



5-1-2011

How Effective the International Criminal Court Has Been: Evaluating the Work and Progress of the International Criminal Court

Moses Retselisitsoe Phooko

Follow this and additional works at: <http://scholarship.law.nd.edu/ndjicl>



Part of the [International Law Commons](#)

Recommended Citation

Phooko, Moses Retselisitsoe (2011) "How Effective the International Criminal Court Has Been: Evaluating the Work and Progress of the International Criminal Court," *Notre Dame Journal of International & Comparative Law*: Vol. 1: Iss. 1, Article 6.

Available at: <http://scholarship.law.nd.edu/ndjicl/vol1/iss1/6>

This Note is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Journal of International & Comparative Law by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

**HOW EFFECTIVE THE INTERNATIONAL CRIMINAL COURT HAS BEEN:
EVALUATING THE WORK AND PROGRESS OF
THE INTERNATIONAL CRIMINAL COURT**

Moses Retselisitsoe Phooko

**HOW EFFECTIVE THE INTERNATIONAL CRIMINAL COURT HAS BEEN:
EVALUATING THE WORK AND PROGRESS OF THE INTERNATIONAL CRIMINAL
COURT**

Moses Retselisitsoe Phooko*

ABSTRACT

There are serious challenges facing the International Criminal Court (ICC). Two of these hindrances are that: firstly, the ICC has been accused of only targeting the African continent; and secondly, the Rome Statute of the International Criminal Court (Rome Statute) has no enforcement mechanism against the state parties who refuse to cooperate with the court. In light of these challenges, the question is whether the ICC would be able to meet the expectations of the international community. The significance of this study is to contribute to the effort of making the ICC an independent, credible and effective tribunal to end impunity for those who commit heinous crimes. This paper seeks to assess the work and progress of the ICC since its inception in 2002. To achieve this, the paper will focus on the causes of non-implementation of pending warrants of arrest and attempt to ascertain whether the aforesaid warrants have had effects on the conditions that lead to: the investigations by the ICC; the cases before the court which have, in my view, compromised the integrity and autonomy of the ICC because of, inter alia, its selective geographical prosecutions; convictions made by the court (if any); the pillar of the ICC, namely cooperation from member States to the Rome Statute that seems to be lacking; the future relationship between the African Union and the ICC given the current tension between the two institutions; the recent developments on the definition of the crime of aggression as a success in pre-empting States from occupying other States outside the permissible grounds under the Charter of the United Nations; and views on the proposed introduction of the oversight mechanism for the ICC and recommendations on how to improve the effectiveness of the Court.

INTRODUCTION

Three hundred thousand people have been killed in Darfur, Sudan since 2003.¹⁷⁴ Conflicts in other parts of the world including the Democratic Republic of Congo (DRC), Uganda and Colombia, continue to claim more innocent lives. Kenneth Roth opined the inability of the international community to punish perpetrators of heinous crimes as follows:

The cause of this century's brutality is not simply the evil that lies in some men's hearts. It is our [collective] failure to build on the Nuremberg precedent by ensuring that all such killers are brought to justice. Too often since the Holocaust, the cries of the victims have gone unanswered. . . . Too many others responsible for the atrocities of this century continue to enjoy impunity.¹⁷⁵

Kenneth Roth's assessment of the situation then is relevant even today: some of the perpetrators indicted by the ICC for heartless crimes are walking freely, including President Omar Hassan Al Bashir.¹⁷⁶ In other cases, the warrants of arrest have become stale.¹⁷⁷ What does this signify to the victims, and will the ICC be able to live to the expectations of the international community by punishing those responsible for crimes that "shock the conscience of humanity"?¹⁷⁸ The inability or delay of any judicial institution to deliver justice is a grave concern for those who look to the courts as the proper body to bring justice.

It is against this background that the drafters of the Rome Statute foresaw a need to incorporate a provision for review of the Statute after seven years of operation, in order to address these concerns.¹⁷⁹ The first Review Conference was held in Kampala, Uganda on May 31, 2010 to reflect on eight years of the ICC's existence and to attend to outstanding issues such as the

* LL.M candidate., International Human Rights Law, University of Notre Dame Law School, Centre for Civil and Human Rights, USA (expected May 22, 2011), LL.B. & Dip. in Human Rights (North West University, Mafikeng), former law clerk at the Constitutional Court of South Africa under Justice Zak Yacoob, advocate of the High Court of South Africa phookor@gmail.com. I am grateful to the editors, Matilda EK Lasseko-Phooko and Benard Akang'o for comments.

¹⁷⁴ UN News Centre, *Fresh Clashes in Darfur Kill Dozens of Civilians, UN-African Union Mission Reports*, Sept. 7, 2011, <http://www.un.org/apps/news/story.asp?NewsID=35847&Cr=darfur&Cr=darfur&Cr1>.

¹⁷⁵ Kenneth Roth, *Endorse the International Criminal Court*, in 3 TOWARD AN INTERNATIONAL CRIMINAL COURT? 19 (Council on Foreign Relations ed., 1999).

¹⁷⁶ Prosecutor v. Omar Hassan Ahmad Al Bashir, No. ICC-02/05-01/09-1, Warrant of Arrest (Mar. 4, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf>.

¹⁷⁷ Rep. of the Int'l Crim. Ct., 64th Sess. Aug. 1, 2008-July 31, 2009, ¶¶ 23-24, U.N. Doc. A/64/356 (Sept. 17, 2009), available at http://reliefweb.int/sites/reliefweb.int/files/resources/C3FF0A887709D69E4925765D000A45E5-Full_Report.pdf.

¹⁷⁸ M. Cherif Bassiouni, *International Crimes: Jus Cogen and Obligatio Erga Omnes*, 59 LAW & CONTEMP. PROBS. 63 (1996).

¹⁷⁹ Rome Statute of the International Criminal Court, art. 123, July 17, 1998, U.N. Doc. A/Conf. 183/9 (hereinafter, Rome Statute).

crime of aggression on the Rome Statute.¹⁸⁰ In his opening address, the President of the Assembly of State Parties, Ambassador Christian Wenaweser, boldly articulated that the international community is “looking at a functioning judicial institution that had eluded [it] for decades.”¹⁸¹ He stated that the conference “will take stock both of the achievements to this day and of the challenges ahead.”¹⁸² Little did he know that his ambitions for a successful permanent international criminal court would become a reality when the delegates at the end of the symposium reached consensus on the definition of the crime of aggression.¹⁸³ The crime of aggression, and its jurisdiction, has been a subject of a vigorous debate for centuries because there was no agreement on its meaning.¹⁸⁴ Even its inclusion in Article 3 of the Rome Statute did not have significance because it was non-operational.¹⁸⁵ It was only on February 13, 2009 that the Special Working Group on Crime of Aggression proclaimed that it had reached an agreement on a draft definition of the crime of aggression, breaking five years of deliberation.¹⁸⁶

The need for the creation of an independent and permanent international criminal tribunal to end impunity by trying those responsible for heinous crimes was first conceived at the Paris Peace Conference in 1919.¹⁸⁷ This idea became a reality on July 17, 1998 when 120 countries at the UN Diplomatic Conference voted in favour of the Rome Statute.¹⁸⁸ The ICC became operational on July 1, 2002 after the Rome Statute was ratified by 60 countries.¹⁸⁹ As of October 12, 2010, 114 States have ratified the Rome Statute.¹⁹⁰ The court has jurisdiction over genocide, crimes against humanity,

¹⁸⁰ *Review conference of the Rome Statute*, Int’l Crim. Ct., <http://www.icc-cpi.int/Menus/ASP/ReviewConference/> (last visited November 20, 2011).

¹⁸¹ Christian Wenaweser, *ICC Review Conference: Opening Remarks*, Int’l Crim Ct., available at http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Statements/ICC-RC-statements-ChristianWenaweser-ENG.pdf (last visited April 12, 2011).

¹⁸² *Id.*

¹⁸³ ICC-ASP/13/Res. 6, (June 10, 2011) available at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf

¹⁸⁴ Michael J. Glennon, *The Blank-Prose Crime of Aggression*, 35 YALE J. INT’L. L. 71 (2010).

¹⁸⁵ Art. 5(1) (d) of the Rome Statute lists the crime of aggression as one of the crimes subject to the ICC jurisdiction. Art. 5(2) suspends the ICC’s jurisdiction over the crime of aggression pending its definition and exercise of jurisdiction. The only crimes that may be brought presently before the ICC include genocide, crimes against humanity, and war crimes.

¹⁸⁶ Glennon, *supra* note 11, at 73.

¹⁸⁷ Shingirai Maparura, *Justice for Export: Africa and the International Criminal Court*, CONSULTANCY AFRICA INTELLIGENCE July 2, 2010, available at http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=459:justice-for-export-africa-and-the-international-criminal-court&catid=57:africa-watch-discussion-papers&Itemid=263.

¹⁸⁸ Melisa K. Marle, *The International Criminal Court: Assessing the Jurisdictional Loopholes in the Rome Statute*, 49 DUKE L.J. 825 (1999).

¹⁸⁹ *About the Court, International Criminal Court*, <http://www.icc-cpi.int/Menus/ICC/About+the+Court/>.

