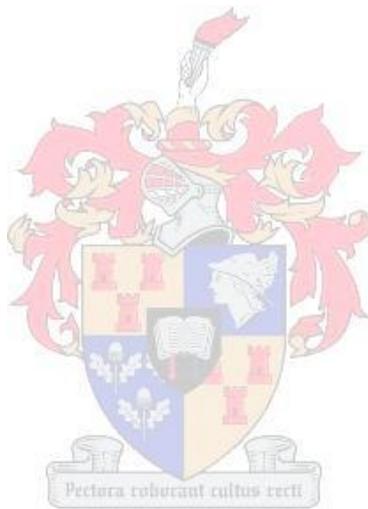


**STATE COOPERATION WITHIN THE CONTEXT
OF THE ROME STATUTE OF THE
INTERNATIONAL CRIMINAL COURT: A
CRITICAL REFLECTION**



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Thesis presented for the degree of Master of Laws at

Stellenbosch University

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March 2013

Declaration

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Abstract

This thesis is a reflection of the provisions of the Rome Statute in relation to the most fundamental condition for the effective functioning of the Court – the cooperation of states. It broadly examines the challenges experienced by the Court with respect to application of Part IX such as whether non-State Parties to the Rome Statute can, notwithstanding their right not to be party, be compelled to cooperate with the Court owing to the customary international law obligation for all States to repress, find and punish persons alleged to have committed the crimes within the jurisdiction of the Court (war crimes, crimes against humanity, and genocide). This is particularly challenging where such persons are nationals of non-States Parties. The various meanings of international cooperation in criminal matters is discussed with reference to and distinguished from the cooperation regime of the International Criminal Tribunals for Rwanda and the former Yugoslavia.

For States Parties to the Rome Statute, the thesis evaluates the measure of their inability or unwillingness to genuinely prosecute persons alleged to have committed crimes within the jurisdiction of the Court within the context of the principle of complementarity. It seeks to address, where such inability or unwillingness has been determined by the Court, how effective the cooperation between the States Parties and the Court could best serve the interests of justice. The thesis answers the question on what extent the principle of complementarity influences the cooperation of States with the Court, whether or not these States are party to the Rome Statute. The concept of positive complementarity that establishes a measure of cooperation between the Court and the national criminal jurisdictions is further explored in the context of the Court's

capacity to strengthen local ownership of the enforcement of international criminal justice.

A nuanced discussion on the practice of the Court with respect to the right of persons before the Court is developed. The rights of an accused in different phases of Court proceedings and the rights of victims and affected communities of crimes within the Court's jurisdiction are considered at length and in the light of recently-established principles regulating the Court's treatment of these individuals. These persons are key interlocutors in the international criminal justice system and have shifted the traditional focus of international law predominantly from states to individuals and bring about a different kind of relationship between States as a collective and their treatment of these individuals arising from obligations to the Rome Statute.

Finally the thesis interrogates the enforcement mechanisms under the Rome Statute. Unlike States, the Court does not have an enforcement entity such as a Police Force that would arrest persons accused of committing crimes within its jurisdiction, conduct searches and seizures or compel witnesses to appear before the Court. Yet, the Court must critically assess its practice of enforcing sentences that it imposes on convicted persons and in its contribution to restorative justice, the enforcement of reparations orders in collaboration with other Rome Statute entities such as the Trust Fund for Victims.

Opsomming

Hierdie tesis is 'n weerspieëling van die bepalings van die Statuut van Rome in verhouding tot die mees fundamentele voorwaarde vir die effektiewe funksionering van die Hof - die samewerking van State. Dit ondersoek breedweg die uitdagings wat deur die Hof ervaar word met betrekking tot die toepassing van Deel IX soos byvoorbeeld of State wat nie partye is tot die Statuut van Rome, nieteenstaande hul reg om nie deel te wees nie, verplig kan word om saam te werk met die Hof weens die internasionale gewoontereg verpligting om alle persone wat na bewering misdade gepleeg het binne die jurisdiksie van die Hof (oorlogsmisdade, misdade teen die mensdom en volksmoord) te verhinder, vind en straf. Dit is veral uitdagend waar sodanige persone burgers is van State wat nie partye is nie. Die verskillende betekenis van die internasionale samewerking in kriminele sake word bespreek met verwysing na, en onderskei van, die samewerkende stelsel van die Internasionale Kriminele Tribunale vir Rwanda en die voormalige Joego-Slawië.

Vir State wat partye is tot die Statuut van Rome, evalueer die tesis - in die konteks van die beginsel van komplementariteit - die mate van hul onvermoë, of ongewilligheid om werklik persone te vervolg wat na bewering misdade gepleeg het binne die jurisdiksie van die Hof. Dit poog om aan te spreek, waar so 'n onvermoë of ongewilligheid bepaal is deur die Hof, hoe effektiewe samewerking tussen State wat partye is en die Hof, die belange van geregtigheid die beste kan dien. Die tesis beantwoord die vraag op watter mate die beginsel van komplementariteit die samewerking van die State met die Hof beïnvloed, ongeag of hierdie State partye is tot die Statuut van Rome. Die konsep van positiewe komplementariteit wat samewerking vestig tussen die Hof en die nasionale jurisdiksies aangaande kriminele

sake word verder ondersoek in die konteks van die Hof se vermoë om plaaslike eienaarskap in die handhawing van die internasionale kriminele regstelsel te versterk.

'n Genuanseerde bespreking op die praktyk van die Hof met betrekking tot die reg van persone voor die Hof word ontwikkel. Die regte van 'n beskuldigde in die verskillende fases van die hof verrigtinge en die regte van slagoffers en geaffekteerde gemeenskappe van misdade binne die hof se jurisdiksie word in diepte bespreek in die lig van die onlangs gevestigde beginsels wat die Hof se behandeling van hierdie individue reguleer. Hierdie persone is sleutel gespreksgenote in die internasionale kriminele regstelsel en het die tradisionele fokus verskuif van die internasionale reg van State na individue, en bring oor 'n ander soort verhouding tussen State as 'n kollektiewe en hulle behandeling van hierdie individue as gevolg van hul verpligtinge aan die Statuut van Rome.

Ten slotte bevraagteken die tesis die handhawings meganismes onder die Statuut van Rome. In teenstelling met State, het die Hof nie 'n handhawing entiteit soos 'n Polisiemag wat persone kon arresteer wat beskuldig word van misdade binne sy jurisdiksie, deursoek en beslagleggings uitvoer of persone dwing om as getuies te verskyn voor die Hof nie. Tog, moet die Hof sy praktyk van uitvoering van vonnisse wat dit oplê op veroordeelde persone en in sy bydrae tot herstellende geregtigheid die handhawing van herstelling in samewerking met ander Statuut van Rome entiteite soos die Trust Fonds vir Slagoffers krities assesser.

Acknowledgements

I would like to first acknowledge and thank God for the gift of education and this far He has brought me. My very existence would be meaningless if it was not for His guidance and constant watching over me.

For my Beloved wife Tleng whose love and support neither fails nor wavers. I am blessed to have such a *'fruitful vine in my house'*. You remain the shining jewel in my crown. For Dad and Mom who have a good understanding of my strengths, pray for and steer me in the right direction to maximise on these strengths, thank you for the greatest inheritance one could receive – a firm foundation in the ways of the Lord.

To my brothers Dennis and Lance, I am grateful for your constant support through this life's journey. Ma and my sisters-in-law your encouragement as I took up my studies at Stellenbosch University gave me the strength to study – thank you.

To my supervisor Prof. Gerhard Kemp, I acknowledge the role you have played in my professional development long before I commenced studies at Stellenbosch University and your continued friendship. Ms. Mary Nel for graciously allowing me to work on my thesis while I served as her Research Assistant in 2010.

I would also like to thank the Department of Public Law, Stellenbosch University and the Institute for Justice and Reconciliation for financial contribution to attend the Review Conference of the ICC Statute in Kampala in June 2010, which provided me with valuable insights on the conduct of States Parties to the Rome Statute and acted as a crucial catalyst in my writing and professional development.

List of Abbreviations

ACCG	<i>Allied Control Council for Germany</i>
ACHPR	<i>African Charter on Human and Peoples' Rights</i>
ACHR	<i>American Convention on Human Rights</i>
ASP	<i>Assembly of States Parties</i>
AU	<i>African Union</i>
Cap	<i>Chapter</i>
CAR	<i>Central African Republic</i>
CICC	<i>Coalition for the International Criminal Court</i>
CIPEV	<i>Commission for the Investigation of Post-Election Violence</i>
DRC	<i>Democratic Republic of Congo</i>
Doc	<i>Document</i>
Ed(s)	<i>Editor(s)</i>
Edn	<i>Edition</i>
ECtHR	<i>Extraordinary Chambers of the Courts of Cambodia</i>
ECHR	<i>European Convention for the Protection of Human Rights and Fundamental Freedoms</i>
ECtHR	<i>European Court of Human Rights</i>
EU	<i>European Union</i>
GCG	<i>Grand Coalition Government</i>
GoK	<i>Government of Kenya</i>
GoS	<i>Government of Sudan</i>
GoSS	<i>Government of South Sudan</i>
GoU	<i>Government of Uganda</i>

IACtHR	<i>Inter-American Court on Human Rights</i>
ICC	<i>International Criminal Court</i>
ICCPR	<i>International Covenant on Civil and Political Rights</i>
ICESCR	<i>International Covenant on Economic, Social and Cultural Rights</i>
ICJ	<i>International Court of Justice</i>
ICTR	<i>International Criminal Tribunal for Rwanda</i>
ICTY	<i>International Criminal Tribunal for the former Yugoslavia</i>
IHL	<i>International Humanitarian Law</i>
IHRL	<i>International Human Rights Law</i>
ILM	<i>International Legal Materials</i>
IMT	<i>International Military Tribunal at Nuremberg</i>
IMTFE	<i>International Military Tribunal for the Far East at Tokyo</i>
KNDR	<i>Kenya National Dialogue and Reconciliation</i>
LRA	<i>Lord's Resistance Army</i>
OAS	<i>Organisation of American States</i>
OAU	<i>Organisation for African Unity</i>
ODM	<i>Orange Democratic Movement</i>
OTP	<i>Office of the Prosecutor</i>
OPCV	<i>Office of the Public Counsel for Victims</i>
Para	<i>Paragraph</i>
PCIJ	<i>Permanent Court of International Justice</i>
PNU	<i>Party of National Unity</i>
PrepCom	<i>Preparatory Committee on the Establishment of an International Criminal Court</i>
PTC	<i>Pre-Trial Chamber of the International Criminal Court</i>

RPE	<i>Rules of Procedure and Evidence</i>
SCAP	<i>Supreme Commander for the Allied Powers</i>
SCSL	<i>Special Court for Sierra Leone</i>
SPLM/A	<i>Sudan Peoples' Liberation Movement/Army</i>
TJRC	<i>Truth, Justice and Reconciliation Commission</i>
UK	<i>United Kingdom</i>
UN	<i>United Nations</i>
UNGA/GA	<i>United Nations General Assembly</i>
UNHRC	<i>United Nations Human Rights Council</i>
UNSC /SC	<i>United Nations Security Council</i>
UNTS	<i>United Nations Treaty Series</i>
UPDF	<i>Uganda Peoples Defence Forces</i>
USA	<i>United States of America</i>
WWII	<i>World War II</i>

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CHAPTER I

International Cooperation with the International Criminal Court

1.1 Introduction

1.2 Legal framework for cooperation among States in criminal matters

1.3 Cooperation of States with the *ad hoc* Tribunals

1.4 Cooperation by States under the Rome Statute

1.5 Cooperation by African States with the Court

1.6 Conclusion

The ICC...is totally dependent on full, effective, timely and predictable cooperation, particularly from States Parties.

- ICC Pre-Trial Chamber Judge Hans Peter-Kaul

1.1 INTRODUCTION

International cooperation and judicial assistance in criminal matters is the subject of Part IX of the Rome Statute establishing the International Criminal Court (“Rome Statute”).¹ This Part IX of the Rome Statute represents a novelty in its provisions concerning international cooperation and judicial assistance in criminal matters with respect to the obligations therein for States Parties. This is in marked *contrast* to the cooperation and judicial assistance in criminal matters before the International Criminal Tribunals for the former Yugoslavia and Rwanda (“*ad hoc* Tribunals”) as well as inter-State cooperation on criminal matters.

¹ Rome Statute of the International Criminal Court UN Doc A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90, available at <http://www.un.org/law/icc/statute/romefra.htm> [accessed 5 February 2010]

The International Criminal Court (“Court”) is not endowed with police or military forces authorised and empowered to apprehend suspects or to gather evidence. For these tasks, the Court depends, as the two *ad hoc* tribunals do, on the cooperation of existing national criminal justice systems.² The regime of cooperation of the *ad hoc* tribunals and the Court bears noteworthy distinctions defined by the manner in which these international institutions were established. This Chapter will reflect on the cooperation regime at the *ad hoc* Tribunals as well as the cooperation regime under the Rome Statute.

The *ad hoc* Tribunals were formed pursuant to Chapter VII actions of the United Nations Security Council.³ Article 25 of the Charter of the United Nations imposes a duty on all Member States ‘to accept and carry out the decisions of the Security Council in accordance with the Charter.’⁴ All States are therefore obligated to

² A. Ciampi, The Obligation to Cooperate, in *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos*, edited by H.A.M. Von Hebel, J.G. Lammers and J. Schukking (1998) (OUP), 1607 -1638, at 1607-8

³ See Statute of the International Tribunal for the former Yugoslavia (1993) Security Council Resolution 827 (1993) on Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian law Committed in the Territory of the Former Yugoslavia, (1993) *ILM* 1192; as amended by Security Council Resolution 1166 of 13 May 1998, available at <http://www.un.org/icty/> [accessed 5 February 2010]. Statute of the International Criminal Tribunal for Rwanda (1994) Security Council Resolution 955 Establishing 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, available at <http://www.un.org/ictcr> [accessed 5 February 2010]

⁴ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, available at: <http://www.unhcr.org/refworld/docid/3ae6b3930.html> [accessed 5 February 2010].

cooperate with the *ad hoc* Tribunals as an obligation *erga omnes*.⁵ In addition to this, Article 103 of the Charter provides that:

‘...in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.’

In essence, nothing under international law of treaties can hinder the cooperation between the *ad hoc* Tribunals and Member States of the United Nations.

The regime of cooperation under the Rome Statute is governed by a different set of rules. The Rome Statute, itself being a creature of treaty by States, is limited to the rules of international law concerning treaties.⁶ With respect to Part IX of the Rome Statute (“Part IX”), obligations to cooperate and assist the Court are limited to States that are party to the Rome Statute.⁷ Only in limited cases where situations are referred to the Court by the Security Council,⁸ and it is arguable whether the drafters of Part IX envisaged this, may non-States Parties be said to have a duty to cooperate with the Court.

⁵ Obligations *erga omnes* are obligations recognized in international law as owed by States towards the community of States as a whole. See *Barcelona Traction case* [Belgium v. Spain] (Second Phase) ICJ Rep 1970 3 par 33 “...an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. [at 34] Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.”

⁶ The Rome Statute as an international treaty only binds States which are parties to it. This is in accordance with a well-established principle of international law. For a restatement of this rule, see Art. 34 of the Vienna Convention on the Law of Treaties: ‘A treaty does not create either obligations or rights for a third State without its consent’

⁷ A. Ciampi, *supra* note 2, at 1608

⁸ Art. 13 (b) Rome Statute, *supra* note 1

Whereas provisions in Part IX were agreed upon by the negotiators of the Rome Statute, the practical aspects of its application present a challenge to practitioners of international criminal law. The novelty of the treaty obligations, in as much as it marks a milestone in the development of international criminal law, presents a significant challenge for its application.

Traditionally, the sources of international law have been listed under Article 38 (1) of the Statute of the International Court of Justice as: i) international conventions, whether general or particular, establishing rules expressly recognised by the contesting States; ii) international custom, as evidence of a general practice accepted as law; iii) the general principles of law recognised by civilized nations; and iv) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Commentators have argued whether the list of sources appears in a hierarchy as to their application. The challenge with respect to application of Part IX is whether non-States Parties to the Rome Statute can, notwithstanding their right not to be party, be compelled to cooperate with the Court owing to the *customary international law* obligation for all States to repress, find and punish persons alleged to have committed the crimes within the jurisdiction of the Court - war crimes, crimes against humanity, and genocide (core crimes). This is particularly challenging where persons suspected of committing these core crimes are nationals of non-States Parties. With respect to States Parties to the Rome Statute, several questions pertaining to cooperation exist, *inter alia*: what is the measure of their inability or unwillingness to genuinely

prosecute persons alleged to have committed crimes within the jurisdiction of the Court? Where such inability or unwillingness has been determined by the Court, how effective will the cooperation between the State Party and the Court be to serve the interests of justice? Chapter II will discuss some of the nuances pertaining to the Court's Pre-Trial and Appeals Chambers views on complementarity.

Part IX provides for the arrest and surrender of persons to the Court. These provisions have been greatly influenced by the experience of the *ad hoc* Tribunals.⁹ With this being key to the functioning of the Court, there is a need to ensure that the process of arrest and surrender conform to the obligations on States to ensure the protection of human rights of the persons being surrendered to the Court. Questions to consider include: what effect does the infringement of his or her human rights during arrest and surrender to the Court have to the trial of the accused person and whether there are circumstances where the violations of the rights of the accused that would be so grave as to lead to an acquittal or mitigated sentence. Trial Chamber I in the *Decision on Sentence Pursuant to Article 76 of the Statute in Prosecutor v. Thomas Lubanga Dyilo* considered the cooperation of the accused with the Court despite onerous circumstances presented by the former Prosecutor Mr. Louis Moreno-Ocampo, including failure to comply with evidence disclosure requirements ordered by the Chamber and infringement of the accused's right to a fair trial.¹⁰ With respect to the above, further questions to address include: what the effect is of amnesties and immunities, if at all; and what effect do they have on the arrest and surrender of an accused and the extent of cooperation between States and the Court. The rich

⁹ Calvo-Guller K. N, *The Trial Proceedings of the International Criminal Court* (2006) (Martinus Nijhoff) at 17.

¹⁰ See "Decision on Sentence Pursuant to Article 76", *The Prosecutor v. Thomas Lubanga Dyilo*, Case No.: ICC-01/04-01/06, Trial Chamber, 10 July 2012, paras. 88-91.

experience and lessons that can be gleaned from the *ad hoc* Tribunals and other special tribunals such as the Special Court for Sierra Leone (“SCSL”) and the Extraordinary Chambers of the Courts of Cambodia (“ECCC”) can (although not conclusively) shed light on both the procedural and substantive questions raised above. Chapter III will reflect on these issues on some detail.

Finally, it is incontrovertible that the Court will and does depend on the cooperation of States¹¹ to be able to arrest persons alleged to have committed crimes within the jurisdiction of the Court as provided by the Rome Statute, transfer these persons to the seat of the Court, perform searches and seizures in the territory of States if individuals refuse to cooperate, or compel reluctant witnesses to appear before the Court.¹² Without a mechanism of enforcement, the Court’s survival and scope of influence is severely challenged despite the elaborate provisions in Part IX. The question remains: what means of enforcement does the Court have for its survival, or is it the proverbial ‘giant without arms and legs’ who ‘needs artificial limbs to walk and work.’¹³ The opportunities and challenges of the Court’s enforcement mechanisms will be discussed in Chapter IV.

1.2 Legal framework for cooperation among States in criminal matters

¹¹ See “Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997”, *The Prosecutor v. Tihomir Blaski*, Case No.: IT-95-14-AR108 bis, Appeals Chamber, 29 October 1997, para. 26.

¹² B Swart, General Problems. In *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos*, edited by H.A.M. Von Hebel, J.G. Lammers and J. Schukking, 1589

¹³ A Cassese, ‘On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law’ 9 EJIL (1998) 1, at 13

Cooperation among States in criminal matters exists in the form of mutual legal assistance between States. This form of collaboration between States is based on the respect of the sovereignty of States. Jurisdiction is an attribute of a State's sovereignty.¹⁴ It is trite law that there are jurisdictional limits for courts concerning criminal matters. Criminal jurisdiction of States is primarily exercised on a territorial basis. This means that jurisdiction is primarily limited to crimes that occur in a State's territory and by its nationals under the active personality principle.¹⁵ The extraterritoriality of criminal jurisdiction exercised by any State depends on the cooperation among States to apprehend individuals who are nationals of a requested State but have committed crimes in the requesting State or who are nationals of the requesting State but resident – in hiding or otherwise – in the requested State. The rationale is that where a crime has been committed, the perpetrator of the crime must not escape trial by virtue of territorial jurisdictional limitation. This form of cooperation by States can be described as *horizontal* in that the requesting and requested States are considered as at par in the fight against impunity for crimes committed regardless of where they were committed.

The framework of inter-State of horizontal cooperation relies to a large extent on the law of extraditions. In addition to there being an explicit and written extradition treaty between States, there are two other requirements with respect to successful extraditions under international law. The first is the *double criminality rule*, which

¹⁴ A State's jurisdiction refers to the competence of the State to govern persons and property by its criminal and civil law.

¹⁵ Active personality jurisdiction exercised by court based on the nationality of the perpetrator of the crime whereas passive personality jurisdiction is exercised by the courts of the nationality of the victim of the crime; See Watson GR "The Passive Personality Principle" 28 *Texas International Law Journal* 1 (1993) and Hathaway OA, "Between Power and Principle: An integrated Theory of International Law" 71 *University of Chicago Law Review* (2005) 1, where the active personality and passive personality principles of jurisdiction are defined and explained.

States that the crime that the accused person is alleged to have committed must be a crime prohibited by law in both the requesting and requested State. The second is that the accused person cannot be transferred from a requested State to the requesting State to stand trial for a crime where the law of the requesting state prescribes the death penalty as the penalty for the crime. The case *Mohamed and Another v. President of the Republic of South Africa and Others* before the Constitutional Court of South Africa highlights these requirements and particularly second condition above mentioned for a lawful extradition of a suspect from one jurisdiction to another.¹⁶ The Constitutional Court ruled that the South African government may not extradite a suspect who may face the death penalty without seeking an assurance from the receiving country – in this case the United States of America - that the suspect will not be sentenced to death.

A challenge with this particular model of cooperation on criminal matters becomes evident where there is a gap in the laws of the requesting or requested State on the specific crimes that the perpetrator is suspected of committing and the prerogative of legislative entities in any given State to determine what kind of punishment is merited for a particular crime. The debate around the abolition of the death penalty rages on with proponents and opponents not running out of arguments in support and defense of their convictions.

1.3 Cooperation of States with the *ad hoc* Tribunals

¹⁶ *Mohamed and Another v. President of the Republic of South Africa and Others* 2001 (3) SA 893 (CC).

As mentioned previously, States have a responsibility for the prosecution of its nationals who are accused of committing war crimes, crimes against humanity and genocide in their territories. In response to the gross violations of human rights and grave breaches of the Geneva Conventions of 1949 and their Additional Protocols during the Balkans conflict in the early 1990s, the United Nations Security Council (“UNSC”) established an international criminal tribunal to deal with war crimes that took place during the conflicts in the Balkans.¹⁷ A similar international tribunal was established by the UNSC regarding the genocide that took place in Rwanda.¹⁸

In *Prosecutor v. Timohir Blaški*, the Appeals Chamber of the ICTY remarked that cooperation in criminal matters between the ICTY and by extension the ICTR and States is ‘vertical’.¹⁹ The Statutes that created the ICTY and ICTR give primacy of jurisdiction for the crimes within the jurisdiction of these tribunals to the tribunals over the jurisdiction of States. The standard at the time for the prosecution of crimes of an international nature was that individual States had an obligation arising from the Geneva Conventions of 1949 – also a customary international law norm to punish individuals who are suspected of committing serious violations of international humanitarian law (that is war crimes).²⁰ The primacy of jurisdiction lying with the

¹⁷ *Supra* note 3; *See also* United Nations Security Council Resolution 808 (1993) of 22 February 1993 established an international tribunal for the prosecution of persons responsible for the serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 with its seat in The Hague available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_808_1993_en.pdf [accessed 3 October 2012].

¹⁸ *Supra* note 3; *See also* United Nations Security Council Resolution 955 (1994) of 8 November 1994 established an international tribunal for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda between 1 January 1994 and 31 December 1994 with its seat in Arusha available at <http://www.unicttr.org/Portals/0/English/Legal/Resolutions/English/955e.pdf> [accessed 3 October 2012].

¹⁹ *Prosecutor v. Timohir Blaški*, Appeals Chamber, 29 October 1997, IT-99-14-AR 108bis, para. 47 and 54.

²⁰ Henckaerts J. and Doswald-Beck L., *Customary International Humanitarian Law, Volume I: Rules*, (2005) (Cambridge University Press), xvi

ICTY and ICTR meant that the States of the former Yugoslavia and Rwanda in particular were to arrest and surrender accused persons within their territories to the ICTY and ICTR for trial.

