The Methodology by which Transitional Justice Strategies Ought to be incorporated into the International Criminal Court Framework

by

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## Acknowledgments

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ABBREVIATIONS

<table>
<thead>
<tr>
<th>Acronym</th>
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<tr>
<td>ACJHR</td>
<td>African Court of Justice and Human Rights</td>
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<td>ATJ</td>
<td>Alternative Transitional Justice</td>
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<td>AU</td>
<td>African Union</td>
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<td>CICC</td>
<td>Coalition for an International Criminal Court</td>
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<td>ECOWAS</td>
<td>Economic Community of West African States</td>
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<td>EU</td>
<td>European Union</td>
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<td>ICC</td>
<td>International Criminal Court</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>ICD</td>
<td>International Crimes Division</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>International Criminal Law</td>
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<td>International Criminal Tribunal for Rwanda</td>
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<td>ICTY</td>
<td>International Criminal Tribunal for Former Yugoslavia</td>
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<td>ILC</td>
<td>International Law Commission</td>
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<td>IMT</td>
<td>International Military Tribunal</td>
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<td>LDC</td>
<td>Least Developed Countries</td>
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<td>LRA</td>
<td>Lord’s Resistance Army</td>
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<td>R2P</td>
<td>Responsibility to Protect</td>
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<tr>
<td>SCSL</td>
<td>Special Court of Sierra Leone</td>
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<td>TRC</td>
<td>Truth and Reconciliation Commission</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UPDF</td>
<td>Uganda People’s Defence Force</td>
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SUMMARY

This research seeks to establish a methodology by which transitional justice strategies ought to be incorporated within the International Criminal Court (ICC) framework. The study is based on the situation in Uganda as an example of the state that has a situation and cases before the ICC. The aim of the thesis was achieved through the adoption of a combination of theoretical legal research and the non-doctrinal approaches.

This research establishes that the primary responsibility to prosecute persons suspected of violating international law lies with the states. The importance of the concept of individual criminal responsibility, the idea that every person suspected of committing the most serious offences must be held accountable regardless of status. The principle of individual criminal responsibility is further developed with the creation of the ICC.

This research clarifies that there are limitations in terms of what prosecutions can achieve during transitional periods; further, that trials in the ICC and national courts can be undertaken together with proceedings of the Truth and Reconciliation Commissions or indigenous mechanisms. Such an approach will allow for confines of prosecutions to be addressed.

Despite the existence of principles and institutional framework that are intended to ensure individuals are held accountable for the most serious offences of international concern, the majority of individuals are not held accountable. In order for the ICC to operate effectively it would need to seek to go beyond deterrence and retribution. This would require post – conflict states to devise transitional arrangements that compel with the ICC structure.

Thus the research recommends that it would be better for judicial and non-judicial measures to be adopted in states that have cases before the ICC. Particularly Uganda must adopt the mato oput method formally as a tool to address the past human rights abuses in Uganda. All persons regardless of whether they have been granted amnesty or not must be held accountable under the mato oput measures. This implies all persons with exception to those that the ICC has issued the warrants of arrest against.
INTRODUCTION

1. TITLE

The Methodology By Which Transitional Justice Strategies Ought to be Incorporated into the International Criminal Court Framework.

2. KEY WORDS

Transitional justice, transitional justice mechanisms, accountability, impunity, deterrence, national courts, International Criminal Court, selective justice, truth commission, retribution, reconciliation, criminal process, alternative transitional justice, bottom up and top-down approaches.

3. PURPOSE OF STUDY

This thesis focuses on the methodology by which transitional justice strategies ought to be incorporated into the International Criminal Court framework.

4. AIMS OF STUDY

1. To ascertain the role of the International Criminal Court (ICC) in relation to transitional justice mechanisms.

2. To establish means by which the transitional justice or restorative justice bottom-up approaches could be integrated in the ICC’s top-down approach leading to alternative transitional justice measures being used within the ICC framework.

3. Consider examples of mechanisms that have been adopted by domestic courts and states in Africa to address past human rights abuses, the progress and effort made in seeking to establish accountability for international criminal
offences. These issues are addressed for the purpose of establishing a model for transitional justice that can be used by states that have situations and cases before the ICC.

5. **DEFINITION OF THE PROBLEM**

It is the norm that there is always an on-going conflict in the world at all times,¹ despite the number of conflicts around the world considered to have declined by 40 per cent between 1992 and 2005.² Nevertheless the gravest atrocities such as genocide, crimes against humanity, war crimes and other civil and political rights violations occur in Africa.³

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Subsequently, there is evidence suggesting that the situation on the African continent has improved.\textsuperscript{4} However, more recently, the African continent has witnessed conflicts in Egypt, Tunisia, Libya and Mali. It is evident that the fact still remains that when it comes to commission of the most serious offences, history keeps repeating itself.\textsuperscript{5} Judge Richard Goldstone, former prosecutor at the Hague tribunal stated, ‘the hope of never again so often becomes the reality of again and again.’\textsuperscript{6}

Africa as a continent has witnessed various human rights violations, both past and present, in what appears to be a repeating cycle.\textsuperscript{7} The act of putting perpetrators in the dock by an independent criminal court, has been described by Plessis, not only as a reflection of post war human rights aspiration come true, but also as a signal of hope for the African region.\textsuperscript{8} Perpetrators of human rights violations have been prosecuted in the past in both domestic and international courts. Since the Nuremberg and Tokyo tribunals, the notion of international justice has been developed with an increase in institutions


\textsuperscript{5} Robert Cryer, Hakan Friman, Darryl Robinson and Elizabeth Wilmshurst International Criminal Law and Procedure (Cambridge University Press 2007) 54.


\textsuperscript{8} September 2013 Charles Taylor’s appeal against the 50 years prison sentence failed. This should constitute a signal for African leaders to respect human rights, Reed Brody ‘Bringing a Dictator to Justice the Case of Hissene Habre’ (2015) Journal of International Criminal Justice 1-9.
intended to prosecute individuals suspected of having committed the most serious crimes as demonstrated under chapter 1 sections 1.2 of this thesis.

Africa has encountered its share of problems with regards to conflicts.\(^9\) States generally do not always prosecute persons suspected of having committed the most serious offences of international concern.\(^10\) The African Union (AU), particularly, has been reluctant in supporting the ICC.\(^11\) There are several reasons for the failure of domestic courts to prosecute offenders. These include a collapse of an effective national judicial system or the inability of states to prosecute, making it possible to resort to international courts such as the ICC.\(^12\) For instance, in the situation in Former Yugoslavia in 1993 - 1994,\(^13\) it would have been impractical to rely on various criminal law courts in the regions constituting the former Yugoslavia to undertake prosecution of

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suspected individuals due to the nature of conflict, as such trials would have been biased.

Another reason for the failure of national courts to prosecute those suspected of committing the most serious offences is the fact that the state would have played a part in the commission of the atrocities through state agents or individuals acting in their private capacity, but with the complicity of the state.\footnote{Antonio Cassese 'The Role of Internationalized Courts and Tribunals in the Fight Against International Criminality' in Cesare PR Romano, Andre Nollkaemper and Jann K Kleffner Internationalized Criminal Courts Sierra Leone East Timor Kosovo and Cambodia (Oxford University Press Scholarship Online 2004) 4.} On 21 August, 1942, President Franklin D. Roosevelt, in condemning the offences committed against the civil population, announced that ‘the time will come when’ perpetrators ‘will have to stand in the courts of law of the very countries which they are now oppressing and to answer for their acts’.\footnote{Sheldon Glueck War Criminals Their Prosecutions and Punishment (New York AA Knopf 1944) 79.} The challenges faced by states are by no means new.\footnote{Sheldon Glueck War Criminals Their Prosecutions and Punishment (New York AA Knopf 1944) 79.} The challenges of prosecuting international crimes include gathering of evidence and issues of fairness.\footnote{Sheldon Glueck War Criminals Their Prosecutions and Punishment (New York AA Knopf 1944) 79.} Consequently, for many years, a large majority of suspects of international crimes have escaped prosecution as will be demonstrated in chapter one of this thesis.

As a result of the problem of domestic courts failing to prosecute, there is a need for international courts which could intervene and prosecute where domestic systems fail. Contrary is the situation in Sierra Leone which, was
triggered by large scale atrocities that were committed against children.\textsuperscript{18} A Truth and Reconciliation Commission (TRC)\textsuperscript{19} was adopted by the members of the United Nations (UN) Security Council as an alternative non-judicial mechanism to address the predicament of children, both as victims and perpetrators. The Security Council in this particular situation was of the view that a TRC would be better suited to address cases involving juveniles.\textsuperscript{20}

This is a classic example of a situation in which the Security Council had to strike a balance between the principle of accountability and restorative justice. The action of the Security Council in opting for the creation of a TRC for purposes of addressing issues with regards to juveniles implies that each situation ought to be treated on its own merit. This would mean taking into account the practicalities of adopting a particular approach. The same reasoning could be applied in relation to the work of the ICC. While the number of situations and cases before the ICC has continued to rise, the focus of the ICC still remains on African states.\textsuperscript{21} The lack of success of states in trying suspected perpetrators has led to the ICC being forced to intervene and undertake investigations likely to lead to prosecution, as is the case in relation

\textsuperscript{19} The initials ‘TRC’ refer to Truth and Reconciliation Commission however not all commissions include the term ‘reconciliation’ in their titles.
to Uganda, the Democratic Republic of Congo (DRC) and Kenya. One of the justifications for the creation of the ICC was to ensure deterrence. The extent to which the ICC has been a deterrent factor can be questioned, as despite its creation the world has continued to witness grave atrocities.

This study focuses on transitional societies, particularly African states that have been referred to the ICC for investigation. This is because the first situations ever referred to the ICC were African cases. The Court marked ten years of existence in July 2012 and still before it are seven African cases. The study focuses on Uganda, as its situation was the first to be referred to the Court. Since the referral of the situation, the ICC has continued to focus on African cases. For example, other African cases that the ICC is concentrating on include the situations in the Central African Republic (CAR),

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Kenya and the Sudan. Africa remains a continent where human rights are violated by different means such as unlawful killings, torture, and rape.26

For the purposes of this study, a transitional society refers to states that are emerging from violent conflict to a more democratic situation.27 The study will focus on specific transitional justice strategies; particularly Truth and Reconciliation Commissions (TRCs), indigenous forms of justice delivery such as gacaca courts, and the criminal process under the ICC structure. This is intended to facilitate the development of a hybrid conception of transitional justice that leads to a form of justice resolution that involves a combination of retributive and restorative elements. The need to combine the two methods arises as a result of the quest to find a better solution to conflicts in Africa.

The current framework under the ICC is insufficient, hence the Court has been criticised for several reasons.28 The ICC has close links to the Security Council, a political organ.29 As a result, this raises questions with regards to its capacity to be independent and impartial as an international court. This is because, of the five permanent members of the Security Council, the United

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Kingdom (UK) and France are parties to the Rome Statute, while China, the Russian Federation and the United States of America (USA) are not signatories to the treaty. The Rome Statute is problematic as it permits non-states parties to refer situations based in the states that are not parties to the Rome Statute.30 Since inception, the ICC has focused its cases on the African continent, despite the existence of other more serious cases such as the situation in Afghanistan.31 The Rome Statute does not have a provision with regard to defence and there are challenges in attaining means to secure the disclosure of evidence in a manner that is fair to the defendant.32 This places the defendant on a disadvantage as he or she lacks the capacity to appeal against a conviction.

The ICC further lacks the competence and means to enforce its own decisions, it has no police force of its own. The Court lacks executive powers and units33 and finally, the Court is dependent on states’ parties to the Rome Statute in order to ensure its full effectiveness. The effective execution of arrest warrants and the surrender of suspects to The Hague will depend on the cooperation of states with the ICC.34

No international court or tribunal has ever been created with more careful attention to its relationships than the ICC.\textsuperscript{35} There are two explanations that have been offered for this: firstly, a multilateral treaty created the ICC. This implies that the ICC needs to be distinguished from its predecessors such as the Nuremberg and Tokyo tribunals, the International Criminal Tribunal for Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). However this has not been the case as the Court has instead been deemed to be no different from the Nuremberg Tribunal due to lack of uniformity in its application of international justice.\textsuperscript{36} The ICC has restricted its investigation and prosecutions to weak states.\textsuperscript{37}

When states sign and ratify treaties, they agree to comply with the provisions of that treaty.\textsuperscript{38} Therefore in order for the ICC to be able to achieve its mandate under the Rome Statute and operate effectively, it requires states to cooperate. Hans-Peter Kaul writes that ‘the Court is totally dependent, hundred percent dependent, on full, effective and timely cooperation …. from states’ parties.’\textsuperscript{39} Thus, the nature of cooperation under the Statute has been

\textsuperscript{35} Philippe Kirsch ‘The International Criminal Court and National Jurisdictions’ in Mauro Politi and Federica Gioia (eds) \textit{The International Criminal Court and National Jurisdiction} (Ashgate 2008) 1.

\textsuperscript{36} David Hoile \textit{Justice Denied the Reality of the International Criminal Court} (African Research Centre 2014) 398.

\textsuperscript{37} David Hoile \textit{Justice Denied the Reality of the International Criminal Court} (African Research Centre 2014) 387, Chapter 10 - 13.

\textsuperscript{38} The Vienna Convention on the Law of Treaties 1969 Article 26 \textit{Pacta sunt servanda}.

\textsuperscript{39} Hans –Peter Kaul ‘The ICC and International Criminal Cooperation Key Aspects and Fundamental Necessities’ in Mauro Politi and Federica Gioia (eds) \textit{The International Criminal Court and National Jurisdiction} (Ashgate 2008) 85.
referred to as a compromise and a hybrid system.\textsuperscript{40} However, despite the Rome Statute stipulating clearly obligations of states’ parties, the fact remains that whether states cooperate with the ICC or not, mainly depends on the discretion of the individual states.\textsuperscript{41} So, this implies that states are not under a strict obligation to comply with the requests of the Court, thus making the ICC ineffective.

The need for cooperation among states is further extended to states that are not state parties, particularly where the Security Council has referred a state to the ICC, as was the case in the situation of Darfur - Sudan. Evidence has shown, particularly in relation to the ICTY, ICTR and more recently the situation in Darfur that it is difficult to investigate alleged crimes in the absence of evidence due to state authorities’ refusal to cooperate.\textsuperscript{42} For instance, in reference to the situation in Darfur, since its referral to the ICC, the Court has only issued an arrest warrant for the Sudanese president Omar al-Bashir. However, despite states parties to the ICC being given an opportunity to arrest and hand him over to the Court, none of the states have made use of this

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{40} Hans -Peter Kaul ‘The ICC and International Criminal Cooperation Key Aspects and Fundamental Necessities’ in Mauro Politi and Federica Gioia (eds) \textit{The International Criminal Court and National Jurisdiction} (Ashgate 2008) 87.
\item \textsuperscript{42} Machteld Boot \textit{Genocide Crimes against Humanity War Crimes} (Intersentia 2002) Chapter 1.
\end{itemize}
\end{footnotesize}
The ability of the ICC to exercise its jurisdiction over the crimes effectively will depend on whether the states cooperate. In the absence of cooperation, the ICC would be inadequate. It is essential for states to cooperate with the ICC, considering that the Court lacks enforcement powers.

Accordingly, this implies that despite the ICC having an element of impartiality as a Court, it is highly dependent on states parties. Mark Druml argues that, notwithstanding the fact that international criminal tribunals have a degree of independence, they continue to be dependent on national systems to apprehend suspects, provide witnesses and obtain evidence required to secure a conviction. As mentioned earlier, the ICC lacks the power to execute an arrest warrant directly in circumstances where a state fails to comply with its obligations. The cooperation regime under the ICC has further been criticised as too state sovereignty orientated, consequently leading to gaps and delays in the procedures. This illustrates the limitation of the ICC and a possibility that the absence of cooperation with the Court is likely to hinder the effective operation of the Court.

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43 This issue is considered further under chapter 3 of this thesis.
46 Hakan Friman ‘Cooperation with the International Criminal Court Some Thoughts on Improvements under the Current Regime’ in Mauro Politi and Federica Gioia The International Criminal Court and National Jurisdiction (Ashgate 2008) 97, David Hoile Justice Denied the Reality of the International Criminal Court (African Research Centre 2014) chapter 8.
In addition, the ICC is restricted in terms of what it is able to achieve. For instance, the Court is not under an obligation to prosecute all serious offences. However, it can prosecute only those offences that are stipulated under the Statute. The ICC has jurisdiction over the most serious crimes of international concern, namely genocide, crimes against humanity and war crimes.\(^{48}\) The Rome Statute has retroactive effect from the date of entry into force, which was 1 July, 2002. A state that becomes a party to the Rome Statute accepts the jurisdiction of the Court in respect to crimes referred to under Article 5. Consequently, the ICC can exercise jurisdiction only over these offences.\(^{49}\)

The Court lacks the power to exercise universal jurisdiction, this means there is a restriction in terms of cases that can be referred to the Court.

The law as stipulated within the ICC framework cannot be expected to be relevant and useful in every situation. As seen in the situation of Sierra Leone referred to above, each situation is different. Thus, this thesis is intended to consider and propose measures aimed at making the ICC more effective. The contention is that the limitations of the ICC imply that it is essential that the Court operates in a manner that will make it possible for states to be able to adopt other transitional justice strategies, which would be intended to operate alongside the ICC and national prosecutions. This means that Alternative Transitional Justice (ATJ) methods, particularly TRCs and traditional measures such as \textit{gacaca} courts, must be established by states that have


\(^{49}\) The Rome Statute 1998 Article 124, 8, and 12.
situations and cases before the ICC. This is because, theoretically, it still remains a fact that it is impossible to prosecute all suspects involved in committing the most serious offences, hence there is need for more practical and flexible approaches to be adopted.

The ICC would need to go beyond the objectives of deterrence and retribution to address ATJ mechanisms, thereby contributing towards making the Court more effective and relevant to the people most affected. This could be done by extending the ICC work on outreach processes to include the making recommendations for states with situations and cases before the ICC. These should include that they adopt TRCs or traditional measures, to address the limitations of prosecutions. Therefore the implication would be that African states that have situations and cases before the ICC will, in addition to prosecution under the ICC and national courts, adopt TRCs or traditional measures to address past human rights abuses.

The basis of the thesis is the criticism of the ICC framework, its functions, mandate, procedures and the subject matter of jurisdiction. The adoption of other ATJ measures within the ICC framework will contribute towards achieving a permanent solution to Africa’s conflicts through upholding the domestic rule of law, rebuilding the war-torn societies, promoting peace, reconciliation and justice, as well as making the ICC more effective. The introduction of restorative justice measures to operate alongside the ICC
framework will lead to the ICC being more effective and relevant, particularly within communities whose situations are being investigated. This is fundamental in order to make justice more relevant to the grassroots communities most affected.

6. SIGNIFICANCE OF THE STUDY

It is essential to adopt a critical approach to the ICC as this will lead to making the Court more effective. The ICC cannot be expected to operate like an ordinary domestic criminal court because of the nature of offences over which it has jurisdiction. The ICC seeks to deter extraordinary offences. Since these have been described as being the most serious international offences, it is necessary for the ICC to seek to achieve objectives beyond retribution and deterrence.

The Statute is silent on the possible relationship between the ICC and other forms of transitional justice, particularly TRCs and indigenous approaches. Academics50 have put forward suggestions on how the relationship between prosecution and alternative strategies can be established. However, the current proposals are flawed as they fail to provide an adequate solution without contradicting provisions under the Rome Statute, or in some cases the proposals presented are impractical.

Roche \textsuperscript{51} adopts an insightful approach to the subject, particularly by identifying the fact that the Rome Statute does not provide specific guidance on how provisions of the Statute should be interpreted, should a state under investigation establish a TRC or adopt indigenous methods. This therefore implies that any discretion regarding the interpretation of statutory provisions under such circumstances is vested in the ICC Prosecutor and the Court.

The study will therefore compare and contrast the ICC system of prosecution with alternative mechanisms, mainly TRCs and the indigenous strategies in an effort to reconcile the two models of justice. Over the past forty years, TRCs have been created in states undergoing transition from authoritarian or communist regime to more democratic regimes. \textsuperscript{52} The UN defines TRCs as official, provisional, non-judicial fact finding bodies that are intended to investigate past abuses of human rights or humanitarian law committed over a number of years. \textsuperscript{53} Unlike trials, TRCs adopt a victim centred approach with the purposes of establishing the truth about a particular regime and offences committed. Truth and Reconciliation Commissions vary in scope and issues that need to be dealt with always depend on the mandate of a particular

Commission.\textsuperscript{54} Regardless of the mandate, the rationale for their establishment is to address crimes of international concern, such as genocide and war crimes, through seeking to achieve justice by way of setting a historical record about the truth of a situation.\textsuperscript{55} In the process other objectives such as reconciliation, respect for the rule of law are realised as demonstrated under chapter three of this thesis.

However, a more interactive approach between the ICC and TRCs might, for instance, involve the latter granting conditional amnesty to perpetrators that come forward.\textsuperscript{56} The word ‘amnesty’ is derived from the Greek word \textit{amnestia}, which means ‘forgetting’. The general rule in relation to amnesties is that they are no longer acknowledged as the natural price to be paid for transition from repression to democracy.\textsuperscript{57} This is justified in the recent proliferation of criminal tribunals and courts established in order to hold suspected individuals accountable for the crimes.

Amnesties, however, have been adopted by governments in the past as a means of securing peace through the act of pardoning offenders. Examples of states that have embraced the practice of granting amnesty to officials of past regimes suspected of violating human rights by committing offences such as

\textsuperscript{54} For instance the Commission in Argentina and Chile were intended to concentrate on forced disappearances, Commission in East Timor had a broad mandate include violations of economic, social and cultural rights. See also the South African Commission chapter 3 of this thesis.


\textsuperscript{56} The South African TRC – TRC Report Volume 5 1998 Chapter 3 of this thesis.

torture and crimes against humanity include Cambodia, Uruguay, Argentina, Guatemala, Haiti, South Africa, El Salvador and Chile. Blanket amnesties have been criticised on the basis that they fail to affirm the rights of victims and that they are incapable of securing lasting peace or reconciliation.\(^{58}\)

Consequentially, the UN detached itself from the amnesty granted under the Lome Accords in relation to rebel forces suspected of committing war crimes and crimes against humanity in the civil war in Sierra Leone.\(^{59}\) Nevertheless, amnesties that have been accompanied by TRCs, intended to rectify the historical records of events, compensation of victims and institutional reforms, have been widely accepted.\(^{60}\) This was the case in relation to the TRCs in South Africa and East Timor that were vested with the powers to grant amnesty.\(^{61}\)

However, the issue is how the ICC would deal with a situation where an amnesty has been granted. Would the granting of amnesty by the state


constitute a bar to prosecution under the ICC? What would be the ICC’s reaction to a situation where a state that is under investigations was to grant amnesties to individuals suspected of having committed the most horrendous crimes? In order to ascertain how the ICC would respond, reference is made to the Rome Statute. The Statute does not address the issue of amnesty. Nevertheless, Dugard suggests that the rationale for the absence of the issue of amnesty in the Statute is because the Act was never drafted with the purposes of permitting amnesty to be raised as a defence.\(^6\) Thus, amnesties will never constitute a bar to the ICC’s capacities to exercise its jurisdiction.\(^6\)

The Rome Statute imposes a duty on states to prosecute individuals suspected of having committed the most serious offences such as genocide, war crimes or crimes against humanity. This is done by the preamble of the Statute acknowledging that ‘it is a duty of every state to exercise criminal jurisdiction over those responsible for international crimes.’ The granting of amnesties is thus contrary to the Rome Statute. Permitting amnesties under the Rome Statute would constitute a violation of fundamental objectives of the ICC such as putting an end to impunity. The subject of amnesty was part of the agenda of the Rome Diplomatic Conference.\(^6\) The concept of amnesty was considered as this is evident in the _travaux preparatoires_, and was overruled.

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\(^6\) The Rome statute 1998 Article 53 (3) (c).

in the context of the defence of *ne bis in idem*.\(^{65}\) Surely had the parties to the Rome Statute intended to incorporate amnesty as a defence, a specific provision would have been incorporated to that effect.

However the Security Council acting under Chapter VII of the UN Charter could, under article 16 of the Rome Statute, order a deferral of prosecution for two months or more in circumstances where the amnesty was granted. Under the Rome Statute, such a resolution would have to be renewed every twelve months, though under the concept of amnesty, an individual is exempted from prosecution permanently. So the act of allowing amnesties is contrary to article 16 of the Rome Statute. On the other hand, the Security Council acting under Chapter VII implies that such a decision was adopted as a result of a determination that prosecution of the perpetrator would constitute a threat to international peace and security.

Scharf\(^{66}\) argues that the Rome Statute includes provisions that could lead to the recognition of amnesty indirectly. Accordingly, an amnesty could be recognised under article 17(1) (b) of the Rome Statute, thereby the ICC deeming the case in relation to the situation inadmissible. Nonetheless, based on the Statute, as well as the *travaux preparatoires*, it is unlikely that an amnesty would be permitted. Consequently, national courts are obliged to

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prosecute individuals responsible for the most horrific crimes of international concern.\(^{67}\) The obligation is further recognised under international law.\(^{68}\) Hence, proposing to do otherwise would not only be contrary to international law, but also promote a culture of impunity.\(^{69}\)

Yet there is a possibility that a TRC can be allowed to operate alongside the ICC and national proceedings in states that have situations and cases before the Court. The establishment of TRCs, if undertaken, would be intended to benefit the victims and not the perpetrators. This is relevant in order to ensure reconciliation.\(^{70}\) However, TRCs could be established in such a way that perpetrators also benefit by ensuring a strategy that guarantees due process procedures. For instance, this can be achieved by refraining from publicly naming offenders, as was the case in the Chilean Truth Commission that was established in 1990.

The study seeks to establish means by which trials under the ICC framework can operate alongside alternative mechanisms, particularly TRCs and indigenous tactics. It is necessary to carry out further research in order to establish the role that the ICC should play under such circumstances. The study contributes to existing knowledge by clarifying the role that the ICC


should undertake, should it ever be faced with such a situation. This would be done by establishing a model of transitional justice that would be suitable for adoption in states that have situations and cases before the ICC. The objective of the research is to determine means by which the ICC can operate as a hybrid Court, that has both backward and forward looking aims, including ending impunity, deterrence, the strengthening of the rule of law, contribution to rebuilding of affected communities and the entire state as a whole.\footnote{Similar approach was recommended in relation to Special Court of Sierra Leone see Alison Smith ‘Sierra Leone The Intersection of Law Policy and Practice’ in Cesare PR Romano, Andre Nollkaemper and Jannk Kleffner (eds) \textit{Internationalized Criminal Courts} (Oxford University Press 2004) Chapter 7.}

Such a model will be beneficial to states that have situations and cases before the ICC. So far, it has been the Least Developed Countries (LDC) because the chances of a Least Developed Country being referred to the ICC is high compared to that of developed states as illustrated under the definition of the problem.\footnote{Today it remains a fact that all situations before the ICC are not only based in Africa but are LDC.} The current framework of the ICC is restrictive. The nature of criminal proceedings under International Criminal Justice (ICJ) is restricted to adversarial and inquisitorial trial forms.\footnote{Mark J Findlay and Ralph Henham \textit{Transforming International Criminal Justice Retributive and Restorative Justice} (Routledge 2012) Chapter 7.} Less attention is given to addressing approaches common in LDC that tend to be more restorative in nature.

The issue that arises however is whether it is ethical for the ICC, vested with the mandate to secure retribution and deterrence, to be expected to achieve aims beyond its objectives. The thesis thus clarifies whether the ICC must be
expected to achieve justice at an international level, involving both transitional or restorative and retributive objectives. The study further ascertains whether restorative justice is among the objectives of the ICC. The thesis seeks to address the issues raised above and determine what the role of the ICC is or ought to be. Questions as to whether transitional or restorative justice has a role to play in establishing international criminal justice will be considered in detail under chapter two. In the chapter, the ICC is criticised on its’ adoption of profoundly the adversarial and inquisitorial procedurals, on the basis that this constitutes a limitation towards achieving ‘justice’ as well as being effective in situations in Africa.

The adoption of a more robust restorative approach, such as the indigenous methods or TRCs will ensure that the affected communities, victims, offenders and their families are restored to community life.74 A methodology by which transitional justice could be incorporated within the ICC framework that will ensure that the ICC goes beyond its current role of retribution and deterrence, by incorporating indigenous methods and TRCs is set out in the next section.

7. RESEARCH DESIGN, METHODOLOGY AND JUSTIFICATION OF STUDY

The aims of the thesis are achieved through the adoption of a combination of doctrinal or theoretical legal research and the non-doctrinal approach referred

to as ‘law in context.’\textsuperscript{75} Doctrinal research seeks to provide a systematic account of rules governing a particular legal category.\textsuperscript{76} It involves the analysis of the relationship of rules, the identification of complications, and creates leeway to envisage future developments. One of the postulations of the doctrinal approach is that the nature of legal research is derived from the law itself.\textsuperscript{77}

This approach seeks to enquire what the law is in a particular area.\textsuperscript{78} For instance, one of the aims of the research is to ascertain the role of the ICC in relation to transitional justice and restorative justice mechanisms. This implies that there is a gap in the law that needs to be filled. Partly, this aim will be achieved by reference to the black letter law because the ICC is established on a treaty basis, the Rome Statute. Reference to the black letter law is intended to identify and clarify the gaps in the law. This is justified on the basis that this approach aims to systematise, rectify and clarify the law on any particular subject.\textsuperscript{79} Since the proposition of this thesis is to establish a methodology by which transitional justice ought to be incorporated into the ICC framework, the study will therefore determine how the ICC can achieve objectives beyond

\textsuperscript{75} Mike McConville and Wing Hong Chui ‘Introduction and Overview’ in Mike McConville and Wing Hong Chui (eds) \textit{Research Methods for Law} (Edinburgh University Press 2007) 1, 3 – 4, Ian Dobinson and Francis Johns ‘Qualitative Legal Research’ in Mike McConville and Wing Hong Chui (eds) \textit{Research Methods for Law} (Edinburgh University Press 2007) 18 - 22.
\textsuperscript{76} Ian Dobinson and Francis Johns ‘Qualitative Legal Research’ in Mike McConville and Wing Hong Chui (eds) \textit{Research Methods for Law} (Edinburgh University Press 2007) 19.
\textsuperscript{78} Ian Dobinson and Francis Johns ‘Qualitative Legal Research’ in Mike McConville and Wing Hong Chui (eds) \textit{Research Methods for Law} (Edinburgh University Press 2007) 19.
\textsuperscript{79} Mike McConville and Wing Hong Chui ‘Introduction and Overview’ in Mike McConville and Wing Hong Chui (eds) \textit{Research Methods for Law} (Edinburgh University Press 2007) 4.
deterrence and retribution. This can be achieved if the ICC was to operate at a complementary level with institutions such as TRCs or traditional mechanisms that must be established by states that have cases before the Court.

On the other hand, the adoption of the non-doctrinal ‘law in context’ approach underlies the premise that there is a problem in society and that the law contributes to the cause of the problem.\(^8^0\) Under the approach, the law is thus regarded to be a problem by contributing to a social problem. The idea is that whilst the law might provide a solution or fraction of a solution, other non-law solutions not prohibited might in fact be ideal.\(^8^1\) In this study, the problem created by the law is the existence of the limitations underlying the Rome Statute, such as issues in relation to lack of enforcement powers of its decisions, challenges the ICC is facing in relations to cooperation with states, selectiveness in securing justice by focusing on the key perpetrators and leaving the others to escape impunity.

