MAKERERE  **UNIVERSITY**

ASSESSING THE EFFECTIVENESS OF THE INTERNATIONAL CRIMINAL COURT IN PROSECUTING WAR CRIMES IN AFRICA

BY

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2022/HD09/3988U

A DISSERTATION SUBMITTED TO THE DIRECTORATE OF RESEARCH AND GRADUATE TRAINING IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE AWARD OF THE DEGREE OF MASTER OF LAWS OF MAKERERE UNIVERSITY

OCTOBER, 2025

Declaration

, **KASOZI SALEH,** declare that the work herein presented is my original work and has not
ubmitted to any University or any other Institution of Higher Learning for an Academic Av

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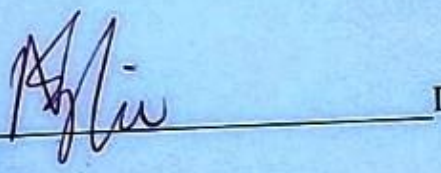
Signature:  Date: 20th Nov. 2025

Dr. Sylvie Namwase

Dedication

To my mother.

Acknowledgements

Throughout my research, I have been immensely blessed by the generosity and support of a number of people, to whom I am indebted.

Dr. Sylvie Namwase - the principal supervisor who has walked with me this research journey right from the rather grey research ideas; guiding with unlimited patience through to producing this dissertation. I am grateful for the commitment and time she took to read every single draft that was produced while providing scholarly and constructive timely feedback. Gratitude also goes to Dr. Bagenda Emmanuel for his guidance and feedback which widened the scope of my outlook on international legal landscape.

Further appreciation also extends to Prof. Ben Twinomugisha who guided on the topic and the appropriate methodology.

Acronyms

ACHPR	African Charter on Human and Peoples' Rights
CRB	Criminal Register Book
EU	European Union
IACP	International Association of Chiefs of Police
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Yugoslavia
NGO	Non-Governmental Organisation
LRA	Lord's Resistance Army
SGBV	Sexual and Gender Based Violence
UNO	United Nations Organisation
IHL	International Humanitarian Law
TWAIL	Third World Approaches to International Law
TPLF	Tigray People's Liberation Front
CAHDI	Committee of Legal Advisers on Public International Law
UNSC	United Nations Security Council
AU	African Union
NATO	North Atlantic Treaty Organisation
SS	Schutzstaffel, or the Protection Squads
SD	Sicherheitsdienst
ICRC	International Committee of the Red Cross
IMT	International Military Tribunal
USA	The United States of America
UK	The United Kingdom
TPLF	Tigray People's Liberation Front
EALA	East African Legislative Assembly
EAC	East African Community
EU	European Union
NIAC's	Non-International Armed Conflicts
IAC's	International Armed Conflicts
ICD	International Crimes Division

SA	Southern African Litigation Centre
OTP	Office of the Prosecutor
ASP	Assembly of States Parties
ICRC	International Committee of the Red Cross
CPC	Coalition des Patriotes pour le Changement
FPRC	Front Populaire pour le Renaissance de la Centrafrique
ENDF	Ethiopian National Defence Forces
UPC	Unite pour la paix en Centrafrique
UAE	United Arab Emirates
MINUSCA	United Nations Multilateral Integrated Stabilisation Mission
ACP-EU	African Caribbean and Pacific – European Union Joint Parliamentary Assembly.
CHA	Cessation of Hostilities Agreement
MLC	Movement for the Liberation of Congo
FPLC	Forces Patriotiques pour la Liberation du Congo
DRC	Democratic Republic of Congo
ALC	Armee de Liberation du Congo
ECOWAS	Economic Community of West African States
ACJHR	African Court of Justice and Human Rights
ACJHPR	African Court of Justice and Human and People's Rights

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Abstract

The study is an analysis of the effectiveness of the International Criminal Court (ICC) in prosecuting war crimes in Africa. Given that the ICC was the Court established, among others, to prosecute war crimes as a crime of grave international concern, the study examines whether the Court has effectively played this role in Africa. Anchored in the Third World Approaches to International Law (TWAIL) and Sovereignty theories, the study analyzed the evolution of war criminal prosecution, the peculiar nature of war crimes manifested in the African conflicts and the hinderances to the ICC prosecution efforts. These informed, in a TWAIL lens, the questions of how war criminal prosecution has evolved over time, informing the inception of the ICC, what the ICC mandate is and how TWAIL perceived such mandate; and finally, how TWAIL and sovereignty exacerbate the challenges inhibiting the ICC prosecution efforts of war criminals. To achieve the overall objective, the study used qualitative research design, specifically a doctrinal in-depth analysis, extensively examining the existing legal literature, statutes, treaties, case law, and official reports related to the International Criminal Court (ICC) and its engagement in prosecuting war crimes globally and specifically in Africa. Thematic analysis was the main approach adopted in an effort to match the data with the challenges affecting the Court's prosecution role, involving identification, organization and interpretation of patterns and themes. There were five major themes, namely: state sovereignty, states parties' cooperation with the ICC, the principle of complementarity under the ICC dispensation, jurisdiction of the ICC and immunity under international customary law in the face of ICC arrest warrants as pertinent issues underlying the ICC prosecutions. This analysis allowed the researcher to draw connections between legal principles, identify recurring patterns and gain a comprehensive understanding of the ICC's engagement in Africa. The findings were that not even TWAIL scholarship, for it had drawbacks, nor the Rome Statute have the solution to the underlying challenges to the ICC mandate, the problem being deeply entrenched in the geopolitical divide. Despite the international efforts to

curb impunity for war crimes, a gap still persists. This study is an addition to the existing literature on the effectiveness of the ICC, adopting a TWAIL approach intertwined with sovereignty.

Chapter One

Introduction

The International Criminal Court, (ICC), has jurisdiction over the 4 grave breaches of international humanitarian law, that is; the crime of aggression, genocide, war crimes and crimes against humanity, however, the focus of this study was war crimes. The reason for this choice is given under the scope of the study. War crimes are defined extensively in the Statute of the ICC,[1] but briefly, these are serious violations of the laws and customs of war, committed during an armed conflict. They include murder, rape, sexual violence, targeting of civilian and civilian objects, taking hostages, pillaging, using child soldiers, torture, cruel treatment, among others, as stipulated in the Geneva Conventions.[2] They are indictable if committed as part of a plan or policy or on large scale.[3]

By the end of the First World War, the world powers, together with civil society such as humanitarian entities like the Red Cross, were intensively deliberating on the idea of establishing a criminal court to try people that would have committed such breaches during wars.[4] The idea even gained much more momentum after the Second World War.[5] Core atrocities like genocide,[6]mass murders[7] and the mistreatment of prisoners of war[8] had been the order of the day.

[1] Infra.

[2] Infra.

[3] Ibid.

[4] Vagias M., 'The Territorial Jurisdiction of the International Criminal Court: Certain Contested Issues', 2011, Bynkers Hoek Publishing.

[5] Ibid.

[6] The systematic extermination of the Jews in Germany and the German occupied territories of Europe. The Jews being required to wear the Star of David.

[7] Concentration camps were human extermination centres in the Nazi Aryanisation agenda.

[8] Captured POWs on either side had to endure hard labour, long street matches, starvation, poor accommodation against the ideals of the Geneva Convention.

However, after the Allies trying, through the application of Victors' Justice,[9] the Nazi war criminals at the Nuremberg,[10] and the Japanese war criminals in the Tokyo trials,[11] there seemed a sense of satisfaction among the international community. As such, the whole idea of punishing war criminals was tentatively sent into hibernation. This set a precursor for subsequent human atrocities. Cases in point were the conflict in Cambodia which was perpetrated by the Khmer Rouge, the one in the Former Yugoslavia that nearly decimated ethnicities[12] and the 1994 Rwandan Genocide that left over a million Tutsi people massacred could not be simply watched as the perpetrators walked on. Indeed, international tribunals were established albeit on a temporary case by case basis by the United Nations (UN). The Nurnberg and Tokyo Tribunals were constituted and addressed war crimes, crimes against humanity and crimes against peace committed during the Second World War.

In the 1990's, after the end of the cold war, tribunals like the ICTY and the ICTR were the result of the consensus that impunity is unacceptable. However, because they were focusing on particular conflicts, there was a general agreement that an independent and permanent criminal court was needed. On the 17th day of July, 1998, the international community reached an historic milestone when 120 States adopted the Rome Statute, the legal basis for the establishment of the permanent International Criminal Court. Upon ratification by 60 state parties, the Rome Statute came into force.[13]

The court may exercise jurisdiction over such international crimes only if they were committed on the territory of a state party or by one of its nationals.[14] This notwithstanding, jurisdiction is exercisable if the case is referred to the Prosecutor by the United Nations Security Council, whose resolutions are binding on all the United Nations members,[15] or if a state makes a declaration submitting to the jurisdiction of the Court.[16]

[9] The victorious powers meting their presumed justice to the vanquished.

[10] The trial of the Nazi war criminals at Nurnberg by the Allies.

[11] The trial of the Japanese war criminals.

[12] There were multi ethnic conflicts in the former Yugoslavia such as the Bosnian Serbs, Albanians, Macedonians, Croats and all across the diverse Slav territory.

[13] Article 126(1), The Rome Statute of the International Criminal Court.

[14] Article 12(1) and (2) read together with article 14, ibid.

[15] Article 13(b), ibid.

[16] Article 12(3), ibid.

The exercise of the Court's jurisdiction has been greatly challenged by different factors, grossly hinged on the global political arena and the innate fear of neocolonialism. These factors can be broadly thematized as immunity, state cooperation, jurisdiction and sovereignty. They are examined in detail in the study below.

In this chapter, the study deals with, in addition to the introduction, the background to the study, statement of the problem, the purpose; both general and specific, the research questions, scope, justification, operational concepts and theoretical framework. Further still, the chapter covers a review of the existing literature and the methodology adopted in the research.

1.1 **Background of The Study**

The past twenty years of the court have been hugely significant. In the DRC, the first charges were confirmed against Thomas Lubanga who was then transferred to The Hague together with Germain Katanga and Mathieu Ngudjilo.[17]In Darfur, the ICC issued warrants for the Government Minister, Ahmed Haroun and the militia leader, Ali Mohamed Abdel Rahman 'Kushayb'.[18] During the Arab Spring, Muamar Qaddafi, the former Libyan strongman, was indicted together with his son, the *de facto* Prime Minister, Saif Al Islam Qaddafi and the Intelligence Chief, Abdallah Al Senussi.[19]In 2018, the ICC lodged an inquiry into allegations of crimes against humanity, including torture and rape by US forces in Afghanistan and at CIA interrogation facilities.[20] Recently, it has indicted the Russian leader Vladimir Putin on charges of unlawful deportation of population (children) and that of unlawful transfer of population (children) from occupied areas of Ukraine to the Russian Federation.[21]This Court is intended to complement, but not replace, national courts. It only prosecutes cases where national justice systems do not carry out proceedings or when they claim to do so but in reality, are unwilling or unable to carry out such proceedings genuinely. This is the principle of complementarity exercised by the ICC.

The Prosecutor can initiate investigations and prosecution in three ways.

[17] See The Prosecutor v. Thomas Lubanga, and the Prosecutor v. Germain Katanga and Mathiew Ngudjolo, infra.

[18] ICC, 'Warrant of Arrest for Ali Kushayb', ICC-02/05-01/07-Corr, 27 April, 2007.

[19] ICC, 'Warrant of Arrest for Abdullah Al Senussi', ICC-01/11-01/11-4.

[20] Lara J. & Michael C., '*The New York Times'*, June 11, 2020.

[21] ICC, 'Situation in Ukraine: ICC Judges Issue Arrest Warrants against Vladimir Vladimirovich Putin and Maria AAlekseyevna Lvova-Belova', Press Release: 17 March 2023.

1. State parties to the Statute of the ICC can refer situations to the Prosecutor,
2. The United Nations Security Council can request the Prosecutor to launch an investigation,
3. The Office of the Prosecutor may initiate investigations *proprio motu* (by its own motion) on the basis of information received from reliable sources.
   In this case, the Prosecutor must seek prior authorization from the Pre-Trial Chamber composed of three independent judges.

From the foregoing, ideally those in power can no longer exempt a war criminal from prosecution. Superiors or military commanders may be held responsible for criminal offences committed by persons under their effective command and control or effective authority and control. Still, victims can send information to the Prosecutor concerning crimes within the jurisdiction of the Court. For the very first time in history, victims have a right to participate in the proceedings and seek reparations.

Be that as it may, war crimes have persisted world over, Africa in particular. In Africa, they manifest themselves in a very unique way deriving from the nature of the African conflicts. The uniqueness is also portrayed in the attempts at prosecution, which is also, in turn, grossly affected by the geopolitical dynamics. In Libya, for instance, there are over ten warring factions each with a considerable control over their realm. In such cases it is nearly impossible to investigate, gather evidence and enforce warrants. In Sudan, the United Nations Security Council Resolution authorizing the ICC to exercise jurisdiction is only limited to Darfur yet there are fresh crimes in the current conflict. Efforts to extend jurisdiction have been hindered by the alliances in the UNSC. In Ethiopia, yet another conflict zone, the powerful militaries of the government and Tigray have meant that in order to achieve a sustainable truce, the government would not prosecute war criminals in the opposite ranks. Such is the nature and problem of war crimes in Africa.

Thus, this study set out to examine the effectiveness of the ICC in prosecuting war crimes in Africa, not by assessing the cases already before the Court, but rather, by examining those apparent war crimes in the most recent conflicts in Africa which have not been brought before the Court. Several war crimes such as rape, use of child soldiers, mass killings, ethnic cleansing, starvation and targeting nonmilitary facilities have been reported in the selected case studies of Ethiopia, CAR, Sudan and Libya.

In all these, no investigations have been initiated and no cases have been referred through the different trigger mechanisms. As such, this raises a question regarding the effectiveness of the court in relation to its stated mandate relating to war crimes.

1.2 Problem Statement

The study set out to examine why, despite a permanent international criminal court being in place, several war crimes in Africa have not been prosecuted by the court and remain persistent. The ICC was established to deter, among other crimes, war crimes by bringing such perpetrators to account where their states are either unwilling or unable to prosecute them. While notable progress has been realized by the court in its 20-years of operation, it still faces several handicaps that undermine its effectiveness in Africa. The failure to effect an ICC arrest warrant in South Africa against Omar Al-Bashir, the former Sudanese President highlights one example of these challenges. Other challenges lie with the complexity and political nature of war crimes in Africa. For example, in Ethiopia, the Cessation of Hostilities Agreement (CHA) protects those in the ranks of the warring parties from prosecution and allegations of abuses on the government side have been met with rejection, the state citing political biases by its accusers. In Libya, there are over 20 warring factions each with a given realm where it asserts authority and the state appears unable to reign in the abuses committed on the different belligerents. Yet in Sudan, the current war between the Rapid Support Forces (RSF**)** and the Sudanese military has raged on with unsuccessful attempts to enquire into the atrocities committed therein. Despite such a state, even the ICC prosecution mechanisms have yielded very little successes in these conflict zones. Furthermore**,** while the ICC has prosecuted some war crimes in Africa, a close analysis of the categories of the perpetrators it has prosecuted invites legal and justice concerns about those the court has left unpunished and why.

1.3 Objectives

1.3.1 Overall Objective

The overall objective of this study is to critically examine the effectiveness of the International Criminal Court in prosecuting war crimes in Africa.

1.3.2 Specific Objectives

i. To critically analyze the development of war crime justice and the inception of the International Criminal Court.
ii. To critically examine the jurisdictional principles and mandate of the International Criminal Court.

iii. To examine the nature and incidence of war crimes in African conflicts.
iv. To examine the challenges facing the ICC in the prosecution of war crimes in Africa.
v. To suggest possible remedies to the challenges and propose a way forward.

1.4 Research Questions

i. How has war criminal prosecution evolved over time to inform the inception of the ICC?
ii. What is the mandate of the ICC and how has it been implemented in Africa in relation to war crimes?
iii. What is the nature of war crimes in Africa?
iv. What challenges hinder the prosecution of war crimes in Africa by the ICC and what is / are the possible solutions if any?

1.5 Scope of the Study

1.5.1 Geographical Scope

This study primarily focused on the International Criminal Court's role in combatting war crimes, with a specific reference to the African continent. The choice of the geographical scope was informed by the persistent wars on the African continent, with bewildering evolutions of the nature and scale of crimes in them from either party involved but at times ignored by the international community. A selection of African case studies such as the Tigray region of Ethiopia, the Central African Republic, war crimes in Darfur and Libya, will be adopted as the centres of reference. These conflicts have always raised important questions about the effectiveness of the ICC in addressing the resultant war crimes. By analyzing the African conflicts, the study offers insights into the challenges faced by the ICC in prosecuting war criminals and seeking justice for the victims.

1.5.2 Content Scope

The study covers various aspects related to the ICC's role in prosecuting war crimes. The choice for war crimes is the persistence of wars on the African continent and the ever-evolving face of the crimes committed by the warring parties.

As opposed to crimes against humanity, war crimes arise as a ramification of war and on the other hand, the crime of genocide has greatly reduced over time.[22] In the modern times, on the very rare occasions, if it is to happen, it is still as a part of a war effort.[23] Similarly, in Africa, although a few states have committed aggressive acts against others, cases in point being Rwanda and Uganda against DRC, the crime has not been as persistent and devastating to humanity as the war crimes have been.

The case studies selected were justified hereinbelow, but briefly, they followed the different trigger mechanisms of the Court. For instance, the choice of Ethiopia was intended to examine the global politics surrounding the United Nations Security Council references of cases to the ICC.[24] This was in comparison to Libya, another case that followed the same trigger mechanism. For CAR, the choice was based on the argument among TWAIL scholarship that states have adopted state references as a trigger mechanism to extend local conflicts that they have failed to decisively settle.[25] Yet for Sudan, it was a comparison of how the situation in Darfur was handled as compared to the hesitant response to the current conflict that is covering the whole country.[26] The other justifications such as the African choice and war crimes are further ahead in the study but also briefly, African conflicts are never ending, each fresh conflict manifesting new kinds of war crimes. The Tigrayan conflict, for instance, revealed unseen before war crimes like the application of a 'zone of invisibility'[27] by the Ethiopian forces.

1.5.3 Temporal Scope

The study primarily considered the developments and actions of the ICC since its establishment and operationalization in 2002 up to date. The time scope focuses on the ICC's history since its inception, providing a comprehensive understanding of its evolution, growth and challenges faced during its two-decade tenure.

[22] Susanna, Shepard, 'Trends in Genocide', IAFS-4500

[23] Ibid.

[24] Article 13(b), the Rome Statute, supra.

[25] Parvathi, Menon, infra.

[26] See Resolution 93/2005, the UNSC.

[27] Teklehaymanot G., Weldemichel, 'Tigray War: Modern Geographies of Mass Violence and the Invisibilization of Populations', Political Geography, vol.118, April 2025.

By examining the developments from 2002 to the present, the study assessed the ICC's impact on prosecuting war crimes and its response to contemporary conflicts in Africa. The selected African conflicts fell well within this time frame, making them appropriate cases to assess the ICC's effectiveness in recent contexts.

1.6 Justification of the Study

The study is so relevant at such a time when a number of African countries are witnessing wars and experiencing indictable crimes under the ICC. There are several forgotten humanitarian breaches in warfare across the globe.

After Darfur and the Central African Republic, there came the Tigrayan war, pitting the Federal Government forces of Ethiopia assisted by their neighbours, the Eritreans against the regional forces of Tigray, the TPLF. To date, although there are some war criminals against whom justice processes have been commenced, they are said to be opaque and subject to very little scrutiny.

It is said that just a handful of soldiers have been convicted for the abuses committed during the war but their identities and crimes remain secret.[28]

And just like many African states, Ethiopia has denied any accusations of abuses during the war. For instance, the Ethiopian government and military have downplayed the Axum massacre claiming that the victims were combatants and that some of the perpetrators may have been criminals dressed in Eritrean and Ethiopian military uniforms provided by the TPLF.[29]

It was after intensive criticism that the government accepted that the victims were civilians killed by the Eritrean forces.[30] In this conflict, complex forms of war crimes manifested. There was use of aid as a weapon against civilians and starvation into surrender,[31]for instance.

This, plus other conflicts in which war crimes have been committed, are discussed in detail in the study, illustrating the dire state of affairs and as such, the research provides additional literature on the role of the ICC in Africa as part of the broader quest to maintain peace and justice. The study results are potentially instructive to governments, the civil society, human rights advocates and academics.

[28] The New Humanitarian, Ethiopia's New Struggle Over War Crimes Accountability, 29 March 2023.

[29] Ibid.

[30] Ibid.

[31] Ibid.

1.7 Conceptual Frame Work

Figure 1: Conceptual framework of the study

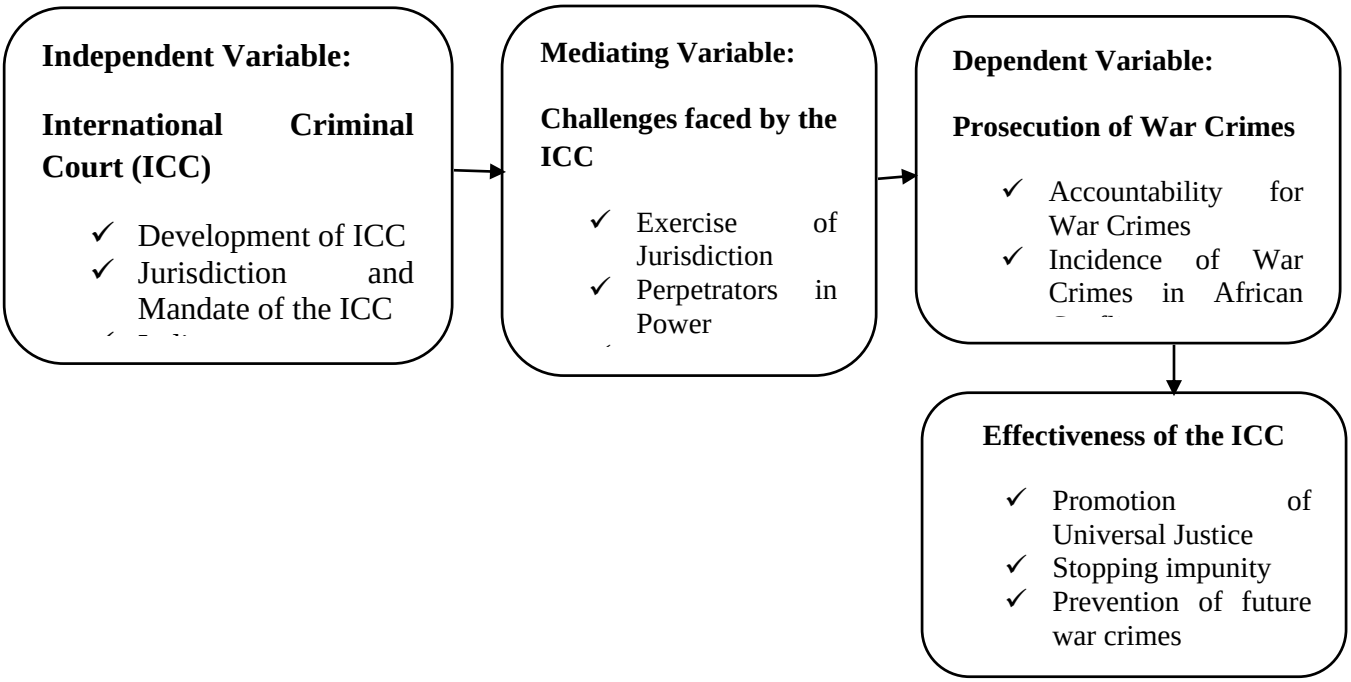

Figure 1 presents a comprehensive conceptual framework that outlined the main concepts and relationships in this study. The framework aimed to provide a structured approach to answer the research questions and gain insights into the effectiveness of the ICC in prosecuting war crimes, particularly in the context of African conflicts.

At the core of the conceptual framework was the independent variable, the International Criminal Court (ICC). This variable was divided into three dimensions, the Development of the ICC, the jurisdiction and mandate dimension, and the indictment procedures. The dependent variable, combating war crimes, was measured by two dimensions; accountability for war crimes and the incidence of war crimes in Africa.

The mediating variable, the challenges faced by the ICC, identifies five dimensions influencing the court's effectiveness. Exercise of jurisdiction highlights challenges related to jurisdictional limitations and obtaining cooperation from state parties. Sovereignty influences the exercise of jurisdiction and the application of the complementarity principle.

The study set out to assess the effectiveness of the International Criminal Court in prosecuting war criminals particularly in Africa. The effectiveness of the Court was measured on the success it has recorded in attaining the two basic objectives in the preamble to the Rome Statute,[32] that is, the determination to stop impunity and contribute to the prevention of future such crimes.[33] The success and effectiveness are highly dependent on several factors and as such, they were conceived as the dependent variables in the study. The factors included states parties' cooperation, the effect of immunities on the warrants against heads of state and other high-ranking officers of conflict affected states, the application of the doctrines of complementarity and sovereignty and finally, the exercise of the Court's jurisdiction. On the other hand, the International Criminal Court was adopted as the independent variable. With the establishment of a permanent Court with the jurisdiction to try grave breaches of the law and custom of war, the expectation was that such culprits would be prosecuted in the attempt to stop impunity and prevent further such crimes.[34]

1.8 **Definition of Operational Concepts**

i**. Assess:** This means an evaluation of the ability of the ICC to perform its prosecution function and determination of the quality, if any, of the performance of the function, following set parameters of the conflict situations in the selected case studies and the prosecution processes initiated therein.

ii**. Effectiveness:** This is how successful the Court has been in putting an end to impunity, a fact that would contribute to the prevention of atrocious crimes against women, children and civilians not taking part in hostilities and that even rights of combatants are protected as per the customs of war, all these as set out in the preamble to the Rome Statute of the International Criminal Court.

iii **Prosecution:** In this study, prosecution means ensuring that the Office of the Prosecutor of the Court initiates the processes that would ultimately lead to some form of accountability, be it national application of complementarity or indictments by the ICC. Therefore, the study's focus is not limited to only those cases that have already come before the Court and or been settled by it. Rather it extends to and in fact to a large extent, focuses on those apparent war crimes violations that have not been investigated by the Court. Prosecution therefore is used to include the investigation mandate of the Court under the Office of the Prosecutor.

[32] The Rome Statute of the International Criminal Court.

[33] Para. 6 of the preambles, ibid.

[34] Ibid.

1.9 Theoretical Framework

The study was underpinned by two theories: the Sovereignty theory and the Third World Approaches to International Law theory (TWAIL). The sovereignty theory is combined with the TWAIL theory with the result that the study is fundamentally rooted more in the latter than the former theory. In any event, sovereignty in this study is also examined from a TWAIL perspective.

1.9.1 Sovereignty Theory

To understand the sovereignty theory, one has to first conceptualise what statehood is. There are two theories in determination of what constitutes a state; the constitutive theory and the declaratory theory. These are the ways by which we know that such a territory and a people is a state. Under the constitutive theory, a territory is a state if another state recognizes it as such. Internationally, such states may include, but not limited to, Kosovo- recognized by over 100 UN states out of the 193, South Ossetia- recognized by Russia, Venezuela, Nicaragua, Syria and Nauru; and, on the African continent, Somaliland, recognized by 35 countries, notably China, France, Israel, the neighbour Ethiopia, et al.

On the other hand, the declaratory theory is to the effect that a state is so if it satisfies the attributes as laid out in the Montevideo Convention.[35]Such a territory must have a permanent population, defined frontier, a recognized government and finally, the capacity to enter into international relationships.[36]Essentially, a state exists by bringing together three elements, a material territory, a population and exclusive political authority- sovereignty.[37]

Sovereignty, under the theory of a state, is the formal social authority that an individual has over others to achieve a common goal either even assumed by the community members or sometimes imposed on them by those that exercise such power.

One of the features of state power is sovereignty, a feature designating the character of state power to be supreme in the territory of that particular state- internal sovereignty and equally, to be independent abroad in relation to other states – external sovereignty.[38]

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[35] Montevideo Convention on the Rights and Duties of States.

[36] Article 1, ibid.

[37] Ibid., see also, Article 2(1) of the Charter of the United Nations.

[38] Ramona, Gabriella Tatar & Adela, Moisi, 'The Concept of Sovereignty', Journal of Public Administration, Finance and Law, accessed on https://doi.org/10.47743/jopafl-2022-24-27.

In summary, sovereignty is the power of the commanding state in the interior materialized in the elaboration of generally binding norms and the behaviour of the state in relation to other states, determining its cross-border relations without any interference from outside.[39]An illustration of what sovereignty is can be found under Article 1 of the Ugandan Constitution. Thus, it provides that all power belongs to the people and that all authority in the state emanates from the people of Uganda and that they shall be governed through their will.[40]

1.9.1.1 The Evolution of the Concept

1.9.1.1.1 Westphalian Sovereignty

The treaty of Westphalia ended the thirty-years' war between the Protestants and the imperial Catholic. It was a fight for European hegemony. During the war, the two belligerents comprised nations on one and the other side. For instance, for the Protestant Union, there were the Swedish Empire, Kingdom of Bohemia, Kingdom of France, Kingdom of England, et al. On the other side, the Roman, Spanish and Bavarian Empires comprised.[41]In essence, these were current-day states.

When the signatory parties endorsed this treaty, they undertook to respect the territorial rights of other parties and not to interfere in internal affairs of the other. This is the purest meaning of sovereignty. Whenever sovereignty is referred to in its strictest and narrowest sense then it is the Westphalian sovereignty.

Westphalian sovereignty encompasses the principles that first define national sovereignty. For the first time, an international act recognized the equality of states. At the time, sovereignty meant the creation of a state in the international arena.

The prince emerged victorious over the Papacy and there was a balance of power among states for peace. Internationally, sovereignty has served as a basis for recognition, on the basis of legal equality, diplomacy and international law.[42]

1.9.1.1.2 The Secular Theory

Earlier on, precisely around 1570's, the concept of sovereignty had been developed to mean the power of the prince to make laws.

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[39] Ibid.

[40] See Article 1(1) and (2) of the 1995 Constitution of the Republic of Uganda.

[41] Ramona, Gabriella Tatar & Adela, Moisi, supra.

[42] Ibid.

In this theory, the king is an independent sovereign from the outside, hence the famous assertion that the prince is accountable only to God, which idea led to the detachment of the state from papal power. In this theory, sovereignty has five attributes. To begin with, it has the prerogative to appoint Magistrates, defining the function of each, to enact laws, declare war or conclude peace, the right of judgment, of last resort and the right to life or death (pardon).[43]In the classical definition, sovereignty is the absolute and perpetual power of a Republic.[44]

1.9.1.1.3 State Sovereignty

Hugo Grotius did not only ground the idea of sovereignty but also delimited the sovereignty of the state from the monarch.[45]He analysed a set of general and international norms and came to a conclusion of the need to differentiate the bearer of state power and the state as a subject of power and sovereignty.

1.9.1.1.4 The Classical Theory

By the 1700's, new ideas had been developed, notably the French philosopher Jean Jacques Rousseau's classical theory. In his famous work, The Social Contract, he describes the people as the holders of sovereignty and the leaders of such states as the submissive officials who can be removed at any time.[46]To him, by concluding a social contract, a moral and collective body is created. Then a public person, called a state when passive and sovereign when active, is finally evolved. That sovereignty is created and ultimately legitimized by the citizens.

As such, individuals waive some of their rights and give other people rights, notably the right to make decisions for them. Thus, the autonomy of will, as well as contractual freedom, allow the assignment of debt. In reality, sovereignty is legitimized by cession.[47]

1.9.1.1.5 National Sovereignty

Charles Montesquieu, while sharing the concept that sovereignty belongs to the people, the philosopher included in the scientific and political circuit the category of nation, attaching it to the notion of sovereignty, thus generating a new conception, national sovereignty.[48]

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[43] Jean, Bodin, 'The Six Books of the Republic', 1993.

[44] Ibid.

[45] Ramona, Gabriella Tatar & Adela, Moisi, supra.

[46] Ibid.

[47] Ibid.

[48] Charles, Montesquieu, 'Lessons in Legal Philosophy', 1964.

Supported by the Italian philosopher Giogio del Vecchio, professor of Law, Montesquieu asserts that a state is not as such or not perfectly so, if it lacks sovereignty. That the so-called semi-sovereign states and those under protectorate or vassal represent imperfect state figures.

1.9.1.1.6 Sovereignty of the People

The English philosopher, John Locke, (1632-1704), argued his concept of Two Treatises of Government. That the people entrust the realization of state power to the legislative assembly, which the people themselves elect. Although there is a delegation, the people do not lose their sovereign status since they retain the right to cancel the social contract, remove or overthrow and / modify the composition of its representatives within the power of the state; to revolt. This is what is referred to as popular sovereignty. It is the foundation of the struggle against despotism in the realization of state power.

Under this theory, there is an important translation of monarchical sovereignty into popular sovereignty coupled with the declaration of the human and citizen rights and the Constitution of Revolutionary France. This follows the United States of American independence. Modelling and moderating characters of sovereignty emerge, rejecting the idea of a perfect and inalienable sovereign state. Moderating theories that bring about self-limitation of sovereignty are propounded by pioneers such as George Jelinek. The state then limits its sovereignty by submitting to international treaties and norms for its own existence. In these treaties and conventions, the sate sets its own limitations beyond which it cannot go. A clearest example is the Rome Statute of the International Criminal Court.

1.9.1.2 The Westphalian Choice

In summary, sovereign equality is the basis of the UN Charter.[49]UN Resolution 2625 of 1970 defined the principle of sovereignty by the following ideas: states are legally equal, each state enjoys the rights of full sovereignty, each state has the obligation to respect the personality of the other states, territorial integrity and political independence of each state are inviolable; each state has the right to freely choose and develop its political, social, economic and cultural system; each state has an obligation to respect its international commitments in full and in good faith and to live in peace with the other states. With the intense global transformations, the contemporary state has to adapt to the new interpretations of the notion of sovereignty. The role and functions of the state have greatly evolved.

[49] See Article 2, the Charter of the United Nations Organisation.

This study applies this theory in its Westphalian and contemporary interpretations. This combination of the Westphalian and contemporary theories presents the best scenario faced with the application of international law, in this case international criminal law. The two interpretations are the most applicable in the face this study as they capture the dictates of the UN Charter, that is, the respect for the territorial rights of all states and non-interference in the affairs of a sovereign state.

