can only be remedied if national prosecutions are undertaken.

[465] Interview Transcript.

[466] Colonel Mutare Daniel Kibibi of DRC was so assured that the ICC will never touch him and thus he would get away with whatever international crime he had perpetrated in the DRC. This position was changed when he faced trial before the mobile national courts in DRC.

Secondly, prosecution of international crimes before international courts is very expensive.[467] The cost of completing one trial is far much higher when compared to prosecutions before national courts. It is estimated that a trial before the ICTR costs around 22.6 million USD.[468] On the other hand, national courts are comparably cheaper when conducting the trials. For example, when assessed, it transpired that, the prosecution of international crimes at national courts in Canada one trial only cost 1.3 million USD a figure which is considerably lower than that of the ICTR.[469] Also, the prosecutions before Rwandan ordinary courts and *Gacaca* have proven to be cheaper taking into account the number of perpetrators tried and the budget spent.[470]

Thirdly, the participation of victims in national trials and the ability to witness those who committed international crimes against them offers an opportunity for the victims to witness justice being done. This brings about a feeling of ownership of the entire justice rendering process. When reference is made to national prosecutions conducted in countries like Rwanda and DRC[471] the ability of victims to witness

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467 Rupert S., "Funding Justice: The Price of War Crimes Trials," available at https://www.american.edu.hrbrief [Accessed 4 August 2015].

468 UN General Assembly, Budget for the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994, for the biennium 2012-2013, UN Doc. A/66/368,19 September 2011, xx 19, 48; see also Wippman D., "The Costs of International Justice," *American Journal of International Law*, 2006, No. 100, p. 861; It is estimated that a trial before the ICTR costs around 22.6 million USD.

469 Luft A., 'Canada's first War Crimes Trial Closes' Available at http://www.unhcr.org/cgibin/texis/vtx/refdaily?pass=463ef21123&id=494b45258[Accessed 12 August 2014].

470 Available at https://www.hrc.org/new/2014/03/28rwanda-justice-after-genocide-20-years#_ftn14 [Accessed 12 August 2014].

471 Example, the witness of a notorious colonel Mutare Daniel Kibibi trial by villagers was positively received; Interview transcript.

trials has had a rather positive impact. This is what is missing in trials conducted before international courts or tribunals. Most international trials with the exception of those being held under specialized courts are conducted in third countries. For example, the ICTY,[472] ICTR[473] and ICC[474] are all located in countries other than those where international crimes were perpetrated. This limits the ability of victims to take part in such public trials. It is notable that, only a fraction of victims can really witness such trials and in most cases, it is the victim-witnesses who have such opportunity to do so leaving majority of the victims out of the loop. The situation is therefore curable if trials are being held before national courts.

Fourthly, prosecution of international crimes before national courts places the investigators closer to the crime scenes unlike international trials where evidence is collected and then transmitted to places where the courts are located. Where applicable, witnesses are also transported to give testimony.[475] The inherent difficulties are witnessed in the ICC prosecutions of Kenya post-election violence cases. Carrying prosecutions before domestic courts enables investigators to carry thorough investigation at no pressure of distance between the crime scene and the court. They are therefore much at ease in providing the prosecution with enough

[472] The ICTY which deals with the prosecution of international crimes perpetrated in the Former Yugoslavia is located at the Hague, the Netherlands.

[473] ICTR which deals with the prosecution of international crimes perpetrated in Rwanda is located in Arusha, Tanzania.

[474] The sitting of the court is the Hague, The Netherlands. Since the ICC is a permanent Court dealing with international crimes perpetrated around the globe it needed to have a permanent seating place.

[475] See the practice that was adopted by the ICTR and currently the ICC. These two courts are situated in places outside the territory where international crimes were perpetrated. These are unlike the SCSL which was established in the *locus delict* something which made the outreach programs more effective. The participation of victim – witnesses was more approachable although it was subject to challenges of witness protection which had to be overcome at all phases i.e. investigation, pre-trial, trial and post - trial.

evidence to meet the high standard of proof in criminal trials; that of beyond reasonable doubt.[476] This however is subject to the ability of qualified domestic investigators to carry out investigations of international crimes and the availability of comprehensive witness protection mechanisms which ensure that the victims are protected at all phases beginning from investigation up to the conclusion of trials. The latter is imperative taking into account the fact that international criminal trials have placed high reliance on witness testimony to prove all cases.

With the above enumerated importance of national prosecution of international crimes, the next question that needs answering is whether states are under an international obligation to ensure that they prosecute international crimes committed within their borders.

4.5 Conclusion

The prosecution of international crimes at domestic courts is of such importance that no expert in the field of international criminal justice can deny. While it has always been painted that international criminal justice as justice before international courts, it has been demonstrated otherwise in this chapter. Therefore, those who feel that provided there is the ICC, there is no need to invoke domestic courts to prosecute international crimes, are very wrong because of the important role domestic courts play in dispensing justice to the victims of international crimes. Apart from this

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[476] Brown C., *International Courts and Tribunals Series: A common law of International Adjudication*, 2007, p. 85. International Criminal Tribunal for the former Yugoslavia Rules of Procedure and Evidence U.N. Doc. IT/32/Rev.7 (1996) rule 87(A) similar to International Criminal Tribunal for Rwanda Rules of Procedure and Evidence U.N. Doc. ITR/3/REV.1 (1995) rule 87(A) which states that; "[a] finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt."

important role, states are also under an international obligation or duty to prosecute international crimes perpetrated in their territories. This has been demonstrated by the number of international treaties and customary international law imposing such a duty which is extendable to third states where the perpetrators may take refuge as clearly pointed out by the ICJ. International criminal justice is one way of addressing gross human rights violations in a post conflict situation. However, the limitations placed on criminal justice have demonstrated that, this tool works together with other transitional justice mechanisms to bring about a holistic form of justice to the victims of international crimes.

CHAPTER FIVE

AFRICA AND INTERNATIONAL CRIMINAL JUSTICE

5.1 Introduction

International criminal justice has played an important role in addressing gross human rights violations as demonstrated in the previous chapter. The prior chapter also analyzed international treaties which impose a duty on states to prosecute international crimes. While the preceding chapter was centered on international and general accounts, this chapter assesses the place of international criminal justice in Africa. The scrutiny is based on regional and sub-regional commitment by African states to end impunity to international crimes. Through the analysis of instruments adopted at regional (the African Union) and sub-regional economic integrations it is argued that, in paper Africa has shown the desire to see that perpetrators of international crimes are prosecuted and justice availed to the victims.

The objective of this chapter is to analyse the legal framework for the prosecution of international crimes at regional and sub-regional level while showing the practice and assertiveness of the AU towards international criminal justice. It further analyses the extent to which African countries have transmitted international obligations at domestic level through the adoption of legislation. These analyses are done with a view of reflecting the extent legislative framework has been available for the prosecution of international crimes in Africa.

5.2 The African Union

The African Union (AU) was created from the previous existing Organisation of African Unity (OAU) which was established in 1963[477] and lasted for 39 years when it was replaced in 2002.[478] The AU is a regional organization consisting of African member states. Unlike its predecessor which fought mainly against colonialism with minimal role on human rights issues, the AU has embraced the principles of human rights and the need to protect and promote them as its core objective.[479]

The AU has a number of organs which help in its functioning. These organs include; the Assembly of the Union, the Executive Council, the Pan-African Parliament, the Court of Justice, the Commission, the Permanent Representatives Committee, the Specialized Technical Committees, the Economic, Social and Cultural Council, the Peace and Security Council[480] and the Financial Institutions.[481] Out of all these organs, three of them i.e. Assembly of the Union, the Court of Justice and the Commission have played a key role in echoing the Union's position on international criminal justice.

In assessing the commitment by this regional body to end impunity to international crimes, reference is made to different documents relevant to the functioning of the

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[477] African Union Handbook African Union Commission and New Zealand Crown, 2014 at 10.available at http://summits.au.int/en/22ndsummit/events/launch-au-handbook [Accessed 6 October 2014].

[478] The call for a new Africa regional body was echoed in the Sirte Declaration FOURTH Extraordinary Session of the Assembly of Heads of State and Government, 8-9 September 1999, EAHG/Draft/Decl. (IV) Rev.1. para 8 (i).

[479] Constitutive Act of the AU, article 3(e).

[480] *Ibid*., article 20 (bis) of the Constitutive Act (which was inserted by article 9 of the Protocol on Amendments to the Constitutive Act 2003).

[481] *Ibid*., article 5 (a) to (i).

Union and the decisions undertaken by the Union's organs. These documents have in one way or another reflected the AU position with regard to international criminal justice and the need to end impunity to international crimes.

5.2.1 The Africa Union Constitutive Act

African Union Constitutive Act is the basic document that establishes the African Union. It contains the fundamental provisions that stipulate the objectives and the different mandates of the organization's organs. While affirming the desire to ensure the protection of fundamental human rights,[482] promote peace, security and stability in the continent,[483] the Act goes further and provides for the right to intervene in cases where genocide, war crimes and crimes against humanity are committed.[484] The right of intervention is subject to the decision of the Assembly.[485] Subjecting the decision to the Assembly which is a political body proves difficult especially when friendly relations take predominance. Hence, in apparent instances that may otherwise warrant intervention, it may not necessarily trigger the use of the provision.[486] This provision has been used in numerous times by the AU and different authors as the revealed commitment to end impunity to international crimes.

However, one must note that, intervention in cases of mass violence does not equate to the holding accountable the perpetrators of the said international crimes. As stated

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482 *Ibid*., Preamble paragraph 9 and article 3 (h) and 4 (m).
483 *Ibid*., article 3 (f)
484 *Ibid*., article 4(h).
485 *Ibid*.
486 Bjorn Moler, "The African Union as Security Actor : African Solutions to African Problems?," Working Paper no. 57, Regional and Global Axes of Conflict, Danish Institute for International Studies, p. 2 and 3. See also Paul D. Williams (2006) Military responses to mass killing: The African union mission in Sudan, International Peacekeeping, 13:2, 168-183, available at http://www.tandfonline.com/page/terms-and-conditions [Accessed 18 July 2015].

by Murungu Chacha, intervention does not surmise prosecution.[487] Albeit the Act being progressive and revolutionary in terms of intervention, the provision can only be used to further prosecution whenever the Union deems fit. What intervention does is to halt the continued commission of international crimes in a territory. What happens to the perpetrators thereafter is a whole different regime. Accountability for the commission of international crimes can only be done before a court of law or by other mechanism thought fit like Truth and Reconciliation Commissions.

Unless the AU does something extra, reliance on this article alone is not enough to stand as an expression of the commitment to end immunity to international crimes. Thus, taking this aboard, a number of instruments has been adopted by the AU to further the spirit of the founding document as shall be analysed in the subsequent parts. In line with this, subsequent decisions, resolutions and declarations of the Union's organs have been adopted to further the spirit of the provision to extend from the right to intervene to the commitment to end impunity to international crimes by prosecuting the perpetrators.

5.2.1.1 African Union Decisions Reflecting its Position on Ending Impunity to International Crimes

The Assembly is the supreme organ of the Union composed of heads of states or their representatives.[488] Therefore, decisions made by the Assembly reflect the voice

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[487] Murungu C., 'Immunity of State Officials and Prosecution of International Crimes,' in Murungu C and Biegon J, (eds), *Prosecuting International Crimes in Africa*, *op. cit*, p. 33 at 53.

[488] Constitutive Act of the AU, article 6; Biswalo J.M., 'The Assembly, Executive Council and Commission,' in Yusuf.A. and Ouguergouz F., (eds) *The African Union Legal and Institutional*

of member states. The desire to end impunity to international crimes in Africa started with the predecessor of the AU, the OAU. In several declarations passed by the OAU, the importance of fostering the promotion and protection of human rights[489] was recognized which were largely violated in the ongoing conflicts in Africa. However, the irony of it was that, it never took steps to ensure the perpetrators are held accountable. It even chose to make Iddi Amin Dada its chairperson in 1975 despite the fact that his regime was far from what the Union was articulating.

Its successor the AU, in 1999 ministerial conference, adopted a declaration which furthers the desire to end impunity to international crimes. It made the realization that genocide and other crimes against humanity resulted in widespread violation of human rights.[490] Further, it was recognized that in order to address human rights issues in the continent, there was the need to do so impartially by ensuring the perpetrators of genocide, war crimes and crimes against humanity were dealt with accordingly.[491] The need to domesticate human rights and international humanitarian treaties to which Africa states are parties' was also echoed.[492]

Framework: A Manual on the Pan-African Organization, Mkuki na Nyota Publishers Ltd, Dar es salaam, Tanzania, 2015, pp.79-94.

489 Declaration on the Political and Socio Economic Situation in Africa and the Fundamental Changes Taking Place in the World adopted by the Assembly of Heads of State and Government of the OAU in 1990; the Declaration establishing within the OAU, a Mechanism for Conflict Prevention, Management and Resolution adopted by the Assembly of Heads of State and Government of the OAU in Cairo (Egypt) in June 1993; Cairo Agenda for Action on relaunching Africa's socio economic formation adopted by the extraordinary session of the Council of Ministers held in Cairo, Egypt, from 25 to 28 March, 1995. available at http://www.achpr.org/instruments/ [Accessed 8 October 2014].

490 Grand Bay (Mauritius) Declaration and Plan of Action, 16 April 1999, preamble para 3 available at http://www.achpr.org/instruments/ [Accessed 8 October 2014].

491 *Ibid*., paragraph 11.

492 *Ibid*., paragraph 14.

In the 2000s the AU openly stated its commitment to end impunity to international crimes (total rejection of impunity) as evidenced in the Assembly decisions in relation to Hissene Habre and his prosecution for international crimes committed during his leadership.[493] The AU took the initiative to aid the government of Senegal in prosecuting Hissene Habre.[494] It is striking to note that, the efforts were not actively supported by the AU members who were required to make contribution to reach the monetary budget to conduct the trial. Such contributions were not made.[495] The expression of dissatisfaction by the AU in relation to the contribution ought to be made by member states ceased in 2012 when it finally secured international assistance.[496] This shows that in order to achieve the prosecution of international crimes which are expensive, the continent has to join hands on fiscal support. The lack of support by AU member states shows the lack of seriousness in ending impunity to international crimes through actualization of passed resolutions. It is right to say that, the member states do not put their words into action. Commitments are easy said than done.

The positive desire to end impunity to international crimes was also echoed in the AU 2009 Ordinary session. It encouraged member states to make conducive environment for them to fulfill their primary obligation of prosecuting international crimes. This was voiced as quoted hereunder that the AU:-

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493 Decision on the Hissene Habre Case And The African Union (Doc.Assembly/AU/8 (VI)) Add.9; Decision on the Trial of Mr. Hissene Habre and the African Union 124 Assembly/AU/Dec.157 (VIII); Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of The Republic of The Sudan, Assembly/AU/Dec.221(XII).

494 Decision on the Hissene Habre Case Doc. Assembly/AU/12 (XIII) Rev.1, July 2009.

495 *Ibid*, Decision on the Hissene Habre Case Doc. Assembly/AU/9(XVI), February 2010.

496 Decision on the Hissene Habre Case Doc. Assembly/AU/12(XVIII), January 2012.

> Encourages Member States to initiate programmes of cooperation and capacity building to enhance the capacity of legal personnel in their respective countries regarding the drafting and safety of model legislation dealing with serious crimes of international concern, training of members of the police and the judiciary, and the strengthening of cooperation amongst judicial and investigative agencies[497]

The above positive encouragement has not been followed up to see how far states have actualized such a resolution.[498] While it is the desire of the Union to see that countries have the capacity to prosecute international crimes, such desire can be fulfilled if it is followed upon. No any resolution has been adopted thereafter to recall this commitment and express satisfaction that such a call was acted upon or even to a certain extent or express dissatisfaction for an otherwise unpromising scenario.

Despite the positive outlook on the commitment to end impunity to international crimes expressed by the AU, between 2008 and 2012 the AU questioned how universal jurisdiction was abused by European states.[499] The Union took note of the fact that most African officials had been indicted for charges relating to the commission of one or more international crimes in European countries.[500] There have been arguments that the use of universal jurisdiction is abused by clearly targeting African officials and subjecting them before European Courts, a form of domination

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497 Decision On The Meeting Of African States Parties to the Rome Statute of the International Criminal Court (ICC) Doc. Assembly/AU/13(XIII), Adopted by the Thirteenth Ordinary Session of the Assembly in Sirte, Great Socialist People's Libyan Arab Jamahiriya on 3 July 2009, para 6.

498 Interview transcript.

499 United Nations General Assembly (UNGA) Resolution A/RES/64/L117 on the Scope and Application of the Principle of Universal Jurisdiction adopted on 16 December 2009; Decision on the Abuse of the Principle of Universal Jurisdiction Doc. EX.CL/731(XXI) July 2012.

500 Decision on the Abuse of the Principle of Universal Jurisdiction Assembly/au/14(XI)July 2008; Decision on the Abuse of the Principle of Universal Jurisdiction Assembly/Dec.213(XII) February 2009; Decision on the Abuse of the Principle of Universal Jurisdiction Doc. Assembly/AU/11(XIII) July 2009; Decision on the Abuse of the Principle of Universal Jurisdiction Doc. EX.CL/540(XVI) February 2010.

and exertion of influence by European countries.[501] This line of argument is a reflection of how African leaders are trying to embrace their independence from the domination of European nations which lasted a good number of years prior to independence.[502]

However, this position has been counter argued by the EU indicating that universal jurisdiction has also been exercised in other parts of the world.[503] It is also here argued that, in all instances such officials were not facing similar charges before national courts. If prosecutions or investigations had commenced against such accused persons, European courts would have respected the exercise of territorial jurisdiction. Another argument raised by the AU for the abuse of universal jurisdiction is on indictments issued against African officials by lower courts in Europe. The position in Africa is that the exercise of universal jurisdiction can be invoked by higher courts.[504] This has therefore made the AU wary about the position in Europe. As such, there have been clear arguments and calls to ensure that courts

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501 AU-EU Technical Ad hoc Expert Group Report on the Principle of Universal Jurisdiction, Council of EU, 16 April, 2009, available at www.register.consilium.europa.eu/doc/srv [Accessed 15 February 2014]. Universal jurisdiction has been invoked against officials from Central African Republic, Ivory Coast, Mauritania, Morocco, Republic of Congo, Democratic Republic of Congo, Tunisia, Equatorial Guinea and Zimbabwe.

502 African countries were dominated by European countries under colonial rule. The fact that Africa was partitioned among these powers and that they had absolute control over African states is something that will never leave the back of the minds of most Africans. What they did could not be justified by any rational being and the atrocities committed against Africans will always interplay in any politics between the two groups.

503 AU-EU Technical Ad hoc Expert Group Report on the Principle of Universal Jurisdiction, Council of EU, 16 April, 2009, pp. 27-29. Countries cited include, Afghanistan, Argentina, Chile, China, Bosnia Herzegovina, Cuba, Elsavador, Iran, Iraq, Israel, Mexico and Guatamala.

504 See the position of Kenya, Uganda and Rwanda in respective chapters of the thesis.

with original jurisdiction to exercise universal jurisdiction are at least higher courts.[505]

Further, the indictment of serving heads of states before the ICC has been an area of contention between the African Union and the ICC.[506] These negative perceptions started when the president of Sudan, Omar Hassan Ahmad Al-Bashir, was indicted in 2005 following the Security Council referral.[507] The negativity continued in 2011 when the Security Council referred the situation of Libya to the ICC.[508] The referral resulted in the opening of cases against Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, however, only the case of Saif Al-Islam Gaddafi is still running.[509] The tension reached its apex in 2013 when the already indicted Uhuru Kenyata and William Ruto became president and vice president of Kenya respectively.[510] There has been a withdrawal of *Uhuru Kenyatta*[511] and William Ruto charges.[512]

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505 AU-EU Technical Ad hoc Expert Group Report (n. 452) above has not addressed this issue. It has noted that criminal matters falling within the criminal laws of a particular country and independence of the judiciary have been adhered to at all times.

506 Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC) Doc. Assembly/AU/13(XIII) July 2009.

507 The situation in Sudan was referred to the ICC by SC resolution 1593 31 March 2005, S/RES/1593; Decision on the Application by the International Criminal Court (Icc) Prosecutor for the Indictment of the President of The Republic Of The Sudan Assembly/AU/Dec.221(XII) July 2009; Decision on International Jurisdiction, Justice and the International Criminal Court (ICC)2 Doc. Assembly/AU/13(XXI)May 2013.

508 United Nations Security Council Resolution 1970 of 26 February 2011, referred the situation in Libya to the ICC.

509 ICC-01/11-01/11.

510 Addis Ababa, 12 October 2013 – Extraordinary Session of the Assembly of the African Union.

511 *The Prosecutor v Uhuru M Kenyatta, Decision on the withdrawal of charges against Mr Kenyatta*, No.: ICC-0l/09-02l11, 13 March 2015.

512 *The Prosecutor v William Samoei Ruto and Joshua Arap Sang* ICC-CPI-20160405-PR1205.

The flipped Kenyan situation brought similarity to the previous two situations of Libya and Sudan. All situations had one theme in common i.e. the cases were opened against serving heads of states while Sudan and Libya shared a common theme of cases opened in situations whose conflicts were still ongoing.[513] These themes have been the grounds for the AU to seek alternative route to prosecution before the ICC.[514]AU requested the SC to act pursuant to article 16 of the Rome Statute which tries to balance the need for justice and the attainment of peace. The reasoning of the AU has been that, such prosecutions in Libya and Sudan posed a threat to the efforts to bring peace in an already volatile situation.[515] This was voiced out by the AU Assembly as quoted here:-

> Further reaffirms its previous Decisions on the activities of the ICC in Africa, adopted in January and July 2009, January and July 2010, January and July 2011, January and July 2012 respectively, in which it expressed its strong conviction that the search for justice should be pursued in a way that does not impede or jeopardize efforts aimed at promoting lasting peace and reiterated AU's concern with the misuse of indictments against African leaders.[516]

It has been noted in previous chapters that peace and justice are two sides of the same coin and they work together to strengthen the society subjected to a series of conflict and political instability. It is recognized that there can be justice and peace at the same time. Therefore, to argue that one should not be prosecuted because it will

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513 Oette L., "Crimes in Darfur Before The ICC: Five Years On Peace and Justice, or Neither? The Repercussions of the al-Bashir Case for International Criminal Justice in Africa and Beyond," *Journal of International Criminal Justice,* 2010, No. 8, at 334 – 365.

514 The AU requested the SC to defer the cases pursuant to article 16 of the Rome Statute; Decision on the Progress Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court (ICC), Doc. EX.CL/710(XX) January 2012; Decision On The Implementation Of The Decisions On The International Criminal Court (ICC) Doc. EX.CL/731(XXI) July 2012.

515 African Union, Peace and Security Council, Communique of the 142nd Meeting, 21 July 2008, PSC/MIN/Comm (CXLII), x 11(i), at 2, Communique of the 151nd Meeting, 22 September 2008, PSC/MIN/Comm.1(CLI) and Darfur: The Quest for Peace, Justice and Reconciliation, Report of the African Union High-Level Panel on Darfur (AUPD Report), PSC/AHG/2 (CCVII), 29 October 2009.

516 Decision on International Jurisdiction, Justice and the International Criminal Court (Icc), *op. cit.*

escalate violence and halt peace building process is to condone impunity unless there is concrete evidence that supports such a belief and not mere sentimental feelings.[517] The above argument has been criticized by experts in the field.[518]

However, it warrants a close look into the truth of such a position especially where some writers have supported the position taken by the AU.[519] Hence, taking Libya for example is it in a better place after the overthrow of Gaddafi and the prosecution thereafter?[520] Solutions by the West may not always bear positive fruits. The AU is better placed to know what serves the continent at the present circumstances so its position should not be ignored but rather be embraced to bring about credibility and attainment of international justice through the ICC. Notably, the Security Council has not granted the wishes of the AU by not deferring the situations of Libya, Sudan and Kenya. As a result, the AU opted not to cooperate with the ICC in effecting the arrest of the indicted African leaders[521] pursuant to article 98 (1) of the Rome Statute, those who do not comply with such decision are to be dealt with in accordance with

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517 Oette L., "Crimes in Darfur before the ICC: Five Years on Peace and Justice, or Neither? The Repercussions of the al-Bashir Case for International Criminal Justice in Africa and Beyond," *op. cit*, p. 350; Cheng C., "Justice and Gadhafi's Fight to the Death," *The Wall Street Journal*, April 6, 2011; McDoom O., "Analysis: Justice Clashes with Peace on Darfur Bashir Warrant," *Reuters*, July 14, 2008.

518 Lubbe H.J., "The African Union's decisions on the indictments of Al-Bashir and Gaddafi and their implications for the implementation of the Rome Statute by African States" in Ambos K. and Maunganidze O.A. (eds) *Power and Prosecution Challenges and Opportunities for International Criminal Justice in Sub-Saharan Africa* Volume 24 of the series, Göttingen Studies in Criminal Law and Justice" by Universitätsverlag Göttingen 2012, p. 179 – 199.

519 Dowden R., "ICC in the Dock", *Prospect*, London, May 2007; Louise Parrott, "The Role of the International Criminal Court in Uganda: Ensuring that the Pursuit of Justice does not come at the price of peace," *The Australian Journal of Peace Studies*, Vol. 1 (2006).

520 The Guardian, "UK military action partly to blame for chaos in Libya, says Tunisia PM." Available at www.theguardian.com/world/2015/aug/06 [Accessed 10 August 2015]. Gaddafi's son Saif al- Islam was sentenced to death in Libya on 28 July 2015 together with other 8 persons of the former regime.

521 Decision on the Application by the International Criminal Court (Icc) Prosecutor for the Indictment of the President of The Republic Of The Sudan Assembly/AU/Dec.221(XII) July 2009; Decision on International Jurisdiction, Justice and the International Criminal Court (ICC)2 Doc. Assembly/AU/13(XXI)May 2013.

article 23 (2) of AU Constitutive Act.[522] This has been implemented in a number of times. In 2016, President Al Bashir visited Uganda[523] and Rwanda[524] without being arrested. Similarly, the 2015 situation in South Africa[525] followed the failure of Chad in 2009,[526] Kenya in 2010,[527] Malawi in 2011,[528] Democratic Republic of Congo in 2014,[529] Djibouti and Nigeria to arrest the President of Sudan.[530] This has put the ICC weaknesses to test and so far it is a proven fact that in order for the ICC to be effective cooperation from member states is vital.

The refusal to arrest indicted serving heads of states follows the AU call for respect of immunities of serving heads of states. The AU concluded in the Extraordinary session that,

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522 "…any Member State that fails to comply with the decisions and policies of the Union may be subjected to other sanctions, such as the denial of transport and communications links with other Member States, and other measures of a political and economic nature to be determined by the Assembly."

523 "Al-Bashir defiantly visits Uganda," May 12 2016, information available at http://www.bdlive.co.za/africa/africannews/2016/05/12/al-bashir-defiantly-visits-uganda [Accessed 25 August 2016].

524 Ssuuna I. and Muhumuza R., "Sudan's al-Bashir, attending Rwanda summit, defies the ICC," Jul. 16, 2016 available at http://bigstory.ap.org/article/30970f039e73499cba53ebf018226384/african-leaders-meet-amid-south-sudan-violence-icc-concerns [Accessed 25 August 2016].

525 *Southern Africa Litigation Centre - v - Minister of Justice and Constitutional Development & 11 Others* High Court of South Africa (Gauteng Division, Pretoria) Case Number: 27740/2015.

526 *Prosecutor v. Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I,* Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to the Republic of Chad, 27 August 2010.

527 *International Commission of Jurists-Kenya v Attorney General & Another,* Misc. Crm. Application No.685 of [2011] eKLR

528 See the case of *Prosecutor v. Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I*, Corrigendum to the Decision pursuant to Article 87(7) of the Rome Statute on the failure by the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, 13 December 2011, para 8.

529 Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, *The Prosecutor v Omar Hassan Ahmad Al Bashir,* Pre-Trial Chamber II, 9 April 2014 (ICC-02/05-01/09).

530 Tladi D., "The Duty on South Africa to Arrest and Surrender President Al-Bashir under South African and International Law: A Perspective from International Law," *Journal of International Criminal Justice*, 2015, p. 1-21. It has been maintained that the duty to cooperate under the Security Council Res 1593 is with regard to Sudan and does not entail a duty to Rome Statute member states.

> No charges shall be commenced or continued before any international court or tribunal against any serving head of state or Government or anybody acting in such capacity during his/ her term of office. To safeguard the constitutional order, stability and integrity of member states, no serving AU Head of State or Government or anybody acting or entitled to act in such a capacity, shall be required to appear before any international court or tribunal during their term of office.[531]

The above decision has further been solidified in the amendment to the Protocol on the Statute of the African Court of Justice and Human Rights under article 46*bis* which has been discussed in subsequent parts. Therefore, states are to act in accordance with article 98 of the Rome Statute where a referred state is not a party to the Statute.[532] Although the issue of immunity of state officials (*ratione personae)*[533] is not core part of the thesis, and therefore not dealt with in lengthy, it is worth giving it a snippet outlook for building arguments for further understanding. It is clear that, international criminal law, with reference to the statute of ad hoc tribunals, special courts and the ICC has come to embrace the lift of the veil of immunity when it comes to international crimes committed by state officials[534] who are endowed with immunity from prosecution under domestic courts.[535] Decisions of the international

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[531] Extraordinary Session of the Assembly of the African Union, Addis Ababa , Ethiopia October 2013 available at http://www.au.int/en/content/extraordinary-session-assembly-african-union [Accessed 15 October 2014].

[532] The article stipulates that;

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.
2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

[533] See *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)* [2002] ICJ Rep 3, para 55

[534] Rome Statute, Article 27 (2); article 7 of the Nuremberg Charter; Statute of the ICTY article 7(2); Statute of the ICTR article 6(2) and Statute of the SCSL article 6(2).

[535] Murungu C., 'Immunity of State Officials and the Prosecution of International Crimes' in Murungu C. and Biegon J., (eds), *Prosecuting International Crimes in Africa* Pretoria University Law Press, 2011, 33, 44–6.

courts have supported a similar position.[536] Even though some argue that the immunity of heads of states from non-state parties to the Rome Statute is waived with reference to SC referral,[537] a lot is left to be desired as to why article 98 was in place at all.

Immunity of the *troika*[538] from prosecution before foreign domestic courts (this includes all processes pertaining thereto such as arrest) has remained a rule of customary international law affirmed by the ongoing codification process before the ILC.[539] If this is the case, the exceptions to such immunity are only in relation to *ratione materiae* but *rationae persona is* absolute.[540] Therefore, it is yet to be established that a rule of customary international law has emerged or is in the process of emerging to change the immunity *rationae personae*. The lifting of immunity in international tribunals has been with specific context and for specific countries that are affected or parties to a treaty.[541] The automatic lifting of immunity of serving

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536 ICC Pre-Trial Chamber I, *The Prosecutor v Al Bashir*, Decision on the 'Prosecution's Application for a Warrant of Arrest against Omar Hassan Al Bashir' (4 March 2009) ICC-02/05-01/09-3, and ICC Pre- Trial Chamber I, *Prosecutor v Al Bashir*, Second Decision on the 'Prosecution's Application for a Warrant of Arrest' (12 July 2010) ICC-02/05-01/09-94.

537 Monageng S.M., 'Africa and the International Criminal Court: Then and Now,' in Werle G., Fernandez L. and Vormbaum M., *Africa and the International Criminal Court,* International Criminal Justice Series, Volume 1, Asser Press, The Hague, The Netherlands, 2014, at 30.

538 Special rapporteur Concepción Escobar Hernández International Law Commission Third report on the immunity of State officials from foreign criminal jurisdiction Sixty-sixth session Geneva, 5 May-6 June and 7 July-8 August 2014, p. 7/53.

539 *Ibid*. see also, *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)* [2002] ICJ Rep 3, para 55. The ICJ stated that "there exists [no] customary international law [in] any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity."

540 *Ibid*. Simbeye Y., *Immunity and International Criminal Law*, Wey Court East, England, Ashgate Publishing Ltd, 2004.

541 See the statutes of international tribunals and Special courts and the Rome Statute. There has been no indictment of a serving head of state before any ad hoc tribunal. All those prosecuted were from an overthrown regime. Further, if one looks into Kenya, it is ok for the president to be prosecuted because of the commitment the country has in the Rome Statute. However a similar conclusion cannot be easily reached for states that are not parties to the Statute of the ICC.

heads of states who are not parties to the Rome Statute is not a rule of customary international law.[542] To impose the contrary position on non-state parties to the Rome Statute is making the Rome Statute akin to rules of customary international law something which flies beyond treaty obligations as understood in international law. Basic principles of treaty law such as *pacta tertiis nec nocent nec prosunt* (a treaty does not create either obligations or rights for a third state without its consent) are clearly violated if there is no separation between state parties and non-state parties to the ICC.[543]

It must be emphasized that the position taken by African countries against the ICC has even moved Burundi and South Africa to express their move to withdraw from the Court[544] while Kenya is mounting pressure to do the same[545] and Gambia has reconsidered its decision to withdraw following the coming into power of the new President. Burundi cited the biasness of the Court and the exercise of their sovereignty as triggering factors for their withdrawal.[546] The AU has also passed a resolution during its annual Heads of States summit in Addis urging states to leave the ICC. It must be noted that, issues of sovereignty touch the heart of many African

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542 A Head of state is a representative of the people of a particular country. Immunity is given to such persons to ensure the proper functioning of international legal order. As such, the ICC is specific to parties thereto. The arrest of such head of states of non-state parties to the Rome Statute is expected to be done by a particular state (through the elaborated provisions under the Rome Statute on cooperation) which when acting will breach a rule of customary international law which calls for such a state to accord immunity to that head of state. A new rule of customary international law can only emerge where there is state practice supported with *opinion juris*. Thus far, nothing has indicated the development of such a new rule with regard to limiting immunity of heads of state.

543 Vienna Convention on the Law of Treaties 1969 article 34.

544 Trigt, E.V., "Africa and withdrawal from the ICC," 28 October, 2016 available at https://www.peacepalacelibrary.nl/2016/10/africa-and-icc-withdrawal/ [29 October 2016].

545 Ombuor, R., "Kenya Signals Possible ICC Withdrawal," 13, December 2016, available at http://www.voanews.com/a/kenya-signals-possible-icc-withdrawal/3634365.html [16 December2016].

546 Trigt, E.V., "Africa and withdrawal from the ICC," *op. cit*.

leaders and are at the core of the African Union objectives.[547] Any interference by foreign states is viewed as a direct attack on the sovereignty of most African states.[548]

When it comes to the ICC, the SC referring cases to the Court is viewed as a direct domination by the permanent members of the Council (most of who are not even members to the Statute) on Africa. This reflection is a direct impact of colonial domination which struck the continent at a time when other parts of the world were embracing the concept of state sovereignty which was also reflected in philosophical thinking of that era.[549] African countries passed from colonial domination to independence which was already limited in the effect that there was no longer absolute sovereignty.[550] To ensure trustworthiness of the ICC, the SC needs to be impartial and address situation like Syria which is alarming to the community of nations.[551]

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547 Constitutive Act of the African Union article 3 (b) and 3(d).

548 *AFP*, "Rwanda's Kagame says ICC Targeting Poor, African Countries," July 31, 2008; Rwanda Radio via BBC Monitoring, "Rwandan President Dismisses ICC as Court Meant to 'Undermine' Africa," August 1, 2008.

549 Anghie A., "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law," *Harvard International Law Journal*, Vol. 40, No.1, 1999, p. 3. "[T]he colonial confrontation was not a confrontation between two sovereign states, but between a sovereign European state and a non-European state that, according to the positivist jurisprudence of the time, was lacking in sovereignty [these were considered to be objects of sovereignty as opposed to being subjects of sovereignty]… Even when the colonies were perceived to challenge some of the fundamental assumptions of the discipline, as in the case of the doctrine of self-determination, which was used in the 1960s and 1970s to effect the transformation of colonial territories into sovereign states, such challenges were perceived, mainly in political terms, as a threat to a stable and established system of international law, which was ineluctably European and was now faced with the quandary of accommodating these outsiders."

550 *Ibid*, pp. 60-68.

551 Security Council, "Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution," 22 May 2014, https://www.un.org/press/en/2014/sc11407.doc.htmhttps://www.un.org/press/en/2014/sc11407.doc.htm [Accessed 29 June 2014]. China and Russia vetoed the decision to refer the situation of Syria to the ICC. This shows the politics that have crippled the credibility of the ICC to many African states.

While Gambia and Burundi cited biasness of the ICC as one of the factors for withdrawal, South Africa on the other hand cited the competing obligations between customary international law and the Rome Statute on immunity of serving heads of states.[552] As stated in preceding paragraphs, immunity *ratione personae* of serving heads of states before domestic courts is absolute[553] while the Rome Statute has lifted such immunity.[554] The problem arises only where a country is forced to trigger its criminal process to arrest a serving Head of State something that will violate rules of customary international law. This is what South Africa faced in 2015. The decision by South Africa not to arrest Albashir was termed to be unlawful by South Africa's High Court.[555] There is therefore a need to ensure a holist interpretation of the provisions of the Rome Statute without exerting pressure on Africa states to conduct themselves in a manner that is inconsistency with rules of customary international law.

Apart from negative perceptions on the use of universality principle and the prosecutorial strategies of the ICC outlined above, the AU has expressed its desire for an amendment to article 16 of the Rome Statute in order to allow the United Nations (UN) General Assembly to defer cases for one (1) year in cases where the UN Security Council would have failed to take a decision within a specified time

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552 Trigt, E.V., "Africa and withdrawal from the ICC," *op. cit*.

553 Special rapporteur Concepción Escobar Hernández International Law Commission Third report on the immunity of State officials from foreign criminal jurisdiction Sixty-sixth session Geneva, 5 May-6 June and 7 July-8 August 2014, p. 7/53.

554 Rome Statute, article 27.

555 *Southern Africa Litigation Centre - v - Minister of Justice and Constitutional Development & 11 Others* High Court of South Africa (Gauteng Division, Pretoria) Case Number: 27740/2015.

frame.[556] This desire to amend the provision of the Rome Statute came about as a result of failure of the SC to honour the AU's requests for deferral. As such, the AU is of the view that the Council is using international criminal justice to further political motives which are not geared towards helping Africa but rather dominating and shaming it. This negative perception will fade away only when the Council addresses situations elsewhere in the globe where international crimes are committed at alarming rate.[557] However, apart from the above negative reaction in recent years, the AU has passed Protocols and Charters which in one way or another express the commitment to end impunity to international crimes.

5.2.2 African Charter on Democracy, Elections and Governance 2007

African Charter on Democracy, elections and Governance (ACDEG) was passed to further the essence of the AU Constitutive Act with respect to good governance, popular participation, the rule of law and human rights, fair election, independence of judiciary, building democratic culture, sustainable development and human security and the fight against corruption.[558]

The ACDEG has eleven chapters. While it has focused more on democracy and political related issues, it has made the respect of human rights as one of the core

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556 Tladi D., "The ICC Decisions on Chad and Malawi on Cooperation, Immunities, and Article 98," *Journal of International Criminal Justice* No.11, 2011, p. 199.

557 Hoile D., *Justice Denied: The Reality of the International Criminal Court,* The Africa Research Centre, London, 2014, chapter twelve pp. 167- 175 analyzed the Iraq situation, chapter thirteen, p. 176- analyzed Afghan situation. Example the author analyzes the number of complaints received by the ICC prosecutor and the justification not to open investigations in Iraq because the crimes had not reached the level of threshold for ICC intervention were not convincing. He has further demonstrated how serious the situation of impunity to international crimes is in Afghanistan and the lack of emphasis from the ICC to even acknowledge the situation at hand left alone to open an investigation.

558 Rome Statute preamble and article 1 and 2.

values in attaining democracy and good governance.[559] In doing so, it has openly recognized the need to end impunity in order to realize the promotion and protection of human rights.[560] The recognition is made with reference to state parties' obligation in ensuring the established human rights system under the AU is strengthened to fight impunity.[561] Further, any perpetrators of unconstitutional change of government are to be held accountable under the AU system[562] or through extradition.[563]

The Charter has specifically dealt with the crime of unconstitutional change of government following after its predecessor the Lome Declaration which in detail addresses issues of unconstitutional change of government.[564] This has also been explicitly inferred under the AU Constitutive Act article 3(g) and 4 (j), (m), (o) and (p). While unconstitutional change of government is not a crime under international law, Africa has come to introduce it as a new international crime as shall be assessed in subsequent parts. Thus, unconstitutional change of government entails:

> Any putsch or coup d'états against a democratically elected government, any intervention by mercenaries to replace a democratically elected government, any replacement of a democratically elected government by armed dissidents or rebels, any refusal by an incumbent government to relinquish power to the

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559 African Charter on Democracy, elections and Governance Adopted by the Eighth Ordinary Session of the Assembly, Held in Addis Ababa, Ethiopia, 30 January 2007 article 2 (1), 3 (1), 4 (1) and 4 (2); Edward R. McMahon The African Charter on Democracy, Elections and Governance a Positive Step on A Long Path May 2007, Open Society Institute, Africa Governance Monitoring and Advocacy Project, available at http://www.afrimap.org/english/images/paper/ACDEG&IADC_McMahon.pdf. [Accessed 21 June 2015]. See also the problems relating to democracy and election facing Burundi where people are reported to have been killed and thousands fleeing to Tanzania for refuge. Information available at http://www.bbc.com/news/world-africa-33590991 [Accessed 21 June 2015]. Patrick J. Glena., "Institutionalizing Democracy in Africa: A Comment on the African Charter on Democracy, Elections and Governance." *African Journal of Legal Studies* 5 (2012) 119-146.

560 *Ibid*., article 7.

561 *Ibid*.

562 *Ibid*., article 25 (5).

563 *Ibid*., article 25 (9).

564 Lomé Declaration of July 2000 on the framework for an OAU response to unconstitutional changes of government (AHG/Decl.5 (XXXVI).

> winning party or candidate after free, fair and regular elections or any amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government.[565]

One of the prohibited conduct under the Charter is "any amendment or revision of the constitution or legal instruments," has remained a major challenge facing African countries. It has been noted recently in Rwanda where a referendum was held to provide for change of constitution to extend the number of times a person can stand for election as a president of the country.[566] The issue about democracy is the voice of the people. If the people decide to change the Constitution out of their own free will does it amount to unconstitutional change of government or it is democracy outside the limitations imposed by European and Western standards? There has been a system that has been accepted where presidential term is limited to a maximum of two terms. This is true for many African countries. The precedent for this has been from Europe and Western countries as adopted in Africa especially by the introduction of multiparty democracy. While the process serves good to many nations to ensure change of government, it is entirely left to the people of a particular country to decide otherwise if true democracy is to be embraced.

The political remedies for unconstitutional change of government are of an obligatory character noting the use of the term "shall" for all applicable provisions. Thus, the AU shall suspend State Party where unconstitutional change of government

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[565] *Ibid*., article 23 (2) - (5). The provisions although lengthy do not cover the change of government through uprising. This means that as the provisions stand, change of government through uprising falls outside the scope of the Charter. However, the law is subject to interpretation, it is therefore yet to be seen if the courts will be progressive to expand the scope of what unconstitutional change of government entails.

[566] The constitutional changes in Uganda and Rwanda are a clear example of the violation of the provisions of the Charter.

has taken place from the exercise of its right to participate in the activities of the Union.[567] Moreover, sanctions are to be imposed on member states which aid the unconstitutional change of government.[568] The provisions are therefore not directly applicable to individuals but rather to states. Hence, this could have been the reason why the AU has been willing to adopt more compulsory provisions. The sanctions for unconstitutional change of government are also provided for under the Protocol for the Establishment of the PSC[569] and the AU Constitutive Act.[570] Notably, the AU has in a number of occasions taken sanctions against such unconstitutional changes of government in the continent.[571]

The Charter does not focus on states alone but also touches individuals who perpetrate unconstitutional change of government. The Charter therefore appeals to member states to end impunity to unconstitutional change of government either via domestic courts of territorial state or third state[572] or under the AU Court with jurisdiction to prosecute such a crime.[573] When reference is made to the "AU Court," the provision shows the pattern of desire to have a judicial organ within the AU with

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567 ACDEG, article 25 (1); Kane I., 2008. 'The Implementation of the African Charter on Democracy, Elections and Governance', *African Security Review* 17(4): 43-63. Example of instances where the AU suspended members because of unconstitutional change of government include; the suspension of Burkina Faso in 2015, Egypt in 2013, Ivory Coast 2010, Niger 2010, Guinea 2008 and Central African Republic in 2013.

568 *Ibid*., Article 25 (6). These sanction are imposed pursuant to article 23 (2) of the AU Constitutive Act.

569 Article 7(1)(g).

570 Article 30.

571 Omorogbe E. Y., "A Club of Incumbents? The African Union and Coups d'Etat," *Vanderbilt Journal of Transnational Law*, pp. 134, 138 – 153. "…AU response to the successful coups in Togo (February 2005), Mauritania (August 2005 and August 2008), Guinea (December 2008), Madagascar (March 2009), and Niger (February 2010). When responding to coups, the AU has consistently favored the constitutional order, irrespective of the conduct of incumbent regimes, the claims made by those challenging them, or the likelihood that the coup might advance democracy. As a result, the AU's actions have generally protected incumbent governments."

572 ACDEG, Article 25 (9).

573 *Ibid*., article 25 (5).

criminal jurisdiction. However, not much has been elaborated within the Charter to give effect to such a position. The provisions for accountability make use of the word "may" as opposed to the use of the word "shall." This makes issues of accountability not as compelling as they would have been if more compelling wording of the provisions was adopted.

Notably, even if unconstitutional change of government is not one of the core international crimes under international law, in all cases, such conduct are usually coupled with the commission of other core international crimes like war crimes or crimes against humanity. Therefore, the Charter is innovative in its own right addressing what is a common problem in the continent needing redress. It is not to adhere to what the international community has recognized to be common but to take a step further lower to the level of the continent and address issues that are peculiar to the continent that may not form a priority to the rest of the world. It must be noted that, since it was adopted in 2007, the Charter has received 47 signatures and 24 ratifications. It entered into force on 15 February 2012.[574]

5.2.3 African Union Model National Law on Universal Jurisdiction on International Crimes 2012

Universality principle entails the ability of a state to prosecute international crimes committed elsewhere i.e. outside its territory with persons and against persons who

[574] Information available at http://www.au.int/en/treaties/african-charter-democracy-elections-and-governance [Accessed 3 June 2015].

are not its nationals.[575] This understanding is derived from Princeton Principles on Universal jurisdiction.[576] The exercise of universal jurisdiction according to the principles does not require any nexus between the crime, perpetrator, victim and the country seeking to invoke it. The applicability of universal jurisdiction is based on the grounding that the international community shared common values whose protection transcends traditional understanding and exploits of state sovereignty.[577] Universality principle waters down the walls of state sovereignty by giving community of states power to prosecute perpetrators of crimes which violate the shared common values or interests. This shared interest which denotes the nature of the crime in question is the basis for the invocation of universal jurisdiction.[578]

Further, the rationale for the applicability of universal jurisdiction on international crimes is premised on the fact that in most circumstances, territorial states usually are unable to hold the perpetrators accountable for the crimes committed hence giving

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[575] United Nations General Assembly (UNGA) Resolution A/RES/64/L117 on the Scope and Application of the Principle of Universal Jurisdiction adopted on 16th December 2009; Cassese A., *The Oxford Companion to International Criminal Justice,* Oxford University Press, Oxford United Kingdom, 2009; Lafontaine F., "Universal Jurisdiction-The Realistic Utopia," *Journal of International Criminal Justice,* 2012, No.10, pp. 1277-1302; O'Keefe R., "Universal Jurisdiction Clarifying the Basic Concept," *op. cit*; Bassiouni M.C., 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice' *op. cit*, p. 153; Bassiouni M.C., 'The History of Universal Jurisdiction and its Place in international Law' in Macedo S., (ed.*) Universal Jurisdiction, National Courts and the Prosecution of Serious Crimes under International Law, op. cit*, pp. 39-63.

[576] Princeton University Programme in Law and Public Affairs, The Princeton Principles on Universal Jurisdiction 28 (2001), Article 1(1). "…universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction."

[577] Broomhall B., "Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International Law." *New England Law Review,* 2000-2001, No.35, pp. 399 – 420.

[578] Jalloh C.C., "Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective On Universal Jurisdiction," *Criminal Law Forum,* 2010, No. 21, pp. 1-65 at 7.

other states jurisdiction to intercede.[579] In the 2000s states where international crimes have been committed have been active prosecuting international crimes in domestic courts example Rwanda,[580] Kenya,[581] Uganda[582] Libya and Democratic Republic of Congo.[583] This does not however rule out the advantages of invoking universal jurisdiction especially in instances when territorial states are still unable or unwilling to prosecute.

That being the case, it is worth pointing out that, the practice of prosecuting perpetrators of international crimes under the universal jurisdiction has been prevalent in Europe. Hence, over the years, European countries have been active prosecuting perpetrators of international crimes under this principle.[584] Cases like P*inochet*[585] and the Prosecutions in Belgium of Rwandese for the 1994 genocide famously referred to the Butare four (Vincent Ntezimaro, Alphonse Higaniro,

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579 Joyner C.C., "Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability," *Law and Contemporary Problems*, Vol. 59, No. 4, 1996, pp. 153-172 at 166.

580 Schabas W.A., "Genocide Trials and Gacaca Courts," *Journal of International Criminal Justice*, 2005, No. 3, p. 879 at 889; Report on the completion strategy of the International Criminal Tribunal for Rwanda as at 5 November 2014, S/2014/829 para 5. The report documents cases that were transferred to Rwanda from the ICTR.

581 Kenya post-election violence cases have been prosecuted under the ordinary crime approach. The quantity of such prosecutions is still very low. It is yet to be seen whether restorative justice will be adopted as opposed to retributive justice. Information available at http://www.capitalfm.co.ke/news/2015/03/uhuru-apologises-for-past-atrocities-much-to-kiplagats-delight-2/ [Accessedn16 June 2015].

582 Uganda's International Crimes Division (ICD) has been up and running since 2011. So far the case of *Uganda v Thomas Kwoyelo Constitutional Appeal No. 01 of 2012; Decision of 8th April, 2015.*has been cleared to proceed for trial. The prosecutor has drawn charges based on both the Geneva Conventions Act and the Penal Code

583 Clark P., 'Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda,' in *Courting Conflict? Justice, Peace and the ICC in Africa,* p. 38.

584 Kaleck W., "From Pinochet to Rumsfeld: Universal Jurisdiction in Europe," 1998–2008, 30 *Michigan Journal of International Law,* 2009, pp. 931 – 958. The author assessed the practice of applying universal jurisdiction in European countries particularly Belgium, France, Switzerland, United Kingdom, The Netherlands, Scandinavia, Germany, Austria and Spain.

585 *R. v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No. 3), 2 All E.R. 97 (H.L. 1999).*

Consolata Mukangango and Julienne Mukabutera)[586] are classic examples. The recent arrest of General Karanzi Karake of Rwanda is another exercise of jurisdiction (universal or passive personality) by European countries on African indicted officials.[587] The prosecution of international crimes under the universality principle in Europe was facilitated by the presence of legislative framework authorizing national courts to prosecute international crimes under the principle.

African countries on the other hand have not prosecuted anyone based on this principle. The prosecution of Hissene Habre before the Extra Ordinary Chambers in Senegal is the first glimpse of utilization of the universal principle although in a way not traditionally understood.[588] The lack of effective legislative framework to that effect has been one of the main crippling factors for the absence of such practice.[589] While most African states have laws on extradition which is one aspect of universal

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586 Reydams L., "Belgium's First Application of Universal Jurisdiction: The Butare Four Case," *Journal of International Criminal. Justice*, 2003, Bol. 1, pp. 428 – 436. The author has given a background of the cases, summary of the trial and assessed the merits and shortcomings of the cases.

587 Wilkinson T., "Spain indicts 40 Rwandan officers Jurist charges officials in massacres after 1994 genocide. President Kagame is accused, but he has immunity," February 07, 2008, available at http://articles.latimes.com/2008/feb/07/world/fg-rwanda7 [Accessed 20 July 2015]; Audiencia Nacional (Central Examining Magistrate No 4) (Spain) 6 February 2008.

588 See information available at www.chambresafricaines.org/ [Accessed 4 November 2014]. Agreement Between the Government of the Republic of Senegal and the African Union on the Establishment of Extraordinary African Chambers within the Senegalese Judicial System; Statute of the Extraordinary African Chambers within the Senegalese judicial system for the prosecution of international crimes committed on the territory of the Republic of Chad during the period from 7June 1982 to 1 December 1990; Sarah Williams., "The Extraordinary African Chambers in the Senegalese Courts An African Solution to an African Problem?," *Journal of International Criminal Justice,* 2013, vol. 11, No. 5, pp. 1139-1160.

589 Other factors that may have caused the lack of prosecution of international crimes under the universality principle in Africa may be attributed to the absence of political incentives to ensure that the principle is utilized and the high costs of prosecuting international crimes coupled with the absence of necessary infrastructure. See Langer M., "The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes," *American Journal of International Law,* vol. 1, No. 105, 2011, 1-49 at 5.

jurisdiction,[590] they did not seem to have laws enabling them to exercise universal jurisdiction before their own courts for all core international crimes.[591]

Recently, African countries which have implemented the Rome Statute have provisions covering the exercise of universal jurisdiction on perpetrators of international crimes.[592] Therefore, due to the *lacuna* that existed in law, European countries dominated the available opportunity to try alleged African perpetrators of international crimes before their own courts.[593] This was negatively perceived by African Union member states. The AU in series of resolutions expressed its disappointment on the abuse of universality principle by European states.[594] This

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590 Example; South Africa: Extradition Act 67 of 1962; Malawi: Extradition Act, chapter 8:03 of 1972; Botswana: Extradition Act, 2005; Tanzania: Extradition Act CAP.368 REV 2002.

591 Except for the countries with general laws on universal jurisdiction like Democratic Republic of the Congo: Penal Code Book 1, Section VI, article 3-6; the Republic of Congo: Law N° 8-98 of 31 October 1998; Ethiopia: Penal Code, section 17 and 18; Ghana: Courts Act 1993, article 56(4); Niger Law No 2003-025 of 13 June 2003, section 208; Rwanda: Organic Law No 08/96 of 30 August 1996 on the Organization of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity committed since 1 October 1990. The Geneva Conventions implementing legislation also provide for the exercise of universal jurisdiction only in relation to the grave breaches which are limited to war crimes perpetrated in international armed conflicts. Example Botswana: Geneva Conventions Act 1970, section 3(1); Kenya: Geneva Conventions Act 1968, section 3(1); Malawi: Geneva Convention Acts 1967, section 4(1); Mauritius: Geneva Conventions Act 1996, section 3(1); Namibia: Geneva Conventions Act 2003, section 2(1) to (3); Nigeria: Geneva Conventions Act 1960, section 3(1); Tanzania: Geneva Conventions Act 1957 (UK) and Geneva Conventions Act (Colonial Territories Act) Order 1959 (UK); Uganda: Geneva Conventions Act 1964, section 1(1) and Zimbabwe: Geneva Conventions Act 1981, section 3(1).

592 International Criminal Court Act, Acts Supplement No. 6, Uganda Gazette, no. 39, vol. CIII, June 25, 2010; South Africa Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002; Kenya International Crimes Act. No. 16 of 2008, Revised Edition 2012; Mauritius: The International Criminal Court Act 27 of 2011. Some laws do not provide for absolute universal jurisdiction instead the exercise of universal jurisdiction requires a nexus to the country wishing to prosecute.

593 See The AU-EU Expert Report on the Principle of Universal Jurisdiction 8672/1/09 REV1 RdB/lgf 1 Brussels, 16 April 2009.

