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**THE ROLE OF THE INTERNATIONAL CRIMINAL COURT IN PROMOTING
INTERNATIONAL PEACE AND SECURITY:
A CASE STUDY OF DEMOCRATIC REPUBLIC OF CONGO**

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ABSTRACT

This study is generally about the role of the International Criminal Court (ICC) in the maintenance of international peace and security using the Democratic Republic of Congo (DRC) as a case study. Consequently, it examined the effect that the ICC has had in contributing to peace and security in Africa before discussing the ICC's intervention and impact in DRC and finally concluded with a number of recommendations towards making the ICC's role more effective in maintenance of international peace and security. The study set out two hypotheses. First, that the ICC has played a significant role in promoting peace and security in the world and secondly that there are impeding factors that promote or impede to the effectiveness of this role. The study, which relied largely on secondary data supported by intermediate primary data from interviews of key informants including a thematic approach to presentation of information, was situated broadly within the idealism theory and within it also located within the liberalism theory.

The study found that the ICC has a significant role to play in the maintenance of international peace and security that has been recognized globally, not only by individual states like the DRC that have referred cases to it, but also from international institutions such as the United Nations Security Council, which has also referred situations such as in Darfur and Libya to the ICC. The study established that the ICC has had both a positive and negative impact on peace and security and has also suffered challenges that have limited its role in promoting peace and security. The place of justice within the peace, security and reconciliation debate has been emphasized in this study, with this concepts being found to be mutually co-existent and not necessarily exclusive of each other. The study found that there are opportunities that exist that would bolster the role of the ICC in the achievement and maintenance of peace and security at national, regional as well as international levels.

Lastly, the study has given recommendations on how to enhance the role of the International Criminal Court as a key global judicial institution in the maintenance of international peace and security. These include the need to have stronger complementary public institutions to the ICC at the national level, ensuring meaningful justice, limiting practices and factors that undermine peace and reconciliation, adoption of integrated approaches to justice and enhancing the universality of international criminal justice through universal ratification and domestication of the Rome Statute of the ICC.

Declaration

I, **ESTHER W. WAWERU**, hereby declare that this dissertation thesis is my original work. This work has never been submitted to any university, college or other institution of learning for any academic or other award. Other works cited or referred to are accordingly acknowledged.

Signature:.....Date:

ESTHER W. WAWERU

SUPERVISOR’S APPROVAL

This project has been submitted for examination with my approval as University supervisor.

Signed:..... Date:.....

DR. KIZITO SABALA

Dedication

I dedicate this work to the victims of violence and the human rights defenders who yearn for justice and sustainable peace in DRC and elsewhere globally. May the debate transcend theories, and lead to real and meaningful justice for you.

Acknowledgement

First and foremost, I thank the Almighty God for this accomplishment and for His sustenance and guidance throughout my Postgraduate studies.

I acknowledge the information shared with me by human rights advocates that breathed life into the case study. I appreciate the encouragement and support that I received from my mum, Ruth M. Waweru, my family, friends and professional colleagues who pushed me to bringing this research project to conclusion. I acknowledge the moral, intellectual and other support received from the Kenya Human Rights Commission (KHRC), my employer at the time of starting my Postgraduate studies in 2012.

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List of Abbreviations

ADF	Allied Democratic Forces
AFDL	Alliance of Democratic Forces of the Liberation of Congo-Zaire
BBC	British Broadcasting Corporation
CSOs	Civil Society Organizations
CAR	Central Africa Republic
DRC	Democratic Republic of Congo
FARDC	Armed Forces of the Democratic Republic of the Congo
FDLR	Forces Démocratiques Pour la Libération du Rwanda
FNI	Front des Nationalistes et des Intégrationnistes
FRPI	Force de Résistance Patriotique en Ituri
ICC	International Criminal Court
ICJ	International Court of Justice
ILC	International Law Commission
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
MONUC	UN Organization Mission in the Democratic Republic of the Congo
NATO	North Atlantic Treaty Organization
NGOs	Non-Governmental Organizations
OTP	Office of The Prosecutor
SCSL	Special Court for Sierra Leone
TJRC	Truth Justice and Reconciliation Commission
TRC	Truth and Reconciliation Commission
UK	United Kingdom
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UPC	Union des Patriotes Congolais
US	United States
VOA	Voice of America

CHAPTER ONE

INTRODUCTION AND BACKGROUND OF THE STUDY

1.1 Introduction and Background

Peace and security are the essence of social organizations. The social contract between government and its citizens is that the entirety of government is based on the provision of peace and security to the citizenry. Thomas Hobbes, writing in the *Leviathan*, states that the essence of law is to take man out of his short, brutish, and nasty life to an orderly civilized society.¹ In his book, *On the Law of War and Peace*, Hugo Grotius observes that the essence of international relations is to realize peace and security of mankind.² However, the peace and security of the world is constantly under threat due to politics, diverse interests and struggles for power. This is particularly more evident in developing countries where democracies are still evolving, institutions in their formative stages, and a culture of tribal allegiances is still rife and valued over nationalism or even regionalism.

Conflicts have characterized human history over the years, leading to loss of lives and property, necessitating the need for systems and mechanisms for realizing, protecting and sustaining peace and security. The adoption of The Hague Conventions, the establishment of the League of Nations and its successor, the United Nations were necessary to prevent other acts of massive atrocities being visited upon human beings.³ However, the formation of the United Nations did not provide the requisite legal force to prevent and or prosecute such actions that would lead to destabilization of international peace and security. Consequently, the United Nations, in living up to the obligations under the United Nations Charter of maintaining peace

¹ Hobbes, T. *Leviathan*. Revised Edition, eds. A.P. Martinich and Brian Battiste. Peterborough, ON: Broadview Press, 2010.

² Grotius H. *De jure belli ac pacis* (On the Law of War and Peace) - Paris, 1625 (2nd ed. Amsterdam 1631)

³ UN Charter, Preambular Statement, available at <https://treaties.un.org/doc/Publication/CTC/uncharter.pdf> accessed on 21 August 2015

through justice⁴, formed various *ad hoc* criminal tribunals to prosecute persons who perpetrated the crimes which threaten international peace and security. Such tribunals include the Nuremburg Tribunal; the International Criminal Tribunal for the Former Yugoslavia (ICTY); the International Criminal Tribunal for Rwanda; and the Special Court for Sierra Leone, among others.⁵ Given the *ad hoc* nature of these institutions, there was widespread agreement on the need to establish a permanent court of criminal justice, along the lines of the International Court of Justice, but focused on the gravest of crimes that threaten international peace and security. This was the beginning of the formation of the International Criminal Court (ICC).

The maintenance of peace and security remains the core reason for the existence of the community of nations. The members of the United Nations have individually ascribed to and committed themselves to the objects and principles contained in the Charter of the United Nations to maintain peace and security in the world. The relevance of the ICC in promoting deterrence of crimes that threaten peace and security, as well as compliance with international criminal regulations as an idea, cannot be gainsaid. However, the practicality of fulfillment of this objective, given the working environment, sponsors, or the promoters of the ICC, is the subject of debate. Whereas the importance of resolution of conflicts is not doubted, the efficacy of the ICC has not been tested, beyond the trial of a selection of what is often perceived as “weak leaders from weak nations”, such as the Democratic Republic of Congo (DRC). The need to analyze, and prove, whether the ICC’s model of justice, serves the goal of reducing intra and inter-state conflicts.

⁴ Ibid Preambular Statement, Para 4

⁵ Krzan, B. The Relationship Between the International Criminal Court and the Security Council, *Polish Year Book of International Law* (2009), p 85-104

This study seeks to analyse the extent to which the ICC has promoted international peace and security, with special reference to the Democratic Republic of Congo, which has so far had the highest number of indicted persons and the first convicts before the Court.

1.2 Statement of the Problem

The lack of accountability for crimes of the most serious concern for the international community remains to be a great challenge to peace and security. The situation countries currently before the ICC are countries that have undergone some form of internal conflict that has raised the concerns of the international community. These concerns arise out of the realization that the conflict activities in one country cannot be ignored as their continuance pose a threat to international peace and security. Previous studies have explored the success of the ICC in meting justice for the perpetrators and victims of crimes against humanity, war crimes and genocide.

While the Congolese conflict began in 1998, the Court's temporal jurisdiction only extends as far back as July 2002, the date the Rome Statute came into effect.⁶ The ICC is still in its institutional infancy and thus needs to tread carefully in determining what to pursue and at what cost. Additionally, the ICC is faced by the idea proposed by some that a "Western" court of justice has no place in resolving African conflicts, even if these conflicts have been characterized by the planet's worst massacres in decades. The ICC has in this vein been viewed as unfairly targeting African nations. In addition, there is a tendency - currently in vogue in some Western settings - to reject the possibility of marrying justice and African culture, a tendency that pushes some to speak vaguely of a "traditional" African notion of justice that would be different than universally accepted notions. In determining its potential role in the conflict in the Democratic

⁶ Nzongola-Ntalaja, G. *From Zaire to the Democratic Republic of the Congo*. Nordic Africa Institute: Uppsala (2004) p. 5

Republic of Congo, it is worth noting that the Office of the Prosecutor of the ICC had to consider the stability of the country's government, the future of its national justice system, the ramifications of unequal justice for victims of the entire war and the feasibility of successful prosecutions.

1.3 Objectives of the Study

The general objective of the research will be to find out the role that the International Criminal Court has played in the maintenance of international peace and security. The specific objectives are:

1.3.1 To review the ICC's intervention in Africa in promoting international peace and security;

1.3.2 To evaluate the extent to which the ICC has influenced the maintenance of international peace and security in DRC;

1.3.3 To expound on the debate between justice, peace and reconciliation in the context of the working of the ICC; and

1.3.4 To make policy recommendations on enhancing the role of the ICC in international peace and security

1.4 Research Questions

1.4.1. What is the effect of the ICC's intervention in Africa in promoting international peace and security?

1.4.2 What is the extent to which the ICC has influenced the maintenance of international peace and security in DRC?

1.4.3 What has been the debate on justice, peace and reconciliation and how has it impacted on the ICC's work?

1.4.4 Are there policy recommendations that can be made towards enhancing the role of the ICC in international peace and security?

1.5 Research Hypotheses

This research study is based on two hypotheses. First it hypothesizes that the International Criminal Court has played a significant role in promoting peace and security in the world, with a special reference to the Democratic Republic of Congo. Secondly it hypothesizes that there are impeding factors that pose challenges to the effective role of the ICC in international peace and security.

1.6 Justification and Rationale of the Study

1.6.1 Academic Justification

This study will contribute to the larger, ongoing academic analysis of the role of the ICC in promoting global peace and security, with special reference to the ICC's work in DRC. Whereas there have been previous studies looking at the various roles that the ICC plays in international peace and justice, this study explores the judicial role that the ICC plays in dispensing justice and how that affects peace and security. This study uses the idealism theory in international relations in interrogating this role. Further, the results of this study will provide useful research information and resource to students and academicians in the subjects on international justice, peace and security.

1.6.2 Policy Justification

The study will provide incisive suggestions to policy makers and other stakeholders who wish to understand in depth the area of study. Consequently, it offers a basis for further criticisms and development of the knowledge on the effectiveness of the ICC in promoting peace and security. The study will also offer recommendations that would be useful in the development

of policy guidelines and decisions to enhance peace and security and moreover the need to interrogate the role of the ICC and if it is biased as African states argue as well as how to enhance the role of the ICC in the maintenance of peace and security.

1.7 Theoretical Framework

The study is broadly premised on the idealism theory in international relations and also borrows from its related and descendant theories of neoliberalism and institutionalism which argues that international institutions allow nations to successfully cooperate in the international system. The twin concepts of international peace and security are based on the foundation of international organizations such as the League of Nations and its successor, the United Nations. The International Criminal Court, as an international organization is based on the notion that crimes that are so grave as to cause cumulative shock on the conscience of humanity ought to be nipped in the bud. Peace, justice and security go hand in hand and are interrelated and interconnected. Each is complimentary to the others and the absence or threat of one has the effect of undermining the others. Consequently, bringing to justice the perpetrators of the atrocities of international concern, remains the greatest responsibility of the ICC and therefore the ICC as an international organization plays a crucial role in defining and sustaining global peace and security.

1.8 Research Methodology

1.8.1 Case Study

The study used descriptive case studies of DRC as well as other conflict zones for comparison purposes, to identify characteristics of the conflicts and the role of retributive justice as contrasted with reconciliation in maintaining international peace and security. Case studies were used in order to facilitate an in depth and specific study that would result in reliable and

substantial information. Case studies in Social Science Studies aid in in-depth examination and understanding into a research phenomenon.⁷

1.8.2 Data Collection

The study relied on primary data collected from interviews and self-administered questionnaires targeting key informants comprising a group of respondents with expertise in the area under study and who have demonstrable experience and knowledge on the case studies selected.

The study also relied on secondary data from government reports, research papers, journals, published books and newspaper articles. These sources complement and supplement the information and form the bulk of the literature on the role of the ICC in the maintenance of international peace and security.

1.8.3 Data Analysis and Presentation

The study employed the use of both qualitative and quantitative data analysis methods. Qualitative data from information on the role of the ICC in international peace and security was analyzed to establish trends, inform the conclusions and make relevant recommendations on the role of the ICC and the extent to which it has contributed to peace and security.

The data collected was presented in the form of a report with narratives from the respondents.

1.9 Scope and Limitations of the Study

The study was limited to the twin concepts of peace and international security, and the role of the ICC in promoting the same. It sought to review the ICC's intervention in Africa and to evaluate the extent to which the ICC has influenced the maintenance of peace and security.

⁷ Lewis, J. & Nicholls, C." Design Issues" in Ritchie, J. et al (eds) *Qualitative Research Practice: A Guide for Social Science Students and Researches* 2nd ed (London: Sage, 2014) pp 65-66

Further, the case study was limited only to the DRC, due to presence of ongoing conflicts, as well as established precedent in referral of cases to the ICC, albeit with specific contrast drawn from other ICC situations. The time scope of the study was limited to 2004, when the first case was referred to the ICC, to the appeal of the Lubanga case, up to 2016, and the time of finalizing the writing of this study report.

1.10 Chapter Outline

The study was undertaken in five chapters. Each chapter aims at answering one or more of the research questions. Chapter one serves as the introduction, and provides the general background and framework for the study. Chapter two is dedicated to a review of the role and implications of the ICC's intervention in Africa, limited to the situations in Darfur/Sudan, Libya, Kenya and Uganda. It also interrogates the challenges and opportunities of the ICC in the maintenance of peace and security. Chapter three is dedicated to an incisive analysis of the role of the ICC in the DRC conflict, with special reference to maintaining international peace and security. The chapter focuses on the continuing conflicts in the DRC, and analyses the ICC response, in terms of its application of its entire mechanisms to realize justice, peace and security. Chapter four discusses the ensuing debate between justice, peace and reconciliation and how this impacts on the maintenance of international peace and security. It also reflects on the roles played by other quasi-judicial processes that have contributed to or impeded the realization of peace and security. The Chapter also looks at the challenges and opportunities of the ICC. Finally, chapter five presents the findings, conclusions and recommendations of the study.

CHAPTER TWO

A REVIEW OF THE INTERNATIONAL CRIMINAL COURT'S INTERVENTION IN AFRICA

Introduction

This chapter traces the need for the creation of the ICC and the role of the United Nations in the execution of its mandate. It also examines the ICC's interventions and the experiences in relation to the deterrent role of the ICC in contributing to the realization and maintenance of international peace and security and the challenges that it has faced. In so doing the chapter will focus on Uganda, Sudan, Kenya and Libya.

2.1 The United Nations and the ICC

The principles and objects of the United Nations require states to take collective measures for the prevention and removal of threats to international peace, to suppress breaches to peace and to promote the peaceful resolution of international disputes or situations that may potentially threaten international peace and security.

The continued impunity, the continued freedom from punishment for offences committed, led the international community to commence discussions on the establishment of a permanent international criminal court that would try those perceived to bear the greatest responsibility for the most serious crimes of international concern. Thus in July 1998 at the Rome Conference, the Statute establishing the ICC was born. The statute came into force on 1 July 2002.⁸

⁸ Rome Statute of the International Criminal Court available at [http://untreaty.un.org/cod/icc/statute/english/rome_statute\(e\).pdf](http://untreaty.un.org/cod/icc/statute/english/rome_statute(e).pdf) accessed on 24 March 2015

The creation and existence of the United Nations or the community of nations is premised upon the collective need to pursue and maintain international peace and security. The constitutive Charter also reaffirms the determination of the United Nations to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained.⁹ The Preamble to the Rome Statute¹⁰ in reaffirming the principles of the UN Charter recognizes that such grave crimes threaten the security, peace and well-being of the world.¹¹

Since its establishment the ICC has had twenty-three cases in nine situation countries being Democratic Republic of Congo, Central African Republic, Uganda, Kenya, Sudan, Libya, Cote d'Ivoire, Mali and most recently, Georgia.¹² The ICC's work has sparked interesting debates about its role in the maintenance of peace and security in the world, with arguments advanced on which should precede the other between peace and justice. The preamble to the United Nations Security Council Resolution 1593 reaffirms that justice and peace are compatible and that justice is an important factor in restoring peace and security.

The ICC is the first permanent international mechanism for bringing individual perpetrators of war crimes, crimes against humanity and genocide to justice where national judicial systems are unwilling or unable to do so. Established in 2002, the Court operates on the basis of its 1998 Rome Statute which was heavily informed by the experiences with the Nuremberg and Tokyo trials after the Second World War, and other ad hoc tribunals established

⁹ UN Charter. <http://www.un.org/en/documents/charter/chapter1.shtml> accessed on 24 March 2015

¹⁰ Supra note 8; also <http://www.un.org/en/documents/charter/chapter1.shtml> accessed on 24 March 2015.

¹¹ Nikko G., *The Role of the International Criminal Court in Peace Processes: Mutually Reinforcing or Mutually Exclusive?* IPPR, 2006 (available at <http://www.crisisgroup.org/en/publication-type/commentary/the-role-of-the-international-criminal-court-in-peace-processes.aspx> accessed on 1 May 2015)

¹² <https://www.icc-cpi.int/> accessed on 30 August 2016

to deal with the war crimes in countries such as Cambodia, former Yugoslavia, Rwanda, and Sierra Leone among others.

2.2 Country Experiences

The ICC was intended to be a credible, independent judicial institution with the ability to fairly and impartially adjudicate serious international crimes, where national judicial systems have failed or are unwilling to prosecute. The justification for international courts is situated in the assumption that they will deter future atrocities and that by administering judgment and punishment the probability of future violations will decrease. This logic is entrenched in the Rome Statute's preamble.¹³ Of the ten situations under investigations by the ICC, nine are in Africa. These are in the Democratic Republic of Congo (DRC), Central Africa Republic (CAR), Mali, Uganda, Kenya, Libya, Sudan and Côte d'Ivoire.¹⁴ The ICC has come a long way since its inception in 2003, with a total of 23 cases and ten situations under investigations. The ICC's jurisdiction in a situation is triggered in three ways- referral by a state party, referral by the United Nations Security Council or by the exercise of the Prosecutors *proprio motu* powers.¹⁵ Three situations have been referred to the Prosecutor by States Parties (Uganda¹⁶, the Democratic Republic of the Congo, and the Central African Republic), two situations (Darfur/Sudan and Libya) have been referred by the UN Security Council (UNSC), the Libya situation, at the beginning of March 2011, through a unanimous Security Council decision. The investigation in Kenya was started by the Prosecutor *proprio motu*, as a result of the post-election violence in 2007- 2008. In each of these situations, the ICC has employed different approaches and

¹³ The Rome Statute's preamble clearly expresses the goal of ending impunity for the "perpetrators of these crimes and thus to contribute to the prevention of such crimes".

¹⁴ <https://www.icc-cpi.int/pages/situations.aspx> accessed 29 August 2016

¹⁵ Article 13 of the Rome Statute, *ibid*

¹⁶ ICC, 'President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC', ICC-20040129-44-En. Available at https://www.icc-cpi.int/Pages/item.aspx?name=president+of+uganda+refers+situation+concerning+the+lord_s+resistance+army+lr_a_+to+the+icc accessed 23 August 2015

strategies with the aim of obtaining justice for the crimes committed and thus contribute to the maintenance of peace and security through its deterrence effect. To examine this, the Chapter discusses the ICC's intervention in Sudan, Libya, Kenya and Uganda.