1.8.2 The Third World Approaches to International Law (TWAIL)

This theory presupposes that there has always been a Eurocentric approach to international law and as such, TWAIL started as a broad opposition to international law in its current form,[50] branding the current structure of the UNSC indefensible as it legitimizes Western hegemony through the cloak of universality.[51]

In the earliest stages, the scholars, also known as the TWAIL 1 scholars, laid particular emphasis on the sovereign equality of states without outside intervention and a new international economic order. They submitted to international law, arguing that the pre-colonial state was no a stranger to it albeit castigating the current form in which it is for legitimizing the subjugation and oppression of the third world.[52] It can be discerned from this scholarly work that there was a largely pro-state approach.

On the contrary, the TWAIL 2 scholars, while recognizing the sovereignty of all states, laid their emphasis on the rights of man.[53]They criticise the process of the formation of the third world state which was largely violent in character, The violent character even carried on by the new independent leaders, paying less or no attention at all to human rights and justice.[54] In summary, they put a human face to the theory. The scholars had three main objectives, namely:

[50] Ian Martin, 'The New World Order: Opportunity or Threat to Human Rights', Harvard Law School Human Rights Program, 1993.

[51] Ibid.

[52] Ian Martin, 'The New World Order: Opportunity or Threat to Human Rights', Harvard Law School Human Rights Program, 1993.

[53] Makau Matua and Antony Anghie, 'What is TWAIL?', American Society of International Law, Cambridge University Press, April 5-8, 2000, Vol. 94.

[54] Ibid.

i. to understand, unpack and deconstruct the uses of international law,

ii. to construct an alternative for international legal governance and

iii. to eradicate underdevelopment in the third world.[55]

In their works, they struggle to change the subordinate state of the third world generally. In so doing, some have been reformists, particularly those that accept international law dispensation but advocate for reform. Others have been radical by advocating for a total transformation of international law, yet others have been collaborators- the so-called minimalist assimilationists.[56] Viewing TWAIL in 2 segments, that is; 1 and 2, the theory is premised on the following:

That there should be universality as opposed to Europe being the center. That Christianity should not be the basis of civilization and that capitalism and imperialism as adopted by Europe only sustains the European Empire.[57]

That while the UN had been meant to be the overall guardian and colonialism totally overthrown after the second world war, it was just a transfer of global affairs from Europe to the UNSC.[58]A new world order that had been envisaged only created the UNSC as another vehicle for subjugation.[59]As such, European hegemony only changed form and not substance.[60]

The theorists further argue that the third world, economically, fell under the Bretton Woods and it became a recipient of rules rather than a participant.[61]The scholars view the third world as a movement rather than a description of a development stage both politically and economically.[62]Always being oppositional to questions in international law, the purpose is to eliminate a perceived injury to the third world.[63]

[55] Ibid.

[56] Ibid.

[57] Ibid.

[58] Ibid.

[59] Ibid.

[60] Surakiart, Sathirathai, 'An Understanding of the Relationship between International Legal Discourse and Third World Countries, 25 HARV. INT'L L.J. 395 (1984).

[61] Julius K. Nyerere, 'The Third World Strategy: Economic and Political Cohesion in the South, 1983.

[62] Makau Matua and Antony Anghie, supra.

[63] Ibid.

While criticizing its form, the theorists argue that the current international law, although important, it is built on European supremacy and privileges Europe, thus illegitimate.[64] The state of affairs they argue, is only exacerbated by the Eurocentric corpus of international human rights law,[65]which is controlled by the indefensible UNSC.[66]

In conclusion, TWAIL 1 movement presents an alternative voice to Eurocentrism. It frowns on European universality. It is both political and economic. Although not geographically bound, it prides its origins in the third world (the South).[67] It seeks new construct of international law and does not treat as sacred any institution, norm or process that fronts the North as the epitome of civilization. They argue that all factors that favour hierarchies and oppression have to be resisted.[68]

On the other hand, TWAIL 2 theorists add a twist to the argument. They remind the TWAIL 1 theorists of the failures of the post-colonial state especially in the fight for equality of the people, the struggle for democracy, non-violence and hardship. That TWAIL should be a justice seeking movement rather than a power transformation struggle.[69]

1.9.2.1 TWAIL and Individual Responsibility in Internal Conflicts

Anthony Anghie, one of the critics of TWAIL 1, argues that the fundamental failure of the first proponents of the theory is the failure to address the excesses of the post-colonial third world leadership.[70]It is in TWAIL 2 that we see a holistic approach- that which also considered humanitarian ideas. These second theorists advocated for a consistent and objective approach to the dangers manifested by the massive violence in conflicts.[71]Notably, the theorists criticized the regime of individual responsibility that was in place at the time for its failures to address dangers such as those in Rwanda, the scholars having published their works before the establishment of the ICC.[72]They advocated for a system of IHL that reflects the needs and interests of the people rather than states.

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[64] Ibid.

[65] Ibid.

[66] Ibid.

[67] Ibid.

[68] Ibid.

[69] Ibid.

[70] Ibid.

[71] Ibid.

[72] Ibid.

It is little wonder therefore, that the African Union was at the forefront of those that spearheaded the Rome Statute of the International Criminal Court.[73]The theorists had questioned the ICTY and ICTR, vouching for the ICC, arguing that since the ad hoc tribunals had always been established by the UNSC, or at least initiated by it, it was not proper since it is not the UNSC with the overall power over situations in the world. In this way, international law was not inclusive and participatory.[74]

1.9.2.2 TWAIL in the Face of the International Criminal Court

Seen as an inclusive and participatory court, the ICC was immensely welcomed by the TWAIL theorists.[75] However, with the passage of time, the shortfalls in the Statute of the ICC have unfolded, much to the dismay of the proponent TWAIL scholars.

To them, there was inserted in the Statute[76]an anti-TWAIL provision in the statute that empowered the UNSC to refer situations to the court.[77]It is this hegemony that TWAIL had sought to eradicate by fighting the ad hoc tribunals. The other source of dismay among TWAIL scholarship towards the statute was its failure to squarely outlaw nuclear weapons plus the ICC's very limited jurisdiction.[78]In summary, although TWAIL has had several reservations towards the ICC dispensation, the scholars maintain a compromised stance. They do not wholly advocate for the disbandment of the court but rather advocate for a participatory approach to the decisions reached regarding the perpetrators of war crimes in conflicts.[79] They argue that the complementarity principle should be emphasized. This is a compromised stance.

That where such mechanisms lack, its only then that the ICC would take over.[80]That international law should focus on serving global justice.[81]

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[73] Africa, as a continent, has the highest number of states parties to the Rome Statute of the ICC, with Senegal, a member of the AU, having been the very first signatory.

[74] Makau, Matua, and Antony, Anghie, supra.

[75] Ibid.

[76] The Rome Statute, supra.

[77] Article 13(b), ibid.

[78] Article 13, ibid.

[79] Makau, Matua, and Antony, Anghie, supra.

[80] Ibid.

[81] Ibid.

1.9 Literature Review

While reviewing the existing literature, the study categorised it following the different specific objectives. As such, it was sectionised in order to ensure that no area of focus is left out. The three broad categories are: the development of war crime justice, the establishment, jurisdiction and mandate of the ICC; the challenges facing the ICC exercise of jurisdiction and finally, the analysis of TWAIL scholarship on International criminal justice systems.

1.9.1 The Development of War Crime Justice, Jurisdiction and the Mandate of the ICC

Markus Wagner,[82] in his observations on the perceptions and realities facing the ICC and its jurisdiction, notes a general consensus underlying the Rome Statute. That several states had ratified the treaty and that although the treaty is not perfect, it is the case with all the other international treaties and not peculiar to the Rome Statute.

However, he further notes that Part 2 of the treaty regarding jurisdiction, admissibility and the law applicable has several defects, notably the exercise of jurisdiction in case a state in question is not a member. In this case, he notes that it is only by the Security Council reference that such perpetrators can be prosecuted. He advocates for the German proposal of a universal jurisdiction where all peoples of the world would submit to the court. Further, that the ICC had a check on the military operations of the militarily bigger states such as the US. In his observations, a work of 2003, he had anticipated that all the world powers would submit to the court. To date, the US does not submit to the jurisdiction of the ICC in regard to American war criminals.

For the Security Council reference, the geopolitical arena does not permit such references where the 5 permanent members wield a veto. This is the case with Myanmar where China cannot allow the indictment of the military war criminals in power. The same applies to Syria where Russia has always vetoed any such resolutions. Indeed, the world is the same even after the establishment of the ICC as opposed to the author's anticipated fundamental change. Since this work was just a year after the inception of the ICC, much of it was anticipatory and fairly theoretical. After two decades, the current study considered it imperative to examine the major stumbling blocks in the ICC's war crimes prosecution process given the current geopolitical divides.

[82] Markus, Wagner, '*The ICC and its Jurisdiction- Myths, Misperceptions and Realities'*, (2003).

Penn Carey and William W Burke-White,[83] emphasize the complementarity principle. The ICC is intended to complement, rather than replace, national criminal jurisdictions. The court will only intervene when national legal systems are unable or unwilling to genuinely investigate and prosecute the most serious crimes. This principle underscores the primary responsibility of states to bring perpetrators to justice and ensures that the ICC acts as a court of international resort.[84] The ICC's complementarity principle came into play in the case of the Central African Republic (CAR).[85]

In this case, in 2014, the ICC suspended the prosecution against Jean-Pierre Bemba, a former vice president of the DRC, as his national proceedings were deemed genuine and capable of providing justice.[86] However, the authors do not indicate the abuse of the principle and the total lack of neither national nor international trial for particular cases such as the Saif Al Islam case.[87]Under Article 17(1)(a), the term genuine was interpreted to mean the genuineness of the investigation or prosecution not just a mere willingness of a state to carry out an investigation or prosecution.[88]A state in question may challenge the admissibility of a case on grounds that they have had national processes that have carried out investigations and prosecutions, yet in actual sense it had been a mechanism to defeat the ICC intervention.[89]

Bharadwaj,[90] notes that the ICC's exercise of jurisdiction enables it to hold individuals accountable regardless of their nationality or the location of the alleged crimes. This stands in contrast to municipal law, where jurisdiction is typically based on the territorial principle, allowing states to prosecute crimes committed within their borders or by their own nationals abroad only.

[83] Penn Carey and William, W. Burke White, 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of Justice', 2008.

[84] Ibid.

[85] International Criminal Court, 'Situation in the Central African Republic', Case Information Sheet.

[86] Ibid.

[87] See The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al Senussi, No. 01/11-01/11, in which case the Libyan government sought to challenge the Pre-Trial Chamber's decision to hold the case against Saif Al-Islam Gaddafi and Abdullah Al Senussi admissible despite the fact that the duo had been seemingly tried in Libya.

[88] Ibid.

[89] Ibid.

[90] Bharadwaj, supra.

The ICC's universal jurisdiction reflects its commitment to global justice and its capacity to ensure that perpetrators of grave international crimes are brought to trial, irrespective of where the offenses occurred. For instance, in the case of Joseph Kony, leader of the Lord's Resistance Army (LRA), the ICC exercised universal jurisdiction. The LRA's atrocities extended across different countries in East and Central Africa.

The author does not provide the challenges to enforcement where the universality principle is founded on the Security Council reference instead of State reference or the Prosecutor's *proprio motu* powers for non-ICC member states. In the current study, the challenges to enforcement where the exercise of jurisdiction is based on the Security Council reference are illustrated, demonstrating the immensely deep geopolitical divide engulfing the process.

Markus, Benzing,[91] while analysing the ICC Statutory provisions on complementarity, examines the relevancy of the principle in what he refers to as the complementarity paradox[92] and its application in Africa. He highlights the significance of the provision on complementarity in the acceptance of the ICC Statute. That although it is a barrier to the court's jurisdiction,[93] it was a major basis for the states parties' acceptance of the Statute of the ICC. This is in contrast with ad hoc tribunals that provided for the established courts as wielding primary jurisdiction over the offences.[94]

In his analysis still, he argues that although Article 53(1)(b) of the Statute of the ICC requires the Prosecutor to have regard to the admissibility of a case when referred by the UNSC, the decisions of the UNSSC under the UN Charter are binding on international organisations under chapter vii of the UN Charter. As such, the court is highly unlikely, practically speaking, to disagree with the UNSC's determination of admissibility- taking the latter's persuasive weight.

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[91] Markus Benzing, 'The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity', A. von Bogdandy and R. Wolfrum, eds., Max Planck Yearbook of United Nations Law, Vol. 7, 2003, 591-632.

[92] It is paradoxical that the same court that has declared a given state unwilling or unable to investigate and prosecute these offences requires the same state to cooperate in investigations and enforcement.

[93] The provision stipulates that the Court can only intervene in cases, inter alia, where the state in question is unwilling or unable to prosecute offenders.

[94] Articles 9(1) and 8(2) of the ICTY and the ICYR, respectively, provided for the respective ad hoc tribunals as the primary courts.

The author emphasizes that complementarity was designed to strike a balance between the sovereign right of all states to have criminal jurisdiction over acts within their jurisdiction and the interest of the international community in the effective prosecution of international crimes, the avoidance of impunity and deterrence of future crimes within the jurisdiction of the Court. That this is a diplomatic compromise and a recognition of the fact that the resources of the ICC would be limited. That the Statute operates as a catalyst encouraging states to investigate and prosecute crimes under the jurisdiction of the Court. The standing questions to the principle would then be: what happens in cases of amnesties and pardons especially those operating under popular justice? The principle, on the other hand, can be viewed as an excessive concession to state sovereignty, potentially endangering the endeavor of establishing a permanent Court.

In this research, the delicate balance between sovereignty and the international need to stop impunity is examined through the Libyan case of Saif Al Islam Gadhafi and Abdallah Senussi[95]and the South African case challenging the government's decision not to affect the ICC warrant against President Omar Al Bashir in Chapter two.

1.9.2 Challenges to the ICC Functionality

Alexander Heinze and Viviane E. Dittrich,[96] categorise the challenges facing the Court into 2; internal and external. The Court's authority is contingent upon the cooperation of state parties and the jurisdictional conditions outlined in the Rome Statute.[97]

This limitation hampers the ICC's ability to address crimes committed in regions where state cooperation is lacking, given the classical theory of sovereignty or where powerful states may obstruct investigations, in pursuit of hegemony.[98]A case in point is the U.S. tirade when the Prosecutor attempted to investigate the U.S. military for possible war crimes in Afghanistan.[99] This lack of universal acceptance is another major challenge.

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[95] The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al Senussi, supra.

[96] Alexander Heinze and Viviane E. Dittrich, eds., '*The Past, Present and Future of the International Criminal Court*', (Brussels: TOAEP, 2021).

[97] Ibid.

[98] Mattew C. Weed and Dianne E. Rennack, 'International Criminal Court: U.S. Sanctions in Response to Investigation of War Crimes in Afghanistan', Congressional Research Service, June 19, 2020.

[99] President Trump, through Executive Order No. 13928, authorized sanctions against any foreign person found to be acting in support of the ICC Prosecutor's investigation of the U.S. personnel for alleged war crimes related to the

While the court boasts a considerable number of state parties, it still faces non-cooperation and resistance from states that have not ratified the Rome Statute and even the members, in which case the members who are under duty to cooperate have instead challenged the Court's jurisdiction.

Countries presumed as powerful like the United States, China, and Russia are posing the greatest threat to the Court's jurisdiction by inhibiting its indictment processes. In light of the current challenges to the Court, State cooperation has never been more necessary. Besides the US and Russia, even smaller African States including Uganda threatening the very existence of the revered Court.

Paolina Massidda, et. al.,[100] further discuss the challenges to the Court, with witness interference and security concerns at the forefront. Securing witnesses and protecting them from harm is a persistent issue, particularly in conflict-affected regions. Witnesses, especially those testifying against powerful individuals or entities, at times face intimidation, threats, or even violence, obstructing the court's ability to gather credible evidence and conduct fair trials. Cases in conflict-affected regions, such as the situation in the Democratic Republic of Congo, have faced challenges in securing witnesses and protecting them from reprisals, affecting the quality of evidence presented before the court. Moreover, the ICC operates in a complex geopolitical landscape where the pursuit of justice can intersect with political interests.

The Security Council's power to refer cases to the ICC and grant deferrals can lead to politicized decision-making.[101]In some situations, the Council's reluctance to refer cases involving powerful states has raised concerns about selectivity and the court's impartiality. In the African context, for instance, the UNSC failed to set up a probe team to investigate the human rights abuses in Tigray when China, a holder of veto power on the UNSC, voted 'no' to the motion, emphasizing its opposition to what it termed as 'any politicization of human rights issues'.[102]

Afghanistan conflict. The US reacted angrily, sanctioning the ICC Prosecutor for initiating an investigation into possible war crimes committed by the US military while on operations in Afghanistan.

[100] Paolina Massidda, et. al., 'Representing Victims before the International Criminal Court A Manual for Legal Representatives' <www.icc-cpi.int>.

[101] The UNSC itself is practically divided into two blocks, the US, UK and France on one side and then Russia and China on yet another. In the folds of these camps are different states that are usually protected by their UNSC allies.

[102] Jevans Nyabiage, *The South China Morning Post,* 'China votes 'no' on Tigray abuses probe by UN team, calls it interference in Ethiopia's affairs', 19 Dec 2021.

Yet on the other hand, the situation in Libya was swiftly referred by the same council since the suspects seemed to have no political alliances with the council members. The current researcher observes that striking a balance between justice and political considerations poses a continuous challenge for the ICC.

Dimitris Liakopoulos and Dimitris Liakopoulos[103] question the enforcement arm of the ICC, which is reliant on state cooperation for the arrest and transfer of suspects. Some states, particularly those that have not ratified the Rome Statute, may be unwilling to cooperate in apprehending individuals sought by the court. That this lack of enforcement mechanisms hinders the timely execution of arrest warrants and can result in impunity for those evading justice.

Cases such as former Sudanese President Omar al-Bashir, who evaded arrest despite being indicted by the ICC for war crimes, crimes against humanity and genocide in Darfur, are cited, highlighting the limitations in enforcement mechanisms, grossly hinged on the Westphalian sovereignty. The current study thus provided possible alternatives for addressing these challenges deemed crucial for enhancing the ICC's effectiveness and credibility in delivering justice.

Bina D'Costa,[104] sheds light on the Tigray conflict, which erupted in November 2020 in the Tigray region of Ethiopia, drawing global attention for the grave allegations of war crimes, human rights abuses and violations of international humanitarian law. This brings forth perspectives from the most recent conflicts with war crimes that are vital for the scholarly legal debates about the effectiveness of the ICC in prosecuting war crimes. The author cites reports from Human Rights Watch, together with Amnesty International that documented numerous instances of war crimes and human rights violations committed during the conflict. These documented abuses include ethnic cleansing, mass detentions, sexual slavery, extrajudicial executions and other grave breaches of international humanitarian law. That the conflict involved the Ethiopian federal government and forces from the neighboring region of Amhara against the Tigray People's Liberation Front (TPLF). The hostilities led to a dire humanitarian crisis, with widespread displacement, food insecurity and reports of atrocities perpetrated against civilians.

[103] Dimitris Liakopoulos and Dimitris Liakopoulos, 'International Cooperation, Legal Assistance and the Case of Lacking States Collaboration within the International Criminal Court' (2019) 10 Revista CES Derecho 374.

[104] Bina D'Costa, 'Tigray's Complex Emergency, Expulsions and the Aspirations of the Responsibility to Protect' (2022) 14 Global Responsibility to Protect 5.

Women and children have been particularly reported to have been vulnerable to sexual violence and exploitation, resulting in a significant human toll on innocent lives.

Rowland J V Cole,[105]in his timely article that is published just after the ICC's indictment of Al Bashir and AU's rebuttal thereto, highlights the rather political as opposed to legal considerations that have raised cynicisms among the African heads of state. He notes that these leaders seem to be bent on protecting their own. That although the indictments have predominantly been after Africans, the cases have been undergoing substantial judicial scrutiny before reaching the trial chambers of the court. That AU's response to the court and the interaction of international criminal justice and geopolitics results in tensions.

They are these tensions that have gravely undermined the international efforts to have a functional and permanent international criminal justice system and that the dream of bringing individual offenders to justice, after all, is not easy. Citing the claim of sovereignty and immunity, states will guard their own, especially when it comes to powerful figures like sitting heads of state such as Al Bashir and influential personalities like Saif Al Islam Gaddafi. It is why international criminal law enforcement is unpalatable to states.

The consequence, he notes, is that the once common vision of using international law to bring an end to impunity is no bifurcated by political interests yet the plight of the victims accentuates the need for deterrence. That accountability remains an integral part of the protection of human rights. This current research further analyses the complexities in international law enforcement in the deepening global political divide, where even global players are seemingly rallying behind some African states to defeat the ICC jurisdiction.

Ramona, Gabriela Tatar and Adela, Moisi,[106]while capturing the essential aspects of the concept of sovereignty, considered the different interpretations thereof. They notably identified different theoretical interpretations such as the secular theory, the classical one, national sovereignty, the sovereignty of the people and the contemporary interpretation. However, they particularly emphasized the Westphalian interpretation.

[105] Roland JV Cole, 'Africa's Relationship with the International Criminal Court: More Political than Legal', Melbourne Journal of International Law, Vol. 14.

[106] Ramona Gabriela Tatar and Adela Moisi, 'The Concept of Sovereignty', Journal of Public Administration and Finance, available at https://doi.org/10.477433/jopafl-2022-24-27.

That this theoretical approach admits the exclusion of external actors from the configurations of internal authority. That this is the strictest and most rigid sense of the theory of sovereignty.

In the analysis, however, the authors note that the theory, albeit meaning a great gain in its emergence, Westphalian sovereignty can no longer accurately describe reality in the contemporary world. They cite illustrations of how states even voluntarily and democratically delegate some power to a common structure for security and prosperity. A case in point were the regional blocs such as the EU, AU, EAC, et al. That sovereignty, currently, receives ne connotations and conceptual additions in order to respond to ne socio-political requirements. This research analyses ho Westphalian concepts of sovereignty have been interpreted to defeat the ICC jurisdiction, yet state cooperation is the bedrock of the court's exercise of international criminal law enforcement. Indeed, the research adopts the Westphalian interpretation to examine the challenges to the ICC prosecutorial role in the fight against impunity for war crimes.

1.9.3 TWAIL Scholarship and the International Criminal Justice Systems

Makau, Mutua,[107]one of the prominent TWAIL analysts, broadly defines TWAIL scholarship as a movement opposed to international law with three objectives, namely: understand, unpack and deconstruct international law, secondly; to construct an alternative for international legal governance and lastly, to eradicate underdevelopment in the third world. He divides the movement into three main categories. They are: the affirmative reconstructionist, seeking to reform international law, the radicals, those seeking to completely overhaul the international law and the collaborators or the minimalist assimilationists. Whichever the category, TWAIL scholarship has been stratified as TWAIL 1 and TWAIL 2.

Makau observes that to TWAIL 1, a stratum of scholarship that was produced by the first generation of post-colonial lawyers, criticized international law for having made Europe the centre, Christianity the basis of civilization, capitalism innate and imperialism necessary to sustain the European empire. While advocating for a united nations body, these scholars argued that such a body should be the guardian of all equal nations and colonialism completely overthrown. However, they were later disappointed that after the establishment of the UN, power was just transferred from Europe to the UNSC, which, to them, is another vehicle for subjugation.

[107] Makau Mutua and Antony Anghie, 'What is TWAIL', American Society of International Law, Cambridge University Press, Vol. 94, April 5-8, 2000.

That European hegemony just changed face not substance and economically, the third world fell under the Bretton Woods. The third world remained a recipient of rules not a participant.

While observing that TWAIL is largely counterhegemonic, he argues that its purpose is to eliminate injury to the third world. Although they believe that international law is important, they argue that as it currently is, it privileges Europe and thus illegitimate. That the UNSC is indefensible and that TWAIL presents an alternative voice to Eurocentrism. Through these lenses, the current research analyses the broad opposition to the ICC prosecution of war criminals and the failure of state cooperation.

On the other hand, Antony Anghie,[108]another TWAIL analyst largely focusing on TWAIL and its approach to human rights and individual responsibility in international conflicts, observes that while TWAIL seeks to unpack the use of international law as a medium of perpetuating hierarchy and racialization finding it no longer applicable to civilized nations, observes that even TWAIL is not aware of its failures – the failures of the post-colonial state such as the exclusion of minorities, violence and hardship. That TWAIL 2, meanwhile, is concerned with the negligence of the existing institutions and advocate for an objective and consistent approach. It is this approach and that of Mutua[109] that this research will combine to adopt a hybrid of TWAIL approach as a theory in the analysis of the effectiveness of the prosecutorial role of the ICC on war crimes.

In conclusion, as the literature review delved into the evolution of war crimes, the ICC mandate, and its challenges, a comprehensive understanding of war crimes and the ICC prosecutions in its pursuit of international justice emerged. There is an effort to analyse literature on the ICC and Africa, sovereignty and TWAIL, these being the theories underlying the research.

Also in question was the complexity of asserting the ICC mandate in the face of sovereignty, immunity, lack of cooperation from states parties, failure of the complementarity principle and lack of jurisdiction. This study further sheds grim light on how really complex the situation is in the face of the two broad theories of sovereignty and TWAIL. It is a grounding analysis in war crimes literature. A criticism on the ICC African war crimes prosecutions and the intervening factors hindering the processes.

[108] Ibid.

[109] Ibid.

1.10 Methodology

1.10.1 Research Design

This study adopts a qualitative research design, specifically a doctrinal research approach. The doctrinal research design involved a comprehensive and in-depth analysis of existing legal literature, statutes, case law, and other legal documents related to the International Criminal Court (ICC) and its role in prosecuting war crimes. This design was deemed appropriate for the research objectives, which aimed to critically analyze legal principles, doctrines, and the ICC's engagement in addressing war crimes in Africa. The qualitative approach allowed for a nuanced understanding of complex legal issues and the interpretation of legal texts, and facilitated a deeper exploration of the research topic. The study also deploys case study analysis of situations in selected African countries where there have been challenges with ICC prosecution of war crimes.

1.10.2 Data Collection Methods

Data collection for this research primarily relies on desk reviews and document analysis. As a doctrinal research study, the researcher extensively examined the existing legal literature, statutes, treaties, case law, and official reports related to the International Criminal Court (ICC) and its engagement in prosecuting war crimes globally and specifically in Africa. This desk review involved accessing reputable academic journals, books, legal databases, institutional repositories, and official websites to gather comprehensive and up-to-date information. The researcher used systematic and thorough searches to ensure the inclusion of relevant legal sources to effectively address the research objectives.

1.10.3 Data Analysis

Thematic analysis was the main approach used for data analysis in this research. Thematic analysis involved identifying, organizing, and interpreting patterns and themes within the collected legal documents.[110]

[110] Wambugu, Kyalo, Mbii & Nyonje, 'Research Methods: Theory and Practice', 2015, Aura Publishers, Nairobi, Kenya.

The researcher systematically analyzed the legal literature and case law related to themes such as state sovereignty, states parties' cooperation with the ICC, the principle of complementarity under the ICC dispensation, jurisdiction of the ICC and immunity under international customary law in the face of ICC arrest warrants as pertinent issues underlying the ICC prosecution of war crimes in Africa. This analysis allowed the researcher to draw connections between legal principles, identify recurring patterns, and gain a comprehensive understanding of the ICC's engagement in prosecuting war crimes.

1.10.4 Ethics

As a doctrinal research study, the researcher adhered to the ethical considerations primarily pertaining to academic integrity, proper citation of sources, and adherence to copyright laws.[111]The researcher ensured that all legal sources and authors are appropriately credited and cited in the research. Similarly, plagiarism was strictly avoided, and the study adhered to the ethical guidelines for academic research including acknowledging content got from various sources. To ensure originality, the study was subjected to the recommended tests for plagiarism which were passed as required. Since this research did not involve human participants, there are no issues related to informed consent or data privacy. The research thus upheld the principles of academic honesty and rigor in the analysis and presentation of the findings, ensuring the trustworthiness and credibility of sources.[112]The researcher's goal was to critically analyze legal principles and documents without imposing own subjective perspectives on the findings and analyzed them with objective academic and legal lenses. To avoid research biases, the study examined the different literature on from multiple perspectives, thus coming to an informed and neutral conclusion.

1.10.5 Limitations

Despite the comprehensive nature of doctrinal research, the researcher acknowledges certain limitations that were faced during this research. Among the limitations was some limited access to legal sources that had rich/detailed African and ICC war crime content to comprehensively inform the discussions. Specifically, some relevant documents were not accessible due to restrictions related to sensitivity and the confidentiality protocols.

[111] Lorella et al., 'Ethics in Research: Principles and Practical Considerations', 2023, Springer.

[112] Kumar R., 'Research Methodology, A Step-by-Step Guide for Beginners', 3rd ed., 2011, Sage Publications Ltd., London.

However, the researcher made several efforts to gather a wide range of publicly available legal literature on the topic plus some case law. Additionally, there was a possibility of interpretation bias, where the researcher's subjective perspective could influence the analysis of legal texts. Nonetheless, this was addressed by adopting a systematic approach to data analysis to ensure reliability of the researcher's interpretations and credibility of findings.

Furthermore, as doctrinal research involves analyzing existing legal texts, statutes and case law, the researcher could not have captured real-time developments or perspectives of individuals and partner states directly involved in ICC processes, nevertheless, the researcher strived to address these limitations by conducting rigorous data analysis and drawing well-grounded conclusions from the available legal literature. The method adopted, albeit appropriate for a normative study, left out the experiences from discussions and interviews, thereby missing the empiricism that would give the research a practical touch.

1.10.6 Summary of Chapters

Chapter 1: Introduction

This chapter introduces and examines the background of the study in light of the two broad theories of TWAIL and sovereignty, particularly in regard to the problem statement, the study objectives, research questions, justification and the limitations of the study. It also examines the related literature and the methodology to apply in the analyses.

Chapter 2: The development of war crimes prosecutions and the inception of ICC

This chapter examines the history of war crimes prosecution and such tribunals that foreran the ICC dispensation, highlighting early challenges with sovereignty in war crimes prosecutions. There is a specific focus on the evolution of the ICC, looking at its establishment and functionality. In particular, its war crimes jurisdiction is analysed and theoretically assessed, foregrounding some of the challenges posed by Sovereignty and undergirded by TWAIL critiques. The Court's relevance is then analysed by examining some particular cases handled and the referrals made, closely examining the effect of the three trigger mechanisms. The chapter closes with a note on the African perception of the International Criminal Court, foreshadowing the challenges to be explored in the fourth chapter.

Chapter 3: Incidence and Nature of War Crimes in Africa

This chapter contains a presentation of the findings on the effectiveness of ICC in prosecuting war crimes in Africa, analysing the nature of war crimes, why there are selected conflicts, who are the belligerents, how these hostilities are conducted, how have the selected conflicts ended, whether there has been prosecutorial response to the alleged war crimes in the selected conflicts and if so, who is facing justice and why? There is also an analysis of the unique contexts of war and their ensuing crimes in Africa, and the broader political complexity surrounding the domestic, regional and global conflicts in which the war crimes are embroiled. The chapter concentrates on four case studies, that is; Ethiopian Tigray, Sudan, the Central African Republic and Libya, which choices are justified in the analyses.

Chapter 4: Discussion of Results

In this chapter, the results obtained from the desk review and thematic analysis of legal documents are thoroughly discussed in line with the study objectives. Also, in the chapter insights into the trigger mechanisms and the role of the pre-trial chamber of the ICC to further shed light on the prosecution processes either commenced or not and account for the same in the TWAIL perspective. The discussion focuses on providing a TWAIL understanding of the challenges within the African context, of prosecuting war crimes by the International Criminal Court (ICC). The findings are divided into five themes namely: sovereignty, immunity, jurisdiction, cooperation and complementarity.

Chapter 5: Conclusion and Recommendations

This final chapter provides a summary of the findings, restates the main results and the significance albeit without bringing in new data. It answers the central research question while acknowledging the study constraints and the contribution to the existing body of knowledge. There are suggestions on the feasible applications in order to amend the state of affairs. Finally, in this chapter, the researcher identifies areas for further investigation.

Chapter Two

The Evolution of War Criminal Prosecution and the International Criminal Court

2.0 Introduction

This chapter presents first and foremost, the history of war crimes and the attempts to prosecute the culprits, with the historical part divided into different epochs, from pre-history where we see war crimes predating the stone age such as prehistoric feuds and human sacrifices. This period covers the colonial era of warfare with the Anglo-Boer and the Herero wars as the instances manifesting crimes. During these times, there are faltering attempts towards humanity in warfare with the Lieber Code enactment to guide the parties during the American Civil war and the adoption of the Oppenheim definition of what amounted to a war crime as *jus cogens* in 1906, at time of great significance since many Third World states are under colonisation and not considered sovereign and as such, they are not parties to the comity of nations and have no role in discussions and adoptions of international law, for this case international humanitarian law for they are seen as parts of the European Dominion.[1]

The next stage is the mechanised warfare as a result of the industrial revolution. This is during the 19th and the 20th centuries, with the Franco-Prussian war as the main manifestation of human brutalities in wars as will be examined below. The analysis then extends to the two great wars, that is, the First and Second World Wars and the international concerns over the scale of the crimes that ensue during these wars. Although there were steps towards fighting impunity after these two great wars, these were largely engineered by the winners of the thereof- popularly referred to as "victor's justice", a system that does not punish the war criminals in the winner's ranks as will be examined in the chapter below.

[1] Antony Anghie, 'The Evolution of International; Law: Colonial and Postcolonial Realities', Third World Quarterly, Vol. 27, No. 5, pp 739-753, 2006.

Later, there is an examination of the ad hoc tribunals which are temporary and for specific conflicts, a system greatly criticised by the first group of TWAIL scholars but, as will be seen, they formed much of the standard of international criminal prosecution with several definitions adopted therefrom-notably the definition of what amounted to an armed conflict that required the intervention of the international community to avoid trivialisation of the crimes and the Court's jurisdiction.

The chapter then examines the development of the International Criminal Court, analysing some of its contentious provisions with particular reference on what was discussed and recommended in the International Law Commission Report[2] contrasted with the recommendations of the Preparatory Committee on the Establishment of an International Criminal Court[3] and what finally was provided in the final draft Rome Statute of the International Criminal Court. The ICC trigger mechanisms and the role of the pretrial chamber are examined in the process, with particular emphasis on the UNSC referrals, examining the intricate politicking involved, the politicised application of the doctrine of "responsibility to protect" and the hegemonic composition of the UNSC. Some prominent cases are also examined to assess the relevance of the Court and analyse what underlies their successes as opposed to the failures in chapter three. The African perspectives on the Court are in the crowning part of the chapter. These are then subjected to TWAIL scholarship and sovereignty reflections on what such an international criminal court envisioned juxtaposed with the current state of affairs in order to examine whether there is a deviation from what was discussed and adopted in the Statute;[4] a factor that would impede the Court's acceptance and its general war criminal prosecution role.

