

# AN ASSESSMENT OF THE BASIC PROCEDURES FOR INITIATING PROCEEDINGS BEFORE THE INTERNATIONAL CRIMINAL COURT (ICC): ISSUES FOR AFRICA

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## **Abstract:**

*The International Criminal Court (“the ICC”) is a permanent international court established to investigate, prosecute and try the most serious crimes of concern to the international community, a mandate and power it derives through the Rome Statute.*

*<sup>63</sup> It is a court empowered to prosecute heinous crimes committed on State Parties’ territories or on Non-State Parties’ territories who accept the court’s jurisdiction. The process of initiating actions before the court is complex, often requiring state party cooperation and funding. This work appraised the process of referrals from State Parties, the Security Council, and the Chief Prosecutor’s Office. The researchers found that despite the court’s flamboyant mandate and attractive potential for maintaining global peace and security, its massive reliance on state parties in investigating and prosecuting suspects has overbearing negative consequences on its success, especially in Africa. African countries are reluctant to cooperate with the court, and the court appears to focus its prosecution on the continent. There are cases of selective investigations and prosecution, and the court is inundated with the potentials to be used as a political tool, which creates issues for the progress and general wellbeing of Africa. The article recommended, among other things, more cooperation of Africans and the need to provide severe consequences for non-cooperating states. The article also recommended the need for NGOs in Africa to advocate for investigations and prosecution by ICC of persons who commit crimes within the court’s jurisdiction.*

## **Introduction**

The creation of a permanent International Criminal Court (ICC) with a worldwide jurisdiction is one of the most critical developments in international criminal law. The court was established by the Rome Statute in 1998, but began sittings on 1 July 2002, having been ratified by 60 countries. The court was created to try heinous crimes against humanity. Its global jurisdiction explains the danger of such crimes and the need to curb them. Generally, international criminal justice seeks to address international crimes, which pose an

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<sup>63</sup> The Rome Statute of the International Criminal Court, Article 1. Also see International Criminal Court, ‘Understanding the International Criminal Court.’ ICC Publication. <<https://www.icc-cpi.int/iccdocs/pids/publications/uicceng.pdf>> accessed on 22 January 2021.

enormous danger to humans and their wellbeing. The acts of the perpetrators engender massive potential for disorganising the economic and domestic life of many countries.

Apart from the pains and suffering these crimes cause, they negatively impact international legal order and the relationship between sovereign States. This situation makes it compelling for global discussions for solutions to these cataclysmic challenges and how to curb it. This is because the desperate methods adopted and used by generations seem greatly influenced by the very nature of the events themselves and those who suffer from them.

In the later part of the 20<sup>th</sup> Century, acts of terrorism, drug trafficking, and other atrocities of humanitarian law concerns in countries like the former Yugoslavia, Rwanda, Sierra Leone, and other parts of the world necessitated the creation of the ICC<sup>64</sup>. Therefore, creating a permanent international criminal court with worldwide jurisdiction is one of the law's fundamental developments.<sup>65</sup>

As a solution to crimes against humanity, the ICC has three steps or means of instituting an action before it.<sup>66</sup> These are the State Parties' referral, referral by the Security Council acting under Chapter vii of the United Nations Charter, and investigations by the Office of the Chief Prosecutor on its own volition. The legal basis for the court's procedures and proceedings are its foundational Treaty - the Rome Statute<sup>67</sup> and the Rules of Procedures and Evidence (RPE).<sup>68</sup> However, before we discuss these steps, it is necessary to give an overview of the crimes within the court's jurisdiction.

### **Crimes Within The Jurisdiction Of The ICC**

Under Article 5 (1) of the Rome Statute, the ICC has jurisdiction over four heinous crimes of international concerns - genocide, crimes against humanity, war crimes, and the crime of aggression.

#### ***Genocide***

Genocide is characterised by the specific intent to wholly or partly destroy a national, ethnic, racial, or religious group through the killing of its members or by other means. This means, may include causing serious bodily or mental harm, deliberately inflicting life conditions calculated to bring about its physical destruction, imposing measures intended to prevent births, or forcibly transferring children of a group to another group.<sup>69</sup> Resolution 96 (1) of the General Assembly, declares it as a denied right of existence of an entire human group, and homicide which is denying a human beings' right to life.<sup>70</sup> It is a crime simultaneously directed against individual victims, the group to which they belong, and human diversity.<sup>71</sup>

<sup>64</sup> Prosecutor v. Norman (2004) SCSL 4 (Paras.30-35).

<sup>65</sup> The Rome Statute, Preamble.

<sup>66</sup> K. Phillipe and R. Darry, 'Referrals by State Parties in Cassese' (Leading Independent Publisher, 2002) 619.

<sup>67</sup> Rome Statute, Article 21.

<sup>68</sup> The Rules of Procedures and Evidence.

<sup>69</sup> The International Criminal Court, '*How the Court Works*' The International Criminal Court official website <<https://www.icc-cpi.int/about/how-the-court-works>> accessed 14 October 2020.

<sup>70</sup> L. Sadat, 'The International Criminal Court and the Transformation of International Law' (Buckingham Penguin Books Publisher, 2002) 12.