594 Decision on the Abuse of the Principle of Universal Jurisdiction Doc. EX.CL/731(XXI) July 2012. Decision on the Abuse of the Principle of Universal Jurisdiction Assembly/Dec.199(XI) July 2008; Decision on the Abuse of the Principle of Universal Jurisdiction Assembly/Dec.213(XII) February 2009; Decision on the Abuse of the Principle of Universal Jurisdiction Doc. Assembly/AU/11(XIII) July 2009; Decision on the Abuse of the Principle of Universal Jurisdiction Doc. EX.CL/540(XVI) February 2010.

dissatisfaction has also paved way for cases to be instituted before the International Court of Justice somehow relating to the operation of the universality principle.[595] Thus, to aid African states have legislative framework on universal jurisdiction, the AU Commissioned experts to draft a model Law on Universal jurisdiction[596] which was later adopted by the AU Assembly of States.[597]

The model law is therefore as the name suggests, a model for African states as they empower their national courts with universal jurisdiction.[598] It is therefore expected that the transmission of the law will be made to make it applicable in domestic courts. It is not envisioned that the law be adopted as a whole. States can choose the best suited method to transmit such obligation either by incorporating certain provisions in their existing laws or by adopting a new legislation that implements the model law. However, since most of the provisions are akin to the obligations under international crimes instruments, the best method will be to bundle everything in a legislation that deals with international crimes.

The Model law referred to here is an extract of basic principles that entail the application of universal jurisdiction on international crimes.[599] The model law makes reference to the core international crimes recognized in international law i.e. war

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595 *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), Judgment, 14 February 2002, 2002 I.C.J. 121 (Arrest Warrant Case); Certain Criminal Proceedings in France (Congo v. France), 2003 I.C.J.*

596 The African Commission, Resolution 167 (XLVII), 48th Ordinary Session held from 10th to 24th November 2010.

597 African Union (Draft) Model National Law on Universal Jurisdiction over International Crimes, Meeting of Government Experts and Ministers of Justice/Attorneys General on Legal Matters, 7–15 May 2012, Addis Ababa, EXP/MIN/Legal/VI.

598 *Ibid*., section 1.

599 *Ibid*. see the opening statement.

crimes, crimes against humanity and genocide.[600] On top of that, the model law provides for an extended category of crimes to which states can exercise universal jurisdiction. These include the crime of piracy,[601] trafficking in narcotics[602] and terrorism.[603] African states have embraced such crimes that are of concern to their community hence a slight departure from the position under international criminal justice.

The aim of model law is to end impunity to international crimes[604] by giving courts jurisdiction to try non-nationals who have committed international crimes in foreign territory.[605] The type of universal jurisdiction provided for under the model law is a conditional one as opposed to that which is considered to be absolute.[606] Therefore, the model law provides that;

> The Court shall have jurisdiction to try any person alleged to have committed any crime under this law, regardless of whether such a crime is alleged to have been committed in the territory of the State or abroad and irrespective of the nationality of the victim, provided that such a person shall be within the territory of the State.[607]

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600 *Ibid*., article 8-11. The definition of the core international crimes under the model law is similar to the one found in international treaties and customary international law.

601 *Ibid*., article 12.

602 *Ibid*., article 13.

603 *Ibid*., article 14. Terrorism has been dealt with in two instruments under the AU. These are OAU Convention on the Prevention and Combating of Terrorism July 01, 1999 entered into force on December 06, 2002 and Protocol to the OAU Convention on the Prevention and Combating of Terrorism July 01, 2004.

604 *Ibid*., article 3 (a).

605 *Ibid*., article 4.

606 Example Belgium: Act of 1999 Concerning the Punishment of Grave Breaches of International Humanitarian Law, 10 February 1999, available at, http://www.refworld.org/docid/3ae6b5934.html [accessed 22 July 2015]. Article 7 provides that "[t]he Belgian courts shall be competent to deal with breaches provided for in the present Act, irrespective of where such breaches have been committed." This law was however amended in 2003.

607 AU Model Law, article 4.

From the above provision, it is clear that the exercise of universal jurisdiction under the model law is conditioned on the presence of the accused in the territory of the state seeking to invoke universal jurisdiction in order to prosecute perpetrators of crimes under the model law.[608] It must be noted that, the model law has ascribed universal jurisdiction to the highest court with original jurisdiction. This has not been a recent development. Limitations to the exercise of universal jurisdiction have been notable in the provisions that have existed in some African countries that enable countries to exercise universal jurisdiction. The model law has therefore borrowed from existing state practice.[609] Therefore, lower courts are not eligible to exercise universal jurisdiction.

The model law is a non-binding instrument providing provisions on universal jurisdiction envisioned to be implemented in domestic legislative framework.[610] This is therefore its major weakness. However, from the objectives of adopting a Model law, a non-binding instrument is the best option. This technique provides member states with guidelines on how to go about having universal jurisdiction provisions under their domestic legislation without necessarily having the need to go through the cumbersome procedure of adopting a treaty. The model law is therefore not imposing a mandatory obligation of being reproduced as it is before national laws.

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608 This has been followed by legislative provisions domesticating the Rome Statute in African countries. See selected laws above.

609 Botswana: Section 3(3) of the Geneva Conventions Act 1970 provides that a subordinate court shall have no jurisdiction to try grave breaches of the Geneva Conventions; Nigeria: Section 11(2) of the Geneva Conventions Act 1960 provides that a magistrate's court shall have no jurisdiction to try grave breaches of the Geneva Conventions.

610 See the opening statement under the AU Model Law para 2.

States may choose a mode of adoption and how best it fits in the already existing legislative framework.

The model law has embraced aspects of immunity which is enjoyed by state officials before foreign courts.[611] The provision on immunity is not absolute. It is limited to the extent of existing treaty obligations by member states which wave immunity of state officials.[612] This can be read together with the provisions of the Rome Statute Article 27 which has done away with immunity of state officials before the Court and is expected that member states will follow similar inclination as they implement the Model law. The model law has further incorporated aspects such as extradition,[613] cooperation among states,[614] punishment,[615] rehabilitation and reparation for victims[616] and witness protection.[617] While some of the aspects are inherent in the functioning of the universal jurisdiction principle, some have been borrowed from the contemporary aspects of international criminal justice enabling states to have a holistic approach in ending impunity to international crimes.

5.2.4 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights 2014

The African Union (AU) Assembly of Heads of State and Government adopted the Protocol on Amendments to the Protocol on the Statute of the African Court (referred

611 *Ibid*., article 3.
612 *Ibid*., article 16.
613 *Ibid*., article 17.
614 *Ibid*., article 18.
615 *Ibid*., article 19. The model law has provided for punishment not below 20 years.
616 *Ibid*.
617 *Ibid*., article 7.

hereafter as the Malabo Protocol) during a meeting held in Malabo, Equatorial Guinea, in June 2014. The Protocol changes the jurisdiction and organs of the African Court of Justice and Human Rights (ACJHRs) which is intended to replace the African Court of Human and Peoples' Rights (ACHPRs).[618] The Malabo Protocol was adopted to implement the desire to have criminal jurisdiction before the African Union Court which had remained pending since 1979.[619] The desire to have criminal chamber within the main judicial organ of the AU can be traced from the time the ACHPR was established. This idea never took root as it was thought to be too early for the continent to have such a judicial organ with jurisdiction over international crimes. The ACJHRs was initially proposed under the Protocol to the Statute of the African Court of Justice and Human Rights as the main judicial organ of the Union.[620] The Court has jurisdiction over the following:-

a) the interpretation and application of the Constitutive Act;
b) the interpretation, application or validity of other Union Treaties and all subsidiary legal instruments adopted within the framework of the Union or the Organization of African Unity;
c) the interpretation and the application of the African Charter, the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, or any other legal instrument relating to human rights, ratified by the States Parties concerned;
d) any question of international law;
e) all acts, decisions, regulations and directives of the organs of the Union;
f) all matters specifically provided for in any other agreements that States Parties may conclude among themselves, or with the Union and which confer jurisdiction on the Court;
g) the existence of any fact which, if established, would constitute a breach of an obligation owed to a State Party or to the Union;
h) the nature or extent of the reparation to be made for the breach of an international obligation.

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618 The African Court of Justice and Human Rights is yet to be operational as the Protocol establishing it has not yet received required number of ratifications.

619 See Draft African Charter on Human and Peoples' Rights, prepared for the Meeting of Experts in Dakar, Senegal, 28 November – 8 December 1979, OAU/CAB/LEG/67/1, para 4. Later in 2006 the efforts to establish a criminal chamber to prosecute Hissene Habre led to a similar proposal to have a criminal chamber for the AU judicial organ. See Report of the Committee of Eminent African Jurists on the Case of Hissene Habre, paras. 35 and 39. The Report is available at http://www.peacepalacelibrary.nl/ebooks/files/habreCEJA_Repor0506.pdf. [accessed on 3 December 2015].

620 Protocol to the Statute of the African Court of Justice and Human Rights 2008 Adopted by the 11th Ordinary Session of the Assembly of the Union, in Sharm El-Sheikh, Egypt, 01 July 2008 article 2.

In 2009, the formal process to have criminal jurisdiction upon the ACJHRs began with the task being conferred upon the African Union Commission (AUC).[621] These efforts continued in 2010,[622] 2011[623] and 2012.[624] The 2012 decision called for the inclusion of the crime of unconstitutional change of government which has been adequately elaborated under the ACDEG.[625] In 2013, the AU expedited the process for the extension of jurisdiction of the ACJHR following the tension that rose between the Union and the way the ICC was indicting African serving heads of states.[626]

In June 2014 the AU adopted the Protocol on Amendment to the Protocol to the Statute of the African Court of Justice and Human Rights (herein referred to as Malabo Protocol) which gives international criminal jurisdiction to the ACJHRs.[627] Although the adoption of the Malabo Protocol has followed a series of tension between the AU and the ICC and as widely criticized, it is conversely sought fit for the purpose of this research to give a holistic assessment of relevant provisions which

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621 Decision on the implementation of the Assembly Decision on the abuse of the principle of universal jurisdiction, Decision Assembly/AU/Dec. 213(XII), 4February 2009.

622 Assembly/AU/Dec. 292(XV), July 2010.

623 Decision on the Implementation of the Assembly Decisions on the International Criminal Court, Assembly/AU/Dec.366 (XVII); July 2011.

624 Decision on the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights Doc. Assembly/Au/13(Xix)A, July 2012.

625 Decision on the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Assembly/AU/Dec.427(XIX), para 2. There was also a call to review the financial implications for conferring criminal jurisdiction to the Court. see also Report on the Workshop on the Definition of Crimes of Unconstitutional Change of Government and Financial and Structural Implications, AfCHPR/LEGAL/Doc.3, para. 12. Report on the Financial and Structural Implications of Extending the Jurisdiction of the African Court of Justice and Human Rights to Encompass International Crimes, EX.CL/773(XXII) Annex 2 Rev., para. 4.

626 Decision on the Progress Report of the Commission on the Implementation of the Decisions on the International Criminal Court, Assembly/AU/Dec.493(XXII) para 6 and13.

627 Malabo Protocol.

aim at ensuring the international criminal jurisdiction of the court is carried out. The need for a criminal chamber is evident on the inclusion of other crimes which are beyond what is provided for under international legal instruments, the legal necessity emanating from other instruments like the ACGDG, [628]the need of having an African court close to African people who have been victims of international crimes.[629] However, there are other pertinent issues such as prevalent impunity that has existed in the continent and the costs associated with prosecuting international crimes which tend to be high.[630]

5.2.4.1 Selected Provisions under the Malabo Protocol

5.2.4.1.1 Structure of the Court

The Malabo Protocol having introduced a new form of jurisdiction to the existing Court necessarily called for the restructuring of the Court's organs. In response to this, the Principal organs of the Court have subsequently been changed and shall now include the Presidency,[631] the Office of the Prosecutor,[632] the Registry[633] and the Defence Office.[634] The Protocol has established specific organs dealing with

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628 Abass A., 'Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges,' *European Journal of International Law*, Vol. 24 No. 3, 2013, 933–994.

629 Murungu C., Towards a Criminal Chamber in the African Court of Justice and Human Rights, *Journal of International Criminal Justice*, Volume 9, Issue 5, 2011, 1067–1088.

630 *Ibid.*

631 *Ibid*., article 2 (1).

632 *Ibid*., article 2 (2) and Annex Statute of the African Court of Justice and Human and Peoples Rights, article 22 A. The office is among other things responsible for conducting investigations and prosecutions of crimes stated in the Statute.

633 *Ibid*., Protocol Amendment at article 2 (3) and the Annex Statute of the ACJHPRs article 22B. The registry deals with witness protection and detention of accused persons among other functions listed under the article.

634 *Ibid* Protocol Amendment article 2 (4) and the Annex Statute of the ACJHPRs article 22C. The defence office will be dealing with securing the rights of the suspects and accused persons who are brought before the court. It will therefore handle all issues relating to the exercise of functions of the defence counsel.

prosecution of international crimes i.e. the office of the prosecutor[635] and defence. Further, the structure of the court has been designed to include three sections i.e. a General Affairs Section, a Human and Peoples' Rights Section and an International Criminal Law Section.[636] From the way the court's principal organs are structured, it is right to say that the aim is in ensuring independence as each organ discharges its core functions specified in the Malabo Protocol and its annex Statute. This structure is important for the separation of human rights related cases and criminal cases emanating from the breach of norms of international law or norms specified in different AU conventions.

Mirroring international instruments i.e. ad hoc tribunal statutes, special court statutes and the Rome Statute, the International Criminal Law Section of the Court is to have three (3) Chambers[637] i.e. a Pre-Trial Chamber,[638] a Trial Chamber[639] and an Appellate Chamber.[640] This is designed to enable impartial and fair decisions on any case before the court and also afford the accused the right to appeal which is guaranteed in different international and regional human rights instruments. There is therefore nothing novel on this classification.

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635 Malabo Protocol, Article 2; the Annex Statute of the ACJHPRs, Article 22(6).
636 Annex Statute of the ACJHPRs article 16 (1).
637 *Ibid*., article 16 (2).
638 *Ibid*., article 19 *Bis*(1)-(3) which shall issue arrest warrants and witness protection orders in accordance with the rules provided under the statute.
639 *Ibid*., article 19 *Bis*(4) and (5).
640 *Ibid*., article 19 *Bis*(6).

5.2.4.1.2 Offences Recognized and Mode of Liability under the Annex Statute

The international criminal jurisdiction of the Court is different from what many have been accustomed to at the international level. While at the international level the jurisdiction of courts is limited to core international crimes, the ACJHRs has been empowered to try the 14 crimes including the traditional core international crimes of genocide, crimes against humanity, war crimes and the crime of aggression.[641] Thus, the court has jurisdiction on the following crimes with the possibility of expanding the list.[642]

> The Crime of Unconstitutional Change of Government; Piracy, Terrorism, Mercenarism, Corruption, Money Laundering, Trafficking in Persons, Trafficking in Drugs, Trafficking in Hazardous Wastes, Illicit Exploitation of Natural Resources[643]

These additional crimes haven't been the focus of international criminal justice since its active inception in 1945 although they have been committed around the globe and have caught the attention of the United Nations in numerous occasions.[644] For Africa, these crimes violate their shared common moral value hence the desire to be addressed at the regional level.[645] It is with this regional peculiarity that one cannot

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641 *Ibid*., article 28A (1)-(3) and (14).

642 *Ibid*., article 28A (2).

643 *Ibid*., article 28A (4)-(13).

644 Convention against Corruption, Dec. 9, 2003, G.A. res. 58/4, UN Doc.A/58/422 (2003); Report on Terrorism and Human Rights, Inter-Am. C.H.R., OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr. (2002); Report on Terrorism and Human Rights, Inter-Am. C.H.R., OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr. (2002);Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/55/49 (Vol. I) (2001), entered into force Dec. 25, 2003.

645 African Convention on the Conservation of Nature and Natural Resources; Convention for the Elimination of Mercenarism in Africa; Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa; African Nuclear Weapon-Free Zone Treaty (Pelindaba Treaty); OAU Convention on the Prevention and Combating of Terrorism; Convention for the Elimination of Mercenarism in Africa; Protocol to the OAU Convention on the Prevention and Combating of Terrorism, available at http://www.au.int/en/treaties [Accessed 1 December 2015].

term it as international crime for the purpose of international prosecution under the established ICC which is limited to the list provided under article 5 of the Rome Statute. Africa has decided that these crimes must not be left to be punished merely at domestic level but should rather be punished with the same focus and intensity as international crimes recognized at the global level. This is what any regional group needs provisions to address its peculiar needs and not a mere copy and paste of what is already available at the international level. Since it has been stated that such crimes have not been "well-articulated and established under international law,"[646] it is an opportunity for Africa to impact in jurisprudential development of these crimes. It will be an era where Africa has passed from receiving norms of international law developed by other parts of the globe, to actually impacting such development through a judicial process.

The definition of core international crimes, i.e. crime of genocide, war crimes and crimes against humanity under the Annex Statute is progressive. The provisions on genocide and crimes against humanity have taken aboard the jurisprudential developments under the ad hoc tribunals and the ICC. Therefore, the definition of the crime of genocide has been expanded through the inclusion of rape when coupled with the required *dolus specialis* as conduct amounting to genocide.[647] Also, there has been an addition of contextual element under the definition of crimes against humanity. The Protocol has included conduct "when committed as part of a widespread or systematic attack or enterprise directed against any civilian

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[646] Amnesty International, Malabo Protocol Legal and Institutional Implications of the Merged and Expanded African Court, *op. cit*., p. 16.

[647] Annex Statute of the ACJHPRs, Article 28B(f). Rape was first recognized as a conduct amounting to genocide in the *Prosecutor v. Akayesu*.

population."[648] The element that is progressive is the inclusion of the word "enterprise." It is therefore yet to be seen how the court will progressively interpret the provision when it finally becomes operational.

For the category of war crimes, the Protocol has made express reference to the grave breach of the First Additional Protocol to the Geneva Conventions of 8 June 1977 in relation to international armed conflicts. Also, under the definition of the crime of aggression "…any other act inconsistent with the provisions of the Constitutive Act…" has been inserted. Further, the Protocol has listed 22 acts amounting to war crimes when committed in an armed conflict not of international character.[649] The expanded list is a reflection of what has crippled the continent over the years. Most armed conflicts in Africa are internal armed conflicts and therefore falling outside the scope of long list of war crimes adopted after WWII which cater for armed conflicts of international character. It must be emphasized that, the adoption of similar articulation of the conduct amounting to the core international crimes is a solidification that such a position reflects rules established under the body of customary international law.

The mode of criminal responsibility has been maintained as the one recognized at international level[650] thus persons are individually liable for crimes committed under the Annex Statute.[651] However, the Annex Statute has included corporate criminal

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[648] *Ibid*., article 28C (2) (a) – (i).
[649] *Ibid*., article 28D (g).
[650] *Ibid*., article 28N.
[651] *Ibid*., article 46B.

liability i.e. legal persons as recognized by the body of corporate rules.[652] This is an expansion to the limits placed on international criminal justice which has over the years focused solely on individual criminal responsibility.[653] The Malabo Protocol has taken aboard the reality that corporations have in a number of times played part in the commission of international crimes and at all times they have never been held accountable for their actions.[654]

Hence, the Court when operational will create a whole new jurisprudence in international criminal justice. This is a big step in the world of human rights where it has been recognized that corporations have been the culprit of violating the inalienable rights of men. In realizing the limits placed on nature of sentences imposed on individuals i.e. penal sanctions, the Malabo Protocol has given the Court power to impose penalties such as pecuniary fines and forfeiture of "property, proceeds or any assets acquired unlawfully or by criminal conduct" upon conviction.[655] These kinds of sentences will be relevant and practical when dealing with corporate criminal liability. It would have been appropriate if other sentences

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652 *Ibid*., article 46C.

653 Clapham A., "Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Groups," *Journal of International Criminal Justice*, No.6, 2008, pp. 899 – 926. International criminal justice from the Nuremberg tribunal to the ICC has not concerned itself with the need of holding corporations accountable for playing part in the commission of international crimes.

654 Stigen J. and Fauchald O.K., "Corporate Responsibility before International Institutions," *The George Washington International Law Review*, 2009, Vol. 40, p. 1025 at 1033. Corporations normally do not directly commit international crimes. They have increasingly played a role in financing the commission of international crimes a form of aiding and abetting governments or paramilitary groups.

655 Annex Statute of the ACJHPRs, Article 43A (2) and (5).

such as "adverse publicity" were adopted so as to shame the corporation and act as a deterring tool.[656]

5.2.4.1.3 Referral of Situations to the Court and Complementarity under the Annex Statute

The Annex Statute has been closely modeled by the Rome Statute in respect to how situations are referred to the Court.[657] The state party to the Protocol, Peace and Security Council of the Union, the Assembly of Heads of States, or the prosecutor (*proprio motu*) can refer a situation to the Court.[658] This clause resembles the provisions of the Rome Statute except for the power given to the Assembly of States. While under the Rome Statute, the Assembly of states has not been given power to refer situations to the ICC, the Malabo Protocol has taken a different direction. As much as this is different, the assembly of states being a political organ may not be effective in referring situations as such.

The practice before the ICC has even revealed that no state has referred situations of other states before the ICC. It is therefore left to be seen if anything different will be demonstrated through practice once the Protocol comes into force i.e. whether the assembly will ever reach a decision to refer a situation of one member state to the

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656 Stigen J. and Fauchald O.K., "Corporate Responsibility before International Institutions," *op. cit*, p. 1043.

657 Rome Statute article 13(a)-(c) "The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14; (b) 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 United Nations; or (c) The Prosecutor has initiated an investigation in respect to such a crime in accordance with article 15.

658 Annex Statute of the ACJHPRs, article 46F (1)-(3).

court. Akin to the position under the Rome Statute, the Peace and Security Council an organ of the AU which has similar functions to those discharged by the UNSC has been given power to refer situations to the Court.[659]

The Annex Statute to the Malabo Protocol has further adopted the principle of complementarity contained in the Rome Statute.[660] This principle as explained in chapter three of the thesis entails that the established court is not a court of first resort but rather a court of last resort which works to complement courts with primary jurisdiction to prosecute international crimes. Complementarity is both a legal principle and a test for admissibility of cases. Therefore, the adoption of the principle by the AU is a further solidification that the duty to prosecute international crimes is primarily vested on the territorial state.[661] Consequently, the ACJHRs is not a court of first resort but rather, a court of last resort.[662] It is expected that states will fulfill their primary obligation of prosecuting international crimes before national courts.

While the Annex Statute models the Rome Statute, it is not a copy and paste. The Malabo Protocol has been innovative taking into account other factors which are pertinent to the realization of the principle of complementarity. The Protocol has made a conscious recognition of the possible existence of courts with international

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659 *Ibid*.

660 Rome Statute established the ICC as the court of last resort and complementary to national justice mechanism. This is seen on the admissibility rules contained under article 17 of the Statute.

661 The conferring of criminal jurisdiction of the ACHRJ does not do away with the primary responsibility of states to prosecute international crimes.

662 Annex Statute of the ACJHPRs, article 46H.

criminal jurisdiction under Regional Economic Communities (RECs).[663] This recognition therefore made the ACJHRs complementarity to such RECs courts.[664] This departure comprehends the fact that some sub regional integrations have also contemplated empowering their courts to prosecute core international crimes like the EACJ.

Notably, the rules of admissibility which enhance the principle of complementarity under the Protocol have remained similar to those contained under the Rome Statute. Therefore, the determining factor is the unwillingness or inability of a state to prosecute the alleged crimes.[665] While this is the position with national courts, no reference has been made to RECs courts to which the ACJHRs is complementary to. This could have been an oversight which will be remedied through interpretation to afford situations under which prosecutions before RECs courts may give way to the ACJHRs. Further, in all conditions for admissibility of case, reference is still being made to states with a notable omission of RECs courts which have been mentioned under the Protocol.[666] It is not right to conclude that these courts have been inferred under the provisions on states. Thus, provisions addressing such a relationship need to be provided for.

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663 *Ibid*., article 46H (1).

664 Abass A., 'Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges,' *European Journal of International Law* , Vol. 24 No. 3, 2013, 933–994. The construction made by Abass that the provision implies the court can accept a case where it has passed admissibility test for both national and regional economic communities is not what the provision provides. This complementarity regime with REC is only applicable in instances where the court is empowered to prosecute international crimes which thus far none of the REC courts have such power. The only REC contemplating empowering its court with criminal jurisdiction is the EACJ.

665 *Ibid*., article 46H (3).

666 *Ibid*., article 46H (2).

The gap under this provision is relationship between the court and the ICC taking into account that Africa has the highest number of member states ascribed to the Rome Statute. Will the two scramble for cases? Or will the ICC give way to a regional body which is closer to the heart of victims? It will take time to see what practice will evolve in this regard due to the lack of explicit provisions on this regard.

5.2.4.1.4 Immunities

Immunity of state officials' is a very alive issue when dealing with individual accountability for the commission of core international crimes. The question of state officials' immunity under international law is an old debate that has been resurrected by the AU member states of recently. When reference is made to state officials' immunity it attaches to two concepts i.e. functional immunity[667] and personal immunity[668] which have been born out of the rule of state immunity. It is a well settled position that state officials enjoy immunity from courts of foreign state for violations of international law.[669] When reference is made to state officials who enjoy immunity *ratione personae* under international law, it includes heads of states,

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667 Van ALebeek R., *The Immunity of States and their Officials in International Law and International Human Rights Law*, Oxford University Press, New York, United States, 2010, pp. 2-3. Functional immunity protects state officials from the jurisdiction of foreign courts for certain conduct performed by them on their official capacity in the discharge of state duties. These conduct cannot be taken to have been done on their personal capacity.

668 *Ibid*. This provides immunity to state official during their term in office and covers all conduct.

669 *Arrest Warrants Case (Democratic Republic of Congo v Belgium) Judgement* ICJ Reports 2002, p. 3. The Court concluded that there was no existence of customary international law rule that stripped away the immunity of state officials before foreign national courts. The principles laid down in the Nuremberg, Tokyo, ICTY, ICTR and ICC did not establish a new rule of customary international law.

heads of governments and other members of government like ministers of foreign affairs.[670]

The position of individual criminal responsibility for violation of international law has changed the outlook of immunity of state officials. As such, immunity of state officials before international tribunals has been watered down. The limit of state officials' immunity was first articulated in the international criminal trials before the Nuremberg and Tokyo tribunals.[671] The position continued to be supported by the international practice as evidenced in the subsequent documents addressing international crimes. These include: - ICTR Statute,[672] ICTY Statute[673] and Rome Statute.[674] Practice has proven that, no state official can plead functional immunity before international tribunal where such acts constitute one or more of the prohibited core international crimes.

On the historical account of the indictments and prosecutions of state officials before international tribunals issues of personal immunity of state official were never called to question. This was due to the fact that, mostly those prosecuted had ceased to hold office at the time trials commenced.[675] However, of recent, the practice that has furthered the provisions of the Rome Statute particularly article 27 (2) of indicting

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670 Van ALebeek R., *The Immunity of States and their Officials in International Law and International Human Rights Law*, *op. cit*, p. 187 and 188.

671 International Military Tribunal-Nuremberg Judgments 1946 at 217-221.

672 Article 7.

673 Article 6.

674 Article 25 and 27(1).

675 The indictment of Charles Taylor by the SCSL at a time he was still the president of Liberia is a departure from such practice. See *Prosecutor v Taylor, Decision on Immunity from Jurisdiction, Case No. SCSL 2003-01-11CL25.*

serving heads of states[676] has touched the heart of the matter.[677] It has made the issue of personal immunity to spike flames with the AU. The member states of the AU have continued placing reliance on personal immunity of state officials as a rule that must be adhered to in all prosecutions before international tribunals or courts because it is well settled for all prosecutions before domestic courts.[678] This reliance does not follow that there is a rule of customary international law in relation to immunity of state officials before international tribunals or the waiver of such immunity.[679]

In order to halt article 27 (2) of the Rome Statute, the member states of the AU adopted the following provision on immunity. The Annex Statute to the Malabo Protocol provides that,

> No charges shall be commenced or continued before the Court against any serving African Union Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.[680]

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676 The ICC indicted three serving heads of states Ghadafi, Al Bashir and Kenyatta. It has also indicted the deputy Vice president William Ruto another state official.

677 The indictment of serving heads of states like Al Bashir, Moamar Ghadaffi and Uhuru Kenyatta.

678 *R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte* [1999] 2 ALL ER 97 p. 176 and 181; Labuschagne J.M.T., "Immunity of the Head of State for Human Rights Violations in International Criminal Law," *South Africa Yearbook of International law*, 2001, No.26, p. 180. Malabo Protocol, Article 46A*bis* This article has embraced the traditional understanding of immunity *ratione personae* as expanded by special rapporteur Concepción Escobar Hernández International Law Commission Third report on the immunity of State officials from foreign criminal jurisdiction Sixty-sixth session Geneva, 5 May-6 June and 7 July-8 August 2014, p. 7/53. Where she states that this immunity is "afforded to political leaders who serve as central organs of the State in international relations (Head of State, Head of Government or Minister for Foreign Affairs) is justified because they are the highest-ranking representatives of the State or because they play a key role in the management of foreign policy. In this connection, when they leave office, they will only be protected by immunity *ratione materiae*, which would protect them against criminal action solely for public acts performed in the fulfillment of the highest functions of State." Despite this position, the Malabo Protocol has not expanded as to who are the state officials who enjoy this kind of immunity. It is yet to be seen how the Court once operational, it will interpret this provision. The question is whether it will adhere to this understanding or it will expand to cover officials as covered under immunity *ratione materiae.*

679 Tladi D., "The Immunity Provision in the AU Amendment Protocol Separating the (Doctrinal) Wheat from the (Normative) Chaff," *Journal of International Criminal Justice*, 2015, No. 13, pp. 3-17 at 6-8.

680 Malabo Protocol, article 46A.

The above quoted provision is a clear expression of personal immunity i.e. *ratione personae*.[681] The decision to have such a provision is mainly centered on the desire by the AU to safeguard the sovereignty of African states.[682] Therefore, any crime committed can be prosecuted after such people have served their term. The above provision under the Malabo Protocol is however bringing conflicting obligations for Rome Statute member states who agreed to waive immunity under article 27(2). This could have far reaching consequences in the realm of fulfilling treaty obligations by African member states.

Nonetheless, when analyzing the immunity provision under the Malabo Protocol it is correct to conclude that, the provision has limited the ability to prosecute heads of states and other officials for a certain period only.[683] The immunity is granted to state officials until such people cease to hold office. It therefore means that, international crimes can be prosecuted when such people have retired, been expelled or overthrown from government. This is the trend that took shape in relation to the prosecutions in Ethiopia and Hissene Habre in Senegal. What remains unanswered is the possibility of putting to test 'justice delayed is justice denied' in clear cases where some heads of states and other state officials tend to overstay in power. Will they ever face justice under this provision? It will be right to read the Malabo Protocol as a whole to include the crime of unconstitutional change of government

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681 *Ibid*.

682 Odumbana N.J., "Can these Dry Bones Live? In Search of a Lasting Therapy for AU and ICC Toxic Relationship," *African Journal of International Criminal Justice,* 2014, p. 69. The tension between the AU and the ICC as fuel by the UNSC role in the ICC prompted the regionalization of international criminal law by adopting provisions that reflect the interests of the continent's political elites.

683 Malabo Protocol, article 46A.

which covers scenarios where people refuse to relinquish offices or amend constitution in order to stay in power.[684] If the provisions are implemented in a holistic manner we can rightly say that justice will be given to victims.

Furthermore, the phrase "during their tenure of office" can be interpreted to limit the tenure of office as we know it. The applicability of the provision can be for the period in which the person is in the present position and not to be eligible for re-election or re-appointment for another term if the official is alleged to have committed offences stipulated under the Annex Statute to the Malabo Protocol. Further, other instruments under the AU can be invoked to make sure that those who want to overstay in power do not have the opportunity to in already existing provisions that prohibit the change of constitutions to stay in power and the consequences thereof.[685]

It is therefore commendable that the Annex Statute has tried to take aboard the realities in African continent and given a more realistic approach to international criminal justice. The provision does not therefore breach any rule of customary international law or reflect an existing rule of customary international law.[686] It has been enacted to cover a grey area of international criminal justice which has not

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[684] Annex Statute of the ACJHPRs, article 28E (d) and (e).

[685] African Charter on Democracy, Election and Governance article 25 (4) provides that, 'the perpetrators of unconstitutional change of government shall not be allowed to participate in elections held to restore the democratic order or hold any position of responsibility in political institutions of their State.'

[686] Tladi D., "The Immunity Provision in the AU Amendment Protocol Separating the (Doctrinal) Wheat from the (Normative) Chaff," *op. cit*.

crystallized to norms of customary international law. Issues of sentences,[687] compensation and reparation of victims[688] and rights of the accused[689] have also been maintained. While most critics have jumped to only one provision, the Protocol appears to be a good tool for ending impunity in the continent. It is however notable that, even though African countries cheered the adoption of the Protocol, signatures and ratifications have not been quick to come compared to the process leading to the adoption of the Rome Statute.

From the data retrieved on 9th March 2016, the Protocol has received 8 signatures adding to the number of states that had signed as of 23 February 2015 which were only three countries.[690] It is still a good pace that in a span of less than one year the Protocol has received additional five signatures. Although there is no ratification as of yet, states sometime take time to ratify instruments. It is therefore too soon to jump into a negative conclusion following the picture that is present in the international arena where some instruments took long time before they entered into force.[691]

687 Annex Statute of the ACJHPRs, article 46F.
688 *Ibid*., article 45.
689 *Ibid*., article 46A.
690 See information available at http://www.au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights [Accessed 9 March 2016]. The countries that have signed the Protocol include; Benin, Guinea Bissau, Congo, Ghana, Mauritania, Sierra Leone, Kenya, Sao Tome and Principe.
691 Example, the OAU Convention on Prevention and Combating of Terrorism was adopted in 1999 but came into force in 2014.

5.2.5 Extraordinary African Chambers

The Extraordinary African Chambers (hereinafter referred to as EAC) were created by an agreement between the AU and the government of Senegal.[692] The chambers are mandated to prosecute persons who bear the greatest responsibility in the commission of crimes and serious violations of international law, customary international law and international conventions ratified by Chad.[693] The EAC is limited to prosecute genocide, war crimes, crimes against humanity and the crime of torture committed in the territory of Chad from 7 June 1982 to 1 December 1990.[694] The EAC jurisdiction is based on universal jurisdiction and the applicable law is the EAC Statute, international criminal law, the Senegalese Criminal Code, Code of Criminal Procedure and relevant Senegalese laws.[695] Typical of prosecutions based on universal jurisdiction reliance is placed on domestic law than international law. The Chambers started working by arresting Hissene Habre in 2013 and provided a conviction on 30th May 2016.[696]

Hissene Habre is the former Chadian president who was accused for committing mass killing and torture during his reign from 1982 to 1990 when he was

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692 Agreement between the Government of the Republic of Senegal and the African Union on the Establishment of Extraordinary African Chambers in the Senegalese Courts), Available at http://legal.au.int/en/sites/default/files/Agreement%20AU-Senegal%20establishing%20AEC-english_0.pdf. [Accessed 16 October 2014].

693 Statute of the Extraordinary African Chambers within the Senegalese judicial system for the prosecution of international crimes committed on the territory of the Republic of Chad during the period from 7June 1982 to 1 December 1990 Available at http://legal.au.int/en/sites/default/files/Agreement%20AU-Senegal%20establishing%20AEC-english_0.pdf. [Accessed 16 October 2014] article 3.

694 *Ibid*., article 4, 6, 7 and 8.

695 Agreement between the Government of the Republic of Senegal and the African Union, article 1(4).

696 Hiseene Habre has been convicted of crimes against humanity including rape, sexual slavery and ordering killings during his rule from 1982 to 1990 and sentenced to life imprisonment.

overthrown.[697] The efforts to bring Habre to trial started in 2000 when the victims filed charges against Habre in Senegal.[698] However, due to political maneuvers[699] and the lack of legislative framework for the prosecution of international crimes in Senegal, Habre was not put to trial.[700] This triggered the victims to seek for justice elsewhere in Belgian courts where universal jurisdiction law was expansive. Even with that move, the government of Senegal still had control over Habre as the only way he could appear before Belgian courts was through extradition which Senegal refused.[701] Senegal sought the opinion of the AU as to whether to prosecute Habre or otherwise. The AU 2006 decision was to the affirmative.[702]

In order to effect the prosecution of Habre, the Senegalese domestic penal and criminal procedure laws had to be rehabilitated.[703] This is another apparent evidence of the lack of domestic substantive body of rules in effecting prosecution of core international crimes in Africa. Despite these positive efforts, Senegal was still not effecting the prosecution. It was difficult to commence prosecutions following the decision of the ECOWAS court on inability of Senegal to prosecute because the

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697 Information available at http://www.hrw.org/habre-case [Accessed 16 October 2014].

698 Information available at http://thinkafricapress.com/chad/trial-hissene-habre-turning-point-justice-africa [Accessed 16 October 2014].

699 Brody R., "The Prosecution of Hissène Habré - An "African Pinochet," *New England Law Review*, 2001, 321, 327-330.

700 Chambre d'accusation de la Cour d'appel de Dakar (Criminal Chamber of the Dakar Appeals Court), Senegal, Ministere Public et Francois Diouf Contre Hisse'ne Habre (arre"t n8 135), 4 July 2000, available at http://www.hrw.org/legacy/french/themes/Habre¤ -decision.html 30 September 2013).

701 Information available at http://www.refworld.org/cgibin/texis/vtx/rwmain?page=category&category=COI&publisher=&type=&coi=SEN&docid=502236852&skip=0 [Accessed 16 October 2014].

702 Decision on the Hisse'ne Habre¤ Case and the African Union, AU Doc. Assembly/AU/Dec.127 (VII), July 2006,

703 Niang M., "The Senegalese Legal Framework for the Prosecution of International Crimes," *Journal of International Criminal Justice*, 2009, No. 7, 1056-1058.

enabling laws would apply retrospectively.[704] However, such would not be the case if prosecutions were conducted in an international or internationalized tribunal.[705] The failure of Senegal to act prompted Belgium to institute a case before the ICJ which ruled that Senegal had to prosecute or extradite Habre without further delay.[706] When all these were unfolding, the AU and the government of Senegal were working towards enabling Senegal to discharge its obligation as stipulated under the CAT. The end result was the creation of the Extraordinary African Chambers.[707]

This is the first time the AU has positively put into work its desire to end impunity to international crimes. It is the first trial by Africa against an African leader and the first time universality principle is put to operation by an African country. This clearly shows that Africa is leaning towards ensuring impunity does not prevail in the continent no matter how long it takes. While Williams calls the EAC "a political compromise and a solution to a particular impunity problem, rather than a carefully

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704 *Hisse'ne Habre v Republique du Senegal, (ECW/CCJ/JUD/06/10), La Cour de Justice de la Communaute Economique des Etats de l'Afrique de l'Ouest, judgment of 18 November 2010.*

705 It has been noted that, international criminal justice dispensed at international tribunals or internationalized courts never pose a threat to restrospectivity of enabling statutes. Such has been the case from the first international trials conducted at the Nuremberg and Tokyo tribunals. It followed the same trend with all subsequent tribunals and special courts where laws criminalizing international crimes were adopted *post facto.* The customary nature of international crimes has given the practice a kick that is normally not available for other conduct falling short of the elevated character. Therefore, it was envisioned that a similar move should put Senegal in the safe net under international law. The main thing that needs to be established is the customary nature of the crimes incorporated under Senegalese laws or indeed that such laws have arisen from the prior treaty obligations to which Senegal adhered to. Then questions of retrospectivity can easily be dealt with.

706 *Belgium v Senegal* Questions Relating to the Obligation to Prosecute or Extradite Judgment, I.C.J. Reports 2012, p. 422

707 Agreement between the Government of the Republic of Senegal and the African Union on the Establishment of Extraordinary African Chambers in the Senegalese Courts), Available at http://legal.au.int/en/sites/default/files/Agreement%20AU-Senegal%20establishing%20AEC-english_0.pdf. [Accessed 16 October 2014].

constructed model for transitional justice"[708] it is here submitted otherwise. This is Africa acting in its own way different from what most have been accustomed to. Whether aimed at blocking European countries or not, the bottom line is the prosecution and conviction have taken place thereby halting impunity which is what everyone is striving to achieve. A different route may have been taken but Africa is heading the same direction that other countries around the globe are or already have; ending impunity to international crimes.

5.3 Sub-Regional Commitment to End Impunity to International Crimes

The African regional integrations have been divided between the regional (AU) and sub-regional integrations. The sub-regional economic integrations are specific to certain states based on their geographical location. Therefore, there are different sub regional organizations for the Eastern (East African Community- EAC),[709] Western (Economic Community for Western African States- ECOWAS)[710] and southern (Southern African Development Community - SADC) part of Africa.[711] This part of the thesis assesses the commitment of two sub regional organisations the EAC and SADC to fight impunity to international crimes at their level.

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[708] Williams S., "The Extraordinary African Chambers in the Senegalese Courts An African Solution to an African Problem?," *journal of International Criminal Justice,* 2013, No. 11, pp. 1139 -1160 at 1159.

[709] Information available at http://www.eac.int/index.php?option=com_content&view=article&id=44&Itemid=54 [Accessed 16 October 2014].

[710] Information available at http://www.ecowas.int/ [Accessed 29 October 2014].

[711] Information available at http://www.sadc.int/about-sadc [Accessed 29 October 2014].

5.3.1 East African Community (EAC)

The EAC is integration between six countries. These are South Sudan, Burundi, Kenya, Rwanda, the United Republic of Tanzania, and the Republic of Uganda. Kenya, Uganda and Tanzania have a good history of collaboration in a number of things leading to the formation of the EAC.[712] The first union was in 1917 on custom matters between Kenya and Uganda, in 1927 Tanganyika joined.[713] This was followed by the East African High Commission created in 1948 and was dissolved in 1961.[714] The desire to work together and achieve the commonly shared interests did not end there. In 1961 the East African Common Services Organisation was established and lasted up to 1967[715] followed by the East African Community the predecessor of the current EAC. It was operational between 1967 and 1977.[716] Its dissolution did not kill the spirit of cooperation. The EAC was resurrected in 1999 by signing of the Treaty for the Establishment of the East African Community.[717]

The EAC is an economic integration and therefore its objectives are centered towards attaining economic and political excellence. However, the Community has as its core purpose the need to enhance peace and security in the region[718] and further the

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712 Information available at http://www.eac.int/index.php?option=com_content&view=article&id=44&Itemid=54 [Accessed 16 October 2014].

713 *Ibid*.

714 *Ibid*.

715 *Ibid*.

716 Umbricht V., Multilateral Mediation: Practical Experiences and Lessons, The Netherlands, Martinus Nitjhof Publishers, 1989.

717 Available at http://www.eac.int/treaty/news/index.php?option=com_docman&Itemid=78 [Accessed 16 October 2014]. The treaty entered into force on 7th July 2000, when it was ratified by Kenya, Uganda and Tanzania.

718 *Ibid*., article 5 (f).

protection of human rights.[719] In order to enhance the protection of human rights, the EAC has used different strategies to achieve that end including the passing of a human rights bill.[720] This is crucial taking into account the fact that the member states with the exception of Tanzania have been plagued with mass violence and brutal violation of human rights.

Since its formation, the EAC has been silent on issues of international criminal justice but has been leaning towards extending the jurisdiction[721] of the East African Court of Justice (EACJ).[722] The EACJ is the judicial organ of the Union whose jurisdiction is limited to the interpretation of the treaty and related issues.[723] It has no jurisdiction over human rights issues.[724] However, there has been a drafted Protocol to extend jurisdiction which is yet to be operational. There have also been desires to have a sub-regional court with criminal jurisdiction pursuant to article 27 (2) of the EAC Treaty.[725] The wish for a criminal jurisdiction of the court started in 2004 and reached apex in April 2012 when the East African Legislative Assembly (EALA) adopted a resolution solidifying the desire.

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719 *Ibid*., article 6.
720 EAC Bill of Rights.
721 The desire to extend the criminal jurisdiction of the court started in 2004. See i2004, 2005, 2011 EALA hansard available at http://www.eala.org/component/docman/cat_view/45-key-documents/34-hansard.html [Accessed 22 October 2014].
722 EAC Treaty, article 23 of the Treaty establishes the EACJ.
723 EAC Treaty.
724 *Katabazi and 21 others V Secretary General of the East African Community and another* 20 November 2007, EACJ First Instance Division, Ref. No. 1 of 2007; *Attorney General of Kenya V Independent Medical Legal Unit* 15 March 2012, EACJ Appellate Division, Appeal No. 1 of 2011.
725 *Ibid*. see also, EAC Council of Ministers, 25th Extraordinary Meeting.

In spite of the crippling effect of the tight jurisdiction of the EACJ, the EAC has been upfront in responding to the accountability of international crimes committed in Kenya. The EALA passed a resolution to refer Kenyan cases that are before the ICC to the EACJ.[726] This decision was a premature move taking into account the absence of a Protocol that gives the EACJ jurisdiction to entertain international crimes cases. It is worthy to note that, the EAC later joined the AU in pushing for a deferral of the cases before the ICC.[727] Accordingly, there has not been anything concrete in the area of international criminal justice thus far.

However, there is a future prospect in ending impunity to international crimes at the EAC level. To start with, the express recognition of primacy of sub regional courts' jurisdiction on international crimes to that of the ACJHR is a milestone in avoiding competition in rendering justice to the victims of international crimes in Africa. Therefore, African victims will have four avenues (national courts, EACJ, ACJHRs and the ICC) available that deal with the prosecution of international crimes on the basis of complementarity principle. While there is clarity on the complementarity between national courts, EACJ and ACJHRs, there is no such clear revelation when it comes to the ICC.[728] This is something that has to be addressed as these courts become operational. Proper referral procedure should be able to bring a balance to

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[726] East Africa Legislative Assembly 4th Meeting of the 5th Session held in Nairobi, Kenya on the 26 April, 2012. Information available at http://eala.org/key-documents/doc_details/430-motion-icc-to-defer-criminal-cases-against-the-president-a-deputy-president-of-kenya.html [Accessed 22 October 2014].

[727] East African Legislative Assembly, Bujumbura, Burundi; October 24, 2013, Available at http://www.eac.int/index.php?option=com_content&view=article&id=1385:defer-the-kenyan-icc-cases-eala-states&catid=146:press-releases&Itemid=194 [Accessed 22 October 2014].

[728] The ICC is the first court to introduce the principle of complementarity. At a time when the court was being established, states did not see that at a point in time the desire that African leaders have had to have a regional court with criminal jurisdiction will come into fruition. As such, no complementarity regime was established between the ICC and regional or sub regional courts.

the competing forums available to the victims of international crimes.

Furthermore, the fact that East African region has played a host to the ICTR is of added advantage in enabling the Community to effectively play part in the prosecution of international crimes. Also, Rwanda which has already prosecuted international crimes at domestic level and Uganda which is currently in the process of prosecuting international crimes at domestic level shall provide a pool of knowledge on the prosecution of international crimes in the region.[729] Therefore, it is not expected for the Community to lack trained personnel fit for the prosecution of international crimes under the EACJ. Additionally, EAC member states form part of the International Conference on the Great Lakes Region (ICGLR). This is the only inter-governmental organization in the African continent that has come up with the most comprehensive document addressing international crimes.

5.3.2 International Conference on the Great Lakes Region (ICGLR)

The International Conference on the Great Lakes Region (ICGLR) is an inter-governmental organization.[730] Just like other sub regional organizations, the ICGLR is geographically limited to countries around the great lakes region[731] where there is intertwining of problems experienced among member states. However, unlike the other sub regional groups which are mainly geared towards economic emancipation, the ICGLR was created in order to foster the promotion and attainment of peace and

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729 A thorough analysis of domestic prosecution of international crimes in Rwanda has been provided for under Chapter 6 of the thesis.

730 See information available at http://www.icglr.org/index.php/en/background [Accessed 24 October, 2014].

731 See information available at http://www.state.gov/s/greatlakes_drc/191417.htm [Accessed 24 October, 2014].

security in an area that has been prone to civil wars and internal unrests.[732] It has been thought fit to deal with these problems at a sub-regional level rather than leaving the peace building process to individual countries.

Therefore, the process to its creation emanated from the United Nations efforts to attain peace in the region, particularly the DRC.[733] The desire expressed under these resolutions for an ICGLR bore fruits when the Secretariat of the International Conference was established under the auspices of the UN and AU in Nairobi, Kenya and its headquarters are in Bujumbura, Burundi.[734] The ICGLR is comprised of the following countries; Angola, Burundi, Central African Republic, Republic of Congo, Democratic Republic of Congo, Kenya, Uganda, Rwanda, Republic of South Sudan, Sudan, Tanzania and Zambia.[735]

In order to attain peace and security in the region, the ICGLR has also made efforts to address international crimes committed in the region through the passing of key documents on core international crimes i.e. the Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination (hereafter referred to as the Great Lakes Protocol).

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732 See information available at http://www.icglr.org/index.php/en/background [Accessed 24 October, 2014].

733 Security Council resolution 1291 (2000) on the situation concerning the Democratic Republic of the Congo, U.N. Doc. S/RES/1291 (2000); Security Council resolution 1304 (2000) on the situation concerning the Democratic Republic of the Congo, U.N. Doc. S/RES/1304 (2000) para 18. "Reaffirms the importance of holding, at the appropriate time, an international conference on peace, security, democracy and development in the Great Lakes region under the auspices of the United Nations and of the OAU, with the participation of all the Governments of the region and all others concerned."

734 See information available at http://www.icglr.org/index.php/en/background [Accessed 24 October, 2014].

735 *Ibid*.

The passing of the Great Lakes Protocol is a step towards the realization of the promotion of peace and security in the Great Lakes Region (GLR).[736] While concerned with the ongoing violations of human rights in the region amounting to the commission of international crimes, the member states under the Protocol have also expressed their concerns on the ongoing impunity to such crimes.[737]

The member states have vowed to ensure that the perpetrators of international crimes in the region are prosecuted. This express determination is made at the preamble of the Protocol.[738] The Great Lakes Protocol as suggested in key document addressing international crimes has put much emphasis on the crime of genocide. Chapter two of the Protocol is dedicated to bring about an end to discriminatory ideologies and policies which are linked to the *dolus specialis* element of the crime of genocide.[739] This emphasis is a conscious decision taking into account the history for the formation of the ICGLR which was motivated by among other things the genocide committed in Rwanda. Despite this focused approach, the Protocol has laboured in other provisions to address core international crimes in their holistic manner.

The Protocol has not provided an express definition of any core international crime. It has linked the crimes to the existing international instruments that address them. The crime of genocide has been recognized as defined under article 2 and 3 of the

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736 Dar-Es-Salaam Declaration On Peace, Security, Democracy And Development In The Great Lakes Region, International Conference on Peace, Security, Democracy and Development in the Great Lakes Region First Summit of Heads of State and Government, Dar-Es-Salaam, 19-20 November 2004.

737 Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination 2006, Preamble para 2.

738 *Ibid*., preamble para 11 and article 8 (1).

739 *Ibid*., article 2-7.

Genocide Convention and article 6 of the Rome Statute.[740] War crimes and crimes against humanity on the other hand, have been provided as stipulated under article 7 and 8 of the Rome Statute.[741] Therefore, there is no alteration of what core international crimes the member states are seeking to address but rather the same that they have agreed to under the Rome Statute with the exception of the crime of aggression which was incorporated in the Rome Statute after the Protocol was adopted.

In order to end impunity to international crimes in the region, the member states have recognized the importance of domestic courts in prosecuting international crimes. Therefore, impunity to international crimes in the region will be effectively dealt with if article 9 of the Great Lakes Protocol is kept in motion by partner states. The article requires member states to have legislation that give effect to the provisions of the Protocol in their respective countries. The legislation must provide effective penalties for core international crimes addressed by the Great Lakes Protocol.[742] Kenya, Uganda, Rwanda and DRC have comprehensive legislative framework addressing international crimes. These laws were however not enacted in furtherance to the commitment made under the Protocol.

Once legislative framework is in place, the perpetrators of international crimes must then be brought before national courts or international justice organs.[743] Noting on the wording of the Protocol, there is no primacy between the two available venues

740 *Ibid*., article 1 (a) and 8 (2).
741 *Ibid*., article 1 (h) and (i); article 8 (3).
742 *Ibid*., article 9 (1).
743 *Ibid*., article 9 (2).

for prosecuting international crimes. This is because of the use of the word "or". The Great Lakes Protocol has limited the jurisdiction of member states in relation to international crimes recognized by the Protocol. The exercise of jurisdiction can be claimed under three international jurisdictional headings namely; nationality, territorial or passive personality.[744] To ensure prosecution of perpetrators of international crimes, member states are called upon to cooperate[745] on issues such as extradition,[746] joint commission of inquiry,[747] exchange of information relevant in the prosecution of crimes under the Great Lakes Protocol[748] and the obligation to cooperate with the ICC in accordance with the provisions of the Rome Statute.[749]

These are envisioned to enable member states to work together and help each other to ensure impunity is halted. Since the prosecutions are envisioned to be conducted in national courts, the joint effort in the identified areas shall go a long way in enabling individual states to be at ease in prosecuting international crimes.

As stated above, the obligation placed by the Great Lakes Protocol on member states is to arrest and bring before competent courts the perpetrators of genocide, war crimes and crimes against humanity either domestic or international.[750] There is

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744 *Ibid*., article 10 (a) to (c).
745 *Ibid*., article 13.
746 *Ibid*., article 14 and 15.
747 *Ibid*., article 16.
748 *Ibid*., article 20. Information referred to is on the "perpetrators, co-perpetrators and accomplices involved in the commission of the crime of genocide, war crimes, and crimes against humanity; b) Any items of evidence connected to the crimes mentioned above, whether committed or attempted; c) The elements needed to establish the evidence for these crimes; d) Arrests and police investigations carried out by the competent authorities against the nationals of other Member States and persons residing in their territories."
749 *Ibid*., article 21, 22 and 23.
750 *Ibid*., article 9 (3).

therefore no multiplicity of avenue to prosecute international crimes by purporting to establish a new court. In case of inability to prosecute before domestic courts, international justice organs act as a fall back plan. With this regard therefore, the ICC[751] and ACJHRs[752] (when operational) are possible venues provided states are parties to the instruments establishing the courts.

Consequently, instead of a judicial organ, the Protocol established a Committee for the prevention and the punishment of the crime of genocide, war crimes, and crimes against humanity and all form of discrimination was established pursuant to article 26 of the Great Lakes Protocol.[753] The Committee was established with the following purposes:

> (a) Regularly reviewing situations in each Member State for the purpose of preventing genocide, war crimes, crimes against humanity, and discrimination;
> (b) Collecting and analysing information related to genocide, war crimes, crimes against humanity, and discrimination;
> (c) Alerting the Summit of the Conference in good time in order to take urgent measures to prevent potential crimes;
> (d) Suggesting specific measures to effectively fight impunity for these crimes;
> (e) Contributing to raising awareness and education on peace and reconciliation through regional and national programmes;
> (f) Recommending policies and measures to guarantee the rights of victims of the crime of genocide, war crimes, and crimes against humanity to truth, justice and compensation, as well as their rehabilitation, taking into account gender specific issues and ensuring that gender-sensitive measures are implemented;
> (g) Monitoring amongst the Member States, where applicable, national programmes on Disarmament, Demobilization, Rehabilitation, Repatriation and Reinstallation (DDRRR) for former child soldiers, ex-combatants and combatants.[754]

The established Committee is therefore not a quasi-judicial organ but rather an organ which serves as a watch dog in providing advice as to how best the member states

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751 Referral of situation shall be dome in accordance with the procedure provided for under the Rome Statute. Opening of cases shall also be subject to rules of admissibility contained therein.

752 The referral procedure is provided for under the Malabo Protocol Annex Statute.

753 Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination 2006, article 9 (3).

754 *Ibid*., article 38.

can end impunity to international crimes in the region and prevent their future commission.[755] This is one way which will enable member states to know how to overcome hurdles faced as they strive to ensure perpetrators of international crimes are prosecuted in their own countries. The Protocol has further adopted a similar spirit to that of the Rome Statute. It expressly stipulates that the official capacity of the person shall not act as a shelter to his/her to criminal liability.[756] Therefore, when looking on the face of things one arrives at a conclusion that this brings about competing obligation with the recent Malabo Protocol under the AU which gives immunity to state officials during their term of service.[757]

The Great Lakes Protocol states that "Head of State or Government, or an official member of a Government or Parliament, or an elected representative or agent of a State" shall be prosecuted equally as any other person or official.[758] Hence, will the member states surrender these persons to a competent court international or domestic or will they wait until their term of service has expired in accordance with the provisions of the latter Protocol? The Protocol as such binds member states alone thus, the behaviour of some states towards the Al Bashir arrest is not contrary to their obligation as Sudan is not a party to the Protocol.