2.1 Pre-Historic War Crimes

War crimes, as they are understood today, date back before Stone Age.[5] During the primitive feuds, men were slain, women and children enslaved, human sacrifices, and cannibalism took place.[6]

[2] United Nations, International Law Commission Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, General Assembly, Official Records, 50th Session, Supplement No. 22 (A/50/22).

[3] United Nations, Report of the Preparatory Committee on the Establishment of an International Criminal Court, General Assembly, Official Records, 51st Session, Supplement No. 22A (A/51/22).

[4] The Rome Statute, supra.

[5] Micheal, Bryant, 'A World History of War Crimes: From Antiquity to the Present', 2nd ed. Bloomsbury Academic, London, 2015.

[6] Ibid.

Stone Age massacres have been unearthed at different excavation sites such as Talheim, Germany and Djebel Sahaba, Sudan.[7]

Subsequent to the Stone Age, classical and religious literature of Europe and Asia such as the Quran, the Book of Deuteronomy, Mahabharata, the Works of Cicero and Sun Tzu's The Art of War evidence the beastly practices of human warfare.[8] Even Prior to the concept as it is today, ancient laws of war in China, India, Israel, Greece and Rome plus Persia and the Islamic World existed.[9] Neither the Roman *jus gentium* nor the medieval code of chivalry softened the brutality of warfare particularly when the cause was consecrated as just and the enemy a true outsider. Outside Europe, warfare saw wholesale destruction of cultural property by the Mongols, Turkish and Arabian invaders in India.[10]

On the African continent, wars of tribal and ethnic conquests, defence against external aggression, and expansions are the known conflicts. They were largely fueled by the drive to preserve a culture and kings built their kingdoms on the basis of powerful armies.[11] A case in point is Shaka Zulu, the Zulu King, 1787-1828, who forged the most powerful kingdom in southern Africa thriving on the organisation of his military.[12] Just as the early European warfare mixing gun powder with the spike and the bow, the African earliest flash of modern warfare came with the adoption of gunpowder brought to the continent by the earliest traders and explorers.[13] The combination of this with the horse that greatly improved upon the mobility and effectiveness of the military wrecked more havoc in areas like Dahomey and Benin.[14]

The African pre-historic era also evolves around the onset of the colonial regime since it is the most documented among all. Wars prominently featuring are the First and Second Anglo-Boer

[7] Ibid.

[8] Ibid.

[9] Ibid.

[10] Ibid.

[11] Ashley, Jackson, 'War, Violence and Peace in Africa', Journal of Southern African Studies, vol. 34, no. 4, 2008, pp. 969-79.

[12] Ibid.

[13] Thornton, K. John, 'African and Africans in the Making of the Atlantic World, 1400-1800', 1998, Cambridge University Press, pp.115-123.

[14] Ibid.

wars, the Herero wars, among others.[15]All through these wars, war crimes such as forced movement into concentration camps, raping of women, starvation, mass murders, desert drying and starvation, scorched earth policy, prisoner-of-war massacres featured prominently.[16]

These notwithstanding, the term 'War Crimes' was coined in 1906 by Oppenheim in his treatise 'International Law'.**[17]** War crimes are violations of the laws of war that lead to criminal liability for those combatants that have violated them.[18] They are varied through history as these laws keep evolving with time and shifts in paradigms. A discussion on such crimes will come later in this chapter. The concept emerged upon the codification of the hitherto customary international law (*jus cogens*) that applied to warfare between sovereign states.[19]These included the Lieber Code,[20] that defined Command Responsibility for war crimes and crimes against humanity as well as the Military Responsibilities of the frontline soldiers fighting for the Confederate States and the Hague Conventions of 1899 and 1907.[21]

Suffice it to mention that the first trial for a war criminal was that of Peter Von Hagenbach, realised by an ad hoc tribunal of the Holy Roman Empire in 1474 for his command responsibility for the actions of his soldiers, because "he, as a knight, was deemed to have a duty to prevent" criminal behaviour by a military force.[22] Despite having argued that he had obeyed superior orders, Von Hagenbach was convicted, condemned to death, and beheaded.

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[15] Wessels, Andre, 'A Century of Postgraduate Anglo-Boers War (1899-1902),2010, African Sun Media, p. 32.

[16] Schaller, Dominik, J., Moses, A. Dirk, ed., 'From Conquest to Genocide: Colonial Rule in German Southwest Africa and German East Africa', Oxford: Bergham Books, p.296.

[17] Ibid.

[18] Cassese, Antonio, 'Cassese's International Criminal Law', 3rd ed., Oxford University Press, pp. 63-66. See also, ICRC Database, 'Customary IHL, Definition of War Crimes, https://ihl-databases.icrc.org/en/customary-ihl/vi/rule156.

[19] Cassese, Antonio, supra.

[20] The 1863 Law that applied to the Union Army in the American Civil War.

[21] These particularly dealt with International War.

[22] Abdallah Banda Abakaer Nourain, 'International Criminal Court', Accessed December 27, 2016. https://www.icc-cpi.int/darfur/banda. "Barasa Case: The Prosecutor v. Walter Osapiri

Even though the prohibition of certain behaviour in the conduct of armed conflict can be traced back many centuries, the concept of war crimes as it is known today developed particularly at the end of the 19th and the beginning of the 20th centuries, when international humanitarian law, also known as the law of armed conflict, was codified.[23] Two turning points are noted during this period.

First, the concept of nationalism that drove war adrenaline – the desire and agitation for warring, to steaming point unlike the previous wars that had been driven by attachment to dynasties and secondly, the emergence of the industrial revolution that unleashed more barbarism in war with the invention of more destructive weapons which brutalised war and brought about wholesale butchery.[24]

2.2 1870 -1907: Peering into the Future of Warfare in the Age of Industrialisation and the Development of Humanitarian Law

The end and beginning of the 19th and 20th centuries, respectively, are watershed moments in the struggle against unconventional warring, seeing the development of the laws and principles of war. European powers are intent on determining the dominant, with their arsenal replenished by the different inventions in their industry.

The industrial revolution is driving the military beyond unprecedented limits. The heading is particularly chosen for the reason that this is the time when the first modern weapons are deployed, an insight into what would come in the future warfare. Indeed, modern bolt-action rifles were deployed from the 1880's through to the 1960's, fueling casualty numbers. These rifles had first been used in the Franco Prussian war. They included the Chassepot and Dreyse Needle Gun,[25] et al. On the humanitarian side, the warring parties pay little or no attention to the atrocities meted to the civilians and after these wars, there are virtually no attempts at prosecution of the war criminals.

[23] Akande, Dapo, Max Du Plessis, and Charles Jalloh, 'An African Expert Study on the African Union Concerns about Article 16 of the Rome Statute of the ICC', Pretoria, South Africa: Institute for Security Studies, 2010.

[24] Micheal, Bryant, supra.

[25] Will, Elsbury, 'Modern Military Rifles and Shotguns; Their History and Use: A Resource Guide', Reference Librarian, Researcher and Reference Services Division, September 20, 2023.

2.2.1 The Franco-Prussian War

War historians have concluded that the Franco Prussian War of 1870 was the birth of modern warfare.[26] It was more/less an insight into how a future modern war would look like.

The war was fought between the Second French Empire and the North German Confederation led by the Kingdom of Prussia, lasting from the 19th of July, 1870 to the 28th of January, 1871, ending with the Treaty of Frankfurt.[27] Being a war well within the industrial revolution, modern weapons were deployed. Several war crimes coming with a modern warfare were laid open.

The Dornach atrocities,[28]violence against civilians such as rape, murder and destruction of property and sieges of Metz and Paris were some of the many such crimes. These crimes would horribly unfold in the later wars such as the ugly siege of Stalingrad during the WW2. With the fall of Sedan, an ever-deepening spiral of violence would ensue. The German policy of 'living off the land'[29] deprived civilians of livelihoods. Gustav Moynier, one of the founders of the International Committee of the Red Cross, on realising the horrors of a modern war, proposed a permanent international court in response to the devastation of this war.[30] From such obscure traces, the international community begins to figure out a permanent criminal court to try international crimes, particularly, for this study, war crimes.

Such a court, TWAIL scholarship has argued, envisioned an arrangement where all the peoples of the globe, the south and the north, would participate and where all the states would submit, unlike the selective ICC driven by the global south against the global north.[31]

2.2.2 A Concerned International Community Attempts to Prosecute War Criminals

With the ever-changing face of war and the resultant crimes, some effort towards combating war crimes, such as prosecuting the culprits, had to be taken.

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[26] Mark, Stoneman, 'Atrocities in the Franco-Prussian War, 1870-71', December 22, 2008.

[27] Ibid.

[28] The execution of 200 French POW's at Dornach would later come to known as the Dornach Atrocities.

[29] The policy of requisitioning animals, fodder and food for the German armies conducted by their mobile unit.

[30] International Criminal Court Project, 'Evolution of International Criminal Justice', https://www.aba-icc.org/about-the-icc/evolution-of-international-criminal-justice/ accessed on 11/13/2023 at 1:20 PM.

[31] Makau, Mutua, supra.

First efforts are seen as early as 1860's with the adoption of the Lieber Code as a guide to the American civil war combatants, then the first Geneva Convention of 1864, which was later revised by the following Geneva Conventions and the Additional Protocols. The Hague Convention of 1899 is also examined as another international effort towards prohibiting and prosecution of war crimes.

Upon this background, the Versailles Treaty attempts to provide for the prosecution of the German war criminals of the first world war albeit half-heartedly and one sided. This is followed by the tribunals of the second world war that mainly prosecuted the axis war criminals. The ICTY and ICTR are the major tribunals that were particular and ad hoc in nature but initiated by the UN, a giant step towards the establishment of an international system that would be used in the future prosecutions of war criminals. Indeed, they are these tribunals that foreran the ICC.

2.2.2.1 The Hague and the First Geneva Conventions

The Hague Conventions were international treaties negotiated at the First and Second Peace Conferences at The Hague, Netherlands, in 1899 and 1907, respectively, and were, along with the Geneva Conventions, among the first formal statements of the laws of war and war crimes in the nascent body of secular international law.[32] The Hague Conventions focus on the prohibition to warring parties from use of certain means and methods of warfare. Several other related treaties have been adopted since then. In contrast, the Geneva Convention of 1864 and subsequent four Geneva Conventions that revised and replaced the 1864, 1906 and the 1929 Conventions and the two 1977 Additional Protocols focus on the protection of persons not or no longer taking part in hostilities. Both The Hague and Geneva laws identify several of the violations of its norms, though not all, as war crimes.

However, there is no one single document in international law that codifies all war crimes. Lists of war crimes can be found in both international humanitarian law and international criminal law treaties, as well as in international customary law.[33]

[32] Akhavan, Payam, "Are International Criminal Tribunals a Disincentive to Peace? Reconciling Judicial Romanticism with Political Realism", Human Rights Quarterly 31, no. 3 (2009): 624–54. doi:10.1353/hrq.0.0096.

[33] Allen, Tim, 'Trial Justice: The International Criminal Court and the Lord's Resistance Army. African Arguments', New York: Zed; In Association with International African Institute; David Philip; Distributed in the USA exclusively by Palgrave Macmillan, 2006.

2.2.2.2 The Paradox of the Evolution of War Crimes in the Era of Colonialism

Suffice to note that these conventions take place during the time of colonisation where sovereignty as a right is largely a preserve of the European and Western states yet it formed the foundation of international law.[34] Indeed, the African state then is internationally viewed as another part of the bigger European dominion[35] and as such, is not part of the effort to control war crimes by prosecuting the criminals. Even the atrocities committed during wars of independence by the colonisation powers are never talked about in the international corridors.[36]

These third world states and their citizens are, at the time, viewed as non-existent, sub humans and, at the very least, third class humans who do not deserve protection.[37]

2.2.2.3 The Instructions for the Government of Armies of the United States in the Field (The Lieber Code), 24 April 1863.

The Lieber Code was applied as early as the American Civil War[38] when Abraham Lincoln issued, as a military order, General Order 100 on April 24, 1863, just months after the military executions at Mankato, Minnesota. Franz Lieber, a German lawyer, political philosopher, and veteran of the Napoleonic Wars wrote the *Instructions for the Government of the Armies of the United States in the Field* (Lieber Code). Suffice to note that at the time of the Napoleonic Wars, new technology and military thinking were opening up new military options.[39]

This led to questions on what was acceptable and that which was off the limits among military circles. It is at this grappling time when the American Civil War breaks out, a war often considered as the first to be fought on an industrial scale.[40]

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[34] Note 1.

[35] Antony Anghie, 'Imperialism, Sovereignty and the Making of International Law', Cambridge Studies in International and Comparative Law, Cambridge University Press, 2005.

[36] Ibid.

[37] Ibid.

[38] American Society of International Law, 'The Rules of War: From Civil War-Era Lieber Code to the Geneva Conventions' accessed on http//www.asil.org/highschool curriculum.

[39] Ibid.

[40] Ibid.

These powers then considered 'appropriate battlefield behaviour' as those determined and governed by the 'laws and usages of war'-custom.[41]There were no documented laws of war at all.[42] The Code was founded on three main principles, namely: military necessity, the distinction between a combatant and a civilian and humane treatment of prisoners.[43]

President Abraham Lincoln of the U.S. made the Code military law for all wartime conduct of the Union Army. It defined command responsibility for war crimes and crimes against humanity as well as stated the military responsibilities of the Union soldier fighting the Confederate States of America.[44]

Although the Code was only applicable in the US for sovereignty reasons, the Code immensely influenced the provisions in the Geneva Conventions.[45] Cases in point are the provisions on military necessity,[46] protection of civilians-where 'civilians' is first defined in a code,[47] prisoners of war,[48] definition of a 'soldier',[49] prohibition on torture,[50] humane treatment,[51] among others. Still, this code influenced the Hague Conference as Regulations on Land Warfare were adopted directly from it.

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[41] Ibid.

[42] Ibid.

[43] See, generally, sections i and ii of the Instructions for the Government of the Armies of the United States in the Field (Lieber Code), 24 April 1863.

[44] Allison, Simon, "Think Again: Civil Society in Kenya Is Down, but Not out", Institute for Security Studies, January 5, 2016.

[45] The 4 Geneva Conventions, supra, and their Common Article 3.

[46] Article 16 of the 4th Convention was adopted from articles 14,15 and 16 of the Lieber Code.

[47] Articles 4 and 16 of the 4th Convention are adopted from articles 19 and 22 of the Lieber Code.

[48] The 3rd Convention adopts article 4 from articles 56 and 57 of the Lieber Code.

[49] Note 36.

[50] Articles 130 and 147, the 3rd and 4th Geneva Conventions, respectively, and Common Article 3 are adopted from Article 80 of the Lieber Code.

[51] Articles 12,13 and 147 of the 1 st,3rd and 4th Geneva Conventions, respectively, and Common Article 3 are adopted from article 68 of the Lieber Code.

The regulations have since been greatly updated, in particular, the most recent updates being the Protocol to the Geneva Conventions adopted in 1977.[52] In summary, as Dr Lieber put it, the Code was an American contribution to the stock of common civilisation.[53]For TWAIL, the enforcement of these Conventions is another way of bringing imperialism and use of force to Africa.[54] As a dilemma, even during the American Civil War there were some grave breaches that went unprosecuted, arguably because the Union Army was victorious and as such, it is the victor's justice implemented.[55]

They are replications of the 19th Century standard of civilisation that much painted Africa as barbarous and savage as differentiated from the European civilised.[56]They enable the western states to arrogate for themselves the authority to intervene in non-western states.[57] The other criticism, and quite pertinent to this study, is that African leader have exploited these hegemonic laws, like their Western counterparts, at the expense of the weak-usually the political opposition, labelling political resistance as armed conflict.58 It is a case of selectivity and contravention of the principle of complementarity.[59]

[52] Protocols Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of International Armed Conflicts, Protocol 1; and the other Protocols of adopted in 1977 updating the Geneva Conventions.

[53] The American Society of International Law, 'The Rules of War: From the Civil War-Era Lieber Code to the Geneva Conventions'.

[54] Ntina Tzouvala, 'TWAIL and the "Unwilling or Unable" Doctrine, Continuities and Raptures', 109 AJIL UNBOUND, 266(2016).

[55] There were sieges in Atlanta, Georgia on the orders of Union General Ulysses Grant to General William Tecumseh Sherman, destruction of food and other vital supplies to civilians, raids on civilian homes for food and the city of Columbia was left ablaze; The American Society of International Law, 'The Rules of War: From the Civil War-Era Lieber Code to the Geneva Conventions'.

[56] Ntina Tzouvala, supra.

[57] Ibid.

58 Asad G. Kiyani, 'Third World Approaches to International Criminal Law', 109, AJIL UNBOUND, 255 (2016).

[59] Parvathi Menon, 'Self-Referring to the International Criminal Court: A Continuation of War by Other Means, 109, AJIL UNBOUND, 260(2016).

2.2.2.4 The Early Twentieth Century and the Failure of the Treaty of Versailles.

The First World War (WW1) saw the dawn of stricter restraints on war that ultimately led to treaties. World governments started to try and systematically create a code for how war crimes would be defined. It is during the post-World War 1 that the Hague[60] and Geneva Convention[61]Regulations were first implemented[62]and the first application of 'victor power'- a belief that the winner determines who is to be tried for the crimes committed during the time when the war was raging[63]which is gravely opposed by TWAIL scholarship who later advocate for a permanent court system.[64]

A small number of German military personnel of the First World War were tried in 1921 by the German Supreme Court for alleged war crimes.[65]There were other national trials in Bulgaria and the Ottoman. However, this was a half-hearted effort as several Axis war criminals, notably Kaiser William, were never prosecuted despite the fact that a full Article had been inserted in the Treaty of Versailles providing for the first world war crimes prosecutions.[66]

All efforts toward the extradition to Allied tribunals were rejected by the national states and for sovereignty reasons, the objections were upheld by the Allies and the international community at large. This failure of justice on different levels has bolstered the argument that the post first world war settlement, as seen through the lenses of the Law of War, was a disaster. The Germans, Bulgarians and Ottomans, together forming the Axis and as such, the vanquished, were left to stage their own national trials.[67]

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[60] Supra.

[61] The First Geneva Convention, 1864, revised by the 1906 Convention.

[62] Mark Lewis, 'The Birth of the New Justice', The Internationalisation of Crime and Punishment, 1919-1950, Jan 30 2015.

[63] Ibid.

[64] Antony Anghie, supra.

[65] These were also known as the Leipzig Trials.

[66] See Article 227, the Treaty of Versailles.

[67] Mark, Lewis, supra.

Many guilty verdicts were seen as light weight compared with the gravity of the crimes[68]yet many were later overturned by successive governments and several amnesties granted when sitting regimes sought to appease nationals.[69]

The TWAIL argument that national war criminal prosecutions would do better than foreign courts since sovereignty entails jurisdiction over crimes within a state's territory and that it is an accused's right to be tried at home[70]is gravely disproved in the post-World War 1 trials. States tend to favour their Officers as heroes.[71] For the Allies, there were little to no efforts towards holding accountable their own ranks for war crimes committed during the war.[72]In legal development, the trials did little contribution to the enforcement of the laws of war although it was a positive step in the direction of war crime prosecution.[73]However, the bitter experience of the war crimes debacle would leave an enduring mark on the minds of the planners who devised the trials of the Nazi and Japanese war criminals twenty-five years later. A new paradigm of war crimes prosecution that would revolutionise international law as seen herein below in the aftermath of the Second World War (WW2) would emerge.

2.3 The Second World War and the Nuremberg and Tokyo War Crimes Tribunals

In many ways, international justice for the atrocious crimes of genocide, crimes against humanity and war crimes truly begin with post-WW2 trials, most notably the International Military Tribunal at Nuremberg. As momentous and influential as the Nuremberg Tribunal was and continues to be, international criminal justice is also the product of numerous other important events, including events that occurred pre-Nuremberg.[74]These trials, as seen below, were instrumental in informing the discussion around the establishment of a permanent court system after a lot of criticism from TWAIL and other international community members for being selective and temporary.

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[68] A case in point is the 4-year-sentence handed to the crew members of U-86, a submarine that had torpedoed a British hospital ship and subsequently fired on the lifeboats carrying survivors.

[69] Mark, Lewis, supra.

[70] Antony Anghie, supra.

[71] Mark, Lewis, supra.

[72] Ibid.

[73] The Catastrophe of the Modern Era: 1919-Present, Protecting Humanity after World War 1: Successes and Failures.

[74] International Criminal Court Project, 'Evolution of International Criminal Justice', supra.

2.3.1 The Nuremberg Trials of the German Second World War Criminals

The modern concept of war crime was further developed under the auspices of the Nuremberg trials based on the definition of War Crimes in the London Charter.[75]The Charter was annexed to the London Agreement and explained the constitution, jurisdiction and the role of the Nuremberg Trial. Along with war crimes, the charter also defined crimes against peace and crimes against humanity, which are often committed during wars and in concert with war crimes.[76] In the Charter, war crimes were defined to mean violations of the laws or custom of war. Such violations had to include, but not limited to, murder, ill-treatment or deportation to slave labour or for any other purpose, of civilians including in the 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 and devastation not justified by military necessity. It should be noted that war crimes, according to the Charter, were quite similar to the crimes against humanity generally.

Also indictable under the Charter were the crimes against peace. The Germans had committed indiscriminate, brutal misdeeds in their 'Final Solution', Germanisation/Aryanisation, general pacification, extermination of the undesired races of the Jews, the Gypsies, *et al*; and the gas chambers.[77]International criminal tribunals, by their nature, are established to stop impunity. In that way, twenty-two senior Nazi officials were indicted.

They included both political and military leaders. Notably, Luftwaffe Commander Hermann Goering, Minister of War Production Albert Speer, Joachim Von Ribbentropp, Alfred Rosenberg, Rudolf Hess, Ernst Kaltenbrunner, Wilhem Keitel were tried. Adolf Eichmann was tried later in Israel after spending a while on the run. Adolf Hitler, the Fuhrer (Leader of the Nazi Party) was never tried having committed suicide towards the end of the war. Also, Nazi Organisations were declared criminal entities. Chief among these were the Gestapo, the elite SS unit, the Leadership Corps of the Nazi Party and the SD.[78]

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[75] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, August 8, 1945, London.

[76] Azikiwe Abayomi, "Africans Rally behind Sudan President", Workers World, March 12, 2009. http://www.workers.org/2009/world/sudan_0319/.

[77] Department of State, United States of America, Office of the Historian, Milestones: 1945-1952 'The Nuremberg Trial and the Tokyo War Crimes Trials (1945-1948), https;//history.state.gov/milestones/1945-1952/Nuremberg.

[78] Ibid.

The Court at Nuremberg consisted of British, American, French and Russian judges. These are the major Allied participants in the war and are constituting themselves into a tribunal to try criminals from the other party that they have been warring against, a classic illustration of victor's justice.[79] It is this very justice that TWAIL sought to eliminate from the face of international law. It largely infringed sovereignty as it is understood in the Westphalian model, that the state rarely recognises any higher authority as a private individual recognises the authority of the state.[80] The argument that international criminal law and international law at large are handmaidens of imperialism and colonialism built on hierarchies and double standards starts to find root during these trials. The seeds of selectivity mechanisms of the economically and politically stronger state against the weaker, TWAIL argues, as portrayed in the present dispensation of the ICC, were sown during the Nuremberg tribunal.[81]

2.3.2 International Military Tribunal for the Far East-1946 (IMTFE)

Also known as the Tokyo Trial, the Tokyo War Crimes Tribunal or simply as the IMTFE, was convened on May 3, 1946, to try the leaders of the Empire of Japan for three types of crimes: "Class A" (crimes against peace), "Class B" (war crimes), and "Class C" (crimes against humanity), committed during World War II.[82] Unlike the IMT, the IMTFE was not created through international agreements. Nonetheless, it was as structurally similar as it could get.[83]

In 1945, three powers in China, the US and the UK, through the Potsdam Declaration, demanded the unconditional surrender of Japan and that stern justice had to be meted to all the Japanese war criminals.[84]

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[79] Suyith, Xavier,'Locating and Situating Justice Pal: TWWAIL, International Criminal Tribunals, and Judicial Powers', Cambridge University Press, 10 May 2022.

[80] Djuvara,'General Theory of Law', 1999.

[81] Suyith, Xavier, supra.

[82] Barasa, 'International Criminal Court', Accessed December 29, 2016. https://www.icc-cpi.int/kenya/barasa. Barnes, Gwen P. 'The International Criminal Court's Ineffective Enforcement Mechanisms: The Indictment of President Omar Al Bashir', Fordham International Law Journal 34, no. 6 (2011).

[83] Ibid.

[84] Department of State, United States of America, Office of the Historian, Milestones: 1945-1952, supra.

With Moscow declaring war on Japan, a subsequent Moscow Declaration laid a plan for the future occupation of Japan.[85]The overall Commander of the Allied Armies in the Far East, General MacArthur, was given full authority to issue all orders for the implementation of the terms of surrender, occupation, control and any other orders incidental.[86] As such, he approved and issued the Tokyo Tribunal Charter and the Rules through a special proclamation.[87]

The Charter set out the constitution, jurisdiction and the roles thereof of the IMTFE. Unlike the IMT, the IMTFE's exercised a fairly broader temporal jurisdiction, stretching as far back as 1931 to also capture the war criminals in the Japanese invasion of Manchuria.[88]To have an international flavour, the Charter permitted General MacArthur to appoint Judges from the many countries that had signed the Japanese instrument of surrender. They even included, but not limited to, Judges smaller states like the Philippines, India,[89]and the Netherlands.[90]Just like the IMT, this Tribunal also had the mandate to try criminals for the crimes against peace, war crimes and crimes against humanity. The definition of a 'war crime' was nearly verbatim to that in the London Agreement - the Nuremberg Charter for the IMT. Nine Senior Japanese political figures and eighteen military leaders were indicted.[91]

As an evolutionary step forward in the fight against impunity for war crimes, a Japanese scholar was also indicted.[92]However, for geo-political reasons, the Japanese war Emperor, Hirohito, was never indicted. In fact, he even retained his throne as the emperor albeit with reduced authority.[93] For this reason, a war criminal still escaped justice.

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[85] Ibid.

[86] Ibid.

[87] Suyith, Xavier, supra.

[88] The Empire of Japan invaded Manchuria in China following the Mukden false flag incident. By 1932, the war had ended and the Japanese established a puppet state of Manchukuo, with their occupation lasting through the WW2 until August 1945.

[89] Notably, Justice Radhabinod Pal, from India, was the first Judge appointed to an International Tribunal from the Global South.

[90] Department of State, United States of America, Office of the Historian, 'Milestones: 1945-1952', supra.

[91] Ibid.

[92] Shumei Okawa, a Japanese nationalist, educator, political philosopher and Islamic writer, was indicted, in particular, for war crimes.

[93] Department of State, United States of America, Office of the Historian, 'Milestones: 1945-1952', supra.

All the defendants, apart from the scholar,[94]and other two who had died before trial, were found guilty and sentenced to punishments ranging from seven years to death by hanging. The influence of geopolitics in the enforcement of international law generally has always been fundamental. As it will be seen later in the chapters ahead, sometimes it also affects the actions, or inactions for that case, of the ICC. Global alliances and nationalities of the culprits at times determine the steps to follow. This influence has irked the African states parties who argue sovereign rights to try their nationals[95]and the reformist group of TWAIL scholarship.[96]

Also, important to note was that after these two international military trials, single occupying allied powers held subsequent trials such as military commissions. A case in point were the German trials in particular occupied areas. The US, for instance, held about twelve trials from 1946 to 1949, combining defendants accused of similar acts or related events. They were later to be informally known as the 'Subsequent Nuremberg Trials'.[97]In Japan, several other additional trials were held in different cities outside Tokyo.

On international war crime justice, the Nuremberg and Tokyo tribunals contributed greatly to its development that was at its nascent and fledgling stages. Although these tribunals were fundamental in the fight against impunity, they presented a one-sided case. Several war crimes were committed on either side, however, like the victor's justice that the WW2 military tribunals were, the allied criminals were never brought to account.

That notwithstanding, these tribunals stood as the only references on how the international community could come together to try leaders for war crimes that had, for centuries, never been tried. Ultimately, they served as models for new series of criminal tribunals established later in the 1990's. For the first time, the terms 'crimes against peace', 'war crimes' and 'crimes against humanity' were used acceptably and defined for use in future international instruments. Although fairly expanded, the terms in the Nuremberg and IMTFE Charters have been retained verbatim.[98]

[94] By the time of trial, Shumei Okawa was adjudged to be unfit to stand trial.

[95] Markus, Benzing, supra.

[96] Makau, Mutua, supra.

[97] Department of State, United States of America, Office of the Historian, Milestones: 1945-1952, supra.

[98] Ibid.

On the evolution of war crimes prosecution, these two military tribunals improved upon the international efforts earlier seen in the Treaty of Versailles which had only ended on paper and never implemented.[99] On the other hand, they grounded the practice at the time that the winner in a war determined the justice that followed that war. Although war crimes had been committed on either side of the belligerents, the prosecution efforts only focused on the axis.[100]In fact, for the world war 1 prosecutions, the Allies were mainly concerned with their imperialist gains as most of the emphasis was laid on reparations and the return of ceded territory.[101]It is no wonder that they accepted the German nationalists' rejection of the extradition of their war criminal officers.[102]To make matters worse, upon the German request to prosecute their war criminals, the Allies even reduced the number to a mere 46.[103]There were prosecutions in Bulgaria and the Ottoman Empire but still conducted by those very Axis.[104]

For World War 2, it has already been noted that the Nuremberg tribunal only constituted judges from the 4 major Allies, namely: France, USA, Russia and Britain, with defendants only from the Germans.[105]In the Tokyo trials, neither the imperialist Emperor nor the American war criminals were indicted.[106]In total disregard of German sovereignty, after Nuremberg, the USA then conducted other 12 series of trials for junior German officers at different venues in Germany, this time doing it alone as an occupational government.[107]

Be that as it may, unlike the World War 1 criminal prosecutions, the Nuremberg and Tokyo main tribunals greatly contributed to the war crimes prosecution efforts. Indeed, after these precedents, the conduct of war was drastically changed. For instance, obedience to superior orders was no longer an absolute defence.[108]

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[99] See Article 227, the Treaty of Versailles, supra.

[100] Mark Lewis, supra.

[101] Ibid.

[102] Ibid.

[103] Ibid.

[104] Ibid.

[105] Suyith Xavier, supra.

[106] Department of State, United States of America, Office of the Historian, supra.

[107] Matthew Lippman, 'The Other Nuremberg: American Prosecutions of the Nazi War Criminals in Occupied Germany', Department of Criminal Justice, University of Illinois, Chicago.

[108] Matthew Lippman, supra.

Individuals could be held responsible for their actions during war and the agitation for a permanent international criminal court even gained more traction.[109]The series of trials that followed Nuremberg conducted by the American occupying power, in particular, made an important contribution as they affirmed that, civilians, military officials and leaders, no matter how exalted their statuses, were and are subject to criminals trial and punishment for the violations of international law.[110]That those who act behind the scenes and those who draft the orders are as guilty as those who carry the orders out.[111]

2.4 The Second Geneva Conventions and their Additional Protocols

The Geneva Conventions are four related treaties adopted and continuously expanded from 1864 to 1949 that represent a legal basis and framework for the conduct of war under international law.[112]Every single member state of the United Nations has currently ratified the Conventions, which are universally accepted as *jus cogens* (compelling international customary law), applicable to every situation of armed conflict in the world.[113]

The Additional Protocols to the Geneva Conventions adopted in 1977 containing the most pertinent, detailed and comprehensive protections of international humanitarian law for persons and objects in modern warfare are still not ratified by several states continuously engaged in armed conflicts, namely the United States, Israel, India, Pakistan, Iraq, Iran, and others.[114]Accordingly, states retain different codes and values about wartime conduct.[115]Some signatories have routinely violated the Geneva Conventions in a way that either uses the ambiguities of law or political maneuvering to sidestep the laws' formalities and principles.[116]

[109] Ibid.

[110] Ibid.

[111] Ibid.

[112] Ambos Kai, 'Slow Wheels of Justice: The ICC's Disappointing Track Record', Spiegel Online, December 14, 2011.

[113] Ibid.

[114] Ibid.

[115] Ibid.

[116] Ibid.

However, many of the rules contained in these treaties have been considered as part of the *jus cogens* – a set of the compelling international customary law and, as such, are binding on all States whether or not States have ratified the treaties themselves.[117]In addition, many rules of customary international law apply in both international and non-international armed conflict, expanding in this way the protection afforded in non-international armed conflicts, which are regulated only by common Article 3 of the four Geneva Conventions[118] and Additional Protocol II.[119]Suffice to note, like already mentioned above, these Conventions reflect the aspirations of the perceived civilised peoples of the world.[120]Many of the fundamental provisions were adopted from the American Lieber Code.[121]They are viewed as an extension of a colonial agenda, imperialist in character as its application has at times been viewed by some TWAIL scholarship as selective,[122]justifying the importance of these Conventions in this study.

2.5 The Special International Criminal Tribunals

Special international criminal tribunals are selected special war crime trials in different regions of the world, picking from Europe - Yugoslavia; Africa – Sierra Leone and Rwanda; and Asia-Cambodia. They were part of the efforts, before the establishment of a permanent Court for war criminal trials, to curb impunity for grave humanitarian crimes where national judicial systems either failed or sought assistance in what is now quite similar to the complementarity principle applied by the ICC. They are presented in the sequence of years that they were established.

[117] Ibid.

[118] Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949.

[119] Antony Anghie and B.S. Chimni. 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*', Chinese Journal of International Law 2, no. 1 (January 1, 2003): 77–103. doi: 10.1093/oxfordjournals.cjilaw.a000480

[120] Ntina Tzouvala, supra.

[121] Supra.

[122] Ntina Tzouvala, supra.

2.5.1 International Criminal Tribunal for the Former Yugoslavia (ICTY)

The Committee of Legal Advisers on Public International Law sat to consider the United Nations Security Council (UNSC) resolution 808 of 1993 that had decided that such a tribunal be established.[123]It was at the CAHDI 6th meeting that a resolution to establish this tribunal was passed.