As stated previously, the ICC is not intended to replace the role of domestic courts in prosecuting those suspected of having committed the most serious offences. However, as addressed in the definition of the problem, there is a problem of states failing to undertake their primary duty of ensuring persons

\(^{8^0}\) Mike McConville and Wing Hong Chui ‘Introduction and Overview’ in Mike McConville and Wing Hong Chui (eds) *Research Methods for Law* (Edinburgh University Press 2007) 1.

\(^{8^1}\) Mike McConville and Wing Hong Chui ‘Introduction and Overview’ in Mike McConville and Wing Hong Chui (eds) *Research Methods for Law* (Edinburgh University Press 2007) 1, Kamari Maxine Clarke *Fictions of Justice the International Criminal Court and the Challenge of Legal pluralism in Sub-Saharan Africa* (Cambridge University Press 2009).
suspected of committing the most serious offences are held accountable for various reasons. The states that have cases before the ICC have been subjected to a conflict for long periods of time. As a result, it would require more than what the ICC currently has to offer to address the challenges within these states and ensure the atrocities are not repeated.

Therefore, the law needs to be reformed and developed in order to provide a solution. One of the problems created by law that will be addressed in this thesis, is identified in the second aim that intends to establish means by which the transitional justice bottom-up approach could be integrated within the ICC’s top-down approach leading to alternative transitional measures being used within the ICC framework. The problem is that the ICC operates under a top-down approach, and this is problematic for the following reasons; firstly, the ICC is not only concerned with the ‘most serious crimes of international concern,’ but also with the most serious offenders. The lower level offenders are unlikely to be prosecuted due to budgetary restrictions, hence, will no doubt escape accountability. The law makes it clear that states are expected to take measures to address these issues rather than relying on the ICC to provide a solution to all the issues.

This thesis will further consider some examples of ATJ mechanisms adopted by states in Africa to address past human rights abuses. These issues are considered for the purpose of assessing how the ICC could be more relevant to

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82 The Rome Statute 1998 Article 5.
Africa as well as to encourage other African states to be more cooperative with the Court. Currently, the ICC is perceived as being biased and more of an institution that is seeking to intervene in matters of sovereign African states.\textsuperscript{83} Incorporating ATJ measures into the ICC framework will allow indigenous approaches and TRCs to operate together with ICC prosecutions. Consequently, the procedurals within the Rome Statute will not be restricted to inquisitorial or adversarial approach, but will be extended to incorporate approaches that LDC tend to adopt for the purpose of addressing past human rights abuses.

Secondly is the issue of isolation. The Court is located miles away from the population concerned. Justice needs to be brought closer to home in order to ensure lasting peace in African states that have cases before the ICC. The prosecution of few individuals will make little or no difference to most of the people in the Sudan, Uganda or the DRC because the communities in these states have been subjected to conflicts for decades and they neither know nor understand the meaning of peace. More needs to be done at a local level for the purposes of introducing a culture of mutual respect for human rights.

For instance, lessons can be drawn from the ICTR that has been criticised for its remoteness from the Rwandese people located in Arusha, Tanzania, some

\textsuperscript{83} Kamari Maxine Clarke \textit{Fictions of Justice the International Criminal Court and the Challenge of Legal pluralism in Sub-Saharan Africa} (Cambridge University Press 2009).
kilometres away from Rwanda. Despite its efforts in trying to inform the public through the Rwandese media, prosecutions undertaken in Rwandese courts were preferable to the ICTR adjudication because local justice was more accessible, compatible with community expectations, and made it possible for the Rwandese to have control over both criminal and civil proceedings. On this basis, references are drawn from Rwanda, as it is a classic example of an African state that adopted an indigenous method in seeking to address past human rights abuses where nearly the entire population was involved in the commission of atrocities.

The ICC creates provision for the Court to be set up in a state that is being investigated, hereby making it easy to gather evidence that might be essential in securing convictions. The work of the ICC in states under investigations will be assessed critically in order to determine the Court’s effectiveness. It is essential for trials to be conducted in states where violations occur in order to ensure lasting peace, and to discourage a culture of impunity. The case studies focus on situations that have encountered serious human rights violations for a long period of time. For that reason, undertaking trials and creation of TRCs or traditional methods within these communities will provide an opportunity for the people to be educated and means of inculcating a human rights culture.

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The clarification of the law on the role of the ICC with ATJ mechanisms such as indigenous methods or TRCs will lead to the establishment of a model that can operate alongside the ICC. Overall, achieving the aims of the study will not only answer the question of whether the prosecution under the ICC, truth commissions or indigenous approaches can operate at a complementary level, but also facilitate the reconciliation of the different approaches. Such an approach is intended to make the ICC more effective and relevant to Africa’s problems.

Finally the third aim is to consider the mechanisms adopted by domestic courts, states as well as considering specifically progress and effort made in seeking to establish accountability for international criminal offences for the purposes of establishing a model for transitional justice. This part of the study will adopt a case study approach, focusing on the situation in Uganda. This case has been chosen for two main reasons. Firstly, it is the first situation to be referred to the ICC, and it is an African state. Secondly, it is due to the issues that have arisen as a result of the situation being referred to the ICC. These include proposals for the adoption of the traditional *acholi* forms of justice to deal with the crimes committed by the Lord’s Resistance Army (LRA). It is currently not clear how these issues will be addressed under the framework of the ICC. These circumstances therefore indicate the need for the incorporation of the TRCs and indigenous forms of justice with specific conditions to
operate within the ICC framework. The notion of transitional and restorative justice is developed below.

In addition, the selection of Uganda as a case study is because it was the first member state to voluntarily refer a situation to the ICC. The fact that Uganda had referred its situation voluntarily implied that the state would be expected to cooperate with the ICC. Uganda is regarded to have an effective operating legal system. Thus assessing the manner in which the situation was considered and handled by the ICC, the situation in Uganda would help to establish a model on the effectiveness of the ICC and how such issues can be addressed in future. On 13 October 2005, the ICC opened arrest warrants for five senior leaders of the LRA a rebel group who for a long time have been insurgents against the government of Uganda under President Yoweri Museveni.87

The situations described above will be evaluated against the developments in Rwanda, particularly the establishment of the gacaca courts, established to try genocide suspects in order to relieve the burden of the national courts and help rebuild indigenous communities.88 The gacaca courts model will be assessed and evaluated in developing a model of transitional justice. However, it is important to point out that the ICTR is a tribunal vested with temporary

87 Press Release ‘International Criminal Court Warrant of Arrest Unsealed against Five LRA Commanders’ 14 October 2005
jurisdiction, whereas the scope of the project will be restricted to examining the operation of these strategies within the ICC framework since it is permanent.

This study is a desk-based project. Doctorial research is library based and focuses on the collection and analysis of primary and secondary sources. The primary sources in this study include the Rome Statute, other relevant legislations under international and domestic criminal law as well as case law. Whilst secondary sources include journal articles or commentaries on legislation, textbooks, newspapers, unreported cases, case digests, legal dictionaries, encyclopaedias, periodicals, particularly legal, political and criminological. This material is accessible electronically as well as in hard copies. This project is an in-depth research study to suggest a methodology for how ATJ measures can be justified within the ICC framework through the creation of a model for transitional justice that can be adopted by states before the ICC.

8. LITERATURE REVIEW

Transitional justice is by nature a deeply politicised procedure. The form of transitional justice developed needs to be practical and normally tends to

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89 Terry Hutchinson Researching and Writing Law (Oxford University Press 2010) 7.
symbolise the nature of transition occurring within a particular state.\textsuperscript{91} The term ‘transitional justice’ refers to a conception of justice associated with periods of political change within a state.\textsuperscript{92} The concept is characterised by the adoption of measures, including domestic, hybrid, and international prosecution of perpetrators, TRCs offering reparations to victims of human rights violations, institutional reforms, construction of memorials and museums for the purposes of preserving the past.\textsuperscript{93} On an operational level, transitional justice therefore refers to institutions or tools adopted to investigate or address past violations of human rights.

According to Chandra Sriram; \textit{The study and practice of transitional justices analyses policy choices made by regimes emerging from armed conflict and}
Transitional justice has been defined and classified by scholars in three major ways: firstly, through its tools, instruments and institutions. Secondly, through a chronological of institutional development and thirdly by clarification versions of regimes changes that lead to an endorsement of transitional justice. Three different phases of transitional justice have been identified: first, the post-war phase. The Nuremberg Trials (1945) illustrates such an accomplishment of transitional justice, the object of the trials being to establish individual and collective accountability. The second phase adopts a restorative approach, illustrated by the creation of TRCs to deal with past human rights abuses. This method was first adopted in Argentina, followed by other states including South Africa, Bolivia, Brazil, Canada, Chad, Columbia, Chile, Ecuador, El Salvador, Ghana, Nepal and Peru among others. Finally, the third phase is the creation of a permanent International Criminal Court intended to prosecute the most serious offences of international concern.

Nevertheless, the concept continues to evolve and most recently is the adoption of indigenous approaches that is the *gacaca* courts in Rwanda and *mato oput* in northern Uganda. Still, the above definition of transitional justice is rather restrictive as systematic human rights violations can also occur in democratic states.\(^{100}\) There are two main conceptions of transitional justice, the narrow and broad approaches. The narrow approach is intended to focus on the past and is characterised by acts such as prosecution of the perpetrators and compensation of the victims, while the broad approach focuses on the future through emphasising reconciliation and institutional reforms, including measures that would deter similar abuses in future.\(^{101}\)

More recently, McEvoy and McGregor argued that the traditional view that involves the restriction of the application of transitional justice to a limited and linear time of period of transition from authoritarian regime to democracy had become invalid.\(^{102}\) Transitional justice processes are no longer understood to correlate to an exclusive moment in time.\(^{103}\) This orthodoxy is challenged in Patricia Lundy and Mark McGovern by addressing a transition from a conflict within an ostensible democratic society of Northern Ireland.\(^{104}\) They argue

that the structure in which transitional justice is addressed ignores the problem that human rights abuses could continue to occur in circumstances where, in theory, the norms of liberal democratic accountability prevail. Consequently, this leads to a permission of a ‘radical critique of implicit liberal versions of transition that may otherwise struggle to deal with the subversion of the rule of law, under the guise of law itself, in ostensibly libel democratic state.’

The success of a transitional justice will depend on the effectiveness of the measures adopted to address past atrocities. The ICC structure currently does not provide an effective measure to ensure that individuals responsible for the crimes are held accountable. Firstly, the Rome Statute is temporally restrictive as the Court can only exercise jurisdiction for crimes committed after the entry into force of the Statute, or the entry into force of the Statute for the state concerned. The Rome Statute’s inability to extend its jurisdiction to atrocities committed prior to its entry into force has notably been criticised. Secondly, there is the issue of selective justice. The ICC is not only concerned with the ‘most serious crimes of international concern’ but also with the most serious offenders. The lower level offenders are unlikely to be prosecuted

due to budgetary restrictions and hence, will no doubt escape accountability. Selective justice leads to inconsistency in the application of the law. It not only prevents punishment, but it is also contrary to the rule of law.\textsuperscript{110}

9. LIMITATION OF STUDY

Out of the seven African cases before the ICC, the inquiry in this study is restricted to one situation that is under consideration by the Court, Uganda. A limit had to be imposed due to time and financial restrictions.

10. CONCLUSION AND OVERVIEW OF CHAPTERS

Recently the world has seen an increase in the number of mechanisms seeking to establish individual accountability, including \textit{ad hoc} tribunals, domestic judicial systems and hybrid courts set up for purposes of prosecuting those suspected of committing the most serious offences. Despite the increase in tribunals, punishment of human rights abuses has not always been a high priority. This has been particularly common among African states where perpetrators of enormous atrocities have either enjoyed immunity or have been granted amnesty.

There are currently seven African cases before the ICC, and a total of twenty suspects. The ICC in 2012 marked ten years in existence and yet atrocities similar to those addressed under the Statute are still being committed. No

\textsuperscript{110} Payam Akhavan ‘The Yugoslav Tribunal at a Crossroads the Dayton Peace Agreement and Beyond (1996) 18 \textit{Human Rights Quarterly} 259.
wonder Gerry Simpson argues that the object of a functioning ICC and ad hoc tribunals is not to prevent history from repeating itself as we have so many times witnessed, but rather the institutions are intended to tell us when we do.¹¹¹ The arguments suggest that sovereign states, as they have done over the years, are inclined to act in a manner that would constitute a violation of ICL. Consequently, there is need for the ICC to go beyond its current objectives of deterrence and retribution to ensure effectiveness and making the Court more relevant to Africa. Therefore chapter one focuses on the history of institutions and jurisprudence of International Criminal Justice.

Chapter two examines the role of the ICC in relation to ATJ. The role of the ICC is scrutinised. The possibility of ATJ measures being able to operate besides the ICC is considered. This is addressed for the purpose of ascertaining how transitional justice bottom-up approaches could be integrated within the ICC’s top-down approach leading to ATJ measures being used within the ICC framework. The chapter further considers the purposes of ICJ so as to justify the criticisms of the ICC.

Chapter three focuses on some examples of ATJ processes that have been adopted in the past to address human rights abuses. The analysis of the notion of justice is based on TRCs and traditional approaches such as Rwanda’s gacaca courts. Questions like why states tend to adopt such approaches other

than prosecution will be addressed. The premise underlying the chapter is that prosecutions alone are insufficient to address the challenges faced by states under transition. Therefore, other strategies must be adopted to function in tandem with prosecution to address past human rights abuses.

Chapter four adopts a case study approach. The chapter addresses the situation in Uganda. An assessment of actions, functions and progress made by the domestic courts and the state in seeking to establish accountability for international criminal offences is assessed.

Finally, chapter five concludes the study and makes some recommendations and the contribution to existing knowledge.
CHAPTER ONE
HISTORY OF INSTITUTIONS AND JURISPRUDEENCE OF INTERNATIONAL CRIMINAL JUSTICE

1.1 Introduction to History of International Justice

International law in general focuses on the rights and responsibilities of states.\(^1\) If a state violates norms of international law, thereby causing harm to another state or a state national, the injured state can claim for such violations by seeking to hold the state responsible for those acts.\(^2\) However over time, a number of circumstances have led to international law recognising individual responsibility for actions regarded as criminal under international law.\(^3\)

International Criminal Law (ICL) is a legal discipline that consists of several components which have a functional relation on the basis of the pursuit of value oriented goals.\(^4\) These goals include the prevention and inhibition of international criminality, improvement of accountability, eliminating impunity and the establishment of International Criminal Justice (ICJ).\(^5\) The different components of ICL originate from different legal disciplines, including international law, national criminal law, comparative criminal law and

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\(^2\) Lori F Damrosch, Louis Henkin, Sean D Murphy, Han Smit *International Law Cases and Materials* (West Thomson Reuters Business 2009) 1306.


procedures, international and regional human rights law.\(^6\) These different disciplines cannot be easily reconciled as they are all different on the basis of their content, scope, subjects, values, goals and methods.\(^7\) Nonetheless, the various legal disciplines that form ICL constitute a functional whole, despite the absence of a cohesive doctrinal methodology that exists in other legal disciplines, granting them more defined systematic natures.\(^8\) There is in existence a system of ICL, which originates from the functional association that exists between the different aspects of these disciplines, as well as the value oriented goals that ICL seeks to achieve.\(^9\)

The sources of ICL include treaties,\(^10\) custom,\(^11\) general principles\(^12\) and others as listed in the Statute of the International Court of Justice.\(^13\) Therefore, ICL is a broad discipline, with a combination of several disciplines that differ in nature, value, goals, contents, methodology, subjects and techniques.\(^14\) The subjects in ICL are individuals.\(^15\) Therefore ICL is biased towards individuals and its enforcement is reliant on the cooperation of national criminal justice

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\(^7\) M Cherif Bassiouni *Introduction to International Criminal Law* (Martinus Nijhoff 2003) 1.

\(^8\) M Cherif Bassiouni *Introduction to International Criminal Law* (Martinus Nijhoff 2003) 1.


\(^11\) Offences regarded as ‘war crimes’ today were first recognised on a national level. For instance Piracy was recognised in 1600s, whilst Slave trade and slavery in the 1800s, Jacobs W F Sundberg *Piracy* in M Cherif Bassiouni *Introduction to International Criminal Law* (Martinus Nijhoff 2003) 803, M Cherif Bassiouni ‘Enslavement as an International Crime’ (1991) 23 New York University Journal of International Law and Politics 445 - 517.

\(^12\) Including elements of criminal responsibility, elements of a crime, principles of legality and *ne bis in idem*, and others from the national jurisdictions such as the meaning and content of maxim *aut dedere aut judicare*, Carl-Friendrich Stuckenber *Multiplicity of Offences Concursus Delictorum* in Robert Cryer, Hakan Friman, Darryl Robinson *An Introduction to International Criminal Law and Procedure* (Cambridge University Press 2010) 459.

\(^13\) Statute of the International Court of Justice Article 38.


systems. Consequently, individuals suspected of violating the rules of ICL are normally prosecuted before national or international institutions. At national level, criminal law is concerned with wrongs committed by individuals against society.

The concept of individual criminal responsibility was introduced for the first time at an international level following the World War II, on the basis of the Nuremberg and Tokyo Charters. The principle was further affirmed by the UN General Assembly, which confirmed the notion of direct criminal responsibility under ICL, regardless of the dictates of domestic law. These precedents were further reinforced with the establishments of the ICTY and ICTR, the institutions that will be addressed in detail below. Finally, the Rome Statute further provides for individual responsibility. These precedents establish the principle of individual responsibility under ICL, and the ability of ICL to be directly enforced against individuals. This therefore implies that there is no doubt on the existence of the principle of direct individual responsibility in ICL.

17 Lori F Damrosch, Louis Henkin, Sean D Murphy, Han Smit International Law Cases and Materials (West Thomson Reuters Business 2009) 1306.
19 The Nuremberg Charter Article 6.
20 Affirmation of the Principles of International Law Recognised by the Charter of the Nuremberg Tribunal General Assembly Resolution 95 (I) UN Document A/236 (1946) 1144.
21 The ICTY Statute Articles 7(1) and 23(1).
22 The ICTR Statute Articles 6(1) and 22(1).
24 M Cherif Bassiouni Introduction to International Criminal Law (Martinus Nijhoff 2003) 68.
Therefore, ICJ refers to the institutions that have been established for the purposes of upholding justice in situations where individuals are allegedly accused of having committed international criminal offences, such as sexual offences or violations of the laws of war. The development of ICJ, illustrated by the increase in institutions set up for the purposes of prosecuting individuals, is relatively recent, as will be illustrated in this chapter. On the other hand, ICL is the substantive body of law that seeks to establish individual responsibility on the basis of international mechanisms. The mechanisms contain details of the elements of offences that need to be established before an individual can be charged for committing an offence.

In order to put the thesis into context, it is essential to consider the history of international justice as this leads to an appreciation of the current framework as well as any proposals intended to improve the system. The understanding of the history of international justice is essential to this study in order to illustrate how the notion of international justice has developed through the increase in institutions intended to prosecute individuals suspected of having committed the most serious offences of international concern.

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However, it is ironic that despite the increase in such institutions, there are many countries where individuals suspected of committing such offences still escape liability. The history considered in this chapter makes references to instances when states took measures to ensure that individuals suspected of committing offences were prosecuted based on either multilateral treaties or by means of the UN Security Council adopting particular actions. However, despite such actions today, there are countries that fail to prosecute for various reasons. As a result, the problem of individuals escaping accountability still stands. In order to be able to recommend an effective hybrid conception of transitional justice, that involves retributive and restorative characteristics, consideration of the history is necessary to justify the need for the ICC to go beyond its current objective of deterrence and retribution.

1.2 History of International Justice

This section considers the history of ICJ. The history further signifies the importance of establishing individual criminal liability in international law, the status of an individual is not taken into account. The norm is that only those deemed guilty of committing offences of international concern should be prosecuted. States have the primary responsibility of prosecuting individuals suspected of committing international criminal offences. Consideration of

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the history illustrates how the notion of international justice has developed with a proliferation of institutions intended to prosecute individuals suspected of committing international criminal offences.

Besides the lessons that have been learnt from history, the world is still facing challenges. Particularly, there are still states that for various reasons are reluctant to undertake prosecutions. The thesis focuses on African countries whose situations have being referred to the ICC. It intends to highlight the reasons why African states seem critical of the ICC. There is need for the ICC to consider each situation before the Court on its own merit as opposed to the current framework that is considered in greater detail in chapter two. The object is to develop a hybrid conception of transitional justice that involves the combination of retributive and restorative characteristics within the ICC framework. Such an approach will be ideal in leading to non-repetition of the atrocities in states involved, as well as promotion of a culture that respects human rights.

The notion of establishing individual accountability lies on the basis that at every stage of civilisation of mankind, there has been an existence of limitations on the conduct of warfare. Accordingly, as early as the Egyptian

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and Sumerian wars of the second millennium B.C., there were rules in place intended to define circumstances under which a war could be initiated (*jus ad bellum*).\(^{29}\) The fact that these norms have existed for a long period of time implies that there was a possibility that individuals could be held accountable for violation of these norms. For instance, in the seventh century B.C., the Babylonians conformed to the well-established rules of international law in the manner they treated both prisoners and captured persons.\(^{30}\) Following the operation against Jerusalem in 690 B.C., the victorious Sennacherib handled most of the conquered Jews with authorised approved mercy;

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I \text{ assaulted Ekron and killed the officials and the patricians who has committed the crimes and hung their bodies on poles surrounding the city. The (common) citizens who were guilty of minor crimes, I considered prisoners of war. The rest of them those who were not accused of crimes and misbehaviour, I released.}
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This quotation reveals that the need to establish individual accountability dates back to the early stages of human civilisation. The passage further highlights the idea that persons suspected of having committed offences have always been held accountable for the offences. Accountability must be restricted to those who, according to the prescribed law, have been deemed guilty beyond


reasonable doubt. However, where there is an absence of evidence to establish that an accused has in fact committed an offence, the accused must not be subjected to punishment. A penalty must only be imposed on individuals that are deemed guilty and no person should escape accountability. If this belief was essential even way back in the seventh century B.C., therefore, it is only reasonable to ensure that there are measures in place under the current ICC structure to guarantee that all persons suspected of having committed offences are held accountable, regardless of status or role played towards the commission of offences.31

The origins of ICJ dates as far back as 1474 with the trials of Peter von Hagenbach, governor of the territory of Breisbach, which constituted the first war trials in history. Hagenbach was tried for atrocities including murder, arson and robbery that allegedly he had ordered to be committed whilst in command of the city. Hagenbach sought to rely on the defence of superior orders claiming he was acting under the orders of Duke Charles of Burgundy from 1469 to 1474, however, the Court composed of Swiss, German and Alsatian judges rejected the defence.32 The rejection of the defence of superior orders is deemed to have contributed towards the legitimacy of the Nuremberg Trials considered under section 1.2. 2 below.33

The trial of Hagenbach was international in nature due to the composition of the Court. This claim has been verified by Schwarzenberger, who has argued that the trial was “international” in nature on the basis that while a regular trial would have been conducted before local judges, in this case the bench was composed of a number of allies. In addition, as the Swiss towns had ceased to be part of the Holy Roman Empire, their participation gave an international character to the bench before which Hagenbach was tried.\textsuperscript{34} An international court or an \textit{ad hoc} tribunal was vital in this case because, had the bench been composed of local judges, it would have been regarded as subjects to the Holy Roman Empire presiding on the case. This could have led to possible bias, thereby making the trials illegitimate. The implication of the trial having been conducted at the time that the Swiss towns were longer part of the Holy Roman Empire political entity further contributed to making the Court more legitimate.\textsuperscript{35}

The Hagenbach trial raises the issue as to what the correct forum for trying individuals suspected of committing international crimes should be. In the case in point, the defendant questioned the legitimacy of the Court in prosecuting the accused’s conducts. This implies that prosecution of such offences should be conducted at a national as opposed to an international

\textsuperscript{34} Georg Schwarzenberger ‘A Forerunner of Nuremberg The Breisach War Crime Trial of 1474’ 1946 \textit{The Manchester Guardian} 4 cited in Kevin Jon Heller and Gerry Simpson (eds) \textit{The Hidden Histories of War Crimes Trials} (Oxford University Press 2013) 14 – 49.
level. Consequently, Cryer argues that the Hagenbach tribunal’s refusal to accept Hagenbach’s argument, that only a Court of Burgundy could try him, served as a model for the International Criminal Tribunals specifically the former Yugoslavia’s rejection of Dusko Tadic’s plea of *jus de non evocando*.

A similar plea of *jus de non evocando* was raised in the *Prosecutor v. Tadic* Interlocutory Appeal. In addition, the argument was further raised by Slobodan Milosevic’s defence before the ICTY. At this stage in ICL, the correct forum for trying individuals was not clear. The scheme of denying the legitimacy of the tribunal and claiming that the tribunal possessed no right to try the defendant has been raised several times in international trials. It has been argued that the defence suggests that it is a human right to be tried before a court in the country of the defendants’ nationality. However, the plea has never been successful. This thesis however intends to illustrate the importance of undertaking trials at a national level, particularly in states that have faced violation of human rights for long periods of time.

Undertaking trials at a national level would lead to positive implications in states affected, such as upholding the rule of law, encouraging a culture of

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respect for human rights and to prevent recurrence of the offences. The debate of the suitable forum for undertaking criminal trials is explored further in Chapter three. In addition, Military Court Martials and Heraldic Courts also conducted war trials in medieval times under the chivalric code.\(^{41}\) However, the reasoning for conducting trials was on the basis that the mercenaries had engaged in military acts in the absence of a declaration of a formal war.\(^{42}\) Thus, it implies that military acts were only permitted during formal wars. As a result, in the absence of a declared war, persons suspected of committing unlawful acts would be subjected to the wrath of the law. However, there is a difference in the nature of offences that were being tried as crimes compared to the ones that are regarded as offences today. Telford Taylor refers to the term ‘war crime’ as a misnomer,\(^{43}\) accordingly, war crimes consisted then, of acts which would be criminal if performed in a time of peace.\(^{44}\) The term was extended to different types of acts, including killing, wounding, kidnapping, destroying or carrying off other people’s property.

As a result, the term ‘war crimes’ was used in a broad manner and included a wide range of acts. For instance Peter Von Hagenbach was tried for commanding offences including murder, arson and robbery. These were incorporated within the definition of the term ‘war crimes,’ so representing a


different concept of war crimes, as normally such offences would have to be tried under domestic criminal law as opposed to international law. Subsequently, it can be established that the nature of offences that were being tried as war crimes historically are those which today would be treated as offences tried under domestic jurisdictions. However, substantive ICL provides a definition of war crimes and details of how the offence can be committed.\(^{45}\)

Historically, punishment was not restricted to individuals, but also extended to members of companies, thus individuals affiliated to certain companies could be deemed guilty of committing acts of a criminal nature.\(^{46}\) For instance, the free companies (ecorcheurs), whose representatives wandered through France burning and pillaging during the hundred years war, were tried as war criminals by the Court-Martials of ordinary military forces.\(^{47}\) This implies that historically, the need to establish accountability for offences committed was not only restricted to individuals acting in a personal capacity, but also extended to those associated with certain companies.\(^{48}\) The basis for conducting trials was that offences were contrary to the laws of wars, particularly if committed during a time of peace.

\(^{45}\) The Rome Statute 1998 Articles 5, 6, 7 & 8.
By the nineteenth century, military tribunals adopted a trend of prosecuting their own soldiers and those of enemies that were deemed to have violated the laws of war. For instance, Major Henry Wirz, the Swiss medical doctor was appointed commandant of Andersonville prison camp in Georgia in April, 1864.\textsuperscript{49} However, by August 1864, there were a total of 32,000 Union Army prisoners in Andersonville. The Confederate authorities were not providing enough food for the prisoners and consequently men began to die of starvation.\textsuperscript{50} In addition, the water became polluted leading to inmates acquiring diseases. Out of the 49,485 inmates who entered the camp, nearly 13,000 died from disease and malnutrition.\textsuperscript{51} In May 1865, the Union Army arrived in Andersonville and photographs of the prisoners were taken and eventually appeared in \textit{Harper's Weekly}.\textsuperscript{52} The photographs caused outrage among the population. As a result calls were made for persons responsible to be held accountable for the offences.\textsuperscript{53} So, Wirz was tried before a military commission headed by Major General Lew Wallace on 21st August 1865, for charges of conspiracy to injure the health and lives of Union soldiers and murder.\textsuperscript{54} Wirz sought to rely on the defence of superior orders. However, the

\begin{footnotes}
\item[54] Henry Wirz hanged 1865 \url{http://www.history.com/this-day-in-history/henry-wirz-hanged} (accessed on 14 June 2013).
\end{footnotes}
tribunal influenced by the promulgated Lieber Code, \textsuperscript{55} Brussels Declaration, \textsuperscript{56} and the Oxford Manual \textsuperscript{57} rejected the defence and sentenced Wirz to death.

The Lieber Code, Brussels Declaration and Oxford Manual are vital documents in international law; the latter two represent efforts by states of attempting to codify laws and customs of war. \textsuperscript{58} This is fundamental to this thesis, as it constitutes evidence that laws governing war have existed for as far back as the 19\textsuperscript{th} century, therefore it is necessary for states involved in civil or international war to adhere to the rules. Individuals that violate the rules of war must be held accountable.

On 10 November 1865, Captain Henry Wirz of the Confederate army was hanged at Old Capitol Prison in Washington, the single defendant in the first war crimes trial in American history. \textsuperscript{59} Despite Wirz attempting to demonstrate concern towards the inmates at Andersonville, he had to face

\textsuperscript{55} The Lieber Code Washington DC April 24 1863 Comprised of Instructions for the Government of Armies of the United States in the Field the code was described as being complete, humane and easily understandable by commanders in the field – Leon Friedman \textit{The Law of War A Documentary History} Volume I (Randon House 1972) 152, 158, 776.


\textsuperscript{58} They form the basis of the two Hague Conventions on land warfare and the Regulations adopted in 1899 and 1907, Leon Friedman \textit{The Law of War a Documentary History} Volume I (New York Randon House 1972) 221, 308.

\textsuperscript{59} George Rugg ‘Manuscripts of the American Civil War Andersonville/ Wirz Collection’ \url{http://www.rarebooks.nd.edu/digital/civil_war/topical_collections/andersonville} (accessed on 14 June 2013).
It has been argued that the defendant was simply a scapegoat following the death of defendant superior at Andersonville, General John H. Winder in February. This signifies that individuals have a duty under international law to ensure that the laws of war are adhered to and that failure to do so would lead to consequences, a principle with continuing relevance today.

