

## AFRICA AND THE INTERNATIONAL CRIMINAL COURT

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### ABSTRACT

*Since the establishment and functioning of the ICC in 2002, the work of the ICC has generated a lot of debate, criticisms and controversy. This is largely due to the perception that, as far as the prosecution of cases before the ICC is concerned, the establishment seems to have been functioning most actively against human rights atrocities in African states while the situations in other regions of the world receive much less attention. Despite the ongoing debates around this issue, it is quite important to note that the practice and jurisprudence of the ICC have resulted in a number of significant developments in the field of international law generally and international humanitarian law in particular. This article seeks to highlight some of the major contributions that have been made to the development of the relevant fields of law by the ICC, and gives a general overview of the cases before the ICC which emanated from Africa.*

### I. INTRODUCTION

The International Criminal Court (ICC) came into existence in 2002 when the Rome Statute entered into force on July 1, 2002 and it heralded the promise of universal respect for, and global enforcement of international humanitarian law. African countries were active participants during the drafting process of the Rome Statute. In the ten years of existence of the ICC so far, complaints from over 100 countries have been filed at the ICC, but only seven African countries have cases or situations at the ICC. Central African Republic, the Democratic Republic of Congo, and Uganda referred situations to the ICC. The United Nations Security Council referred the situations in Libya and Sudan to the ICC. The Cote D'Ivoire and Kenya situations were

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initiated by the Prosecutor of the ICC *proprio motu*.<sup>1</sup> As a result of this apparent focus on situations in Africa, there have been arguments to the effect that the ICC seems set up to function for or against Africa:

Indeed, concerns that impunity is not being tackled consistently around the world have a factual basis. Officials from or supported by powerful states have been able to avoid international prosecutions. Victims of the most serious international crimes in Burma, southern Lebanon, Gaza, Chechnya, Iraq and Sri Lanka, for example have lacked access to justice.<sup>2</sup>

However, this article seeks to highlight some significant developments made by the ICC in the realm of international law, particularly as it applies to international humanitarian law. In this introduction, a brief background is given to international law and its distinction from international humanitarian law as well as the challenges facing international humanitarian law in recent times due to the position of the United States of America. Subsequent to this introduction, the article reflects on the contributions of the ICC to international humanitarian law and international law generally. Next, the article presents a general overview of the relationship between Africa and the ICC in terms of the cases before the ICC from the African countries mentioned above, in the ten years of the ICC's existence so far.

A brief historical background of international law and international humanitarian law against the backdrop of Africa's colonial past is relevant for understanding Africa's relationship with the ICC. International law has been defined as "a body of rules and principles which are binding upon states in their relations with

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1. Situation in the Republic of Kenya: Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, March 31, 2010, <<http://www.icc-cpi.int/iccdocs/doc/doc854562.pdf>>, (accessed on January 27, 2012); Situation and Cases, <<http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/>>, (accessed on January 27, 2012); HUMAN RIGHTS WATCH, TURNING PEBBLES: EVADING ACCOUNTABILITY FOR POST-ELECTION VIOLENCE IN KENYA 24 (2011), <[http://www.hrw.org/sites/default/files/reports/kenya1211webwcover\\_0.pdf](http://www.hrw.org/sites/default/files/reports/kenya1211webwcover_0.pdf)>, (accessed on January 8, 2012); HUMAN RIGHTS WATCH, THEY KILLED THEM LIKE IT WAS NOTHING: THE NEED FOR JUSTICE FOR CÔTE D'IVOIRE'S POST-ELECTION CRIMES (2011), <<http://www.hrw.org/sites/default/files/reports/cdi1011WebUpload.pdf>>, (accessed on January 8, 2012); and <[http://en.wikipedia.org/wiki/International\\_Criminal\\_Court](http://en.wikipedia.org/wiki/International_Criminal_Court)>, (accessed on October 22, 2011).

2. HUMAN RIGHTS WATCH, UNFINISHED BUSINESS: CLOSING GAPS IN THE SELECTION OF ICC CASES (2011), <<http://www.hrw.org/sites/default/files/reports/icc0911webwcover.pdf>>, (accessed on January 8, 2012).

one another.”<sup>3</sup> International law was originally applied among the great powers of the nineteenth century, and their colonies were not beneficiaries of international law, ditto international humanitarian law during the colonial period.<sup>4</sup> International humanitarian law is that branch of international law which protects civilians, prisoners of war, and the wounded as well as the sick by limiting the use of violence or deadly force in armed conflict to military objects.<sup>5</sup> The dread of the proliferation of certain deadly and extremely powerful weapons has been the major motivating factor in the development of weapons, treaties, and the subsidiary factor of humanitarian considerations came to the fore during the drafting of the 1997 Ottawa Treaty which prohibited anti-personnel

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3. J. DUGARD, *INTERNATIONAL LAW: A SOUTH AFRICAN PERSPECTIVE* (2004).