Many of the persons indicted, particularly by the Prosecutor of the ICTR were resident in other countries outside Rwanda. The obligation to cooperate with the ICTR in those cases arose from specific statutory provisions relating to this. Cooperation by other States for the arrest and surrender of persons indicted by the Prosecutors of the ICTY and the ICTR is an obligation arising from obligations by all Member States of the UN to comply with UNSC Resolutions under article 25 of the UN Charter. There are however limitations in this model of cooperation. During the course of the ICTR's mandate, Rwanda asserted its interest in conducting its own trials for the *genocidaires* and there were numerous diplomatic interventions to resolve the matter. The ICTR remained with primary jurisdiction over any person alleged to have participated in the 1994 genocide. There have been cases which have since been transferred to Rwanda for adjudication as part of the completion strategy of the ICTR. Other challenges that this model of cooperation has experienced include the harbouring of suspects in States that are not willing to acknowledge that the suspects are in their territories. The ICTR indictment for *Felicien Kabuga* who is said to have financed the media house *Radio Television des Milles Collines* and *Kangura* newspaper, which propagated genocide messages in 1994 in Rwanda, remains outstanding. It is widely believed that the wealthy businessman is in hiding in Kenya under the protection of the government or some influential figures in the country.

1.4 Cooperation by States under the Rome Statute

States have an obligation to cooperate with the Court. Article 86 of the Rome Statute provides that:

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

Wallace argues that under international law, a treaty, although it may be identified as comparable in some degree to a Parliamentary Statute within municipal law, differs from the latter in that it only applies to those States which have expressly agreed to its terms.²¹ States which have agreed to the terms of the Rome Statute by ratification are bound by the terms of the treaty provisions.²² The process of ratification is recognized as indication by a State that it is in full agreement with the letter of the law contained in the treaty. Within the spirit of the treaty, a consenting State covenants not to depart from the obligations placed upon it as much as it will seek to enjoy the benefits derived from the treaty’s provisions. In the same vein, States that have not ratified the Rome Statute, but have signed the treaty are bound as a matter of practice to the spirit of the treaty.²³ Article 125 of the Rome Statute on signature, ratification, acceptance, approval or accession stipulates that the ‘...*Statute is subject to ratification, acceptance or approval by signatory States.*’ The process of ratification, acceptance or approval by a State must be preceded by consent through signing of the Rome Statute by the

²¹ See Rebecca M.M. Wallace *International Law* 5th (2009) 20.

²² As at the time of this writing, there are 121 States that have ratified the Rome Statute. The Rome Statute does not have universal application at this time, although there are campaigns by civil society organizations in the world for universalism.

²³ The following countries participated in the negotiations between States prior to the adoption of the Rome Statute, and appended their signatures to the treaty: Egypt, India, Russia and the United States of America – which has since declared that it has withdrawn its signature from the treaty.

legitimate authority in any given State. Consent by signing is consequently indicative to a certain measure of the intention by States to be bound by the spirit of the treaty.²⁴

Requests for cooperation from States Parties are made by the Court.²⁵ It is the primary responsibility of the Court to make these requests for its efficient working. These requests according to the general provisions for cooperation contained in Article 87 of the Rome Statute are to be made through the States Parties designated diplomatic channels and in the language chosen by States at the time of ratification, acceptance, approval or accession. The Court may elect to use international organizations such as the International Criminal Police Organization and regional organizations to effect its request for cooperation from a State Party.²⁶ The relationship between the Court and inter-State entities is also regulated by the Rome Statute. The working relationship between the United Nations (“UN”) and the Court mentioned in Article 2 of the Rome Statute is explicitly substantiated in Part IX of the Rome Statute.²⁷ The UNSC may be called upon to intervene in the case where a State Party and interestingly a State

²⁴ Article 12 of the Vienna Convention on the Law of Treaties provides for the consent to be bound by a treaty expressed by signing. Whereas the provision is clear that this form of consent applies where the treaty specifically addresses the issue of acceptance of the treaty provisions by the signature of state representatives, one can reach a logical conclusion that any state that sends representatives to international conferences where adoption of a treaty happens, such state unless it indicates otherwise during the adoption process, is wholly committed to the terms of the adopted treaty, although the specific obligations contained in the treaty provisions may not apply outside formal exchange of instruments of ratification.

²⁵ Article 87 Rome Statute *supra* note 1.

²⁶ Article 87 (1) (b) Rome Statute *supra* note 1.

²⁷ Article 2 Rome Statute *supra* note 1 reads that:

The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of State Parties to this Statute and thereafter concluded by the President of the Court on its behalf.

This agreement between the two inter-governmental organizations has been concluded.

not party to the Rome Statute fails to cooperate with requests from the Court.²⁸

UNSC Resolution 1593 (2005) with respect to the situation in Darfur, Sudan is an example of action taken by the UNSC in accordance with the Rome Statute.²⁹

In carrying out its responsibility as the primary body mandated to make orders requesting the cooperation of States Parties, the Court:

‘...may take such measures, including measures related to the protection of information, as may be necessary to ensure the safety or physical or psychological well-being of any victims, potential witnesses and their families.’³⁰

These considerations for the well-being of victims, potential witnesses and their families – individuals in a system of law concerning nations – in the process of requesting the cooperation of States Parties with the Court are a strong indication of the centrality of this category of persons during the negotiations in Rome for a permanent international criminal court and the aftermath of its establishment. By fate or chance, the drafters of the Rome Statute left an indelible mark protecting these individuals in the international criminal justice system.

²⁸ Article 87 (5) (b) Rome Statute *supra* note 1. It is interesting to note that although the general rule is that treaties do not create obligations or rights for third parties in accordance with Article 36 of the Vienna Convention on the Law of Treaties, the drafters of the Rome Statute were aware that prior to the universalisation of the Rome Statute, there is a need to have ‘catch all’ provisions in the Rome Statute to ensure that the true spirit of creating a permanent international criminal court to deal with crimes of a serious nature, are not impeded by technicalities in international law. The mechanisms of the United Nations Security Council are employed in this manner.

²⁹ Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's presence in the territory of the Republic of Kenya, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, 27 August 2010.

³⁰ Article 87 (4) Rome Statute *supra* note 1.

Since the Court has the responsibility to make requests for cooperation from States in accordance with Article 87, there is a case to argue for a State that does not cooperate with the Court for lack of a specific request by the Court for this cooperation. It would be very rare for this sort of situation to exist as the Court constantly reiterates the necessity of State cooperation to fulfil its mandate. It is however, also possible to interpret this requirement for cooperation to be limited to the State of nationality of the accused and territory where the crime was committed. It would be unrealistic to impute non-cooperation of States Party outside of the general good faith of being treaty-bound, without the explicit request to that State Party by the Court for cooperation. It is arguable however in the situation in Darfur, The Sudan where there is an outstanding warrant of arrest for the Sudanese President Omar Al Bashir and other high-ranking government officials, that although no specific request had been made by the Court to countries such as Kenya and Chad, their unwillingness or inability to arrest and surrender President Bashir is a reflection of their commitment to cooperating with the Court at the time of Bashir's visits to the respective countries. Both Chad and Kenya are States Parties to the Rome Statute and failed to arrest President Bashir while he was in these countries. When brought to task over her commitment to cooperating with the Court, Kenya has maintained its full commitment to its obligations under the Rome Statute.³¹ Perhaps to prevent future excuses by States Party to the Rome Statute from their obligation to cooperate with the Court, the request for cooperation by the Court to a State Party must be specific even where

³¹ Most recently, news reports that the Attorney General of Kenya received a letter from the Head of Jurisdiction, Complementarity and Cooperation in the ICC Prosecutor's Office complaining of tardy responses from Kenya in the ongoing investigations and soon-to-commence trials of four Kenyans at the ICC. The Attorney General maintained that Kenya is committed to the Rome Statute regime. *See* All Africa article "Kenya: Githu Passes the Buck Over ICC" available at <http://allafrica.com/stories/201210020046.html> [accessed 5 October 2012].

the request is made to the State of nationality of the accused or State where the crimes in question were committed. This can avert situations where the a State is castigated for not cooperating with the Court, especially where the request for cooperation is either in conflict with other obligations of the State or there are multiple and conflicting requests from different organs of the Court. This would be in line with inter-State cooperation in criminal matters, where the request is specific to a particular matter and directed on a case by case basis.

The Court may also make arrangements on an *ad hoc* basis requesting the cooperation of a State not Party to the Rome Statute.³² Prior to Cote d'Ivoire becoming a State Party to the Rome Statute, it entered into an *ad hoc* arrangement with the Court and it is on this basis that Cote d'Ivoire was able to make a referral of the situation concerning the 2009 post-election violence in that country to the Court. This can be a strategy that the Court may wish to employ in negotiations with States that are not willing to fully bind themselves to the provisions of the Rome Statute but are willing to join the fight against impunity for international crimes and may be amenable to agreements with the Court on specific issues.

In order for States to cooperate effectively with the Court, Article 88 of the Rome Statute explicitly provides that there needs to be systems and procedures existing within States to regulate all forms of cooperation specified by the Rome Statute. It is the duty of each State Party to enact enabling laws and regulations to allow it to fulfil its obligation to cooperate with the Court when called upon to do so.

³² Article 87 (5) (a) Rome Statute *supra* note 1.

The domestication of the Rome Statute presented a challenge to a number of States Parties. African States constitute the largest block of States Parties to the Rome Statute.³³ Of the thirty-three States Parties from the continent, only a half have made efforts to domesticate the Rome Statute.³⁴ Some of these States laws only provide for either complementarity or cooperation clauses and are fraught with implementation problems. There is a need to standardize or provide guidance for the process of domestication of the Rome Statute. This will allow for State Parties to make adequate provisions to effectively cooperate with the Court when called upon so to act. There are instances where enacted implementing legislation of the Rome Statute has led to the arrest and surrender of suspects. *Callixte Mbarushimana*, a Rwandan national allegedly linked to one of the rebel groups operating in the Ituri Province, Democratic Republic of Congo (“DRC”), was extradited from France to The Hague in 2010 to face charges of war crimes in the DRC. Although the Court’s Pre-Trial Chamber declined to confirm criminal charges brought against him by the Prosecutor, the precedence set will be useful for future Court requests for cooperation to effect arrest warrants.

Article 89 provides that

‘The Court may transmit a request for the arrest and surrender of a person...to any State on the territory of which that person may be found and

³³ At the time of this writing, 33 African states are party to the Rome Statute.

³⁴ As at the time of this writing the following African countries have implementing legislation at either draft stage or enacted laws (domesticating) with cooperation and complementarity provisions: Benin, Botswana, Burundi, Congo (Republic of), Central African Republic, Democratic Republic of Congo, Gabon, Ghana, Kenya, Lesotho, Mali, Niger, Nigeria, Senegal and South Africa. See “Amnesty International: The ICC Summary of draft and enacted complementing legislation as at April 2006” available at http://www.iccnw.org/documents/AI_Implementation_factsheet06Nov14.pdf [accessed 5 October 2012].

shall request the cooperation of that State in the arrest and surrender of such a person.’

The lexical reading of this provision is that the Court can make requests for arrest and surrender to both States Parties and non-State Parties. This provision purports to empower the Court to take certain actions in respect to States that are not signatories to the Rome Statute. In this case, the Court has the capacity to request a non-State Party to arrest and surrender a person who is suspected of having committed crimes within the jurisdiction of the Court. In keeping with the law of treaties, however the non-States Parties are not obliged to act on the request thereby buttressing the argument that the international legal system is still based on State sovereignty.³⁵ The article proceeds to qualify that ‘*States Parties shall, in accordance with the provisions of this Part and the procedure under national law, comply with the requests for arrest and surrender.*’³⁶ On reading this article, one gets the sense that the negotiators at the Rome conference that adopted the Rome Statute were involved in serious considerations of addressing international crimes of war crimes, crimes against humanity, genocide and aggression. Owing to the heinous nature of these crimes, persons suspected of committing these crimes should not be shielded from arrest and surrender owing to the non-applicability of the Rome Statute to non-States Parties. This idealistic view must however face the *realpolitik* that States are confronted with in their relations with one another.

³⁵ For more arguments on the international legal system entrenched on the principle of state sovereignty, see Gerhard Kemp ‘Foreign relations, international co-operation in criminal matters and the position of the individual’ *South African Journal of Criminal Justice* (3) 2003 368-392, 373 where he argues that ‘despite utopian references to ‘globalisation’, the international legal system is still firmly premised on the existence of sovereign states and all that this entails. Even recent international instruments stress its importance and oblige signatories to respect it...’; See also Max Huber’s comments in the *Island of Palmas* case.

³⁶ Article 89 (1) Rome Statute *supra* note 1.

1.5 Cooperation by African States with the Court

The Court only has jurisdiction over individuals.³⁷ Outside of these individuals voluntarily surrendering themselves to the Court pursuant to a summons to appear or a warrant for arrest, the Court has not been endowed with an apparatus enabling it to implement decisions on the territory of States.³⁸ Swart observes that ‘in these and other respects, the Court depends on the cooperation of States.’³⁹ It is therefore arguable that an ideal situation where the Court would function in a seamless fashion is where the trigger mechanism for its jurisdiction is a referral by a State Party pursuant to Article 14. Four referrals have been made to the Court at the time of this writing. The first concerns Uganda,⁴⁰ the second concerns the DRC,⁴¹ the third is the situation in the Central African Republic⁴² and the final situation is that concerning Côte d’Ivoire.

³⁷ Article 25 (1) of the Rome Statute (supra) provides that “The Court shall have jurisdiction over natural persons pursuant to this Statute.”

³⁸ In terms of Article 58 of the Rome Statute (supra), “...*the Pre-Trial Chamber [of the ICC] shall issue a warrant of arrest for a person.... [after] having examined the application and the evidence or other information submitted by the Prosecutor... [and] it is satisfied that ... [t]here are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court and the arrest of the person appears necessary.*” Alternatively “...*to seeking a warrant of arrest, the Prosecutor may submit an application requesting that the Pre-Trial Chamber issues a summons for the person to appear...*” and the same shall issue if the Pre-Trial Chamber is satisfied in the same manner as for the issuance of a warrant of arrest and “...*that a summons is sufficient to ensure the person’s appearance...*”; See warrants of arrest issued in the situations in Uganda, DRC, CAR, Sudan and Libya; and summonses for the appearance of individuals in the situation in Kenya and Darfur, Sudan.

³⁹ Swart (supra) 1589.

⁴⁰ See ICC Press Release, President of Uganda Refers Situation Concerning the Lord’s Resistance Army (LRA) to the ICC (Jan. 29, 2004); See ICC Press Release, Prosecutor of the International Criminal Court Opens Investigation into Northern Uganda (July 29, 2004).

⁴¹ See ICC Press Release, Prosecutor Receives Referral of the Situation in the Democratic Republic of Congo (Apr. 19, 2004); See ICC Press Release, The Office of the Prosecutor of the International Criminal Court Opens its First Investigation (June 23, 2004).

⁴² See ICC Press Release ICC-OTP-20050107-86, Prosecutor Receives Referral of the Situation in the Central African Republic (July 7, 2005); See ICC Press Release ICC-OTP-20070522-220, the Office of the Prosecutor of the International Criminal Court Opens its Investigation in CAR (May 22, 2007).

These four referrals have however not been devoid of controversy surrounding the cooperation between these African governments and the Court. In the situation concerning the DRC, it is widely perceived that following the issuing of warrants for the arrest of five of its nationals, the DRC has not delivered all five suspects to the Court despite having *de facto* and *de jure* control of the entire DRC.⁴³ In the situation concerning Uganda, the Court has issued five warrants for the arrest of the top commanders of the Lord's Resistance Army ("LRA").⁴⁴

The Uganda Peoples Defence Forces ("UPDF"), which is the armed forces of the Government of Uganda ("GoU") was involved in sustained armed conflict with the LRA in northern Uganda for a period of two decades from 1986. The LRA was driven out of the territory of Uganda by the beginning of 2005 and into South Sudan. By this time, the GoU was rendered incapable of enforcing the warrants of arrest for the five suspects. It was then that the negotiations for peace began in Juba between the GoU and the LRA. Whereas the GoU was in close proximity to some of the LRA commanders, the pre-conditions set for the peace negotiations included the non-enforcement of the warrants of arrest while the commanders attended the talks. It was later in the Juba Peace Talks that the LRA called for the revoking of the warrants of arrest as a condition for the signing of the last document to seal the Juba Peace Agreement. The Court did not revoke the warrants of arrest as demanded by the LRA, forcing the immediate retreat of the LRA to the lawless Garamba National Park in eastern DRC and an end to the Juba Peace Talks. There has also been hue and cry

⁴³ There is an outstanding warrant for the arrest of *Bosco Ntaganda*, leader of a rebel group operating in the east of the DRC. Reports by civil society indicate that the suspect resides in eastern DRC in plain view of the authorities but continues to enjoy free movement.

⁴⁴ The Pre-Trial Chamber of the ICC has issued warrants for the arrest of *Joseph Kony*, *Vincent Otti*, *Okot Odhiambo*, *Dominic Ongwen*, *Raska Lukwiya (deceased)*. The four suspects are at large and suspected to be in hiding in Garamba National Park in eastern DRC, the Central African Republic or in South Sudan.

about the atrocities committed against civilians in Northern Uganda by the UPDF. None of these crimes have been investigated or prosecuted and there has been a fair amount of criticism that the Court has turned a blind eye to these crimes committed by the GoU.

Cooperation with the Court has proved to be very difficult in the two situations – Sudan (Darfur) and Libya - where the Court's jurisdiction has been triggered by a referral by the UNSC in terms of Article 13(b) Rome Statute and acting under Chapter VII of the UN Charter. Both Sudan and Libya are non-States Parties to the Rome Statute. There is little cooperation between these countries and the Court, with Sudan periodically rejected the legitimacy of the Court and Libya claiming its ability to conduct the trials of *Saif Al Islam Gadhafi* and *Mohammed Al Senussi* both of whom have outstanding warrants of arrest from the Court. Since both situations in Libya and Darfur are referrals made by the UNSC acting under Chapter VII of the UN Charter, one would expect that both Sudan and Libya should cooperate with the Court following a Chapter VII decision to which they are bound.⁴⁵ A similar obligation of all Member States of the UN to cooperate with the UN *ad hoc* Tribunals – created by decisions of the UNSC acting under Chapter VII of the UN Charter and in conformity with Article 25 of the UN Charter.⁴⁶

The involvement of the UNSC, a political body in the judicial and legal functions of the Court was a matter that was debated at length by the negotiators of the Rome Statute. Whereas prior to the adoption of the Rome Statute, the negotiators of this

⁴⁵ Article 13 (b) Rome Statute; Chapter VII of the UN Charter deals with the provisions relating to exercise of powers by the UNSC for the maintenance of international peace and security where a threat to the peace has occurred.

⁴⁶ Article 25 UN Charter provides that “*The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.*”

instrument were alive to the tensions between political and legal objectives of the UNSC and the Court respectively, this tension was revived when the UNSC referred the situation in Darfur, Sudan to the Prosecutor of the Court and the issuing of warrants of arrest by the Pre-Trial Chambers of the Court for the Sudanese President Omar Al-Bashir and other high-ranking Sudanese government officials involved in the peace negotiations between the Government of Sudan (“GoS”) and the Sudan Peoples’ Liberation Movement/Army (“SPLM/A”). It was widely believed that genocide, war crimes and crimes against humanity had taken place in the situation in Darfur. At the time, the African Union (“AU”) had given the mandate to a High Level Panel on Darfur, which made recommendations on how peace, justice and reconciliation could be addressed in Darfur. The AU subsequently endorsed these recommendations and extended the mandate of the former South African President Thabo Mbeki to chair the African Union High Level Implementation Panel on Sudan, and negotiate the outstanding post-referendum issues between the National Congress Party and SPLM. These negotiations were poised to usher peace to the troubled situation in Darfur and South Sudan in general. As a result of the warrants of arrest, the GoS pulled out of the peace process thereby negating the gains and efforts made by the AU to restore and build peace in Sudan.

The relationship between the AU and the Court over the past seven years cannot be described in any other terms but as a frosty one. The genesis of the tensions between the two institutions stems from the timings of the arrest warrants in both the situations in Uganda and in Sudan. The AU favoured a sequencing of interventions favouring the peace processes in these two countries that were embroiled in decades of conflict, while the Court remains interested in accountability of individuals who bear the

greatest responsibility for the international crimes that have taken place in those two countries. Consequently, the 13th AU Heads of States Summit held in Sirte, Libya called for all African States Parties to the Rome Statute to desist from cooperating with the Court or arresting the President of Sudan⁴⁷ for the war crimes, crimes against humanity⁴⁸ and genocide⁴⁹ with which he has been charged. The AU has reiterated this decision at its 17th session, once again calling its members not to cooperate with the Court⁵⁰ after the Pre-Trial Chamber of the Court issued warrants for the former President of Libya *Muammar Gadhafi* (now deceased), his son *Saif Al Islam Gadhafi* who served as *de facto* Prime Minister of Libya and *Mohammed Al Senoussi* who served the Gadhafi regime as a high ranking military and security officer.

These AU decisions run contrary to the obligation of States Parties to the Rome Statute to cooperate with the Court. All thirty-three African States Parties to the Rome Statute have an obligation to arrest any person at large where an arrest warrant has been issued by the Court. Some countries have made declarations in support of the AU's decisions⁵¹ while others have called upon the AU Member States to comply

⁴⁷ “Decides that in view of the fact that the request by the African Union has never been acted upon, the AU Member States shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El Bashir of The Sudan.” Para 10, Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), Doc. Assembly/AU/13(XIII)

⁴⁸ Arrest warrant issued in 2009 relating to war crimes and crimes against humanity

⁴⁹ Arrest warrant issued in 2010 relating to genocide

⁵⁰ Decision of the 17th AU Heads of State and Government Summit in Malabo, Equatorial Guinea on 15 July 2011 condemning the issuance of arrest warrants by the ICC for Muammar Mohammed Abu Minyar Gaddafi and two other high-level Libyan officials. Participating states at the summit also criticized the UNSC for not requesting the ICC to defer investigations and prosecutions in the situation in Darfur, Sudan under Article 16 of the Rome Statute. Such a request by the UNSC has the effect of suspending the ICC arrest warrant against Sudanese President Omar Al-Bashir; See CICC Press Release, African Union Maintains Contradictory Stance on Justice, (July 18, 2011)

⁵¹ See *Chad says it will not execute ICC warrant against Libya's Gaddafi*, Sudan Tribune (May 19, 2011) “The Chadian government made it clear that it will not cooperate with the ICC in arresting three Libyan officials named by the tribunal’s chief prosecutor...”

with international law.⁵² Most recently the President of Malawi revoked the government's willingness to host the 2012 AU Summit on the grounds that they would rather forfeit the opportunity to serve as host than to invite President Bashir of Sudan. The Minister for Foreign Affairs of Zambia is also on record in saying that Bashir "will regret the day that he was born" should he set foot in Zambia.⁵³

Whereas the African Union Summit decisions call for non-cooperation with the Court, there is little traction on that debate by individual African States Parties to the Court. Most of these States are committed to fulfilling their obligations to cooperate as provided in the Rome Statute. Tladi posits that the AU decisions on non-cooperation with the Court 'raise questions about the direction of international law and international law making from both a normative and institutional perspective'.⁵⁴ An institutional perspective relates to the relationship between institutions charged with the responsibility to protect on various levels both regionally and internationally. In this case, the AU has a regional mandate given to it by its Member States to protect and promote the human rights in the continent. The Court is a treaty-based body whose objective also includes the protection of the rights of individuals relating to the

⁵² Addressing African heads of State at the 15th AU Summit in Kampala, the Vice President of Botswana said "Botswana cannot associate herself with any decision which calls upon her to disregard her obligations to the International Criminal Court." Available at <http://www.gov.bw/en/News/Botswana-stands-by-the-International-Criminal-Court/> (accessed July 19, 2011); See Statement by the Botswana Ministry of Foreign Affairs and International Cooperation following 17th AU Heads of State Summit in Malabo, Equatorial Guinea calling African States Parties to the Rome Statute not to cooperate with the ICC in effecting Gaddafi's arrest warrant. "The Government of Botswana pledges to continue to uphold basic human and political rights and hereby calls on fellow members of the AU to support the ICC in carrying out its mandate to apprehend the Libyan leader, as a critical step towards alleviating the plights of the Libyan people, and having the way for a new democratic dispensation in that country." Available at <http://www.mofaic.gov.bw/index.php> (accessed July 19, 2011)

⁵³ See "Zambia ready to arrest Al Bashir" which appeared in The Sunday Times of Malawi, available at <http://www.bnltimes.com/index.php/sunday-times/headlines/national/6528-zambia-ready-to-arrest-al-bashir> [Accessed 3/10/2012].

⁵⁴ Tladi D, "The African Union and the International Criminal Court: The battle for the soul of international law" 34 *South African Yearbook of International Law* (2009), 57 -69, 57-58

prosecution of international crimes. The AU views the Court as a neo-imperialist institution despite sharing common objectives.