¹⁹⁰ *The State Parties to the Rome Statute, International Criminal Court*, <http://www.icc-cpi.int/Menus/ASP/states+parties/>.

war crimes, and the crime of aggression.¹⁹¹ The ICC will not replace national courts, but it will supplement them when they are “unwilling or unable” to exercise jurisdiction over the world’s most wanted suspects.¹⁹²

The purpose of this discourse is to assess the work and progress of the ICC since its inception in 2002 to date. The study is important because it will contribute towards making the ICC an independent, credible and effective permanent international criminal court to end impunity. The paper will conclude by providing proposals to enhance the effectiveness of the ICC and ensure greater State cooperation with the permanent international criminal court.

In Part I, I look at the pending warrants of arrest,¹⁹³ the factors contributing to the non-implementation, and their effects on the conditions that lead into investigations by the ICC’s prosecutor. I also evaluate whether the ICC’s targeting of low ranking officials is contributory to the non-implementation of warrants of arrest.

Part II assesses the development of cases of the DRC,¹⁹⁴ Central African Republic (CAR),¹⁹⁵ Sudan,¹⁹⁶ Uganda,¹⁹⁷ and Kenya¹⁹⁸ before the court. In particular, I contend that the ICC has made progress given the nature, gravity and complexity of the offences. I also argue that the ICC has, to a certain extent, compromised its credibility through its use of selective prosecutions in Africa, and given no convictions in eight years, this situation is unsatisfactory.

Part III contends that ‘cooperation from member States to the Rome Statute¹⁹⁹ is the pillar of the ICC.²⁰⁰ Consequently, the absence or lack of

¹⁹¹ See Rome Statute, art. 5. The crime of aggression was not defined at the time when the Rome Statute entered into force and thus the court did not have jurisdiction. It was only on July 11, 2010 that the definition was agreed upon, but the actual exercise of jurisdiction is subject to a decision to be taken up on January 1, 2011.

¹⁹² Jennifer J. Llewellyn, *A Comment on the Complementary Jurisdiction of the International Criminal Court: Adding Insult to Injury in Transitional Contexts?*, 24 DALHOUSIE L.J. 192 (2001). See also Rome Statute Art. 1, and Art. 17(2) (3).

¹⁹³ Rep. of the ICC to the UN for 2008/09, *supra* note 4, at 10. The cases are in the following countries: Uganda (Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen), Darfur (Omar Hassan Ahmad Al Bashir, Ahmad Harun and Ali Kushayb), and the DRC (Bosco Ntaganda).

¹⁹⁴ Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Warrant of Arrest (Feb. 10, 2006), available at <http://www.icc-cpi.int/iccdocs/doc/doc191959.pdf>.

¹⁹⁵ *Id.*

¹⁹⁶ Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Warrant of Arrest (July 12, 2010), available at <http://www.icc-cpi.int/iccdocs/doc/doc907140.pdf> (President Al Bashir is charged for genocide under Article 25(3) (a) of the Rome Statute).

¹⁹⁷ Prosecutor v. Joseph Kony, Case No. ICC-02/04-01/05, Warrant of Arrest (Sept. 27, 2005), available at <http://www.icc-cpi.int/iccdocs/doc/doc97185.pdf> (charges include crimes against humanity and war crimes).

¹⁹⁸ Situation in the Republic of Kenya, Case No. ICC-01/09-19, Decision authorizing investigation (Mar. 31, 2010), available at <http://www.icc-cpi.int/iccdocs/doc/doc854287.pdf> (charges include war crimes).

¹⁹⁹ Cooperation with the ICC is mentioned in various provisions of the Rome Statute including art. 86 and art. 93.

support will turn the ICC into an exorbitant, but toothless, international criminal court situated at The Hague, Netherlands. The article also studies the future relationship between the African Union (AU) and the ICC given the current tension between the two institutions.

Part IV argues that the recent resolution on the definition of the crime of aggression is an important success in pre-empting States from occupying other countries outside the permissible grounds under the Charter of the United Nations (UN Charter).²⁰¹ The article also evaluates the seven theories that describe the circumstances that would constitute an act of aggression and, *inter alia*, the controversy brought by the discretion given to a state party to declare that it does not accept jurisdiction of the ICC on the crime of aggression.²⁰²

Part V analyzes the achievements, challenges and failures discussed in Parts I, II, III and IV. It concludes by indicating whether the work of the ICC has been efficient or not. Ultimately, Part V makes recommendations for introducing a system of state compliance to the Rome Statute in order to enhance the effectiveness of the ICC and ensure greater state cooperation with the permanent international criminal court.

PART I: PENDING WARRANTS OF ARREST

This section discusses warrants of arrest and the charges with respect to each country. The absence of a police force in the ICC seems to be the main obstacle in implementing warrants of arrest especially when the state concerned is not willing to apprehend the indicted suspects. This is one of the setbacks facing the court.

(a) Sudan

Sudan's case is unique in that the referral to the ICC was made by the United Nations Security Council (Security Council).²⁰³ Further, Sudan has signed but not ratified the Rome Statute. In *Prosecutor v. Ahmad Muhammad*

²⁰⁰ The International Criminal Tribunal for Rwanda (ICTR) and the former Yugoslavia (ICTY) experienced significant difficulties in their early stages and there were doubts on whether they would deliver justice. The proceedings were costly and too long; hundreds were charged, but only few were convicted. The courts later on considered plea bargaining for low ranking officials in exchange for truth and testifying against "big fishes." This worked briefly but the court later on did not impose sentences recommended by the prosecutors. Rather, it imposed harsher sentences. The accused person did not come forward as they realized that it was no longer guaranteed that a confession and a plea of guilty would result in lenient punishment. Currently, the tribunals are considering sending home accused low ranking officials to stand trial in their countries due to the pressure from the United Nations to complete trials by the end of 2010. See Alex Whiting, *International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered*, 50 (2) HARV. INT'L. L.J. 323 (2009).

²⁰¹ See U.N. Charter art. 51.

²⁰² See ICC Res. 6, *supra* note 10, at art. 15.

²⁰³ Press Release, Security Council, Security Council Refers Situation in Darfur, Sudan, To Prosecutor of International Criminal Court, U.N. Press Release SC/8551 (Mar. 31, 2005) available at <http://www.un.org/News/Press/docs/2005/sc8351.doc.htm> (last visited Apr. 9, 2011). See also Rome Statute, art. 13(b) (dealing with referrals by the Security Council).

Harun and Ali Muhammad Ali Abd-Al-Rahman,²⁰⁴ both warrants of arrest were issued on May 2, 2007. The first accused is facing forty-nine charges for crimes against humanity (murder of civilians in the Kodoom villages) and war crimes (destruction of property).²⁰⁵ The second accused has to answer fifty-one similar charges which include rape.²⁰⁶ The perpetrators have been fugitives since 2007.

In *Prosecutor v. Omar Hassan Ahmad Al Bashir*²⁰⁷ the accused is the first sitting head of state to be indicted by the ICC.²⁰⁸ His warrants of arrest were issued on May 4, 2009 and July 12, 2010 for genocide (amputation of civilians and mental destruction) and crimes against humanity (torture) respectively.²⁰⁹

The Sudanese case is also complex in that it raises the issue of state sovereignty. The undisputed and clear obligation in terms of the Security Council's resolution is that the government of Sudan must arrest President Al Bashir.²¹⁰ The difficulty with this obligation is that on one hand, the ICC has no police force to arrest President Al Bashir. President Al Bashir is the sitting Head of State who still has control of the police and army forces in his country. It is unimaginable that he would order his forces to arrest himself.

Another difficulty is that state parties to the Rome Statute have to cooperate with the ICC by bringing President Al Bashir to the ICC. However, they also have to respect the principle of state or diplomatic immunity of a person under Article 98 of the Rome Statute.²¹¹ Consequently, the conflict faced by states is having to comply with the ICC while also having to respect diplomatic immunity. It is submitted that the principle of State sovereignty seems to be losing its superior status to human rights protection. As was pointed out in *Prosecutor v. Tadic*,²¹² the International Criminal Tribunal for

²⁰⁴ *Prosecutor v. Ahmad Muhammad Harun & Ali Muhammad Ali Abd-Al-Rahman*, Case No. ICC-02/05-01/07, Warrant of Arrest (Apr. 27, 2007), <http://www.icc-cpi.int/iccdocs/doc/doc279813.pdf>.

²⁰⁵ *Id.*

²⁰⁶ *Prosecutor v. Ahmad Muhammad Harun & Ali Muhammad Ali Abd-Al-Rahman*, Warrant of Arrest (Apr. 27, 2007) <http://www2.icc-cpi.int/iccdocs/doc/doc279858.pdf>.

²⁰⁷ *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09-1, Warrant of Arrest (Mar. 4, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf>.

²⁰⁸ *First International Arrest Warrant for Head of State Issued to Bashir Over Darfour [Darfur]*, WORLD TRIBUNE, (Mar. 5, 2009) available at http://www.worldtribune.com/worldtribune/WTARC/2009/af_sudan0188_03_05.asp (last visited Apr. 12, 2011).

²⁰⁹ *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, Second Warrant of Arrest (July 12, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc907140.pdf>.

²¹⁰ See ICC Res. 6, *supra* note 10.

²¹¹ Rome Statute, art. 98 (1) provides that "[T]he Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity."