5.3.3 Southern African Development Community (SADC)

The Southern African Development Community (SADC) was preceded by the Southern African Development Co-ordination Conference (SADCC) which was

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755 *Ibid*.
756 *Ibid*., article 12.
757 Malabo Protocol article 46H.
758 Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination, article 12.

formed in 1980 with the aim of promoting economic development among member states and reduces economic dependence on apartheid South Africa.[759] The founding members included the United Republic of Tanzania, Lesotho, Malawi, Zambia, Angola, South Africa, Botswana, Mozambique, Zimbabwe and Swaziland. Unfortunately, the organization failed to attain its goals and thus a decade down the line the member states had to think of transforming it.[760] In 1992, SADCC was dissolved and a new organization the SADC was formed by signing the SADC Treaty.[761] The new SADC broadened the principles of which it adhered to include issues of peace and security in the region, human rights, democracy and rule of law.[762] However it must be noted, the SADC is purely geared towards economic development and as such, issues of human rights have not found their way to the core objectives set in the Treaty. The Organisation has five key organs including the Summit of Heads of State or Government,[763] The Council of Ministers,[764] Commissions,[765] The Standing Committee of Officials,[766] The Secretariat[767] and the Tribunal.[768] Currently, the Organisation has 15 members and addition of 5 member states when compared to the 10 founding members of the former SADCC.

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759 Information available at http://www.sadc.int/about-sadc [Accessed 29 October 2014].

760 Nathan L., *Community of Insecurity: SADC Struggle for Peace and Security in Southern Africa*, Ashgate Publishing Limited, Farnham, England, 2012, pp. 20-25.

761 *Ibid*., article 2.

762 SADC Treaty, article 4.

763 *Ibid*., article 9 (1) (a).

764 *Ibid*., article 9 (1) (b).

765 *Ibid*., article 9 (1) (c).

766 *Ibid*,. article 9 (1) (d).

767 *Ibid*., article 9 (1) (e).

768 *Ibid*., article 9 (1) (f). The tribunal became operational in 2006 with mandate of ensuring member states acts in accordance with the obligations stipulated under the SADC Treaty.

The SADC has been proactive in the area of international criminal justice. Between 1995 and 1999 SADC member states were in the fore front cooperating with international tribunals to ensure the end of impunity to international crimes. Example, The United Republic of Tanzania played a host to the ICTR, Namibia, South Africa and Rwanda fully cooperated with the ICTR to bring to justice genocide suspects who were present in their territories.[769]

Further, SADC played a key role during the negotiations of the Rome Statute especially for the establishment of the ICC. In 1997, SADC regional Conference on the establishment of the International Criminal Court adopted ten principles of consensus which set the grounds of member states' negotiations.[770] The principles among other things affirmed the need to have an independent court with mandate to prosecute core international crimes.[771] Further, the principles were loud enough to put in writing the concerns of member states about the role of the SC in the ICC and the possibility of prejudice due to political considerations.[772] This is what is happening in recent years and is exactly what African states are now voicing their concerns on. Hence, the prejudice of the SC was something that was seen coming even prior to the adoption of the Rome Statute. It is however noteworthy that, the

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769 Andre Rwamakuba was surrendered by Namibia, George Rutaganda , Jean Paul Akayesu and Clement Kayishema were surrendered by Zambia and Ignance Bagilishema was surrendered by South Africa .

770 Pretoria Statement of common understanding on the International Criminal Court, adopted by the delegates from the SADC States at the Conference on the International Criminal Court held in Pretoria, 5-9 July 1999.

771 *Ibid*.

772 *Ibid*., para 8.

principles found their way in the Rome Statute something which is remarkable in its own right.[773]

Two years after the adoption of the Rome Statute in 1998, SADC's Legal Sector adopted a plan of action channeled to the member states.[774] The plan of action among other things was to advocate for the implementation of the Rome Statute and the definition of the crime of aggression.[775] Unlike what could have been anticipated following the positive role played by SADC in the negotiations of the Rome Statute, the region does not have an independent document addressing impunity to international crimes. What is available is the SADC Mutual Defence Pact which addresses issues of use of force as governed by international law. SADC tribunal,[776] although mandated to ensure compliance by member states with the founding treaty which embraces promotion and protection of human rights[777] does not deal with the prosecution of international crimes and there is no future prospect on that. This is however not a negative thing. To the contrary, the omission avoids multiplicity of instruments covering basically same issues. It also gives member states room to implement their international and regional obligations on prevention of the commission of international crimes and punishment of perpetrators in the event

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773 Maqungo R., "The establishment of the International Criminal Court: SADC 's participation in the negotiations," *African Security Review,* Vol 9, No 1, 2000. Principle of complementarity, independence of the court, jurisdiction of the Court on core international crimes and states cooperation with the ICC.

774 Windhoek Plan of Action on ICC Ratification and Implementation in SADC, adopted at the Conference on International Criminal Court (ICC) Ratification and Implementation for the Southern African Development Community (SADC) Region.

775 *Ibid*., para 4.

776 SADC Treaty, article 16.

777 *Ibid*., article 4.

international crimes are committed. It is however important to note that, the SADC tribunal has been suspended and is yet to resume operation.

Noteworthy, most of the efforts at sub regional level with the exception of the EAC (which is envisioning carrying prosecution of international crimes at the EACJ) are geared towards the enabling of national courts to prosecute international crimes. As such, they strive to make sure that member states fulfill their obligation in different international treaties and thus playing the key and primary role of prosecuting international crimes domestically. But the question is how far did states provided for a good legislative framework for the prosecution of international crimes?

5.4 Legislation Addressing Core International Crimes in Selected African States

The above instruments and those articulated in chapter three impose directly or by inference a duty on member states to prosecute international crimes. Although most instruments do not make express requirement on states to incorporate the provisions of the conventions with the exception of the Genocide Convention,[778] the duty to prosecute international crimes is ideally discharged by first transmitting the international obligations into domestic legal system depending on whether the country is a monist or dualist state.[779] The absence of necessary legislative

[778] The Rome Statute does not require states to incorporate its provisions however, the trend has shown that having implementing legislation is the best practice.

[779] A monist state treats international law as part of domestic legal system and its application is direct while a dualist state treats international law and municipal law as two separate systems. Therefore, for international law to apply at domestic level, it must be incorporated into the domestic legal system by an Act of parliament.

framework makes it difficult and impractical to conduct prosecution of international crimes in domestic courts.[780]

Thus, the applicability of international instruments still depends on whether a country falls under a dualist or monist approach. The constitution of a country normally stipulates how international law has effect before domestic courts. Traditionally, common law countries have been grouped in the dualist approach on applicability of international law before domestic courts. In essence, domestication of international instruments is paramount in making international law applicable in domestic courts i.e. the parliament has to pass laws giving effect to international law.[781] There has however been a shift where a common law country like Kenya has adopted an otherwise approach i.e. the monist approach.[782] This approach is mainly adhered to by civil law countries. There is automatic application of international instruments upon ratification.[783] The only further step monist states take is to publish the international agreements in a Government gazette.[784]

While it is recognized that ordinary criminal law can be used to prosecute international crimes, such move usually does not carry the moral guilty attached to

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780 *The Prosecutor v. Michel Bagaragaza*, "Decision on the Prosecution Motion for Referral to the Kingdom of Norway," 19 May 2006. The transfer of Bagaragaza case to Norway was rejected because of the absence of legislative framework that addresses international crimes as is expected under the rules of the ICTR.

781 Mapunda B.T., "Treaty Making and Incorporation in Tanzania," *op. cit,* p. 161.

782 The Constitution of Kenya R.E 2010 article 2 (5) and 2 (6).

783 Dixon M., *International Law*, 7th edn.Oxford University Press, Oxford 2013 at 98.

784 See the constitution of Rwanda of 2003 Revised in 2015 Official Gazette n° Special of 24/12/2015, article 168. "Upon publication in the Official Gazette, international treaties and agreements which have been duly ratified or approved have the force of law as national legislation in accordance with the hierarchy of laws provided for under the first paragraph of Article 95 of this Constitution."

international crimes.[785] Further, crimes under domestic laws do not completely reflect the definition of international crimes as spelt out in different treaties.[786] These limitations therefore solidify the importance of having domestic legislation that addresses international crimes. Therefore, nation states have choices on how they wish to transmit the conventions that give effect to international criminal law.[787] Some States may wish to have a separate law for each convention or employ specific provisions to certain laws to give the international conventions teeth under municipal level. The following Table shows the existence of domestic legislation addressing core international crimes from selected African states.

Table 1: Domestic Legislation Addressing Core International Crimes from Selected African States

Country	Brief	Legislation addressing international crimes and their prosecution
Zimbabwe	Has adopted laws to address war crimes and the crime of genocide. There is no specific law providing for the crimes against humanity. Zimbabwe has signed the Rome Statute but has not ratified it.	I. Genocide Act 2000 II. Geneva Conventions Act 1981 III. Extradition Act 1982
Tanzania	Has adopted law addressing war crimes. There is no specific legislation to address crimes against humanity or genocide despite the fact that the country is a party to the Genocide Convention and the Rome Statute	I. Geneva Conventions Act (Colonial Territories) Order in Council, 1959 II. Extradition Act CAP.368 REV 2002.
South Africa	It is the most progressive country in Africa that has up to date legislative framework addressing international crimes.	I. Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 II. The Implementation of the

785 Ferdinandusse W., The Prosecution of Grave Breaches in National Courts, p. 728.

786 Rissing-van Saan R., "The German Federal Supreme Court and the Prosecution of International Crimes Committed in the Former Yugoslavia," *Journal of International Criminal Justice*, 2005, No. 3, p. 381, at 395-396.

787 Kemp G., "The Implementation of the Rome Statute in Africa," in Werle G., Fernandez L. and Vormbaum M., *Africa and the International Criminal Court, op. cit*, p. 63.

Country	Brief	Legislation addressing international crimes and their prosecution
		Geneva Conventions Act 8 of 2012 III. Extradition Act 67 of 1962
Mozambique .	The country has legislation addressing war crimes. There is no specific law providing for crimes against humanity or genocide. It is yet to ratify the Rome Statute	I. The Law on Military Crimes No. 17/87 of 21 December 1987.
Mauritius	Adopted the Rome Statute Implementing Legislation	I. The International Criminal Court Act 27 of 2011 II. The Geneva Conventions (Amendment) Act 2003
Malawi	There is no Rome Statute Implementing legislation but have provisions on genocide and war crimes.	I. Republic of Malawi (Constitution) Act article 17 prohibits genocide II. Penal Code (Amendment) Act No. 1 of 2011, section 217A III. Geneva Conventions Act Chapter 12:3 of 1968 IV. Extradition Act, chapter 8:03 of 1972
Democratic Republic of Congo	DRC is a monist state however it has incorporated international law in its municipal laws. Moreover, there is a draft legislation for the implementation of the Rome Statute	I. Military Penal Code (MPC). Loi N° 024/2002
Botswana	There is a draft legislation for the implementation of the Rome Statute	I. Geneva Conventions Act 1970 II. Extradition Act, Chapter 09:03, 2005
Kenya	Following the adoption of legislation implementing the Rome Statute, Kenya has a comprehensive legislative framework on core international crimes	I. International Crimes Act. No. 16 of 2008. Revised Edition 2012 II. The Geneva Conventions Act, Chapter 198 of 1968 III. Extradition (Contiguous and Foreign Countries) Act Chapter 76 R.E 2014
Uganda	Following the adoption of legislation implementing the Rome Statute, Uganda has a comprehensive legislative framework on core international crimes	I. Geneva Conventions Act Chapter 363 of 1964, II. International Criminal Court Act, Acts Supplement No. 6, Uganda Gazette, no. 39,

Country	Brief	Legislation addressing international crimes and their prosecution
		vol. CIII, June 25, 2010 III. Extradition Act 1964, Chapter 117
Rwanda	There are several laws in Rwanda which are relevant to the prosecution of international crimes. An in depth analysis has been provided for in the country specific chapter. It is noteworthy that Rwanda is not party to the Rome Statute.	I. Organic Law No 08/96 of 30 August 1996
Ethiopia	The availability of these provisions enabled Ethiopia to be the first country to effectively carry domestic prosecution of international crimes after regime change.	I. Criminal Code of the Federal Democratic Republic of Ethiopia 2004 section 281
Nigeria	Implementing legislation to be available.	I. Crimes Against Humanity, War Crimes, Genocide and Related Offences Bill, 2012 II. The Geneva Convention Act 1960

Source: The AU-EU Expert Report on the Principle of Universal Jurisdiction 8672/1/09 REV1 RdB/lgf 1 Brussels, 16 April 2009

From Table 1, it is notable that, countries which have implemented the Rome Statute have a more comprehensive legal framework that criminalizes all the core international crimes. The laws on core international crimes in Kenya,[788] Uganda,[789] South Africa[790] and Mauritius[791] cited in Table 1 above have been enacted to implement the Rome Statute with the exception of the laws implementing the

[788] International Crimes Act.No. 16 of 2008. R.E. 2012, section 6.

[789] International Criminal Court Act, Acts Supplement No. 6, Uganda Gazette, no. 39, vol. CIII, June 25, 2010, section 6,7,8 and 9.

[790] Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 Part 1 of Schedule 1 echoes article 6 of the ICC Statute in relation to genocide, Part 2 of the Schedule echoes article 7 of the Statute with regard to crimes against humanity and Part 3 mirrors war crimes as spelt under article 8 of the ICC Statute.

[791] The International Criminal Court Act 27 of 2011 crimes against humanity as stipulated under Part I of the Schedule; genocide a provided under Part II of the Schedule and war crimes stated under Part III of the Schedule, all of which have mirrored relevant provisions of the Rome Statute.

Geneva Conventions. The laws in Kenya, Uganda, South Africa and Mauritius have similar approach to definition of international crimes, provisions on general principles of criminality, cooperation and assistance.

The laws have defined international crimes as contained in the Rome Statute with no expansion or limiting what each crime entails. Domestic courts have been given jurisdiction to prosecute international crimes something which was not possible prior to the passing of the aforesaid legislation. Prosecutions before the enactment of these laws would have been made possible for specific offences amounting to international crimes as spelt out in the Geneva Conventions implementing laws available in the countries which were enacted during colonialism. If prosecution of international crimes were to be sought, recourse would have to be made to existing penal laws and hence adopting the soft mirror theory on domestic prosecution of international crimes.

It is argued therefore that limited legislative framework had before negatively affected the practice of prosecuting international crimes. It must also be remembered that, even with the new legislative framework, limitations still exist. The application of such laws is subject to rules of retrospectivity. This is why it is still difficult to use the new laws to prosecute international crimes committed before the new comprehensive laws were enacted particularly by drawing examples from Kenya and Uganda.[792]

[792] These have been adequately covered under the country specific chapters.

The issue of immunity of heads of state in laws available in Kenya,[793] Uganda,[794] South Africa[795] and Mauritius[796] has been addressed differently. Kenya[797] and Uganda[798] have somehow shone from the strict limit of official immunity as stated under the Rome Statute and provided for inapplicability of immunity in relation to proceedings before the ICC. On the other hand, South Africa[799] and Mauritius[800] have embraced the inapplicability immunity as a defence in light with the provisions of the Rome Statute. While the position is progressive, the implementation of such provisions is still difficult especially in relation to serving heads of states. This has been the case with South Africa on the failure to arrest Al Bashir. Even with a progressive court decision requiring South Africa to arrest a serving head of state, there was no implementation of such a decision.[801]

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793 International Crimes Act.No. 16 of 2008.R.E. 2012 section 6.

794 International Criminal Court Act, Acts Supplement No. 6, Uganda Gazette, no. 39, vol. CIII, June 25, 2010, section 6, 7, 8 and 9.

795 Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 Part 1 of Schedule 1 echoes article 6 of the ICC Statute in relation to genocide, Part 2 of the Schedule echoes article 7 of the Statute with regard to crimes against humanity and Part 3 mirrors war crimes as spelt under article 8 of the ICC Statute.

796 The International Criminal Court Act 27 of 2011 crimes against humanity as stipulated under Part I of the Schedule; genocide a provided under Part II of the Schedule and was crimes stated under Part III of the Schedule, all of which have mirrored relevant provisions of the Rome Statute.

797 Kenyan International Crimes Act section 27.

798 Ugandan International Criminal Court Act section 25.

799 Implementation of the ICC Act section 4(2)(a) which states that 'any other law to the contrary, including customary and conventional international law, the fact that a person . . . is or was a head of State or government, a member of a government or parliament, an elected representative or a government official . . . is neither (i) a defence to a crime; nor (ii) a ground for any possible reduction of sentence once a person has been convicted of a crime'.

800 Mauritius ICC Act, section 6 states that, 'It shall not be a defence to an offence under section 4 nor a ground for a reduction of sentence for a person convicted of an offence under that section to plead that he is or was Head of State, a member of a Government or Parliament, an elected representative or a government official of a foreign State.'

801 *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development & 11 Others High Court of South Africa (Gauteng Division, Pretoria)Case Number: 27740/ (2015).* "[O]ur Constitution reveals a clear determination to ensure that the Constitution and South African law are interpreted to comply with international law, in particular international human rights law… These provisions of our Constitution demonstrate that international law has a special place in our law which is carefully defined by the Constitution. The Immunities Act, at its highest, confers discretion on the Minister to grant immunities and privileges on persons of her choosing. But she must exercise that discretion lawfully, in accordance with South Africa's

The need to respect the rules of customary international law in relation to immunity *ratione personae* and the desire to fulfill treaty obligations and domestic laws that limit such immunity before the ICC has proven difficult. The easy applicability of such provisions is certain in cases where such heads of states have ceased to hold office as is with the case of Hissene Habre. Under such circumstances, no one can plead functional immunity as a bar to prosecution for commission of international crimes before domestic court.

From the analysis, it is evident that, selected countries have had years of limited legislative framework on international crimes. The changes that have been witnessed in the legal framework on international crimes have been made possible after the coming into force of the Rome Statute in the 2000s and states took initiative to implement the treaty. Countries that have not implemented the Rome Statute still have limited legislative framework prohibiting core international crimes except Ethiopia, DRC and Rwanda.

The availability of good legislative framework in countries such as Ethiopia since 1957[802] and Rwanda immediately after the commission of genocide in 1994 have

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domestic and international law obligations. She cannot lawfully exercise the discretion where the effect will be to prevent the arrest and surrender of a person subject to an ICC warrant and request for surrender."

802 The Penal Code of Ethiopia 1957 which was later repealed by the Criminal Code of the Federal Republic of Ethiopia 2005, section 246 and Title II which deals with crimes in violation of International Law section 269 - 283.

enabled the countries to carry domestic prosecution of international crimes.[803] DRC is also carrying prosecution of international crimes before domestic courts.[804] It is also remarkable to note that the ICC has approved the prosecution of Germain Katanga by domestic courts of DRC for crimes other than those prosecuted by the ICC.[805]

To give a picture on the limited legal framework, a look on the laws in Zimbabwe and Tanzania serves the purpose. Zimbabwe has laws on genocide and war crimes and nothing on crimes against humanity. Tanzania has laws on war crimes and nothing on the crime of genocide and crimes against humanity. How then can international crimes be prosecuted under such a limited legislative framework? Resort can only be made to ordinary crime approach in the prosecution of international crimes not covered under the existing laws. Limited legislative framework makes it impossible to prosecute all the core international crimes before domestic courts. In Tanzania for example, only war crimes as spelt out in the Geneva Conventions Act (Colonial Territories) Order in Council can be prosecuted.[806] War crimes falling outside the scope of the law, crimes against humanity and the crime of genocide cannot be prosecuted. The fulfillment of the primary obligation to prosecute international crimes cannot be realized in absence of a progressive legislative framework.

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803 Tiba F., 'The Trial of Mengitsu and other Derg members for Genocide, Torture and Summary Executions in Ethiopia' *op. cit* p. 168.

804 Clark P., 'Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda,' in Clark P. and Waddel N., Courting Conflict? Justice, Peace and the ICC in Africa, London, 2008, p. 37.

805 *The Prosecutor v Germain Katanga* Decision Pursuant to article 108(1) of the Rome Statute, ICC-01/04-01/07-3679.

806 No. 1301 of 1959.

From Table 1, the aspect of crimes against humanity which does not have an independent body of international conventions like the crime of genocide and war crimes is left unaddressed in most countries that have not implemented the Rome Statue. It is important that there is a holistic criminalization of international crimes as they have come to be accepted by states because it directly affects the ability of state to prosecute. There is movement in different countries to urge governments to domesticate the Rome Statute. Some have been able to move the law reform and bills are in place while others are still lagging behind without any prospect of drafting implementing legislation as a matter of paramount importance.[807]

5.5 Hindrances to the Implementation of International Conventions on Core International Crimes in Africa

Table 1 has given an overview of existing legislative framework on international crimes in selected African countries. It is clear that the most implemented international conventions are the Geneva Conventions of 1949. Most of the implementing laws were enacted during colonialism. The Genocide Convention and the Rome Statute have also been implemented to some extent.[808] Some countries have draft legislation while others are yet to even begin the process to implement the

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[807] Example Tanzania and Malawi are yet to even have draft bills for the implementation of the Rome Statute. See information available at http://www.nyasatimes.com/2014/11/16/malawi-law-society-chrr-urge-govt-urged-to-domesticate-rome-statute/ [Accessed 20 November 2014]. Ivory Coast, Ghana, Guinea, Liberia, Sierra Leone and Mali have made some progress.

[808] Schroeder B.M. and Tiemessen A., 'Transnational Advocacy and Accountability: From Declaration of Anti- Impunity to Implementing the Rome Statute,' in Betts A. and Orchard P., editors, *Implementation and World Politics: How International Norms Change Practice* Oxford University Press, Oxford, United Kingdom, at 56. Olugbuo B.C., 'Implementing the International Criminal Court Treaty in Africa: The role of non-governmental organisations and government agencies in constitutional reform' in KM Clarke & M Goodale (eds) *Mirrors of justice: Law and power in the post-cold war era*, 2010, 106 at 127.

Rome Statute.[809] This state of affairs could be attributed to a number of facts which are inherent in each jurisdiction.

As Duplesis found, the challenges faced and reasons for delay in implementing the Rome Statute are peculiar to each country.[810] The conventions adopted under the African Union are yet to have implementing legislation. The importance of having implementing legislation for international treaties cannot be overrated. Passing implementing legislation is the most important step a state can take to fulfill its international obligations especially those surrounding human rights and international criminal law. The lack of domestic legislation has thus far been used against states that fail to fulfill their primary obligation to prosecute international crimes. An example can be taken from the Belgium and Senegal case before the ICJ on the prosecution of Hissene Habre.

The implementation of international instruments is an act of African states as independent and sovereign entities. However, it cuts across to say that the lack of political will and priority is one of the factors that have given rise to the non-implementation.[811] For most African countries having a legislative framework on core international crimes has not been of paramount importance even though at sub regional, regional or international level, African states are at the fore front in

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809 See information available at http://www.iccnow.org/?mod=romeimplementation&idudctp=10&show=all [Accessed 11 November 2014].

810 Du Plessis M., "Complementarity and Africa: The Promises and Problems of International Criminal Justice", *African Security Review*, 2000, No. 17, pp. 154-170. Du Plessis M., and Stone L., Implementation of the Rome Statute of the International Criminal Court (ICC) in African countries. Institute for Security Studies, Pretoria 2008.

811 Interview transcripts and data from questionnaires.

ratifying international instruments.[812] The major question is whether African countries will proceed to implement the Rome Statute or will they await the coming into force of the African Court Protocol which they will implement following the distrust towards the ICC? Only time will reveal what states will lean towards.

Another stumbling block in implementing international conventions lies on the lack of exposure among the local people on the absolute necessity to have legislative framework addressing international crimes something which removes pressure on government to act accordingly.[813] Therefore, when reference is made to individual countries, reality reveals that it is not a matter of national priority to have the necessary laws to enable the prosecution of international crimes. Further, it has been noted from interviews that, the lack of a clear mechanism devised to ensure international instruments are transmitted to domestic law has had a crippling effect to most African countries. It has been revealed that there is a disconnection between the responsible ministries especially the ministry of foreign affairs and the Attorney General's office. [814] As a result, most ratified treaties are not transmitted to proper offices in order to be legislated.[815]

On another note, some African states are yet to implement the Rome Statute due to inability to do because of incompatibility issues between the Rome Statute and

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812 Dugard J., 'Africa and international criminal law: Progress or marginalization?' *American Society of International Law Proceedings*, 2000, p. 229-230. Interview Transcript.

813 Interviews held with participants (representatives of their governments from ministries of foreign affairs and Attorney Generals' office) from Gambia, Ethiopia, Kenya, Swaziland, Malawi, Zambia, Botswana, Namibia and Tunisia during the United Nations Regional Fellowship on International Law, Ethiopia, February 2015.

814 Interview transcripts.

815 *Ibid*.

existing legislative framework.[816] In order to make the Rome Statute implementing legislation workable and constitutionally right, it has to be compatible to existing laws. However, most African countries have legislation that does not rhyme with the provisions of the Rome Statute on issues like immunity of state officials and death penalty.[817] It therefore becomes a strenuous task to first amend the existing laws prior to having the new laws or alternatively enacting new laws which are not compatible with existing laws.[818] It is argued that, the domestication of international conventions on core international crimes does not necessarily require the reproduction of the entire convention into a law. On the contrary, states can opt to give jurisdiction to domestic courts on the core international crimes by amending the existing penal laws and provide for new offences.[819] This has been the position for countries that are not party to the Rome Statute such as Rwanda and Ethiopia.

While most of the blame has been placed on governments, it is worth to note that, there is little follow-up framework at both international and regional level that continues to remind states to adopt implementing legislation.[820] NGOs have had a positive effect mobilizing states to adopt implementing legislation on the Rome

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816 Bergsmon M., "Building Legal Architecture, Human Capacity and Political Will," *in Positive Reinforcement: Advocating for International Criminal Justice in Africa*, Southern Africa Litigation Centre, Johannesburg, South Africa, 2013 at 44.

817 Example immunity has been maintained or altered in constitutions of African countries reference can be made from country chapters in Kenya and Uganda. Also, the countries have maintained death penalty.

818 Interview transcripts and data from questionnaires.

819 The new offences will be captured under provisions of relevant laws and hence courts will have jurisdiction to prosecute. Other matters that require a test of compatibility issues can slowly be resolved while the offences have already found their way in domestic laws.

820 Interviews with AU legal office personnel who commented on the lack of a devised mechanism to follow up on the implementation at country level of instruments adopted.

Statute.[821] It is desirous that a similar framework that has been adopted for the human rights regime can also feature in the international criminal justice regime.[822] Human rights conventions have been closely followed up and have yielded good results where a number of domestic laws have been adopted to implement such international conventions. However as practice has revealed, sometimes states just take time to enact laws. Therefore, it can also be said that with time many states will most likely have laws on international crimes. The trend has thus far changed from having very limited legislative framework to a more comprehensive framework in some of selected countries as shown in Table 1.

5.6 Conclusion

As demonstrated in this chapter, African countries are committed to end impunity to international crimes in the region. This is reflected at both regional and sub-regional level. In paper, African countries have comprehensive documents providing for the prohibition and the punishment of perpetrators of international crimes. These documents range from resolutions to Protocols. Therefore in paper, African countries have put their desire to end impunity in the loudest form possible. However, these regional and sub-regional efforts have not been transmitted to national levels. As witnessed, a number of instruments that require legislation have not been legislated at country level. This does not go to say that there is no good framework for the prosecution of international crimes at national level. On the contrary, it is acknowledged that prior to the 2000s; most countries had very limited laws on core

821 Examples can be drawn from the Coalition for the International Criminal Court and the Pan African Lawyers Union.

822 The body of human rights law has widely been incorporated in national laws. The Convention on Rights of the Child and the International Bill of Rights (have found their way in contemporary worlds' constitutions).

international crimes. However, the coming into force of the Rome Statute has enabled states to pass new laws that comprehensively cover issues pertaining to the prosecution of international crimes before domestic courts.

On the other side of the coin, one may not help wondering why there is fragmentation of venues mandated to prosecute international crimes in Africa. Although the efforts by sub regional groups like the EAC to give the EACJ jurisdiction over international crimes is a positive response, it does not come without negative effect. The negativity is close linked to multiplicity of courts dealing with the same thing (the prosecution of international crimes) a practice that was mushrooming with the ad hoc tribunals and thought could be controlled with the coming into existence of the ICC. Need to say, if efforts can be joined at regional level to fully support the ACJHR to prosecute as stipulated in the Amendment Protocol, then there will be no need to have a sub-regional courts playing similar role to that of the ACJHR.

Commendable is the fact that the AU is progressive in the area of international criminal justice despite the negative reaction it has towards the ICC. Optimistically, there is light at the end of the tunnel and the world waits to see a regional court addressing international crimes in an impartial manner. That is the true test to which the ACJHR has to pass in the coming years as it works to further the commitment contained under the Malabo Protocol to the ACJHR.

CHAPTER SIX

THE NATIONAL PROSECUTION OF INTERNATIONAL CRIMES IN RWANDA

6.1 Introduction

All the previous chapters dealt with different issues on international criminal justice on a general level. Chapter five established that Africa, through different regional organisations, has established a reasonable legal framework for ending impunity to international crimes. Further, the legal framework has been transmitted in some of reviewed countries while others have not.

This chapter examines the prosecution of international crimes at domestic level with a focus on Rwanda. The country has played a big role in the prosecution of the perpetrators of genocide committed in Rwanda. Although the prosecution of international crimes in Rwanda has been praised via the ICTR and the Gacaca system, it is noteworthy as shall be demonstrated in this chapter that, the Rwandan courts played a critical role in the prosecution of international crimes. The chapter is intended to first, analyze legislative framework on the prosecution of international crimes in Rwanda. Secondly, the chapter assesses the practice and lessons in prosecuting international crimes in the country. Domestic courts in Rwanda offer a viable venue for ending impunity to international crimes as supported by a good legal framework for the prosecution of international crimes in Rwanda which has improved over the years.

6.2 The Historical Background of Rwanda

Rwanda is one of the East African Countries. She was initially a feudal state[823] which later came to be colonized by Germany[824] and then transferred to Belgium after WWI. She was kept by Belgium as a trusteeship territory through the UN after WWII.[825] The origin and crafting of the ethnic groups in the country that is the Tutsi, Hutu and Twa has been well documented through a historical account of the country which reveals a mutual peaceful co-existence among them prior to colonialism.[826] What is of significance is that, the two major ethnic groups (Hutu and Tutsi) were used by colonial powers to facilitate the ends of colonial objectives. The colonialists used the centralization of power[827] and divide and rule tactic hereby creating an expansive ethnic discrimination brewing hatred among the two with far reaching consequences than anyone would have predicted then.[828]

The Tutsi population was the minority but highly favoured and preferred by the colonial powers and the Catholic Church something which kept them at an advantaged position socially, politically and economically when compared to their

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823 Butare-Kiyovo J., 'Discovering and Addressing the Root Cause of Genocide in Rwanda,' in Butare-Kiyovo J., ed., *International Development from a Kingdom Perspective*, Carlifonia, United States of America, William Carey University Press, 2010, p. 156.

824 Germany colonized Ruanda-Urundi during its colonial occupation using the famous indirect rule which utilized the local leaders to achieve their objectives.

825 Information available at http://thecommonwealth.org/our-member-countries/rwanda/history [Accessed 21 January 2015].

826 Rennie J.K., "The Pre-colonial Kingdom of Rwanda: A Reinterpretation," *Trans-African Journal of History 2*, No.1, 1972; Carney J.J., *Rwanda Before the Genocide: Catholic Politics and Ethnic Discourse in the Late Colonial Era,* New York, USA, Oxford University Press, 2014. The Hutus are said to comprise of 85% of the population while the Tutsi are 14% and the Twa are around 1%.

827 Kiwuwa D.E., *Ethnic Politics and Democratic Transition in Rwanda,* New York, USA, Routledge, 2012.p. 69. The use of centralized form of governing removed the then existing sharing of power among the natives and introduced the concentration of enormous power to one single chief.

828 Katayanagi M., *Human Rights Functions of the UN Peacekeeping Operations*, , The Hague, The Netherlands, Martinus Nijhoff Publishers 2002, p. 139.

counterparts, the Hutu.[829] As one would anticipate, the shift of events that opened the eyes of Tutsi to the desire to attain independence was a move that kept them at odds with the colonial power.[830] In the decolonization process the division between the Hutu and Tutsi was noticeable in the lack of common ground under which to fight for their independence. The Hutus demanded independence not only from the colonialist but also from the Tutsi who resisted such move.[831] The tension resulted in a series of conflicts between 1959 and 1967[832] characterized by serious violations of human rights.[833] There is no record that shows the perpetrators of such violations were ever held accountable. From analysis in chapter 3 of this thesis, the historical factors that made accountability an exception after the Nuremberg trials affected Rwanda as well.

While favoured during colonial domination, the replacement of a Tutsi ruling class by a Hutu dominated one party in 1962 proved to be sour to the Tutsis.[834] It was further intensified by the seizure of power from a corrupt independence government in 1973 by Hutu General Juvenile Habyarimana. Rwanda remained under military

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829 Gahima G., *Transitional Justice in Rwanda, Accountability for Atrocities*, Routledge, New York, USA, 2013, p. 33. Throughout colonial period, the Hutu had to endure the reality that rising in power and becoming economically well-off was a far-fetched idea something that shaped the unfolding events as one trails through the historical account of Rwandan politics and social development.

830 Van Den Herik L.J., *The Contribution of the Rwanda Tribunal to the Development of International Criminal Law*, Martinus Nijhoff Publishers, Laiden, The Netherlands p. 19. The Belgians together with the Catholic church started favouring the Hutu.

831 Kiwuwa D.E., *Ethnic Politics and Democratic Transition in Rwanda, op. cit*, p. 76.

832 This period was marked by among other events, the Social Revolution where the monarchy gave way to democratic government between 1959 and 1962.

833 Report by Mr. B.W. Ndiaye. Special Rapporteur, Extrajudicial, summary or arbitrary executions, on his mission to Rwanda, from 8 to 17 April 1993, E/CN.4/1994/7/Add.1, 11 August 1993 para 16 estimates around 10,000 and 14,000 people killed during that time. Most of the Tutsi migrated to Uganda. Rwanda became a Republic in 1961.

834 Mamdani M., *When Victims Become Killers: Colonialism, Nativism and the Genocide in Rwanda*, Princeton-New Jersey, USA, Princeton University Press, 2001, pp. 122-152.

domination for five years until the passing of a new constitution making General Habyarimana the President who ruled until the exiled Tutsi formed the Rwandese Patriotic Front (RPF) which set in motion a civil war in the country in 1990.[835]

6.3 Sketch of the 1994 Genocide

The already hinted tension between the Hutu and Tutsi population intensified upon the invasion by RPF. The Habyarimana government started spreading hatred towards the Tutsi population in the effort to try to stay in power.[836] At the end, peace talks began in order to settle the tension between the government and RPF and resulted in the signing of peace agreements in 1992 and 1993.[837] Unfortunately, these agreements did not bring peace in Rwanda.

The situation in Rwanda worsened on 6th April, 1994 after the death of President Habyarimana of Rwanda and Nitaryamira of Burundi on a plane crash – an assassination.[838] In retaliation to the killing of a Hutu president, the already furious Hutus in Rwanda decided to wage war against Tutsi population in the country; conduct amounting to genocide under international law.[839] These acts were mostly

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835 See information available at, www.un.org/en/preventgenocide.shtml [Accessed 23 January 2015].

836 Prosecutor v Nahimana, Barayagwiza and Ngeze, Judgment and Sentence of 3 December 2003, Trial Chamber I and Prosecutor v Nahimana, Barayagwiza and Ngeze, Judgment of 28 November 2007, *The Media case.*

837 The Arusha Accord 1993 also known as the Comprehensive Peace Agreement made up of five protocols was preceded by the N'sele Ceasefire Agreement 29 March 1991 which came into force 1 August 1992 but was never adhered to. Information available at http://peaceaccords.nd.edu/matrix/accord/63 [Accessed 23 January 2015].

838 See information available at www.unitedhumanrights.org/genocide_in_rwanda.htm [Accessed 23 January 2015].

839 *Prosecutor v Nahimana, Barayagwiza and Ngeze, Judgement 3 December 2003;* UN Doc.S/1994/640, 31 May 1994.

perpetrated by Hutus against Tutsis although there is a small number of Hutus who had also fallen victims of the genocide.[840]

The genocide was characterized by different acts of serious violations of human rights. It is estimated that about 800,000 Tutsi were massacred.[841] Further, around 250,000 women were subjected to rape and other forms of sexual violence,[842] many people were also displaced.[843] The killings were done in the most organized[844] and inhuman way by using machetes. There was no place in Rwanda that was safe. Even churches were hunted down and burnt for harbouring Tutsis.[845] Women and children were not spared. As such, acts of sexual violence were at an alarming rate.[846] While the international community had closed its eyes, the RPF did not give up.[847] In July 1994, RPF captured Kigali and declared ceasefire. A national Unity government was formed and marked the end of the genocide and the beginning of accountability for

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840 Information available at www.bbc.com/news/world-africa-13431486 [Accessed 23 January 2015]. The main organisers of the genocide as proven in the cases prosecuted before the ICTR were politicians, military leaders and businessmen.

841 Magnarella P. J., "The Background and Causes of the Genocide in Rwanda," *Journal of International Criminal Justice*, 2005, Vol 3, No. 4, pp. 801-822.

842 Information available at http://www.un.org/en/preventgenocide/rwanda/about/bgjustice.shtml [Accessed 6 February 2015].

843 United Nations Security Council Resolution 935, 1 July 1994, UN Doc. S/RES/935.

844 Intarahamwe (those who fight together) was moblised to dab off the Tutsi population so that Hutus would remain in power.

845 Hatzfeld J., *Machete Season: The Killers in Rwanda Speak*; NEW York, USA, Farrar, Straus and Giroux, 2006; Dallaire R., *Shake Hands with the Devil: The Failure of Humanity in Rwanda,* Toronto, Canada, Random House,2003; Keane F., *Season of Blood: A Rwandan Journey,* London, United Kingdom, Penguin Books, 1996; Berry J.A., *Genocide in Rwanda: A Collective Memory,* Washington DC, USA, Howard University Press, 1999; Melvern L., *Conspiracy to Murder: The Rwandan Genocide*, London, UK, Verso, 2004.

846 Human Rights Watch, *Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath*, 1 September 1996. UNHCR Refworld,
Available at: http://www.unhcr.org/refworld/docid/3ae6a8510.html [Accessed 6 January 2015].

847 Gourevitch P., *We wish to inform You That Tomorrow We Will be Killed With Our Families: Stories from Rwanda,* NEW York, USA, Farrar, Straus and Giroux, 1998.

atrocities committed. Many victims desired justice for the crimes committed against them.[848]

It is important to point out that, prior to the commission of genocide; Rwanda was a party to international conventions prohibiting genocide and war crimes. It became a party to the Genocide Convention in 1975 and as revealed in previous chapters, Rwanda was also bound under customary international law. Therefore, in order to combat impunity and bring justice to the victims of genocide, the government of Rwanda and the community of states through the UN followed the trend that dominated the development of international criminal law in the 1990s that is, the creation of an adhoc tribunal, the ICTR.[849] The establishment of the Tribunal was also prompted by the then existing judicial situation in Rwanda which was not conducive to conduct prosecution of international crimes at the earliest possible time.[850] The structure and establishment of the ICTR has been explained under chapter three of the thesis. However, it is important to point out here that, the ICTR has left a legacy in the area of international criminal justice.[851]

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848 Yolande Mukagasana was documented in an interview where she said "Don't talk to me about reconciliation Mr. President, talk to me about justice". Information available at www.rwanda-genocide.org [Accessed 23 January 2015].

849 Jones N., *The Courts of Genocide: Politics and the Role of Law in Rwanda and Arusha,* Routledge, New York, USA, p. 7.

850 Schabas W.A., "Genocide Trials and Gacaca Courts," *Journal of International Criminal Justice,* 2005, vol 3, pp.1 - 17 at 4.

851 From the records of the ICTR, it has managed to prosecute high government and military officials for their role in the commission of the genocide. It was the first international tribunal to give judgment for the crime of genocide in the case of *the Prosecutor v Akayesu.* Further, the ICTR has left a lasting legacy in terms of the jurisprudential development in the interpretation of the elements of the core international crimes.; Askin K.D., "Gender Crimes Jurisprudence in the ICTR: Positive Developments," *Journal of International Criminal Justice,* 2005, Vol 3, No. 4, pp. 1007-1018; Nsanzuwera F., "The ICTR Contribution to National Reconciliation," *Journal of International Criminal Justice*, 2005, Vol 3, No. 4, pp. 944-949

However, due to the limitations placed to the court, the court being limited to persons most responsible for the commission of crimes listed under the Statute,[852] other options had to run parallel to the ICTR. Thus, the government of Rwanda being willing to see justice rendered to the victims, denied granting of amnesties[853] and undertook a mixed approach to prosecute perpetrators before national courts and via the traditional justice systems of Gacaca.[854] The ICTR had played a significant role in aiding the establishment of other mechanisms by assisting in the technical and resource needs to make them run and succeed in providing justice to the victims.[855] Prosecutions were also conducted before military courts in Rwanda and in third states especially European Courts under the universality principle.[856] Other non-judicial mechanisms were also adopted to bring about healing and reconciliation including the establishment of the National Unity and Reconciliation Commission (NURC).[857]

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852 From the cases tried before the ICTR it is with great appreciation that one arrives at the conclusion that the Court has dealt with the most senior officials and not otherwise.

853 Clark P., "Hybridity, Holism and Traditional Justice: The Case of the Gacaca Courts in Post-Genocide Rwanda," *George Washington International Law Review,* 2007, Vol. 39, No. 765, pp. 780-781.

854 Fierens J., "The Rwandan Courts in Quest of Accountability Gacaca Courts: Between Fantasy and Reality," Journal *of International Criminal Justice*, 2005, Vol. 3, No. 4, pp. 896-919.

855 Peskin V., "Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Programme," *Journal of International Criminal Justice,* 2005, Vol 3, pp. 950 – 961.

856 "In France, prosecutors brought charges against Pascal Simbikangwa for complicity in genocide and crimes against humanity. Prosecutors are bringing the case on behalf of an association of civil plaintiffs, the Collectif des Parties Civiles pour le Rwanda, based in Reims, France. In Sweden, Stanislas Mbanenande was indicted in November 2012 for genocide and other crimes. In Norway, Sadi Bugingo was convicted in February 2013 of complicity in the premeditated killings of at least 2,000 Tutsis, and was sentenced to 21 years in prison. And in the Netherlands, on 1 March 2013 a Dutch court convicted Yvonne Basebya of inciting genocide, and sentenced her to six years and eight months in prison." Information available at http://www.opensocietyfoundations.org/voices/beyond-arusha-global-effort-prosecute-rwandas-genocide [Accessed 11 February 2015].

857 See information available at http://www.nurc.gov.rw/index.php?id=83 [Accessed 2 March 2015]. It was created in 1999 by an Act of parliament.

It must be pointed on the onset that, the current thesis has not focused on the prosecution of international crimes before the ICTR nor via the *gacaca* system or military courts. Rather, the focus has been placed on national conventional courts (ordinary courts) as one of the venues taken by the government of Rwanda to combat impunity to international crimes.

6.4 Legislative Framework Addressing International Crimes

As stated in previous chapters, for national courts to prosecute international crimes there must be a law giving them jurisdiction. With international crimes, the laws flow from international laws. Therefore, any domestic law that deals with international crimes will be a direct reflection of the existing international law either treaty or customary. Rwanda has been a party to the Genocide Convention and the Geneva Conventions.[858] However, how international law takes effect on domestic courts depends on whether a state follows the dualist or monist approach.

Rwanda is traditionally a monist state which inherited the Belgian civil law system where international law has a direct application upon ratification.[859] This was the position during and after the core international crimes were committed in the country. The monist approach to the binding of international conventions has been maintained under the 2015 amendments to the Constitution.[860] Despite being a monist state, the complicated nature of the crime of genocide made it imperative to

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858 Van Den Herik L.J., *The Contribution of the Rwanda Tribunal to the Development of International Criminal Law, op. cit*., p. 99.

859 Constitution of Rwanda 20 December 1978 revised 1991.

860 The Constitution of Rwanda 2003, Revised 2015, Official Gazette n° Special of 24/12/2015, Article 168. The hierarchy of laws in Rwanda places international conventions as 3rd in accordance with article 95 of the Constitution.

have a domestic legislation. The need for a domestic legislation addressing the crime of genocide is reflected under article V of the Convention.[861] The article provides categorically that,

> The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.

The provision underlines the importance of a domestic legislation to address the crime of genocide. The complicated nature of the crime of genocide under normal circumstances is not captured in existing penal laws of different countries. Therefore, to prohibit and punish the crime of genocide, the convention's definition of the crime had to find its way to domestic laws by legislation.[862]

Rwanda became a party to the Genocide Convention in 1975 and the Geneva Conventions in 1964.[863] However, due to the lack of political will and priority by the then government,[864] Rwanda did not take any step to fulfill the obligations it assumed under article V of the Genocide Convention. Rwanda being a monist state, gives inference to the lack of need of a domestic law. However, the absence of legislative framework providing for the crime of genocide and other international crimes negatively affected the ability to prosecute. The existing penal law did not embrace the elements of international crimes as comprised in international

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861 The Genocide Convention.

862 Quingley J., *The Genocide Convention" An International Law Analysis,* Ashgate Publishing Limited, Hampshire, England, 2006, pp. 65-66.

863 See information available at https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=375 [Accessed 5 February 2015].

864 UN Doc E/CN.4/Sub.2/L/623, (1975), para 39 cited in Rugege S. and Karimunda A.M., 'Domestic Prosecution of International Crimes: The Case of Rwanda,' in in Werle G., Fernandez L. and Vormbaum M., *Africa and the International Criminal Court, op. cit*, p. 79 at 84.

instruments. Prosecutions could not therefore be commenced at domestic level until the legislative framework was in place and a proper structure of accountability was adopted.[865] Thus, Rwanda prepared and adopted specific law to cater for international crimes, the Organic Law No. 08 of 1996 which is the Principle legislation on international crimes in the country.[866] It is supplemented by the law on Repressing the Crime of Genocide, Crimes Against Humanity and War Crimes of 6 September 2003.[867]

The 1996 law was enacted specifically first and fore most to deal with a situation that had already occurred and needed redress. This milieu is reflected in the provisions of the law. Article 1 of the law categorically states that it has been enacted to prosecute persons who have committed crimes since 1 October 1990.[868] Further, the law is not only a substantive piece of legislation but both substantive and procedural law. This is captured in the wording of article I which echoes the organization of criminal proceedings.[869] It therefore captures substantive issues like the crimes in question and procedural aspects like establishment of specialized chambers, hearing and pleas.

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865 Schabas W.A., "Genocide Trials and Gacaca Courts," *op. cit.*, p. 5. The conference which Rwanda held to assess the forms of accountability after the genocide revealed that prosecutions before national courts were imperative. As such, the specialized chambers to be established were to be equipped by a domestic law addressing core international crimes. This was therefore a step towards the fulfillment of the obligation under article V of the Genocide Convention.

866 Organic Law No. 08 of August 30, 1996 on the Organization of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity committed since October 1, 1990.

867 Organic Law No. 33 on Repressing the Crime of Genocide, Crimes Against Humanity and War Crimes of 6 September 2003.

868 Organic Law No. 8.

869 *Ibid*.

6.4.1 The Definition of International Crimes, Jurisdiction and Categorization of Offenders

The Organic law No. 08 has not reproduced the definition of international crimes but has linked the categorization to the definition of international crimes contained in the relevant international Conventions to which Rwanda is party to.[870] To that effect when reference is made to the crime of genocide it should be defined as stipulated under the Genocide Convention. Equally, war crimes are defined as contained under the four 1949 Geneva Conventions and the 1977 Additional Protocols. Further reference has been made to the International Convention on the Non-Applicability of Statutory Limitations on war crimes and crimes against humanity.

Although the law has not explicitly stated customary international law, inference should be made to include the equivalent definition under customary international law. This is important due to the lack of international conventions on crimes against humanity which are recognized under customary international law. On the strength of this legal framework, the crime of genocide has been prosecuted by domestic courts. For example, in the case of *Dusabe Jean Pierre v. Prosecutor,* the High Court of Kigali upheld the conviction by lower court for killings that amounted to genocide.[871] Similarly, in the case of *Pte Birori Théogène v. Prosecutor* the High Court of Kigali upheld conviction of lower court on charges of genocide by killing and collaboration to procure the killing of members of society based on their

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870 *Ibid.*, article 1 (a).
871 RPA A 0011/GEN/06/CS of 2006.

ethnicity.[872] Apart from the crime of genocide, courts have also prosecuted individuals for committing crimes against humanity.[873]

The definition of international crimes i.e. war crimes, the crime of genocide and crimes against humanity has been provided for under the 2003 law.[874] The law has adopted the conventional definition of the core international crimes. It has also added a new crime of genocide not found in international instruments. This is captured under article 4 of the law which reads that;

> Shall be sentenced to an imprisonment of ten (10) to twenty (20) years, any person who will have publicly shown, by his or her words, writings, images, or by any other means, that he or she has negated the genocide committed, rudely minimised it or attempted to justify or approve its grounds, or any person who will have hidden or destroyed its evidence. Where the crimes mentioned in the preceding paragraph are committed by an association or a political party, its dissolution shall be pronounced.[875]

Some cases have been prosecuted on the basis of this provision. These include the *Prosecutor v. Twagirayezu Evariste,*[876] N*sengiyumva J.Esperance v. Prosecutor,*[877] *Prosecutor v. Ndayizeye Gaspard,*[878] and *Prosecutor v. Ntsinzimihigo Emmanuel.*[879] Also, Rwanda enacted another law to provide for the crime of genocide ideology.[880] The crime has the following characteristics;

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872 RS/REV/GEN0005/09/CS of 08/04/2011.

873 *2Lt Rudatinya Emmanuel v. Prosecutor* RPAA 0014/Gén/06/CS.

874 Repressing the Crime of Genocide, Crimes Against Humanity and War Crimes, Law No. 33 of 2003. Chapter one deals with the crime of genocide, chapter two deals with crimes against humanity and chapter three deals with war crimes.

875 *Ibid*.

876 N° RP0040/10/TGI/RSZ of 08/07/2010. The accused was acquitted because the prosecution failed to prove beyond reasonable doubt the offence under article 4 of Law No. 33 bis 2003.

877 URUBANZA R.P.A 0225/08/CS. The High Court of Kigali ordered a retrial.

878 RPA.0282/10/HC/RWG of 19/08/201. The accused was convicted under article 4 of Law No. 33 bis 2003.

879 RPA 1334/09/HC/KIG of 14/01/2011. Conviction under article 4 of Law No. 33 bis 2003 made in 2009 was upheld.

880 Law N°18/2008 Of 23/07/2008 Relating To The Punishment of the Crime of Genocide Ideology. Article 2 provides; "The genocide ideology is an aggregate of thoughts characterized by conduct,

a. threatening, intimidating, degrading through defamatory speeches, documents or actions which aim at propounding wickedness or inciting hatred;[881]
b. marginalizing, laughing at one's misfortune, defaming, mocking, boasting, despising, degrading creating confusion aiming at negating the genocide which occurred, stirring up ill feelings, taking revenge, altering testimony or evidence for the genocide which occurred;[882]
c. Killing, planning to kill or attempting to kill someone for purposes of furthering genocide ideology.[883]

These characteristics have added on the position under international law on incitement to commit genocide. The law is much broader than what international law has provided.[884] This is explained by the fact that these laws are enacted to cover situations that have actually happened or continue to happen in the society and therefore are progressive than what international law provides. Courts have prosecuted perpetrators of the crime of genocide ideology as evidenced in the case of the *Prosecutor v. Kabagwira Rosalie,*[885] *Prosecutor v. Murara Emmanuel,*[886] *Prosecutor v. Baziruwiha Damascène*[887] and *Prosecutor v. Kanyamahanga François.*[888]

Crimes covered by the 1996 law also include other offences which are incriminated under Rwandan penal code and were committed in connection with the genocide.[889]

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speeches, documents and other acts aiming at exterminating or inciting others to exterminate people basing on ethnic group, origin, nationality, region, colour, physical appearance, sex, language, religion or political opinion, committed in normal periods or during war."

881 *Ibid.*, article 3(1).

882 *Ibid.*, article 3(2).

883 *Ibid.*, article 3(3).

884 Wilson R. A. "Inciting Genocide with Words," *Michigan Journal of International Law*, 2015, vol 36, No. 2

885 N° RP0291/09/TGI/RSZ of 29/04/2010. The accused was found guilty for having genocide ideology.

886 0557/09/TGI/NYGE of 29/01/2010. The accused was acquitted for charges of genocide ideology.

887 RPA 0186/10/HC/MUS of 27/05/2011. The accused was appealing against the decision of the lower court where he was convicted on charges of genocide ideology. The appellate court upheld the decision of the trial court.

888 RP 0836/09/TGI/NYGE of 2011. The accused was acquitted for charges of genocide ideology.

889 Organic Law No. 08, article 1 (b).

The relevant provisions enable the prosecution of offences which do not directly fall under the any of the three core international crimes but are prohibited by domestic penal law. The use of both international and existing penal code is what has been termed as dual incrimination.[890]

The courts have been given jurisdiction over persons present in Rwanda and those outside Rwanda provided there is enough evidence to support prosecution. Further, offenders have been grouped into four categories depending on the role played in the genocide and the nature of the offences committed.[891] Therefore, the four categories include:-

> Category 1: a) person whose criminal acts or whose acts of criminal participation place them among the planners, organizers, instigators, supervisors and leaders of the crime of genocide or of a crime against humanity : b) persons who acted in positions of authority at the national, perfect oral, communal, sector or cell level, or in a political party, the or fostered such crimes; c) notorious murderers who by virtue of the zeal or excessive malice with which they committed atrocities, distinguished themselves in their areas of residence or where they passed; d) persons who committed acts sexual torture;
> Category 2: persons whose criminal acts or whose acts of criminal participation place them among perpetrators, conspirators of accomplices of intentional homicide or of serious assault against the person causing death;
> Category 3: persons whose criminal acts or whose acts of criminal participation make them guilty of other serious assaults against the person;
> Category 4: persons who committed offences against property.

The above categorization plays an important role in sentencing upon conviction. The 2003 law has also outlawed immunity of state officials under article 18 of the 2003 law.

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[890] Rugege S. and Karimunda A.M., 'Domestic Prosecution of International Crimes: The Case of Rwanda,' *op. cit.*, p. 87. The laws applicable include Penal Code, the Code of Criminal Procedure and the Code of Judicial Organization and Jurisdiction.

[891] Organic Law No. 08, article 2.

6.4.2 Penalties

The penalties for offences provided under the law differ in accordance with the categorization provided under article 2.[892] Therefore, following that provision upon conviction, a person could be given death penalty[893] which was removed in 2007,[894] life imprisonment[895] or imprisonment for a term not exceeding 15 years,[896] suspension of civic rights[897] or civil damages.[898] The type of sentence issued also depends on whether the person confessed/pleaded guilty or not.[899] If she/he did, then the sentence is considerably reduced.[900] Therefore, confession was considered as an extenuating factor.

The cases that have been decided by courts have shown that judges have adhered to the provisions and the trend of sentencing varied accordingly. Example, the cases here have revealed sentences issued being as low as 4 years and as high as 15 years. The *Prosecutor v. Kabagwira Rosalie* the sentence given was 10 years,[901] *Prosecutor v. Byiringiro J.P. and Others* the sentence given was 4 years,[902] the *Prosecutor v. Nshogoza Anastase and Others sentence* was 5 years,[903] 7 years were given under the

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892 *Ibid*.
893 *Ibid*., article 14 (a).
894 Organic Law No. 31/2007 of 25 July 2007.
895 *Ibid*., article 14 (b).
896 *Ibid*., article 15 and 16.
897 *Ibid*., article 17.
898 *Ibid*., article 14 (d) and chapter VII.
899 *Ibid*., article 10. The reduction of sentences upon guilty plea was aimed at ensuring that there is a form of reconciliatory achievement in the process of bringing justice to the victims.
900 *Ibid* article 16.
901 Case No. RP0291/09/TGI/RSZ 29/04/2010.
902 Tribunal de Premiere Instance de Kibungo, Judgment of 21 October 1998, cited in Rugege S. and Karimunda A.M., 'Domestic Prosecution of International Crimes: The Case of Rwanda,' op.cit.
903 Tribunal de Première Instance de Byumba, Judgment of 30 November 1999, cited in Rugege S. and Karimunda A.M., *ibid*.