This ‘collision course’ between the AU and the Court Tladi argues is predicated on the challenge of a new value-based international law in the form of the Court, that is supposedly supported on mostly European values and pushed on non-Western cultures in the name of universality.⁵⁵ This supposition however cannot be true in the sense that fighting a culture of impunity cannot be said to belong solely to European values. The suppression of crimes and the fight against humanity is representative of universal norms to which the AU and indeed Africans subscribes. Tladi suggests that the discontent by the African political body rests squarely on the position that ‘the dignity, sovereignty and integrity of the African continent’⁵⁶ dictates that Africa itself should mete out justice for crimes committed by Africans against Africans.⁵⁷ Evidently few African criminal justice systems are equipped to investigate and prosecute the crimes within the jurisdiction of the Court. The capacity of these African States should be built in order to address the impunity gap created when the Court prosecutes a handful of cases in a given situation where gross violations of human rights have taken place. Chapter II will discuss the concept of positive complementarity as a possible solution to the AU and ICC impasse.

⁵⁵ Tladi (*supra*), 64; See also Koskeniemi ‘International law in Europe: Between tradition and renewal’ (2005) 16 *European journal of International Law* 113

⁵⁶ AU Summit Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court 9ICC), Assembly/AU/Dec 245(XIII), July 2009, para. 12

⁵⁷ Tladi, *supra* note 54, 67

CHAPTER II

The Principle of Complementarity: Kenya's challenge of cooperation with the Court

- 3.3 Introduction
 - 3.4 Background to the Situation in Kenya
 - 3.5 Factual Basis for the Admissibility Challenge
 - 3.6 Theoretical Understanding of Complementarity
 - 2.4.1 Legal basis for complementarity
 - 2.4.2 Exposition of Article 17 and the Court's interpretation of complementarity in the Kenyan situation
 - 2.4.3 Unwillingness or inability
 - 3.7 A place for positive complementarity in Kenya
 - 3.8 Concluding remarks
-

2.1 INTRODUCTION

The preamble of the Rome Statute affirms that '*the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at a national level and by enhancing international cooperation*'.⁵⁸ It further emphasizes that '*the International Criminal Court shall be complementary to national criminal jurisdictions*'.⁵⁹ Article 1 Rome Statute provides that the Court '*...shall be complementary to national criminal jurisdictions*.' This is the basis of the principle of complementarity, which has been

⁵⁸ Para 4 of the preamble of the Rome Statute *supra* note 1.

⁵⁹ Para 10 of the preamble of the Rome Statute *supra* note 1.

coined from an epistemological concept in atomic physics⁶⁰ and upon which the Court is to determine the admissibility of a case.⁶¹

The complementary character of the Court reflects the intentions of the drafters of the Rome Statute that the Court aims at promoting the effectiveness of and not replaces national mechanisms.⁶² States Parties with jurisdiction over international crimes are not automatically precluded from exercising exclusive jurisdiction merely because the Court has been seized of a matter. Both *ad hoc* Tribunals established by the UNSC, conversely have primacy of jurisdiction over national criminal jurisdictions.⁶³ Primacy of jurisdiction means that: (i) the exercise of jurisdiction by the *ad hoc* Tribunals prevents any investigation or prosecution at the national level;⁶⁴ (ii) the *ad hoc* Tribunals may formally ask national jurisdictions to defer cases to them at any time before the issue of a final judgment at national level; and (iii) the *ad hoc* Tribunals may exercise their jurisdiction even after final judgment has been delivered

⁶⁰ The origin of complementarity as an epistemological concept is atomic physics. It denotes that two descriptions, though incompatible because they describe mutually exclusive observations, are both indispensable and together necessary for an exhaustive description because the conditions of observation influence the object under investigation. Such a conceptualisation of complementarity is intrinsically linked to the name Niels Bohr, a Danish physicist, who initially developed the notion in response to the epistemological difficulties in understanding the nature of light. As some experiments showed light to be particles while others showed that it behaved like waves, Bohr asserted that these two descriptions, although incompatible because mutually exclusive, are ‘complementary’ in order to describe the nature of light exhaustively. In his words, the two descriptions ‘represent equally essential knowledge about atomic systems and together exhaust this knowledge’. N. Bohr, *Atomic Physics and Human Knowledge* (New York, Wiley 1958) 74. In Bohr’s view, not only practical considerations lead to such a conclusion, but also the fact that the conditions of observation, such as an experimental device, in atomic physics influence the object under investigation. The significance of Bohr’s assertion was not confined to atomic physics, however, but was subsequently considered by him as a means to clarify epistemological problems in other sciences, including biology, psychology and philosophy and taken up by others in these and other fields. For an overview, see E. Rasmussen, *Complementarity and Political Science* (Odense, University Press of Southern Denmark 1987) 4 – 12.

⁶¹ Admissibility of cases before the Court is governed by Article 17 Rome Statute *supra* note 1.

⁶² Hector Olasolo, *The Triggering Procedure of the International Criminal Court*, (Leiden: Martinus Nijhoff Publishers, 2005), 121.

⁶³ The curtains are closing on the ICTY and ICTR (“ad hoc Tribunals”) as their extended mandates are expiring. The ensuing argument is premised on the nature of the primacy of jurisdiction of the *ad hoc* tribunals over national criminal jurisdictions at the times that the *ad hoc* tribunals were established and operated. At present the *ad hoc* tribunals are considering the transfer of cases to national criminal jurisdictions.

⁶⁴ Seguin, J. “Denouncing the International Criminal Court: An Examination of U.S. Objections to the Rome Statute”, *18 Boston University International Law Journal* (2000), 99-100.

by national courts if the latter have characterized the crimes as ordinary crimes or national proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.⁶⁵

Unlike the *ad hoc* Tribunals, the Court is a permanent institution and its relationship with national criminal jurisdictions does not assert primacy of jurisdiction, but rather on the above mentioned complementarity. The regime established by the Rome Statute is such that a State's competence to try international crimes remains untouched.⁶⁶ According to the complementarity principle, trials concerning crimes within the jurisdiction of the Court remain the primary responsibility of States.

The complementarity approach mentioned in paragraph 10 of the Preamble and in Article 1 is novel in international criminal justice in that states have the primacy of criminal jurisdiction. When understood in this sense, it is easy to see how the Plenipotentiaries at the Rome conference viewed complementarity as a basis of incentive for States to ratify the Rome Statute in that it represents a complete shift from the precedence of the two *ad hoc* Tribunals, which have primacy of jurisdiction over any state. However, the complementary nature of Court and national jurisdictions is hinged on the willingness and ability of a state to exercise jurisdiction over its own nationals for war crimes, crimes against humanity and genocide.

⁶⁵ Article 9 (2) ICTR Statute, *supra* note 3 and Article 10 (2) ICTY Statute, *supra* note 3.

⁶⁶ Aravena, C.C., "The Admissibility Test before the International Criminal Court under Special Consideration of Amnesties and Truth Commissions" in Jann K. Kleffner and Gerben Kor (eds.), *Complementary views on Complementarity: Proceedings of the international roundtable on the complementary nature of the International Criminal Court* (The Hague: T.M.C. Asser Press, 2004), 115.

This chapter discusses the situation in Kenya before the Court and specifically analyses the test of the complementarity principle through Kenya's admissibility challenge at the Court. Kenya's underlying argument in challenging the admissibility of cases before the Court is based on assertions of its sovereignty.

2.2 BACKGROUND TO THE SITUATION IN KENYA

Kenya's fate as a country in transition was sealed when violence erupted following the publication of the results of highly contested presidential elections at the end of 2007. While the country had characteristically experienced violence during past election periods, the violence then was sporadic and took place mainly prior to the election date. The 2007 elections were markedly different. They were marred by violence shortly after the announcement of the presidential results by the now defunct Elections Commission of Kenya. The violence that broke out in various parts of the country left over 1,300 people dead and over 600,000 others internally displaced.

Under the Chairmanship of H.E. Kofi Annan of the Panel of Eminent African Personalities representatives of the two political parties Party of National Unity ("PNU") and Orange Democratic Movement ("ODM"), their leaders (the two Principals), signed the National Accord and Reconciliation Act 2008 that paved the way for a Grand Coalition Government ("GCG") headed by the two Principals, Mr. Mwai Kibaki and Mr. Raila Odinga as the President and Prime Minister of the Republic of Kenya respectively.

The Kenya National Dialogue and Reconciliation (“KNDR”) initiative that was established by the two Principles agreed on a reform agenda, which included undertaking constitutional, legal and institutional reform, and addressing accountability and impunity. Three commissions were initially established: (i) Commission of Inquiry into Post Election Violence (“CIPEV”); (ii) Truth, Justice and Reconciliation Commission (TJRC); and (iii) Independent Interim Elections Commission. CIPEV, which was established in May 2008 under The Commissions of Inquiry Act, Cap 102 of the Laws of Kenya, is the most relevant of the three Commissions to consider in this paper as it was mandated to ‘investigate the facts surrounding circumstances related to acts of violence that followed the 2007 Presidential Elections’ and thereafter make recommendations within three months of its formation.⁶⁷ After receiving a 30-day extension⁶⁸ of its mandate, CIPEV delivered a report in October 2008 containing recommendations for *inter alia* the establishment of a Special Tribunal for Kenya that met international standards to try persons accused of committing crimes related to the post-election violence in Kenya.⁶⁹ Failing to abide by the recommendations of CIPEV, the two Principals committed to referring the situation to the Court in terms of Article 13 (a) Rome Statute.⁷⁰ Kenya signed the Court Statute on 11 August 199 and deposited its instrument of ratification on 15

⁶⁷ CIPEV created under the Commissions of Inquiry Act, Cap 102 Laws of Kenya on 22 May 2008 by Kenya Gazette Notice No. 4473 and 4474 of 23 May 2008.

⁶⁸ Extension of Time Kenya Gazette Notice No. 8661 of 11 September 2008.

⁶⁹ Report of the Commission of Inquiry into the Post-Election Violence in Kenya, Government of Kenya Printers, October 2008 pp. 453-476.

⁷⁰ Chapter 5, paragraph 5 of the CIPEV Report reads:

“If either an agreement for the establishment of the Special Tribunal is not signed, or the Statute for the Special Tribunal fails to be enacted, or the Special Tribunal fails to commence functioning as contemplated above, or having commenced operating its purposes are subverted, a list containing names of and relevant information on those suspected to bear the greatest responsibility for crimes falling within the jurisdiction of the proposed Special Tribunal shall be forwarded to the Special Prosecutor of the International Criminal Court. The Special Prosecutor shall be requested to analyze the seriousness of the information received with a view to proceeding with an investigation and prosecuting such suspected persons.”

March 2005.⁷¹ As Kenya is a State Party to the Rome Statute, the Court has jurisdiction over war crimes, crimes against humanity and genocide committed in the territory of Kenya after the entry into force of the Rome Statute in Kenya.⁷²

In December 2010, the Court's Prosecutor filed an application to the Pre-Trial Chamber for summonses to appear for six individuals suspected of bearing responsibility for crimes against humanity alleged to have been committed during the post-election violence of 2008 in Kenya.⁷³ The six are: Francis Kirimi Muthaura (former Head of Public Service, Secretary to the Cabinet and Chairman of the National Security Advisory Committee), Uhuru Muigai Kenyatta (Deputy Prime Minister, son of the Kenya's first President and 2013 presidential aspirant), Mohammed Hussein Ali (former Police Commissioner), William Samoei Ruto (former Minister for Education and 2013 presidential aspirant), Henry Kiprono Kosgey (former Minister for Industrialization) and Joshua Arap Sang (a radio broadcaster).⁷⁴ On 8 March 2011, the Pre-Trial Chamber II issued summonses to appear for the six Kenyan citizens on the basis that there was evidence pointing to the fact that these six individuals.⁷⁵

⁷¹ Kenya: Signature and ratification and implementation status. <http://www.icc-cpi.int/Menus/ASP/states+parties/African+States/Kenya.htm> (accessed 28 March 2011).

⁷² See Articles 11 (2) and 12 (2) of the Rome Statute, *supra* note 1.

⁷³ Prosecutor's Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, No.: ICC-01/09 of 15 December 2010, *Prosecutor v Ruto, Kosgey and Sang* (ICC-01/09-01/11-307) and Prosecutor's Application Pursuant to Article 58 as to Francis Muthaura, Uhuru Kenyatta and Mohammed Hussein Ali, No.: ICC-01/09 of 15 December 2010, *Prosecutor v Muthaura, Kenyatta and Ali* (ICC-01.09-02/11-274)

⁷⁴ The first three are aligned to President Mwai Kibaki's Party of National Unity (PNU) and the last three are aligned to Prime Minister Raila Odinga's Orange Democratic Movement (ODM).

⁷⁵ *Decision of Pre Trial Chamber II on Prosecutor's Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, No.: ICC-01/09 of 8 March 2011, *Prosecutor v Ruto, Kosgey and Sang* (ICC-01/09-01/11-307) and *Decision of Pre Trial Chamber II on Prosecutor's Application Pursuant to Article 58 as to Francis Muthaura, Uhuru Kenyatta and Mohammed Hussein Ali* of 8 March 2011, *Prosecutor v Muthaura, Kenyatta and Ali* (ICC-01.09-02/11-274)

The six Kenyans first appeared before the Pre-Trial Chamber II in February 2011. Following this appearance, the Government of Kenya submitted applications first to the Pre-Trial Chamber expressing its ability and willingness to handle the post-election violence on its own. The Pre-Trial Chamber II decided against this admissibility challenge and the decision was confirmed by the Appeals Chamber. These decisions based on the Court's interpretation of the principle of complementarity laid out in the Rome Statute, forms the basis of this Chapter.

2.3 FACTUAL BASIS FOR THE ADMISSIBILITY CHALLENGE

The Government of Kenya filed an application on 31 March 2011 pursuant to Article 19 (2) (b) and Article 17 (1) (a) of the Rome Statute. This was based on Kenya being the State which has jurisdiction over the post-election violence in the situation in Kenya and the two cases currently before the Court concerning the conduct of Kenyan citizens.⁷⁶ The Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the Rome Statute (Application under Article 19) is premised on what the government states are “fundamental and far reaching constitutional and judicial reforms very recently enacted in Kenya.”⁷⁷ Kenya argues that the Constitution of Kenya Act (new Constitution) promulgated in August 2010 provides for a “Bill of Rights which significantly strengthens fair trial rights and procedural guarantees within the Kenyan criminal justice system”, “...a comprehensive range of judicial reforms which fundamentally transform the administration of justice in Kenya”

⁷⁶ Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute, Situation in the Republic of Kenya in the Cases of Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey, Joshua Arap Sang *and* Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 31 March 2011 (Application under Article 19)

⁷⁷ *Id.*, para 2

including “...national courts [that] will now be capable of trying crimes from the post-election violence, including the ICC cases,” and “guarantees the independence of the State’s investigative organs and ushers in wide-ranging reforms to the police services.”⁷⁸ On this basis, the Government of Kenya submitted that the two cases before the Court are inadmissible.

Kenya asserted that it had cooperated with the Court at every instance including with the then Prosecutor Moreno-Ocampo, who visited the country on several occasions prior to his initiation of investigations concerning the post-election violence. Kenya finds that owing to its respect and cooperation with the Court, it should not be treated as an unwilling and non-cooperative state. More forcefully, Kenya rejects any idea that the Court has primacy over national criminal systems. The Government of Kenya recognizes that there have been national and international criticisms over its judicial and investigative bodies. It however mentions that it is information from these very institutions that have guided Prosecutor’s investigations.

To understand Kenya’s position, it is important to consider the main arguments in the Application under Article 19. First, Article 17 of the Rome Statute reflects the need to respect the sovereignty and integrity of national criminal justice systems and the Court needs to take this into consideration when determining the admissibility of a case.⁷⁹ Where investigations or prosecutions are underway in a State, there should be a presumption of inadmissibility of a case.⁸⁰

⁷⁸ Application under Article 19 *supra* note 76, para 2

⁷⁹ Application under Article 19 *supra* note 76, para 27

⁸⁰ Commentary on the Rome Statute of the International Criminal Court (Edited by O. Triffterer), 2nd Ed., p. 616.

Second, the Government of Kenya argues that there is no definition of “unwillingness” in the Rome Statute and that there is no sign of “unwillingness” on the part of Kenya as none of the grounds in Article 17 (2) are applicable to Kenya.⁸¹ Be that as it may, reading Article 17 of the Rome Statute, there are two alternatives in paragraph (1) combined with exceptions. A case is inadmissible before the Court unless the investigation or prosecution by a State with jurisdiction is not affected by “unwillingness” or “inability”. To determine these exceptions, paragraphs (3) and (4) provide guidance. From the wording in these two paragraphs (3) and (4), it appears that the drafters were clear in dealing with the inquiries as to unwillingness and inability on the part of a state to genuinely investigate and prosecute relative to an ongoing case. In a sense, the complementary nature of the Court is brought to existence when a case is the subject of a national criminal jurisdiction. The question of unwillingness and inability can therefore only be interrogated in the context of existing cases at the national level, failing which the inquiry may be redundant. The Application under Article 19 however sheds light to the limited jurisprudence by the Court concerning admissibility challenges, particularly pronouncements by the Court on investigations or prosecutions at “the time of the proceedings”.⁸²

⁸¹ Article 17 (2) Rome Statute *supra* note 1 reads:

In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

- (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
- (b) There has been an unjustified delay in the proceedings in which the circumstances is inconsistent with an intent to bring the person concerned to justice;
- (c) The proceedings were not or are not being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

⁸² The Government of Kenya Application, para 19 where the authority *Prosecutor v Katanga and Chui*, Appeals Chamber, Judgment on the Appeal of Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497, 25 September 2009, paras 78-80. The Government of Kenya argues that the relevant period for the Pre-Trial Chamber to consider when determining the capacity of the Kenya criminal justice system to deal with the post-election violence cases is the entire reform process ongoing in the country, and not only the information available at the time of filing of the Government of Kenya Application.

Third, within the reforms of the investigative processes, the new Constitutional Office of the Director of Public Prosecutions (DPP) is established, “independent of Government with all the necessary safeguards to guarantee independence of investigations and prosecutions at all levels.”⁸³ The Application under Article 19 stated that the appointment of the DPP of Kenya would have been concluded by end of May 2011 and investigation of all cases including those presently before the Court would have commenced. In the interim, a Directorate of Criminal Investigations had already undertaken preliminary investigations in Kenya and further investigations on post-election violence related cases are being conducted in seven of Kenya’s eight provinces to lay a basis for local trials.⁸⁴ Kenya stated that by the end of July 2011, a detailed investigation report will be available to the Court concerning post-election violence related cases, including those presently before the Court.⁸⁵

Kenya rebutted claims that its own investigations concerning post-election violence related cases had only been for low-level perpetrators thus excluding the senior-level perpetrators from the ODM and PNU political parties.⁸⁶ Kenya argued that “[m]any international courts have used a “bottom up” approach in investigating the most serious violations, it being very difficult to start an investigation at the highest levels without a sound knowledge of underlying crimes.”⁸⁷ Furthermore Kenya argued that since the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya, 31, March 2010

⁸³ Application under Article 19 *supra* note 76, para 67.

⁸⁴ Application under Article 19 *supra* note 76, paras 69- 70.

⁸⁵ Application under Article 19 *supra* note 76, paras 71- 74.

⁸⁶ Decision pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya, 31, March 2010 (Decision Authorizing Investigation in Kenya), paras. 182- 187.

⁸⁷ Application under Article 19 *supra* note 76, para 34 and 71.

(Decision Authorizing Investigation in Kenya), “...significant developments... [i]n particular, the adoption of the new Constitution in August 2010 and associated reforms has meant that Kenya is able to conduct national criminal proceedings for all crimes arising from the post-election violence.”⁸⁸ Essentially, it is subtly conceded that when the Pre-Trial Chamber was considering the application by the Prosecutor to initiate investigations into the situation in Kenya pursuant to Article 15 of the Rome Statute, there were glaring inadequacies in the Kenyan criminal justice system to deal with post-election violence related cases.⁸⁹

While the Application under Article 19 points to the establishment of the necessary reforms to facilitate investigations and try all cases arising from the post-election violence, there is concern that the Application under Article 19 “contains empty promises which cannot be used to pre-empt the Court’s jurisdiction.”⁹⁰ The Rome Statute provides four instances where the Court shall determine that a case before it is inadmissible: where the case is being investigated or prosecuted by a State which has jurisdiction over it; where the case has been investigated by a State with jurisdiction and that State decides not to prosecute; the person has already been tried for conduct which is the subject of the complaint; or the case is not of sufficient gravity to justify further action by the Court.⁹¹ The contention is that none of the four conditions have been met in the two cases concerning the situation in Kenya to merit a finding of inadmissibility. From the reading of Article 17 (1) of the Rome Statute, it may not be sufficient for the Government of Kenya to state that it is embarking on investigations

⁸⁸ Application under Article 19 *supra* note 76, para 34.

⁸⁹ Application under Article 19 *supra* note 76, para 36.

⁹⁰ Amnesty International Public Statement “Kenya’s Application Before the International Criminal Court: A Promise is Not Enough to Pre-empt the Court’s Jurisdiction” 06 April 2011, AI Index: AFR 32/003/2011

⁹¹ Article 17 (1) (a) to (d) Rome Statute *supra* note 1.

based on the reform processes in the country for the two cases to be considered inadmissible, particularly in light of the fact that there have not been successful steps to establish a credible national judicial process to try the six individuals let alone other Kenyan citizens who committed crimes and human rights abuses during the post-election violence. The issue is further compounded by the fact that the failure to set up a local judicial process led the Prosecutor to request the Pre-Trial Chamber to initiate investigations in Kenya. Upon receiving authorization to investigate, the Prosecutor has since completed investigations, obtained summonses to appear and is ready to prosecute if the charges against the six individuals are confirmed.

Fifth, Kenya argues that there are substantial reforms in the judiciary including the appointment of a new Chief Justice, the establishment of a Judicial Service Commission, to “promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice”⁹² In essence Kenya argues that its judiciary, although lacking in some areas, is currently receiving due attention from the Executive and Legislature through the enactment of laws to provide for a judicial system that would adequately address the post-election violence cases.⁹³ Du Plessis and Gevers note that Kenya has one of the best developed judiciaries in Africa. It is also one of the few African countries to have domestically implemented the Rome Statute, and the resulting legislation is impressive and progressive.⁹⁴ In essence, the Government of Kenya is requesting the Pre-Trial

⁹² Constitution of Kenya, Articles 171-172.

⁹³ Application under Article 19 *supra* note 76, paras 47 -66.

⁹⁴ Max Du Plessis and Chris Gevers, International Justice: Kenyan case a good test of an ICC founding principle, Business Day, 28 January 2011.

Chamber to consider the entire reform process in Kenya “as a whole and not merely the date on which the application is first filed”.⁹⁵

2.4 THEORETICAL UNDERSTANDING OF COMPLEMENTARITY

What then is the place of the principle of complementarity in the prosecution of the core international crimes? Article 17 of the Rome Statute suggests that the Court’s *ultima ratio* jurisdiction will only come into action when a State is unable or unwilling to genuinely investigate or prosecute persons alleged to have committed genocide, war crimes and crimes against humanity. The default position remains that when these core international crimes take place in a given territory, States with jurisdiction (based either on ‘active personality’ or ‘passive personality’) have the primary responsibility to conduct investigations and prosecutions. The relationship between the Court and national criminal jurisdictions is therefore based on the formal primacy of jurisdiction of the latter. The Court is established by treaty and its jurisdiction is conferred upon it by the consent of States Parties to the Rome Statute. In essence State Parties declare an intention to delegate their criminal jurisdiction to the Court under certain conditions. Arguably then, the principle of complementarity imports the sovereignty of States Parties to the Rome Statute in so far as the determination of jurisdiction and concomitantly the admissibility of cases. Complementarity as a defining characteristic of the Court does raise the question of sovereignty of States. Mégret observes that on the one hand, it represents a minimal recognition of the legitimacy of State sovereignty. As a presumption in favour of national criminal jurisdiction, complementarity is an implicit, normative and

⁹⁵ Application under Article 19 *supra* note 76, para 19.

substantive preference for the work of national jurisdictions in dealing with international crimes. On the other hand, complementarity is also a potent threat to State sovereignty. The price of the international community's recognition of the priority of national criminal jurisdictions is that the Court may exercise its jurisdiction only if that priority is not put to good use.⁹⁶

The Court is, and has always been, promoted as an institution whose fundamental objective is to become universal. Mégret observes that an ICC without States Parties would be non-existent; an ICC with few and marginal States Parties would be irrelevant.⁹⁷ Moreover, there is a system of checks and balances in the Rome Statute on the Court's delegated authority. An exposition of the relevant Rome Statute provisions is necessary to illustrate the uniqueness of the principle of complementarity.