2.2.1 ICC's Intervention in Sudan

Fighting began between Darfur rebel groups and the Sudanese government in February 2003, with the government arming and supporting Janjaweed militias which committed widespread ethnic cleansing against the tribes from which the rebels were drawn. By November 2004, tens of thousands of people had been killed, some 1.65 million internally displaced, and another 200,000 fled into Chad. Hundreds of villages in the three states of Darfur were burned and destroyed, with indiscriminate attacks on civilians, rape, looting and torture.¹⁷

The UN Security Council followed a credible process in referring the Darfur situation to the ICC. It began by issuing a UNSC presidential statement in April 2004 expressing deep concern over the humanitarian crisis, and condemned the violence by all parties.¹⁸ In July 2004, the Council by Resolution 1556 adopted under Chapter VII of the UN Charter in July 2004, determined that the situation in the Darfur region of Sudan constituted a threat to international peace and security and urged the Sudanese government to investigate and prosecute those criminally responsible for the violence committed.¹⁹

The Secretary-General appointed a distinguished five-member commission in October 2004, pursuant to the UNSC Resolution 1564 adopted in September 2004. The Commission was tasked to investigate reports of violations of international humanitarian law and human rights law

¹⁷ Totten C. D. & Nicholas T., *Arguing for an Integrated Approach to Resolving the Crisis in Darfur: The Challenges of Complementarity, Enforcement, and Related Issues in the International Criminal Court*, 98 *J. Criminal Law. & Criminology* (2008) OUP pp 1069, 1107.

¹⁸ UNSC Resolution 1547 adopted in June 2004

¹⁹ <http://www.un.org/press/en/2004/sc8160.doc.htm> accessed 3 September 2016

in Darfur by all parties.²⁰ Having visited the Sudan, met with government officials, rebels, and NGOs, the commission released its elaborate report in January 2005, finding that war crimes and crimes against humanity had occurred in Darfur, and recommended that the Security Council refer the situation to the ICC under Article 13(b) of the Rome Statute. The situation in Darfur was referred to the ICC in March 2005. The commission of inquiry, the Security Council, and later the ICC Prosecutor all gave due consideration as to whether Sudanese authorities were conducting credible investigations which should take precedence under the Rome Statute's principle of complementarity. Despite being urged by the African Union Peace and Security Council, Sudan failed to cooperate and was reluctant to investigate and prosecute the crimes.²¹

The situation in Sudan is arguably an Achilles Heel of the ICC where Omar al Bashir, a sitting president of a state that is not a party to the Rome Statute, was indicted by the Court.²² Once the ICC issued the arrest warrants²³ against Bashir, all signatories were obligated to arrest Bashir if he came into their territory under the cooperation obligations of the Rome Statute.²⁴ On 3 July 2009, following the issuance of the arrest warrants against Bashir, the AU adopted a resolution urging its members not to cooperate with the ICC in the enforcement of the arrest warrants as obligated under Article 98 of the Rome Statute.²⁵ This resolution has been cited as the basis for non-execution of the arrest warrants by most African states.

²⁰ Report of the International Commission of Inquiry on Darfur to the UN Secretary-General pursuant to Security Council Resolution 1564 of 18 September 2004 (25 January 2005), paras. 73-488.

²¹ African Union, Peace and Security Council, 151st Meeting, (Sep. 22, 2008), New York, PSC/MIN/Comm.1(CLI), available at: <http://www.peaceau.org/uploads/reportdarfureng.pdf> accessed 20 August 2016

²² Prosecutor V. Omar Hassan Ahmed Al Bashir. Case No. ICC-02/05-01/09-73 available at <https://www.icc-cpi.int/darfur/albashir> accessed 24 November 2015

²³ The first and second arrest warrants were issued on 4 March 2009 and 12 July 2010 respectively.

²⁴ See Rome Statute, Article 86, available at http://legal.un.org/icc/statute/99_corr/9.htm accessed 9 November 2015

²⁵ AU Decision of the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC) para 10 UN Doc Assembly/AU/13(XIII) (3 July 2009); Decision on The Progress Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court (ICC) Doc. EX.CL/710(XX) adopted by the AU at its 18th Ordinary Session held in Addis Ababa, Ethiopia, 29 – 30 January 2012; Decision on The Implementation of the Decisions on the International Criminal Court (ICC) Doc. EX.CL/731(XXI) adopted by the AU Assembly at its 19th Ordinary Session held in Addis Ababa, Ethiopia on 15 - 16 July 2012; Decision on

Since the issuance of the arrest warrants, a number of state parties to the Rome Statute have hosted and declined to arrest Bashir whenever he was in their jurisdictions. For instance, Chad hosted Bashir in 2010, 2011, 2013 and 2014; DRC in 2014; Malawi in 2011; Djibouti in 2011; Kenya in 2010 and Nigeria in 2013. It is worth noting that when Bashir visited Kenya and Nigeria, civil society organizations moved to court and obtained arrest warrants against Bashir and in both instances Bashir had to flee the countries for fear that the arrest warrants could be enforced.²⁶ In contrast Uganda revoked its invitation whereas other countries such as Botswana, France and Central Africa Republic have threatened to enforce the arrest warrants.²⁷

Considering that the UN Security Council, by a majority, referred the Darfur situation to the ICC, it was most inapt and defeatist for China, a permanent member of the Council, to have hosted Bashir in June 2011, notwithstanding that as a non-ICC state party China is under no strict statutory obligation to cooperate with the Court. The absence of clear requirements for cooperation demonstrates that the Council should have exercised its Chapter VII powers to require the cooperation of all UN members. Although there is no deferral of the Darfur situation under Article 16 of the Rome Statute, the failure to mandate cooperation by Sudan, ICC member states and the wider UN membership may be argued to as considerably a *de facto* deferral of the Darfur cases.

While the UNSC referred the investigation of Darfur to the ICC, the resolution made no such requirement of compliance that were listed in the ICTY²⁸ and ICTR²⁹ resolutions.³⁰ Resolution 1593 only ‘urged’ cooperation from states and expressed no obligation for non-

International Jurisdiction, Justice and the International Criminal Court (ICC) Doc. Assembly/AU/13(XXI) adopted by the AU Assembly at its 21st ordinary session held in Addis Ababa, Ethiopia on 26 - 27 May 2013.

²⁶ <http://allafrica.com/stories/201307161269.html> accessed 9 November 2015

²⁷ <http://www.arrestbashir.org/bashir-s-travels/> accessed 20 August 2016

²⁸ International Criminal Tribunal for the former Yugoslavia

²⁹ International Criminal Tribunal for Rwanda

³⁰ UNSC Resolution 1593 para. 6.

signatories. Resolution 1593 clearly directs the government of Sudan to cooperate fully with the ICC and its Prosecutor, but Sudan has refused to arrest and surrender government minister Ahmed Haroun and Janjaweed militia leader Ali Kosheib, charged with crimes against humanity and war crimes in the ICC arrest warrants issued in April 2007. The ICC Prosecutor reported to the Council in December 2007 that Sudan was not cooperating, but China blocked efforts to have the Council issue a presidential statement. In June 2008, when the Prosecutor briefed the Council on Sudan's noncooperation, the Council issued its first and only presidential statement noting the arrest warrants and urging Sudan to cooperate fully with the Court. The Council has since failed to take any further action to demand Sudan's cooperation, even after the Court delivered to the Council a judicial decision finding that Sudan had failed to execute the arrest warrants against Haroun and Kosheib.

The absence of enforcement criteria, when combined with the statutory obligations under the Rome Statute to arrest indictees, further creates a tangled web for the ICC. The failure to cooperate with the Court now extends to some parties to the Rome Statute who are obligated to cooperate under Part 9 of the treaty, as well as nonparties, as demonstrated earlier. All signatories to the Rome Statute revoke immunity for government officials and those in the military.³¹ Even though Bashir's immunity has been revoked³², the ICC heavily and solely relies on the willingness and cooperation of states willing to arrest Bashir. This problem only undermines the legitimacy of the ICC, in that it has no ability to enforce ICC's decisions without the willing participation from state parties. Therefore, the question becomes if the structure of the ICC's power is really conducive to its mission of accountability, justice, and deterrence. This highlights one of the many challenges that the ICC is encumbered with.

³¹ Rome Statute, Art. 27.

³² Immunity of Sudanese state officials was revoked by UNSC Resolution 1593 which binds Sudan to the Rome Statute effectively forcing compliance to Article 27 which prohibits immunity.

The ICC's involvement in the Darfur situation, and more so, the possible indictment of Bashir has been criticized as potentially aggravating the matters in the Country. The AU Peace and Security Council maintained that the pursuit for justice in Darfur, should not impede or jeopardize efforts of promoting lasting peace. In fact the AU Peace and Security Council recognized that the ICC's Prosecutor's application for arrest warrants could undermine conflict resolution efforts and the pursuit of peace and reconciliation.³³ It can be argued that the referral of the Darfur situation to the ICC has had a positive effect in deterring further violations of human rights and humanitarian law, and has helped to restore some measure of peace or made achieving peace and security more difficult in Sudan.³⁴ It can be claimed that the referral helped pressure one rebel faction and the Sudanese government into adopting the May 2006 peace agreement.

In addition, the referral and the first two arrest warrants could have helped pressure the Sudanese government's acceptance of the eventual UN-AU peacekeeping force (UNAMID³⁵), and the voluntary surrender of two rebel leaders indicted later may have influenced the government to resume peace talks. Overall, there have been mixed opinions on the effect of the ICC's arrest warrants in Sudan on the peace process. Countries such as South Africa, as with most African Union members were critical of the indictment of Bashir on the basis that it could damage the peace talks.³⁶

³³ *Op Cit*, African Union, Peace and Security Council

³⁴ BBC News, UN Fears over Warrant for Bashir, 6 November 2008, <http://news.bbc.co.uk/2/hi/africa/7712616.stm>. Accessed 26 November 2015

³⁵ United Nations Mission in Darfur

³⁶ Thompson-Flores, T. "The International Criminal Court: Will It Succeed or Fail? - Determinative Factors and Case Study on this Question", *Loyola University Chicago International Law Review*, Vol. 8 Issue 1 (2010) pp 57-84

2.2.2 Libyan Referral to the ICC

Libya was the second referral by the UN Security Council to the ICC following the break of the civil war in 2011. The referral decision, the first ever unanimous decision of the Security Council under Chapter VII of the Charter, was reached on 27 February 2011, based on the universal responsibility to protect.³⁷ Violence erupted in Libya in the wake of the famous Arab Spring, when the Libyan government opened fire on peaceful protestors in the capital Tripoli and in the city of Benghazi resulting in the death of over 300 people. These attacks had been sparked by the intention of the then Libyan President Colonel Muammar Gaddafi to suppress the protestors, accompanied by highly inflammatory remarks calling on his supported to attack the protestors.³⁸

The suppression on otherwise peaceful protestors in Libya by the Gaddafi regime, coupled with the inflammatory threats by Gaddafi himself, and longstanding resentment of the Libyan leader by many states triggered an extraordinary series of UN actions, including the unanimous referral decision by the Council in order to promote peace and security of both the nation, and the region.

First to act was the UN Human Rights Council (HRC) in Geneva, in a resolution adopted on 25 February 2011 that strongly condemned the gross and systematic human rights violations, including indiscriminate armed attacks against civilians, extrajudicial killings, arbitrary arrests, detention and torture of peaceful protestors, some of which amounted to crimes against humanity. After recalling the importance of accountability and the need to fight against

³⁷ [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1970\(2011\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1970(2011)) accessed 20 August 2016

³⁸ http://www.ijsr.in/upload/1907508673Microsoft%20Word%20-%20Paper_103.pdf accessed 20 August 2016

impunity, the HRC resolution created an international commission of inquiry to investigate the alleged crimes, identify the perpetrators, and recommend accountability measures.³⁹

When the Security Council adopted Resolution 1970, the Council believed that the ICC referral was justifiable to the extent that it would help protect the civilians and restore peace and security as required for the exercise of the powers under Chapter VII of the Charter.⁴⁰ Unlike the Darfur referral, it cannot be said that the Council was relying on referral to the ICC alone to restore peace and security in Libya. Resolution 1970 also imposed an arms embargo, a travel ban on designated Libyan officials, and an asset-freeze on designated officials and entities. With Gaddafi forces menacing the population of rebel-held Benghazi, only three weeks after Resolution 1970 the Council adopted Resolution 1973 authorizing UN member states to take all necessary means (including military force), with the exception of an occupation force, to protect civilians.⁴¹ This was aimed at ensuring that there was an end to the hostilities while still ensuring that channels of access to justice remained open.

The ICC Prosecutor acted quickly on the referral, finding on 3 May 2011 after a preliminary examination that there was a reasonable basis to open an investigation, and on 16 May 2011 requested arrest warrants for Muammar and Saif al-Islam Gaddafi and for Libyan intelligence chief Abdullah al-Sanussi. Soon thereafter, there emerged interests from some of the referral supporters such as the United States, the United Kingdom and France who were already engaged in military action in support of the no-fly zone and the protection of civilians as per the Resolution 1973. These three nations, among others, demonstrated an implied interest in stalling

³⁹ In Swift, Decisive Action, Security Council Imposes Tough Measures on Libyan Regime, Adopting Resolution 1970 in Wake of Crackdown on Protesters". UN. 26 February 2011. Available at <http://www.un.org/News/Press/docs/2011/sc10187.doc.htm> accessed 27 October 2015.

⁴⁰ The Relationship Between the ICC and the Security Council: Challenges and Opportunities, International Peace Institute Meeting Notes (March 2013), available at https://www.ipinst.org/wp-content/uploads/publications/ipi_e_pub_relationship_bet_icc_and_sc_2.pdf accessed 20 August 2016

⁴¹ Bassiouni, 'The Permanent International Criminal Court', in Sands P. and Lattimer M. (eds), *Justice for Crimes Against Humanity* (2003) 173, at 210.

the judicial process based on the desire of finding a peaceful end to the hostilities. Some of the statements by British and French officials insinuated that they were amenable to pursuing political settlements, which would have potentially interfered with the ICC judicial process. After the fall of the Gaddafi regime and the emergence of a transitional government, the priority for the US, UK and France appeared to be their relationship with the new authorities, and not support for the prosecution referred to the ICC. Resolution 1970 requires Libyan authorities to cooperate fully with the ICC, but the government has said repeatedly that it prefers to try Saif al-Islam Gaddafi in Libyan domestic proceedings rather than surrender him to the Court.⁴² Except perhaps for Germany, Security Council members have not voiced support for the continuing ICC proceeding. Having set in motion this independent judicial process, the support of the UNSC members is highly desirable, in order to affirm the credibility of the ICC and the judicial processes.⁴³ Further, the UNSC referral should be seen as and remain a principled invocation of the ICC to achieve justice, and not get tied to the controversy within the UN over whether NATO⁴⁴ powers.

In Libya as in Darfur, it was only the use of the Council's power of referral that made justice and accountability possible, extending the reach of the Court to states that had chosen not to become parties to the Rome Statute.⁴⁵ The fact that this was done so rapidly, by a unanimous vote, and at the urging of a defecting Libyan diplomat at the UN, made it all the more remarkable. In hindsight, it might have been better to allow a full process of inquiry to establish

⁴²[http://www.academia.edu/1558775/Between Justice and Politics The International Criminal Courts Interventi on in Libya](http://www.academia.edu/1558775/Between_Justice_and_Politics_The_International_Criminal_Courts_Interventi_on_in_Libya) accessed 23 August 2016

⁴³ See *Decision on the Admissibility of the Case under Article 19(1) of the Statute*, ICC-02/04-01/05-377, Pre-Trial Chamber II, 10 Mar. 2009, at para. 37.

⁴⁴ North Atlantic Treaty Organization

⁴⁵ Roper, S & Barria, L. State Co-operation and International Criminal Court Bargaining Influence in the Arrest and the Surrender of Suspects, 21 *Leiden Journal of International Law*. (2008). pp 457, 464

the facts justifying referral, and also to call upon Libya to first exercise its national primary responsibilities to investigate crimes under the Rome Statute's principle of complementarity.⁴⁶

Due to the extraordinary speed with which Resolution 1970 was adopted, the language largely mirrored that of Resolution 1593 referring Darfur to the ICC. There was no time for intra-governmental consultations, those of the US in particular, to reconsider the limitations that had been written into Resolution 1593. The resolution retained (a) reference only to the Council's power of deferral under Article 16, and not to the power of referral under Article 13(b), (b) exclusion of nationals of non-party states from jurisdiction,⁴⁷ (c) purported recognition that the ICC state parties and not the UN will pay the costs of investigation, and (d) language that merely urges UN members not party to the Rome Statute to cooperate with the ICC while stating they have no obligation to do so. With this language enshrined in both referral resolutions, there is a danger that the precedent will be repeated in future referrals. With the Court already suffering significant backlash from African states, it is unhelpful for non-state parties in the Security Council to exclude themselves from ICC jurisdiction while referring another non-state party to the Court, and to usurp the General Assembly's power to make the decision whether to fund the costs of the referral.

There is room for debate as to whether the referral of Libya had any deterrent effect, if not on Gaddafi then on others associated with his regime who might not otherwise have defected. There were defections from Gaddafi's inner circle, and some of them may have been motivated by the fear of prosecution. Some rebel leaders may also have been constrained by the possibility

⁴⁶ Pre-Trial Chamber I issues three warrants of arrest for Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdulla Al-Senussi". International Criminal Court. 27 June 2011. available at <http://web.archive.org/web/20111126013502/http://www.icc-cpi.int/NR/exeres/D07229DE-4E3D-45BC-8CB1-F5DAF8370218.htm> accessed on 29 October 2015

⁴⁷ Brazil, which had abstained on Resolution 1593 because of the inclusion of this language, supported Resolution 1970, still noting its objection to the language.

of prosecution, as all parties to the conflict in Libya were subject to ICC jurisdiction under the referral. It is also impossible to know if the referral might have cut off a real possibility that Gaddafi would have negotiated his departure.

Shortly after the issuance of the arrest warrants, the AU, seeing this as a hindrance to the peace efforts that it led, albeit with low possibility of success, declared that its members would not enforce the warrants.⁴⁸ A declaration of this kind was difficult to enforce since it would have required the unanimous support of all the then ICC member states to agree. At the same time, by April 2011, with the Arab spring, the other leaders were dealing with their own national protests, and countries such as Egypt, resorted to domestic prosecutions in the fear of justice.⁴⁹ A high likelihood of punishment for serious crimes, wherever committed, would greatly enhance the value of the ICC for general deterrence.⁵⁰

There have been arguments by some scholars that in determining the likely deterrent effect of the ICC prosecutions in Libya, one ought to interrogate other factors that would have contributed to the end of the conflict.⁵¹ One such factor would be the political settlement that would have given Gaddafi the chance to leave Libya, considering that a number of states such as Uganda and Venezuela were willing to offer him asylum. The other factor was the negotiation of a power-sharing deal between Gaddafi and the rebels. The defection of Gaddafi's senior supporters who particularly opted to leave the country is yet another factor for consideration in this debate.