²¹² *Prosecutor v. Tadic*, Decision on Jurisdiction (Appeals Chamber), Judgment of 2 October 1995, 105 ILR 453.

the former Yugoslavia (ICTY) held that “it would be a travesty of law and betrayal of the universal need for justice, should the concept of state sovereignty be allowed to be raised successfully against human rights.”²¹³ This is further supported by the indictment of President Charles Taylor on March 7, 2003 while he was still a sitting Head of State.²¹⁴ He was, however, arrested after resigning as President.²¹⁵ Ultimately, the provision of Article 27 of the Rome Statute can also be invoked justifying the indictment of President Al Bashir based on the principle that the law should apply equally to all of those accused of grave crimes.²¹⁶

Given the current outstanding warrants of arrest, Sudan will arguably neither ratify the Rome Statute in the near future, nor will President Al Bashir authorize the arrest of his indicted commanders and himself. President Al Bashir is not a fugitive because he walks freely and is seemingly innocent as ever. He arguably also enjoys the lenient treatment from the African Union. Further, this is one of the most unfortunate cases in the African continent where leaders shield perpetrators regardless of the nature of the crimes committed. Indeed, birds of a feather flock together. It is contended that one of the reasons President Al Bashir is protected is because some of the African leaders are, in one way or the other, also responsible for international crimes in their respective countries. The situation in Sudan remains tense and the victims have arguably lost faith in the justice system.

(b) *Uganda*

Uganda has ratified the Rome Statute and it was President Yoweri Museveni who referred the case to the ICC under Articles 13(a) and 14 of the Statute to conduct investigations.²¹⁷ Consequently, five warrants of arrest were issued on July 8, 2005.²¹⁸ After the international community had spent efforts to apprehend Raska Lukwiya in order to answer nine criminal charges against him in *Prosecutor v. Raska Lukwiya*,²¹⁹ the accused cheated justice.²²⁰ He died

²¹³ Andrea Bianchi, *Immunity versus Human Rights: The Pinochet Case*, 10 EUR. J. INT'L L. 237, 261 (1999) (explaining that state practice and the logic of generally accepted principles display an inconsistency between the notion of international crimes and any form of immunity that shields individuals behind their official position).

²¹⁴ *Prosecution v. Ghankay Taylor*, SPECIAL CT. SIERRA LEONE, <http://www.sc-sl.org/CASES/ProsecutorvsCharlesTaylor/tabid/107/Default.aspx> (last visited Apr. 9, 2011).

²¹⁵ *Id.*

²¹⁶ Rome Statute, *supra* note 6, at art. 27 (providing that “[T]his Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as [Head of State or Government] . . . in no case exempt a person from criminal responsibility under this Statute, nor shall it, in itself, constitute a ground for reduction of sentence.”).

²¹⁷ Abigail H. Moy, *The International Criminal Court's Arrest Warrants and Uganda's Lord's Resistance Army: Renewing the Debate Over Amnesty and Complementarity*, 19 HARV. INT'L L.J. 267 (2006).

²¹⁸ *Id.*

²¹⁹ *Prosecutor v. Raska Lukwiya*, Case No. ICC-02/04-01/05055, Warrant of Arrest (July 8, 2005), <http://www2.icc-cpi.int/iccdocs/doc/doc97193.pdf>.

whilst still at large thus escaping counts of war crimes and crimes against humanity.²²¹ It is sad that someone who allegedly attacked civilians at the refugee camps died without accounting for his evil deeds. His death has denied the people of Uganda justice and truth on why their loved ones were killed. In *Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*,²²² the accused are charged for war crimes (pillaging at a redacted IDP camp) and all remain at large since 2005.

(c) *DRC*

In *Prosecutor v. Bosco Ntaganda* the accused is charged for war crimes (recruitment of child soldiers under the age of fifteen).²²³ He is still on the run from the long arm of the law since August 2006.²²⁴ Overall, there are seven pending warrants issued during the 2005, 2006, 2007 and 2009 periods.²²⁵

The principle of equality before the law set forth in Article 27 of the Rome Statute has arguably been compromised in the DRC and Uganda in the following respect: the Presidents, both in the DRC and Uganda, referred the cases to the ICC prosecutor to conduct investigations against rebel leaders, warlords and opposition leaders in the order of their ranking. The aforesaid referrals should have been approached with utmost caution. They trigger important questions. What about both presidents' forces who have also committed atrocities? Who is the senior commander of the army forces? Why are the governments' forces not being investigated including the Heads of States? For example, towards the end of September 2009, "two thousand civilians were slaughtered and over seven thousand women and girls were raped by both rebels and government forces" in the North and East of Congo.²²⁶ In Uganda, President Yoweri Museveni has on various occasions

²²⁰ Cf. Stephanos Bibas & William Burke-White, *International Idealism Meets Domestic-Criminal Procedure Realism*, 59 DUKE L.J. 637, 639 (2010) (referring to Slobodan Milosevic's sudden death before facing war crimes verdict).

²²¹ *Prosecutor v. Kony*, Case No. ICC-02/04-01/05, Decision to Terminate the Proceedings Against Raska Lukwiya, ¶ 10 (July 10, 2007), <http://www.icc-cpi.int/iccdocs/doc/doc297945.pdf>.

²²² *Situations and Cases*, INT'L CRIM. CT., available at <http://www.icc-cpi.int/Menu/ICC/Situations+and+Cases/Situations/Situation+ICC+0204/> (last visited Apr. 23, 2011).

²²³ *Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, Warrant of Arrest (Aug. 22, 2006), <http://www.icc-cpi.int/iccdocs/doc/doc305330.pdf>.

²²⁴ *Callixte Mbarushimana* arrested in France for crimes against humanity and war crimes allegedly committed in the Kivus (Democratic Republic of the Congo), INT'L CRIM. CT., (Oct. 11, 2010), [http://www.icc-cpi.int/menu/icc/press%20and%20media/press%20releases/press%20releases%20\(2010\)/pr581](http://www.icc-cpi.int/menu/icc/press%20and%20media/press%20releases/press%20releases%20(2010)/pr581).

²²⁵ See Rep. of the Int'l Crim. Ct., *supra* note 4.

²²⁶ DEMOCRATIC REPUBLIC OF CONGO, HUM. RTS. WATCH (2010) <http://www.hrw.org/en/world-report-2010/democratic-republic-congo-drc>.

ordered his security forces to “shoot and kill the civilians”.²²⁷ The troops are also implicated in the killing and torture of the civilians in the remote area of Karamoja as part of the “disarmament exercise.”²²⁸ These are serious crimes alleged to have been committed by government forces that purport to be on a peace keeping mission. It is thus submitted that this one-sided investigation and prosecution hugely impacts on the execution of the warrants of arrest. Further, it is contended that the heads of state are shielding their men from the ICC. Consequently, as long as it is clear that the law is targeting select individuals, it will be difficult to execute warrants of arrest and bring all perpetrators to justice regardless of their official capacities.

The situation in the DRC and Uganda illustrates a clear case for impunity of Heads of State, prosecution of selective “small fishes” and disregard of equality before the law. Accordingly, Presidents Joseph Kabila and Yoweri Museveni and their army officials should also be investigated under the doctrine of command responsibility.²²⁹

The Sudanese situation truly reflects the objectives of the ICC because the warrants of arrest have been issued against everyone who is suspected of committing heinous crimes regardless of their office or rebel or political affiliation. The suspects are still at large and changing their hiding places in search of “save heavens [sic].”²³⁰ The Ugandan Lord’s Resistance Army (LRA) is said to be heavily recruiting soldiers in remote areas of central Africa.²³¹

PART II: CASES BEFORE THE COURT

There are currently four cases before the ICC referred by state parties to the Rome Statute. However, the proceedings have experienced delays because all of the accused are doing everything possible to prove their alleged innocence.

(a) DRC

In *Prosecutor v. Thomas Lubanga Dyilo* (Lubango case), Mr. Lubango a Congolese national, is charged for war crimes that include enlisting children

²²⁷ *Yoweri Museveni Orders Guards to Shoot and Kill Youth*, FREE UGANDA, Mar. 17, 2010, <http://freeuganda.wordpress.com/2010/03/17/ugandayoweri-museveni-orders-guards-to-shoot-and-kill-youth>.

²²⁸ *Uganda Army Accused of Karamoja Torture Abuses*, BBC NEWS AFRICA, Aug. 17, 2010, <http://www.bbc.co.uk/news/world-africa-10996764>.

²²⁹ The command responsibility refers to a person (usually a military leader) who possesses command authority. This leader may also be criminally responsible for crimes committed by his subordinates if he or she fails to prevent the crimes despite having had knowledge that his subordinates were about to commit such crimes.

²³⁰ Statement by ICC Prosecutor Luis Moreno-Ocampo to the International Criminal Court (May 31, 2010), available at http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Statements/ICC-RC-statements-LuisMorenoOcampo-ENG.pdf.