<sup>71</sup> S. Ratner and J. Abrans, 'Accountability for Human Rights Atrocities in International Law' (3<sup>rd</sup> end. Oxford University Press, 2009) 12-14.

The obligation to prevent these crimes vests in individual States on who the duty of identifying the indicative factors that they may occur rests and to take steps to prevent it since they develop over time. However, there exist cases where individual States vested with such obligations, did nothing despite early signs. For instance, Kate O' Neil<sup>72</sup> stated that there were actors who should have responded to the early warnings of the 1994 genocide in Rwanda and who could have acted when presented with clear evidence of atrocities to prevent its occurrence. This situation may exist because most of the political aspirations of the post-world war II era could not mobilise sufficient political and social interest for Africans. There were political and economic imbalances caused by this failure, which among other factors, gave rise to both potential, actual genocides and ethnic cleansing in most African Countries. In Nigeria, the worst hit in recent times by these crimes is the North Central (informally referred to as Middle Belt) and Southern Kaduna of Kaduna State.

The standard definition of genocide as contained in Article 2 of the Genocide Convention,<sup>73</sup> which is adopted in the Statute of the ad hoc tribunals and the Rome Statute, is that it includes acts committed with intent to destroy the whole or part, the national, ethnical, racial or religious groups by:

- a) Killing members of a group;
- b) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or part;
- c) Imposing measures intended to prevent birth within a group;
- d) Forcibly transferring children of the group to another group.

All acts of genocides are punishable. It should also be noted that conspiracy, incitement, attempt, and complicity in genocide are equally punishable.<sup>74</sup>

### ***Crimes against Humanity***

Crimes against humanity are as old as humanity itself. These crimes are serious violations committed as part of a large-scale attack on civilian populations. Article 7 of the Rome Statute listed the 15 forms of crimes against humanity: offences of murder, rape, imprisonment, enforced disappearances, enslavement – particularly of women and children, sexual slavery, torture, apartheid deportation. Like any other international crime, crimes against humanity can be prosecuted via any of the methods of bringing a case before the ICC. One fundamental issue that stands out is the question of the State's readiness to institute such cases before the court and provide necessary supports that will aid justice. State actors often show little interest in global discussions on the subject. An example of such problem is the States' reluctance to provide suggestions for the Rome Statute amendments to include other crimes like Drug Trafficking and Terrorism.

Despite the above reluctance, especially by African countries, the International Law Commission developed several international criminal code drafts. Subsequently, a significant advancement was introduced when the Security Council created two tribunals. The first being the *International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Former*

<sup>72</sup> K. O'Neil, 'The Genocide Convention: An International Law Analysis' (Ashgate Publishing Ltd, 2006) 27-31.

<sup>73</sup> Also see Article 6 of Rome Statute of the International Criminal Court Genocide.

<sup>74</sup> Rome Statute, Article 3; Also see Miles Jackson. 'A Conspiracy to Commit Genocide' *Journal of International Criminal Justice* 13 (2015). <<https://watermark.silverchair.com/mqv060.pdf>> accessed 22 January 2021.

*Yugoslavia since 1991 (ICTY)*; and the *International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the territory of Rwanda and Rwandan Citizens Responsible for Genocide and other such Violations committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 (ICTR)*. These tribunals were created in response to mass killings in the Former Yugoslavia and Rwandan. State cooperation is therefore required for the court to bring the perpetrators of these crimes to justice.

### **War Crimes**

A war crime is a severe violation of the laws and customs applicable in armed conflicts known as international humanitarian law. These laws define situations that determine individual criminal responsibility under international law. Unlike crimes against humanity, war crimes have no requirement of widespread or systematic commission. A single isolated act such as murder, ill-treatment or deportation to slave labour or for any purpose of the civilian population of or in occupied territory, the plunder of public or private property, wanton destruction of cities, towns or villages without military necessity can constitute a war crime.

Specifically, war crimes are grave breaches of the Geneva conventions in the context of armed conflict. These crimes include the use of child soldiers, the killing or torture of civilians or prisoners of war, intentionally directing attacks against hospitals, historical monuments, or buildings dedicated to religion, education, art, science, or charitable purposes.<sup>75</sup>

### **Crime of Aggression**

Before the year 2017, the crime of aggression is widely regarded as being under international customary law. Despite Article 8 bis 1 and 2 of the Rome Statute's provision for the crime of aggression, there was no established international court or tribunal that can try its offenders. The first international trial of the crime of aggression was instituted before the Nuremberg International Military Tribunal following the Second World War and was christened the "crimes against peace."<sup>76</sup> However, in the wake of 15 December 2017, member states to the Rome Statute activated the International Criminal Court's jurisdiction over the crime of aggression as its fourth core crime.<sup>77</sup> By this added jurisdiction, the International Criminal Court is for the first time since the post Second World War trials in Nuremberg and Tokyo, empowered to hold leaders criminally responsible for aggression crimes from 17 July 2018.<sup>78</sup>

The crime of aggression is defined as:

*The planning, preparation, intimidation or execution, by a person in the position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and, scale, constitutes a manifest violation of the Charter of the United Nations.*<sup>79</sup>

<sup>75</sup> The Geneva Convention 1948.

<sup>76</sup> L. Green, 'The Contemporary Law of Armed Conflict (Manchester University Press, 2002) 20.