As such, the ICTY was established by the authority of UNSC resolution 808 of 1993 and the mandate being drawn from its Statute adopted under Security Council Resolution 827 of 1993 to prosecute persons for serious breaches of international humanitarian law and the Geneva Conventions committed in the territory of the former Yugoslavia since 1991 when different Balkan nationalities started to agitate for independence.[124]The Statute provided for the nature of crimes indictable. These formed the *ratione materiae* of the offences. They included, but not limited to, grave breaches of the 1949 Geneva Conventions and violations of the custom of war.[125]

On the *ratione personae* side, the tribunal's jurisdiction covered persons who planned, instigated, ordered, committed or otherwise aided and abated in the planning, execution and preparation of these crimes. There was no positional immunity of any nature and both superiors and subordinates could be indicted similarly.[126]In total, the tribunal indicted 161 persons. Famously, the former President Slobodan Milosevic. The other notable indictees included Milan Babic; the former President of the Republika Srpska Krajna, Ramush Haradinaj; the former Prime Minister of Kosovo, Radovan Karadzic; also, former President of the Republika Srpska and the former Commander of the Bosnian Serb Army, General Ratko Mladic. The highest sentence meted was life in prison.[127]

[123] Council of Europe, Committee of Legal Advisers on Public International Law, 'Implementation and Functioning of International Criminal Tribunals, 2023.

[124] Ibid.

[125] See Articles 2 – 5 of the Statute Establishing the ICTY.

[126] Article 7, ibid.

[127] Council of Europe, Committee of Legal Advisers on Public International Law, 'Implementation and Functioning of International Criminal Tribunals, supra.

Part of the criticism against this tribunal was its refusal to indict NATO officials for war crimes,[128]portraying the traditional victor's justice as NATO emerged victorious. This is why the inclusion of this tribunal is pertinent to the study.

2.5.2 International Criminal Tribunals on the African Continent

Antony Anghie,[129]while disagreeing with the International Criminal Tribunal for Rwanda, advocates for an international effort that is permanent- the ICC. There arguments that hybrid international criminal courts, that is; those that blend international establishments with local settings; although ad hoc in establishment, are better suited for international criminal trials.[130]

This is perhaps why the UN, despite the fact that there is the ICC, still established the Special Criminal Court in Central African Republic.[131] Such courts navigate the delicate balance between global alliances and the need to fight impunity, the balance between sovereignty rights and the need to fairly and adequately prosecute war criminals.[132] The CAR case will be revisited fully in the subsequent chapter. In this discussion, the study summarises what transpired in Rwanda after the genocide and the role of the hybrid Gacaca courts,[133] plus in the case of Sierra Leone where massive use of child soldiers, rape, torture, civilian killings, among others took centre stage.

[128] Colangelo, Anthony J., 'Manipulating International Criminal Procedure: The Decision of the ICTY Office Not of the Independent Prosecutor Not to Investigate NATO Bombing in the Former Yugoslavia', North western University Law Review, vol. 97, No. 3, (2002-2003), pp. 1393-1436; Available at SSRN: https://ssrn.com/abstract. 32776346.

[129] Supra.

[130] Markus Benzing, supra.

[131] Hybrid Justice, 'Special Court in Central African Republic; https://hybridjustice.com/special-criminal-court-in-central-african-republic, accessed on 11/16/2024 at 7P.M.

[132] Markus, Benzing, supra.

[133] Final Monitoring and Research Report on *Gacaca*, 'The Contribution of the Gacaca Jurisdiction to Resolving Cases Arising from the Genocide, Contributions, Limitations and Expectations of the Post-Gacaca Phase, PRI London, U.K.

2.5.2.1 International Criminal Tribunal for Rwanda (ICTR)

By UNSC Resolution 955, the ICTR was established in 1994 to judge the war crimes committed in Rwanda following the assassination of former President Juvenile Habyarimana. The crimes falling within the jurisdiction, *ratione materiae*; included, among others; violations of Common Article 3 of the Geneva Convention and Additional Protocol11 thereto.[134]

2..5.2.1.1 TWAIL Perspectives on the ICTR

For TWAIL scholarship, the tribunal was *ad hoc* in character and largely predominated by Western influence.[135]This is why, later, the *Gacaca* court system that was based locally in Rwanda, was established, in respect of the sovereign right to have jurisdiction over criminal matters within a sovereign state- Rwanda.[136]As an experimental alternative to international tribunals, the system achieved in bringing together the perpetrators and the survivors and enabled speaking out by way of confession and truth telling.[137]It also fostered remorsefulness and forgiveness, leading to closure in the sense that the victims felt that there was justice to them.[138]

Flowing from this, TWAIL scholars argued that where there is involvement of the community affected or at least the state in which the crimes were committed,[139] then there would be acceptable justice.[140]It was why they advocated for a permanent international court but with all states involved as equal stakeholders. This would, in turn, involve the state in question in the prosecution processes in case its nationals were to be indicted for international crimes. The Gacaca court, however, has not gone without criticism. A closer examination of the system indicates flaws that were observed by the TWAIL movement.

[134] See Articles 2-4, the Statute Establishing the ICTR.

[135] Note 127.

[136] Ibid.

[137] Ibid.

[138] Ibid.

[139] Department of Public Information, 'The Justice and Reconciliation Process in Rwanda', Outreach Programme on the Rwanda Genocide and the United Nations, March 2014.

[140] Makau, Mutua, supra.

For instance, local trials brought about limitations on accused's ability to effectively defend themselves, flawed decision making arising from the judges' ties to the parties and pre-conceived views of what actually happened,[141] heavily influenced by the social and political contexts, thereby blurring neutrality and impartiality required of adjudicators. On the persons indictable; *ratione personae*; the ICTR was modelled on the ICTY.[142]In total, the ICTR indicted 93 individuals and has since been succeeded by the IRMCT. 4 of these cases have been transferred to national jurisdiction, 14 acquitted and 51 sentenced.[143]

2.5.2.2 Special Court for Sierra Leone (SCSL)

This Special Court for Sierra Leone was established by an agreement between the Government of Sierra Leone and the UN in 2002. on the request of the Sierra Leone government.[144] It was an alternative to UN ad hoc tribunals and only focused on those bearing the greatest responsibility.[145] It targeted the local populations in its extensive outreach. However, it mainly included international judges as was the preference of the government, something that greatly affected its legitimacy as it suffered from the ''spaceship phenomenon''-being perceived as a curiosity and an anomaly with little impact on the citizens' lives.[146]

The crimes falling within this court's realm were, among others, breaches of Common Article 3 of the Geneva Conventions and Additional Protocol 11 and violations of international humanitarian law plus crimes under Sierra Leone law.[147] This Statute was largely modelled on the framework of the ICTY and ICTR. The Sierra Leone conflict is infamous for its use of child-soldiers.

[141] Note 127.

[142] Articles 5 and 6 are similar to Article 7 of the ICTY, supra.

[143] UN, ICTR, 'Key Figures of the ICTR Cases', 2021.

[144] Tom, Perriello and Marieke, Wierda, 'The Special Court for Sierra Leone Under Scrutiny', International Centre for Transitional Justice, Prosecutions Case Studies Series, March 2006.

[145] Ibid.

[146] Ibid.

[147] Articles 2 – 5, the Statute Establishing the Special Court for Sierra Leone.

Bearing this in mind, the Statute of this Court had a special feature that the court had no jurisdiction to try persons that were aged under 15 at the time of committing the alleged atrocities.[148]As the court only focused on the greatest bearers of responsibility, many mid-level commanders were never prosecuted.[149] A case in reference was 'Colonel Savage', as was infamously known, who massively killed civilians and buried them in the infamous 'Savage Pits' in the village of Tombodu, Kono but walked freely.[150]This is an impunity gap that was left. For TWAIL and sovereignty concerns, the Statute establishing the Court did not impose responsibility on other states as it lacked the power under the UN Charter to oblige all UN members to enforce the provisions of the tribunal Statute.[151] This greatly hampered the Court's efforts to prosecute offenders that were outside the jurisdiction.

A lesson to the ICC was the case of former Liberian President Charles Taylor, who was accused of arming and funding the rebels across the border in Sierra Leone but attempted to play a peace-maker role and politically arranged his exile in Nigeria.[152]The case highlighted how international criminal justice is immensely hinged on political will as it was not until the cooperation between the President of Sierra Leone, Ellon Johnson Sirleaf and that of Nigeria, Olusegun Obasanjo that Charles Taylor was extradited to stand trial in Sierra Leone.[153] This was a watershed moment in the fight against impunity for international war crimes.

2.6 The Rome Statute of the International Criminal Court

On 17 July 1998, the international community reached a historic milestone when 120 States adopted the Rome Statute, the legal basis for establishing the permanent International Criminal Court. The Rome Statute entered into force on 1st July, 2002 after ratification by 60 countries, opening a new chapter in the story of international war crimes prosecution, with the establishment of a permanent court to do the same, the International Criminal Court-ICC.

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[148] See Article 7, ibid.

[149] Tommy, Ibrahim, 'Lessons from the Special Court for Sierra Leone in the Fight against Impunity ', A Paper Presented on International and Transitional Justice Organised by Avocats Sans Frontières-Uganda Mission and the Uganda Coalition of the International Criminal Court, Imperial Botanical Beach Hotel, Entebbe, 31 July, 2012.

[150] Ibid.

[151] Chapter vii, the Charter of the United Nations.

[152] Antonio Cassese, 'Report on the Special court for Sierra Leone', Independent Expert Paper.

[153] Tommy, Ibrahim, 'Lessons from the Special Court for Sierra Leone in the Fight against Impunity', supra.

The concept of an international criminal court was identified as early as the 15th century, and by the late 19th century, international criminal law began to emerge in the form of violations of rules governing military conflict.[154] However, it was not until the end of World War II that the modern concept of international criminal law began to take shape.

With Nazi Germany launching a military campaign and committing startling atrocities prompted the Allied powers to place "among their principal war aims the punishment, through the channel of organized justice, of those guilty of or responsible for these crimes, regardless of whether they have ordered them, perpetrated them or participated in them".[155]
This justice system then was instituted through tribunals which were part of a larger post-war initiative to advance international criminal law.

In 1948, the Convention on the Prevention and Punishment of the Crime of Genocide[156] (Genocide Convention) was adopted, marking the first international recognition that "genocide, whether committed in time of peace or in time of war, is a crime under international law."[157] The following year, the Geneva Conventions of 1949, comprising four treaties, were adopted.[158] These four treaties called on the states to criminalize grave breaches of international humanitarian law.

[154] Sandra L. Jamis, 'A Permanent International Criminal Court. A Proposal That Overcomes Past Objections,' Denver Journal of International Law and Policy, Vol. 23, No. 2, 1995, p. 421.

[155] United States, Department of State, Office of the Historian, 'The Nuremberg Trial and the Tokyo War Crimes Trial (1945-1948),' Milestones: 1945-1952.

[156] United Nations, Office of the High Commissioner for Human Rights, 'Convention on the Prevention and Punishment of the Crime of Genocide,' 9 December 1948.

[157] Article 1, ibid.

[158] International Committee of the Red Cross, 'Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949; Convention Relative to the Treatment of Prisoners of War, Geneva, 12 August 1949; and the Convention Relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949,' Treaties and States Parties, International Humanitarian Law Databases 29 November 2022.

When the United Nations (UN) General Assembly adopted the Genocide Convention, it also invited the International Law Commission (ILC) – a committee of legal experts working to develop and codify international law –to examine the possibility of establishing a permanent international criminal court.[159]

With the onset of the Cold War, post-war cooperation to advance international criminal law slowed dramatically. However, in 1990, the ILC's post-Nuremberg project was revived following a special session of the UN General Assembly focused on international drug trafficking prosecutions and a well-received ILC report. Building on this success, the ILC resumed the task of preparing a draft statute for a comprehensive international criminal court.[160]The move proved timely as it coincided with the return of international criminal justice to the agenda of the international community in response to atrocities in Yugoslavia and Rwanda.

2.6.1 The Establishment of the International Criminal Court and the TWAIL Perspectives on the Substantive Issues in the Rome Statute of the International Court

Article 2 of the Statute[161] establishes the ICC. As issues at hand during the process of establishment, the discussions dwelt much on the relationship between the Court and the UN, in particular, the status and the nature of the court and its method of establishment.[162] The members generally agreed that the court should be an independent judicial institution,[163] although some, just like the TWAIL scholars,[164] had preferred the Court to be part of the UN. Since it was not established by a UNSC Resolution like the ICTY, it was not adopted as an organ of the UN.

[159] United Nations, General Assembly, 260(iii), 'Prevention and Punishment of the Crime of Genocide,' 9 December 1948.

[160] Cherif, M. Bassiouni,'Historical Survey: 1919-1998,' International and Comparative Criminal Law Series- The Statute of the International Criminal Court: A Documentary History, Vol. 2, 1 February 1999.

[161] The Rome Statute, supra.

[162] United Nations, 'Report of the Preparatory Committee on the Establishment of an International Criminal Court', Vol 1, (Proceedings of the Preparatory Committee during March-April and August 1996), General Assembly, Official Records, 51st Session, Supplement No. 22 (A/51/22).

[163] Ibid.

[164] Ibid.

The Court was established as a full-time, permanent institution that would promote stability and uniformity in the international criminal jurisprudence. For the case of war crimes, the court would settle what amounted to war crimes since these keep on evolving with time.
With time, for instance, the Court has since adopted the definition of the character of an armed conflict as distinguished from civil uprisings from the ICTY as will be discussed in the following chapter.[165] It not being a UN organ, the court membership leaves out some UN member states, a factor that makes the UNSC a world police of some kind since such states, when they have alleged international criminals and have not submitted to the ICC, can only have such criminals indicted by the ICC through the UNSC references.[166]

It will be recommended later in this study that an amendment to the UN Charter is necessary to incorporate the court as one of the organs of the UN, which is the TWAIL argument. The power granted to the UNSC to competently create ad hoc tribunals in response to a particular situation endangering international peace and security, it was pointed out, just as TWAIL scholarship does, should be distinguished from the then endeavour to establish a permanent criminal court with general powers and competence. As such, the establishment of the court by an international treaty enjoyed general support as an independent permanent universal institution as opposed to specialised UN Agencies.[167]In fact, the proposals were submitted, notably, by the US and Israel, states which later failed to ratify the Rome Statute.[168] It is arguable that this was a plot to shun the Court's jurisdiction by some states as opposed to UN Agencies for which all UN members are, by default, members.

The other contentious issue was the coming into force. Here, there were two opposing and equally, imposing arguments.

[165] See *The Prosecutor v. Dusko Tadic, Case No. IT-94-1-AR72*, United Nations Security Council, International Criminal Tribunal for the Former Yugoslavia.

[166] Article 13(b), the Rome Statute, supra.

[167] United Nations, 'Report of the Preparatory Committee on the Establishment of an International Criminal Court', supra.

[168] Ibid.

Putting the number of ratifications required for the Treaty to become forceful too high would delay the establishment which, in the eyes of the international community,[169] was urgent at the time but a high number would mean universal acceptance and legitimacy.[170]On the other hand, putting the number fairly low would hasten the process.[171] There was another proposal to include the 5 permanent members of the UNSC among the required ratifications.[172] It was finally resolved that a low number would not necessarily preclude the early establishment without geographical and legal system representations and would accord the establishment of the Court the urgency it called for.[173]Finally, the number was put at 60 ratifications,[174] with Senegal, an African state, depositing its signature to set the pace.[175]

There are 34 African states parties currently and ironically, in 2009, the first state party, Senegal, called on a mass withdrawal of the African bloc, the largest bloc of the ICC membership.[176] The Court currently boasts 124 states parties,[177] with Ukraine soon becoming the 125th.[178] However, there are notable absentees such as the United States, Israel, China, India and Russia.
On the African continent, Ethiopia, Sudan and Libya,[179] states that have recently had allegations of war crimes in their conflicts, are notable non-states parties. To further highlight how politics influences the ICC membership, Burundi, a former state party, has since withdrawn after the Court decided to investigate its violations during the crackdown on the opposition protests[180]and President Roderigo Duterte, formerly of Philippines, decided to pull out when the Court decided to investigate the alleged violations in his war on drugs.[181]

[169] Ibid.

[170] Ibid.

[171] Ibid.

[172] Ibid.

[173] Ibid.

[174] Ibid. See, also, Articles 125 and 126 of the Rome Statute of the International Criminal Court.

[175] The *Voice of America*, 'African International Criminal Court Members Mull Withdrawal Over Bashir Indictment', 2009-06-08.

[176] Ibid.

[177] Claire Klobucista and Mariel Ferragumo, CFR, Council on Foreign Relations, 'The Role of the ICC', November 22 2024.

[178] Ibid.

[179] Ibid.

[180] Ibid.

[181] Ibid.

The processes of ratification and the current membership emphasise the sovereign rights of the independent states, adopting the Westphalian model of sovereignty-there is no power above that of the state.[182]

2.6.2 Jurisdiction and Admissibility of the Cases

The Court may exercise jurisdiction over such international crimes of unimaginable magnitudes that shock the conscience of humanity only if they were committed on the territory of a State Party or by one of its nationals. The definition of the crimes was essential during the discussions to avoid trivialisation of the role of the Court and unnecessary interference of the Court into the affairs of sovereign states.[183]These conditions, however, do not apply if a situation is referred to the Prosecutor by the United Nations Security Council, whose resolutions are binding on all UN member states, or if a State makes a declaration accepting the jurisdiction of the Court as it was in the case of Ivory Coast.[184]They are the Prosecutor's proprio motu powers and the powers of the UNSC to refer matters to the court that have had a marked significance on the relationship between the ICC and Africa as shall be examined in chapter 3 ahead, pitting the forces of sovereignty and immunities with the fight against impunity for international grave crimes, more so the war crimes.

2.6.3 The Trigger Mechanisms of the ICC Jurisdiction

The Prosecutor can initiate an investigation or prosecution in three different ways: (i) States to the Statute of the ICC can refer situations to the Prosecutor. It has been a concern of some TWAIL scholarship that this has a likelihood of continuing a war by way of a party in power exercising the right of a state to refer a matter to the ICC against its opponent.[185]A case in point is Uganda, where the LRA conflict that the state could not win outrightly was referred to the ICC.

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[182] Ramona Gabriella Tatar & Adela Moisi, 'The Concept of Sovereignty', Journal of Public Administration, Finance and Law, accessed on https://doi.org/10.47743/jopafl-2022-24-27.

[183] United Nations, 'Report of the Preparatory Committee on the Establishment of an International Criminal Court', supra.

[184] Although the state was not a signatory to the Statute, it referred its case to the ICC.

[185] Parvathi Menon, supra.

Another case was Ivory Coast where the sitting President that had won the elections, afraid of his opponent, Laurent Gbagbo, referred the matter to the ICC.[186](ii) the UNSC can request the Prosecutor to launch an investigation; (iii) the Office of the Prosecutor may initiate investigations *proprio motu* (on its own initiative).[187]These three trigger mechanisms do not preclude a non-member state from accepting the jurisdiction of the court if the crime in question was committed on its territory or by its national(s). This was the case with Ivory Coast, a non-member state at the time, but accepted the jurisdiction of the court and referred the former president Laurent Gbagbo to the court for the international crimes committed during the post-election violence.[188]States that become party to the Statute[189] accept the jurisdiction of the ICC in respect of the crimes under its jurisdiction.[190] The court has jurisdiction over individuals not states[191] and unlike the ad hoc tribunals, it does not have primacy over municipal courts.[192]

2.6.3.1 United Nations Security Council Reference and TWAIL

The most critical of the three mechanisms are the two, the UNSC reference and the Prosecutor acting on their own motion. They are these two that have caused a lot of disagreement among many African states in the fight against impunity for war crimes. This is why this study has delved deeper into them. The UNSC exercises its power drawing from the UN Charter,[193] with powers to refer any situation in any state, whether the state in question is a party to the Rome Statute or not.[194]This Charter envisioned a preeminent role of the council in matters of international peace and security.[195]

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[186] Ibid.

[187] Parvathi Menon, supra.

[188] International Criminal Court, 'Situation in the Republic of Cote d'Ivoire', 02/2011.

[189] The Rome Statute of the International Criminal Court.

[190] See, generally, article 5, ibid.

[191] Article 25, The Rome Statute, supra.

[192] Article 17, ibid.

[193] See, generally, chapter v, and articles 23 and 27, the Charter of the United Nations.

[194] Ibid.

[195] Article 24(1), ibid.

The UNSC comprises 15 members, 5 of whom are permanent, with the power to veto decisions.[196] TWAIL has criticised this system. Under TWAIL, the system is a symbol of the dominance of the Western powers against the global south, exposing the ugly inequalities and Eurocentrism.

Although TWAIL does not directly challenge the composition of the UNSC, it has questioned it. To TWAIL, universalism is a biased concept, masking the interests of the powerful states that dominate the UNSC.[197]The Security Council itself played no role in the creation of the ICC, as in the creation of the *ad hoc* tribunals that preceded the ICC although its members were active participants in the negotiations at the final Diplomatic Conference in Rome in 1998. Ironically, some permanent members of the UNSC have remained non-state parties to the Rome Statute yet they engage in the referral proceedings and voting.[198] The argument would be, if the court is good, why don't these states ratify the statute? And if they are nonstate parties, why should they engage in the referral proceedings against other states? These and other questions have arisen against the UNSC references and remain unanswered, leading to the ever-increasing opposition to the ICC dispensation. The power of referral by the UNSC under Article 13 (b) in itself is considered to be one of the specific features of modern international law,[199] arising out of the responsibility to protect and keep peace around the globe, a duty enshrined in the United Nations Charter.[200]

2.6.3.1.1 Adopting Resolutions 1593(2005) and 1970 (2011); An Illustration of the UNSC Power to Refer Situations to the ICC

Prominently, there are two situations that can graphically demonstrate the power politics of the UNSC referrals; the cases of the Sudan and Libya. The Libyan case, just as the Sudan, was referred to the ICC through a UNSC resolution.

[196] Ibid.

[197] Amber Smith, 'Third World Approaches to International Law: The Responsibility to Protect and Regional Organisations: An Overview', October, 2019.

[198] China and the USA are non-state parties to the Rome Statute while Russia withdrew its signature in 2016.

[199] See the decision of the Appeals Chamber of the ICTY on the power and role of the UNSC in maintaining international peace and security.

[200] Chapter v, and articles 23 and 27, the UN Charter, supra.

Remarkably, the Resolution to refer the Libyan situation was passed unanimously,[201] with the UNSC acting under what is known as the responsibility to protect, popularly known as R2P.[202] Also noteworthy was the fact that although the situation had been referred to the ICC investigations, there was a preemptive military intervention immediately after the passing of the resolution. This military intervention was led by the France, a permanent member of the UNSC together with the North Atlantic Treaty Organisation, (NATO), a military alliance of western powers.

The decision of the UNSC to refer the situation in Darfur to the International Criminal Court in 2005 was historic in a way that for the first time the UNSC referred a situation to the ICC and as a result of the investigations, the ICC issued an arrest warrant against a sitting head of state.[203] This exceptional jurisdiction was predicated on the UNSC's determination that the situation in Sudan constituted a threat to international peace and security under Article 39.[204] It also reflected the conviction that trials of persons responsible for the human rights violations in Darfur would help restore peace and stability in the country and the region.[205]

Suffice to note that although the resolution was adopted, it was not unanimous. There were some four abstainers, (Algeria, Brazil, China and the USA),[206]with varying views. Among these, the study chose to analyse the views from Algeria, an African state and China and USA, the permanent members of the UNSC with veto powers.

For USA, it chose to abstain maintaining the stance it had carried during the preparations of the Rome Statute that ICC non-member states should not be subjected to the Court's jurisdiction and that they preferred a hybrid tribunal in Africa instead.[207]

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[201] Resolution 1970 was adopted on the 26th of February, 2011.

[202] R2P gained prominence during the uprising in Libya against the Ghaddafi regime. The UNSC passed a resolution under the auspices of the responsibility to protect Libyan populations from the attacks of the regime that was perceived as having turned against its citizens who had civilly demanded for a change in the governance. This resolution was capitalized upon by France and NATO to launch preemptive military strikes against the Libyan army and several other government installations.

[203] President Omar Al Bashir, the then President of Sudan, was indicted.

[204] The UN Charter, supra.

[205] UNSC, Resolution 1593(2005), adopted by the Security Council at its 5158th meeting, on 31st March, 2005.

[206] UN, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court, Press Release, 31 March, 2005.

[207] Ibid.

On a positive note, though, the country representative noted that they had chosen against a veto in order to bring to justice those responsible for the crimes and atrocities that had happened in Darfur and end what she referred to as the "climate of impunity there". The USA also cited the exemption from investigation and prosecution of its nationals in the resolution as another reason for its action.

In the TWAIL perspective, this shows that the Court was established to prosecute nationals of politically and economically weaker states, a cause for resistance against the Court. She maintained that although the USA had not vetoed, it maintained its firm and long-standing objection to the Court. For Algeria, an African state, it cited the need to consider the AU proposal on the resolution of the conflict. They insisted that even in the UNSC there could be double standards. That at the start of the conflict, it had been the AU that had deployed its soldiers and begun negotiations on the various complex issues. That the compromises at the UNSC meeting had come "at any cost".[208] The preference of an AU solution reflected a desire among the African states to resolve the African problems locally without what they refer to as colonial and hegemonic interventions. This would be reflected in the later conflicts in Ethiopia, South Sudan and Sudan.

For China, another permanent member of the UNSC with the power to veto resolutions but had chosen to abstain, Wang Guangya, its representative, said that they preferred a political solution.[209] That China would prefer trials in Sudanese local courts and that China would not support a UNSC referral without the consent of the Sudanese government. He still maintained that as a non-state party to the Rome Statute, China had reservations to many of the statute's provisions.[210] However, they chose not to veto in order to express their concern over the appalling state of the violations of international humanitarian law in the conflict. The Chinese reservations against the Rome Statute continue to influence their actions whenever such resolutions come up with the ever-widening geopolitical divide across the globe.

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[208] UN, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court, supra.

[209] Usually, such a solution, whenever invoked, it refers to negotiations involving the warring parties in order to end hostilities. This, in some cases, does not impose punishment to the war criminals. In fact, the agreements arising from such sometimes provide for immunities to the criminals.

[210] UN, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court, supra.

2.6.3.2 The Prosecutor Acting on their Own Motion (*Proprio Motu*)

The Office of the Prosecutor is one of the four organs of the International Criminal Court (ICC). The Office receives and analyses referrals in order to determine whether there is a reasonable basis to investigate the crimes under the jurisdiction of the Court and, to conduct prosecutions, if warranted, before the Court of persons responsible for such crimes.[211]By conducting preliminary examinations, investigations and prosecutions, the Office contributes to the overall objective of the Court – to help end impunity for the perpetrators of the most serious crimes of concern to the international community as a whole, and thus to contribute to the prevention of such crimes.

In furtherance of the proprio motu powers, the Prosecutor may start an investigation on the territory or against nationals of a State Party.[212] It is this power that has led to conflict between the Court and the African Union that imputes bias on the Prosecutor.[213] It is the policy of the Office of the Prosecutor that investigations focus on those individuals who bear the greatest criminal responsibility for crimes committed in a situation under investigation, including, but not limited to, heads of state like President Omar Al Bashir, senior political leaders like Abdallah Al Senussi and Saif Al Islam and heads of militaries.[214] Such categories of intended targets also happen to be the sovereigns in their respective states and internationally command immunity under customary law, a challenge when it comes to enforcement of warrants.

2.6.3.4 State Referrals

A state in question may also refer a situation to the Court whether it is a state party to the Statute or not.[215] Among the three mechanisms, this is the less controversial as it has always been the state in question's leadership referring international crimes to the ICC.

[211] Article 15, the Rome Statute of the ICC.

[212] Ibid.

[213] ASF, 'Africa and the International Criminal Court: Mending Fences', MacArthur Foundation.

[214] Article 28, the Rome Statute, supra.

[215] Articles 12, 13(a) and 14, ibid.

Cases in point include the situations in the CAR,[216] that in Ivory Coast[217]and the case of Joseph Kony and other LRA commanders referred by Ugandan authorities.[218] It has been argued that states use this mechanism to settle political scores and often viewed by TWAIL scholarship as continuing conflicts.[219] They are, as argued by TWAIL, extensions of conflicts when sovereigns seek to consolidate their power by casting their rivals far off in the Hague.[220]The aforementioned cases of Ivory Coast,[221] Uganda[222] and the CAR are cases in point, where political rival Laurent Gbagbo, Joseph Kony and former President and political rival, Ange -Felix Patasse.[223]

2.6.4 The Pre-Trial Chamber of the International Criminal Court

The Pre-Trial Chamber, which usually consists of three judges, has been described as the Court's gatekeeper, with significant power to influence which cases are investigated, how those investigations are conducted and which investigations result in trials.

As previously mentioned, the Pre-Trial Chamber authorizes prosecutor- initiated investigations,[224] decides challenges to the jurisdiction of the Court or the admissibility of a case during the investigative stage[225] and reviews the prosecutor's decision not to pursue a case referred to the OTP.[226] Questions of admissibility usually arise as a result of the application of the complementarity doctrine, which is discussed in detail hereinbelow.

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[216] There were two referrals by the state under two different Presidents, the first being that of President Bozize where the national judicial systems determined that they could not ably handle the case of angel Felix Patasse, the former President that had been toppled in a coup by Bozize, and the second referral in 2014. See, also, ICC OTP, Statement by the ICC Prosecutor, Fatou Bensouda, on the referral of the situation since 1 August 2012 in the CAR, 12 June, 2014.

[217] President Alassane Ouattara referred the political opponent Laurent Gbagbo to the ICC.

[218] The Ugandan authorities referred the case of the LRA rebels led by Jos3eph Kony to the ICC.

[219] Parvathi Menon, supra.

[220] Ibid.

[221] Ibid.

[222] Ibid.

[223] Amnesty International, 'Central African Republic: Referral to the International m Criminal Court should be Accompanied by Judicial Reforms to Address Impunity', Public Statement, Jan 12, 2005.

[224] Article 15(4), the Rome Statute, supra.

[225] Articles 18(2) and 19(6), ibid.

[226] Article 53(3), ibid.

The Pre-Trial Chamber also has a number of responsibilities during investigations. It has the authority to issue orders and warrants as part of the investigative process, including to protect victims and witnesses, preserve evidence, ensure the rights of the defence and facilitate investigations.[227] The Pre-Trial Chamber can issue arrest warrants and summonses for suspects based on applications from the prosecutor, where it finds that there are "reasonable grounds to believe" that a crime has been committed.[228] Once an accused is in custody, the Pre-Trial Chamber is also responsible for ensuring the rights of the accused, including determining whether they will be released or detained pending trial.[229]

Before a case goes to trial, the Pre-Trial Chamber must confirm the charges brought by the OTP. At confirmation hearings, the prosecutor must establish "substantial grounds" to believe that the accused committed the crime(s) in question. The accused is generally present at the hearing and may both challenge the evidence presented by the prosecutor and present their own evidence. Based on the evidence presented, the chamber may confirm or decline to confirm any of the charges presented and may also adjourn proceedings to request that the prosecutor provide further evidence or amend the charges.[230]

This requirement is a measure against abuse of court process and a furtherance of the Court's independence in order to achieve acceptability among nations.

TWAIL has criticised the chamber for abuse of due process as the proceedings are ex parte.[231] The suspects for the alleged crimes that are the subject of the proceedings are not present at this point. Also, the chamber's authorization of investigation can be perceived as an infringement on sovereignty.[232] The Westphalian model adopted in this study asserts that there is only one sovereign, answerable to no body above.[233] By the chamber, an international institution, authorizing investigation is an infringement on the sovereign power that has decided not to investigate nor prosecute the alleged criminals.

[227] Article 57, ibid.

[228] Article 58, ibid.

[229] Article 60, ibid.

[230] Article 61, ibid.

[231] ICC: 'The International Criminal Court- Current Challenges and Perspectives', Salzburg Law School on International Criminal Law, August 08, 2011.

[232] Ibid.

[233] Ibid.

This further exacerbates the already sour relations the Court has with the African Union. The effectiveness of the Court, which is heavily reliant on states' cooperation is at a great risk since the affected sovereigns will most likely not cooperate with the Court.

2.6.5 The Criminal Law Principles Applicable to the ICC that are Relevant to the Current Study

Just like several a criminal statute, the Rome Statute, in apportioning criminal liability, provides for a number of well-established criminal law principles embedded in part 3. In this study, not all of them are relevant. However, there are those that are quite significant especially in the law of war as they are these principles without which many perpetrators would seek to escape liability, namely: a) non-retroactivity. This is also known as *ratione personae*.[234]A person is only criminally responsible if the actions constituting the alleged war crime took place after the coming into force of the statute. b) Individual criminal responsibility. The Statute is very elaborate on who is culpable. By the nature of wars, they are the commanders that give orders but actually these orders are effected by the men / juniors.

The law covers those who perpetrate crime jointly, through others, those who induce or solicit, aid and abet or otherwise assist and those that contribute. It also holds liable those that incite and make attempts in order to commence the criminal acts. This provision can be read together with the provisions on holding officials and commanders equally culpable.[235] Finally, the statute disregards the law on limitations of time with which to prosecute an alleged criminal. This is so important in the fight against impunity in that on several occasions, the perpetrators of war crimes are those in power. Case in point is Darfur, Libya, Ethiopia, the Central African Republic, *et al*. It is always difficult to enforce warrants of arrest against persons in power as they shun international travel yet at home nobody could arrest them. Their time only reckons when they are ousted from power, something that can take years.

[234] Article 24, the Rome Statute, supra.

[235] Articles 27 and 28, ibid.

2.6.6 The Principle of Complementarity and States Cooperation under the Rome Statute in the Face of TWAIL and Sovereignty

The Court is intended to complement, not to replace, national criminal justice systems.[236]It can prosecute cases only if national justice systems do not carry out proceedings or when they claim to do so but in reality, are unwilling or unable to carry out such proceedings genuinely - the principle of complementarity.[237]As such, the Prosecutor must have considered the state in question's right to have the first priority in prosecuting the crimes in its territory before they can take over such a matter. Similarly, the Prosecutor has to have regard to the admissibility of a case even when referred by the UNSC.[238]

From a TWAIL perspective, however, it is arguable that this is another form of hegemony in a disguised cloak given that the UNSC's decisions under the UN Charter are binding on all UN member states, which are fundamental in the functioning of the Court.[239]As such, the court is highly unlikely, practically speaking, to disagree with the UNSC's recommendations to engage in a situation and it will most likely deem the national efforts inadequate. taking the latter's persuasive weight. This dispensation is the court's stark difference from the ad hoc tribunals which had inherent jurisdiction over the crimes for which they were established to prosecute.[240]The requirement for the Court to first consider complementarity of the National Courts can be waived when the state in question passes the responsibility to prosecute a case to the ICC, thereby leaving the principle open to a concessional approach.[241]

[236] Article 17, ibid.