Prosecutor v. Hakizimana Appolinaire and Other,[904] 8 years were given in the *Prosecutor v. Semukanya Vincent and Others*,[905] while 15 years were given in the case of *Prosecutor v. Muransgira Jean Baptiste*.[906] As of 2000, there were around 20,000 guilty pleas.[907]

6.5 Subsequent Legal Reforms

The first legislative reform that aimed at facilitating the prosecution of international crimes in ordinary courts was in 1996. Years after domestic trials had commenced, Rwanda continued to enact and amend existing legislative framework to meet international standards required in the prosecution of international crimes. These were also necessary to facilitate the transfer of cases from the ICTR to Rwanda. These legal reforms were made in different areas of law including sentencing, additional crimes connected to the crime of genocide, responsibility for commission of international crimes and hearing of international crimes cases. An overview of these reforms is made as follows:

First, the abolition of death sentence. One of the notable areas that came to be amended to reflect the position in international tribunals is the sentencing aspect in penal legislation. Prior to 2007, Rwanda embraced death sentence as a form of penalty for murder. This made it clear that persons who were convicted of international crimes akin to murder in Rwandan courts would face a similar sentence.

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904 Tribunal de Première Instance de Gitarama, Judgment of 24 August 1998, cited in Rugege S. and Karimunda A.M., *ibid*.

905 Tribunal de Première Instance de Kibungo, Judgment of 17 July 1998, cited in Rugege S. and Karimunda A.M., *ibid*.

906 Tribunal de Première Instance de Nyamata, Judgment of 30 March 1998.

907 Schabas W.A., Schabas W.A., "Genocide Trials and Gacaca Courts," *op. cit*., p. 8.

However, the International criminal justice does not recognize death penalty as a form of penalty fit in the era where human rights have formed centre stage in democratic societies. Thus, in 2007 Rwanda enacted a law that aimed at abolishing death sentence.[908]

The enacted law was applicable retrospectively to all sentences issued prior to its coming into force.[909] The law's sole aim was to abolish death penalty in all existing legislation and substitute it with life imprisonment.[910] Where applicable, special conditions may be imposed on persons convicted and sentenced to life in prison.[911] The special conditions include the absence of possibility of parole or presidential pardon for the first 20 years[912] and the confinement of the convict in isolated prisons.[913] The second condition remained an issue with international community and the ICTR. There was a greater possibility that genocide convicts would automatically receive the solitary confinement sentence. Therefore, in order to address this, amendments were made.[914] Therefore, solitary confinement is not applicable to only cases that have been transferred to Rwanda from the ICTR. This is a double standard whereas other cases emanating in Rwanda are eligible for such a sentence.

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908 No. 31/2007 of 25 July 2007
909 *Ibid*., article 6.
910 *Ibid*., article 1 and 2.
911 *Ibid*., article 3.
912 *Ibid*., article 4(1).
913 *Ibid*., article 4(2).
914 Organic Law No. 66/2008 of 21 November 2008 modifying and complementing Organic Law No. 31/2007 of 25/07/2007 relating to the Abolition of the Death Penalty, Official Gazette of the Republic of Rwanda, 1 December 2008.

Secondly, amendments were made to the existing penal code and criminal procedure code[915] in order to bring a balance in the sentencing practice and change the evidential position that made it difficult to admit testimony of accomplices.[916] The amendments also brought about new categories related to the crime of genocide including the crime of destroying the remains of genocide victims,[917] demolishing memorial sites or cemeteries for the victims of the genocide[918] and the theft of the remains of genocide victims.[919]It must be noted that such crimes have not been recognized in international law. However, this is progressive development of the laws through domestic practice.

Moreover, there has been an expansion on the only recognized form of responsibility before international tribunal i.e. individual responsibility. The law has included a provision that imposes accountability on state institutions, public or private companies, enterprises, associations or organizations with legal personality for committing international crimes.[920] It is commendable how domestic legislation are expanding on international instruments to reflect the dynamics that were never captured under international instruments. Therefore, the laws on domestic implementation have been more embracing to the reality on the ground even though it has taken 2 decades to come up with such laws.

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915 Organic Law No.01/2012 of 2 May 2012 instituting the Penal Code, Official Gazette of the Republic of Rwanda, 14 June 2012, part II, chapter one.

916 The law amended a provision that did not allow counsels to present evidence of those who took part in the commission of the offence – accomplices. .

917 Organic Law No.01/2012, article 18.

918 *Ibid*., article 19.

919 *Ibid*., article 17.

920 *Ibid*., article 122.

Thirdly, the complicated nature of international crimes trials calls for specific expertise in order to truly deliver justice akin to that being rendered before international tribunals. Rwandan judges underwent a high degree of training to equip them with international criminal law knowledge.[921] This in itself is a milestone. However, the government made a unique move by amending law to enable international judges to preside over domestic international crimes proceedings.[922] This is an innovation in its own right giving domestic court an international judge makes it akin to specialized court. It is envisioned to increase transparency and enable the transfer of expertise to local judges.

The lack of legislative framework for the prosecution of international crimes prior to the genocide was cured by the above analyzed legal reforms. Rwanda has now a comprehensive legislative framework for the prosecution of international crimes. With such a state of an art laws, the restructuring of the judiciary which is responsible for implementing the laws was also necessary.

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[921] International Crisis Group, 'Five Years after the Genocide in Rwanda: Justice In Question', ICG Report Rwanda No 1, 7 April 1999.

[922] Organic Law No. 03/2012/OL of 13 June 2012 determining the organisation, functioning and jurisdiction of the Supreme Court, Official Gazette of the Republic of Rwanda, 9 July 2012, article 13 (2). within the general interest of the judiciary or for sake of conforming the proceedings to the international jurisprudence, upon his/her own initiative or request by an accused, his /her counsel or national or foreign prosecution authority, may request the United Nations, any other international organisation or a foreign country for judicial cooperation to send judges to Rwanda and sit with Rwandan judges in cases of international and cross-border crimes committed on the Rwandan territory or abroad the transfer of which has been requested and which are referred to in the Organic Law determining the organisation, functioning and jurisdiction of courts and in the Organic Law instituting the Penal Code.

6.5.1 The Criminal Justice System and the Establishment of the Specialized Chambers

The court system of Rwanda was a historical reflection of the colonial dominated country. It was mirrored to that of Belgium court system/civil law system comprised of local courts,[923] district courts,[924] appellate courts and the Court of final Appeal.[925] The office of public prosecution was under the ministry of Justice comprised of 12 regional offices.[926] This structure is what was available immediately after the genocide. However, the 2003 Constitution restructured the Rwandan court system. Therefore, the current court system in Rwanda is comprised of Ordinary Courts which include the Supreme Court, the High Court of the Republic, the intermediate courts and primary courts.[927] The other category of courts includes the specialized courts which consist of the *Gacaca* courts and Military courts. It is also provided under the Constitution that, an organic law may establish other specialized courts.[928] International crimes prosecuted under the ordinary courts are appealable to a higher court in hierarchy. No international crime prosecuted under the *gacaca* courts is to be appealed through the ordinary court system.[929] This is because; the rules of procedure

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923 Prior to the genocide, there were 146 local courts. Information available at http://www.crisisgroup.org/~/media/Files/africa/centralafrica/rwanda/Five%20Years%20After%20the%20Genocide%20in%20Rwanda%20Justice%20in%20Question.pdf [Accessed 9 February 2015].

924 *Ibid*. There were 12 district courts prior to the genocide.

925 *Ibid*.

926 *Ibid*.

927 See information available at http://www.judiciary.gov.rw/home/ [Accessed 9 February 2015].

928 Organic Law No 02/2013/OL of 16/06/2013 Organic Law modifying and complementing Organic Law n° 51/2008 of 09/09/2008 determining the organization, functioning and jurisdiction of courts as modified and complemented to date.

929 *Murenzi Félicien v. Prosecutor* RPAGEN0002/14/TGI/MHG, 2015*; Général Major Laurent Munyakazi v. Prosecutor* RPAA 0008/Gén/07/CS 2009*; Munyakayanza Cyprien v. Prosecutor* RPAA 0034 /Gén/06/CS*; Niyonzigira Samson v Prosecutor* RP GEN 0003/14/TGI/MHG, 2015*; Dr Zirimwabagabo Charles v. Prosecutor* RPAA 0002 GEN/10/CS; *Bujeje Alfred v. Prosecutor* RPAA 0032/Gén/06/CS, 2007*; Nsengiyumva Alphonse v. Prosecutor* RS/REV/GEN 0007/09/CS, 2011; *Murindangabo Joseph v. Prosecutor* RS/INCONST/GEN 0001/08/CS, 2009. All the

are different between the ordinary courts and *gacaca* courts. It would have therefore been unjust not to separate the two even though both of them are essentially dealing with core international crimes.

With this structure in mind, it is appropriate to have a reflection on the working of the criminal justice system in order to warrant the reasons for the innovation of the specialized chambers. Criminal justice system of Rwanda was severely shattered during the genocide. When reference is made to the criminal justice system, it includes the judiciary, police, prisons and prosecution office. However, even prior to the genocide, the justice system had a lot to be desired. It had little and under skilled[930] man power[931] and was crippled with corrupt practices which did not guarantee independence of judiciary.[932] As such, the justice system in Rwanda was never built to accommodate a large number of cases that emerged from the genocide. To just give a rough picture, there were around 124,000 detained suspects who were awaiting trials as of 1995 in prison with capacity of accommodating only 80,000 prisoners.[933]

In a normal scenario, the number of cases could not in any circumstance be dealt with under the justice system that was available during that time. Therefore, the

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appeals to the ordinary courts including the High Court of Kigali originating from the *gacaca* courts were rejected for the failure to follow proper procedure to file the appeals before courts with jurisdiction.

930 Amnesty International, Rwanda: The enduring legacy of the genocide and war, AFR 47/008/2004, p. 4 available at http://www.amnesty.org/fr/library/asset/AFR47/008/2004/en/285043da-d5f7-11dd-bb24-1fb85fe8fa05/afr470082004en.pdf. [Accessed 9 February 2015]. Some of the magistrates prior to the genocide did not possess even a law degree.

931 *Ibid*. In 1996 there were 50 judges, 14 prosecutors and 39 police. Most of the judges and other working judicial officials fled during the genocide hence the judiciary was left with little to no man power.

932 *Ibid*., p. 6.

933 *Ibid*., p. 3.

international community and the government of Rwanda refurbished the judiciary (including the training of judicial personnel and supporting staff on different aspects of international crimes) and established the Tribunals of first Instance.[934] With regard to the judiciary which was under staffed after the genocide needed man power,[935] an intensive recruitment and training programme was carried out to fill the gap that existed.[936] Noteworthy, people with no legal specialization were appointed as judges following the intensive training carried out.[937] However, today the situation is different. Judges have legal qualifications including the prosecutors.[938] The ICTR together with other non-African states[939] and Interpol[940] played a significant role in making sure that the justice mechanism in Rwanda was up to standard to deal with

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934 *Ibid*., p. 6. The tribunals of first instance were agreed to be established under article 25 and 26 of the Arusha Accords, signed on 4 August 1993.

935 *Ibid*. Example after the genocide the 600 judges decreased to only 237 while only 53 judges were dealing with criminal cases.

936 Judicial Reform, Public Confidence and the Rule of Law in Rwanda Keynote address by Justice Sam Rugege, Chief Justice of Rwanda, to the Qatar Law Forum, London, 28 February 2013. Available at http://www.qatarlawforum.com/wp-content/uploads/2012/01/Rugege_Speech_Legal_Reforms_and_the_Rule_of_Law_in_Rwanda.pdf [Accessed 9 February 2015]. Supported by information obtained from interview and questionnaires.

937 Interview Transcript. The interviewee revealed that majority of judges after the genocide had no law degrees. This was due to the fact that the government could not find qualified personnel to fill the posts as a result those willing to fill the post were given a crush program to equip them with the requisite knowledge.

938 Human Rights Watch, 'Law and Reality: Progress in Judicial Reform in Rwanda', 25 July 2008 available at http://www.hrw.org/sites/default/files/reports/rwanda0708webwcover.pdf [Accessed 10 February 2015]; Report on the Achievements of Judiciary of Rwanda for the Past Ten Years (July 2004- June 2014). "Before 2004 there were 702 judges with only 84 qualified in law among them 19 were females. Today, there are 288 judges, all of them qualified in Law."

939 The countries included Belgium, Canada, France, Germany, Italy, United States of America, and The Netherlands. Dieng, A., 'Capacity-Building Efforts of the ICTR: A Different Kind of Legacy', *Northwestern Journal of International Human Rights*, Vol 9, No. 3, p. 406-407; Report on the Completion Strategy of the International Criminal Tribunal for Rwanda, UN Doc. S/2007/676, 20 November 2007, para. 51; Report on the Completion Strategy of the International Criminal Tribunal for Rwanda, UN Doc. S/2008/322,13 May 2008, para. 61.

940 Rwandan Genocide Fugitives Project under Interpol assisted Rwandan investigators to secure the arrest of fugitive offenders. Information available http://www.interpol.int/Public/Wanted/images/rwanda.pdf. [Accessed 10 March 2015].

the prosecution of the majority of genocide cases.[941]

Further, the infrastructures which were destroyed during the genocide had to be restored if not improved.[942] Apart from infrastructural rehabilitation, there was the crafting of legislative framework for the prosecution of international crimes as previously analyzed. Further, the government of Rwanda ensured that other issues relevant to the prosecution of international crimes were also addressed; example the issue of witness protection.[943] Two decades of rendering justice to the victims of international crimes has given birth to comprehensive penal legislation in Rwanda addressing the reality on the ground.

The restructuring of the judiciary led to the establishment of specialized chambers in the Tribunals of First Instance and the military courts in order to accommodate the prosecution of genocide and related crimes in the ordinary courts.[944] Crimes stated under the law could not be prosecuted in any other court than the Specialized Chambers unless it was an appellate case which would land before the Court of Appeal.[945] Further, the prosecutors who dealt with international crimes were also a

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941 UN Security Council Resolution 1503, UN Doc. S/RES/1503, 28 August 2003, p. 2; Report on the Completion Strategy of the International Criminal Tribunal for Rwanda (as at 3 November 2008), UN Doc. S/2008/726, 21 November 2008, para. 58.

942 International Crisis Group, 'Five Years after the Genocide in Rwanda: Justice In Question', ICG Report Rwanda No 1, 7 April 1999, p. 7-9. It is estimated that around USD 4,200,000 from the European Union, Switzerland, Belgium, Japan and USAID was invested in rehabilitating the judicial infrastructure. Further, around 10 million USD was channeled towards equipping of the ministry of Justice. The Donors included the European Union, UNHCR, USAID, United Nations Development Programme (UNDP), Germany, Belgium, Canada and Denmark and Ireland.

943 Information obtained from interview and questionnaires.

944 Organic Law No. 08, Chapter V, article 19.

945 *Ibid*., article 22 and article 25 dealt with questions of review.

closed clutch formed after the Specialized Chambers.[946] This ensured that international crimes cases were dealt with personnel who had received training in that particular field.[947] Further, it helped to avoid backlog of ordinary crimes which were not related to the genocide as other courts were able to carry on with the daily rendering of service on other issues.

The first genocide trial in the ordinary court was held in 1996. A number of trials followed thereafter.[948] Even though experts have argued that the jurisprudence of the ordinary courts in the development of international criminal justice is of minimum significance,[949] to the victims, justice was rendered at home and that should be the greatest significance to any international criminal lawyer.

In 2013 the government of Rwanda decided to establish the Specialized Chambers of the High Court.[950] The Chambers on international crimes have jurisdiction on both international crimes and cross border crimes as shown on the law establishing them,

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946 *Ibid*., article 22 and 23. "Officers of the Public Prosecution Department for the Specialized Chambers of the Tribunals of First Instance shall be named by the Prosecutor General of the Court of Appeal from among those assigned to the Office of the Public Prosecutor on Proposal of the Public Prosecutor. They shall be supervised by the First Deputy designated for that purpose."

947 *Ibid*, article 20.

948 It is estimated that around 10,000 cases were litigated in national courts as of 2006. No data is available detailing the number of cases litigated to date. Information available at http://www.un.org/en/preventgenocide/rwanda/about/bgjustice.shtml [Accessed 2 April 2015].

949 Schabas W.A., 'Genocide Trials and Gacaca Courts', *Journal of International Criminal Justice*, 2005, No. 3, p. 879 at 889. judgments will not be of great interest to international criminal lawyers, because there is little in the way of discussion of the legal issues relating to the prosecution of the international crimes within the jurisdiction of the Rwandan courts, genocide and crimes against humanity. Instead, they deal principally with the assessment of factual issues, and are of undoubted interest in this respect as an insight into the dynamics of genocide ... Perhaps most importantly, the judgements provide a reassuring portrait of a judicial system hard at work, contending with the rights of the accused, conflicting evidence and legal questions, and attempting to come to a fair result.

950 Article 4 of Law No 02/2013/OL of 16/06/2013 Organic Law modifying and complementing Organic Law n° 51/2008 of 09/09/2008 determining the organization, functioning and jurisdiction of courts as modified and complemented to date.

Article 90 of Organic Law n° 51/2008 of 09/09/2008 determining the organization, functioning and jurisdiction of courts as modified and complemented to date, is modified and complemented as follows:

> "The Specialized Chamber of the High Court have jurisdiction to hear at the first instance: 1° cases transferred to Rwanda from the International Criminal Tribunal for Rwanda/ Mechanism for International Criminal Tribunals or from other countries; 2° the following international crimes and cross-border crimes: a. terrorism and hostage-taking; b. human trafficking especially child trafficking; c. slavery and other crimes of similar nature; d. torture, inhuman or degrading treatment of human beings; e. crime of genocide; f. crimes against humanity; g. war crimes, genocide denial or revisionism, inciting, mobilizing, aiding and abetting, or otherwise influencing, whether directly or indirectly, the commission of any of the above mentioned crimes. Other international crimes and cross-border crimes provided under Organic Law instituting the Penal Code shall remain under the jurisdiction of the High Court. The Specialized Chamber of the High Court shall also have jurisdiction to hear appeals in cases involving crimes of the genocide against the Tutsi and other related crimes".[951]

From the above provision, it is apparent that the new Chamber has moved past the 1994 events and has come to embrace other forms of cross border crimes in light with the spirit of African instruments as revealed in chapter 5 of the thesis. Therefore, the Chamber has jurisdiction far and beyond the core international crimes. The High court Chamber is therefore endowed with jurisdiction on terrorism, hostage-taking and human trafficking especially child trafficking.[952] Building on the previous existing penal framework on international crimes, the law has a holistic approach to international crimes. From its enabling instrument, the Chamber is dealing with cases of Genocide and crimes against humanity in appeal from lowest court.[953]

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951 *Ibid*., article 14.

952 *Ibid*., article 14 2(a) and (b).

953 *Ibid*. Interview with the registrar has further indicated that the chambers are handling transferred cases from ICTR as aided by fugitive Tracking team under the office of the prosecutor to track Fulgence Kayishema, Charles Sikubwabo, Aloys Ndimbati, Charles Ryandikayo, and Phénéas Munyarugarama who were indicted by the ICTR but remained at large. The genocide tracking unit arrested Ladislas Ntaganzwa in December 2015.

The Chamber is therefore catering for specific situation of Rwanda. At the moment, apart from appeals from lower courts, the docket of international crimes cases emanate from the transferred cases from ICTR, one deported from Canada, one extradited from Sweden and one from Denmark.[954] Overall, there have been about 10,000 cases prosecuted before domestic courts.[955] This number is higher compared to trials held before international courts. These statistical data underscores the importance of domestic prosecution of international crimes in ending impunity.

6.5.2 Transferred Cases from the ICTR

The ICTR has dealt with a number of cases emanating from the genocide in Rwanda as stipulated by its enabling statute. Although located outside Rwanda, it has rendered justice to the victims by prosecuting those most responsible. The ICTR has conducted trials and delivered 55 judgments for 76 accused[956] and referred ten cases to France[957] and Rwanda.[958] The Court has also indicted 9 fugitives.[959] What is of interest for the current thesis, are the cases that were transferred back to Rwanda.

It is evident that national justice mechanisms are not only the available avenue to prosecute perpetrators of international crimes in large numbers but also offer a place

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954 Interview transcript.

955 Human Rights Watch, "Rwanda: Justice After Genocide—20 Years On," March 28, 2014, available at https://www.hrw.org/news/2014/03/28/rwanda-justice-after-genocide-20-years#_ftn12 [Accessed 9 February 2015].

956 Report on the completion strategy of the International Criminal Tribunal for Rwanda as at 5 November 2014, S/2014/829 para 5.

957 *Ibid*. W. Munyeshyaka and L. Bucyibaruta cases transferred to France.

958 *Ibid*. B. Munyagishari and J. Uwinkindi Pastor cases were transferred to Rwanda together with those under fugitive tag.

959 *Ibid*. Augustin Bizimana, Félicien Kabuga, Protais Mpiranya (these will be tried on Residual Mechanism when arrested); Ladislas Ntaganzwa, Fulgence Kayishema, Charles Sikubwabo, Aloys Ndimbati, Charles Ryandikayo, Phénéas Munyarugarama (the fugitive accused cases have been referred to Rwanda).

to transfer a docket of cases that could not be completed by ad hoc tribunals. This feature is different when it comes to the operation of the ICC. The ICTR was created with limited jurisdiction and was expected to complete prosecutions within a certain time frame. In contrast, the ICC is not limited as such because it is a permanent court.

While the primary responsibility of prosecuting international crimes rests on a state where the crimes were committed it is not automatic that such responsibility befalls for situations where cases need to be transferred from ad hoc tribunals in order to complete the mandate within the required time frame. Rwanda, although willing to take cases, it had to constantly demonstrate that it was fit to carry prosecutions on the basis of international standards. According to ICTR rule 11*bis*, the referral of cases was to any state "willing and adequately prepared to accept the case, where the accused would receive a fair trial in the courts of the State concerned and that the death penalty would not be imposed or carried out."[960] Rwanda was the only African country that accepted the referrals together with three European countries.[961]

Thus, the referral process although commenced in 2003 was not accomplished immediately. While the first law enacted in 1996 was enough to kick start domestic prosecutions of international crimes, it was not enough to meet international standards that the ICTR desired to have been established in Rwanda.[962] Therefore,

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960 ICTR statute, article 20 stipulates the fair trial standards.

961 Office of Prosecutor, 'Complementarity in Action: Lessons Learned from the ICTR Prosecutor's Referral of International Criminal Cases to National Jurisdictions for Trial', February 2015, para 25, p. 9. The countries included France, Norway, The Netherlands.

962 Organic Law No. 8 of 1996.

the first attempts in early 2007 to refer cases to Rwanda were not successful.[963] This was due to inadequate fair trial standards that the domestic justice system was experiencing at that time.[964] The available laws and efforts by Rwanda were just aiming at ensuring the perpetrators were brought before courts of law. No much thought was given on the rights of accused and what mechanisms ought to be in place to guarantee them. Therefore, there were pressing issues that needed redress.

To accommodate transfer of cases in Rwanda, a law was passed.[965] It addressed common issues relating to the transfers and sought to guarantee the rights and

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963 Completion Strategy of the International Criminal Tribunal for Rwanda UN Doc. S/2003/946,, 6 October 2003, para. 23. *The Prosecutor v. Fulgence Kayishema*, Case No. ICTR-2001-67-I, Prosecutor's Request for the Referral of the Case of *Fulgence Kayishema* to Rwanda pursuant to Rule 11*bis* of the Tribunal's Rules of Procedure and Evidence, 11 June 2007; *The Prosecutor v. Gaspard Kanyarukiga*, Case No. ICTR-2002-78-I, Prosecutor's Request for the Referral of the Case of *Gaspard Kanyarukiga* to Rwanda pursuant to Rule 11*bis* of the Tribunal's Rules of Procedure and Evidence, 7 September 2007; *The Prosecutor v. Yussuf Munyakazi*, Case No. ICTR-97-36-I, Prosecutor's Request for the Referral of the Case of *Yussuf Munyakazi* to Rwanda pursuant to Rule 11*bis* of the Tribunal's Rules of Procedure and Evidence, 7 September 2007; *The Prosecutor v. Ildephonse Hategekimana*, Case No. ICTR-00-55-I, Prosecutor's Request for the Referral of the Case of *Idelphonse Hategekimana* [sic] to Rwanda pursuant to Rule 11*bis* of the Tribunal's Rules of Procedure and Evidence, 7 September 2007; *The Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-2000-61-I, Prosecutor's Request for the Referral of the Case of *Jean-Baptiste Gatete* to Rwanda pursuant to Rule 11*bis* of the Tribunal's Rules of Procedure and Evidence, 28 November 2007; *The Prosecutor v. Yussuf Munyakazi*, Case No. ICTR-97-36-R11*bis*, Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda, 28 May 2008 (*Munyakazi* (TC)); *The Prosecutor v. Gaspard Kanyarukiga*, Case No. ICTR-2002-78-R11*bis*, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, 6 June 2008 (*Kanyarukiga* (TC)); *The Prosecutor v. Ildephonse Hategekimana*, Case No. ICTR-00-55B-R11*bis*, Decision on Prosecutor's Request for the Referral of the Case of Ildephonse Hategekimana to Rwanda, 19 June 2008; *The Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-2000-61-R11*bis*, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, 17 November 2008 (*Gatete* (TC)); *The Prosecutor v. Fulgence Kayishema*, Case No. ICTR-01-67-R11*bis*, Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda, 16 December 2008 (*Kayishema* (TC); *The Prosecutor v. Yussuf Munyakazi*, Case No. ICTR-97-36-R11*bis*, Decision on the Prosecution's Appeal against Decision on Referral under Rule 11*bis*, 8 October 2008, para. 4 (*Munyakazi* (AC)); *The Prosecutor v. Gaspard Kanyarukiga*, Case No. ICTR-2002-78-R11*bis*, Decision on the Prosecution's Appeal against Decision on Referral under Rule 11*bis*, 30 October 2008, para. 4 (*Kanyarukiga* (AC)); *The Prosecutor v. Ildephonse Hategekimana*, Case No. ICTR-00-55B-R11*bis*, Decision on the Prosecution's Appeal against Decision on Referral under Rule 11*bis*, 4 December 2008, para. 4 (*Hategekimana* (AC)). In light of these Appeal Chamber decisions, the Prosecutor decided not to appeal the *Gatete* (TC) and *Kayishema* (TC) referral chamber decisions.

964 *The Prosecutor v. Yussuf Munyakazi*, Case No. ICTR-1997-36-I, Oral Hearing on Rule 11*bis*, 24 April 2008.

965 Official Gazette of the Republic of Rwanda, 19 March 2007.

security of the accused, the defence team and witnesses. Therefore, the law had provision on the type of crimes to which transferred cases would be tried in Rwanda,[966] admissibility of evidence collected by the ICTR,[967] guaranteeing of accused rights,[968] protection of defence witnesses[969] and the guaranteeing of freedom of movement of defence team and their protection.[970] The law dealt with minimum issues as such other things that were left outside its scope needed to be addressed. This resulted in the amendment of the 2007 Transfer Law. In 2009, another law was passed to compliment the 2007 law by widening the scope of issues covered. [971] The law guaranteed the rights of accused[972] and provided for the admission of testimony of witnesses residing abroad.[973] This was the main thing covered by the law. It was therefore a short legislation with minimal provisions.

The government of Rwanda replaced the 2007 law in 2013.[974] This new law aimed at creating a more favourable condition under which defence witnesses could freely participate in criminal trials without the fear of being arrested or detained. It further made provisions which would make it possible to hear testimony of witnesses who were residing outside Rwanda. Therefore, the law has widened the immunity of

966 *Ibid*., article 3.
967 *Ibid*., article 7 – 12.
968 *Ibid*., article 13.
969 *Ibid*., article 14.
970 *Ibid*., article 15.
971 Organic Law No. 03/2009/OL modifying and complementing the Organic Law No. 11/2007 of 16/03/2007 concerning the Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from Other States, Official Gazette of the Republic of Rwanda, 26 May 2009.
972 *Ibid*., article 3.
973 *Ibid*., article 4.
974 Organic Law No. 47/2013 of 16 June 2013 relating Transfer of Cases to Republic of Rwanda, Official Gazette of the Republic of Rwanda, 16 June 2013. Article 13 provides that "[w]ithout prejudice to the relevant laws of contempt of court and perjury, no person shall be criminally liable for anything said or done in the course of a trial."

defence witnesses for anything said during trial and their freedom from arrest, seizure or detention during their testimony.[975] It further provided for status of evidence gathered by the ICTR and affirmed the admissibility of testimony via video conference.[976]

The government of Rwanda abolished death sentence, narrowed the solitary confinement,[977] provided for the immunity of defence team and witnesses in relation to genocidal ideology, refurbished detention facilities and enacted new laws to deal with transfer of cases.[978] The government also sought to assist the building up of legal aid to make lawyers for defence readily available to the accused.[979] Therefore, following these changes both legislative and infrastructural, the subsequent requests for referral of cases back to Rwanda were accepted and are currently before the High Court. [980]

6.6 Challenges Faced During the Prosecution of International Crimes

Although the prosecution of international crimes in Rwanda's ordinary courts has to a great extent been successful, the process has not been without challenges and

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975 *Ibid*., article 14 and 15.

976 *Ibid*., article 9-13 and article 16.

977 Organic Law No. 66/2008 of 21 November 2008 modifying and complementing Organic Law No. 31/2007 of 25/07/2007 relating to the Abolition of the Death Penalty, Official Gazette of the Republic of Rwanda, 1 December 2008.

978 *Jean Uwinkindi v. the Prosecutor*, Case No. ICTR-01-75-AR11*bis*, Decision on Uwinkindi's Appeal against the Referral of his Case to Rwanda and Related Motions, 16 December 2011, para. 22.

979 Interview transcript.

980 *The Prosecutor v. Fulgence Kayishema*, Case No. ICTR-01-67-I, Prosecutor's Request for the Referral of the Case of Fulgence Kayishema to Rwanda pursuant to Rule 11*bis* of the Tribunal's Rules of Procedure and Evidence, 4 November 2010; *The Prosecutor v. Charles Sikubwabo*, Case Nos. ICTR-95-1D-I & ICTR-96-10-I, Prosecutor's Request for the Referral of the Case of Charles Sikubwabo to Rwanda pursuant to Rule 11*bis* of the Tribunal's Rule of Procedure and Evidence, 4 November 2010; *The Prosecutor v. Jean-Bosco Uwinkindi*, Case No. ICTR-2001-75-I, Prosecutor's Request for the Referral of the Case of Jean-Bosco Uwinkindi to Rwanda Pursuant to Rule 11*bis* of the Tribunal's Rules of Procedure and Evidence, 4 November 2010.

setbacks. This is because in a post conflict society the rendering of justice is not as smooth sailing as in a country which has not been subjected to the most horrific acts a society can go through. Therefore, in the process of prosecuting international crimes in ordinary courts, there were a number of challenges faced especially in the early formative years. These challenges have been revealed by those who had had a direct hand in the judicial process including presiding judges, witnesses, investigators and defence counsels.

6.6.1 Detention Facilities in a Post Conflict Environment

Prior to the commencement of the first genocide trial, there were large numbers of accused detained in prisons around the country. This number kept on increasing as years rolled by. It is estimated that around 125,000 persons were detained awaiting trials in connection to the genocide.[981]Many died due to harsh conditions and overcrowding because the number of detainees was higher than the capacity of the prisons.[982] This also took a toll on the ordinary court system which struggled to render justice[983] on time in line with the notion that justice delayed is justice denied.

Thus, more detainees continued to stay in prisons awaiting trials longer than they normally would.[984] Criticism of arbitrary detention started to pour from the international community. To ameliorate the situation, government of Rwanda introduced the traditional justice mechanism, the gacaca which has helped in dealing

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981 Schabas W.A., Schabas W.A., "Genocide Trials and *Gacaca* Courts," *op. cit.*

982 Human Rights Watch, *Justice Compromised: the Legacy of Rwanda's Community-Based Gacaca Courts*, http://www.hrw.org/reports/2011/05/31/justice-compromised-0,[Accessed 10 February 2015].

983 Interview Transcripts.

984 *Ibid*. Other accused stayed years in prisons without trial.

with backlog of criminal cases resulting from the genocide and completed its work in 2012.[985] Further, the government created new detention centres in Kigali and Mpanga. These new facilities have hosted prisoners from SCSL and those from ICTR transferred cases. The government is also envisioning building new prisons for the other convicts.[986]

6.6.2 Investigation of International Crimes and Protection of Witnesses

It is important to note from a practical side that, the investigation of international crimes is a rather complex process. It was observed that the complexities made it difficult to gather the required evidence for the prosecution side.[987] However, the training and the knowledge accruing from experience in the field made matters better for the investigators. The involvement of Interpol has also assisted the investigation process and the arrest of fugitive offenders.[988]

As noted in this chapter, the prosecution of international crimes in Rwandan courts has placed a high reliance on testimony of victim witnesses or survivors. However, during the first years of prosecuting international crimes in ordinary courts or even *gacaca,* there was a weak witness protection mechanism. As a result, most witnesses

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985 Information available at http://www.bbc.com/news/world-africa-18490348 [Accessedd 11 February 2015]. The gacaca courts have tried around two million accussed. The gacaca system has received the attention of the international community and international law scholars finding its way in the writings of many scholars. Need to say that much criticism has been leveled against the system as falling short of a system that adheres to the respect of rights of accused.

986 Office of Prosecutor, 'Complementarity in Action: Lessons Learned from the ICTR Prosecutor's Referral of International Criminal Cases to National Jurisdictions for Trial', February 2015, p. 24.

987 Interview transcript. The investigation of crimes in Rwanda is vested with Rwanda National Police under the Criminal Investigation Department (CID). Information available at http://www.police.gov.rw/ [12 June 2015].

988 Office of Prosecutor, 'Complementarity in Action: Lessons Learned from the ICTR Prosecutor's Referral of International Criminal Cases to National Jurisdictions for Trial', *op. cit*., The work of the genocide tracking unit at Public Prosecution Authority has helped the arrest of fugitive offender.

were reluctant to testify because of threats of death; some had to flee their homes because of their participation in international crimes trials while others suffered psychological damages,[989] physical abuse or death of other witnesses and the lack of protection readily available for them.[990] In other instances, in the middle of proceedings, witnesses refused to enter appearance something which affected the ongoing cases.[991]

In order to address this difficulty which went on for a good number of years, the government of Rwanda formed Witness and Victims Assistance and Protection programmes under the National Public Prosecution Authority (NPPA).[992] The Witnesses and Victims Protection and Assistance Unit (WVPAU) has played a key role in the protection of witnesses in Rwanda something which is crucial to attaining justice to the victims of international crimes. It has helped victims who now receive protection prior, during and after trial depending on the threats and needs of the witness in question.

> Statistics provided by the VWSU indicate that the Unit assisted 1003 witnesses during genocide trials in gacaca between the opening of its operations in 2006 and 2009. Of these witnesses, 265 were for the defence and 738 for the prosecution, and roughly half of these cases involved responses to threats. Between 2008 and 2011, the Unit handled 262 genocide cases at stage one of threats, 137 at stage two, 92 at stage three and 16 at stage four, for a total of 507 cases. In 2011, the VWSU also responded to 245 rogatory

989 Information available at http://nppa.gov.rw/our-services/witnesses-and-victims-protection/?L=1 [Accessed 9 February 2015].NPPA, Report of Witness Protection Unit, 2008, 2009, 2010, 2011, and 2012.

990 *Ibid*.

991 *Ibid*.

992 *Ibid*. Witnesses and Victims Protection and Assistance Unit (WVPAU) was created in 2006 to offer protection to victims and witnesses who give testimony before Judicial police, Prosecution Authority, Ordinary courts (Classic Courts), Gacaca courts, ICTR and Letters rogatory (rogatory commission). Different measures have been adopted to ensure the security and safety of witnesses including offering protection measure during investigation phase, at the trial phase and post-trial phase. Measures like psychological support, sheltering of witnesses in special houses, closed sessions, video conferencing during trials and relocation of witnesses who are at great danger.

> commissions from foreign jurisdictions to assist genocide witnesses, including 30 individuals located outside of Rwanda.[993]

These notable achievements are commendable. However, what has been out of the purview of the legal and government ability to aid the prosecution of international crimes is the refusal to attest to crimes committed by the relatives of the perpetrators who in other instances had remained the only witnesses to the crimes committed.[994] This remains a challenge not only in Rwanda but also at international level.

6.6.3 Right to Legal Representation and Legal Aid

Criminal justice is a twofold process where we have the prosecution and defence. In Rwanda, the prosecution and its machinery received enough attention from the government but not the defence. The right to legal representation is guaranteed by the Constitution of Rwanda.[995] However, the government task was then to ensure the availability of legal counsel to the accused. This was initially a huge challenge as reflected in the minimum number of legal aid facilities availed to the accused who could not afford an advocate.[996] Even for those who could afford one, who were in fact few,[997] the pool of legal practitioners was shallow. There were very few advocates immediately after the genocide. However, the number has increased over

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993 Clark P. and Palmer N., "Testifying to Genocide: Victims and Witness Protection in Rwanda,"

994 *Ibid*.

995 Constitution of Rwanda, articles 18 and 19.

996 Prosecutor's Request for the Referral of the Case of Bernard Munyagishari to Rwanda Pursuant to Rule II bis of the Rules of Procedure and Evidence, 091! 1/2011, Case No. ICTR-2005-89, Amicus Curiae Brief for the Republic of Rwanda in Support for the Prosecutor's Application for Referral Pursuant to Rule II bis, paras J 8-26; Amicus Curiae Brief of the Kigali Bar Association in the Matter of the Prosecutor's Request for the Referral of the Case of Munyagishari Bernard, 23/01/2012. Case No. lCTR-2005-89.

997 Interview transcript.

the years.[998] Even with the increase in number, most practitioners are not keen to take criminal cases.

This situation has however improved over the years. The admission of foreign lawyers into Rwandan practice has provided a wider availability of defence counsels. Further, the funding of legal aid by Rwandan government is another milestone in ensuring that legal aids function and are well resourced.[999] However, deducing from the defence arguments on referral cases, legal aid remains to be a challenge. Now that legal counsel have been made available to the accused, the issue of lack of resources and delayed or no payment has cropped up.[1000] Therefore, the process is still ongoing. It is taking long time but there is hope that eventually this will no longer be an issue.

6.6.4 Independence of Judiciary

Independence and impartiality of judiciary in a post conflict environment is one area that most people are wary of. The constitution of Rwanda guarantees the presumption of innocence and independence of the judiciary.[1001] It is therefore important to examine whether such provision is actually observed in practice. From interviews conducted, it is apparent that judges in Rwanda have maintained the independence of the bench.[1002] In all instances where international crimes cases are

998 Information available at http://rwandabar.org.rw/ [Accessed 4 December 2014].
999 Interview transcripts.
1000 Monitoring Report for the Munyagishari Case (March 2014), 27/03/2014 para 30 and 52.
1001 Constitution of Rwanda, article 140.
1002 Interview transcripts.

under trial, judges have guaranteed the presumption of innocence.[1003] No accused has been condemned to prison prior to a formal hearing under ordinary courts where such a case originated.[1004] There has been readiness to hear the defence under a presumption that this person is not necessarily guilty of the offences charged. This is therefore a victory in a post conflict justice.

6.7 Conclusion

From the analysis made in this chapter, it is right to conclude that Rwanda serves as a classic example of an African state with political willingness to ensure that the domestic prosecution of international crimes is successful. This political willingness is partly attributed to the fact that the new government to a large extent took no part in the commission of international crimes during the 1994 genocide. Rwanda underwent legal and justice system reformation in order to accommodate the pressing need of bringing justice to the victims of international crimes committed in the country.

The lack of a domestic law addressing genocide during and immediately after the occurrence of the genocide reveals the lack of priority in fulfilling the commitments

[1003] Throughout the research there was no evidence of an instance where an accused was not presumed to be innocent.

[1004] During the early years of national prosecution of international crimes many accused persons experienced arbitrary detention due to inadequate infrastructure to adjudicate cases that emanated from the genocide. However, as pointed under this chapter, the refurbishment of the judiciary and introduction of the gacaca aided to reduce the problem of arbitrary detention. However, the judiciary is still generally faced with the problem of backlog of cases but the inherent problem is no longer there. Report on the Achievements of Judiciary of Rwanda for the Past Ten Years (July 2004- June 2014), August 2014.

states undertake in international instruments. The only thing that Rwanda could not do in the prosecution of international crimes in domestic courts is the prosecution of those who bear the greatest responsibility. While this can be explained by the fact that the trend during its time was a split prosecution between ad hoc tribunal and national courts, a lot is left to be desired by the trend that African states have shown in recent years. Further, there has been a notable omission of prosecution of members of RPF who have been documented to have committed one or more international crimes during the genocide. This is not peculiar to Rwanda; victors' justice has been the general trend in international criminal justice since its formal inception.

CHAPTER SEVEN

THE NATIONAL PROSECUTION OF INTERNATIONAL CRIMES IN UGANDA

7.1 Introduction

The previous chapter clearly showed that where there is a political will, the prosecution of international crimes is possible. In this chapter, the government of Rwanda undertook several steps to bring about legislative and infrastructural changes in order to prosecute a huge number of international crimes cases perpetrated during the 1994 genocide.

This chapter is a continuation of country study on the prosecution of international crimes focusing on Uganda. The chapter's objective is to give analysis of the legislative framework for the prosecution of international crimes in Uganda assessing how it has changed to enable the application of hard mirror theory. In the process of analyzing the prosecution of international crimes in Uganda, a comparative analysis between Uganda and Rwanda is drawn. Historical factors and the lack of political will have influenced the practice of prosecution of international crimes in Uganda. Domestic courts could offer a viable venue to prosecute international crimes due to the change of trend in the country's efforts to bring accountability.

7.2 The Historical Background of Uganda

Uganda is one of the East African Countries. It was originally comprised of chieftaincies[1005] and a number of Kingdoms including, Buganda, Bunyoro, Busoga,

[1005] Mwakikagile G., *Uganda: The Land and Its People,* Dar es salaam, Tanzania, New Africa Press, 2009, p. 91 and 92.

Ankole and Toro.[1006] Uganda was declared a self-governing territory under the leadership of Prime Minister Kiwanuka in 1961. The same year general elections were held making Milton Obote the elected Prime Minister under Uganda People's Congress (UPC).[1007] The period under which Milton Obote reigned (1962-1971) was characterized by human rights violations[1008] and constitutional changes.[1009] It is estimated that around 1,000 people died while a number of others suffered serious injuries.[1010] There was however no accountability for such violations.

In 1971, Obote's own soldier Idi Amin Dada, organized a *coup de tat* and successfully overthrew Obote from power. The dictatorial leadership of Amin is known for the expulsion of Asians, its notorious torture and killings of the military, politicians and civilians who posed threat to the regime.[1011] There was no support from the OAU to exorcise the regime following the election of Amin to hold the position of the chairperson of the Organisation in 1975. It is therefore apparent that international crimes particularly crimes against humanity were committed in Uganda.[1012] However, when it came to accountability, no prosecutions were ever conducted.

[1006] Information available at http://thecommonwealth.org/our-member-countries/uganda/history [Accessed 23 May 2015].

[1007] *Ibid*.

[1008] Bisase A.S., *Guardian Angel: The Beginning*, Author House, London, United Kingdom, 2012, p. 116. State designed actions that resulted in the loss of life and property in a large scale. Torture and other forms of brutality were also common.

[1009] Mutibwa P.M., *Uganda since Independence: A story of Unfulfilled* Hopes, Africa World Press Inc, London, England, 1992, p. 43-47. In 1966 the constitution was changed to abolish the kingdoms that were in place and thus making Milton Obote the first president of Uganda.

[1010] Mwakikagile G., *Obote to Museveni: Political Transformation in Uganda Since Independence,* Intercontinental Books, pp. 7-13.

[1011] Briggs P., *Uganda*, Travel Guides, p. 24 it is estimated that around 300,000 people were killed during Amin's 8 years of leadership.

[1012] Amnesty International, Human Rights in Uganda, AI Report, AFR 59/05/78, June 1978, p. 11. Random killings, targeted killing of the Acholi and Langi soldiers and torture were documented.

The Amin regime was short lived. He was overthrown from power by Tanzania's army which fought in self-defence to the invasion by Amin in 1979.[1013] "Professor Yusuf Lule, a former Commonwealth Assistant Secretary-General and Chairman of UNLF, became President for two months. He was then replaced by Godfrey Binaisa who was replaced in 1980 by a Military Commission led by Paulo Muwanga, which organised elections in December that year."[1014]

The 1980 elections returned Obote for a second term between 1980 and 1985. This phase was also characterized by conduct amounting to one or more categories of war crimes and crimes against humanity.[1015] Again no prosecution of international crimes was carried out. In 1986, Museveni became the president of Uganda to date.

7.3 International Crimes Perpetrated in Northern Uganda

The post-independence politics that provided division between the North and the Western and Southern inhabitants of Uganda paved a way to a prolonged bloodiest conflict in the country. The overthrown regime of Obote II forced most soldiers to flee North in fear of what the Museveni government would do following the atrocities committed.

[1013] *Ibid*.

[1014] More information available at: http://thecommonwealth.org/our-membercountries/uganda/history#sthash.diYRMTF2.dpuf [Accessed 23 May 2015].

[1015] Amnesty International, 'Uganda Breaking the circle: protecting human rights in the northern war zone,' AFR 59/01/99, 17 March 1999. The government army is reported to have committed mass murder in Mpigi, Bushenyi and Luwero Districts.

On August 20, 1986, some Acholi combatants who had taken refuge in Sudan,[1016] waged war against the NRA under Uganda People's Democratic Movement/Army (UPDM/A). The insurgency reached peace agreement with the government in 1990.[1017] Moreover, in the same year when UPDM was active, Alice Auma a.k.a Lakwena created the Holy Spirit Movement which was defeated in 1987. This defeat prompted the formation of a new army group, the Lord's Resistance Army (LRA) under Joseph Kony with similar spiritual linkage to that of Lakwena.[1018]

The civil war has lasted for almost three decades with far reaching consequences to the rights all seek to enjoy. Human rights laws and IHL have been violated by both sides to the conflict i.e. the rebels and the government forces resulting in the commission of a number of international crimes.[1019] It is reported that, the LRA and the Ugandan army[1020] have committed a series of conduct amounting to nothing short of the prohibited acts under the body of international criminal law.[1021]

[1016] It has provided for a long time a safe haven for the rebel fighters to organize train and attack the Northern part of Uganda. Over the years, the government has made deals with Sudan to stop its support to the rebels. Sudan finally agreed to stop supporting the LRA.

[1017] *Ibid*.

[1018] More information available at, http://www.c-r.org/accord-article/causes-and-consequences-war-acholiland-2002#sthash.j0ZSzDFX.dpuf [Accessed 29 March 2015]. Kony formed the LRA in 1987 in effort to bring about the submission of the government to the principles of Christianity.

[1019] Human Rights Watch, Uprooted and Forgotten: Impunity and Human Rights Abuses in Northern Uganda, vol. 17, no. 12(A), September 2005, available at http://www.hrw.org/sites/default/files/reports/uganda 0905.pdf [Accessed 29 March 2015].

[1020] Amnesty International, 'Uganda: Failure to investigate alleged human rights violations in Karamoja region guarantees impunity,' AFR 59/013/2010, 1 November 2010. Reports have revealed that the Uganda People's Defence Force (UPDF) have committed mass killings in the disarmament program.

[1021] Amnesty International, 'Uganda Breaking the circle: protecting human rights in the northern war zone,' AFR 59/01/99, 17 March 1999.

In the North, the NRA committed a series of human rights violations against the followers of the former regime in revenge to what they did during their reign.[1022] For the LRA, the human rights violations have included but not limited to mass murder, abduction, sexual enslavement, mutilation, burning and destroying of human settlement including houses and villages, recruiting children as combatants – child soldiers, porters and sex slaves[1023] to aid the LRA fulfill its mission of attacking civilians and the government.[1024]

The Western part of Uganda has also not been exempted from human rights violations. It is reported that the Allied Democratic Forces (ADF) engaged in guerrilla warfare in the Western part of Uganda. ADF is responsible for a number of human rights violations some of which may amount to international crimes.[1025] All these accounts of serious human rights violations coupled with the commission of international crimes raise one question, have the perpetrators been held accountable?

7.4 Legislative Framework for the Prosecution of International Crimes in Uganda

Uganda is a party to a number of international instruments that give it an obligation to ensure the promotion and protection of human rights in its territory. These

[1022] Amnesty International, 'Uganda Human Rights Violations by the National Resistance Army,' AFR 59/20/91, December 1991.
[1023] Amnesty International, 'Solidarity Action for Universal Rights Uganda Stop child abductions for slave soldiering, AFR 59/04/99, available at https://www.amnesty.org/en/search/?q=uganda&sort=relevance&p=8 [Accessed 30 March 2015].
[1024] Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended On 27 September 2005, No.: Icc-02/04-01/05, para 5.
[1025] Human Rights Watch World Report, New York, United States of America, 1999, p. 82.

international obligations are applicable both at times of conflict and peace[1026] with a certain category being limited to conflict scenarios.[1027] While the long list of international obligations to which Uganda has committed itself to discharge is pleasing to the eyes, the country which adheres to the dualist school needs to have domestic legislation to make international law applicable domestically. It is noteworthy that Uganda has transmitted some of its international obligations giving domestic courts legislative tools for the prosecution of international crimes as discussed hereunder.

The legislative framework for the prosecution of international crimes committed in the Northern Uganda armed conflict range from the international standard

[1026] International Covenant on Economic, Social and Cultural Rights accession 21 January 1987; International Covenant on Civil and Political Rights accession 21 June 1995; Optional Protocol to the International Covenant on Civil and Political Rights 14 November 1995; International Convention on the Elimination of All Forms of Racial Discrimination Accession 21 November 1980; Convention on the Rights of the Child signed and ratified on 17 August 1990; Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts acceded on 6 May 2002; Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour ratified on 21 June 2001; Convention relating to the Status of Refugees and Protocol Relating to the Status of Refugees acceded 27 September 1976. Convention on the Prevention and Punishment of the Crime of Genocide acceded 14 November 1995. African [Banjul] Charter on Human and Peoples' Rights signed 18 Aug 1986 and ratified on 10 May 1986; Convention Governing the Specific Aspects of Refugee Problems in Africa signed on 10 September 1969 and ratified on 24 July 1987; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa Signed on 18 Deemberc 2003 and ratified on 22 July 2010; African Charter on the Rights and Welfare of the Child signed on 26 February 1992 and ratified on 17 August 1994. This list has been limited to those addressing in one way or another the human rights which have been violated in the ongoing conflict in Northern Uganda which inevitably, if meeting the threshold, may amount to crimes against humanity.

[1027] Rome Statute of the International Criminal Court signed on 17 March 1999 and ratified on 14 June 2001; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva Convention relative to the Treatment of Prisoners of War, Geneva Convention relative to the Protection of Civilian Persons in Time of War all acceded on 18 May 1964; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims on Non-International Armed Conflicts (Protocol II) acceded 13 March 1991;

implementing legislation to the existing penal laws prohibiting ordinary crimes in the country. It should be noted at this juncture that, there was no comprehensive legislation in Uganda for international crimes until 2010 when the country enacted a legislation to implement the Rome Statute. Prior to that, the only law dealing with one set of international crimes i.e. war crimes was the Geneva Conventions implementing legislation as shall be assessed hereunder. This state of affairs has negatively affected the prosecution of international crimes in Uganda. Given this fact, resort can only be made to the soft mirror approach for all international crimes perpetrated prior to the coming into force of the Rome Statute implementing legislation that are not covered by the Geneva Conventions implementing law.

With the above in mind, analysis of legislative framework for the prosecution of international crimes is provided hereafter. There will be an analysis of penal laws prior to 2010 to give an overview of what they cover to afford the prosecution of international crimes in the country. Thereafter, the main law dealing with international crimes enacted in 2010 is analyzed.

7.4.1 The Ugandan Penal Code 1950

The Ugandan Penal Code was enacted in 1950. It is the key legislation addressing criminal offences of different nature.[1028] One must bear in mind that the Penal Code

[1028] Penal Code Act cap 20 of 1950. The law addressed crimes such as Treason and Offences Against the State; Offences Affecting Relations with Foreign States and External Tranquillity; Unlawful Assemblies, Riots and Other Offences Against Public Tranquillity; Corruption And The Abuse Of Office; Offences Relating to The Administration of Justice; Offences Relating to Religion; Offences against Morality; Murder and Manslaughter; Offences Connected with Murder and Suicide; Assaults; Offences Against Liberty; Offences Relating to Property; Robbery and Extortion; Burglary, Housebreaking and Similar Offences; Offences Causing Injury to Property.

was not enacted to deal with offences committed in armed conflict. Just like the available penal codes in other countries, the laws are primarily enacted to cover crimes committed in the daily functioning of a country especially at time of peace. This is why when analyzing crimes that would have otherwise been analogous to those committed in armed conflict; they lack the necessary elements to qualify them as international crimes.[1029]

Thus, crimes prosecutable under the Penal Code are termed as ordinary crimes. They do not require a nexus with an armed conflict in order to qualify as a crime akin to war crimes and do not require a wide spread nature to qualify them as crimes against humanity. The law therefore takes aboard even isolated incidents. Further, the penal code does not have any offence that contains the specifications of the crime of genocide. The nature of the existing penal code therefore does not provide legislation on international crimes.

If the penal code is used to prosecute international crimes, the only line that can explain it is the soft mirror approach. Where there is limited legislative framework for the prosecution of international crimes, existing penal laws can be used to bring about accountability.[1030] The prosecutions will however not label such conduct as international crimes but rather they will be treated as ordinary crimes. This is a

[1029] *Ibid*. Example chapters that deal with Offences against Morality; Murder and Manslaughter; Offences Connected with Murder and Suicide; Assaults; Offences Against Liberty; Offences Relating to Property; Robbery and Extortion; Burglary, Housebreaking and Similar Offences; Offences Causing Injury to Property have similar outlook to war crimes and crimes against humanity prohibited under the Geneva Convention Act and the ICC Act. What they lack is the ingredients that would transform them to international crimes.

[1030] Materu S., *The Post-Election Violence in Kenya: Domestic and International Legal Responses*, *op. cit*., p. 91 and 92.

setback. Henceforth, the moral guilt that is associated with international crimes cannot be attained through this avenue. Crimes like murder, manslaughter, offences against liberty and offences relating to property[1031] have similar outlook to some war crimes[1032] and crimes against humanity.[1033] What they lack are the specific elements that would transform them to international crimes. Hence, if a person is prosecuted for the crime of murder under the Penal Code, even if such conduct is a crime against humanity, the prosecution based on the Penal Code can never reveal that. What will be sought to be proved beyond reasonable doubt is that murder was committed and not killing as an aspect of crimes against humanity.

It is also notable that, punishment for some of the offences like murder[1034] and rape[1035] is greater when compared to the one provided for under international instruments on core international crimes. The Penal Code has maintained the death penalty something that has been viewed by human rights activists as a departure from the spirit of international instruments that seek to do away with death penalty. When compared to Rwanda which had to pass laws abolishing death penalty, it shows that eventually, to meet international standards, Uganda may as well have to abolish death penalty.

[1031] Penal Code.

[1032] Example, article 8 of the Rome Statute stipulates war crimes to include, willful killing, and destruction of property, torture, rape and causing serious bodily harm among others. The qualification for war crimes is that they must be committed in armed conflict either of international or internal character. They denote the violation of the laws and customs of warfare.

[1033] Example, article 7 of the Rome Statute, crimes against humanity includes murder, torture, rape and slavery. The qualification however is that such crimes must be committed as part of a widespread or systematic attack against civilian population. This qualification is not available under ordinary crimes.

[1034] Penal Code, section 189.

[1035] *Ibid*., section 124.