<sup>77</sup> Coalition for the International Criminal Court, 'Historic Activation of the Crime of Aggression' <<http://www.coalitionfortheicc.org/explore/icc-crimes/crime-aggression>> accessed 4 October 2020.

<sup>78</sup> Coalition for the International Criminal Court (n 15).

<sup>79</sup> The Rome Statute, Article 8(1).

For clarity, Article 8 (2) defines 'acts of aggression' to mean the use of armed forces by a State against the sovereignty, territorial integrity, or political independence of another State or its use in any manner that is inconsistent with the Charter of the United Nations.<sup>80</sup> These acts include invasion, military occupation, bombardment, blockade of ports or coasts, and annexation by using force. The Court can only exercise jurisdiction over the crime of aggression if a decision is taken to that effect by a two-thirds majority of States Parties.<sup>81</sup>

## **The Basic Procedures For Initiating Proceedings Before The International Criminal Court (ICC)**

### ***The State Parties Referrals***

Referral by States Parties is one of the procedures for bringing a matter before the ICC to activate the court's machinery for investigations and prosecution. Only States who are parties to the Statute may make referrals. 'A State Party referral is made when any country that has ratified the Rome Statute refer such case to the ICC or brings to the notice of the ICC Prosecutor, the commission of alleged atrocity crimes.'<sup>82</sup> The referral is made on atrocities committed on the territory of the State Party making it or on the territory of another State Party or 'by a national from the referring State Party or another State Party.'<sup>83</sup>

Most cases of atrocity crimes entertained by the ICC were based on State Party referrals. This is sometimes called a "self-referral." African countries who have made self-referral to the ICC on alleged atrocity crimes committed on their territory include the Democratic Republic of the Congo, Uganda, the Central African Republic (twice self-referred), Mali, and Gabon.<sup>84</sup>

An example of such self-referral on alleged atrocity crimes committed on State Party territory is the Mali referral of 2012. In January 2012, there was a case of rebellion against the Malian government by Al-Qaeda in the Islamic Maghreb (AQIM), the National Movement for the Liberation of Azawad (MNLA), Ansar Dine, and other armed groups. These rebel groups overran northern Mali after a military coup that ousted President Amadou Toumani Toure.<sup>85</sup> They attacked and killed civilians and captured major cities like Timbuktu, Gao, and Kidal. Some of the rebels destroyed historical mausoleums, monuments, and mosques, in Timbuktu. Consequently, in July 2012, as a State Party, Mali made a referral of itself to the ICC on alleged atrocity crimes committed by its nationals upon its territory, following which, the ICC Office of the Prosecutor opened a preliminary examination.

It should be noted that non-States Parties may seek referral by the Security Council if the situation threatens international peace and security. In the alternative, they may pass information to the Chief Prosecutor to initiate an investigation. This procedure applies to individuals, international organisations, amongst others.

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<sup>80</sup> Also see, M. Lippman, 'Crime against Humanity' *Boston College Third World Law Journal*, [1997] (17) 171.

<sup>81</sup> International Criminal Court, 'Understanding the International Criminal Court.' ICC Publication. <<https://www.icc-cpi.int/iccdocs/pids/publications/uicceng.pdf>> accessed on 22 January 2021.

<sup>82</sup> American Bar Association - ICC Project, 'How the ICC Works', <<https://how-the-icc-works.aba-icc.org/>> accessed on 17 October 2020.

<sup>83</sup> Ibid

<sup>84</sup> Ibid

<sup>85</sup> Ibid

### ***Security Council Referrals***

The United Nations' chore mandate is to maintain international peace and security, and to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about peaceful adjustment or settlement of international disputes or situations which might lead to a breach of the peace.<sup>86</sup> This is done through its principal organ, the Security Council. The Council is responsible for the prosecution of the world's worst war criminals and maintaining international peace and security, a function it shares in a complex and delicate relationship with ICC.<sup>87</sup>

The UN Security Council (UNSC) is empowered to refer alleged atrocity crimes committed in any country to the ICC Prosecutor by passing a resolution authorized under the UN Charter. For instance, by Resolution 1593 of 2005 Darfur and Resolution 1970 of 2011 Libya, the Security Council referred the situations in Sudan and Libya to the International Criminal Court, respectively.<sup>88</sup> These two referrals were important milestones for the ICC. Similarly, the UNSC also referred the situation in Darfur to the ICC in March 2005.<sup>89</sup>

### ***Actions by The Chief Prosecutor***

The Rome Statute defined the Chief Prosecutor's roles and functions in Article 42 and provided for the Chief Prosecutor's office as a separate organ of the Court, required to act independently. The ICC Prosecutor may commence a preliminary examination *Proprio motu*<sup>90</sup> into alleged atrocity crimes committed on the territory of any State Party, or by its national, or on the territory of a non-State Party who consented to the jurisdiction of the ICC or by its national. However, the ICC Prosecutor must receive approval from judges to open a formal investigation after completing its preliminary examination.

Apart from initiating an examination on its own volition, the Chief Prosecutor may receive a request to initiate an investigation by individuals, international bodies, and non-state parties provided the crimes are of sufficient gravity, committed on the territory of a State Party or on the territory of a non-State Party that accepts the jurisdiction of the Court.