²³¹ *Uganda LRA Rebels ‘on Massive Forced Recruitment Drive’*, BBC NEWS AFRICA, Aug. 12, 2010, <http://www.bbc.co.uk/news/world-africa-10947791>.

under the age of fifteen and using them to actively participate in hostilities.²³² He is alleged to be the founder and president of the *Unions patriots congolais* (UPC) and Commander in Chief of its military wing, the Forces patriotiques pour la liberation du Congo (FPLC).²³³ Mr. Lubanga is allegedly responsible as a co-perpetrator of the aforesaid crimes.²³⁴ The case experienced numerous delays because of Mr Lubanga's challenge that a fair trial was not possible because the prosecution did not disclose certain evidence to his defence and the court.²³⁵ The trial chamber I upheld his challenge and stayed the proceedings in June 2008.²³⁶ After being operational for seven years without a single trial, January 26, 2009 marked the start of the first ever trial before the ICC.²³⁷ The prosecution presented its evidence from January until July 14, 2009.²³⁸ It tendered 199 items of evidence and thirty witnesses testified before the court.²³⁹ The defence started its case in October 2009.²⁴⁰ The case started three years after Mr Lubanga's arrest in March 2006.²⁴¹ The commencement of the first trial is arguably a huge step towards the creation of the court's jurisprudence.

In *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*²⁴² the accused allegedly jointly committed war crimes and crimes against humanity which include sexual slavery, rape and attack of civilians, murder and destruction of the enemy's property through other persons, within the meaning of Article 23, 3(a)²⁴³ of the Rome Statute.²⁴⁴ The pre-trial chamber confirmed

²³² Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Summary, <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0104/Related+Cases/ICC+0104+0106/Democratic+Republic+of+the+Congo.htm> (last visited Apr. 10, 2011).

²³³ *Id.*

²³⁴ *Id.*

²³⁵ Prosecutor v. Thomas Lubanga Dyilo, Case. No. ICC-01/04-01/06, ¶¶ 23, 47, and 54, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on June 10, 2008 (Jun. 13, 2008), <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0104/Related+Cases/ICC+0104+0106/Court+Records/Chambers/Pre+Trial+Chamber+I/>.

²³⁶ *Id.* at ¶ 95.

²³⁷ Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Summary, <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/democratic%20republic%20of%20the%20congo> (last visited Apr. 10, 2011).

²³⁸ Rep. of the ICC to the UN for 2008/09, *supra* note 4, at 6.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ Prosecutor v. Lubanga Dyilo, *supra* note 64.

²⁴² Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chiu, Case No. ICC-01/04-01/07, Summary, <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200107/democratic%20republic%20of%20the%20congo> (last visited Apr. 18, 2011).

²⁴³ Rome Statute Art. 25, 3(a) (providing that "[I]n accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of

the charges on September 26, 2008 the ICC and the parties commenced preparations for the trial.²⁴⁵ This includes the disclosure of evidence, and the protection of witnesses and information. Mr. Katanga challenged the admissibility of the case against him on the basis that he was already prosecuted for similar offences in his country.²⁴⁶ The court held a public hearing on the challenge and all the parties to the case participated.²⁴⁷ His contention was dismissed on the basis that there was no case opened against him in the DRC.²⁴⁸ He appealed the decision.²⁴⁹ Mr. Katanga was turned over to the ICC on October 17, 2007 and Mr. Chui on February 6, 2008.²⁵⁰ Their trials commenced on November 24, 2009.²⁵¹

(b) Central African Republic

In *Prosecutor v. Jean-Pierre Bemba Gombo* the accused was arrested on May 24, 2008 and charged as a co-perpetrator of war crimes (murder, torture, rape and pillage) and crimes against humanity (murder and rape).²⁵² The pre-trial chamber II started a hearing to confirm the charges on January 12, 2009 but the matter was adjourned.²⁵³ The chamber asked the prosecutor to consider amending the charges on the basis that the facts of the case were more likely to establish a different form of criminal responsibility (command responsibility).²⁵⁴ It confirmed the charges on June 15, 2009 but declined to confirm torture as a war crime.²⁵⁵ The prosecutor appealed the chamber's unfavourable ruling on June 22, 2009. Mr. Gombo's trial commenced eight months later.²⁵⁶

(c) Sudan

the Court if that person: (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible").

²⁴⁴ *Id.* at Art. 23 (providing that "a person convicted by the Court may be punished only in accordance with this Statute").

²⁴⁵ Rep. of the Int'l Crim. Ct. to the UN for 2008/09, *supra* note 4, at 7.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, *supra* note 69.

²⁵¹ *Id.*

²⁵² *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Summary, <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0105/Related+Cases/ICC+0105+0108/Case+The+Prosecutor+v+Jean-Pierre+Bemba+Gombo.htm> (last visited Apr. 23, 2011).

²⁵³ Rep. of the Int'l Crim. Ct. to the UN for 2008/09, *supra* note 4, at 7.

²⁵⁴ *Id.*

²⁵⁵ *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, <http://www.icc-cpi.int/iccdocs/doc/doc699541.pdf>.

²⁵⁶ Rep. of the ICC to the UN for 2008/09, *supra* note 4, at 8.

In *Prosecutor v. Bahr Idriss Abu Garda* the accused was summoned on May 17, 2009 to appear before the ICC for allegations that he is responsible as a rebel commander for crimes committed against AU Peace-keepers in Haskanita, Darfur.²⁵⁷ His first appearance was on May 18, 2009.²⁵⁸ The hearing for confirmation of charges took place on October 19, 2009.²⁵⁹ The ICC has declined to confirm the charges against the accused and subsequent appeals by the prosecutor have also been unsuccessful.²⁶⁰

A general view has emerged within the international community that war crime tribunals have been “too slow to investigate, charge and prosecute” offenders.²⁶¹ In Alex Whiting’s words:

Delays in bringing perpetrators to justice can diminish the deterrent value of such prosecutions, undermine the quality of the evidence in the case, allow perpetrators to continue living in impunity and continue committing crimes, discourage and marginalize the victims, and lead to a squandering of the world’s interests and attention which will, in time, be diverted to other crises.²⁶²

Indeed, the fact that there have been no convictions since the ICC’s conception seven years ago, coupled with the delays in the commencement of trials, may appear unsatisfactory. However, these delays should be looked at objectively by taking into account all the factors that sometimes affect a trial rather than simply advocating for speeding up trials. Ignoring essential rights such as due process and the right to challenge evidence and procedural issues can potentially compromise the credibility of the proceedings. For example, Saddam Hussein’s rushed trial and execution for crimes against humanity was labeled as being “flawed and unsound.”²⁶³ Further, the protection of all parties to a trial has to be guaranteed, including witnesses and victims, to preempt a situation such as that in Iraq where three defense attorneys were assassinated in Saddam’s case.²⁶⁴ This is a clear example of a sham proceeding. The *Lubanga* case was delayed, *inter alia*, because the prosecutor failed to disclose certain evidence to the defense. The ICTY in *Prosecutor v. Aleksovski* articulated that “both parties must be given equal opportunity in relation to the evidence

²⁵⁷ *Prosecutor v. Bahr Idriss Abu Garda*, Case No. ICC-02/05/02/09, Summary, <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0205/Related+Cases/ICC02050209/ICC02050209.htm> (last visited Apr. 23, 2011).

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ Whiting, *supra* note 27, at 323.

²⁶² *Id.* at 326.

²⁶³ See generally, *Saddam trial ‘flawed and unsound,’* BBC NEWS, Nov. 20, 2006, available at http://news.bbc.co.uk/2/hi/middle_east/6163938.stm.

²⁶⁴ *Supra*, at ¶ 18-24.

tendered by the other.”²⁶⁵ Accordingly, the accused person in the *Lubanga* case had a right to challenge the proceedings in order to vindicate his fair trial rights. It is thus submitted that the delays, such as the one in the *Lubanga* case, are unavoidable in a system that is cognisant of, *inter alia*, fair trial rights and the legitimacy of the proceedings.

Other problems or inescapable delays can also be caused by the gravity and complexity of the war crimes themselves.²⁶⁶ Prosecution of war crimes is also a “project in its infancy.”²⁶⁷ This view does not suggest that all delays are unavoidable or unreasonable. Therefore, there is a need to treat each case based on its facts and merits. According to Alex Whiting, “in war crimes cases, delay can be essential for allowing the truth to emerge . . . [and thus] the goal should be to determine whether justice requires expediency, some degree of delay or the balance of the two.”²⁶⁸ This view is supported because these crimes often occur in times of conflict and in most cases criminal justice is often non-existent and/or not independent after the war. Further, even after the war, it is difficult to conduct quick investigations where perpetrators (i.e., the Sudanese conflict) are still in power. For example, investigators have struggled to gain access in Sudan and they have relied on witnesses who are outside of the country.²⁶⁹ It is also difficult to prove mass crimes when “the very existence of the crimes is denied by the accused and establishing the link between the crimes and perpetrators can be an enormous undertaking,” largely because the accused, in a high-level positions, are generally not direct participants in the crimes.²⁷⁰ This is the position taken by the accused persons before the ICC. They have all entered a plea of not guilty and claim that they are innocent.

Though the prosecution usually begins by trying small fish, the ultimate goal of war crimes prosecutors is to “bring to justice the highest-level commanders responsible for the commission of the crimes.”²⁷¹

The ICC’s one-sided focus on the African continent is troubling and is a grave concern for the credibility and independence of the court. The ICC’s focus on Africa has been dubbed as “pursuing its own brand of justice.”²⁷² As discussed earlier, regardless of referrals from the state parties, the ICC should have foreseen the dangers of indicting African leaders given the historical

²⁶⁵ Prosecutor v. Aleksovski, Case No. IT-95-14/1, Decision on Prosecutor’s Appeal on Admissibility of Evidence, ¶ 24-26, (Int’l Crim. Trib. for the Former Yugoslavia (Feb. 16, 1999), available at <http://www.icty.org/x/cases/aleksovski/acdec/en/90216EV36313.htm#26>.