Prosecution of international crimes in Uganda under the penal code halts impunity. The only thing that will lack for the victims of the offences perpetrated in the armed conflict is the moral guilt associated with prosecutions under the relevant laws prohibiting international crimes. This is why it is imperative that international crimes are reflected under relevant legislation of a country. It must be noted that, the International Crimes Division (ICD) has been given power to prosecute crimes within its jurisdiction emanating from the Penal Code.[1036] In the case of *Uganda v. Kwoyelo,* charges have been preferred for crimes stipulated under the Penal Code.[1037]

It must be noted that, prosecution of international crimes as ordinary crimes has started recently despite the fact that international crimes have been perpetrated in different periods since Uganda attained its independence. This scenario proves the lack of political will to prosecute international crimes in the country. If there were political will, criminal charges could have been brought against perpetrators of international crimes using the Penal Code before 2011.

7.4.2 The Geneva Conventions Act, Cap.363 16 October 1964

The Geneva Conventions are the culmination of the principles contained in the body of international Humanitarian Law. Their applicability is limited to times of war. Uganda acceded to the four Geneva Conventions and the Additional Protocols.[1038]

[1036] The ICD is detailed discussed in subsequent parts.

[1037] HCD-00-ICC Case No. 02/2010 (2011) (Uganda). Charges under the Penal Code include Murder, Kidnap with intent to Murder, Robbery with Aggravation, and Attempted Murder.

[1038] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva Convention relative to the Treatment of Prisoners of War, Geneva Convention relative to the Protection of Civilian Persons in Time of

The Country had taken a step further to transmit the obligations necessary to give effect to the provisions of the Four Geneva Conventions. The law is therefore aiming at enabling domestic courts to apply the provisions contained in the conventions as stipulated under the enabling legislation. It is a short piece of legislation containing 6 sections and four schedules which are a reproduction of the four Geneva Conventions.

The Geneva Convention Act has prohibited grave breaches as contained in the relevant provisions of the Four Geneva Conventions.[1039] The Act provides for liability to any person who commits or aids, abets or procures the commission of grave breaches as contained under relevant provisions of the Geneva Conventions.[1040] These provisions are applicable to international armed conflicts. [1041] There has therefore been no alteration as to what the grave breaches entail. A cross reference has been made to the relevant provisions of the conventions giving effect to exactly what is contained in the Conventions.

Noteworthy, the liability for grave breaches under the Act is not limited to conduct perpetrated in Uganda but extends to cover liability for those perpetrated outside

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War all acceded on 18 May 1964; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims on Non-International Armed Conflicts (Protocol II) acceded 13 March 1991;

[1039] Geneva Conventions Act Cap 363 of 1964.

[1040] *Ibid*, section 2.

[1041] Article 50 of the first convention, article 51 of the second convention, article 130 of the third convention and article 147 of the fourth convention.

Uganda.[1042] Further, jurisdiction of courts is not limited to nationals, it also covers non-nationals. This is a form of universal jurisdiction for grave breaches.[1043] However, Ugandan courts have never invoked these provisions to prosecute anyone on the basis of universal jurisdiction a practice that is at variant with what has been witnessed in European countries.[1044] Notably, should a person be found guilty for a grave breach involving the killing of any of the protected persons as categorized under the Conventions, such a person is liable to life imprisonment while for other breaches such a person is liable for a term not exceeding fourteen (14) years.[1045] The limit of maximum sentence to life in prison is different from the position of comparable crime (murder) under Penal Code at the time when the Act was enacted.

Despite the presence of this legislation, the courts in Uganda had never invoked their provisions to prosecute the perpetrators of war crimes in the Northern part of Uganda. The *Uganda v. Thomas Kwoyelo* is the first instance where the Act has been put to use.[1046] The Court has categorically affirmed the applicability of article 3 common to the Geneva Conventions and the applicability of the Act to cases emanating from Northern Ugandan conflict. While most were wary on whether such a conflict could be characterized as that of international armed conflict for the Act to apply, the Court has held to the affirmative. The Court stated that the spillover of the

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[1042] Geneva Conventions Act, section 2 (1). "Where an offence under this section is committed without Uganda, a person may be proceeded against, indicted, tried and punished for that offence in any place in Uganda as if the offence had been committed in that place, and the offence shall, for all purposes incidental to or consequential on the trial or punishment of the person, be deemed to have been committed in that place."

[1043] *Ibid*.

[1044] European countries have utilized universal jurisdiction to prosecute international crimes perpetrated outside Europe. Examples have been drawn in chapter 5 of the thesis. These include prosecutions in UK, Belgium, France and Spain.

[1045] Geneva Conventions Act, section 2.

[1046] Constitutional Appeal No. 01 of 2012; Decision of 8th April, 2015.

conflict to Sudan and Democratic Republic of Congo transformed it to that of an international armed conflict.[1047]

It must be emphasized that, courts cannot use the absence of legislation as a reason for non-prosecution of crimes committed since the late 1980s. The lack of political will to prosecute has made provisions that would have otherwise imposed accountability dormant in the statute books. This is a revelation of a government that works together to ensure impunity prevails despite what the laws have provided for. If such were not the case, courts and prosecutorial team would have prosecuted on the basis of this law.

7.4.3 Amnesty Act 2000

Amnesty laws are pieces of legislation passed by the governing parliament to exclude perpetrators of war related crimes from criminal liability as long as the hostilities have ceased and they have chosen to surrender.[1048] These laws therefore view justice as a threat to lasting peace instead they opt to forgive those who perpetrated crimes during conflict so as to attain lasting peace. It is believed that by granting amnesty the society will be reconciled.[1049] It is important to note that, what amnesty laws do is the acknowledgement that crimes have been perpetrated during conflict and the choice is granting forgiveness and barring perpetrators from criminal proceedings.[1050] If not within the permissible limits under the body of IHL, these

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[1047] *Ibid*, p. 39 and 40.
[1048] O'Shea A., *Amnesty for crime in international law and practice*, 2002, pp. 1-325.
[1049] Cassese A., *Cassese's International Criminal Law, op. cit*., p. 309.
[1050] *Ibid*. Throughout history states have over the years opted to grant amnesty for crimes perpetrated in conflict example, France with regard to the war in Algeria, Italy with regard to WWII, Chile

laws may go against the very heart and purpose of international criminal justice.[1051] Practice of the SCSL has demonstrated thus far that international law recognizes no amnesties for international crimes prosecuted before international courts.[1052] It categorically held that,

> [w]hatever effect the amnesty granted in the Lomé Agreement may have on a prosecution for such crimes as are contained in Articles 2 to 4 in the national courts of Sierra Leone, it is ineffective in removing the universal jurisdiction to prosecute persons accused of such crimes that other states have by reason of the nature of the crimes. It is also ineffective in depriving an international court such as the Special Court of jurisdiction.[1053]

This position therefore makes amnesties applicable before national courts pursuant to article 6(5) of the Additional Protocol II and rule 159[1054] of customary international humanitarian law.[1055] This was clarified in the case of *Víctor Raúl Pinto* in 2007, Chile's Supreme Court stated:

> In non-international armed conflicts, those who raise arms against a legitimate government are subject to the penal sanctions imposed by the State in question since legally they do not have the right to participate in combat or to take up arms. [However the state may grant broad amnesty after cessation of hostilities]… the purpose of the amnesty would be to facilitate the re-establishment of social peace by supporting the defeated in the conflict who are in the hands of those who hold the power in the State, facilitating the restoration of peace in that society.[1056]

However, for as much as amnesties are allowed, the court proceeded to conclude the exceptions that amnesty should have no place in international law for those who

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the Decree-Law on General Amnesty 1978 and Argentina granted amnesties for Alande period, Sierra Leone under the Lome Peace Accord.

[1051] Dugard J., 'Restorative justice: International law and the South African model' in McAdams A.J., (ed) *Transitional justice and the rule of law in New Democracies* (1997) 269; Roht-Arriaza N. and Gibson L., 'The developing jurisprudence on amnesty,' *Human Rights Quarterly*, 1998, No. 20, p. 843.

[1052] *Prosecutor v. Morris Kallon and Anr* , Summary Of Decision on Preliminary Motion Based on Lack of Jurisdiction/ Abuse of Process: Amnesty Provided by the Lomé Accord, SCSL-2004-15-PT; Case No.SCSL-2004-16-PT.

[1053] *Ibid*., para 88.

[1054] Additional Protocol II, Article 6(5).

[1055] Information available at https://www.icrc.org/customary-ihl/eng/docs/v1 [Accessed 2 April 2015].

[1056] Information available at https://www.icrc.org/customary-ihl/eng/docs/v2_cou_cl_rule159 [Accessed 2 April 2015].

violated rules of international humanitarian law by committing war crimes. This would have otherwise defeated article 148 of Geneva Convention IV. Therefore, amnesties should be limited to those who merely participated in the conflict not those who actively violated IHL principles.[1057] This position has been supported by Uganda's Constitutional Court in its ruling on the case of *Uganda v. Thomas Kwoyelo*[1058] where the court stated that:

> It appears to me that the amnesty as defined both in the Act and by the learned authors cited above is targeted at political crimes and those incidental to such acts or crimes. I do not think the definitions, and indeed the purpose of the Act, or in its implementation, would include granting amnesty to grave crimes committed by an individual or group for purposes other than in furtherance or in the cause of the war or rebellion.[1059]

Following the above reasoning, what Uganda initially did with the enactment of the Amnesty Act 2000 was not completely in conformity to international law. Although supported by some section of the affected community,[1060] the law was issued prior to cessation of hostilities and initially barred criminal prosecutions or any form of punishment[1061] for the perpetrators who applied for amnesties for the duration under which the law remained in force. The law provides amnesty for Ugandans who have participated in war since 1986. It covers different forms of participation including:- "actual participation in combat, collaborating with the perpetrators of the war or armed rebellion, committing any other crime in the furtherance of the war or armed

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1057 *Ibid*.
1058 Constitutional Appeal No. 01 of 2012; Decision of 8th April, 2015.
1059 *Ibid*., p. 30.
1060 Office of the UN High Commissioner for Human Rights, 'Making peace our own Victims' Perceptions of Accountability, Reconciliation and Transitional Justice in Northern Uganda,' United Nations 2007. Vinck P., et al, 'Northern Uganda Research Note on Attitudes About Peace and Justice In Northern Uganda', available at http://hhi.harvard.edu/sites/default/files/publications/publications%20-%20vulnerable%20-%20research%20note.pdf. [Accessed 2 April 2015].
1061 Amnesty Act section 2 and 3 (2).

rebellion."[1062] Hence, no one was exempted from the provisions unless the perpetrators opted not to apply in accordance with the procedures laid down under the law.[1063] The law even granted amnesty for those who were captured and detained prior to their application provided they renounced hostilities.[1064] It however did not cover those already convicted for war related offences like treason.[1065] This therefore negatively affected prosecution of international crimes.

The 2006 amendments, that gave the Minister of Internal Affairs the ability to block individuals from being granted amnesty by presenting a list of those who did not qualify to the parliament, narrowed the scope of application. However, the amendments did not provide which criteria were used to exclude a person from being granted amnesty.[1066] Further, the minister had never provided such a list. The only limits were exercised by the DPP who used the power granted to her under the Act to indict *Thomas Kwoyelo* and not to confirm the grant of amnesty upon his application. As of 2012 May, the law on amnesty ceased to be in force pursuant to section 16 of the Amnesty (Amendment) Act. This was further illuminated by the Minister for Internal Affairs, Minister Hillary Onek as quoted hereunder:

> I would like to clarify misconceptions about the status of the Amnesty Law. On May 23, 2012, through statutory instrument 34 of 2012, Part II of the Amnesty Act expired. The implication of this is that the Amnesty Commission will no longer issue amnesty certificates to individuals who return from rebellion seeking amnesty for crimes committed during war or rebellion against the Government of Uganda," Onek said.[1067]

[1062] *Ibid*., section 3 (1)(a) to (d).
[1063] *Ibid*., section 4 (1) and (5).
[1064] *Ibid*., section 4 (2) – (4).
[1065] *Gabula v. Attorney General (HCT-00-CV- CS- 0054) [2012] UGHCICD 1 (6 March 2012).*
[1066] Amnesty (Amendment) Act 2006 (Uganda), s. 2A.
[1067] Information available at http://www.newvision.co.ug/news/633185-amnesty-law-stopped-operating-last-may.html [Accessed 2 April, 2015].

Therefore, in resonance with the Minister's decree, those who were issued with amnesty certificates were now protected from prosecutions.[1068] However, the perpetrators who had not applied for amnesty up to the time the law ceased to continue to operate were not covered by amnesties and hence could be prosecuted before national courts.

The Amnesty law kept Uganda at odds with its international obligations demonstrated in chapter four where states have a duty to prosecute international crimes. The narrow understanding of the law has therefore affected prosecutions that could have otherwise been done before national courts for over a decade. This is so because even those detained prior to application for amnesty were granted amnesty upon application during detention. This law has also affected the only case that has found way to the International Crimes Division (ICD) of the high court as demonstrated in the subsequent parts under this chapter.

7.4.4 The International Criminal Court Act, 2010 Act No.11 of 2010

Uganda is a party to the Rome Statute, signed on 17 March 1999 and ratified on 14 June 2001.[1069] It took the country about a decade to pass an implementing legislation giving effect to the provisions of the Rome Statute.[1070] The goal of the government

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[1068] Around 24,000 people have received amnesty certificates. See, Justice Law and Order Sector (JLOS), 'Justice at Cross Roads? A Special Report on the Thomas Kwoyelo Trial, October 5, 2011,' available at http://www.jlos.go.ug/page.php?p=curnews&id=69 [Accessed 2 April, 2015].

[1069] *John Magezi, Judy Obitre Gama and Henry Omoria v. Attorney General, Constitutional Court of Uganda at Kampala.* The ratification of the Rome Statute was challenged before the court of Law on the grounds that such ratification ought to have been made by the parliament of Uganda since the Rome Statute was at odds with constitutional provisions particularly those with reference to immunity, double jeopardy and the non -respect of national pardons. The petition was however dismissed.

[1070] International Criminal Court Act No. 11, 2010, section 2.

has always been the attainment of peace at the expense of accountability. This is the reason for the passing of amnesty law in 2000. However, the pressure of non-governmental organizations especially the Coalition for the ICC moved Uganda to new dimensions in adding legislative framework for the prosecution of international crimes in Ugandan courts. The referral of cases to the ICC made it imperative for Uganda to ensure the complementarity regime was working.[1071] From analysis of the laws available prior to 2010/2011, it is clear that the only law available in Uganda that addressed international crimes is the Geneva Conventions Act. There was no any law on crimes against humanity or the crime of genocide. There was therefore no effective legislative framework for the prosecution of international crimes in the country.

The ICC Bill which contained detailed provisions on international crimes was ready for consideration in parliament since 2004. However, due to the desire to attain peace following the peace talks, the parliament never discussed the Bill that year not in the subsequent parliamentary meetings due to the upcoming elections in 2006.[1072] Time lapsed with no further deliberations on the Bill.[1073] Nonetheless, on 5th December, 2006 a similar Bill was tabled in parliament for consideration.[1074] It took another 4 long years before it was adopted while other bills that were tabled before the

[1071] Nouwen S., 'ICC Intervention in Uganda: Which Rule of Law does it Promote?," in Zurn M., Nollkaemper A. and Peerenboom R., *Rule of Law Dynamics: In an Era of International and Transnational Governance*, Cambridge University Press, New York, USA, 2012.

[1072] Letter from the Ministry of Justice and Constitutional Affairs addressed to the Registrar of the ICC on the Requests for Arrest and Surrender of the Leaders of the Lord Resistance Army (LRA), 10 April, 2006. The solicitor General expressed his views that the new parliament following the successful elections would pass the Bill during the 2006 session.

[1073] Nouwen S., *Complementarity in the Line of Fire: Catalysing Effect of the International Criminal Court in Uganda and Sudan*, Cambridge University Press, New York, USA, 2013, p. 196; Nouwen S., 'ICC Intervention in Uganda: Which Rule of Law does it Promote?," *op. cit.*

[1074] International Criminal Court Bill 2006.

parliament were adopted, the ICC Bill was kept on hold with similar reasoning of it being a threat to the peace talks that were going on in Juba. Importantly, this second time around there were other factors that made the discussion of the bill important. Among those factors, desire to end impunity was not the main one. Rather, the international image of Uganda which was to play host to the ICC Review Conference scheduled in 2010 became the boosting factor.[1075] As anticipated, the incentive worked and the Bill was adopted in 2010.

Even though Uganda had a piece of legislation prohibiting war crimes, other core international crimes stipulated under the Rome Statute could not be prosecuted in domestic courts unless there was legislation to that effect. The ICC Act was therefore passed with a purpose of giving jurisdiction to domestic courts over core international crimes[1076] stipulated under the Rome Statute among other purposes.[1077] The following is an overview of selected provisions of the law.

7.4.4.1 Definition of International Crimes and Jurisdiction

The Act has provided for a link of definition of each category of international crimes. The provisions on genocide,[1078] war crimes[1079] and crimes against humanity[1080] have specific provision linking the understanding of the crime to the Rome Statute

[1075] Nouwen S., *Complementarity in the Line of Fire: Catalising Effect of the International Criminal Court in Uganda and Sudan*, *op. cit*., p. 197. One of the requirements for hosting the Review Conference was the presence of domestic legislation implementing the Rome Statute.
[1076] International Criminal Court Act (hereinafter referred to as ICC Act), section 3. Although the Act has made reference to war crimes, crimes against humanity, genocide and the crime of aggression, it has not provided for a separate provision on the crime of aggression.
[1077] *Ibid*., section 2.
[1078] *Ibid*., section 7 (2).
[1079] *Ibid*., section 9 (2).
[1080] *Ibid*., section 8 (2).

Specific provision. There is therefore no modification of the content of the Rome Statute with reference to the definition of the three international crimes.[1081] This sharply contrasts to the legal framework in Rwanda which has added a number of new conducts relating to the crime of genocide.

Further, the law has adopted a limited jurisdiction with reference to core international crimes. Courts can only exercise jurisdiction in relation to any offence stipulated under the Act after the Director of Public Prosecutions (DPP) has consented to them.[1082] When reference is made to each provision that provides for the crime, it may give an impression that the courts have been given universal jurisdiction.[1083] However, Ugandan courts have jurisdiction over persons (18 and above)[1084] who have committed international crimes in Uganda or elsewhere but with a conditional nexus to Uganda. Unlike other laws like South Africa that have adopted a complete universal jurisdiction,[1085] the ICC Act has limited its jurisdiction on offences committed outside Uganda.

The law requires the operation of universal jurisdiction only if the person is present in Uganda.[1086] Other circumstances entail the operation of nationality[1087] or passive personality principles of jurisdiction.[1088] Jurisdiction is also asserted to persons who commit international crimes while employed by Uganda on a civilian or military

[1081] When compared to Organic Law No. 8 of Rwanda, a similar approach was adopted.
[1082] *Ibid*., section 17.
[1083] *Ibid*., section 7 – 9.
[1084] *Ibid*., section 19 (V).
[1085] Reference is made to the discussion under chapter 5 of the thesis.
[1086] *Ibid*., section 18 (d).
[1087] *Ibid*., section 18 (a).
[1088] *Ibid*., section 18 (c).

capacity.[1089] This position is different from that of Rwanda which has made cognizance of corporate liability.

The law can be invoked to prosecute persons who are accused for committing international crimes after 25 June 2010 when the Law entered into force. For international crimes committed prior to this date, prosecutions can be made under the Geneva Conventions or the Penal Code to which the Act makes reference to.[1090] Any prosecution made under the penal code as stipulated earlier will not reflect the mental and material elements of any of the core international crimes. Such prosecutions will entail the use of ordinary crime approach to prosecute international crimes. Even though international crimes will be prosecuted as ordinary crimes, such prosecutions will equally end impunity. It is however ideal for prosecutions of international crimes before national courts to mirror those conducted before international tribunals and courts so as to reflect the inherent nature of international crimes which differs from ordinary crimes.

7.4.4.2 Offences Against Administration of Justice

The ICC Act has lengthy provisions on offences relating to administration of justice. These provisions necessarily take into account the nature of international criminal prosecutions which may entail the prosecution of persons with influence in the society and who are capable of interfering in one way or another the proceedings before courts of law. The provisions cover issues pertaining to corruption and bribery in the conduct of prosecutions under the law, giving of false or fabricated evidence

[1089] *Ibid*., section 18 (b).
[1090] *Ibid*., section 9 (4); 19 (1) (b) and (c) and 19 (4) (b).

and the interference of witnesses or officials dealing with the prosecution of international crimes.[1091] It is noteworthy that the provisions on corruption and bribery cover ICC judges, registrar and deputy registrar and other officials.[1092]

The penalties under these provisions range between 7 and 14 years.[1093] These provisions are important to ensure that there is no miscarriage of justice. Where anything to the contrary is done, prosecutions can commence against such persons. The question that remains unanswered is whether prosecution of ICC officials will be done in Uganda or such provisions will just remain dormant in the Statute books to never be utilized in a court of law.

7.4.4.3 Immunity of State Officials

As stated in chapter 5 of the thesis, immunity of state officials has remained an aspect that African states have chosen to embrace. It must be noted that, international law has over the years recognized the immunity of head of states in relation to their prosecutions before domestic courts. Similarly, the Constitution in Uganda provides for personal immunity of the President.[1094] The President cannot be prosecuted in Ugandan courts for any crime during the time he holds office. This is a similar position to that adopted under the Malabo Protocol. However, on a different

[1091] *Ibid*., section 10-16.
[1092] *Ibid*., section 10 and 11.
[1093] *Ibid*. section 17 of the Act requires the consent of DPP for all offences relating to the administration of justice. The accused person may be "arrested, or a warrant for his or her arrest may be issued and executed, and the person may be remanded in custody or on bail, even though the consent of the Director of Public Prosecutions to the institution of a prosecution for the offence has not been obtained, but no further proceedings shall be taken until that consent has been obtained."

[1094] The Constitution of Uganda, article 98 (5).

standing as noted in the mentioned chapter, the Rome Statute has stripped away immunity of state officials.[1095] Echoing the provisions of the Rome Statute, the ICC Act has maintained irrelevance of state official in relation to proceedings before the ICC.[1096] However, there is no any analogous provision to cover domestic provisions. Therefore, any immunity that may be granted to any other official apart from the one for the President under the Constitution, will still apply to domestic courts but not to proceedings before the ICC. The law has maintained the customary rules of international law regulating the immunity of state official from foreign criminal jurisdiction.[1097]

Noteworthy, the provision stripping away immunity under the ICC Act does not touch the President. He or she will still remain immune because rules of interpretation follow that, in case of discordant provisions between the Constitution and the ICC Act, the Constitution of Uganda will prevail. Thus, the President cannot be prosecuted for any international crime committed until he ceases to hold office. Thus, immunity as provided for under the Constitution still holds water when it comes to domestic and international prosecutions. However, the immunity here is only on the President, therefore other state officials are not covered by the relevant provision under the Constitution.

[1095] Rome Statute, article 27 (2).
[1096] ICC Act, section 25.
[1097] Concepción Escobar Hernández, Special Rapporteur, Fifth report on immunity of State officials from foreign criminal jurisdiction, International Law Commission, Sixty-eighth session, Geneva, 2 May-10 June and 4 July-12 August 2016.

Apart from these inconsistencies between the ICC Act and the Rome Statute, the law has maintained the general principles of criminal liability recognized both in international and domestic law.[1098] It has further provided for comprehensive provisions on cooperation with the ICC which covers most part of the Act from section 20 to 102. When applying the law, reference to other existing laws may be necessary. The Act has made such realization and provided for cross reference laws.[1099] All referred laws may be applicable depending on the facts of the case. Example, in order to determine if section 18 (a) of the Act which deals with jurisdiction over nationals applies, the Uganda Citizenship and Immigration Control Act becomes relevant. Thus, the ICC Act becomes effective as complimented by other existing laws of the country.

The only problem emanating from cross referencing is the applicability of death penalty to murder charges made under the Penal Code. Taking into account the fact that the ICC Act is not applicable to crimes committed prior to 2010, most charges may have to be made under other penal laws. While Rwanda has enacted laws to do away with death penalty, Uganda is yet to reach such a milestone. Therefore, just as it took almost two decades for Rwanda to have a good legislative framework that echoes international standards for prosecution of international crimes, it may also take longer to bring Ugandan laws in line with international criminal justice standards. Therefore, as it stands today, legislative framework for the prosecution of

[1098] *Ibid*., section 19. The incorporation of modes of criminal liability recognized in international law such as command responsibility which are generally not available in domestic penal liability is one way of ensuring there is unison between international and domestic trials.

[1099] Extradition Act Cap 117; Geneva Conventions Act Cap 363; Magistrate Courts Act Cap 16; Penal Code Cap 120; Prisons Act Cap 304; Trial on Indictments Cap 23; Uganda Citizenship and Immigration Control Act Cap 66.

international crimes is comprehensive. The Geneva Conventions Act and the ICC Act provide Uganda with laws that enable it to adhere to the hard mirror theory on the domestic prosecution of international crimes perpetrated in the country.

7.5 Accountability for International Crimes Committed in Uganda

It has been adequately documented that international crimes committed in Uganda are not a recent phenomenon. They date as far back as years immediately after independence. Both of the Obote regimes i.e. Obote I and Obote II were characterized by a series of human rights violations which amounted to either war crimes or crimes against humanity.[1100] The Iddi Amin regime took a similar picture.[1101] It is however sad to note that accountability for atrocities committed in 1960s-1980s was never a priority.[1102] Victims for such crimes never got justice and never will. Those most responsible have already passed on.

Therefore, there will never be trial for the crimes they committed. This picture is what has characterized the face of international criminal justice in the cold war period.[1103] It is therefore not strange that atrocities were committed with impunity. It was only those countries which had a vision and the new regimes could not tolerate impunity that rose beyond the ordinary. These are like Ethiopia which was able to prosecute the perpetrators of international crimes.[1104] In contrast, Uganda fell in the pot of many African countries with no political priority of bringing justice to the victims of international crimes.

[1100] Bisase A.S., *Guardian Angel: The Beginning*, *op. cit*.
[1101] Amnesty International Human Rights in Uganda 1978, *op. cit*.
[1102] Apuuli K. P., 'Amnesty and International Law: The Case of Lord's Resistance Army Insurgents in Northern Uganda,' *op. cit*., p. 33 at 44.
[1103] Reference is made to the discussion made under chapter 3 of the thesis.
[1104] Tiba F., 'The Trial of Mengitsu and other Derg members for Genocide, Torture and Summary Executions in Ethiopia,' *op. cit*.

In the 1980s, Uganda took the easy way out in ending the civil war which brought Museveni to power. Between 1986 and 1988, the peace deals and the call of those in exile to return home were fuelled by the granting of amnesties by the government.[1105] This helped to somehow get people to cease hostilities but did not end the war or indeed human rights violations in the North. It has been well acknowledged that international crimes committed in Uganda did not end with the coming into existence of a new government (Museveni government) following the fall of the first two governing regimes after independence. Reports have revealed that the NRA and LRA have committed a series of human rights violations.[1106] It is noteworthy that for almost two decades, nothing was done to ensure that those responsible were held accountable. There were neither investigations nor prosecutions for alleged serious violations of human rights amounting to the commission of international crimes.[1107] Much emphasis was placed on attaining peace in the Northern part of Uganda through the grant of amnesties with little or minimal emphasis on accountability for atrocities committed[1108] despite the presence of legislation that prohibited the atrocities committed during a civil war since 1964.

However, accountability for atrocities committed in the North has taken a different

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[1105] Apuuli K. P., 'Amnesty and International Law: The Case of Lord's Resistance Army Insurgents in Northern Uganda,' *op. cit.*, p. 33 at 44.

[1106] Amnesty International, 'Uganda Human Rights Violations by the National Resistance Army" *op. cit.*

[1107] Amnesty International, 'Uganda Failure to Investigate Alleged Human Rights Violations in Karamajoo region Guarantees Impunity,' *op. cit*; Human Rights Watch, 'Uprooted and Forgotten: Impunity and Human Rights abuses in Northern Uganda,' op.cit.

[1108] The American Non-Governmental Organizations Coalition for The International Criminal Court, 'The Current Investigation by the ICC of the Situation in Northern Uganda,' A programme of the United Nations Association of the United States of America Last updated February 16, 2006, available at http://amicc.org/docs/Northern%20Uganda%20Fact%20Sheet.pdf [Accessed 31 March 2015]. Example the Ugandan government tried military intervention under "Operation Iron Fist" which yielded minimal result in terms of attaining lasting peace in the region. Further, many peace agreements have been concluded to bring about a closure to the hostilities but have not borne a lasting solution.

face from 2000. It is noteworthy that, a similar face that the 1980s took returned in the 2000s but with a legislative backup i.e. the Amnesty Act[1109] which was enacted to pardon those who had committed atrocities since the war began in 1986. The governments of Uganda has also taken initiatives to bring about criminal liability by referring cases to the ICC[1110] and setting up an International Criminal Division (ICD) in domestic court system.

7.6 International Crimes Division

Uganda court system is comprised of courts of judicature and local courts.[1111] The courts of judicature are formal courts made up of the Supreme Court,[1112] Court of Appeal,[1113] High Court,[1114] Industrial Court[1115] and subordinate courts which include Chief Magistrate Courts and Qadhi courts.[1116] The High Court has several Divisions.[1117] Unlike the situation in Rwanda where the judiciary was completely shattered during the genocide, the judiciary in Uganda has always been in a good

[1109] Amnesty Act 2000.
[1110] The government of Uganda made a self referral referring the situation of Northern Uganda to the ICC. The Court is focusing on the alleged war crimes and crimes against humanity committed by LRA and national authorities in Uganda.
[1111] Information available at http://www.judiciary.go.ug/ [accessed 11 April 2015].
[1112] *Ibid*. The Supreme Court is the final court of appeal. The Supreme Court is headed by the Chief Justice and supported by ten (10) Justices. The procedure, powers and jurisdiction of the Supreme Court are regulated by the Supreme Court rules.
[1113] *Ibid*. The Court of Appeal is the constitutional court and it also hears all appeals from the High Court. The procedure, powers and jurisdiction of the Court of Appeal are regulated by the Court of Appeal rules.
[1114] *Ibid*. The High court has original jurisdiction on civil and criminal matters. The High Court headquarters is in Kampala. There are however 12 high court circuits.
[1115] *Ibid*. The Industrial Court was established under the Labour Disputes (Arbitration and Settlement) Act, 2006 Cap 224.
[1116] *Ibid*. These are headed by chief magistrate.
[1117] *Ibid*. The Civil Division, Criminal Division, Family Division, Land Division, Commercial Division, Anti-Corruption Division, Execution and Bailiffs Division and the International Crimes Division.

functioning order although not without challenges.[1118] This is explained by the fact that the conflict in Northern Uganda was concentrated on only a part of the country. For the rest of the country, things were functional including the judiciary.[1119]

There has therefore never been an instance where prosecution of international crimes perpetrated in the North was impossible due to unavailability of courts and infrastructure to prosecute using the ordinary crime approach. To this effect, prosecution of government soldiers is reported to have been conducted before military courts.[1120] Furthermore, to deal with crimes perpetrated in the Northern part of Uganda, prosecutions were conducted on terrorism[1121] and treason charges.[1122] No prosecution was made for war crimes perpetrated as stipulated under the Geneva Conventions Act. Also, due to the absence of legislative framework over the years, no prosecutions have been made for crimes against humanity perpetrated in the Northern Uganda.

[1118] Jurdi N., *The International Criminal Court and National Courts: A contentious relationship,* p. 153. Challenges facing the judiciary in Uganda have included backlog of cases, the understaffing of lower courts, delay in justice and constant adjournment of cases.

[1119] Information available at http://amicc.org/docs/Northern%20Uganda%20Fact%20Sheet.pdf [Accessed 31 March 2015].

[1120] The particular cases that have been decided in military courts have not been accessible.

[1121] The Anti-Terrorism Act 2002,*Uganda v. Sekabira & 10 Ors (H.C. Cr. Case No. 0085 OF 2010) [2012] UGHC 92 (14 May 2012);Annet Namwanga v.Uganda (Crim Misc. Applic. No.04 Of 2011) ((Crim Misc. Applic. No.04 Of 2011)) [2011] UGHC 39 (1 April 2011).*

[1122] Jurdi N., *The International Criminal Court and National Courts: A contentious relationship, op. cit* pp. 157 – 160. It is indicated that there were a number of prosecutions alleging some individuals to have collaborated with the rebels. About 160 have been reported to have been detained on charges of treason. See the case of *John Sebwato & Anor v. Uganda* (Misc. Cr. Appl. No. 198/1989) ((Misc. Cr. Appl. No. 198/1989)) [1990] UGHC 7 (12 March 1990); *Barihaihi & Anor v. Director of Public Prosecutions* (Misc. cause no.67 of 2011) [2012] UGHC 204 (5 October 2012)*;Kinyambila v. Uganda* (Criminal Misc. Application No. 87 Of 2012) [2013] UGHCCRD 3 (4 February 2013)*; Dr.Kizza Besigye & others v. Attorney General* (Const. Petition No.7 Of 2007) [2010] UGCC 6 (12 October 2010); *Okello v. Uganda* (Criminal Misc. Application No. 006 Of 2012) [2012] UGHC 119 (3 July 2012); *Kizito Senkula v. Uganda* (Criminal Appeal No.24 of 2001)) [2002] UGSC 36 (18 December 2002); *Gabula v. Attorney General* (HCT-00-CV- CS- 0054) [2012] UGHCICD 1 (6 March 2012).

Absence of prosecution of international crimes is also explained by the fact that, amnesty was the main option taken by the government of Uganda since the first international crimes were committed in the country. While a few cases have been litigated under military courts,[1123] there was over the years no desire to bring about accountability through the criminal justice mechanisms. This was solidified as shown above by the enactment of the Amnesty Act. However, amnesty did not achieve what the government sought i.e. to end hostilities in the North. Atrocities in large magnitudes continued to be perpetrated especially by the LRA. "Very few victims of LRA abuses interviewed by Human Rights Watch in the camps expressed any desire for "forgiveness" many asked for "punishment" of the commanders."[1124]

In 2002 hope for accountability was seen when Uganda ratified the Rome Statute. The government made referral of the situation in Northern Uganda to the ICC.[1125] The Prosecutor being satisfied that crimes within the jurisdiction of the ICC have been committed issued arrest warrants for five people including Joseph Kony.[1126]

[1123] Ocowun C., Gulu Court Martial Convicts 120 UPDF Soldiers, *New Version,* 20 September 2007. Available at http://www.newvision.co.ug/new_vision/news/1219188/gulu-court-martial-convicts-120-updf-soldiers [Accessed 4 July 2015].

[1124] Human Rights Watch interviews with victims, Gulu, Kitgum and Pader districts, February 25-March 7, 2005 cited in Human Rights Watch, 'The Lack of Accountability,' September 2005, available at, http://www.hrw.org/reports/2005/uganda0905/6.htm [Accessed 30 March 2015].

[1125] Press Release, Int'l Criminal Court, President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC, ICC-20040129-44 (Jan. 29, 2004), available at http://www.icc-cpi.int/Menus/Go?id=04d961fa-a963-4b7e-9ce0-e8a0ebf95822&lan=en-GB. [Accesed 10 April 2015]. The referral indicated the desire to refer only the LRA cases. However, the ICC being a court of no biasness, the referral is not restricted to LRA crimes alone even though the indictments have revealed so far that cases opened are against the LRA.

[1126] See *Prosecutor v. Kony,* Case No. ICC-02/04-01/05, Warrant of Arrest for Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen and Raska Lukwiya Issued on 8 July 2005 as Amended on 27 September 2005 (Sept. 27, 2005), available at http://www2.icc-cpi.int/iccdocs/doc/doc97185.PDF [Accessed 10 April 2015].

Only one Dominic Ongwen has been arrested so far and is awaiting trial.[1127] The trial should give new jurisprudence in relation to the prosecution of the victim turned perpetrator of international crimes.

The self-referral sent a message to the LRA who agreed to enter into peace negotiations with the government of Uganda[1128] leading to the establishment of the International Crimes Division (ICD).[1129] This was a result of the Juba agreement on reconciliation and accountability to which the LRA have failed to sign the final document.[1130] The parties made a conscious realization of the need to refurbish the justice mechanism to enable the prosecution of crimes committed in the over two decade conflict.[1131] Therefore, the government of Uganda acted on a non-binding agreement to fulfill its obligations by establishing the ICD.[1132]

[1127] Amnesty International, Uganda/CAR: Impending transfer of suspected LRA commander to ICC offers opportunity for justice, 18 January 2015, available at, https://www.amnesty.org/en/articles/news/2015/01/ugandacar-impending-transfer-suspected-lra-commander-icc-offers-opportunity-justice/ [Accessed 1 April 2015]. Since Uganda ratified the Rome Statute, reports have revealed the commission of a number of international crimes falling within the scale of those prosecutable by the ICC. These have included but not limited to the recruitment of child soldiers, indiscriminate murder, mutilation, and torture, rape of civilians and flagrant destruction of property. This has inevitably increased the number of internally displaced persons.

[1128] Internal Crisis Group, Africa Report No. 124, Northern Uganda: Seizing the Opportunity for Peace ii (2007), available at http://www.crisisgroup.org/library/documents/africa/central_africa/124_northern_uganda_seizing_the_opportunity_for_peace.pdf. [Accessed 10 April 2015].

[1129] Information available at Justice, Law and Order Sector (JLOS), "Frequently Asked Questions on the International Crimes Division of the High Court of Uganda," available at, http://www.jlos.go.ug/uploads/ICD_FAQs.pdf [Accessed 10 April 2015].

[1130] Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement, Juba, Sudan, June 29, 2007, paras. 4,5 and 6; Annex to the Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement, Juba, Sudan, February 19, 2008, paras. 7, 10-14,

[1131] *Ibid*., para 5.

[1132] Information available at, http://www.judicature.go.ug/data/smenu/18/International_Crimes_Division.html [accessed 11 April 2015].

The need to establish a new division specifically geared towards the prosecution of international crimes is to enable efficacy of such prosecutions. The ICD was established in 2008 originally as a war crimes division of the high court and was transformed to the ICD by a legal notice issued by the Chief Justice in 2011.[1133] The notice provides for crimes which the Division is empowered to prosecute which includes; war crimes, crimes against humanity, genocide, terrorism, human trafficking, piracy and other international crimes contained in Uganda's 2010 International Criminal Court Act, 1964 Geneva Conventions Act, Penal Code Act, or any other criminal law.[1134] From this list, it is apparent that the ICD has jurisdiction far and beyond what the Rome Statute has provided for.[1135]

The ICD has jurisdiction on crimes which have an international element to it. The open ended clause "any other international crime" gives room for Malabo Protocol crimes to fall within the jurisdiction of the ICD upon Uganda's ratification, entry to force of the Malabo Protocol and implementation.[1136] The specialized division on prosecution of international crimes in Uganda is similar to that of Rwanda. Both of them are established as high court divisions and deal with core international crimes and other crimes that have an international element.

[1133] The High Court (International Crimes Division) Practice Directions, Legal Notice No. 10 of 2011, Legal Notices Supplement, Uganda Gazette, no. 38, vol. CIV, May 31, 2011.

[1134] ICC Act, section 6.

[1135] This practice has followed the trend that is also adopted in Rwanda as discussed under chapter 6 and also the practice under the African union as discussed under chapter 5. The jurisdiction of these courts is beyond the Rome Statute core international crimes.

[1136] Annex Statute to the Malabo Protocol, article 28. The Crime of Unconstitutional Change of Government; Piracy, Terrorism, Mercenarism, Corruption, Money Laundering, Trafficking in Persons, Trafficking in Drugs, Trafficking in Hazardous Wastes, Illicit Exploitation of Natural Resources.

The ICD applies a set of legislation relevant to the conduct of prosecutions for crimes under its jurisdiction.[1137] It is notable that the Division has its own set of rules which caters for the procedure before the Court.[1138] The rules are meant to be applicable at pre trial and trial phases of the prosecution.[1139] It is mandatory for both prosecution and defence to appear before at pre trial conference failure of which the judge may issue sanctions and penalties.[1140]

The High Court division comprises of judges that have received training on international and transnational crimes.[1141] The ICD has one case that is directly dealing with international crimes committed in the Northern part of Uganda; the *Uganda v. Kwoyelo.*[1142] The accused is charged for crimes committed under the Geneva Conventions Act[1143] and the Penal Code.[1144] The case has undergone a series of appeal centered on the Amnesty Act. Initially the Constitutional Court directed the ICD to stop the trial of *Kwoyelo* because such trial violated his right to be granted

[1137] The Trial on Indictment Act, Cap 23 of 1971; Penal Code Act, Cap 120 of 1950; the Evidence Act Cap 363 of 1964; the Geneva Conventions Act Cap 6 of 1909.

[1138] The Judicature (High Court) (International Crimes Division) Rules, 2015, passed March 2016.

[1139] *Ibid*. Rule 2(2). In the event of a lacuna in the rules, the normal rules governing criminal proceedings before the high court of Uganda apply with "necessary modifications."

[1140] *Ibid*. Rule 8. At the pre trial conference matters pertinent to the case are decided such as issues relating to the protection of witnesses, disclosure of evidence and confirmation of case for trial.

[1141] Interview transcript. The training of judges has been paramount. The Institute of Security Studies has organized a number of training to both the judges and prosecutors.

[1142] HCD-00-ICC Case No. 02/2010 (2011) (Uganda).

[1143] *Uganda v. Kwoyelo Thomas alias Latoni* Amendment of charges in the International Crimes Division of the High Court of Uganda at Kampala, count 1; willful killing contrary to Article 147 of the Fourth Geneva Convention of 12th August 1949, and which is an offence contrary to section 2(1) (d) and (e) of the Geneva Conventions Act, Cap. 363 of the laws of Uganda; count 2 taking of hostages contrary to Article 147 of the Forth Geneva Convention of 12th August 1949, and which is an offence contrary to section 2(1) (d) and (f) of the Geneva Convention Act, Cap 363 of the laws of Uganda. Count 3, Extensive Destruction of Property constituting a Grave Breach under Article 147 of the Fourth Geneva Convention of 12th August 1949, and which is an offence contrary to section 2(1) (d) and (f) of the Geneva Convention Act, Cap 363 of the laws of Uganda.

[1144] *Ibid*. Charges under the Penal Code include Murder, Kidnap with intent to Murder, Robbery with Aggravation, and Attempted Murder.

Amnesty under the Amnesty Act. The accused had applied for amnesty while in detention and instead of being granted amnesty the DPP commenced criminal proceedings.[1145] The 2012 decision marked the dark era in the domestic prosecution of international crimes in instances where amnesty laws exist. Hopes of many were crushed and only the appellate decision of the Supreme Court where the Attorney General had appealed the decision of the Constitutional Court on 13 grounds could provide an about turn in the direction such prosecution had taken.

On April, 2015 the Supreme Court unanimously[1146] partially allowed the appeal of *Kwoyelo* and ordered the ICD to resume trial.[1147] The partiality came from the rejection by court of grounds 6, 7 and 8 of appeal. Thus, the argument that the Amnesty Act was contrary to Uganda's obligations under international law, the Court decided otherwise.[1148] The Court applied both domestic and international law to arrive at its decision. The Court made analysis of different international instruments including the Geneva Conventions and the Rome statute which are part of Ugandan laws. Other instruments used included, the United Nations Charter and the Universal Declaration of Human Rights (UDHR) specifically the preambles which articulate the commitment to promote and protect human rights.[1149]

The Court agreed that grave breaches were not covered by amnesty law and affirmed that the Amnesty Act did not grant blanket amnesties. The court stated that, the

[1145] *Kwoyelo case*.
[1146] Judgments of justices Katureebe, Dr. Kisaakye, Okello, Tumwesigye, Kitumba and Dr. Odoki.
[1147] Decision of 8th April, 2015.
[1148] *Ibid*., pp. 35 – 43.
[1149] *Ibid*., pp. 36 - 37.

Amnesty Act did not provide for blanket amnesty because amnesty law is inapplicable to persons who have committed grave human rights violations contrary to the laws and customs of war.[1150] This position was reached following the analysis of the Act and its amendment which inferred power to the DPP and expressly gives the Minister power to exclude certain persons from being granted amnesty.[1151] Further, the Court stipulated that the provisions of the Amnesty Act cover only conduct that were done in furtherance of the war or in cause of war (political crimes). The Act excludes willful killing of civilians or conduct contrary to article 147 of the Geneva Conventions or article 8 (2) of the Rome Statute.[1152]

Following the decision by the Court to allow the *Kwoyelo* case to proceed to trial, police opened investigation[1153] and Kwoyelo appeared before the ICD pre trial.[1154] Other cases include Achelam case, cases for 19 soldiers of Joseph Kony[1155] and Jamil Mukulu's case. Jamil Mukulu the leader of Allied Democratic Forces (ADF)

[1150] *Ibid*., pp. 28 - 33.

[1151] Amnesty Act 2000, section 3.

[1152] *Uganda v. Thomas Kwoyelo* Decision of 8th April, 2015.

[1153] Information available at http://acholitimes.com/2015/06/22/police-opens-investigations-into-lras-kwoyelo-case/ [Accessed 26 June 2015].

[1154] Rebel Kwoyelo hearing to resume May 2, 5 April 2016, available at http://www.monitor.co.ug/News/National/Rebel-Kwoyelo--hearing-to-resume-May-2/-/688334/3146192/-/dslhiw/-/index.html [Accessed 12 May 2016].
During the pre trial hearing on 4 April 2016, the prosecution presented evidence to be used during the trial which included 113 witnesses and other documentary evidence. International Justice Monitor, Kwoyelo Trial Postponed (Again) in Ugandan Court: Causes and Ramifications
22 July 2016, available at http://www.ijmonitor.org/2016/07/kwoyelo-trial-postponed-again-in-ugandan-court-causes-and-ramifications/ [Accessed 7 August 2016]. "the trial was postponed to July 18, 2016. On July 18, the trial was again postponed. The ICD has not been specific as to a new date but has hinted that another pre-trial hearing may be held in August 2016 with the full trial scheduled for October 2016."

[1155] International Crimes Division Annual Report 2014 'Enhancing Public Confidence in the Judiciary' International Crimes Division Annual Report 2014, Annual Judges' Conference held at Imperial Resort Beach Hotel, Entebbe 26th - 30th January 2014. Available at http://www.judicature.go.ug/files/downloads/International%20Crimes%20Division%20Report%2020130001.pdf. [Accessed 17 April, 2015].

was arrested in Tanzania[1156] accused for committing mass massacre in Uganda.[1157] The Resident Magistrate at Kisutu gave a decision ordering Mukulu to be extradited to Uganda.[1158] The extradition was made and Mukulu was remanded in custody awaiting trial.[1159]

7.7 The Investigation of International Crimes in Uganda

The investigation of international crimes is not analogous to the investigation of ordinary crimes. Those tasked with the responsibility of investigating international crimes have constantly acknowledged the inherent difficulties in accomplishing their work. Nonetheless, only effective investigation can give way to the prosecution of international crimes. The availability of evidence to support relevant charges is the only way to commence a criminal trial.

The investigation of international crimes entails both the availability of expertise and resources. In Uganda, the task of investigating ordinary and international crimes is vested on the Directorate of Criminal Investigation and Intelligence (DCII) of the

[1156] Information available at http://www.irinnews.org/report/101432/ugandan-rebel-leader-s-arrest-a-shot-in-the-arm-for-justice [Accessed 31 May 2015].

[1157] *Ibid*. Particularly the Kichwamba Technical Institute massacre in the western Ugandan district of Kabarole, where about 80 students were reported to have been killed. Further, the UN reports have revealed that ADF was led by Mukulu have committed gross human rights violations and breaches of IHL in the DRC killing about 237 civilians.

[1158] The decision was rendered on June 25th 2015. However, Mkulu had planned to challenge the decision on the ground that he will not receive fair trial in Uganda.

[1159] SSEMAKADDE I., "The state should try or release Jamil Mukulu," The observer, 15 July 2016, available at http://www.observer.ug/viewpoint/45340-the-state-should-try-or-release-jamil-mukulu [19 July 2016.] "Mukulu has spent more than 320 days on remand awaiting committal to the High court but the Chief Magistrate's court at Jinja has failed and/or refused to release him on bail. Mukulu has also been denied the right to a public trial."

Ugandan Police Force.[1160] The training of police on the investigation of international crimes has been at the fore. [1161] This has provided knowledge to the investigation unit on how to investigate international crimes.[1162] It would have been ideal if the investigation process was aided by the presence of ICC investigators on the ground working on analogous cases for the ICC. This however has not been the case. ICC has not been proactive in enabling local investigators.[1163] There has not been a clear vision to disseminate knowledge from international personnel to local investigators something that brings questions about how positive is the complementarity regime.[1164]

It would have been ideal if the ICC works closely with Ugandan government in ensuring the end of impunity.[1165] In the only case before the ICD, the prosecution has presented during the pre trial 113 witnesses envisioned to testify and "seven pieces of evidence that the prosecution intends to rely on in prosecuting this matter, including video tapes showing the Barlonyo massacre, photos of exhumation, more police statements, medical treatment forms and detailed postmortem reports among

[1160] The Police force is established by the Police Act Chapter 303 of 1994. Interview transcript. So far the unit is managing to carry investigations of international crimes under the Police War crimes Investigation headed by Mr. Venansio Tumuhimbise.

[1161] *Ibid*. The Institute for International Criminal Investigations (IICI) Programme Director has worked closely with the DPP to facilitate the investigation of war crimes between 2010 and 2011.

[1162] Information available at http://www.iici.info/ [Accessed 26 April 2015]. It is noteworthy that, the late Deputy DPP of Uganda Joan Kagezi undertook special training in the IICI's.

[1163] Interview transcript.

[1164] *Ibid*.

[1165] The American Non-Governmental Organizations Coalition for the International Criminal Court, 'The Current Investigation by the ICC of the Situation in Northern Uganda,' 16 February 2006, available at www.amicc.org [Accessed 20 April 2015].

others."[1166] From the evidence presented by the prosecution, reliance is still placed on testimony as key evidence in international crimes trials.

7.7.1 The Witness Protection System

The Northern Uganda civil war being one of the conflicts that have lasted for a long time poses its own unique risks to witnesses who are to testify before the ICD. Further, the prosecution of the crimes in domestic courts in the same territory where the perpetrators and their relatives reside is another challenge.[1167] Thus, there is a high risk of being killed, endure serious bodily harm, receive threats and analogous problems.[1168] This has been proven thus far with the killing of the deputy DPP who was responsible for the prosecution of cases before the ICD.[1169] Therefore, the risks are not only to the witnesses but also to those who are in one way or another involved in ensuring the prosecution of cases before the ICD.

This inevitably calls for a well-established system of security to not only officers of the prosecution and judges but also to the witnesses. As a response to this, the Office of the High Commissioner for Human Rights (OHCHR) and the Uganda Human Rights Commission (UHRC) have made efforts to conduct workshops on issues

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[1166] Rebel Kwoyelo hearing to resume May 2, 5 April 2016, available at http://www.monitor.co.ug/News/National/Rebel-Kwoyelo--hearing-to-resume-May-2/-/688334/3146192/-/dslhiw/-/index.html [Accessed 12 May 2016].

[1167] Mahony C., *The Justice Sector Afterthought: The witness Protection in Africa*, Institute of Security Studies, Pretoria, South Africa, 2010.

[1168] See information available at,http://www.uganda.ohchr.org/EN/Pages/DisplayNews.aspx-NewsID=WitnessProtectionWorkshop.htm. [Accessed 20 December 2015].

[1169] See information available at http://allafrica.com/stories/201504011563.html [Accessed 20 December 2015].

pertaining to the protection of witnesses.[1170]

Efforts to ensure that there is adequate witness protection regime[1171] have culminated in the adoption of the Judicature (High Court) (International Crimes Division) Rules, 2015. The rules supplement the ICC Act provisions on protection of witnesses which cover proceedings before the ICC. [1172] The rules have provided for a definition of a witness and a victim for the purpose of extending protection measured. According to the rules therefore,

> witness" means a person who has made a statement or has given or agreed to give evidence in relation to an offence or criminal proceedings before the Division and includes a person who may require protection due to their relationship or association with the witness.
> victim" means persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute crimes under the jurisdiction of the Division and may include-
>
> (a) the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization or organizations; or
>
> (b) Institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes and to their historic monuments, hospitals and other places and objects for humanitarian purposes;[1173]

Witness and victims protective measures are issued at pre trial and trial phases of the proceedings.[1174] Measures include in camera hearing, expunging of names and addresses of witnesses and victims from the public records, non disclosure of victims

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[1170] Information available at www.uganda.ohchr.org/ [Accessed 20 December 2015].

[1171] African Youth Initiative Network, 'Victims' Voices on Transitional Justice in Uganda: On behalf of the Victims-by the victims' April 2014. Frank N. Othembi, secretary, Uganda Law Reform Commission, presentation at the Judicial Colloquium on Victim and Witness Protection and the Administration of Justice, Bomah Hotel, Gulu, Uganda, August 1, 2011, http://www.jlos.go.ug/uploads/ULRC%20Presentation_Mr.%20Frank%20Othembi%20(1).pdf (accessed November 8, 2011), p. 2;

[1172] ICC Act, section 16, 20, 23, 46 and 58.

[1173] Judicature (High Court) (International Crimes Division) Rules, 2015. Rule 3.

[1174] *Ibid*, rule 6(d) and rule 36.

and witness information to third parties and electronic presentation of testimonies.[1175] The nature of protective measures that the Division can issue has taken into account sexual violence victim-witnesses, children and elderly persons who may appear before the Division. Thus, measures such as psychological support can be granted to such persons when needed.[1176]

The rules are elaborative to cover post trial phase. The Division can issue protective measures to witnesses who are at risky as a result of testimony given or their participation during trial.[1177] The rules have however not specified the kind of orders that they can issue in such cases.[1178] Reference has been made to the need of liaising with Government authorities and other organizations responsible for the protection of witness.[1179] There is no any other authority that has been established to deal with witness protection. It is however notable that as it stands, there is a section in the ICD's registry that caters for this protection of victims and witnesses who appear before the division known as Victims and witness Section.[1180] The rules have not provided for protective measures during investigative phase.[1181]

[1175] *Ibid*, rule 36 (9) (a) – (e).
[1176] *Ibid*, rule 36 (10) (a) – (h).
[1177] *Ibid*, rule 49.
[1178] Practice of international tribunals and courts, measures issued have included relocation and change of identity of the affected witness or victim.
[1179] *Ibid*.
[1180] Judicature (High Court) (International Crimes Division) Rules, 2015; In all international tribunals such as the ICTY, ICTR and ICC they have special units dealing with witness and victims protection. Rwanda established the Witnesses and Victims Protection and Assistance Unit (WVPAU) in 2006 to offer protection to victims and witnesses who give testimony before Judicial police, Prosecution Authority, Ordinary courts (Classic Courts), Gacaca courts, ICTR and Letters rogatory (rogatory commission).
[1181] The aim of protective measures issued to witnesses or victims is to ensure that their participation in criminal proceedings do not negatively affect their lives. As such the protective measures ensure that the personal liberty, physical integrity and life of the victims are protected at all times including the investigation phases of criminal proceedings.

7.8 Challenges in the Prosecution of International Crimes in Uganda

The prosecution of international crimes in Uganda is not without challenges. Being it a novel experience for the country, the legislative framework and justice system have adjusted to accommodate the demands of prosecuting international crimes in Uganda. The difficulties on the road may be many but it is without a doubt that Uganda has taken a positive turn in ending impunity to international crimes.

7.8.1 The biased concentration of LRA cases

The prosecution of international crimes before the ICC has been shadowed by the negative image of concentration of cases emanating from Africa. A similar outlook may be moving stealthily in the domestic prosecution of international crimes in Uganda. Thus far it is apparent that, prosecution of international crimes committed in Uganda both at the ICC and before domestic courts is focused on crimes perpetrated by the LRA. In contrast, little effort has been channeled to international crimes documented to have been committed by the Ugandan national authorities.[1182]

End of impunity means that no biasness should exist on which cases to prosecute. Government officials should equally be prosecuted and if convicted, be given appropriate sentence for directly committing or participating in the commission of international crimes. It is only then that can one talk of justice in its holistic manner. Since, no one is above the law; therefore, there must be equality before the law. Therefore, no perpetrator of international crimes should avoid prosecution just

[1182] When reference is made to the docket of cases before the ICD, there is thus far no case opened against the Ugandan army soldiers irrespective of evidence suggesting that they committed international crimes in the Northern Ugandan conflict.

because the selection of cases has been focused on those against the government. Such a position defeats the ends of justice.