In Nigeria, for instance, Non-Governmental Organizations have called for an investigation into the civilian killings in North-Eastern Nigeria by Boko Haram. In 2018, the Socio-Economic Rights and Accountability Project (SERAP) wrote to the ICC requesting the Court to investigate the 2010 Jos riots and the incessant killings in the North Central part of Nigeria and Southern part of Kaduna State for potential crimes against humanity.<sup>91</sup> Just recently, in the aftermath of the #EndSARS protest, the SERAP sent a petition to the Prosecutor of the ICC, Mrs Fatou Bensouda urging her to promptly investigate reports that the Nigerian authorities and some politicians engaged the use of thugs, soldiers, and security agents to intimidate, harass,

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<sup>86</sup> United Nations Charter, Article 1.

<sup>87</sup> F. Bensouda, 'An Emergency of the United Nations Addressed to the Secretary General' [2012] <<http://www.un.org/docs/journal/as/asp>> accessed 22 October 2020.

<sup>88</sup> *ibid*

<sup>89</sup> *ibid*

<sup>90</sup> *ibid*

<sup>91</sup> L.M. Ocampo, 'An Emergence Humanitarian Crises' [2009] (20) <<http://historymatters.co.zo./2009/05/20/an-open-letter-unfolding-humanitarian-crises-in-gbaramatu-in-the-Niger-Delta>> accessed 22 October 2020.

attack, and kill some #EndSARS peaceful protesters in several parts of the country, especially in Abuja, Lagos, Edo, Osun, Plateau, and Kano States.<sup>92</sup>

However, before an investigation is opened, each of the referrals or communications must be subject to the following analysis:

1. **Initial Review:** Any time a complaint is received, the Prosecutor must analyse the seriousness of the information received and decide whether there is a reasonable basis to open an investigation.
2. **Basic Reporting:** Once it has been determined that communication is not manifestly outside the court's jurisdiction, it is subjected to 'Basic Reporting.' This involves simple factual and legal analysis, drawing on communications, referrals, and readily available public information.

The situations in the Democratic Republic of Congo, Uganda, the Central African Republic, Darfur, Sudan, Kenya, Libya, Cote d' Ivoire, and several other situations have been a subject of analyses before the office of the Prosecutor.

### **Commencement And Determination Of A Case<sup>93</sup>**

The legal processes through which a case is determined from commencement to enforcement are complex and slow. Upon receipt of a referral, the Office of the Prosecutor will carry out preliminary examinations to determine whether there is sufficient evidence supporting the allegation of crimes of sufficient gravity falling within the ICC's jurisdiction. The preliminary examination also includes a determination as to whether there are genuine national proceedings in the country where the crimes are alleged to have been committed and whether commencing an investigation would serve the interests of justice and the victims' interest. At this stage, the jurisdiction of the Court is critically considered. The Prosecutor must be satisfied that all issues under consideration are resolved in the affirmative before undertaking the next step.

Stage two is the investigations into the allegations. This includes evidence gathering and identification of suspects. Where there is sufficient evidence for prosecution and suspects have been identified, the prosecution will request the ICC judges to issue an arrest warrant. The cooperation of the State Party or a non-State Party that has accepted the court's jurisdiction<sup>93</sup> is required to effect the arrest and transfer suspects to the ICC for prosecution. However, where a warrant of arrest is unnecessary, a summons to appear may be issued where a suspect may appear voluntarily. Upon the service of summons to appear, if the suspects fail to appear, a warrant of arrest may be issued.

Stage three is the pre-trial, where an initial appearance is made to confirm the suspect's identity and ensure the suspect understands the charges. It should be noted that even if the suspect was not arrested or fails to appear voluntarily, legal submissions can still be made, but until the suspect is present, hearings cannot begin. There is also the confirmation of charges hearings where the prosecution, the Defence, and the Legal representative of victims make submissions. After these hearings, usually within 60 days, the judges decide if there is enough evidence for the case to go to trial.

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<sup>92</sup> Nwafor, 'SERAP drags Bahari government, military to ICC over killing of #EndSARS protesters.' *Vanguard* (Nigeria, 22 September 2020) <<https://www.vanguardngr.com/2020/10/serap-drags-buhari-government-military-to-icc-over-killing-of-endsars-protesters/>> accessed 22 October 2020.

<sup>93</sup> The International Criminal Court (n 7)

Stage four is the trial where the prosecution must prove the guilt of a suspect beyond reasonable doubt. Witnesses are called, and evidence is taken before the court issues a verdict. Where the verdict is of guilt, the court issues a sentence. The sentence can be up to 30 years of imprisonment and a life sentence in exceptional circumstances.

The fifth stage is the appeal, which is made to the Appeals Chamber. Both parties have the right to appeal a Trial Chamber's decision on the accused's guilt or innocence and the sentence. Similarly, the victims and the convicted person may appeal an order for reparations where made. An appeal is decided by five judges of the Appeals Chamber, who are not the same judges of the Trial Chamber. An appellate decision is final unless the court orders a re-trial before the Trial Chamber.

The final stage is the enforcement of the sentence, which is usually served in countries that have agreed to enforce ICC sentences.