4. E.A. POSNER, *THE PERILS OF GLOBAL LEGALISM* 96 (2009). In the nineteenth century, international law was thought to apply mainly to the Great Powers—Britain, France, Russia, Prussia (then Germany), the Austro-Hungarian Empire, and (maybe) Italy, Japan and the United States later joined the list. The many other countries of the world, especially those in regions where there were no formal states in the Western sense, were given either second-class status or no status at all. International law regulated the conduct of soldiers in wars between Britain and France, but not in wars between France and the political entities that occupied North Africa. Great Powers that sought to penetrate the markets of weak states thus would send military forces to protect their subjects, violating the sovereignty of the state in question to a degree that would be an act of war between great powers. In the extreme, of course, foreign states would conquer, colonize, or exert territorial control over the weak state. This would all happen even while leaders of the Great Powers insisted that international law was universal.

5. Y. Dinstein, *Human Rights in Armed Conflict: International Humanitarian Law*, in *HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES* (T. Meron ed., 1984), at 345-346. It is common practice to refer to the Geneva Conventions and Protocols as international humanitarian law. This appellation underlines the humanitarian motives that impelled the international community to adopt them. It must be observed, however, that all the laws of war—whether formulated in Geneva, The Hague, or elsewhere—are an outcome of a realistic compromise between humanitarian considerations, on the one hand, and requirements of military necessity, on the other. It is arguable that the Geneva Conventions reflect the tilting of the scales in favor of humanitarian considerations, whereas in other instances (principally, The Hague Conventions) there is a more balanced equilibrium between such considerations and the demands of military necessity. But, historically, many of the provisions of the Geneva Conventions are derived from the Hague Conventions. This is particularly true of the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea of 12 August 1949...It replaces the Tenth Hague Convention of 1907, which for its part was an adaptation to maritime warfare of the principles of the Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armies in the Field of 6 July 1906. The latter is the precursor of the Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field of 12 August 1949. Needless to say, the mere transposition of stipulations from one instrument drafted at The Hague to another formulated in Geneva does not by itself modify their nature. Legal norms do not acquire a humanitarian nature simply because they are incorporated in one series of conventions rather than another. Their character must be determined by substance and not by purely technical criteria. *See also*, <[http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/humanitarian-law-factsheet/\\$File/What\\_is\\_IHL.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/humanitarian-law-factsheet/$File/What_is_IHL.pdf)>, (accessed on 20 August 2008).

land mines.<sup>6</sup>

It is pertinent to remember the distinction in international law between the right to go to war termed *jus ad bellum*<sup>7</sup> and the actual regulation of war itself termed *jus in bello*.<sup>8</sup> This article deals majorly with the concept of *jus in bello*, and tangentially with the concept of *jus ad bellum*,<sup>9</sup> which has become confined to the Chapter VII mandate of the United Nations Security Council.<sup>10</sup> A state may however utilize armed force in self-defense.<sup>11</sup>

The International Court of Justice (ICJ) has through various decisions like the 2007 Bosnian case,<sup>12</sup> the 1986 Nicaraguan case against the United States of America,<sup>13</sup> the 1949 Corfu Channel case,<sup>14</sup> and the two Congo cases<sup>15</sup> against Rwanda<sup>16</sup> as well the case on the legality of usage of nuclear weapons<sup>17</sup> asserted the importance of

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6. T. Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. (2000).

7. R. WALLACE, INTERNATIONAL LAW 248 (1997).

8. *Id.*, at 272.

9. R.D. Sloane, *The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 YALE INT'L L. J. (2009), at 47 and 49.

10. Articles 39- 51, but especially 41 and 42 of the 1945 United Nations Charter; see full text at <<http://www.un.org/en/documents/charter/chapter7.shtml>>, (accessed on October 7, 2009).

11. *Id.*, Art. 51.

12. *See*, Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment delivered on 26 February 2007, Rosalyn Higgins presiding, <<http://www.icj-cij.org/docket/files/91/13685.pdf>>, (accessed on 20 August 2008).

13. *See*, Case Concerning Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. United States of America*), Judgment delivered 27 June 1986.

14. The Corfu Channel Case (Assessment of the Amount of Compensation Due from the People's Republic of Albania to the United Kingdom of Great Britain and Northern Island), Judgment delivered on 15 December 1949, <<http://www.icj-cij.org/docket/files/1/1663.pdf>>, (accessed on August 22 2008).

15. The first case was: Armed Activities on the Territory of the Congo (*Democratic Republic of the Congo v. Rwanda*), Judgment delivered on 30 January 2001, <<http://www.icj-cij.org/docket/addHit.php?summaryID=644&case=117&lang=en>>, (accessed on 22 August 2008).

16. The second case was: Armed Activities on the Territory of the Congo (New Application: 2002) (*Democratic Republic of the Congo v. Rwanda*), Judgment delivered on 3 February 2006, <<http://www.icj-cij.org/docket/files/126/10435.pdf>>, (accessed on 24 August 2008).

17. Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Report 1996, at 66, opinion delivered on 8 July 1996, based on a letter dated 27 August 1993 from the Director-General of the World Health Organization filed at the Registry on 3 September 1996, communicating the decision of the World Health Assembly to submit a question to the court for its advisory opinion on whether health and environmental effects of the use of a nuclear weapon by a State in armed conflict would be a amount to breach of its obligations under international law, <<http://www.icj-cij.org/docket/files/93/7407.pdf>>, (accessed on 24 August 2008).

international humanitarian law in global security, peace and justice.<sup>18</sup> The International Criminal Tribunal for Former Yugoslavia (ICTY)<sup>19</sup> and the International Criminal Tribunal for Rwanda (ICTR)<sup>20</sup> have both through their judgments, elucidated on the principles of international humanitarian law and strived to bring those with the greatest responsibility for violations of international humanitarian law to book. The International Committee of the Red Cross (ICRC) has also been very influential in norm creating processes of international humanitarian law under international law.<sup>21</sup>

Present day international humanitarian law has been dominated by its neutralization through the pick and choose philosophy of relevant treaties practiced by the sole super power, the United States of America via the 2001 to 2008 controversial war on terror of Bush's regime.<sup>22</sup> His successor, President Barack Obama, in his Nobel Prize acceptance speech on December 10, 2010 declared that "when there is genocide in Darfur, systemic rape in Congo, repression in Burma-there must be consequences."<sup>23</sup> But he made no mention of America's unwillingness to subject itself to the jurisdiction of the ICC. A notorious example is Article 98 agreement clause of the International Criminal Court which the American government has signed with weak and dependent states to prevent the prosecution of American soldiers for war crimes, except on American soil.<sup>24</sup>

## II. THE INTERNATIONAL CRIMINAL COURT AND GENOCIDE

The end of the Cold War rivalry between the Eastern bloc led by the Soviet Union, and the Western Bloc led by the United States of America was expected to herald global

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18. R. Higgins, *Human Rights in the International Court of Justice*, 20 LEIDEN J. INT'L L. (2007), at 745-751; F.O. Raimondo, *The International Court of Justice as a Guardian of the Unity of International Humanitarian Law*, 20 LEIDEN J. INT'L L. (2007), at 593-611.

19. See, <<http://www.icty.org/action/cases/4>>, (accessed on 20 September 2008).

20. <<http://www.unicttr.org/>>, (accessed on 20 September 2008).

21. P. STOEVA, *NEW NORMS AND KNOWLEDGE IN WORLD POLITICS: PROTECTING PEOPLE, INTELLECTUAL PROPERTY AND THE ENVIRONMENT* 57 (2010). On the other hand, the ICRC has the trust of and some influence over national governments due to its high professionalism and continued political neutrality. The ICRC has played an important role in constructing the principles of the Geneva Conventions and consequently in successfully lobbying states to accept them, making it an organization with ample experience of norm creation and persuasion.

22. See, P. Fitzpatrick, "Gods Would Be Needed ...": *American Empire and the Rule of (International) Law*, LEIDEN J. INT'L L. 16 (2003); and POSNER, *supra* note 4.

23. See, <<http://www.whitehouse.gov/the-press-office/remarks-president-acceptance-nobel-peace-prize>>, (accessed on 28 October, 2011).

24. A.T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* 147 (2009).

peace and security but rather ethnic tensions flared up in the Balkans in Europe and in Rwanda leading to genocide. Ironically genocide became more frequent after the Cold War and the perceived post-Cold War peace became an illusion.<sup>25</sup> The Rome Statute of the International Criminal Court under Article 6 incorporated the elements of crimes under the Convention on the Prevention and Punishment of Genocide and it states that:

For the purpose of this Statute, ‘genocide’ means any of the following acts committed with intent to destroy, in whole or in part, a national ethnical, racial or religious group as such:

- Killing members of the group;
- Causing serious bodily or mental harm to members of the group;
- Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- Imposing measures to prevent birth within the group; and
- Forcibly transferring children of the group to another.

In respect of individual criminal responsibility, the ICC under Article 25 states that:

(3) In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide.

This appears to be more restrictive than the ICTR provisions, which apart from the general section on criminal responsibility goes beyond direct and public incitement as in the ICC Statute by also listing, “conspiracy to commit genocide,” “attempt to commit genocide” and “complicity in genocide.”<sup>26</sup> The job of the prosecutor may become more difficult to establish genocide under the Rome Statute of the ICC unlike the situation which obtains at the ICTR. In passing, it is also important to note that the ICC can only exercise genocide jurisdiction over natural persons and not over legal

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25. S.P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* (2002), at 31-32.

26. T.E. Davies, *How the Rome Statute Weakens the International Prohibition on Incitement to Genocide*, 22 HARV. HUM. RTS L. J. (2009).

persons like corporations.<sup>27</sup> However directors of companies can be prosecuted for genocide under the doctrines of joint criminal enterprise and command responsibility.<sup>28</sup>

The prohibition of genocide is now universally accepted as *jus cogens*<sup>29</sup> under international law from which no derogation is permissible.<sup>30</sup> This has been exemplified by the recent developments in international humanitarian law, particularly when one takes a look at the Statutes and decisions of the ad hoc international criminal tribunals of the former Yugoslavia and Rwanda<sup>31</sup> as well as the genocide indictments issued by the ICC. On 12 July 2010, an arrest warrant was issued by the ICC against President Omar Hassan Ahmad Al Bashir of Sudan for acts of genocide in the Darfur region of Southern Sudan.<sup>32</sup> Blurred are the previous distinctions between non-international and international armed conflicts,<sup>33</sup> with the coming into being of the following instruments: the Rome statute of the International Criminal Court,<sup>34</sup> the Statute of the International Criminal Tribunal for Rwanda,<sup>35</sup> the Statute of the International Criminal Tribunal for the Former Yugoslavia<sup>36</sup> as well as statutes of the Special Court for Sierra Leone,<sup>37</sup> and the