⁴⁸ African Union, "Decision on the Implementation of the Assembly Decisions on the International Criminal Court: Doc. EX.CL/670(XIX)", Assembly/AU/Doc.366(XVII), 1 July 2011, para. 6

⁴⁹ <http://www.ecfr.eu/ijp/case/libya> accessed 29 August 2016

⁵⁰ Politi M. and Nesi G. (eds) *The Rome Statute of the International Criminal Court: A Challenge to Impunity* Farnham: Ashgate (2001) 197, at 204, also Politi M. and Nesi G. (eds) *The International Criminal Court and National Jurisdictions* Farnham: Ashgate (2001) p 319

⁵¹ Kersten M. *Between Justice and Politics: The international Criminal Court's Intervention in Libya*, 2016

The ICC Prosecutor, in her periodic report to the UN Security Council in May 2016, while citing the positive results yielded by her office largely due to the cooperation of the Libyan Government's Prosecutor-General's office, reiterated that "justice, accountability and the deterrent effects of the law remain critical components for achieving lasting peace and stability in Libya."⁵²

2.2.3 ICC's Intervention in Kenya

Kenya ratified the Rome Statute in March 2003 and has been a member since.⁵³ The ICC's intervention in Kenya was unique, being the first time that the ICC Prosecutor exercised the *proprio motu* powers under the Rome Statute to begin investigations into the 2007-2008 post-election violence.⁵⁴ On 27 December 2007, the Electoral Commission of Kenya declared the results of the highly contested multi-party general elections, declaring the reelection of then incumbent President, Mwai Kibaki. These results were disputed and rejected by among others the main opposition candidate, Raila Odinga.⁵⁵ This sparked a series of mass countrywide protests that evolved into widespread violence largely instigated along tribal lines leading to loss of thousands of lives, injuries, sexual and gender based crimes and displacements. The violence resulted in the death of over 1000 people and the displacement of over 350,000 persons.⁵⁶

There were various attempts to resolve the political impasse and to end the violence. One of these, and the most notable, was the Kenya National Dialogue and Reconciliation (KNDR) Committee spearheaded by the AU which mandated a panel of Eminent African Personalities,

⁵² <http://www.un.org/apps/news/story.asp?NewsID=54060#.V8SizPI97IU> accessed 29 August 2016

⁵³ <http://kenyalaw.org/treaties/treaties/241/Rome-Statute-of-the-International-Criminal-Court-> accessed 20 August 2016

⁵⁴ Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya" International Criminal Court. pp. 79–83. Available at <http://www.icc-cpi.int/iccdocs/doc/doc854287.pdf> accessed October 29, 2015

⁵⁵ *BBC News*. "Odinga rejects Kenya poll result". 31 December 2007. Available at <http://news.bbc.co.uk/1/hi/7165406.stm> accessed 29 October 2015

⁵⁶ http://www.kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf accessed 29 October 2015

led by His Excellency Kofi Annan, to mediate the peace process in Kenya. The KNDR process concluded that Kenya needed to go through four main agenda items in the pursuit of peace and reconciliation.⁵⁷

One of the main recommendations of the KNDR process was the need to have independent investigations into the violence. This gave birth to the Commission of Inquiry into the Post-Election Violence (CIPEV) that was chaired by Justice Philip Waki. The CIPEV recommended the establishment of a special tribunal to prosecute those suspected of culpability in the violence. The Commission set a deadline for the establishment of the tribunal, failure to which the list of suspected perpetrators would be forwarded to the ICC Prosecutor for prosecution of crimes within the mandate of the Rome Statute. Owing to the failure to establish the tribunal, the then ICC Prosecutor, Louis Moreno Ocampo, requested and got authorization from the ICC Pre-Trial Chamber II to investigate ICC crimes in Kenya. On 15 December 2010, the Prosecutor presented the charges of crimes against humanity to Pre-Trial Chamber II as two separate cases and requested the Pre Trial Chamber II to issue summons to appear against six Kenyans including the current President Uhuru Kenyatta and Deputy President William Ruto to face trial before the ICC.⁵⁸

In the first case William Ruto, Henry Kosgey, and Joshua Sang were charged with four counts of crimes against humanity. They were all accused of committing the crimes as indirect co-perpetrators at locations including Turbo town, the greater Eldoret area, Kapsabet town, and Nandi Hills town. The specific charges were of murder, constituting a crime against humanity in

⁵⁷ <http://www.kofiannanfoundation.org/> accessed 23 November 2015

⁵⁸ See <https://www.icc-cpi.int/kenya> accessed 23 November 2015

violation of article 7(1)(a) of the Rome Statute;⁵⁹ deportation or forcible transfer of a population, constituting a crime against humanity in violation of article 7(1)(d) of the Rome Statute;⁶⁰ torture, constituting a crime against humanity in violation of article 7(1)(f) of the Rome Statute⁶¹ and persecution, constituting a crime against humanity in violation of article 7(1)(h) of the Rome Statute.⁶² The Court confirmed the charges against William Ruto and Joshua Sang in 2012.⁶³ The case against Ruto and Sang was terminated in April 2016 for lack of sufficient evidence to sustain trial as a result of alleged massive witness interference and other offences against the administration of justice.

In the second case, Francis Muthaura, Uhuru Kenyatta, and Mohammed Ali were charged with five counts of crimes against humanity. They were accused of committing ICC crimes as indirect co-perpetrators at various locations including Kisumu, Kibera, Nakuru and Naivasha. These crimes were murder, constituting a crime against humanity in violation of article 7(1)(a) of the Rome Statute;⁶⁴ deportation or forcible transfer of a population, constituting a crime against humanity in violation of article 7(1)(d) of the Rome Statute;⁶⁵ rape and other forms of sexual violence, constituting a crime against humanity in violation of article 7(1)(g) of the Rome

⁵⁹ "Prosecutor's Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang" International Criminal Court. 15 December 2010. p. 16. Available at <http://www.icc-cpi.int/iccdocs/doc/doc1050835.pdf> accessed 27 October 2015

⁶⁰ Ibid.

⁶¹ "Prosecutor's Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang" International Criminal Court. 15 December 2010. p. 17. Available at <http://www.icc-cpi.int/iccdocs/doc/doc1050835.pdf> accessed 27 October 2015.

⁶² Ibid

⁶³ Supra note 58

⁶⁴ "Prosecutor's Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali" International Criminal Court. 15 December 2010. pp. 16–17. Available at <http://www.icc-cpi.int/iccdocs/doc/doc1050845.pdf> accessed 27 October 2015

⁶⁵ "Prosecutor's Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali" International Criminal Court. 15 December 2010. p. 17. Available at <http://www.icc-cpi.int/iccdocs/doc/doc1050845.pdf> accessed 27 October 2015

Statute;⁶⁶ persecution, constituting a crime against humanity in violation of article 7(1)(h) of the Rome Statute⁶⁷ and inhumane acts, constituting a crime against humanity in violation of article 7(1)(k) of the Rome Statute.⁶⁸ The charges were confirmed against Uhuru Kenyatta and Francis Muthaura in January 2012. However, a year later, the charges against Muthaura were dropped, while those against Kenyatta were dropped in December 2014 and the case was eventually closed in March 2015 following allegations of massive witness interference and other offences against the administration of justice that resulted in insufficient evidence to sustain the trial.⁶⁹ The ICC Prosecutor dropped the charges, saying Kenyan officials had obstructed and made it untenable to sustain the investigations and the case and decried the failure by the government to protect witnesses from intimidation.⁷⁰ The prosecution repeatedly asked for more time to build its case, saying witnesses had been bribed and intimidated, and the Kenyan government had refused to hand over documents vital to the case. Human Rights Watch had also accused the Kenyan government of acting as a roadblock and "impairing the search for truth".⁷¹

Further, in taking action against those corruptly influencing witnesses, the Prosecutor requested Kenya to arrest Walter Barasa, who allegedly tried to bribe potential witnesses in the case against Ruto. These actions would make him criminally responsible for several offences against the administration of justice under Article 70 of the Rome Statute, in particular for corruptly influencing witnesses under Article 70(1) (c). On 14 May 2014, the Kenyan High

⁶⁶ International Criminal Court. "Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang" 8 March 2011. p. 22. Available at <http://www.icc-cpi.int/iccdocs/doc/doc1037044.pdf> 27 October 2015.

⁶⁷ International Criminal Court "Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali" (8 March 2011. pp. 22–23. Available at <http://www.icc-cpi.int/iccdocs/doc/doc1037052.pdf> accessed 27 October 2015.

⁶⁸ See Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's "Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang" ICC, available at <http://www.icc-cpi.int/iccdocs/doc/doc1039488.pdf> accessed 27 October 2015

⁶⁹ <https://www.icc-cpi.int/Pages/item.aspx?name=pr1099> accessed 27 October 2015

⁷⁰ <https://www.icc-cpi.int/Pages/item.aspx?name=otp-statement-05-12-2014-2> accessed 27 October 2015

⁷¹ See ICC drops Uhuru Kenyatta charges for Kenya ethnic violence Available at <http://www.bbc.com/news/world-africa-30347019> accessed on 29 October 2015

Court ordered that an arrest warrant be issued against Barasa, but this decision was suspended by the Court of Appeal on 29 May 2014, Kenya's Court of Appeal decided to suspend the arrest warrant.

The withdrawal of the charges and the termination of proceedings at the ICC were preceded by a number of actions at the national, regional and international levels that immensely and undeniably contributed towards undermining the role of the ICC in Kenya. Kenya mounted a spirited political and diplomatic attack against the ICC and rallied its allies at the regional and international fronts to support its cause to defeat the ICC's intervention. These efforts were based on the fact that following the confirmation of charges in 2012, Kenyatta and Ruto came together to seek the top government positions as President and Deputy President of Kenya, with their campaigns largely centered on their cases at the ICC.

In 2013 Uhuru Kenyatta and William Ruto were elected as President and Deputy President of Kenya. They rallied support at the African Union to seek withdrawal *en masse* of African states from the Rome Statute. The agenda of the AU has included discussions and decisions by member states to withdraw from the ICC, based on Kenya's proposal, on the argument that the ICC unfairly targets African countries⁷² and failed to respect state sovereignty. At the Assembly of State Parties to the ICC, Kenya lobbied state parties to endorse proposed amendments to Article 27 of the Rome Statute to provide for immunity for sitting heads of states. Kenya has also, prior to the termination of the proceedings, argued that the ICC's intervention in Kenya was a threat to peace and security. In 2013, Kenya sought to have the UN Security Council refer the ICC cases for trial in Kenya arguing that they were a threat to peace and security since Kenya was engaged in a war against the *Al Shabaab* terrorist group in Somalia,

⁷² <https://www.theguardian.com/world/2016/feb/01/african-union-kenyan-plan-leave-international-criminal-court> accessed 24 August 2016

having obtained the requisite Security Council authorization under Chapter VII of the Charter. This request enjoyed the backing of the majority of the member states of the AU.⁷³

The Kenyan cases at the ICC brought to the fore a number of factors that demonstrate the challenges that the ICC faces. For instance, the proposed amendments to provide for immunity for sitting heads of states would have resulted in defeating one of the core reasons that the ICC was created- prosecuting those who bear the greatest responsibility. The consolidation of political power at the regional level to defeat the ICC, cannot be ignored. African states form the largest bloc of state parties to the Rome Statute, with 34 out of the 54 African states being members of the ICC. The threat of a mass pullout from the ICC would essentially weaken the Rome Statute system and defeat the universality of the Court. In July 2016, the AU Summit⁷⁴ having discussed the AU-ICC relations and taken note of the recommendations of the AU Executive Council on the implementation of the Decisions of the ICC decided that

The Open-ended Ministerial Committee's mandate will include the urgent development of a comprehensive strategy including collective withdrawal from the ICC to inform the next action of AU Member States that are also parties to the Rome Statute, and to submit such strategy to an extraordinary session of the Executive Council which is mandated to take such decision[.]

The other factor worth noting is with regards to the ICC's reliance on state cooperation in the execution of its mandate. In the case of Kenya, the Prosecutor relied on the Kenyan government's cooperation in ensuring a suitable environment for the prosecution team to conduct investigations, identify and protect witnesses. The Prosecutor and the trial Chamber decried the

⁷³ Decision on International Jurisdiction, Justice and the International Criminal court (ICC) Doc. Assembly/AU/13(XXI), http://iccnow.org/documents/AU_decisions_21st_summit_May_2013.pdf accessed 24 August 2016

⁷⁴ AU Decisions, Declarations and Resolutions at the 26th Ordinary Session of the Assembly of the Union available at http://www.au.int/en/sites/default/files/decisions/29514-assembly_au_dec_588_-_604_xxvi_e.pdf accessed 24 August 2016

massive and “unprecedented” levels of witness tampering that contributed to the collapse of the cases.

It has however been argued that the ICC intervention in Kenya and the pending cases then contributed significantly to the peaceful elections in 2013.⁷⁵ Indeed in the run-up to the elections, the ICC Prosecutor, Fatou Bensouda warned that the ICC would not hesitate to move in should crimes within its jurisdiction be committed. The Prosecutor’s strategy of complementarity can be argued to have significantly contributed to deterring the commission of crimes during the 2013 elections, especially given Kenya’s history of multiparty electoral violence.⁷⁶

2.2.4 The ICC’s Intervention in Uganda

Uganda ratified the Rome Statute of the ICC on 14 July 2002. On 16 December 2003, President Yoweri Museveni referred the situation in Northern Uganda to the ICC “in order to maintain peace and security as well as the well-being of the people of northern Uganda”.⁷⁷ The Ugandan government referral followed allegations of crimes and crimes against humanity that had been committed as a result of the government’s conflict with the Lord’s Resistance Army (LRA) since 2002. The ICC Prosecutor opened investigations in July 2004 and later requested the Court to issue arrest warrants against the top LRA commanders Dominic Ongwen, Joseph Kony, Okot Odhiambo, Raska Lukwiya and Vincent Otti. All the suspects had been at large until January 2015, when Dominic Ongwen surrendered himself to the court and is set to face trial in December 2016 for 67 counts of war crimes and crimes against humanity. The other suspects

⁷⁵ <https://www.crisisgroup.org/africa/horn-africa/kenya/kenya-after-elections> accessed 20 August 2015

⁷⁶ Nichols, L. *The International Criminal Court and the End of Impunity in Kenya* (Switzerland: Springer, 2015) p252

⁷⁷ Statement by Uganda’s Attorney General Hon. Peter Nyombi on 2 February 2015, available at <http://www.mediacentre.go.ug/press-release/statement-government-dominic-ongwen-case> accessed 3 September 2016

remain at large, with Okot believed to be deceased. It is notable that Ugandan President Yoweri Museveni made the referral to the ICC and the subsequent surrender of Ongwen, albeit having become one of the critics of the ICC.

Ongwen's surrender to the ICC was as a result of diplomatic talks held between Uganda, the US and CAR which led to his transfer to the ICC by the AU anti- LRA taskforce. Ongwen was arrested in CAR in January 2015 and later transferred to US custody, noting that the US had two years earlier release a reward of 5 Million US Dollars for information leading to the arrest of Ongwen.⁷⁸ The LRA is accused of perpetuating crimes, not only in Northern Uganda but in South Sudan, CAR and DRC. These illegal operations, inevitably have a negative impact on peace and security in the region. As such there were legitimate expectations that the ICC would have taken note of this and prosecuted the crimes committed in other countries, particularly DRC and CAR who are state parties to the ICC. In CAR, victims of these atrocities urged the ICC to prosecute Ongwen for the crimes committed in their country.

The UN has reported the death of over 100,000 people and the kidnapping of over 60,000 children in central Africa region caused by the LRA.⁷⁹ The LRA is also believed to have shifted bases to eastern DRC and Sudan at one time.⁸⁰ In August 2016, there were reports of continued LRA attacks in DRC and CAR.⁸¹ This definitely raises doubt as to the effectiveness of the Ongwen arrest by the ICC in the maintenance of peace and security in the central African region. The security in the region has been the subject of diplomatic discussions particularly between the Uganda and DRC governments, which have, unfortunately not yielded much.⁸² Even though, it

⁷⁸ <http://natoassociation.ca/the-ongwen-trial-part-ii-on-justice-and-security-in-uganda/> accessed 3 September 2016

⁷⁹ Hirondele News Agency: ICC/CAR- Victims want Ongwen tried for crimes in Central African Republic, Bangui, 25 February 2015

⁸⁰ Amnesty International, Arrest Now! Uganda: Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen, 2007

⁸¹ <https://lra-crisistracker.com/> accessed 3 September 2016

⁸² <http://ugandaradionetwork.com/story/museveni-kabila-discuss-regional-security> accessed 3 September 2016

has arguably been weakened and reduced in size, the LRA continues to pose insecurity in the region.

2.2.5 DRC, ICC & International Peace and Security

In order to interrogate the nexus between the possible role of the ICC in DRC and international peace and security, it is best to start by offering a brief summary of the conflict, which began in 1998 when Rwandan- and Ugandan-backed rebels ousted the Congolese government in Kinshasa.⁸³ The war in DRC is characterized by a chain of armed conflicts that range from instances of civil war to international conflict between nation-states. Indeed, no less than a half-dozen neighboring countries have participated in the aggressions at one point or another. Throughout, the war has been characterized by gross violations of human rights that require that the demands for justice and accountability for these atrocities have to be met in order to facilitate the continuance of peace and security.

Over and above these, the existence and influence of international actors cannot be ignored. In part, these actors have been motivated by the economic desire to control the region's rich mineral resources, including diamonds, gold, timber and cobalt. Further, the local ethnic-spewed disputes are heavily influenced by among other things, disagreements on land ownerships. The ICC's interest has been effect of the sheer brutality of the violence on civilians that has resulted in reports of rape, torture, murder, looting and pillage, conscription into armed conflict, intentionally attacking civilians, genocide and other acts of war crimes and crimes against humanity.⁸⁴

An incisive analysis of the ICC's role in maintaining peace and security is the subject of the study. Chapter three of this study takes a deeper interrogation of the ICC's intervention and

⁸³ Fessy, T. "*Congo terror after LRA rebel raids*". BBC News. 23 October 2008

⁸⁴ Butty, J. "A New Study Finds Death Toll in Congo War too High", VOA News, 21 January 2010.

involvement in DRC and the role and extent to which the ICC has contributed to international peace and security as a result of its intervention.

CHAPTER THREE

THE ICC AND THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY IN DRC

Introduction

This Chapter is dedicated to an incisive analysis of the history of the violence in the Democratic Republic of Congo (DRC) and the role that the ICC has played with special reference to maintaining international peace and security. The chapter focuses on the continuing conflicts in the DRC and analyses the ICC's response and intervention while interrogating the extent to which the ICC's involvement has contributed to the realization and maintenance of peace and security in the DRC and the central African region. It also analyses the challenges that the ICC has faced in this regard. The DRC has grappled with a series of wars and conflict for close to two decades now.

3.1 A Brief History of the Conflict in DRC

Over the past two decades, the people of DRC have witnessed horrific atrocities at the hands of a multitude of armed groups, foreign forces, militias and the national Congolese army. The conflict in DRC has resulted in the massacres of over 5.4 Million people, torture, forcible displacement, destruction of property and infrastructure⁸⁵, physical and mental harm and widespread and unprecedented cases of sexual and gender based violence, which have earned the DRC the infamous title of "The Rape Capital of the World".⁸⁶ The victims have largely been

⁸⁵ McCrummen, S. "Prevalence of Rape in E. Congo Described as Worst in World". *The Washington Post*. (2007) Retrieved 17 July 2015.

⁸⁶ <http://www.easterncongo.org/about-drc/history-of-the-conflict> accessed 24 September 2015

ordinary civilians who continue to suffer against a background of impunity for grave violations of human rights which has long been the norm in the DRC.⁸⁷

The first war started in 1996 with the invasion by Rwandan and Ugandan military forces in pursuit of the Hutu perpetrators of the Rwandan Genocide of 1994 who fled into DRC. During this war, the then president, Mobutu Sese Seko was overthrown in a coup and Laurent-Desire Kabila ascended to power. Kabila was backed by Ugandan and Rwandan military forces under what was known as the “Alliance of Democratic Forces of the Liberation of Congo-Zaire” (AFDL).

In 1998, Kabila who had been aided by the Rwandan⁸⁸ and Ugandan governments to ascend to power accused Rwanda of exploiting the minerals in DRC and thus allowed the Hutu armies to regroup and force out the foreign armies. Uganda and Rwanda mounted a joint invasion of DRC in 1998 forcing neighboring countries- Angola, Namibia, and Zimbabwe- to come to Kabila’s aid. The Second war was instigated by the assassination of President Kabila in 2001 and a transitional government led by Joseph Kabila (the former Kabila’s son) was established. In 2002, he successfully negotiated the withdrawal of Ugandan and Rwandan forces from DRC in a peace agreement that promised a power-sharing interim administration.⁸⁹ This led to a temporary cessation of hostilities but a proxy war between Rwanda and the Kinshasa government ensued until the end of 2008. This war was waged by General Laurent Nkunda aimed at terminating the Democratic Forces for the Liberation of Rwanda (FDLR), which he accused of being supported by the DRC government. In 2008, the conflict took a different turn

⁸⁷ Autesserre, S. "Dangerous Tales: Dominant Narratives on the Congo and their Unintended Consequences". *African Affairs* Oxford University Press (2012). 111 (443): 202–222

⁸⁸ Pomfret, J. Rwandans Led Revolt in Congo in *Washington Post Foreign Service*, Wednesday, 9 July 1997 p A01, available at <http://www.washingtonpost.com/wp-srv/inatl/longterm/congo/stories/070997.htm> accessed 23 August 2016

⁸⁹ Zapata, M. Congo: The First and Second Wars, 1996-2003 in *Enough 101*, November 29 2011 available at <http://www.enoughproject.org/blogs/congo-first-and-second-wars-1996-2003> accessed 23 August 2016

with the DRC and Rwandan forces coming together to fight the FDLR in the North and South Kivu Provinces backed by UN and AU peacekeepers.⁹⁰

In November 2009, after the signing of the Lusaka Ceasefire Agreement in July of that year⁹¹, the UN Security Council passed Resolution 1279 setting up the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) whose mandate was to observe ceasefire and later to supervise the ceasefire agreement and capacity build the DRC on conflict resolution for the ensuing violence. A year later the mandate of MONUC was enhanced to encompass the protection of human rights defenders, civilians and humanitarian personnel as well as supporting the government in its efforts towards consolidating peace and stabilizing the nation.