The United States of America (USA)’s army further tried a number of its own soldiers who allegedly committed atrocities during the Philippine insurrection of 1899 -1902. The American army headed by a private commissioner, Charles Francis Adams, undertook investigations. He confirmed that most of the allegations were true. For instance, the Case of Court-Martial of General Jacob H. Smith, who was charged with the offence of ‘conduct to the prejudice of good order and military discipline’ contrary to Laws of War as embodied in the General Orders, No 100. The specification of the charge was as follows: issuing inappropriate instructions in the conduct of hostilities in the Island of Samar, whereby the subordinates were instructed to kill all persons capable of bearing arms with a minimum age limit of 10 years and the setting on fire of the island. General Smith particularly advised his subordinates that the interior of Samar was to be turned into a ‘howling

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64 Manila PI April 1902 S. Document 213 57th Cong., 2nd Session 5-17.
Considering the gravity of the alleged offences, it was only reasonable that the accused had to be subjected to trial for the purposes of establishing accountability for the alleged offences. The trial came to be regarded as something of significance, resulting in other trials being undertaken. Jacob H. Smith’s trial constituted a reminder to individuals engaged in war zones of states, the importance of the law of war and the need for individuals involved to adhere to these laws.

As a result, states were keen to prosecute individuals suspected of acting contrary to the laws of war. The action of states adopting a tendency to prosecute at a domestic level became common as illustrated in events that occurred in different countries as indicated below. For instance states adopted an initiative to undertake prosecution at a domestic level. Great Britain, for instance, tried its soldiers for unrestrained behaviour during the Boer war. Therefore, the primary responsibility for prosecuting criminal offences in international law is vested upon states. Where for some reason recourse is made to prosecute at an international level, states may agree by means of a multilateral document such as the Rome Statute or the UN Security Council establishing the tribunal under Chapter VII of the UN Charter. This matter remains significant today, particularly the fact that the ICC operates under a complementary level is evidence that the primary responsibility to prosecute

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70 As was the case in the creation of the ICTY and ICTR.
lies with the states, states are obliged to undertake prosecution of suspected perpetrators at a domestic level.\footnote{The Rome Statute 1998 Article 17(1) (a), Jeremy Sarkin ‘Enhancing the Legitimacy Status and Role of the International Criminal Court by using Transitional Justice or Restorative Justice Strategies’ (2011 -12) Interdisciplinary Journal of Human Rights Law 83 – 103 http://ssrn.com/abstract=2123033 (accessed on 14 June 2013).} This matter is significant to the thesis as the research intends to establish a methodology by which the ICC can go beyond its objective of deterrence and retribution by operating closely with the states that have cases before the ICC for purposes of ensuring lasting peace as well as respect for human rights.

A further important foundation of the ICC can be found in the works of Hugo Grotius (1583 – 1645), famously regarded as the father of modern international law, who came to be regarded as the most systematic and comprehensive author on international legal theory in relation to war.\footnote{Hugo Grotius ‘The Law of War and Peace’ (1625) Book 3 in Leon Friedman The Law of War A Documentary History Volume I (New York Randon House 1972) 14, 16 -146.} The works, completed in the seventh century, indicate the significance of the law governing wars as well as the notion that wars are intended to be undertaken in a manner that complies with the international legal theory in relation to war.\footnote{Hugo Grotius ‘The Law of War and Peace’ (1625) Book 3 in Leon Friedman The Law of War A Documentary History Volume I (New York Randon House 1972) Chapter I contains details of the General Rules From the Law of Nature Regarding What is Permissible in War with a Consideration of Ruses and Falsehood.} These laws still remain of great importance today.

The idea of establishing individual accountability for persons who act contrary to the laws of war is still of great significance today, as no person is allowed to escape liability. Throughout history, trials intended to establish criminal
responsibility have been established. Further to the cases already discussed, following the First World War, the Versailles Peace Conference sought an undertaking for war trials to be held as discussed in the next section. It is necessary for the ICC to seek to achieve other goals apart from deterrence and retribution, in order to ensure that not only the most serious offences are prosecuted. The ICC must play an active role in ensuring that prosecutions are undertaken within the states whose situation and cases are before the Court.\textsuperscript{74} This is essential to this thesis that argues in favour of a hybrid ICC that would incorporate restorative tactics such as the TRCs and traditional methods. Such an approach will result in the ICC becoming more relevant to Africa, legitimate and effective in its operation and enhancing its role of being a deterrent measure.

Having considered the historical background of ICJ, the next section considers both major and minor trials undertaken following the World War One and Two. This section is included in the thesis for the purposes of identifying possible systematic issues that could be relevant to modern international law under the ICC framework.

\textbf{1.2.1 Commission on Establishing Accountability of the First World War}

Following the First World War, a commission composed of fifteen members was set up by the Allies to investigate the responsibility for the initiation of the war, violations of the laws of war as well as to ascertain a tribunal that

would be suitable to conduct trials. The World War I Commission strongly believed that the hierarchy of persons in authority, regardless of rank, should never be a reason for protecting perpetrators from responsibility, as long as a properly constituted tribunal was vested with the responsibility of establishing crime accountability. This implies that the idea of holding persons suspected of violation of the law of war was essential, regardless of the rank of the perpetrator. The Commission eventually issued a report in March, 1919. The central powers were allegedly responsible for the preliminary war. Accordingly, it was held that the laws of war and humanity had been violated. The commission recommended that high officials such as the Kaiser be tried for ordering such crimes and on the basis of command responsibility.

In addition, the commission recommended that a High Tribunal be set up for the Allies, comprising representatives of the Allied states with an objective of

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78 German Empire, Austro-Hungarian Empire, Ottoman Empire and Kingdom of Bulgaria.


trying individuals for breaches of the laws of war, custom and humanity.\textsuperscript{82} The USA and Japanese members of the Commission condemned this feature. The USA representatives argued that they were not aware of any international statute criminalising laws or principles of humanity and customs of war.\textsuperscript{83} On the other hand, the Japanese representatives probed whether international law recognised a penal law applicable to those who were guilty.\textsuperscript{84}

However, the mainstream was convinced, quite rightly, based on the Martens Clause, that there was in existence a body of ICL founded on the notion of responsibility to protect, as illustrated below.\textsuperscript{85} The Martens’s Clause was initially designed to provide humanitarian rules for the protection of the population of occupied territories, particularly those based on territories subjected to armed conflict.\textsuperscript{86} The Marten’s Clause forms the basis of customary international humanitarian and human rights law; it laid the foundation for the principle that it is not necessary for a law or treaty to be in place prescribing certain acts or offences, before measures to prosecute can be undertaken.\textsuperscript{87}

\textsuperscript{82} ‘Report of the Commission to the Preliminary Peace Conference’ reprinted (1920) 14 American Journal of International Law 95 122.
\textsuperscript{84} ‘Report of the Commission to the Preliminary Peace Conference’ reprinted (1920) 14 American Journal of International Law 95 152.
\textsuperscript{85} ‘Report of the Commission to the Preliminary Peace Conference’ reprinted (1920) 14 American Journal of International Law 95 118.
\textsuperscript{87} John A Appleman Military Tribunals and International Crimes (Bobbs –Merrill Indianapolis 1954) 8.
The Marten’s Clause became an important aspect of international law and subsequently was also incorporated in international agreements. The Marten’s Clause infers that states that are not parties to the conventions will still be bound on the basis of the laws of nations, laws of humanity and public conscience, thus forming the basis for customary international law. This entails that something not prohibited in treaty law may not necessary be lawful. The significance of the Marten’s Clause has been illustrated through the history of treaty formation since 1899. The Marten’s Clause was further relied upon at the Nuremberg trial addressed under section 1.2.2 below, where it formed the basis of a legal argument against claims that the tribunal and the charter was retroactive penal law. Relying on the Martens Clause, the tribunal held that the crimes such as deportation of inhabitants of occupied territories, defined in the Charter, were forbidden and constituted a crime under customary law, hence justifying the Nuremberg trials.

The fundamental issue, which arises, is whether there exists in international law a responsibility to protect victims of the most severe offences of international concern and the need to punish the perpetrators. The basis of the principle of responsibility to protect (R2P) was first ascertained in the Martens Clause enclosed in the Hague Conventions of 1899 (II) and 1907 (IV). The Convention codified legal principles in humanitarian law, which accords individuals’ legal protection during war, and in time of peace. However the Martens Clause has been less influential, particularly in some African states such as the DRC, Sudan, Northern Uganda and Central African Republic, where some perpetrators have been able to escape responsibility. Thus, the need to undertake this study and establish means of how the Martens Clause can become a reality in the conflicts in African states.

Following the peace conference, the Treaty of Versailles was adopted. On that basis German Kaiser, Wilhelm II, was to be ‘publicly arraigned’ for ‘a supreme offence against international morality and the sanctity of treaties’ before an international tribunal. The indictment constitutes the development of ICL, particularly the idea of holding former leaders accountable for

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96 The Hague Convention 1907 Preamble.
offences committed. The tribunal comprised five judges appointed by the power states; the USA, UK, France, Italy and Japan. The judges were further vested with the discretion of imposing any punishment considered fit. However, the decision was never executed, as the Netherlands, acting within its rights, declined to hand over the Kaiser to the Allies, on the grounds that the offence that the Kaiser allegedly committed, was not listed in its extradition treaties with the Allies. Consequently, the Netherlands regarded the offence as a non-extraditable political offence.

The Treaty further created provision for the trials of German nationals to be undertaken for war crimes in the domestic courts of the Allies states. However, as was the case for the Kaiser, these provisions never came to be a reality. Nevertheless, Germany embarked on undertaking prosecutions of twelve individuals, which took place before a German court, the ‘Imperial Court of Justice’ Reichsgericht, sitting at Leipzig between 1921 and 1923. The Germans argued that their own courts were capable of conducting the trials and that international law would be applied in trying the cases. International law was to be applied because defendants were being prosecuted for violating the law of war.

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100 The Treaty of Versailles 1919, Part VII – Penalties, Article CCXXVII.
101 The Treaty of Versailles 1919, Part VII – Penalties, Article CCXXVII.
103 The Treaty of Versailles 1919 Articles 228 and 229.
Defendants who were tried at Leipzig included Karl Heynen, the officer who was in charge of the British prison camp in Westphalia. Heynen was eventually found guilty of beating prisoners who either attempted to escape or declined to work in a coal mine.\(^{104}\) Thus Heynen was sentenced to 10 months imprisonment. Captain Emil Muller who was in charge of an overcrowded prison camp in Flazy-le-Martel was found guilty of brutality and sentenced to six months imprisonment. Robert Neumann a German private was convicted of assaulting British prisoners.\(^{105}\) The respective individuals were all charged for different offences that were deemed punishable under ICL.\(^{106}\) However the trials were branded prejudiced towards the defendants. Six of the twelve indictees were acquitted and others were given lenient sentences.\(^{107}\) Nonetheless these cases have acquired an important status as models for the development of ICJ.\(^{108}\) The trial meant that states were justified in prosecuting persons suspected of the commission of crimes under international law. Moreover, this implied that it was not necessary for states to wait for the creation of an *ad hoc* international court or tribunal or nowadays, a referral of

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\(^{105}\) Other cases include German commanders of submarines who were responsible for sinking hospital ships thus violating the 10th Hague Convention of 1907.


\(^{107}\) For instance Lieutenant Captain Karl Neumann commander of U- boat which sank the British hospital Ship *Dover Castle*, Neumann claimed superior orders by German Admiralty, German Court accepted defence consequently Neumann was acquitted, Claus Kress ‘Versailles Nuremberg the Hague Germany and The International Criminal Law’ (2006) 40 *International Lawyer* 16–20.

the situation to the ICC. States can and must take measures towards prosecuting those who are responsible for international crimes.

Among the trials undertaken was that of two officers of the U-boat 86, Lieutenants Ludwig Dithmar and John Boldt who were prosecuted and sentenced to four years imprisonment for the role played in sinking the British troop ship *Llandovery Castle* that resulted in the death of over 230 people.\(^{109}\) The defendants sought to argue that they were instructed to shell the survivors by the captain, however the court rejected the defence. The German Supreme Court clarified that under the German military Penal Code, if execution of an order in the regular course of duty involves a violation of the law, such an action was punishable. This implies that superior orders could not be regarded as a valid defence and that persons who violate the laws must be held responsible.

A German soldier, Major Benno Crusius, was further found guilty of war crimes, on the basis of the ordering of the shooting of the wounded French prisoners and consequently was sentenced to two years imprisonment.\(^{110}\) Based on examples considered, it can be concluded that ICL is not new. The notion of seeking to establish accountability for international law offences committed has been in existence for a long period of time. So far, this chapter has addressed examples of circumstances in history when individuals were

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\(^{109}\) *Dithmar and Boldt Case (Llandovery Castle Case) Imperial Court of Justice* 16 July 1921, ‘The Llandovery Castle’ (1922) 16 *American Journal of International Law* 708 – 724.

prosecuted for committing offences of war. This action is noteworthy because prosecution indicates the importance of making sure that those responsible for violating the laws of war are held accountable.

This is regardless of the existence of laws prohibiting such actions within a state and under such circumstances individual responsibility can be established on the basis of international customary law, as illustrated by the Marten’s Clause. This would extend to the ICC and crimes that are within the ICC jurisdictions. For that reason, despite the Rome Statute encompassing clear details on how a situation can be referred to the Court, it could be argued that crimes that the ICC has jurisdiction over, have already been accorded the status of customary international law. This could imply that there is no need for states to be parties to the Rome Statute before the Court can exercise its jurisdiction. However, since the ICC was formed on the basis of a treaty, other factors must be taken into account as elucidated in chapter two.

That set aside, the ICC cannot be expected to prosecute every individual suspected of the commission of a most serious offence. On this basis, it will be only reasonable for the ICC to incorporate ATJ measures within the Rome Statute as proposed by this study. Such an action is important for purposes of

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ensuring that no individual will escape with impunity, therefore, people in states where violations are committed, are urged to respect human rights and the rule of law.

In 1920 an ‘advisory committee of jurists’ was called upon to formulate a project for the creation of a Permanent Court of International Justice, which recommended the creation of a ‘High Court of International Justice’, with a mandate of trying crimes for breach of universal law of nations, upon referral by the Assembly or the Council of the League of Nations.112 However, the recommendation was rejected by the Assembly as being ‘premature.’113 The draft statutes of an international criminal court were later adopted in 1925 by non-governmental organisations such as the Inter-Parliamentary Union,114 and by scholarly bodies such as the International Law Association in 1926.115 However, none of the drafts amounted to anything concrete at the time. The possibility of establishing an international criminal court was only going to be reconsidered again seventy-four years later as detailed under section 1.2.12 of the Chapter.

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112 See the text of the Second Resolution adopted by the Advisory Committee in Lord Phillimore ‘An International Criminal Court and the Resolution of the Committee of Jurists’ (1922-3) 3 British Yearbook of International Law 80.

113 Text of the Second Resolution adopted by the Advisory Committee in Lord Phillimore ‘An International Criminal Court and the Resolution of the Committee of Jurists’ (1922-3) 3 British Yearbook of International Law 84.


Nevertheless states were still keen to ensure that the laws of war were clarified and codified consequently, in terms of the treaty for the Renunciation of War (Briand-Kellogg Pact or Pact of Paris)\textsuperscript{116} that was signed on 27\textsuperscript{th} August 1928.\textsuperscript{117} The treaty condemned the recourse to war for the resolution of international disagreements, proposing that all disputes be resolved by pacific means.\textsuperscript{118} However, the pact has been criticised for failing to make the violation of its provisions an international crime, punishable by either national or international courts.\textsuperscript{119} The pact further failed to provide means by which sanctions could be imposed on states that opted to use force against others.\textsuperscript{120} Furthermore there were no measures in place requiring the states parties to intervene with measures of force under circumstances where the Pact had been violated.

In the absence of trials being undertaken at an international level, some states such as the USA,\textsuperscript{121} Germany,\textsuperscript{122} and the United Soviet Socialist Republic (USSR)\textsuperscript{123} took initiatives to undertake prosecutions at national levels for international crimes. This is evident by reference to some trials that were undertaken between the two World Wars. For instance, the USA tried

\begin{footnotesize}
\textsuperscript{116} The Treaty entered into force on July 24\textsuperscript{th} 1929 with ratifications from 46 states and 16 states signifying their intention to conform to the treaty.
\textsuperscript{117} Note that Germany was a party to the treaty implying that Germany was condemning recourse to war for settlement of international disputes instead opting for all disputes to be settled only by pacific means.
\textsuperscript{118} Sheldon Glueck \textit{War Criminals Their Prosecutions and Punishment} (New York Alfred A Knopf 1944) 38.
\textsuperscript{119} Sheldon Glueck \textit{War Criminals Their Prosecutions and Punishment} (New York Alfred A Knopf 1944) 38.
\textsuperscript{121} US Supreme Court in case \textit{ex p. Quirin v Cox} 317 US 1 63 S Ct 2 87 L Ed 3 - Case involving the trial of seven German saboteurs for violations laws and customs of warfare.
\textsuperscript{122} R K Woetzel \textit{The Nuremberg Trials in International Law with a Postlude on the Eichmann Case} (London Stevens and Sons Limited 1962) 37.
\textsuperscript{123} Trials conducted in Krasnodar November 1943, Charkow February 1944 and Lublin December 1944.
\end{footnotesize}
individuals for violation of international customary law despite the absence of the definitions of terms such as custom and the offence itself.\footnote{US Supreme Court in case \textit{ex p Quirin v Cox} 317 US 1 63 S Ct 2 87 L Ed 3.}

Despite these trials lacking aspects of international law in the sense that they were not conducted in an international tribunal, as it was individual states taking the initiative to prosecute, the trials are of great worth to international law, because they show the fundamental principle of establishing individual accountability in international law. This section has therefore explained that the primary responsibility to prosecute persons suspected of violating international law lies with the states. Trials conducted between the two World Wars therefore indicate the importance of the need of states to take actions in prosecuting persons suspected of violating international law. Trials were first held at an international level at the Nuremberg Tribunal that was intended to prosecute individuals suspected of committing offences such as genocide and war crimes following the Second World War. The Nuremberg trial is addressed in detail in the next subsection.

\subsection*{1.2. 2 Nuremberg International Military Tribunal}
This section will consider the trials conducted following World War II, particularly the Nuremberg International Military Tribunal (IMT). This is due to the variety of defendants who were brought before the tribunal and the reasoned opinions of judges on all aspects of the law of war.\footnote{Leon Friedman \textit{The Law of War A Documentary History} Volume I (New York Randon House 1972) 780.} Other trials were conducted among others; the International Military Tribunal at Tokyo, the USA Military Tribunal at Nuremberg, the USA Military Commissions
based in various places in Europe and Asia, the American tribunals in Dachau and other regions of Germany that were intended to try the lower level accused offenders. The British on the other hand, also established military courts to try suspected offenders in their occupied regions. The British however only tried conventional war crimes such as maltreatment of prisoners or civilian populations.

Military tribunals were further established elsewhere outside Germany, particularly in France, Italy, Yugoslavia, Belgium, Greece, Holland, Poland, Norway and Russia, such trials were conducted in national courts. This thesis will focus on trials undertaken at Nuremberg IMT and the Tokyo IMT that were instituted in January 1946. This is because Nuremberg and Tokyo IMTs constitute, as will be revealed below, the first time in history when former government officials were tried for offences committed whilst in power. The background towards the formation of Nuremberg IMT is considered as well as its nature, mandate and legacy.

1.2.3 Historical Background of the Nuremberg International Military Tribunal

During the course of World War II, several declarations were issued in respect to the punishment of war criminals. On 7 October 1942, it was announced that a UN War Crimes Commission would be established for the

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purpose of the investigation of war crimes.\textsuperscript{131} Eventually, a declaration was issued in Moscow in 1943 by the Allies, the UK, the USA and USSR, which guaranteed punishment for Axis war criminals (the German and the Japanese).\textsuperscript{132} According to the declaration, the Allies would ensure that the Axis war criminals were judged and punished in states where the offences were committed. Ultimately, the Allies following the influence of the USA and then USSR decided that it was essential to prosecute such persons as a matter of urgency.\textsuperscript{133} Consequently, France, the UK, USA and the USSR drafted the charter of an international tribunal that was prepared in London. It was this London Charter that formed the foundation for the Nuremberg IMT. On 8 August 1945, the four major powers entered into an agreement,\textsuperscript{134} which provided for the establishment of an \textit{ad hoc} International Military tribunal at Nuremberg for purposes of conducting trials of war criminals.\textsuperscript{135}

\textbf{1.2. 4 Nature and Mandate of the Nuremberg IMT}

The tribunal was formed for the purposes of conducting trials and punishment of major war criminals of Europe, following the end of World War II.\textsuperscript{136} The Nuremberg trial was conducted by the rules and procedures as set out in the

\textsuperscript{133} Arieh J Kochavi \textit{Prelude to Nuremberg Allied War Crimes Policy and the Question of Punishment} (University of North Carolina Press 2005).
\textsuperscript{134} Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of The Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis’ (1945) 13 \textit{U.S. Dept. of State Bull.222 Trial of War Criminals} (Department of State Publication 2420 Washington 1945) 13.
\textsuperscript{135} London Agreement for the IMT Article I Charter of the International Military Tribunal 1945.
The adoption of the Charter suggested the impression that no man was above international law. Nuremberg tribunal was vested with jurisdiction over crimes against peace, war crimes and crimes against humanity. The major powers in conducting the criminal proceedings were seeking to achieve several objectives, however the primary objects were as follows: (1) to punish civilian and military leaders for waging aggressive war; (2) to punish persons responsible for committing war crimes; (3) to clarify certain laws of humanity as a result deterring the repetition of genocide, the oppressions of other minority groups and foreign nationals.

The trials commenced on 14 November 1945, and lasted for nine months. A wide range of persons including military leaders, states men, administrators, bankers, industrialists, propagandists and educators were tried for offences including crimes against humanity, crimes against peace, war crimes and conspiracy to commit such crimes. A total of twenty-four defendants were prosecuted before the tribunal. The charges against the defendants were mainly those that fall under article 6 of the IMT’s Charter that provides for the offences of conspiracy, war crime, crimes against peace and humanity.
The prosecution team was represented by the major powers, whilst the
defence team was mainly composed of German lawyers, either selected by the
defendants or assigned by the tribunal.\textsuperscript{144} During the trial, the prosecution
team had a total number of thirty-three witnesses and several documents,
which were used as evidence against the individuals. On the other hand, the
defence team had a total of sixty-one witnesses in addition to voluminous
documentation.\textsuperscript{145}

At the opening session, the USA Chief Prosecutor, Justice Robert Jackson
delivered an inspiring speech, which addressed a number of issues that remain
relevant to ICJ today. Jackson referred to the Tribunal as ‘the greatest tribute
ever paid by power to reason.’\textsuperscript{146} Jackson further sought to justify the
Nuremberg trials by arguing that while this piece of legislation was being
subjected against the German aggressors, the law would only serve a useful
purpose by condemning aggression by any other nations, including the allied
states that had created the Nuremberg IMT.\textsuperscript{147} This further clarifies the need
for every individual to be prosecuted and punished for offences committed
regardless of status or nationality.

In terms of the judgement and sentencing, the tribunal’s verdict was to be
regarded as final and not subjected to review, implying that there were no
provisions for appeals against decisions of the tribunal.\textsuperscript{148} Upon conviction,

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\textsuperscript{144}John A Appleman \textit{Military Tribunals and International Crimes} (Bobbs – Merrill Indianapolis 1954) VIII.
\textsuperscript{145}John A Appleman \textit{Military Tribunals and International Crimes} (Bobbs – Merrill Indianapolis 1954) VIII.
\textsuperscript{148}The Charter of the International Military Tribunal Articles XXVI.
\end{flushright}
the tribunal had the right to impose death or any other punishment. By the end of the trial, three of the defendants namely Hjalmar Schacht, Hans Fritzsche, Franz von Papen and three of the accused who were members of organisations such as Security Services (SD), the Stormtroopers (SA), the Secret State Police (Gestapo), and the Elite Guard (SS) were acquitted. Twelve defendants were sentenced to death and seven to imprisonment ranging from ten years to life.

The trials indicated the prominence of establishing individual accountability. The Charter clarified that the tribunal was intended to prosecute individuals or individuals that were members of organisations suspected of committing offences punishable under the Charter. The following defendants, Martin

\[\text{149 The Charter of the International Military Tribunal Articles XXVII.}\]

\[\text{150 The SA High Command and Reich Cabinet, John A Appleman Military Tribunals and International Crimes (Bobbs – Merrill Indianapolis 1954) VIII, R K Woetzel The Nuremberg Trials in International Law with a Postlude on the Eichmann Case 2 (London Stevens and Sons Limited 1962), other such organisations included The Leadership Corps of the Nazi Party, The Reich Cabinet and the General Staff and High Command of the German Armed Forces.}\]

\[\text{151 Those sentenced to death include Goering former Commander in Chief of Luftwaffe, Hess former deputy to Hitler was sentenced to life imprisonment, Von Ribbentrop (foreign minister of Nazi) was sentenced to death, Keitel (Chief of the High Command of German Armed Forces) was sentenced to death, Kaltenbrunner (Chief of the Security Head Office) was sentenced to death, Rosenberg (Reich Minister for Occupied Eastern Territories) was sentenced to death, Frank (Governor – General of Poland under Nazi regime) was sentenced to death, Frick (Supreme Reich authority in Bohemia & Moravia) was sentenced to death, Streicher (publisher of Der Sturmer, an anti-Semitic Newspaper) he was sentenced to death, Funk (participated in Nazi programme of economic discrimination against Jews president of the Reichsbank was sentenced to life imprisonment, Raeder (Commander in-Chief of the German Navy from 1935 to 1943) was sentenced to life imprisonment, Sauckel (held position of Plenipotentiary-General for the Utilisation of Labour) was sentenced to death, Jodl (Chief of the Operations Staff of the High Command of the German Armed Forces) was sentenced to death, Seyss-Inquart (Reich Commissioner of the Netherlands) was sentenced to death, Bormann (served as Head of the Nazi party Chancellery & Secretary to Hitler was sentenced to death in absentia, Von Schirach (served as Gauleiter of Vienna) was sentenced to twenty years imprisonment, Speer (served as Reich Minister for Armaments & Munitions & Plenipotentiary General for Armaments under the four year plan) was sentenced to twenty years imprisonment, Von Neurath (served as Reich minister without portfolio, President of the Secret Cabinet Council & a member of the Reich Defence Council) was sentenced to fifteen years’ imprisonment, Doenitz (served as commander in chief of the German Navy under the Nazi regime & head of state succeeding Hitler) was sentenced to ten years imprisonment, International Military Tribunal Volume XXII 527 -587 see also }\text{http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-XXII.pdf (accessed 30 June 2013).}\]

\[\text{152 The Charter of the International Military Tribunal Articles 9, 10.}\]
Bormann and Fritz Sauckel were members of the group Leadership Corps regarded to be criminal, thus were deemed to be among those who used the group for criminal purposes.\textsuperscript{153} The IMT also concluded that the organisations Gestapo and SD were used for criminal purposes, specifically which they were engaged in the prosecution and extermination of the Jews, brutalities and killings in the concentration camps.\textsuperscript{154} Among others allegations, the groups were deemed responsible for the mistreatment and murder of prisoners of war.\textsuperscript{155}

On this basis, members of the group, particularly all executives, administrative officials and all local Gestapo officials, were deemed to be criminals. This included the executives and administrative officials serving both abroad, in Germany and members of the Frontier Police.\textsuperscript{156} The defendant Kaltenbrunner is an example of an individual who according to IMT used the Gestapo and SD for criminal purposes.\textsuperscript{157} The notion of establishing individual criminal liability on the basis of membership of an


\textsuperscript{154} R K Woetzel \textit{The Nuremberg Trials in International Law with a Postlude on the Eichmann Case} (London Stevens and Sons Limited 1962) 197.

\textsuperscript{155} R K Woetzel \textit{The Nuremberg Trials in International Law with a Postlude on the Eichmann Case} (London Stevens and Sons Limited 1962) 197.

\textsuperscript{156} R K Woetzel \textit{The Nuremberg Trials in International Law with a Postlude on the Eichmann Case} (London Stevens and Sons Limited 1962) 197.

\textsuperscript{157} International Military Tribunal Volume XXII 511 \textcolor{red}{http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-XXII.pdf} (accessed 30 June 2013), other groups deemed to have been used for criminal purposes and whose members were regarded as criminals include the SS, R K Woetzel \textit{The Nuremberg Trials in International Law with a Postlude on the Eichmann Case} (London Stevens and Sons Limited 1962) 199.
organisation represented a body of international law that was based on the concept of conspiracy.\textsuperscript{158}

More recent, there has been certain groups that have been identified as criminal particularly, \textit{Al Qaida} or Nigerian Islamist group, \textit{Boko Haram}, similar to Nuremberg. These individuals affiliated to these organisations can be deemed to be promoting criminal purposes. At Nuremberg IMT, some elements of a criminal organisation included the existence of criminal conspiracy, co-operation for criminal purposes, the need for the group to be bound together and organised for common purpose.\textsuperscript{159} The tribunal further illuminated that the groups must be formed and used in relation to committing offences denounced by the Charter.\textsuperscript{160} This is of great importance today, particularly to groups that can be linked to commission of certain offence, such as terrorism. However, this subject is beyond the purpose of this thesis. The substantial issue is that of establishing individual criminal liability. Nuremberg IMT made it clear that men and not entities committed crimes against international law. On that basis, the tribunal would ensure that individuals suspected of committing the most horrendous offences would be held accountable.\textsuperscript{161}

\textsuperscript{158} R K Woetzel \textit{The Nuremberg Trials in International Law with a Postlude on the Eichmann Case} (London Stevens and Sons Limited 1962) 216.
\textsuperscript{159} International Military Tribunal Volume XXII in R K Woetzel \textit{The Nuremberg Trials in International Law with a Postlude on the Eichmann Case} (London Stevens and Sons Limited 1962) 191.
\textsuperscript{160} International Military Tribunal Volume XXII in R K Woetzel \textit{The Nuremberg Trials in International Law with a Postlude on the Eichmann Case} (London Stevens and Sons Limited 1962) 191.
1.2.5 The Legacy of Nuremberg International Military Tribunal

Nuremberg constitutes a milestone in the development of international law. The notion of indicting leaders of the Nazi Germans who had survived World War II before the international military tribunal has been described as a revolution. For the first time in modern history, the leaders of a defeated state were indicted for committing serious crimes, jeopardising the bases of peaceful co-existence among individual human beings and peoples: crimes against peace, war crimes and crimes against humanity. Nuremberg constitutes the first time in history, former leaders who were held accountable for offences committed.

The tribunal was criticised for being biased, particularly because all judges and prosecutors were from victorious Allies, making it possible for biasness in the decisions rendered. The existence judges from Germany could have improved the legitimacy of the trials. There is a need for universal courts to be universal or balanced in composition, if the law is to prevail. This is essentially for the purposes of legitimacy. The use of neutral judges would have contributed towards the credibility of the tribunal in the eyes of the Germans. This flaw in the selection of judges was to be resolved to some extent.