[237] Bowcott Owen, 'Kenya's Uhuru Kenyatta Becomes First Head of State to Appear before ICC', *The Guardian*, October 8, 2014.

[238] Article 53(1)(b), the Rome Statute, supra.

[239] See, generally, chapter vii of the Charter of the United Nations.

[240] See, for instance, articles 9 and 8, the ICTY and ICTR, respectively.

[241] Markus Benzing, supra.

The justification for this was to strike a balance between the sovereign right of all states to have criminal jurisdiction over acts within their jurisdiction in consideration of the arguments raised during the preparatory meetings of the Rome Statute in which it was found that giving the Court inherent jurisdiction to the provided international crimes would be incompatible with the principle of complementarity[242]and the interest of the international community in the effective prosecution of international crimes, the avoidance of impunity and deterrence of future crimes within the jurisdiction of the Court.[243]It was a diplomatic compromise and a recognition of the fact that the resources of the ICC would be limited.[244]

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 courts in situations, would be a major success.[245]The Statute operates as a catalyst to encourage states to investigate and prosecute crimes under the jurisdiction of the Court. Also, the accused's right to a fair trial also connotes the right to be tried at home whenever possible. As such, the court being far off in the Netherlands, it is fairly justified that let the accused be first heard at their home. The principle, on the other hand, can be viewed as an excessive concession to state sovereignty, potentially debilitating the endeavor of fairly prosecuting international criminals.

2.6.7 Sovereignty and State Cooperation Under the ICC Statute

For the court to complement national justice systems, there has to be a mutual relationship in the form of cooperation. The question then is, if the court has determined that a given state cannot duly investigate and prosecute a case for the reasons of unwillingness or inability to do so, how then will this state cooperate with the court? The reason for unwillingness is at times political, the perpetrators being the ones in power as the case of former Sudanese President Omar Al Bashir.

[242] United Nations, 'Report of the Preparatory Committee on the Establishment of an International Criminal Court', supra.

[243] Ibid.

[244] Ibid.

[245] Ocampo Luis Moreno, 'Statement at the ceremony for the solemn undertaking of the Chief Prosecutor', June 16 2003.

And the reason for inability is sometimes the collapse of the state systems as the case with Libya, Somalia and the DRC. For the latter, the court, together with the international community, are endowed with the requisite resources to gather evidence. However, for the former, the forces of sovereignty, immunity and jurisdiction are very much at play, pitting the court with the national resistance.[246]

2.6.8 War Crimes Under the Rome Statute of the International Criminal Court

In the preamble, the ICC Statute provides that the international community has been mindful of the fact that millions of children, women and men have been victims of 'unimaginable atrocities that deeply shock the conscience of humanity' and that they are determined to put an end to impunity of the perpetrators of these crimes.

Under Article 1, the ICC is established as a permanent Court to have jurisdiction over the 4 crimes under the Statute; i.e.; the crime of genocide, crimes against humanity, war crimes and the crime of aggression.[247]Unlike all the other tribunals seen hereinabove, for the first time the international community established a permanent court with a permanent and predictable jurisdiction. It was an evolutionary leap in the fight against war crimes, particular to this study of the evolution of war crimes.

Article 8 elaborates this criminal act in detail. They are indictable when committed as part of a plan or policy or on a large scale. [248]An extensive definition is provided, categorising the crime into six. Thus, the first category is the grave breaches of the Geneva Conventions of 1949 against persons or property protected under the Conventions. They include several acts like willful killing, torture or inhuman treatment including biological experiment.

It should be bizarrely noted that during WW2, German scientists carried out biological experiments on human-prisoners.

[246] Ocampo Luis Moreno, 'Statement at the ceremony for the solemn undertaking of the Chief Prosecutor', June 16 2003.

[247] Article 5, the Rome Statute of the International Criminal Court.

[248] See Article 8(2)(a), ibid.

Recently, the Russian President was put under investigation by the ICC for, among others, unlawful deportation of children, a war crime.[249]The next category are the serious violations of the laws and custom applicable in international armed conflict, within the established framework of international law. Such violations include intentionally directing attacks against civilian population or against individuals not taking part in the hostilities, attacks against non-military objects, attacking items and personnel in humanitarian assistance, attacking undefended areas and are not military objects, among others.[250]This is the most elaborate category with twenty-four provisions on such serious violations. It should be noted still, that this provision is to do with international armed conflict.

For non-international armed conflict, the Statute provides the jurisdiction *materiae* to include serious violations of Common Article 3 of the Geneva Conventions of 12 August, 1949. They include, albeit not limited to, any of the listed acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause.[251] Concerned with non-international armed conflict, this is the most applicable in the African context where most conflicts fall in this category. Conversely, paragraph d limits the application of the c in non-international armed conflict. It does not apply, for instance, internal disturbances and tensions such as riots.

A further jurisdiction of the ICC extended to non-international armed conflict is where there are serious violations of the laws and customs applicable in armed conflict within the established framework of international law. This is more important to Africa as studies indicate that it has the highest number of NIAC's, with about 35 of them by 2020 as compared to Latin America's 6 or even Europe's 7.[252] This implies that while determining the nature of war crime in an internal armed conflict, resort is made to international standards of the laws and custom of war.[253] The Rome Statute of the ICC is the bedrock of war criminal standards currently.

[249] See Article 8(2)(a)(vii), ibid.

[250] See Article 8(2)(b), ibid.

[251] See Article 8(2)(c), ibid.

[252] Geneva Academy of International Humanitarian Law and Human Rights, Geneve, Switzerland.

[253] See Article 8(2)(e), ICC Statute, supra.

It is as a result of an ages old experience in war. From the medieval conflict to the dawn of modern warfare all the way to the biological warfare. It is a kind of enforcement of the grand humanitarian treaties-the Geneva Conventions. Several crimes that have ever been witnessed in any form of conflict are covered.

2.7 **The Court's Successes since Establishment: An Examination of some Prominent Cases**

The Court has been active since July, 2002 and in this span, it has had some marked effect on the African continent in the field of prosecution of grave international crimes, in particular, war crimes. Although this study set out to examine the Court's effectiveness basing on the uninvestigated cases, it is fair and just to examine some cases prosecuted and assess the reasons for their prosecution in contrast to those uninvestigated. In this study, three of them have been sampled for the reasons given therein.

2.7.1 The Prosecutor v. Jean-Pierre Bemba Gombo[254](Bemba)

Here, the accused was indicted by the Court as a result of a state referral. Jean-Pierre Bemba Gombo led a rebel movement against the government of DRC; the Movement for the Liberation of Congo (MLC), and as such, was the Supreme Commander of its military wing, the Armee de Liberation du Congo (ALC). This outfit was active across the border in the CAR. The then transitional government in CAR, having determined that it was unable to effectively investigate and prosecute the abuses in their territory, they referred their case to the ICC, requiring it to investigate the situation since 1st July2002. The MLC, as one of the active outfits in the territory, was investigated and its leader, Jean-Pirre Bemba Gombo was I indicted. An arrest warrant was issued and he was arrested in Belgium and charged with, among others, war crimes of pillaging, [255]rape[256] and murder.[257]

[254] The Prosecutor v. Jean-Pierre Bemba Gombo, ICC 01/05-01/08.

[255] Article 8(2)(e)

[256] Ibid.

[257] Ibid.

The questions for determination were: i. whether Bemba had had effective control over his military outfit, ii. If a leader could be liable even if he did not have actual knowledge of the crimes under article 28,[258] iii. whether Bemba, as the overall commander, had taken all necessary measures to prevent such crimes.

At the first instance, the Court determined that Bemba had had effective control over the MLC and was fully aware of the crimes.[259] It was also determined that the crimes had been severe and not isolated. That it was the modus operandi of the MLC.[260] However, the appellate court of the ICC determined otherwise although with dissenting judgements. It found that he had been convicted outside the scope of the charges and that his command responsibility had been wrongly assessed.[261] The case highlighted the importance of Command Responsibility. Bemba was not acquitted simply because of the failure of the Court but rather, the person indicted not being the responsible commander of the military wing. Secondly, a non-citizen was tried for crimes committed in a territory.

The overall assessment of the case is that all the 8 judges failed to at least order a retrial on the charges that were not outside the scope,[262] thereby occasioning a miscarriage of justice. But more important, the court, despite being accused of witch hunt, acquitted an African, thereby dispelling the fears thereof. Although the case was investigated, it was as a result of state reference as most of the others that have been prosecuted, whether ending in convictions or acquittals.

2.7.2 **The Prosecutor v. Germain Katanga**[263]**(Katanga)**

DRC ratified the Rome Statute of the ICC on the 11th of April, 2002.[264] The government then referred the situation in its territory to the Court, on the 3rd of March, 2004.[265]

[258] Article 28 of the Rome Statute of the ICC distinguishes between military and non-military superiors, although even a military commander may be a superior under certain circumstances.

[259] Nora, Kersten, 'Distinguishing Military and Non-Military Superiors; Reflections on the Bemba Case at the ICC', Journal of International Justice, vol. 7(5), 2009, pp.983-1004.

[260] Ibid.

[261] Ibid.

[262] Ibid.

[263] The Prosecutor v. Germain Katanga ICC-01/04-01/07.

[264] ICC, 'Democratic Republic of the Congo. Situation in the Democratic Republic of the Congo', ICC-01/04.

[265] Ibid.

The reference required the Court to investigate all the events within the Court's jurisdiction on the territory since 1st July, 2002.[266] Investigations were commenced on the 21st June, 2004 and still ongoing.[267] Following these events, Katanga was indicted for among others, 4 counts of war crimes committed in Begoro, DRC.[268] This included murder, pillaging, attacking civilian populations and destruction of property under article 25(3)(d).[269]He was convicted of the crimes as charged and sentenced to 12 years in prison, although the appeals chamber reduced the sentence.

The significance of this case was that among the orders was a reparation for the victims in form of symbolic compensation, support for housing, income generating activities, education and psychological support. The convict being determined indigent, the Court applied its established fund to cater for the reparation.[270] It should also be noted that also this case was as a result of a state referral, where the government of the DRC had failed to decisively deal with the many rebel outfits within its territory that were threatening its very existence. The ICC was called in to help settle a score of some sort, an extension of conflict as per some TWAIL scholarship.[271]

2.7.3 **The Prosecutor v. Bosco Ntaganda**[272] (**Ntaganda**)

As a result of the DRC reference, Bosco Ntaganda was also indicted by the ICC.[273] He is the former deputy chief of staff and commander of operations of the *Forces Patriotiques pour la Liberation du Congo* (FPLC).[274] Two warrants were issued against him on the 22nd of August, 2006 and a another on the 13th of July, 2012.[275] He was accused of 13 counts of war crimes and 5 crimes against humanity all committed in Ituri, DRC. He was found guilty on the 8th of July,2019 and sentenced to 30 years in prison, the appeals chamber confirming the same. Just as in Katanga, this case also passed orders to reparation to the victims.[276]

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[266] Ibid.

[267] Ibid.

[268] Icc, 'The Prosecutor v. Germain Katanga', ICC-01/04-01/07.

[269] Ibid.

[270] Article 79, the Rome Statute, supra.

[271] See, for instance, Parvathi, Menon, supra.

[272] The Prosecutor v. Bosco Ntaganda, ICC -01/04-02/06.

[273] Ibid.

[274] Ibid.

[275] Ibid.

[276] Ibid.

2.8 The ICC and the African Perceived 'Race-Hunting'

The diplomatic receptive role of African states in the establishment of the ICC, with its unprecedented legal mandate, was a triumph for a continent with a recent history of legal — diplomatic subjugation. African countries not only played a role in the diplomatic processes but also were fundamental in the actualisation of the Court. In fact, Senegal was the first state to ratify the Statute. Currently, out of 54 African states, 34 are members and notably, its only African states that have triggered investigations by way of state referrals.[277] Africa has been so cooperative that it has surrendered several suspects to the Court. In this way, the study notes that the Court garnered support from Africa.

In total, the Court has investigated 11 situations as of 2019, indicting 32 suspects.[278] Out of the 11, 5 were state referrals, to wit: DRC, CAR, Uganda, Mali and Cote de Voire.[279] 4 proprio motus, to wit Kenya, Gabon and Georgia outside Africa.[280]Only 2 were referred by the UNSC, that is; Libya and Darfur.[281]It should as well be noted that even during the resolutions to refer Libya and Darfur to the ICC by the UNSC, no African state voted against them.[282]They either voted in favour or abstained.[283]The ICC is now investigating situations in Afghanistan, Colombia, Palestine, alleged crimes in Iraq by the UK forces, Ukrainian Separatists alleged crimes and alleged Russian forces crimes in Ukraine since 2013.[284]

State referrals have been the most favoured mechanism of ICC prosecutions. Even during the preparation of the Statute, it is noted that this mechanism never had controversies.[285]African states have favoured and applied this mechanism to fight their opponents.

[277] Marshet Tadesse Tessema & Marlen Vesper-Graske, 'Africa, the African Union and the International Criminal Court: Irreparable Fissures?' FICHL Policy Brief Series No. 56 (2016).

[278] Chantal, Meloni, 'Referral by State Party: International Criminal Court (ICC)', May, 2019.

[279] Ibid.

[280] Ibid.

[281] Ibid.

[282] Ibid.

[283] Ibid.

[284] Ibid.

[285] Ibid.

For instance, Uganda has applied it against the LRA rebels, DRC against many rebel groups, Mali against the northern rebels, wherein Ahmad Al Faqi Al Mahdi[286]was found guilty of war crimes and sentenced to 9 years by the Court on the 27th of September, 2016. With the Court acknowledging notable complementarity steps in Mali, the investigations were concluded. The state of Comoros also referred Israel to the Court as a result of the IDF raid on the naval flotilla, the Mavi Marmara, an aid carrying vessel to Gaza in which 9 people were killed and several injured.[287] Six American and Latin American ICC member states have also referred the case of Venezuela to the ICC wherein the government of Venezuela is accused of crimes indictable by the ICC committed in the context of the demonstrations and political unrest in their territory since April, 2017. The referring states include Canada, Argentina Republic, Chile, Colombia, Peru and Paraguay.[288]

With a few successes in cases that have been brought to the Court through state referrals and several challenges with those triggered through other means like UNSC reference and proprio motu, an investigation into this state of affairs was worthy a study. The case of African witch hunt fails with the examination of the state referrals, where African leaders themselves have been utilizing the Court to refer their opponents and indeed most of the successful cases have been such. As writers note, the solution lies in more justice not less.[289]

It is the proprio motu and the UNSC trigger mechanisms, those which affect even the sitting Presidents that have led the hitherto harmonious relationship between the ICC and Africa bitter. The issuance of an arrest warrant against the then President of Sudan, Omar H.A. Al Bashir was exacerbated by a followed issuance of another warrant against the then President of Kenya, Uhuru Muigai Kenyatta and his deputy, William Samoi Ruto.[290] Through its union, Africa reacted in a very hostile manner. In the summit of May, 2013, the Chairperson then had this to say:

[286] Ibid.

[287] Ibid.

[288] Ibid.

[289] Coalition for the International Criminal Court, 'Africa and the International Criminal Court. Setting the Facts Straight', at https://coalitionfortheicc.org/explore-international-criminal-court-africa-icc.

[290] The Prosecutor dropped the charges later on the 5th of December, 2014, and in March, 2015, the Kenyatta case was terminated by the ICC, Ruto and Joshua Arap Sang cases vacated in 2016, see Prosecutor v. Ruto and Sang, case No. ICC-01/09-01/11, Decision on Defence Applications for Judgment of Acquittal.

the process the ICC is conducting in Africa has a flaw. The intention was to avoid any kind of impunity, ill-governance and crime, but now the process has degenerated into some kind of race hunting. (Hailemariem Desalegn, the then Ethiopian Prime Minister and Chairperson of the AU Summit).[291]

The AU Assembly then held an extraordinary summit and requested that no international tribunal or Court should commence or continue charges against serving heads-of-state or Government or anybody acting in such capacity.[292] The Assembly then instructed Kenyatta not to appear before the Court until the UNSC responded to the deferral request.[293] On the contrary, the ICC has, in fact, even acquitted some high-ranking Africans and former heads of state. Abdallah Al Senussi, the former intelligence chief in Libya previously indicted by the Court with Saif Al Islam was determined inadmissible despite the fact that the UNSC had referred his case to the ICC.[294] Similarly, Laurent Gbagbo, the former President of Ivory Coast and his co-defendant, Charles Ble Goude were also acquitted by the same Court on the grounds of lack of sufficient evidence.[295]

2.9 **The Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Rights** (**the Malabo Protocol/ the Protocol**)

Following up to the African Union's 12th Ordinary Session, Addis Ababa, February 2009, the African Union Commission was requested to examine the possibility and implications of empowering the African Court on Human and People's Rights to try international crimes such as genocide, crimes against humanity and war crimes.[296]

[291] Marshet Tadesse Tessema & Marlen Vesper-Graske, supra.

[292] AU Extraordinary Assembly held on the 12th day of October, 2013 sat to discuss the future of the African relationship with the ICC.

[293] Marshet Tadesse Tessema & Marlen Vesper-Graske, supra.

[294] ICC, 'Decision on the Admissibility of the Case Against Abdullah Al-Senussi', ICC-01/11-01/11-466-Red, Pre-Trial Chamber1, 11 October, 2013.

[295] The Prosecutor v. Laurent Gbagbo and Charles Ble Goude, ICC-02/11-01/15.

[296] Gerhard, Werle and Moritz, Vormbaum, 'The African Criminal Court. A Commentary on the Malabo Protocol', International Criminal Justice Series, Springer, vol. 10, 2017.

Several resolutions to establish an intra-African criminal jurisdiction.[297] These culminated into the 2014 summit meeting in Malabo, Equatorial Guinea where the Protocol on the Amendment to the Protocol on the Statute of the African Court of Justice and Human Rights, the "Malabo Protocol", was adopted.[298]

This African criminal court was viewed as a regional alternative as envisaged in the "ICC Withdrawal Strategy Document" that had encouraged AU member states to withdraw from the ICC and advocated for a regional criminal justice system.[299] AU members have been encouraged to ratify the protocol in order to attain the force of law.[300] However, for political and contentious provisions on immunity, the protocol has had a very slow ratification progress, albeit with a fairly low number of required ratifications.[301] The 15th member, Mauritania, ratified the protocol on the 9th day of May, 2023,[302] and the protocol is likely to attain a force of law.

2.9.1 **Analysis of some provisions of the "Malabo Protocol" pertinent to the current study**

The Preamble to the Protocol, quite elaborate as it is, does not mention the international obligations established under the UN nor the ICC Statute howsoever.[303] Rather, it keeps mention of the AU obligations in Africa. From the start, it can be observed that this is a parallel international criminal justice system, in opposition to the ICC arrangement.

[297] Ibid.

[298] Ibid.

[299] Allwell, Uwazuruike, 'The AU's Journey to an African Criminal Court: a regional perspective', Global Affairs, 2021. https://doi.org/10.1080/23340460.2021.1959375

[300] Ibid.

[301] Article 11(1) of the Protocol requires 15 ratifications for it to enter into force.

[302] Data Protection Africa, 'Africa: AU' s Malabo Protocol set to enter force after nine years', May 19, 2023.

[303] See the preambles to the Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Rights.

On the structure, the Protocol establishes the African Court of Justice and Human and People's Rights, (ACJHPR), replacing the African Court of Justice and Human Rights,[304] with both original and appellate jurisdictions over the offences falling under the 3 sections of the Court.[305] These sections are: the general affairs, the human and people's rights section and the international criminal law section, where war crimes fall.[306] Also, the Court has 3 chambers, the pre-trial, the trial and the appellate chamber.[307] Just as the ICC, the ACJHPR also has the Office of the Prosecutor (OTP). This office investigates and prosecutes alleged war criminals, in particular; and acts independently of the Court.[308] The Protocol further establishes the Peace and Security Council, quite similar to the UNSC, with powers to refer a case to the Court.[309] In the Protocol still, an African individual can report a case to the Court, plus a civil society group with observer status with the AU.[310] All these can refer cases to the Court except that the state from which a referred case originates must have declared acceptance of the Court, unlike the provisions of the Rome Statute on the UNSC trigger mechanism.[311]

War crimes, among other 13 offences triable by this Court, are defined elaborately but copying from the Rome Statute.[312] However, in addition to them, there are certain notable would-be national offences such as corruption and unconstitutional change of political power.[313] The Protocol further establishes international crimes as triable by the Court such as terrorism, illicit trading in natural resources and money laundering.[314] For war crimes, they are defined to mean the grave breaches of the Geneva Conventions and the Protocols thereto, plus a range of the breaches under the Rome Statute, without reference to it at all.[315]

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[304] Article 8, ibid.

[305] Article 3, ibid.

[306] Article 16, ibid.

[307] Ibid.

[308] Article 22A, ibid.

[309] Article 15, ibid.

[310] Article 16, ibid.

[311] Ibid.

[312] Articles 14(1)(3) and 28D(a), ibid.

[313] Article 14(1), ibid.

[314] Ibid.

[315] Article 28D, ibid.

2.9.2 **Examination of immunity provisions in the Protocol**

The tirade against the ICC from the African leadership was as a result of the warrants issued against the leaders of Libya, to some extent, and that against the then President of Sudan, Omar Al Bashir.[316] Indeed, AU seemed comfortable and cooperative when warrants had been issued against war criminals fighting political establishments such those against Jean-Pierre Bemba, Germain Katanga, Joseph Kony, Laurent Gbagbo and the likes.[317] The AU even urged William Ruto, who had earlier been indicted by the ICC, not to cooperate when he assumed Kenyan Presidency.[318] The ICC Withdrawal Document was as a revolt by the AU against the ICC for issuing warrants against fellow Presidents.[319] As a result, an immunities provision was inserted in the Protocol particularly shielding sitting heads of state and other high ranking government figures from prosecution for alleged offences triable by the ACJHPR.[320]

Immunities shielding such war criminals are believed to have a negative effect on the fight against impunity and attaining lasting peace.[321] This clause on immunity had not been in the first draft of 2012. The provision was inserted as a rebellious move against the ICC and an alternative opposition thereto.[322] It is seen as a step back in the fight against impunity for grave breaches of international humanitarian law. Proponents of the immunities have argued that since the crimes are not affected by the statute of limitation as provided for in the Protocol, alleged offending heads of state could be tried at the time they leave office.[323] Contrary to this assertion, though, many African leaders never peacefully leave office, if they even leave it at all. Some have been presidents for life and only vacate office on death.

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[316] Dire, Tladi, 'Immunities', Gerhard, Werle and Moritz, Vormbaum, (eds.), International Criminal Justice Series, the African Criminal Court, a commentary on the Malabo Protocol, vol. 10, ASSER PRESS.

[317] Gerge Shadrack, Kamanda, 'The International Criminal Court in Africa: A motion for continued constructive engagement', Research Paper, International Journal of African Studies, 2021.

[318] Ibid.

[319] Ibid.

[320] Ibid.

[321] Larissa, van den Herik and Elies, van Sliedregt, 'Internationa Criminal Law and the Malabo Protocol, About Scholarly Reception, Rebellion and Role Models', Grotius Centre Working Paper Series, 2017/066-ICL.

[322] Ibid.

[323] Ibid.

Others have been forced into exile and on several occasions, they opt for friendly government when seeking refuge. In conclusion therefore, immunity provisions in the Protocol will likely help offending African heads of state evade trial and accountability and they are a retrogression towards authoritarianism.[324]

Notwithstanding the above observations, a close examination of the cases before the ICC to establish whether the cynicism among the African leaders towards the ICC are justified. This analysis paints a rather different phenomenon. One, the cases before the ICC end up there legally, having followed the established trigger mechanism as already discussed.[325] As we have realized, several of the cases were by state reference. The only sentimental cases were the only two referred by the UNSC and this was because one of them, Darfur, indicted an African head of state, among the ranks of the AU leadership.[326] Secondly, considering the Court's membership, out of the 122 member states of the ICC as by 2022, Africa has the biggest share, 33 member states.[327]

Finally, African leadership has great support for the referrals made by other African states of their situations to the ICC.[328] DRC, Benin and Tanzania, for instance, supported the UNSC referral of the Darfur case to the ICC,[329] while South Africa, Gabon and Nigeria voted in favour of the UNSC referral of Libya.[330] Similarly, Ivory Coast submitted voluntarily to the Court's jurisdiction and undertook to cooperate.[331] Kenya's President then, Mwai Kibaki, and the Prime Minister, Raila Odinga, supported the Prosecutor's independent decision to open investigations into the human rights violations following the violent protests after the 2007 Presidential elections.[332] Again, supported by ECOWAS, Mali referred its situation in the north to the ICC investigations. Fatou Bensouda, the ICC Prosecutor had this to say:

[324] Makau, Mutua, 'Africans and the ICC: Hypocrisy, impunity and perversion'. 2016, In K. Clerk, et al., (eds.), Africans and the ICC: Perceptions of justice, pp. 47-60, Cambridge University Press, London.

[325] George Shadrack, Kamanda, 'The International Criminal Court in Africa: A motion for continued constructive engagement', International Journal of African Studies, Case Western Reserve University, School of Law, 2022.

[326] Ibid.

[327] Ibid.

[328] Ibid.

[329] Ibid.

[330] Ibid.

[331] Ibid.

[332] Ibid.

"The high rate of referrals from Africa could just easily show that the leaders on the continent were taking their responsibilities to international justice seriously. African states receive more than half of the Office of the Prosecutor's total requests for cooperation and 70% of these requests are met with positive responses."[333]

As some notable international law scholars have emphasized, the only situations in which the Court's jurisdiction is truly controversial are those that have been referred by the UNSC.[334] African leaders, in fact, have only objected to the two references, that is, Darfur and to a lesser extent, Libya.[335] This is why, in summary, the argument ought to refocus on the role of the UNSC, especially its lack of action elsewhere such as in the subsequent case studies, but not the ICC on the African continent.[336]

This notwithstanding, the Court's failure to effect warrants and initiate investigations in many crime-infested conflicts has dented its relevance. The non-action in these severe situations warranted an investigation, thus the relevance of the study. In the next chapter, the study analyses the incidence of war crimes in Africa using the selected case studies, pointing out the background to the conflicts, the reasons for the wars, the parties involved, how these conflicts ended and the prosecutorial efforts after the wars for the war criminals to show whether actually the ICC-African relationship is a 'race-hunt' and examine whether the Court has been effective.

[333] Coalition for the International Criminal Court, ICC Investigations. https://www.coalitionfortheicc.org/explore/icc-investigations.

[334] See, for instance, Cherf, M. Bassiouni and Douglas, Hanse, 'ICC Forum: The Inevitable Practice of the Office of the Prosecutor', 24 November, 2019.

[335] Ibid.

[336] Ibid.

Chapter Three

The Complexities and Accountability for War Crimes in African Conflicts

3.0 Introduction

This chapter presents the complex nature of African conflicts. It analyses how the conflicts are sometimes ethnic, localized and with numerous militant groups taking part in the hostilities. The parties are at times foreign supported and to make it worse, the international support at times comes from the great powers with permanent seats on the UNSC. Other conflicts are taking place in almost failed states, with state institutions nearly collapsed and warlords governing certain areas under their occupation. The government has completely lost control over them and cannot enforce any warrants. These factors make accountability efforts very complex and delicate as authorities seek to mend relationships among, for instance, the different ethnicities that have been engaged in the commission of international war crimes. In the analysis, the nature of war crimes, who the belligerents are/were, how the hostilities are/were conducted, how the selected conflicts ended, what has been the prosecutorial response to the alleged war crimes in the selected conflicts and if so, who faced/is facing justice; are the main focus of the chapter. The answers to these questions lead to the examination of the ICC war criminal prosecution and the challenges it faces in the subsequent chapter. Of the war crimes on the African continent, the study focuses on four selected cases, namely: Sudan, the Central African Republic (CAR), the Ethiopian (Tigray) conflict and Libya.

Libya, Sudan, the Central African Republic and Ethiopia, plus many other African states, have remained conflict-stricken to watch. They have been selected despite other conflict zones since they bring out the thematic analyses of the challenges facing the ICC more aptly. For Ethiopia, instability preceded the war that began in 2020.[1] It then gained intensity leaving a great human toll in the wake as the Federal government tried to quell the advances of the Tigray People's Liberation Front.[2]

[1] New Lines Institute for Strategy and Policy, 'Genocide in Tigray: Serious Breaches of International Law in the Tigray Conflict, Ethiopia, and Paths to Accountability', June 2024.

[2] Ibid.

A humanitarian crisis unfolded in many parts of the country as the African Union embarked on the mediation processes.[3] To date, prosecution of the alleged war criminals on either side has remained elusive.

The choice of Ethiopia is grounded in the need to examine the application of the UNSC referral as a trigger mechanism suited for states that are non-members of the Rome Statute, the state not being a member. National response to prosecution is also examined to see whether local justice systems are sufficient in the fight against impunity for grave breaches of international humanitarian law, in particular, war crimes. The enquiry focuses on the geopolitical factors that have affected the application of this mechanism. The case builds jurisdiction as the thematic relevance.

The Central African Republic, (CAR), has been another conflict-infested state in Africa of recent. The conflict ensued for several years, leaving the country in an intractable cycle of violence. In the wake, several humanitarian breaches were witnessed and the ICC commenced its investigations into the same. However, with just a handful of the culprits indicted, the Court then announced its conclusion of the process and that it would not pursue new lines of inquiry within the country yet national systems did not have the capacity to effectively prosecute the perpetrators. To fill the justice gap, the UN, in conjunction with the CAR government, established a hybrid court- the Special Criminal Court (SCC). The study examines the effectiveness of such courts in the absence of the ICC coupled with broken national systems, building on the theme of accessibility as opposed to the far-off ICC court system.

Yet for Sudan, the choice is based on the fact that the state in question, just as Libya and Ethiopia, is a non-member of the Rome Statute. But what is particularly special in this case is the fact that there have been two successive conflicts under two different regimes and there exists a UNSC ICC referral covering only one region, Darfur, referred during the Al Bashir regime.[4] This UNSC referral does not cover the entire country yet the ongoing conflict is particularly a fight for power, majorly centering in the capital, Khartoum.[5]

[3] Ibid.

[4] Congressional Research Services, 'The War and Humanitarian Crisis in Sudan',19 November, 2024.

[5] Ibid.

Another special feature, albeit not under the current examination of the study, is the arrest warrant issued under the auspices of the Darfur conflict against a seating head of state.[6]Pertaining to this study, it is special in a way that although it is not the Darfur conflict under examination, questions shall be raised pertaining to geopolitics and sovereignty as to why the same UNSC is hesitant to refer the current situation to the ICC.

The other question that will come later in the subsequent chapter is state corporation in cases of ICC warrants with reference to that against Omar Al-Bashir, the former president, with particular emphasis on the South African case against the government for its failure to effect the warrant,[7] thematically emphasising sovereignty, cooperation, immunity and jurisdiction.

For Libya, yet another case in the study, the choice is informed by the peculiar character of the conflict and the application of the complementarity principle under the Rome Statute dispensation. Unlike the other cases, it can be ably described as a failed state.[8] There are several factions with each controlling a given territory as will be discussed in the subsequent chapter.[9] To make it worse, many of the factions are backed by foreign states, further exacerbating the already divisive nature of the conflict. Another intricacy in the ICC prosecution efforts is the factional amnesty granted to one of the most prominent war criminals, Saif al-Islam Gaddafi.[10] This is another case that will be discussed in the subsequent chapter to examine the themes of sovereignty and complementarity in the face of TWAIL, the questions being when is there closure in the case of a war criminal? Must that criminal be ICC adjudged? Can the affected society grant amnesty? Does the amnesty require participation of the citizens upon whom the atrocities were meted?

3.1 Libya

[6] United Nations Security Council Resolution 1593, 2005.

[7] The Minister of Justice and Constitutional Development v. The Southern African Litigation Centre (867/15) [2016] ZASCA 17 (15 March, 2016).

[8] Richard Ware, 'Libya: The Consequences of a Failed State', U.K. Parliament, House of Commons Library, Research Briefing, 18 May, 2018.

[9] Sari Arraf, 'Geneva Academy, The War Report 2017, Libya: A Short Guide on the Conflict', June 2017.

[10] The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al Senussi, No. 01/11-01/11.

The ongoing conflict in Libya is characterized by a myriad of armed groups and actors who are divided across different ideological, national, regional, ethnic and tribal lines. The tendency to depict the conflict as a rivalry between nationalist and Islamist camps suffers from oversimplification, because it tends to detract attention from other factors that come into play. These factors include regional tensions between the historical provinces of the country; tribal and ethnic tensions, which in some cases date back to discriminatory policies pursued in the era of the Gaddafi regime, in addition to conflicts between revolutionary forces and actors identified with the older regime. Moreover, armed groups are strongly embedded in their local context, which means that ideological and political agendas intersect with local identities as well. With growing competition over resources in the country, these conflicting allegiances and identities have further intensified with armed groups vying for a stake in Libya's future.[11]

The current proliferation of armed groups in Libya is anchored in the settings of the 2011 uprisal, which led to the ouster of the Gaddafi regime later that year. The violent crackdown of the former regime on protestors led to the emergence of various local councils and armed militia groups on a city-by-city basis.[12] In addition, the Transitional National Council (TNC) was established in February 2011 by members of the exiled opposition and high-ranking defectors, to act as the military leadership of the uprisal and the political representative of the Libyan opposition.

While the TNC eventually gained wide recognition from the international community, it failed to build close relations with local councils and armed groups leading the uprisal.[13] More importantly, the TNC did not succeed in disarming these groups or incorporating them effectively into the state security apparatus, which had almost entirely collapsed after the fall of the Gaddafi regime.

As a result of a disarrayed process of integration, many armed groups were put on the payroll of the government but retained a high degree of autonomy from the state.[14]

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[11] Gartenstein Ross and N. Barr, 'Dignity and Dawn: Libya's Escalating Civil War, International Centre for Counter-Terrorism Research Paper, Feb 2015, p17.

[12] Ministry of Foreign Affairs of the Netherlands: Libya: Militias Tribes and Islamists.

[13] Lecher W., 'Fault Lines of the Revolution: Political Actors, Camps and Conflicts in the New Libya, Research Paper, 2013, German Institute for International and Security Affairs, 4 May 2013, p9.

[14] Ministry of Foreign Affairs of the Netherlands: Libya, supra.