²⁶⁶ Whiting, *supra* note 27, at 326.

²⁶⁷ *Id.* at 326.

²⁶⁸ *Id.* at 324.

²⁶⁹ *Id.* at 362-63.

²⁷⁰ *Id.* at 329.

²⁷¹ *Id.* at 337.

²⁷² Samar Al-Balushi & Adam Branch, *Africa: Africom and the ICC- Enforcing International Justice in Continent?*, ¶ 2, ALLAFRICA.COM (May 27, 2010), available at <http://allafrica.com/stories/201005271324.html>.

political clouds that have surrounded previous international criminal tribunals.²⁷³ Accordingly, the ICC has tarnished its own legitimacy.

In light of the above, the international community's expectations should be realistic and not demand quick action in isolation of the unavoidable circumstances of each case nor disregard that the accused person also has the right to a fair trial including the presumption of innocence until proven guilty. Further, justice should not be measured by the number of convictions but by the legitimacy of the proceedings from investigation until sentencing. The court is functioning, investigations are underway and three trials have commenced.

PART III: COOPERATION OF STATE PARTIES WITH THE ICC

Expressing the difficulties associated with executing arrest warrants, then judge of the ICTY McDonald opined that, "[w]hen we issue an arrest warrant, it's just disregarded."²⁷⁴ This indicates that an international court is largely dependant on state cooperation. The ICTY had then handed down seventy-seven indictments but only ten suspects were in custody.²⁷⁵

The ICC has no police force, *inter alia*, to execute warrants of arrest issued by it.²⁷⁶ This is a clear illustration that the efficiency of the ICC is largely dependent on state cooperation and the international community. It is inconceivable that the prosecutor of the court would enter a sovereign state without approval from said country to conduct his investigations. Speaking for the ITCR and ICTY, Dagmar Stroh said that "the courts were fully functional after overcoming several initial problems [sic]" but highlighted that cooperation of states remains an "indispensable requirement for efficient proceedings."²⁷⁷ Indeed, the ICC's work depends primarily on the support of member states and non-state parties (when requested by the Security Council or the ICC) to function expeditiously.²⁷⁸ The obligations to cooperate with the court are listed in various provisions of the Rome Statute including Article 86 that in part provides:

States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court²⁷⁹.

²⁷³ STEVEN C. ROACH, *POLITICIZING THE INTERNATIONAL CRIMINAL COURT: THE CONVERGENCE OF POLITICS, ETHICS, AND LAW*, 6 (Rowman & Littlefield Pub., INC, 2006).

²⁷⁴ Young Sok Kim, *The Cooperation of State to Establish an Effective Permanent International Criminal Court*, 6 J. INT'L. L. & PRAC. 157, 160 (1997).

²⁷⁵ *Id.* at 158.

²⁷⁶ Hans-Peter Kaul, *The International Criminal Court: Current Challenges and Perspectives*, 6 WASH. U. GLOBAL STUD. L. REV. 575, 578 (2007).

²⁷⁷ Dagmar Stroh, *State Cooperation with the International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, 6 MAX PLANK INST. COMP. PUB. LAW 249, 249 (2001).

²⁷⁸ See generally, Jacob Katz Cogan, *International Criminal Courts and Fair Trials: Difficulties and Prospects*, 27 YALE J. INT'L L. 111 (2002).

²⁷⁹ International Cooperation and Judicial Assistance Act (Art. 86), emphasis added.

In light of the binding nature of the aforesaid provision, state parties are obliged to assist the ICC with any support that it has sought. Cooperation with the ICC includes provisional arrest, and the identification of the whereabouts of the suspects.²⁸⁰ It is unfortunate that the AU has urged its members (who are also parties to the Rome Statute) not to cooperate with the court in executing warrants of arrest and surrendering of President Al Bashir.²⁸¹ Consequently, the court is unable to apprehend the Sudanese and other suspects in the African region. It is thus evident that without the members states support, the ICC would be toothless.

Security Council referrals affect the ICC

The Security Council bears the primary responsibility for maintaining international peace and stability.²⁸² It has discretionary powers under Chapter VII to, *inter alia*, determine the existence of threat to any peace,²⁸³ and decide what measures to take without use of force in order to implement its decisions and making referrals to the ICC.²⁸⁴

The Security Council's referrals are arguably problematic because a state that has not ratified the Rome Statute is able to participate and vote in the Security Council's meetings regarding a matter that is to be referred to the ICC. The Security Council, pursuant to Chapter VII provisions of the UN Charter referred the case of Sudan to the ICC in 2005 and "urged all member States and non-member States to the Rome Statute to cooperate fully" with the court.²⁸⁵ Support has not been forthcoming. Despite several difficulties that the prosecutor of the ICC has brought to the attention of the Security Council about having no access to Sudan, the Security Council has not engaged any approach that has resulted in the arrest of the suspects.²⁸⁶

The Security Council has so far only made referrals to the ICC but has never taken any tough follow-up steps to enforce compliance with the ICC.²⁸⁷ There is arguably less progress on cases (with the exception of Lubanga case which is on trial) referred to the ICC by the Security Council. Elizabeth Minogue suggests that the Security Council "could invoke its Chapter VII authority to order forces to cooperate with and assist an international court in any way possible" such as ordering the forces deployed in Sudan to search for

²⁸⁰ *Id.* at Art. 92 & 93.

²⁸¹ *African Union in Rift with Court*, BBC NEWS AFRICA, July 3, 2009, available at <http://news.bbc.co.uk/2/hi/8133925.stm>.

²⁸² U.N. Charter art. 24(1) para. 1.

²⁸³ *Id.* at Art 39.

²⁸⁴ *Id.* at Art. 41.

²⁸⁵ Press Release, Security Council, Security Council Refers Situation in Darfur, Sudan, To Prosecutor of International Criminal Court, U.N. Press Release SC/8551 (Mar. 31, 2005), available at <http://www.un.org/News/Press/docs/2005/sc8351.doc.htm>.

²⁸⁶ See generally Elizabeth C. Minogue, *Increasing the Effectiveness of the Security Council's Chapter VII Authority in the Current Situations before the International Criminal Court*, 61 VAND. L. REV. 674 (2008).

²⁸⁷ *Id.* at 656.

indictes or aid the prosecutor with his investigations.”²⁸⁸ This proposition is only supported to the extent that the Security Council should further attempt to enforce compliance with the ICC’s requests for international support. This could be in a form of diplomatic isolations with any state that refuses to arrest and surrender suspects to the ICC. The proposition that deployed forces should assist with carrying out investigations is not supported. Soldiers are generally not experts on carrying out investigations. The nature of the crimes allegedly committed requires skill. Lack or absence of expertise may negatively affect the gathering of evidence. Conducting investigations might be a too heavy a burden on deployed forces that are expected to bring stability.

AU and the ICC

There have been mixed reactions regarding the ICC and its intervention in Africa, it has been labelled as a “tool of imperialists pursuing its own brand of justice at the cost of enflaming war and disregarding the interests of victims.”²⁸⁹ This presumably suggests that the ICC is a foreign Court that was created for only prosecuting Africa. The AU has publicly urged its members not to cooperate with the ICC’s regarding the arrest of President Al Bashir, in Sudan.²⁹⁰ The basis for such attacks on the ICC and refusal to cooperate with it need to be assessed. There is no doubt that atrocities are being committed in the Africa. The attacks thus should not be on the ICC’s involvement in Africa, but rather to encourage it to expand its scope of focus beyond Africa and to other regions where atrocities are also committed.

International case law²⁹¹ has confirmed that genocide and crimes against humanity are violations of *jus cogens* norms – “overriding norms” that prevail over any other norms.²⁹² These norms also entail *erga omnes* duties of states that are obligations not only owed to victims but to all states and the international community as well.²⁹³ Accordingly, all states have a clear

²⁸⁸ *Id.* at 659.

²⁸⁹ See Samar Al-Balushi & Adam Branch, *Africa: Africom and the ICC - Enforcing International Justice in Continent?*, ALLAFRICA.COM, May 27, 2010, available at <http://allafrica.com/stories/201005271324.html>.

²⁹⁰ Assembly/AU/Dec.296(XV) ¶ 5, July 27, 2010, available at <http://www.dirco.gov.za/diaspora/docs/audecision/summitJul2010Decisions.pdf>.

²⁹¹ *Prosecutor v. Anto Furundzija*, Case No.IT-95-17/1-T, Appeal Judgment, ¶153, Dec. 10,1998, where the court said that a norm against torture is *jus cogens* “because of the importance of the values it protects”

²⁹² Vienna Convention on the Law of Treaties Art. 53, May 23, 1969, 1155 U.N.T.S. 331. A *jus cogens* norm is a “. . . peremptory norm of general international law [that is] accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having character.”