Despite the enhanced mandate of the MONUC to MONUSCO⁹², the violence still ensued, posing a threat to the stability in the Great Lakes Region. This led to the signing of the Peace, Security and Cooperation Framework for the DRC and the Region in a bid maintain peace in the region in 2013.⁹³ The fragility of the peace process in Congo persists owing to the existence and operation of several armed militia and rebel groups in the region. These include the Ugandan based Lord's Resistance Army (LRA), the Democratic Forces for the Liberation of Rwanda (FDLR), the Ugandan Allied Democratic Forces (ADF), the Burundian National Liberation Forces (FNL) and the Mai-Mai Militias.⁹⁴ It is worth noting that the Congolese wars have seen the involvement of military forces from other countries in Africa notably, Sudan, Uganda, Zimbabwe, Chad, Angola, Namibia and Libya, clearly demonstrating the involvement

⁹⁰ <http://worldwithoutgenocide.org/genocides-and-conflicts/congo> accessed 15 November 2015

⁹¹ The Lusaka Agreement was signed following calls by the UN Security Council for ceasefire and the withdrawal forces from Angola, Namibia, Zimbabwe, Chad, who had come in to support the Kabila administration and Rwanda and Uganda on the other hand supporting the rebel group, Congolese Rally for Democracy (RDC)

⁹² United Nations Organization Stabilization in the Democratic Republic of the Congo

⁹³ <http://monusco.unmissions.org/en/background> accessed 24 September 2015

⁹⁴ Ibid

of forces beyond the DRC borders and the international aspect of the violence, further consolidating the fact that the DRC crisis has undoubtedly posed a threat to international peace and security.

3.2 The Intervention of the ICC in DRC

DRC became a state party to the ICC having signed the Rome Statute in September 2000 and ratified it in April 2002.⁹⁵ This had been preceded by mounting international pressure on the DRC situation to be referred to the ICC. In 2003, while addressing the Assembly of State Parties to the Rome Statute, the ICC Prosecutor, Louis Moreno Ocampo, invited the DRC to join the ICC and to refer cases of mass atrocities to the Court. The Prosecutor while making this call appreciated that the ICC would have to operate in a highly complex military and political environment. Indeed in June 2014 when the Prosecutor announced the opening of investigations there were reports of fierce fighting between the Congolese government and rebels in the province of South Kivu.⁹⁶ In accordance with Article 14⁹⁷ of the Rome Statute, the DRC government referred the situation to the ICC on 19 April 2004, requesting the Prosecutor to investigate whether crimes under the Court's jurisdiction had been committed in the territory of the DRC since the entry into force of the Rome Statute, on 1 July 2002.⁹⁸

Whereas there had been ongoing violence resulting in the commission of crimes falling within the scope of crimes that the ICC would be concerned with, since the 1990's, the ICC's investigation and intervention in the DRC was limited to the period after the Rome Statute came

⁹⁵ https://asp.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/democratic%20republic%20of%20the%20congo.aspx accessed 15 June 2015

⁹⁶ Ibid

⁹⁷ http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2004/Pages/prosecutor%20receives%20referral%20of%20the%20situation%20in%20the%20democratic%20republic%20of%20congo.aspx accessed 15 June 2015

⁹⁸ Beyani, C. "Recent Developments in the African Human Rights System 2004-2006". *Human Rights Law Review* (Oxford University Press) (2007). 7 (3).

into force in 2002. The investigations focused on the eastern part of DRC primarily in the North and South Kivu Provinces and the Ituri region. The Prosecutor established that there were reliable reports of mass murders, summary executions, rape, enforced disappearance, torture and illegal use of child soldiers which fell within the ambit of the ICC crimes against humanity and war crimes⁹⁹ and decided to open investigations.¹⁰⁰ The investigations initially focused on the armed ethnic conflicts between the Hema and Lendu communities in the Ituri district.¹⁰¹ Since the opening of the ICC investigations, in June 2004, the ICC has issued seven arrest warrants for war crimes and crimes against humanity against Thomas Lubanga Dyilo Germain Katanga, Mathieu Ngudjolo Chui, Bosco Ntaganda, Callixte Mbarushimana and Sylvestre Mudacumura.¹⁰²

The investigations initially gave rise to the opening of cases against Thomas Lubanga Dyilo¹⁰³, Bosco Ntaganda¹⁰⁴, Mathieu Ngudjolo¹⁰⁵, and Germain Katanga¹⁰⁶. These four faced charges of alleged crimes of enlisting, conscripting and using child soldiers under the age of fifteen, murder, sexual slavery, pillaging among other war crimes and crimes against humanity committed in the Ituri region. Of particular note is the fact that these accused persons acted on

⁹⁹ <https://www.icc-cpi.int/drc> accessed 15 June 2015

¹⁰⁰ Office of the Prosecutor, “*Paper on Some Policy Issues before the Office of the Prosecutor*”, The Hague: ICC, September 2003, p.3.

¹⁰¹ Ibid

¹⁰² http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/Pages/situation%20index.aspx accessed 15 June 2015

¹⁰³ The Prosecutor v. Thomas Lubanga Dyilo ICC-01/04-01/06 available at <https://www.icc-cpi.int/drc/lubanga> accessed 15 June 2015

¹⁰⁴ Opened on 2 September 2015 Supra note 15 <https://www.icc-cpi.int/drc> accessed 15 June 2015

¹⁰⁵ Prosecutor v. Mathieu Ngudjolo Chui ICC-01/04-02/12 available at <https://www.icc-cpi.int/drc/ngudjolo> accessed 15 June 2015

¹⁰⁶ The Prosecutor v. Germain Katanga ICC-01/04-01/07 available at <https://www.icc-cpi.int/drc/katanga> accessed 15 June 2015

behalf of one side of the conflict ad retaliated against the other. Lubanga and Ntaganda acted for the Hema with Katana and Ngunjolo retaliated for the Lendu community.¹⁰⁷

In addition to the initial four cases, the OTP opened two cases, against Callixte Mbarushimana¹⁰⁸ and Sylvestre Mudacumura¹⁰⁹, for their roles in attacks on civilians in the Kivu Provinces of Eastern DRC.¹¹⁰ Mudacamura was the alleged supreme commander of the Forces Démocratiques Pour la Libération du Rwanda (FDLR), an offshoot of the forces that escaped from Rwanda, following the civil war that broke out during the 1994 genocide. Mbarushimana was the alleged executive secretary of the FDLR. It was claimed that in 2009, the FDLR launched attacks against civilians in the Kivus, in order to raise their ‘status’, and legitimize their goals on the international stage.¹¹¹ In the process, war crimes and crimes against humanity were committed. Mbarushimana was apprehended by French authorities and handed over to the ICC; however, the Pre- Trial Chamber of the ICC declined to confirm the charges on account of the insufficiency of the evidence presented by the OTP and found that there was no reasonable basis for the case proceeding to trial. The case was closed, with the possibility of being reopened, should the OTP meet the evidentiary threshold necessary to sustain a trial. The other suspect, Mudacamura, is still at large.

The Congolese situation, offered the first ever suspects before the permanent international criminal court, marking a historic significance to the ICC. These were -Thomas Lubanga, the leader of the rebel *Union des Patriotes Congolais* (UPC), Germain Katanga, commander of the *Force de Résistance Patriotique en Ituri* (FRPI), and Mathieu Ngunjolo,

¹⁰⁷ Buisman C. Ascertainment of the truth in International Criminal Justice, PhD Thesis submitted to Brunel University School of Law (2012)

¹⁰⁸ <https://www.icc-cpi.int/drc/mbarushimana/pages/alleged-crimes.aspx> accessed 15 June 2015

¹⁰⁹ <https://www.icc-cpi.int/drc/mudacumura> accessed 15 June 2015

¹¹⁰ See the OTP webpage on the Situation in the DRC, online: http://www.icc-cpi.int/EN_Menus/ICC/Situations%20and%20Cases/Situations/Situation%20ICC%200104/Pages/situation%20index.aspx

¹¹¹ Human Rights Watch, “Unfinished Business: Closing Gaps in the Selection of ICC Cases” (2011) Online: <http://www.hrw.org/sites/default/files/reports/icc0911webwcover.pdf>.

former leader of the *Front des Nationalistes et des Intégrationnistes* (FNI).¹¹² Within the DRC, the ICC focused its attention on Ituri province because it deemed the atrocities committed there to be the gravest in the Congolese conflict. The Court's investigations were greatly boosted by the government's cooperation in the effecting the arrests, with the assistance of the MONUC. All three leaders were charged with war crimes and crimes against humanity, including involvement in the murder in February 2005 of nine Bangladeshi peacekeepers.

For purposes of interrogating the role of the ICC in the maintenance of international peace and security in DRC, this chapter limits itself to the three concluded cases- the convictions of Lubanga and Katanga and the acquittal of Ngudjolo.

3.2.1 The Lubanga Case¹¹³

Thomas Lubanga was convicted by the ICC on 14 March 2012 of conscripting and recruiting child soldiers under the age of 15 years and actively engaging them in hostilities. Lubanga was sentenced to 14 years' imprisonment for these war crimes, but was dissatisfied with the conviction and sentence and appealed to the Appeals Chamber, which confirmed the verdict and sentence in December 2014. Following this confirmation of the decision on conviction and sentence, the victims of the atrocities within the scope of the case are currently awaiting a decision on reparations. Lubanga is currently serving his imprisonment term in DRC having been transferred from the ICC on 19 December 2015.

The ICC begun its investigations that would give rise to the charges against Lubanga in 2004. Arrest warrants were unsealed in February 2006 and Lubanga was subsequently arrested and surrendered to the ICC and made his initial appearance before the Court in March 2006 to

¹¹². Brubacher M, "The ICC, National Governments and Judiciaries" in N. Waddell and P. Clark (eds.), *Peace, Justice and the ICC in Africa*, Meeting Series Report, London: Royal African Society, March 2007, pp.22-23.

¹¹³ The Prosecutor v. Thomas Lubanga Dyilo ICC-01/04-01/06 available at <https://www.icc-cpi.int/drc/lubanga#9> accessed 2 September 2016.

face trial for war crimes of child recruiting, conscripting and using child soldiers in the eastern DRC region of Ituri. The Pre Trial Chamber's confirmation of charges against him on 29 January 2007, paved way for the trial which commenced on 26 January 2009.

Lubanga was the president and one of the founders of the UPC that was established in September 2000. Alongside the FPLC¹¹⁴, the military arm of the UPC, Lubanga's armed group took over power in Ituri in September 2002 and waged war against the Lendu militias until August 2003. During this period, the UPC/FPLC engaged in massive and widespread recruitment of child soldiers who underwent harsh military trainings in addition to being severely punished. Thereafter, the child soldiers were actively engaged in the fighting as military bodyguards and as soldiers. There existed a special wing that was known as the "*Kadogo Unit*" comprising of children under 15 years of age.

The ICC Trial Chamber I found that there was demonstrable evidence that as the Commander-in-Chief and the political leader of the army, Lubanga was responsible for the overall coordination of the operations of the UPC/FPLC including planning and supporting the military operations. The Court established that Lubanga actively and closely supported the recruitment and enlistment of children including through his public speeches.

3.2.2 The Katanga Case¹¹⁵

In July 2007, the ICC issued warrants of arrest under seal against Germain Katanga for war crimes and crimes against humanity he allegedly committed in the Ituri District in eastern DRC. Three months later, he was arrested and the arrest warrants were unsealed as he made his first appearance in court on 22 October 2007. On 26 September 2008, the ICC Pre Trial Chamber I confirmed the charges against Katanga. His case was enjoined with that of Ngudjolo at Pre-

¹¹⁴ Forces Patriotiques pour la Libération du Congo

¹¹⁵ The Prosecutor v. Germain Katanga ICC-01/04-01/07 available at <https://www.icc-cpi.int/drc/katanga> accessed 2 September 2016

Trial stage.¹¹⁶ Katanga, of Lendu ethnicity, was initially charged as a principal perpetrator but was found guilty of being an accessory to the crimes of murder as a crime against humanity and a war crime and directing an attack against civilians, destruction of property and pillaging as constituting war crimes.

As at 2002, Katanga was the military leader of the *Force de Résistance Patriotique en Ituri* (FRPI), a largely Ngiti combatant group, based in Ituri region. He served as the *Brigadier-Général* in the *Forces Armées de la République Démocratique du Congo* (FARDC) pursuant to a presidential appointment in December 2004. He was arrested by the DRC government, while still holding this position in the Congolese government's army and handed over to the ICC. ICC's Trial Chamber II, by majority, on 7 March 2014, convicted Katanga of being an accessory to one count of murder as a crime against humanity and four counts of war crimes committed in Ituri on 24 February 2003. The Court found that Katanga made a significant contribution planning the operation that led to the crimes committed by the Ngiti milita group against the largely Hema community in Bogoro area. Katanga was acquitted of the charges of rape and sexual slavery due to insufficient evidence linking him to the crimes. Katanga was condemned to serve 12 years in prison less the close to seven years already spent in custody. Although, the Prosecutor and Katanga had filed appeals against the conviction and sentence, both appeals were withdrawn on 25 June 2014. The Court is set to make a decision on the compensation of the victims in the case.

3.2.3 The Ngudjolo Case¹¹⁷

Mathieu Ngudjolo of Lendu ethnicity, worked as a trained nurse before taking to military combat as the head of the Lendu group known as the *Front des Nationalistes et Intégrationnistes* (the FNI). In 2006, there were media reports that Ngudjolo had entered into a peace agreement

¹¹⁶ https://www.icc-cpi.int/CourtRecords/CR2008_05172.PDF accessed 2 September 2016

¹¹⁷ The Prosecutor v. Mathieu Ngudjolo Chui ICC-01/04-02/12 available at <https://www.icc-cpi.int/drc/ngudjolo> accessed 2 September 2016

with the DRC government and had been offered amnesty and integration into the government army, FARDC (The Armed Forces of the Democratic Republic of the Congo). As part of the integration process, Ngudjolo underwent military training and was arrested in February 2008, while still an active member of the Congolese government's army.

Ndudjolo was arrested and arraigned before the Court in February 2008 pursuant to the sealed arrest warrants issued in July 2007. He was charged with 7 counts of war crimes and 3 counts of crimes against humanity and in March 2008, his case was consolidated with that of Katanga.¹¹⁸ In 2012, his case was separated from that of Katanga¹¹⁹ and he was subsequently acquitted of the charges, a decision which the Prosecutor appealed against but which was upheld by the Appeal's Chamber of the ICC due to the unreliability of the evidence presented at trial.¹²⁰

3.3 The Extent to which the ICC has contributed to Peace and Security in DRC

3.3.1 The Positive Role of the ICC's Intervention

The self-referral of the DRC situation by the Congolese government is arguably a strong recognition of the role of the ICC in maintenance of peace and security and bolsters the argument that justice is an essential ingredient in the maintenance of peace and stability. The demonstrated relationship between the ICC and the DRC government has exemplified complementarity in the true spirit of the Rome Statute, in what the OTP has referred to as 'burden sharing' agreements, where the ICC focuses on those bearing the greatest responsibility for the most serious crimes whereas the government prosecute the mid and lower level perpetrators.¹²¹ In the Lubanga, Katanga and Ngudjolo cases, domestic authorities and MONUC had done most of the hard work

¹¹⁸ Supra Note 34 https://www.icc-cpi.int/CourtRecords/CR2008_05172.PDF accessed 2 September 2016

¹¹⁹ <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/04-01/07-3319> accessed 2 September 2016

¹²⁰ https://www.icc-cpi.int/CourtRecords/CR2015_03782.PDF accessed 2 September 2016

¹²¹ Ibid.

of capturing the suspects and investigating their crimes.¹²² Self-referrals, while depicting a state's acknowledgment of its unwillingness or inability to prosecute, demonstrate the concepts of positive complementarity, particularly with respect to the arrest and surrender of Katanga, Lubanga and Ngudjolo to the ICC. Further the involvement of the ICC in DRC can be argued as having pressured for domestic accountability measures and prosecutions, whether intentionally or as a corollary.

The Rome Statute places the primary responsibility to investigate and prosecute crimes within its jurisdiction upon the state party and will only intervene where a state party is either unwilling or unable to investigate and prosecute these crimes. Under this principle of complementarity espoused under Article 17 of the Rome Statute, some level of cooperation between the ICC and national courts is envisaged by Article 93 of the Rome Statute, which states that the Court may cooperate with, and provide assistance to, a State Party which is investigating or trying a crime within the jurisdiction of the Court.¹²³ Nonetheless, it is contested as to how far the Rome Statute provides the ICC with a mandate to pursue positive complementarity. The OTP continues to refer to positive complementarity as one of the key principles guiding prosecutorial strategy¹²⁴ and has cited examples of positive complementarity activities that seem to reveal a very broad approach.¹²⁵

The Court has had notable successes, particularly the arrest and trials of Lubanga, Katanga and Ngudjolo. Although it is not entirely possible to demonstrate that these proceedings

¹²² Allimadi M., "ICC Probe for Nkunda, DRC Militia Leader", Black Star News, 20 December 2007, available at www.blackstarnews.com/?c=122&a=4008.

¹²³ Rome Statute available at http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf accessed 15 June 2015

¹²⁴ Trial Chamber I ordering stay of proceedings, June 13, 2008, ICC-01/04-01-/06-1401.

¹²⁵ ICC Office of the Prosecutor, Strategic Plan June 20122015, www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Documents/OTP%20Strategic%20Plan.pdf accessed 22 August 2015

have contributed to the reduction of crime in DRC, the cases' notable impact was the fear of possible arrest expressed by other suspected war criminals.¹²⁶ The conviction of Lubanga increased awareness that conscription and use of children soldiers constitutes a crime under international law and more specifically, crimes under the Rome Statute. For example, in Ituri, many children were chased away from the militia groups. The link between such cover-up attempts and the Lubanga case at the ICC even prompted UN agencies and NGOs to speak of 'the Lubanga syndrome'.¹²⁷

Over and above this, the international aspect of the Congo conflict as demonstrated by the cooperative role of other nations in the apprehension and surrender of Ntaganda has bolstered the positive role of the ICC in contributing to the peace and security of the region. Ntaganda was arrested pursuant to the ICC warrants of arrest when he willingly surrendered himself at the US embassy in Kigali, Rwanda, requesting to be transferred to the ICC to face trial, after years of being on the run.¹²⁸ This level of cooperation, coming from the US which is not a state party to the Rome Statute and Rwanda which has been critical of the ICC, illustrates a recognition of the positive role of the ICC as being a force to reckon with, not only in the fight against impunity but in the sustenance of peace in the region. However, the refusal or inability of the DRC government to arrest and turn over Ntaganda, cast doubt as to the continued existence of the positive complementarity.

Some human rights defenders and Congolese victims claim that the arrest of Bosco Ntaganda contributed to some relative peace in the Ituri region. Ntaganda was a rebel leader, also

¹²⁶ Branch A., "International Justice, Local Injustice" *Dissent*, Summer 2004, available at <http://dissentmagazine.org/article/?article=336> accessed 18 August 2015

and J. Ku and J. Nzelibe, "Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?" *Washington University Law Quarterly*, vol. 84, 2007.

¹²⁷ <https://justiceinconflict.org/2012/04/06/the-international-criminal-court-and-deterrence-the-lubanga-syndrome/> accessed 12 September 2016

¹²⁸ See the BBC Report 'Bosco Ntaganda: Wanted Congolese in US Mission in Rwanda' available online at <http://www.bbc.co.uk/news/world-africa-21835345> . 12 September 2016

known as “The Terminator”, who served as the Chief of Military Operations of the Union of Congolese Patriots (UPC)¹²⁹ under Thomas Lubanga before the latter’s arrest and trial at the ICC and the internal wrangles that ensued. The fact that Ntaganda as a rebel leader was not able to recruit or groom successive leaders under him to take over from him at the helm of the UPC had the effect of leaving a power vacuum and arguably the leadership gap contributed to the weaknesses of the rebel group and their effectiveness in their operations. Throughout his military career, Ntaganda moved from one armed group to the other and was on several occasions integrated into the Congolese army. His story is not very different from that of other rebel group leaders who have been rewarded by the Congolese government, for instance with government appointments or even wealth. For most of the Congolese, Ntaganda’s surrender to the ICC and the commencement of proceedings against him was significant to the people who suffered and witnessed the grievous crimes that were committed by him or under his command. In addition to this, the proceedings against Ntaganda send a strong message to rebel groups and commanders that are still actively involved in the ongoing conflict in DRC that they too can be apprehended and held to account for their actions.