In August 2012, the TNC transferred power to the newly elected General National Council (GNC). Yet, none of the successive governments that emerged from the Council managed to stop state funding for these armed groups or bring them under control, and the numbers of fighters on the government payroll was recorded to be around 200,000 at the beginning of 2014.[15] In fact, by that time many armed groups had bolstered their power, and some political parties and figures had aligned themselves with certain militias.[16] As a result, armed groups came to exert control over the work of the parliament and state institutions, thus hindering the basic functioning of the government and putting the viability of state institutions in peril. This was evidenced on numerous occasions in 2013–2014, when armed groups allied with various political factions stormed the GNC and other government buildings, demanding political concessions.[17] The situation of violence deteriorated in mid-2014, when Ahmed Maiteeq, widely perceived as backed by Misrata-based Islamist groups, was appointed as the new Prime Minister. On 16 May 2014, General Khalifa Haftar launched Operation Dignity with the purpose of eradicating Islamist militias in Benghazi. Two days later, Zintani militias allied with Haftar raided the GNC and declared the legislative body suspended.

Earlier that year, the GNC's decision to extend its mandate, which was originally due to expire on February 2014 – had been highly contentious,[18] leading Haftar to conduct an abortive coup d'état. This extension was more criticized given the GNC's failure to address the country's economic, political and security problems. The decision came after an Islamist/ Berber/Misratan bloc gained control of the GNC, which was narrowly divided between a coalition generally described as nationalist (the National Forces Alliance) and a rival coalition composed of Islamist factions.[19] Consequently, new elections were scheduled on 25 June 2014.

Following the GNC raid, Misrata-based militias moved to the capital at the behest of political allies in the Council. This was followed by clashes between these groups and Zintani militias that initially

[15] Salah H., 'Libya Militias and the Quest for National Unity', Human Rights Watch, 27 October 2015.

[16] Ministry of Foreign Affairs of the Netherlands: Libya, supra.

[17] Ibid.

[18] Middle East Institute, 'Libya Congress Extends its Mandate Until End of 2014', 23 December 2013.

[19] Gartenstein, Ross and N. Barr, supra.

occurred on a limited scale.[20]In Benghazi, Islamist factions were prompted to unite in order to rebuff Haftar's forces. They then announced the establishment of the Benghazi Revolutionaries Shura Council (BRSC), an umbrella group of Islamist militias, including Ansar al-Sharia in Libya (ASL) and the 17 February Martyrs Brigade.[21]

Meanwhile, the parliamentary elections in June resulted in gains for the nationalist bloc at the expense of the Islamist/Mistran bloc that had previously dominated the GNC.[22] This shift led to the emergence of a coalition of Islamist/ Misratan militias, set to take control of the capital. They launched Operation Libya Dawn in order to drive out Haftar-aligned Zintani militias from their positions in the capital, including the strategic Tripoli International Airport, which had been under the control of the al-Qa'qa and Sawa'iq Zintani militias since the fall of the former regime in 2011.

The intensity of clashes forced the newly elected parliament, now called the House of Representatives (HoR), to retreat to the city of Tobruk in the east of the country.[23] Tripoli International Airport was seized by Libya Dawn forces, which had gained control over most of the capital.[24]wo days later, former GNC members from the losing Islamist/Misratan bloc announced the reinstatement of the GNC, thus marking the beginning of a harsh split in the political institutions of the country.

The Libyan Supreme Court invalidated on procedural grounds a constitutional amendment on the basis of which the HoR was established. While the court refrained from decreeing the dissolution of the HoR, the ruling de-legitimized the newly elected parliament and further complicated the political situation in the country. The HoR rejected the ruling by claiming that the decision was rendered under pressure from Islamist militias controlling the capital, and continued to hold its sessions.[25]

[20] Ibid., p 23.

[21] Ibid., p22.

[22] Eljarh, M., 'Libya's Islamists Go for Broke', Foreign Policy, 22 July 2014.

[23] Humphrey, B, 'Theoretical Implications of Moving the Libyan Government to Tobruk', Arsenal for Democracy, 24 August 2014.

[24] 'Tripoli Airport Seized by Islamist Militia', *Al Jazeera,* 23 August 2014.

[25] 'H.o.R. Says Operation Dignity Under National Army', *Libya Herald,* 17 November 2014.

In the same month, the HoR endorsed Operation Dignity as an operation under the General Chief of Staff of the Libyan Army, Abd-al-Raziq al-Nazuri.[26]Haftar was eventually appointed by the HoR as Chief of Staff of the Libyan Army.[27]

3.1.1 The Warring Parties

General National Council (GNC): This was Libya's first democratically-elected parliament (in July 2012) after the fall of the Gaddafi regime.[28] Following the parliamentary elections of June 2014, which resulted in a considerable loss for the Islamist/Misratan bloc that previously dominated the GNC, some members of that bloc refused to hand over power to the newly elected HoR and announced, in August 2014, the reinstatement of the GNC.[29] Some members of the GNC, in a contentious move, declared its dissolution and the establishment of the High Council of State in its place.[30]The GNC is presided over by Nuri Abu Sahmain and its aligned government, the National Salvation Government, is headed by Khalifa al-Ghweil, who are both strong opponents of the PC and the LPA.[31]

House of Representatives (H.o.R.): This is Libya's elected and internationally recognized parliament, which came into being following the 2014 June elections.[32] It is headed by Ageelah Saleh, who has strong links with General Haftar. Due to Operation Dawn,[33] the HoR had to retreat to the city of Tobruk in the east of the country. The HoR-linked government is headed by Abudullah al-Thinni and sits in the eastern city of Bayda.[34] Until late 2015, al-Thinni's government was the internationally recognized government of Libya.

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[26] 'H.o.R. Says Operation Dignity Under National Army', *Libya Herald,* 17 November 2014.

[27] 'Libya Names Anti-Islamist General Haftar as Army Chief', *BBC News,* 2 March 2015.

[28] Sari Arraf, 'Geneva Academy, supra.

[29] Ibid.

[30] Ibid.

[31] Ibid.

[32] Ibid.

[33] Ibid.

[34] Ibid.

The Presidential Council (PC): Born out of the UN-brokered LPA in December 2015, and functions as a head of state and Supreme Commander of the Libyan Army.[35] It consists of nine members and is presided over by Faiez al-Serraj. According to the LPA, Serraj would head the GNA, while the two governments linked to the HoR and GNC would be dissolved.[36] The GNA came to be recognized by the international community as the legitimate government of Libya, though it was not endorsed by the HoR as required by the LPA.

Operation Dignity: This was a military campaign launched in May 2014 by General Khalifa Haftar with the purpose of eradicating Islamist militias in Benghazi, but which gained wider scope with time.[37]Besides the LNA, the alliance of armed groups behind Operation Dignity includes Zintanti militias from the western town of Zintan, (most notably the al-Qa'qa, Sawa'iq and Muhammad al-Madani militias),[38] the Benghazi-based al-Sa'iqa Special Forces and Cyrenaica Army in the east, and ethnic Tubu and Tuareg fighters in the south.[39]

Operation Dawn: Another military outfit, Operation Dawn was launched by a coalition of Islamist/Misratan armed groups in July 2014 in order to drive out Haftar-aligned Zintani militias from their positions in Tripoli.[40]The coalition included a number of Misratan militias, most notably, Libya Central Shield Force, Islamist-aligned militias from Tripoli, the LROR, Zawiya brigades, the Knights of Janzour militia and various Barbar militias.[41]

[35] Ibid.

[36] Ibid.

[37] Ibid.

[38] Ibid.

[39] U.K. Home Office, Libya: Security and Humanitarian Situation, Country Policy and Information Note, p18, 27 January 2018.

[40] Sari Arraf, 'Geneva Academy', supra.

[41] Ibid.

The coalition had fractured long before the entry into force of the LPA in late 2015, with tensions growing between Misratan factions and Tripoli-based groups in particular.[42]The Steadfastness Front established by Saleh Badi in mid-2015 is considered to be the successor of the former coalition.[43]

Libyan National Army (LNA): Although proclaimed by its leader, General Khalifa Haftar, to be the national army of Libya, it is, in fact, a mixture of military units, former police officers and tribal or regional-based armed groups.[44] The LNA came to the fore in Mid-2014 with the launch of Operation Dignity.[45] In March 2015, Haftar was designated by the HoR as Chief of Staff of the Libyan Army. The LNA has a strong hold on the eastern part of the country with control over some parts in Central Libya.

Zintani Militias: These are armed groups from the western city of Zintan, who are allied with LNA forces. They were driven out of Tripoli as a result of Operation Dawn.[46] Some later joined the so-called Tribal Army – comprising fighters from the Warshefana region and other tribal elements from western Libya – to confront Libya Dawn forces.[47]They held Saif al-Islam in captivity for over five years until his Libya Shield Forces (LSF), an umbrella coalition of armed groups that was established in 2012 and nominally under the authority of the Ministry of Defense freed him. It comprises three largely independent divisions that are named after their geographical locations, namely: the Eastern, Central and Western Shields.[48] The eastern branch, (also called Libya Shield One), is part of the Benghazi Revolutionaries Shura Council (BRSC).[49]

[42] Toaldo Mattia and Fitzgerald Mary, 'A Quick Guide to Libya's Main Players', European Council on Foreign Relations, Middle East and North Africa', 19 May 2016.

[43] Wehrey F. and Abrababah A., ' Taking on Operation Dawn: The Creeping Advance of the Islamic State in Western Libya', Carnegie Middle East Centre, 24 June 2015.

[44] Toaldo, Mattia and Fitzgerald, Mary, supra.

[45] Sari, Arraf, 'Geneva Academy, supra.

[46] Ibid.

[47] Toaldo Mattia and Fitzgerald, Mary, supra.

[48] Sari Arraf, 'Geneva Academy, supra.

[49] Ibid.

The Central Shield Force is predominantly composed of Misratan militias and, together with the Western Shield, was a key component of the former Libya Dawn coalition.[50]

Misratan Third Force: This is an armed group falling under the authority of Misrata's Military Council and led by Jamal al-Treki.[51] The Third Force was originally deployed in the southern part of Libya by the National Salvation Government in early 2015 in order to stabilize communal fighting in Sabha.[52] The group had to withdraw from some of its positions in the region following heavy clashes with LNA forces in mid-2017.[53] It is considered to be loyal to the GNA.[54]

Benghazi Revolutionaries Shura Council (BRSC): This is an umbrella group of Islamist militias that united in June 2014 to rebuff Haftar's forces in Benghazi. It included the former Ansar al-Sharia in Libya, the 17 February Martyrs Brigade, the Rafallah al-Sahati Brigade and Libya Shield One. Its presence in Benghazi today is limited to the districts of Sabri and Souk al-Hout in the city centre.[55]

Ansar al-Sharia in Libya (ASL): A radical Islamist group that was originally established in Benghazi in 2011, the group is affiliated with al-Qaeda and is considered to be responsible for the September 2012 attack on the US Consulate in Benghazi.[56] Following the attack, the group went through a process of rebranding, changing its name from Katibat Ansar al-Sharia in Benghazi to Ansar al-Sharia in Libya.[57] This change reflected the group's plan to expand its activity to the rest of the country, later leading to the emergence of affiliates in the cities of Derna, Sirte and Ajdabiya.[58] Until recently, it was the leading force in the BRSC. It announced its dissolution in May 2017, citing heavy losses that have wiped out its leadership.

[50] Ibid.

[51] Ibid.

[52] Wehrey, F., 'Insecurity and Governance, Challenges in Southern Libya', Carnegie Endowment for International Peace, 30 March 2017.

[53] Sari, Arraf, 'Geneva Academy', supra.

[54] Ibid.

[55] Ibid.

[56] Toaldo, Mattia and Fitzgerald, Mary, supra.

[57] Sari, Arraf, 'Geneva Academy', supra.

[58] Ministry of Foreign Affairs of the Netherlands: Libya, supra.

Islamic State in Libya (ISIL): This first emerged in early October 2014, when Islamist factions in the eastern city of Derna pledged allegiance to the Islamic State.[59] It was, however, ousted from the city in mid-2015 by the DMSC.[60]In March 2015, ISIL went on to seize the coastal town of Sirte, which was only liberated in late 2016 following Operation al-Bunyan al-Marsous. Currently, the group's presence in Libya is limited to desert areas in the south and some cells around the country.[61]

Derna Mujahideen Shura Council (DMSC): A coalition of jihadist militias that was formed in December 2014 in opposition to ISIL and the Islamic Youth Shura Council in Derna.[62]It managed, half a year later, to oust ISIL from the city, which has since remained under an LNA blockade. Following the terrorist attack on Egyptian Copts in May 2017, the Egyptian Air Force launched several airstrikes against DMSC positions in Derna.[63] The city remains the last key centre in eastern Libya that the LNA has been unable to take.[64]

Benghazi Defense Brigades (BDB): This was formed in May 2016 with the purpose of supporting the BRSC and retaking Benghazi from Haftar-aligned forces. It is comprised of a number of anti-Haftar army and police personnel as well as militiamen of various political stripes, including hardline Islamists. The group was recently involved, together with the Misratan Third Force, in heavy clashes against LNA forces in South Libya.[65]

Libyan National Guard (LNG): A coalition of militias formed in February 2017 in support of the GNC-linked government of Khalifa al-Ghweil. The LNG is composed largely of Misratan militias with a number of Amazigh militias, and also includes the LROR.

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[59] Sari, Arraf, 'Geneva Academy', supra.

[60] Ibid.

[61] Ibid.

[62] Hate Speech International, 'Mapping Libya's Islamists', 7 June 2017.

[63] Sari, Arraf, 'Geneva Academy', supra.

[64] 'LNA Airstrikes on Derna After Haftar Appoints New Head of Operations', *Libya Herald*, 17 June 2017.

[65] Sari, Arraf, 'Geneva Academy', supra.

The coalition is reported to exert control over almost all of western Tripoli, whereas the rest of the capital is controlled by forces loyal to the GNA.[66]

Presidential Guard: This is an armed military outfit created by the PC in May 2016 to secure government buildings and vital installations in Tripoli. Some units of the Presidential Guard later turned against the PC by supporting an attempt of the GNC-aligned government to reassert itself in the capital in October 2016.[67]

3.1.2 Foreign Interference in the Libyan Conflict

Egypt: The neighbouring country plays an active role in the Libyan conflict. It is reported to have provided military support for LNA forces in both training and equipment.[68] The Egyptian Air Force has allegedly conducted airstrikes against Operation Dawn forces, together with the UAE Air Force, in August 2014.[69] It was reported to have conducted additional airstrikes in Benghazi in October 2014.[70] These attacks were not openly admitted by the Egyptian authorities. The country's involvement became overt in early 2015 when Egyptian warplanes conducted a series of airstrikes on ISIL positions in the east of Libya. In April 2016, Egyptian President, Abdel Fattah al-Sissi, publicly voiced support for LNA forces, citing the need to rid Libya of extremist elements.[71] Egypt recently launched new airstrikes on Islamist positions in Derna and Jufra.

United Arab Emirates (UAE): According to a recent report of the panel of experts of the UN Sanctions Committee, the UAE has been providing both material and direct support to the LNA, significantly increasing the air support available to the LNA.[72] Together with Egypt, the UAE is also alleged to have launched airstrikes against Operation Dawn forces in August 2014. The country hosted an important meeting between Haftar and Serraj in early May 2017.

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[66] Ibid.

[67] Ibid.

[68] 'Egypt Regime Sends Military Support to Libya's Haftar', *The New Arab,* 23 October 2016.

[69] Gartenstein, Ross and N. Barr, supra.

[70] Micheal, M. and Al Mosmari,'Egypt War Planes Hit Libya's Militias, Officials Say', *Associated Press*, 15 Oct 2014.

[71] 'Al Sissi Confirms His Support for Haftar's Forces', *The New Arab*, 18 April 2016.

[72] United Nations Security Council, *Final Report of the Panel of Experts on Libya Established Pursuant to Resolution 1973*(2011) U.N. docs/2017/466, June 2017, para 132.

France: The presence of French military personnel in Libya was confirmed by the French Ministry of Defense, following the death of three officers in a helicopter crash near Benghazi in July 2016.[73] Although openly supporting the GNA, France had been reportedly providing intelligence support to LNA forces around Benghazi.[74]The new government recently stated that it was reviewing its position on the Libyan conflict, and called for a united national army that would include Khalifa Haftar to battle Islamist militants.[75]

Qatar: The Gulf state has reportedly provided military support to Islamist groups in Libya.[76] In addition, it has maintained links with jihadist Abdelhakim Belhadj, the former leader of the defunct Libyan Islamic Fighting Group, since 2011.[77]In early June 2017, the HoR-linked government broke diplomatic relations with Qatar, accusing it of destabilizing the country by supporting terrorist groups with money and weapons.[78]

Turkey: In 2014, al-Thinni's government accused Turkey of providing weapons to GNC-linked groups in Tripoli, but Turkey denied these allegations.[79] According to the UN panel of experts, Turkish companies previously delivered weapons to the defunct Libya Dawn coalition.[80]Both Turkey and Qatar are considered to have less influence on actors in Libya than Egypt or the UAE.[81]

[73] Ibid., para 133.

[74] International Crisis Group, *The Libyan Political Agreement, as Signed on 17 December 2015, Article 3*.

[75] 'France Under Macron Signals Shift in Libya Policy, 'Toward Haftar', *Reuters*, 19 May 2017.

[76] Gartenstein Ross and N. Barr, supra.

[77] Toaldo, Mattia and Fitzgerald, Mary, supra.

[78] Jamie Prentis, 'Beida Government Cuts Off Diplomatic Relations with Qatar', *Libya Herald*, June 5, 2017.

[79] Tolba J. and Al-Warfalli, 'Libyan PM Says Turkey Supplying Weapons to Rival Tripoli Group', *Reuters*, 27 February,2015.

[80] Toaldo Mattia and Fitzgerald Mary, supra.

[81] Ibid.

United States: The US has voiced strong support for the GNA, and former Secretary of State, John Kerry, said he would support any requests from the PC for an exemption from the arms embargo.[82]

Throughout 2016, the US deployed special forces, mainly for intelligence gathering, and offered to train and equip Libyan forces.[83] The US supported Operation al-Bunyan al-Marsous forces in recapturing Sirte from ISIL, and has launched airstrikes against the group's positions in the country on numerous occasions since 2015.

3.1.3 War Crimes in the Conflict

Reports about alleged war crimes committed by Libyan National Army forces emerged shortly after. According to a Human Rights Watch report, these include the killing and beating of civilians, as well as summary executions and the desecration of bodies of opposition fighters.[84] The LNA issued a statement describing the unlawful killings as 'isolated' incidents, and ordering that those responsible be brought to military trial.[85] A U.N. Expert Reports indicated several war crimes committed in the conflict by the different warring parties. Different factions have been reported to have committed different war crimes.[86]

It should be noted that the main actors at the moment are the Government for National Unity (GNU), based in Tripoli and supported by the UNSC and some other international actors and the Government for National Stability (GNS) which is aligned with the HoR and the LNA led by Khalifa Haftar, and also acknowledged by the UNSC, supported by Egypt.[87] Although supported by the UNSC, the GNU has committed atrocities but merely described them as law enforcement against criminals. The clashes are inter-factional competitions. They have committed torture, rape, arbitrary detentions, used child soldiers, among other war crimes.

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[82] International Crisis Group, *The Libyan Political Agreement*, supra.

[83] Ibid.

[84] Human Rights Watch, *Libya: War Crimes as Benghazi Residents Flee*, 22 March, 2017.

[85] Hanly K., 'Op-Ed: Rivals from Competing Libyan Governments Meet in Rome', Digital Journal, 24 April, 2017.

[86] U.N., Global Perspective Human Stories', Fragile Stability in Libya Increasingly at Risk, Security Council Hears', Feb 19, 2025.

[87] Amani Africa, 'AUPSC Summit on the Situation in Libya', July 23, 2025.

They included repression of civic groups, arbitrary detentions, murders, rape, enslavement, extra-judicial killings and forced disappearances. The situation was reported as precarious.[88] In yet another report, murder, torture, extra-judicial killings, rape and enslavement remained persistent war crimes in the conflict.[89]

3.1.4 Attempts to End the Hostilities

On 15 April, Serraj called for international help concerning the escalation of hostilities in southwestern Libya between the pro-GNA Misratan Third Force (now called the 13th Brigade) and the BDB on one side, and the LNA on the other side.[90]On 22nd April,a meeting took place in Rome between the President of the HoR, Ageelah Saleh, and the head of the High Council of State, Abdulrahman Sewehli, under the sponsorship of the Italian foreign minister.[91]A breakthrough in the talks occurred on 2 May, when Haftar met with Serraj in Abu Dhabi. The two sides reportedly agreed to the annulment of Article 8 of the LPA and the restructuring of the PC.[92] The foreign minister of the GNA subsequently stated that Haftar would be head of the army provided that he recognized the GNA as the legitimate government of the country.Tripoli witnessed heavy clashes on 26–27 May between militias loyal to the GNA and to the GNC. The clashes resulted in the death of 52 pro-GNA fighters, 17 of whom were reportedly summarily executed.[93]

[88] Hanan Salah, 'U.N. Experts Find War Crimes, Crimes Against Humanity in Libya, Continued Investigation of Rights Situation in the Country Remains Essential', Human Rights Watch, 28 March, 2023.

[89] 'War Crimes and Crimes Against Humanity Committed in Libya Since 2016, Says U.N.', *The Guardian*, 4 October, 2021.

[90] Sari Arraf, 'Geneva Academy', supra.

[91] Amnesty International, 'Evidence Points to War Crimes by Libyan National Army Forces', 23 March,2017.

[92] Al Jazeera Centre for Studies, 'The Haftar-Sarraj Reproachment and Prospects for a Resolution of the Libyan Crisis', 25 May,2017.

[93] 'Rival Factions Clash in Libya's Tripoli', *Al Jazeera*, 27 March,2017.

Meanwhile, following a terrorist attack by the Islamic State that led to the death of 30 Egyptian Copts in the Egyptian province of Minya, the Egyptian Air Force launched new airstrikes on Islamist positions in Derna and Jufra.[94] The city of Derna and its environs are the last eastern areas not under the control of the LNA, and Derna has been blockaded by the LNA since June 2015, when the Derna Mujahideen Shura Council (DMSC) ousted ISIL from the city.[95]

The HoR-linked government then announced the breaking off of diplomatic relations with Qatar following a similar decision by the UAE and Egypt, which are considered key allies of the eastern administration. In a statement, the HoR accused Qatar of destabilizing the country by supporting terrorist groups with 'money and weapons'.[96]However, the GNA is unlikely to endorse this move given its warm relationship with Qatar.[97] In summary, therefore, the instabilities in Libya are raging and there seems no end on the horizon.

3.1.5 Prosecutorial Response

In a very recent development, Saif al-Islam al-Gaddafi, son of the former leader Muammar Gaddafi and one of the most notable war criminals, was released from his detention on 9 June.[98] His captors, the Zintani militia Abu Bakr al-Siddiq Brigade, which had detained him for more than five years, cited an amnesty law passed the previous year by the HoR as the reason for his release.[99]

Saif al-Islam is accused of the murder and persecution of civilians as crimes against humanity, and since 27 June 2011, he has been facing an arrest warrant from the International Criminal Court.[100] He was sentenced to death in absentia by a Tripoli court in July 2015.[101]

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[94] 'New Egyptian Derna Airstrikes as Cairo Warns of Libyan Islamist Threat', *Libya Herald*, 29 May, 2017.

[95] LNA's Derna Blockade to be Base for Ramadan', *Libya Herald*, 25 May, 2017.

[96] Jamie Prentis, 'Beida Government Cuts Off Diplomatic Relations with Qatar', supra.

[97] Ibid.

[98] Sari Arraf, 'Geneva Academy', supra.

[99] Stephen C, 'Gaddafi Son Saif al-Islam Freed by Libyan Militia', *The Guardian*, 11 June, 2017.

[100] ICC Warrant of Arrest for Saif al-Islam Gaddafi, Pre-Trial Chamber 1, ICC-01/11, 27 June 2011.

[101] Sari Arraf, 'Geneva Academy', supra.

His current whereabouts are unknown. Suffice to note that Saif Al Islam has since challenged his trial in the ICC.[102] A dissection of the case of the Prosecutor v. Saif Al Islam and Another,[103] later in the subsequent chapter will illustrate the challenge the Court faces when it faces a state which is unwilling and, for one reason or another, is unable to duly prosecute alleged international crimes. The prosecutions are conducted by either side, each asserting jurisdictional realms across their respective spheres of influence. The sides prosecute rivals at the exclusion of their ranks. This immensely affects accountability, the application of complementarity and cooperation with the ICC.[104]

3.2 Sudan

3.2.1. Background to the Conflict

Amid a standoff over plans to fold the paramilitary Rapid Support Forces (RSF) into the army, a conflict was boiling underneath in the heart of the capital, Khartoum by April, 2023.[105]Abdel Fattah al-Burhan, the Sudan Armed Forces, (SAF), leader, and Mohamed Hamdan Dagalo "Hemedti", the head of the Rapid Support Forces, (RSF), had ruled together since seizing power in 2019 on the back of a popular movement protesting the regime of long-time dictator Omar al-Bashir.[106]But relations between the two were perpetually strained. After jointly dissolving the civilian government in a 2021 coup, neither was willing to concede to the other on the issue of merging their forces. By early 2023, increasingly at odds and under heavy outside pressure to abide by a commitment to restore civilian rule, both commanders had positioned their troops for a showdown.[107]

[102] Ibid.

[103] The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al Senussi, No. 01/11-01/11.

[104] Lisa Schlein, 'Libyan State, Armed Militia Groups Allegedly Commit War Crimes with Impunity', *VOA*, Africa, March 27, 2023.

[105] Human Rights Council, Findings of the investigations conducted by the Independent International Fact-Finding Mission for the Sudan into violations of international human rights law and international humanitarian law, and related crimes, committed in the Sudan in the context of the conflict that erupted in mid-April 2023, A.HRC/57/CRP.6.

[106] Ibid.

[107] Ibid.

The war began with attacks by the Rapid Support Forces, (RSF), on government sites as airstrikes, artillery, and gunfire were reported across Sudan.[108] The cities of Khartoum and Omdurman were divided between the two warring factions, with al-Burhan relocating his government to Port Sudan as RSF forces captured most of Khartoum's government buildings. Attempts by international powers to negotiate a ceasefire culminated in the Treaty of Jeddah in May 2023,[109] which failed to stop the fighting and was ultimately abandoned. Over the next few months, a stalemate occurred, during which the two sides were joined by rebel groups who had previously fought against Sudan's government.[110] By mid-November, the Minni Minnawi and Mustafa Tambour factions of the Sudan Liberation Movement officially joined the war in support of the Sudanese Armed Forces, alongside the Justice and Equality Movement (JEM).

In contrast, the Tamazuj movement joined forces with the RSF, while the Abdelaziz al-Hilu faction of the Sudan People's Liberation Movement–North attacked SAF positions in the south of the country.[111]It is noteworthy that for the first time since independence, Sudanese fighters waged war the capital, Khartoum and in the riverine heartland.[112] Over the course of the year, the battle for the capital has grown, morphing into a nationwide civil war, with a widening variety of groups throwing in their lot with one side or other in a country awash with guns. Hemedti's RSF outmatched the army for much of the war, seizing most of Khartoum in the early days of conflict and keeping the momentum for some time as its foe struggled to fight back. After expanding its grip on Greater Khartoum in the first months of the war, including by seizing Sudan's main oil refinery, a boon for its operations, in October and November the RSF turned its attention elsewhere. It conquered most of Darfur, the western region where it had first emerged from the remnants of the Janjaweed, a Bashir-backed militia responsible for atrocities against the area's non-Arab majority in the early 2000s.[113]

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[108] Ibid.

[109] Ibid.

[110] Ibid.

[111] Gallopin Jean-Baptiste, 'The Massalit Will Not Come Home: Ethnic Cleansing and Crimes Against Humanity,' Human Rights Watch, 9 May, 2024.

[112] Ibid.

[113] 'ICC Prosecutors Seek Evidence of War Crimes in Sudan's Darfur', *Al Jazeera*, 11 June, 2024.

As momentum began to swing toward the RSF, as the paramilitary defeated army forces in Darfur and made gains in Khartoum State, Kordofan, and Gezira State.

Since February 2024, the SAF has made gains in Omdurman and by June the same year, the it had made gains in Sennar State.[114] Further negotiations between the warring sides have produced no significant results, while many countries have provided military or political support for either al-Burhan or Hemedti. As of September 2024, the SAF has made notable gains in Khartoum and Khartoum North (Bahri).[115]

With the two forces largely arrayed along an east-west divide, the humanitarian threats facing Sudan's people have surged. With Hemedti's forces appearing overstretched as they fought on different fronts, their momentum stalled.[116]Clashes across the country, particularly in Kordofan and Omdurman, Khartoum's major suburb west of the Nile, strained their supply lines and resources, although their fighting capabilities remained substantial, with a steady inflow of arms and personnel.[117]

That said, the RSF seems unable to or uninterested in administering areas under its control – some with populations deeply hostile to it, due in part to its wanton looting and other abuses – and has struggled to control new recruits. Each advance by the RSF tends to bring with it a corresponding collapse of what is left of Sudanese state services; those state institutions that remain tend to operate only in army-held areas. Outside Darfur, the territories the RSF have conquered are havens for looting and atrocities amid extreme insecurity, destruction and mass displacement.[118]

[114] Ibid.

[115] Ibid.

[116] Ibid.

[117] Ibid.

[118] Ibid.

3.2.2 War Crimes in the Conflict

The civil war in Sudan has seen widespread war crimes committed by both the Sudanese Armed Forces (SAF) and the Rapid Support Forces (RSF), with the RSF being singled out by the Human Rights Watch, the United Kingdom and United States governments for committing ethnic cleansing and crimes against humanity.[119]

The conflict has been marked with heavy indiscriminate shelling, gunfire, and airstrikes on markets and populated residential neighbourhoods, causing a high number of fatalities.[120] Hospitals have been targeted during aerial bombings and artillery fire, and medical supplies looted. These attacks severely impacted Sudan's healthcare system, disrupting medical services and leaving the majority of the hospitals in conflict-affected states out of service, with the UN declaring Sudan the most dangerous country for humanitarian workers after South Sudan.[121]

In Geneina, West Darfur, the RSF and Arab militias killed more than 15,000 non-Arab people. On 22 July, a Masalit tribal leader claimed that more than 10,000 people had been killed in West Darfur alone, and that 80% of Geneina's residents had fled.[122]Massacres against the Masalit were recorded in towns such as Tawila, Sirba, Ardamata, Kutum, and Misterei, while mass graves have been discovered around Geneina.[123]

The UK and US governments, witnesses, and other observers described the violence in the region as tantamount to ethnic cleansing or even genocide, with non-Arab groups such as the Masalit being the primary victims.[124] The RSF and Arab militias are also accused of widespread robberies, looting food and sexual violence against Sudanese and foreign women, particularly Masalit and non-Arab women.

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[119] Ibid.

[120] Gallopin Jean-Baptiste, 'The Massalit Will Not Come Home: Ethnic Cleansing and Crimes Against Humanity,' supra.

[121] ICC Prosecutor Says Warring Parties Committing War Crimes in Darfur', *Al Jazeera* 5 February, 2024.

[122] Gallopin Jean-Baptiste, 'The Massalit Will Not Come Home: Ethnic Cleansing and Crimes Against Humanity,' supra.

[123] Ibid.

[124] Ibid.

NGOs estimate that the actual figure of sexual violence victims could be as high as 4,400.[125] Targeted torture and killings of intellectuals, politicians, professionals, and tribal leaders has also been reported. Notable victims include Adam Zakaria Is'haq, a physician and human rights advocate, and Khamis Abakar, the governor of West Darfur, who was kidnapped, tortured, and executed.[126] The SAF and RSF are accused of threatening, attacking and killing journalists and activists during the conflict.

Detainees have been abused and some killed at SAF and RSF detention sites. Across Sudan, the RSF and allied militias have terrorized women and girls through sexual violence, attacking them in their homes, kidnapping them from the streets, or targeting those trying to flee to safety across the border Masalit civilians have been hunted down and left for dead in the streets, their homes set on fire, and told that there is no place in Sudan for them.[127]

UN investigation discovered a mass grave of 87 individuals, all Masalit civilians, near Geneina, allegedly killed by the RSF between 13 and 21 June.[128] The Darfur Bar Association reported the next day that the refugee camps of Kreinik and Sirba were under siege by the RSF. All makeshift shelters and refugee camps had been burned down. Numerous villages, neighbourhoods, and cultural sites in and around Geneina were destroyed, including the city's Grand Market and the palace of the Masalit Sultanate.[129] With aid not reaching those who need it most, the situation has become one of the world's worst humanitarian crises. The United Nations High Commissioner for Refugees (UNHCR) reported that the war has displaced almost 8 million people.[130]There are increasing reports of children being recruited into armed groups. Observers accused the RSF of recruiting children as young as 14 to fight against the SAF using "money" and "false pretences", with some of them reportedly seen on the frontline in Khartoum.

[125] Amnesty International, 'War Crimes and Civilian Suffering in Sudan', 2 August, 2023.

[126] Ibid.

[127] Raoul Wallenberg Centre, 'Breaches of the Genocide Convention in Darfur, Sudan*' (April 2023—April 2024):* An Independent Inquiry.

[128] Ibid.

[129] Ibid.

[130] 'Sudan, South Sudan Most Dangerous Countries for Aid Workers, UN says', *Sudan Tribune,* 29 September, 2023.

Sky News Arabia reported, in 2024, on conscription of hundreds of children between the age of 12 and 14 at a military camp near Shendi, River Nile State as part of the Popular Resistance of Sudan.[131]

3.2.3 Efforts to End the War

The UNSC, following the outbreak of hostilities, passed a resolution calling on all partis to the conflict to cease hostilities and seek a sustainable solution through dialogue.[132]They called upon the parties to respect civilian life and abide by their commitments under international humanitarian law (IHL). Following closely with this resolution, another was passed calling upon the belligerents to respect the principles of IHL including, among others, respect of humanitarian and the UN personnel.[133] In 2024, another UNSC resolution was passed to demand that the RSF lifts its siege of El Fasher, et al.[134]

The US, on the other hand, leading the international effort to end the war, sanctioned the parties in it. It accused the RSF and the SAF of genocide and lethal attacks against civilians, respectively and thus slapped sanctions on their respective generals.[135] Still, the US sanctioned 7 UAE companies accused of funnelling arms to the RSF.[136]It should be noted that these sanctions have, to date, remained the most significant international effort towards ending the hostilities, with the UN draft resolution on strengthening measures to protect civilians and increase humanitarian aid access having been vetoed by Russia and China.[137]Submitted by Sierra Leone, an African state, it was appallingly referred to as the 'UK draft' by Russia, and in return, the UK representative referring to the Russian actions a 'disgrace'.[138]

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[131] 'More than 5,000 reportedly killed in El Geneina 'Genocide', *Radio Dabanga*, 20 June, 2023.