²⁹³ *Prosecutor v. Anto Furundzija*, Case No.IT-95-17/1-T, Appeal Judgement, Dec. 10, 1998 at ¶15; the court said “. . . the prohibition of torture imposes upon States obligations . . . *erga omnes*, that is, obligations owed towards all the other members of the international community, each of which then has a correlative right. In addition, the violation of such an obligation simultaneously constitutes a breach of the correlative right of all members of the international

obligation that is owed to the international community to prohibit atrocities including arresting President Al Bashir and surrendering him to the ICC. The AU seems to be relying on the impunity provisions accorded to heads of states under Article 98 of the Rome Statute to justify its refusal to cooperate with the ICC.²⁹⁴ It is submitted that the AU's reliance under Article 98 of the Rome Statute as erroneous because all members of the United Nations have an obligation to abide by the decisions of the Security Council.²⁹⁵ Further, the AU seems to be contending that as much as Chad and Kenya (both state parties to the Rome Statute and members of the AU) are AU members that are obliged under the UN Charter to adhere to the United Nations resolutions, they are also bound to comply with the decisions of the AU arising from Article 23 (2) of the Constitutive Act of the African Union which imposes sanctions on member states who fail to comply with the decisions and policies of the AU.²⁹⁶ This argument is also mistaken because it fails to acknowledge that when there is a conflict of between the UN Charter and other international agreements, the obligations flowing from the UN Charter prevail.²⁹⁷ As was found by the International Court of Justice (ICJ) in *Libyan Arab Jamahiriya v. United States of America* that "members of the United Nations are obliged to accept and carry out the decisions of the Security Council . . . the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention."²⁹⁸

community and gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfillment of the obligation or in any case to call for the breach to be discontinued."

²⁹⁴ Article 98 provides, "(1) The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity. (2) The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender."

²⁹⁵ U.N. Charter, art 25.

²⁹⁶ Press Release, African Union, Division of Communication and Information, On the Decision of the Pre-Trial Chamber of the ICC informing the UN Security Council and the Assembly of the State Parties to the Rome Statute about the Presence of President Omar Hassan Al-Bashir of the Sudan in the Territories of the Republic of Chad and Kenya, A. U. Press Release 119/2010, (Aug. 29, 2010), available at <http://www.scribd.com/doc/36619566/Press-Release-AU-Bashir-Kenya-Muigwithania-com>.

²⁹⁷ U.N. Charter, art. 103 provides, "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

²⁹⁸ Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (*Libyan Arab Jamahiriya v. United States of America*) Provisional Measures, Order of 1992 I.C.J. (Apr. 14, 1992), ¶¶ 42 – 44, available at <http://www.icj-cij.org/docket/files/89/7213.pdf?PHPSESSID=cf9b8267fdc335a0c89abec2ccb63d1d>.

As things stands, it appears that the discussions about the establishment of the African Court of Justice on Human Rights (ACJ) will slowly but surely gain momentum.²⁹⁹ The ACJ is to exercise jurisdiction over international crimes committed on the African continent.³⁰⁰ The danger with the ACJ is that individuals and non-governmental organizations will not be able to bring complaints directly to the court but will have to do so *via* the AU.³⁰¹ The accessibility is thus made unreasonably difficult. The move to create the ACJ is arguably going to shield those who have committed atrocities from being apprehended and handed over to the ICC. The reason for this is, in my view, that the AU has been too lenient and slow to act against those who commit gross violations of human rights in the region. Should the ACJ come into existence, it remains unclear on what will happen to the African countries that have ratified the Rome Statute because there will be two tribunals with jurisdiction to prosecute perpetrators of international crimes. It is also doubtful whether the AU will act against President Al Bashir and other suspects as it has done nothing so far to assist the ICC with executing warrants of arrest. The ACJ will thus be dependent on the political will of AU members to prosecute those who commit atrocities.

Part IV: Resolution on the Crime of Aggression: Two Steps Forward, Three Steps Back

The Rome Statute was not a first attempt to define the crime of aggression, the efforts started in 1919 after World War I, in an attempt to prosecute German Kaiser Willem II for “a supreme offence against international morality and sanctity of treaties.”³⁰² Mr. Willem found refuge in the Netherlands and requests for his extradition were turned down.³⁰³ The efforts to try him thus failed.³⁰⁴ Crime of aggression was also recognised in the International Military Tribunal at Nuremberg (the Nuremberg Trials) as having been codified in 1923 in the draft Treaty of Mutual Assistance (TMA).³⁰⁵ The TMA proclaimed that “aggressive war [was] an international crime,” and that “the parties would undertake that no one of them will be guilty of its commission.”³⁰⁶ The accused persons at the Nuremberg Trials were charged, *inter alia*, for crimes against peace that was defined as “planning, preparation, initiation or waging of a war of aggression, or a war in violation of

²⁹⁹ The International Centre for the Legal Protection of Human Rights, *African Union adopts the Protocol on the Statute of the African Court of Justice and Human Rights*, available at <http://www.interights.org/AfricanSingleProtocolAdopted/index.htm>.

³⁰⁰ *Id.* at ¶ 3.

³⁰¹ *Id.* at ¶ 3.

³⁰² Noah Weisbord, *Prosecuting Aggression*, 161, 162 HARV. INT’L L.J. 161, 2 (2008).

³⁰³ *Id.* at 162.

³⁰⁴ *Id.* at 162.

³⁰⁵ JORDAN J. PAUST *ET AL*, INTERNATIONAL CRIMINAL LAW, 594 (Carolina Academic Press, 3d., 2007).

³⁰⁶ *Id.* at 589-90.

international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.”³⁰⁷ Twelve accused were convicted.³⁰⁸ This was the first time that the crime of aggression was successfully prosecuted but the trials thereafter were labelled as “unprincipled” because of, *inter alia*, the ambiguity of the offences.³⁰⁹ The International Military Tribunal for the Far East also tried and convicted twenty-three accused persons for having committed the crime of aggression.³¹⁰ Despite the convictions in both the aforesaid trials, the tribunals did not define the crime of aggression.³¹¹ The United Nations General Assembly three attempts to define the crime of aggression were unsuccessful.³¹² It was only on July 11, 2010, when the international community reached a consensus on the definition of the crime of aggression in Kampala, Uganda.³¹³

This is a big development towards pre-empting states from invading other countries outside the permissible grounds, such as the right of individual or collective self-defense against an armed attack, set forth in the UN Charter.³¹⁴ Acts of aggression that have arguably been committed include the contentious invasion of Iraq by the United States of America in 2003. However, nothing could be done to bring the perpetrators of the crime of aggression before the ICC pending an international agreement on the definition and the elements of the crime.

The new definition provides a detailed attempt to highlight circumstances under which the crime of aggression can be committed, but is not immune from criticisms for, *inter alia*, being too broad. Article 8 *bis* of the amendment to the Rome Statute defines the crime of aggression as follows:

1. For the purpose of this Statute, “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.”
2. For the purpose of paragraph 1, “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any

³⁰⁷ *Id.* at 589.

³⁰⁸ Michael J. Glennon, *The Blank-Prosed Crime of Aggression*, 71, 72 YALE J. INT’L L. 71, 74 (2010).

³⁰⁹ *Id.* at 75.

³¹⁰ *Id.* at 74.

³¹¹ *Id.* at 74–75; *See also* the UN Charter, arts. 1, 39, which contains the terms act of aggression although they are not defined.

³¹² *See generally* Weisbord, *supra* note 129; for a detailed discussion on various measures that were undertaken to define the crime of aggression, *see also* Benjamin B. Ferencz, *The United Nations Consensus Definition of Aggression: Sieve or Substance?*, 10 J. INT’L & ECON. 701, 707 (1975) and Michael J. Glennon, *The Blank-Prosed Crime of Aggression* 35 YALE J. INT’L L. 71, 74 (2010).

³¹³ *See generally, supra* note 10.

³¹⁴ U.N. Charter, art. 51.

other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

- a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- c) The blockade of the ports or coasts of a State by the armed forces of another State;
- d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.³¹⁵

The above definition arguably reflects developments from the criminal charges instituted against the accused persons at the Nuremberg Trials. The present definition is to a large extent more precise in that it provides various circumstances under which an act of aggression can be committed. It also appears from the definition that the crime of aggression can only be committed by a state and not a non-state actor such as mercenaries.³¹⁶

Michael Glennon's concerns on the draft definition of crime of aggression adopted by the Special Working Group on the Crime of Aggression in 2009 seems to have not been addressed despite the fact that there has been a consensus on the definition.³¹⁷ According to him:

“[p]reparation for armed conflict armed conflict engages more than military and defense ministry personnel. Intelligence

³¹⁵ Coalition for the International Criminal Court: *Crime of Aggression*, art. 8 1–2(g).

³¹⁶ *Id.* at art. 8(2).

³¹⁷ Glennon, *supra* note 135, at 77.

agencies provide a wide variety of information to defence planners that advance military objectives Lawyers advise policy makers what use of force is lawful. Who among them incurs criminal liability for planning or preparing the crime of aggression? Where is the line drawn?”³¹⁸

This view is supported. It would arguably be difficult to determine who should bear the greatest criminal liability for the planning or preparing of acts that constitute the crime of aggression. Another difficulty is that Article 8(1) *bis, inter alia*, requires that the preparation and planning of an act of aggression be manifest in its character and gravity of scale. These terms are not defined; there are no guidelines on what precisely is meant by manifest and gravity of scale and which factors need to be taken into account to ascertain manifest and gravity of scale. They are thus open to debate and various interpretations can be applied. A defendant would arguably face an unknown and difficult case because the aforesaid undefined terms, in my view, still needs to be dissected. The prosecution will also have a difficult task of proving conduct that qualifies as “an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations” under Article 8(1) above.