The contrast in the nature of crimes committed in the same region in the Lubanga and Ntaganda cases is also significant in demonstrating the role of the ICC in bringing and maintaining peace and security in DRC. Lubanga was charged with conscription of child soldiers.¹³⁰ Ntaganda on the other hand was charged with 13 counts of war crimes and five crimes against humanity allegedly committed in Ituri, DRC, in 2002-2003.¹³¹ Human rights activists raised concerns as to the narrow nature of charges in the Lubanga case which left out

¹²⁹ Referred to in French as Union des Patriotes Congolais, (UPC)

¹³⁰ ICC, *The Prosecutor v. Thomas Lubanga* available at <http://www.icc-cpi.int/iccdocs/PIDS/publications/LubangaENG.pdf> accessed 22 August 2015

¹³¹ <https://www.icc-cpi.int/drc/ntaganda/pages/alleged-crimes.aspx> accessed 3 September 2015

the majority of victims of the vast crimes that were committed in Ituri. As such, the expanded list of crimes facing Ntaganda represents the nature of violations that most of the ethnic communities suffered.¹³²

In this respect some Congolese inhabitants consider that the ICC has somewhat contributed to peace and security in some parts of the DRC. However at the same time, the decision by the ICC not to pursue cases relating to crimes committed in other parts of DRC such as in North and South Kivu as well as Kinshasa, the political capital, point to some deficiencies in the system in terms of dealing with the perpetrators of crimes.¹³³ While Ituri was the largest affected area by the conflict between the two main ethnic communities- the Hema and the Lendu- there are other areas where atrocities within the jurisdiction of the ICC were committed but which remain unaddressed by the ICC and national courts. Lendu-based militias, despite their alleged involvement in perpetuating serious atrocities, as well as senior political figures in the DRC, Uganda or Rwanda who supported the armed groups, have never been prosecuted.¹³⁴

The deterrent nature of the ICC cases proceedings has been felt at the national level and have contributed to increased domestic prosecutions. More importantly, it is worth noting that in domestic cases, the courts in DRC have made positive reference to the jurisprudence at the ICC and to the provisions of the Rome Statue, among other international criminal justice principles. For instance, in April 2006 a military tribunal in Songo Mboyo sentenced seven members of the Congolese army to life imprisonment, while citing the provisions of Rome Statute. In this case, the court found 60 individuals collectively guilty of the crime of rape. Similarly, in June of the

¹³² <https://www.hrw.org/news/2015/08/27/icc-trial-bosco-ntaganda-alleged-crimes-democratic-republic-congo> accessed 12 September 2015

¹³³ Waweru Interview with Daniel M. a Congolese victim representative in Dakar, September 2015.

¹³⁴ Human Rights Watch, *Ituri: "Covered in Blood," Ethnically Targeted Violence in North Eastern DR Congo*, vol. 15, no. 11(A), (2003), available at <http://hrw.org/reports/2003/ituri0703/>; Human Rights Watch, *Democratic Republic of Congo – The Curse of Gold* (New York: Human Rights Watch, 2005), available at <http://hrw.org/reports/2005/drc0505/>.

same year, the Mbandaka military tribunal, relied on the Rome Statute when it sentenced 42 soldiers for crimes against humanity.¹³⁵ These domestic jurisprudence demonstrates the direct implementation of the Rome Statute by a State Party to the ICC system, albeit not perfect. Local judicial officials in Ituri displayed an impressive degree of enthusiasm and courage for undertaking prosecution of international crimes.¹³⁶

3.3.2 The Limited Role of the ICC's Intervention

Despite, the notable positive role of the ICC cases in the DRC situation, there have been concerns raised as to the selection of the cases and the focus of the ICC investigations as not targeting those who bore the greatest responsibility. The ICC has been criticized for not investigating Congolese government officials who allegedly perpetrated or contributed to the atrocities and individuals in the Rwandese and Ugandan governments and military forces, who allegedly contributed to the violence and the crimes. Further, the narrow geographical scope adopted by the ICC in the DRC cases, more so the Lubanga case, has raised questions about the OTP's decision not to investigate the wider and broader aspects of the crimes related to the role of Ugandan and Rwandan governments who allegedly trained and financed Lubanga's UPC. UN reports indicate that the conflict in DRC has involved other states and individuals, including ICC fugitive Joseph Kony and other LRA members.¹³⁷ In addition to this, the conflict has seen the direct involvement of at least seven other countries as earlier discussed under this chapter.

The ICC Prosecutor's decision not to widen the scope of its investigations has been criticized by various actors, including the Court itself. On 29 January 2007, the Pre Trial Chamber, in its decision confirming the charges, noted that the conflict in DRC was an armed

¹³⁵ Ocampo L. M, "Instrument of Justice: The ICC Prosecutor Reflects", *Jurist: Legal News and Research*, 24 January 2007

¹³⁶ Ibid.

¹³⁷ See the Human Rights Watch World Report 2012 online: <http://www.hrw.org/worldreport-2012/world-report-2012-democratic-republic-congo>

conflict of international character. The Court observed that an armed conflict may become international, if “another State intervenes in that conflict through its troops (direct intervention) or if some of the participants in the internal armed conflict act on behalf of that other State (indirect intervention)”.¹³⁸ The Court noted that the role of Uganda and Rwanda in the DRC conflict constituted substantial evidence of the international character of the armed conflict.¹³⁹ This observation is closely tied to the debate on the role of the ICC and its limitations with respect to investigating and prosecuting aggressors, noting that the crime of aggression will only come into force in 2017.

Intrinsically, the DRC conflict cannot be discussed without interrogating the other extenuating factors that largely contribute to the ongoing conflict. The DRC is richly endowed with minerals that have given rise to the battle for control and exploitation of the resources. It is believed that there have been other non-state agents that have been involved in fueling the violence, a fact that was not lost to the ICC. Indeed, the former ICC Prosecutor Luis Moreno Ocampo also suggested that multinational corporations carrying out resource extraction in eastern DRC who were involved in contributing to the war, could also face criminal charges at the ICC. Regrettably, there have been no such charges instituted to date. In this respect the role of the ICC with regards to other actors who contribute to the threats to peace and security is limited and hampers the positive effect that the Court would have due to its inability to apprehend and prosecute them. The continuing violence in DRC has been associated with the exploitation of natural resources in the eastern part where it has been alleged that multinational actors exploit the absence of peace for their interests.

¹³⁸ ICC, Pre- Trial Chamber I “Decision on Confirmation of Charges, 27 January 2007 “ p73, para 209 available at https://www.icc-cpi.int/CourtRecords/CR2007_02360.PDF accessed 20 August 2015

¹³⁹ Ibid pp76-77 para 220-222

The decision to acquit Ngudjolo elicited mixed reactions in DRC. Ngudjolo was acquitted in December 2012 following the failure by the OTP to prove salient elements of the crimes that he was facing. The OTP failed to demonstrate that Ngudjolo had sufficient organizational control of the Lendu and Ngiti militia groups that were at the center of the charges. Among the Lendu and Ngiti communities, the acquittal decision was celebrated while in contrast the decision was met with frustration, disappointment and anger among the Hema community. The Hema community castigated the ICC Prosecutor for ineptness and taking the case too lightly. Some groups saw the return of Ngudjolo as being detrimental to reconciliation of communities on account that the decision reinforced the frustrations of the victims and could potentially endanger peace in Ituri. Some leaders from the Hema community felt slighted by the Ngudjolo acquittal claiming that he was guilty, yet Lubanga who was innocent was convicted. The decision was seen as likely to aggravate the tensions on the ground pitting the Lendu and Hema communities against each other and forcing them to take matters into their own hands due to the frustrations and the perceived advancement of impunity. There were calls by some groups for additional prosecutions to address the tensions particularly to explore government accountability.¹⁴⁰

The Lubanga, Katanga and Ngudjolo cases also represent the ICC's attempts to maintain good working relations with the Congolese government in order to facilitate ICC investigations during ongoing conflict and to maintain the support of the Court's principal donors in the context of the Congolese elections and their direct aftermath. The Ituri conflict is arguably the most isolated from the Kinshasa political capital, of all DRC conflicts and therefore displays the least

¹⁴⁰ Bueno, O. Reactions to the Ngudjolo Decision: Divisions Among Iturian Communities, *War Crimes Prosecution Watch* Vol 7 No. 21 2 January 2013 available at http://publicinternationallawandpolicygroup.org/wp-content/uploads/2013/01/WCPW_Master_11413.html

capacity to destabilize the government.¹⁴¹ This highlights a fundamental dilemma for the ICC, which often operates in fraught political and military environments.¹⁴² However, so far, the ICC's responses have significantly undermined the Court's legitimacy among affected populations, which had hoped it would finally hold accountable those most responsible for mass atrocities, some of whom were in government.¹⁴³

Women's rights defenders, however fault the ICC for failing to secure evidence relating to rape that occurred in the DRC and which the Office of the Prosecutor has expressed frustrations in securing evidence of these crimes. Referencing DRC as "the headquarters of rape" two respondents expressed their disappointments with the ICC. Indeed, the rape victims in the larger Ituri region continue to bear the brunt of these crimes from the children that they bore from the rape incidents. The failure to address the issue of rape is viewed as some to be a catalyst for raising a bitter generation that would likely seek retaliation thus casting doubts as to the positive effect of the ICC's role in promoting peace and security in DRC.¹⁴⁴

The failure by the DRC government to arrest and surrender Ntaganda, speaks to the limitations of cooperation between the ICC and the government. The retention of Ntaganda in the Congolese army at different intervals, posed a challenge to the ICC's effect of the arrest warrants. For instance, in 2009, Ntaganda was integrated into the Congolese army, as part of a peace process between the rebel groups and the DRC government.¹⁴⁵ Ntaganda's retention in the army then was seen as being essential to the maintenance of peace in the North and South Kivu areas, as such the DRC government did not arrest him. Thereafter, and until his surrender to the

¹⁴¹ Human Rights Watch, *Democratic Republic of Congo – The Curse of Gold* New York: Human Rights Watch, (2005), <http://hrw.org/reports/2005/drc0505/>, pp. 29-31.

¹⁴² Clark J. N., 'Peace, Justice and the International Criminal Court: Limitations and Possibilities' *Journal of International Criminal Justice*, OUP, April, 2011. p13

¹⁴³ Parrott, L. *Supra* Note 85

¹⁴⁴ Waweru Interview with K.J, a women's rights defender from DRC, in Dakar, September 2015

¹⁴⁵ *Ibid.*

ICC, Ntaganda led a mutiny within the Congolese army and joined the M23 rebel forces, during which time, there were allegations of recurrence of recruitment of child soldiers.¹⁴⁶This ostensibly fuelled the violence and increased human rights violations arising from the commission of international crimes.¹⁴⁷

The choice of Lubanga, Katanga and Ngudjolo as the ICC's first prosecuted suspects in the DRC and the cases against them were strategic for various reasons. While undoubtedly the Ituri crimes were the gravest, the court's prosecutorial strategy was characterized with political caution as it was necessary to maintain cordial relations with the government in Kinshasa in order to safeguard the security of ICC staff and as such, MONUC's major peacekeeping presence in Ituri played a key role.¹⁴⁸ This strategy however, portends a fundamental dilemma as much as the Court vitally avoids destabilize already fragile political conditions. Where particularly the perpetrators are part of the political governing class, this strategy may inadvertently send the message that the Court is protecting senior actors from prosecution and thus perpetuating impunity.¹⁴⁹

Another limitation that faces the ICC is the extent to which the Court can aptly cooperate with national courts without compromising its integrity, while upholding the principle of complementarity. For instance, whereas domestic prosecutions may be encouraged, there is a major challenge in terms of sharing of witness information or evidence that portends a threat to vulnerable sources when exposed.¹⁵⁰ Witnesses in such serious crimes are imminently at risk. This risk is further compounded by the absence of adequate legal, policy and infrastructural

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

¹⁴⁸ Arsanjani M. and Reisman M., "Developments at the International Criminal Court: The Law-in-Action of the International Criminal Court", *American Journal of International Law*, 99, April 2005, pp.387-388.

¹⁴⁹ Allimadi, M. "ICC Probe for Nkunda, DRC Militia Leader", Black Star News, 20 December 2007, available online at www.blackstarnews.com/?c=122&a=4008 accessed 15 August 2016

¹⁵⁰ Ku J. and Nzelibe J., "Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?" *Washington University Law Quarterly*, vol. 84, 2007. P4

frameworks in DRC, such as a comprehensive witness protection programme, that would address witness tampering and interference. Human rights defenders have intimated to the massive threats that witnesses have faced in the DRC cases.¹⁵¹

Finally, it is imperative to note that there are other statutory limitations that would portend limitations to the ICC. The Rome Statute, provides for the ICC to be involved where a state is unwilling or unable to prosecute crimes committed within its territory, as having the primary responsibility. This provision must be read with the implied obligation of the ICC to complement, where necessary, domestic prosecutions by investigating and prosecuting only those who bear the greatest responsibility. This has been a matter of contentious debate particularly where individuals, who may be dismissed as being mid or lower level perpetrators take a more active and influential role in hostilities when their leaders are apprehended. The ICC's positive deterrent role would be enhanced through its ability to encourage domestic accountability processes and the respect of the rule of law, and thus positive complementarity forms a crucial aspect.

¹⁵¹ Waweru Interview with K.J, a women's rights defender from DRC, in Dakar, September 2015

CHAPTER FOUR

THE DEBATE BETWEEN JUSTICE AND RECONCILIATION AND THE ICC

Introduction

The State Parties to the Rome Statute, recognize that the grave crimes falling within the mandate of the ICC constitute a threat to the peace and security of the world.¹⁵² The role of the ICC, as a judicial organ, in the maintenance of peace and security is therefore unchallenged. The ICC has been at the center of the debate between justice and reconciliation and the role that the Court ought to play. While reconciliation is not a statutory mandate of the ICC, it has been argued that justice has a direct correlation to reconciliation. One of the ideal goals of international criminal justice is to help societies in transition to achieve peace and justice through restoration of the rule of law and accountability processes for international crimes.¹⁵³ However, this debate has at times posed a challenge to the ICC particularly with respect to the sequencing and the rationale for the ICC's involvement. This chapter discusses this debate and the challenges posed in the execution of the ICC's mandate in contributing to the maintenance of international peace and security. In this regard, the chapter offers a contextual analysis of the reconciliation and retributive justice debate using the Truth and Reconciliation Commission (TRC) in South Africa versus Kenya's Truth Justice and Reconciliation Commission (TJRC) as well as other transitional justice mechanisms. It also presents an analytical review of the academic discourses and debates on the concepts of justice, peace and reconciliation punctuated with specific global, continental and regional examples. The chapter also discusses the challenges and opportunities of the ICC in the maintenance of international peace and security.

¹⁵² Preamble to the Rome Statute available at https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf accessed 29 August 2016

¹⁵³ Galbraith, *The Pace of International Criminal Justice* (2009) 31 *Michigan Journal of International Law* 79-155, p83

4.1 Justice and Peace

Justice, peace and reconciliation are key components of transitional justice. Transitional justice refers to a series of approaches, largely encompassing a range of judicial and non-judicial mechanisms in post-conflict situations with the multiple objectives of establishing peace, promoting reconciliation and justice as well as bringing an end to unaddressed historical injustices.¹⁵⁴ Peace and justice in the context of international criminal justice and intentional peace and security are often discussed as though they are mutually exclusive or competing concepts.¹⁵⁵ There are diverse opinions on the position of peace and justice in societies in transition or conflict. Some of these opinions are characterized by the debate on whether justice should be foregone in order to enhance peace, while others opine that justice sometimes undermines peace, which can be argued as being myopic and short term. This is contrasted with the opinions that justice is an essential element of realizing lasting peace and reconciliation and therefore mutually coexisting preconditions.

Transitional justice approaches characteristically endeavor to integrate these elements of peace, justice and reconciliation and are broadly classified as either retributive or restorative. Retributive justice is a theory of justice that considers appropriate punishment, as a morally acceptable response to crime, by providing satisfaction and psychological benefits to the victim, the offender and society.¹⁵⁶ Retributive justice places great importance on judicial processes such as criminal prosecutions as a means of securing justice for the victims of atrocities as well as a deterrent measure for future crimes.

¹⁵⁴ International Center for Transitional Justice ‘What is transitional justice?’ (ICTJ) (2012), available at: <http://ictj.org/about/transitional-justice> Accessed 10 July 2015

¹⁵⁵ Maunganidze, O.A International Criminal Justice as Integral to Peacebuilding in Africa: Beyond the ‘Peace v Justice’ Conundrum in Merwe and Kemp (eds) International Criminal Justice in Africa: Issues, Challenges and Prospects, Nairobi, Strathmore University Press (2016) pp47-62,

¹⁵⁶ Nozick, R. Philosophical Explanations. Cambridge, MA: Harvard University Press. (1981). pp. 366–368.

Restorative justice on the other hand utilizes non-judicial mechanisms and prioritizes the reconciliation¹⁵⁷ and healing needs of the victims and their communities¹⁵⁸ through truth-telling, information gathering, memorialization and official public apologies.¹⁵⁹ Restorative justice focuses on the needs of victims and accords them an opportunity to actively participate in the processes while also encouraging and offering the offenders an opportunity to accept responsibility for their actions and to take measure to repair the harms caused to the victims as individuals or a community rather than authorities.¹⁶⁰

The choice of the different transitional justice mechanisms may vary according to a specific country context.¹⁶¹ The mechanisms of retributive and restorative justice approaches can be both mutually exclusive as well as reinforcing depending on their application in a particular situation. In Uganda, the government's endeavors to end the prolonged civil war through a negotiated peace agreement that would offer amnesty to the Lord's Resistance Army (LRA) were hampered by the ICC's indictment of the LRA leaders for war crimes, but they escaped capture and have continued to pose danger to local communities to date.¹⁶² Despite this, the Ugandan government cooperated with the ICC and handed over the Deputy Leader of the LRA in 2015.¹⁶³ In contrast, Rwanda opted to prosecute the leaders of the genocide through the UN International Criminal Tribunal for Rwanda (ICTR) and complemented this with the prosecution

¹⁵⁷ Aertsen, I; et al., eds Restoring justice after large-scale violent conflicts: Kosovo, DR Congo and the Israeli-Palestinian case. William Publishing. (2008).

¹⁵⁸ Clark, P. Kaufman, Z. D. Nicolaidis, K. 'Tensions in Transitional Justice', In: Clark, P. Kaufman, Z. D. *After Genocide: Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond*, London: Hurst Company (2008)

¹⁵⁹ Brown, S. and Sriram, C, L. 'The Big Fish Won't Fry Themselves: Criminal Accountability for Post-Election Violence in Kenya', *African Affairs*, (2012) 111:443, pp 244 – 260

¹⁶⁰ Perry R. The Role of Retributive Justice in the Common Law of Torts: A Descriptive Theory, 73 *Tenn. L. Rev.* (2006); 177 Ronen Perry, The Third Form of Justice, 23 *Canadian Journal of Law and Jurisprudence* (2010)

¹⁶¹ Cavadino, M & Dignan, J. *The Penal System: An Introduction* (2nd ed.), p. 39. London: Sage. (1997).

¹⁶² Souaré, I. K. 'The International Criminal Court and African Conflicts: The Case of Uganda', *Review of African Political Economy*, 36:121, (2009) 369 - 388

¹⁶³ <http://america.aljazeera.com/articles/2015/1/13/lord-s-resistancearmy.html> accessed 29 August 2016

of lower-level perpetrators using its traditional judicial system of *Gacaca* courts, with the aim of achieving truth, reconciliation and justice.