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27. Article 25(1). The original draft text submitted by the French delegate to the 1998 Rome Conference had presented a draft that read: "The Court shall have jurisdiction over legal persons, with the exception of States, when the crimes committed were committed on behalf of such legal persons or by their agencies or representatives. The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes." *Reproduced in* A. MCBETH, *INTERNATIONAL ECONOMIC ACTORS AND HUMAN RIGHTS* 306 (2010).

28. *Id.*, at 308 (giving the example of 12 out of 23 officials of the Farben German company convicted in 1948 by the United States Military Tribunal at Nuremberg).

29. *See*, A. ORAKHELASHVILI, *PEREMPTORY NORMS IN INTERNATIONAL LAW* 47 (2006). The International Law Commission, "while drafting what became Article 53 of the Vienna Convention, determined that it is the subject-matter importance of a rule which makes it peremptory and proposed only substantive norms as examples of *jus cogens*, such prohibitions of aggression, genocide, slavery, as well as basic human rights and self-determination."

30. R.M.M. WALLACE, *INTERNATIONAL LAW* 114 (2002)

31. M.N. SHAW, *INTERNATIONAL LAW* 431 (2008)

32. *Situation in Darfur, Sudan in the Case of the Prosecutor v. Omar Hassan Ahmad Al Bashir ("Omar Al Bashir")*, 12 July 2010, <<http://www.icc-cpi.int/iccdocs/doc/doc907140.pdf>>, (accessed on 31 July 2010).

33. J. DUGARD, *INTERNATIONAL LAW* (2000), at 437

34. *See*, <<http://untreaty.un.org/cod/icc/statute/rome-fra.htm>>, (accessed November 1, 2008).

35. *See*, <<http://69.94.11.53/ENGLISH/basicdocs/statute/2007.pdf>>, (accessed on November 1, 2008).

36. *See*, <<http://www.un.org/icty/legaldoc-e/basic/statut/statute-feb08-e.pdf>>, (accessed on November 1, 2008).

37. *See*, <<http://www.sc-sl.org/Documents/scsl-statute.html>>, (accessed 1 November, 2008).

Special Court for Cambodia.<sup>38</sup>

The Rome Statute has contributed greatly in fusing the gap between international<sup>39</sup> and non-international armed conflicts,<sup>40</sup> in the area of war crimes usually identified with the former, by using the same terminology in drafting elements of war crimes in both types of conflicts.<sup>41</sup> As Lindsey has noted, “the jurisprudence of these *ad hoc* tribunals and the adoption of the Rome Statute developed considerably the notion of war crimes, including serious violations in [the] case of non-international armed conflict.”<sup>42</sup> The terminology of the Rome Statute also reflects an improvement upon the Statutes of the ICTR and the ICTY, for example Articles 25 and 26 respectively which both employ the term “new facts” as opposed to “new evidence” employed by Article 84 of the ICC Statute regulating review of judgments.<sup>43</sup>

### III. THE ORIGINS OF CRIMES AGAINST HUMANITY PROVISIONS OF THE ROME STATUTE

Crimes against humanity were provided for by Article 6(c) of the Nuremberg Charter.<sup>44</sup> In the major case at Nuremberg<sup>45</sup> against twenty four defendants which was later reduced to twenty two,<sup>46</sup> the opening statement of the Chief Prosecutor laid out crimes against humanity which the top echelon of Nazi Germany had engaged in; as battle

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38. <[http://www.eccc.gov.kh/english/cabinet/law/5/Kram\\_and\\_KR\\_Law\\_amendments\\_27\\_Oct\\_2004\\_Eng.pdf](http://www.eccc.gov.kh/english/cabinet/law/5/Kram_and_KR_Law_amendments_27_Oct_2004_Eng.pdf)>, (accessed 1 November 2008); <[http://www.eccc.gov.kh/english/cabinet/law/4/KR\\_Law\\_as\\_amended\\_27\\_Oct\\_2004\\_Eng.pdf](http://www.eccc.gov.kh/english/cabinet/law/4/KR_Law_as_amended_27_Oct_2004_Eng.pdf)>, (accessed on November 1, 2008).

39. Art. 8 (2) (a) (b).

40. Art. 8 (2) (c).

41. K. DORMANN, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE 3 (2003). It was the view of the PrepCom that there was no difference between ‘inhuman treatment’ (Art. 8(2) (a) (ii)-2) and ‘cruel treatment.’ The specific elements of the war crime under Art. 8(2) (c) (1)-3 are therefore drafted in the same way as for the corresponding crime in an international armed conflict.