2.4.1 Legal basis for complementarity

The point of departure is that the admissibility of each case before the Court is presumed.⁹⁸ Article 17 stipulates that a case is inadmissible where certain criteria listed are met. The default rule in the absence of those criteria being satisfied is admissibility.⁹⁹ Aravena and Robinson disapprove of the simplistic appreciation of the complementarity test where it is understood that Article 17 suggests that a case is

⁹⁶ Mégret F., "Why would states want to join the ICC? A theoretical exploration based on the legal nature of complementarity." in Jann K. Kleffner and Gerben Kor (eds.), *Complementary views on Complementarity: Proceedings of the international roundtable on the complementary nature of the International Criminal Court* (The Hague: T.M.C. Asser Press, 2004), 2.

⁹⁷ Mégret, *supra* note 96, 4.

⁹⁸ Aravena C.C., *supra* note 66, 116.

⁹⁹ Darryl Robinson, "Comments on Chapter 4" in Jann K. Kleffner and Gerben Kor (eds.), *Complementary views on Complementarity: Proceedings of the international roundtable on the complementary nature of the International Criminal Court* (The Hague: T.M.C. Asser Press, 2004), 141

admissible before the Court where a State with jurisdiction is unable or unwilling to genuinely prosecute persons alleged to have committed the core international crimes. Rather the 'unwilling and unable' test only comes into question when evaluating the genuineness of an existing national criminal procedure.¹⁰⁰ This distinction is particularly important in will be re-visited in the coming sections where the situation in Kenya is analyzed.

2.4.2 Exposition of Article 17 and the Court's interpretation of complementarity in the Kenyan situation

Article 17(1) (a) requires the existence of either of two national processes for a case to be found inadmissible; an investigation or a prosecution. Furthermore, the investigation or prosecution must be conducted by a State which has jurisdiction over the crimes committed.¹⁰¹ These requirements must exist simultaneously. An investigation is a systematic inquiry about the facts of a crime and about participation in it, while a prosecution is the opening and undertaking of a judicial criminal process.¹⁰² The Appeals Chamber decisions of August 30, 2011 relating to the admissibility challenge by the Government of Kenya of the Kenyan cases before the Court elaborate on the principle of complementarity in support of the Rome Statute

¹⁰⁰ Daryl Robinson *supra* note 99, 142

¹⁰¹ Jurisdiction of a State is determined either by: the accused being a national of the State; the crime occurring within the State's territory (territorial jurisdiction); or based on extradition treaties between States on the basis of universal jurisdiction. The duty of all states to prosecute individuals alleged to have committed genocide, war crimes and crimes against humanity is an obligation *erga omnes* [*Barcelona Traction* case, [(Belgium v Spain) (Second Phase)] ICJ Rep 1970 3 at paragraph 33]. As such following from the universal jurisdiction theory, it is possible that investigations or prosecutions are or have been conducted by another state under the universality principle other than the prosecuting state.

¹⁰² Aravena *supra* note 66, 117.

provisions.¹⁰³ These decisions suggest that the test taken by the Court to determine the admissibility of cases before it is first that whether there are national proceedings in the State with jurisdiction. Only if there are existing proceedings does the Court then investigate whether the state is unwilling or unable to genuinely carry out investigations and prosecutions in terms of Article 17 of the Rome Statute.¹⁰⁴ The Appeals Chamber in *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* case lays the foundation for judicial precedence that “the initial questions to ask are (1) whether there are ongoing investigations or prosecutions or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned.”¹⁰⁵ The jurisdiction of the Court in the situation concerning the DRC was triggered by a State referral under Article 14 of the Rome Statute. It is clear in such cases of self-referral that the State is willing to cooperate with the Court on the crimes committed in that country. In Kenya however, although the government demonstrated a willingness to cooperate with the Court following negotiations between its officials and the Prosecutor, Kenya was not prepared to cede jurisdiction to the Court for these particular cases. The Appeals Chamber Decisions of 30 August 2011 conclusively asserts that the first stage of the admissibility test, being whether national proceedings are or have taken place, remains regardless of the

¹⁰³ Judgment on the Appeal of the Republic of Kenya against the Decision of the Pre-Trial Chamber II of 30 May 2011 entitled ‘ Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19 (2) (b) of the Statute’, *Prosecutor v Muthaura, Kenyatta and Ali* (ICC-01.09-02/11-274), Appeals Chamber (30 August 2011) (hereafter ‘Appeals Chamber Decision of 30 August, 2011, Case I’) and Judgment on the Appeal of the Republic of Kenya against the Decision of the Pre-Trial Chamber II of 30 May 2011 entitled ‘ Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19 (2) (b) of the Statute’, *Prosecutor v Ruto, Kosgey and Sang* (ICC-01/09-01/11-307) Appeals Chamber (30 August 2011) (hereafter ‘Appeals Chamber Decision of 30 August 2011, Case II’)

¹⁰⁴ AC Decision of 30 August 2011, Case I and II, paras. 40 and 41 respectively

¹⁰⁵ Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (ICC-01/04-01/07 OA 8), Appeals Chamber (25 September 2009) para. 78.

trigger mechanism of the Court's jurisdiction in a situation that it is seized of. In relevant portion the Appeals Chamber Decision says:

It should be underlined...that determining the existence of an investigation must be distinguished from assessing whether the State is unwilling or unable genuinely to carry out the investigation or prosecution, which is the second question to consider when determining the admissibility of a case. For assessing whether the State is indeed investigating the genuineness of the investigation is not at issue; what is at issue is whether there are investigative steps.¹⁰⁶

Under Article 17(1)(b), a past investigation or prosecution disqualifies a case for trial before the Court, where a systematic inquiry into the facts of and participation in these crimes has taken place, and further where the State has decided not to prosecute the case. According to Article 17(1) (c), a case is inadmissible under the *ne bis in idem* principle.¹⁰⁷ Finally, Article 17(1) (d), a case is inadmissible if it '*is not of sufficient gravity to justify further action by the Court.*' This is an objective criterion as it is based on the case itself and not on the existence or nature of a national action concerning it. This is perhaps why this criterion does not have any exception unlike the other criteria listed in Article 17. Following from the objectivity of this criterion, one must reject the opinion that the mere fact that cases are being or have been investigated by a truth commission makes them fall under the ground of

¹⁰⁶ Appeals Chamber Decision of 30 August 2011 Case I and II, paras. 40 and 41 respectively.

¹⁰⁷ Article 20 of the Rome Statute, *supra* note 1, espouses the *ne bis in idem* principle and provides that no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted. For the purposes of the admissibility test under Article 17, this applies to trials conducted at the State level.

inadmissibility in Article 17(1)(d), as a consequence of the fact that truth commissions would partially fulfil the goals of criminal prosecution.¹⁰⁸

Where a State that is challenging the admissibility of cases before the Court, that State must show that investigative steps or prosecutions are underway and not merely assert that there are plans towards investigations or prosecutions.

The earlier decision by the Pre-Trial Chamber II relating to the admissibility challenge was clear that for an admissibility challenge to succeed, investigations at the national level concerning the same suspects must be ongoing, as opposed to some future investigations as submitted by the government of Kenya.¹⁰⁹ The Pre-Trial Chamber concluded that it was insufficient for a state with jurisdiction to claim ongoing investigations, unless concrete evidence of such investigations is brought before the Court. The Pre-Trial Chamber was less convinced of future investigations regardless of “fundamental and far-reaching constitutional and judicial reforms...enacted in Kenya.”¹¹⁰ Further that it required “current investigative steps undertaken.”¹¹¹ The Appeals Chamber set the burden on the state to show that cases are inadmissible¹¹²:

¹⁰⁸ Aravena *supra* note 66, 119.

¹⁰⁹ International Criminal Court, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, *Prosecutor v Muthaura, Kenyatta and Ali* (ICC-01/09-02/11-96), Pre-Trial Chamber II (May 30, 2011) (hereafter ‘PTC II Decision of 30 May 2011, Case I’), para. 59 and International Criminal Court, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, *Prosecutor v Ruto, Kosgey and Sang* (ICC-01/09-02/11-96), Pre-Trial Chamber II (May 30, 2011) (hereafter ‘PTC II Decision of 30 May 2011, Case II’), para. 63

¹¹⁰ International Criminal Court, Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the Rome Statute, *Situation in the Republic of Kenya* (ICC-01/09-01/11-19), Pre-Trial Chamber II (31 March 2011) para 2 (hereafter ‘Kenya’s Admissibility Challenge of 31 March 2011’)

¹¹¹ Pre-Trial Chamber Decision of 30 May 2011 Case I and Case II, paras. 60 and 64 respectively.

¹¹² Appeals Chamber Decision of 30 May 2011 Case I and Case II, paras. 61 and 62 respectively.

to discharge this burden the State must provide the Court with evidence of a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case. It is not sufficient merely to assert that investigations are ongoing.

Even where a State challenging the admissibility of cases before the Court can demonstrate that investigative steps or prosecutions related to crimes within the Court's jurisdiction are proceeding locally, the Appeals Chamber found that the local investigations or prosecutions must be of the same individuals before the Court and for the same conduct that the Court investigations and prosecutions relate. This judge-made criteria of the admissibility test knocks the wind off Kenya's sail.

Article 17(1) (a) of the Rome Statute does not elaborate on the nature of ongoing national proceedings. The decisions of the Court in the Kenya cases provide direction on what these national proceedings should look like. The first point to note on this from the Appeals Chamber decisions of 30 May 2011 is that there is a distinction between the admissibility at the preliminary stages of a situation, in which Articles 15 and 18 of the Rome Statute relate and admissibility of cases under Article 19 where a suspect or a state with jurisdiction lodges a challenge relating to a case.¹¹³ An admissibility challenge in a case requires a higher undertaking on the part of the suspect or state with jurisdiction. In this situation, the Pre-Trial Chamber was not satisfied with Kenya's submission that it was going to investigate "persons at the same level in the hierarchy"¹¹⁴ for the same overall conduct or type of crimes that the

¹¹³ Appeals Chamber Decisions of 30 May 2011 Cases I and II, paras 37 and 38 respectively.

¹¹⁴ Kenya's Admissibility Challenge of 31 March 2011, *supra* note 100, para 32

Court was investigating.¹¹⁵ The Appeals Chamber agreed with the Pre-Trial Chamber noting that “the national investigation must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court” in connection to an application filed under Article 19.¹¹⁶

In issuing a warrant of arrest in the case *Prosecutor v Thomas Lubanga*, the Pre-Trial Chamber held that a determination of inadmissibility of a case requires that “national proceedings encompass both the person and the conduct which is the subject of the case before the Court.”¹¹⁷

In summary therefore, according to Article 1 Rome Statute, the Court is ‘complementary to national criminal jurisdictions’. Consequently, under article 17 (1) (a) of the Rome Statute, a case is inadmissible before the Court where it is the subject of an investigation or prosecution by a State with jurisdiction unless the State concerned is unwilling or unable genuinely to carry out the investigation or prosecution. If the case has already been investigated and a decision not to prosecute has been made, the case is only admissible if the decision resulted from the unwillingness or inability of the state genuinely to prosecute. In addition a case is admissible where the person concerned has already been tried for conduct that is the subject of the complaint, and a trial by the Court is not permitted under the statute’s double jeopardy provisions.

2.4.3 Unwillingness or inability

¹¹⁵ Pre-Trial Chamber Decisions of 30 May 2011 in Cases I and II, paras. 50 and 54 respectively.

¹¹⁶ Appeals Chamber Decisions of 30 August 2011 in Cases I and II paras. 39 and 40 respectively.

¹¹⁷ International Criminal Court, Decision on the Prosecutor’s Application for a Warrant of Arrest. Article 58, *Prosecutor v Thomas Lubanga Dyilo* (ICC-01/04-01/06-8-US-Corr), Pre-Trial Chamber 1 (10 February 2006).

In assessing the unwillingness of a State to carry out a genuine investigation or prosecution, the Court will consider whether: the relevant proceedings or national decision were designed to shield the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; there has been an unjustified delay in the proceedings which, under the circumstances, is inconsistent with an intent to bring the person concerned to justice; and the proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice. These considerations are taken with regard to due process recognized by international law.¹¹⁸

In order to determine inability, the Court considers whether due to a total or substantial collapse or unavailability of its national judicial system, the State in question is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.¹¹⁹

Even where the Prosecutor has determined that a case is admissible based on the exclusion of a State's unwillingness or inability as per Article 17, an investigation into any situation by the Prosecutor can only be initiated after the requirements of Article 53 have been met. There may have been an incorrect or partially incorrect understanding of the complementarity, where it was sufficient to theorize that the jurisdiction of the Court is activated where a state is unwilling or unable genuinely to carry out the investigations or prosecutions. El Zeidy and Broomhall suggest that

¹¹⁸ Article 17(2) Rome Statute, *supra* note 1.

¹¹⁹ Article 17(3) Rome Statute, *supra* note 1.

where crimes within the jurisdiction of the Court have taken place in a State and the State fails to act, the inaction is sufficient grounds for the admissibility of cases at the Court.¹²⁰

2.5 A place for positive complementarity in Kenya and Concluding Remarks

Complementarity at the Court is certainly solidifying in terms of its interpretation from the Rome Statute provisions. Before the complementarity mould sets, certain concerns of the international community, particularly in the situation countries of the ICC must be addressed in order for the objective of the Court – to combat impunity - to succeed. Positive complementarity addresses these concerns and most importantly supports local ownership of states in the fight against impunity for international crimes. Though not an elegant term, the expression found great support in the stock-taking process on complementarity at the Review of the Rome Statute Conference held in Kampala in 2010. The notion of positive complementarity extends the cooperation among States to include support of national judicial and penal institutions. The object of positive complementarity is the strengthening of national jurisdictions to carry out effective investigations and prosecutions of the core international crimes. Unlike the other states, which Mégret refers to as *quasi-virtuous* or *almost virtuous*¹²¹, some states recognize that their legal systems would not

¹²⁰ See Mohamed El Zeidy, *The Principle of Complementarity in International Criminal Law* 161, 221, 230 (2008); Markus Benzing, *The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight Against Impunity*, 7 Max Planck Yearbook of United Nations Law 591, at 601; See also Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* 91 (2003); Nidal Jurdi, *Some Lessons on Complementarity for the International Criminal Court Review Conference*, 34 South African Yearbook of International Law 28, 29-30 (2009)

¹²¹ Mégret *supra* note 96, defines ‘Quasi-virtuous’ States or ‘almost virtuous’ States as States which can conceive that their nationals might commit international crimes but who cannot conceive that they would not want to try them.

effectively prosecute international crimes committed by their nationals, but are nevertheless committed to the long-term goal of the fight against impunity.

At the Review Conference of the Rome Statute held in Kampala in May-June 2010 by the Assembly of State Parties (ASP), South Africa and Denmark were jointly responsible for the stock-taking process on complementarity. It is at this stock-taking exercise by the ASP that the concept of ‘positive complementarity’ emerged. The duty of States to prosecute those responsible for genocide, crimes against humanity and war crimes in its territory emanates from a long-standing principle in international law.¹²² This duty is especially burdensome where a State’s judicial system faces several handicaps that prevent it from effectively investigating and prosecuting these international crimes. There is another limitation of investigations and prosecutions at the international level. The Court cannot investigate and prosecute every person accused of committing the crimes within its jurisdiction. In fact, the Court can only prosecute a handful of people who in the opinion of the Prosecutor are the ‘most responsible for the most serious crimes, based on evidence’.¹²³ A State’s obligation to ensure that justice is carried out in its territory for those affected by the crimes is not dispensed with after the Court has taken over investigations and prosecutions. At the domestic level, there are many more perpetrators of crimes who must face the justice system.

This is where the concept of ‘positive complementarity’ finds its basis. There is a need to strengthen the national systems of State Parties to be able to handle the

¹²² Also articulated in the Preamble of the Rome Statute, *supra* note 1.

¹²³ *The Office of the Prosecutor’s experience in respecting complementarity*, Statement by Mrs. Fatou Bensouda, Prosecutor-elect of the ICC at the ICC Pacific Outreach Roundtable in Sydney, Australia 16 Feb 2012 available at <http://www.icc-cpi.int/NR/rdonlyres/298482DC-8E27-415E-97C6-EEA930837EB9/0/StatementSidneycomplementarity.pdf> [Accessed 12 May 2012]

numerous cases that cannot, for logistical and other reasons, be handled at the international level.

As stated above, Article 17 of the Rome Statute recognizes the sovereignty of States to deal with serious crimes of international concern. The notion of positive complementarity came about during the negotiation concerning the Rome Statute. States recognized that in addition to the integral role of the principle of complementarity in the effective functioning of the Rome Statute system, states may assist each other towards ensuring that the national criminal jurisdictions are capable of handling the crimes over which the Court has jurisdiction. This is evidenced in a resolution adopted at the ICC Review Conference in Kampala, where the Assembly of States Parties recognized “the desirability for States Parties to assist each other in strengthening domestic capacity to ensure that investigations and prosecutions of serious crimes of international concern can take place at the national level.”¹²⁴ The Office of the Prosecutor’s policy on positive complementarity is aimed at ‘encouraging genuine national proceedings where possible, including in situation countries, relying on its various networks of cooperation, but without involving the Office directly in capacity building or financial and technical assistance’.¹²⁵ The Report of the Bureau of the Assembly of States Parties refers to positive complementarity as:¹²⁶

“[A]ll activities/actions whereby national jurisdictions are strengthened and enabled to conduct genuine national investigations and trials of

¹²⁴ Resolution RC/Res.1, adopted at the 9th Plenary meeting of the Assembly of States Parties, Kampala, 8 June 2010.

¹²⁵ ICC Prosecutorial Strategy 2009 – 2012, 1 February 2010, para 17 <http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPPProsecutorialStrategy20092013.pdf> [Accessed 28 March 2011].

¹²⁶ Report of the Bureau on stocktaking: Complementarity, para 16 http://www.icc-cpi.int/iccdocs/asp_docs/ASP8R/ICC-ASP-8-51-ENG.pdf [Accessed 28 March 2011].

crimes included in the Rome Statute, without involving the Court in capacity building, financial support and technical assistance, but instead leaving these actions and activities for States, to assist each other on a voluntary basis.”

Within the ambit of positive complementarity, the focus of investigations and prosecutions should shift from the four Kenyans whose criminal charges were confirmed in January 2012 to the scores of other individuals who need to be brought to account for their role in the post-2007 election violence.¹²⁷ There is sufficient evidence to believe that crimes against humanity have been committed in Kenya and following from the CIPEV recommendations and reports from civil society organizations operating in Kenya, there is an outcry for justice at the local level. These crimes need to be investigated and persons who committed these crimes tried by Kenyan criminal courts – whether hybrid or special tribunal meeting international standards or the High Court of Kenya empowered by the International Crimes Act of 2008.

A report submitted by a Government Working Committee on the ICC, established following the confirmation of charges decision by the Pre-Trial Chamber to advise the government on the implications of the decision reports that “provisions set out in Article 50 (2) (n) of the Constitution...could permit Kenya to have jurisdiction in respect of crimes under international law at the time of the PEG.”¹²⁸ The Working Committee on the ICC recommends the appointment of an independent Special

¹²⁷ There have been efforts in the media to shift the focus from the Kenyan ICC suspects “Plea to Give Ocampo Six a Black Out, Daily Nation”, <http://mobile.nation.co.ke/Plea+to+give+Ocampo+Six+a+blackout+/-/1292/1143482/-/format/xhtml/-/k4m6q2/-/index.html> [Accessed on 7 April 2011]

¹²⁸ Report of the Working Committee on the International Criminal Court, paras 70-8, 70

Prosecutor to investigate and prosecute crimes related to the post-election violence in Kenya without the necessity of establishing special courts or chambers in Kenya.¹²⁹ A more sustainable role for the Special Prosecutor, other than to investigate and prosecute the four Kenyan accused persons before the Court, is for this office to investigate and prosecute other individuals responsible for the post-2007 election violence.

¹²⁹ Id, para 79-85, 79 and 82.

CHAPTER III

The Rights of the Accused, Victims of International Crimes and Witnesses Appearing Before the Court

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3.1 INTRODUCTION

This Chapter commences with a section reflecting on the rights of an accused person before the Court. As a precursor to the discussion, the rights of an accused are linked to the right to a fair trial under international human rights law and international humanitarian law and the enforcement of this right at the national, regional and international levels. The minimum guarantees espoused in this human right are discussed in the light of the process of arrest and surrender of persons to the Court. Questions discussed include: what effect does the infringement of these rights have on the arrest and surrender of a person to the Court and on the trial of the accused person as a whole and whether there are circumstances surrounding violations of the rights of the accused that would be so grave as to call for his or her acquittal, or mitigated sentence? The conduct of the Court Prosecutor in one of the cases is briefly discussed to highlight these issues. The section concludes with an examination of the effect of amnesties and immunities (including official immunities and so-called evidentiary immunities), and their effect on the surrender of accused persons and the subpoena of witnesses.

In the following section, the innovative rights of victims under the Rome Statute system are described. The discussion on the right to participate in legal proceedings is broken down to the different phases of proceedings at the Court: the pre-trial phase; trial phase; appellate phase and other proceedings arising from the investigation and prosecution of a case. In the discussion, actual Court practice in determining victim status and the evaluations of applications to participate in the current situations of the Court are critically examined. Some observations on how the practice can be

streamlined in future situations and cases are also made in the interests of oiling the Rome Statute system of justice. The Chapter concludes with an in-depth analysis of the right to reparations for victims of international crimes under the Rome Statute. The right to reparations is influenced by the right to a remedy under traditional public international law and subsequently individualised under international human rights law and international humanitarian law. In this context, case law at the national, regional and international courts is useful to gain an understanding of the right. Finally the right to reparations in international criminal law as codified in the Rome Statute is analysed with the assistance of the first case before the Court to establish the principles applicable in realising the right to reparations to victims of the crimes within the Court's jurisdiction.

3.2 THE RIGHTS OF THE ACCUSED

3.2.1 Right to a fair trial

The right to a fair trial is a crucial guarantee in the efforts to create and maintain standards for human rights at the international level. The guarantee of the inalienable right to a free and fair trial is recognized in a number of international and regional human rights treaties.¹³⁰ The very existence of this right in these numerous treaties is

¹³⁰ See International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR], Articles 9, 14, & 15; the African Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 59 [hereinafter African Charter], Articles 3, 6, & 7; American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 673 [hereinafter ACHR], Articles 7, 8, & 9; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 312 U.N.T.S. 221, E.T.S. 5, as amended by Protocol No. 3, E.T.S. 45, Protocol No. 5, E.T.S. 55, and Protocol No. 8, E.T.S. 118 [hereinafter ECHR], Articles. 5, 6, & 7; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Oct. 21, 1950, 75 U.N.T.S. 31 [hereinafter GCI], Article 3; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Oct. 21, 1950, 75 U.N.T.S. 85 [hereinafter GCII], Article 3; Geneva Convention Relative to the Treatment of Prisoners of War, Oct. 21, 1950, 75 U.N.T.S. 135 [hereinafter GCIII], Article 3; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Oct. 21, 1950, 75 U.N.T.S. 287 [hereinafter GCIV], Article 3; Protocol

an indication of possible tensions between punishing individuals who are perceived to be 'guilty' of committing gross violations of human rights and the strict adherence of an accused's procedural rights in the conduct of his/her trial. Stapleton recognizes this tension between the minimum procedural guarantees of the right to a fair trial and the practical considerations involved in trying individuals accused of grave human rights violations.¹³¹ She asks the question whether it is acceptable to compromise the rights of the accused in order to vindicate victims of the crimes within the jurisdiction of the Court. Stapleton suggests that the Court must guarantee the accused a fair trial and argues for the impermissibility of any derogation.¹³²

What are these minimum guarantees for a fair trial recognized by international law? The concept envisions a trial of an accused person that provides a number of procedural protections as a base standard for conducting the trial. Widely recognised minimum guarantees include the following rights¹³³:

- a) All persons shall be equal before courts and tribunals and are entitled to the minimum guarantees to fair trial in full equality;
- b) The tribunal is competent, independent, impartial, and established by law;

Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 7, 1978, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I], Article 75 (Fundamental Guarantees); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Dec. 7, 1978, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II], Article 6 (Penal Prosecutions); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984), Article 7; Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., at 72, U.N. Doc. A/810 (1948) [hereinafter UDHR], Articles 9-11.

¹³¹ Stapleton S, 'Ensuring a Fair Trial in the International Criminal Court: Statutory interpretation and the impermissibility of derogation' (1999) 31 *New York University Journal of International Law and Politics*, 535-592, 535.

¹³² Stapleton, *supra* note 131

¹³³ See provisions of human rights treaties *supra* note 130.

- c) Everyone charged with a criminal offense shall have the right to be presumed innocent until proven guilty according to law;
- d) The accused has the right to be tried in his presence;
- e) The accused has the right to defend himself in person or through legal assistance of his own choosing; if he does not have legal assistance he shall be informed of this right; in any case where the interests of justice so require the accused shall be assigned legal assistance without payment by him if he does not have sufficient means to pay for it;
- f) The accused has the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses against him;
- g) The accused has the right to have the free assistance of an interpreter if he cannot understand or speak the language used in court;
- h) The accused has the right not to be compelled to testify against himself or to confess guilt;
- i) No one shall be liable to be tried or punished again for an offense for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country;
- j) No one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offense was committed.