7.8.2 Incompatibilities between the Rome Statute and the Existing Legislative Framework

The main challenge that most countries face is bringing domestic legislation in conformity to the Rome Statute. Uganda is not an exception. The provisions of the Rome statute provide maximum sentence for any crime listed therein to be life in prison. Uganda on the other hand, has maintained the death penalty under its penal legislation which has proven useful in the domestic prosecution of international crimes using the ordinary crime approach.[1183]

The experience of Rwanda has revealed that, for it to qualify as a country worth of receiving the transfer of cases from the ICTR it had to abolish the death penalty.[1184] Yet it was not an instant turn of events. It took a long time after the commencement of domestic prosecution of international crimes before the death penalty was abolished.[1185] Thus, Uganda may take a similar road, slowly amending its legislative framework to meet international standards in the prosecution of international crimes. However, one thing that may not find its way in the domestic laws is the waiver of immunity as provided for under the Rome Statute.[1186] Inclination thus far is more

[1183] Ugandan Penal Code, section188, 189, 286 (2) and 391(2).
[1184] Organic Law No. 66/2008 of 21 November 2008 modifying and complementing Organic Law No 31/2007 of 25/07/2007 relating to the Abolition of the Death Penalty.
[1185] It must be noted that the prosecution of international crimes in Rwanda commenced in 1996 but the abolition of death sentence was made in 2008. This was facilitated by the conditions imposed by the ICTR in order to transfer cases that the tribunal has been handling.
[1186] Rome Statute article 27.

towards what the Malabo Protocol has provided and that is to exclude officials from prosecution until they cease to hold office.[1187] The ICC Act does not contain any provision that touches on the issue of immunity from prosecution before domestic courts. This position is supported by African Heads of States as revealed in the resolutions discussed in previous chapters. This is adherence to rules of customary international law in relation to immunity of state officials before foreign domestic courts.[1188] To lift such immunity, it will be going against settled position under customary international law. Hence, even though Western NGOs and activists would desire African countries to adopt the position under the Rome Statute, the practice thus far reveals a different stance.

7.8.3 Charges Under the ICC Act

The ICC Act was enacted in 2010. It is therefore right to conclude that for crimes to be prosecuted under the law, they must be those which were committed after the Act came into force. In this context crimes committed prior to the enactment of the law cannot be brought under the law in adherence to the known maxim *nullum crimen, nulla poena sine lege* and the rules against retrospective applicability of laws.[1189] The law cannot apply *ex post facto.*[1190]

However, the conduct prohibited under the law require a desirable approach to the

[1187] Annex Statute to the Malabo Protocol, article 46.

[1188] Concepción Escobar Hernández, Special Rapporteur, Fifth report on immunity of State officials from foreign criminal jurisdiction, International Law Commission, Sixty-eighth session, Geneva, 2 May-10 June and 4 July-12 August 2016.

[1189] Constitution of Uganda, Article 28 (7).

[1190] Van Schaack B., '*Crimen Sine Lege*: Judicial Lawmaking at the Intersection of Law and Morals,' *Georgetown Law Journal*, 2008, vol 97, p. 119. The maxim literally translates to mean a person should be held criminally liable to a conduct which was an offence prior to its commission. The aim of these principles is to safeguard the accused.

rules of retrospective applicability of laws. Crimes stipulated under the ICC Act are deeply rooted in the rules of customary international law particularly *jus cogens* which bind every state unless they persistently objected to their formation.[1191] Thus is it right to say that because a country falls under the dualist school when these rules are finally transmitted to pieces of legislation, should persons not be prosecuted for international crimes committed prior to the enactment of the law? The practice that was created by international tribunals is that even in the absence of treaty that prohibits certain conduct, core international crimes were prosecuted for falling under the rules of customary international law.[1192]

Uganda's Constitution provides for applicability of treaties.[1193] There is no reference to applicability of customary international law before domestic courts and there is thus far no jurisprudence on it. Hence, states have primary obligation to prosecute international crimes as bound by rules of customary international law and treaty obligations. This means that, there is existence of international crimes against every state irrespective of the presence of domestic legislation.

Domestic implementing legislation gives courts authority to try international crimes at least in dualist countries. The legislation does not create new offences (with reference to core international crimes), they empower courts to exercise

[1191] The nature of these crimes as *jus cogens* does not automatically grant jurisdiction on courts to prosecute.

[1192] *The Prosecutor v. Dario Kordić and Mario Čerkez* Case no. ICTY-95-14/2-A Appeal Judgment 17 December 2004 at para.44 "The maxim of *nullum crimen sine lege* is also satisfied where a State is already treaty-bound by a specific convention, and the International Tribunal applies a provision of that convention irrespective of whether it is part of customary law"

[1193] The Constitution of Uganda, article 123 read together with Ratification of Treaties Act Cap 204.

jurisdiction[1194] to what would otherwise be difficult to. The principle of legality (which protects the accused against legal conduct being criminalized later on) is satisfied as prior to the enactment of domestic law prohibiting core international crimes.[1195] This is so because the accused is aware that the conduct in question constitute international crimes[1196] to which any state can exercise jurisdiction. If the courts in Uganda will take this approach, it is easy to bring charges for international crimes committed prior to the enactment of the ICC Act as crimes under the body of customary international law. The practice thus far has indicated reluctance to do so as charges have been brought under the Geneva Conventions Act and the Penal code.[1197]

7.8.4 Technical Challenges

The first case before the ICD *Uganda v Kwoyelo* was instituted in 2009 before the High Court. Due to amnesty challenges, the case resumed trial in 2015 following the decision of the Supreme Court**.**[1198] Its first pre trial hearing was held in April 2016 and was schedule to proceed to trial on July 2016.[1199] However, the July session was

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[1194] *The Prosecutor v. Michel Bagaragaza* Case no. ICTR-2005-86-r11*bis* Decision on the Prosecution Motion for Referral to the Kingdom of Norway *Rule 11 bis of the Rules of Procedure and Evidence* . The ICTR denied motion to transfer cases to Norway because the courts in the country did not have jurisdiction *ratione materiae* to prosecute the crime of genocide at the time the petition was made.
Namwase S., *The Principle Of Legality and The Prosecution of International Crimes In Domestic Courts: Lessons From Uganda, op. cit.*

[1196] *Kononov v. Latvia* European Court of Human Rights, (Application no. 36376/04) Grand Chamber Judgment 17 May 2010 available at, http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=83754828&skin=hudoc-en&action=request [Accessed 7 May 2015].

[1197] Reference is made to the *Kwoyelo case.*

[1198] Decision of 8th April, 2015.

[1199] Rebel Kwoyelo hearing to resume May 2, 5 April 2016, available at http://www.monitor.co.ug/News/National/Rebel-Kwoyelo--hearing-to-resume-May-2/-/688334/3146192/-/dslhiw/-/index.html [Accessed 12 May 2016].

postponed due to budget constraints and technical problems.[1200] In August 2016, the defence lawyers did not enter appearance hence another adjournment.[1201] The court appointed new lawyers to represent the accused.[1202] The ICD is striving to meet the technical challenges. This being the first time Uganda is prosecuting international crimes, the challenges experienced are lessons for improvement.

7.9 Conclusion

It has taken Uganda almost four decades to begin the prosecution of international crimes committed in its territory. Throughout the history of the country impunity has prevailed with the aid of the governing regime. The lack of political will to bring about accountability for international crimes perpetrated in the country has been the main factor that enabled the flourishing of the culture of impunity despite the availability of key legislation prohibiting the commission of war crimes.

Uganda has domesticated the Rome Statute but the key piece of legislation is yet to be invoked to prosecute crimes perpetrated in the North due to fears of applying the law retrospectively. Charges have therefore been brought under the Geneva Conventions Act and the Penal Code. The only hurdle in prosecuting international crimes under the penal code is the non- replication of the key ingredients of international crimes in ordinary crimes.

[1200] International Justice Monitor, Kwoyelo Trial Postponed (Again) in Ugandan Court: Causes and Ramifications
22 July 2016, available at http://www.ijmonitor.org/2016/07/kwoyelo-trial-postponed-again-in-ugandan-court-causes-and-ramifications/ [Accessed 7 August 2016].

[1201] Owich J., Kwoyelo's Lawyer Fails to turn to in Court: Case Adjourned, Acholi Times, 15 August 2016, Available at http://acholitimes.com/2016/08/15/kwoyelos-lawyers-fail-to-turn-up-in-court-case-adjourned/ [Accessed 9 September 2016].

[1202] Wokorach-Oboi K., 'LRA'S Thomas Kwoyelo Gets New Lawyers,' 17 August 2016, available at http://letstalk.ug/article/lras-thomas-kwoyelo-gets-new-lawyers

It is noteworthy that, the Supreme Court of Uganda has set ground for future prosecution of international crimes in the country. The court has explicitly rejected the applicability of amnesty law to persons who have committed international crimes. Therefore, what was considered to be the main hurdle in the prosecution of international crimes in Uganda is no longer an issue. The ICD is therefore expected to end the culture of impunity to the prosecution of international crimes in Uganda.

CHAPTER EIGHT

THE NATIONAL PROSECUTION OF INTERNATIONAL CRIMES IN KENYA

8.1 Introduction

The previous chapter gave an analysis of the legislative framework for the prosecution of international crimes before domestic courts in Uganda and went further to provide for the prosecution of international crimes before domestic courts. Through such analysis, reasons for delay in prosecution were clearly articulated. This chapter analyses the legislative framework for the prosecution of international crimes in Kenya through analysis of existing laws on international crimes prior to 2008 and after the enactment of ICC implementing legislation in 2008. The chapter further assesses the practice of prosecuting international crimes before domestic courts in Kenya. In both analyses, the chapter draws a comparative analysis between the findings in Rwanda and Uganda on one hand and the situation in Kenya on the other. The legislative framework for the prosecution of international crimes has improved over the years. There is a clear lack of political will to bring about accountability for international crimes perpetrated in the country.

8.2 Historical Background of Kenya

Kenya is an East African country with a population of around 45,941,977 people of diverse ethnicity.[1203] The country has a total surface area of 580,367 square kilometres and is the 47th largest country in the world computed from its actual land

[1203] Information available at http://worldpopulationreview.com/countries/kenya-population/ [Accessed 20 May 2015]. The ethnicity includes Kikuyu, Luhya, Luo, Kalenjin, Kamba, Kisii , Meru, other Africans, non-African including Asians, Europeans, and Arabs.

mass.[1204] Kenya is a former colony of Britain. The struggle for her independence was triggered by the Mau Mau uprising of 1952 where many Kenyans were killed.[1205]

The politics leading to independence were characterized by ethnic divisions, the majority (Luo and Kikuyu) being represented by Kenya African National Union (KANU) while the minority (remaining ethnicity) were represented by Kenya African Democratic Union (KADU). The division was somehow swept under the rag in order to unite the newly independent state. Kenya gained her independence on 12th December, 1963 with Jomo Kenyatta as its first Prime Minister under (KANU).[1206]

Kenya became a Republic in 1964 with a new Constitution under the leadership of President Jomo Kenyatta.[1207] The constitutional changes after independence were necessary to transform the state machinery to cater for African economic, political and social interests which were bottled-up during colonialism.[1208] The one common feature in independent African country was a one party state. Since independence Kenya was a de facto one party state. In 1982, Kenya made constitutional amendments and empowered the one party system by law.[1209] Ethnicity and

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[1204] *Ibid*.

[1205] Asingo P.O. 'The Political Economy of Transition in Kenya,' in Oyugi W.O., et al (eds), *The Politics of Transition in Kenya: From KANU to NARC,* Heinrich Boll Foundation, Nairobi, Kenya, 2003, p. 15 at 16. The uprising was followed by a series of events that culminated to the attaining of independence. These include the 1958 and 1960 increase of Africans in the Legislative and Executive Councils.

[1206] KANU was launched in 1960.

[1207] Information available at http://www.historyworld.net/wrldhis/PlainTextHistories.asp?historyid=ad21 [Accessed 2o May 2015].

[1208] Asingo P.O., The Political Economu of Transition in Kenya,' *op. cit*.

[1209] Kanyinga K., 'Limitations of Political Liberalization: Parties and Electoral Politics in Kenya 1992-2002,' in Oyugi W.O., et al (eds), *The Politics of Transition in Kenya: From KANU to NARC,* Heinrich Boll Foundation, Nairobi, Kenya, 2003, p. 102.

favouritism took shape during the J. Kenyatta term. He favoured his own in every area be it political, business, commerce, civil service or even military service. The Kikuyu became a powerful class.[1210]

In 1978 upon the sudden death of Jomo Kenyatta, the constitutional successor i.e. the Vice President of Kenya Daniel Arap Moi came to power. He maintained his position as President by winning the majority in KANU. The one party rule was soon to be changed after the pressure to give way to multiparty democracy mounted. Multipartism came with ethnic ties and the desire to see other ethnicity into power. There were several parties which were created including but not limited to the Forum for the Restoration of Democracy (FORD) which later split to FORD-Kenya and FORD-Asili, the Democratic Party of Kenya (DP) and National Development Party (NDP).[1211]

The first multiparty elections were held in 1992 and KANU won the elections returning Moi into power who had already ruled the country since 1978. He again won the second term in 1997.[1212] Both terms of elections were characterized by

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[1210] *Ibid*., p. 22. The one area that has constantly brought strife in the favourtism is on land redistribution that was done after independence. The land that was originally owned by Kenyans was appropriated by colonialists and given to white settlers. Upon independence, the Kenyatta government redistributed the land not to those who originally owned the tracts but to other people of different ethnicity like Luo, Kikuyu and Luhya while favouring the Kikuyu. This has left a lot of resentment and bore major land disputes in the country.

[1211] Kanyinga K., 'Limitations of Political Liberalization: Parties and Electoral Politics in Kenya 1992-2002,' *op. cit*., pp. 106 – 108.

[1212] Odhiambo- Mbai C., 'The Rise and Fall of The Autocratic State in Kenya,' in Oyugi W.O., et al (eds), *The Politics of Transition in Kenya: From KANU to NARC*, Heinrich Boll Foundation, Nairobi, Kenya, 2003, p. 67.

ethnic clashes fuelled by politicians.[1213] This was revealed in 2002 Akiwumi report.[1214] It is reported that at least 3000 people were killed in the clashes of the two term elections of 1992 and 1997.[1215] No one was held accountable for the crimes committed. The lack of accountability for such crimes was contributed by the lack of political will to bring about the end to impunity.

The 1997 elections marked the last term of President Moi's eligibility to contest for reelection because of a two five years term limit.[1216] In the years following the 2002 elections, KANU and NDP joined forces and many speculated that Moi would choose Raila Odinga to succeed him. To the contrary, he named Uhuru Kenyatta as party president and presidential candidate.[1217] This brought friction in the newly merged party (and also to the other non - Kikuyu ethic population) and led to the departure of those who did not agree with President Moi. They joined the Liberal Democratic Party (LDP).[1218]

To mimic KANU-NDP's joint venture, the opposition leaders of DP, FORD-Kenya and the National Party in January 2002 formed the National Alliance for Change

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[1213] Human Rights Watch 'Kenya Report: Politicians Fuelled Ethnic Violence,'1 November 2002, available at http://www.hrw.org/news/2002/10/31/kenya-report-politicians-fueled-ethnic-violence [Accessed 25 May 2015].

[1214] *Ibid*. It is estimated that 2,000 people were killed and around 500,000 internally displaced between 1991 and 1995.

[1215] Cheeseman, N., "The Kenyan Elections of 2007: An Introduction", in *Journal of Eastern African Studies*, 2 (2008) 2, p. 170.

[1216] This clinging of power is a common problem to most African leaders. In the past it was worse because of lack of limited presidential term under the constitutions. But now it is even worse because leaders are willing to change Constitutions in order to be eligible for reelection no matter what the repercussion. What is even more striking is the scenario in Burundi where President Nkuruzinza spiked violence as he desired to serve for a third term.

[1217] Kanyinga K., 'Limitations of Political Liberalization: Parties and Electoral Politics in Kenya 1992-2002,' *op. cit*., pp. 110-118.

[1218] *Ibid*.

(NAC).[1219] Moreover, the National Alliance (Party) of Kenya (NAK) former National Party of Kenya (NPK) made another name change after the Liberal Democratic Party (LDP) joined forces. Now the National Rainbow Coalition (NARC) became the strongest coalition. The allegations that people were fed up by the dominance of two ethnic groups in Kenyan politics i.e. Kikuyu and Kalenjin[1220] were shocked by the nomination and winning of Mwai Kibaki who is also a Kikuyu.[1221] It is noteworthy that the 2002 elections were not free from violence and intimidations from both the ruling and opposition party.[1222] It was the concern of NGOs that if they persisted they would have affected the elections.[1223] Despite this set back, elections were held and NARC won the 2002 elections overthrowing KANU's autocratic rule.[1224]

The next term of election whose violence escalated to the greatest magnitude was the 2007 elections. Typical of the multiparty democracy in Kenya is the formation of

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[1219] *Ibid*., p. 120.

[1220] Jonyo F., 'The Centrality of Ethnicity in Kenya's Political Transition,' in Oyugi W.O., et al (eds), *The Politics of Transition in Kenya: From KANU to NARC,* Heinrich Boll Foundation, Nairobi, Kenya, 2003, p. 155 at 159-160.

[1221] Mutua M., *Kenya's quest for democracy: taming the leviathan,* London, Lynne Rienner Publishers, 2008, p. 285. Mwai Kibaki managed to forge unity among the people and attracted the majority to join NARC in the promise that he would change the government by creating Prime Minister's position.

[1222] Astil J., 'Violence mars final day of Kenya's election campaign,' 27 December 2002, available at http://www.theguardian.com/world/2002/dec/27/kenya.jamesastill [Accessed 25 May 2015]. Mutahi, P. "Political Violence in the Elections", in Maupeu, H., Katumanga, M., and Mitullah, W., *The Moi Succession: The 2002 Elections in Kenya*, Nairobi: Transafrica Press, 2005; Kiai, M., Summary of Electoral Violence in Kenya: January-August 2002, Central Depository Unit, December 2002. Political violence was mainly manned by militia groups including the *Mungiki, Kamjesh, Taliban, Jeshi la Mzee*and *Jeshi la Kingole*. The strongest of them was *Mungiki.*

[1223] Information available at http://news.bbc.co.uk/2/hi/africa/2602819.stm [Accessed 25 May 2015]. "The organization [Amnesty International] accuses the opposition of attacking women attending a rally of the ruling party in Nairobi, and says opposition campaigners were injured by Kanu supporters near Eldoret."

[1224] Wanyande P., 'The Politics of Alliance Building in Kenya: The Search for Opposition Unity,' in Oyugi W.O., et al (eds), *The Politics of Transition in Kenya: From KANU to NARC,* Heinrich Boll Foundation, Nairobi, Kenya, 2003, pp. 128-132.

coalitions. The 2007 elections had two main coalitions[1225] which were ethnically dominated and thus divided. There was the Orange Democratic Movement (ODM) which was supported by Luo, Luhya and Kalenjin as led by Raila Odinga[1226] and Party of National Unity (PNU) supported by Kikuyu and led by Mwai Kibaki.[1227] Prior to the 2007 elections, opinion polls had indicated that Raila Odinga was leading hence most anticipated that he would win the elections.[1228] To the contrary, on 30th December 2007 Mwai Kibaki was declared the winner of 2007 elections and hours after was sworn in as president. ODM refused to accept election results stating that they were defective. This was supported by the EU[1229] and reiterated in Kriegler and Waki Reports on the 2007 elections.[1230] This marked the beginning of an escalated ethnic violence in the country.[1231]

8.3 International Crimes Perpetrated in Kenya

International crimes perpetrated in Kenya can be traced far back to the colonial period. The famous books by Elkins[1232] and Anderson[1233] have detailed accounts of torture and other inhuman acts committed against the Mau Mau supporters.

[1225] There were around 119 political parties registered in 2007.

[1226] The ethnic groups dominate the Nyanza and Western Provinces and Rift Valley.

[1227] This group is based in the Central and Eastern Provinces and also enjoys adequate representation in Nairobi, the Coast Province and Rift Valley.

[1228] Information available at http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-kenya [Accessed 25 May 2015].

[1229] European Union Election Observation Mission, 'Kenya Final Report General Elections 27 December 2007,' 3 April 200, pp. 5-8 and 33 – 34.
Available at http://www.eods.eu/library/FR%20KENYA%2003.04.2008_en.pdf [Accessed 25 May 2015]. The EU noted that the 2007 elections did not meet the international standards of a democratic election. One factor that crippled the democratic nature of the 2007 election was the lack of transparency in the election process and totalling of results.

[1230] Kriegler and Waki Reports on 2007 Elections R.E. 2009, p. 32.
Available at http://www.kas.de/wf/doc/kas_16094-1522-2-30.pdf [Accessed 25 May 2015].

[1231] EU Report on Kenya (n. 934), pp. 38-39.

[1232] Elkins C., *Britain's Gulag: The Brutal End of Empire in Kenya*, London, Jonathan Cape, 2005.

[1233] Aanderson D., *Histories of the Hanged: Britain's Dirty War in Kenya and the End of Empire,* London,Weidenfeld and Nicolson, 2005.

According to Anderson, trials conducted were only limited to the supporters of Mau Mau uprising.[1234] Those loyal to colonial powers and the colonialists who perpetrated different forms of crimes against humanity[1235] were not prosecuted.[1236] Impunity of those in government was normal and could not be questioned.

After independence, subsequent elections in Kenya had features of internal unrests. For example, it is reported that at least 3,000 people were killed in the clashes during the 1992 and 1997elections.[1237] The broken promises of the 2002 elected president of Kenya changed the political wind of the 2007 elections.[1238] New alliances had to be formed to put a strong base for the president to contest again. The announcement of the same person as the winner of 2007 election was a slap on the face to the many people who showed up to vote during the elections expecting change that never came. [1239]

With the deep rooted anger, the flawed elections provided an environment for explosion of angered groups. The notorious *Mungiki*[1240] and other militia groups like

[1234] *Ibid*. see also *Regina v Dedan Kimathi Wachiuri* Criminal Case No. 46 of 1956.
[1235] Elkins C., *Britain's Gulag: The Brutal End of Empire in Kenya, op. cit*, pp. 5-49. The assaults against Mau Mau supporters as mounted by the Governor and Colonial office has far reaching consequences leading to the detaining of around 1.5 million civilians who were subjected to different forms of inhuman treatments.
[1236] *Ibid*.
[1237] Cheeseman, N., "The Kenyan Elections of 2007: An Introduction," *Journal of Eastern African Studies*, 2 (2008) 2, p. 170.
[1238] It was expected that the President would move constitutional reforms including creating the post of the prime minister and further ensure the 50/50 allocation of ministerial and key civil service positions among the allied political parties.
[1239] United Nations High Commissioner for Human Rights, Report from OHCHR Fact-finding Mission to Kenya, 6-28 February 2008 pp. 4-6. Available at http://libraryresources.unog.ch/coi [Accessed 25 May 2015]; Kriegler and Waki Reports *op. cit*, pp. 47-49.
[1240] This militia openly stated its support for Uhuru Kenyata in the 2002 elections.

the Sabaot Land Defence Force (SLDF)[1241] found a platform to perpetrate violence as organized and fuelled by politicians and businessmen.[1242] This was further aided by the nature of impunity of crimes perpetrated in connection with elections that has prevailed over the years. Thus, hours after the announcement of results violence erupted in Nairobi around the shantytown of Kibera and Kisumu and later diffusing to different areas of the country.[1243] The violence is reported to have started as a spontaneous reaction to the election results and later came to be more organized targeting ODM rivals who fought back to counter the attacks.[1244] The police's excessive use of force also did not aid the situation.

Political violence that leads to the commission of atrocities falling under the ambit of international crimes has always been based on build up tensions preceding the elections in Kenya. This was the situation in the 2007 elections. It is feared that such tension has already started to build up following the situation where Raila Odinga together with his CORD Coalition partners and their supporters were tear gassed as they tried to storm the Anniversary Towers.[1245]

The 2007 post-election violence resulted in a number of human rights violations amounting to international crimes particularly crimes against humanity. Reports have revealed around 1,113 deaths, 3,561 people suffered injuries, 117,216 private

[1241] Human Rights Watch, "Turning Pebbles" Evading Accountability for Post-Election Violence in Kenya, 2011, p. 12. This militia is reported to have committed attacks prior and after the elections.
[1242] Kriegler and Waki Reports op. ct, p. 54.
[1243] Report from OHCHR Fact-finding Mission to Kenya, *op. cit*, p. 8.
[1244] *Ibid*., pp. 8-10.
[1245] Olick F., "Raila tear gassed in failed bid to storm IEBC and eject officials," 26 April, 2016. Information available at http://www.the-star.co.ke/news/2016/04/26/raila-teargassed-in-failed-bid-to-storm-iebc-and-eject-officials_c1339031 [Accessed 29 April 2016].

properties and 491 Government owned properties were wrecked as a result of the post-election violence.[1246] Further, 350,000 persons were internally displaced.[1247] The violence was halted by initiation of a mediation process by the AU on 22 January 2008.[1248] The 41 days mediation process resulted in the signing of National Accord and Reconciliation Act by PNU and ODM leaders on February 28, 2008.[1249] The Act created a coalition government sustaining Mwai Kibaki as the President of Kenya and making Raila Odinga the Prime Minister. These changes resulted in constitutional amendments to cater for the position of the Prime Minister.

The mediation was not one dimension. It also saw fit and necessary to bring about the need to hold the perpetrators of post-election violence accountable. This was voiced by Kofi Annan, who stated that,

> Bringing to justice those responsible for the post-election violence is essential to help Kenya heal its wounds, and prevent such crimes from being committed again. In doing so, we must understand that no single community or group is being targeted. It is about bringing individuals to account for crimes they may have committed and ensuring that the victims receive justice.[1250]

Therefore, accountability became one of the key components in concluding the mediation process.[1251] It is however important to assess the laws that are available in Kenya to ascertain if international crimes can be prosecuted before domestic courts.

[1246] Kriegler and Waki Reports, *op. cit*, p. 53. The people died in different areas including the "Rift Valley (744), Nyanza (134) and Nairobi (125). The districts of Uasin Gishu (230), Nakuru (213) and Trans Nzoia (104)."

[1247] *Ibid*., p. 56.

[1248] Office of the AU Panel of Eminent African Personalities, 'Back from the Brink: The 2008 Mediation Process and Reforms in Kenya,' The mediation was chaired by Kofi Annan who worked together with Graça Machel and Benjamin Mkapa.

[1249] Act No. 4 of 2008.

[1250] Kofi Annan speaking at the Conference "The Kenya National Dialogue and Reconciliation: Two Years On, Where Are We?," Nairobi, 2 December 2010.

[1251] Constitution of Kenya (Amendment) Bill 2009. The bill was an implementation of the recommendations given by the Commission of Inquiry. The amendment bill had a provision empowering parliament to establish a special tribunal to prosecute international crimes perpetrated during the 2007 post election violence.

8.4 Legislative Framework for the Prosecution of International Crimes

This sub part provides an analysis of the legislative framework for the prosecution of international crimes in Kenya. Kenya is a party to a number of international conventions dealing with a number of issues including those pertaining to international criminal justice.[1252] Notably, some of the conventions have been transformed into domestic laws. Kenya was traditionally a dualist country and therefore needed to implement international conventions for them to have effect before domestic courts. However, this has been changed since the new constitution was passed. The 2010 Constitution has transformed Kenya into a monist state making international laws directly applicable without a need of domesticating them.[1253] This position has changed the traditional understanding that in most cases civil law countries would automatically belong to the monist school.[1254] Kenya being a common law country and now belonging to the monist school is a change that warrants to be articulated in literatures pertaining to the applicability of international law in domestic courts.

The analysis under this sub part has taken a holistic approach scooping out the existing legislative framework as it stands today. It will be exposed and thus argued that, prior to 2008; the available law that directly deals with international crimes is

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[1252] International Covenant on Economic, Social and Cultural Rights, Acceded 1 May 1972; International Covenant on Civil and Political Rights, Acceded 1 May 1972; International Convention on the Elimination of All Forms of Racial Discrimination, Acceded 13 September 2001; Convention on the Elimination of All Forms of Discrimination against Women, Acceded 9 March 1984; United Nations Convention against Transnational Organized Crime, Acceded 16 June 2004; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Acceded 25 February 1997;

[1253] The Constitution of Kenya article 2(5) and 2 (6).

[1254] Mapunda B.T., *Treaty Making and Incorporation in Tanzania, op. cit*.

the Geneva Conventions Act.[1255] This law caters for only one category of international crime i.e. war crimes. Other international crimes particularly the crime of genocide and crimes against humanity had not been featured in any existing laws. It is only after the passing of International Crimes Act of 2008 that all core international crimes with the exception of the crime of aggression have their rooting in domestic legislation in Kenya. Analysis of the laws is provided hereunder.

8.4.1 The Penal Code Chapter 63 R.E 2012

The Penal Code is Kenyan principal legislation addressing different forms of criminal conduct. It is the oldest penal law that came into force in 1930. Therefore, there is no question of its applicability to crimes committed during the 2007 post-election violence. The law is thus applicable to any conduct falling within its scope. Individual criminal liability befalls to direct perpetrators or those who aided, abated, counseled, procured or even attempted the commission of prohibited conduct.[1256]

Like the Ugandan Penal Code, the provisions in the Kenyan Penal Code provide for the punishment of conduct that fall within the category of international crimes although under different heading. Conduct amounting to murder,[1257] assault,[1258] different forms of sexual offences, [1259] offences against liberty,[1260] and offences

[1255] Chapter 198 of 1972 R.E 2012.
[1256] Kenya Penal Code, Chapter 63 part V. the law also provides for liability of corporations and other legal entities which fall out of the scope of the ICC Statute.
[1257] *Ibid*., Chapter XIX.
[1258] *Ibid*., Chapter XXIV.
[1259] *Ibid*., Chapter XV and the Sexual Offences Act of 2006.
[1260] *Ibid*., Chapter XXV.

against property[1261] are provided for under the Penal Code. The provisions under this law do not reflect any category of international crimes as provided for under different international instruments including the Rome Statute. What is criminalized is analogous conduct with different material and mental element.[1262] However, the conduct remains the same.

As stated by Materu who adheres to the soft mirror approach[1263] and even supported by the jurisprudence of the ICC, such labeling is not an issue but what is important is that the conduct criminalized is the same. The Penal Code of Kenya is therefore applicable in prosecuting crimes (international crimes) committed during the 2007 post-election violence. Whenever the Penal Code is used to bring charges to prosecute those who have perpetrated international crimes, the practice is understood in terms of prosecuting international crimes as ordinary crimes. While under international criminal law such conduct are termed as crimes against humanity, war crimes, or genocide depending on the context and the nature of the conduct, under the Kenyan Penal Code they will fall in one or more of the aforementioned categories without an overhead label.

Punishment under the Kenyan Penal code ranges from death penalty to conditional or unconditional imprisonment for a certain term, imprisonment for life, compensation

[1261] *Ibid*., Division V.
[1262] The *actus reus* of example murder remains the same. However, the qualification to make it one of the core international crimes is what is not provided for under the definition.
[1263] Materu S., *The Post-Election Violence in Kenya: Domestic and International Legal Responses*, *op. cit*., p. 91 and 92.

and fines.[1264] Example, a person who is convicted for murder or manslaughter is liable to death or imprisonment for life.[1265] This severity of punishment is enough to acknowledge that the prosecution of international crimes under the Penal Code does impose a punishment that is equivalent or even higher than that provided for under the body of international criminal justice particularly the Rome Statute.[1266] Therefore, the Penal Code offers a tool that can be used to bring charges for international crimes under the ordinary crime approach ascribed to by the soft mirror theory. However, it is still desirable that, international crimes are prosecuted as international crimes before domestic courts. This will ensure that the severity of international crimes is reflected in the prosecutions. The moral guilt associated with such gross human rights violations is achieved when international crimes are prosecuted as such. Apart from the Penal Code, the Geneva Conventions Act is another law that can be used to prosecute international crimes in Kenya.

8.4.2 Geneva Conventions Act Chapter 198 of 1972 R.E 2012

The Act is the implementation legislation for the body of international humanitarian law, the four Geneva Conventions to which Kenya is a party to. The law is an old body of domestic legislation providing for the criminalization of war crimes. It came into force in 1968. It is a very short piece of legislation containing schedules of the four Geneva Conventions. It contains eight sections.

[1264] *Ibid*., Chapter V.
[1265] *Ibid*., section 204 and 205. Attempted murder and manslaughter are punishable by imprisonment for life and 14 years imprisonment.
[1266] The punishment under the Rome Statute does not go beyond imprisonment for life.

The Act provides for universal jurisdiction for grave breaches as contained under the Geneva Conventions.[1267] There is no reproduction of the content of the conventions, a mention of the sections in a manner as to provide for cross reference has been adopted. Further, there are sections providing for notice of trial,[1268] legal representation,[1269] appeal,[1270] reduction of sentence and custody.[1271] Therefore, Kenya is able to prosecute war crimes under the heading of grave breaches under its domestic laws. It is however noteworthy that, no provision of the Act has ever been invoked to assume universal jurisdiction for war crimes committed in other countries.

For the case of post-election violence, the Geneva Conventions Act is not applicable. The law being limited to crimes perpetrated in armed conflict (war crimes) falls outside the scope of crimes committed during the time of peace. Therefore, the absence of international armed conflict in post-election violence makes the law inapplicable.

While European countries were active prosecuting international crimes committed in Africa, countries like Kenya which ought to prosecute war crimes have never assumed jurisdiction. This passiveness is partly [1272] attributed to the limited

[1267] Geneva Conventions Act, Section 3. The section makes reference to the relevant articles of the Geneva Convention providing for grave breaches which form part of the law in terms of schedules.
[1268] *Ibid*., Section 4.
[1269] *Ibid*., section 5.
[1270] *Ibid*., section 6.
[1271] *Ibid*., section 7.
[1272] The exercise of universal jurisdiction must be provided for under relevant provisions of domestic laws for the offences to which the courts seek to prosecute. The country has to also have the ability to prosecute and enforce sentences upon conviction.

legislative framework that has existed over the years on international crimes. Example, even though Kenya is party to the Genocide Convention, no law has ever been enacted to transform the provisions contained in the convention. There was further no any law addressing crimes against humanity which were initially contained under the body of customary international law until they came to be transmitted under the Tribunals statutes and the Rome Statute.

Thus, the absence of legislative framework over the years had crippled Kenyan courts. It was therefore not prudent to indict a person for one crime (war crime) if the same person is alleged to have committed other crimes falling under the category of crimes against humanity or genocide as was the case of Rwanda. However, this has changed. As of 2008 Kenya adopted legislation providing the country with the most comprehensive law to deal with international crimes perpetrated in Kenya or elsewhere.

8.4.3 International Crimes Act Number 16 of 2008

In order for a country to adhere to the hard mirror theory on domestic prosecution of international crimes, the legal framework providing for international crimes must be reformed. Kenya took initiatives to implement the Rome Statute by enacting the International Crimes Act. Kenya signed the Rome Statute on 11 August 1999 and ratified the same on 15 March 2005. It took Kenya three years to implement the Statute. The Act was enacted in 2008 and became operational on 1st January 2009. This was necessary because from independence up to 2010, Kenya was adhering to

the dualist school on the applicability of international law at domestic level.[1273] Thus, to make international law applicable, there must be legislation in place. The Act was therefore enacted to cater for two objectives which include: to provide legislative framework for the punishment of international crimes as contained in the Rome Statute and to enable Kenya to cooperate with the ICC.[1274]

It must be noted that, the Act became operational two years after the 2007 post-election violence where international crimes were committed. Therefore, following the principle of *Nullum crimen, nulla poena sine lege*, the law is as a matter of general rule inapplicable for international crimes perpetrated in Kenya prior to it coming into force. This principle is well enshrined under article 77 (4) of the 1969 Constitution[1275] which was applicable prior to it being replaced in 2010. The new Constitution which changed the country from a dualist to a monist state provides a different grounding on applicability of international law in Kenya.[1276]

Under the new Constitution, persons can be prosecuted for international crimes even though they have not been provided for under any of Kenyan law.[1277] This position is less cumbersome for domestic courts trying to assume jurisdiction for international crimes which have not been domesticated. If this was the position during the 2007 post-election violence, domestic courts could have been prosecuting international

[1273] The Constitution of Kenya, 2010 article 2(5) and 2(6) provide that the general rules of international law and any treaty ratified by Kenya shall form part of the law of Kenya.
[1274] International Crimes Act 2008.
[1275] Kenya Constitution 1969 (as Amended to 1997). "No person shall be held to be guilty of a criminal offence on account of an act or omission that did not, at the time it took place, constitute such an offence…"
[1276] The Constitution of Kenya, 2010 article 2(5) and 2(6).
[1277] *Ibid*., article 50(2)(n)(i) which reads negatively provides for the ability to be convicted for an act or omission was at the time it was committed or omitted a crime under international law.

crimes as such and would not revert to the ordinary crime approach. However, at the moment, any international crime perpetrated after 2009 when the International crimes Act became operational can be prosecuted using the law. Kenya has a modern legislative framework for the prosecution of international crimes which is a reflection of the commitments under the Rome Statute.

8.4.4 Selected Provisions of the International Crimes Act 2008

The International Crimes Act is a comprehensive legislation reflecting the provisions of the Rome Statute. Majority of the provisions under the law are geared towards enabling the government of Kenya to fully cooperate with the ICC. Parts III- VII of the Act cater for different things on cooperation including but not limited to arrest and surrender, evidence gathering and enforcement of penalties.[1278] Further, the law has provided under part IX provisions regulating the possibility of the ICC to sit and hold proceedings in Kenya.[1279]

Part X deals with request of assistance to the ICC.[1280] This is one part which makes the realization that, during the domestic prosecution of international crimes, the ICC can come handy in a number of ways. Thus it provides for the ability of the Attorney-General (AG) or the Minister[1281] to seek assistance on the investigation or trial proceedings of international crimes in Kenyan courts.[1282] The assistance so requested is on anything the ICC may lawfully provide including "(a) the

[1278] The International Crimes Act, 2008.
[1279] *Ibid*., section 161-167.
[1280] *Ibid*.
[1281] *Ibid*., section 2(1)(b). The Minister under the Act "means the Minister for the time being responsible for matters relating to national security."
[1282] *Ibid*., section 168.

transmission of statements, documents, or other types of evidence obtained in the course of an investigation or a trial conducted by the ICC; and (b) the questioning of any person detained by order of the ICC."[1283] It is interesting to note that immediately after the interpretation section, the law provides for a section stipulating that the law is binding on the Government.[1284] This provision is inspired by the fact that what the law does is putting in place provisions which the Government of Kenya has agreed on international plane. Moreover, it predominantly provides for obligations which the Government has to discharge with respect to cooperation with the ICC.

The following sub part is analysis of selected provisions of the International Crimes Act 2008 those that are relevant in carrying out the prosecution of international crimes before Kenyan High Court.

8.4.4.1 Definition and Jurisdiction over International Crimes

The definition of international crimes is almost similar to what the Uganda ICC Act has provided. The law has adopted specific provisions for each offence linking them to the definition under the Rome Statute.[1285] Kenya and Uganda have not bothered altering the definitions in any manner whatsoever but have provided for a reference link with the specific provisions of the Rome Statute. However, a notable departure is witnessed on the International Crimes Act when reading the provision providing for crimes against humanity. The law has made recognition that the Rome Statute

[1283] *Ibid*., section 170 (a) and (b).
[1284] *Ibid*., section 3.
[1285] *Ibid*., section 6(4).

may not have adequately captured conduct amounting to crimes against humanity. Therefore, the provision allows for the definition to borrow what other conventions and customary international law provide. This position could be attributed to the lack of independent convention catering for crimes against humanity.

Similar to the Ugandan law, the Act has provided for limited universal jurisdiction. The provisions on jurisdiction require a nexus between the offence and the Republic of Kenya. As such the law has provided for territorial jurisdiction,[1286] nationality jurisdiction,[1287] passive personality jurisdiction[1288] and jurisdiction based on the citizenship of the victim of a country involved and allied with Kenya in an armed conflict.[1289] The connection with Kenya is not required for cases where a person has committed international crimes elsewhere with no connection with Kenya but appears to be within Kenyan territory.[1290]

8.4.4.2 Punishment

Punishment for international crimes i.e. war crimes, genocide and crimes against humanity prescribed under the law depends on whether the offence is one of intentional killing or not. Thus, if a person is convicted of an offence that has intentional killing as its basis such a will be sentenced to death.[1291] On the other hand conviction on any other case will attract a punishment of imprisonment for life or

[1286] *Ibid*., section 8(a).
[1287] *Ibid*., section 8(b) (i). This provision extends to cover persons who are not citizens of Kenya but are employed by GOK on civilian or military capacity. On the other hand, jurisdiction can also be assumed where the perpetrator is a citizen or was employed by the country that was involved in armed conflict with Kenya. This is enumerated under section 8(b)(ii).
[1288] *Ibid*., section 8(b)(iii).
[1289] *Ibid*., section 8(b)(iv).
[1290] *Ibid*., section 8(c).
[1291] *Ibid*., section 6(3)(a); Kenya Penal Code, section 204 sets out the punishment for murder.

lesser term.[1292] Imposing of death penalty is a modification from what the Rome Statute provides. Under the Rome Statute, the highest punishment is imprisonment for life a model that has been adopted by Uganda.[1293]

Kenya has maintained the provisions of the Penal Code with reference to intentional killing. While most human rights activists will be critical about the death penalty, it is noteworthy that a country is free to adhere to the rules it has desire to preserve. Just like the way the USA has maintained the death penalty, other African countries have also opted to do the same as is the case with Uganda's penal code and Kenya's penal code and International Crimes Act. It is yet to be seen whether such provisions will affect the future authorization to prosecute offences that have not been prosecuted by the ICC[1294] similar to the situation in Rwanda which ultimately caused Rwanda to abolish the death penalty in order to receive cases from the ICTR.

While the above sentences are applicable to proceedings conducted before domestic courts, the Act has provisions that enable Kenya to act as a state of enforcement of sentences issued by the ICC.[1295] The serving of sentences in Kenya may be a subject of further conditions as the minister may deem fit.[1296]

[1292] *Ibid*., section 6(3)(b).
[1293] Rome Statute, article 77.
[1294] *The Prosecutor v. Germain Katanga* Decision Pursuant to article 108(1) of the Rome Statute.
[1295] The International Crimes Act, 2008, section 134.
[1296] *Ibid*., section 134 and 135.

8.4.4.3 Offence Against the Administration of Justice

The Act has comprehensive provision on offences against the administration of justice in relation to ICC judges and officials. Offences against the administration of justice committed by those employed in Kenyan Judiciary are covered under the Penal Code.[1297]

Just like in Uganda, the law has provided in detail what these offences entail and the punishment accruing after their commission. The offences stipulated attract four varying degree of punishments. The highest is imprisonment of up to fifteen (15) years which is applicable for offences of bribery of judges or other officials.[1298] The next category is for offences whose punishment is up to seven (7) years which cover the offence of perjury[1299] and fabricating of evidence.[1300] Another set of offences i.e. obstruction of justice,[1301] intimidation[1302] and retaliation against witnesses[1303]attracts five (5) years imprisonment. The final set of offences comprises of witness giving Contradictory evidence,[1304] offences relating to affidavits,[1305] and obstructing officials[1306] where if found guilty, can be sentenced up to two (2) years imprisonment. The highest penalty under these provisions is higher (15 years imprisonment) than that provided for under Uganda's ICC Act which is 14 years imprisonment.

[1297]Kenya Penal Code, Chapter X.
[1298] The International Crimes Act, 2008, section 9.
[1299]*Ibid*., section 12.
[1300]*Ibid*., section 14.
[1301]*Ibid*., section 10.
[1302]*Ibid*., section 16.
[1303]*Ibid*., section 17.
[1304]*Ibid*., section 13.
[1305]*Ibid*., section 15.
[1306]*Ibid*., section 11.

8.4.4.4 Immunity of State Officials

The immunity of state officials has been waived by the Rome Statute. The provisions of the Act have maintained the same position in relation to surrender of persons to the ICC. Section 27 provides that;

> The existence of any immunity or special procedural rule attaching to the official capacity of any person shall not constitute a ground for (a) refusing or postponing the execution of a request for surrender or other assistance by the ICC; (b) holding that a person is ineligible for surrender, transfer, or removal to the ICC or another State under this Act; or (c) holding that a person is not obliged to provide the assistance sought in a request by the ICC.[1307]

State officials' immunity will be maintained only pursuant to section 62 which provides for instances where the request to surrender is in conflict with obligations to another state.[1308] The section is analogous to article 98 of the Rome Statute. The section on immunity is similar to the one provided under Ugandan ICC Act. Immunity of state officials is still maintained for all proceedings before Kenyan courts when reference is made to the law. Therefore, those officials (not Kenyan) who enjoy immunity under customary international law cannot be prosecuted in Kenya when universal jurisdiction is exercised.

The Constitution of Kenya article 143 (4) has limited immunity of president from criminal prosecution before Kenyan courts to the extent that the same has been waived by an international treaty.[1309] Therefore, the President of Kenya can be prosecuted before domestic courts in Kenya for charges on any of the core international crimes because such immunity has been waived under the Rome

[1307] *Ibid*.
[1308] *Ibid*.
[1309] The Constitution of Kenya, 2010, article 143 (4).

Statute.[1310] The president of Kenya does not enjoy immunity from prosecution before domestic courts in relation to core international crimes. This is a departure from the position that is available in Uganda as stated in the previous chapter.

The Rome Statute implementing legislation has provided Kenya with the missing link in the availability of substantive laws on international crimes. The law has provided for the three core international crimes and their punishment. Domestic courts in Kenya are therefore now able to utilize this law to prosecute the perpetrators of international crimes before the High court.[1311] Moreover, other laws that play part in ensuring the smooth running of criminal proceedings on international crimes such as those on witness protection are also in place.

8.4.5 Witness Protection Act, Chapter 79, 2006 R.E. 2012 as amended by the Witness Protection (Amendment) Act , No. 45, 2016

Kenya has a comprehensive piece of legislation addressing different aspects relevant on the protection of witnesses which are crucial in the prosecution of international crimes at domestic level.[1312] Whereas in Rwanda and Uganda, the witness protection regime was initially very sketchy, Kenya has come out very powerful.[1313] The law was passed prior to the coming into force of the ICC Act. It was therefore a response to the realization of an inherent problem facing witnesses before domestic courts in Kenya.

[1310] Rome Statute article 27.
[1311] The International Crimes Act, section 8 (2).
[1312] Constitution of Kenya, Article 50(9) provides for the right to protection and welfare of victims of offences.
[1313] At least Rwanda has improved on it with Uganda still organizing itself on establishing a special unit for victims and witnesses.

The law had initially given a rather limited definition of a witness. While from an international perspective the definition has explicitly made reference to a person giving testimony for the prosecution or defence,[1314] the Kenyan law had not been this forthcoming. It gave an inference of protecting witnesses who appear to give evidence on behalf of the prosecution.[1315] Therefore, defence witnesses could be understood to fit within the exception provided for under section 3 (1) (b) which covers persons who have agreed to give evidence otherwise than those for the state. This was cured by the 2016 amendment which defined a witness in an embracing manner. Witness therefore means

> a person who has made a statement or has given or agreed to give evidence in relation to an offence or criminal proceedings in Kenya or outside Kenya, and requires protection on the basis of an existing threat or risk.[1316]

The category of persons protected covers the witness himself/herself, his/her relatives or any other person who is endangered on account of the testimony.[1317] The section further leaves room for interpretation as to any other person as the need will arise.[1318]

[1314] Agreement between the United Nations and the government of Sierra Leone on the establishment of a Special Court for Sierra Leone, article 15; United Nations Office on Drugs and Crimes 'Good practices for the protection of witnesses in criminal proceedings involving organized crimes Vienna 2008. Available at http://www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf [Accessed 2 April 2015].

[1315] Witness Protection Act, Chapter 79, 2006, section 3 (1) (a) as amended by the Witness Protection (Amendment) Act, 2010.

[1316] Witness Protection (Amendment) Act, No. 45, 2016, section 2 (d).

[1317] *Ibid*., Section 3 (2) and The Witness Protection Regulations, Legal Notice No. 99 of 2011.

[1318] *Ibid*.

The law has further provided for the Witness Protection Agency (WPA)[1319] something that is analogous to what Rwanda has done and even international Tribunals which have all established a special unit for witness protection. The functions of the agency have been well stipulated under the Act. The Agency performs the following functions:-

> "establish and maintain a witness protection programme;[1320] determine the criteria for admission to and removal from the witness protection programme;[1321] determine the type of protection measures to be applied;[1322] advise any Government Ministry, department, agency or any other person on the adoption of strategies and measures on witness protection;[1323] and perform such other functions as may be necessary for the better carrying out of the purpose of this Act.[1324]

Therefore, from the above quotation it is clear that, the agency is responsible for everything related to the protection of witnesses. Witness protection forms part of all phases of prosecution of crimes in Kenya i.e. the investigation, trial and post-trial phases.[1325] Any decision of the agency is appealable to the Witness Protection Complaints Committee.[1326] In order to achieve its objectives, the WPA works closely with other stakeholders.[1327] The WPA gives different protection measures all of which are accorded on a case by case basis. The measures are clearly stipulated under the Law. The WPA upon receiving of application, conduct a due diligence and provides a witness with protective measures the soonest.[1328]

[1319] *Ibid*., section 3A.
[1320] *Ibid*., section 3C(1)(a).
[1321] *Ibid*., section 3C(1)(b).
[1322] *Ibid*., section 3C(1)(c).
[1323] *Ibid*., section 3C(1)(d).
[1324] *Ibid*., section 3C(1)(e).
[1325] The different measures that are adopted have been elaborated in the Witness Protection Rules, Legal Notice No. 224, 2015 and The Witness Protection Regulations, 2011.
[1326] Witness Protection (Amendment) Act, section 12.
[1327] Including; the National Intelligence Service, Kenya Police Service, Kenya Prisons' Service, National Treasury, Office of the Attorney General and Department of Justice and Kenya National Commission on Human Rights to mention just a few.
[1328] Interview transcript.

In recognition of crimes that may be perpetrated against victims as they remain under any witness protection programme, the law sets the Victims Compensation funds.[1329] The fund is payable as

> restitution to a victim, or to the family of a victim of a crime committed by any person during a period when such person is provided protection under this Act[1330] or compensation for the death of a victim of a crime committed by any person during a period when such person is provided protection under this Act, to the family of such victim.[1331]

This is innovative step to extend reparation for crimes committed in connection to testimony given. Practice for international tribunals has been to give reparation to victims of international crimes and not for crimes perpetrated as a result of testimony given. This is therefore a new regime in the area of witness protection above the established practice.

Despite the progressive availability of these rules, it is reported that the WPA being a governmental agency has limited finances and therefore unable to meet all country's witness protection needs.[1332] For example, in financial year 2013/2014, the Agency received only"Ksh196 million out of Ksh450 million it needed."[1333] With little budget came the difficulty of implementing witness protection measures that required availability of funding.[1334] This limitation is overcome by the availability of finances to meet the budget.

[1329] Witness Protection Act, section 3I.
[1330] *Ibid*, section 3I (4)(a).
[1331] *Ibid*., section 3I (4)(b).
[1332] Judicial Services Commission, "Report of the Committee of the Judicial Service Commission on the establishment of an International Crimes Division in the High Court of Kenya," 30 October 2012, p. 149.
[1333] See information available at, http://www.standardmedia.co.ke/article/2000085400/witness-protection-agency-assures-witnesses-of-safety [Accessed 20 March 2016].
[1334] See part II of the Witness Protection Act which provides for the programmes that may be adopted in order to effectively ensure witnesses are protected.

8.5 Accountability for International Crimes Committed during the 2007 Post-Election Violence

Accountability for crimes that would qualify to be international crimes has been very limited since colonial period. Those loyal to colonial powers and the colonialist who perpetrated different forms of crimes against humanity[1335] were not prosecuted.[1336] Impunity was normal and could not be questioned. Other political related crimes perpetrated during the 1992 election were also not addressed. However, international crimes perpetrated during the 2007 post-election violence caught the attention of many and the call for accountability has been voiced by those who desire to see justice being done.

In the early efforts of establishing a mode to make the perpetrators of the 2007 post-election violence accountable, a Commission of Inquiry into the Post-Election Violence (CIPEV) was established.[1337] The Commission worked for a short span of time tendering a report on 15 October 2008.[1338] In its report it identified the nature of the post-election violence and crimes perpetrated during the violence. The CIPEV recommended the establishment of a Special Tribunal[1339] to prosecute those alleged to have committed the crimes in question within a stipulated time framework failure

[1335] Elkins C., *Britain's Gulag: The Brutal End of Empire in Kenya, op. cit*, pp. 5-49. The assaults against Mau Mau supporters as mounted by the Governor and Colonial office has far reaching consequences leading to the detaining of around 1.5 million civilians who were subjected to different forms of inhuman treatments.
[1336] *Ibid*.
[1337] Minutes of the Kenya National Dialogue and Reconciliation, Nineteenth Session, 3 March 2008.
[1338] Back from the Brink p. 104.
[1339] See information available at http://www.hrw.org/news/2009/03/25/establishing-special-tribunal-kenya-and-role-international-criminal-court [Accessed 28 May 2015].

of which matters were to be forwarded to the ICC.[1340] This was also supported by the Kenya National Commission on Human Rights (KNCHR) which had carried its own investigations and contained a list of alleged perpetrators.[1341]

The President and Prime Minister adopted the report with the view to implement it.[1342] However, the efforts to establish the proposed tribunal hit a snag in the Kenyan parliament. In three different occasions, the proposed constitutional amendment for the setting up of the Tribunal was rejected by parliament.[1343] The setting up of the Special Tribunal was a move similar to what other post conflict countries had adopted to prosecute the perpetrators of international crimes. While in other instances like Rwanda and Sierra Leone the UN played the key role, the case of Senegal was different. The AU had a bigger role to play. Kenya would have been benchmark if it implemented the recommendations. It would have been the first country to tackle the problem of impunity to international crimes in Africa by establishing a tribunal free from pressure of western powers.

However, the lack of political will to bring the key perpetrators before domestic courts was evident. Thus, the recommendations of the CIPEV were never brought

[1340] Letter from CIPEV to the President, Minister of Justice and the Panel, 3 July 2008; Kofi Annan, Letter to the Principals, 23 February 2009; Kofi Annan, Letter to the Principals, 22 June 2009.
[1341] Back from the Brink , *op. cit*, p. 105.
[1342] The Statute for the Special Tribunal for Kenya, "The Tribunal shall have the power to prosecute persons responsible for genocide, gross violations of human rights and crimes against humanity committed in Kenya … between 1st December, 2007 and 28th February 2008 or crimes committed on any earlier or later date and which are connected in accordance with the principles of criminal justice and are of a nature and gravity similar to those crimes committed between 1st December, 2007 and 28th February 2008."
[1343] The Constitution of Kenya Amendment Bill, 2009.

into fruition.[1344] This scenario did set in motion the ICC which acted under *proprio motu* provisions opening up investigations against the key perpetrators of 2007 post-election violence.[1345] It is notable, as stated elsewhere that, cases that the ICC was pursuing have been withdrawn following the reluctance and refusal of witnesses to testify.

With the ICC playing part in the accountability pitch, Kenya has therefore fallen in the same category as other African states. It has cases being dealt by the ICC which prosecutes those who bear the greatest responsibility while on the other hand domestic courts are left with other cases to prosecute. The Truth, Justice and Reconciliation Commission (TJRC) formed the third leg in ascertaining the causes of the violence and tendering recommendations.[1346]

It is not proposed for the current thesis to analyze the prosecutions that are underway before the ICC nor does it seek to comment on the work of the TJRC. Attention is devoted to the prosecution of post-election violence before domestic courts. As such an analysis of the actual prosecution is provided in the following sub parts.

[1344] There was a clear indication that those most responsible in the perpetration of crimes against humanity during the post-election violence would not face justice before domestic courts. Reference has been made to the famous slogan "Don't be vague, go to The Hague!" to denote the necessity of an international court to step in and prosecute perpetrators of international crimes in Kenya.

[1345] This is in accordance with article 15(3) of the ICC Statute. This was the first time the prosecutor of the ICC used her power to open up investigations. In other instances investigations can be opened after state or SC referral.