42. C. LINDSEY, WOMEN FACING WAR 19 (2001).

43. J. Galbraith, *New Facts’ in ICTY and ICTR Review Proceedings*, 21 LEIDEN J. INT’L L. (2008), at 131, 149.

44. SHAW, *supra* note 31, at 437.

45. At Tokyo there was another war crimes tribunal which sentenced the Japanese Premier and six generals to death and they were hanged on 23 December 1948. On a comprehensive account of the tribunal, see A.C. BRACKMAN, THE OTHER NUREMBERG: THE UNTOLD STORY OF THE TOKYO WAR CRIMES TRIALS (1987).

46. R.H. Jackson, The Case against the Nazi War Criminals (Opening Statement for the United States of America and Other Documents, 1946), at 1-2.



against the working class,<sup>47</sup> battle against the churches,<sup>48</sup> and crimes against the Jews<sup>49</sup> (now known as genocide).

The genesis of crimes against humanity can be traced to the 1935 Nuremberg Laws of Nazi Germany which legalized German majority discrimination practices against minority Jews and entailed enforced emigration resulting in the Holocaust when other European countries could not accommodate the Jews.<sup>50</sup> A resolution of the United Nations General Assembly on 10 December 1946 affirmed the seven principles of the Charter of Nuremberg<sup>51</sup> and its judgment.<sup>52</sup> Nuremberg has influenced the mechanisms of the ad hoc international war crimes tribunals in the former Yugoslavia, Rwanda and the International Criminal Court in the adoption of individual criminal accountability<sup>53</sup> as opposed to State accountability under the Nuremberg crime of aggression.<sup>54</sup>

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47. *Id.*, at 26-29.

48. *Id.*, at 29-33.

49. *Id.*, at 33-47.

50. H. ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* (1963), at 247-248. Legalized discrimination had been practiced by all Balkan countries, and expulsion on a mass scale had occurred after many revolutions. It was when the Nazi regime declared that the German people were not only unwilling to have any Jews in Germany but wished to make the entire Jewish people disappear from the face of the earth that the new crime, the crime against humanity-in the sense of a crime "against the human status," or against the very nature of mankind-appeared.

51. W. BOSCH, *JUDGMENT ON NUREMBERG: AMERICAN ATTITUDES TOWARDS THE MAJOR GERMAN WAR-CRIME TRIALS* 231 (1970).

52. United Nations General Assembly Resolution 95(1) of 11 December 1946., full text available at: <<http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/033/46/IMG/NR003346.pdf?OpenElement>>, (accessed on 27 August 2009). The full text of the principles is available at: <<http://www.icrc.org/ihl.nsf/full/390>>, (accessed on 27 August 2009). Principle I : Any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment. Principle II: The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law. Principle III: The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law. Principle IV: The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law provided a moral choice was in fact possible to him.

53. P. Roberts, *Comparative Law for International Criminal Justice*, in *COMPARATIVE LAW: A HANDBOOK* (E. Rücü & D. Nelken eds., 2007).

54. C. Bell, C. Campbell, & Ni F. Aoláin, *The Battle for Transitional Justice: Hegemony, Iraq, and International Law*, in *JUDGES, TRANSITION, AND HUMAN RIGHTS* (A. Gordon, M. John & K. McEvoy, eds., 2007), at 147, 154-155.

#### IV. AFRICA AND THE INTERNATIONAL CRIMINAL COURT

Article 13 of the Rome Statute governs the exercise of jurisdiction of the ICC. The Court can assume jurisdiction when State Parties acting under Article 14 of the Rome Statute refer to the Prosecutor, situations where crimes under the ICC's jurisdiction have occurred. Central African Republic, Democratic Republic of Congo and Uganda referred situations to the ICC. Secondly, the Court can also exercise jurisdiction when the Security Council of the United Nations acting under Chapter VII of the United Nations Charter, refers a situation where crimes under the ICC's jurisdiction have taken place. The United Nations Security Council referred the situations in Libya and Sudan to the ICC. Thirdly, the Court can assume jurisdiction when the Prosecutor initiates an investigation under Article 15 of the Rome Statute.<sup>55</sup> The Cote D'Ivoire and Kenya situations were initiated by the Prosecutor of the ICC *proprio motu*.

##### A. The Situation in Libya

The United Nations Security Council on February 26, 2011 adopted Resolution 1970, and thus referred "the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court."<sup>56</sup> Warrants of arrest for crimes against humanity were issued by the ICC on June 27, 2011, for the then Libyan President, Muammar Gaddafi and his son, Saif Al-Islam Gaddafi as well as the head of military intelligence, Abdullah Al-Senussi.<sup>57</sup> The Peace and Security Council (PSC) of the African Union on March 10, 2011 at the Heads of State and Government level meeting assessed the Libyan crisis and issued a communique strongly against foreign military intervention in Libya and advocated for a peaceful African resolution.<sup>58</sup>

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55. Full text of the Rome Statute available at: <<http://www.icc-cpi.int/iccdocs/PIDS/femalecounsel/RomeStatuteEng.pdf>>, (accessed on January 21, 2012).

56. United Nations Security Council Resolution 1970 (2011), para. 4, full text available at: <<http://www.icc-cpi.int/NR/rdonlyres/081A9013-B03D-4859-9D61-5D0B0F2F5EFA/0/1970Eng.pdf>>, (accessed on October 20, 2011).