Nevertheless, there are often tensions within and among different transitional justice approaches and the outcome is often indefinite and unpredictable. In the Rwandese instance, the use of hybrid local and international court, did not rid the processes of controversies and suspicion amongst the local people.¹⁶⁴ One of the problems noted by scholars is the lack of coordination between domestic and international bodies, with each pursuing its own objectives.¹⁶⁵

Observers of transitional justice application and processes argue that it is difficult to achieve actual justice through criminal prosecutions. Brubacher argues for instance that the 1994 ICTR served to “deflect responsibility, to assuage the consciences of states which were unwilling to stop the genocide... [and] largely masks the illegitimacy of the Tutsi regime”.¹⁶⁶ He further argues that criminal tribunals such as those in Rwanda and Yugoslavia are “less meaningful if they cannot be applied or enforced without prejudice to redress transgressions or unless they have a deterrent effect such as behavior modification on the part of would be perpetrators”.¹⁶⁷ Carla Del Ponte, the former Prosecutor of the ICTY opined that peace without justice is unsustainable since unpunished crimes form stumbling blocks to lasting peace because even after a hundred years people do not simply forget the atrocities visited against them.

Conversely, restorative justice through truth commissions set up with due regard to international criminal law, human rights and humanitarian law would not pose a risk of

¹⁶⁴ Buckley-Zistel, S. ‘We are Pretending Peace: Local Memory and the Absence of Social Transformation and Reconciliation in Rwanda’, In: Clark, P. Kaufman, Z. D. *After Genocide: Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond*, London: Hurst Company (2008)

¹⁶⁵ Martin, J. *The English Legal System* (4th ed.), p. 174. London: Hodder Arnold (2005).

¹⁶⁶ Brubacher M., “The ICC, National Governments and Judiciaries” in N. Waddell and P. Clark (eds.), *Peace, Justice and the ICC in Africa*, Meeting Series Report, London: Royal African Society, March 2007, pp.22-23.

¹⁶⁷ *Ibid*

undermining or conflicting criminal prosecutions at either national or international levels.¹⁶⁸ The contention is that this risk is particularly pronounced where truth commissions employ amnesties, and particularly absolute amnesties, to perpetrators of these serious crimes. On the other hand, criminal prosecutions should be better tailored to focus on the victims and to place events in proper perspective.¹⁶⁹

Other considerations need to be taken into account in transitional justice discourses such as the level of human rights abuse, the mode of terminating the conflict, the road to lasting democracy and peace and the commitments of the democratic forces as well as the period of transition after the conflict has come to an end.¹⁷⁰ For instance, the Kenyan post-election violence, in comparison to civil wars in western Africa, was relatively small-scale and occurred only in temporary cycles around election time as such both retributive and restorative justice approaches were employed in the form of the TJRC and the proposed special tribunal. However, the latter was never established within the set timelines resulting in the intervention of the ICC the Prosecutor's *proprio motu* investigations.

4.2 Truth and Reconciliation Commissions as a Recourse to International Peace and Security

Truth and reconciliation commissions (TRCs) are tasked with discovering and revealing past wrongdoing by a government as a means to resolving conflict arising by addressing historical wrongs and injustices. More often than not, these commissions are set up during transition by states emerging from civil strife or dictatorships to investigate human rights

¹⁶⁸ Baros, M. 'The Establishment of the International Criminal Court: Institutionalising Expedience?' 1 *Hertfordshire Law Journal*, (2003) p. 58.

¹⁶⁹ Schabas W., *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: OUP, 2010), at 309; Schabas W., 'Prosecutorial Discretion V. Judicial Activism at the International Criminal Court', 6 *Journal of International Criminal Justice* (2009) 731-761; Schabas W., "'Complementarity in Practice': Some Uncomplimentary Thoughts', 19 *Criminal Law Forum* (2009) 5-33).

¹⁷⁰ Asaala, E. 'Exploring transitional justice as a vehicle for social and political transformation in Kenya', *African Human Rights Journal*, (2010) 377 – 406

violations.¹⁷¹ Truth commissions have become a means of uncovering repressive authoritarian regimes and identifying systemic socioeconomic injustices. The first recognizable truth commission was established in Uganda in 1974 by President Idi Amin to investigate enforced disappearances under his own government. Since then, truth commissions have become a means to investigate past human rights violations¹⁷² and have been regarded as a credible alternative to criminal prosecutions, in some instances, in the belief that they positively contribute to peace, reconciliation, justice and development.¹⁷³

TRCs were first widely used in South and Central America.¹⁷⁴ They gained traction as viable transitional justice mechanisms in Africa after the South African TRC submitted its report in 1998.¹⁷⁵ The increased usage in Africa in the past decades signifies the credence placed on these commissions' role in improving transitioning states' respect for human rights, democracy, governance and the rule of law.¹⁷⁶

The twentieth century were characterized by genocide, collective violence, ethnic cleansing, human rights abuses, war crimes, fierce dictatorial and 'racial' repression and brutal civil wars that resulted in a myriad of attacks on human dignity and human life.¹⁷⁷ At the end of these atrocities, people have sought to know the truth of what happened¹⁷⁸, bring perpetrators to

¹⁷¹ Priscilla B. H., *Unspeakable Truths: Facing Challenge of Truth Commissions*. New York: Routledge, 2010.

¹⁷² Rotberg R. and Thompson, D. eds., *Truth versus Justice: The Morality of Truth Commissions*. Princeton University Press, 2000.

¹⁷³ Hayner P. B., *Unspeakable Truths: Facing the Challenge Of Truth Commissions*, London: Routledge (2001) pp 62-67

¹⁷⁴ Id.

¹⁷⁵ Roper, L. Barria, L. The Use of Truth and Reconciliation Commissions in Africa: Does Establishing a Historical Record Lead to Reconciliation? 4 (Feb. 28, 2007) (unpublished paper presented at the International Studies Association Annual Convention), available at http://www.allacademic.com/meta/p179239_index.html

¹⁷⁶ Kathryn Sikkink Hunjoon Kim, Explaining the Deterrence Effect of Human Rights Prosecutions in Transitional Countries, 54 INT'L STUD. Q.

¹⁷⁷ Eric D. W., *Century of Genocide: Utopias of Race and Nation* Princeton (2003) Totten William S. Parsons, *Century of genocide: critical essays and eyewitness accounts* New York (2004).

justice and build a new future in which respect for human rights and human dignity and the rule of law, are embedded in a peaceful society.

The interlude between the ancient regime and the new order is predominantly a phase in which people, individually or as a collective, try to break or deal with the painful burden of the past, morally, psychologically and judicially. The assortment of instruments— to consciously deal or reconcile with the past – in the course of these so called ‘transitional justice’ periods has increased remarkably during the past three decades.¹⁷⁹ Amongst the most prominent ways to deal with the aftermath of these episodes of violence and repression are, among others, prosecutions, truth seeking, reconciliation, vetting, reparations and restorations and memory and memorials.¹⁸⁰

Since the establishment of the Nuremburg and Tokyo Tribunals, at the end of the Second World War, there emerged a number of internationalized trials that brought perpetrators of human rights violations to justice. This was followed by an imperative evolution of international criminal courts in the early 1990s prosecuting serious crimes such as genocide, crimes against humanity and war crimes. These are notably, the ICTR, the ICTY and the ICC. In addition to these, there was the evolution of the hybrid courts for Sierra Leone, Cambodia, Kosovo, Lebanon and Timor-Leste.

In addition to prosecutions, truth commissions and commissions of inquiry have formed part of a broad range of alternative mechanisms to address repressive and violent legacies. In some instances, particularly for most young democracies or those still in transition, truth commissions have been used as a welcome substitute to criminal prosecutions. In more than

¹⁷⁹ International Center for Transitional Justice (ICTJ), Transitional Justice Approaches <http://www.ictj.org/en/tj/> accessed 23 August 2015

¹⁸⁰ Article 19, Who wants to forget? Truth and access to information about past human rights violations (London 2000); United Nations Security Council, The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies. Report of the Secretary General (UN: doc. S/2004/61623 August 2004) ICTJ, Transitional Justice Approaches.

thirty countries, at least forty-four truth commissions – or similar commissions of inquiry – were established. The most famous of these ‘truth institutions’ was the Truth and Reconciliation Commission for South Africa (1995-1998), which dealt with human rights abuses during the Apartheid-era.¹⁸¹ These truth commissions are - in contrast to criminal tribunals – victim centered and often aspire to achieve reconciliation.

4.2.1 The South African Truth and Reconciliation Commission (TRC)

The South African TRC was a quasi-judicial organ established after the abolition of apartheid by the Promotion of National Unity and Reconciliation Act, No. 34 of 1995 to provide restorative justice.¹⁸² The TRC’s was mandated to hear and record witness accounts of human rights violations and grant reparations and rehabilitation to the victims of apartheid. The TRC, was among the first commissions internationally to hold public hearings and was widely viewed by many as a crucial component of South Africa’s transition to a full and free democracy. Despite some notable flaws, the TRC is generally viewed as having been successful.¹⁸³

The Commission also had the discretion to offer perpetrators of violence who requested amnesty from both civil and criminal prosecutions for the abuses committed during the apartheid era.¹⁸⁴ Amnesty was granted as long as the crimes were politically motivated, proportionate, and there was full disclosure by the person seeking amnesty. To avoid victor's justice, no side was exempt from appearing before the commission. The commission heard reports of human rights violations and considered amnesty applications from all sides, from the apartheid state to the

¹⁸¹ Amnesty International (AI), Liberia. Truth, Justice and Reparation. Memorandum on the Truth and Reconciliation Commission Act (AI- index- AFR 34/005/2006; London 2006)

¹⁸² Gade, C.B.N. Restorative Justice and the South African Truth and Reconciliation Process, *South African Journal of Philosophy* 32(1),(2006) pp10-35

¹⁸³ Vora, J. A. and Vora E. "The Effectiveness of South Africa's Truth and Reconciliation Commission: Perceptions of Xhosa, Afrikaner, and English South Africans." *Journal of Black Studies* 34.3: 2004.pp301-322.

¹⁸⁴ Id.

liberation forces, including the African National Congress. A total of 5,392 amnesty applications were refused, granting only 849 out of the 7,112.¹⁸⁵

The TRC's emphasis on reconciliation is in sharp contrast to the retributive approach taken by the Nuremberg Trials for instance and the absence of the retributive aspect, remains debatable. Drawing from the success of the reconciliatory approach to addressing human-rights violations after political change, other countries have been inspired to set up commissions similar to the TRC. In a survey study by Jay and Erika Vora, the effectiveness of the Commission was measured on a variety of levels, namely its usefulness in terms of bringing out the truth of what had happened during the apartheid regime, the feelings of reconciliation as directly linked to the TRC, and the positive effects both domestically and internationally that the Commission brought about in a variety of ways from the political environment of South Africa to the economic one.

¹⁸⁶ The study recorded the opinions of three ethnic groups -the British Africans, the Afrikaners, and the Xhosa- on the effectiveness of the truth telling aspect of the TRC thus:

All participants perceived the TRC to be effective in bringing out the truth, however, in varying degrees. The Afrikaners perceived the TRC to be less effective in bringing out the truth than the English participants and much less effective than did the Xhosa...¹⁸⁷

The differences in opinions about the effectiveness can be attributed to how each group viewed the proceedings. Some viewed them as not entirely accurate as many people would lie in order to keep themselves out of trouble while receiving amnesty for their crimes, given that the Commission would grant amnesty to some with consideration given to the weight of the crimes committed.

¹⁸⁵ Department of Justice and Constitutional Development of the Republic of South Africa, The Truth and Reconciliation Official Website, available at <http://www.justice.gov.za/trc/amntrans/index.htm> accessed 2 July 2015.

¹⁸⁶ Vora,J and Vora E. Supra Note 186

¹⁸⁷ Id.

Interestingly, each group viewed the TRC as not being very effective in fostering reconciliation. The British African and the Afrikaners' feelings were almost at par while the Xhosa felt that the TRC was less effective. Some respondents in the study felt that the proceedings only opened up past memories of the horrors that had taken place, yet they had begun to forget them. These responses and sentiments fan the debate on the TRC's effectiveness in terms of achieving truth and reconciliation.

A 1998 study by South Africa's Centre for the Study of Violence and Reconciliation and the Khulumani Support Group,¹⁸⁸ found that most people felt that the TRC had failed to achieve reconciliation between the black and white South African communities. Most respondents to the survey believed that justice was a necessary prerequisite for reconciliation to happen rather than an alternative to it. Curiously, some respondents even felt that the TRC's proceedings were tilted in favour of the perpetrators and failed to address the needs of the victims of the violation.¹⁸⁹ For instance, despite former president F.W. de Klerk appearing before the commission and restating his apology for the suffering caused by apartheid, many black South Africans were angered and dissatisfied by the Commission's decision to grant amnesty for the gross human rights violations committed by the apartheid government. The BBC described such criticisms as stemming from a "basic misunderstanding" about the TRC's mandate,¹⁹⁰ which was to uncover the truth about past abuse, using amnesty as a mechanism, rather than to punish past crimes.

Nonetheless, the TRC 's process has been lauded by some of the proponents of the peace before justice debate. The peace versus justice debate has spun around the issues of whether

¹⁸⁸ Storey, P. "A Different Kind of Justice: Truth and Reconciliation in South Africa". *The Christian Century* (10–17 September 1997).

¹⁸⁹ As William Kentridge, director of Ubu and the Truth Commission, put it, "A full confession can bring amnesty and immunity from prosecution or civil procedures for the crimes committed. Therein lies the central irony of the Commission. As people give more and more evidence of the things they have done they get closer and closer to amnesty and it gets more and more intolerable that these people should be given amnesty."

¹⁹⁰ Barrow, G. "South Africans reconciled? Special Report". BBC. (30 October 1998). Retrieved 26 December 2015

peace, as a crucial component of an efficient and effective truth telling and reconciliation process, can effectively satisfy the demands and legitimate expectations of justice for crimes committed and their resultant violations. This debate has evolved to include the use of reconciliation as a different trajectory to the peace versus justice discourse.¹⁹¹ The conservative argument has been to embrace a combination of approaches that somewhat responds to the demands for justice and criminal accountability while delaying the pursuit of criminal responsibility until after peace has crystalized.¹⁹²

Undeniably, whether pursued individually or complimentarily, truth and reconciliation processes, as illustrated by the South African experience have the capability to foster reconciliation in situations where grave crimes have been committed which arguably cannot be achieved to the same extent through criminal accountability processes, which may in some instances hamper and undermine peace and reconciliation due to the retributive nature of prosecutions.

4.2.2 The Kenyan Truth, Justice and Reconciliation Commission (TJRC)

The TJRC was established by the Truth Justice and Reconciliation Act of 2008, as per the recommendations of the Kenya National Dialogue and Reconciliation (KNDR) process paving way for the Country to address past historical injustices and human rights abuses that occurred in Kenya from 12 December 1963 to 28 February 2008. The TJRC's mandate was to establish an accurate and complete historical record of these human rights abuses and to ensure criminal, restorative and social justice while promoting peace and national unity. Its delay in publishing the final report, until 3 May 2013, elicited various reactions from cynicism to guarded optimism.

¹⁹¹ Halpern and Weinstein, 'Rehumanizing the Other: Empathy and Reconciliation', in *Human Rights Quarterly* 26 (2004), pp. 561–583). p. 577

¹⁹² Roman, David, *Lustration and Transitional Justice: Personnel Systems in the Czech Republic, Hungary, and Poland*. Philadelphia: University of Pennsylvania Press, 2011.

It was often dismissed as a lost cause especially with the wrangles that surrounded its leadership. Some human rights and community based groups challenged the credibility and impartiality of the Chairperson, Ambassador Bethuel Kiplagat, on the basis of his alleged role in the Wagalla Massacre, one of the historical injustices that fell within the temporal scope of the TJRC's mandate.¹⁹³

The initial disagreements surrounding the suitability of the TJRC chair took center stage in the formative months of the TJRC and even became the subject of litigation, thus consuming a considerable amount of time and derailing the set timelines for the Commission's work. This definitely undermined the TJRC's credibility, but of greater significance is that the TJRC failed to actively organize and seek widespread support from the public through partnering with the media and key civil society organisations, who at one point openly indicated their reservations about the chair and disengaged from the process. Transitional justice processes require the wide and active participation and involvement of key stakeholders such as the media and civil society, which help to promote a sense of public ownership and transparency of the process. The limited civil society engagement, cast against a backdrop of integrity concerns over the entire process, contributed to the risks associated with the frustrations of the adoption and implementation of the Commissions' recommendations, leading to negative perception of the whole process.

The mandate of the TJRC, both in terms of the temporal and issue scope was incredibly broad which inevitably led to the TJRC facing operational as well as logistical challenges. In addition to this, the process faced serious political challenges relating to the mode of hearings, the summoning power as well as the questions surrounding the leadership in the TJRC. For instance, certain high profile individuals who had been summoned failed to appear before the

¹⁹³ Daily Nation, 24 July 2009 "First to Face the Truth" available at <http://www.nation.co.ke/News/-/1056/629316/-/ul2eo6/-/index.html> accessed 20 November 2015

Commission. Further, there were spirited court legal battles instituted to expunge the names of powerful individuals named in the report.¹⁹⁴ It was argued that as contrasted to Kenya, the South African TRC enjoyed and benefitted from the moral leadership of Archbishop Desmond Tutu and then President Nelson Mandela who advocated for forgiveness and reconciliation, whereas in Kenya the demand was more towards truth and justice. Indeed, of notable difference is that the South African TRC deliberately omitted the pursuit of justice in its mandate as opposed to Kenya's TJRC that opted for an all-inclusive process that eventually failed to adequately deliver. To date the report of the TJRC remains encased, after it was handed over to President Uhuru Kenyatta who is adversely named in the report with respect to historical injustices and human rights abuses. The lack of political will and commitment on the part of the political class, led by the government, to promote healing and reconciliation further hampers the effectiveness of the TJRC and the implementation of its report.

At a basic level, the inclusion in Kenya's TJRC of the words 'truth', 'justice' and 'reconciliation' in its title refer to contested matters that cannot satisfy the expectations of all. Indeed, some of the TJRC's objectives such as fostering national unity, reconciliation and healing required fundamental policy initiatives that were outside its mandate. Broadly, Kenya's historical injustices are embedded in skewed socio-economic and political structures that lead to social inequities and marginalization. Efforts to promote national unity must focus on addressing these underlying problems in order to promote a sense of fairness and inclusiveness in terms of governance and distribution, exploitation and access to national resources. It is therefore important to realize that a short-term intervention such as the TJRC is limited in effecting broad structural changes in society and remains an insufficient tool for reconciliation and healing. The unaddressed justice needs from the TJRC process which are further compounded by the failure to

¹⁹⁴ See <http://www.state.gov/j/drl/rls/hrrpt/2013/af/220124.htm> accessed 29 August 2016

implement its recommendations, do not auger well with the nation's desire for peace, healing and reconciliation and justice, which are all inevitable components of lasting peace.

4.3 The ICC's Impact on International Peace and Security

The ICC is intended to promote world peace and security.¹⁹⁵ The ICC has the jurisdiction to prosecute individuals for the international crimes of genocide, crimes against humanity, and war crimes.¹⁹⁶ The fact that the ICC operates in situations of both ongoing conflict and aftermath opens discussions on peace and justice and which should precede the other.¹⁹⁷ Oftentimes the temptation to argue that peace is more important than justice arises where there are promises to end a conflict as illustrated in the Darfur situation in Sudan. Peace diplomats have often argued that potential ICC prosecutions pose challenges to their peace negotiations and that justice should take a back seat to peace.¹⁹⁸

Human Rights Watch argues that insisting on justice and accountability, does not necessarily mean the end of peace talks or result in renewed instability.¹⁹⁹ With the evolution of international law and practice, peace and justice should inevitably form the core and mutual objectives of negotiations aimed at ending conflicts. Initiatives aimed at pursuing justice do not necessarily antagonize ongoing peace deliberations and therefore do not in and of themselves pose risks to reconciliation. One such illustration is with respect to the unsealing of the Special Court for Sierra Leone's arrest warrants against former Liberian president Charles Taylor.²⁰⁰ Conversely, it can be argued that the ICC's involvement in Uganda with respect to the LRA leaders may have had the short term effects of bringing the parties to the negotiating table.

¹⁹⁵ Strapatsas, N. "Universal Jurisdiction and the International Criminal Court", *Manitoba Law Journal*, (2002), vol. 29, p. 2.

¹⁹⁶ Rome Statute

¹⁹⁷ Chappell, L. 'The Role of the ICC in Transitional Gender Justice: Capacity and Limitations' in S. Buckley-Zistel and R. Stanley (eds.): *Gender in Transitional Justice*, Palgrave, (2012) pp. 37–58.