### **The Workings Of The ICC: Issues For Africa**

The critical issues for Africa can be seen from the requirements for bringing a matter to the notice of the ICC and the procedure for the determination of the matter. These include issues with referrals generally, selective actions, cost of investigation, Security Council support to the ICC, the self-centeredness of State Actors and the delay in investigations and prosecutions.

#### ***State Party Referrals***

Although State Parties chiefly make referrals, they, however, constitute a major problem to ICC's ensuring the prosecution of atrocity crimes in Africa. The ICC relies heavily on State Party cooperation to prosecute individuals who commit crimes within the court's jurisdiction. If the States decide not to cooperate with the ICC when it issues an arrest warrant, the court becomes handicapped. Furthermore, States can decide to shield a suspect from the ICC's prosecution processes if they fear the indicted person could divulge information about their government's crimes. For instance, although the DRC government referred the situation in North-Eastern Congo to the ICC in 2003, Bosco Ntaganda, who was among persons indicted, was seen in Goma with the Congolese Minister of Interior and other senior Congolese military officers sometime in January 2009. The DRC's government's reaction to criticism is that his remaining free will be best for domestic peace.<sup>94</sup>

Some African States seem to renege on their support for the war against impunity and atrocity crimes by aligning with other African leaders. An example is Botswana's Foreign Minister's apology for saying that Kenya's newly elected President would be banned from the Southern African country if he fails to cooperate with the ICC.<sup>95</sup> In Libya, 'the UK encouraged local courts, against the ICC's wishes, to deal with the

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<sup>94</sup> 'Kabila's position on the arrest of Ntaganda "has not changed"', *Congo Planet*, 13 April 2012, at <<http://www.congoplanet.com/news/1965/joseph-kabila-position-on-bosco-ntaganda-arrest-has-not-changed.jsp>> accessed 22 October 2020.

<sup>95</sup> BBC, 'Botswana apologises to Kenya over Kenyatta ICC warning', 14 March 2013. <<http://www.bbc.co.uk/news/world-africa-21784867>> accessed 22 October 2020.



prosecution of Saif Gaddafi.<sup>96</sup> Similarly, 'In August 2009, the African Union made it clear that its member States would not cooperate with the ICC in order to arrest Bashir.'<sup>97</sup>

Again, some States quickly set up some national tribunals or courts to shield some of these indicted persons from ICC's prosecution. The States are neither ready to prosecute them nor are they ready to cooperate with the Court whenever a referral is made. This practice is engendered by Article 17 of the Rome Statute, which renders a case inadmissible before the court if a country is investigating or prosecuting a case unless the prosecution can show that the country is unwilling or unable in reality to carry out the proceedings genuinely.<sup>98</sup> However, such a decision can only be taken if:

- a. The proceedings were or are being undertaken, or the national decision was made to shield the person concerned from criminal responsibility for crimes;
- b. There was an unjustifiable delay in the proceedings;
- c. The proceedings were not or are not being conducted independently or impartially, which is inconsistent with the intent to bring the person concerned to justice.

In some countries, the State Party may take governmental actions that are inconsistent with investigations by the ICC. In Nigeria, for instance, cases pending an inquiry into petitions against the terrorist Boko-Haram group before the court suffered setbacks as amnesties were granted to some of its members. Similarly, the Zamfara State Government promised forgiveness and cows to bandits who surrender their arms.<sup>99</sup> In Kaduna State, the government used taxpayers' monies to pay Fulani herdsmen involved in killings in Southern Kaduna.<sup>100</sup> All of these may appear to have been intended to shield the criminals by integrating them into society(s). In Uganda, before referring the Northern Uganda situation to the ICC in December 2003, the Uganda government enacted the Amnesty Act (2000) to shield several actors like the Lord Resistance Army (LRA) from prosecution by the Court.<sup>101</sup>

Again, the requirement of a crime so committed to be of sufficient gravity is of grave concern. Gravity is an important consideration in determining what cases the Court will investigate and prosecute. The Appeals Chamber examined the meaning of the gravity criterion in the *Prosecutor v Bosco Ntaganda*<sup>102</sup> and held that there are three criteria, which must be met. First, the alleged conduct must be systematic or on a large-scale, and should be such that the community suffers social harm. Second, the suspect should be one of the most senior leaders in the crime under investigation. Third, regard should be had to the role played by him and the State or organisation's role in the overall commission of crimes. This is an issue as there may arise situations

<sup>96</sup> Catherine Gegout, 'The International Criminal Court: limits, potential and conditions for the promotion of justice and peace' *THIRD WORLD QUARTERLY* (2013, VOL. 34, NO. 5, 800-818) <<https://doi.org/10.1080/01436597.2013.800737>> accessed 22 October 2020.

<sup>97</sup> Catherine Gegout (n 34).

<sup>98</sup> M. Bensing, 'The Complementarity Regime of International Criminal Court: International Criminal Justice Between State Sovereignty and the Right Against Impunity (Max Planck United Nations Publisher 2003) 3.

<sup>99</sup> See M. Kujenga-amani, 'Rural Banditry in Zamfara State, Northwest Nigeria (Zamfara State, June 13, 2019), <[https://www.refworld.org.<docid/2019/06/rural> banditry in zamfara](https://www.refworld.org/docid/2019/06/rural%20banditry%20in%20zamfara)> accessed 23 October 2020.