57. <<http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/icc0111/related%20cases/icc01110111/>>, (accessed on January 27, 2012).

58. Communique of the 265th Meeting of the Peace and Security Council, full text available at <[http://au.int/en/dp/ps/sites/default/files/COMMUNIQUE\\_EN\\_10\\_MARCH\\_2011\\_PSD\\_THE\\_265TH\\_MEETING\\_OF\\_THE\\_PEACE\\_AND\\_SECURITY\\_COUNCIL\\_ADOPTED\\_FOLLOWING\\_DECISION\\_SITUATION\\_LIBYA.pdf](http://au.int/en/dp/ps/sites/default/files/COMMUNIQUE_EN_10_MARCH_2011_PSD_THE_265TH_MEETING_OF_THE_PEACE_AND_SECURITY_COUNCIL_ADOPTED_FOLLOWING_DECISION_SITUATION_LIBYA.pdf)>

*B. The Situation in Sudan*

The United Nations Security Council, on March 3, 2005, acted under Chapter VII of the Charter of the United Nations and referred “the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court”.<sup>59</sup> Earlier on September 18, 2004, it had determined that the non-international armed conflict in Sudan constituted “a threat to international peace and security and to stability in the region,”<sup>60</sup> and established an International Commission of Inquiry on Darfur. The Commission submitted its findings on January 25, 2005 and concluded that war crimes and crimes against humanity had been committed in the Darfur region of Sudan. It then recommended a referral of its findings to the ICC by the United Nations Security Council.<sup>61</sup>

The national army of Sudan and its allies, the Popular Defence Force, and the Militia/Janjaweed engaged in armed conflict in Darfur, Sudan against rebel groups such as the Sudanese Liberation Movement Army and the Justice and Equality Movement. The Sudanese army and its allies allegedly perpetrated murders of civilians and rape of female civilians, forcible transfers in the towns of Kodoom, Bindisi, Mukjar, Arawala and the environs from 2003 to 2004. Mr. Ahmad Harun who served as Minister of State for the Interior of the Sudanese government from 2003 to 2004 allegedly personally managed the “Darfur Security Desk” which coordinated the suppression of the rebel movements above. He was also allegedly personally involved with the recruitment of, provision of arms and funds for the Militia/Janjaweed in order to commit the above crimes against civilians. Mr. Ali Kushayb, a member of the Popular Defence Forces allegedly around August 2003 to March 2004 commanded a large number of Militia/Janjaweed in Darfur which perpetuated war crimes and crimes against humanity.

On April 27, 2007 the Pre-Trial Chamber I of the ICC issued warrants of arrest for Ahmad Muhammad Harun (Ahmad Harun) and Ali Muhammad Ali Abd-Al-

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59. United Nations Security Council Resolution 1593 (2005), para. 1, <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/292/73/PDF/N0529273.pdf?OpenElement>>, (accessed on October 22, 2011).

60. United Nations Security Council Resolution 1564 (2004), preamble, <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/515/47/PDF/N0451547.pdf?OpenElement>>, (accessed on October 22, 2011).

61. REPORT OF THE INTERNATIONAL COMMISSION OF INQUIRY ON DARFUR TO THE UNITED NATIONS SECRETARY-GENERAL, <[http://www.un.org/news/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/news/dh/sudan/com_inq_darfur.pdf)>, (accessed on October 22, 2011).

Rahman (Ali Kushayb).<sup>62</sup> On March 4, 2009, in connection with the above crimes in Darfur, Sudan, the Pre-Trial Chamber I of the ICC issued a warrant of arrest for the President of Sudan, Omar Hassan Ahmad Al Bashir (Omar Al Bashir) in respect of two counts of war crimes and five counts of crimes against humanity.<sup>63</sup>

### C. *The Situation in the Central African Republic*

The arrest of Jean-Pierre Bemba Gombo, Commander-in-Chief of the Mouvement de Liberation du Congo (MLC) for war crimes by Belgian authorities on May 24, 2008 on the basis of an ICC warrant of arrest was for alleged rape, torture and pillaging of a town within the Central African Republic from 26 October 2002 to 15 March 2003. He was also a former rebel leader and vice- President in the DRC.<sup>64</sup> The MLC had joined forces with the national army of CAR under the command of the then President of the CAR, Mr. Ange-Félix Patassè to fight rebels led by the former head of the CAR armed forces, Mr. François Bozizè. The Rome Statute of the ICC was ratified by the CAR on October 3, 2001 and on December 21, 2004 after Mr. François Bozizè became Head of State, the CAR referred to the ICC crimes which had occurred after July 1, 2002 within its territory.<sup>65</sup>

### D. *The Situation in the Democratic Republic of the Congo (DRC)*

Disputes over land allocation and natural resources in the Ituri province of the DRC occurred in 1999, which resulted in armed conflict between some armed groups in the DRC and some countries in the region between July 2002 and December 2003. On April 11, 2002, the DRC ratified the Rome Statute of the International Criminal Court and on March 3, 2004, the DRC government “referred to the Court the situation (the events falling under the Court’s jurisdiction) on its territory since the entry into force

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62. *Prosecutor v. Ahmad Muhammad Harun (Ahmad Harun) and Ali Muhammad Ali Abd-Al-Rahman (Ali Kushayb)*, Case No. ICC-02/05-01/07, full text available online at <<http://www.icc-cpi.int/iccdocs/PIDS/femalecounsel/HarunAndRahmanCisEng.pdf>>, (accessed on October 20, 2011).