3.2.2 The Rome Statute and the rights of an accused

As mentioned above, the right to a fair trial has developed over the years. This is particularly so in the context of international criminal tribunals and demonstrated by the substantive provisions relating to the right to a fair trial in the Charter of the International Military Tribunal, created by the London Agreement of August 1945 to prosecute individuals after World War II at Nuremberg, as compared to those of the ICTR and ICTY Statutes.¹³⁴

For its part, the Rome Statute is replete with provisions guaranteeing the rights of the accused as recognized by the international community under major human rights instruments, humanitarian, and/or customary international law. Article 67 of the Rome Statute enunciates the following rights of the accused as a part of the minimum guarantees: the right to be tried without undue delay;¹³⁵ to be present at trial;¹³⁶ to conduct a defense and to counsel assigned and paid for by the Court;¹³⁷ to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;¹³⁸ to have the assistance of an interpreter;¹³⁹ and not to be compelled to testify or confess to guilt.¹⁴⁰

¹³⁴ Compare Article 16 of the Charter of the International Military Tribunal, Aug 18, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, which provides that

In order to ensure fair trial for the defendants, the following procedure shall be followed: (a) The Indictment.... (b) During any preliminary examination or trial of a Defendant he shall have the right to give any explanation relevant to the charges made against him. (c) A preliminary examination.... (d) A Defendant shall have the right to conduct his own defense before the Tribunal or to have the assistance of Counsel. (e) A defendant shall have the right through himself or through his Counsel to present evidence at the Trial in support of his defense, and to cross-examine any witness called by the Prosecution.

with Article 21 ICTY Statute, *supra* note 3 and Article 20 ICTR Statute, *supra* note 3 which both contain more substantive provisions relating to the rights of the accused.

¹³⁵ Article 67 (1) (c) Rome Statute, *supra* note 1.

¹³⁶ Article 67 (1) (d) Rome Statute, *supra* note 1; this right is limited by sub-section (2) where an accused may be removed from the courtroom where his conduct continues to disrupt proceedings. Such an accused will then be placed in a room where he will instruct his counsel using the communication technology provided.

¹³⁷ Article 67 (1) (d) Rome Statute, *supra* note 1.

¹³⁸ Article 67 (1) (e) Rome Statute, *supra* note 1

Article 67 of the Rome Statute contains other guarantees to an accused, which one would not find in the standard international human rights treaties such as the right to remain silent ‘without such silence being a consideration in the determination of guilt or innocence,’¹⁴¹ the right ‘to make an unsworn oral or written statement in his or her defense’¹⁴² and the right ‘not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.’¹⁴³ Additionally, the Rome Statute provides for the right of the accused to a fair and public hearing;¹⁴⁴ to be protected from more than one trial on the same charges;¹⁴⁵ and not to be found guilty of conduct which, at the time it took place, was not a crime within the court's jurisdiction.¹⁴⁶

The Rome Statute is unequivocal on ensuring that the rights of an accused are upheld. At the investigative stage, the Rome Statute has placed certain mechanisms to ensure that the integrity of the process is maintained. In this respect, Article 54 (1) (c) obliges the Prosecutor in the conduct of investigations ‘to fully respect the rights of persons arising under this Statute.’ Article 55 substantiates further on the rights of persons during an investigation. These provisions are distinct in the field of international criminal law in that the Rome Statute codifying the rights that are available to individuals who may be the subject of pre-trial proceedings before the Court.

3.2.3 Effect of immunities and amnesties on the rights and trial of an accused

¹³⁹ Article 67 (1) (f) Rome Statute, *supra* note 1.

¹⁴⁰ Article 67 (1) (g) Rome Statute, *supra* note 1.

¹⁴¹ Article 67 (1) (g) Rome Statute, *supra* note 1.

¹⁴² Article 67 (1) (h) Rome Statute, *supra* note 1.

¹⁴³ Article 67 (1) (j) Rome Statute, *supra* note 1.

¹⁴⁴ Article 64 (2) Rome Statute, *supra* note 1.

¹⁴⁵ Article 20 Rome Statute, *supra* note 1 with the exception being where the previous proceedings shielded the person from criminal responsibility or the proceedings was not conducted independently or impartially.

¹⁴⁶ Article 22 Rome Statute, *supra* note 1.

At the national level, immunities and amnesties granted to individuals prevents courts of law from exercising jurisdiction over the recipients of these tools. There are various reasons why amnesties and immunities are given to individuals. In the case of immunities, they mostly present themselves as barriers to liability for government officials and international civil servants from national courts while these officials and civil servants performed their official and sanctioned acts on behalf of the state or international organisation that they represent.

Amnesties on the other hand are a tool used in societies that are in transition from gross violations of human rights to democracy and the rule of law. In all cases where amnesties are used, they serve the purpose of ‘silencing the guns’ of conflict and assisting in the negotiations for a peaceful resolution to the conflict. Uganda, a situation country at the Court where it is reasonably foreseeable that considerations of amnesty may play in the investigation and prosecution of cases, an Amnesty Act was legislated in 2000 with the purpose of ending rebellions in Uganda by encouraging rebels to lay down their arms without fear of prosecution for crimes committed during the fight against the Government of Uganda. The Amnesty Act of Uganda has three main functions: providing amnesty to rebels who renounce rebellion and give up their arms; facilitating an institutionalized resettlement and repatriation process; and providing reintegration support, including skills training for ex-combatants, and promoting reconciliation.¹⁴⁷

¹⁴⁷ Section 2, Amnesty Act 2000 of the Laws of Uganda.

This section shall reflect on the Rome Statute's provisions relating to the investigations and prosecutions of individuals who may be immune from the Courts jurisdiction or who may be recipients of amnesties with respect to crimes within the subject matter of the Court.

3.2.3.1 Official and evidentiary immunities

Part III of the Rome Statute dealing with the general principles of criminal law is useful in assessing the effects of immunities on an individual alleged to have committed crimes within the jurisdiction of the Court. In this Part III, the Rome Statute clarifies instances where the Court will and will not exercise jurisdiction over an individual.¹⁴⁸ Most of these provisions are reflective of norms in international law. Article 26 elucidates the exclusion of jurisdiction by the Court 'over any person under the age of 18 at the time of the alleged commission of a crime'. In the situation in the DRC and Uganda, child soldiers were used in the armed conflict that existed in those countries. The reality of the situations is that these child soldiers were mostly forcibly recruited into the groups as the Trial Chamber found in the *Prosecutor v Thomas Lubanga Dyilo*.¹⁴⁹

Whereas the Office of the Prosecutor has taken a strategy to investigate and prosecute 'those who bear the greatest responsibility' for crimes in any given situation, it is unlikely that a person under the age of 18 years would bear this responsibility. Some commentators however mention that there is a lacuna in the Statute on how to deal

¹⁴⁸ According to Article 25 (1) Rome Statute, *supra* note 1, the Court only exercises jurisdiction over natural persons.

¹⁴⁹ On March 14 2012, Thomas Lubanga Dyilo was found guilty of the war crime of conscripting child soldiers. See Judgment Pursuant to Article 74 of the Statute in *Prosecutor v Thomas Lubanga Dyilo*, 14 March 2012, ICC-01/04-01/06-2842

with persons who are not children under the age of 15 years as expressed in other international human rights treaties but have yet to attain the age of 18 years at the time when the crimes were committed. *Dominic Ongwen*, one of the LRA commanders still at large with an outstanding warrant of arrest issued by the Court is a case in point. Studies by the Justice and Reconciliation Project, a civil society organisation operating in northern Uganda suggest that while Dominic Ongwen was abducted as a child and recruited as a soldier by the LRA, he ‘excelled’ in his designated duties and was elevated to become a senior commander by the LRA leader Joseph Kony. Dominic Ongwen and others like him may have committed crimes between the ages of 15 and 18 years, for which the Court would not have jurisdiction *stricto sensu*, yet such an individual may bear criminal responsibility based on national criminal law. The domestication of the Rome Statute may also present a challenge at the national level in relation to Article 17 where there is (or should exist) the capacity within national criminal justice systems to deal with juvenile cases. Unless cured at the national level, such a gap may undermine efforts in the local fight against impunity for international crimes.

Article 27 provides that:

“This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence...Immunities or special procedural rules which may attach to the official capacity of a person, whether

under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.”

Official capacity as Head of State or Government has been a ground to exclude criminal capacity and was supported by diplomatic relations among States¹⁵⁰ as well as supported by national laws.¹⁵¹ It is as a result of the irrelevance of official capacity at the Court that an arrest warrant was issued against the President of the Sudan Omar Al-Bashir and other government ministers, and summonses to appear issued to the Deputy Prime Minister of Kenya, Uhuru Kenyatta and other ministers in the Kenyan government. As discussed in Chapter I, these arrest warrants and summonses to appear have various effects on the cooperation between the Sudan, Kenya and other African States with the Court.

Article 31 of the Rome Statute presents grounds for excluding criminal responsibility and may count as forms of evidentiary immunity. They include: mental illness incapacitating a person from appreciating unlawfulness of an act;¹⁵² intoxication which vitiates appreciation of unlawfulness of an act;¹⁵³ self-defence;¹⁵⁴ unlawful act committed under duress or threat of imminent death or serious injury.¹⁵⁵ Article 32 of the Rome Statute provides that a mistake of fact or law, which negates *mens rea*, excludes criminal responsibility and as read with Article 33 of the Rome Statute, a

¹⁵⁰ Decision by the ICJ in The Case Concerning the Arrest Warrant of 11 April 2000, *DRC v. Belgium* illustrates this.

¹⁵¹ The Constitutions and other national legislations provide that the Head of State or Government shall be liable for civil or criminal charges while they occupy the position.

¹⁵² Article 31 (1) (a) Rome Statute, *supra* note 1.

¹⁵³ Article 31 (1) (b) Rome Statute, *supra* note 1; the exception to this rule is when a person voluntarily gets intoxicated under circumstances that the person knew that as a result of intoxication, he or she would commit an unlawful act.

¹⁵⁴ Article 31 (1) (c) Rome Statute, *supra* note 1; the exception also applies to threats to property essential for survival of people. Interestingly military necessity is not in itself a ground to exclude criminal responsibility.

¹⁵⁵ Article 31 (1) (d) Rome Statute, *supra* note 1.

mistake of law only exempts a person from criminal liability where they have received an order from a superior without knowing the order was unlawful.¹⁵⁶

3.2.3.2 Amnesties and the Rome Statute

The Rome Statute does not deal with the question of amnesties. Stahn however mentions three instances where the Court may be faced with the issues of amnesties: in the review of a decision of the Prosecutor not to initiate an investigation or prosecution under Article 53 (3); a ruling on admissibility under Article 18 and 19; and a deferral of investigation or prosecution under Article 16.¹⁵⁷ Stahn presents the scenario where an amnesty is issued by a state where crimes within the Court's jurisdiction are alleged to have taken place. As Article 17 (1) (a) and (b) require an investigation, which does not necessarily mean a criminal investigation, the possibility of a conditional amnesty combined with a truth and reconciliation procedure may satisfy the investigation requirement.¹⁵⁸ The Appeals Chamber decision on the admissibility challenge by the Government of Kenya however seems to suggest that for purposes of establishing that a State is able to deal with crimes to the exclusion of the Court, the state must demonstrate that there exists national criminal investigations or trials for the same individuals as are being investigated by the Court and for the same conduct in question. The Appeals Chamber rejected the general truth and reconciliation process in Kenya as a possible avenue to deal with the crimes committed during the 2007/2008 post-election violence in that country. In any

¹⁵⁶ Article 33 (2) Rome Statute, *supra* note 1, provides that orders to commit the crimes within the Court's jurisdiction remain unlawful.

¹⁵⁷ Stahn C, 'Complementarity, Amnesties and Alternative Forms of Justice: Some interpretive guidelines for the International Criminal Court' (2005) *Journal of International Criminal Justice*, 695 – 716 [hereinafter Stahn], 695-699

¹⁵⁸ Stahn, *supra* note 157, 698

event, the Truth, Justice and Reconciliation Act of 2008 clearly provides, in keeping with norms in international law on the question of amnesties, that there shall be no amnesties for war crimes, crimes against humanity and genocide.¹⁵⁹

Amnesties are generally inconsistent with the obligation of States to provide accountability for serious crimes under international law including war crimes, crimes against humanity and genocide.¹⁶⁰ If a challenge to the jurisdiction of the Court or admissibility of a case be raised by any party on account of an amnesty, the Court remains the final arbiter according to Article 19 and as discussed in Chapter II. The Court has not made any pronouncements on the legalities of amnesties for purposes of prosecutions at the Court. Nevertheless, from the emerging norm of the impermissibility of an amnesty for certain crimes, including those for which the Court has jurisdiction, it is reasonable to foresee that any amnesty, conditional or otherwise, granted to a person alleged to have committed a crime within the jurisdiction of the Court, will not exclude such a person from criminal responsibility and accountability before the Court. As to the surrender of the individuals alleged to have committed these crimes or the subpoena of witnesses with evidence that may assist the Court in the determination of innocence or guilt of an accused, states are obliged to cooperate with the Court within the meaning of Part IX and as discussed in Chapter I regardless of the immunities or amnesties that may apply. Article 71 provides for sanctions for persons before the Court, but the complexities of cooperation of reluctant witnesses

¹⁵⁹ Section 34 (2) and (3) Truth, Justice and Reconciliation Act no 6 of 2008 provides:

(2) The Commission may in accordance with this Part, and subject to subsection (3), recommend the grant of conditional amnesty to any person liable to any penalty under any law in Kenya.

(3) Notwithstanding subsection (2), no amnesty may be recommended by the Commission in respect of genocide, crimes against humanity, gross violation of human rights or an act, omission or offence constituting a gross violation of human right including extrajudicial execution, enforced disappearance, sexual assault, rape and torture.

¹⁶⁰ Stahn, *supra* note 157, 701

away from the Court are not sufficiently addressed. The practice of the two *ad hoc* Tribunals on how to deal with the complexities of cooperation – often in difficult political environments is useful.¹⁶¹ Nevertheless, the Rome Statute does not support the evaluation of these issues to national courts, but rather to interpretation by the Court judges.

3.3 THE RIGHTS OF VICTIMS OF INTERNATIONAL CRIMES

The Rome Statute has codified the rights of victims of international crimes for the first time in the history of international law. Victims of the core crimes are entitled to the right to participate in legal proceedings before the Court as well as the right to receive reparations. It may be important to first assess how this right of victims of international crimes arose under international law and how the right has developed over the years to the right to participate in legal proceedings and to reparations at the Court.

3.3.1 The right to participate in legal proceedings

The participation of victims of crimes within the jurisdiction of the Court in legal proceedings is said to be one of the major achievements of modern day international

¹⁶¹ For more on the complexities of co-operation between international criminal tribunals and states, see Peskin V, *International Justice in Rwanda and the Balkans – Virtual Trials and the Struggle for State Cooperation* (2008) Cambridge. See further Decision on assigned counsel application for interview and testimony of Tony Blair and Gerhard Schröder, *Prosecutor v. Milosevic*, Case No. IT-02-54, 9 December 2005 and the earlier decision in Decision on Application for Subpoenas, *Prosecutor v. Krsti*, Case No. IT-98-33-A, 1 July 2003.

criminal justice.¹⁶² This status to express “views and concerns” through legal representation had never before been accorded to victims at an international criminal tribunal. The shift in the Rome Statute from provisions purely retributive in nature to incorporating restorative aspects of justice through the inclusion of this right of victims to participate in the proceedings was in response to criticisms of the *ad hoc* Tribunals where there was no provision in the ICTR and ICTY Statutes expressly addressing victims.¹⁶³ In incorporating this right to participate in legal proceedings, the drafters of the Rome Statute were cognizant of this new role that victims would play in dispensing international criminal justice and particularly that the right to participate in legal proceedings may give a measure of satisfaction to those who have suffered harm.¹⁶⁴

The general principle that victims have a right to participate in proceedings is captured in Article 68 (3) of the Rome Statute. Earlier provisions of the Rome Statute also specify proceedings in which victims’ views must be sought.¹⁶⁵ Article 68 (3) provides that:

“Where the personal interests of victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which

¹⁶² Chung “Victims’ Participation at the International Criminal Court: Are concessions of the Court clouding the promise” 2008 6 *Northwestern University Journal of Human Rights* 159-227, 159.

¹⁶³ Jorda C & de Hemptinne J, *The Status and Role of the Victim, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY*, 1387, 1388 (Antonio Cassese et al. eds., 2002) (stating that the Rome Statute “appears to mark a new step forward ... victims are accorded the double status denied to them by the provisions setting up the *ad hoc* Tribunals. First they are able to take part in the criminal process.... Secondly, they are entitled to seek from the Court reparations”).

¹⁶⁴ See Silvia A. Fernández de Gurmendi, *Definition of Victims and General Principle, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE* 427, 429 (Roy S. Lee ed., 2001)

¹⁶⁵ Under Article 15 Rome Statute, *supra* note 1, victims may be heard when the Prosecutor commences investigations *proprio motu*; under Article 19 Rome Statute *supra* note 1, victims may be heard when questions relating to jurisdiction or admissibility are raised; and under Article 53 Rome Statute, *supra* note 1, as read with Rule 92(2) RPE victims may be heard when the Prosecutor determines not to investigate or prosecute based on the interests of justice.

is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.”

Victims can present these views and concerns through their legal representatives and in accordance with the Court’s Rules of Procedure and Evidence (RPE). In particular, victims have an absolute right to attend trial proceedings,¹⁶⁶ a discretionary right to participate in the questioning of witnesses,¹⁶⁷ the right to participate in pre-trial procedure such as investigations¹⁶⁸, the right to be heard on matters relating to decisions on reparations¹⁶⁹ and to intervene in appeals concerning reparation orders.¹⁷⁰ Article 68(3) also curtails victims’ right to participate where they would infringe on the rights of the accused. In this sense, there is a balancing of interests among the parties in the proceedings. Lee observes that ‘victims do not have the right to become a genuine party to the proceedings, but they do have the right to be represented before the ICC.’¹⁷¹

3.3.1.1 Victims’ participation in the phases of proceedings

At the outset, victims of crimes within the jurisdiction of the Court can only participate in proceedings once the Court’s jurisdiction has been seized in accordance with Article 12. Participation of these victims in Court proceedings is not automatic.

¹⁶⁶ Rule 91 (2) RPE

¹⁶⁷ Rule 91 (3) RPE

¹⁶⁸ Article 15 (3) Rome Statute, *supra* note 1.

¹⁶⁹ Article 75 (3) Rome Statute, *supra* note 1.

¹⁷⁰ Article 82(4) Rome Statute, *supra* note 1.

¹⁷¹ Lee ‘XI’ in *The International Criminal Court: Elements Of Crimes And Rules Of Procedure And Evidence*.

Victims who fall under a situation that is before the Court must fulfil certain requirements to participate on Court proceedings. Rule 89 of the RPE suggests that each individual victim must prepare an application to the relevant Chamber for determination of victim status. The interpretation by the judges at the ICC of this right to participate in legal proceedings has however drawn much attention and it is meritorious to reflect on the various interpretations of the right to participate in legal proceedings.

3.3.1.2 Participation at the investigative stage of proceedings

Aldana-Pindell points that ‘the Rome Statute and ICC RPE do not grant victims complete autonomy to make decisions regarding either the initiation of criminal investigation or how the investigation should proceed before trial.’¹⁷² Investigative powers lie squarely on the Prosecutor in accordance with Article 42 of the Rome Statute. What then is the role of victims at the investigative stage of proceedings at the Court? The first decision on this right to participate was issued in January 2006 by the Pre-Trial Chamber in the investigation of crimes in the situation in the DRC and effectively the first interpretation of Article 68 (3) of the Rome Statute.¹⁷³ The Pre-Trial Chamber, while recognizing that the general right to participate in the investigation stage of proceedings was not expressly granted by the Rome Statute, nevertheless granted victims the right to participate in the investigative stage of the proceedings. The Chamber found that this participation of victims was “consistent

¹⁷² See Aldana-Pindell, ‘In vindication of justiciable victims’ right to truth and justice for state-sponsored crimes’ 35 *Vanderbilt Journal of Transnational Law* 1399-1501, 1429.

¹⁷³ Situation in the DRC, Situation No. ICC-01/04-101-tEN-Corr, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, and VPRS 6, Public Redacted Version, para. 63 (Pre-Trial Chamber I, Jan. 17, 2006) [hereinafter 17 January 2006 DRC Decision].

with the object and purpose of the victims participation regime established by the drafters of the Statute.”¹⁷⁴ Article 68(3) therefore imposes an obligation on the Court *vis-à-vis* persons recognised as victims in terms of which they are authorised, irrespective of ‘any specific proceedings being conducted in the framework of such an investigation, to be heard by the Chamber in order to present their views and concerns and to file documents pertaining... [to an] investigation of ... [a] situation’.¹⁷⁵ Article 68(3) entails both substantive and procedural elements of the right to participation in that it affords individuals standing to claim their status as victims and to assert their recognised rights.

At the investigative stage, victims known to the Office of the Prosecutor and the Registry may express their views and concerns where a Pre-Trial Chamber adopts measures in relation to the protection of persons and evidence. This includes the protection and privacy of witnesses and victims; preservation of evidence; protection of arrested persons¹⁷⁶ or those who have appeared in response to summons; and the protection of national security information.¹⁷⁷ Equally, a unique investigative opportunity may arise, which requires immediate security of evidence, thus necessitating adoption of measures considered essential for the defence trial. Victims may also express their views and concerns during such unique investigative opportunity. Victims, through their legal representatives also participate in the pre-trial phase of the confirmation of charges proceedings.

¹⁷⁴ 17 January 2006 DRC Decision, *supra* note 173, para. 50

¹⁷⁵ 17 January 2006 DRC Decision, *supra* note 173, para 200-237

¹⁷⁶ Victim representation in the situation in Libya is on-going at the Court although the suspects *Saif Al-Islam* and *Mohammed Al-Senussi* are under arrest in Libyan government custody.

¹⁷⁷ Articles 57(3) (c) and Article 54(3) (f) Rome Statute, *supra* note 1, in relation to the duties of the Prosecutor.

Victims in a number of cases before the Court have expressed their views and concerns about the charges that have been brought against suspects who have been arrested or summoned to appear before the Court.¹⁷⁸ The concluded confirmation of charges hearings in the two Kenya cases *Prosecutor v. Muthaura, Kenyatta & Ali* and *Prosecutor v. Ruto, Kosgey & Sang* highlighted challenges in victim participation and legal representation at the Court. On several occasions, Victims' Legal Representatives lodged complaints about the lack of access to their clients owing to either security situation in Kenya or the lack of adequate funds from the Registry to effectively consult and confer with clients. In both cases, Victims' Legal Representatives were based outside of Kenya. As a result of these hiccups, the Trial Chamber seized with the matter has recently decided that the victims in the Kenya cases would be represented by local counsel who would interface with the Office for the Public Counsel for Victims. No doubt, effective participation at the pre-trial stage not only sets the tone for the trial stage but also is imperative for the effective exercise of victims' rights in the entire Court process.

Chung notes two major developments following the first decision to grant participatory rights to victims at the investigative stage of proceedings. First, due to the slow processing of hundreds of applications from victims in the situations under investigation by the Court, in the Darfur region of The Sudan; the DRC; northern Uganda; and the Central African Republic ("CAR"), there was growing evidence that the system of victims' participation established in the early decisions was failing the very victims it was meant to serve.¹⁷⁹

¹⁷⁸ Victims were represented in the confirmation charges in the following cases: Kenya, DRC, CAR, Cote d'Ivoire, Darfur

¹⁷⁹ Chung, *supra* note 162, 160

Van den Wyngaert supports this critical failing and explains that the process of receiving individual applications from victims, in standard forms plus supporting evidence, which often have to be translated to one of the Court's official languages, is a long and cumbersome process.¹⁸⁰ These applications are also circulated to the different parties for their observations before a final determination is made by the judges - first to grant victim status and then to confer the right to participate in a proceeding. Moreover, an order issued by a Chamber granting a victim the right to participate in any one stage of the proceedings does not guarantee that they can participate in subsequent stages of the proceedings. Victims are compelled to submit further applications for assessment of the personal interest¹⁸¹ at every stage of proceedings. Van den Wyngaert laments that this process may work in a national proceeding where the number of victims is not as voluminous as at the Court. The case-by-case approach adopted by the Court inevitably delays legal proceedings and may not be sustainable as the number of situations and cases increase.¹⁸² This problem, in the practice of the Court, was discussed at the conference in Rome prior to the adoption of the Rome Statute. Some delegates at the Rome conference mostly having the adversarial model in mind had feared the 'crippling effect' of granting participatory rights to victims beyond their more traditional role as witnesses.¹⁸³

Chung further notes that, two years after this first decision on victims' right to participate in legal proceedings was issued, the second development relates to the Pre-

¹⁸⁰ Van den Wyngaert "Victims Before International Criminal Courts: Some views and concerns of an ICC Trial Judge" 2011 44 *Case Western Reserve Journal of International Law* 475-493, 478

¹⁸¹ In the 17 January 2006 DRC Decision, *supra* note 173, the Pre-Trial Chamber's view is that applications by victims will be on a case-by case basis to determine the impact of the victims' interests.