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extent at the later trials conducted in Tokyo,\textsuperscript{169} where a number of judges from various countries other than the main victorious powers were invited to preside on the bench. All the judges were nationals of the states that had suffered from the Japanese military hostility.\textsuperscript{170}

For this reason, the unquestionable way of the ICC in acquiring credibility even among the African states is by ensuring involvement in the procedures and operations of the Court.\textsuperscript{171} As a result of Nuremberg, state sovereignty has lost its absolute character and is counter-balanced by the requirements of human rights protection. Prior to Nuremberg, the concept of state sovereignty was a fundamental pillar of the international legal order.\textsuperscript{172} The UN Charter recognised the significance of state sovereignty and equality as a result this was incorporated in the UN Charter.\textsuperscript{173} Matters occurring in a particular domestic jurisdiction were perceived to be issues that the concerned state was mandated to deal with, as opposed to other states intervening.\textsuperscript{174} The UN Charter imposes an obligation on states to seek to achieve international cooperation with regards to settling international problems and to promote and encourage respect for human rights and fundamental freedoms for all.\textsuperscript{175}

\textsuperscript{169} The Tokyo International Tribunal is considered in detail under section 1.3.6 of chapter 1.
\textsuperscript{171} Recently Fatou Bensouda of Gambia was elected by consensus Prosecutor of the ICC by the Assembly of States Parties on the 12th December 2011 and was sworn in on 15th June 2012 http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/Pages/theprosecutor2012.aspx (accessed on 5 July 2013).
\textsuperscript{173} The United Nations Charter Article 2(1).
\textsuperscript{174} The United Nations Charter Article 2(7).
\textsuperscript{175} The United Nations Charter Article 1(3).
Equally, the only basis for a state to prosecute any offences of a criminal nature in ICL must be grounded on the principles of territoriality and nationality. As seen in the history of institutions, prior to Nuremberg there was no institution that existed for the purposes of prosecuting international criminal offences at an international level. It was at Nuremberg where high-ranking officials in a government of the state were prosecuted regardless of their positions. On this basis, the IMT Charter specifically provided that ‘official position of defendants, whether Heads of State or responsible officials in government departments, shall not be considered as freeing them from responsibility or mitigating punishment.’\(^\text{176}\) This proposition since Nuremberg has come to be accepted as the norm. Therefore former head of states such as Slobodan Milosevic and Charles Taylor have been arrested and indicted under international law.

In addition, arrest warrants have been issued for serving heads of state such as Omar al-Bashir of Sudan, despite the fact that no further action has occurred to implement the arrest warrant.\(^\text{177}\) As a result, the concept of sovereign state has come to be suppressed.\(^\text{178}\) Nuremberg is said to constitute a transition of core values among states, into a codified document containing an effective enforcement measure, the IMT.\(^\text{179}\)

\(^\text{176}\) The International Military Tribunal Charter Article 7.
As argued above, the primary responsibility for prosecution of international criminal offences is vested with the states where the offences occur. Nuremberg however implies that under international law, a tribunal can be created for the purposes of trying former statesmen and individuals that might have violated international law in a process leading to reduction in the threat of wars.\(^{180}\) Since Nuremberg, the tribunals that followed at an international level was the creation of the ICTY and the ICTR, which were established by the UN Security Council acting under chapter VII.\(^{181}\) Then eventually, the ICC was established under the Rome Statute.\(^{182}\)

The IMT therefore constitutes evidence that trials could be conducted under international law.\(^{183}\) Criminal liability would not only be established under national law, but also extended to international law. Nuremberg therefore allowed international law to be applied directly to individuals, thus disregarding the doctrine of state sovereignty and the traditional approach of international law being a subject only applicable on states.\(^{184}\) Nuremberg set out principles for the concept of individual responsibility against war crimes and crimes against peace.\(^{185}\) The concept of individual responsibility extends to all persons regardless of status within the state or military hierarchy.\(^{186}\)

\(^{180}\) John A Appleman *Military Tribunals and International Crimes* (Bobbs – Merrill Indianapolis 1954) V.

\(^{181}\) The tribunals are addressed in detail under section 1.3.8 Chapter 1.

\(^{182}\) Dealt with in great detail in Chapter 2 of this thesis.


\(^{185}\) The Charter of the International Military Tribunal adopted August 8, 1945.

\(^{186}\) The Charter of the International Military Tribunal Article 7.
The Nuremberg judgement raised a vital principle to substantive international law, that *nullum crimen sine lege*, the importance of establishing individual accountability where there is violation of the most severe offences of international concern. The tribunal went further to rule that:

*crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced . . . individuals have international duties which transcend the national obligations of obedience imposed by the individual state.*\(^{187}\)

This was to be perceived as fundamental for the purposes of introducing a culture that respects and protects individual human rights.\(^{188}\) Greenwood once argued in reference to international law, ‘no man or nation is above the laws of common decency and morality, No man may stand higher than, or be exempt from the law.’\(^{189}\) Today there is no doubt that every person suspected of violating ICL would be held accountable.

Nuremberg has also contributed enormously towards clarifying issues concerning substantive ICL, such as the doctrine of *ex post facto* used by the defence team to refer to the Nuremberg trials.\(^{190}\) The doctrine *ex post facto* or *nullum crimen sine lege* or *nulla poena sine lege previa* provides that there is no crime without the established law or there can never be a punishment in

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189 John A Appleman *Military Tribunals and International Crimes* (Bobbs – Merrill Indianapolis 1954) VI.
the absence of a pre-existing law. The argument lies on the basis that there was no precedent that justified the punishment of individuals for the offences of planning, initiation, aggressive war, crimes against humanity or conspiracy to commit the crimes. In justifying the Nuremberg trial, Appleman considers a number of issues that are addressed below.

Firstly, is the issue of equity, relying on the maxim, ‘to do equity means to do justice.’ Some academics have argued that the doctrine of *ex post facto* is limited to the principle of justice, implying that if there was no injustice, there would have been no violation of international norms. This was the view adopted by the tribunal that held accordingly:

‘It is to be observed that the maxim *nullem crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring states without warning is obviously untrue, for in such circumstances, the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrongs were allowed to go unpunished.’

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The tribunal’s reasoning was further endorsed by Kelsen,196 who argued that a retroactive law, which provides for punishment for conduct that is illegal when committed, is an exception to the doctrine of *ex post facto*.197 Kelsen further argues that the doctrine is only available under domestic law.198 The absence of a precedent, does not in any way invalidate the Nuremberg trials, besides the Martens Clause was also relied upon to justify the trials as addressed above. Therefore it was necessary to conduct trials at Nuremberg for the purpose of setting a precedent.199 The fact still remains that it is an offence for an individual to take the life of another or a group of people without justification. In addition, cases of the eighteenth and nineteenth centuries can be referred to as a precedent for the Nuremberg trials.200 The Nuremberg IMT is an example of an international tribunal established in order to try individuals under specified laws as set out in the Charter.

However, Nuremberg was not the only trial undertaken, there are others particularly the Tokyo International Military Tribunal that was created in the Far East. The tribunal, its nature and mandate are considered below.

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200 R K Woetzel *The Nuremberg Trials in International Law with a Postlude on the Eichmann Case* (London Stevens and Sons Limited 1962) 22, The trials that were undertaken by states such as United States and Great Britain.
1.2.6 The Tokyo International Military Tribunal

The Tokyo IMT was established in January 1946, following the proclamation of General Douglas MacArthur. MacArthur set up the tribunal as means of implementing the Potsdam Declaration on the basis of his position as the Supreme Commander, relying on powers vested on him by the Allied states. Japan accepted the proclamation as a sign of surrender. The Tokyo IMT was established for the purpose of trying individuals or members of organisations charged with offences of crimes against peace, war crimes and crimes against humanity in the Far East. In terms of judgement and sentencing, the Tokyo IMT, like Nuremberg, could impose a death sentence upon convicted persons.

The Tribunal comprised eleven judges. Nine were from the signatory states including Australia, Canada, China, France, New Zealand, the Netherlands, UK, USA, USSR and the other two were from India and the Philippines. The proceedings began on 29 April 1946, with the indictment of twenty-eight defendants. The nature of charges included crimes against peace,
conspiracies, war crimes and murders. The trial lasted two and a half years until November 1948. The Tokyo IMT sentenced seven defendants to death, one to twenty years’ imprisonment, one to seven years’ imprisonment and the rest to life imprisonment.\textsuperscript{207} In terms of the manner in which the trials were conducted, reference was made to the procedural and substantive law as applied in the Nuremberg trials, such as the denial of the defence of superior orders.\textsuperscript{208} The Tokyo IMT, like Nuremberg, has also been described as a victor’s justice. Consequently, the same criticisms subjected to Nuremberg are applicable.\textsuperscript{209} This is because despite differences in the procedural of the two tribunals, the substantive law that was applied was similar to the Nuremberg precedent.\textsuperscript{210}

Following the Second World War a number of other criminal trials were held besides the IMT Nuremberg and Tokyo.\textsuperscript{211} The tribunals mainly tried the minor war criminals such as financiers, industrialists, police authorities.\textsuperscript{212}

The key issue illustrated from the trials is the need to establish individual

during the trial. Shumei Okawa was declared mentally unfit to stand trial. See Tokyo International Military Tribunal Judgment 48 425.
\textsuperscript{207} R K Woetzel \textit{The Nuremberg Trials in International Law with a Postlude on the Eichmann Case} (London Stevens and Sons Limited 1962) 227.
\textsuperscript{208} International Military Tribunal Judgment 48 437– 9.
\textsuperscript{210} R K Woetzel \textit{The Nuremberg Trials in International Law with a Postlude on the Eichmann Case} (London Stevens and Sons Limited 1962) 232.
\textsuperscript{212} R K Woetzel \textit{The Nuremberg Trials in International Law with a Postlude on the Eichmann Case} (London Stevens and Sons Limited 1962) 218.
accountability in international law, for instance, in the *Einsatzgruppen* case, the Court held that nations could only act through human beings, and that when Germany signed, ratified and promulgated The Hague and Geneva Conventions, every person in Germany was bound to comply with the provisions.\(^{213}\) This is not always the case in international law, it depends on the nature of the system adopted by a particular state whether dualist or monist. However, the significance of the decision was to highlight the fact that dualist states that fail to domestic international laws, intended to protect the rights of individual, can never claim that such laws do not apply due to international customary law.

1.2.7 The Eichmann Trial

One of the most important trials held after Nuremberg and Tokyo was that of Adolf Eichmann, former Chief of the Jewish Affairs Section of the Reich Security Head Office.\(^{214}\) Eichmann was deemed to have assisted in the liquidation of millions of Jews at Auschwitz. Eichmann was further accused to have participated in the Wannsee Conference, which took place in Berlin in 1992, where the question of Jews was on the agenda, the main issue was the need to establish a ‘final solution’ to the Jewish question.\(^{215}\)

As a result, Eichmann was deemed responsible for the execution of almost six million people. Agents of the state of Israel from Argentina eventually abducted Eichmann. The trial was conducted between 11 April 1961, and 14

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\(^{213}\) *US v Ohlendorf* No 9 Trials of War Criminals Volume IV 460 - 461.

\(^{214}\) *The Attorney General of the Government of Israel v Adolf the son of Karl Adolf Eichmann in the District Court of Jerusalem and Criminal Case* No 40/61.

\(^{215}\) International Military Tribunal Volume XXII 491 – 496.
August, 1961, in Jerusalem for crimes against the Jewish people, crimes against humanity and membership of a hostile organisation.\textsuperscript{216} The defendant, Eichmann, was found guilty of all fifteen counts of the indictment. The case constitutes an example of a situation where a defendant suspected of committing international offences was tried under domestic law. Eichmann was tried under Israeli law.\textsuperscript{217}

The trial suggests that when it comes to commission of offences such as crimes against humanity as charged by a defendant, any state has the capacity to prosecute regardless of where the offences were committed.\textsuperscript{218} This is compatible with the provisions within the ICC that require states to take measures of ensuring individuals suspected of committing the grave offences are held accountable.\textsuperscript{219} This issue forms the basis of this study, however the study seeks to go beyond the notion of establishing individual responsibility by seeking to introduce measures that will allow for the local people based in states that have situations and cases before the ICC to be involved in the process. Such an approach is envisioned to ensure that the root difficulties that contributed towards the individuals committing the offences are addressed.

\textsuperscript{217} Defendant was charged of crimes against the Jewish people, crimes against humanity, war crimes & membership in a hostile organisation as defined in the Israeli Nazis and Nazi Collaborators (Punishment) Law of August 1 1950 Laws of the State of Israel No 67 154.
\textsuperscript{218} M Cherif Bassiouni \textit{Introduction to International Criminal Law} (Transnational Publishers Inc Ardsley 2003) 121.
\textsuperscript{219} The Rome Statute 1998 Article 1, 17.
1.2.8 The *ad hoc* International Criminal Tribunals

Since Nuremberg and Tokyo, the years 1955 and 1992 can be described as years of silence.\(^{220}\) Part of the reasons for this was due to the failure of collective bodies such as the Security Council, vested with the mandate of ensuring international peace and security to enforce international law.\(^{221}\) The Security Council failed to cope with the increase in violence, its inability to act swiftly and effectively to prevent atrocities amounting to serious threat to peace or breaches of peace is evident in regards to Somalia, the former Yugoslavia, Sierra Leone, Eritrea, Indonesia, the Middle East,\(^{222}\) Chile and Guatemala.\(^{223}\)

In addition, Stalin’s regime led to as many as twenty million deaths that were unaccounted for and unacknowledged.\(^{224}\) Idi Amin’s regime resulted into hundreds of thousands of Ugandans murdered and expelled.\(^{225}\) Former Ethiopian leader Mengistu Haile Miriam ruled over a regime that led to political opponents being killed, yet he was never prosecuted for the atrocities committed.\(^{226}\) The same applies to Chad’s Hissene Habre who was similarly


\(^{226}\) Nancy Combs *Guilty Pleas in International Criminal Law Constructing a Restorative Justice Approach*
suspected to be responsible for tens of thousands of political murders.\textsuperscript{227} However recently a tribunal has been created to try Hissene Habre.\textsuperscript{228}

Therefore the period of silence appeared to be a period when impunity reigned.\textsuperscript{229} There were no international tribunals established to prosecute international crimes, neither did states undertake their duty of prosecuting individuals suspected of committing the most serious offences.\textsuperscript{230} The period of silence occurred despite the existence of codified laws governing armed conflicts, these laws were aimed at governing the conduct of states.\textsuperscript{231} History will be assessed against the current situation with the existence of codified laws under the Rome Statute. This study is intended to make the ICC more effective and legitimate.

\begin{thebibliography}{9}
\bibitem{228} Reed Brody ‘Bringing a Dictator to Justice the case of Hissene Habre’ (2015) \textit{Journal of International Criminal Justice} 1 – 9.
\end{thebibliography}
However some national courts took measures to prosecute atrocities committed abroad during the period of silence.\textsuperscript{232} For instance, in 1963, a group of survivors of the atomic bombing of Hiroshima and Nagasaki initiated a legal suit against the Japanese Government, claiming before the Tokyo District Court.\textsuperscript{233} The survivors claimed compensation on the basis of the Peace Treaty of 1952. Despite the Court ruling against the complainants, the bombing was deemed illegal.\textsuperscript{234}

Another important decision before a national court was the Eichmann decision as addressed above, under section 1. 2.7.\textsuperscript{235} The Supreme Court of Israel dismissed claims of the defendant Eichmann, who accordingly claimed that the Israeli Court lacked jurisdiction over the alleged offences because there was no territorial or personal link between the offences and Israel.\textsuperscript{236} The Supreme Court clarified that states could enact legislation defining crimes under international law in their national systems as long as the conducts concerned were prohibited under international law at the time of commission.\textsuperscript{237} The Court reaffirmed the principle of universal jurisdiction as an important tool of international justice by arguing that national courts when

\textsuperscript{232} Kathryn Sikkink \textit{The Justice Cascade How Human Rights Prosecutions are Changing World Politics} (New York W W Norton & Company 2011).
\textsuperscript{235} The \textit{Eichmann} Case (1962) 36 ILR 304.
\textsuperscript{236} The \textit{Eichmann} Case (1962) 36 ILR 304.
\textsuperscript{237} Peter B House \textit{Eichmann Supreme Court Judgment 50 Years on its Significance today} (Amnesty International Publications 2012) 5.
trying individuals for crimes under ICL did not only enforce their own law but they acted as enforcers of international law.238

The USA courts also adopted measures in prosecuting offences under international law that had been committed in other states including Paraguay in relation to torture,239 assassination order by Chilean authorities,240 torture, arbitrary arrest and forced disappearance in Argentina,241 arbitrary killing in East Timor,242 torture and forced disappearances in the Philippines,243 atrocities in Bosnia and Herzegovina,244 torture and arbitrary detention in Haiti,245 torture in Guatemala,246 Ethiopia247 and the terrorist bombing of a Pan Am aircraft over Lockerbie in Scotland.248 These trials are significant because they have filled in the gap for international prosecution and for the failure of domestic courts to prosecute.249

It was until 1993 and 1994 when the UN Security Council established two ad hoc tribunals in Rwanda and former Yugoslavia for the purposes of prosecuting individuals for grave violations of international humanitarian

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243 Marcos Case Judgement of 16 June 1994 25 F 3d 1467 (9th Cir. 1994).
244 Kadic et al. v Karadzic judgement of 13 October 1995 70 F 3D 232 (2nd Cir. 1995).
law: the two *ad hoc* tribunals the ICTY and ICTR. In establishing the ICTY and ICTR, the Security Council acted under Chapter VII of the UN Charter that creates provision for the Security Council to take necessary measures to maintain or restore international peace and security. The Security Council further emphasized that the establishment of the tribunals was essential in achieving reconciliation and peace building in a war torn society.

The rationale for the creation of the tribunals under Chapter VII was that the atrocities that were being committed demanded immediate attention, which would act as a deterrence effect on further crimes. Prior to the establishment of the ICTY, in February, 1993, the Security Council confirmed that ethnic atrocities committed in the former Yugoslavia constituted “a threat to international peace”, and consequently that the establishment of an *ad hoc* international criminal tribunal would contribute towards the restoration of peace.

Besides the Security Council making such a determination for former Yugoslavia and Rwanda, there were other states such as Cambodia, where

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allegedly the Pol Pot regime had committed genocide.\textsuperscript{256} There was an absence of effective official public processes of accountability initiated and implemented in Cambodia, neither were there any international acts of condemnation.\textsuperscript{257} Despite the efforts made by the UN to establish a tribunal,\textsuperscript{258} eventually a hybrid tribunal was established; this issue is addressed further under section 1.2.11 below.

In relation to the ICTY and ICTR, the Security Council therefore, was convinced that the commission of atrocities constituted a threat to international peace and security. Thus, it was essential for action to be taken to ensure that individuals in the former Yugoslavia and Rwanda were deterred from committing further crimes. The adoption of the tribunals under Chapter VII was the best option available because creating the tribunal through the treaty making process under international law of treaties would have been too slow a procedure to adopt.\textsuperscript{259} Treaty making take a long time because the process requires negotiation, authentication, conclusion and ratification or

\textsuperscript{259} Vienna Convention on the Laws of Treaties 1969 for details on conditions and guidelines for the adoption of treaties in International law.
signing of the treaty. A treaty only binds states that are a party to it. It was unlikely that the states of former Yugoslavia and Rwanda would have signed up to the treaty. This then would have been pointless and would not have solved the problem that urgently demanded attention.

The background, developments, structure and nature of the tribunals are briefly considered below. This is essential as the tribunals were established before the creation of the ICC. The ad hoc nature of the tribunals and expenses involved in their operation led to states appreciating the need to revisit the debate on the establishment of a permanent International Criminal Court.

The creation of the ICTY and ICTR has been described as a milestone in the history of ICJ. This is because for the first time in history, the Security Council acknowledged the need to establish accountability for the most horrendous crimes to international concern as a fundamental part for the maintenance of international peace and security. It symbolised the UN’s dedication to the restoration of international law and the international legal

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order. In doing that, the Security Council affirmed its vital role in ensuring accountability, a role reaffirmed in the ICC framework that accorded the Security Council the capacity to refer any situation to the ICC. In addition, the *ad hoc* tribunals have contributed towards the development of ICL as a result of decisions rendered, such as the *Akayesu* verdict that established sexual violence as a form of genocide.

However, the operation of the *ad hoc* tribunal was not without challenges. For instance, the inclusion of the notion of ‘most serious crimes’ in the framework of the *ad hoc* tribunals entails only the most responsible persons would be investigated. However, from the experience of the tribunals, a different situation is portrayed, for instance under the ICTY, the first judgement of the tribunal was a low level offender, a camp guard. Under the ICTR, the first judgement was that of Jean Paul Akayesu a mayor of a small town in Rwanda called Taba. The prosecution of these defendants raised questions in international law as to whether this should be the type of defendants that should have been tried before the *ad hoc* tribunals that were intended to

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266 *Prosecutor v Jean- Paul Akayesu* Judgement Case No. ICTR=96-4 2 September 1998.
prosecute the most serious offenders.\textsuperscript{271} This is because the tribunals were vested with wide personal jurisdiction, the resolutions establishing the tribunals and their statutes do not impose a limitation on the level of perpetrators that may be prosecuted before the tribunals.\textsuperscript{272} Instead both Statutes grant the tribunals competence to try individuals responsible for serious violations.\textsuperscript{273} The type of persons who were tried can be contrasted to the Nuremberg tribunal that focused on trying the top officials such as the military and political leaders as illustrated above.

There was an absence of defendants such as Tadic or Akayesu.\textsuperscript{274} This raises criticisms as to how international courts can become forums of ‘small fish’.\textsuperscript{275} The reason why the \textit{ad hoc} tribunals conducted trials of less serious perpetrators was because despite the ICTY and the ICTR Statutes\textsuperscript{276} granting the prosecutor capacity to act independently as a distinct organ of the tribunals, the institutions remained substitute organs of the Security Council, implying that their finances were subject to the member states of the United

\textsuperscript{271} Michael Bohlander \textit{International Criminal Justice A critical Analysis of Institutions and Procedures} (Cameron 2007) 10.
\textsuperscript{272} Statute of the ICTR, Statute of the ICTY, Sarah Williams ‘The Completion Strategy of the ICTY and the ICTR’ in Michael Bohlander \textit{International Criminal Justice A critical Analysis of Institutions and Procedures} (Cameron 2007) 155.
\textsuperscript{273} The ICTY and ICTR Statutes Article 1.
\textsuperscript{274} Michael Bohlander \textit{International Criminal Justice A critical Analysis of Institutions and Procedures} (Cameron 2007) 10.
\textsuperscript{275} Michael Bohlander \textit{International Criminal Justice A critical Analysis of Institutions and Procedures} (Cameron 2007) 11.
Nations.\textsuperscript{277} This is of relevance to this study particularly, with reference to lessons that the ICC as a permanent Court can learn from the \textit{ad hoc} tribunals. For instance, the ICC is supposed to focus on the most responsible persons, or top-level cases. The ICC as a result, contains clear guidelines as to the level of perpetrators that should be tried and the seriousness of the offences as the only basis to trigger the jurisdiction of the Court to prosecute.\textsuperscript{278} The implication of the top level approach of the ICC is further considered in Chapter two of the thesis.

In addition, the \textit{ad hoc} tribunals were set up with the purpose of achieving peace and reconciliation in the Balkans\textsuperscript{279} and Rwanda.\textsuperscript{280} However, there is little evidence to suggest that the tribunals alone can achieve these aims or that they have actually achieved these goals.\textsuperscript{281} One of the main reasoning for this has been that the \textit{ad hoc} tribunals proved to be an expensive means of ensuring accountability.\textsuperscript{282} Part of the reasons for high costs of operation has been due to prolonged trials, backlogs and unacceptable periods of pre-trial

\begin{footnotes}
\footnotetext{278}{The Rome Statute 1998 Preamble, Article 1, 17(1) d.}
\footnotetext{280}{Security Council Resolution 955 resolution includes a statement that the prosecution of offenders ‘would contribute towards the process of national reconciliation – Preamble paragraph 7.}
\footnotetext{281}{Michael Bohlander International Criminal Justice A critical analysis of Institutions and Procedures (Cameron 2007) 11, Sarah Williams ‘The Completion Strategy of the ICTY and the ICTR’ in Michael Bohlander International Criminal Justice A critical analysis of Institutions and Procedures (Cameron 2007) 153 - 235.}
\end{footnotes}
detentions.\textsuperscript{283} Other factors that have contributed to the high operational costs of the tribunal have been the fact that despite the tribunals being \textit{ad hoc} in nature, the resolutions establishing the tribunals were salient on the end dates, thus the dates when tribunals were expected to complete their task and cease to function were never stipulated within the constitutive instruments.\textsuperscript{284}

The criticism of the tribunals is intended to establish a framework by which the ICC should operate to ensure effectiveness. Recommendations for the introduction of restorative measures within the ICC framework will be made. For this reason, the \textit{ad hoc} tribunals constitute a significance precedent that is of great relevance to the ICC as a permanent institution.

1.2.9 The International Criminal Tribunal for former Yugoslavia

Prior to the creation of the ICTY, there were widespread atrocities that can be referred to as mass killings that were being committed in the territory of former Yugoslavia, particularly in Bosnia and Herzegovina, in the early 1990s. This prompted the Security Council into establishing an \textit{ad hoc} tribunal for the purpose of prosecuting persons suspected of committing the offences. Therefore, the ICTY was established in order to prosecute individuals responsible for the violations of International Humanitarian Law in the territory of former Yugoslavia after 1 January, 1991.\textsuperscript{285}

\textsuperscript{283} Sarah Williams ‘The Completion Strategy of the ICTY and the ICTR’ in Michael Bohlander \textit{International Criminal Justice A critical Analysis of Institutions and Procedures} (Cameron 2007) 154.

\textsuperscript{284} Sarah Williams ‘The Completion Strategy of the ICTY and the ICTR’ in Michael Bohlander \textit{International Criminal Justice A critical Analysis of Institutions and Procedures} (Cameron 2007) 154.

\textsuperscript{285} ICTY Statute Article 1 - 8.
The events that led to the establishment of the tribunal were characterised by dreadful violations of humanitarian law such as commission of sexual offences and ethnic cleansing against civilians. Prior to the creation of the ICTY, the Security Council adopted resolution 780 (1992), which established a Commission that was mandated to investigate claims of international crimes in Yugoslavia. The Commission issued its report on the findings in 1994.\textsuperscript{286} However in 1993, whilst the Commission was still in process of investigating the situation, the UN Secretary-General acting in response to the Security Council in resolution 808 (1993), recommended the creation of a tribunal by resolution.\textsuperscript{287}

As addressed above, the ICTY was established under Chapter VII of the UN Charter\textsuperscript{288} following the determination that the ‘widespread and flagrant’ violations of international humanitarian law that were occurring within the territory of former Yugoslavia constituted a threat to international peace and security.\textsuperscript{289} The resolution 827 further sets out the purposes of the Security Council in establishing the ICTY. Accordingly, the tribunal was intended to ‘put an end to such crimes and take effective measures to bring to justice the persons who were responsible for them’, and hence ‘contribute to the restoration and maintenance of peace’.\textsuperscript{290} The ICTY is unique from the other tribunals or criminal courts ever established because it was established

during an on-going conflict.\textsuperscript{291} The ICTY despite being \textit{ad hoc}, has primacy over domestic courts.\textsuperscript{292}

The Security Council was convinced that creation of the ICTY would ‘contribute to ensuring that such violations are halted and effectively redressed’.\textsuperscript{293} The goals of the Security Council were rather broad and ambitious; the extent to which the ICTY has been able to achieve these aims is beyond this thesis. However, as pointed out above, the establishment of the tribunal implied that Security Council did have a role to play in seeking to establish individual accountability in international law. More importantly, the ICC would not only have Nuremberg to emulate, but also the ICTY, despite it being an \textit{ad hoc} institution.

Despite criticisms, the ICTY generally has managed to establish individual accountability for the offences, bringing justice to the territory as well as restoration and strengthening of the rule of law.\textsuperscript{294} The ICTY has also been able to contribute substantially and procedurally\textsuperscript{295} to the development of the jurisprudence of ICL.\textsuperscript{296} But most importantly, there is a right to a fair trial to

\begin{thebibliography}{99}
\bibitem{291} Payam Akhavan ‘The Yugoslav Tribunal at a Crossroads the Dayton Peace Agreement and Beyond’ (1996) 18 (2) \textit{Human Rights Quarterly} 259.
\bibitem{294} For achievements of the ICTY refer to ‘Bringing Justice to the Former Yugoslavia the Tribunal’s Core Achievements’ \url{www.un.org/icty/cases-e/factsheets/achieve-e.htm} (accessed on 17 August 2013).
\bibitem{296} Some cases decided by tribunal includes \textit{Prosecutor v Dusko Tradić} ICTY Case No IT 94 1 T Opinion and Judgement (May 7 1997), \textit{Prosecutor v Milutinovic} et al ICTY Case No IT 05 87 T (February 26 2009), \textit{Prosecutor
all parties in a criminal trial at a procedural level under International Human Rights law.297 The concept is guaranteed in international criminal proceedings.298 This is further illustrated under the Rome Statute which guarantees equality before the Court, presumption of innocence, the right to fair trial, public hearing, right to adequate time, facilities for preparation of defence and the right to counsel among others.299

1.2.10 International Criminal Tribunal for Rwanda
During the same time when there were mass killings in the former Yugoslavia, Rwanda was experiencing an outbreak of ethnic conflict between the Hutus who constituted about 85 per cent of the population and the Tutsis who were the minority. Following the death of the Hutu president Juvenal Habyarimana, Hutu activist troops and mobs initiated the killings that came to be referred to as genocide, and raping of Tutsi minorities leading into the death of over 800,000 people.

v. Kunarac ICTY Case No IT-96-23T & IT-96-23/1-T Trial Judgement 22 February 2001, Furundzija Case ICTY Case No IT 95 17/1 A Appeals Chamber Judgement (July 21 2000).


298 Prosecutor v Dusko Tadic Case No IT-94 1-T, Trial chamber, Decision on Prosecutor’s Motion requesting Protective measures for victims and witnesses 10 August 1995 Paragraph 25, Case also guaranteed right to fair trial as suggested under article 21 of the statute of the ICTY.

In addressing the genocide in Rwanda, the Security Council determined that it was necessary to create the ICTR on similar grounds as that of the ICTY. The ICTR was created by the adoption of the same procedure as the creation of the ICTY. Initially, the Security Council condemned the commission of atrocities and then established the commission of Experts to undertake the investigations. However, before the Commission could report on the situation, the Security Council had already decided to establish the tribunal.

The ICTR was established for the purpose of addressing perpetrators of the genocide of April 1994, which resulted in claiming lives of one million people in just four months. Like the ICTY, the ICTR was established as an enforcement measure by the Security Council acting under Chapter VII of the UN Charter. The Security Council following the model of the ICTY Statute drafted the ICTR Statute. During the process leading to the creation of the ICTR, Rwanda, as then a member of the Security Council supported the initiative. However, later on Rwanda withdrew its support due to its failure to secure certain issues within the Statute, particularly, the inclusion of the death penalty, granting the tribunal jurisdiction over offences committed prior to 1994. This would imply inclusion of other crimes other

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than genocide. Subsequently, Rwanda voted against its creation.\textsuperscript{304} However, this did not in any way affect the legality of the creation of the ICTR, as the basis and justification for its creation lies in the Security Council acting under Chapter VII of the UN Charter.\textsuperscript{305}

The ICTR, like the ICTY has three main organs: Office of the Prosecutor, a Registry, and three Trial Chambers that undertake similar roles as that of the ICTY. To ensure uniformity, as well as establish coherency in the jurisprudence, the two tribunals share a joint Appeals Chamber based in The Hague.\textsuperscript{306} The ICTR, like its counterpart the ICTY, has jurisdiction over war crimes, crimes against humanity and genocide; however the elements of the last two crimes are different from the ICTY.\textsuperscript{307} The ICTR like ICTY has primacy over the domestic courts.\textsuperscript{308} The \textit{ad hoc} tribunals gained whole wide recognition and credibility and have contributed towards the establishment of the ICC.\textsuperscript{309} The ICTR has contributed to the development of substantive ICL, through its jurisprudence,\textsuperscript{310} for example, in the area of sexual offence

\textsuperscript{304} S/PV.3453, 2, 10–12, China abstained on the Resolution, Sigall Horovit ‘The Impact of the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone on Impunity in Rwanda and Sierra Leone’ in Vincent Obisienunwo Orlu Nmehielle \textit{Africa and the Future of International Criminal Justice} (Eleven International Publication 2012) 15 – 52.