[1346] It was established by the Truth, Justice and Reconciliation Commission Act No. 6 of 2008 which came into force on the 17 March 2009. The TJRC was mandate in accordance with section 5 of the TJRC Act to among others; establish the gross human rights violation perpetrated by the government since independence, recommending the prosecution of the perpetrators, determining the way of making it up for the victims, etc. It tendered its last report in 2013. The Principal Act was amended in 2013 under the Truth, Justice and Reconciliation (Amendment) Act, 2013 No. 44 of 2013.

8.6 International Crimes Division and Prosecution of International Crimes as Ordinary Crimes

The court system in Kenya comprises of Supreme Court,[1347] the Court of Appeal,[1348] High Court,[1349] and subordinate courts which include Magistrates' Courts, Kadhis Courts, Court Martial, and any other Courts or local Tribunals established by an Act of Parliament.[1350] The judiciary in general has undergone major changes following the adoption of the new Constitution which called for the renewal of the judiciary in 2010.[1351] The process of bringing about changes in the judiciary started with the passing of laws particularly the Judicial Service Act[1352] and Vetting of Judges and Magistrates Act.[1353] The process of vetting under the named law aims at ensuring that the judiciary is working properly and its independence is guaranteed through tackling the problem of rampant corruption and ineffectiveness among magistrates and judges.

Other changes are notable in areas such as recruitment of more judicial officers and staff, building and refurbishment of more courts and adoption of modern management practices with support from government and development partners.[1354] These changes aimed at addressing pressing issues such as inadequate prosecutors

[1347] Constitution of Kenya, article 163.
[1348] *Ibid*, article 164.
[1349] *Ibid*, article 165 and 162. The High Court has several Divisions including the Industrial Court, Environmental and Land Division, Civil Division, Family Division, Commercial Division, Criminal Division, Judicial Review Division and Constitution and Human Rights Division.
[1349] *Ibid*, article 162 (2)(b).
[1350] Information available at http://www.judiciary.go.ke/portal/page/about-the-judiciary [Accessed 3 February 2014].
[1351] Constitution of Kenya.
[1352] No. 1 of 2011 R.E 2012.
[1353] Chapter 8B 2011 R.E 2012.
[1354] Performance Management Directorate, "Judiciary Case Audit and Institutional Capacity Survey," The Judiciary, Republic of Kenya, 2014, p. 3.

and judicial officers resulting in backlog of cases.[1355] Despite these short comings, Kenyan courts have never been in a state that they are incapable of functioning. Therefore, unlike the situation in Rwanda, Kenya follows the position of Uganda that courts have not been unable to prosecute international crimes perpetrated in the territory.

However, to bring about efficacy in the investigation and ultimate prosecution of international crimes before Kenya's domestic courts, there have been efforts to establish the International and Organized Crimes Division (IOCD) within the Kenyan High Court.[1356] These efforts are made pursuant to section 8 (2) of the International Crimes Act.[1357]

This desire is not different from the position in Uganda and Rwanda as analyzed in the previous chapters. The Division will have jurisdiction far and beyond the ICC crimes. It will be akin to the ICD in Uganda and the Rwanda International Crimes Chamber in their capability of prosecuting other crimes with an international element like the ones provided for under the Malabo Protocol.[1358]

In order to effectively prosecute international crimes before the proposed IOCD, the JSC report made an innovative proposal. It proposed for a Special Prosecutor

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[1355] *Ibid*.

[1356] *Ibid*., the Judicial Service Commission (JSC) engaged a committee to seek information on the viability of establishing the International Crimes Division in 2012.

[1357] Number 16 of 2008.

[1358] Performance Management Directorate, "Judiciary Case Audit and Institutional Capacity Survey," The Judiciary, Republic of Kenya, 2014. Example piracy, money laundering, cybercrime, human trafficking, terrorism and drug trafficking, and any other international crimes as stipulated under international instruments to which Kenya is a party to.

pursuant to article 157(12) of the Constitution and an independent prosecution unit under the office of the DPP exclusively responsible for the prosecution of international crimes.[1359] The Unit has been established.[1360] The mandate of the unit is limited to core international crimes i.e. genocide, war crimes and crimes against humanity.[1361] The independent unit is headed by the Special Prosecutor assisted by other prosecutors employed under the Unit. This will enable the utilization of skilled personnel in the field.

In preparing for the launching of the IOCD, training has been conducted on Judiciary personnel, Prosecutions under the DPP office and Office of Criminal Investigation.[1362] It is however important to note that, since the proposal was tendered in 2012, no IOCD has been established to date. It is only in January 2015 that the Judiciary has affirmed the commitment to establish it coming July 2015.[1363] However, up to September 2016, it is yet to be established. This reveals the lack of political will to ensure that the perpetrators of international crimes are held accountable.

[1359] Judicial Services Commission, "Report of the Committee of the Judicial Service Commission on the establishment of an International Crimes Division in the High Court of Kenya," 30 October 2012

[1360] Information available at http://www.odpp.go.ke/index.php/international-crimes-division.html [Accessed 16 July 2016].

[1361] *Ibid*.

[1362] Interview transcript. Director of Public Prosecutions Keriako Tobiko and the Director of Criminal Investigations Ndegwa Muhoro have been at the fore to ensure that those working under them receive training on investigation and prosecution of international crimes. The two offices work together to bring about the effective prosecution of international crimes.

[1363] Information available at http://www.wayamo.com/?q=projects/international-and-organised-crimes-division-icd-kenyan-high-court [Accessed 15 June 2015].

The IOCD is a necessary step in ending impunity to international crimes in Kenya. The AG of Kenya Prof. Githu Muigai stated that the delay in the establishment of the Division has crippled Kenya's ability to prosecute international crimes on behalf of the ICC in Kenya (absence of appropriate institution).[1364] Contrary to what the AG has stated, Kenya is not expected to prosecute international crimes on behalf of the ICC; it is fulfilling its primary obligation of ending impunity to international crimes.[1365]

As of March 2015, the Director of Public Prosecutions of Kenya tendered a report which revealed that there were "6,000 reported cases and 4,575 files opened" in relation to crimes committed during the 2007 post-election violence.[1366] The report is yet to be made public. However, the number of cases reveals the overwhelming nature of the magnitude of cases that need redress. International crimes committed in absence of armed conflict no matter how small the scale may be when compared to international crimes perpetrated during armed conflicts, they usually shock the prosecution, investigation and judiciary. Normally, the justice system is challenged on how best to tackle the many cases which were never anticipated, where victims depend on them to see justice being rendered. This has been witnessed in Rwanda, Uganda and now Kenya.

[1364] Kenya Citizen TV, 12, May 2015.

[1365] Judicial Services Commission, "Report of the Committee of the Judicial Service Commission on the establishment of an International Crimes Division in the High Court of Kenya" (JSC Report), 30 October 2012.

[1366] Information available at http://m.news24.com/kenya/MyNews24/Full-State-of-the-Nation-address-by-president-Uhuru-Kenyatta-20150326 [Accessed 9 June 2015].

It must be emphasized that, according to the existing reports, the number of convictions based on ordinary crime approach for crimes connected to the 2007 post election violence has been very low.[1367] This position may be subject to change depending on what the report of the DPP has revealed. However, some of the perpetrators have been convicted for crimes perpetrated during the 2007 post-election violence. It must be emphasized that, even though such crimes amounted to crimes against humanity, no court in Kenya has prosecuted anyone for such crimes against humanity. The lack of laws prohibiting crimes against humanity at the time of the 2007 post-election violence has made it impossible to bring such charges.

The cases reviewed in the following paragraphs reveal the prosecution of crimes related to the 2007 post-election violence as ordinary crimes. There is therefore no mention of any international crime i.e. crimes against humanity in the decisions of the courts because such prosecutions were never based on charges of crimes against humanity. The main law that has been used is the Penal Code of Kenya. The International Crimes Act has not been used in any of the analyzed cases.

It is noteworthy that, there have been acquittals for many cases brought for trial relating to the 2007 post-election violence although some of the perpetrators have been convicted.[1368] Example, *R v Peter Kipkemboi Ruto*[1369] has been convicted for murder in relation to the 2007 post-election violence killing and was sentenced to

[1367] Human Rights Watch, "Turning Pebbles", December 2011, p. 27. Available at www.hrw.org/fr/node/103360[Accessed 9 July 2015].

[1368] A Progress Report To The Hon. Attorney-General by the Team on Update of Post-Election Violence Related Cases in Western, Nyanza, Central, Rift-Valley, Eastern, Coast And Nairobi Provinces March, 2011, Nairobi, ICC-01/09-79-Anx1 16-09-2011 2/84 EO PT.

[1369] [2010] eKLR.

death by Kenya's Court of Appeal in Nakuru.[1370] Other cases include *Republic v. John Kimita Mwaniki*[1371] where the accused was charged and convicted of murder contrary to section 202 as read with section 203 of the Kenyan Penal Code. From the facts of the case, it is apparent that the accused did not perpetrate the crime alone. However, the other perpetrators were not brought before the court under a joint charge.[1372] And from the records thus far, nothing reveals that they have been prosecuted on separate charges.

Other murder cases where the accused were convicted include; *Republic v. Mosobin Sot Ngeiywa and Japheth Simiyu Wekesa,*[1373] *Republic v. Ben Pkiech Loyatum*[1374] and *Republic v. James Omondi & 3 others.*[1375] On the other hand, the case of *Republic v. Andrew Mueche Omwenga* the charge of murder was reduced to manslaughter and upon conviction the accused was sentenced to 10 years imprisonment.[1376]

In the case of *Republic v Edward Kirui*[1377] the judges ordered a retrial where the accused was initially acquitted for crimes charged.[1378] This is one case where a police officer was charged for murder of two persons. The police have been alleged

[1370] Information available at http://africajournalismtheworld.com/2015/02/20/kenya-peter-kipkemboi-ruto-sentenced-to-death-for-pev-killing/ [Accessed 9 July 2015].
[1371] Criminal Case No. 116 of 2007, [2011] eKLR.
[1372] *Ibid*. p. 18. The court affirmed "Robert, Geoffrey, Supe, Mathayo, Elijah and Peter *(of Mengiso)"* made good their escape.
[1373] Kitale 811/30/2008 Kitale HRCC NO. 19 OF 2008.
[1374] Eldoret HRCC No. 5 of 2008.
[1375] Criminal Case No. 57 of 2008, [2015] eKLR. *James Omondi alias Castro, Wycliffe Walimbwa Simiyu alias Zimbo and Paul Otieno alias Baba* were convicted. The fourth accused was acquitted.
[1376] Nakuru HRCC No. 11 of 2008.
[1377] Criminal Appeal No. 198 of 2010, [2014] eKLR.
[1378]HC.CR.C. No. 9 OF 2009.

to have perpetrated a number of crimes during the 2007 post election violence. Therefore, this case shows the desire to ensure all those who perpetrated the crimes irrespective of their official capacity are held accountable. This incident sharply contrast with Uganda where the ICD is yet to indict any government soldier for crimes they are alleged to have perpetrated in the Northern part of Uganda.

It must be noted that, all of these cases have been prosecuted as ordinary crimes; no one has been prosecuted for international crimes before any Kenyan domestic court. The prosecutions so far have been few compared to the number of cases which ought to be prosecuted.

8.7 Challenges in the Prosecution of International Crimes in Kenya

The prosecution of international crimes before domestic courts comes with its challenges. African countries being fairly new to the practice of bringing about accountability for international crimes before domestic courts face a number of challenges. This has been the case in Rwanda and Uganda as analysed in chapter 6 and 7 of the thesis respectively. Kenya is not an exception.

Reflecting on the few cases that have been prosecuted relating to international crimes perpetrated during the 2007 post-election violence, Kenya has faced and still faces a number of challenges as the victims yearn for justice. It must be noted that, the absence of legislative framework at the time international crimes were committed inhibited the application of hard mirror theory on the prosecution of international crimes. As stated in the previous part, the absence of a specialized division of the

high court specifically dealing with the prosecution of international crimes is inhibiting effective measures to end impunity. Therefore, on top of these main crippling factors, there are notable challenges in the prosecution of international crimes in Kenya.

8.7.1 Lack of Political Will to Prosecute International Crimes

Following the failure to implement recommendations by the CIPEV to establish a special Tribunal for the prosecution of post-election violence, Kenyan government has displayed reluctance to bring about accountability by retributive justice. This could be attributed to the fact that those who hold high office i.e. the president and vice president are also alleged to have perpetrated crimes during the post-election violence. The turn down of a Constitution Amendment to that effect is one sign of the lack of political will. Even after the recommendations by the JSC to establish an IOCD, the trend is almost the same. Three years down the line, the Division has not been established. In the words of Prof. Githu Muigai AG "If it was up to me, two years ago, it would have been ready."[1379] There is therefore no priority to ensure that the IOCD is established.

Further, the 2015 March report of the DPP as supported by the President indicating that PEV cases cannot be prosecuted, hence the government ought to look at "restorative approaches" is another sign of unwillingness to invoke retributive

[1379] Kenya Citizen TV, 12, May 2015. The IOCD was supposed to be up and running by June 2014.

justice.[1380] Judging Kenya on the threshold of Western justice may not be ideal. The country can decide the best mechanism of addressing international crimes as it deems appropriate to bring about accountability. Similar position was taken by Rwanda when reference is made to the *Gacaca* courts.[1381] It is therefore awaited with anticipation on what restorative justice for Kenya will look like.

8.7.2 Poor Investigation of Criminal Cases

The investigation of crimes in Kenya is entrusted to the Criminal Investigation Department (CID). Reports from the DPP have consistently indicated difficulty in conducting investigation of crimes perpetrated during the 2007 post-election violence. As of 2013 a new team was set to carry out the investigation of approximately 4,000 out of which only 1,500 were considered to be eligible for trial before the IOCD.[1382] Even with the new team, difficulties still persisted. The March 2015 report from the DPP has indicated that difficulties still exist in the investigation of such cases.[1383] Other cases like *Republic v. Joseph Lokuret Nabanyi*[1384] and *Republic v. Stephen Kiprotich Leting & 3 Others*[1385] were dismissed due to the lack of sufficient evidence. The Court in the case of *Stephen Kiprotich* stated that;

[1380] Sh10 billion fund has been promised to achieve the proposed restorative justice. Information available at http://www.capitalfm.co.ke/news/2015/03/uhuru-apologises-for-past-atrocities-much-to-kiplagats-delight-2/ [Accessedn16 June 2015].

[1381] "Kagame calls for equality in international justice", *The New Times* (Kigali), 24 September 2012. "This home-grown solution through our Gacaca court process, has served us better than any other system could…. We have been able to strengthen the rule of law in our country, particularly through universal access to quality justice, so that citizens are not hindered by financial constraints or long distances to judicial centres."

[1382] Information available at https://thehaguetrials.co.ke/article/new-team-investigate-kenyas-pending-pev-cases [Accessed 17 June 2015].

[1383] Information available at http://m.news24.com/kenya/MyNews24/Full-State-of-the-Nation-address-by-president-Uhuru-Kenyatta-20150326 [Accessed 9 June 2015].

[1384] Criminal Case No. 40 of 2008, [2013] eKLR.

[1385] Nakuru High Court Criminal Case No. 34 of 2008.

> One would have expected the police to place before court evidence of the Accused having been part of the gang that pre-arranged to commit this offence. That, however, was not the case. The evidence on record does not show, leave alone suggest, the involvement of the Accused in any pre-arranged plan to execute any or any unlawful act... I know that it is an undoubtedly difficult thing to prove even the intention of an individual and therefore more difficult to prove the common intention of a group of people. But however difficult the task is, like any other element of crime, the prosecution must lead evidence of facts, circumstances and conduct of accused persons from which their common intention can be gathered. In this case there is absolutely no evidence of the raiders and/or any of the accused having met to arrange the execution of any or any unlawful purpose. There is absolutely no evidence to show that the Accused and/or others had a pre-arranged plan to attack Kimuli, Rehema and/or Kiambaa farms and kill their residents... In this case, without placing any evidence on record, the prosecution wants me to find that the Accused had a common intent with the murderers of the deceased and were part of that joint enterprise. That cannot be... I have to point out the shoddy police investigations in this case so that blame is placed where it belongs... The judiciary is being accused of acquitting criminals and unleashing them to society... I do not want to dismiss those complaints off hand. But what I know is that courts acquit accused persons if there is no evidence against them. In our criminal jurisprudence: out of 100 suspects, it is better to acquit 99 criminals than to convict one innocent person. Because of that our law requires that for a conviction to result the prosecution must prove beyond reasonable doubt the case against an accused person.[1386]

Judges have also expressed their observations in relation to the poor investigation of criminal cases brought before them in the case of *Republic v. James Omondi & 3 others.* The court stated that,

> More often than not courts have made pronouncements decrying the shoddy manner in which criminal cases are investigated. In the present case, the police acted with utmost professionalism… The case was investigated by senior and experienced investigators. The combination of this effort is evident in the quality of evidence that was produced before this court. It is the hope of this court that the investigations conducted in this case should serve a template on how investigations should be conducted with a view to resolving cases involving serious crimes. Maybe the high profile of the victim of this crime may have prompted the police to marshal their best resources in resolving the case. That should not be the case. Each serious crime should be accorded the professionalism that was shown in this case.[1387]

The above decision has shown the court's concern on the lack of professionalism in the investigation of crimes in Kenya. Even though that was a general remark, the case specifically dealt with crimes perpetrated during the post-election violence which as reports have revealed, constitute one or more category of crimes against

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[1386] *Ibid*.
[1387] Criminal Case No. 57 of 2008 [2015]eKLR, p. 10.

humanity. Therefore, it is right to conclude that, the lack of seriousness on the investigation of crimes has negatively affected the quality of evidence available to support the high burden of proof in criminal cases. As such, many cases are not prosecuted or when prosecuted they end in acquittal because of insufficient evidence.[1388]

In 2011 the AG Prof. Muigai stated that time had lapsed since the crimes were committed that is why it has been difficult to gather evidence.[1389] Questions that arise out of this are the following: what can be drawn from the Hissene Habre trial that convicted him decades after the crimes were committed? How did the EAC manage to gather evidence for crimes committed 3 decades ago? The submissions are just a reflection of lack of commitment to ensure thorough investigation is conducted and prosecutions commenced. This brings back the lack of political will in the search for justice. Victims have continued pressing the government to bring about the investigation and prosecution of those claimed to have perpetrated international crimes during the conflict as stated by the prosecutor of the ICC Fatou Bensouda.[1390] As detailed in the previous chapters on Uganda and Rwanda, the investigation of international crimes is not similar to the investigation of ordinary crimes. When the investigators are faced with over 4,000 complaints to investigate, if not well trained

[1388] *Republic v. Joseph Lokuret Nabanyi,* Criminal Case No. 40 of 2008, [2013] eKLR. The court needed direct or circumstantial evidence to corroborate testimony of the witness to rule out the possibility of mistake of identity.

[1389] Kenya National Assembly Official Record (Hansard) 23 November 2011.

[1390] Mkawale S., "PEV victims want leaders investigated," 22 January 2015, available at http://standardgroup.co.ke/entertainment/pulse/article/2000148727/pev-victims-want-leaders-investigated [Accessed 17 June 2015].

and equipped such investigations may never bear fruits.[1391] This being the case, special training and expertise are required.[1392]

8.7.2.1 The Witness Protection System and Reluctance to Testify

The Report by the DPP has indicated that most witnesses are not willing to testify on post-election violence cases due to fear of reprisal.[1393] The WPA as discussed in 8.3.5 is working to ensure that witnesses that come under its protection are provided with protection measures as needed.

The procedure for application into a witness protection programme requires applications to be made by a witness and or related person, an intermediary, a legal representative, a parent or legal guardian, public prosecutor or law enforcement agency.[1394] There is therefore no way a witness can be protected without prior application and assessment by the Agency. Since the office of the DPP has indicated witnesses are reluctant to testify, it needs to disseminate information about the protection measures that can be accorded to the witnesses in case of any threat they may face. If such information is availed to them, it may ease such reluctance. Further, protections measures ought to be requested and granted to witnesses at the investigation phase of international crimes.

[1391] Human Rights Watch noted that most investigators were not trained enough to conduct the investigation of PEV cases.

[1392] Training is already underway and the established international crimes division under the Office of Director of Public Prosecution is a step to ensure specialization.

[1393] Amnesty International "Kenya: Victims still seeking justice for the post-election violence," 15 July 2014, available at https://www.amnesty.org/en/articles/news/2014/07/kenya-victims-still-seeking-justice-post-election-violence/ [Accessed 16 June 2015].

[1394] See information available at http://www.wpa.go.ke/programme/admission [Accessed 16 June 2015].

Thus far, WPA holds routine awareness forums especially targeting the stakeholders like the police, the Directorate of Criminal Investigations, Ethics and Anti-Corruption Commission, Office of the Director of Public Prosecutions and the Judiciary.[1395] The Agency also conduct awareness campaigns through mass media especially radio and television in order to reach the general public, to make them aware of the existence of the agency and the services that the agency offers.[1396] These mass campaigns have not been as robust as would have been expected. Therefore, more need to be done to reach the general public.

It must be noted that, the problem of witnesses' fear of reprisal and their protection is not one that is unique to Kenya. Other countries like Uganda and Rwanda, even international courts face a similar challenge.[1397]

8.7.3 Charges under the International Crimes Act

Kenya faces a similar situation to that of Uganda i.e. the retrospective application of the law dealing with international crimes. The International Crimes Act came into force in 2009 while international crimes were committed during the 2007 post-election violence. The application of the law is therefore limited if literal meaning of

[1395] Interview transcript.
[1396] *Ibid*.
[1397] Example, the ICC prosecutor has stated that one of the reasons for the withdrawal of Kenyatta and Ruto cases is the absence of witnesses as a result of their refusal to testify. See also, Human Rights Watch 'Justice in motion: The Trial Phase of the Special Court for Sierra Leone.' Available at http://www.hrw.org/en/node/11565/section/1 [Accesses 28 April 2015]. In Sierra Leone, 'threats have been generalized calls in public meetings against any individual who testifies at the Special Court however, in other instances particular witnesses have been singled out and subjected to verbal intimidation, searched for in their villages, or subject to more serious threats.' See also, 'Survivors of the Rwandan genocide face intimidation as they prepare to testify before the ICTR.' Available at http://www.ddrd.ca/site/what_we_do/index.php?id=1723&subsection=themes&subsection=themes_documents [Accessed 6 April 2013].

the principle of *nullum crimen sine lege nullum poena sine lege* is adhered to. This limitation is evident in cases that have been prosecuted before domestic courts thus far. That is all cases that have adhered to the ordinary crime approach in the prosecution of international crimes. For these, the Penal Code has therefore been the principal law used.[1398]

To bring charges under the International Crimes Act, one has to justify that the principle of *nullum crimen sine lege nullum poena sine lege* is not broken. Crimes against humanity although stipulated under the Rome Statute to which the Act has implemented have their origin in the body of customary international law.[1399] The prohibition against such crimes has attained the status of *jus cogens.* Although the mere fact that norms belong to the category of *jus cogens* is not an automatic grant of jurisdiction, the customary nature of such prohibition is a justification that these crimes have existed and are known to perpetrators even before the laws come to pass.[1400] The International Crimes Act has not created new offences; it has given Kenyan High court jurisdiction on offences that have been in existence.

The lack of convention on crimes against humanity means that these crimes have continued to exist under customary international law. Ordinarily, dualist states pass implementing legislation on treaties; they do not pass implementing legislation on customary international law. Assume that Rome Statute was not in existence, it means Kenya will only have legislative framework for war crimes and the crime of

[1398] Reference is made to analysis under 8.6 of the current thesis.
[1399] Reference be made to 2.4.3 of the current thesis.
[1400] *International Commission of Jurists-Kenya v Attorney General & Another,* Misc. Crm. Application No.685 of 2010[2011] eKLR. The court stated that, "Genocide, war crimes, and crimes against humanity are regarded under international law as *deliciti jus gentium.* They constitute a corpus of crimes that are an affront to humanity and its existence."

genocide which have conventions addressing them. How would one have justified the prosecution of crimes against humanity? To invoke the customary nature of crimes against humanity, to justify their existence prior to the Act, justifies the adherence to the principle of legality. The true test of whether prosecutions may be made under the International Crimes Act waits the establishment of the IOCD.

8.8 Conclusion

The legislative framework for the prosecution of international crimes in Kenya has greatly improved over the years. Initially, Kenya had a very sketchy legislative framework basically prohibiting war crimes under the Geneva Conventions Act. Genocide and crimes against humanity lacked the necessary legislative framework hence the adoption of the ordinary crime approach in prosecuting international crimes in Kenya.

The implementation of the Rome Statute in 2008 changed the limited framework. Now Kenya has the International Crimes Act that prohibits all core international crimes. The new Constitution has adopted a monist approach thus making international law (ratified treaties and rules of customary international law) applicable directly without the need for enacting legislation. There is therefore adequate legislative framework for the prosecution of international crimes in Kenya.

It has also been noted under this chapter that, a culture of impunity is what Kenya inherited from its colonialists. Crimes against humanity perpetrated by colonialists

were never prosecuted by colonial and independent government. Culture of impunity in all election related crimes continued years after independence. In 2007, after the post election violence, the demand for accountability for international crimes perpetrated was high. Efforts to bring about the prosecution of international crimes in Kenya have been full of challenges including the lack of political will to prosecute those responsible for violating individuals' rights. Few prosecutions have been made under the ordinary crime approach.

CHAPTER NINE

CONCLUSION AND RECOMMENDATIONS

9.1 Introduction

The previous chapters have given an analysis of the legal framework and practice of the prosecution of international crimes from a regional perspective to a detailed country study. The chapters have therefore provided a comparative analysis of both the law and practice of prosecuting international crimes in Rwanda, Uganda and Kenya. The current chapter is summing up what the thesis has presented. The conclusions are provided on the basis of the assumptions which the researcher proceeded with in doing the research. Also, the chapter provides for recommendations on how best Africa can achieve the domestic prosecution of international crimes by drawing lessons from the countries studied.

9.2 Summary of Major Findings of the Study

The research intended to analyse the law and practice in relation to the prosecution of international crimes in Africa. It was focused in three selected countries i.e. Rwanda, Uganda and Kenya. The study had therefore two specific objectives. The first specific objective was at examining the legislative framework that is available in selected African states and assess whether they offer a tool for the realization of prosecution of international crimes at municipal level. The second specific objective aimed analyzing the practice of national courts in dispensing justice to the victims of international crimes.

The research had the following elements of hypothesis. First, that, African countries do not have adequate legislative framework to prosecute international crimes. Secondly, that, there is lack of priority and political will to ensure international crimes are prosecuted at domestic level in Africa. The following part therefore provides a conclusion on each hypothesis. The study has revealed that the general trend in relation to the prosecution of international crimes has changed both at the regional and national level.

9.2.1 Findings Based on the Main Hypothesis

The main hypothesis of the study was that, African countries have been passive in prosecuting international crimes at domestic level. This has been proven to the affirmative for Kenya and Uganda and negative for Rwanda.

The study established that there is no account of the prosecution of international crimes in African continent during colonialism despite evidence revealing the commission of international crimes by colonial powers. While international crimes were prosecuted in continental Europe, in Africa the same colonialists were embracing the culture of impunity. Thus international criminal justice was biased to that effect. Since international criminal justice was mainly developed in the West and Japan by the political will of "victorious powers of WWII," the sour political relations during the cold war blinded the prosecution of international crimes at the global level. In Africa, matters were even worse. As noted in chapter 3 of the thesis, in the period between 1960 and 1990 (cold war era) international crimes were perpetrated during civil wars in a number of African countries. Since there was a

culture of impunity in the continent and at the international level there was no unity of efforts to prosecute perpetrators of international crimes. People got away with mass murder, rape and other inhuman crimes. Ethiopia is one example which prosecuted international crimes perpetrated during Mengistu regime. This was contributed by among other things, the presence of comprehensive legislative framework on the prosecution of international crimes. Other crimes that were perpetrated during the cold war period but have been prosecuted in 2015/2016 is the trial of Hissene Habre in Senegal where he was convicted.

The establishment of the ICC has greatly affected the way international crimes are being prosecuted in African domestic courts. The ICC which is operating under the complementarity principle is a court of last resort. This inevitably puts pressure on individual countries to ensure that international crimes perpetrated in their territory are prosecuted. Some African countries parties to the Rome Statute including Uganda and Kenya have one common feature; the ICC either under self-referral, *proprio motu* powers or referral by the SC took the first initiative to prosecute international crimes. African countries are yet to prosecute international crimes domestically without the ICC acting as Court of first resort. If African countries will eventually discharge their primary responsibility of prosecuting international crimes, the negativity towards Europe and the ICC will be eliminated. So far, African countries have started to lean towards the end of impunity to international crimes.

In Uganda, international crimes have been perpetrated in the Northern part for over two decades. Impunity has prevailed since the 1970s. Over the years, amnesty was

adopted as one way of dealing with crimes perpetrated in the North. A law was adopted to that effect. This has been discussed in chapter 7 of the thesis. Thus, accountability was not a priority until after the establishment of the ICD. *Uganda v Kwoyelo* being the first case before the court opened doors for further prosecutions. No case has been opened against government soldiers who have, according to the reports, perpetrated international crimes.

On the other hand, in Kenya, no international crimes have been prosecuted in the country as international crime. The approach used is the ordinary crime approach where existing penal laws have been used to prosecute international crimes. The prosecution is faced with a number of challenges. One of the challenges is the existing difficulties in the investigation of international crimes. The lack of efficiency in gathering of evidence in a scene where international crimes were perpetrated has greatly affected the ability of Kenya to fulfill its primary obligation of prosecuting international crimes at domestic level. Cases have been dismissed because of inadequate evidence.

Kenya has been unable to prosecute the many international crime cases it has due to, among other reasons the absence of an institution that is responsible for solely prosecuting international crimes. In contrast, Rwanda conferred jurisdiction to prosecute international crimes to the ordinary courts and later Specialized Chamber of the High Court. On the other hand, Uganda established the ICD that has almost similar jurisdiction. Kenya is lacking the one stop area which deals with the prosecution of international crimes. Efforts to establish the IOCD have not yet born

fruits since the first idea was conceived in 2012. It is evident that, the number of international crimes perpetrated during an armed conflict or even internal unrests are very high, ultimately shocking the justice mechanism. If there are no infrastructural modifications, a country's ability to prosecute international crimes remains at stake. Kenya is also looking into the possibility of adopting restorative justice as opposed to retributive justice to tackle international crimes perpetrated during the post-election violence.

Rwanda has stepped out of the box. A country whose judiciary, investigation and prosecution infrastructures had collapsed during the 1994 genocide had to refurbish the criminal justice system. The number of cases the courts were expected to adjudicate was higher than the capacity of courts, prisons, investigators and prosecutors. There was therefore a total overhaul of justice mechanism which enabled the country to fulfill its primary obligation of prosecuting international crimes perpetrated in its territory. Witness protection system was also refurbished providing witnesses with the much needed protection in these kinds of trials. These have been adequately documented under chapter 6 of the thesis. Rwanda prosecuted about 10,000 international crimes cases to date.

9.2.2 Findings Based on the First Element of the Hypothesis

The first element of the hypothesis was that, African countries do not have adequate legislative framework to prosecute international crimes. The hypothesis element has been proven negative in selected studied countries and affirmative in some African countries.

9.2.2.1 Legal Framework at Regional Level

The study has revealed in chapter 5 that, at the regional and sub-regional level, there are well crafted instruments dealing with international crimes in one way or another. These include the African Union Constitutive Act, African Charter on Democracy, Elections and Governance, African Union Model Law on Universal Jurisdiction on International crimes and Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination.

The Malabo Protocol is the last to be adopted. It is the most progressive instrument adopted in the world incorporating other forms of crimes that are of concern to the African continent. It further adopts a more embracing form of liability i.e. corporate liability adding to the most celebrated individual criminal liability. One feature that has departed from the existing framework at international level is the issue of immunity of serving heads of state and other officials. This is the position that has been adopted in numerous AU resolutions and further supported by state practice especially when it comes to the arrest of Al Bashir. The Malabo Protocol is yet to become operational. Only three countries have signed the Malabo Protocol. Other instruments are also suffering from the same fate. It is yet to be seen an African block that walks the talk.

9.2.2.2 Legal Framework from Selected African Countries

The prosecution of crimes including international crimes at domestic level presupposed the existence of legislative framework criminalizing such conduct. This

is more important for dualist countries but also monist countries like Rwanda have also seen the need to enact domestic legislation providing for international crimes.

As reviewed under Chapter 5 of the thesis, some African countries lack the necessary legislative framework for the prosecution of international crimes. The most legislated international instruments are the four Geneva Conventions which provide for war crimes. The Genocide Convention has not really been legislated as much. On the other hand crimes against humanity which do not enjoy an independent international instrument have consequently not been criminalized in most African countries. This was the position from independence to the 2000s.

The study has shown that, legislative framework for the prosecution of international crimes has greatly changed with the adoption of the Rome Statute. Some African countries have taken the initiative to adopt legislation implementing the Rome Statute. The implementing legislation have consequently enabled such countries to have comprehensive legislation on core international crimes. This is because the Rome Statute contains all the four core international crimes and thus when countries adopt domestic laws they criminalize the three core international crimes i.e. genocide, war crimes and crimes against humanity. Other African countries as explained in Table 1 have not implemented the Rome Statute. These countries continue to have a weak legislative framework for the prosecution of international crimes.

Drawing from the selected East African countries' legislative framework for the prosecution of international crimes, it can be observed that it has changed over the years. Rwanda although not a party to the Rome Statute has a good legislative framework that enabled the prosecution of international crimes perpetrated during the genocide. Even though it was a monist state, it adopted Organic Law No. 08 as the first legislation that addressed international crimes. Other laws came to be enacted over the years covering different aspects relevant in rendering justice to victims of international crimes. As evidenced under chapter 6, this is a result of continual efforts. It was not done once, but over the years necessary legislation were adopted.

Kenya and Uganda on the other hand have implemented the Rome Statute. However, prior to the implementation, both countries had legislative framework prohibiting war crimes under the relevant Geneva Conventions Act. However, the lack of the necessary legislative framework for all the core international crimes negatively affected the two countries in the prosecution of international crimes before domestic courts. Both Uganda and Kenya have not so far charged any person under the two laws because they were both enacted after the international crimes were committed.

The ICC Act and the International Crimes Act have adopted the definition of the core international crimes as contained under the Rome Statute with Kenya widening crimes against humanity to include those enshrined under the body of customary international law. Other key features of the legislation have been analyzed in chapter 7 and 8 respectively.

9.2.3 Findings on the Second Element of the Hypothesis

The second element of the hypothesis was that, there is lack of priority and political will to ensure international crimes are prosecuted at domestic level in Africa. This hypothesis was proven in the affirmative in Kenya and Uganda while for Rwanda it was proven to the negative.

9.2.3.1 Political Will to Prosecute International Crimes in Rwanda

Where there is a will there is a way. This famous saying has been proven to be right under the study. When assessing the situation in Africa, the study has shown that Rwanda was politically willing to address international crimes domestically. It therefore did the impossible and brought about accountability for atrocities committed during the genocide. The political willingness coupled with help from international organizations and donor countries moved the country to refurbish its justice institutions both physical infrastructures and human resources in order to bring justice to victims. Further, when considering the prosecutions in other parts of Africa like Ethiopia and DRC, one cannot help observing that, both reveal that where there is the political will to effect the prosecution of international crimes at domestic level, there is nothing that will hinder a country from fulfilling its primary duty.

9.2.3.2 Political Will to Prosecute International Crimes in Uganda

The lack of political will in Uganda was witnessed in the many years impunity prevailed despite the presence of necessary legislative framework to prosecute international crimes perpetrated in the North. Amnesty was adapted as alternative to

accountability. In 2008 the first case was instituted before the High Court. Charges have been brought under Geneva Convention Act and the Penal Code. The political will to bring more cases is still little because 8 years now there is still one case only. Political will is also lacking in instituting charges against government soldiers alleged to have committed international crimes.

9.2.3.3 Political Will to Prosecute International Crimes in Kenya

Kenya is suffering from the lack of political will to ensure that international crimes are prosecuted in domestic courts. As stated in chapter 8, Kenya enacted the Geneva Conventions Act in 1972 with a universal jurisdiction clause but it has never been invoked despite being surrounded by countries where war crimes have been perpetrated for many years. International crimes perpetrated during the 2007 post election violence just like other election related crimes in the past, have not been adequately adjudicated to date. The DPP has revealed that there are "6,000 reported cases and 4,575 files opened," with no prospect of prosecuting them due to a number of reasons stated in chapter eight. The government is able to overcome the challenges where political will is available. If Rwanda was in a worst state with even a more pressing number of cases, Kenya is better placed and can tackle the problems if it is willing to. Availability of political will is however tricky taking into account the fact that the president and vice president were indicted before the ICC on crimes against humanity charges. It is apparent that there is no willingness to resort to retributive justice instead the president has mentioned restorative justice as the best option for post-election crimes.

Adoption of accountability mechanism for 2007 post-election violence crimes started with an option on establishment of the Special Tribunal to deal with post-election cases. This proposition was turned down by Kenyan parliament leading to the opening of the cases before the ICC. The next proposal was tendered by the JSC. It proposed the establishment of the IOCD. However, the process towards the establishment of the IOCD has been dragged three years since it first was proposed. If there will be no change in the way those in decision making position respond to the need to bring justice to the victims, many may never receive justice for the crimes perpetrated against them.

9.3 Recommendations

9.3.1 Design a Centre for Investigation of International Crimes

This centre will be comprised of the most qualified investigators of international crimes who will be made readily available to render help to member states as and when needed. Further, since there is already a move to establish a court with criminal jurisdiction at the AU level, such a centre will equally be useful in investigating international crimes that the court will deal with in the future.

9.3.2 Training of Investigators, Prosecutors and Judges on International Criminal Law and International Criminal Justice

International criminal law or criminal justice should form one of the core courses in university syllabuses. Similar to the way law students are trained on crimes and their adjudication, a separate course dealing with international crimes should be made mandatory. At the moment, this subject has not received the much attention needed

at the undergraduate level. It forms part of public international law or elective subject and in other universities; it does not even feature in the undergraduate courses offered. This has to change if Africa wants to have its own pool of lawyers with enough knowledge on the subject. Training is vital in ending impunity to international crimes.

9.3.3 Harmonization of Treaty Obligations

There is a need of harmonizing the existing international obligations. African states are incurring contradicting international and sub-regional obligations when reference is made to the ICC Statute, the Malabo Protocol and the Great Lakes Protocol.

9.3.4 Solidifying Efforts to Address Impunity to International Crimes at Regional and Domestic Level

African states are called to work as one contributing financial and human resources towards empowering the court under the AU which is far from starting to exercise its criminal jurisdiction. Further, efforts should also be made to ensure domestic courts are also capable of rendering justice to victims of international crimes which is not the case at the moment as witnessed in the study conducted.

9.3.5 Developing Legislative Framework for the Prosecution of International Crimes at Domestic Level

African states should enact laws providing for provisions on international crimes. This can be an amendment of the existing Penal laws, or enact new legislation. For those in the Great Lakes region they will be implementing the Protocol while the rest

will implement the Genocide Convention and the body of customary international law providing for CAH. However, if the Malabo Protocol was operational they would have implemented the Protocol which is ideal.

9.3.6 Develop good governance structures and establish strong accountability systems through checks and balances

The establishment of systems for effectively ensuring proper checks and balances between different arms of the government is imperative. Once the systems are in place, no one organ will control the functioning of the other in ending impunity to international crimes. The culture of accountability has to be developed and engraved as part of the communities. Lessons on leadership, governance and accountability ought to be made part of learning process from primary education. This will groom a community that is sensitive to upholding human rights standards and accountable upon violations.

9.3.7 Provide for Strong Witness Protection System

African countries need to enact laws addressing the issue of witness protection and provide institutions mandated with the task of protecting witnesses enough funds to discharge their duties. This will solve the problems of weak evidence which is not supported by testimonies just because witnesses fear reprisal or their safety.

9.3.8 Echoing the Moral Guilty of International Crimes when Prosecuted under Ordinary Crime Approach.

The prosecution of international crimes before domestic courts can either take the hard mirror approach or the soft mirror approach. When prosecuted as ordinary crimes, judges need to echo the desire that such crimes could have been prosecuted as international crimes if legal framework was available. This can be articulated in an opinion (*orbita dictum)* in the judgments given. This will therefore be possible only if judges have the necessary exposure to the law governing international crimes. Therefore, training of judiciary personnel remains crucial.

9.3.9 Change Perception of the past and press forward with Building a Culture of Accountability

It is evident that the past has crippled Africa in a number of ways. Slave trade and colonialism have negative impacts to date. One of it is the culture of impunity. However, it is high time that this changes. Africans cannot go about blaming the past even though it has contributed greatly to the existence of state of affairs.

9.4 Future Research

Chapter five has revealed that the domestic prosecution of international crimes is ongoing in a number of countries in Africa. The current study covered only Kenya, Uganda and Rwanda. There is therefore a room to research about the domestic prosecution of international crimes in other African countries. There is also a need to track the developments that will emerge in the domestic prosecution of international crimes in Kenya, Uganda and Rwanda. Emphasis may also be placed on the jurisprudence of domestic courts on international crimes which has not been covered by the current thesis.

BIBLIOGRAPHY

Books

Ambos K. and Othman M., eds., *The New Approaches in International Criminal Justice Kosovo, East Timor, Sierra Leone and Cambodia*, 2003.

Ball H., *War crimes and Justice: A Reference Handbook,* California, ABC-CLIO, 2012.

Bantekas I. and Nash S., *International Criminal Law,* London, United Kingdom, Cavendish Publishing Limited, 2003.

Bassiouni C.M., ed., *International Criminal Law,* vol. 1, *Sources, Subjects, and Contents*, 3rd ed., Leiden, Netherlands, Martinus Nijhoff/Brill, 2008.

Bassiouni M.B., *Crimes Against Humanity in International Criminal Law,* The Hague, Netherlands, Martinus Nijhof Publishers, 1999.

Bassiouni M.C., *Crimes Against Humanity in International Criminal Law,* The Hague, The Netherlands, Kluwer Law International, 1999.

Bassiouni, C.M., *The Institutionalization of Torture by the Bush Administration: Is Anyone Responsible?* Mortsel, Belgium, Intersentia, 2010.

Bergsmo M., ed., *Criteria for Prioritizing and Selecting Core International Crimes Cases*, 2nd ed., FICHL Publication Series No.4, Oslo, Torkel Opsahl Academic EPublisher, 2010.

Berry J.A., *Genocide in Rwanda: A Collective Memory*, Washington DC, USA, Howard University Press, 1999.

Birmingham D., *The Decolonization of Africa,* London, UK, University College London Press, 1995.

Bisase A.S., *Guardian Angel: The Beginning*, Author House, London, United Kingdom, 2012.

Carney J.J., *Rwanda Before the Genocide: Catholic Politics and Ethnic Discourse in the Late Colonial Era,* New York, USA, Oxford University Press, 2014.

Cassese A., *Cassese's International Criminal Law,*New York, United States of America, Oxford University Press, 2013.

Cassese A., *International Criminal Law*, 2nd ed., Oxford, UK, Oxford University Press, 2008.

Cassese A., *International Criminal Law,* Oxford, United Kingdom, Oxford University Press, 2008.

Cassese A., *The Oxford Companion to International Criminal Justice,* Oxford United Kingdom, Oxford University Press, 2009.

Cassese, A., *International Law*, 2nd ed., Oxford, UK, Oxford University Press, 2005.

Chui, W.H. and McConville, M., *Research Methods for Law*, Edinburgh, Edinburgh University Press, 2010.

Cryer R. et al, *An Introduction to International Criminal Law and Procedure*, New York, The United States of America, Cambridge University Press, 2010.

Cryer R., *Prosecuting International crimes: Selectivity and the International Criminal Law Regime,* Cambridge, United Kingdom, Cambridge University Press, 2005.

Dallaire R., *Shake Hands with the Devil: The Failure of Humanity in Rwanda,* Toronto, Canada, Random House,2003.

Damgaard C., *International Criminal Responsibility for Core International Crimes,* Berlin, German, Springer – Verlag, 2008.

Dixon M., *International Law*, Oxford, UK, Oxford University Press 2013.

Du Plessis M., and Stone L., *Implementation of the Rome Statute of the International Criminal Court (ICC) in African countries*, Pretoria, South Africa, Institute for Security Studies, 2008.

Findlay M., etal, *International and Comparative Criminal Justice: A Critical Introduction,* New York, United States of America, Routledge, 2013.

Francis D.J., *Uniting Africa: Building Regional Peace and Security,* Hampshire, England, Ashgate Publishing Limited, 2006.

Gahima G., *Transitional Justice in Rwanda, Accountability for Atrocities,* New York, USA, Rutledge, 2013.

Gallant K. S., *The Principle of Legality in International and Comparative Criminal Law*, Cambridge, UK, Cambridge University Press, 2009.

Gann H.L. and Duignan P., *World War II and the Beginning of the Cold War,* Leland, United States of America, Stanford Junior University, 1996.

Ginyera-Pincywa, A.G., *Northern Uganda in National Politics,* Kampala, Uganda, Fountain Publishers, 1992.

Gourevitch P., *We wish to inform You That Tomorrow We Will be Killed With Our Families: Stories from Rwanda,* NEW York, USA, Farrar, Straus and Giroux, 1998.

Hargreaves J.D., *Decolonization in Africa,* New York, USA, Routledge, 1996.

Hatzfeld J., *Machete Season: The Killers in Rwanda Speak*; NEW York, USA, Farrar, Straus and Giroux, 2006.

Henckaerts J. and Doswals-Beck L., *Customary International Humanitarian Law Volume 1: Rules,* International Committee of the Red Cross, New York, United States of America, Cambridge University Press, 2005.

Hoile D., *Justice Denied: The Reality of the International Criminal Court,* The Africa Research Centre, London, 2014.

Inazumi I., *Universal Jurisdiction in Modern International Law: Expansion of national Jurisdiction for prosecuting Serious crimes Under International Law,* Cambridge, United Kingdom, Intersentia nv, 2005.

Jallow H. and Bensouda F., 'International Criminal Law in African Context' in Duplessis M., *African Guide to International Criminal Justice,* Pretoria, South Africa, Institute of Security Studies, 2008, p. 16.

Jones N., *The Courts of Genocide: Politics and the Role of Law in Rwanda and Arusha,* New York, USA, Routledge, p. 7.

Jørgensen N. H. B., *The Responsibility of States for International Crimes*, Oxford, UK, Oxford University Press, 2000.

Katayanagi M., *Human Rights Functions of the UN Peacekeeping Operations*, The Hague, The Netherlands, Martinus Nijhoff Publishers, 2002.

Keane F., *Season of Blood: A Rwandan Journey,* London, United Kingdom, Penguin Books, 1996.

Kerr R. and Mobekk E., *Peace and Justice: Seeking Accountability after War,* Polity Press, 2007.

Kiwuwa D.E., *Ethnic Politics and Democratic Transition in Rwanda,* New York, USA,Routledge, 2012.

Kleffner J.K., *Complementarity in the Rome Statute and National Criminal Jurisdictions,* New York, United States of America, Oxford University Press, 2008.

Klose F., *Human Rights in the Shadow of Colonial Violence: The Wars of Independence in Kenya and Algeria*, Philadelphia, USA, University of

Pennsylvania, 2013.

Kreb C. and Lattanzi F., eds., *The Rome Statute and Domestic Legal Orders Volume 1: Constitutional Aspects and Constitutional Issues,* Italy, 2000.

Lee R., *The International Criminal Court: The Making of the Rome Statute--Issues, Negotiations and Results,* Kluwer Law International, The Hague, Netherlands, 1999.

Leggett I., *Uganda: The Background, the issues, the People*, Kampala, Uganda, Fountain Publishers Limited, 2001.

Lemkin, Raphael, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, and Proposals for Redress,* Washington, D. C. Carnegie Endowment for International Peace, 1944.

Lepard B. D., *Customary International Law: A New Theory with Practical Applications*, Cambridge University Press, Cambridge, UK, 2010.

Lepard B.D., *Customary International Law: A New Theory with Practical Application*, Cambridge University Press, New York, United States of America, 2010.

Lepard B.D., *Customary International Law: A New Theory with Practical Application,* New York, United States of America, Cambridge University Press, 2010.

Mallinder Louise, *Amnesty, Human Rights and Political Transition: Bridging the Peace and Justice Divide*, Oxford, UK, Hart Publishing, 2008.

Mamdani M., *When Victims Become Killers: Colonialism, Nativism and the Genocide in Rwanda*, Princeton, New Jersey, Princeton University Press, 2001.

Marke J.J., Sloane R. and Ryan M., *Legal Research and Law Library Management* New York, USA, Law Journal Press, 2005.

Materu F.S., *The Post-Election Violence in Kenya: Domestic and International Legal Responses*, The Hague, Netherlands, T.M.C Asser Press, 2014.

McDoom O., "Analysis: Justice Clashes With Peace on Darfur Bashir Warrant," *Reuters,* July 14, 2008.

McGoldrick D., *The Permanent International Criminal Court,* Portland, United States America, Hart Publishing, 2004.

Melvern L., *Conspiracy to Murder: The Rwandan Genocide*, London, UK, Verso, 2004.

Mutibwa P.M., *Uganda since Independence: A story of Unfulfilled* Hopes, London, England, Africa World Press Inc, 1992.

Mutua, M., *Kenya's quest for democracy: taming the leviathan,* London, Lynne Rienner Publishers, 2008, p. 285.

Mwakikagile G., *Obote to Museveni: Political Transformation in Uganda Since Independence,* Intercontinental Books.

Mwakikagile G., *Uganda: The Land and Its People*, Dar es salaam, Tanzania, New Africa Press, 2009,

Nathan L., *Community of Insecurity: SADC Struggle for Peace and Security in Southern Africa*, Farnham, England, Ashgate Publishing Limited, 2012.

Namwase S., *The Principle Of Legality and The Prosecution of International Crimes In Domestic Courts: Lessons From Uganda*, Lap Lambert Academic Publishing, Saarbrucken Germany, 2012.

Nouwen S., *Complementarity in the Line of Fire: Catalyzing Effect of the International Criminal Court in Uganda and Sudan*, Cambridge University Press, New York, USA, 2013.

Nowak M., *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2nd ed., Kehl, Germany, N.P. Engel, 2005.

O'Shea A., *Amnesty for crime in international law and practice,* The Hague, The Netherlands, Kluwer Law International, 2002.

Orakhelashvili A., *Peremptory Norms in International Law*, UK, Oxford University Press, Oxford,2008.

Popa R., *The Contribution of the Extraordinary Chambers in the Courts of Cambodia to the Establishment of Hybrid Tribunals*, Norderstedt, Germany, Grin Verlag, 2009.

Quigley J., *The Genocide Convention: An International Law Analysis*, Hampshire, England, Ashgate publishing Limited, 2006.

RölingBernard V. A., and Cassese A., *The Tokyo Trial and Beyond: Reflections of a Peace monger*, Cambridge,UK, Polity Press, 1994.

Schabas W. A., *An Introduction to the International Criminal Court*, 3rd ed., Cambridge, UK, Cambridge University Press,2007.

Schabas W. A., *Genocide in International Law*, 2nd ed., Cambridge, UK, Cambridge University Press, 2009.

Schabas W. A., *The International Criminal Court: A Commentary on the Rome Statute*, Oxford, UK, Oxford University Press, 2010.

Schabas W., *Unimaginable Atrocities: Justice, Politics and the Rights at the War Crimes*, Oxford University Press, Oxford , United Kingdom,2012.

Schabas W.A., *An Introduction to International Criminal Court,* Cambridge, The United Kingdom, Cambridge University Press, 2011.

Schabas W.A., *Genocide in International Law: The Crime of Crimes*, Cambridge, United Kingdom, Cambridge University Press, 2000.

Schabas W.A., *The United Nations International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone,* Cambridge, United Kingdom Cambridge University Press, 2006.

Schwarzenberger G., *International Law As Applied by Courts and Tribunals,* London, United Kingdom, Stevens, 1968.

Smeulers A. and Grunfeld F., *International Crimes and Gross Human Rights Violations: A multi and Interdiscplinary textbook*, Laiden, The Netherlands, Martinus Nijhoff Publishers, 2011.

Stigen J., *The Relationship Between the International Criminal Court and National Jurisdictions: The Principle of Complementarity,* Laiden, The Netherlands, Martinus Nijhoff Publishers, 2008.

Sunga L.S., *The Emerging System of International Criminal Law: Developments in Codification and Implementation,* Kluwer Law International, The Hague, The Netherlands, 1997.

Totani Yuma, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II*, Cambridge, USA, Harvard University Press, 2009.

Umbricht V., Multilateral Mediation: Practical Experiences and Lessons, The Netherlands, Martinus Nitjhof Publishers, 1989.

United Nations, *The Work of the International Law Commission,* seventh edition, 2007 (United Nations publication, Sales No.E.07.V.9), vol.I, Parts I. 3 and II.

Van ALebeek R., *The Immunity of States and their Officials in International Law and Intentional Human Rights Law*, New York, United States, Oxford University Press, 2010, p. 2.

Van Den Herik L.J., *The Contribution of the Rwanda Tribunal to the Development of International Criminal Law,* Laiden, The Netherlands, Martinus Nijhoff Publishers.

Van Den Herik L.J., *The Contribution of the Rwanda Tribunal to the Development of International Criminal Law,* The Hague, The Netherlands, Martinus Nijhoff Publishers, 2005.

Werle G., *Principles of International Criminal Law*, The Hague, The Netherlands, TMC Asser Press, 2005.

Werle Gerhard, *Principles of International Criminal Law*, 2nd ed., The Hague, The Netherlands, TMC Asser Press 2009.

Zahar A., and Göran S., *International Criminal Law: A Critical Introduction*, Oxford, UK, Oxford University Press, 2008.

Chapters in Books

Abi-Saab G., 'The Concept of "International Crimes" and its Place in Contemporary International law' in Cassese A., Weiler J.H.H. and Spinedi M., eds., *A Critical Analysis of the ILC'S Draft Article 19 on State Responsibility,* Berlin, German, Walter de Gruyter & Co, 1988.

Sundberg J.W.F., 'The Crime of Piracy,' in Bassiouni M.C., ed., *International Criminal Law: Sources, Subjects and Contents,* Vol I, 3rd ed, Laiden, The Netherlands, Koninklijke Brill NV, 2008, p. 813.

Asingo P.O. 'The Political Economy of Transition in Kenya,' in Oyugi W.O., et al, eds., *The Politics of Transition in Kenya: From KANU to NARC,* Nairobi, Kenya, Heinrich Boll Foundation, 2003.

Bassiouni C.M., 'International Crimes: The Ratione Materiae of International Criminal Law,' in Bassiouni C.M., ed., *International Criminal Law, Sources, Subjects, and Contents,* 3rd ed., Leiden, Netherlands, Martinus Nijhoff/Brill,2008.

Bassiouni C.M., 'The Subjects of International Criminal Law: *Ratione Personae*,' in Bassiouni, C.M., ed., *International Criminal Law,* vol. 1, *Sources, Subjects, and Contents,* 3rd ed., Leiden, Netherlands Martinus Nijhoff/Brill, 2008.

Bassiouni M.C., 'The History of Universal Jurisdiction and its Place in international Law' in Macedo S., ed., *Universal Jurisdiction, National Courts and the Prosecution of Serious Crimes under International Law,* Pennsylvania, United States of America, University of Pennsylvania Press, 2004, p. 39.

Bassiouni M.C., 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice' in Bassiouni M.C., ed.,

International Criminal Law: International Enforcement, 3rd edition, Laiden, The Netherlands, Martinus Nijhoff Publishers, 2008, 153.

Belleli R., 'The Establishment of the System of International Criminal Justice' in Belleli R., ed., *International Criminal Justice Law and Practice: From the Rome Statute to its Review*, Farnham, United Kingdom, Ashgate Publishing Limited, 2010, 5.

Ben-Naftali O., 'The Obligations to Prevent and to Punish Genocide,' in Gaeta P., ed., *The UN Genocide Convention: A Commentary*, Oxford, UK, Oxford University Press, 2009.

Biswaro J.M., 'The Assembly, Executive Council and Commission,' in Yusuf.A. and Ouguergouz F., (eds) *The African Union Legal and Institutional Framework: A Manual on the Pan-African Organization*, Mkuki na Nyota Publishers Ltd, Dar es salaam, Tanzania, 2015, p.79.