¹⁸² Van den Wyngaert, *supra* note 180, 479-480

¹⁸³ Mekjian GJ & Varughese MC, 'Hearing the Victims' Voice: Analysis of victims' advocate participation in the trial proceeding of the International Criminal Court' 2005 XVII 1 *Pace University School of Law Journal* 1-49, 19.

Trial Chamber's granting leave for an appeal to determine whether the various decisions of the Pre Trial Chambers had correctly interpreted the governing rules to permit them to grant a "procedural status of victim" or theoretical right to participate, during the investigative and pre-trial stages of the proceedings.¹⁸⁴ There was an urgent need to clarify how applications for participation in the investigative and pre-trial stages of proceedings are to be dealt with.

3.3.1.3 Participation at the Trial Stage of Proceedings

The trial stage is the most visible platform for victims participating in legal proceedings at the Court. In this stage, victims are not only represented as witnesses called by either the Prosecution or the Defence, but they are considered as a party to the trial proceedings represented by Counsel of their choice. Concern has been raised that the presence of victims as a party in the trial stage unduly prejudices the accused in that Counsel for Victims may take on the role of *Prosecutor bis*. Musila notes that

The Prosecutor's and victims' interests do not always converge and that the Prosecutor may often be driven by the singular objective in the furtherance of her/his law enforcement function – establishing guilt as efficiently as possible,

¹⁸⁴ Chung, *supra* note 162, 161; *See* Situation in Darfur, Sudan, Situation No. ICC-02/05-118, Decision on Request for Leave to Appeal the "Decision on the Requests of the OPCV on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2) (e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor," Public, 7-8 (Pre-Trial Chamber I, Jan. 23, 2008) [hereinafter First Darfur Grant of Appeal]; Situation in the Democratic Republic of the Congo, Situation No. ICC-01/04-438, Decision on Request for Leave to Appeal the "Decision on the Requests of the OPCV on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2) (e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor," Public, 7-8 (Pre-Trial Chamber I, Jan. 23, 2008) [hereinafter First DRC Grant of Appeal].

a fact that may lead to ignoring issues central to victims' claims and concerns.¹⁸⁵

If the first trial at the Court in the case *Prosecutor v. Thomas Lubanga Dyilo* is anything to go by, the trial judges are astute and have been seen to uphold the rights of the accused to a fair trial.

The trial process in an adversarial system presupposes that the Prosecution will build its case against the accused and discharge the burden of proof. The Defence on its part will make submissions aimed at creating a reasonable doubt that the accused committed the crimes for which s/he is charged. The Court's RPE however have adopted a hybrid version of both the adversarial and inquisitorial system much like the RPE of the ICTR and ICTY. In the Court's context, the inclusion of the expression of victims' views and concerns is akin to the *partie civile* under the French legal system. How do the trials at the Court run? All parties, including victims' legal representatives make oral presentations and interventions at the hearing, through written submissions or both. Victims' legal representatives are not silent observers during proceedings and the Pre-Trial Chamber in the situation in the DRC supports this.¹⁸⁶ It is true as well that victims' legal representative are permitted to observe proceedings and make submissions based on their observations.¹⁸⁷ Rule 89 RPE directs that victims' legal representatives can make opening and closing statements. It provides in relevant portion:

¹⁸⁵ Musila G, *Rethinking International Criminal Justice: Restorative justice and the rights of victims at the International Criminal Court*, (Berlin, Lap Lambert Academic Publishing) 2011, 153.

¹⁸⁶ *Situation in the Democratic Republic of Congo (Prosecutor v. Thomas Lubanga Dyilo)* Decision on the Arrangements for Participation of Victims a/001/06, a/002/06 and a/003/06 at the Confirmation Hearing, 22 September 2006 [hereinafter *Lubanga Confirmation Hearing*] at 6 – the Pre-Trial Chamber confirmed that Victims' Legal Representatives can make opening and closing statements.

¹⁸⁷ Rule 91 (2) RPE; *See* written submissions relating to *Lubanga Confirmation Hearing*

“[...] Subject to the provisions of sub-rule 2, the Chamber shall then specify the proceedings and manner in which participation is considered appropriate, which may include making opening and closing statements.”

Rule 91(2) provides that:

“A legal representative of a victim shall be entitled to attend and participate in the proceedings in accordance with the terms of the ruling of the Chamber and any modification thereof given under rules 89 and 90. This shall include participation in the hearings unless, in the circumstances of the case, the Chamber concerned is of the view that the representative’s interventions should be confined to written observations or submissions. The Prosecutor and the Defence shall be allowed to reply to any oral or written observation by the legal representative for victims.”

The RPE support the role of the legal representative to intervene in the trial proceedings by questioning a witness, an expert or an accused.¹⁸⁸ However, the Trial Chamber reserves the right to regulate the right to question in terms of Rule 91(3) (b) to take into account ‘the rights of the accused, interests of witnesses, the need for a fair, impartial and expeditious trial and to give effect to Article 68 paragraph 3’, which relates to personal interests of the victims, appropriateness and the defendant’s rights. The Appeals Chamber has endorsed the position that Rule 92(5) RPE which provides for a mandatory right for victims or their legal representatives to be notified in a timely fashion of all public proceedings and filings before the Court. In the Appeals Chamber’s, view, victims will additionally be afforded access to confidential

¹⁸⁸ Rule 91(3)(a) RPE

material to the extent that such access does not breach other necessary protective measures if in the view of the Chamber a victim's personal interests are materially affected. In the RPE and Chambers' decisions, we see that the Court judges' have ensured that this innovative aspect of legal proceedings that includes a new party – victims – does not prejudice the accused and does not create a *Prosecutor bis* situation. The Trial Chamber remains in control of the interventions of victims' legal representatives.

Victims are permitted to participate in reparations proceedings, which commence at the end of a trial and where an accused has been found guilty of the offences with which (s) he is charged. Reparations proceedings commence at the Trial Chamber and are subject to appeals. In this regard, Article 82(4) Rome Statute provides that:

“Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.”¹⁸⁹

Legal representatives are invited to make submissions orally, in writing or both as the Chamber pleases relating to orders for reparations that it will make.

3.3.1.4 Participation at the appellate stage and other proceedings

Victims are allowed to participate in appellate proceedings where their interests are shown to be affected. The Appeals Chamber in *Prosecutor v Thomas Lubanga Dyilo* agreed with victims and the Prosecutor that since the Trial Chamber's ruling to

¹⁸⁹ Article 82(4) Rome Statute, *supra* note 1.

dismiss charges against the accused based on abuses by the Prosecutor of non-disclosure of exculpatory materials covered by Article 54(3)(e) of the Rome Statute, affected victims' interests in that they could no longer participate in the trial and concomitantly would not be able to request for reparations in the case, the victims could then participate in the appellate proceedings and submit their views and concerns pertaining to the Prosecutor's motion to appeal.¹⁹⁰

Where there is an appeal relating to reparations orders, Rule 91 (4) RPE provides as follows:

“A legal representative of the victim, the convicted person or a bona fide owner of property adversely affected by an order under Article 75 may appeal against the order for reparations, as provided in the Rules of Procedure and Evidence.”

3.3.2 Victims' rights to reparations under international law

Reparations are the embodiment of a society's recognition, remorse and atonement for harms inflicted.¹⁹¹ To an extent, reparations represent the acknowledgment that the recipient has experienced some form of harm and that there is a need to redress this harm and restore the individual to the place that (s)he was before the harm took place. However, it is clear that in so many instances that it is not possible to fully restore the individual who has gone through the trauma of an event to the state prior to the event, particularly because restoration is not merely a matter of quantum. This is true in the

¹⁹⁰ *Prosecutor v Thomas Lubanga Dyilo*, 'Decision on the Participation of Victims in the Appeal' 6 August 2008, ICC-01/04-01/06 OA 13.

¹⁹¹ Roht-Arriaza N, 'Reparations Decisions and Dilemmas' (2004) 27 *Hastings International and Comparative Law Review*, 157-219 [hereinafter Roht-Arriaza], at 159.

case of killings, torture, rape and even destruction to personal property, which has sentimental value attached to it. In these cases reparations are not to be seen as replacement of what was lost because that is not possible as illustrated above, but reparations are aimed at assisting the harmed individual to, in a sense move on with their lives in a positive sense.

There has been a progressively growing legal basis for the redressing victims of gross violations of human rights and serious violations of humanitarian law. Reparations has long been a recognized principle of international law and evidenced in human rights instruments as well as in the decisions of regional human rights and national courts. It has a basis in both tort (delict) and the law governing state responsibility.¹⁹²

Van Boven describes reparations in human rights, as a generic term representing ‘all types of redress, material and non-material, for victims of human rights violations’.¹⁹³

Reparations can encompass a variety of concepts including damages, redress, compensation, satisfaction and restitution.¹⁹⁴ Each component represents a unique remedy to victims. Compensation refers to the amount of money awarded by a judicial or quasi-judicial body after an assessment of harm suffered. Restitution is a return to the situation before the harm occurred. Rehabilitation refers to the provision of on-going social, medical, legal and/or psychological care to victims. Satisfaction refers to broader measures, which may be individual or societal, such as the

¹⁹² Roht-Arriaza, *supra* note 193.

¹⁹³ Van Boven T, ‘Study Concerning the right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms’ UN Doc E/CN.4/Sub.2/1993/8 of 2 July 1993 [hereinafter Van Boven], para 13.

¹⁹⁴ Van Boven, *supra* note 193; See also Saul B ‘Compensation for Unlawful Death in International Law: A focus on the Inter-American Court of Human Rights’ (2004) 19 *American University International Law Review* 523-584, at 541

verification of facts, the search for bodily remains, public apologies, memorialisation, institutional reforms and sanctioning of perpetrators.

Reparations can be material (compensation, restitution and rehabilitation) or moral. Moral reparations can include a range of non-material measures which address the victim's felt-needs to be heard, for justice and for measures to avoid repetition of the violating act such as the removal of those most responsible from positions of power and influence, the disclosure of the facts of a victim's mistreatment or official, public apologies from governments for past violations.¹⁹⁵

Before assessing the right to reparations for individuals as is the possibility under the Rome Statute, the following section shall reflect on the evolution of this right in the form of remedies from a state-centric approach based on traditional international law to the individualised approach stemming from the development of human rights treaties.

3.3.2.1 Inter-State remedies

Traditional international law placed States at the centre of the law of nations. Remedies at the international level were therefore associated with principles of state responsibility. As stated by the Permanent Court of International Justice ("PCIJ") in the *Chorzow Factory* case, the obligation to make reparation to another State for the breach of an international legal obligation is a fundamental principle of international

¹⁹⁵ Roht-Arriaza, *supra* note 191, 159.

law.¹⁹⁶ The International Law Commission (“ILC”) has codified this principle.¹⁹⁷ Some conservative interpretations of international law continue to limit reparations to the inter-state level. Consequently aggrieved nationals of any state can only be redressed where their claims are espoused by their state of nationality and the claim is made against another state for the harm caused to the individual.¹⁹⁸ However, since World War II (WWII), international law has shifted dramatically, in both theory and practice, towards the protection of individual human rights and as such, international law now guarantees an individual right to reparation.¹⁹⁹

3.3.2.2 Remedies under international and regional human rights treaties

The cause of the shift from State to individual-centric understanding of remedies has been the development of international human rights law. Most human rights treaties concluded since WWII includes a right to a remedy.²⁰⁰ The International Covenant on Civil and Political Rights (“ICCPR”), one of two core human rights treaties, demands that each State Party ensure that any person whose rights or freedoms are violated shall have an effective remedy, notwithstanding that the violation has been committed

¹⁹⁶ Chorzow Factory case (Jurisdiction); ICJ, Reparation for Injuries Suffered in the Service of the United Nations, para.184; The Wall Advisory Opinion.

¹⁹⁷ See Draft Articles on Responsibility of States for Internationally Wrongful Acts, Articles 30-31 and 34-37.

¹⁹⁸ For an example of a conservative interpretation of international law, Diplomatic protection was first espoused by the International Court of Justice in the *Barcelona Traction* case. See also Final Report of the Special Rapporteur, Mr. M. Cherif Bassiouni: The Right to Restitution, Compensation, and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms UNESCOR, 56th Sess. UN Doc. E/CN.4/2000/62, (January 18, 2000) [hereinafter Bassiouni], at 6.

¹⁹⁹ Though the method by which this reparation is achieved is still open to debate. Shelton D, ‘Righting Wrongs: Reparations in the Articles of State Responsibility’ 96 *American Journal of International Law* (2002), 833-856 [hereinafter Shelton], at 834. See also the Darfur Commission of Inquiry Report, paras. 596-597, which states the universal recognition of the right to an effective remedy, has a bearing on State responsibility. Thus, an offending State now has an international responsibility to make reparations towards the victims of an internationally wrongful act (which includes international crimes such as genocide, crimes against humanity and war crimes).

²⁰⁰ See also Shelton, *supra* note 199, 843; Bassiouni, *supra* note 198, 7.

by persons acting in an official capacity.²⁰¹ Furthermore, it states that the claim to a remedy should be determined by a competent authority (judicial, administrative, legislative or otherwise) imbued with the power to enforce any remedies ordered.²⁰²

The right to a remedy has been found to contain both procedural and substantive components.²⁰³ Procedurally, the right to remedy broadly entails that the State afford the victim access to justice. This entails the creation of appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law.²⁰⁴ Generally speaking, this means that the victim should have their claim heard by an independent and impartial remedial body with the ability to afford adequate redress for the alleged violation.²⁰⁵ Substantively, the United Nations Human Rights Council (“UNHRC”) has stated that the right to an effective remedy requires States to make reparations to individuals whose rights have been violated. Such reparation can include, among other measures, restitution, rehabilitation and satisfaction (including public apologies, construction of memorials and the prosecution of human rights violators).²⁰⁶

Remedies are also available for violations of the International Covenant on Economic, Social and Cultural Rights (“ICESCR”). Though the rights guaranteed in this treaty are to be realised progressively,²⁰⁷ the Committee on Economic, Social and Cultural Rights has stated that it considers the rights contained in the ICESCR to be capable of direct and immediate operation within the domestic legal system of each State

²⁰¹ Article 2(3) (a) ICCPR.

²⁰² Article 2(3)1(b)-(c) ICCPR.

²⁰³ Shelton, *supra* note 199, 839.

²⁰⁴ UNHRC General Comment No. 31, para. 15.

²⁰⁵ Shelton, *supra* note 199, 839.

²⁰⁶ UNHRC General Comment No. 31, para. 16.

²⁰⁷ Article 2(1) ICESCR.

Party.²⁰⁸ Furthermore, States have been encouraged to create accessible, timely and effective judicial or administrative remedies for all justiciable ICESCR rights.²⁰⁹

The right to a remedy is also reflected in every regional human rights treaty. For example, the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”) states that “everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”²¹⁰ The American Convention of Human Rights (“ACHR”) empowers the Inter-American Court of Human Rights (“IACtHR”) to “rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.”²¹¹ Lastly, the African Charter on Human and Peoples’ Rights (“ACHPR”) contains provisions ensuring access to justice, the right to adequate compensation in the case of spoliation of resources and enshrining judicial independence.²¹² The absence of an explicit and general guarantee of a right to an effective remedy has been somewhat addressed by the conclusion of the Protocol to Establish the African Court on Human and Peoples’ Rights which empowers the Court to “make appropriate orders to remedy [a] violation, including the payment of fair compensation or reparation.”²¹³

²⁰⁸ Committee on Economic, Social and Cultural Rights, General Comment No. 9

²⁰⁹ Shelton, *supra* note 199, 847; ECOSOC, General Comment No. 3; ECOSOC, GC No. 9

²¹⁰ Article 13, ECHR.

²¹¹ Article 63, ACHR.

²¹² Articles 7, 21(2) and 26 ACHPR

²¹³ Article 27(1) Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights.

A State which fails to protect an individual's human rights commits an independent, further violation if it also denies the victims of those violations an effective remedy. While most scholars seem relatively firm in this opinion, the areas of controversy in this field surround the precise contours of the effective remedy and whether it can be provided through different means. Some international treaties specify particular means by which remedy must be afforded²¹⁴ while the ICCPR remains relatively open to judicial, administrative and other methods being used.

3.3.2.3 The UN Basic Principles and Guidelines on Reparations

The right to reparations developed further in 1985 with the conclusion of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (hereinafter Basic Principles of Justice).²¹⁵ Though focused on domestic crimes, these principles set forth comprehensive standards for a State's obligation to provide reparations to individual victims of crime.²¹⁶ The principles state that redress should be granted through formal or informal procedures that are expeditious, fair, inexpensive and accessible. The principles also state that perpetrators should provide reparations directly and that States should establish national reparations funds to compensate in the event of a perpetrator's indigence.²¹⁷ Lastly, the Basic Principles of Justice state that victims participate in proceedings which affect their personal

²¹⁴ Convention Against Torture, Art 14 specifies that States Parties are to ensure victims of torture obtain redress and have an enforceable right to fair and adequate compensation. Though it should be noted that even in this case, litigation surrounding the Convention Against Torture has revealed that reparations can still be denied when a claim is brought outside of the State in which the torture took place. See *Al-Adsani v. Kuwait*; *Al-Adsani v. United Kingdom*.

²¹⁵ *Basic Principles of Justice*.

²¹⁶ Bassiouni, *supra* note 198, 9.

²¹⁷ *Basic Principles of Justice*, Annex, A, 8; Annex, A, 4; Annex, A, 5.

interests.²¹⁸ There is a connection between the Basic Principles of Justice's concern for victim's dignity and participation and the inclusion of victim's participation and reparation provisions in the Rome Statute.²¹⁹

The Basic Principles of Justice helped to lay the foundation for the eventual conclusion of the UN Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UN Basic Principles and Guidelines).²²⁰ While not legally-binding²²¹, the Basic Principles and Guidelines aim to consolidate and organize existing obligations to as great a degree as possible. Thus, several prominent voices in international law consider them to be representative of the current status of the right to reparations under international law.²²² The Basic Principles and Guidelines state that the right to reparation is part of the State's core obligation to respect, ensure respect and implement international human rights law and international humanitarian law.²²³ They enshrine three basic rights for victims of international crimes: the right of access to justice, the right to reparation for harm suffered and the right to truth.²²⁴ With respect to reparation, any measures provided should be "proportional to the gravity of the violations and the harms suffered" and should be derived from the perpetrator, if possible, with the State providing monetary

²¹⁸ This encouragement was qualified as the *Basic Principles of Justice* seek to ensure such participation is in line with the rights of the accused and relevant national criminal law and procedure, *Basic Principles of Justice*, Annex, A, 6 (b).

²¹⁹ Ferstman C, "NGOs and the Role of Victims in International Criminal Justice" Seminar organised by the Forum for International Criminal Justice and Conflict, Monday 2 October 2006

²²⁰ Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, GA Res., UNGAOR, 60th Sess., UN Doc. A/Res/60/147 (16 December 2005) [hereinafter Basic Principles and Guidelines]

²²¹ Rombouts et al, in De Feyter, 362.

²²² Van Boven, in Ferstman et al, 32.

²²³ Basic Principles and Guidelines, *supra* note 220, Principle I, (1); II (3) (d).

²²⁴ Basic Principles and Guidelines, *supra* note 220; Bassiouni, *supra* note 198, 28-34.

compensation when this is not possible.²²⁵ Reparations judgments should be enforceable domestically and reparation is deemed to include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.²²⁶

Restitution should seek to “restore the victim to the original situation before the gross violations” occurred.²²⁷ Compensation should be provided for any economically assessable damage including, among other things, physical and mental harm, lost economic opportunities, material damages (loss of earnings or earnings potential), moral damages and costs (medical, psychological, and the like).²²⁸ Rehabilitation includes medical, psychological care and legal and social services.²²⁹ Satisfaction measures include the cessation of a continuing violation, verification of facts and public disclosure of the truth, the location of the disappeared, assistance with the recovery, identification and reburial of bodies in accordance with the victim’s family’s wishes and cultural practices.²³⁰ Moreover, satisfaction also includes various symbolic reparations such as official declarations or judicial decisions restoring the dignity of the victim or their family, public apologies or commemorations and tributes to the victims.²³¹ Satisfaction also entails longer term goals, such as the creation and promotion of mechanisms for preventing and monitoring social conflicts and their resolution.²³² Lastly, guarantees of non-repetition include, among other things, ensuring that the military is under civilian control, that all judicial proceedings accord with due process and that judicial independence is ensured.²³³

²²⁵ Basic Principles and Guidelines, *supra* note 220, Principle, IX, (15).

²²⁶ Basic Principles and Guidelines, *supra* note 220, Principle, IX, (17-18).

²²⁷ Basic Principles and Guidelines, *supra* note 220, Principle IX, (19).

²²⁸ Basic Principles and Guidelines, *supra* note 220, Principle IX, (20)

²²⁹ Basic Principles and Guidelines, *supra* note 220, Principle, IX, (21)

²³⁰ Basic Principles and Guidelines, *supra* note 220, Principle, IX, (22) (a)-(c).

²³¹ Basic Principles and Guidelines, *supra* note 220, Principle IX, (22) (d), (e), (g).

²³² Basic Principles and Guidelines, *supra* note 220, Principle, IX, (23) (g).

²³³ Basic Principles and Guidelines, *supra* note 220, Principle IX, (23), (a)-(c).

3.3.2.4 Remedies under international humanitarian law (IHL)

Though strongly debated, IHL contains elements of a right to a remedy. The 1907 Hague Convention requires that a State which violates its terms pay compensation.²³⁴ The Geneva Conventions furthered this protection by formally prohibiting agreements between States which would absolve liability for ‘grave breaches’ of IHL.²³⁵ Furthermore, Additional Protocol I reaffirmed that a party to an international armed conflict which violates its IHL obligations shall, if the case demands, be liable to pay compensation and bear responsibility for the actions of individuals in its armed forces.²³⁶

However, despite the seemingly explicit provisions in the IHL treaties above, the existence of an individual right to reparation for violations of IHL is contested.²³⁷ Some argue that under IHL, individuals are limited to asking the State of their nationality to espouse a claim for diplomatic protection and assert claims for compensation from the violating State in question. Others, including the International Committee of the Red Cross, argue that the trend of international law is towards the recognition of the individual’s right to a remedy and specifically reparations in the context of IHL violations.²³⁸ For the purposes of this paper, it is enough to note that reparations of some kind (whether requested by a State or an individual) are due to victims of international crimes.

²³⁴ Article 3, 1907 Hague Convention.

²³⁵ Article 148, Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949.

²³⁶ Art. 91, Additional Protocol I.

²³⁷ See contra, Bassiouni, *supra* note 198, 9; ICRC Customary IHL Study Rules, 537, 541-546.

²³⁸ ICRC CUSTOMARY IHL Study Rules, 537 and discussion of State practice at 541-546.

3.3.2.5 Reparations in practice at the international level

Practice at the international level with regard to giving effect to the right to reparations has, in general, been disappointing. There have been some individual successes, but there has been little actual compensation to victims for violations.²³⁹ The UNHRC generally issues general or declaratory decisions and affords States a large margin of appreciation on specific reparation awards.²⁴⁰ Nevertheless, in cases pertaining to the right to life and the prohibition of torture, the UNHRC has expressed the view that States are under a legal obligation to investigate, take actions thereon, bring to justice the persons found responsible and extend treatment to the victims.²⁴¹ The UNHRC has also recommended the payment of “adequate” or “appropriate compensation” in recent cases.²⁴² Though underwhelming, the UNHRC’s decisions can be conceived as providing victims of human rights abuses a measure of satisfaction and a guarantee against non-repetition.

States have also provided reparations to victims by means of inter-State negotiation. For example, as a result of international negotiation and lobbying, Holocaust victims have been compensated by Germany through a variety of means. Under the German *weidergutmachung* law, individual compensation was given to victims or the State of Israel (if no living survivors). In total, Germany has provided \$104 billion to victims of Nazi crimes. It has also provided apologies, restitution of lost property,

²³⁹ Sarkin, in De Feyter, 155.

²⁴⁰ Oette, in Ferstman et al, 219.

²⁴¹ Van Boven, in Ferstman et al, 23.