Article 8(2) *bis* further provide seven theories (a-g) under which an act of aggression may be committed. The relevant parts which were absent from the criminal charges at the Nuremberg Trials are subparagraphs (a), (b) and (c) that list acts that would qualify as an act of aggression;

- “(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- c) The blockade of the ports or coasts of a State by the armed forces of another State”³¹⁹

The above three theories are noticeable developments from the Nuremberg Trials because they extend the circumstances under which an act of aggression can be committed. Despite these developments, there are other concerns. Firstly, there is no clarity about the number of victims that have to be injured/present by the state allegedly committing an act of aggression under subparagraph (b) (i.e., bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State). Secondly, the attack by the armed forces in

³¹⁸ *Id.* at 77.

³¹⁹ *Supra* note 10, at art.8, 2(a)–(c).

subparagraph (d) (i.e., an attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State) is silent on whether material support, such as financing armed forces, to attack on the land of another state would also qualify an act of aggression. There are no guidelines regarding the factors which need to be considered in assessing what constitutes substantial involvement under subparagraph (g) (i.e. the sending by, or on behalf of, a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein). Would the sending of only ten mercenaries or armed groups constitute substantial involvement and thereby qualify as an act of aggression? How would the mercenaries be linked to a particular state because they are presumably not easily recognised and their employer, is unknown? These are just some of the issues that will perhaps be a subject of litigation and prove difficult to provide a precise meaning for.

In considering the accomplishments of the ICC and the crime of aggression in the Rome Statute, the resolution on a definition of the crime of aggression represents a step in the right direction. However, the terms that have been used in the provision are a clear indication that the agreement is a product of prolonged negotiations and compromise. This significantly takes away from the accomplishment. With the ICC struggling with the practical implementation of seemingly clear provisions in the Rome Statute, the inclusion of an overly broad provision does not do much to assist it. These are some of the challenges surrounding the new definition. In a tongue in cheek manner, academics have welcomed the Review Conference for having produced “complicated and incoherent provisions” that will assist them in writing journal articles.³²⁰

Jurisdiction

Article 15 *bis* concerns the exercise of jurisdiction over the crime of aggression.³²¹ However, the problem with the jurisdiction provision is that the state party to the Rome Statute would have an option to make a declaration to the effect that it does not accept the court’s jurisdiction over the crime of aggression. Kevin Jon Heller is of the view that the factors surrounding the exercise of jurisdiction make it hard to believe that “any significant act of aggression will ever be prosecuted.”³²² In developing his assessment, he

³²⁰William A. Schabas, *The Result: Prosecuting Aggression at the International Criminal Court*, ¶ 6, June 12, 2010, available at <http://iccreviewconference.blogspot.com/2010/06/result-prosecuting-aggression-at.html>.

³²¹ Article 15(4) provides, “[t]he Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such declaration may be effected at any time and shall be considered by the State Party within three years.”

³²² Keven J. Heller, *Opinio Juris, The Sadly Neutered Crime of Aggression*, June 13th, 2010, available at <http://www.opiniojuris.org/2010/06/13/the-sadly-neutered-crime-of-aggression/>.

favorably summarises the provision of jurisdiction (or what he refers to as opt-out (OO) clause) as follows:

- State Party & State Party → Jurisdiction
- State Party & State Party OO → Jurisdiction
- State Party & Non-State Party → No Jurisdiction
- State Party OO & State Party → No Jurisdiction
- State Party OO & State Party OO → No Jurisdiction
- State Party OO & Non-State Party → No Jurisdiction
- Non-State Party & State Party → No Jurisdiction
- Non-State Party & State Party OO → No Jurisdiction
- Non-State Party & Non-State Party → No Jurisdiction.³²³

The summary shows that the ICC will have jurisdiction on a state party that commits an act of aggression against another state party and vice versa. This would apply if both states parties have not made a declaration exempting them from the court's jurisdiction. A state party that commits an act of aggression against the state party that has made a declaration not to accept the ICC's jurisdiction will be prosecuted.³²⁴ Where a state party that has declared not to accept the ICC's jurisdiction commits an act of aggression against a state party, the ICC will have no jurisdiction.³²⁵ Where a non-state party commits an act of aggression against state party that has made a declaration not to accept the ICC's jurisdiction, the court will not prosecute vice versa.

This is an indication that the jurisdiction clause was highly debated. For example, some of the delegates at the Kampala Conference made a proposal "aimed at divorcing draft Article 8 *bis* from customary international criminal law and purported to explicitly exclude certain instances of state use of force from the definition of the crime of aggression."³²⁶ There was nonetheless no agreement.³²⁷ The option not to accept jurisdiction arguably renders the prosecution for aggression redundant. For example, a state may decide to ratify the Rome Statute but make a reservation on the crime of aggression jurisdiction thus shielding its leaders from prosecution. It is unfortunate that even if a state has ratified the Rome Statute, it would still have an option not to accept the jurisdiction of the ICC over the crime of aggression. Therefore, it seems unlikely that there will be a prosecution brought for the crime of aggression in the near future.

Given the complexity of the crime of aggression and the fact that some states (for example the United States of America in Afghanistan and Iraq) are

³²³ *Id.* at ¶ 2.

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ Claus Kreß and Leonie von Holtendorff, *The Kampala Compromise on the Crime of Aggression*, 8 J. INT'L CRIM. JUST., 1179–1217 (2010); (The authors provide a more detailed discussion of the deliberations and concerns during the Review of the Rome Statute Conference).

³²⁷ *Id.*

still at war with other countries, this was arguably the best compromise that was possible. These are nonetheless achievements.

PART V: OBSERVATIONS AND CONCLUSION

There are many achievements that the international community can reflect on since 2002. But, there are challenges remain. Today, the international community speaks of an existing and functioning, permanent international criminal court. Three complex trials are underway including that of recruiting child soldiers to take part in the war in DRC. The French authorities recently arrested a Congolese national, Mr. Callixte Mbarushimana and handed him over to the ICC to answer charges of crimes against humanity (murder, torture, rape and persecution) and war crimes (attacks against the civilian population). The confirmation of charges hearing against six Kenyan suspects is scheduled for September 2011.³²⁸ Despite an absolute lack of cooperation from the Sudanese government, the prosecutor has managed to conduct and gather information from various Sudanese people who are outside of the country. Further, investigations are underway in, *inter alia*, DRC, Uganda, Libya and CRA. In Uganda, the ICC's intervention has forged room for peace talks with the rebels.³²⁹ The prosecutor is also monitoring the situation in Colombia, Georgia, Chad, Afghanistan and Nigeria.³³⁰ The Security Council recently referred the situation in Libya for investigations of crimes against humanity.³³¹ The ICC's involvement in Ivory Coast prior the 2010 conflict did decrease violence.³³²

The office of the prosecutor has adopted a thematic approach by prosecuting one particular crime.³³³ The advantage of this method is that as these crimes are addressed, the law develops in those specific areas and this

³²⁸ PRESS RELEASE, INT'L. CRIM. CT., CONFIRMATION OF CHARGES HEARING IN THE CASE OF PROSECUTOR V. WILLIAM SAMOEI RUTO, HENRY KIPRONO KOSGEY AND JOSHUA ARAP SANG SCHEDULED TO START ON 1 SEPTEMBER 2011, (APR. 7, 2011), AVAILABLE AT [HTTP://WWW.ICC-CPI.INT/NR/EXERES/F5ADDE2B-A126-4A58-AA76-BC3F9F42A897.HTM](http://www.icc-cpi.int/NR/EXERES/F5ADDE2B-A126-4A58-AA76-BC3F9F42A897.HTM); SEE ALSO PRESS RELEASE, INT'L. CRIM. CT, CONFIRMATION OF CHARGES HEARING IN THE CASE OF PROSECUTOR V. FRANCIS KIRIMI MUTHAURA, UHURU MUGAI KENYATTA AND MOHAMMED HUSSEIN ALI SCHEDULED TO START ON 21 SEPTEMBER 2011 (APR. 8, 2011), AVAILABLE AT [HTTP://WWW.ICC-CPI.INT/MENUS/ICC/PRESS%20AND%20MEDIA/PRESS%20RELEASES/PR651](http://www.icc-cpi.int/MENUS/ICC/PRESS%20AND%20MEDIA/PRESS%20RELEASES/PR651).

³²⁹ Conf. Rep., *The International Criminal Court at Work: Challenges and Successes in the Fight Against Immunity*, (Sept. 21, 2007), available at http://www.dgvn-nrw.de/fileadmin/user_upload/Vereinsbilder/Conference_Report_31.10.07.pdf.

³³⁰ U.N. NEWS CENTRE, *INTERNATIONAL CRIMINAL COURT MONITORING EVENTS IN GEORGIA, PROSECUTOR SAYS*, AUG. 20, 2008, AVAILABLE AT [HTTP://WWW.UN.ORG/APPS/NEWS/STORY.ASP?NEWSID=27759&Cr=GEORGIA&Cr1](http://www.un.org/apps/news/story.asp?NewsID=27759&Cr=GEORGIA&Cr1); SEE ALSO ADETOKUNBO MUMUNI, *NIGERIA: INTERNATIONAL CRIMINAL COURT ANALYSES JOS CRISIS*, SAHARA REPORTERS, NOV. 7, 2010, AVAILABLE AT WWW.SAHARAREPORTERS.COM

³³¹ International Criminal Court, Prosecutor, Luis Moreno-Ocampo, *Statement of the Prosecutor on the opening of the investigation into the situation in Libya* (Mar. 3, 2011), available at http://www.icc-cpi.int/NR/rdonlyres/035C3801-5C8D-4ABC-876B-C7D946B51F22/283045/StatementLibya_03032011.pdf.