Blakesley C.L., 'Extraterritorial Jurisdiction' in Bassiouni M.C., (ed) *International Criminal Law: International Enforcement*, 3rd edition, Laiden, The Netherlands , 2008.

Blattmann R., 'International Criminal Justice in Africa: Specific Procedural Aspects of the First Trial Judgment of the International Criminal Court,' in Werle G., Fernandez L. and Vormbaum M., eds., *Africa and the International Criminal Court,* International Criminal Justice Series, Volume 1, The Hague, The Netherlands, Asser Press, 2014, p. 35 at 36.

Brubacher M., 'The ICC, National Governments and Judiciaries,' in N. Waddell and P. Clark eds., *Peace, Justice and the ICC in Africa*, Meeting Series Report, London, Royal African Society, March 2007.

Cassese A., 'From Nuremberg to Rome: International Military tribunals to The International Criminal Court' in Cassese A., Gaeta P. and Jones R.W.D.J., eds., *The Rome Statute of the International Criminal Court: A Commentary*, 2008, vol 1, 1.

Cassese Antonio, 'Is Genocidal Policy a Requirement for the Crime of Genocide?,' in Paola G., ed., *The UN Genocide Convention: A Commentary*, Oxford, UK, Oxford University Press, 2009.

Chui W.H., 'Quantitative Legal Research' in Mc Conville M. and Chui W.H., *Research Methods for Law* Edinburg University Press, Edinburgh, Great Britain, 2007, p.46.

Clark P., 'Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda,' in Clark P. and Waddel N., *Courting Conflict? Justice, Peace and the ICC in Africa*, London, 2008, p. 37.

Clark, R. S., 'Crimes against Humanity at Nuremberg', in Ginsburgs, G. and Kudriavtsev, V. N., eds., *The Nuremberg Trial and International Law,* Dordrecht, Nijhoff, 1990.

Crawford J., 'The Drafting of the Rome Statute,' in Philippe S., ed., *From Nuremberg to The Hague: The Future of International Criminal Justice*, Cambridge, UK, Cambridge University Press, 2003.

Dickinson L.A., 'The Dance of Complementarity: Relationships among Domestic, International and Transnational Mechanisms in East Timor and Indonesia', in Stromseth J.E. ed., *Accountability for Atrocities: National and International Responses*, Ardsley, New York, USA, Transnational Publishers, 2003, p. 319.

Dobinson I. and Johns F., 'Qualitative Legal Research' in Mc Conville M. and Chui W.H, eds., *Research Methods for Law* Edinburgh, Great Britain, Edinburg University Press, 2007, p. 16.

Dugard J., 'Restorative justice: International law and the South African model' in McAdams A.J., ed., *Transitional justice and the rule of law in New Democracies*, 1997, p. 269.

Gaeta P., 'Internationalization of Prohibited Conduct' in Cassesse A., *The Oxford Companion to International Criminal Justice*, Oxford, United Kingdom, Oxford University Press, 2009.

Gaja G., 'Issue of Admissibility in Case of Self referrals,' in Politi M. and Gioia F., eds., *The International Criminal Court and National Jurisdictions* Hampshire, England, Ashgate Publishing Limited, 2008.

Grono N. and O'Brien A., 'Justice in Conflict? The ICC and Peace Processes,' in Clark P. and Waddel N., *Courting Conflict? Justice, Peace and the ICC in Africa*, London, 2008, p. 16.

Hanna M.W., 'An Historical Overview of National Prosecution of International Crimes' in Bassiouni M.C., ed., *International Criminal Law: International Enforcement Volume III,* Laiden, The Netherlands, Martinus Nijhoff Publishers, 2008, p. 297.

Jessberger F., 'International v National Prosecutions of International Crimes' in Cassesse A., *The Oxford Companion to International Criminal* Justice, Oxford, United Kingdom, Oxford University Press, 2009, p. 208.

Jonyo F., 'The Centrality of Ethnicity in Kenya's Political Transition,' in Oyugi W.O., et al (eds., *The Politics of Transition in Kenya: From KANU to NARC*, Heinrich Boll Foundation, Nairobi, Kenya, 2003, p. 155.

Kanyinga K., 'Limitations of Political Liberalization: Parties and Electoral Politics in Kenya 1992-2002,' in Oyugi W.O., et al, eds., *The Politics of Transition in*

Kenya: From KANU to NARC, Heinrich Boll Foundation, Nairobi, Kenya, 2003, p. 102.

Kemp G., 'The Implementation of the Rome Statute in Africa' in Werle G., Fernandez L. and Vormbaum M., *Africa and the International Criminal Court,* International Criminal Justice Series, Volume 1, The Hague, The Netherlands, Asser Press, 2014,p. 63.

Kieh G.K., 'Humanitarian Intervention in Civil Wars in Africa,' in Valls A., *Ethics in International Affairs: Theories and Cases*, Oxford, England, Rowman and Littlefield Publishers, 2000, p.135.

Kustenbauder M., 'Northern Uganda: protracted conflict and structures of violence,' in Falola T. and Njoku R.C., eds., *War and Peace in Africa,* North Carolina, Unites States of America, Carolina Academic Press, 2010, p. 451.

Lubbe H.J., 'The African Union's decisions on the indictments of Al-Bashir and Gaddafi and their implications for the implementation of the Rome Statute by African States,' in Ambos K. and Maunganidze O.A. eds., *Power and Prosecution Challenges and Opportunities for International Criminal Justice in Sub-Saharan Africa* Volume 24 of the series, Göttingen Studies in Criminal Law and Justice" by Universitätsverlag Göttingen 2012, p. 179.

Lutz Ellen L., 'Prosecutions of Heads of State in Europe,' in Lutz E.L. and Reiger C., eds., *Prosecuting Heads of State,* Cambridge, UK, Cambridge University Press, 2009.

Mbazira C., 'Prosecuting International Crimes Committed by the Lord's Resistance Army in Uganda' in Murungu C. and Biegon J., eds., *Prosecuting International Crimes in Africa,* Pretoria, South Africa, Pretoria University Press,2011, p. 197.

Monageng S.M., 'Africa and the International Criminal Court: Then and Now,' in Werle G., Fernandez L. and Vormbaum M., *Africa and the International Criminal Court,* International Criminal Justice Series, Volume 1, The Hague, The Netherlands, Asser Press, 2014, p. 30.

Mose E., 'The International Criminal Tribunal for Rwanda' Justice' in Belleli R., (ed) *International Criminal Justice Law and Practice: From the Rome Statute to its Review*, Farnham, United Kingdom, Ashgate Publishing Limited, 2010,p.79.

Murungu C., 'Immunity of State Officials and Prosecution of International Crimes, 'in Murungu C and Biegon J, (eds) in Murungu C. and Biegon J., eds., *Prosecuting International Crimes in Africa,* Pretoria, South Africa, Pretoria University Press, p. 33.

Neldjingaye K, 'The trial of Hissene Habre in Senegal and its contribution to

International Criminal Law' in Murungu C. and Biegon J., eds., *Prosecuting International Crimes in Africa,* Pretoria, South Africa, Pretoria University Press,2011, p. 185.

Nkhata M., 'Implementing the Rome Statute in Malawi and Zambia: Progress, Challenges and Prospects' in Murungu C. and Biegon J., eds., *Prosecuting International Crimes in Africa,* Pretoria, South Africa, Pretoria University Press, 2011, p. 227.

Nouwen S., 'ICC Intervention in Uganda: Which Rule of Law does it Promote?," in Zurn M., Nollkaemper A. and Peerenboom R., eds., *Rule of Law Dynamics: In an Era of International and Transnational Governance,* New York, USA, Cambridge University Press, 2012.

Ocampo L.M., 'The International criminal Court in Motion,' in Stahn C. and Sluiter G., *The Emerging Practice of the International Criminal Court,* Laiden, The Netherlands, Martinus Nijhoff Publishers, 2009, 13.

Odhiambo- Mbai C., 'The Rise and Fall of The Autocratic State in Kenya,' in Oyugi W.O., et al eds., *The Politics of Transition in Kenya: From KANU to NARC,* Heinrich Boll Foundation, Nairobi, Kenya, 2003, p. 67.

Okey R., 'The Legacy of Massacre: The Jasenovac Myth and the Breakdown of Communist Yugoslavia,' in Levene M. and Roberts P., eds., *The Massacre in History,* New York ,United States of America, Berghahn Books, 1999, p.263.

Olugbuo B., 'Positive Complementarity and the Fight Impunity in Africa' in Murungu C. and Biegon J., eds., *Prosecuting International Crimes in Africa,* Pretoria, South Africa, Pretoria University Press, 2011, p. 249.

Olugbuo B.C., 'Implementing the International Criminal Court Treaty in Africa: The role of non-governmental organisations and government agencies in constitutional reform' in Clarke K.M. and Goodale M., eds., *Mirrors of justice: Law and power in the post-cold war era,* 2010, p. 106.

Orentlicher D.F., 'Universal Jurisdiction A Pragmatic Strategy in Pursuit of a Moralist's Vision' in Sadat L.N. and Scharf M.P., eds., *The theory and Practice of International Criminal Law Essays in Honour of M Cherrif Bassiouni,* Laiden, The Netherlands, Martinus Nijhoff Publishers, 2008, p. 127.

Overy R., 'The Nuremberg trials: International Law in the making' in Sands P., ed., *From Nuremberg to the Hague: The Future of International criminal Justice,* Cambridge University Press, New York, USA, 2003, p. 3.

Pocar D., 'The Experience of the UN Tribunals and their Completion Strategies' in Belleli R., ed., *International Criminal Justice Law and Practice: From the*

Rome Statute to its Review, Farnham, United Kingdom, Ashgate Publishing Limited, 2010,p.67.

Roht-Arriaza N., 'The New Landscape of Transitional Justice', in Roht-Arriaza N. and Mariezcurrena J., (eds), *Transitional Justice in the Twenty-First Century: Beyond Truth and Justice*, Cambridge, United Kingdom, Cambridge University Press, 2006, p. 1.

Rugege S. and Karimunda A.M., 'Domestic Prosecution of International Crimes: The Case of Rwanda,' in Werle G., ed., *Africa and International Criminal Court,* T.M.C Aser Press, The Hague, The Netherlands, 2014, p. 79.

Schroeder B.M. and Tiemessen A., 'Transnational Advocacy and Accountability: From Declaration of Anti- Impunity to Implementing the Rome Statute,' in Betts A. and Orchard P., eds., Implementation *and World Politics: How International Norms Change Practice* Oxford, United Kingdom, Oxford University Press, p. 56.

Simpson G., 'One among Many: The ICC as a Tool of Justice during Transition,' *Courting Conflict? Justice, Peace and the ICC in Africa*, p. 73.

Steel R., 'The End and the Beginning,' in Hogan J.M., ed., *The End of the Cold War: Its Meaning and Implications*, Cambridge, United Kingdom, Cambridge University Press, 1992, p.103.

Stone L., 'Implementation of the Rome Statute in South Africa' in Murungu C. and Biegon J., eds., *Prosecuting International Crimes in Africa*, Pretoria, South Africa, Pretoria University Press, 2011, 305.

Tiba F., 'The Trial of *Mengistu* and other Derg members for Genocide, Torture and Summary Executions in Ethiopia' in Murungu C. and Biegon J., eds., *Prosecuting International Crimes in Africa*, Pretoria, South Africa, Pretoria University Press, 2011, p. 163.

Tiba K. F., 'Mass Trials and Modes of Criminal Responsibility for International Crimes: The Case of Ethiopia' in Heller K. and Simpson G., eds., *The Hidden Histories of War Crimes Trials*, Oxford, United Kingdom, Oxford University Press, 2013, p. 306.

Triffterer O., 'The Preventive and Repressive Function of the Permanent International Court', in Politi M. and Nesi G., eds., *The Rome Statute of the International Criminal Court: A Challenge to Impunity*, United Kingdom, Ashgate Publishers, 2001, p.143.

Wanyande P., 'The Politics of Alliance Building in Kenya: The Search for Opposition Unity,' in Oyugi W.O., et al, eds., *The Politics of Transition in*

Kenya: From KANU to NARC, Nairobi, Kenya, Heinrich Boll Foundation, 2003, p. 128.

Webley, L., 'Qualitative Approaches to Empirical Legal Research' in Cane, P and Kritzer, H.M., *The Oxford Handbook of Empirical Legal Research*, New York, United States of America, Oxford University Press, 2010, p.926.

Winter R., 'The Special Court for Sierra Leone,' in Belleli R., ed., *International Criminal Justice Law and Practice: From the Rome Statute to its Review,* Farnham, United Kingdom, Ashgate Publishing Limited, 2010, p.101.

Journal Articles

Abass A., 'Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges,' *European Journal of International Law*, Vol. 24 No. 3, 2013, 933–994.

Anghie A., "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law," *Harvard International Law Journal*, Vol. 40, No.1, 1999, p. 3.

Akhavan P., "Beyond Impunity: Can Internationals Criminal Justice Prevent Future Atrocities?," *American Journal of International Law*, 2001, p. 7.

Akhavan, P., "The Crime of Genocide in the ICTR Jurisprudence," *Journal of International Criminal Justice*, 2005, No. 3, p. 989.

Alamuddin, A. and Webb, P., "Expanding Jurisdiction over War Crimes under Article 8 of the ICC Statute," *Journal of International Criminal Justice*, 2010, No.8, p. 1219.

Apuuli K. P., "Amnesty and International Law: The Case of Lord's Resistance Army Insurgents in Northern Uganda," *African Journal on Conflict Resolution*, 2007, Vol. 5, No. 2, p. 33.

Askin K.D., "Gender Crimes Jurisprudence in the ICTR: Positive Developments," *Journal of International Criminal Justice,* 2005, Vol 3, No. 4, p. 1007.

Askin K.D., "Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals," *American Journal of International Law*, 1999, p. 93.

Barnes G.P., "The International Criminal Court Ineffective Enforcement Mechanisms: The Indictment of President Omar Albashir," *Fordharm International Law Journal*, 2011, vol 34, No. 6, p. 1584.

Beco, G. de., "War Crimes in International Versus Non-International Armed Conflicts—"New Wine in Old Wineskins"?," *International Criminal Law Review*, 2008. No. 8, p. 319.

Bekou O., "Crimes at Crossroads: Incorporating International Crimes at National Level" *Journal of International Criminal Justice* 2012, vol.10, p. 677.

Ben-Naftali O. and Sharon M., "What the ICJ did not say about the Duty to Punish Genocide: The Missing Pieces in a Puzzle," *Journal of International Criminal Justice,* 2007, No. 5, p. 875.

Broomhall B., "Towards the Development of an Effective System of Universal Jurisdiction for Crimes under International Law." *New England Law Review,* 2000-2001, No.35, pp. 399 – 420.

Brubacher M.R., "Prosecutorial Discretion within the International Criminal Court," *Journal of International Criminal Justice,* 2004, No. 2, p. 71.

Cheeseman, N., "The Kenyan Elections of 2007: An Introduction", in *Journal of Eastern African Studies,* 2008, No. 2, p. 170.

Cheng C., "Justice and Gadhafi's Fight to the Death," *The Wall Street Journal*, 2011.

Chesterman, S., "An Altogether Different Order: Defining the Elements of Crimes against Humanity," *Duke Journal of Comparative and International Law,* 2000, No. 10, p. 307.

Clark P., "Hybridity, Holism and Traditional Justice: The Case of the Gacaca Courts in Post-Genocide Rwanda," *George Washington International Law Review,* 2007, Vol. 39, No. 765, p. 780.

Cole R.J.V., "Africa's Relationship with The International Criminal Court: More Political than Legal Africa's Relationship with the International Criminal Court," *Melbourne Journal of International Law,* 2013, vol. 14, p. 670.

Cryer R. and Bekou O., "International Crimes and ICC Cooperation in England and Wales," *Journal of International Criminal Justice,* 2007, No. 5, p. 441.

Damaska M., "Individual Criminal Responsibility in a World of States: Unacknowledged Presence in International Criminal Justice," *Journal of International Criminal Justice,* 2011, No 10, p.1239.

Dieng, A., "Capacity-Building Efforts of the ICTR: A Different Kind of Legacy," *Northwestern Journal of International Human Rights,* Vol. 9, No. 3, p. 406.

Du Plessis M., "Complementarity and Africa: The Promises and Problems of International Criminal Justice", 17 *African Security Review* 2000, p. 154.

Dugard J., "Africa and international criminal law: Progress or marginalization?," *American Society of International Law Proceedings,* 2000, No. 94, p. 229.

Elbadawi I. and Sambanis N., "Why are there so many civil wars in Africa? Understanding and Preventing Violent Conflicts," *Journal of African Economies,* 2000, p. 1.

Eser A., "Transnational Measures against Impunity of International Crimes," *Journal of International Criminal Justice,* 2012, p. 621.

Ferdinandusse W., "The Prosecution of Grave Breaches in National Courts," *Journal of International Criminal Justice,* 2009, No. 7, p. 723.

Ferdinandusse W., "The Prosecution of Grave Breaches in National Courts," *Journal of International Criminal Justice,* 2009, No. 7, p. 723.

Ferdinandusse W., "The Prosecution of Grave Breaches in National Courts," *Journal of International Criminal Justice,* 2009, No. 7, p. 723.

Fierens J., "The Rwandan Courts in Quest of Accountability Gacaca Courts: Between Fantasy and Reality," Journal *of International Criminal Justice,* 2005, Vol. 3, No. 4, p. 896.

Greenawalt, A.K.A., "Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court," *Virginia Journal of International Law,* 2009, vol. 50, p. 107.

Haley J.O., "The Tokyo International Military Tribunal: A Reappraisal, and: The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II (review)," *Journal of Japanese Studies,* 2009, Vol. 35, No 2, p. 445-451.

Hay J., "Implementing the ICC Statute in New Zealand," *Journal of International Criminal Justice,* 2003, No. 2, p. 191.

Hudson A. and Taylor A.W., "The International Commission against Impunity in Guatemala: A new Model for International Criminal Justice Mechanism," *Journal of International Criminal Justice,* 2010, No. 8, p. 53.

Hwang P., "Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court," *Fordham International Law Journal,* 1998, No. 22,Vol. 2, p. 457.

Jalloh, C.C., "Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective On Universal Jurisdiction," *Criminal Law Forum,* 2010, No. 21, p. 1.

Jessberger F. and Geneuss J., "The Many Faces of the International Criminal Court," *Journal of International Criminal Justice,* 2012, No.5, p. 1081.

Joyner C.C., "Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability*," Law and Contemporary Problems*, Vol. 59, No. 4, 1996, p. 153.

Jurdi N.N., "Some Lessons on Complementarity for the International Criminal Court Review Conference," *South Africa Year Book of International Law,* 2010.

Kaleck W., "From Pinochet to Rumsfeld: Universal Jurisdiction in Europe," 1998–2008, 30 *Michigan Journal of International Law,* 2009, p. 931 – 958.

Kim, P., "The Law of Genocide in the Jurisprudence of ICTY and ICTR in 2004," *International Criminal Law Review,* 2005, No. 5, p. 431.

Kleffner J.K., "The Impact of Complementarity on National Implementation of Substantive International Criminal Law," *Journal of International Criminal Justice,* 2003, No. 1, p. 86.

Lafontaine F., "Universal Jurisdiction-The Realistic Utopia," *Journal of International Criminal Justice,* 2012, No.10, p. 1277.

Magnarella P. J., "The Background and Causes of the Genocide in Rwanda," *Journal of International Criminal Justice,* 2005, Vol. 3, No. 4, p. 801.

Maqungo R., "The establishment of the International Criminal Court: SADC 's participation in the negotiations," *African Security Review,* Vol. 9, No 1, 2000.

Megret F. and Samson M.G., "Holding the Line on Complementarity in Libya: The Case for Tolerating Flawed Domestic Trials," *Journal of International Criminal Justice,* 2013, No. 11, p. 571.

Mettraux, G., "Crimes against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda," *Harvard International Law Journal*, 2002, No. 43, p. 237.

Modolell G. J. L., "The Crime of Forced Disappearance of Persons according to the Decisions of the IACtHR," *International Criminal Law Review*, 2010, No. 10, p. 475.

Momtaz, D., "War Crimes in Non-International Armed Conflicts under the Statute of the International Criminal Court," *Yearbook of International Humanitarian Law,* 1999, No. 2.

Morris M.H., "The Trials of Concurrent Jurisdiction: The Case of Rwanda," *Duke Journal of Comparative and International Law,* 1997, No 7, p. 349.

Mukimbiri, J., "The Seven Stages of the Rwandan Genocide," *Journal of International Criminal Justice,* 2005, No. 3, p. 823.

Naqvi Y., "Amnesty for War Crimes: Defining the Limits of International recognition," *International Review of the Red Cross,* 2003, Vol 85, No 851, p. 583.

Niang M., "The Senegalese Legal Framework for the Prosecution of International Crimes," *Journal of International Criminal Law*, 2007, Vol. 7, p. 1047.

Nsanzuwera F., "The ICTR Contribution to National Reconciliation," *Journal of International Criminal Justice'*, 2005, Vol 3, No. 4, p. 944.

Nsereko D.D.N., "Prosecutorial Discretion before National Courts and International Tribunals," *Journal of International Criminal Justice,* 2005, No. 3, p. 123.

O'Keefe R., "Universal Jurisdiction Clarifying the Basic Concept," *Journal of International Criminal Justice,* 2004, No. 2, p.735.

Oette L., "Crimes in Darfur before the ICC: Five Years On Peace and Justice, or Neither? The Repercussions of the al-Bashir Case for International Criminal Justice in Africa and Beyond," *Journal of International Criminal Justice,* 2010 No. 8, p. 334.

Omorogbe E. Y., "A Club of Incumbents? The African Union and Coups d'Etat," *Vanderbilt Journal of Transnational Law,* p. 134.

Okuta A., "National Legislation for Prosecution of International Crimes in Kenya," *Journal of International criminal Justice,* 2009, vol 7, p. 1063.

Oosterveld, V., "Gender Jurisprudence of the Special Court for Sierra Leone—Progress in the Revolutionary United Front Judgment," *Cornelius International Law Journal*, 2011, p. 44 at 49.

Peskin V., "Courting Rwanda The Promises and Pitfalls of the ICTR Outreach Programme," *Journal of International Criminal Justice,* 2005, Vol 3, p. 950.

Philippe X., "The Principles of Universal Jurisdiction and Complementarity: How do the two principles intermesh?," *International Review of the Red Cross,* 2006, Vol 88, No. 862, p. 375.

Philippe X., "The Principles of Universal Jurisdiction and Complementarity: How do the Two Principles Intermesh?," *International Review of the Red Cross,* Vol. 88, No.862, 2006, p. 375.

Plessis M., "South Africa's Implementation of the ICC Statute," *Journal of International Criminal Justice,* 2005, Vo. l5, p. 460.

Pocar F., "The Proliferation of International Criminal Courts and Tribunals: A Necessity in the Current International Community," *Journal of International Criminal Justice,* 2004, No. 2, p. 304.

Reisman, W. M., "International Law after the Cold War," *American Journal of International Law,* 1990, No.84, p. 859.

Rennie J.K., "The Pre-colonial Kingdom of Rwanda: A Reinterpretation," *Trans-African Journal of History 2*, No.1, 1972.

Rissing-van Saan R., "The German Federal Supreme Court and the Prosecution of International Crimes Committed in the Former Yugoslavia," *Journal of International Criminal Justice,* 2005, No. 3, p. 381.

Robinson D., "Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court," *European Journal of International Law,* 2003, p. 481.

Roht-Arriaza N. and Gibson L., "The developing jurisprudence on amnesty," *Human Rights Quarterly*, 1998, No. 20, p. 843.

Schabas W.A., 'Genocide Trials and Gacaca Courts', *Journal of International Criminal Justice,* 2005, No. 3, p. 879.

Schabas W.A., "A Synergistic Relationship: The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone," *Criminal Law Forum,* 2004, Vol 15, No. 3.

Schabas W.A., "Genocide Trials and Gacaca Courts," *Journal of International Criminal Justice,* 2005, No. 3, p. 879.

Schomburg, W. and Peterson, I., "Genuine Consent to Sexual Violence Under International Criminal Law," *American Journal of International Law,* 2007, p. 101.

Sluiter G., "Implementation of the ICC Statute in the Dutch Legal Order," *Journal of International Criminal Justice,* 2003 No. 2, p. 158.

Spinga V., "No Redress without Justice: Victims and International Criminal Law," *Journal of International Criminal Justice,* 2012, No. 10, p. 1377.

Steenberghe R., "The Obligation to Extradite or Prosecute Clarifying its Nature," *Journal of International Criminal Justice,* 2011, No. 9, p. 1089.

Steven L.A., "Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of its International Obligations," *Virginia Journal of International Law,* 1999, No. 39, p. 425.

Stromseth J., "Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?," *Georgetown Law the Scholarly Commons,* 2009,p. 87.

Szpak, A., "National, Ethnic, Racial, and Religious Groups Protected against Genocide in the Jurisprudence of the Ad Hoc International Criminal Tribunals," *European Journal of International Law,* 2012, No. 23, p.155.

Tomuschat C., "The Legacy of Nuremberg," *Journal of International Criminal Justice,* 2006, No. 4, p. 830.

Van der Wilt, H., "War Crimes and the Requirement of a Nexus with an Armed Conflict," *Journal of International Criminal Justice,* 2012, No.10, p.1113.

Van Schaack B., "*Crimen Sine Lege*: Judicial Law making at the Intersection of Law and Morals," *Georgetown Law Journal,* 2008,vol 97, p. 119.

Vendermeersch D., 'The ICC Statute and Belgian Law', *Journal of International Criminal Justice,* 2004, No. 2, p. 133.

Werle G. and Burghardt B., "Do Crimes Against Humanity Require the Participation of a State or a 'State-like' Organization?", *Journal of International Criminal Justice,* 2012, No 10, p. 1151.

Werle G., "Individual Criminal Responsibility in article 25 ICC Statute," *Journal of International Criminal Justice,* 2008, No. 5, p.1.

Williams, S., "Genocide—The Cambodian Experience," *International Criminal Law Review,* 2005, No. 5, p. 447.

Wippman D., "The Costs of International Justice," *American Journal of International Law,* 2006, No. 100, p. 861.

Yang L., "On the Principle of Complementarity in the Rome Statute of the International Criminal Court," *Chinese Journal of International Law,* 2005, Vol. 4, No. 1, p. 121.

Zayas, A. M., "International Law and Mass Population Transfer," *Harvard International Law Journal,* 1975, No.6, p. 207.

Online Materials and Reports

African Union Handbook African Union Commission and New Zealand Crown, 2014 available at http://summits.au.int/en/22ndsummit/events/launch-au-handbook [Accessed 6 October 2014].

Amnesty International Central African Republic: More than 50 Muslims killed in two attacks 24 January 2014 Available at http://www.amnesty.org/en/news/car-50-muslims-killed-2014-01-24 [Accessed 6 February 2014].

Amnesty International, 'Solidarity Action for Universal Rights Uganda Stop child abductions for slave soldiering, AFR 59/04/99, available at https://www.amnesty.org/en/search/?q=uganda&sort=relevance&p=8 [Accessed 30 March 2015].

Amnesty International, Uganda/CAR: Impending transfer of suspected LRA commander to ICC offers opportunity for justice, 18 January 2015, available at, https://www.amnesty.org/en/articles/news/2015/01/ugandacar-impending-transfer-suspected-lra-commander-icc-offers-opportunity-justice/ [Accessed 1 April 2015].

Annex to the Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement, Juba, Sudan, February 19, 2008. Available at, http://www.iccnow.org/documents/Annexure_to_agreement_on_Accountability_signed_today.pdf [Accessed 1 April 2015].

Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations Of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, UN Doc. A/49/342S/1994/1007, 29 August 1994. Available at, http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_1994_en.pdf. [Accessed 1 April 2015].

Astil J., 'Violence mars final day of Kenya's election campaign,' 27 December 2002, available at http://www.theguardian.com/world/2002/dec/27/kenya.jamesastill [Accessed 25 May 2015].

Coalition for the International Criminal Court 'States Parties to the Rome Statute, available at http://www.iccnow.org/documents/RATIFICATIONS byRegion_2Arpil2012_eng.pdf [Accessed 6th January 2014].

Communique of the 15th Ordinary Summit of the EAC Heads of states Kampala Uganda30thNovember 2013,

http://www.eac.int/news/index.php?option=com_docman&task=doc_download&gid=353&Itemid=73. [Accessed 6th January 2014].

Council Decision 2003/335/JHA of 8 May 2003 on the investigation and prosecution of genocide, crimes against humanity and war crimes. Available at http://europa.eu/legislationummaries/justicefreedom_security/judicial cooperationincriminal_matters/l16005_en.htm [Accessed 8 September 2014].

D'Amato A., 'National Prosecution of International Crimes' available at http://anthonydamato.law.northwestern.edu/Adobefiles/National%20prosecutions-int%20crimes3rd08.pdf. [Accessed 6 February 2014].

Dasgupta A., 'Kenyans Seek Justice for Crimes Committed During Mau Mau Rebellion,' 18 November 2012, available at http://www.internationalpolicydigest.org/2012/11/18/kenyans-seek-justice-for-crimes-committed-during-mau-mau-rebellion/ [Accessed 16 June 2015].

Democratic Republic of Congo, South Sudan, Mali and Sudan see Human Rights Watch, 'Child Soldiers World Wide 12 March 2012,' Available at http://www.hrw.org/news/2012/03/12/child-soldiers-worldwide [Accessed 5 February 2014].

Elkins C., 'My critics ignored evidence of torture in Mau Mau detention camps,' Available at http://www.theguardian.com/commentisfree/2011/apr/14/torture-mau-mau-camps-kenya[Accessed 20 November 2014].

European Union Election Observation Mission, 'Kenya Final Report General Elections 27 December 2007,' 3 April 200, Available at http://www.eods.eu/library/FR%20KENYA%2003.04.2008_en.pdf [Accessed 25 May 2015].

Gettleman J., 'Africa's Forever Wars Why the continent's conflicts never end,' Available athttp://www.foreignpolicy.com/articles/2010/02/22/africas_forever wars [Accessed 5 February 2014].

Henry J., 'Digging up Mass Graves in Chad The Habré Trial: 23 Years on12 December 2013, Available at http://www.hrw.org/news/2013/12/12/digging-mass-graves-chad [Accessed 6 February 2014].

Henry J., 'Justice Cannot Wait in South Sudan' 31 January 2014 Available at http://www.hrw.org/news/2014/01/31/justice-cannot-wait-south-sudan [Accessed 6 February 2014].

Human Rights Council Special session of Human Rights Council appoints Independent Expert on situation of human rights in Central African Republic Available athttp://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=14186&LangID=E [Accessed 6 February 2014].

Human Rights Watch 'Kenya Report: Politicians Fueled Ethnic Violence,'1 November 2002, available at http://www.hrw.org/news/2002/10/31/kenya-report-politicians-fueled-ethnic-violence [Accessed 25 May 2015].

Human Rights Watch "We will kill you if you cry" Sexual Violence in the Sierra Leone Conflict 17 January 2003. Available at

http://www.hrw.org/en/reports/2003/01/16/well-kill-you-if-you-cry [Accessed 5 February 2014].

Human Rights Watch Central African Republic, 'War Crimes by Ex-Seleka Rebels Hold Commander Accountable for Attack on Town 25 November 2013', Available athttp://www.hrw.org/news/2013/11/24/central-african-republic-war-crimes-ex-seleka-rebels [Accessed 5 February 2014].

Human Rights Watch Condemns Security Council's Inaction in face of Evidence of Crimes against Humanity in the Democratic Republic of the Congo July 15, 1998 Available at https://www.hrw.org/news/1998/07/14/hrw-condemns-security-councils-inaction-face-evidence-crimes-against-humanity. [Accessed 5 February 2014].

Human Rights Watch interviews with victims, Gulu, Kitgum and Pader districts, February 25-March 7, 2005 cited in Human Rights Watch, 'The Lack of Accountability,' September 2005. Available at, http://www.hrw.org/reports/2005/uganda0905/6.htm [Accessed 30 March 2015].

Human Rights Watch Ivory Coast: Call for the protection of civilians and respect of the population's fundamental rights December 16, 2010. Available at https://www.hrw.org/news/2010/12/16/ivory-coast-call-protection-civilians-and-respect-populations-fundamental-rights [Accessed 5 February 2014].

Human Rights Watch Mali, 'War crimes by Northern Rebels Armed; Groups Commit Rape, use Child Soldiers' 30 April 2012, Available at http://www.hrw.org/news/2012/04/30/mali-war-crimes-northern-rebels [Accessed 5 February 2014].

Human Rights Watch Shocking war crimes in Sierra Leone: New Testimonies on mutilation, rape of civilians 25 June 1999 Available at http://www.hrw.org/news/1999/06/24/shocking-war-crimes-sierra-leone [Accessed 5 February 2014].

Human Rights Watch South Sudan: 'Ethnic Targeting, Widespread Killings Civilian Protection, Independent Inquiry Needed January 16, 2014', available athttp://www.hrw.org/news/2014/01/16/south-sudan-ethnic-targeting-widespread-killings [Accessed 6 February 2014].

Human Rights Watch, 'Early to War: Child Soldiers in the Chad Conflict17 July 2007'. Available at http://www.hrw.org/reports/2007/07/16/early-war [Accessed 5 February 2014];

Human Rights Watch, 'Genocide in Rwanda 1 May 1994', Available at http://www.hrw.org/reports/1994/05/01/genocide-rwanda [Accessed 5 February 2014].

Human Rights Watch, *Justice Compromised: the Legacy of Rwanda's Community-Based Gacaca Courts*, http://www.hrw.org/reports/2011/05/31/justice-compromised-0,[Accessed 10 February 2015].

Human Rights Watch, Uprooted and Forgotten: Impunity and Human Rights Abuses in Northern Uganda, vol. 17, no.12 (A), September2005, available at http://www.hrw.org/sites/default/files/reports/uganda0905.pdf [Accessed 29 March 2015].

Internal Crisis Group, Africa Report No. 124, and Northern Uganda: Seizing the Opportunity for Peace ii (2007), available at http://www.crisisgroup.org/library/documents/africa/central_africa/124_northern_uganda_seizing_the_opportunity_for_peace.pdf. [Accessed 10 April 2015].

International Crimes Division Annual Report 2014 'Enhancing Public Confidence in the Judiciary' International Crimes Division Annual Report 2014, Annual Judges' Conference held at Imperial Resort Beach Hotel, Entebbe 26th - 30th January 2014. Available at http://www.judicature.go.ug/files/downloads/International%20Crimes%20Division%20Report%2020130001.pdf.[Accessed 17 April, 2015].

Judicial Reform, Public Confidence and the Rule of Law in Rwanda Keynote address by Justice Sam Rugege, Chief Justice of Rwanda, to the Qatar Law Forum, London, 28 February 2013.Availableat http://www.qatarlawforum.com/wpcontent/uploads/2012/01/Rugege_Speech_Legal_Reforms_and_the_Rule_of_Law_in_Rwanda.pdf [Accessed 9 February 2015].

Justice Law and Order Sector (JLOS), 'Justice at Cross Roads? A Special Report on the Thomas Kwoyelo Trial, October 5, 2011,' available at http://www.jlos.go.ug/page.php?p=curnews&id=69 [Accessed 2 April, 2015].

Kimenyi M.S, "Can the International Criminal Court Play Fair in Africa?" October 17 2013 Available at http://www.brookings.edu/blogs/africa-in-focus/posts/2013/10/17-africa-international-criminal-court-kimenyi [Accessed 21 October 2013].

Ssemakadde I., "The state should try or release Jamil Mukulu," The observer, 15 July 2016, available at http://www.observer.ug/viewpoint/45340-the-state-should-try-or-release-jamil-mukulu [19 July 2016].

Kriegler and Waki Reports on 2007 Elections R.E. 2009, Available at http://www.kas.de/wf/doc/kas_16094-1522-2-30.pdf [Accessed 25 May 2015].

Laumann D., ‘British crimes in Kenya "cannot be forgotten," says victim,’ 6 August 2012, available at http://peoplesworld.org/british-crimes-in-kenya-cannot-be-forgotten-says-victim/ [Accessed 16 June 2015].

Letter to Human Rights Council on the Human Rights Situation in Sudan August 23, 2013 Available at http://www.hrw.org/news/2013/08/23/sudan-letter-human-rights-council-human-rights-situation-sudan-0 [Accessed 6 February 2014]

Monbiot D., ‘Deny the British empire's crimes? No, we ignore them,’ 23 April 2012. Available at http://www.theguardian.com/commentisfree/2012/apr/23/british-empire-crimes-ignore-atrocities [Accessed 20 November 2014].of the International Criminal Court in 1998’ (Declaration, 2 February 1998) Availableathttp://www.iccnow.org/documents/DakarDeclarationFeb98Eng.pdf [Accessed 25 September 2014].

Open Society Foundation “International Crimes, Local Justice: A Handbook for Rule-of-Law Policymakers, Donors and Implementers” (2011), 22 available at http://www.opensocietyfoundations.org/sites/default/files/international-crimes-local-justice-20111128.pdf. [Accessed 12 June 2014].

Paper on some policy issues before the Office of the Prosecutor ICC-OTP-2003 September 2003 available at http://www.icc-cpi.int/nr/rdonlyres/policy_paper.pdf [Accessed 2 June 2013].

Perpetual Fear Impunity and Cycles of Violence in Zimbabwe March 8, 2011 available at http://www.hrw.org/node/96946 [Accessed 6 February 2014].

Press Release, Int’l Criminal Court, President of Uganda Refers Situation Concerning the Lord’s Resistance Army (LRA) to the ICC, ICC-20040129-44 (Jan. 29, 2004), available at http://www.icc-cpi.int/Menus/Go?id=04d961fa-a963-4b7e-9ce0-e8a0ebf95822&lan=en-GB. [Accessed 10 April 2015].

Rikhof J., ‘Fewer Places to Hide? The Impact of Domestic War Crimes prosecutions on International Immunity’ Available at www.isrcl.org/Papers/2008/Rikhof.pdf [Accessed 5 September 2014] at 12-13. See also information by the International Centre for Transitional Justice Available at http://www.ictj.org/images/content/7/8/780.pdf. [Accessed 2 September 2014].

RLP National Reconciliation and Transitional Justice (NRTJ) Audit, focus group discussions in Arua, 2–8 October 2011, available at, www.beyondjuba.org/NRTJA/index.php. [Accessed 29 March 2015].

Rwandan Genocide Fugitives Project under Interpol assisted Rwandan investigators to secure the arrest of fugitive offenders. Information available at

http://www.interpol.int/Public/Wanted/images/rwanda.pdf.[Accessed 10 March 2015].

Sandbrook D., 'Stop saying sorry for our history: For too long our leaders have been crippled by a post-imperial cringe,'2 August 2010. Available at http://www.dailymail.co.uk/debate/article-1299111/Stop-saying-sorry-history-For-long-leaders-crippled-post-imperial-cringe.html [Accessed 20 November 2014].

The Arusha Accord 1993 also known as the (Comprehensive Peace Agreement made up of five protocols) was preceded by the N'sele Ceasefire Agreement 29 March 1991 which came into force 1 August 1992 but was never adhered to. Information available at http://peaceaccords.nd.edu/matrix/accord/63 [Accessed 23 January 2015].

The SAGE Dictionary of Social Research Methods, DOI: Available at http://dx.doi.org/10.4135/9780857020116 [2 October 2013].

Trigt, E.V., "Africa and withdrawal from the ICC," 28 October, 2016 available at https://www.peacepalacelibrary.nl/2016/10/africa-and-icc-withdrawal/ [29 October 2016].

United Nations High Commissioner for Human Rights, Report from OHCHR Fact-finding Mission to Kenya, 6-28 February 2008 Available at http://libraryresources.unog.ch/coi [Accessed 25 May 2015].

Ombuor, R., "Kenya Signals Possible ICC Withdrawal," 13, December 2016, available at http://www.voanews.com/a/kenya-signals-possible-icc-withdrawal/3634365.html [16 December2016].

Pierre J., 'Colonial War crimes in Africa,'5 November, 2011. Available at http://www.blackagendareport.com/content/colonial-war-crimes-africa [Accessed 6 February 2014].

Vinck P., et al, 'Northern Uganda Research Note on Attitudes About Peace and Justice In Northern Uganda', available at http://hhi.harvard.edu/sites/default/files/publications/publications%20-%20vulnerable%20-%20research%20note.pdf. [Accessed 2 April 2015].

Security Council, "Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution," 22 May 2014, https://www.un.org/press/en/2014/sc11407.doc.htmhttps://www.un.org/press/en/2014/sc11407.doc.htm [Accessed 29 June 2014].

Webb M., 'Uganda civil war victims laid to rest Many human remains being buried by loved ones with the dignity not possible during country's long conflict 31

Dec 2013'. Available at http://www.aljazeera.com/video/africa/2013/12/uganda-civil-war-victims-laid-rest-20131231165326901995.html [Accessed 26 February 2014].

Wheeler S., 'Counting the Dead in South Sudan 30 January 2014', Available athttp://www.hrw.org/news/2014/01/30/dispatches-counting-dead-south-sudan [Accessed 6 February 2014].

Windhoek Plan of Action on ICC Ratification and Implementation in SADC, adopted at the Conference on International Criminal Court (ICC) Ratification and Implementation for the Southern African Development Community (SADC) Region May 2001 http://www.pgaction.org/pdf/pre/02_2001_WindhoekPlan.pdf[Accessed 18 February 2015].

Wilkinson T., "Spain indicts 40 Rwandan officers Jurist charges officials in massacres after 1994 genocide. President Kagame is accused, but he has immunity," February 07, 2008, available at http://articles.latimes.com/2008/feb/07/world/fg-rwanda7 [Accessed 20 July 2015].

Reports and Official Letters

Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement, Juba, Sudan, June 29, 2007.

Amnesty International, 'Uganda Breaking the circle: protecting human rights in the northern war zone,' AFR 59/01/99, 17 March 1999.

Amnesty International, 'Uganda Breaking the circle: protecting human rights in the northern war zone,' AFR 59/01/99, 17 March 1999.

Amnesty International, 'Uganda Human Rights Violations by the National Resistance Army,' AFR 59/20/91, December 1991.

Amnesty International, 'Uganda: Failure to investigate alleged human rights violations in Karamoja region guarantees impunity,' AFR 59/013/2010, 1 November 2010.

Amnesty International, Human Rights in Uganda, AI Report, AFR 59/05/78, June 1978.

Coalition for the International Criminal Court, 'Africa and the International Criminal Court' (Fact Sheet, 25 May 2009).

Coalition for the International Criminal Court, 'Africa and the International Criminal Court' (Fact Sheet, 25 May 2009).

Concepción Escobar Hernández, Special Rapporteur, Fifth report on immunity of State officials from foreign criminal jurisdiction, International Law Commission, Sixty-eighth session, Geneva, 2 May-10 June and 4 July-12 August 2016.

Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) S/1994/674 27th May 1994.

Gulu Court Martial Convicts 120 UPDF Soldiers, *New Version,* 20 September 2007.

Human Rights Watch "Universal Jurisdiction in Europe The State of the Art," June 2006, Vol 18, No. 5(D).

Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) S/25274 11Th February 1993.

International Crisis Group, 'Five Years after the Genocide in Rwanda: Justice In Question', ICG Report Rwanda No 1, 7 April 1999.

International Law Commission, Report of the International Law Commission on the Work of Its 46th Session, UN GAOR, 49th sess, Supp No 10, UN Doc A/49/10 (1994) ch II(B)(f). 800.

International Law Commission, Report of the International Law Commission on the Work of Its 46th Session, UN Doc A/49/10 (1994) ch II(B)(f).

Judge Sang-Hyun Song President of the International Criminal Court Keynote remarks at ICTJ retreat on complementarity Greentree Estate, New York 28 October 2010.

Kofi Annan, Letter to the Principals, 22 June 2009.
Kofi Annan, Letter to the Principals, 23 February 2009.

Letter from CIPEV to the President, Minister of Justice and the Panel, 3 July 2008.

Office of Prosecutor, 'Complementarity in Action: Lessons Learned from the ICTR Prosecutor's Referral of International Criminal Cases to National Jurisdictions for Trial', February 2015.

Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome 15 June -17 July 1998, Vol 1 A/CONF.183/9.

Report by Mr. B.W. Ndiaye. Special Rapporteur, Extrajudicial, summary or arbitrary executions, on his mission to Rwanda, from 8 to 17 April 1993, E/CN.4/1994/7/Add.1, 11 August 1993

Report of the Secretary General on the Establishment of the Commission of Experts Pursuant to paragraph 2 of the Security Council Resolution 780 (1992) S/24659 14th October 1992.

Report of the secretary-general to the U.N. Security Council on the protection of civilians in armed conflicts, S/2004/431, May 28, 2004.

Report on the Completion Strategy of the International Criminal Tribunal for Rwanda, UN Doc. S/2007/676, 20 November 2007.

Report on the Completion Strategy of the International Criminal Tribunal for Rwanda, UN Doc. S/2008/322, 13 May 2008.

Report on the Completion Strategy of the International Criminal Tribunal for Rwanda (as at 3 November 2008), UN Doc. S/2008/726, 21 November 2008.

Report on the completion strategy of the International Criminal Tribunal for Rwanda as at 5 November 2014, S/2014/829.

UN Commission on Human Rights Report of the Independent Expert to update the set of principles to combat impunity 2005.

United Nations Resolutions and Documents

Security Council Resolution 764 on Bosnia and Herzegovina S/RES/764 13th July 1992.

Statement from Brazil (UN Doc.A/C.6/62/SR.26, 13 December 2007.

Statement from Congo (UN Doc.A/C.6/62/SR.24, 13 December 2007.

Statement from Cuba (UN Doc.A/C6/SR.23, 3 November 2009, at 8) Belgium (UN Doc.A/CN.4/612, 26 March 2009.

Statement from South Africa (UN Doc.A/C6/SR.22, 2 November 2009.

Statement from Sri Lanka (UN Doc.A/C6/64/SR.21, 30 October 2009.

Statement from Uruguay (UN Doc.A/C.6/63/SR.25, 19 November 2008.

Statements from Sweden, speaking on behalf of the Nordic countries (UN Doc.A/C.6/62/SR.22, 31 October 2007.

UN Commission on Human Rights Resolution 1999/1ECN.

UN Security Council Resolution 1325 (2000) 14 August 2000.

UN Security Council Resolution 1503, UN Doc. S/RES/1503, 28 August 2003.

United Nations General Assembly Resolution 117 (II) of 21st November 1947.

United Nations General Assembly Resolution 44/39 of 4th December 1989.

United Nations General Assembly Resolution 52/160 15 December 1997.

United Nations General Assembly Resolution A/RES/64/L117 on the Scope and Application of the Principle of Universal Jurisdiction adopted on 16 December 2009.

United Nations General Assembly Resolutions 2840 (XXVI)100 and 3074 (XXVIII)101.

United Nations General Assembly, Budget for the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994, for the biennium 2012-2013, UN Doc. A/66/368, 19 September 2011, xx 19.

United Nations Security Council resolution 1291 (2000) on the situation concerning the Democratic Republic of the Congo, U.N. Doc. S/RES/1291 (2000).

United Nations Security Council resolution 1304 (2000) on the situation concerning the Democratic Republic of the Congo, U.N. Doc. S/RES/1304 (2000).

United Nations Security Council Resolution 1325 (2000) 14 August 2000

United Nations Security Council Resolution 1593 31 March 2005, S/RES/1593.

United Nations Security Council Resolution 1970 of 26 February 2011, referred the situation in Libya to the ICC.

United Nations Security Council Resolution 771 on the Former Yugoslavia S/RES/771 13th August 1992.

United Nations Security Council Resolution 780 on the Establishment of a Commission of Experts for the former Yugoslavia S/RES/780 6 October 1992.

United Nations Security Council Resolution 808 1993 S/RES/808 22nd February 1993.

United Nations Security Council Resolution 935, 1 July 1994, UN Doc. S/RES/935.

United Nations Security Council Resolution 955 Adopted 8 November 1994 S/RES/955.

Yearbook of International Law Commission 1983 Vol II (Part One) A/CN.4/364.

Yearbook of International Law Commission 1994 Vol II (Part two).

Yearbook of International Law Commission 1996 Vol II (Part two).

African Union, Peace and Security Council, Communique of the 142nd Meeting, 21 July 2008, PSC/MIN/Comm(CXLII), x 11(i), at 2,

Africa Union Resolutions and Declarations

Agreement between the Government of the Republic of Senegal and the African Union on the Establishment of Extraordinary African Chambers in the Senegalese Courts), Available at http://legal.au.int/en/sites/default/files/Agreement%20AU-Senegal%20 establishing%20AEC-english0.pdf.[Accessed 16 October 2014].

Cairo Agenda for Action on relaunching Africa's socio economic formation adopted by the extraordinary session of the Council of Ministers held in Cairo, Egypt, from 25 to 28 March, 1995.

Communique of the 151nd Meeting, 22 September 2008, PSC/MIN/Comm.1(CLI) and Darfur: The Quest for Peace, Justice and Reconciliation, Report of the African Union High-Level Panel on Darfur (AUPD Report), PSC/AHG/2 (CCVII), 29 October 2009.

Court of Justice and Human Rights Doc. Assembly/Au/13(Xix)A, July 2012.

Dar-Es-Salaam Declaration On Peace, Security, Democracy And Development In The Great Lakes Region, International Conference on Peace, Security, Democracy and Development in the Great Lakes Region First Summit of Heads of State and Government, Dar-Es-Salaam, 19-20 November 2004.

Decision on International Jurisdiction, Justice and the International Criminal Court (ICC)2 Doc. Assembly/AU/13(XXI)May 2013.

Decision on International Jurisdiction, Justice and The International Criminal Court (ICC)2 Doc. Assembly/AU/13(XXI) May 2013.

Decision on the Abuse of the Principle of Universal Jurisdiction Doc. EX.CL/731(XXI) July 2012.

Decision on the Abuse of the Principle of Universal Jurisdiction Assembly/Dec.199(XI) July 2008.

Decision on the Abuse of the Principle of Universal Jurisdiction Assembly/Dec.213(XII) February 2009.

Decision on the Abuse of the Principle of Universal Jurisdiction Doc. Assembly/AU/11(XIII) July 2009.

Decision on the Abuse of the Principle of Universal Jurisdiction Doc. EX.CL/540(XVI) February 2010.

Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of The Republic Of The Sudan Assembly/AU/Dec.221(XII).

Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of The Republic Of The Sudan Assembly/AU/Dec.221(XII) July 2009.

Decision on the Hissene Habre Case And The African Union (Doc.Assembly/AU/8 (VI)) Add.9.

Decision on the Hissene Habre Case Doc. Assembly/AU/12 (XIII) Rev.1, July 2009.

Decision on the Hissene Habre Case Doc. Assembly/AU/12(XVIII), January 2012.

Decision on the Hissene Habre Case Doc. Assembly/AU/9(XVI), February 2010.

Decision on the Hisse'ne Habre¤ Case and the African Union, AU Doc. Assembly/AU/Dec.127 (VII), July 2006.

Decision On The Implementation Of The Decisions On The International Criminal Court (ICC) Doc. EX.CL/731(XXI) July 2012.

Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC) Doc. Assembly/AU/13(XIII) July 2009.

Decision on the Progress Report of the Commission on the Implementation of the Assembly.

Decisions on the International Criminal Court (ICC), Doc. EX.CL/710(XX) January 2012.

Decision on the Report of the Second Meeting of States Parties to the Rome Statute on the International Criminal Court (ICC) Doc. Assembly/AU/8(XIV) February 2010.

Decision on the Trial of Mr. Hissene Habre and the African Union 124 Assembly/AU/Dec.157 (VIII);

Declaration establishing within the OAU, a Mechanism for Conflict Prevention, Management and Resolution adopted by the Assembly of Heads of State and Government of the OAU in Cairo (Egypt) in June 1993;

Declaration on the Political and Socio Economic Situation in Africa and the Fundamental Changes Taking Place in the World adopted by the Assembly of Heads of State and Government of the OAU in 1990.

East Africa Legislative Assembly 4th Meeting of the 5th Session held in Nairobi, Kenya on the 26 April, 2012. Information available at http://eala.org/key-documents/doc_details/430-motion-icc-to-defer-criminal-cases-against-the-president-a-deputy-president-of-kenya.html [Accessed 22 October 2014].

East African Legislative Assembly, Bujumbura, Burundi; October 24, 2013, Available at http://www.eac.int/index.php?option=com_content&view=article&id=1385:defer-the-kenyan-icc-cases-eala-states&catid=146:press-releases&Itemid=194 [Accessed 22 October 2014].

Extraordinary Session of the Assembly of the African Union, Addis Ababa , Ethiopia October 2013 . Available at http://www.au.int/en/content/extraordinary-session-assembly-african-union [Accessed 15 October 2014].

Grand Bay (Mauritius) Declaration and Plan of Action, 16 April 1999.

International Conference on the Great Lakes Region of 26th November, 2006. The Protocol is part of the Great Lakes Pact and came into force in 2008.

Joint Communiqué African Workshop on the Ratification and Implementation of the Kampala Amendments to the Rome Statute of the International Criminal Court (ICC) available at www.crimeofaggression.info [Accessed 24 October 2014].

Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination 2006.

Protocol on Amendment to the Protocol to the Statute of the African Court of Justice and Human Rights 2014 Adopted by the Twenty-Third Ordinary Session of the Assembly, Held in Malabo, Equatorial Guinea 27th June 2014.

Protocol to the Statute of the African Court of Justice and Human Rights 2008 Adopted by the 11th Ordinary Session of the Assembly of the Union, In Sharm El-Sheikh, Egypt, 01 July 2008.

Statute of the Extraordinary African Chambers within the Senegalese judicial system for the prosecution of international crimes committed on the territory of the Republic of Chad during the period from 7June 1982 to 1 December 1990 Available at http://legal.au.int/en/sites/default/files/Agreement%20AU-Senegal%20establishing%20AEC-english_0.pdf. [Accessed 16 October 2014].

INTERVIEW GUIDE/ QUESTIONNAIRE

NATIONAL PROSECUTION OF INTERNATIONAL CRIMES IN AFRICA: THE LAW AND PRACTICE

INVESTIGATION UNIT, PROSECUTION UNIT AND JUDICIARY

Optional

Name:……

Occupation:……...

1. What is your knowledge on international crimes and international criminal justice?
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2. Have you been receiving training on the investigation/prosecution/adjudication of international crimes? If yes please elaborate on the nature of training received
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3. Comment on the problems/challenges faced by investigators/prosecutors/judges on the investigation/ prosecution of international crimes.
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4. What measures have been taken to overcome the problems thus far?
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5. What have been reasons for slow pace of investigation/prosecution of international crimes in the country?
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6. What factors have been associated with the successful prosecution of international crimes as international crimes or under the ordinary crime approach?
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INTERVIEW GUIDE/ QUESTIONNAIRE

NATIONAL PROSECUTION OF INTERNATIONAL CRIMES IN AFRICA: THE LAW AND PRACTICE

PRACTITIONERS AND INTERNATIONAL EXPERTS

Optional

Name:……

Occupation:……..

1. Comment on the ROLE PLAYED BY African countries in the evolution of international criminal justice.

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2. What is your opinion on the adequacy of legal framework for domestic prosecution of international crimes in Africa.
   At the regional level

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   At domestic level

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3. What are your views about the Malabo Protocol of 2014?

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4. What factors have contributed to the practice in Africa in relation to the presence of majority of cases before the ICC?

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5. Is the future of international criminal justice domestic?

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INTERVIEW GUIDE/ QUESTIONNAIRE

NATIONAL PROSECUTION OF INTERNATIONAL CRIMES IN AFRICA: THE LAW AND PRACTICE

WITNESS PROTECTION

Optional

Name:……

Occupation:……

1. What measures have been taken to disseminate knowledge to the public about the services offered by Witness Protection Agency?
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2. Is Witness Protection Agency receiving enough financial support to meet its monetary budget expenditures?
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3. Measures taken to protect witnesses on international crimes cases
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4. How well does the office of the Office of the Director of Public prosecutions work with Office of the Director of Public Prosecution on post-election violence cases?

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5. Existing collaborations with other justice sector stakeholders.

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6. Challenges facing Witness Protection Agency in its operations.

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7. Possible areas of reform

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