²⁴² Rombouts et al, in De Feyter, 377 referring to the UNHRC decisions *Sminova v. Russia*; *Perterer v. Austria*; *Kankanamge v. Sri Lanka*. The preference for general recommendations to pay compensation is echoed in the practice of the UN Committee Against Torture. See Oette, in Ferstman et al, 238.

compensatory pensions and other measures aimed to supplement the material compensation provided by legal measures.²⁴³

Claims Commissions provide another method for victims to obtain reparations from States for violations of international law. Through institutions such as the UN Claims Commission and the Ethiopia-Eritrea Claims Commission, victims have been able to gain some measure of reparations.²⁴⁴ Lastly, several international reparations funds, such as the Voluntary Fund for Victims of Torture, have been established to provide compensation to victims. This fund is supported by voluntary donations from States, organizations and individuals and provides funding to non-governmental organizations which assist torture victims and their families. It is one of the largest United Nations humanitarian funds with a budget of \$13 million.²⁴⁵ Other examples of international reparations funds include the UN Voluntary Trust Fund on Contemporary Forms of Slavery, the UN Development Program Trust Fund for Rwanda and the Court's Trust Fund for Victims ("TFV").

3.3.2.6 Reparations in practice at the regional level

²⁴³ Bassiouni, *supra* note 198, 10; Shelton, *supra* note 199, 841-844; It should be noted that Germany's practice with respect to the international crimes committed during WWII has not been adopted universally. Japan, for example, has taken a markedly different path. It has staunchly refused to pay individual claims arising out of its WWII actions. It has compensated some States for WWII-related activities (roughly \$3.9 billion to the Philippines, Vietnam, Burma and Indonesia). It has also created a 'consolation fund' for former 'comfort women' of the Japanese Army. However, compensation claims in the Japanese courts and in the United States' court system have failed due to, among other reasons, statutes of limitations and the waivers found in the peace treaties signed after WWII.

²⁴⁴ As of July 2004, the overall amount of compensation made available by the UN Claims Commission was \$18 billion; See also Shelton, *supra* note 199, 852; ICRC, CUSTOMARY IHL Study Rules, 542. For information on the Ethiopia-Eritrea Claims Commission, see ICRC, CUSTOMARY IHL Study Rules, 542.

²⁴⁵ See also Bassiouni, *supra* note 198, 34; Roht-Arriaza, *supra* note 191, 175.

As noted above, almost every regional human rights treaty guarantees a right to a remedy (in one form or another). The practice of these regional systems has been very instructive in fleshing out the contours of the right to reparations under international law.

The IACtHR has, arguably, generated the most important jurisprudence on forms of reparations other than, or in addition to, compensation. It has stated consistently that the obligation to provide reparations reflects a rule of customary law²⁴⁶ and has ordered a wide range of innovative measures²⁴⁷ within the traditional categories: restitution,²⁴⁸ compensation,²⁴⁹ rehabilitation,²⁵⁰ and satisfaction²⁵¹ and guarantees of non-repetition.²⁵² Furthermore, the IACtHR has set up trust funds, appointed experts and kept cases open in order to monitor the implementation of the ordered remedies.²⁵³

In contrast, the European Court on Human Rights (“ECtHR”) has been very conservative when ordering reparations, limiting its exercise for the most part to

²⁴⁶ Shelton, *supra* note 199, 841.

²⁴⁷ Faúndez Ledesma, *The Inter-American System for the Protection of Human Rights: Institutional and procedural aspects* / Héctor Faúndez Ledesma. -- 3 ed. -- San José, C.R. :Instituto Interamericano de Derechos Humanos, 2008.

²⁴⁸ The IACtHR has determined that the ideal outcome of a guarantee of “fair and adequate compensation” is full restitution, i.e. the restoration of the status quo ante. However, where this is not possible, compensation is often required. De Greiff, *Handbook*, 455.

²⁴⁹ Examples of this category of reparation measures include reimbursement of cost and expenses.

²⁵⁰ Examples of this category of reparation measures include medical and psychological treatment.

²⁵¹ Examples of this category of reparation measures include public apologies or symbolic memorials.

²⁵² In general, reparations measures only benefit the direct victims of the human rights violation that have been recognized as such in the first stages of the procedure before the Inter-American Commission on Human Rights and their next of kin. However, in some cases, with the aim to address the causes of violations in order to prevent recurrence the IACtHR, has also specified a range of measures including investigation, prosecution and punishment of those responsible, legislative and institutional reforms, as well as training as “guarantees of non-repetition”. As a result of the compliance of these measures, such judgments have had a wide effect, reaching individuals that have not appeared as applicants before the Court but were suffering the same human rights violation. In this respect, what is noteworthy about these types of measures are that at the same time of addressing the problem of the limited access to the international system, have also secured in some aspects the effective domestication of the American Convention. See: IACtHR, Case of “The Last Temptation of Christ” (Olmedo-Bustos et al.) v. Chile. Merits, Reparations and Costs. Judgment of February 5, 2001. Series C No. 73

²⁵³ Shelton, *supra* note 199, 841.

monetary reparation. Furthermore, the President of the Court has indicated that just satisfaction²⁵⁴ does not automatically flow from the finding of a violation of the ECHR or its Protocols. Furthermore, the President stated that compensation will be granted only in default of the domestic judicial system to guarantee a full reparation and only “if necessary”.²⁵⁵

Finally, the case-law of the African Commission on Human and Peoples’ Rights shows a hesitation in making specific recommendations on awards for compensation or other forms of reparations. Instead, the Commission has preferred to declare a violation and grant the State Party a measure of discretion in terms of the implementation of the remedy.²⁵⁶

3.3.3 The right to reparations under the Rome Statute

As previously mentioned, one of the fundamental contributions of the Rome Statute to the body of international criminal law is the provision of the right to reparations to victims of crimes covered by the Statute.²⁵⁷ There are two key provisions in the Rome Statute pertaining to this right to reparation. Article 75 relating to the right of reparations to victims and Article 79 which establishes the Trust Fund for Victims (TFV) for the benefit of victims of crimes within the jurisdiction of the Court and for families of such victims. In relevant portion Article 75 provides that:

²⁵⁴ Article 41, ECHR.

²⁵⁵ President of the ECHR, Practice Direction, Just Satisfaction Claims. 28 March 2007, Available at: <http://www.echr.coe.int/NR/ronlyres/8227A775-CD37-4F51-A4AA-1797004BE394/0/PracticeDirectionsJustSatisfactionClaims2007.pdf>

²⁵⁶ Oette, in Ferstman et al, 219.

²⁵⁷ Haslam E, ‘Victim Participation at the International Criminal Court: A triumph of hope over experience?’ in D. McGoldrick, P Rowe & E Donnelly, *The Permanent International Criminal Court: Legal and Policies Issues* (2004) 315-334.

The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation... determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.²⁵⁸

After making a determination as to the award, the Court is empowered to make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims. The Court may order that such an award is made through the TFV. Rules 94 to 96 RPE set out the procedures for reparations to victims. These rules direct that the Court may invite to the reparations' hearings not only the victims and the convicted person, but also interested persons or interested States whose properties could be affected by the rulings on reparations. Nevertheless, neither the Rome Statute nor the RPE prescribe how these provisions regarding reparations will be implemented.²⁵⁹

3.3.3.1 Decision establishing principles and procedures to be applied to reparations

²⁵⁸ Article 75(1) Rome Statute; See Donat-Cattin D, 'Article 68' in Triffterer *Commentary on the Rome Statute of the International Criminal Court: Observer's notes article by article* (1999) 965-1014 for a history of the provision relating to the right to reparations.

²⁵⁹ Henzelin M, Heiskanen V & Mettraux G, 'Reparations to Victims Before the International Criminal Court: Lessons from international mass claims processes' (2006) 17 *Criminal Law Forum* 317-344, at 338 noting that the 'Statute and Rules do not provide...any predetermined mechanisms or procedures for processing reparations claims and implementation of awards'.

Trial Chamber I in the case of the *Prosecutor v. Thomas Lubanga Dyilo* established the principles and procedures to be applied to reparations in August 2012.²⁶⁰ This decision followed the Judgment Pursuant to Article 74 of the Rome Statute in the same case where the accused *Thomas Lubanga Dyilo* was found guilty of the war crimes that he was charged – including conscripting or enlisting children under the age of fifteen years into armed forces or groups and using them to participate on the hostilities. This is the first decision by the Court interpreting the right to reparations and sets important benchmarks and foundations in the reparations regime and victimology in international criminal justice.

In terms of the procedure that was followed in the determination of the Court's principles and procedures to be applied to reparations in line with the RPE, the Trial Chamber granted leave for submissions from the following parties before making its final determination on the matter: the Office of the Prosecutor; The Defence of the convicted person; Legal Representatives of Victims; the Registry; Office of Public Counsel for Victims; Trust Fund for Victims; and Other parties: Women's Initiatives for Gender Justice; International Centre for Transitional Justice, UNICEF, Fondation Congolaise pour la Promotion des Droits humains et la Paix, Avocats sans Frontières and certain other Non-Governmental Organisations.²⁶¹

In establishing the principles relating to reparations pursuant to Article 75 (1) of the Rome Statute, the Chamber recognized that the 'Statute and the Rules reflect a growing recognition in international criminal law that there is a need to go beyond the

²⁶⁰ See Decision establishing the principles and procedures to be applied to reparations in the case of the *Prosecutor v. Thomas Lubanga Dyilo*, 7 August 2012, ICC-01/04-01/6 [hereinafter Reparations Decision].

²⁶¹ Requests to appear before the Chamber and make submissions are made pursuant to Regulation 81(4) (b) of the Regulations of the Court on issues related to reparations.

notion of punitive justice, towards a solution which is more inclusive.’²⁶² This recognition is in keeping with established standards of international human rights law and particularly the 2005 UN Basic Principles. The Chamber took note of the 2004 Report of the United Nations Secretary General on The rule of law and transitional justice in conflict and post-conflict societies.²⁶³ The two main purposes for reparations according to the Chamber are that they oblige those responsible for crimes to repair the harm that they have caused and to enable the Chamber to ensure that offenders account for their acts.²⁶⁴

Within the context of transitional justice, the Chamber also recognized that reparations have the added advantage of promoting reconciliation between the convicted person, the victims of the crimes and the affected communities. This statement has received conflicting reactions amongst transitional justice practitioners who are intimately aware of the situation in Ituri where the convicted person *Thomas Lubanga Dyilo* comes from. The conflict in Ituri, which the convicted person was a central part of, was one between the *Hema* and the *Lendu* communities. It is alleged that some of the children who joined the convicted person’s rebellion, did so out of their own volition or were ‘volunteered’ by their parents and communities to fight the opposing group. Since the crimes that *Thomas Lubanga Dyilo* was convicted of involved the recruitment and use of children from his own community, the direct victims of the case in point and possibly direct beneficiaries of reparations are the child soldiers and their immediate families, from the convicted person’s *Hema*

²⁶² Reparations Decision, *supra* note 260, para 177.

²⁶³ Reparations Decision, *supra* note 260, footnote 367; See also The rule of law and transitional justice in conflict and post-conflict societies, Report of the United Nations Secretary-General s/2004/616, 23 August 2004; Updated Set of principles for the protection and promotion of human rights through action to combat impunity, Report of the independent expert Diane Orentlicher, E/CN.4/2005/102/Add.1, 8 February 2005

²⁶⁴ Reparations Decision, *supra* note 260, para 179;

community. The question is asked by the victims of the crimes committed by the child soldiers from the *Lendu* community as to how the reparations process would promote reconciliation between the two communities if the direct beneficiaries of the reparations will be the *Hema* community. These are some difficult situations presented in a post-conflict community and exacerbate the tension between the objectives of peace and justice.²⁶⁵ The Chamber has however noted that, for purposes of application of principles of reparations under the Rome Statute, the Court will adopt a *broad and flexible* interpretation to give the *widest possible remedies* available to victims and evaluations on a case-by-case basis.²⁶⁶

The Chamber established the following principles:

- a) **Principle of Dignity, non-discrimination and non-stigmatisation** – all victims regardless of their participation in the trial proceedings or not, will be treated fairly and equally.²⁶⁷ This principle may have the desired effect of curbing the increasing volumes of applications from victims to participate in proceedings at the Court discussed in an earlier section. This is the case where the principles are publicised effectively to victims and affected communities that reparations will take a non-discriminatory application.²⁶⁸

²⁶⁵ ICC Press Release, ICC-CPU-20121121-PR856 of 21 November 2012 ‘Katanga and Ngudjolo Chui case: ICC Trial Chamber II Severs Charges’...announces that the verdict in the case against Mathieu Ngudjolo will be issued on December 18, 2012. If he is found guilty of the crimes with which he is charged, there will be the possibility of reparation proceedings for purposes of addressing the harm caused to victims of his crimes. There is a wider

²⁶⁶ Reparations Decision, *supra* note 260, paras 180-181.

²⁶⁷ Reparations Decision, *supra* note 260, para 187

²⁶⁸ Reparations Decision, *supra* note 260, paras 258 and 259 where the Chamber pronounced that the responsibility of the publicity of the principles lies with the Registry and that its outreach activities with national authorities and local communities is encouraged.

- b) **Principles on Beneficiaries** – the beneficiaries of reparations are both direct and indirect victims pursuant to Rule 85 RPE. As a direct victim may be clear, an indirect victim status may not be as clear. The Chamber will determine an indirect victim as for example the parents of a child soldier.²⁶⁹ Legal entities may also benefit as victims but priority may be given to certain victims in vulnerable situations such as victims of sexual and gender-based violence.²⁷⁰
- c) **Principle on Accessibility and consultation with victims** – the Chamber endorsed a gender-inclusive approach to all principles with sufficient consultations with victims *in situ* paying particular attention to their priorities.²⁷¹
- d) **Principle on Victims of sexual violence** – victims include women and girls, and boys and men alike. Reparations awards for this group of victims require a specialist, integrated and multidisciplinary approach particularly to meet obstacles faced by women and girls when seeking access to justice.²⁷²
- e) **Principle on Child victims** – reparations decisions will be guided by the fundamental principle of the “best interests of the child” enshrined in the Convention on the Rights of the Child. Where child soldiers are victims,

²⁶⁹ Reparations Decision, *supra* note 260, paras 194-195

²⁷⁰ Reparations Decision, *supra* note 260, paras 197-200.

²⁷¹ Reparations Decision, *supra* note 260, paras 202-206.

²⁷² Reparations Decision, *supra* note 260, paras. 207-209.

reparations programs must include their re-integration into society and rehabilitation to promote reconciliation within society.²⁷³

- f) **Principle on the Scope of reparations** – the Chamber recognized the uncertainty in the number of victims in the case and despite the volumes of applications from victims, these numbers are not representatives of the totality of victims. The Chamber endorsed the use of both individual and collective reparations noting that the two are not mutually exclusive and may be awarded concurrently.²⁷⁴ When collective reparations are awarded, they should address the harm suffered by victims on an individual and collective basis.²⁷⁵
- g) **Principle on the Modalities of reparations** – a comprehensive approach to reparations was adopted, including restitution, compensation (requires broad application consistent with international human rights law assessments of harm and damage), rehabilitation. The Chamber reserved a non-exhaustive list of the forms of reparations not excluding those with symbolic, preventative and transformative value.²⁷⁶

²⁷³ Reparations Decision, *supra* note 260, paras. 210-216.

²⁷⁴ Reparations Decision, *supra* note 260, paras. 217-220; See also Appeals Chamber Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19(2)(a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772, para. 36.

²⁷⁵ Reparations Decision, *supra* note 260, para. 221.

²⁷⁶ Reparations Decision, *supra* note 260, paras. 222-241.

- h) **Principle on Proportional and adequate reparations** – reparations should support programmes that are self-sustaining and benefits paid by periodic instalments rather than by way of lump-sum.²⁷⁷
- i) **Principle on Causation** – the Court should not be limited to “direct” harm or the “immediate effects” of the crime, particularly in this case involving child soldiers, but instead the Court should apply the standard of “proximate cause”. The Court must be satisfied that there exists a “but/for” relationship between the crime and the harm.²⁷⁸
- j) **Principle on the Standard and Burden of Proof** – as the trial stage is concluded when an order of reparations is considered, the appropriate standard of a balance of probabilities is sufficient. Where the reparations award emanates from the TFV a more flexible approach is to be taken.²⁷⁹ These kinds of awards are akin to what has become known as the second mandate operations and assistance of the TFV in situation countries of the Court outside of a judicial determination of guilt or innocence of an accused person.

In conclusion, the Chamber asserted the principle respecting the rights of the defence in that nothing in the abovementioned principles will prejudice or be inconsistent with the rights of the convicted person to a fair and impartial trial.²⁸⁰

²⁷⁷ Reparations Decision, *supra* note 260, paras. 242-246.

²⁷⁸ Reparations Decision, *supra* note 260, paras 247-250.

²⁷⁹ Reparations Decision, *supra* note 260, paras. 251-254.

²⁸⁰ Reparations Decision, *supra* note 260, para. 255

Chapter IV

Enforcement Mechanisms to Secure International Cooperation

4.1 Introduction

4.2 Enforcement of Sentences under the Rome Statute

4.3 Horizontal Cooperation among States on Enforcement

4.4 Vertical Cooperation among States on Enforcement

4.5 Cooperation of States in Enforcement of Sentences under the Rome Statute

4.5.1 Ensuring the cooperation of States in the enforcement of sentences of imprisonment

4.5.2 Ensuring the cooperation of States in the enforcement of fines and forfeitures

4.5.3 Ensuring the cooperation of States in the enforcement of reparations orders

4.6 Concluding remarks

The need to continue codifying international law is apparent . . . But an even greater challenge for us now--and, in many respects an even greater opportunity--is enforcement. Although international law is often caricatured as elusive and abstract, there is nothing abstract about its enforcement . . .

--Madeleine Albright²⁸¹

4.1 INTRODUCTION

This chapter interrogates the enforcement mechanisms under the Rome Statute.

Unlike States, the Court does not have an enforcement entity such as a Police Force

²⁸¹ Albright MK, 'International Law Approaches the Twenty-First Century: A U.S. Perspective on Enforcement', (1995) *18 Fordham International Law Journal*, 1595, 1596

that would arrest persons accused of committing crimes within its jurisdiction, conduct searches and seizures or compel witnesses to appear before the Court. Yet, the Court must critically assess its practice of enforcing sentences that it imposes on convicted persons and in its contribution to restorative justice, the enforcement of reparations orders in collaboration with other Rome Statute entities such as the TFV.

The enforcement of sentences is an indispensable part of international criminal justice. In fact it may be called the backbone of the system of international criminal justice.²⁸² Even against this background, Kress and Sluiter note that doctrinal writings on the enforcement of international criminal sentences are few yet critically needed to prepare for the enforcement regime of the Court.²⁸³ As with many other topics in international criminal law – including those discussed earlier in this thesis on state cooperation in Chapter I, complementarity in Chapter II, the rights of persons at various stages of Court proceedings and processes in Chapter III – enforcement as governed by Part X of the Rome Statute read together with the relevant provisions of the RPE is the first elaborated codification and documentation of enforcement of international criminal sentences. At the time of this writing, the Court has rendered its first Judgment and Sentence against *Thomas Lubanga Dyilo*.²⁸⁴ In the same case, the Court has established the first ever set of principles and procedures for the application of the reparations regime etched in the Rome Statute.²⁸⁵ It is beneficial at this stage to reflect on the provisions on enforcement of sentences as well as of reparations orders by the Court with a view to contributing to the strengthening of the enforcement

²⁸² Kress C & Sluiter G ‘Preliminary Remarks’ in the Rome Statute of the International Criminal Court: A Commentary Volume II (Cassese A, Gaeta P and Jones JRW eds) (Oxford: Oxford University Press, 2002), 1751-1756 [hereinafter Kress and Sluiter Preliminary Remarks], 1752

²⁸³ Kress and Sluiter Preliminary Remarks, *supra* note 282, 1755

²⁸⁴ Refer to the footnote in Chapter III on this decision

²⁸⁵ See Chapter III which analyses the principles and practices on the application of reparations under the Rome Statute

regime of the Court and setting the point of departure for future Court determined sentences and reparations orders.

4.2 ENFORCEMENT OF SENTENCES UNDER THE ROME STATUTE

Part X of the Rome Statute clarifies that the enforcement relates to the regulations concerning the sentence that the Court has ordered for a convicted person as well as the enforcement of fines and forfeiture measures of the assets of a person who has been sentenced. There is an immediate connection between the enforcement of sentences with Part IX of the Rome Statute dealing with the cooperation of States with the Court. Article 103 elucidates the role of States in the enforcement of sentences of imprisonment. As mentioned previously, the Court does not have an enforcement agency and relies entirely on States to enforce sentences of imprisonment. States Parties are therefore acting in concert or in cooperation with the Court, in the enforcement regime under the Statute. Rule 199 RPE provides that ‘the functions of the Court under Part 10 shall be exercised by the Presidency’.²⁸⁶ The Presidency²⁸⁷ shall designate a State drawn from a list of states maintained by the Registry²⁸⁸ in which a convicted person shall serve a sentence of imprisonment.²⁸⁹ In indicating their willingness and acceptance to enforce the sentences of imprisonment, States ‘may attach conditions to its acceptance’²⁹⁰, which the Presidency is not obliged to accept but may request for additional clarity before making a decision to

²⁸⁶ Rule 199 RPE

²⁸⁷ The Presidency is one of four Organs of the Court established under Article 34 Rome Statute. According to Article 38 (3) ‘...the Presidency...shall be responsible for:

(a) The proper administration of the Court, with the exception of the Office of the Prosecutor; and

(b) The other functions conferred upon it in accordance with this Statute.’

²⁸⁸ According to Rule 200 (1) RPE, the Registry of the Court shall maintain a list of states which indicate their willingness to enforce a sentence of imprisonment for persons convicted by the Court.

²⁸⁹ Article 103 (1) (a) Rome Statute, *supra* note 1.

²⁹⁰ Article 103 (1) (b) Rome Statute, *supra* note 1.

include or exclude such a State from the list of states which will enforce sentences issued by the Court.²⁹¹

The drafters of the Rome Statute in this Part maintained the sovereignty of states to determine what conditions in accordance with their national laws and procedures they would maintain in the enforcement of sentences. In the same breath, the drafters also wanted the Court to maintain a measure of control in the enforcement regime under the Statute. Every state has its unique laws and procedures of enforcement. Kress and Sluiter make this distinct point that states ‘...distinguish the enforcement rules governing the question of *whether to enforce* from those governing the question of *how to enforce*’.²⁹² For some states the question of whether and how to enforce is governed by national criminal procedure legislation, while in others the two are treated separately and governed by different legislation.²⁹³ In an effort to harmonise the enforcement regime, the Court must then be seen as the ultimate overseer while maintaining state autonomy to determine conditions for enforcement. Article 106 (1) Rome Statute supports this position. It provides that,

“The enforcement of a sentence of imprisonment shall be subject to the supervision of the Court and shall be consistent with widely accepted international treaty standards governing the treatment of prisoners.”

Article 106(1) introduces the concept of ‘international treaty standards governing the treatment of prisoners’ to the enforcement regime under the Rome Statute. These standards are traced to the Standard Minimum Rules for the Treatment of Prisoners

²⁹¹ Rule 200 (2) RPE

²⁹² Kress and Sluiter Preliminary Remarks, *supra* note 282, 1751

²⁹³ Kress and Sluiter Preliminary Remarks *supra* note 282, 1751 give the example of the United States where the law of corrections, which relates to *how to enforce*, are governed by the law of corrections, which is entirely separate from the law of criminal procedure in the United States.

adopted by the United Nations on 31 July 1957.²⁹⁴ These standard rules may be said to reflect customary international law.²⁹⁵ They were adopted at a time when the enforcement of prison sentences for convicted persons by the International Military Tribunal (IMT) at Nuremberg faced a measure of criticism. On 1 October 1946, the IMT at Nuremberg rendered its judgment in twenty-two major German war criminals. Three of the accused were acquitted.²⁹⁶ Of those convicted, the IMT at Nuremberg imposed twelve death sentences²⁹⁷, three terms of life imprisonment²⁹⁸, two terms of twenty years' imprisonment²⁹⁹, one term of fifteen years' imprisonment³⁰⁰, and one term ten years' imprisonment.³⁰¹ The London Charter that established the IMT at Nuremberg did not provide for appellate proceedings following the trial stage. Once the judgment was issued, the enforcement stage followed. Article 29(1) of the London Charter provided the framework for enforcement. It states:

“In the case of guilt, sentences shall be carried out in accordance with the orders of the Allied Control Council for Germany, which may at any time reduce or otherwise alter the sentences, but may not increase the severity thereof.”³⁰²

The Allied Control Council for Germany (ACCG) operated less on legal considerations than it did on the political. The Council enforced prison sentences at the allied military prison at Berlin Spandau from 18 July 1947. The conditions of the

²⁹⁴ Standard Minimum Rules for the Treatment of Prisoners adopted by the United Nations on 31 July 1957 ECOSOC Res. 663 C (XXIV), amended by ECOSOC Res. 2076 (LXII), 13 May 1977

²⁹⁵ Rodley, N.S., *The Treatment of Prisoners under International Law* (1999) 278-279;

²⁹⁶ Fritzsche, von Papen, and Schacht.

²⁹⁷ For Göring, Ribbentrop, Keitel, Kaltenbrunner, Rosenburg, Frank, Frick, Streicher, Sauckel, Johl, Seyß-Inquart and Bormann.