[132] UNSC Resolution 2724(2024).

[133] UNSC Resolution 2730(2024).

[134] UNSC Resolution 2736(2024).

[135] Jennifer, Holleis and Emand, Hassan, 'Sudan: Is the Bloody War Heading Toward an End?' *DW*, 4 February, 2025.

[136] Ibid.

[137] UN, 9786th Meeting, 'Russian Federation Vetoes Security Council Resolution Aimed at Strengthening Measures to Protect Civilians, Increase Humanitarian Aid Access in Sudan', UNSC 15901, 18 November, 2024.

[138] Ibid.

The arguments brought about by China were that the UNSC had to be guided by respect for Sudan's independence and territorial integrity, and that not by external solutions.[139] Vetoing the draft, yet another geopolitical player, Russia, argued that the draft rejected the government of Sudan's right to control border and security as well as protection of civilians.[140] Across the divide, leading international players like Japan had called for a complete cease fire.[141] While referencing the 2005 Resolution, Switzerland had called for a language similar to it in the draft resolution.[142] The diplomatic front has been reported not to be equal to the effort. The different backers of the warring parties have not pushed their sides to negotiations. For instance, Egypt and Qatar openly support the SAF whereas the UAE supports the RSF but none has played a crucial role in tending hostilities. There has been no implementation of the Jeddah Declaration from either side.[143]

With the war entering a third year, the only hope of it ending is in either side winning it. Reports indicate that the RSF has lost ground significantly, losing both Khartoum, the capital and the breadbasket, Gezira state.[144] They are now concentrating on North Darfur, their heartland.

The International Crisis Group reports that there seems to be no end in sight as neither side appears to achieve victory, despite the SAF taking territory.[145] And with the shown listlessness in curbing and prosecuting war criminals, even in the event of a decisive military victory there is no likelihood of accountability. The closest it is likely to get will be the usual victor's justice imposed by whoever wins.

[139] Ibid.

[140] Ibid.

[141] Ibid.

[142] Ibid.

[143] The Jeddah Declaration of Commitment to Protect the Civilians of Sudan, 11 My, 2023; spearheaded by the US and Saudi Arabia.

[144] International Crisis Group, 'Bolstering Efforts to End Sudan's Civil War', Commentary, 30 January, 2025.

[145] Ibid.

3.2.4 Prosecutorial Response

The International Criminal Court and Amnesty International are investigating war crimes and crimes against humanity committed during the war, limiting their role to Darfur.[146] It should be noted that Sudan is not a member of the Rome Statute and as such, the ICC jurisdiction is limited to the efforts of the UNSC by way of a resolution referring the situation to the ICC.[147] It was by this resolution that the situation in Darfur, back in 2005, was referred to the Prosecutor, thereby indicting the former President Omar Al Bashir. The Prosecutor has been reported to have found grounds to believe that war crimes, among other indictable international crimes, have been committed in Darfur in the ensuing battles between the RSF and the SAF.[148] The Prosecutor has still called upon people with evidence of war crimes in Sudan's Darfur to put it forward.[149] This, the OTP argues, falls within the ambit of the 2005 UNSC Resolution mandating the investigations and jurisdiction of the ICC to Darfur.[150]

The SAF accused the RSF of perpetrating these crimes. General Abdel Fattah al-Burhan (SAF commander) established a committee to investigate these allegations.[151] Several countries proposed a motion to the UN Human Rights Council for an investigation into the atrocities. Although a UNSC draft resolution had called for concrete steps to ensure accountability for the perpetrators of war crimes in the conflict,[152]it was vetoed by China, arguing that these matters fell well within the sovereign right of Sudan. And despite the international call for domestic efforts to punish the perpetrators, there has been no concrete effort from the government, most probably due to the sheer lack of political will, nor from the international community to date.[153]

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[146] Agnes Callamard, 'Sudan: War Crimes Rampant as Civilians Killed in both Deliberate and Indiscriminate Attacks', Amnesty International, New Report, 11 May, 2024.

[147] See Articles 13 and 14 of the Rome Statute of the International Criminal Court.

[148] Karim Khan, ICC Prosecutor: 'Grounds to Believe Crimes in Darfur', *Associated Press*, 30 January, 2024.

[149] 'ICC Prosecutor Seeks Evidence of War Crimes in Sudan's Darfur', *Al Jazeera*, 11 June, 2024.

[150] Ibid.

[151] Ibid.

[152] UN, 9786th Meeting, 'Russian Federation Vetoes Security Council Resolution Aimed at Strengthening Measures to Protect Civilians, Increase Humanitarian Aid Access in Sudan', supra.

[153] Ibid.

Another key point in the fight against impunity for war crimes in the African conflicts is that although the ICC issued a warrant of arrest against Omar Al Bashir upon a UNSC resolution referring the situation in Darfur to the ICC, he remained on a wanted list. Despite the requirement for international corporation to support the ICC, states remained adamant in enforcing the warrant. Arguments of immunity and sovereignty could be put forward. The classical South African case can ably illustrate this lack of willingness to assist the Court in enforcing warrants.[154] It will be examined later in the subsequent chapter. That said, although Bashir is in custody in Sudan, the military government has rejected the ICC calls to hand him over. It is arguable that such a government is highly unlikely to enforce any such warrants in future, should the UNSC refer the current situation.

3.3 Central African Republic (CAR)

3.3.1 Background to the Conflict

The current crisis began in December, 2012 when a coalition of Muslim armed groups from the northeast called Seleka marched south towards the capital Bangui.[155] It was stopped before it reached the city. Negotiations hastily convened in Libreville under the auspices of the Economic Community of Central African States (ECCAS) led to the creation of a transitional government bringing together then President François Bozize and Seleka leaders.[156] The Libreville power sharing agreement was short lived.

On 24 March 2013, while President Bozize was dragging his feet to implement the deal, Seleka took control of Bangui, only facing resistance from a South African army contingent urgently deployed in December 2012.[157] Seleka's rule was also short-lived. Its leader, Michel Djotodia, had minimal authority over the commanders of the various militias that made up the Seleka coalition and never managed to establish a functioning government during his nine-month 'presidency'.[158]

[154] The Minister of Justice and Constitutional Development v. The Southern African Litigation Centre (867/15) [2016] ZASCA 17 (15 March, 2016).

[155] Global Conflict Tracker, 'Conflict in Central African Republic', Centre for Preventive Action, 9 July, 2024.

[156] Ibid.

[157] Ibid.

[158] Ibid.

Instead of governing, Seleka commanders turned to looting and arresting political opponents arbitrarily, among other abuses.[159] In response to Seleka's abuses, self-defense groups, mainly Christian, called the 'anti-balaka', or 'the invincible', formed in the west of the country and on 5 December, 2013, attacked Bangui.[160] Meanwhile, the French military mission, Sangaris, deployed with a United Nations Security Council validated mandate. The Seleka was ousted and an ECCAS summit in Chad's capital, Ndjamena, decided to put in place a new transitional government.[161] Catherine Samba-Panza was elected the head by the National Transitional Council on 23 January, 2014.

In response to the failing state functionary, an African Union-led (AU) peacekeeping force, the International Support Mission to the Central African Republic (*Mission Internationale de Soutien à la Centrafrique sous Conduite Africaine*, MISCA) was transformed in September 2014 into a full-scale UN peacekeeping mission, the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (*Mission multidimensionnelle intégrée des Nations Unies pour la stabilisation en République Centrafricaine*, MINUSCA).[162] A European bridging mission (EUFORCAR) was also deployed from April 2014 to March 2015 in Bangui. Since then, calmer periods have alternated with outbreaks of violence killing hundreds.[163]

The causes of the crisis lie in the CAR's troubled past, while new dynamics since 2012 have perpetuated violence. In the lead-up to the coup, former President François Bozizé's paranoid weakening of the security forces left the population and eventually his own government vulnerable to Seleka's attack.[164] The rebel movement came from the northeast, a part of the country historically neglected by central government. The entrepreneurs of violence at the helm of ethnically based rebel militia enlisted guns-for-hire from across the border to make their challenge.[165]

[159] Ibid.

[160] Ibid.

[161] Ibid.

[162] Ibid.

[163] Ibid.

[164] Ibid.

[165] Ibid.

The government's chronic economic mismanagement also provoked deep resentment among the population while the absence of education or job opportunities made disenfranchised young people particularly vulnerable to recruitment by armed militia or manipulation by politicians.[166] The representation of the conflict, perpetuated by the international media, as one pitting Christians against Muslims distorts a more nuanced reality.

Before 2012, religious identity was not a major source of tensions, although the minority Muslim community had struggled for official recognition for decades with the central government.[167] Central African society was tolerant of religious diversity. But rhetoric by the Bozizé government used to muster support against the advancing Seleka rebellion created a Muslim threat, portraying the northern group as set on an Islamising mission.[168]non-Muslims, the anti-balaka militia foremost among them, associated the Muslim community with Seleka and blamed them for the crimes the rebels committed while in power.[169]

Longstanding jealousy of Muslims' more influential positions in business circles in Bangui and gold and diamond mining areas also lay behind attacks on them and their property. Violence clearly targeted against civilians for their religion stoked sectarian tensions and ignited a cycle of revenge attacks.[170] A cycle that has degenerated into a nearly failing state, with state functionary collapsing. The successive regimes have been targeting opponents for indictments opting to exclude the culprits within their ranks.

3.3.2 War Crimes in the Conflict

There are two UN Human Rights Office reports detailing the rights abuses in the conflict.

[166] Ibid.

[167] Ibid.

[168] Ibid.

[169] Ibid.

[170] Ibid.

One details brutal organised attacks villages by a pro-government militia while the other describes how specific armed groups perpetrated recurring acts of sexual violence in a systematic and widespread manner.[171] Both reports were based on investigations by the Human Rights Division of the United Nations Multidimensional Integrated Stabilisation Mission in CAR (MINUSCA).[172]

In the first incidence, the "anti-balaka" carried out an attack Boyo village in Ouaka Prefecture from 6 to 13 December, 2021 killing at least 20 civilians, five women and girls raped, some 547 houses burned and looted, and more than 1,000 villagers forced to flee.[173] The militia are reported to have used machetes in their attack on the unarmed civilians. They also held several hundred civilians for three days in the village mosque and threatened to kill them. The attack was seemingly conducted to target and punish the Muslim community of Boyo, which was perceived as being supportive of the *Unité pour la paix en Centrafrique* (UPC), an armed group engaged in fighting the government.[174]

The second report is based on four investigative missions in Mbomou and Haute-Kotto prefectures, as well as the Human Rights Divisions' regular monitoring and reporting work.[175] It details conflict-related sexual violence committed from December 2020 to early March 2022 by members of the Front Populaire pour la Renaissance de la Centrafrique (FPRC) and the UPC, both affiliated with the Coalition des Patriotes pour le Changement (CPC).[176] About 245 women and girls were reported to have been victims of sexual violence, most of whom were aged between eight and fifty-five.[177] Some of the worst violence was committed in the town of Bakouma, in Mbomou prefecture, at the time under the control of the armed groups.

[171] United Nations Human Rights Office, 'Central African Republic: UN Reports detail serious violations, some possibly amounting to war crimes and crimes against humanity', Press Release, Office of the High Commissioner for Human Rights, 25 July, 2022.

[172] Ibid.

[173] Ibid.

[174] Ibid.

[175] Ibid.

[176] Ibid.

[177] Ibid.

Another poignant report by Amnesty International describes the living in CAR as a human rights nightmare.[178] It indicated extensive war crimes and crimes against humanity for the period between December 2013 and May, 2014. There was large scale execution of civilians, widespread rape, recruitment of child-soldiers and cannibalism.[179] The abuses were reported to have been committed by various groups in the broken society. Chief among them were the mainly Christian anti-balaka, the largely Muslim Seleka militia and even soldiers from neighbouring Chad.[180]

There was reported religious strife, nearly amounting to cleansing.[181] It is argued that as the focus of the initial disarmament efforts exclusively targeted the Seleka, it inadvertently handed the anti-Balaka the upper hand, leading to the forced displacement of Muslim civilians in Bangui and western CAR as comparisons of the situation with other situations were posed. In one incidence it would be termed as the "next Rwanda", as others suggested that the Bosnian Genocide situation would be more apt.[182]Even as Seleka was closing in on the capital, clashes began in Bangui's PK5 neighborhood, where members of ethnic groups with ties to Seleka were attacked, such as the Gula.[183]

After the withdrawal of Seleka leaders from Bangui, there was a wave of attacks against Muslims with anti-Muslim pogroms and looting of Muslim neighborhoods, including the lynching of the Muslim former Health Minister Doctor Joseph Kalite by Christian self-defence groups.[184] Much of the tension is also over historical antagonism between agriculturalists, who largely comprise Anti-balaka and nomadic groups, who largely comprise Seleka fighters.[185]There was ethnic violence during fighting between the Ex-Seleka militias, the FPRC and the UPC, with the FPRC targeting Fulani people who largely make up the UPC and the UPC targeting the Gula and Runga, the compositions of the FPRC.[186] It is also reported that in 2019, violence broke out in the north-

[178] Amnesty International, 'War Crimes in the Central African Republic', 18 May, 2020.

[179] Ibid.

[180] Ibid.

[181] United Nations Human Rights Office, *Central African Republic: UN Reports detail serious violations, some possibly amounting to war crimes and crimes against humanity,* supra.

[182] Ibid.

[183] Ibid.

[184] Ibid.

[185] Ibid.

[186] Ibid.

eastern region, where the killing of an ethnic Kara man sparked heavy fighting between the mainly Kara MLCJ and largely Runga FPRC.[187]

3.3.3 Prosecutorial Response

The ICC's investigation in CAR I focussed on alleged war crimes and crimes against humanity committed in the context of a conflict in CAR since 1 July 2002, with the peak of violence in 2002 and 2003. The investigation produced one main case, the Prosecutor v. Jean-Pierre Bemba Gombo 1, involving charges of the following crimes of war crimes, murder, rape, pillaging and crimes against humanity.[188] Proceedings began in another case involving charges against five suspects for offences against the administration of justice allegedly committed in connection with the case of Jean-Pierre Bemba Gombo.[189] On 30th May, 2014, President Samba-Panza formally referred the second situation to the ICC.[190]

The ICC, having determined that the situation was different from the first one, designated it 'Situation in Central African Republic II' in order to distinguish it from 'Situation in Central African Republic I'.[191] In September 2014, the Office of the Prosecutor (OTP) announced, following a period of preliminary examination, the opening of a second investigation in relation to crimes committed in the conflict in the CAR since 1st August 2012.[192] In yet another fundamental development, the Bangui Forum recommended the creation of a Special Criminal Court and truth and reconciliation commission.[193]

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[187] Ibid.

[188] ICC-01/05-01/08 of March, 21.

[189] Ibid.

[190] ICC, 'Situation in the Central African Republic 11', ICC-01/14.

[191] Ibid.

[192] ICC, 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a second investigation in the Central African Republic,' Press Release, 24 September, 2014.

[193] Godfrey, M Musila, 'The Special Criminal Court and Other Options of Accountability in the CAR: Legal and Policy Recommendations,' International Nuremberg Principles Academy, Occasional Paper No. 2, 2016.

3.3.4 The Special Criminal Court for Central African Republic (SCC)

A forum on national reconciliation and reconstruction of key stakeholders (Bangui Forum) consisting of 600 people (including 120 women) drawn from government officials, organised civil society, ethnic communities, religious groups and citizens convened in the Central African Republic's (CAR) capital Bangui to map the country's post conflict future.[194] Following days of deliberations that focused on four key themes – peace and security, justice and reconciliation, governance, and social and economic development – a pact known as the Republican Pact for Peace, National Reconciliation and Reconstruction (National Pact) was signed.[195] The National Pact adopted by the Forum recommended various transitional justice-related measures; in particular, constitutional reform, prosecutions, and security sector reform (essentially disarmament, demobilisation, and reintegration, or DDR).[196] The forum was the culmination of local consultations conducted around the country with the financial and technical support of the United Nations Multidimensional Integrated Stabilisation Mission in the Central African Republic (MINUSCA) and the United Nations Development Programme (UNDP).[197]

The National Pact, which commands support among all sectors of CAR society, should thus be regarded as the blue-print for transitional justice in that country.[198]

The National Pact set out a broad vision and details the mechanisms to be created and measures to be undertaken to achieve set transitional justice goals. In the pact, there are various justice mechanism, among which there is the SCC, our centre of focus herein.
With respect to the SCC, this study focuses on its relationship with the ICC and national Courts.

They include, *inter alia*: subject matter and temporal jurisdiction; relationship between the court, the ICC and ordinary national courts to examine the SCC's significance and see whether Africa could adopt such mechanism to dispel the fears evolving around the ICC. A snapshot of the Court's jurisdiction and status is hereinbelow.

[194] Ibid.

[195] Ibid.

[196] Ibid.

[197] Ibid.

[198] Ibid.

With respect to subject matter jurisdiction, the ICC and the SCC can prosecute the same crimes arising out of the conflict in the CAR (genocide, war crimes and crimes against humanity), although the SCC can additionally prosecute the distinct crime of torture.[199]

Equally, the law establishing the SCC could be amended with greater ease to try lesser crimes under the penal code if the need ever arose.[200] With respect to temporal jurisdiction, the SCC can reach much further back than the ICC, whose temporal jurisdiction was limited in the referral letter to 1st August, 2012 and subsequently endorsed by the ICC Prosecutor in her Article 53 Report.[201] The SCC has also a greater geographical reach than the ICC with respect to crimes linked to the conflict in the CAR.[202] While the ICC's territorial jurisdiction is limited to the territory of the CAR, the SCC can prosecute crimes committed in neighbouring countries.[203]
As a national court, the SCC's relationship with the ICC is governed by the principle of complementarity in Article 17, the cooperation framework anchored on Article 86, and other related provisions in the Rome Statute.[204]

The Court has filled the resource gap and blended the national with the international law.
Indeed, it applies provisions in the CAR Penal Code.[205] In its appeals chamber, the 2023 judgment was a land mark decision for the future hybrid courts.[206] Issa Sallet Adoum's case adopted key points under international criminal justice.[207]

[199] Ibid.

[200] Ibid.

[201] Vianney Ingasso, 'CAR: Special Criminal Court Hands Down First Judgment', 1 November, 2022.

[202] Ibid.

[203] Ibid.

[204] Gervais Bodagay, 'Justice Matters in the Central African Republic: CAR and the ICC Sign Guestbook Symbolising Mutual Cooperation ', ICC, 18 May, 2016.

[205] Ghishain Poissonnier, 'CAR: How Special Criminal Court Appeals Judges Innovated and Proposed a Model ', Justice Info, 1 September, 2023.

[206] Ibid.

[207] Ibid.

The characterization of the existence of a systematic and widespread attack, the qualification of the factual findings, the description of the different types of criminal liability applicable and the individualization of the sentences are some of the fundamentals of international criminal justice that were settled and adopted. The Court's decision was based on international standards adopted and decisions of the Extraordinary Chambers in the Courts of Cambodia, the Extraordinary African Chambers, the Specialised Chambers for Kosovo, the ICTY and the ICTR.[208] The bench was predominantly international with judges from Europe, Asia, the Americas and Africa.[209] Finally, this Court has primacy over the national courts unlike the ICC.[210] It still operates side by side with the ICC and as such, it does not take away the ICC jurisdiction.[211]

It goes without saying that just as many justice missions on the continent, the SCC has had challenges but with a marked significance beyond the ICC impact.

Although by 2021, only 1 out of the 25 arrest warrants issued by the Court had been effected and government figure, Hassan Bouba Ali, had been released, something that portrayed a blatant show of the impediments the Court grapples with;[212] it has gained traction with time.[213] By the end of 2024, it had charged at least 45 people with war crimes and crimes against humanity.

Remarkably, it publicly issued an arrest warrant against Bozize-then living in Guinea Bissau, on multiple counts of crimes against humanity committed during his Presidency.[214] Former anti-balaka leader Edmond Beina was arrested also. These statistics are in stuck contrast with those of the ICC.

[208] Ibid.

[209] Ibid.

[210] Ibid.

[211] Ibid.

[212] Samira, Daoud, 'CAR: Dozens Suspected of Criminal Responsibility for War Crimes and Crimes Against Humanity Remain at Large', Amnesty International, 8 December, 2021

[213] Global Centre for the Responsibility to Protect, 'Central African Republic',1 September, 2024.

[214] Ibid.

On 16 December, 2022, the ICC announced its conclusion of the investigations in the CAR situation 11.[215]

At the time, it had 3 cases, 2 ongoing trials, 5 warrants of arrest, 4 suspects in custody and 1 at large.[216] All these said, the court is a step in the right direction as it has attempted to bring justice closer to the affected communities, a fact that brings about closure and reconciliation as earlier seen in the Gacaca Court initiative in Rwanda.[217] The Court aims at transitional justice and, chief among them all, its establishment had a local involvement with some local Magistrates in the ranks of the bench, unlike the ICC.[218]

3.3 Ethiopia

3.4.1 Background to the Conflict

The causes of the conflict that is believed to be the deadliest since the cold war and of the 21st century are historical.[219] Tigray, a state in the north, is home to over 97 per cent ethnic Tigrayans, with the capital, Mekelle. There are also a few minority groups such as the Irob and Kunama. It should, however, be noted that also a significant number of Tigrayans live in the capital of Ethiopia, Adis Ababa.

Overall, about 6 per cent of Ethiopians, a population of about 120 million people with over 90 ethnicities, are Tigrayans. The Tigrayan language, Tigrinya, is also the Eritrean Highland language and the *lingua franca* in Eritrea.[220]The ethnic group only split between Eritrea and Ethiopia by the agreement between Emperor Menelik and the Italian colonizer.[221]

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[215] The second ICC commencement of investigations into the situation in CAR. They were two situations investigated and as such, the ICC referred to them as 1 and 2.

[216] ICC, 'Situation in the Central African Republic 11', supra. ICC-01/14.

[217] Samira, Daoud, 'CAR: Dozens Suspected of Criminal Responsibility for War Crimes and Crimes Against Humanity Remain at Large', supra.

[218] Ibid.

[219] New Lines Institute, 'Genocide in Tigray: Serious Breaches of International Law in the Tigray Conflict, Ethiopia, and Paths to Accountability', June, 2024.

[220] Ibid.

[221] Ibid.

This historical background fundamentally boiled into a full-fledged conflict in 2020, largely due to power struggle and a constitutional dispute.[222] For more than two decades, the Tigrayans had held sway in a coalition government that had dominated the politics in the country. In the 1980's, the Tigrayan People's Liberation Front, (TPLF), had defeated a military junta and as such, had emerged the leading member of the coalition government.[223] The coalition gave autonomy to the regions but retained a tight grip on the central government.

After protests in which the people had demanded reforms to democracy, the Prime Minister, Abiy Ahmed, dissolved the coalition government and introduced the whole new Prosperity Party, which the Tigrayans refused to join.[224] In 2020, Ethiopia's federal parliament approved the government's decision to postpone all elections planned for August until the end of the pandemic and extended the Prime Minister's mandate, a Prime Minister who is from the Oromo ethnic group.[225]Considering the federal decision to be illegitimate, the Tigrayan regional government held a regional election in September 2020.[226] The TPLF won most of the seats in the regional parliament, a result considered null and void by the federal government. In retaliation, the federal government cut budgetary allocations to Tigray.[227]On 3 November 2020, Prime Minister Abiy Ahmed ordered a military offensive against Tigrayan forces, who had taken command of the military headquarters in Mekelle.[228]

The federal government declared a state of emergency in the region, appointed an interim administration and restricted access to electricity, banking services and communication means in the region.[229]

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[222] 'Ethiopia's Tigray War: The Short, Medium and Long Story', *BBC News*, 17 November, 2020.

[223] Ibid.

[224] Ibid.

[225]New Lines Institute, 'Genocide in Tigray: Serious Breaches of International Law in the Tigray Conflict, Ethiopia, and Paths to Accountability', supra.

[226] Ibid.

[227] Ibid.

[228] Ibid.

[229]Ibid.

Despite declarations by federal representatives that the situation was under control at the end of November 2020, the conflict escalated into a civil war, with dire humanitarian consequences.[230]

Government airstrikes involving Turkish and Iranian drones reportedly killed dozens of civilians. Troops from neighboring Ethiopian regions took sides with either federal or Tigrayan fighters. Amhara troops notably seized disputed western Tigray, where they allegedly committed grave abuses against Tigrayans. Eritrea, which has long-standing disputes with neighboring Tigray, also sent troops against the Tigrayan forces.[231]Under international pressure, Ethiopia eventually acknowledged the presence of Eritrean forces in support of the Ethiopian National Defence Force (ENDF), and called on the Eritrean government to withdraw its troops in May 2021. However, a large-scale Eritrean offensive was reported in September 2022. By October 2022, Ethiopian federal forces working with Eritrean and other allies had taken control of major towns in Tigray.[232]

3.4.2 War Crimes in the Conflict

There is a lot of information indicating that the international rules of humanitarian law were breached in the conduct of hostilities in the conflict and even after the cessation of hostilities.[233] Many amounted to, among other international crimes, war crimes. The breaches of Common Article 3 of the Geneva Conventions occasioned individual responsibility.[234] The violations of IHL are illustrated hereinbelow. The fighting hit and even targeted numerous civilians. There were massacres in the sacred city of Aksum, believed to be the birth place of the biblical Queen Sheba, by the Eritrean forces.[235]

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[230] Ibid.

[231] Ibid.

[232] Ibid.

[233] New Lines Institute, 'Genocide in Tigray: Serious Breaches of International Law in the Tigray Conflict, Ethiopia, and Paths to Accountability', supra.

[234] Ibid.

[235] 'Ethiopia's Tigray Crisis: How a Massacre in the Sacred City of Aksum Unfolded', BBC News, 26 February, 2021.

There was the Togoga airstrike by the ENDF on a market day in which over 64 people are believed to have been killed and about 180 injured.[236] It is settled law under IHL that intentionally directing attacks against civilians not taking direct part in the conduct of hostilities is a war crime.[237]Targeting non-military objects continued with the indiscriminate shelling of Tigrayans in Humera by the ENDF,[238] the shelling of Shire,[239] killing at least 10 civilians, shelling large parts of Makelle city on the 28 of November, 2020[240]and the drone attacks on a school in Dedebit that functioned as an IDP camp[241]are some of the notable breaches of the IHL in the conflict. Similarly, there were breaches from the Tigrayan forces.

Amhara civilians in Mekelle were targeted and ethnically profiled for torture and detention in Shire, Humera, Adebayo, Axum and Mekelle.[242] Tigrayan forces targeted and beat non-Tigrayans in Mekelle, attacked Hitsats camp,[243]summarily executed 26 civilians in Chenna[244]nd Amhara civilians in Kobo.[245]Use of starvation as a war crime has been reported in the conflict. Under the Rome Statute, starvation intentionally used as a method of warfare is a war crime.[246]It includes the destruction of items indispensable to the survival of civilians.[247]A case in point would be the willful impeding of relief supplies to the civilians under the Geneva Convention.

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[236] 'Market Air Raid Kills Dozens in Ethiopia's Tigray, Say Witnesses', Al Jazeera, 23 June, 2021.

[237] See Rome Statute of the ICC, Article 8(2)(b) and (e).

[238] Human Rights Watch, 'Ethiopia: Unlawful Shelling of Tigray Urban Areas', 11 February, 2021.

[239] Ibid.

[240] Ibid.

[241] Ibid.

[242] UN OHCHR, 'Report of the Ethiopian Human Rights Commission (EHRC)/ Office of the United Nations High Commissioner for Human Rights (OHCHR) Joint Investigation into Alleged Violations of International Human rights, Humanitarian and Refugee Law Committed by all Parties', 3 November, 2021, para 99.

[243] New Lines Institute, 'Genocide in Tigray: Serious Breaches of International Law in the Tigray Conflict, Ethiopia, and Paths to Accountability', supra.

[244] Human Rights Watch, 'Ethiopia: Tigray Forces Summarily Execute Civilians', 9 December, 2021.

[245] Ibid.

246 See Article 8(2)(e) of the Rome Statute, supra.

247 Ibid.

Reports indicate that there are reasonable bases to believe that the famine in Tigray resulted from the intentional deprivation of food and other objects indispensable to the survival of civilians.[248] There was reported rape and sexual violence on either side of the conflict. Fighters recognized as belonging to TPLF due to their accent ethnic slurs they used are accused of having committed rape and sexual violence against Amhara women and girls, some as young as 14,[249] 12[250] and 11.[251]Also, TSF soldiers raped girls in Hageray.[252]

The acts were widespread against Amhara and Agew women in Shewa Robit, Sekota, Tabla, Yelen, Kobo, Lalibela, Hayk, Debark, Dessie and Chenna.[253] Acts of rape were also perpetrated in Afar region. There were also cases of revenge rape against Tigrayan women by the Federal government forces.[254]Theses rapes were accompanied by shocking levels of brutality and beatings, death threats and insertion of foreign objects.[255]

[248] New Lines Institute, 'Genocide in Tigray: Serious Breaches of International Law in the Tigray Conflict, Ethiopia, and Paths to Accountability', supra.

[249] Dr. Denis Mukwege Foundation, 'Understanding Conflict-Related Sexual Violence in Ethiopia: A Case of the Tigrayan Conflict', the Hague, Netherlands, 1 November, 2022.

[250] Rita Kahsay, et al, 'In Plain Sight: Sexual Violence in Tigray Conflict', Eleanor Press, 2023.

[251] UN ICHREF, 'Report of the International Commission of Human Rights Experts on Ethiopia', 14 September, 2023.

[252] UN OHCHR, 'Report of the Ethiopian Human Rights Commission (EHRC)/ Office of the United Nations High Commissioner for Human Rights (OHCHR) Joint Investigation into Alleged Violations of International Human rights, Humanitarian and Refugee Law Committed by all Parties', supra.

[253] UN ICHREE, 'Comprehensive Investigative Findings and Legal Determination: International Commission of Human Rights Experts on Ethiopia', 13 October, 2023.

[254] Dr. Denis Mukwege Foundation, supra.

[255] Amnesty International, 'Ethiopia: Summary Killings, Rape and Looting by Tigrayan Forces in Amhara', 16 February, 2022, pp. 14, 15.

There were also cases of ethnic cleansing as Amhara sought to clear out other ethnicities in the Western Zone, especially Tigrayans, in an attempt to have the Zone "ethnically homogeneous". This was through the organized use of force and intimidation.[256]Many Tigrayans fled across the border to Sudan, and those unable to flee were captured, and forcibly transferred to other parts of Tigray. Reports estimate between 140,000 and 185,000 people to have fled the Western Zone to Shire in just a span of two weeks.[257]These, and some other war crimes like pillaging, compulsion, extreme starvation and looting, et al., are the numerous war crimes witnessed in the Ethiopian Tigrayan Conflict, arguably the deadliest conflicts since the cold war.[258]

3.4.3 Efforts to End the Conflict and Achieving Accountability

The Ethiopian conflict ended with a Cessation of Hostilities Agreement (CHA) on the 2 of November, 2022, following the AU-led efforts.[259] As early as 5 November 2020, the Co-Presidents of the ACP-EU Joint Parliamentary Assembly called the parties in conflict to engage in a sincere, peaceful and inclusive dialogue.[260] Similar efforts were undertaken by the European Parliament as it debated and adopted a first resolution on the armed conflict in Tigray on 26 November 2020.[261]

Expressing its concern for the breaches in humanitarian and human rights, it called for immediate and unrestricted humanitarian access, and for the freedoms of expression and press freedom to be upheld, including the restoration of communication means in Tigray. It also called for a ceasefire and for political divergences to be addressed by constitutional means.[262]

[256] Declan, Walsh, 'Ethiopia's War Leads to Ethnic Cleansing in Tigray Region, U.S. Report Says', *The New York Times*, 26 February, 2021.

[257] Norwegian Refugee Council, 'Meet the People Forced to Flee Ethiopia's Tigray Region', 15 January, 2021.

[258] Azeem Ibrahim, 'The Tigrayan War May Be One of the Deadliest Conflicts of This Century', The National Interest, 3 June, 2024.

[259] New Lines Institute, 'Genocide in Tigray: Serious Breaches of International Law in the Tigray Conflict, Ethiopia, and Paths to Accountability', supra.

[260] Ibid.

[261] Ibid.

[262] Ibid.

As per the CHA, the federal government of Ethiopia committed to the implementation of a transitional justice policy aimed at foreseeing accountability, reconciliation, healing and truth finding.[263]The policy was in line with the AU's 2019 Transitional Justice Policy Framework.[264] Also, the Ethiopian Criminal Code (2004),[265]has provisions relating to war crimes and genocide.[266] However, there is reason to doubt the commitment to accountability.

Only 3 cases of rape against soldiers had been prosecuted, 25 charged with rape and sexual violence and 28 charged with civilian killings in northern Tigray.[267]These numbers have remained stagnant as there is no evidence of any increase the charges. To the contrary, the government continues to be skeptical about the basis of the many allegations in the conflict. It brands them as political.[268] As a result, it continues to refuse to cooperate with the ICHREE and denies access to the investigations. The reports were slammed as biased and inflammatory.[269]

[263] Ibid.

[264] African Union, 'Transitional Justice Policy', adopted February, 2019.

[265] Criminal Code of the Federal Democratic Republic of Ethiopia, 2005.

[266] Chapter 1 under the title 11, "Crimes in Violation of International Law", ibid.

[267] New Lines Institute, 'Genocide in Tigray: Serious Breaches of International Law in the Tigray Conflict, Ethiopia, and Paths to Accountability', supra.

[268] Ibid.

[269] Ibid.

Chapter Four

Analysis of the Findings

4.0 Introduction

This chapter follows up on the preceding chapter three, discussing the findings of the study. These findings are categorized into five distinct themes, together referred to as the challenges affecting the performance of the Court with a theoretical anchoring in TWAIL. But before the substantive analysis, the study first delved into the procedural role of the Pre-Trial chamber of the Court, examining its theoretical criticisms, probably accounting for some of the challenges to the Court In summary, there is weaponization of the principle of sovereignty, the defensive application of the doctrine of immunity, the abuse of the complementarity principle, failure of the international requirement to cooperate and the total lack of jurisdiction which is exacerbated by the geopolitical realities involved in the UNSC referrals. Also important is the state rejection of international law on the basis of imperialism and hegemony, leading to some preference of local justice systems as opposed to the ICC, a dispensation viewed as exotic, imperialistic, colonial and hegemonic. The combination of these analyses graphically depicts the nuanced challenges the ICC faces in the prosecution of war criminals in Africa.