¹⁹⁸ *Supra* Note 205

¹⁹⁹ Human Rights Watch, *Selling Justice Short* New York, (2009) p3

²⁰⁰ *Ibid*

Further, the ICC has been accused of racial bias and being a tool of Western imperialism, only punishing leaders from ‘small, weak states’ on the African continent while ignoring crimes committed by richer and more powerful states.²⁰¹ This sentiment has been expressed particularly by African leaders due to an alleged disproportionate focus of the Court on Africa, while it claims to have a global mandate; until early 2016, all the situations which the ICC was investigating are in African countries.

Human Rights Watch posits that foregoing accountability does not necessarily result in peace. In the same way, amnesty and freedom from prosecution only serve to sanction the commission of crimes of international concerns without resulting in the much sought after peace.²⁰² The report exposes continued violence in some situations even after the implementation of peace agreements that included amnesty from prosecution. For instance, in Sierra Leone, a peace agreement signed in 1996 offered immunity to the perpetrators of heinous crimes, Revolutionary United Front rebels in order to consolidate the peace and promote the cause of national reconciliation. Less than a year after the signing of this peace agreement, there was a coup dethroning the then president Ahmad Tejan Kabbah.²⁰³ The 21-year North-South civil war in Sudan ended with the signing of the 2005 Comprehensive Peace Agreement,²⁰⁴ but this did not bring peace to the affected regions even during the negotiation process. In Kenya, recurrent violence had been experienced following the reinstatement of multiparty elections, no action had been taken over the years to prosecute those responsible, who often were persons occupying powerful positions. The culture of impunity was propagated by the repeated failure to address the

²⁰¹ Schiff, B. *Building the International Criminal Court*. Cambridge University Press, Cambridge (2008).

²⁰² *Supra* Note 47

²⁰³ *Supra* Note 48

²⁰⁴ Comprehensive Peace Agreement between the Government of Sudan and the SPLM/SPLA, available at <http://peacemaker.un.org/node/1369> accessed on 9 September 2015.

ethnically-instigated political violence and to hold the perpetrators of human rights violations to account.²⁰⁵

The Office of the Prosecutor at the ICC has often argued that peace and justice must be separated. In a 2007 Policy Brief by the then Chief Prosecutor, Luis- Moreno Ocampo, the Office of the Prosecutor indicated that the primary work of the ICC was to pursue justice, while the pursuit for peace was the prerogative of other institutions such as the UN Security Council. This policy position was echoed by the current Chief Prosecutor, Fatou Bensouda in a State of the Union address where she stated

As the I.C.C. is an independent and judicial institution, it cannot take into consideration the interests of peace, which is the mandate of other institutions, such as the United Nations Security Council... The debate about peace versus justice or peace over justice is a patently false choice. Peace and justice are two sides of the same coin. The road to peace should [not] be seen as running via justice, and thus peace and justice can be pursued simultaneously.²⁰⁶

The Prosecutor's office further argues that the establishment of the ICC has enhanced the integration of peace and justice and security and that justice can have a positive impact on peace and security.²⁰⁷ However, even in light of such positive remarks over the ICC, its efficacy in achieving this impact has hardly been interrogated. It has been argued that the independent and impartial powers of the ICC to contribute to the maintenance of international peace and security are prone to being undermined by the UN Security Council with respect to the balance between

²⁰⁵ Kimani N., *Healing the Wound: Personal Narrative About the 2007 Post-Election Violence* (Nairobi: Twaweza Communications, 2009).

²⁰⁶ Bensouda F. *International Justice and Diplomacy*. New York Times. March 19, 2013. Available at http://www.nytimes.com/2013/03/20/opinion/global/the-role-of-the-icc-in-international-justice-and-diplomacy.html?_r=0 accessed 10 September 2015.

²⁰⁷ Ocampo, L. M., "Informal Remarks by Mr. Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, at the Media Stakeout following his presentation to the UN Security Council." *Coalition for the International Criminal Court*. Page 3. June 29, 2005.

the political and legal aspects of peace and security.²⁰⁸ It therefore appears that some delicate form of coordination ought to be in place for both institutions to deliver on their mandates.²⁰⁹

Miroslav argues that the Security Council enjoys the supremacy in the maintenance of international peace and security and that the establishment of the ICC was unnecessary in pursuit of peace and security.²¹⁰ He further argues that its predecessors, the ad hoc tribunals like the ICTY have often been seen as an obstacle to reconciliation by two of the main conflicting parties in the Dayton Peace Agreement. Questions remain unanswered as to whether the involvement of the ICTY in the conflict had any contribution to lasting peace being attained.²¹¹ The ICC, he argues, would similarly be used to deal with political conflicts rather than pursue justice. In the Sudan situation, the Chief Prosecutor of the ICC conveniently shifted the peace question to the Security Council on the basis that the ICC was only concerned with the delivery of justice. The African Union also expressed concerns that the issuance of summons against Colonel Gaddafi would complicate the solution for the political crisis in Libya.²¹²

In these arguments, the question of the role of the ICC in contributing to international peace and security has either been mentioned in passing in the absence of serious, in-depth and objective analysis being made on its actual role.²¹³ While various arguments and criticisms have been advanced with respect to the general success of the work of the ICC in fighting impunity and prosecuting those bearing the greatest responsibility for international crimes, there have been

²⁰⁸ Parrott, L. *Supra* note 85

²⁰⁹ Krzan, B. *The Relationship between the International Criminal Court and the Security Council*, Polish Year Book of International Law (2009), pp 85-104

²¹⁰ Baros, M., *The International Criminal Court and the Maintenance of International Peace and Security: A Marriage of Convenience?* (November 7, 2011).

²¹¹ Bassiouni M.C., *International Criminal Law: International Enforcement*, Martinus Nijhoff Publishers (2008) 3rd ed., p. 10.

²¹² African Union, Directorate of Information and Communication: Decisions adopted during the 17th African Union Summit, July 2011, at www.africa-union.org.

²¹³ Goldsmith, Jack, *The Self Defeating International Criminal Court*, *University of Chicago Law Review*, 2003 (available at <http://www.jstor.org/stable/1600547>) accessed on 1 May 2015

few that have analyzed the role that the ICC has played in line with the vision of the community of nations on maintenance of international peace and security.²¹⁴ The UN Security Council has clearly underscored that justice is an essential component with undisputed instrumental value in the pursuit of peace, by bringing to justice those responsible for serious crimes.

However, little has been done to interrogate the extent to which the involvement of the ICC in conflict situations has resulted in the restoration and maintenance of peace and security, in a way that enhances international security and peace. It has been argued for instance, that the “interference” by the ICC in the Darfur situation in Sudan has further worsened the situation, particularly in light of the fact that the ICC has targeted persons holding high political positions, including Sudan’s President Omar Al Bashir.²¹⁵

The analysis of domestic and international solutions to problems of impunity and accountability in Kenya demonstrates that in both cases Kenyan politics has importantly shaped both the arguments and their reflection on the justice and peace debate. The political class could not agree on the mode of criminal accountability, whether domestically through the national court or internationally through the ICC obviously seeking options that would least threaten the political interests. As many commentators agree, the debate has often degenerated to be more on politics rather than the desire to pursue justice.²¹⁶

In contrast to the failures and inadequacies of domestic judicial options, the ICC investigations have arguably been more effective due to the inability of politicians to exert full

²¹⁴ Human Rights Watch, *Supra* Note 209

²¹⁵ Grono, N. *The Role of the International Criminal Court in Peace Processes: Mutually Reinforcing or Mutually Exclusive?*, IPPR, 2006 (available at <http://www.crisisgroup.org/en/publication-type/commentary/the-role-of-the-international-criminal-court-in-peace-processes.aspx> accessed on 1 May 2015

²¹⁶ Branch, D. “The International Criminal Court and Kenya: ‘The Half Made Place’ – the ICC and elections, 2012”, *African Arguments*, 31 August, (2011) [online] available at: <http://africanarguments.org/2011/08/31/the-half-made-place-kenya-the-icc-and-elections-2012-by-dan-branch/> Accessed 15 July 2015

control to undermine the criminal justice process.²¹⁷ Over the years, it has become apparent that the involvement of the ICC has been an important element which has shaped the Kenyan transitional justice agenda as well as the political landscape.²¹⁸ The tangential effect of the ICC process was that it increased politicians' efforts to create resistance to it, thus restricting the focus on the much needed institutional and legal reforms and the situation of victims. However, the ICC and the international community strengthened the calls for domestic accountability, giving rise to laudable and notable reforms in the judicial and legislative fronts.²¹⁹

There is a general potential for the ICC to 'positively participate in the democratization process by making leaders accountable', to provide a degree of deterrence of future crimes, as was illustrated in the general election in Kenya in 2013, and to encourage domestic forces to advocate for justice and the respect for human rights.²²⁰ Of notable anecdote is that the 2013 elections were largely premised on the ICC factor, with Uhuru and Ruto joining forces to fight the ICC cases, making the ICC cases their key organizing and campaigning agenda. Although, when the ICC withdrew the charges against Uhuru in December 2014, there were some seeming tensions between the two factions with pressure mounting on the Jubilee administration to exert similar diplomatic and political pressure for the termination of Ruto's case as had been exhibited in the Kenyatta case.²²¹

²¹⁷ Hansen, T. O. 'A Holistic Look: How the ICC Process Shapes Transitional Justice in Kenya', *The International Criminal Court Kenya Monitor*, 19 September, (2011) [online] available at: <http://www.icckenya.org/2011/09/a-holistic-look-how-the-icc-process-shapes-transitional-justice-in-kenya/> Accessed 15 July 2015

²¹⁸ Sriram, C. L. and Brown, S, (2012) 'Kenya in the Shadow of the ICC: Complementarity, Gravity and Impact', *International Criminal Law Review*, 12, 219 – 244

²¹⁹ Wainaina, N. 'The Truth, Justice and Reconciliation Commission: A flawed law', *Pambazuka News*, 29 January, 417, (2009) [online] available at: <http://www.pambazuka.org/en/category/comment/53657> Accessed 15 June 2015

²²⁰ Aptel. C. 'International and Hybrid Criminal Tribunals: Reconciling or Stigmatizing?', In: Arthur, P., ed *Identities in Transition: Challenges for Transitional Justice in Divided Societies*, Cambridge: Cambridge University Press. (2010)

²²¹ <https://thehaguetrials.co.ke/article/we-too-want-icc-free-our-sons> accessed 28 August 2016

Nonetheless, criminal accountability measures, even when successful, are insufficient in ensuring full domestic political accountability. The trials of a handful of individuals may in some instances potentially leave a great impunity gap and encourage low-level perpetrators to by-pass or evade justice which could have potentially negative implications on peace and stability. Thus, the need to close the impunity gap, is an ever increasing one requiring complimentary efforts to the ICC processes through credible national accountability and justice mechanisms.

4.4 The ICC: Challenges and Opportunities

4.4.1 Challenges

The ICC continues to operate in a difficult, and challenging environment. The court has faced massive challenges particularly from the African front as well as from the international front. The political interests have undoubtedly contributed to the weaknesses of the ICC in effectively contributing to the promotion of international peace and security.

4.4.1.1 Lack of Cooperation and Enforcement Mechanisms

The ICC depends on the cooperation of member states in the execution of its mandate. As a statutory requirement member states have a general obligation under Article 86 of the Rome Statute to cooperate with the Court in its investigations and prosecutions of crimes within the jurisdiction of the Court.²²² As the case in Sudan proves, it has become more known in the last years that the ICC is absolutely, dependent on effective cooperation with States Parties in prosecuting criminal cases, in particular when it comes to the key issue of arrest and surrender of the accused; this lack of any form of executive power or self-enforcement mechanism is another weakness of the Court.

Similarly, another limiting factor in that is the unprecedented, indeed gigantic difficulty the Court faces, in order to obtain the evidence required, it has to conduct the necessary, complex

²²² Supra, Rome Statute of the International Criminal Court

investigations in regions thousands of kilometers away from The Hague, regions where travel is difficult, the security situation is volatile and it may be difficult to collect the evidence.

The principle of complementarity presupposes that ICC prosecutions will encourage national prosecutions, where possible, for the lower-ranking perpetrators, or work with the international community to ensure that the offenders are brought to justice by some other means.²²³ Thus, the ICC will therefore often prosecute a few individual high-level perpetrators, while encouraging domestic jurisdictions to help close any potential ‘impunity gap’ left by the ICC’s focus on a minority of suspects who bear the greatest responsibility.²²⁴ In addition, the OTP has indicated that it will take a highly cautious approach to selecting which cases to investigate, acting only when it possesses enough evidence to provide strong prospects for a successful investigation. It is likely that the OTP will pursue cases only where states parties and other sources have already gathered substantial evidence.²²⁵

The ICC relies on states to cooperate with respect to witness protection, in the case of Kenya, this has proved to be an uphill and almost naïve expectation, given the unprecedented levels of witness interference that led to the collapse of the Kenyan cases. The ICC lacks any form of executive power or self-enforcement mechanism, which possess another glaring weakness of the Court. In addition to this, the ICC, could do with more enforcement and support from the UN Security Council, particularly with respect to follow ups on the cases which it has referred to the ICC.

4.4.1.2 Lack of Positive Complementarity

The primary responsibility to investigate and prosecute crimes within the Rome Statute lies with the states. The ICC prosecutions compliment and are aimed to encourage national

²²³ Ibid.

²²⁴ Supra note 85.

²²⁵ Ocampo L. M., Media Interview, 24 January 2007

prosecutions, where possible, for the lower-ranking perpetrators, or work with the international community to ensure that the offenders are brought to justice by some other means.²²⁶ Thus, the ICC will reportedly prosecute small numbers of high-level perpetrators, while encouraging domestic jurisdictions to help close any potential ‘impunity gap’ left by the ICC’s focus on a minority of suspects.²²⁷ In addition, the OTP has indicated that it will take a highly cautious approach to selecting which cases to investigate, acting only when it possesses enough evidence to provide strong prospects for a successful investigation. It is likely that the OTP will pursue cases only where states parties and other sources have already gathered substantial evidence.²²⁸

The broad ICC prosecutorial strategy requires some reform in order to deliver on its mandate in ensuring accountability and an end to impunity.²²⁹ However, it could be argued that the ICC is still developing its broad strategy for case selection, on the basis of the rules outlined in the Rome Statute and its policy of complementarity. The OTP has reiterated that it will focus on perpetrators who bear the greatest responsibility for crimes. This means that the OTP is likely to prosecute only government, military or militia leaders suspected of orchestrating or committing crimes under the ICC’s jurisdiction.²³⁰

The ICC has been fundamentally driven by self-interested pragmatic concerns, which reflect a growing global institution that needs to build support among its states parties and to be perceived as an established global actor in the fight against impunity and access to justice. Genocide, crimes against humanity and war crimes are usually committed during armed conflict as a result of orders “from the top” issued by all kinds of rulers, who at the same time make

²²⁶ Ibid.

²²⁷ Parrott L. Supra Note 85.

²²⁸ Ocampo L. Media Interview, 24 January 2007

²²⁹ Parrott. L, Supra note 85

²³⁰ Office of the Prosecutor, “*Chapter on Some Policy Issues before the Office of the Prosecutor*”, The Hague: ICC, September 2003, p.3.

every effort to cover up their responsibility for the crimes and evade accountability. In pursuing its task, therefore, the Court inevitably gets caught between power politics on the one hand and law and human rights on the other. Consequently, the work of the Court will often continue to be hampered by adverse political machinations or in some instances, political reproach as evidenced by the terse AU-ICC relations. The ICC's attempts to build close working relations with domestic governments highlight the unavoidable challenges of delivering international justice in the midst of ongoing conflict.

4.4.1.3 The AU-ICC Relationship

A further challenge is the terse relationship between the court, and the AU. The ICC faces the challenge of legitimacy arising from the criticism on its criteria for selecting cases and situations in which to intervene. This has been seen largely as unfairly targeting the African continent. This however, can be countered by the argument that a majority of these situations have been referred by the state parties. Most AU members advance the rhetoric that the ICC is a tool for ostracizing and manipulating African leaders.²³¹ Of particular concern, and a compounding factor to this challenge, is the fact that only two of the permanent members of the UN Security Council are parties to the ICC. Yet the Council wields and has utilized its referral powers with respect to African countries only.

The AU argued that the absence of the Kenyan President and Deputy resulting from their required presence at the ICC would constrain them from attending to the domestic security situation in Kenya after the terrorist attack of the Westgate Shopping Mall in Nairobi on 21 September 2013. The AU's October 2013 request to the UN Security Council to defer the two

²³¹ See, for instance, President Bashir in Dealy, 'Interview: Sudan's President Omar Al-Bashir', *Public Broadcasting Service*, 14 Aug. 2009, available at: www.pbs.org/newshour/bb/africa/july-dec09/bashir-full_08-13.html, stating: 'We think that the ICC is a tool to terrorize countries that the West thinks are disobedient.' See also De Waal, 'Darfur, the Court and Khartoum: The Politics of State Non-Cooperation', in N. Waddell and P. Clark (eds), *Courting Conflict? Justice, Peace and the ICC in Africa* (2008) 29, at 34.

Kenyan cases pursuant to Article 16 of the Rome Statute was denied. Soon thereafter, there emerged continued threats from several African states, including Kenya, to withdraw from the Court. All of these actions portray the tense relationship between the AU and the Court that cumulates in the Kenyan cases.²³² In addition to this, the AU adopted a resolution that state parties should not arrest a sitting head of state.

4.4.1.4 Universality of the ICC

The final challenge is with respect to the universality of the ICC. There are limitations to the applicability and jurisdiction of the Rome Statute in a uniform global context. As has been demonstrated by the role of external factors such as Uganda and Rwanda's involvement in the DRC conflict, the ICC must be able to pursue and prosecute aggressors to war, which it cannot do yet, because the crime of aggression is yet to come into force. As such it is imperative to ensure that the ICC will have, after 2017, to the extent possible, jurisdiction with regard to the crime of aggression. All possible ways and means must be exhausted to ensure that the ICC will have, after 2017, to the extent possible, jurisdiction with regard to the crime of aggression. This is a task essentially for the States Parties which have to ratify, support and implement the crime of aggression amendments adopted at the first Review Conference, in Kampala in 2011. There is a general consensus on the intolerance to the commission of international crimes, this offers an opportunity for the Court to address the commission of the crime of aggression, particularly with respect to non-state parties. In this regard, universality of the ICC offers both an opportunity as well as a challenge. The universal ratification of the Rome Statute and the coming into force of the crime of aggression offers more of an opportunity, while the inability of the court to intervene in certain situations remains a challenge, especially with respect to non-member states.

²³² Assembly of the African Union, Decision on Africa's Relationship with the International Criminal Court (ICC), Ext/Assembly/AU/Dec.1 (October.2013).

4.4.2 Opportunities

4.4.2.1 Responsibility to Protect

The responsibility to protect offers an opportunity for the ICC to realize its mandate with respect to the maintenance of international peace and security. The international community will not sit back and watch as atrocities occur. Despite the arguments of state sovereignty, the international community has a responsibility to protect populations from genocide, crimes against humanity, war crimes, ethnic cleansing and their incitement. States have a primary duty to prevent and stop these crimes and the international community can intervene when states fail to do so. States cannot invoke state sovereignty to prevent foreign interference. The principle of the responsibility to protect is enshrined in article 1 of the UN Convention on the Prevention and Punishment of the Crime of Genocide.²³³ The Convention confirms state parties' commitment to prevent and punish the crime of genocide under international law.

The Rome Statute places the primary responsibility to investigate and prosecute crimes upon the states. Where states are unwilling or unable to meet this obligation, the ICC can intervene either by self-referral, *proprio motu* powers or by referral by the UN Security Council. In referring situations to the ICC, the UN Security Council has relied on the principle of the responsibility to protect. With the ensuing entry into force of the crime of aggression in 2017, hitherto critics of the ICC as being incapable of prosecuting certain crimes aggravated by some states, offers the opportunity to the ICC to exercise its mandate in the maintenance of peace and security in the world.

²³³ <https://treaties.un.org/doc/publication/unts/volume%2078/volume-78-i-1021-english.pdf> accessed 30 August 2016

4.4.2.2 The Permanence of the ICC

Prior to the establishment of the ICC, there had been *ad hoc* tribunals and hybrid courts for different countries such as the ICTY, ICTR and Sierra Leone. The International Criminal Court enjoys the advantage of being the first ever permanent international criminal tribunal. This attribute of the ICC is further embellished by the number of state parties that have signed on to the Rome Statute. With 124²³⁴ member states, the universality of the ICC remains one of its greatest opportunities. Despite the threats, largely from African member states, to withdraw from the ICC, there has not been a real withdrawal from the ICC by any of the members. This demonstrates the necessity placed on the Court and the confidence of the member states in the Court's mandate. The sustenance of a growing membership buttresses the permanence of the Court and the confidence associated with such status.