63. *Prosecutor v. Omar Hassan Ahmad Al Bashir (Omar Al Bashir)*, Case No. ICC-02/05-01/09, full text of case available at <<http://www.icc-cpi.int/iccdocs/PIDS/femalecounsel/AlBashirCisEng.pdf>>, (accessed on October 20, 2011).

64. *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-CPI-20090305-PR395, <<http://www.icc-cpi.int/NR/exeres/82ED5CD9-1BFC-4B43-9AAB-84E11936014C.htm>>, (accessed on April 14, 2009).

65. *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, <<http://www.icc-cpi.int/iccdocs/PIDS/femalecounsel/BembaCisEng.pdf>>, (accessed on October 20, 2011).

of the Rome Statute on 1 July, 2002.”<sup>66</sup>

The trial at the ICC of Thomas Lubanga Dyilo, former Commander-in-Chief of the Forces patriotiques pour la liberation du Congo (FPLC), for the use of child soldiers below fifteen years in the Congo conflict from September 2002 to June 2003 started on January 26, 2009.<sup>67</sup> The ICC fixed November 24, 2009 for the commencement of the trial of Germain Katanga, commander of the Force de resistance patriotiques en Ituri (FRPI), and Mathieu Chui, former leader of the Front des nationaliste est integrationnistes (FNI) for sexual slavery, rape, use of child soldiers, murder and pillaging in the Congo conflict.<sup>68</sup>

#### *E. The Situation in Uganda*

President Yoweri Museveni of Uganda in December 2003 referred the situation relating to the Lord’s Resistance Army (LRA) to the ICC.<sup>69</sup> The Pre-Trial Chamber II on July 8, 2005 issued warrants of arrest under seal against the LRA leader, Joseph Kony, his second in command, Vincent Otti, a deputy commander, Okot Odhiambo, brigade commander, Dominic Ongwen, and a deputy commander, Raska Lukwiya for war crimes and crimes against humanity. The warrants of arrest were unsealed on October 13, 2005 and on July 11, 2007 proceedings against Raska Lukwiya were terminated as a result of his death on August 12, 2006.<sup>70</sup>

#### *F. The Situation in Cote d’Ivoire*

Cote d’Ivoire, a non-state party to the Rome Statute, on April 18, 2003 made a declaration under Article 12 (3) of the Rome Statute to become subject to the

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66. *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, <<http://www.icc-cpi.int/iccdocs/PIDS/femalecounsel/LubangaCisEng.pdf>>, (accessed on October 20, 2011); *The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, <<http://www.icc-cpi.int/iccdocs/PIDS/femalecounsel/KatangaAndChuiCisEng.pdf>>, (accessed on October 20, 2012).

67. *Prosecutor v. Thomas Lubanga Dyilo*, *supra* note 66.

68. *See*, <<http://www.iccpi.int/menus/icc/press%20chui>>, (accessed on September 29, 2009). The trial was originally scheduled to commence on September 24, 2009. *See*, *Germain Katanga & Mathieu Ngudjolo case*, *supra* note 66. *See also*, W.W. Burke-White, *Complementarity in Practice: The International Criminal Court as Part of a System of Multi-level Global Governance in the Democratic Republic of Congo*, 18 LEIDEN J. INT’L L. (2005).

69. *See*, President of Uganda refers situation concerning the Lord’s Resistance Army (LRA) to the ICC, <<http://www.icc-cpi.int/menus/icc/press%20icc?lan=en-GB>>, (accessed on January 27, 2012).

70. Situation in Uganda, <<http://www.icc-cpi.int/menus/icc/situations%20index?lan=en-GB>>, (accessed on January 27, 2012).

jurisdiction of the ICC.<sup>71</sup> On December 14, 2010 Cote d'Ivoire confirmed the declaration to be subject to the jurisdiction of the ICC via a letter written by the then newly elected President Alassane Ouattara.<sup>72</sup> On October 3, 2011 the Pre-Trial Chamber III of the ICC, authorized the Prosecutor pursuant to Article 15 of the Rome Statute to investigate allegations of crimes against humanity and war crimes in post presidential election violence after November 28, 2010 in Cote d'Ivoire.<sup>73</sup> "It is submitted that the main objective of the proposed investigation is to identify those individuals who bear the greatest responsibility for ordering or facilitating these crimes."<sup>74</sup>

On November 23, 2011 Pre-Trial Chamber III of the ICC issued a sealed warrant of arrest against Laurent Gbagbo, Ouattara's predecessor, for four counts of crimes against humanity allegedly committed between December 16, 2010 and April 12, 2011. The warrant was unsealed on November 30, 2011 and Laurent Gbagbo was transferred on the same day to the detention facilities of the ICC at The Hague. He made an initial appearance at the ICC on December 5, 2011.<sup>75</sup>