<sup>100</sup> See N. John Owen, 'Kajuru Massacre (Southern Kaduna): Fulani abandoned Kaduna village after killing of 66 persons' (Kaduna State February, 2017) <<https://www.aljazeera.com/2019/02/>> accessed 23 October 2020.

<sup>101</sup> D. Robinson, 'Serving the Interest of Justice: Amnesties, Truth Commission and the International Criminal Court' [2003] (14) *European Journal of International Law*, 481.

<sup>102</sup> (2009) 9 *ICLR* 547.

where atrocity crimes are committed which may not be systematic, or carried on by leaders of the crime, but which none the less causes social harm.

It is important to note that although States can prosecute crimes within the jurisdiction of the Court in their territory, the State's interest should not in any way conflict with that of the ICC, especially in initiating the proceedings<sup>103</sup>. If it does, the ICC would step in and prosecute such individuals, provided the gravity threshold is met.

### *The UN Security Council*

The role of the five permanent members of the UN Security Council (UNSC) is critical where crimes are committed in non-states parties to the ICC. This is because the decision of the UNSC is required to confer jurisdiction on the court. This can occasion enormous delay if the big state powers who are the only nations politically capable of executing an arrest warrant of the ICC are interested in the matter contrary to ICC's desire to prosecute. Furthermore, world powers who are members of the UNSC who are non-states parties such as the USA, China, and Russia can significantly delay ICC investigations to suit them.

The above situation partly necessitated some States Parties calling for the Rome Statute amendments to remove some of the powers vested on the Security Council, considering that some permanent members of the Council are non-states parties. The call is also hinged on the conclusions that there are actual political dimensions at the international level statements made by some powerful countries threatening the court's jurisdiction. For instance, The United States of America emphasised the America Service Members Protection Act 2002, which deepens the country's refusal to cooperate with the ICC and gives authority to the Executive branch to 'use all necessary means' to 'free members of the armed forces of the United States' detained' by the ICC.'

The effect of the powers of the UNSC is that if any of its permanent members' vetoes a resolution to refer a situation to the ICC, the Court cannot gain jurisdiction. The permanent members of the UNSC are China, France, Russia, the United States of America, and the United Kingdom. For instance, in May 2014, Russia and China vetoed the referral of Syria to the ICC.

### *Selective Actions*

The ICC earned enormous criticism concerning its operations and pursuit of international law and order by primarily focusing on Africa's crimes.<sup>104</sup> For instance, while the ICC investigated and issued arrest warrants against indicted individuals in the DRC and Uganda (2004), Sudan (2005), CAR (2007), Kenya (2010), and Libya (2011),<sup>105</sup> it never indicted any person in Iraq, Venezuela and Colombia (2006), Afghanistan (2007), Georgia and Sri Lanka (2008), Honduras and South Korea (2010) after conducting preliminary investigations into allegations in those countries. The reasons given for this are either that the crimes were insufficient in number or that the national justice systems could deal with the issue. In other instances, the ICC explained

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<sup>103</sup> M.M. Deguzman, Gravity and the Legitimacy of the International Criminal Court' [2008] (19) Fordham International Law Journal, 1416.

<sup>104</sup> Centre for International Governance Innovation, 'Ramesh Thakur: ICC's competing ethics of conviction, responsibility', *Daily Yomiuri* (31 July 2008), <<http://www.cigionline.org/articles/2008/07/iccs-competing-ethics-conviction-responsibility>> accessed 23 October 2020.

<sup>105</sup> *ibid*

that investigations are ongoing or simply that the ICC cannot redress crimes committed in a Non-State Party to the ICC.<sup>106</sup> This raises questions on whether the Court is a tool for third world colonization.

The Court has also come under heavy criticisms for using its powers to target selected individuals and blindfolding itself to other individuals notoriously known for their violence and crimes. For instance, in Kenya, the investigation carried on by the ICC is mostly considered unfair by many who see it as targeted only at individuals who could easily be arrested while neglecting notorious atrocity crime suspects who would be difficult to apprehend.<sup>107</sup> Similarly, in the DRC, the ICC indicted and issued arrest warrants against Bosco Ntaganda, but it did not indict Laurent Nkunda, leader of the notorious rebel group called the National Congress for the Defence of the People (CNDP) in Eastern Congo.<sup>108</sup>

Furthermore, the selective actions of the Court are exacerbated when suspects are leaders in power. Catherine Gegout aptly captures this situation thus:

When the ICC launches its own investigations without a UNSC referral, it has in the past avoided investigating people in power and, as a result, it has played a political role as it took sides in a conflict. In the DRC and Uganda, it has only acted against rebels or members of the opposition, whereas a UN Envoy said that government troops in the DRC might have committed rape and murder in North Kivu in summer 2010, and Ugandan human rights activists have asked the ICC to indict both sides of the conflict in Uganda.<sup>109</sup>

However, the ICC cannot be dismissed as a mere Western tool for third world re-colonisation. Indeed, some western countries such as the United Kingdom, Germany, France, and the Netherlands are parties to the Rome Statute. Their membership potentially expands the court's jurisdiction. African countries must always ensure cooperation with the Court to stop or minimize atrocity crimes engendered by impunity and the lack of the rule of law in governance.