The universality of the Rome Statute is both an opportunity as well as a challenge. The aspirations of the Rome Statute is to have members of the United Nations ratify the Statute and remain as ardent members. This has however not been the case. There has been criticism with regards to the membership of the ICC, based on the loud absence of some of the major world powers who are permanent members of the UN Security Council. Even with the referral mechanism, the universal applicability of the Rome Statute remains a mirage.

4.4.2.3 Independent and credible judicial organ

The ICC has largely been viewed as being a credible and independent judicial organ with well-grounded systems, rules and procedures as compared to most national jurisdictions. This remains a great opportunity for the ICC. The majority of the member states to the ICC are from

²³⁴ https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx accessed 30 August 2016.

the African continent-34 members. African states were at the forefront of the clamor for the ICC's establishment and Senegal, an African state was the first state to ratify the Rome Statute.

African states referral of cases to the ICC, is a further demonstration of the credence of the Court. Of the eight African countries that are the subject of the ICC investigations, Uganda, CAR, DRC and Mali self-referred the situations to the ICC.²³⁵ Conversely, when Kenya grappled with the establishment of an accountability process, as per the KNDR recommendations, the legislative motions for the establishment of a special tribunal were defeated twice with parliament preferring the situation to be referred to the Hague based Court on account of lack of confidence in domestic judicial processes.²³⁶

The ICC has demonstrated its credibility and independence in the Kenyan situation. Amid massive witness interference, in both the Ruto and the Uhuru cases, the Prosecutor terminated the proceedings on account of lack of sufficient evidence to sustain a trial. Evidently, the admission of the untenable evidentiary threshold, was critical in maintaining the credibility of the ICC as a court of law removed from political pressure.

²³⁵ <https://www.icc-cpi.int/pages/situations.aspx> accessed 30 August 2016

²³⁶ <http://www.standardmedia.co.ke/article/1144019000/mps-don-t-be-vague-it-s-the-hague> accessed 30 August 2016

CHAPTER FIVE

SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

Introduction

This study sought to assess the effect of the International Criminal Court's (ICC) intervention in Africa in promoting international peace and security and to evaluate the extent to which the ICC has influenced the maintenance of international peace and security in the Democratic Republic of Congo (DRC). The study further sought to expound on the debate between peace, justice and reconciliation and to make recommendations on enhancing the role of the ICC in international peace and security. These objectives set out two hypotheses. First, that the ICC has played a significant role in promoting peace and security in the world and secondly that there are impeding factors that promote or impede to the effectiveness of this role.

These presuppositions were examined within the idealism and liberalism theoretical frameworks which sought to explain the role of the ICC in international peace and security through the analysis of the concepts of peace, justice and reconciliation as being complimentary and mutually co-existing. This Chapter brings to an end this study by revisiting the effect of the ICC's role in maintaining international peace and security. It also revisits the factors that promote or inhibit the effectiveness of this role.

On objective one which relates to hypothesis one, the study found that the ICC has had almost the entire of its focus on African countries. The study also found that most of these situations- five- have been referred to the ICC by State Parties to the Rome Statute while two have been referred by the UN Security Council, thus the study demonstrated the significance placed on the ICC in addressing crimes that are of gravest concern to the international community which pose a threat to international peace and security.

On objective two which relates to hypothesis two, the study found that there exist negative and positive factors that have impacted the effectiveness of the ICC's role in the maintenance of international peace and security. The cooperation of states is crucial in the discharge of the ICC's mandate and where this is wanting the ICC's role is limited. Statutory and other limitations, too have seen the ICC incapable of effectively discharging this role. On the other hand, there are other complementary factors that have enhanced this role, where cooperation is enjoyed or where quasi-judicial and domestic judicial processes exist.

5.1 Summary

This study, in each of its chapters, aimed at empirically answering key research questions that would further support or negate the research hypothesis. The first chapter introduced the concepts of peace and security and the role of the ICC in their maintenance. It traced the history of conflict and the frameworks and mechanisms that have preceded the ICC in addressing the atrocities emanating from the conflicts and demonstrated the rationale and necessity of the international community establishing a permanent international criminal court.

While assessing the impact of the ICC's intervention in Africa, chapter two provided research that validated hypothesis one on the ICC's significant role in international peace and security. It concluded that most of the ICC's work has been in African countries. The relationship between the ICC and AU can be described as being troubled and paradoxical at best. African states were at the forefront for the clamor for the establishment of the ICC and were among the first to ratify the Rome Statute. In addition to being the largest bloc of state parties, African states have contributed to the ICC's interventions by self-referring situations to the Court. Nevertheless, the AU and its members continue to contend that the ICC is unfairly hunting down African leaders; this idea is propelled by the nature of the ICC's trials all of which

have been against African leaders. The relationship between AU and the UN is also troubled partly because of the ICC and the overall treatment of Africa within UN affairs. This is however, only subtly advanced.

The end of impunity, through justice and accountability, for atrocious international crimes can invariably contribute to the promotion of international peace and security through the deterrence effect of the courts judgments and sentences. This is the *raison d'être* of the ICC and other international criminal tribunals.²³⁷ As the trials of the ICC are currently play out, those on trial or have indictments characteristically have immense power and control. Of the 29 indictments, 16 of them are against individuals working within the government or military of their respective country.²³⁸ There is subsequently need for the ICC to further develop case law over time to establish what domestic processes are sufficient to bar ICC action.²³⁹ The AU holds that the ICC is hunting down African leaders and as such the relationship between the ICC and the AU is troubled at best. The end of impunity is seen as a goal that will eliminate the most heinous of crimes against humanity, and consequently, promotion of international peace and security through the deterrence effect of the courts judgments and sentences.

Further, it is unclear if referral to the ICC has had any deterrent effect against the commission of further crimes in Darfur or Libya, and referral was no substitute for the Council's use of other measures to restore peace and security. The Council should use referrals to ensure accountability for serious crimes, and to strengthen the general deterrent effect of international criminal law, rather than as a primary tool to address breaches of the peace.

²³⁷ Gray, C., Gaining Compliance: The Theory of Deterrence and its Modern Application, *Comparative Strategy*, 29, 3, 278-283, 278 (2012).

²³⁸ <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/>, accessed on 25 October 2015

²³⁹ Report on Prosecutorial Strategy, 2006, 5_6 www.icc-cpi.int/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy20060914_English.pdf; see also Prosecutorial Strategy 2009_2012, paras. 19_20, www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPPProsecutorialStrategy20092013.pdf accessed on 25 October 2015

The involvement of the ICC in African states has been necessary and the summonses and arrest warrants issued by the Court undeniably constitute a strong message that the Court is determined and competent to pursue the prosecution of those most responsible, including sitting heads of States. It also demonstrates the clear and unified strategy and tactics employed by the Court in carrying out its central purpose of trying high-ranked state officials. In these decisions, the Court has established an important precedent in its determination to end the impunity of individuals involved in the commission of atrocities, regardless of their official status, thereby validating its existence and necessity.

Upon the examination of the role of the ICC in maintaining peace and security in DRC, chapter three concluded that the ICC's operations so far in the DRC provide crucial insights into how the Court perceives its role and establishes precedents for future investigations and prosecutions. The fact that the ICC could not investigate and prosecute certain crimes in DRC where the role of other actors outside of the DRC were involved such as in Uganda and Rwanda points to some limitation in the extent to which the ICC contributes to international peace and security. However, these are coupled by statutory limitations. The ICC cannot exercise jurisdiction over crimes of aggression until 2017.

From the outset, the ICC's intervention in DRC has been complicated and challenging. In the initial stages, the process was smooth and enjoyed cooperation from the DRC authorities who apprehended and surrendered Lubanga, Katanga, and Ngudjolo to the ICC. The ICC's selection of charges, nature, scope of investigations and the prosecution's outcome were disappointing, particularly with regard to the Ngudjolo case. While the charges against Lubanga were serious, there were unrepresentative of the extent for the atrocities occasioned by his troops. Ituri people felt that Lubanga should also have been charged with mass murders and torture. However,

Katanga's and Ngudjolo's charges were more representative of the crimes, suggesting a possible change in the prosecutorial strategy. The OTP has promised to go after more perpetrators, but given the debacle around budgetary constraints and the tense ICC-AU relations, the investigations which have so far been viewed as being slow and one-sided it is unlikely that new investigations will be commenced. In a sense this can be attributed to the enhanced domestic prosecutions as well as the desire to maintain peace and promote reconciliation and not rattle the government.

The ICC has had both a positive and negative effect on the peace and security situation in DRC. The existence of extraneous and other factors in the DRC have immensely contributed to limiting the role of the ICC. For instance, the ongoing conflict makes it difficult for the ICC to carry out investigations in an active conflict set up, where collaboration with and cooperation from the government, as a state party, would be questioned especially given the government's role in the process. DRC remains in conflict which poses challenges in determining how the ICC's intervention has contributed to any decrease in the hostilities and the commission of international crimes. There has been pressure, particularly from human rights organizations to institute more charges and investigations in DRC, especially in light of the ensuing violence against the perpetrators from the Lendu community.

The ICC's limitation in its role of contributing to peace and security is further exacerbated by the absence of the requisite legal framework and mandate that would enable the Court to try aggressors of violence such as the foreign armies of other states or even multinationals engaged in resource exploitation. The coming into force of the crime of aggression in 2017 would offer the necessary legal backing to support this role. The conclusion

of the cases in the DRC situation will offer a better opportunity to assess the full effect and contribution of the ICC's intervention to the realization of peace and security in the region.

The conflict in DRC has over these years involved other actors outside of the DRC, such as Rwandan and Ugandan military forces, and cumulatively nine countries have been involved since. The ongoing DRC turmoil has been attributed to a number of contributory factors and has undoubtedly presented a threat to peace and security, not only in the DRC but, in the eastern and central African region. Although the violence in the DRC has ensued since 1996 and international crimes committed in the process, the International Criminal Court (ICC) was only involved following a referral of the cases in 2004 and only concerned itself with investigating crimes that had been committed after the entry into force of the Rome Statute on 1 July 2002. The DRC was one of the first countries to be investigated, to have a suspect arrested, tried, and convicted, in the case of Thomas Lubanga, whose verdict was issued on 14 March 2012.

Finally, to further justify the hypothesis that there are impeding factors that promote or impede to the effectiveness of the ICC's role in international peace and security, chapter four delved into the peace, justice and reconciliation debate. It concluded that a broad discourse on the relationship between peace and justice has emerged, with a widespread view that the two are not easily compatible, neither are they mutually exclusive. However, as the discourse has moved on, there is a general agreement that societies recovering from oppression or violent conflict need both legal and restorative approaches, addressing different levels and dimensions of truth and justice. There is need for a holistic interpretation based on five key pillars, including accountability, truth recovery, reparations, institutional reform and reconciliation.²⁴⁰ In light of the large-scale human rights violations and given the limited mandate of the ICC, it is impossible

²⁴⁰ Boraine, A. Transitional Justice. A Holistic Interpretation, in: *Journal of International Affairs* (2006)60, 1, 17-27.

for the Court to prosecute everyone, and consequently, reconciliation becomes not just a legal concept, but a practical matter.

Societies that are recovering from violent conflict and repressive regimes need mechanisms that address both the retributive and restorative demands. There is however no clear conclusion on the sequencing of the pursuit for peace and justice, despite the long drawn debate on peace versus justice. However, it has been underscored that lasting peace and reconciliation can be achieved through justice and that peacebuilding and international criminal justice are mutually reinforcing concepts, even though they may not be intricately connected.

Recent debates have demonstrated that the major causes of the tension between justice and peace is usually as a resultant of pursuing criminal responsibility of particular individuals, those with high political clout and wielding power. These arguments are also often punctuated by claims that the judicial processes and organs are not sufficiently independent and on that basis that the actions by the courts hamper efforts to achieve a lasting peace.²⁴¹ Sometimes “a comprehensive approach to justice” by the ICC is required to accompany efforts to achieve the peace.²⁴² A claim has also been made that pursuing justice may straightforwardly threaten the peace and that deals can and should be done with perpetrators of crimes in order to achieve a peaceful solution.²⁴³

The role of the ICC in reconciliation and peace remains debatable, yet demonstrable. Indeed, despite the numerous challenges faced by the ICC, there are opportunities that can be harnessed innovatively to promote the ICC’s role in the maintenance of peace and security.

²⁴¹ Parrott, L. *Supra* note 85

²⁴² Clark, J. N. ‘Peace, Justice and the International Criminal Court: Limitations and Possibilities’ *Journal of International Criminal Justice*, OUP, April, 2011. P13

²⁴³ N. Waddell & P. Clark, *Peace, Justice and the ICC in Africa: Courting Conflict? Justice, Peace and the ICC in Africa*’ Royal African Society, available at: http://www.royalafricansociety.org/index.php?option=com_content&task=view&id=415

Ultimately, it remains evident that the ICC is not exclusive and is complementary to other processes and vice versa in the pursuit of peace, justice and reconciliation. Additionally, the ICC on its own cannot be looked up to as the only institution that would play this role. Other transitional justice mechanisms, such as truth commissions and traditional justice courts, play a notable complementary role in the maintenance of peace and security.

5.2 Conclusions

Peace, security and justice in the context of conflict situations are not mutually exclusive concepts, but co-exist and one has an effect on the others. International organizations, such as the ICC, established on the basis of one or more of these concepts play a significant role. The international community bears the responsibility to protect and will therefore not stand by and watch as atrocities are committed. In this regard, the judicial role that the ICC plays is crucial in promoting and sustaining peace and security globally. Fundamentally, the UN Security Council as the principal organ of the community of nations with the peace and security mandate, recognizes this important role and has referred to the ICC situations that portend a threat to peace and security as in the case of Darfur in Sudan and Libya.

The large number of ratifications of the Rome Statute of the ICC validates the hypothesis in this study that the significant role and necessity of the ICC cannot be ignored. Further, the ICC's intervention in Africa has led to domestication of the Statute and a greater awareness of the criminality of atrocities committed on the Continent that act as threats to security and peace. Arguably, the ICC's existence and intervention has had a deterrent effect on the African continent and globally, despite the numerous challenges it has faced. Although there have been threats of mass pull out from the ICC, mostly by AU members, it is notable that there has been

no actual step taken by any of the members to officially withdraw from the Court in accordance with Article 127 of the Rome Statute.

The ICC's role in the maintenance of international peace and security, is undisputedly limited owing to a number of factors such as statutory and jurisdictional limitations and enforcement mechanisms. With regard to the ICC's contribution to maintenance of peace and security in DRC, it is clear that the ICC's effectiveness has been inhibited by other extraneous factors such as the economic interests related to the mineral resource exploitation as well as the involvement of foreign forces such as those from Rwanda and Uganda that have fueled the conflict, and which the ICC cannot prosecute yet. As such the ICC can only, inevitably, play a contributory role that is complementary to that of other transitional justice processes such as through commissions and domestic prosecutions.

5.3 Recommendations

5.3.1 The Need for Stronger Complementary Public Institutions

Since the concepts of peace, justice and reconciliation mutually co-exist in discussions on societies in transition, there is need to create and sustain stronger institutions that would complement the ICC and each other. Over and above the restoration of peace and security, which more often than not entails disarmament and disbandment of armed groups, there is the need to establish and rebuild institutions that would secure justice, rule of law and democracy. Investigations, prosecutions and reparations may prove to be difficult where there is need for institutions to be reconstructed, due to the magnitude and extent of the crimes and therefore the need to rebuild public trust and confidence in the processes is of paramount importance. There is need to support the restructuring of judicial institutions in order to encourage national judicial processes to prosecute international crimes.

States must be encouraged and be willing to prosecute crimes within their national jurisdictions as they bear the primary responsibility. In this regard, positive complementarity must be encouraged to effectively address the need for accountability as opposed to negative complementarity where states have embarked on complementary judicial processes with the sole purpose of defeating or undermining the ICC. In the same breath, the ICC, should where possible and safe to do so, share information and evidence that would positively assist in domestic investigations and prosecutions. This should of course have to be done with due observance of the do-no harm principle so as not to expose and endanger witnesses.

In addition to this, the domestication of the Rome Statute and adoption of national implementing law, should be encouraged in order to embolden states to prosecute ICC crimes. Coupled with this, is the need for capacity building that would see the ICC and other international actors offer technical support necessary for effective accountability processes such as training investigators, prosecutors and judicial officers as well as supporting the establishment and operation of effective witness protection mechanisms and victims' reparation programmes. For instance, the ICC could enable local prosecutors and investigators access non-confidential information that would not compromise the security and confidentiality of the sources.

5.3.2 The Need for Meaningful Justice

The delivery of justice, particularly international justice by the ICC must be seen to be meaningful particularly to the affected communities. A fundamental approach to justice is the constituency and locality approach where the interests of all the key actors have to be taken into consideration. There is need to balance the interests of the accused with those of the victims and affected communities. In this regard, while the ICC is to be lauded for its incorporation of the role of victims in criminal proceedings, the proceedings must inspire confidence in the

inclusivity of the process and connect international criminal justice with reconciliation processes. This causality, though challenging, needs to be demonstrated in order to enhance the ICC's role in the maintenance of peace and security. As demonstrated in the DRC cases, the choice of suspects and charges and the ultimate outcome of the cases has had an impact on the situation on the ground. The ICC and indeed other domestic prosecutions must demonstrate that the accountability processes are representative of the nature of crimes committed, atrocities suffered and the justice needs of the victims and affected communities.

5.3.3 Limiting Practices that Undermine Reconciliation

As demonstrated in the DRC cases, unsatisfactory judicial outcomes, portend possible challenges to reconciliation, Retributive justice, by its very nature, focuses on punishing the offenders and there are instances that this could undermine the prospects of reconciliation. In the Congolese cases, the charges preferred against Katanga, Ngudjolo and Lubanga as well as the judicial outcome elicited mixed reactions from the communities. In particular, there were sentiments that revealed the dissatisfaction of the communities with the outcome and even threats of retaliation. The divisive nature of acquittals and convictions can therefore not be ignored.

In the selection of the Kenya cases, the Prosecutor tried to balance the charges and suspects across the political divide and charged suspects from both sides. Although on face value this may be seen as having been a good balance, the deep seated issues of the geographical and temporal scope of the charges had the effect of raising tensions on the ground. This was further exhibited after the decision on confirmation of charges and later the withdrawal of charges. In addition to this, the trial process is a necessary truth-seeking process that must be completed, but which is sometimes impeded by flaws in the process such as unfinished or derailed proceedings

as with the Kenyan cases where there were reports of massive witness tampering that led to the collapse of the cases. As such there is the need to secure the sanctity of the judicial process and outcome.

Outside of the ICC, other accountability processes must also ensure that impeding factors to reconciliation are reduced and constructively employ such measures that would foster peace, security, justice and reconciliation, altogether. For instance, the South African Truth and Reconciliation Commission and the Rwandese *Gacaca* courts are illustrative of pragmatic attempts of securing peace and reconciliation while fostering justice.

5.3.4 Implementation of Integrated Approaches

Although justice can be pursued in various frameworks, the fundamental objective is to adopt approaches that would strengthen peace and stability while ending impunity. In this regard, justice in transitional settings has numerous overlapping purposes ranging from truth telling, reparations, institutional reforms, reconciliation and prevention of future crimes. This can be achieved by adopting hybrid institutions that incorporate two or more of these strategies. Such institutions can be tailor made to suit the realities and complexities of the different situations and contexts as opposed to adoption a one-size-fits-all approach that could be potentially detrimental to the peace and security objectives depending on the context.

5.3.5 Enhancing the Universality of International Criminal Justice

The international community would bolster the role of the ICC by encouraging the universal adoption of the Rome Statute, domestication and applicability across the board. More specifically, the international community should strengthen the role of the ICC in the maintenance of international peace and security by ensuring that State Parties respect the objects of the Statute and positively compliment it. Additionally, the ICC would benefit from

unequivocal support of the UN Security Council, more so with regards to follow up and consistent support of the cases referred to the ICC and should avoid engaging in debates that would undermine the ICC's work. Further a universal outlook of the application of the Rome Statute would bolster the legitimacy of the ICC, hence the desirability for the UN Security permanent members such as the US and China accepting the jurisdiction of the Court by ratifying the Rome Statute.

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