4.1 The Pre-Trial Chamber of the International Criminal Court

The Pre-Trial Chamber, which usually consists of three judges, has been described as the Court's gatekeeper, with significant power to influence which cases are investigated, how those investigations are conducted and which investigations result in trials.

As previously mentioned, the Pre-Trial Chamber authorizes prosecutor- initiated investigations,[1] decides challenges to the jurisdiction of the Court or the admissibility of a case during the investigative stage[2]and reviews the prosecutor's decision not to pursue a case referred to the OTP.[3]Questions of admissibility usually arise as a result of the application of the complementarity doctrine, which is discussed in detail hereinbelow.

[1] Article 15(4), the Rome Statute, supra.

[2] Articles 18(2) and 19(6), ibid.

[3] Article 53(3), ibid.

The Pre-Trial Chamber also has a number of responsibilities during investigations. It has the authority to issue orders and warrants as part of the investigative process, including to protect victims and witnesses, preserve evidence, ensure the rights of the defence and facilitate investigations.[4]The Pre-Trial Chamber can issue arrest warrants and summonses for suspects based on applications from the prosecutor, where it finds that there are "reasonable grounds to believe" that a crime has been committed.[5]Once an accused is in custody, the Pre-Trial Chamber is also responsible for ensuring the rights of the accused, including determining whether they will be released or detained pending trial.[6]

Before a case goes to trial, the Pre-Trial Chamber must confirm the charges brought by the OTP. At confirmation hearings, the prosecutor must establish "substantial grounds" to believe that the accused committed the crime(s) in question. The accused is generally present at the hearing and may both challenge the evidence presented by the prosecutor and present their own evidence. Based on the evidence presented, the chamber may confirm or decline to confirm any of the charges presented and may also adjourn proceedings to request that the prosecutor provide further evidence or amend the charges.[7] This requirement is a measure against abuse of court process and a furtherance of the Court's independence in order to achieve acceptability among nations.

The proceedings are largely ex parte and as such, they have been criticized for their perceived abuse of due process.[8] The suspects for the alleged crimes that are the subject of the proceedings are not present at this point. Also, the chamber's authorization of investigation can be perceived as an infringement on sovereignty.[9] The Westphalian model adopted in this study asserts that there is only one sovereign, answerable to no body above.[10]

[4] Article 57, ibid.

[5] Article 58, ibid.

[6] Article 60, ibid.

[7] Article 61, ibid.

[8] ICC: 'The International Criminal Court- Current Challenges and Perspectives', Salzburg Law School on International Criminal Law, August 08, 2011.

[9] Ibid.

[10] Ibid.

By the chamber, an international institution, authorizing investigation is an infringement on the sovereign power that has decided not to investigate nor prosecute the alleged criminals. This further exacerbates the already sour relations the Court has with the African Union. The effectiveness of the Court, which is heavily reliant on states' cooperation is at a great risk since the affected sovereigns will most likely not cooperate with the Court.

4.2 Sovereignty and the International Criminal Court

Traced back to the Peace of Westphalia, about 1648, the treaty system brought in territoriality in the definition of a state, with the power to govern its population, legislate on internal issues, defend its frontiers and generally assert its full authority without any external interventions.[11]

Underlying the concept of sovereignty are three key elements, namely; territorial integrity, equality of all states and non-interference from other states in the internal affairs of the other. Territorially, a given state has total control and attaches a right to defend over its frontiers as recognized internationally. It is an international crime for a state(s) to aggress another.[12]For equality, all UN states are recognized as equal members with the same attaching rights and obligations.[13] On the other hand, non-interference goes without saying that a recognized sovereign state has to be respected by the equal other.

This Westphalian model of statehood ushered in an absolute authority with little or no external control. A deeper illustration of sovereignty is seen in chapter 1 hereinabove.

The above notwithstanding, in the complexities of the interconnected global system where there are pressing needs for international cooperation in the areas of human rights protection, environment, trade, among others, the absoluteness of the state can no longer hold.

[11] Said Ali, et al., 'The Concept of State Sovereignty in International Law', Asian Social Studies and Applied Research (ASSAR), Vol. 2, Issue 4, November, 2021.

[12] Article 5(d), the Rome Statute, supra.

[13] Article 2(1), the Charter of the United Nations, supra.

While sovereignty is a fundamental principle of international law, its application has to evolve to strike a balance between the imperative of states to govern themselves and the exigencies of international cooperation in the comity of nations, cognizant of the fact that there are internationally shared challenges. These shared challenges and obligations under international customary law have brought about one of the main conflicts between the ICC and the states.

The international community has a duty to protect in what is referred to as the "responsibility to protect" in the UN system.[14] Debates surrounding this duty are that as civilized people of the world, a state cannot commit atrocities against its population as the rest of the world watches by. This system is embedded in the African Union interventionist frameworks.[15] Under the UN application, the doctrine was applied in the international effort to drive Muamar Ghaddafi's regime, formerly controlling Libya out of power.[16] However, the doctrine has not fully been harnessed in several other situations. The conclusion is that even well-thought-out endeavours to stop impunity have been politically abused to further alliances. Coupled with this is the need to respect international obligations under the IHL that has evolved through custom and treaty in the nuanced view of sovereignty as opposed to the absolute Westphalian model. The challenge comes with enforcement. International treaties are consent based while IHL, customary law and international organisations require states to cede some sovereign rights.

Depending on whose favour the concept is in, it is often applied differently. For geopolitical reasons, China chose to veto a UNSC resolution referring the current Sudan conflict to the ICC investigation, citing the state's sovereign right to resolve its internal affairs without external interventions.[17] The current regime in Sudan has vowed not to surrender former President Omar Al Bashir citing its sovereign duty to try its nationals locally.

[14] Frank, Okyere Osei,'20 Years of R2P: Moral Responsibility through an African Lens', Global South Hub, April 14, 2025

[15] FK Mabera, 'The African Union and the Responsibility to Protect; lessons Learnt from the 2011 United Nations Security Council Intervention in Libya', UPSpace Repository, University of Pretoria, 2015.

[16] Ibid.

[17] Congressional Research Services, 'The War and Humanitarian Crisis in Sudan', supra.

The UNSC reference of the situation in Sudan to the ICC has limited the investigation to Darfur only and despite the fact that there are atrocities in many other regions, the investigation cannot stretch beyond Darfur for sovereignty reasons.[18] It has been observed that an excess of sovereignty and state power can lead to international crimes like the Holocaust, but so is the total lack of it.

Where sovereign authority is totally broken, there are emergencies of international crimes.[19] The case of Libya illustrates what the lack of sovereignty can breed. There are over 15 warring factions with corresponding warlords asserting authority.[20] This has left a void in the security system leading to the emergence of terrorist havens and failure to enforce ICC warrants.[21] We can act through sovereignty to restrict actions justified in the name of state sovereignty. Sovereigns need limitations. TWAIL scholarship has argued that the ICC can perpetuate colonial legacies in weaker state, especially Africa, undermining sovereignty.[22]They have argued further that the Western powers use international law to legitimize interventions and that the ICC infringes on the sovereignty. That it is colonial and on a civilizing mission to the perceived weaker violent nations. They have portrayed African people as violent, and in need of suppression.[23] They further argue that the global powers are immune to the "universal jurisdiction" of the ICC. A deeper discussion of the two cases is hereinbelow. The USA has argued that Israel and the USA are non-states parties to the Rome Statute and that they are democracies with law abiding militaries and as such, the ICC has no jurisdiction on them. Also suffice to note is the fact that there are very few of warrants outside Africa. Sovereignty remains a stumbling block in the ICC prosecutions in Africa for the examination above.

[18] See, generally, UNSC Resolution 1593 (2005).

[19] Robert Cryer, 'International Criminal Law against State Sovereignty: Another Round?', the European Journal of International Law, Vol. 16, no. 5, 2006.

[20] Richard Ware, 'Libya: The Consequences of a Failed State', supra.

[21] Ibid.

[22] Richard Ware, 'Libya: The Consequences of a Failed State', supra.

[23] Anghie Antony, 'Finding the Peripheries. Sovereignty and Colonialism in Nineteenth Century International Law', Harvard International Law Journal, 40, 1999.

4.3 **Complementarity and the International Criminal Court**

Suffice to further emphasise that the Court is intended to complement but not to replace national criminal justice systems.[24]It can prosecute cases only if national justice systems do not carry out proceedings or when they claim to do so but in reality, are unwilling or unable to carry out such proceedings genuinely - the principle of complementarity.[25]As earlier on explained in chapter two, the essence was to strike a balance between the sovereign right of all states to have criminal jurisdiction over acts within their jurisdiction but at the same time protect the interests of the international community by effectively prosecuting international crimes, avoid impunity and deter future crimes within the jurisdiction of the Court.[26]

The reason for the unwillingness is often political, the perpetrators being the ones in power or the previously warring parties agreeing to cessations of hostilities but providing for immunities in their agreements. For inability, it is sometimes the collapse of the state systems as the case with Libya and CAR. These are illustrated in the Prosecutor v. Saif Al Islam[27]below and the Ugandan international crimes division of the High Court.

Following the events in Tunisia and Egypt in the early months of 2011,[28]a state policy was designed at the highest level of the Libyan State machinery that aimed at deterring and quelling, by any means, including by the use of lethal force, the demonstrations against the regime of Muammar Gaddafi which started in February 2011.[29]

In furtherance of the above-mentioned state policy, the Libyan Security Forces, which encompassed units of the security and military systems, carried out throughout Libya – and in particular in Tripoli, Misrata and Benghazi as well as in cities near Benghazi such as Al-Bayda, Derna, Tobruk and Ajdabiya –

[24] Article 17, ibid.

[25] The Prosecutor v. Tadic, supra.

[26] Ibid.

[27] ICC-01/11-01/11.

[28] Civilian uprisings against regimes in some parts of the Arabian world that were later popularly came to be known as the Arab Spring.

[29] The Prosecutor v. Saif Al Islam Ghaddafi, supra.

an attack against the civilian population taking part in demonstrations and those perceived to be dissidents, killing and injuring as well as arresting and imprisoning hundreds of civilians.[30]

On 26 February 2011, the United Nations Security Council decided unanimously (15 votes in favour) to refer the situation in Libya to the ICC Prosecutor, stressing the need to hold accountable those responsible for attacks, including by forces under the control of those responsible, on civilians.[31]After conducting a preliminary examination of the situation, the ICC Prosecutor concluded, that there was a reasonable basis to believe that crimes under the ICC's jurisdiction had been committed since 15 February 2011, and decided to open an investigation in this situation.[32]Later, the Prosecutor requested the issuance of these three warrants against Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi for their alleged criminal responsibility for the commission of murder and persecution as crimes against humanity from 15 February 2011 onwards throughout Libya and on 27 June 2011, the Pre-Trial Chamber I granted the Prosecutor's request.[33]

The Libyan government then challenged the admissibility of the case concerning Saif Al-Islam Gaddafi before the Pre-trial Chamber I. While the Judges acknowledged Libya's efforts to restore the rule of law, the chamber rejected the challenge, concluding that Libya was unable to genuinely carry out the prosecution of Mr. Gaddafi and found that the evidence submitted was not sufficient to consider that the domestic and the ICC investigations cover the same case,[34] a finding which was also confirmed by the ICC Appeals Chamber. Another challenge was still lodged by Mr. Gaddafi himself but the same decision was reached, although it was further appealed.[35]

On the other hand, the same court found the Libyan authorities' challenge to the admissibility of the case with regard to Abdullah Al Senussi inadmissible before the ICC as it was then subject to domestic proceedings conducted by the Libyan competent authorities and that Libya was willing and genuinely able to carry out such investigation.

[30] Ibid.

[31] UNSC Resolution 1970 also imposed sanctions against the Libyan regime.

[32] The Prosecutor v. Saif Al Islam Ghaddafi, supra.

[33] Ibid.

[34] Ibid.

[35] Ibid.

On 24 July 2014, the appeals chamber unanimously confirmed the pre-trial chamber I's decision, declaring the case against Abdullah Al-Senussi inadmissible before the ICC, bringing an end to the Proceedings against him,[36]a clear indication of fairness as opposed to the AU imputations of bias and witch hunt.

Complementarity would not be a challenge to the ICC per se. Indeed, Luis Moreno Ocampo[37]argued that the efficiency of the ICC should not be measured on the number of cases that reach the Court. That on the contrary, the absence of trials before the Court, as a consequence of the regular functioning of national courts in situations, would be a major success.[38]Complementarity has, at times, been used as a shield against the Court's operation. Sudan, as a case in point, has vehemently argued that their national court system can ably prosecute the war criminals in the ensuing conflict and those that were indicted upon the investigations in Darfur following resolution 1593.[39]On the other hand, Libya has refused to hand over Saif Al Islam Gaddafi to the ICC despite an arrest warrant against him.

4.4 Immunity and the International Criminal Court

Immunity, generally, stems from the development of the law on diplomatic relations that grew from a customary anchoring,[40] where ancient nations could recognize the status of diplomatic agents and foreign states as equals.[41]

[36] Ibid.

[37] The former ICC Prosecutor of the ICC.

[38] Ocampo, Luis Moreno, Statement at the ceremony for the solemn undertaking of the Chief Prosecutor, June 16 2003.

[39] Supra.

[40] Christian Tomuschat, 'The International Law of State Immunity and Its Development by National Institutions',44 Vanderbilt Law Review, 1105 (2021). Available at: htpps://scholarship.law.vanderbilt.edu/vjtl/vol. 44/iss4/11.

[41] See the Preamble to the Vienna Convention on Diplomatic Relations, 1961.

Bearing in mind the equality of all nations under the U.N. Charter[42]and the need for grace and comity among nations,[43]the law on diplomatic relations was reduced into a binding international treaty, that is; the Vienna Convention.[44]Immunity can be sovereign, Presidential and Diplomatic.

Under the doctrine of sovereign immunity, domestic courts relinquish, **in appropriate cases** (emphasis mine), jurisdiction over a foreign state. A state's courts do not exercise jurisdiction over another.[45]On the other hand, the law on immunity of diplomats covers Presidents and ministers while visiting other states. This is the centre of focus of the study as it has immensely challenged the functionality of the ICC. Immunity of heads of state recognizes both personal and functional immunity. Under functional immunity, heads of state are immune from prosecution even after the expiration of their terms for acts done in their official capacity. Under *ratione personae*, both the private and official acts of the President while in office are covered. It essentially prevents foreign courts from asserting jurisdiction over the President's actions.

Although such immunity is not absolute, in many cases it can only be waived by the home state and as such, states have used this immunity to shield international criminals from arrest. Exceptions to immunity indeed exist. In cases of international crimes, for instance, international law recognizes that a head of state is not shielded from prosecution for crimes like genocide, war crimes, or even crimes against humanity. Indeed, functional immunity was challenged in the classical Pinochet case.[46]The case sheds light on what values and priorities should be accorded prominence in international law. Article 27(2) clearly stipulates that immunities which may attach to official capacities, whether under national or international law, do not bar the Court from exercising jurisdiction over such persons. However, the article is then countered to ensure that the ICC actions are consistent with international law, the Statute provides that the ICC cannot proceed with a surrender request if the request would require the

[42] Article 2 of the U.N. Charter emphasizes the sovereign equality of all nations.

[43] Verlinden B. V. v. Central Bank of Nigeria, 461 U.S. 480, 486 (1983).

[44] The Vienna Convention on Diplomatic Relations, 1961.

[45] House of Representatives Report No. 94-1487, at 3 (1976), on the enactment of the Foreign Sovereign Immunities Act, No. 94-583, 90 Stat. 2891 (1976).

[46] Andrea Bianchi, 'Immunity versus Human Rights: The Pinochet Case', EJIL, 1999.

requested state to act inconsistently with its international obligations regarding state and diplomatic immunity.[47]According to jurisprudence, the ICC is not forbidden from issuing arrest warrants for sitting heads of state. Indeed, the Article does not talk about arrest.

The Pre-Trial Chamber 1 of the ICC decided on the alleged failure of the governments of Chad and Malawi to effect arrest warrants against President Al Bashir of Sudan.[48]It is upon this that the A.U. released a statement that the decision had the effect of rendering Article 98 redundant, non-operational and meaningless. The A.U. believed that the Article provided immunity of President Bashir.[49]In itself, article 98 leaves the statute ambiguous on immunities.[50] A deeper analysis of it seems to confer customary immunity unto high-ranking political players such heads-of-state.

This stance is adopted in the South African case against the government for failure to arrest Al Bashir,[51]a case best analysed under the theme of cooperation although some highlights are herein for purposes of emphasis. Upon issuing arrest warrants against President Omar Al Bashir, the ICC then forwarded to all countries that are parties to the Rome Statute, including South Africa, with a request that they cooperate under the Rome Statute and cause President Al Bashir to be arrested and surrendered to the ICC.

When President Al Bashir arrived in South Africa to attend the AU assembly in June 2015, the Government took no steps to arrest him. It adopted the stance that it was obliged not to do so as President Al Bashir enjoyed immunity from such arrest.[52]The Diplomatic Immunities and Privileges Act was relied upon by the government.[53]The Minister of Justice, acting under the

[47] Article 98 of the Rome Statute.

[48] ICC, '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', ICC-02/05-01/09-139, 12 December 2011.

[49] Jens M. Iverson, 'The Continuing Functions of Article 98 of the Rome Statute', Goettingen Journal of International Law 4 (2012) 1, 131-151.

[50] Ibid.

[51] The Minister of Justice and Constitutional Development v. The Southern African Litigation Centre (867/15) [2016] ZASCA 17 (15 March, 2016).

[52] Ibid.

[53] The Diplomatic Immunities and Privileges Act, 37 of 2001.

said Act,[54]made a proclamation of immunity to President Al Bashir. Section 4 of the Act adopts customary international law on immunities generally and may even be conferred by the Minister.[55]

The case highlights how political forces undermine law to further their agenda. The Executive approach to the case was one of the applications of immunity as a shield yet that of the law was one of strict adherence to international norms and obligations under the Rome Statute. Given that it is the political will that determines the enforcement of warrants, it is an immense challenge to the Court when the Executive is unwilling to arrest a war criminal notwithstanding national court findings.

This political nature of immunities can best be contrasted with the case of Malawi. In 2011, while President Bingu Wa Mutharika, a staunch critic of the ICC, was the then sitting president, the ICC requested Malawi to effect an arrest of President Al Bashir. The response was a sweeping rejection where the information minister told the BBC that it was not her government's business to arrest him.[56]

Conversely, in the following year when a new government led by President Joyce Banda took over, it accepted the ICC request to arrest Al Bashir.[57] Although the failure to effect arrest warrants has firmly been blamed on non-state cooperation, the existence of a room for immunities under the Statute has favoured those against the prosecutions of the Court. Recently, arrest warrants were issued against Prime Minister Benjamin Netanyahu of Israel and former Israel defence minister Yoav Gallant for alleged war crimes committed during the armed conflict with Hamas in Gaza.[58]The first rejection was from Israel, of course it had to anyway; that the Court has no jurisdiction.[59] This is a different challenge altogether, however, prominent states raised concerns over breaches of international customary law on immunities.[60]

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[54] Section 7, ibid.

[55] Ibid.

[56] UN News, 'ICC Asks Malawi to Explain Failure to Arrest Sudan's President on Visit', October 19, 2011.

[57] Gabe Joselow, 'Malawi Cancels AU Summit Over Bashir Controversy', *Voice of America*, June 8, 2012.

[58] Rebecca Ingber, 'Mapping State Reactions to the ICC Arrest Warrant for Netanyahu and Gallant', Just Security, March 06, 2025.

[59] Ibid.

[60] Ibid.

France, a permanent member of the UNSC and a state party to the Rome Statute, cited immunity and emphasised that it would be a breach of international customary law to arrest a sitting head of state.[61]Varied reactions to the warrants were echoed across the globe but with different reasons. An analysis of the major reactions will be seen below in the discussion on state cooperation as a challenge. All in all, immunity remains a complex issue under international law, immensely affecting the ICC prosecutions when such prosecutions are hinged on effecting arrest warrants internationally, especially when they are issued against sitting heads of state. President Al Bashir, during his tenure, while on arrest warrant, managed to visit Chad, China, Kenya, Malawi, Libya and Djibouti.

4.5 International Cooperation and the International Criminal Court

The ICC has no police to enforce warrants. Absent state cooperation the warrants would be meaningless. The requirement for states parties to cooperate with the court is enshrined in the Rome Statute.[62] For states parties to the Statute, whenever there is a warrant against any individuals, they are under obligation to effect the same in case the indictee is on their respective territory.[63]For non-states parties, however, the ICC can invite them to provide assistance on an ad hoc arrangement. This invitation does not impose obligations on the invitee.

On the other hand, the UNSC, invoking its powers under the UN Charter,[64] can mandate a non-state party to cooperate in effecting ICC warrants against indictees on their territory. Such rulings are binding. This is why the UNSC mandated Sudan to comply with the ICC albeit not being a state party to the Rome Statute.[65]

The reliance on sates' cooperation has proved a serious problem in the face of ICC resistance emboldened by the TWAIL scholarship, customary international law on immunities and the forces of sovereignty.

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[61] Ibid.

[62] Article 87 of the Rome Statute of the International Criminal Court.

[63] Ibid.

[64] Chapter v11 of the Charter provides for the powers of the UNSC to oversee world peace and security generally.

[65] See resolution 1593 of the UNSC, supra.

Several African states objected to the requirement to arrest President Omar Al Bashir formerly of Sudan in the wake of the ICC warrant against him. Cases in point are Chad, which failed to arrest him when he visited between the 7 and 8 of August, 2011; Djibouti, Kenya and Malawi. Total failure of states cooperation can be examined with the analysis of the South African case below against the government for its failure to effect the arrest warrant against President Omar Al Bashir. The Janjaweed Militia and the Sudanese military actions in Darfur and elsewhere in Sudan shook the African Union and the international community at large.[66]

On 31 March, 2005, the UNSC adopted the report of the International Commission of Inquiry on the violations of international humanitarian law and human rights law in Darfur and decided to refer the situation to the ICC Prosecutor.[67] As a result of the investigations by the ICC, President Al Bashir stood accused of serious international crimes, among which were war crimes in Darfur.[68] The Pre-Trial Chamber of the ICC then issued two warrants for his arrest. The first warrant was issued on 4 March, 2009 and related to charges of war crimes and crimes against humanity.[69]

The second, which related to charges of genocide, was issued on 12 July, 2010.[70] The warrants were then forwarded to all countries that are parties to the Rome Statute, including South Africa, with a request that they cooperate under the Rome Statute and cause President Al Bashir to be arrested and surrendered to the ICC. When President Al Bashir arrived in South Africa to attend the AU assembly in June 2015, the Government took no steps to arrest him. It adopted the stance that it was obliged not to do so as President Al Bashir enjoyed immunity from such arrest.[71]

[66] International Commission of Inquiry into Violations of International Humanitarian Law and Human Rights Law Report, Journal of International Criminal Justice, 2012.

[67] United Nations Security Council Resolution 1593, 2005.

[68] The Minister of Justice and Constitutional Development v. The Southern African Litigation Centre, supra.

[69] Ibid.

[70] Ibid.

[71] Ibid.

The respondent, the South African Litigation Centre (SALC), then urgently applied to the Gauteng Division of the High Court, Pretoria, seeking orders declaring the failure to take steps to arrest President Al Bashir to be in breach of the Constitution and to compel the Government to arrest and surrender him to the ICC, pursuant to the two warrants.[72]The Government opposed the urgent application and sought and obtained a postponement to enable affidavits to be prepared, a calculated delay tactic that would enable President Al Bashir escape arrest. In granting the postponement, the High Court made the following orders:

i. That President Omar Al Bashir was prohibited from leaving the Republic of South Africa until a final order was made and the government was directed to take all necessary steps to prevent him from doing so.[73]

ii. The Director-General of Home Affairs was ordered to effect service of the order on the officials in charge of each and every point of entry into and exit from the Republic; and once he had done so, to provide the applicant with proof of such service, identifying the name of the person on whom the order was served at each point of entry and exit.[74]

When the hearing resumed the following day, the Court sought the assurance from the Government, that President Al Bashir was still in the country, to which the government answered in the affirmative. The Court then made orders that the conduct of the Respondents to the extent that they had failed to take steps to arrest the President of the Republic of Sudan, Omar Al Bashir, was inconsistent with the Constitution of the Republic of South Africa, 1996, and invalid and that the respondents were forthwith compelled to take all reasonable steps to arrest President Bashir him without a warrant as per the provisions of section 40(1)(k) of the Criminal Procedure Act, 51 of 1977 and detain him, pending a formal request for his surrender from the International Criminal Court.[75]Immediately after this order was made, the government representative told the Court that President Al Bashir had left the country earlier that day.

[72] Ibid.

[73] Ibid.

[74] Ibid.

[75] Ibid.

In those circumstances the assurances that he had been still in the country given to the Court at the commencement and during the course of argument had been false.[76]This is a classic case of state cooperation failing the ICC in the guise of immunity. There are fresh warrants of great international concern that will have a profound effect on the operations of the Court, testing states parties' commitment and international customary law on immunities.

Although they are outside Africa, the two cases are worthy a mention, at the very least, in order to contrast them with the case of Omar Ahmed Al Bashir as they pit the global south against the global north, further testing how the different geopolitical spheres would relate with the Court. The warrants against Vladmir Putin, the President of Russia and Israeli Prime Minister Benjamin Netanyahu shook the international community with varied reactions. The former was indicted for war crimes in the Russia-Ukraine war, particularly for the war crimes of unlawful deportation of population (children) and unlawful transfer of population (children) from the occupied territories in Ukraine to the Russian Federation.[77]On the other hand, the latter was accused of alleged war crimes in the Gaza war with Hamas.[78]

Several states, both parties and non-states parties, have had mixed reactions, a pointer on whether they would cooperate with the Court or not. This study analyses that against Benjamin Netanyahu, where the reactions can be categorised as expressions of compliance, politics, outright non-compliance, non-committal, outright rejection and support.[79]Many Arab and African states expressed their intention to comply and cooperate with the Court, notably Algeria, Namibia, Djibouti and South Africa,[80]the very state that raised immunity as a shield against arresting another sitting head of state, Al Bashir.[81] Arab states also, expectedly, expressed their intent to cooperate with the Court, notably Tunisia, Algeria, Jordan, Turkey, Iraq, Lebanon and others.[82]

[76] Ibid.

[77] ICC: 'Situation in Ukraine: ICC Judges Issue Arrest Warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova', Press Release, March 17, 2023.

[78] Rebecca Ingber, 'Mapping State Reactions to the ICC Arrest Warrant for Netanyahu and Gallant', supra.

[79] Ibid.

[80] Ibid.

[81] Ibid.

[82] Ibid.

From the global south, India is yet to take a formal position, probably due to the relation with Israel;[83] Bangladesh, Colombia, Honduras and Bolivia expressing their support.[84] For the permanent members of the UNSC, each has a reason for its intention not to comply.

France, notably, has raised international customary law on immunities, holding a stance that to effect the warrant would be an illegality.[85] USA has raised lack of jurisdiction.[86] That the ICC has no jurisdiction since Israel is no a state party to the Rome Statute, further emphasing its stance during the preparations to the Rome Statute and vowed not to comply. Indeed, Netanyahu has been in the USA on several occasions. The U.K. has remained non-committal together with China and Russia.[87]

Other major states that remained non-committal include Italy, Australia and India. [88]The above analysis shows that states' reactions to ICC warrants are not usually anchored on the obligations under the Statute but rather political, policy and geopolitical affiliations and as such, it is very difficult to enforce them.

[83] Ibid.

[84] Ibid.

[85] Ibid.

[86] Ibid.

[87] Ibid.

[88] Ibid.

Chapter Five

Conclusions And Recommendations

5.0 Introduction

In this final chapter, the study summarises the findings, restating the main results and the significance. The central research question, that is; whether, in a TWAIL perspective, the International Criminal Court has been effective in prosecuting war crimes on the African continent, is answered. The weaknesses and constraints of the study are highlighted plus the contribution the study has had on the preexisting field of knowledge. An attempt is made at the most feasible applications in order to remedy the state of affairs and areas for further research are suggested.

5.1 The Findings

The examinations and analyses of the legal literature followed the sovereignty theory and the TWAIL scholarship view to war crimes prosecution by the ICC, previously, a gap that has been in this field of knowledge. This followed the African argument that the concept of sovereignty was never extended to Africa, the reason they were colonized. That even after the attainment of independence, European hegemony persisted, realized through internationally biased legislations. This is why we have the Rome Statute establishing the ICC which is biased towards the prosecution of African war criminals excepting the global north, herein referred as an African witch-hunt. For this matter, African sovereigns guard their sovereignty jealously, so much so that they have weaponized it. It was upon this argument that the research based to analyse whether the Court has been effective in prosecuting war criminals in Africa and if not, account for it.

After the study, it was realized that the Court has not exhaustively prosecuted the war criminals. Several factors accounted for this, but analysed according to 5 major legal themes of sovereignty, complementarity, immunity, jurisdiction and state cooperation, interplaying with the global geopolitical divide flowing from the structure of the UNSC.

Two parallels were drawn from sovereignty. One, an excess of state sovereignty and power, it was seen, could lead to international crimes like the war crimes; but, conversely, so can a lack of it. This is the case with failed states like Libya, Somalia, parts of the Democratic Republic of Congo and Haiti. We act through sovereignty to restrict sovereign overreach and for that reason, international law on humanity is necessary. Although the ICC could perpetuate colonial legacies, it is necessary to check sovereign overreaches.

There was also a complementarity paradox. Declarations of states' unwillingness and inability to prosecute international crimes pits such states against the Court, given its reliance on state cooperation. This accounts for failures to effect warrants and cooperate in investigations. Divergencies in global cultures mean a different perception of what amounts to justice. Certain cultures view truth and amnesty commissions as the best closure mechanisms. Others believe in forgiving and forgetting. On the other side of the aisle, the Court believes in trials. Historically, there has been the use of international tribunals for retribution by the victors and as such, states now have an innate fear of such tribunals.

Jurisdiction was yet another factor. Any set of laws operates within a given geographical realm and absent that realm, then such laws cannot operate. The TWAIL's view of an international criminal prosecution was a Court of a universal jurisdiction drawing its authority from the UN as an organ. In this way, it could prosecute all war criminals around the world for all the members of the UN. However, what we have is a Court riddled with geopolitical affiliations in its referrals where it has no geographical reach-the UNSC referrals. State referrals have also been perceived as continuations of conflicts as sovereigns refer their opponents.

Under customary international law, states accord immunity to diplomats, the chief diplomat being a head of a given state. Indeed, there is a divergent interpretation of Article 98 of the Rome Statute. Several states have used customary immunity to avoid effecting warrants against wanted war criminals like former Sudanese President Al Bashir. Already, states have put up this shield to avoid effecting warrants against Israeli Prime Minister Benjamin Netanyahu and Vladmir Putin of the Russian Federation.

A criminal court without a police force can only rely on the cooperation of different sovereigns to effect its arrest warrants. This is the case with the ICC. This reliance on state sovereigns has left the Court reeling with several alleged war criminals escaping justice.

The study restricts the scope to Africa while, at the same time, examining the effectiveness of an international Court. To ably illustrate the themes, the researcher used a few scenarios outside of Africa, although this may be received as a weakness. The combination of the five legal thematic factors of sovereignty, complementarity, immunity, jurisdiction and state cooperation leads to many alleged war criminals escaping prosecution, breeding the impunity gap. Since the argument was Afrocentric, it was paramount to examine what Afrocentric scholarship says on the Court and what its ideal international criminal court would be, hence the TWAIL scholarship theory.

5.2 Recommendations

Some applications to remedy the current state of affairs are suggested herein, with their feasibility hinged on a general reform of the geopolitical system, in particular, the structure of the UNSC membership that has shaped the geopolitical world. The UNSC is a vestige of the great war, the Second World War. Throughout this study, victor's justice has been influential in what happens after the conflicts. Usually, the winners determine who gets justice and who is prosecuted. Beyond the prosecutions, there have also been profound effects of wars but mainly determined by the winners. In this way, the winners of the second great war determined a global system where they could oversee peace and security. This system was effective at the time that immediately followed the war; however, a lot has changed across the globe. Hitherto economically, politically and socially weaker states have now gained a global star. States like India, Germany, Japan, Brazil, Canada and South Africa, on the African continent can be cases of reference. The 5 permanent members have become the world police wielding absolute authority over who does what and what happens to who, yet it lacks representation from the global south. These members are largely influenced by political alliances. A case in point is the unending vetoes against resolutions affecting Israeli military operations in the occupied territories.

The Court should be granted universal jurisdiction over all international humanitarian grave breaches. Currently, jurisdiction is restricted to those nationals and territories of states parties to the ICC and under strict trigger mechanisms or where there is a UNSC reference. For instance, if a situation is in Ethiopia, with breaches by Ethiopians, the Court cannot investigate them unless there has been a state referral or the UNSC.

Absent these and the criminals would never be punished. If some states like Belgium, Germany, France, Spain, Australia, the United States of America, Canada, Senegal and some others have established universal jurisdiction for grave crimes like terrorism, genocide, war crimes and crimes against humanity, torture and other heinous international crimes, why can't it be granted to an internationally embracing court system?

There should be an attempt to balance the Eurocentric aspects of the ICC and the flaws of TWAIL. The study concedes to Antony Anghie's approach that even the African sovereigns have failed to humanize their authority. They are totalitarian in character yet wielding unimaginable impunity within their societies. The Court can establish quasi-international blends in situational areas like what happened in the Central African Republic. This would eliminate the need to fly off witnesses to far off lands in the Hague and the affected communities would feel part of the punitive processes. It would be some kind of propped complementarity yet bridging the impunity gap and curbing victor's retribution. Alternatively, the Court may establish regional circuits. All in all, the above suggestions cannot be effective without the geopolitical will and reformation. An investigation on the application of transitional justice mechanisms in international criminal tribunals is suggested.

Going forward in the development of the ever-evolving international criminal law, jurisprudence and policy, TWAIL scholarship ought to be adopted in order to incorporate the Afrocentric views and representation. Recently, there has been a call to realign the UNSC membership to accommodate more global southern states. There is a general call among TWAIL to have an African state on the permanent seat of the UNSC and overhaul the membership of the 5 permanent members with veto authority. These and other policy reforms would give a global face to the international criminal prosecutions. It is really absurd that a non-state party to the ICC would pass a resolution to authorize the ICC to take action. At such a point, the proponents of state equality would argue that such states would be acting as international law enforcement entities rather than equal states, further encouraging dissent towards the ICC and all hegemonic international bodies.

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