### *Cost of Investigation*

The growing workload of the Court without a commensurate budget, increase strain on the ICC's finances, more so that the Security Council Resolutions referring situations to the ICC would usually stipulate that State Parties bear all costs resulting from the respective investigations and to be funded from voluntary contributions.<sup>110</sup>

The cost implication of initiating investigations and trial of suspects will weigh heavily on the morale of individuals, communities, and the not-so financially buoyant NGO's who may file independent petitions to the Prosecutor. What may be apparent is that if the Office of the Prosecutor receives petitions to investigate and try individuals, the cost may be transferred to the State Party where the alleged crimes were committed.

<sup>106</sup> International Criminal Court, 'Report on Preliminary Examination Activities 2012' (November 2012) <<http://www.icc-cpi.int/NR/rdonlyres/C433C462-7C4E-4358-8A72-8D99FD00E8CD/285209/OTP2012ReportonPreliminaryExaminations22Nov2012.pdf>> accessed 23 October 2020

<sup>107</sup> *ibid*

<sup>108</sup> MS Kimenyi, 'The International Criminal Court: a time of reckoning for Kenya and Africa', Brookings Institution, (17 December 2010) <[http://www.brookings.edu/opinions/2010/1217\\_africa\\_crime\\_kimenyi.aspx](http://www.brookings.edu/opinions/2010/1217_africa_crime_kimenyi.aspx)> accessed 23 October 2020.

<sup>109</sup> Catherine Gegout (n 34) citing 'Kony Part II: accountability, not awareness', Al-Jazeera, (7 April 2012) <<https://www.aljazeera.com/opinions/2012/4/7/kony-part-ii-accountability-not-awareness>>

<sup>110</sup> UN Security Council Resolution 1970, Paragraph 8.

However, where the petition concerns persons in power or any other person to whom the government intends to shield from prosecution, the ICC will not receive any cooperation from that country. This could immensely affect the progress of an inquiry.

It should be noted that despite the language used in the referral resolution transferring costs to States Parties, it would be possible for the United Nations to provide funding to the Court. According to Article 17 of the United Nations Charter, the General Assembly is solely responsible for the United Nations' budget and thus not bound by Security Council Resolutions in terms of deciding on funding the Court.

### ***Security Council Support to the ICC***

The challenges confronting the ICC are beyond the arrest warrant question. There is an overall need for coherence in the Security Council policies on international accountability questions and the ICC.<sup>111</sup> Beyond arrest warrants, the Council can use a wide range of diplomatic tools at its disposal to ensure and promote the acceptability of the court and its operations.

For example, the Security Council can also use or threaten the use of sanctions and freezing assets to induce cooperation by States with the Court and increase the pressure on individuals accused of having committed atrocities, including political leaders, as is the case of Former President Al-Bashir of Sudan. Such pressure can increase the compliance of State Parties in supporting the Court's work, isolate corrupt leaders, and increase respect for the Court's decisions.

### ***The self-Centeredness of State Actors***

Because of its global jurisdiction, state actors can use the court to achieve or secure their stay in power. In this regard, political leaders heading the governments of nations may initiate a process for the ICC to act against rebels or other formidable oppositions to reinforce their regime and authority. This situation can portray the ICC as a political instrument used to focus on one side of the conflict and create an unjust international legal system.<sup>112</sup> Examples are the cases of Joseph Kabila in the DRC in 2004, Yoweri Museveni in Uganda in 2004, François Bozizé in the Central African Republic (CAR) in 2005, and with the government in Mali in 2012.<sup>113</sup>

### ***Delay in Investigations and Prosecutions***

The procedure and *modus operandi* of the International Criminal Court is cumbersome and complex. This complexity occasions excessive delay in investigating petitions and trying suspects of crimes within the jurisdiction of the Court.

A classic example of such delays is the Nigerian situation.<sup>114</sup> On 18 November 2010, the office of the ICC Prosecutor announced its preliminary examination of the situation in Nigeria following petitions submitted to it, alleging members of Boko Haram committed crimes against humanity. It took the Court a period of about 3 years to publish its report on 5 August 2013 relating to preliminary findings on whether the Court can assume

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<sup>111</sup> D. Akande, *The Legal Nature of Security Council Referrals to the ICC and its Impact on Al-Bashir's Immunities* [2009] (7) *Journal of International Criminal Law*, 333.

<sup>112</sup> P Clark, 'Law, politics and pragmatism: the ICC and case selection in the Democratic Republic of Congo and Uganda' cited in N Waddell & P Clark (eds), *Courting Conflict: Justice, Peace, and the ICC in Africa*, London: Royal African Society, 2008, pp 37–45.