\textsuperscript{305} The matter was revisited again in \textit{Kanyabashi ICTR T. Ch. II 18.6.1997}.

\textsuperscript{306} ICTR Statute Article 12 (2).

\textsuperscript{307} ICTR Statute Article 2, 3 and 4 respectively.

\textsuperscript{308} ICTR Statute Article 8(1).

\textsuperscript{309} M Cherif Bassiouni \textit{Introduction to International Criminal Law} (Martinus Nijhoff 2003) 449.

decisions such as Akayesu,\textsuperscript{311} where sexual violence and mutilation were recognised as integral part of the process of destruction in Rwanda.\textsuperscript{312}

Apart from the creation of the ICTY and the ICTR, international justice entered into another era with the development of internationalised or mixed criminal courts. Such courts are also referred to as ‘hybrid’. This is because the law applied, and the institutional settings are a combination of international and domestic in nature.\textsuperscript{313} Cassese\textsuperscript{314} refers to internationalised tribunals as judicial bodies that have a mixed composition. There are two types of such institutions; firstly the institution may either be an organ of the relevant state, as part of the judiciary.\textsuperscript{315} Alternatively, the institution may be an international court established under an international agreement, therefore regarded as not being part of the domestic judiciary.\textsuperscript{316}

Hybrid courts have been established in recent years to investigate and prosecute individuals for violations of ICL.\textsuperscript{317} The idea of internationalised or mixed criminal courts is considered in the following section. This is essential as the hybrid tribunals have advantages of both national and

\textsuperscript{311} Prosecutor v Jean-Paul Akayesu, Judgement Case No ICTR-96-4 2 September 1998 paragraphs 416 - 417.
\textsuperscript{312} Prosecutor v Jean-Paul Akayesu, Judgement Case No ICTR-96-4 2 September 1998 paragraph 731, See also Prosecutor v Musema, Case No ICTR-96-13, 27 January 2000, paragraphs 933 -934.
\textsuperscript{314} Antonio Cassese, Guido Acquaviva, Mary Fan and Alex Whiting, *International Criminal Law Cases and Commentary* (Oxford University Press 2011) 333.
\textsuperscript{315} Antonio Cassese, Guido Acquaviva, Mary Fan and Alex Whiting, *International Criminal Law Cases and Commentary* (Oxford University Press 2011) 333.
\textsuperscript{316} Antonio Cassese, Guido Acquaviva, Mary Fan and Alex Whiting, *International Criminal Law Cases and Commentary* (Oxford University Press 2011) 333.
\textsuperscript{317} Antonio Cassese, Guido Acquaviva, Mary Fan and Alex Whiting, *International Criminal Law Cases and Commentary* (Oxford University Press 2011) 333.
international prosecutions.\textsuperscript{318} This is because hybrid tribunals have been developed specifically for the purposes of addressing failures of the international community in putting an end to impunity.\textsuperscript{319} Hybrid tribunals guarantee that the local population can be involved in the realisation of justice in relation to offences committed in their territory. This is important to the thesis as the study seeks to introduce measures by which indigenous approaches can operate alongside the ICC in ensuring that impunity comes to an end.

1.2.11 The Internationalised or Mixed Criminal Courts or Tribunals

Apart from the International Military Tribunals, the ICTY, the ICTR and the ICC, states have chosen to neither adopt national nor international criminal courts, but instead, established courts that are a hybrid of the two systems referred to as ‘mixed courts’. The Statutes of mixed courts are a combination of domestic and international law. There are circumstances when states have determined that the domestic setting is insufficient to ensure accountability for offences committed. As a substitute, states have opted for hybrid institutions for the purpose of ensuring meaningful accountability.\textsuperscript{320}

The concept of hybrid courts is essential to the thesis as the ICC can imitate the procedures within these institutions that are not contrary to the ICC framework. These measures could include those that seek to

\begin{footnotes}
\item[318] Sarah Williams, Hybrid and Internationalised Criminal Tribunals Selected Jurisdictional Issues (Hart Publishing 2012) 5.
\item[319] Sarah Williams, Hybrid and Internationalised Criminal Tribunals Selected Jurisdictional Issues (Hart Publishing 2012) 5.
\end{footnotes}
incorporate the local people as well as engage them into the work of the ICC. Such an approach would contribute towards ensuring the efficiency of the ICC and its role of establishing accountability, in addition, making justice accorded under the ICC more legitimate.

This has mainly been the case for the courts that were set up in Sierra Leone, East Timor, Kosovo and Cambodia. The terms ‘mixed’ or ‘internationalised’ are used to refer to the courts as means of emphasising on the composition of the judicial body, which would be a mixture of both international and local judges who have the nationality of the state where trials are being undertaken.

In Kosovo, East Timor, Cambodia and Iraq, mixed courts were recognised as part of the judiciary of the state. Mixed courts can be international in nature on the basis of their formation that could, for instance, be an international treaty, as was the case in relation to the

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322 Antonio Cassese, Guido Acquaviva, Mary Fan and Alex Whiting International Criminal Law Cases and Commentary (Oxford University Press 2011) 343.
324 Cambodia Extraordinary Chambers see United Nations General Assembly Resolution 57/228B of 13.5.2003 (to which the UN-Cambodia Agreement is attached), For a general overview on these institutions, Lori F Damrosch, Louis Henkin, Sean D Murphy, Han Smit International Law Cases and Materials (West Thomson Reuters Business 2009) 1344 -1350.
Special Court of Sierra Leone (SCSL). The SCSL was formed by the adoption of a Statute by Sierra Leone and the UN on 16 January 2002.

The rationale for the establishment of mixed courts generally has been the presumption that mixed courts have a greater prospect of restoration of peace and securing justice in a more appropriate manner than national courts. In addition, they have been deemed to be cheaper and more effective in addressing the various needs of the concerned communities than tribunals. Hybrid courts tend to differ in nature, however they are all intended to prosecute grave offences of international concern. Apart from mixed courts, now in existence is a permanent International Criminal Court, whose creation and nature is addressed in detail in the next section. The ICC forms the basis of this study, therefore it is necessary to address the ICC and the history leading to its establishment.

1.2.12 The Creation of the International Criminal Court

Following numerous meetings and preparations, organised by the International Law Commission (ICL) under the umbrella of the UN General Assembly, a conference was held in Rome in June, 1998. Hundreds of states representatives, members of international and non-

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327 Special Court of Sierra Leone (SCSL) refer to the agreement and the Statute of the SCSL available at the Court’s webpage: [www.sc-sl.org](http://www.sc-sl.org) (accessed on 7 August 2013).
governmental organisations participated. At the end of the conference, the Rome Statute of the International Criminal Court was adopted by vote on 15 June 1998.

The creation of the ICC constitutes a peak of the several attempts to create an international criminal court. The first attempt to form an international court was a proposal made by Gustav Moynier in 1872. Gustav Moynier is one of the founders of the International Committee of the Red Cross, who was concerned about the ability of national judges to judge fairly in crimes committed during conflicts in which their countries had participated. However nothing came of this proposal.

With the passing of time, there was a more serious effort towards the creation of an international court, which resulted in the opening for signature and ratification of the 1937 Convention for the creation of an International Criminal Court (ICC 37). The jurisdiction vested with the ICC 37 was limited to ‘terrorism’ and the ‘repression of conspiracies or

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331 120 States for 7 states against and 21 abstentions.
crimes committed with a political or terrorist purpose.\textsuperscript{336} Regrettably, the ICC 37 never entered into force.\textsuperscript{337}

Ultimately, events that led to the establishment of the Court were the quests by Trinidad and Tobago to secure international prosecutions for drugs offences.\textsuperscript{338} Unfortunately, the Court that was later instituted lacked jurisdictions over drugs offences. Initially in 1989, Trinidad and Tobago proposed the creation of a permanent ICC by the UN. Following the request of the General Assembly, the ILC drafted a Statute for the Court. The final draft text was produced in 1994.\textsuperscript{339} The following year, a Preparatory Committee was launched with a mandate of preparing a text of a draft convention.\textsuperscript{340}

The Preparatory Committee relying on the ILC draft articles completed a draft statute. It was during the Preparatory Committee meetings that an agreement to hold a conference for the establishment of an international court was reached. The draft statute was intended to form the basis for the

\begin{flushright}
\textsuperscript{336} Preamble to the ICC 37, Resolution IV of the League of Nations Council.  \\
\textsuperscript{337} By 1\textsuperscript{st} January 1941 no state had ratified the ICC 37.  \\
\textsuperscript{340} Convened by UNGAR 50/46 and with its mandate reaffirmed in UNGAR 51/207 and 52/160, the Preparatory Committee on the Establishment of an International Criminal Court met for six sessions during the years 1995 to 1998; its reports may be found in UNGAOR A/51/22 and in the conference records at UN Doc. A/CONF.183/13 (Vol.III) 5.
\end{flushright}
negotiation at the conference.\textsuperscript{341} However, there were hundreds of proposals by the delegations with a lot of disagreements.\textsuperscript{342} African states were actively involved in the establishment of the ICC.\textsuperscript{343} This signifies that the states were keen to work with the Court towards the realisation of its objectives at the time of its establishment. The AU member states supported the establishment of the Court.\textsuperscript{344} Their involvement was commended by the then President of the ICC, Sang-Hyun Song, who acknowledged that the involvement of the AU member states had:

\textit{Played a very important role prior to and during the establishment of the Court and perhaps, without Africa's support, the Rome Statute would never have been adopted}\textsuperscript{345}

\begin{itemize}
\item \textsuperscript{341} Report of the International Law Commission on its forty-Sixth Session, Draft Statute for the International Criminal Court May 2 to July 22 1994 (GA 49\textsuperscript{th} Session Supp. No 10 (A/49/10) 1994. \\
\item \textsuperscript{342} Kirsch and Holmes ‘The Birth of the International Criminal Court the 1998 Rome Conference’ in Olympia Bekou and Robert Cryer \textit{The International Criminal Court} (Ashgate 2004) 6. \\
\end{itemize}
Consequently, more AU member states have ratified the Rome Statute than the protocol to the African Charter on Human and Peoples’ Rights on the establishment of an African Court on Human and Peoples’ Rights (1998 African Court Protocol), this is despite the fact that both treaties were adopted in 1998.\(^{346}\) The African states hoped that the ICC would be an: ‘independent and effective international penal court’ that would hold perpetrators of the most serious offences accountable in future.\(^{347}\) On this basis, the African states contributed to the negotiation and ultimately the creation of the Court.

Besides African states, approximately 90 African organisations based in states including among others, Kenya, South Africa, Nigeria, Uganda, Rwanda and Ethiopia were part of the Non-Governmental Organisation (NGO), Coalition for an International Criminal Court (CICC), and lobbied


in their respective countries for the creation of an independent and effective ICC. On 27 February 1998, the Council of Ministers of the Organisation of African Unity (OAU), now the ‘AU’, acknowledged the Dakar Declaration and called all the AU members to support the establishment of the ICC. The declaration was preceded by other decisions that constitute evidence of the AU’s support for the ICC.

However, despite Africa having shown support for the establishment of the ICC, the operation of the Court has resulted in the creation of tension between the African states and the ICC, leading to questioning the effectiveness and operations of the ICC generally. The tension between the two institutions was triggered by the issuing of warrants of arrest, by the ICC of the sitting head of State Omar Al Bashir of Sudan. Since then African states have become more critical of the ICC which has resulted in a strained relationship between the two institutions.

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between the ICC and the AU is considered in chapter three, section 4 of this thesis.

As a result of the negotiation process, the implication is that everything that is contained within the Rome Statute is well thought of and constitutes a consensus among states that participated in the process. Therefore, the proposals in this study are intended to improve the effectiveness of the ICC as opposed to seeking to suggest an amendment of the Statute, something that would be challenging to achieve.

The creation of the ICC has been described as the most significant international organisation to be created since the UN.353 Inspired by the creation of the ICTY and the ICTR, the ICC was established by the adoption of the Rome Statute at the Rome Diplomatic Conference on 17 July 1998, (hereinafter the Rome Statute). The Statute entered into force on 1 July 2002.355 Apart from the adoption of the Statute, the state parties also adopted the Elements of Crimes, the Rules of Procedure and Evidence and the Agreement on the Privileges and Immunities of the Court

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355 Sixty ratifications were needed for the ICC to come into force Rome Statute Article 126, as of 5th September 2003 91 states had ratified, the ICC is not an organ of the UNs, although the two institutions have a formal relationship, the Rome Statute 1998 Article 2.
document that were also negotiated by the Preparatory Commission.\textsuperscript{356} The establishment of the ICC has also been described as a significant development of the principle of international individual criminal responsibility.\textsuperscript{357}

1.2.13 Structure and Nature of the International Criminal Court

The law in relation to the ICC is based on the 128 articles in the Rome Statute and the 226 rules in the ICC Rules PE, on that basis the ICC system is similar to the civil law code on Penal Law and Code on Criminal Procedure used in civil law systems.\textsuperscript{358} The ICC is composed of four principal organs [Article 4]; (1) Presidency, (2) an Appeals, Trial and Pre-Trial Division, (3) Office of the Prosecutor, and (4) Registry.\textsuperscript{359} The inclusion of a Pre-Trial Division represents a concession between the common law and civil law systems, thus representing a combination of the two systems. The Court is made up of eighteen judges of the highest possible calibre. Details as to the required qualifications and selection process are addressed under article 36(3) of the Rome Statute.\textsuperscript{360}

The ICC is a permanent institution established by treaty for the purpose of investigating and prosecution of individuals suspected of committing the

\textsuperscript{356} Documents may be found in the Official Records of the first session of the Assembly of States Parties to the Rome Statute of the International Criminal Court on the website of the ICC \url{http://www.icc-cpi.int/asp.html} (accessed on 17 July 2013).


\textsuperscript{359} Details on the composition and administration of the Court are addressed in Part 4 of the Rome Statute.

\textsuperscript{360} The Rome Statute 1998 Article 36.
The most serious crimes of international concern. The offences punishable under the ICC include genocide, crimes against humanity, war crimes and aggression. The adoption of the Statute denotes that individuals suspected of having committed such crimes must be prosecuted. The preamble of the Statute provides;

......the most serious crimes of concern to the international community must not go unpunished...... and that prosecution will be more effective if carried out at a national level and by enriched international cooperation.

The preamble further reveals the determination for seeking to put an end to impunity for perpetrators of such crimes and consequently as a contribution towards the prevention of such crimes.

The ICC therefore provides measures by which individuals could be held criminally liable for grave human rights violations. Therefore, the objectives of the ICC as set out in the preamble are to put an end to impunity, thus contributing towards ensuring deterrence for offences such as genocide, war crimes and crimes against humanity. Although the

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366 Machteld Boot Genocide Crimes against Humanity War Crimes (InterSentia 2002) 1.
ICC cannot be expected to put an end to these offences, its existence is intended to act as a deterrent effect for would be offenders. Mayerfeld argues that, ‘the strength of the ICC’s deterrent effect will depend on its ability to project or reinforce a credible threat that perpetrators of genocide, war crimes and crimes against humanity will be punished for their deeds.’\(^{370}\) Therefore, the ICC is not intended to substitute national courts or replace national criminal justice systems,\(^{371}\) but rather, the ICC is intended to function on a ‘complementary’ level.\(^{372}\) This implies the primary duty to prosecute lies with the states.

1.3 Conclusion

This chapter has highlighted the significance of the history of ICJ, which is relevant in order to appreciate the role and purpose of the ICC as well as ensuring its effectiveness. Key issues that have been highlighted in the chapter include the notion that the primary responsibility to prosecute persons suspected of violating international law lies with the states. The importance of the concept of individual criminal responsibility, the idea that every person suspected of committing the most serious offences must be held accountable regardless of status. The principle of international individual criminal responsibility is further developed with the establishment of the ICC.

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This study is intended to ensure the ICC operates effectively to achieve its objectives. For instance, the study is projected to provide means by which TRCs and traditional approaches can be incorporated within the ICC’s framework, so that the ICC can achieve objectives beyond deterrence and retribution, thus resulting in an improvement in the effectiveness of the Court. On this basis, chapter two examines the role of the ICC in relation to ATJ mechanisms. The role of the ICC will be subjected to scrupulous scrutiny on the basis of the purposes of ICJ. In addition, the possibility of ATJ procedures being able to operate alongside the ICC will be considered.
CHAPTER TWO

THE ROLE OF THE INTERNATIONAL CRIMINAL COURT AND ALTERNATIVE TRANSITIONAL JUSTICE MECHANISMS

2.1 Introduction

This chapter seeks to ascertain the role of the ICC in relation to transitional justice and restorative justice mechanisms. The term alternative transitional justice (ATJ) is used in this context to refer to Truth and Reconciliation Commissions (TRCs) and traditional approaches such as gacaca courts. The chapter is divided into three main sections: the concept of transitional justice and the ICC, the purpose of International Criminal Law (ICL), and the role of the ICC.

2.2 Transitional Justice and the International Criminal Court

Transitional justice refers to means of dealing with past violence in societies moving out of conflict or dictatorship.¹ The terms can be applied to the work of the ICC, because situations come before the ICC as a result of horrendous human rights violations. The ICC in undertaking its work seeks to establish accountability for grave human rights violations. Therefore, transitional justice is very relevant to the ICC framework. The former ICC prosecutor Luis Moreno Ocampo² has argued:

The International Criminal Court is part of the transitional justice project because it aims to confront centuries old methods of behaviour – those of conflict and war, the abuse of civilians, women and children – and to reshape the norms of human conduct while violence is still ongoing, thus aiming, as stated in the Rome Statute, to contribute to the prevention of future crimes.

The ICC thus acknowledges that it is intended to operate as a part of transitional justice. Traditionally, transitional justice was understood to apply to a particular period of time of transition from an authoritarian regime to democracy. However, transitional justice processes are no longer to be restricted to a moment in a specific period of time. For instance, Patricia Lundy and Mark McGovern challenge this orthodoxy by undertaking research and focusing on a transition from conflict within a supposed democracy such as, Northern Ireland. This implies that transitional justice can be applied to any situation or framework, including the ICC process as long as it is adapted to suit that particular framework.

Therefore, transitional justice mechanisms other than prosecution, particularly TRCs and traditional methods, can be used together with the ICC structure as long as they do not conflict with the Rome Statute. Neil

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3 Samuel P Huntingdon The Third Wave Democratization in the Late Twentieth Century (University of Oklahoma Press 1991).
Kritz contends that the ultimate goal of transitional justice is to make the ‘local system sufficiently robust so as to help prevent the occurrence of future atrocities.’\textsuperscript{5} Currently, prosecutions under the ICC framework are not sufficient enough to achieve this goal. So, it is essential to incorporate ATJ measures, particularly indigenous methods such as gacaca courts and TRCs to operate alongside the ICC prosecutions.

The need to integrate ATJ tools within the ICC framework is vital in most regions in Africa. African states still hold on to customary law that is applied by adopting ADR mechanisms and under the local court or traditional system.\textsuperscript{6} The worth of customary law is evident by the emphasis on the notion of harmony/togetherness illustrated in terms such as \textit{Ubuntu} in South Africa\textsuperscript{7} and \textit{Utu} in East Africa.\textsuperscript{8} Consequently, such values have contributed to social harmony in African societies and have been imaginatively assimilated into formal justice systems in the


resolution of conflicts. Before addressing the role of the ICC, it is imperative to consider the purposes of ICJ generally. This is fundamental for the purpose of appreciating the role and legal framework of the ICC.

2.3 The Purposes of International Criminal Justice

This section considers the reasoning for seeking to ensure that persons that commit the most serious offences are held accountable. The aim of ICJ is to achieve certain purposes; among others, retribution, deterrence, rehabilitation, incapacitation and denunciation. There are two main ethical approaches on the justification of punishment; forward-looking (teleological) and the backward-looking approach which focuses on the crime itself (deontological). In practice, most criminal justice systems

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tend to have a combination of the two approaches.\textsuperscript{13} However, when it comes to transitional societies, different societies will have different goals\textsuperscript{14} depending on the needs of that particular society, at that particular time. It is the view of the international community that the best approach to adopt during transitional justice is prosecution of individuals suspected of having committed atrocities.\textsuperscript{15} The international community is justified in having a role and interest to play in regards to issues of transitional justice.\textsuperscript{16} This is because in international law, where the most serious offences such as genocide, war crimes or crimes against humanity are committed in a particular society, the perpetrators do not only wrong that distressed society or perhaps affected individuals, but instead the entire humanity.\textsuperscript{17}

Based on this reasoning, Aukerman argues that the purpose of transitional justice, whether retribution, deterrence, rehabilitation, or condemnation should be solely vested with neither the international community nor the local society.\textsuperscript{18} This implies that where genocide, war crimes or crimes

\textsuperscript{14} Martha Minow \textit{Between Vengeance and Forgiveness Facing History after Genocide and Mass Violence} (Boston Beacon Press 1998) 4.
against humanity have been committed, both the international community and the local society have a duty to ensure that suspected individuals do not escape with impunity. Thus the approach of transitional justice adopted should be a reflection of the needs, desires and political reality of the abused society. For instance, the ICTY’s rationale for punishment has been for the purpose of ensuring deterrence and retribution. This implies that it is in order for any institution, including the ICC to specify the purpose for its establishment and operate strictly for the purpose of achieving the specified objectives.

However, the Rome Statute is silent about the purpose of punishment under the ICC. It could be assumed that the drafters of the Statute assumed that the response to the question would be so apparent as to require no comment of reasoning for it. The only reference to the issue is found in the preamble that affirms that putting an end to impunity for the most serious crimes of international concern would ‘contribute to the prevention of such crimes,’ thus the belief of the ICC symbolising deterrence. The absence of clarity as to the purpose of imposing a

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sentence implies that any justification of sentencing based on acceptable purposes of punishment under international law generally, can be taken into account as long as the justification is not contrary to the object and spirit of the ICC. Such a technique would enable the ICC to seek, to achieve other aims as long as they are not contrary to the constitutive instrument. This is necessary in making the institution more effective and ensuring the root causes of the conflict in the affected areas are addressed.

2.3.1 Retribution

Retribution is defined as the application of pains of punishment to an offender who is morally guilty. Retribution is one of the reasons for justification of punishment in international law, in fact retribution is not only acknowledged as a primary objective of criminal trials, but is also the most important rationale of punishment. The word retribution means ‘vengeance, expiation or giving the offenders their just deserts’, which entails imposing a punishment upon an offender that is merited. However, in practice, international tribunals have developed a tendency to avoid interpreting the retributive justifications of punishment in terms of


27 CMV Clarkson and H M Keating Criminal Law Text and Materials (Sweet and Maxwell 2010) 26, the notion of punishing persons on the basis of vengeance is no longer a popular view; expiation the notion of ‘paying back a debt.’ Nigel Walker Why Punish? (Oxford University Press 1991) 67, 73.
the *lex talionis*.\(^{28}\) The *lex talionis* of the Biblical Old Testament is often articulated through the maxim ‘an eye for an eye, a tooth for a tooth.’ \(^{29}\) By this, it implies that international tribunals are reluctant in claiming revenge as the reason for punishing individuals.\(^{30}\)

For instance, the ICTY in the *Aleksovski* decision\(^ {31}\) clarified that retribution is not to be assumed as accomplishing a need for revenge, but as due articulation of the outrage of the international community at those crimes which constitute the act of denunciation.\(^ {32}\) This was despite the ICTY’s decision of revealing strong characteristics of justification of retribution. In the ICTY’s decision in the *Aleksovski* and *Nikolic*\(^ {33}\), the Court’s decision revealed strong characteristics of justification of retribution, the ICTY held:

> *In light of the purposes of the Tribunal and international humanitarian law generally, retribution is better understood as the expression of condemnation and outrage of the international community at such grave violations of, and disregard for, fundamental human rights at a time that*


\(^{31}\) *Aleksovski* ICTY A Ch. 24.3. 2000.

\(^{32}\) *Aleksovski* ICTY A Ch. 24.3. 2000 paragraph 185.

people may be at their most vulnerable, namely during armed conflict. It is also recognition of the harm and suffering caused to the victims. Furthermore, within the context of international criminal justice, retribution is understood to be a clear statement by the international community that crimes will be punished and impunity will not prevail.\(^{34}\)

This implies, despite retribution being recognised, as one of the reasons for imposing punishment, that it is common for the justification to be used in combination with others such as denunciation, as illustrated in the above example. This implies that it will be justifiable for the ICC to impose punishment on a basis other than retribution or deterrence.

The basis of the retributive theory requires that punishment must be ‘backward looking’.\(^{35}\) This means that justice demands that a crime is punishable as a matter of the act being a criminal act, as opposed to future consequences of conviction and punishment.\(^{36}\) According to this theory, all wrongdoers deserve punishment, the level of punishment subjected to the wrongdoer must fit the wrong committed.\(^{37}\) It is not practical to rely on an absolute retributive theory because it is impossible to prosecute everyone due to limitations such as resources. In relation to the ICC, it is not intended that everyone be prosecuted, but that this be restricted to the


most serious offenders. This is because an absolute retribution would entail prosecuting the greatest number of individuals regardless of the seriousness of the offences or constraints of resources.  

The offenders are punished on the basis that they deserve to be punished as a result of their actions. Therefore, despite the Rome Statute not clarifying the reasoning for punishment under its framework, prosecutions are intended to ensure that persons suspected of having committed genocide, war crimes or crimes against humanity, face their just deserts based on the offence committed.

The retributivists further argue that the appropriate mechanism for the delivery of such legitimate punishment is the law. Consequently, the Rome Statute provides details as to what actions are deemed offences, the definition of offences and the penalties to be imposed for violations of international law. According to the retribution theory, a crime is a violation of the law and the response to that violation is punishment, which must have a legal basis. It follows that punishment must be authorised, delivered and regulated on the basis of the law. In relation to the ICC, punishment is imposed on the basis of the Rome Statute. This

40 Leo Zaibert Punishment and Retribution (Ashgate 2006).
41 See section 2.4 below.
implies that any punishment imposed under the ICC is valid as it will have a legal basis. According to contemporary retributivists, the conception of punishment is an expression of societal disapproval of criminal behaviour.\footnote{Andrew Von Hirsch \textit{Censure and Sanction} (Oxford Clarendon Press 1996) generally.}

In relation to this thesis, undertaking prosecution of the most serious offenders under the ICC constitutes an expression of societal disapproval, those individuals, particularly leaders who allow for violations of individuals rights will not escape punishment for their actions. Therefore, punishing individuals who violate the rules creates a boundary for what is acceptable and unacceptable behaviour as well as emphasizing the vital role and authority of law in society.\footnote{David Garland \textit{Punishment and Modern Society} (University of Chicago Press 1990) chapters 2 and 3.} For instance, the recent action of the AU, of approving immunity for heads of states and senior officials from international criminal prosecution, has been criticised.\footnote{Beth Van Schaack ‘Immunity before the African Court of Justice and Human and Peoples Rights the Potential Outlier’ 10 July 2014 http://justsecurity.org/12732/immunity-african-court-justice-human-peoples-rights-the-potential-outlier/ (accessed on 12 July 2014).} Clearly, the action of adoption of the protocol\footnote{Protocol on the Statute of the African Court of Justice and Human Rights http://www.african-court.org/en/images/documents/Court/Statute\%20ACJHR/ACJHR_Protocol.pdf (accessed on 10 July 2014).} is contrary to international law as evident from chapter one of this thesis.

The ICTY trial Chamber in the \textit{Todorovic} case\footnote{\textit{Todorovic} ICTY T.Ch I 31.7. 2001.} held that retribution ‘must be understood as reflecting a fair and balanced approach to the exaction of punishment for wrong-doing.’\footnote{\textit{Todorovic} ICTY T.Ch I 31.7.2001 paragraph 29, \textit{Plavsic} ICTY T. Ch. III 27.2.2003 paragraph 23.} This means that the penalty imposed must be proportionate to the wrong-doing; in other words, the
punishment must be made to fit the crime.\textsuperscript{51} This means that, it is necessary for as many persons as possible suspected of violating human rights to be held accountable and be subjected to a punishment befitting the seriousness of the offence.

However, a purely retributive tactic is not always the best approach to adopt particularly in situations where the most serious offences to international concern are committed. This is because applying the retributive theory to reality cannot be realistic. For instance, the retributive theory demands that every person found guilty of committing crimes such as genocide, war crimes and crimes against humanity must be subjected to a punishment that is proportionate to the wrong-doing.

Retribution is not by all means the only reason why it is vital to ensure individuals are held accountable for offences. It is vital to punish suspected persons for other reasons other than retribution. For instance, the contention underlying the deterrence theory is that punishment leads to perpetrators to refrain from committing further crimes in future as well as setting examples for others to refrain from committing similar crimes. The concept of deterrence as a justification for punishment in ICJ is addressed below.

\subsection*{2.3.2 Deterrence}

The Rome Statute is silent on the purposes of sentencing. The only reference is in the preamble that provides that putting an end to impunity

\textsuperscript{51} Todorovic ICTY T.Ch I 31.7.2001 paragraph 29, Plavsic’ ICTY T. Ch. III 27.2.2003 paragraph 23.
for serious international crimes will contribute towards the prevention of such offences.52 This implies that the ICC recognises that the Court has a deterrent effect. Deterrence is the omission of a criminal act due to fear of sanctions or punishment.53 However Schabas54 disapproves the lack of clarity on the purpose of sentencing under the Rome Statute, by arguing that the Court’s recognition of having a deterrent effect is not equivalent to suggesting that sentences are imposed under the ICC for the purpose of deterrence. However, that set aside, the ICC is intended to prevent commission of future offences.55 Therefore, the ICC is expected to operate as a deterrent effect.

Deterrence operates on three different levels; individual/specific, general and educative deterrence.56 The Rome Statute does not address the issues in relation to how the ICC is supposed to act as a deterrent effect based on the different levels of the deterrence theory.57 Thus, the thesis is intended

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to address this flaw by providing a proposition on how the Court could be used for deterrence purposes therefore making the ICC effective. Contrary to the retributive theories, deterrent theories are forward looking, this implies that they are concerned with the consequences of punishment. The rationale is that the deterrent theories reduce crime by the existence of the threat of punishment. The decision of the Allied states to conduct trials following the World War II, by creation of the Nuremberg IMT and the IMT in Tokyo was in order to deter similar atrocities.