²⁹⁸ For Heß, Funk and Raeder.

²⁹⁹ For Schirach and Speer.

³⁰⁰ For Neurath.

³⁰¹ For Dönitz.

³⁰² Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishment of the Charter of the International Military Tribunal (IMT), 82 U.N.T.S. (1951) 279[hereinafter London Charter], Article 29(1).

imprisonment were said to be particularly hostile to the seven convicted persons. Although the rules at Spandau were eventually relaxed, it was clear that the objective of the allied powers in enforcing the sentences of the seven had very little to do with their rehabilitation.

The situation was not very different at the IMT at Tokyo. Section V of the Charter of the IMT for the Far East (IMTFE) set out the applicable penalties, as well as the method of enforcement. Article 17 on sentences reads

“...will be carried out in accordance with the Order of the Supreme Commander for the Allied Powers (SCAP), who may at any time reduce or otherwise alter the sentence, except to increase its severity.”

Of the twenty-five accused, seven were sentenced to death³⁰³, sixteen to life imprisonment³⁰⁴, one to twenty years³⁰⁵ and one to seven years.³⁰⁶ Sentences were served at the Japanese prison of Sugamo in Tokyo.³⁰⁷ Unlike the enforcement regime of the IMT at Nuremberg, which was enforced by the four allied countries that of the IMTFE at Tokyo was enforced by Japan. In this sense, the IMT at Nuremberg represents a precedent for a multi-national enforcement regime. The conditions of imprisonment however were not very favourable to the prisoners, although there was a measure of grace accorded to the prisoners at Sugamo compared to those in Spandau.

³⁰³ Doihara, Hirota, Itagaki, Kimura, Matsui, Muto and Tojo.

³⁰⁴ Araki, Hashimoto, Hata, Hiranuma, Hoshino, Kaya, Kido, Koiso, Minami, Oka, Oshima, Sato, Shimada, Shiratori, Suzuki, and Umezu.

³⁰⁵ Togo.

³⁰⁶ Shigemitsu.

³⁰⁷ Kress C & Sluiter G ‘Imprisonment’ in the Rome Statute of the International Criminal Court: A Commentary Volume II (Cassese A, Gaeta P and Jones JRW eds) (Oxford: Oxford University Press, 2002), 1757-1821 [hereinafter Kress and Sluiter Imprisonment], 1762-4.

The striking similarity in both enforcement regimes however is the political considerations that went into decision making at both ACCG and SCAP. Political sensitivities and considerations did not fade away in the debates at the UNSC following the genocide that took place in Rwanda in 1994, as did the IMT, IMFTE and the enforcement institutions created thereunder. Rwanda, then a member of the UNSC voted against the Security Council Resolution 995 that established the ICTR, *inter alia*, on the ground that sentences of accused persons would be enforced in other countries but Rwanda and that the countries that will enforce the sentences would determine the nature of how the sentences will be carried out. Rwanda, dissatisfied with this position, argued that this must be ‘for the International Tribunal or at least the Rwandese people to decide’.³⁰⁸

The designation of a State of enforcement following a conviction at the ICTR is governed by Article 26 ICTR Statute and Rule 103 ICTR RPE. The place of imprisonment from these provisions includes Rwanda.³⁰⁹ Article 27 of the ICTY Statute on the other hand does not specify what country the prison sentence shall be served save that a list of willing States will guide the relevant Chamber.

4.3 HORIZONTAL COOPERATION AMONG STATES ON ENFORCEMENT

³⁰⁸ UN Doc. S/PV.3453, 15 (1994)

³⁰⁹ Rule 103 (A) of the ICTR Rules of Procedure and Evidence reads as follows:

(A) Imprisonment shall be served in Rwanda or any State designated by the Tribunal from a list of States which have indicated their willingness to accept convicted persons for the serving of sentences. Prior to the decision on placement of imprisonment, the Chamber shall notify the Government of Rwanda.

From a completely utilitarian perspective, states have the common objective of preventing and suppressing criminality.³¹⁰ There exists international cooperation among states on the enforcement of sentences of imprisonment. States are in the practice of concluding bilateral and multilateral agreements with each other to ensure that the objective of preventing and suppressing criminality is achieved.³¹¹ Abdul-Aziz posits that in these agreements, a State may wish that its nationals convicted abroad complete their sentences in their national state.³¹² The views of the convicted person are weighed in the decision to transfer enforcement of prison term.

Kress and Sluiter discuss two techniques employed by states in the enforcement of sentences. The first is the ‘conversion’ technique where a requesting state³¹³ enforces the sentence and has the advantage of assuring itself that the trial resulting in the conviction was fair and that the penalty inflicted is not disproportionate. The second technique is one of ‘continued enforcement’ where the requesting state directly enforces and implements the sentence within the legal order of the requested state.³¹⁴

4.4 VERTICAL COOPERATION AMONG STATES ON ENFORCEMENT

Vertical cooperation among states on the enforcement of prison sentences refers to the relationship and/or obligations of states with respect to the sentences ordered by the

³¹⁰ Abdul-Aziz M, “Transfer of Prisoners: International Perspective”, in M.C. Bassiouni (ed.), *International Criminal Law*, Vol. II. *Procedural and Enforcement Mechanisms* (2nd edn., 1999), 488 *et seq.* [hereinafter Abdul-Aziz]

³¹¹ Plachta M, *Transfer of Prisoners under International Instruments and Domestic Legislation* (1993) 143 [hereinafter Plachta], identifies the agreement between Lebanon and Syria in 1951 as the first inter-state treaty on this point.

³¹² Abdul-Aziz, *supra* note 310, 250.

³¹³ A requesting state is one where the convicted person will serve the sentence in imprisonment, often the state of nationality. The requested state is the state that conducts the trial of an accused and convicts.

³¹⁴ Kress and Sluiter *Imprisonment*, *supra* note 307, 1767.

ICTY and ICTR. As previously mentioned, Article 27 ICTY Statute provides for the designation of a State that will enforce prison sentences. Rule 103 ICTY RPE and Practice Directions on the Procedure for the International Tribunal's Designation (Practice Directions) of the State in which a Convicted Person is to Serve his/her Sentence of Imprisonment guide the ICTY in this regard.³¹⁵ Tolbert notes that in practice, there is no obligation on States to provide this form of cooperation with the ICTY or even the ICTR. States would have to be persuaded to provide the *ad hoc* Tribunals with assistance in this regard.³¹⁶ Persuasion would take the form of requiring States to ensure that the domestic legislation meets the Tribunals satisfaction of guarantees for the regulation of enforcement modalities. The *ad hoc* Tribunals would then sign an enforcement agreement with the particular State.³¹⁷ Such agreements are guided by two principles that were established in the Sentence Judgment in the case of the *Prosecutor v. Drazen Erdemovi* : respect for the duration of the penalty as imposed by the Chamber and respect for international rules governing the conditions of imprisonment.³¹⁸ Kress and Sluiter emphasize that unlike the bilateral agreements between States that allows the concerns of the convicted person to be considered in the decision to effect transfer of enforcement of sentence, the ICTR and ICTY Statutes, RPE, Practice Directions and case law do not indicate

³¹⁵ Practice Directions on the Procedure for the International Tribunal's Designation were issued by the ICTY President on 9 July 1998.

³¹⁶ Tolbert D, 'The International Tribunal for the former Yugoslavia and the Enforcement of Sentences', 11 *Leiden Journal of International Law* (1998) 655, 658.

³¹⁷ Such agreements have been concluded between the ICTY and Austria, Bosnia and Herzegovina, Croatia, Denmark, Finland, France, Germany, Iran, Italy, Norway, Pakistan, Spain and Sweden. Benin, Mali and Swaziland are the three African countries that have such an agreement with the ICTR. For the ICTR, the challenge and criticism has been that the convicted persons should not serve their terms of imprisonment in the 'comfortable' prisons in Western countries. Many of the convicted persons by the ICTR remain in the UN Detention Facility at Arusha for long period of time before being transferred to a State to serve their terms of imprisonment. Some of the convicted persons would complete their sentences at the UN Detention Facility.

³¹⁸ Sentencing Judgment, *Prosecutor v. Drazen Erdemovi* , IT-96-22-T, 29 November 1996, para 34.

any duty for the President of the ICTY or ICTR to obtain the views of the convicted person on the designation of the State of enforcement.³¹⁹

In as much as the *ad hoc* Tribunals provide a framework for vertical cooperation among states for enforcement of sentencing, there are some outstanding issues that remain unresolved to-date. Since the first convictions and sentencing in both *ad hoc* Tribunals, some of the convicted persons have since completed their terms of imprisonment but there has not been a standard mechanism to deal with their release into society. Some of the reasons for this include the unwillingness on the part of States to accept these individuals into their countries. It is often the case that the State of nationality of the individual may not be safe or even willing to receive the individual. The Completion Strategies of the *ad hoc* Tribunals also do not pronounce much on enforcement of sentences save for isolated cases.³²⁰ Nevertheless, the experiences of the *ad hoc* Tribunals will be of great persuasive value to the Court's Presidency with respect to the enforcement of sentences.

4.5 COOPERATION OF STATES IN ENFORCEMENT OF SENTENCES UNDER THE ROME STATUTE

The ILC Draft Statute provided for a general obligation on the part of States to recognize and enforce judgments of the Court.³²¹ This obligation to recognize would have meant that States parties to the Rome Statute had a direct obligation to cooperate

³¹⁹ Kress & Sluiter Imprisonment, *supra* note 307, 1775

³²⁰ Articles 12 of the Enforcement Agreements between the UN, Mali and Benin concerning ICTR Sentences provide that, 'in the event that the Tribunal is to be wound up; the Registrar will inform the Security Council of any sentences whose enforcement remains to be completed pursuant to this agreement.'

³²¹ Draft Statute of the International Law Commission UN Doc. A/49/10 [hereinafter ILC Draft Statute], Article 93(1)

with the Court to enforce sentences. The drafters of the Rome Statute had explicitly made room for the obligation to cooperate with the Court in its investigation and prosecution of crimes.³²² Such an obligation to recognize and enforce Court judgments would possibly have dispensed with the Court's requirement to conclude specific agreements with States on enforcement, at least to the details of consent from the State as this is presumed from signature and ratification of the Rome Statute as a whole and concomitantly with the obligation of States Parties to cooperate in this enforcement. There was no consensus among States in Rome concerning the provision on recognition and thus it was deleted from the final draft in Rome. States found a solution to the 'questions of how to determine the State of enforcement'³²³, and how to ensure the supervision of the enforcement by the ICC³²⁴ and once it was decided how to deal with the issue of enforcement of fines and forfeiture orders³²⁵ exhaustively'³²⁶, which in their opinion dispensed with the need for a general clause obliging States to recognize the enforcement mechanism. There is therefore no general obligation on States Parties to cooperate with the Court in enforcement of sentences of imprisonment in the Rome Statute. The same however cannot be said of enforcement of fines and forfeiture measures, which shall be discussed below.

4.5.1 Ensuring the cooperation of States in the enforcement of sentences of imprisonment

³²² Article 86 Rome Statute, *supra* note 1; See also Chapter I which discusses the general obligation of States Parties to fully cooperate with the Court in its investigation and prosecution of crimes within its jurisdiction.

³²³ Articles 103 and 104 Rome Statute, *supra* note 1.

³²⁴ Articles 105 and 106 Rome Statute, *supra* note 1.

³²⁵ Article 109 Rome Statute, *supra* note 1.

³²⁶ Kress and Sluiter Imprisonment, *supra* note 307, 1786.

As explained above, a majority of the delegates at the Rome conference rejected an obligatory enforcement regime in the ILC Draft Statute in favour of the opt-in mechanism espoused in Article 103. Once a State on its own volition accepts to enforce the sentences of imprisonment and has been listed as such by the Court's Registry³²⁷, the Rome Statute gives the Court a measure of control over the enforcement mechanisms. Article 104 (1) reads that the 'Court may, at any time, decide to transfer a sentenced person to a prison of another State.' Article 105 also ensures that 'the Court alone shall have the right to decide and application for appeal and revision'. The supervisory power of the Court over the enforcement of sentences and conditions of imprisonment is made possible because of the permanent stature of the Court, unlike the *ad hoc* Tribunals. It is therefore possible for the Presidency to set up a mechanism to monitor and promote cooperation with States that opt to enforce prison sentences.

4.5.2 Ensuring the cooperation of States in the enforcement of fines and forfeitures

This form of enforcement is in comparison more sensitive to deal with that that of prison sentences. For starters, in current Court practice the enforcement is not applicable. Article 109 Rome Statute regulates enforcement if fines and forfeiture measures. It reads

1. States Parties shall give effect to fines or forfeitures ordered by the Court under Part 7, without prejudice to the rights of bona fide third parties, and in accordance with the procedure of their national law

³²⁷ Rule 200 (1) RPE

2. If a State Party is unable to give effect to an order for forfeiture, it shall take measures to recover the value of the proceeds, property or assets ordered by the Court to be forfeited, without prejudice to the rights of bona fide third parties.
3. Property, or proceeds of the sale of real property or, where appropriate, the sale of other property, which is obtained by a State Party as a result of its enforcement of a judgment of the Court shall be transferred to the Court.

This article limits the enforcement of fines and forfeiture to those ordered by the Court under Article 77 (2) Rome Statute. The relevant portion provides that:

“...the Court may order:

- (a) A fine under the criteria provided for in the Rules of Procedure and Evidence;
- (b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.”

Article 109 does not cover the fines imposed by the Court related to an offence against the administration of justice³²⁸ or provisional measures to secure evidentiary forfeiture.³²⁹ There is however a close relation between the cooperation regime under Part IX of the Rome Statute and the enforcement of fines and forfeiture. From the language of the provision, States Parties are obliged to enforce fines and forfeiture orders. Rule 217 RPE elucidates that this obligation however does not automatically apply to States Parties, but rather that the Presidency must make a request to a State Party in accordance with Part IX of the Rome Statute dealing with cooperation.³³⁰ It

³²⁸ Article 70 (2) Rome Statute, *supra* note 1.

³²⁹ Article 93 (1) (k) Rome Statute, *supra* note 1.

³³⁰ Rule 271 RPE reads

remains however the prerogative of States Parties to give effect to fines or forfeiture orders in accordance with their national legislation governing such orders as expressed in Article 93 (1) (k) Rome Statute.

The Court has yet to enforce fines or forfeitures in the context of convicted persons. To date only one person has been convicted by the Court, *Thomas Lubanga Dyilo*. At the commencement of the pre-trial phase, *Thomas Lubanga Dyilo* was declared indigent. In addition, the forfeiture of property relates to property that a convicted person acquired in the commission of the crimes s/he is convicted. It is not immediately clear that the rebel group that *Thomas Lubanga Dyilo* led acquired property in the course of the conflict in Ituri, although it is not so far removed an idea considering the mineral-rich eastern DRC. The challenge for the Court in this regard would be the identification of the assets of accused persons and here cooperation from States would support the process.

4.5.3 Ensuring the cooperation of States in the enforcement of reparations orders

Article 75(5) of the Rome Statute provides that ‘a State Party shall give effect to a decision under this article as if the provision of article 109 were applicable to this article.’ This reference suggests that there is a separate enforcement of fines and forfeitures to the enforcement of reparations orders. In addition the mandatory

For the enforcement of fines, forfeitures or reparation orders, the Presidency shall, as appropriate, seek compensation and measures for enforcement in accordance with Part 9, as well as transmit copies of relevant orders to an State with the sentences person appear to have direct connection by reason of wither nationality, domicile or habitual residence or by virtue of the location of the sentenced person’s assets and property or with which the victim has such a connection. The Presidency shall, as appropriate, inform the State of any third-party claims or the fact that no claim was presented by a person who received notification of any proceedings conducted pursuant to article 75.

language used in Article 75(5) places an obligatory enforcement regime on States Parties over reparations orders.

Kress and Sluiter advance that there is no practice of horizontal cooperation of states on enforcement of reparations for victims of international crimes.³³¹ The development of the reparations regime in international criminal justice has not been as fast as other components of international criminal law. The practice at the *ad hoc* Tribunals is limited in terms of enforcement of reparations orders. The enforcement of orders by the *ad hoc* Tribunals is limited to the return of stolen property or proceeds from the sale of such property.³³² The obligation by States to enforce the orders of the *ad hoc* Tribunals is expressed in terms of the general duty to cooperate with the *ad hoc* Tribunals.³³³ In the case of the *Prosecutor v. Milošević et al.*, the ICTY ordered the provisional freezing of the assets of the accused following the Prosecutor's application under Rule 105 ICTY RPE for purposes of granting restitution.³³⁴ This order was transmitted to the UN Member States although there is no evidence of how vertical cooperation as described in Chapter I would have been executed by States in fulfilment of the ICTY's order.

4.6 CONCLUDING REMARKS

The Court has now established principles and practices for the application of reparations as discussed in Chapter III following the reparations order in the

³³¹ Kress C & Sluiter G 'Fines and Forfeiture Orders' in the Rome Statute of the International Criminal Court: A Commentary Volume II (Cassese A, Gaeta P and Jones JRW eds) (Oxford: Oxford University Press, 2002), 1823-1848 [hereinafter Kress and Sluiter Fines and Forfeiture Orders], 1833

³³² For example in Article 24(3) ICTY Statute

³³³ Article 29(1) ICTY Statute and

³³⁴ Decision on Review of Indictment and Application for Consequential Orders, *Prosecutor v. Slobodan Milošević et al.*, 24 May 1999, IT-99-37, para. 27.

Prosecutor v. Thomas Lubanga case. The practice of awarding reparations for victims of international crimes has only just begun, while the debate on the national reparations programmes for victims and affected communities of international crimes is steadily gaining traction. It will probably take some more time for inter-State practice on the enforcement of criminal law reparations orders to develop. The only precedent that exists for the enforcement of reparations orders is the case law of the ICTY. In the course of the negotiations on the enforcement of reparations orders under the Rome Statute, there was a proposal from the French delegation to include the attachment of an accused's property, assets or money once an order under Article 75 Rome Statute had been made. This proposal was rejected on the grounds that delegations denied the existence of an obligation for States Parties to cooperate with the Court for purposes of adopting protective measures in the field of reparations.³³⁵

³³⁵ Kress and Sluiter *Fines and Forfeiture Orders*, *supra* note 49, 1834

CHAPTER V

Concluding Remarks

The Court is a permanent institution. In comparison to international law norms regulating the conduct of parties in hostilities and armed conflict, or those norms which govern the inalienable and ‘non-derogable’ rights of an individual, the Rome Statute establishes new values and norms that have been in practice for a long period of time. Some of these norms have been assessed in this thesis under the general rubric of cooperation of States generally³³⁶ and specifically in relation to complementary national jurisdictions,³³⁷ the rights of certain persons who appear before the Court³³⁸ and the enforcement of sentences and orders of the Court.³³⁹ The Rome Statute also codifies for the first time in a multilateral treaty, the prosecution of serious violations of the rules governing the conduct of parties in armed conflict considered as a part of customary international law. The origins of these relatively new norms of international criminal justice are therefore embedded in the ‘tried and tested’ norms in international humanitarian law and international human rights law.

When a critical reflection and assessment of the cooperation regime under the Rome Statute is done, it is clear that there are several challenges that threaten to render the regime ineffective. It may be useful to provide some recommendations that identify opportunities to strengthen the cooperation regime established under Part IX of the Rome Statute.

³³⁶ See Chapter I on International Cooperation with the International Criminal Court.

³³⁷ See Chapter II on The Principle of Complementarity: Kenya’s challenge of cooperating with the Court.

³³⁸ See Chapter III on The Rights of the Accused, Victims of International Crimes and Witnesses Appearing Before the Court.

³³⁹ See Chapter IV on Enforcement Mechanisms to Secure International Cooperation.

The structural weaknesses that characterise the system have been identified more so in the tenuous relationship between the Court, the AU and the UNSC. As the two latter bodies function mostly from a political perspective, it may be important for the Court to assert its judicial functions by making pronouncements that regulate what seem to be contentious issues around cooperation. These pronouncements should buttress not only the general obligation of States Parties to cooperate fully with the Court, but the specific aspects that would strengthen the domestic criminal jurisdictions to fulfil its treaty-based obligations. Perhaps there also is a need for a shift in focus from perceived neo-imperialist arguments advanced against the Court to the engine room of the Court to evaluate what does work and what does not work. In this connection, there should be a greater emphasis on the part of both the States Parties to the Rome Statute and the Court on the domestication of implementing legislation at State –level to facilitate a robust and fully functional international cooperation regime.

The UNSC plays an important role as one of the trigger mechanisms for investigation and prosecution by the Court in terms of Articles 13(b), 15 *ter* and 16 of the Rome Statute. As the Court is still in its infancy stage and in need of legitimacy especially in States that are aggrieved by its *modus operandi* in the first ten years since the Court began its work, it will need the institutional support of the UNSC. Whereas reform of the UN is outside the scope of this thesis, the UNSC as it is currently constituted must exercise its Chapter VII powers given to it by the Charter of the UN to maintain regional peace and security to the exclusion of political considerations that undermine the Courts functions. As non-permanent members of the UNSC as it is currently constituted are selected from the different regions of the world, the UNSC may want to pay particular emphasis on a consultative process with regional representatives where a situation merits the attention of the Court. It may also be beneficial to invite

representatives of a situation under UNSC consideration to the deliberations of UNSC action relating to the Court. Coincidentally, Rwanda was a non-permanent member of the UNSC from 1994 to 1995 when deliberations concerning the establishment of the ICTR took place following the genocide in that country in 1994. The views and concerns of the concerned State, whether a Party or non-State Party of the Rome Statute, and other actors such as civil society organisations working in the situation under UNSC consideration may positively influence UNSC decision making relating to its Rome Statute powers. These consultative processes have the capacity to promote effective cooperation between States and the Court, when the jurisdiction of the Court is invoked in a country that has been referred by the UNSC.

Regional integration bodies *inter alia*: the AU, the European Union (“EU”) and the Organisation of American States (“OAS”) have a role to play to strengthen the Court. There already exists an international mechanism to deal with the investigations and prosecutions of war crimes, crimes against humanity and genocide through the auspices of the Rome Statute, specifically created as a treaty entity by the community of States. It is counter-productive to the suppression of these crimes and the objects of justice for victims when regional integration bodies embark on the creation of new supranational courts akin to the existing Court, whatever the reasons may be. More than 160 governments participated in the conference that adopted the Rome Statute. This number represents more than two-thirds of the nations on earth. In the negotiations for a permanent international criminal court, not once is it recorded that States preferred to establish or endow regional courts with international criminal jurisdiction. Rather, States were interested in enhancing national as well as the Court’s capacity to deal with these heinous crimes. Regional bodies may however

support the Court's cooperation regime by advocating for the universalization of the Rome Statute and focus energies on accession to the Rome Statute for their member States who are not Party to the Rome Statute. In addition, regional bodies, especially the AU should conclude cooperation agreements with the Court that would delineate specific roles and responsibilities of both the Court and the regional body under the shared objective of fighting against impunity.

The enhancement of national criminal jurisdictions to deal with international crimes is key process that States should embark on. The real intention of the 160 governments represented in Rome prior to the adoption of the Rome Statute was that their sovereignty to deal with their nationals who are alleged to have committed war crimes, crimes against humanity and genocide remains intact. As discussed in Chapter II, it is in the interests of all States, whether Party or non-Party to the Rome Statute to have criminal justice systems that would address these crimes in a genuine fashion. Where any given State finds a lacunae in its national legislation incapacitating it from dealing with international crimes, it must seek to immediately remedy such a situation. The responsibility to build the capacity of such states is however not the sole responsibility of the individual State. The principle of positive complementarity envisages that other States as well as the Court can build the capacity of States to investigate and prosecute international crimes. The Court, its staff and growing jurisprudence has thematic expertise that would be useful in strengthening national criminal justice systems. This form of cooperation only serves to strengthen States to fight against impunity for international crimes as well as deal with specific thematic issues such as the protection of witnesses and victims that are key for the work of national criminal justice systems.

National criminal justice systems that are strengthened would be able to respond to requests for the enforcement of Court sentences and orders. As it is clear that there is no general obligation on States Parties to enforce the Court's sentences, the Court relies on States for the enforcement. In fact, the solution of many of the Court's challenges lie in the strengthening of national criminal justice systems. The Court remains the last resort to deal with international crimes and to redress victims of these crimes. The concept of localised trials should be extended the reparations regime. Although this was not addressed in detail in this thesis, strengthened national criminal justice systems includes the extension of States' capacity to deal with the right to reparations at the national level. Ideally, such capacity would also assist in the enforcement of Court ordered reparations.

A relationship of cooperation between the Court and States Parties is the lifeline of the Court and more importantly the legitimization of the international criminal justice system. It will take the concerted efforts of States to develop the international justice system and put into practice the theory behind the system – the enforcement of a rules-based system that protects children, women and men from atrocities that deeply shock the conscience of humanity.

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