### G. The Situation in Kenya

The Kenyan situation at the ICC was initiated by the Prosecutor, after Kenya failed to set up a domestic judicial process to prosecute those alleged to have borne the greatest responsibility for crimes against humanity which occurred after the violence ridden Kenyan 2007 presidential election. The Prosecutor on March 31, 2010 was authorized to commence an investigation into allegations of crimes against humanity allegedly committed after the 2007 Kenyan presidential election.<sup>76</sup> Kenya ratified the Rome

71. Declaration de reconnaissance de la Compétence de la Cour Pénale Internationale, 18 AVR, 2003, <<http://www.icc-cpi.int/NR/rdonlyres/CBE1F16B-5712-4452-87E7-4FDDE5DD70D9/279779/ICDE.pdf>>, (accessed on January 27, 2012).

72. Confirmation de la Déclaration de reconnaissance, Abidjan, le 14 décembre 2010, <<http://www.icc-cpi.int/NR/rdonlyres/498E8FEB-7A72-4005-A209-C14BA374804F/0/ReconCPI.pdf>>, (accessed on January 27, 2012).

73. Situation in the Republic Of Côte D'ivoire, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Côte d'Ivoire, <<http://www.icc-cpi.int/iccdocs/doc/doc1240553.pdf>>, (accessed on January 27, 2012).

74. *Id.*, ¶ 3.

75. ICC-02/11-01/11, *Prosecutor v. Laurent Gbagbo*, <<http://www.icc-cpi.int/menus/icc/situations%20cases/icc02110111/>>, (accessed on January 27, 2012).

76. Situation in The Republic of Kenya: Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, March 31, 2010, paragraphs 185-186, <<http://www.icc-cpi.int/iccdocs/doc/doc854562.pdf>>, (accessed on January 27, 2012).

Statute on March 15, 2005 and it took effect on June 1, 2005.<sup>77</sup> From September 1 to 8, 2011 the Pre-Trial Chamber II of the ICC held confirmation of hearing in respect of the case of the *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*. From September 21, to October 5, 2011 the Pre-Trial Chamber II held confirmation of hearing with regard to the case of the *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*. The Chamber on January 23, 2012, confirmed charges against Mr. Ruto (a former minister for education), Mr. Sang (head of operations at Kass FM radio station), Mr. Muthaura (Head of the Civil Service and Secretary to the Kenyan Cabinet), and Mr. Kenyatta (Deputy Prime Minister and Finance Minister), and committed them to trial but refused to confirm charges against Mr. Ali (Chief Executive of the Postal Corporation of Kenya) and Mr. Kogsey (member of parliament and chairman of Orange Democratic Movement).<sup>78</sup>

## V. CONCLUSION

While the ICC has largely been viewed or perceived as an establishment which has so far actively functioned against atrocities in African States, ‘great care must be taken to ensure that [concerns of racial profiling in the selection of cases are] not allowed to trouble the administration of international criminal justice.’<sup>79</sup> The jurisprudence of the ICC which has impacted positively on the development of international law and international humanitarian law in the context of genocide and crimes against humanity, among others, is a laudable achievement. Given these advancements, the ICC in the next decade and beyond must be seen to be focused on its mandate: ‘to pursue substantive justice for victims of the gravest atrocities’<sup>80</sup> all over the world. Indeed, it appears incredible that atrocities in Iraq, Chechnya, Syria, and Guantanamo Bay have

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77. Article 126 (1) of the Rome Statute.

78. Kenya situation: Decisions on the confirmation of charges issued on 23 January, <<http://www.icc-cpi.int/NR/rdonlyres/E2CCDBB2-0B59-42B6-82E6-B5119F96F47B/284209/ED112Eng.pdf>>, (accessed on January 28, 2012); *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, <<http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/icc01090211/icc01090111>>, (accessed on January 28, 2011); *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, <<http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/icc01090111/icc01090111>>.

79. Chile Eboe-Osuji, *Why Nigerians, Africans should Believe in the ICC*, available at <<http://www.thisdaylive.com/articles>>, (accessed on January 30, 2012).

80. *Id.*

not blossomed into cases under the radar of the Prosecutor of the International Criminal Court. Nevertheless, Afghanistan, Colombia, Georgia, Guinea, Honduras, Korea and Nigeria are situations being investigated by the Prosecutor.<sup>81</sup>

Fourteen cases have been initiated at the ICC and they emanated from the seven situations in seven African countries.<sup>82</sup> It is a plus for Africa that the governments of Central African Republic, Democratic Republic of Congo and Uganda referred situations to the ICC. Conflicts where permanent members of the Security Council of the United Nations have been directly or indirectly involved, that resulted in commission of crimes which are under the ICC's jurisdiction have not resulted into a single situation unlike the seven situations in Africa. Africa has always been at the receiving end of international law and until violent conflicts are eliminated in Africa, the ICC will continue to pursue more cases in Africa as they fall within its mandate. African countries must entrench accountable leadership and good governance, through free and fair electoral processes that guarantee peaceful succession of altruistic political leaders.

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81. Situations and cases, <<http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/>>, (accessed on January 27, 2012).

82. *Id.*