In addition, the Security Council’s decision to establish the ICTY during an ongoing conflict was in order to deter international crimes. Both ad hoc tribunals, the ICTY and ICTR, have deterrence as one of the most important objectives. Deterrence is considered as the best known justification for punishment. Consequently, in the field of international criminal justice, deterrence is the other principal rationale deployed in

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60 Chapter 1 of thesis sections 1.2.3, 1.2.4.
support of prosecutions apart from retribution. Deterrence has been raised as a key justification for inflicting punishment. As Jeremy Bentham concluded,

*When we consider that an unpunished crime leaves the path of crime open, not only to the same delinquent, but also to all those who may have the same motives and opportunities for entering upon it, we perceive that the punishment inflicted upon the individual becomes a source of security for all.*

This means that prosecution and sentencing under the ICC is intended to have a deterrent effect. The theory of deterrence has been advocated by utilitarian political theorists such as Jeremy Bentham, who in contrast to retributivists mainly focuses on the future and advantages of prosecution. The ICC could be deemed to act as a deterrent on individual basis. The object of the deterrence theory is to discourage crime. Under individual deterrence, the rationale is that following the experience of punishment by an individual that person is unlikely to re-offend due to the unpleasant nature of the punishment. This implies that individuals

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69 CMV Clarkson and H M Keating *Criminal Law Text and Materials* (Sweet and Maxwell 2010) 36.
prosecuted under the ICC are unlikely to re-offend. This is particularly true for the most serious offenders.

The level of deterrence most relevant to the ICC is the general and educative deterrence. The argument underlying the theory is that the existence of the threat of punishment deters people from committing crimes. The ICC has accepted that deterrence has a role to play in ICL. As pointed out above, preamble paragraph 5 of the Rome Statute provides that parties are ‘determined to put an end to impunity for the perpetrators of these crimes and thus contribute to the prevention of such crimes.’

Reference to history indicates a lack of enforcement of ICL as illustrated in chapter one. This infers that despite the proliferation of international criminal courts and tribunals, the number of persons who are prosecuted for the offences is relatively small, consequently weakening the aim of deterrence, as individuals are likely to escape punishment. Therefore, if ATJ measures were introduced to function alongside the ICC, this would imply that all persons or at least the majority of persons suspected of violating international human rights would be held accountable.

At a general deterrence level, the ICC is expected to deter individuals from committing genocide, war crimes and crimes against humanity. The

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72 The Rome Statute 1998 Preamble paragraph 5.
ICC is further expected to act as a deterrent effect by virtue of its existence. For instance, the Rome Statute is clear on the offences that are regarded as being the most serious to international concern. The Rome Statute provides details of punishment that can be imposed on individuals who violate the law as set out. The Statute further provides details on how the Court’s jurisdiction can be triggered. The existence of the Rome Statute is thus intended to threaten those who might anticipate crime. At sentencing levels, offenders are punished in order to discourage others from committing crimes. Therefore, punishment is to be recognised as an example to individuals generally of what would happen should others engage in similar conducts, hence resulting in the deterrence of crimes. However at an international level, the ICC has not been effective in acting as a deterrent. This is because despite the ICC’s existence since 2002, individuals have continued to commit the most serious offences, particularly as accomplices; reference can be made to Sudan and Syria. This therefore implies that the ICC has not been effective. The most significant issue is to ensure the ICC is more relevant to Africa. There is

74 The Rome Statute 1998 Articles 5-8 and 8bis.
75 The Rome Statute 1998 Article 76, 77 and 78.
need therefore to encourage prosecution within the ICC framework and the national courts. Such an approach will contribute towards ensuring that atrocities are not repeated.

At an educative deterrence level, punishment of perpetrators leads to a practice of not breaking the law in a community over a period of time, thus the public is educated on what is good and bad conduct. Educative deterrence is more relevant in situations before the ICC. This is because there is a need to ensure the ICC has an impact on communities in states that have cases before the Court for educative purposes. The idea is that once the ICC undertakes prosecution in a particular state, there is a presumption that the people will be deterred from committing similar offences in the future, due to the existence of the risk of prosecution.

As mentioned above, Schabas argues that recognising the Court’s deterrent effect does not constitute a suggestion that the court’s sentencing policy is intended to be a deterrent. However, reference to case law by the ad hoc tribunals on the purposes of international sentencing provides

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81 CMV Clarkson and H M Keating Criminal Law Text and Materials (Sweet and Maxwell 2010) 42.
82 CMV Clarkson and H M Keating Criminal Law Text and Materials (Sweet and Maxwell 2010) 42.
some clarification on the issue. In the *Tadic* case, Judge McDonald held that ‘retribution and deterrence serve as primary purposes of sentence.’ The ICTR on the other hand, has ruled that penalties imposed on individuals found guilty ‘must be directed at retribution of the accused who must see their crimes punished’ …..on the other hand at deterrence ‘thus to dissuade others in future from committing such atrocities by showing such offences will not go unpunished.’

Despite the emphasis on the notion of deterrence and retribution as an object of international punishment, there is inconsistency on the issue.

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For instance, broader approaches have been adopted, particularly the ICTY ruled that the purposes of criminal law punishment, ‘include aims of just punishment, deterrence, incapacitation of the dangerous offenders and rehabilitation.’\(^9^0\) In a different decision however, retribution was said to be an: ‘inheritance of the primitive theory of revenge’, arguing that it was intended to be used in order to achieve the reconciliation.\(^9^1\) Clearly, several factors have in the past been considered to be objectives of international punishment. Considering the Rome Statute fails to


\[^9^1\] Prosecutor v Zejnil Delalic, Zdravko Mucio Esad Landzo IT-96-21-T Judgment 16 November 1998 paragraph 1231- States - A consideration of retribution as the only factor in sentencing is likely to be counter-productive and disruptive of the entire purpose of the Security Council, which is the restoration and maintenance of peace in the territory of the former Yugoslavia. Retributive punishment by itself does not bring about justice.
specifically clarify on the purpose of punishment under the ICC, this therefore means that there is leeway for ATJ measures to be adopted alongside the ICC prosecutions. Such an approach will enable the ICC to achieve other objectives beyond deterrence and retribution thus, addressing the limitations of prosecutions.

However, the importance of deterrence within the ICC is illustrated in its decisions, for instance, in the Lubanga arrest warrant decision, the Pre-Trial Chamber spoke of ‘maximizing the deterrent effects of activities of the court.’ The ‘deterrence function’ was cited to justify the key role of significance in considering the admissibility of the case. Despite this, the concept of deterrence remains a dilemma in criminal justice. This is because it is not easy to identify the effectiveness of the Court in undertaking the deterrence function.

Whilst it is easy to identify those who have not been deterred, it is impossible to identify those who have. However it is to be assumed that the existence of the ICC and its activities does deter atrocities. This is particularly evident in the situation of Uganda, whereby the threat of prosecution by the ICC led to bringing the Lord’s Resistance Army (LRA)

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92 Lubanga ICC-01/04-01/06-8 Decision on the Prosecutor’s Application for a Warrant of Arrest 10 February 2006 paragraph 54.
93 Lubanga ICC-01/04-01/06-8 Decision on the Prosecutor’s Application for a Warrant of Arrest 10 February 2006 paragraph 60.
to the negotiation table. In September 2006, the UN Secretary General for Humanitarian Affairs and Emergency Relief, made a similar observation for in addressing the Security Council. The ICC did not fail to acknowledge its short-term deterrent effect, speaking to the Assembly of States parties in November, 2006 prosecutor Ocampo said:

_The court’s intervention has galvanized the activities of the states concerned. [...] Thanks to the unity of purpose of these states, the LRA has been forced to flee its safe haven in southern Sudan and has moved its headquarters to the DRC border. As a consequence, crimes allegedly committed by the LRA in Northern Uganda have drastically decreased. People are leaving the camps for displaced persons and the night commuter shelters which protected tens of thousands of children are now in the process of closing. The loss of their safe haven led LRA commanders to engage in negotiations, resulting in a cessation of hostilities agreement in August 2006._

Philippe Kirsch adopts a narrow view of the ICC’s deterrent effect by perceiving deterrence as a positive consequence derived from the operation of the Court in a particular situation. Thus, Kirsch argues, the ICC has a deterrent effect in a short term with references to cases that are

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95 This statement is supported by remarks made by the Uganda Minister for security Amama Mbabazi.
before the Court. However, the deterrence effect accordingly, is intended to be gradual, building over time as the number of trials before the ICC increase. As mentioned above, the preamble of the Statute provides that the ICC is intended ‘to put an end to impunity’, therefore contributing to the prevention of crimes.

Clearly, the threat of prosecution in Uganda by the ICC led to new efforts in mediation and ending the civil war and hostilities in 2006. Therefore, this is the more reason why the ICC framework should provide for ATJ measures to operate alongside the ICC. Such a technique would result in participation of the locals in the proceedings, addressing the root causes of the conflict and educating the population on the need to respect the rule of law and human rights. The next section addresses the concept of rehabilitation as a justification for imposing sentences in ICL.

2.3.3 Rehabilitation

Rehabilitation theory presupposes that the offender is a sick person who needs reformation before the person can be allowed back into society. The theory of rehabilitation as a justification of punishment can be traced back to the eighteenth century. However, the theory has not advanced under ICJ because it seems inappropriate and rather disproportionate for

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101 The Situation in Uganda is considered further in Chapter 4 of this Thesis.
102 CMV Clarkson and H M Keating Criminal Law Text and Materials (Sweet and Maxwell 2010) 53.
perpetrators of the most serious offences to benefit from the theory.\textsuperscript{104} This is because ICJ focuses on ensuring persons suspected of committing the most serious offences to international concern, particularly genocide, war crimes and crimes against humanity are held accountable for the offences. It is only reasonable that the most serious offences are subjected to a penalty proportionate to the offences in international law, such as life imprisonment or a period that may not exceed thirty years imprisonment.\textsuperscript{105}

However, there are certain instances when the international tribunals have cited rehabilitation as the basis for punishment, particularly in relation to lower level offenders as evidently illustrated in the decision of the Trial Chamber in the Erdemovic\’ case.\textsuperscript{106} Erdemovic\’ was a young Bosnian Croat who under duress participated in the Srebrenica massacre. The trial Chamber sentenced Erdemovic\’ to a relatively short five-year period of imprisonment. The Chamber took into account Erdemovic\’s corrigible personality and that he was ‘reformable and should be given a second chance to start his life afresh upon release, whilst still young enough to do

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\textsuperscript{105} The Rome Statute 1998 Article 77.
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This therefore implies that rehabilitation can still be used in ICJ where it proves appropriate to do so. This would require each case to be treated on its own merits.

The *Erdemovic* case is an indication that lenient sentences can be imposed in cases in relation to the most horrendous offences to international concern as long as it is appropriate. This view is important in establishing a methodology by which transitional justice strategies, particularly TRCs and traditional approaches, can be incorporated within the ICC framework. Such a system would imply that justification for imposing sentences such as rehabilitation will be taken into account, particularly for less serious offenders.

Rehabilitation of perpetrators will contribute towards addressing the root problems leading to the conflict itself. However, there are certain perpetrators who simply need to be incapacitated for the purpose of preventing them from committing further crimes. Incapacitation as a justification for punishment is considered in the next section.

### 2.3.4 Incapacitation

Incapacitation, like individual deterrence, seeks to prevent crimes from being committed by detaining the individual, therefore preventing them

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107 *Erdemovic*’ ICTY T. Ch. 5.3.1998 paragraph 16.
from committing further crimes.\textsuperscript{108} Incapacitation is a utilitarian justification of punishment.\textsuperscript{109} According to Drumbl, incapacitation has not had much influence under ICJ.\textsuperscript{110} One of the reasons for this is because the incapacitation theories of punishment are controversial, as they rely on the vague science of determining which individuals will re-offend and who will not.\textsuperscript{111} As opposed to focusing on the offence that has been committed, persons are punished for offences they might commit in future.\textsuperscript{112}

Nevertheless, in the Tokyo IMT, Judge Roling, affirmed that the justification for prosecuting aggression, despite the offence not formerly criminal, was that the defendants were dangerous and their influence on Japan had to be barred by imprisoning them.\textsuperscript{113} On the other hand, the ICTY also acknowledged that imposing long prison sentences on defendants allows the tribunal ‘to protect society from the hostile, predatory conduct of the guilty accused.’\textsuperscript{114} Ideally under ICJ the presumption is that, suspected individuals are incapacitated from committing further crimes that can contribute towards the reduction of

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\textsuperscript{113} Dissenting Opinion of the Member from the Netherlands 10–51.
\textsuperscript{114} \textit{Prosecutor v Delalic and Others} Case No IT-96-21-T Judgement paragraph 1232 (16 November 1998).
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crime. For instance, it has been argued that the arrest of high level Rwandan officials responsible for the 1994 genocide contributed towards the prevention of further violence from being committed against Rwanda’s post genocide government.\textsuperscript{115}

Similarly, it has been argued that the long period of time it took to arrest Charles Taylor, the former President of Liberia enabled him to continue to promote violence in Liberia despite being in exile in Nigeria.\textsuperscript{116} Extending incapacitation as a purpose for punishment and sentencing within the ICC framework will imply that the ICC goes beyond its deterrent mandate by recognising the impact of arresting suspected perpetrators. This would imply that, rather than focusing merely on undertaking prosecution, the ICC can encourage states to ensure that they make efforts to ensure that persons suspected of violating international human rights are incapacitated for committing further crimes even prior to their prosecution. The role of the ICC goes beyond the deterrence to achieve other purposes such as denunciation.

### 2.3.5 Denunciation/Communication

Besides, there is no reason why the purpose of sentencing under the ICC should be limited, as deterrence and retribution are not the only purposes of punishment under ICL as highlighted in this chapter. Apart from the

\begin{flushleft}
\textsuperscript{115} Nancy Amoury Combs *Guilty Pleas in International Criminal Law Constructing a Restorative Justice Approach* (Stanford University Press 2006) 50.
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purposes mentioned above, is the concept of denunciation, as a justification of punishment. Denunciation presumes that punishing an offender affords an opportunity to communicate with the offender, the victim and the entire society at large as to the nature of wrong doing.\(^{117}\)

Denunciation is a modern theory of justification of punishment, which has become popular under ICJ.\(^{118}\) The theory is intended to involve offenders, as well as making them understand what was wrong with their actions.\(^{119}\) In the process, the community and society as a whole are educated about the intolerable nature of the behaviour condemned. This implies that rather than the ICC limiting its existence and operation to the deterrence theory, combining ATJ dealings into the ICC agenda will lead to other purposes of punishment being taken into account rather than the current deterrent approach. This will lead to the ICC being more effective and more relevant to the international community as a whole.

Denunciation as a justification of punishment has been manifested in international tribunals such as the ICTY’s decision in *Kordic*’ and *Cerkez*\(^{120}\) cases, in which accordingly;

\[\ldots\text{the educational function . . . [which] . . . aims at conveying the message that rules of international humanitarian law has to be obeyed under all}\]


\(^{120}\) *Kordic*’ and *Cerkez* ICTY A. Ch. 17.12.2004.
circumstances. In doing so, the sentence seeks to internalise these rules and the moral demands they are based on in the minds of the public.\textsuperscript{121}

The importance of a denunciation or communication function of punishment was further acknowledged by the ICTY Appeals Chamber in the \textit{Krs’tic’} appeal.\textsuperscript{122} There the Chamber held in relation to the need to punish the crime of genocide;

\textit{Among the grievous crimes this tribunal has the duty to punish, the crime of genocide is singled out for special condemnation and opprobrium. The gravity of genocide is reflected in the stringent requirements which must be satisfied before this conviction is imposed. These requirements – the demanding proof of specific intent and the showing that the group was targeted for destruction in its entirety or in substantial part – guard against a danger that convictions for this crime will be imposed lightly. Where these requirements are satisfied, however, the law must not shy away from referring to the crime committed by its proper name.}\textsuperscript{123}

This therefore implies that it is not only necessary, but essential for persons suspected of committing the most serious offences to international concern to be prosecuted and sentenced if found guilty. This will indicate to the world as a whole that no individual who commits such offences will be allowed to escape with impunity, therefore reaffirming the rule of law within individuals, societies and the international community at large.

\textsuperscript{121} \textit{Kordic’ and Cerkez} ICTY A. Ch. 17.12.2004 paragraphs 1080–1.
\textsuperscript{122} \textit{Krs’tic’} ICTY A.Ch. 19.4.2004.
\textsuperscript{123} \textit{Krs’tic’} ICTY A.Ch. 19.4.2004 paragraphs 36–7.
Individuals will be aware that they cannot escape punishment for such behaviour. Therefore, this implies that combination of ATJ processes within the ICC structure will enable the ICC to achieve other purposes, other than deterrence.

There are other purposes for imposing punishment under ICJ. An institution such as the ICC vested with a difficult role of undertaking prosecution of the most serious crimes ought to be drafted in a broad manner rather than the current restrictive manner. The integration of ATJ within the ICC framework will imply that the Court acknowledges that it can play other roles in addition to deterrence.

2.3.6 Other Comprehensive Purposes of International Criminal Justice

Apart from the justifications mentioned above, ICJ has other far reaching goals, particularly those with a utilitarian focus intended to focus on the future of the societies in which the offences are committed. Trials at an international level provide an institutional framework based on a recognised process and procedure that recognises the rights of both victim and offenders, obligatory attendance and participation by the offender. 124 For instance, prosecution may lead to securing justice for the victims and families as they are able to find closure in the occurrences. 125 This was illustrated in the ICTY’s decision in the Nikolic’ case, 126 which affirmed

that punishment must therefore reflect both the calls for justice from the persons who have – directly or indirectly – been victims of the crime.\textsuperscript{127}

International Criminal Justice strives to provide means of establishing an accurate recording of history by way of truth telling.\textsuperscript{128} Osiel\textsuperscript{129} for instance, has recommended that trials should be organised in a manner, which creates an account, which will be beneficial to a post-conflict society. Prosecution allows for individual accountability to be established for specific offences rather than blaming an entire group of people based on whatever reason, such as religion or race.\textsuperscript{130} The function of truth telling subsidiary served by trials was illustrated in the ICTY’s first judgement in the \textit{Tadic} case\textsuperscript{131} which addressed historical and contextual elements underlying the Bosnia-Herzegovina, mainly Opstina Prijedor, conflicts of the former Yugoslavia.\textsuperscript{132}

However, the decisions of the international criminal tribunals have been criticised for having engaged in prolonged details of the background of the conflicts, consequently resulting in trials being lengthy.\textsuperscript{133} It has been acknowledged that trials are not the most effective tools to adopt for the

\begin{footnotesize}
\textsuperscript{127} Momir Nikolic’ ICTY T. Ch. I 2.12.2003 paragraph 86.
\textsuperscript{130} Nancy Amoury Combs \textit{Guilty Pleas in International Criminal Law Constructing a Restorative Justice Approach} (Stanford University Press 2006) 54.
\textsuperscript{131} \textit{Prosecutor v Tadic} Case No. IT-94-1-T Opinion and Judgement (May 7 1997).
\textsuperscript{132} \textit{Prosecutor v Tadic} Case No. IT-94-1-T Opinion and Judgement, paragraphs130-92 (May 7 1997).
\end{footnotesize}
purposes of creation of a history record; this is because trials tend to focus on specific issues, specific type of evidence and they tell a story based on the relevant issues to that particular case.\textsuperscript{134} Trials tend to focus on specific individuals and establish how they have contributed towards the conflict at large.\textsuperscript{135}

In addition, it has been argued that criminal trials are not the best forum to seek to write history.\textsuperscript{136} Accordingly, it would be challenging to write the complete history of a period without drifting beyond the bounds of the criminal trial, which is intended to try not only a specific person, but also specific conduct.\textsuperscript{137} Therefore, the limitations of a trial generally are extended to prosecutions under the ICC. The implication is that equally trials conducted under the ICC cannot be expected to create a history of record of the events in a particular area due to the limitations identified above.

A criminal court is vested with the role of being a judge in seeking to establish individual accountability in the commission of offences in a particular conflict. It is odd for a criminal court, such as the ICC to be expected or engage itself in seeking to make determination of general

\textsuperscript{134} Nancy Amoury Combs \textit{Guilty Pleas in International Criminal Law Constructing a Restorative Justice Approach} (Stanford University Press 2006) 54.

\textsuperscript{135} Nancy Amoury Combs \textit{Guilty Pleas in International Criminal Law Constructing a Restorative Justice Approach} (Stanford University Press 2006) 54.

\textsuperscript{136} Martha Minow \textit{Between Vengeance and Forgiveness facing History after Genocide and Mass Violence} (Beacon Press Boston 1998) 46–7.

historical accounts of events;\textsuperscript{138} such a task is beyond the role of a
criminal court.\textsuperscript{139} This is because trials by nature are not designed to
incorporate details of history as Judge Ro¨ ling rightly pointed out that
there is a difference between the ‘real truth’ and the ‘trial truth’.\textsuperscript{140} This is
because the ‘trial truth’, thus the truth that is derived from proceedings of
a trial tends to be restricted to specific issues underlying the commission
of offences being tried and not necessarily the ‘real truth’ in relation to
violations of human rights generally in that particular area.

As much as possible trials, attempt to safeguard against any arbitrariness
and any possible biasness to be safeguarded upon during the proceedings
by granting all parties procedural fairness.\textsuperscript{141} Trials provide means by
which individuals responsible for offences committed can be held
criminally liable as opposed to holding groups liable. Hannah Arendt,
argued that ‘where all are guilty, nobody in the last analysis can be
judged.’\textsuperscript{142} This implies that it makes little or no sense looking to establish
individual responsibility where a majority of the society has participated in
the commission of offences. To ensure that as many persons as possible
are held accountable, other measures of addressing violations of human


\textsuperscript{140} Antonio Cassese and B V A Roling The Tokyo Trial and Beyond Reflections of a Peacemonger (Polity 1994) 50.

\textsuperscript{141} Larry May Crimes against Humanity a Normative Account (Cambridge University Press 2005) 229.

rights must be used rather than being restricted to prosecutions before the ICC and national courts.

However, having considered the purposes of ICJ generally it is vital to consider the role of the ICC so as to identify means of how the ICC might operate to achieve other purposes beyond deterrence within the ICC context. This would be significant to the ICC as a Court intended to address the most serious offences to international concern, implying that it is not an ordinary Court. The ICC adopting such an approach will enable the Court to achieve ICJ purposes beyond deterrence. The next section will thus consider the role of the ICC on the basis of the Rome Statute.

2.4 The Role of the International Criminal Court

The International Criminal Court is a permanent Court that was established by treaty for the purposes of investigating and prosecuting persons suspected of committing the most serious offences of international concern.\textsuperscript{143} The offences within the ICC’s jurisdiction include genocide,\textsuperscript{144} crimes against humanity,\textsuperscript{145} war crimes\textsuperscript{146} and crimes of aggression.\textsuperscript{147} The creation of the ICC by treaty in 1998 signifies that the Rome Statute is

\textsuperscript{143} The Rome Statute 1998 Article 1.
\textsuperscript{144} The Rome Statute 1998 Article 6.
\textsuperscript{145} The Rome Statute 1998 Article 7.
\textsuperscript{146} The Rome Statute 1998 Article 8.
a reflection of compromises accomplished at the Rome Conference.\textsuperscript{148}

Thus the ICC is an institution only binding on states parties.\textsuperscript{149}

The Rome Statute provides that the Court can ‘exercise its functions and powers, as provided in the Statute, on the territory of any state party and by special agreement, on the territory of any other state.’\textsuperscript{150} The ICC is therefore an inter-national as opposed to a supra-national body, similar to any inter-national bodies that exist.\textsuperscript{151} This section considers the role of the ICC under the Rome Statute. On that basis, the following will be considered; the ICC’s mandate as an international criminal court, the applicable law under the Rome Statute and the expectations.

2.4.1 The Mandate of the ICC as a Criminal Court

The jurisdiction of the ICC under the Rome Statute is limited to offences committed after 1 July 2002, for states parties, and offences committed after entry into force of the Statute for that state.\textsuperscript{152} The Statute has been criticised for its incapacity to prosecute atrocities committed prior its entry into force.\textsuperscript{153} However, failure to prosecute retroactively is not intended to

\textsuperscript{148} Sarah Williams \textit{Hybrid and Internationalised Criminal Tribunals Selected Jurisdictional Issues} (Bloomsbury Publishing 2012) 46.
\textsuperscript{150} The Rome Statute 1998 Article 4(2).
\textsuperscript{152} The Rome Statute 1998 Article 11.
grant a form of impunity to previous perpetrators.\textsuperscript{154} There is an assumption under the Rome Statute that domestic courts would punish those responsible for atrocities committed prior to the Statute’s entry into force. In cases where domestic courts fail to exercise their jurisdiction to prosecute, drafters of the Rome Statute were relying on the concept of universal jurisdiction, which theoretically enables any state to exercise jurisdiction to prosecute.\textsuperscript{155}

However the Rome Statute preserves the jurisdictional primacy of sovereign states.\textsuperscript{156} The ICC may exercise jurisdiction only where the alleged offences were committed on the territory of the states parties or where the accused is a national of the state party.\textsuperscript{157} However, this is not necessary under the following circumstances; firstly where the state concerned accepts the jurisdiction of the ICC by issuing a declaration to that effect;\textsuperscript{158} secondly, where the Security Council acting under Chapter VII of the UN Charter refers a situation to the Court.\textsuperscript{159} The ICC is not expected to be a substitute for national courts, but instead complementary

\begin{footnotes}
\textsuperscript{155} Naomi Roht-Arriaza (eds) \textit{Impunity and Human Rights in International Law and Practice} (Oxford University Press 1995), Steven R Ratner, Jason S Abrams and James L Bischoff \textit{Accountability for Human Rights Atrocities in International Law Beyond the Nuremberg Legacy} 3\textsuperscript{rd} edition (Oxford University Press 2009).
\textsuperscript{156} The Rome Statute 1998 Preamble paragraph 4, 10, Article 1, Michael A Newton ‘The Complementarity Conundrum are we Watching Evolution or Evisceration?’ (2010) 8 \textit{Santa Clara Journal of International Law} 115, 127, Sarah Williams \textit{Hybrid and Internationalised Criminal Tribunals Selected Jurisdictional Issues} (Bloomsbury Publishing 2012) 47.
\textsuperscript{157} The Rome Statute 1998 Article 12 (2).
\textsuperscript{158} The Rome Statute 1998 Article 12 (3).
\end{footnotes}
to national courts. The premise is that whenever faced with widespread large scale atrocities, the best response should be resort to national criminal courts as affirmed in the renowned Eichmann decision, where the Supreme Court of Israel stated that the territorial state, that is the state where the crimes have been committed is the appropriate place for adjudication. The advantage of holding trials in the state where an alleged crime was committed is that evidence is easily available, and it is easy to access witnesses.

In addition, the cost of investigation and transportation of witnesses to trial is minimised and most importantly such proceedings have the greatest legitimacy and impact on society involved. This is because the population concerned can easily follow the proceedings; consequently this encourages reconciliation and some sort of closure for the victims and families. In particular, the victims can easily access the institution as

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161 The Eichmann Case (1962) 36 ILR 304.
well as follow the work of the institution closely. Besides, upholding justice for the victims is one of the reasons for seeking to establish accountability. Therefore, it is only just that the institutions are located within their proximity as conducting trials miles from the *locus delicti* often result in domestic resistance there, due to misrepresentation of their work and allegations of bias.

Domestic prosecutions further offer opportunities for prosecuting a large number of offenders; this is because domestic trials cost less than international justice. For instance, the salaries of the Court staff and fees paid to lawyers are relatively low compared to personnel in international courts. Broomham further contends that putting suspected perpetrators on trial in national courts could act as a deterrence effect for future. The population at large would bear in mind the consequences for committing such atrocities. The Rome Statute is therefore justified for granting state parties the jurisdictional primacy. This implies that the ICC acknowledges the need for trials to be conducted in national courts.

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This is further affirmed in the incorporation of the complementarity principle within the ICC structure.

The ICC operates on the basis of complementarity, which provides that the ICC can only exercise jurisdiction where the territorial state is not currently investigating or prosecuting the case or where the state is unwilling or unable to do so. The notion underlying the principle of complementarity is that the ICC can only exercise jurisdiction if no states that has jurisdiction initiates criminal prosecution. Further, the Rome Statute preamble paragraph 6 recalls that ‘it is a duty of every state to exercise jurisdiction over those responsible for international crimes’. The Statute emphasizes that the ICC was established for the purposes of being complementary to national criminal jurisdiction. This implies that the ICC will only investigate a situation where there is a failure to act by the state. Moreno Ocampo further asserted in relation to the principle:

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173 William A Schabas ‘Complementarity in Practice Creative Solutions or a Trap for the Court?’ in Mauro Politi and Federica Gioia (eds) The International Criminal Court and National Jurisdiction (Ashgate 2008) 25.
The principle of complementarity represents the express will of States Parties to create an institution that is global in scope while recognising the primary responsibility of states themselves to exercise criminal jurisdiction. The principle is also based on considerations of efficiency and effectiveness since States will generally have the best access to evidence and witnesses.\textsuperscript{174}

Thus, the principle recognises that it is the responsibility of states to exercise criminal jurisdiction. This is not only a right of states, but also a duty of states.\textsuperscript{175} Then prosecutor Moreno Ocampo further argued in justification of the principle that, it encourages states to initiate their own proceedings before domestic judicial institutions.\textsuperscript{176} The general principle is that the ICC will only investigate in a situation where there has been a clear failure of the state concerned to act.\textsuperscript{177} This implies that the ICC is meant to be the court of last resort,\textsuperscript{178} as national courts have primacy over

\textsuperscript{174} William A Schabas ‘Complementarity in Practice Creative Solutions or a Trap for the Court?’ in Mauro Politi and Federica Gioia (eds) \textit{The International Criminal Court and National Jurisdiction} (Ashgate 2008) 25.
the ICC when it comes to exercising jurisdiction. This implies that if a domestic court is investigating or prosecuting a case or if the issue has already been addressed, such a case will be inadmissible before the ICC. This is contrary to the Statute of *ad hoc* tribunals. The *ad hoc* tribunals have parallel jurisdictions with national courts in issues of the subject matter of the tribunals.

Nevertheless, ultimately as mentioned above, both tribunals have primacy over national jurisdictions; the implication is that tribunals can request national courts to defer to the competence of the tribunal at any stage in the process. As stated above, domestic trials are more favourable than international trials. However, the contention is that states whose situations are before the ICC, should be able to adopt measures that are acceptable to address problems of human rights violations within the terms of the Statute rather than being restricted to prosecutions as the only means of addressing such violations.

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182 The ICTY Statute Article 9(2), The ICTR Statute Article 8 (2).
Such a proposition would be necessary to fill in the gaps in the ICC’s current legal framework. For instance, under the ICC structure, the ICC seats in The Hague in the Netherlands, although it can also seat elsewhere considered desirable. However the chances of the ICC seating in the states whose situation or cases are before the ICC are slim due to the dangers and seriousness of offences involved. Lessons can be drawn from the ICTR, which has been criticised for its remoteness from the Rwandese people, located in Arusha, Tanzania, many kilometres away from Rwanda. Despite its efforts in trying to inform the public through the Rwandese media, prosecutions undertaken in Rwandese courts were preferable to the ICTR adjudication because local justice was more accessible, compatible with community expectations and capacity of Rwandese to have control over both criminal and civil proceedings. This is partly because the locals will be unable to feel a sense of ‘ownership’ of international tribunals.

The fact that the international tribunals and courts focus on the most serious offenders worsens the situation, as it could mean that most victims might not be able to see their immediate oppressors punished.

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could lead to the locals being hostile and bitter towards the institution, hence the root problems leading to the outbreak of the conflict might not be addressed. As a result, the possibilities of such offences being committed again are high. For this reason, it is necessary to enable states whose situations and cases are before the ICC to adopt other forms of transitional justice to address the atrocities other than being restricted to prosecution.