³³² *Supra* note 156, at ¶ 5.

³³³ *Id* at ¶ 7.

generates significant public awareness concerning those crimes, and, the defence can face a specific case.³³⁴ However, the problem with thematic prosecution is that victims of other crimes, such as genocide, are left out.³³⁵ In other words, justice for them would not be done because the accused person would only be prosecuted for war crimes.

Another challenge is that the victims have insufficient knowledge about the ICC. A population-based survey on attitudes about accountability and social reconstruction in the CAR revealed, *inter alia*, the following;

- (a) 23% of victims believed that the ICC had been established by the European community;
- (b) 65% of those who knew about the ICC believed that it has its offices in CAR and that the court could investigate offences committed prior to 2002.³³⁶

The lack of knowledge creates unnecessary and unrealistic expectations from the court and also disappoints the victims. Further, it also creates doubts about the court's efficacy.

The fact that it has secured no convictions in eight years of existence can easily lead to an unjust conclusion that the ICC has failed. Indeed, a court of law is expected to deliver justice without delay. This is nonetheless a challenge that cannot be ignored. Like any other judicial body, the ICC also has its shortfalls. All the current cases before the Court are only from Africa, despite the fact that atrocities falling within the court's jurisdiction are also committed elsewhere. The ICC's target seems to be 'small fish' such as rebels, warlords and opposition leaders,³³⁷ with the exception of Sudan where President Al Bhashir has been indicted. Arrest warrants have been pending for too long. There is no cooperation with the court. In fact, the AU has openly declared that it will not support the court and has also urged its members and friends of Africa not to cooperate with it.³³⁸

The delay in executing warrants of arrest has been caused by lack of cooperation from state and non-state parties. With regard to the late commencement of trials, there is nothing that the court could have done because the defence team has a right to challenge the evidence brought against the accused person. Therefore, any attempts by the ICC to unreasonably deny the accused person the exercise of his due process rights (i.e. to challenge

³³⁴ *Id.* at ¶¶ 7–9.

³³⁵ *Id.* at ¶ 9.

³³⁶ See Patrick Vinck & Phuong Pam, *Building Peace Seeking Justice, A Population-Based Survey on Attitudes about Accountability and Social Reconstruction in the Central African Republic*, 78 (Aug. 2010), available at http://www.law.berkeley.edu/HRCweb/pdfs/BuildingPeace-SeekingJustice-CAR_August2010.pdf.

³³⁷ See Nick Grono, *The International Criminal Court: Success or Failure?* (Jun. 9, 2008), available at <http://www.opendemocracy.net/article/the-international-criminal-court-success-or-failure>.

³³⁸ *Supra*, note 117, at ¶ 7.

evidence) would have arguably compromised the legitimacy of the proceedings. Further, the crimes before the ICC including war crimes, are complex and there is no 'one size fits all' approach. As observed by Alex Whiting, "[t]he expectations of the international community when constructing war crimes tribunals are critically important, especially since the prosecution of war crimes is still a project in its infancy."³³⁹ This view is supported. The international community should be aware that international criminal tribunals are relatively new. In particular, the ICC is still in its early stages. Therefore, the delays are also caused by the gravity and complexity of the offences. The ICC should thus be given a reasonable opportunity to function and then be evaluated. The consensus on the crime of aggression is a success, although the definition has broad terms. The option available to states not to accept the ICC's jurisdiction seems like it will be the only factor making it an obstacle to prosecute the crime of aggression.

The successful prosecution of the first trials will arguably restore hope on the ICC's work. Its success should not be measured by the delay in securing a first conviction, but the legitimacy of how it conducts its investigations and proceedings.

PART VI: RECOMMENDATIONS

The most important thing that the ICC has to do is to maintain its independence. This could be achieved through conducting its affairs in a manner that is purely judicial, objective, neutral and non-political. There is, thus, a need for it to expand its work beyond Africa. The advantage of an independent court is that the international community will have confidence in the entire work of the ICC. In the absence of this, the ICC will lose its credibility and become a place for settling political scores.

All states should respect the ICC's requests and respond promptly to its requests even if they are required to concede some loss of sovereignty. This will assist in eliminating safe havens for suspects. Where requests are ignored, suspects will walk free and victims will see the ICC as toothless. The court should also indict heads of states, particularly in Uganda and the DRC. This will arguably clear the current perception that leaders who make referrals of cases to the ICC immunize themselves and their cronies from prosecution. This would send out a clear message that there is no one above the law. The danger of apprehending heads of states may, however, bring more instability if the international community apprehends them from their sovereign countries.

The international community should push for the United States of America, Russia, China and other countries to ratify the Rome Statute in order to increase global support for the Court. These countries play an important role as members of the UN, and are influential on Security Council resolutions that refer some of the cases to the ICC. Therefore, it is arguably unacceptable for a state that has not ratified the Rome Statute to vote on Security Council meetings regarding a matter to be referred to the ICC. Further, each state

³³⁹ Whiting, *supra* note 27 at 323–24.

should ratify the ICC statute to ensure the ICC has independent and effective power to issue binding orders concerning matters falling within its jurisdiction. Having all states sign on to the Rome Statute will show a form of unity among the international community and collective commitment in upholding the rule of law. The absence of powerful countries in this collective effort arguably sends a message that the ICC was only established for small countries.

The victims have a perception that the ICC will solve all kinds of problems including the crimes committed prior to 2002. The court can only prosecute criminal acts committed after 2002. Accordingly, the court should increase its outreach programme to all the victims and the international community to pre-empt this misconception about its scope of prosecution. This will prevent a situation in which the international community has false expectations about the Court and gets disappointed in the end. The international community should condemn the conduct of the United States of America of entering into bilateral treaties with other countries regarding the crimes falling within the jurisdiction of the ICC.

Other lessons from the ICTY and the ICTR are that the court should consider making plea bargains with the low ranking officials in exchange for confessions and testimonies against ‘big fish’ and other accused persons. This will arguably speed up trials. The danger of such a system is that it is open to abuse. All suspects might end up seeking a plea bargain. The court should also not focus the lion’s share of its budget on one country by indicting all top suspects. The focus should be to prosecute those who bear the greatest criminal responsibility at the ICC and strengthen domestic courts to try low ranking officials and other high ranking officials if it is in the interest of justice to do so.

Article 112(4) of the Rome Statute empowers the Assembly to establish an “independent” oversight mechanism for the ICC to ensure that the Court performs, *inter alia*, its functions effectively. In accordance with this provision, the Bureau of the Assembly of States Parties appointed Mr. Akbar Khan (United Kingdom), with the task of establishing the aforesaid independent oversight mechanism at its fifth meeting, on December 4, 2008.³⁴⁰ The ICC then circulated a non-paper which recommends that the oversight mechanism could be an expanded version of the Office of Internal Audit that will be administered by the Registry.³⁴¹ This proposal has been met with concerns regarding the independence of the said mechanism.³⁴² It is arguably premature to consider the introduction of an oversight body to the ICC. What will the enforcement agency do when many states have not ratified the Rome

³⁴⁰ See ICC-ASP/7/INF.2 (Feb. 6, 2009), available at <http://www.icc-cpi.int/NR/rdonlyres/8C82E364-0B40-4F2F-964F-0A61E4C00F7C/0/ICCASP7INF2ENG.pdf>.

³⁴¹ *Id.*

³⁴² Independent Oversight Mechanism Team Coalition for the International Criminal Court (CICC), *Comments and Recommendations to the Eight Session of the Assembly of States Parties*, The Hague (Nov. 18–26, 2009), available at http://www.iccnw.org/documents/CICC_Oversight_Team_Paper_ASP_8.pdf.

Statute? Therefore, the aforesaid recommendations (including pressurizing other permanent members in the Security Council to ratify the Rome Statute) should be a higher priority than the proposed oversight mechanism. Working on the introduction of an enforcement mechanism at this early stage may, nonetheless, prove fruitful than considering the idea when the ICC is in dire need of an enforcement mechanism.

The Security Council should play a more active and effective role, such as travel restrictions, economic sanctions and diplomatic sanctions on countries that provide a safe haven for suspects, refuse to arrest indictees, or cooperate with the ICC. The active role from the Security Council may be a problem because the Court is not a political body, but the Security Council is a political one. The active role of the Security Council on matters that fall within the ICC may thus compromise the Court's independence.

Today, the international community is speaking about a working court, with trials underway. There is also an emerging norm of customary international criminal law that international crimes cannot go unpunished regardless of the official position occupied by the perpetrator. State sovereignty, it seems, is no longer a justification to prevent the ICC from prosecuting those responsible for gross violations of human rights. Investigations are progressing in Kenya, the DRC, and Sudan. Three new suspects have been arrested and surrendered to the court. Therefore, the permanent International Criminal Court has, to a certain extent, been successful, despite the challenges surrounding it.