<sup>113</sup> *ibid*

<sup>114</sup> See ICC-OTP, Report on Preliminary Examination Activities 2019.

jurisdiction over the alleged offences. Upon determination that the ICC has jurisdiction<sup>115</sup>, it took the Office of the Prosecutor about 2 years more to identify eight potential cases involving the commission of crimes against humanity and war crimes – six by members of Boko Haram and two by Nigerian Security Forces (STF). Between these periods and the 2019 report of the ICC, there has been several communications with the Court and several other attacks were carried on by Boko Haram in Nigeria. For Instance, ‘on 16 December 2017, an attack was reportedly carried out by Boko Haram on a UN World Food Programme convoy carrying humanitarian supplies. Four civilians were reportedly killed in the attack and the aid items were destroyed.’<sup>116</sup>

On 11 December 2020, in what appears to be a relief, the Office of the Prosecutor announced ‘that it has concluded a decade-long preliminary investigation into crimes against humanity and war crimes allegedly committed by Boko Haram and Nigerian security forces in Nigeria. This finally paves the way for a full-blown investigation to begin.’<sup>117</sup> While this announcement is good news, it is uncertain what fruits it will yield as it leaves a careful mind with many questions. For instance, will the Court be able to get living witnesses on the case? If it does, will the witnesses be willing to testify? Even if they do testify, to what would the court place the accuracy of their testimonies 10 years after the first petition was served. Moreover, has there not been other separate but distinct petitions from the country to the ICC on allegations of alleged genocide, crimes against humanity and war crimes? Is it going to be a vicious circle? These and many more questions, potentially render the already hopeless situation, futile.

### **Conclusion And Recommendations**

The ICC in its years of existence established itself as a key institution in international affairs. There is a growing consensus that impunity in the face of atrocity is no longer acceptable and that political leaders who are responsible for these crimes should be punished accordingly. Although the ICC seem to gain acceptance as a Court with global jurisdiction over atrocity crimes, its operation has engendered enormous criticisms on several fronts, especially its bias towards Africa. This situation is primarily due to the ICC's reliance on State Parties' cooperation and funding. The State Parties are required to arrest and surrender suspects, fund investigations and collect evidence, extend privileges and immunities to ICC officials, protect witnesses, enforce ICC order for fines and forfeiture and, sometimes prosecute those who have committed offences against the administration of justice. By this requirement, the court is willingly incapacitated to pursue and enforce its potential core mandate of ensuring peace, order and the rule of law, especially in Africa. This situation gave rise to the Court being criticised as being selective in executing its core mandate and is greatly influenced by self-serving leaders and powerful countries of the world. African countries are by this, left to face the full brunt of the consequences of corruption, lack of respect for human rights and the worst of atrocity crimes. It is for this reason that African states must take decisive steps by actively participating in issues concerning the continent. Therefore, the following recommendations are essential:

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<sup>115</sup> Nigeria deposited its instrument of ratification to the Statute on 27 September 2001 by which the court can assume jurisdiction crimes committed on the territory of Nigeria or by its nationals from 1 July 2002 onwards.

<sup>116</sup> ICC-OTP (n 52).

<sup>117</sup> Amnesty International, ‘ICC: Milestone decision paves the way for full investigation into atrocities in Nigeria.’ (Amnesty International online) <<https://www.amnesty.org/en/latest/news/2020/12/icc-milestone-decision-paves-the-way-for-full-investigation-into-atrocities-in-nigeria/>> accessed on 24 January 2021.

- African states will need to cooperate with the ICC towards a deliberate effort to maintain peace, order, and prevent the commission of atrocity crimes in the continent.
- NGO's and the international community can mount pressure on non-cooperating States to arrest suspected criminals, including heads of state, or encourage them to hand themselves over to the ICC for prosecution, such as the cases with Laurent and Simone Gbagbo in Ivory Coast, Saif Gaddafi in Libya, and Bosco Ntaganda in the DRC. If this is done, it can potentially mark the end of violence and help dismantle the groups that supported them.
- There is a need to provide more severe consequences for non-cooperative States. Those States that harbour criminals should either forfeit their membership of the ICC or be subjected to severe sanctions. Similarly, there is a need to develop criteria for the exercise of the ICC Prosecutor's discretion, which has been an issue of concern for many states<sup>118</sup>.
- There is also a need for NGOs in Africa to advocate for the ICC. For example, when the Kenya Section of the International Commission of jurist sued the Kenyan government<sup>119</sup> for its refusal to arrest Former President Al-Bashir, the High Court of Kenya issued an indictment to put local pressure on the Government.
- Again, States need to enhance their criminal justice system since most of the State Parties practice a democratic system of government. There is a clear separation of powers between the executive, the legislature, and the judiciary. The judiciary can apply the rule of law and limit the state's powers by holding the state accountable for its international obligations.
- African States who have ratified the ICC can encourage other states who have not ratified the ICC even if it appears not to be in the state's interest to ratify international treaties.<sup>120</sup> This would expand the jurisdiction of the court in all African states.
- The ICC will need to do more to fast-track its internal processes of investigation and prosecution of crimes within its jurisdiction. This will increase its acceptance and credibility within the African continent.

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<sup>118</sup> P. Webb, 'The ICC Prosecutor's Discretion not to Proceed in the Interest of Justice (Academic Publisher, 2005) 305

<sup>119</sup> International Commission of Jurists v. Attorney General of Kenya (2011) |CAK| Case No.274-2011|28|

<sup>120</sup> C Reus-Smit (ed), *The Politics of International Law*, Cambridge: Cambridge University Press, 2004; and BA Simmons & A Danner, 'Credible commitments and the International Criminal Court', *International Organization*, 64(2), 2010, pp 225–256.