However the principle of complementarity could prove to be biased against LDCs.\textsuperscript{188} The operation of the principle suggests that the probability of the ICC investigating and prosecuting a case based in the most developed country is very unlikely. Africa in particular has had a series of on-going conflicts and on numerous occasions where there has been a failure to prosecute individuals responsible. Currently all the situations before the ICC are cases in Africa.

The prosecutor of the \textit{ad hoc} tribunals, Louise Arbour argued during the drafting of the Rome Statute that the principle would work in favour of the rich and developed countries and against the LDCs.\textsuperscript{189} The reasons why the ICC might have singled out Africa is due to the persistent culture of impunity. It is common for African states not to proceed in prosecuting

\textsuperscript{188} William Schabas \textit{An Introduction to the International Criminal Court} (Cambridge University Press 2001) 196, William Schabas \textit{An Introduction to the International Criminal Court} 4\textsuperscript{th} edition (Cambridge University Press 2011) 196.

\textsuperscript{189} William Schabas \textit{An Introduction to the International Criminal Court} 4\textsuperscript{th} edition (Cambridge University Press 2011) 196.
individuals suspected of committing such serious offences. Schabas, affirming Louise Arbour’s argument concludes that there is a danger of article 17 becoming a tool for overly harsh assessments of judicial machinery in LDCs. This argument was further confirmed by the ICC trial Chamber I’s acknowledgement of the revival of justice systems in Ituri and Northern Uganda in 2005.

Since it is clear that the ICC is likely to attract cases in the LDCs, it is only reasonable that the ICC operates in a manner that would encourage the LDCs to exercise their duty to prosecute in national courts. Permitting the ICC framework to be extended so as to allow ATJ to operate alongside ICC prosecutions can do this. Such a process will encourage judicial systems in developing countries to be more effective by virtue of having more options of styles of transitional justice to employ, other than being restricted to prosecutions. On this basis, this thesis seeks to consider the methodology by which transitional justice strategies particularly TRCs and indigenous methods ought to be incorporated into the ICC framework.

The proposition is that states that have cases before the ICC must be encouraged to initiate TRCs and indigenous approaches to operate alongside the ICC due to the limitations within the ICC framework. Such a

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191 Lubanga (ICC-01/04-01/06-8) Decision on the Prosecutor’s Application for a Warrant of Arrest 10 February 2006, paragraph 36.
policy will be favourable due to the nature of cases before the ICC and the African states would be more inclined to cooperate with the ICC, hence resulting in improving the Court’s effectiveness.

In relation to the nature of cases before the ICC, the reasoning for proposing that states should be able to initiate other approaches, other than prosecutions is because cases before the ICC or any international tribunals are before these courts, as a result of the states being deemed incapable or unwilling of administering justice. For instance, reference can be made to national legal systems that were deemed incapable or unwilling to administer justice for some reasons, such as, among others, Yugoslavia, Rwanda, the DRC, the Sudan, Uganda and Kenya.192 However, states whose cases are before the ICC cannot simply rely on prosecutions before the Court to address past human rights violations. This is because prosecutions before the ICC are limited, not only in terms of the number of persons that can be prosecuted by the Court, but also the severity of offences committed.193 This implies that the Court is not intended to deal with lower level offenders.194 The implication is that the Court is unlikely

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192 Issues raised here are addressed further in Chapter 4 of this thesis.
194 The Rome Statute 1998 Article 1, 17 (1) d.
to be flooded with cases, resulting in the ICC being ineffective due to excessive and disproportionate workload.\textsuperscript{195}

To a great extent, such a situation occurred at the ICTY, which resulted in the withdrawal of indictments of minor individuals in political and military positions hierarchy,\textsuperscript{196} and the prosecution of lower level offenders such as \textit{Tadic}.\textsuperscript{197} The ICC operates under a top-bottom approach; this implies that the Court will only prosecute the most serious offenders.

However, the current ICC top-bottom model is not capable of reaching the root of the causes of the conflict and resolving the crisis in states concerned. The approach is problematic for the following reasons; firstly, the ICC is not only concerned with the ‘most serious crimes of international concern,’ but also with the most serious offenders.\textsuperscript{198} The lower level perpetrators are unlikely to be prosecuted by the Court due to budgetary limitations and hence will, no doubt, escape accountability.

\textsuperscript{196} The order granting leave for withdrawal of charges against Govedarica, Gruban, Janjic, Kostic, Paspalj, Pavlic, Popovic, Predojevic, Savic, Babic and Spaonja issued by Judge Riad on 8 May 1998…. Considering the submission of the Prosecutor that the increase in the number of arrests and surrenders of accused to the custody of the International Tribunal has compelled her to re-evaluate all outstanding indictments vis-à-vis the overall investigative and prosecutorial strategies of the Office of the Prosecutor….considering that the named accused could appropriately be tried in another forum, such as a State forum…”
\textsuperscript{197} \textit{Prosecutor v Tadic} Case No IT-94-1-T Opinion and Judgement (May 7 1997).
\textsuperscript{198} The Rome Statute 1998 Article 5.
The impact of prosecuting the most serious few perpetrators has little or no impact on the communities most affected. Thus, the prosecution of few individuals will make little or no difference to majority of the people in Darfur, Uganda or the DRC. Therefore, there is need for the ICC to incorporate other ATJ mechanisms to operate alongside the ICC prosecution, to ensure that, as many persons as possible are held accountable. This is vital for the purpose of addressing the root causes of the conflict and to ensure respect for the rule of law and human rights.

2.4.2 State Co-operation

In order to ensure the effectiveness of the judicial process within the ICC, as was the case for the ICTY and ICTR, state cooperation is essential. The decisions, orders and requests of the ICC must be enforced by states, as the Court does not have enforcement agencies. This indicates that the ICC relies on states parties to execute arrest warrants, collection of evidentiary material, to compel witness to give testimonies as well as

199 Situations in selected States are considered further under Chapters 3 and 4 of thesis.
searching the scenes where offences allegedly were committed.\textsuperscript{203} This means that the success of the ICC is dependent on states parties. For this reason, states parties are obliged to co-operate with the ICC’s investigations, the arrest, the surrender of the accused, securing evidence and prosecution.\textsuperscript{204}

It is the responsibility of each state party to ensure that there are procedural measures in place to allow for all forms of cooperation.\textsuperscript{205} However states parties can deny disclosure of documents that according to the state would compromise national security interests.\textsuperscript{206} Non-states parties are not obliged to cooperate with the ICC, however \textit{ad hoc} arrangements can be made to allow for cooperation.\textsuperscript{207} There are four circumstances under which a state party can be exempted from the obligation to cooperate.\textsuperscript{208} Firstly, where a state is actively pursuing its duty to investigate and prosecute, in such a situation, the ICC prosecutor would only intervene after establishing that state party is ‘unable’ or unwilling to undertake its obligations.\textsuperscript{209}

The Rome Statute is silent on factors that are taken into account, to reach the conclusion that a state party is ‘unwilling’ and ‘unable’, discretion is

\textsuperscript{205} The Rome Statute 1998 part 9 Articles 86, 88.
\textsuperscript{206} The Rome Statute 1998 Articles 72, 93(4).
\textsuperscript{207} The Rome Statute 1998 Article 87(5).
thus vested with the prosecutor. This entails that there is a possibility that
the Rome Statute can consider other means of addressing violations of
human rights, such as TRCs and indigenous tactics as being valid factors
to take into account to determine unwillingness and incapacity. This
implies that should the ICC prosecutor decide to adopt such a decision, it
would not be contrary to the Rome Statute.

Secondly, where a state party can establish that the concerned individual
has already been investigated, prosecuted, or either convicted or acquitted,
this is the principle of *ne bis idem*.\(^{210}\) Thirdly, where the Security Council
requests for the suspension of investigations or prosecution,\(^{211}\) suggesting
that the state or non-state party would not be expected to oblige, and so the
ICC is obliged not to investigate such matters. Finally, where a state or a
non-state party has entered into other international agreements, which
would make it inconsistent, should the state decide to oblige and cooperate
with the Court.\(^{212}\) The Rome Statute is drafted in such a way that it is
flexible and allows for different circumstances to be taken into account,
before the ICC decides to proceed with the investigation with regards to a
particular situation. The issue is that the ICC cannot force any state to
comply or cooperate with the Court.

Therefore, in the interest of justice, it is necessary for states to be at liberty
to adopt any transitional justice approaches in addition to prosecution.

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\(^{210}\) The Rome Statute 1998 Articles 17, 20.
\(^{212}\) The Rome Statute 1998 Article 98.
Granting states more options in terms of what measures to adopt for the purpose of addressing human rights violations will lead to the ICC being more effective and more importantly, the root causes of the conflict will be addressed, thus ensuring that the offences are never repeated in future.

Despite the weakness of the ICC, it still remains an independent and self-governing intergovernmental organisation, with international legal personality and powers to request cooperation from the states parties. The fact that states parties are obliged to ensure that procedures are available under domestic law for all forms of cooperation, implies that under the Rome Statute, states parties and other entities are required to collaborate with the ICC, to the extent required of them by the Statute. States are only obliged to work together with the ICC in accordance to the provisions of the Statute; this implies that the ICC cannot expect states to do more than what is required of them under the Statute. This model of interstate judicial cooperation in criminal matters is referred to as a horizontal model as it requires states to cooperate on an equal basis. A state party is justified on its failure or refusal to cooperate with a court, under circumstances where request to work together requires the release of

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216 The ICC prosecutor requested the United Nations peacekeeping force in the DRC (MONUC) to execute the arrest warrants concerning the LRA commanders see Prosecutor’s ‘Submission of Additional Information on the Status of the Execution of the Warrants of Arrest in the Situation in Uganda’ (ICC-02/04-01/05-132) 8 December 2006 paragraph 11.
information that could pose a threat to a state’s national security.\footnote{The Rome Statute 1998 Article 93(4).} This indicates that with regard to the set law, the Rome Statute is clear and only expects states to do what is required of them under treaty law.

However, states that are not a party to the Rome Statute, are not under any obligation to cooperate with the ICC, except in circumstances where the situation in a state has been referred to the ICC by the Security Council, as was the case with Sudan,\footnote{The Rome Statute 1998 Article 13b.} or a state has voluntarily decided to cooperate with the ICC as was the case for Switzerland or with the USA in relation to Ntaganda.\footnote{The Rome Statute 1998 Articles 12 (3), 87(5), Robert Cryer, Hakan Friman, Darryl Robinson\textit{Introduction to International Criminal Law and Procedure} (Cambridge University Press 2007) 457.} Unlike the above-described horizontal model, there are also examples of the vertical model of state cooperation, also referred to as the \textit{supra-state} model.\footnote{Geert – Jan Knoops\textit{Theory and Practice of International and Internationalized Criminal Proceedings} (Kluwer Law International 2007) 310.} The vertical model assumes that the ICC has supremacy over the states, meaning that states are compelled to cooperate.\footnote{This is the case with the ICTY and ICTR which enjoys supremacy over the states and national Courts.} The dependence of the ICC upon states has led to the Court being described as a ‘giant without arms or legs’.\footnote{Robert Cryer, Hakan Friman, Darryl Robinson\textit{Introduction to International Criminal Law and Procedure} (Cambridge University Press 2007) 467.} The horizontal approach under the ICC is a weaker arrangement as national courts are accorded primacy over the ICC.

The vertical model attributes more power than the horizontal as it is limited to what states can do. Therefore, unless states are willing and able
to assist the ICC, to ensure the effectiveness and success of the Court,\textsuperscript{225} there is nothing much that the ICC can do to ensure that states comply with the Rome Statute.\textsuperscript{226} Therefore, one key issue that the ICC could do to ensure effectiveness would be to adopt measures favourable to the LDCs, which will lead to states being more cooperative with the institution.

\subsection*{2.4.3 Applicable law under the Rome Statute}

Under the Rome Statute structure, it is possible for states to be able to adopt other transitional justice strategies, such as TRCs and indigenous approaches without contradicting the provisions of the Rome Statute. One of the ways in which this can be made possible is by means of considering the law applicable under the Rome Statute. The law applicable in cases before the ICC includes the Rome Statute itself, elements of crimes and its rules of procedure and evidence.\textsuperscript{227} Where appropriate, the ICC can refer to relevant treaties, principles and rules of international law, such as those in relation to the international law of armed conflict,\textsuperscript{228} general principles derived from national legal systems as long as they are consistent with the Rome Statute\textsuperscript{229} and previous decisions of the Court.\textsuperscript{230}

\begin{thebibliography}{9}  
\bibitem{227} The Rome Statute 1998 Article 21 1 (a).  
\bibitem{228} The Rome Statute 1998 Article 21 1(b).  
\bibitem{229} The Rome Statute 1998 Article 21 (1) C.  
\bibitem{230} The Rome Statute 1998 Article 21 (2).
\end{thebibliography}
The Statute therefore allows for the application of international law as detailed under the Statute of the International Court of Justice.\textsuperscript{231} This implies that international conventions, international custom, general principles, judicial decisions and teachings of the highly qualified publicists are to be taken into account among other things, such as those stipulated in the Rome Statute. This also indicates that the Rome Statute needs to be interpreted in accordance with the Vienna Convention.\textsuperscript{232} Therefore any provisions within the Rome Statute that is inconsistent with general international law, is subordinate to it unless the provision is intended to be a \textit{lex specialis}, in which case it supersedes other provisions and sources of international law.\textsuperscript{233} The exception is where a \textit{lex specialis} is contrary to a peremptory norm of international law.\textsuperscript{234} This implication would be that it is possible for the ICC prosecutions to operate alongside ATJ procedures as long as the approaches do not involve adopting measures that are contrary to international law generally.

Therefore, establishing a methodology by which ATJ strategies are used within the ICC will not in any way undermine the work of the ICC, instead it will only complement its work. The ICC is already involved with a political organ, the UN Security Council, which has a role to play.
with the ICC’s operation.\textsuperscript{235} For instance, in relation to the crimes of aggression, resolution RC/Res. 6 requires the Prosecutor to notify the Security Council of any potential investigation that arises \textit{proprio motu}, or by state referral, before proceeding with the investigation for the crime of aggression.\textsuperscript{236} However, perhaps the fact that the Rome Statute enables the ICC to make political determination could be viewed as positive and form a basis for justifying the ICC in adopting a methodology that involves acknowledging ATJ measures operating along with the ICC.\textsuperscript{237}

\subsection*{2.5 Conclusion}

This chapter has demonstrated that prosecution in the ICC can be undertaken alongside proceedings of the TRCs or indigenous approaches such as \textit{gacaca} courts at a national level. The ICC symbolises the end of impunity (retribution) and prevention (deterrence). It reminds states of their duty to prosecute crimes within the ICC’s jurisdiction. The purposes of punishment under the ICC is deterrence, the Rome Statute fails to acknowledge that the punishment could seek to achieve other aims such as retribution, rehabilitation, incapacitation, restorative justice or other purposes of ICJ. In order for the ICC to operate effectively, it would need to seek to go beyond deterrence and retribution.

\begin{footnotesize}
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\item \textsuperscript{235} The Rome Statute 1998 Articles 8bis, 13 and 16.
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As much as prosecutions contribute towards the reaffirmation of the rule of law, prosecution of one or two individuals does not lead to the restoration of the rule of law within a particular society. Therefore, it would be better for post conflict states to devise transitional arrangements that comply with the ICC framework. Such an approach will enhance the need to ensure accountability in societies that have been subject to violation of human rights for the purpose of eradicating impunity and introducing a culture of accountability as well as restoration of long-term peace and reconciliation. The current top-bottom approach encourages disconnection on the grassroots level in the concerned states. For instance, in the case of the ad hoc tribunals, the ICTY, ICTR and the SCSL where transitional justice appeared to be rather distance. It was instead, something that was entrenched in the formal institutions rather than communities most affected by the conflict.

The implications that have been seen from the experiences of the top-down approach system is that the institutions tend to be viewed as less relevant to the interests of the communities mainly affected. This could

result in what Drumbi calls ‘the externalisation of justice.’ International justice mechanisms such as the ICC normally tend to be extremely formalised and legalistic, therefore they seem remote, inaccessible and unfamiliar; as such, there are dangers of creating institutional bias towards victims and survivors with formal education. This problem was noted in the ICTY’s Annual Report:

_The tribunal is unlike any other Court. National Courts exist within each state’s criminal justice system and an institutional framework that supports the conduct of criminal proceedings. Within the international community, there are no such mechanisms to ensure the dissemination and interpretation of the work of the Tribunal. The gap, thus created between justice and its beneficiaries victims of the conflict – is exacerbated by the tribunal’s physical location from the former Yugoslavia_.

Drumbl in his discussion of international criminal tribunals characterises transitional justice measures as a form of ‘unidirectionalism’ meaning, and quite rightly, instead of seeking to establish accountability and restoration from the bottom-up through the use of ‘indigenous laws, customs, personalities, politics and practices, international criminal intervention

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tends to drop from the top-down.\textsuperscript{246} In undertaking its primary role of investigation and prosecution with the intention of putting an end to impunity and deterrence, it is fundamental for the ICC to undertake its mandate in a manner that takes into account the needs of the people most affected.

As part of his criticism for legalisation of human rights in transitional societies,\textsuperscript{247} McEvoy argues that in addressing issues of violations of human rights, societies are more inclined to adopt retribution as the view of justice as opposed to political calls of amnesties and reconciliation. However, the absence of retributive justice has been described by some, as a failure to meet certain legal requirements that may cause future difficulties.\textsuperscript{248} As it stands, the possibility that ‘accountability’ could be achieved by the adoption of mechanisms such as TRCs or amnesties could be said to be contrary with what would be regards as conventional legally.\textsuperscript{249}

McEvoy concludes that the issue of human rights within a transitional justice system tends to be a western idea, something that he refers to as ‘western-centric’ and could normally be a top-down focus, hence resulting in a disconnection with the grassroots in the process. The Rome Statute is

clear that the ICC will only prosecute the top-most serious perpetrators. This could be true with regards to the ICC. As much as the ICC under article 3(3), the Rome Statute has the capacity to undertake proceedings in the location where the crimes have allegedly been committed with reference to the situations before the Court. It is clear that adjudication is to be undertaken in The Hague, miles away from the societies that have most been affected.

In order for the ICC to be more effective, more needs to be done at a national/local level. Justice needs to be brought close to those most affected. A localised process enables transitional justice to be more relevant to the communities,\(^250\) hence filling in the necessary gaps caused by concentration of prosecution by an international court. The adaptation of local level measures to address past atrocities is the best way to guarantee a ‘comprehensive community based approach that includes the opinions and ideas of those whose lives have been most directly affected.’\(^251\) Such localised approaches would enable local communities not only to follow the proceedings, but also participate and understand the language.

There is evidence to suggest that the prosecutor of the ICC acknowledges the significance of non-judicial approaches to accountability.\(^252\) In the

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prosecutor’s reports to Security Council on Darfur, focusing particularly on traditional tribal reconciliation mechanisms in Darfur, the prosecutor recognises that ‘these are not criminal proceedings as such for the purposes of assessing the admissibility of cases before the ICC, but they are an important part of the fabric of reconciliation for Darfur as recognised in resolution 1593.’

The basis is that in order for transitional justice to be relevant and credible, its theory and practice should be able to meet the needs of the local people. Much as it is vital to ensure that transitional justice mechanisms are established to ensure accountability for human rights violations; it is also essential to ensure that the process are assessed at a local level. It is thus necessary to reconcile retributive and restorative Justice to ensure incorporation of the needs of local people in affected areas.

The western, liberal tradition of accountability for offences endorses an adversarial, retributive model of formal legal justice. Based on this model and as part of transitional justice, prosecutions have been undertaken in different institutions including ad hoc international criminal tribunals, the ICC and hybrid courts as illustrated under chapter one. On the other hand, alternative restorative justice model particularly TRCs, or

traditional approaches such as *gacaca* courts are seen as the best in promoting reconciliation as they focus on rebuilding or transforming relationships and restoring community.\(^{258}\) For instance, Lambourne contends that it is possible to incorporate principles of both restorative and retributive justice into accountability mechanisms.\(^{259}\) Lambourne’s research is based on four elements of transformative justice; accountability, truth, socioeconomic justice, political justice as vital elements in ensuring peace building.\(^{260}\)

Accordingly, transitional justice is effective only with the involvement of local citizens as well as establishing mechanisms that take into account the local customs, culture and needs.\(^{261}\) Lambourne’s transformative justice advocates for an approach which allows parties involved in a conflict to become subjects and not just objects in the design and implementation of transitional justice mechanisms for the purpose of counter claiming matters of cultural imperialism, as well as ensuring that the needs of survivors and perpetrators are met,\(^{262}\) thus resulting in local ownership, capacity building, elements which contribute towards sustainable peace

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The adoption of such an approach within the ICC structure would provide means by which the ICC could ensure the involvement of local citizens, by taking into account indigenous approaches of people in states whose cases are before the Court. This will therefore contribute towards sustainable peace building and stability, thus ensuring that such atrocities are never repeated.

Despite measures that have been set up to encourage states to prosecute individuals suspected of committing the most serious crimes as demonstrated in the manner the ICC is drafted, the reality is that most international crimes remain unpunished. Gerry Simpson quite rightly reminds us, ‘each war crimes trial is an exercise in selective justice to the extent that it reminds us that majority of war crimes go unpunished’. This will always remain indisputably true since resources are limited. In the situations of Darfur, northern Uganda and the DRC for instance, the idea of prosecuting all individuals suspected of committing international crimes is unthinkable, unrealistic and rather impractical. The ICC needs to find means to operate in a manner that allows states and communities involved to be empowered to prosecute such offences as well as adopt other measures to address the past human rights abuses. After all, it is in the ICC’s best interest that post-conflict states device means of addressing such offences.

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This chapter has demonstrated that the establishment and operation of the ICC fit in generally with the justification for the creation of an international penal process that tends to emphasize on retribution and deterrence.\textsuperscript{265} For instance, the ICTY, in stressing the significance of retribution held that focusing on retribution was not intended to achieve revenge, but rather, an expression of the anger of the international community.\textsuperscript{266} Retribution is perceived to be the most appropriate means of dealing with the most outrageous crimes.\textsuperscript{267} Beigbeder concludes that retribution is for many, the ‘primary object’ of international justice, its main object is to fight against the impunity, up till now enjoyed by leaders most responsible for grave violations of human rights.\textsuperscript{268}

The incorporation of ATJ measures within the ICC will lead to the ICC being more effective, because some of the major challenges currently faced by the ICC will be addressed. For instance, one of the challenges faced by the ICC is that of arresting the offenders,\textsuperscript{269} leading to a problem of perpetrators not being held accountable for their actions, thus escaping punishment. This challenge has been acknowledged by the UN Secretary General, who, in a report stated that ‘[I]n the end, in post-conflict

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\item 266 Alexsovski IT-95-14-/-1-A Appeals Chamber 24th March 2000 Paragraph 185.
\item 267 Rama Mani Beyond Retribution Seeking Justice in the Shadows of War (Polity 2002), Mark A Drumbl Atrocity Punishment and International Law (Cambridge University Press 2007).
\item 268 Beigbeder Yves International Justice against Impunity Progress and New Challenges (Leiden Martinus Nijhoff 2005) 226.
\item 269 Mark A Drumbl Atrocity Punishment and International Law (Cambridge University Press 2007) 170.
\end{enumerate}
\end{footnotesize}
countries, the vast majority of perpetrators of serious violations … will never be tried, whether internationally or domestically. ²⁷⁰

This is apparent even under circumstances where hybrid courts were established, only a small number of suspects were indicted: for instance five (5) in Cambodia,²⁷¹ thirteen (13) in Sierra Leone,²⁷² and eighty-eight (88) in Timor Leste.²⁷³ This means thousands of perpetrators escape without being held accountable. Thus, the fact is, in reality the majority of perpetrators are not held accountable for violations of human rights. This clearly undermines the notion that offenders will be deterred from committing international crimes by the threat of punishment.²⁷⁴

The combination of ATJ dealings within the ICC will encourage states whose situations are before the ICC to take measures, to ensure that no person suspected of committing the most serious offences is allowed to escape punishment. The fusion of other ATJ measures will therefore make the role and workload of the ICC lighter as the ICC and other institutions, particularly the TRCs and traditional approaches, will be established in order to achieve similar objectives.

Using the ICC as part of transitional justice, implies that states will not only appreciate the need to prosecute, but actually ensure that prosecutions are undertaken, as well as establishing TRCs and traditional approaches to address the human rights violations. In order to ensure the success of the ICC in its operation, as part of transitional justice, questions must be asked as highlighted by Phil Clark. 275 In relation to the ICC, the object of prosecution is deterrence.

As demonstrated in this chapter, the objectives of the ICC are not clearly addressed in the Rome Statute. The act of states adopting other measures, other than prosecutions within the ICC structure, would mean that states would be under an obligation to establish tactics in addition to prosecutions, based on circumstances surrounding a particular situation. 276

One of the greatest challenges to any post-conflict society, is how to deal with past human rights violations. Often, a post-conflict government faced with challenges on political, legal as well as morally, on the nature of approach to adapt to address the violent past. 277 While at the same time, the transitional state would be seeking to strengthen the structures and

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processes within the new democratic system as part of the process of rebuilding.278

In establishing a methodology by which ATJ strategies ought to be incorporated into the ICC framework, it is vital to consider techniques, other than prosecution, that have been adopted in African states to uphold justice. The next chapter will therefore consider TRCs and *gacaca* courts as examples of methods that have been adopted in Africa to address past human rights violations.

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278 Taina Järvinen ‘Human Rights and Post Conflict Transitional Justice in East Timor’ [http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?ots783=0c54e3b3-1e9c-be1e-2e2c24-a6a8c706233&lng=en&id=19246](http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?ots783=0c54e3b3-1e9c-be1e-2e2c24-a6a8c706233&lng=en&id=19246) (accessed on 7 July 2014).
CHAPTER THREE

TRUTH AND RECONCILIATION COMMISSIONS AND GACACA COURTS AS EXAMPLES OF APPROACHES ADOPTED TO ADDRESS PAST HUMAN RIGHTS VIOLATIONS IN AFRICA

3.1 Introduction

This chapter demonstrates how transitional justice bottom-up method particularly Truth and Reconciliation Commissions (TRCs) and traditional measures,\(^1\) such as gacaca courts have been used in the past to address human rights violations. Consideration is made in order to ascertain how these procedures can help contribute towards achieving the ICC objectives of deterrence, addressing impunity as well as achieving other aims, including truth, reconciliation, stability and closure.\(^2\)

With the help of case studies, the chapter illustrates with authority, how these institutions can contribute towards realisation of the ICC objectives, aimed at improving the effectiveness of the ICC. This chapter further justifies the need for states under transition to adopt TRCs or traditional procedures in addition to prosecutions at national and international level for the purpose of addressing past human rights violations. On this

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basis, the chapter highlights the need for the ICC to operate at a complementary level with institutions such as TRCs or traditional styles like gacaca courts, with the view of making the ICC move beyond its current objective of deterrence and retribution. This is relevant for the purpose of determining how TRCs and traditional measures could be integrated within the ICC’s top-down approach, leading to ATJ measures being used within the ICC agenda. Such an approach is intended to enhance the effectiveness of the ICC, thus ensuring that offences such as genocide, war crimes and crimes against humanity are not repeated.³

The theme running through this chapter is the notion that ATJ mechanisms, specifically TRCs and gacaca courts, similar to prosecutions under the ICC and national courts are established to put an end to the horrendous atrocities by protecting the population.⁴ This chapter therefore, focuses on TRCs and gacaca courts as examples of ATJ processes that

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can be adopted by states as part of exercising their duty of Responsibility to Protect (R2P), a public international law principle that applies to states with regard to relations towards each other.\(^5\) An assessment of the role that the ICC could play in relation to the public international law principle of R2P is undertaken throughout the chapter. It is significant to this study in order to ascertain how TRCs or traditional methods, such as gacaca courts could be fused within the ICC framework.

Thus, this chapter addresses how the ICC can play a role in influencing R2P among states that have situations and cases before the Court. This is relevant to this study because the international community has the responsibility to intervene when states fail to prosecute and prevent mass atrocities.\(^6\) The contention is that more needs to be done by the states that have situations and cases before the ICC to prevent further atrocities from being committed on the basis of the principle of R2P. However, the ICC should have a role to play in order to register its relevance in the prevention of such atrocities.\(^7\) This is because the ICC is intended to address the most serious offences of international concern.\(^8\) Thus

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\(^7\) M Cherif Bassiouni The Statute of the International Criminal Court A Documentary History (Transnational Publishers 1998).

Hubert and Blatter⁹ argue that where international crimes such as crimes against humanity, war crimes or genocide are committed against the civilian population, R2P must be invoked. The chapter is divided into three sections: section 3.2 addresses the principle of R2P and the role of the ICC, section 3.3 considers examples of some approaches that have been adopted in Africa to address past human rights violations, and finally section 3.4 focuses on Africa and the ICC.

3.2 The Principle of the Responsibility to Protect and the Role of the International Criminal Court

This section addresses the principles of R2P and the role of the ICC in relation to the concept. The year 2015 marks the 10th anniversary of the UN World Summit and the adoption of the R2P principle.¹⁰ This principle is significant to this study because, like the ICC, it imposes on states, the primary responsibility to protect their population, prosecute individuals responsible for violations of international human rights and prevent offences such as genocide, crimes against humanity and war crimes.¹¹ R2P is thus a humanitarian response that is tasked to prevent the most serious atrocities to mankind that are within the jurisdiction of the ICC.

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⁹ Don Hubert and Ariela Blatter ‘The Responsibility to Protect as International Crimes Prevention’ (2012) 1 Global Responsibility to Protect 34.
Currently, the ICC is already undertaking the role of R2P on the basis of seeking to prosecute the most serious perpetrators in situations before the Court. This is notwithstanding the Rome Statute being silent on the role that the ICC is supposed to play with regards to R2P.12 This study focuses on Africa because so far all situations before the ICC are based in African states.13 The states include the situations and cases in Uganda,14 the DRC,15 Central African Republic,16 Mali, Cote d’Ivoire,17 Darfur in Sudan,18 and Libya.19 Despite the situations being before the ICC, violence still prevails

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14 The Prosecutor v Joseph Kony, Vincent Otti and Okot Odhiambo and Prosecutor v Dominic Ongwen ICC-02/04-01-05.

15 The Prosecutor v Thomas Lubanga Dyilo ICC-01/04-01-06, the Prosecutor v Bosco Ntaganda ICC-01/04-02-06, the Prosecutor v Germain Katanga ICC-01/04-01-07, the Prosecutor v Mathieu Ngudjolo Chui ICC-01/04-02-02, the Prosecutor v. Callixte Mbarushimana ICC-01/04-01-10, the Prosecutor v. Sylvestre Mudacumura ICC-01/04-01-12.


in states such as the Central African Republic,\textsuperscript{20} the DRC,\textsuperscript{21} and Darfur in Sudan.\textsuperscript{22} For this reason, this chapter seeks to clarify the role of the ICC in light of the states’ R2P under circumstances where states before the ICC were to adopt ATJ measures such as TRCs or gacaca courts to address past human rights violations. This is pertinent to this study for the purpose of ascertaining how ATJ measures could be assimilated within the ICC framework. In particular it examines the role that the ICC should play under circumstances where TRCs or traditional techniques are adopted in states that have situations and cases before the Court.\textsuperscript{23}

The contention is that the principles of R2P and the ICC have common goals; the two norms are complementary to each other.\textsuperscript{24} Both emerged as a result of the commission of

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horrendous atrocities that demanded a change of international practice to ensure prevention of such atrocities.\textsuperscript{25} The principle of R2P emerged as a result of the atrocities that were committed in the mid 1990s and the idea that more needed to be done to prevent such atrocities.\textsuperscript{26} Similarly, the concept of complementarity as demonstrated in the previous chapter of this thesis provides that the primary responsibility to prosecute individuals suspected of having committed genocide, war crimes or crimes against humanity is with the states where the atrocities occurred.\textsuperscript{27}

Equally, under the principle of R2P, the primary responsibility to protect and prosecute lies with the states.\textsuperscript{28} Therefore, the principle is suitable to this thesis as it focuses on measures that states can adopt to address past human rights violations which are acts undertaken as part of the state’s R2P. In relation to the ICC, it implies that the Court

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should intervene to investigate and undertake prosecution where states have no will and ability to prosecute. This is done not only relying on the basis of the Rome Statute, but also as part of the existence of the principle of R2P. As a result, it is necessary to clarify what the role of the ICC should be in this respect, an issue which this chapter endeavours to achieve.

Currently, the role that the ICC could play under such circumstances is unclear. The role that ICJ, mainly the ICC, can play in relation to R2P is an issue that has not been explored greatly. The conception of the principle of R2P in the 2009 report does not specify the nature of role the ICC is supposed to play, apart from being broad and flexible. For this reason, this study proposes that states that have situations before the ICC should do more to protect the population from being subjected to such atrocities.

Ralph further acknowledges that there is no academic work that clarifies the role that the ICC would assume under circumstances where states that have situations before the ICC were to adopt ATJ measures to address past human rights violations. As demonstrated in chapter two of this thesis, the role of the ICC is limited to prosecution of

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the most serious perpetrators.\textsuperscript{35} The nature of the offences that the ICC exercises jurisdiction over demands that the ICC goes beyond its current objectives of deterrence and retribution, to contribute towards rebuilding the sovereign states by ensuring that atrocities are never repeated.\textsuperscript{36} States, the international community and above all the ICC, can do more to ensure that the offences within the ICC’s jurisdictions are not repeated in states that have situations and cases before the Court.

The principle of R2P demonstrates that states can no longer rely on the doctrine of sovereignty\textsuperscript{37} to prevent foreign inferences; instead a state must be held accountable for


the welfare of the people within its territory.\textsuperscript{38} States as sovereign entities have both rights and responsibilities at international law for which governments must be held accountable.\textsuperscript{39} The principle of R2P is based on the notion that sovereignty as responsibility is grounded in human rights and duty-based conceptions of State authority.\textsuperscript{40} The R2P principle thus imposes a limitation on the doctrine of sovereignty.\textsuperscript{41} Therefore, the principle of sovereignty is not intended to protect dictators who massacre their own people, neither is it envisioned to allow the perpetuation of large scale suffering and death in a particular state.\textsuperscript{42} In relation to this thesis, it implies that there is a need to ensure that individuals suspected of committing genocide, war crimes and crimes against humanity are held accountable. This was further illustrated by the appeal chamber in the \textit{Tadic} case of the ICTY that ruled in relation to the concept of state sovereignty that;

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\item Michael Contarino and Selena Lucent ‘Stopping the Killing the International Criminal Court and the Juridical Determination of the Responsibility to Protect’ (2009) 14 \textit{Global Responsibility to Protect} 563.
\item Von Geusau ‘Staying the Course the Concept of Sovereignty in the Work of Pieter Kooijman’ in Gerard Kreijen, Marcel Brus, Jorris Duursma, Elizabeth De Vos and John Dugard \textit{State Sovereignty and International Governance} (Oxford University Press 2002) 619.
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A State-sovereignty-oriented approach has been gradually supplanted by a human-being oriented approach . . . [I]nternational law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings.\footnote{43} This means that in relations to states under transition, systems adopted during transition must seek to protect and preserve human beings even at the cost of legitimate state interest. This is significant to this thesis because it implies that states that have situations and cases before the ICC have an obligation to ensure that mechanisms such as prosecutions, TRCs or traditional measures are adopted to address past human rights violations. This is vital in order to preserve and protect the rights of people and for the sake of avoiding the repetition of such atrocities.

The UN Secretary General Ban Ki-Moon’s report claims that R2P is intended to strengthen the sovereignty of a state and not to weaken it, it helps states to succeed and not just to react when they fail.\footnote{44} This thus suggests that the ICC can do more to encourage states with situations and cases before it to ensure that TRCs or traditional approaches are adopted. The report further clarifies that R2P is a legal principle that is grounded in international law, by providing that the provisions of paragraphs 138 and 139 of the Summit Outcome are firmly anchored in well-established principles of international law.\footnote{45} The UN admits that R2P provides conditions that allow for a better

\footnote{43} Tadic’ ICTY A. Ch. 2.10. 1995 paragraph 97, Decision on the Defence Interlocutory Appeal on Jurisdiction, Tadic (IT-94-1-AR72) Appeals Chamber 2 October 1995 paragraph 97.  
enforcement of international criminal justice. In relation to this thesis, the ICC’s intervention to prosecute the most serious offenders in a particular situation is part of the enforcement of R2P. This is because of the existence of a connection between the ICC and the principle of R2P.

The ICC recognises the relationship between it and the principle of R2P. Moreno-Ocampo stated that the ICC and the R2P principle have the potential to reinforce one another given the shared aims of both ideas as evident in the quotation below;

*Let me review the common ground of both ideas, because the scheme envisioned by the Responsibility to Protect where each individual State has the primary responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity, including the prevention of such crimes, and the idea that the international community will only step in when a State is failing to do so is very much the scheme retained in Rome for the International Criminal Court, the same concept, including the gravity threshold retained for the Responsibility to Protect is also close to our own legal standards under the Rome Statute.*

The rationale is that under the norm of R2P, every state has a primary responsibility to protect its population from the genocide, war crimes, ethnic cleansing and crimes against humanity, including the prevention of such crimes, and the idea that the international

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community will only step in when a state fails to do what it is expected to do.\textsuperscript{50} This is similar under the ICC framework, which requires states to recognise that it is their primary responsibility to prosecute offenders and that the ICC will only intervene where a state is unwilling and unable to prosecute such cases,\textsuperscript{51} as addressed under chapter two of this thesis. This is referred to as the principle of complementarity, which forms a foundation on which the ICC operates.\textsuperscript{52}

This indicates that the ICC is intended to be a Court of last resort.\textsuperscript{53} The clarity of an undisputable connection between the ICC and the principle of R2P is evident. The ICC as highlighted above has acknowledged this common ground.\textsuperscript{54} Hence, the only thing that is required is to ensure that there is an efficient model in place intended to safeguard the ICC’s credibility, legitimacy, independence as well as effectiveness as it undertakes its role under the principle of R2P, an issue that this thesis seeks to achieve. There is no

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\item Luis Moreno-Ocampo ‘Keynote Address Speech given at The Responsibility to Protect- Engaging America’ Chicago 16 November 2006 \texttt{http://r2pcoalition.org/content/view/61/86/} (accessed on 17 April 2015).
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doubt of the existence of the connection between R2P and the ICC. The ICC has the capacity to contribute and to play a role under circumstances where states whose situations are before the ICC, adopt ATJ measures to address past human rights violations, thus, enhancing the effectiveness of the ICC by making it effective in its role of preventing genocide, war crimes and crimes against humanity.

The only way the ICC would effectively function, as a Court of last resort, would be if there were no cases before the Court.\textsuperscript{55} No cases before the ICC would imply that it is effectively undertaking its role of deterrence of the most serious offences, such as genocide, war crimes and crimes against humanity. It would also indicate that states are undertaking their duty of ensuring that individuals suspected of committing genocide, war crimes or crimes against humanity are held accountable by means of prosecutions in national courts as provided for by the ICC complementary principle addressed in chapter 2.4 of this thesis.

The ICC and the principle of R2P are the two most prominent tools of enforcement of international human rights.\textsuperscript{56} This is due to the existence of the connection between the ICC and the principle of R2P. The principle is grounded on various legal instruments\textsuperscript{57}


such as the Universal Declaration of Human Rights, the Genocide Convention, the four Geneva Conventions and two additional Protocols, the Ottawa Convention on Landmines and the Statute of the International Criminal Court. All of the above instruments focus on the need to move away from the culture of sovereign impunity to a culture of national and international accountability. The development of international humanitarian law has been towards imposing a clear obligation on states to ensure the human rights of people are protected and respected.

Where human rights have been violated, it is important to ensure that culprits are held accountable. The ICC is intended to provide justice through prosecution of suspects. The preamble of the Rome Statute affirms that the most serious crimes of concern to the world must not go unpunished; this implies that individuals suspected of committing the most serious offences to international concern must be held accountable. The Statute further provides that such individuals must be prosecuted at a national level. This suggests that one of the purposes of the ICC as addressed in chapter two of this thesis is

59 United Nations General Assembly Resolution 260 (III) A 9 December 1948 Article 1
retribution, which can only be achieved by means of prosecutions. The ICC therefore is a key institution which if implemented can play a vital role in the exercise of R2P and to set a standard in terms of the expectations of the states.

The Outcome Document of the 2005 UN World Summit establishes three pillars of the R2P:

1. The State has the primary responsibility to protect its population from genocide, war crimes, crimes against humanity, ethnic cleansing, and their incitement;
2. The international community has a responsibility to encourage and assist States in fulfilling this responsibility;
3. The international community has a responsibility to use appropriate diplomatic, humanitarian and other means to protect populations from these crimes. If a State is manifestly failing to protect its populations, the international community must be prepared to take collective action to protect populations, in accordance with the Charter of the United Nations.

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68 Luis Moreno-Ocampo ‘Keynote Address speech given at The Responsibility to Protect- Engaging America’ Chicago 16 November 2006 http://r2pcoalition.org/content/view/61/86/(accessed on 17 April 2015).
This means that under the first pillar of the R2P principle, each individual state is obliged to protect its population from specified offences, such as genocide, war crimes and crimes against humanity. These are all crimes within the jurisdiction of the ICC. It means therefore that each state has a responsibility to protect its civilians from the most severe offences of international concern. With reference to this thesis, the implication is that states have an obligation to guarantee that measures intended to protect its population from such offences are established. Countries that have situations and cases before the ICC must create TRCs or traditional approaches such as the gacaca courts to address past human rights violations in addition to conducting prosecutions in national courts. Consequently, other aims beyond deterrence and prosecution will be accomplished as the TRCs or traditional tactics will operate at a complementary level with the ICC prosecutions.

Apart from prosecutions of suspected individuals, there is need to rebuild the region, this objective as acknowledged by the ICC prosecutor is beyond the ICC, hence the more reason why TRCs or traditional techniques should be adopted, so as to operate alongside the prosecutions in addressing the inadequacy of trials. Such an approach will result into an effective ICC, as well as reducing the possibilities of similar atrocities reoccurring. The role of the ICC is clearly to prosecute, punish and deter perpetrators of genocide,

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war crimes and crimes against humanity. The limitations on the number of individuals that the ICC can prosecute, should imply that states are expected to prosecute and also adopt ATJ measures to address past human rights abuses.

In addition to retribution and deterrence, ICJ has been associated with restoration, historical record keeping, preventing revisionism, expressive functions, crystallising international norms, general affirmative prevention, establishing peace, preventing war, vindicating international law prohibitions, setting standards for fair trials, and ending impunity. Dana cautions against ICJ mechanisms such as the ICC becoming too entangled with idealistic aspirations, such as reconciliation or producing a historical record, at the cost of its primary function to punish perpetrators of the most serious crimes. This is more reason why the ICC should operate in tandem with ATJ mechanisms for the purpose of achieving objectives beyond deterrence and retribution.

There is accordingly, a tendency to veer off course, away from the primary role in light of

the realistic capacity of international criminal courts, when attempting to achieve other well-meaning goals that are beyond the capacity of international courts.78

The outcome of such actions will lead to problematic rulings, distortion of responsibility or accountability, and ultimately failure to achieve the desired aspirations because of institutional and structural limitations.79 For this reason, it is vital for the ICC and other institutions such as TRCs or traditional approaches to operate at a complementary level with each institution exercising its own mandate. The implication is that the nature of role that the ICC is intended to play under the principle of R2P will be secondary,80 as its primary role will be that of a criminal court and of ensuring the most serious perpetrators are held accountable for the offences committed.

The UN report acknowledges that the ICC can be used as a tool for the implantation of the objectives of R2P.81 The role that the ICC could play under circumstances where states adopt TRCs and traditional approaches could be to encourage states to adopt ATJ in addition to national prosecutions. The ICC could also be involved in monitoring the traditional approaches and TRCs procedures to ensure credibility in such processes. Measures could also be put in place to guarantee that individuals that participated in committing the atrocities are never given the opportunity to hold power or positions of

authority. The ICC could further work hand in hand with ATJ institutions and help in terms of training of staff and exchange of information.\textsuperscript{83}

The ICC could also engage states in talks aimed at ensuring that an appropriate approach is adopted to address the challenges facing the states under consideration before it. The ICC monitoring of states before the Court could extend to ensuring that relevant legislation is adopted to allow perpetrators of genocide, war crimes and crimes against humanity to be prosecuted in national courts.\textsuperscript{84} Such an approach by the ICC could contribute towards strengthening the judicial systems of states that have situations and cases before it by ensuring that the systems improve on the culture of respect for human rights and the rule of law to avoid repetition of atrocities.

This section has demonstrated that there is a correlation between the principle of R2P and the ICC. This means that the ICC does have a role to play towards the application of the principle of R2P. This is important as whenever there has been violation of human rights in a particular state, it is not only necessary to ensure that persons responsible are held accountable, but that other objectives such as truth and the collection of a record of past events are attained. Such an approach would enhance the operation of the ICC in states with situations and cases before the Court and contribute towards ensuring that the offences do not re-occur. Thus the next section, considers examples of approaches that can be adopted to address past human rights violations in addition to prosecutions. The

\textsuperscript{83} Mark Freeman and Priscilla B Hayner ‘Truth Telling’ in David Bloomfield, Teresa Barnes and Luc Huyse Reconciliation after Violent Conflict (International Institute for Democracy and Electoral Assistance 2003) 125.
examples considered below address the benefits and the shortcomings of ATJ methods. They indicate how close operation of these institutions can benefit the states that have situations and cases before the ICC as well as how the work of the ICC can be enriched.\footnote{Susan Thomson and Rosemary Nagy ‘Law Power and Justice what Legalism Fails to Address in Functioning of Rwanda’s gacaca courts’ (2011) 5 (1) \textit{International Journal of Transitional Justice} 11, 12, Paul Van Zyl ‘Promoting Transitional Justice in Post-Conflict Societies’ in Alan Bryden and Heiner H’anggi (eds) \textit{Security Governance in Post-Conflict Peacebuilding} (Geneva Centre for the Democratic Control of Armed Forces 2005) 213, Ruti G Teitel \textit{Transitional Justice} (Oxford University Press 2000), Martha Minow \textit{Between Vengeance and Forgiveness Facing History after Genocide and Mass Violence} (Beacon Press 1998), Lisa Laplante ‘Transitional Justice Peace Building and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework’ (2008) 2 (3) \textit{International Journal of Transitional Justice} 333.}

3.3 Examples of Approaches Adopted in Africa to Address Past Human Rights Violations

This section considers examples of mechanisms that have been adopted to address past human rights violations on the African continent. It is imperative to consider examples of how Africa has dealt with past human rights violations, for the following reasons: firstly, in order to make the ICC more useful and relevant to the African states under investigation by the Court. Secondly, to highlight challenges that countries where genocide, war crimes or crimes against humanity have been committed tend to face as they attempt to address the past human rights violations and prevent future violations. The section is an analysis of TRCs and Rwanda’s \textit{gacaca} courts as examples of techniques that have been adopted in Africa for the purpose of addressing past human rights violations.

In particular, this section highlights how the effectiveness of the ICC can be heightened by seeking to achieve other objectives beyond deterrence and retribution by the ICC prosecutions operating in tandem to these institutions.\footnote{Paul Van Zyl ‘Dilemmas of Transitional Justice the case of South Africa’s Truth and Reconciliation Commission’ (1999) 52 (2) \textit{Journal of International Affairs} 665 – 667, Carsten Stahn ‘Accommodating Individual Criminal Responsibility and National Reconciliation the United Nations Truth Commission for East Timor’ (2001) 95 \textit{American Journal of International Law} 952, 953-954.} The creation of TRCs and traditional tactics in states before the ICC will result in other aims being achieved such as
truth, justice, accountability, institutional reforms, peace building, reparations and reconciliation based on the bottom-up approach. These aims are required in states that have been subjected to a conflict in order to ensure long-term peace, security and upholding the rule of law.

The existing structure of the ICC does contribute towards restoration for victims of the crimes, by allowing them to participate in the prosecutorial process and providing reparations. The inclusion of victims within the ICC framework is a reflection of the Court’s interest in restorative justice. This is applicable to this thesis because it justifies the proposition that it is possible for the ICC prosecutions and operation of TRCs or

traditional measures that are restorative in nature to function at complementary levels. Such a method is vital because the ICC deals with the most serious offences,\textsuperscript{95} which result in consequences such as large numbers of victims and perpetrators.

Therefore, the combination of restorative\textsuperscript{96} and retributive\textsuperscript{97} measures in states under transition will be more beneficial to states because such practises allow both perpetrators and victims to be involved in the transition processes.\textsuperscript{98} Restorative justice involves addressing the harm caused by wrongdoing,\textsuperscript{99} the basis is that prosecution alone is not enough to achieve this, thus, victims and perpetrators and the community at large must participate and engage in dialogue for the purpose of addressing the underlying social as well as political causes of the violations.\textsuperscript{100} Such an attitude can help towards ensuring that similar atrocities are never repeated.\textsuperscript{101}

\textsuperscript{95} Moreno-Ocampo ‘Keynote Address the Responsibility to Protect- Engaging America’ 16 November 2006 http://r2pcoalition.org/content/view/61/86/ (accessed on 17 April 2015), The Rome Statute 1998 Article 17.
Different factors tend to contribute towards states decisions on the nature of mechanism to adopt in transitional societies, these may include among others; insufficient funding, political situation and infrastructure.\textsuperscript{102} Sarkin\textsuperscript{103} particularly argues that a democratic society will always have options of measures to adopt to address past human rights violations; these include (i) criminal sanctions, (ii) non-punitive sanctions and (iii) the rehabilitation of the society.\textsuperscript{104} Truth and Reconciliation Commissions or \textit{gacaca} courts can be crafted in a manner that is intended to respond to specific needs and circumstances in the country concerned.\textsuperscript{105}

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For instance, the South African Truth and Reconciliation Commission (SATRC)\textsuperscript{106} was established as a result of a negotiated settlement that was reached for the purpose of preventing the possibilities of a war which threatened to destroy as Villa Vicencio\textsuperscript{107} describes, ‘the very identity, infrastructure and promise of a nation which was yet to be formed.’\textsuperscript{108} The SATRC was perceived to be an essential mechanism in addressing the root causes of the conflict and to ensure that the atrocities were never repeated. It was on this basis that the National Summit on Reconciliation was recommended to facilitate the process of reconciliation in South Africa.\textsuperscript{109} Archbishop Desmond Tutu once asserted that:

\begin{quote}
Western justice is largely retributive. The African understanding is far more restorative – not so much to punish as to redress or restore a balance that has been knocked askew.\textsuperscript{110}
\end{quote}

The above quotation signifies the importance of the notion of harmony/togetherness prevalent among African states, references to terms such as \textit{ubuntu} in South Africa and

\textsuperscript{109} Truth and Reconciliation Commission Report of South Africa Volume 5 Chapter 8.
The concept of togetherness underlies the basis that it is vital for people to be able to live together. Thus, for South Africa, the TRC was a way of ‘looking at the beast in the eyes.’ The realisation that the TRC was the only way that South Africa would be able to ‘walk’ into the future. The political actors saw the need for acknowledgement, reconciliation and reconstruction of society as the only way to ensure the progression of South Africa as a state.

This implies that states that have situations and cases before the ICC should in addition to prosecution in the ICC and national courts, adopt measures intended to address the challenges. Such an approach is essential to enhance the effectiveness of the ICC because it has been argued that unless a broken society tackles the horrors of the past, there can never be a stable foundation upon which a lasting democracy can be built. Therefore it is essential to make sure that the limitations of prosecutions in states before the ICC are addressed. Such a process will result in the ICC becoming more effective, legitimate and relevant, particularly to states that have situations and cases before the Court. In addition, states that have situations and cases before it will be transformed into states that have

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capacity to respect human rights, the rule of law, consequently addressing issues of impunity.\textsuperscript{116} This will be done by TRCs operating in tandem to the ICC prosecutions. The next section addresses TRCs as an ATJ method in detail.

3.3.1 Truth and Reconciliation Commissions

This section considers Truth and Reconciliation Commissions (TRCs) as an example of an approach that can be established to address past human rights violations. The phenomenon of TRCs emerged in the 1970s\textsuperscript{117} and became popular in Latin America following decisions to institute them in the 1980s.\textsuperscript{118} Since then, TRCs have been established in more than forty-five\textsuperscript{119} countries as means of facilitating transitions towards stability.\textsuperscript{120} Several African states have established TRCs among them, South Africa,\textsuperscript{121} Ghana,\textsuperscript{122} Liberia,\textsuperscript{123} Burundi,\textsuperscript{124} Sierra Leone\textsuperscript{125} and Morocco.\textsuperscript{126}


\textsuperscript{120} Kingsley Chiedu Moghalu ‘Reconciling Fractured Societies An African Perspective on the Role of Judicial Prosecutions’ in Ramesh Thakur and Peter Malcontent (eds) \textit{From Sovereign Impunity to International Accountability The Search for Justice in a World of States} (Tokyo United Nations University Press 2004) 199.


\textsuperscript{122} The National Reconciliation Commission Act 2002.

\textsuperscript{123} Act to Establish the Truth and Reconciliation Commission of Liberia 2005.


\textsuperscript{125} Truth and Reconciliation Commission Act 2000.

\textsuperscript{126} Equity and Reconciliation Commission 2004.
Truth and Reconciliation Commissions are official temporary, non-judicial fact finding bodies vested with powers to investigate a pattern of past human rights violations and publicise the truth about human rights abuses\(^{127}\) within a particular country, during, a specified period of time.\(^{128}\) Therefore, creation of TRCs in states under investigation by the ICC can contribute towards meeting the grievances of victims and establishing the truth about the human rights abuses.\(^{129}\) Such a scheme can further contribute towards addressing the root causes of the conflict, as victims would be engaged in the transition process. For example, the SATRC\(^{130}\) was established as part of transition for the purposes of reconciliation by providing a platform on which perpetrators could give a


\(^{129}\) Mark Freeman and Priscilla B Hayner ‘Truth Telling’ in David Bloomfield, Teresa Barnes and Luc Huyse *Reconciliation after Violent Conflict* (International Institute for Democracy and Electoral Assistance 2003) 123.

comprehensive account of what happened during the apartheid era. During the period of more than 300 years of colonialism and apartheid in South Africa, the armed resistance by the African National Congress (ANC) among others, tens of thousands of South Africans suffered human rights violations. Thus TRCs tend to focus on the needs of the victims. Creating TRCs in state that have cases before the ICC will allow for victim participation in the transition process.

Despite criticisms, the SATRC was successful on the national level since the truth about the nature of human rights violations was revealed. This was important for the common good of the nation and curtailing the repetition of similar atrocities. The SATRC also conducted the most hearings, was most resourced, most staffed and it had

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131 Promotion of National Unity and Reconciliation Act 35 of 1995 as amended Section 1.
133 Mark Freeman and Priscilla B Hayner ‘The Truth Commissions of South Africa and Guatemala’ in David Bloomfield, Teresa Barnes and Luc Huyse Reconciliation after Violent Conflict (International Institute for Democracy and Electoral Assistance 2003) 140.
the most impact. Consequently, it is used as a model on which to measure, adjust and improve transitional justice worldwide. The SATRC condemned and to a great extent, revealed a heinous regime, ‘restored victims' dignity by giving public legitimacy to their stories, as well as forming a basis for the promotion of a human rights-based culture, and instilled in ordinary South Africans, a determination that the injustices of the past should never happen again. Denunciation is a modern theory of justification of punishment in international criminal justice, as set out under chapter 2.3.5 of this thesis that involves condemnation of a particular act. The fact that a TRC has the capacity to condemn the heinous atrocities committed over a particular period of time implies that society is educated on what is acceptable and unacceptable, and is therefore less likely to repeat the offences.

With reference to states that have situations and cases before the ICC, this means that rather than the Court limiting itself to securing justice, deterrence and retribution by means of prosecution, it can seek to achieve other aims, such as condemnation which can be effectively achieved by instituting TRCs in states concerned. A technique of this nature would be significant in the promotion of a human rights-based culture and the chances of the heinous crimes being repeated is reduced as people are given the

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opportunity to participate in the transitional process.\textsuperscript{142} This implies that TRCs have the capacity to establish truth from the bottom-up as opposed to prosecutions in international courts that establish truth from top-bottom as addressed in chapter two.

The availability of a public platform to testify is key towards empowering the people in states under transition and particularly those before the ICC. Empowering a generation of victims of past human rights violations can result in the people being educated on their rights and as a result can contribute towards deterrence of such atrocities in the future. This is something that is in line with the ICC’s objectives.\textsuperscript{143} Thus, if TRCs were to operate at a complementary level with the ICC’s prosecutions, such an approach will result in an increase in participation of ordinary people in states under consideration by the ICC. Hence such a method can lead to the Court helping to reduce the number of human rights violations in states before the ICC. In addition, the ICC will become more effective and relevant to the states concerned as ATJ measures will contribute towards the ICC’s goal of having a deterrent effect as provided in the preamble to the Rome Statute. For this reason, it is cardinal for ATJ procedures such as TRCs to operate alongside the ICC prosecutions for the purpose of accomplishing objectives beyond deterrence and retribution.


\textsuperscript{143} The Rome Statute 1998 Preamble.
In addition, the SATRC report contained details of the nature and extent of gross human violations suffered by South Africa between 1960 and 1994. This is significant to this thesis because it results in a collection of details of the nature of the atrocities. This entails that TRCs can lead to blame being apportioned to the appropriate individuals. The intention is to lead to prosecutions by either the ICC or the national courts. For instance, the SATRC investigated the role played by the apartheid government and its agencies. The SATRC further apportioned blame to different sectors within the communities, such as political parties, the media, the judiciary, labour and business sectors and the religious communities for allowing the apartheid system to flourish. However, as stated in chapter one, the need to establish individual responsibility is vital. For this reason, prosecutions must follow TRCs. The SATRC also highlighted the need for any society to deal with its dark past or atrocities committed. Archbishop Desmond Tutu commented on the significance of this, accordingly;

146 Truth and Reconciliation Commission of South Africa Report Volume 5 Chapter 6 paragraph 68 - 69.
Experiences world-wide show that if you do not deal with a dark past such as ours, effectively look the beast in the eye, that beast is not going to lie down quietly, it is going as sure as anything, to come back and haunt you horrendously.¹⁴⁸

The above quotation raises the need to ensure states in transition adopt measures to address past human rights violation beyond prosecution. The benefits that can be derived from establishing a TRC in a state that has a situation and cases before the ICC are enormous compared to not establishing one at all, as illustrated below under section 3.3. Therefore it would be better for TRCs to be created and to operate alongside the ICC’s prosecutions in states that have situations and cases before it. The importance of establishing measures such as TRCs to address past human rights violations is further acknowledge by Jose Zolaquett, former member of the Chilean TRC who said:

....that leaders should never forget that the lack of political pressure to [raise] these issues does not mean they are not boiling underground, waiting to erupt. They will always come back to haunt you. It would be political blindness to ignore the fact that examples of this abound world-wide.¹⁴⁹

The implication of the above sentiment is that a society that intentionally fails to deal with the root causes of its human rights violations could result in creation of ‘mutual

distrust, a ‘thick wall’ between the perpetrators and victims.”

It is therefore necessary that states that have situations and cases before the ICC establish TRCs to address past human rights violations due to the limitations of prosecutions. This is crucial since prosecutions tend to be inadequate as they only focus on cases before the Court.

As a standard, TRCs enjoy a measure of *de jure* independence by virtue of empowerment by the state that establishes it. However where states that have cases before the ICC are reluctant in forming TRCs, the ICC can play a fundamental role of enlightening the states concerned on the benefits of establishing them. There are various benefits that states under transition can derive by virtue of creating TRCs. Another contribution TRCs can make is ascertaining the patterns of responsibility, reforming the institutions,


151 Martha Minow Between Vengeance and Forgiveness Facing History after Genocide and Mass Violence (Beacon Press 1998) 59 - 60.


reparations, acknowledging the innocent and the victimised as well as allowing for reconciliation. In addition, TRCs have the capacity of introducing a new moral and political order, thus paving way for a new beginning. This is because TRCs can result

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in benefits such as; encouraging the people to respect the rule of law, contribution
towards the consolidation of democracy within a society\textsuperscript{159} and respect of human
rights.\textsuperscript{160} This means that the new political order would be one under which violence and
repression would be unacceptable, and therefore a state transforming into a culture that
respects human rights. The ICC seeking to achieve objectives beyond deterrence and
retribution will thus contribute towards ensuring that atrocities are never repeated in
states that have cases before it. It is vital to ensure that states with cases before the ICC
are empowered and equipped to an extent that they become capable of guaranteeing
individuals that violate fundamental human rights are held accountable before national
courts.

In relation to South Africa, the TRC was seen as a representation of a bridge between its
violent past and divided society, and a future based on human rights, democracy and
peaceful co-existence for all South Africans.\textsuperscript{161} Therefore, where the most serious
atrocities are committed, it is necessary for states to do more in addition to conducting
prosecutions. In this vein, it is essential for states to enjoy a future based on human rights,
democracy and peaceful co-existence such as that experienced in South Africa today.

\textsuperscript{159} Joanna R Quinn and Mark Freeman ‘Lessons Learned Practical Lessons Gleaned from Inside the Truth and
Brounéus ‘The Trauma of Truth Telling Effects of Witnessing in the Rwandan gacaca courts on Psychological
\textsuperscript{160} Garth Stevens ‘Truth Confessions and Reparations Lessons from the South African Truth and Reconciliation
Commission’ \url{http://www.unisa.ac.za/contents/faculties/humanities/sosw/docs/ASPJ-2005/ASPJ2005-3-1-03-Truth-
confessions-and-reparations.pdf} (accessed on 14 March 2015), Joanna R Quinn and Mark Freeman ‘Lessons
Learned Practical Lessons Gleaned from Inside the Truth and Reconciliation Commissions of Guatemala and South
\textsuperscript{161} James L Gibson ‘The Contribution of Truth to Reconciliation Lessons from South Africa’ (2006) 50 (3) \textit{Journal
of Conflict Resolution} 409 - 432, Maya Goldstein Bolocan ‘Rwandan Gacaca an Experiment in Transitional Justice’
On this basis, this study proposes that it will be better for TRCs to operate alongside the ICC’s prosecutions in states that have situations and cases before the ICC. The ICC can undertake an advisory role of advising states that have cases before the courts on matters that should be addressed to ensure such atrocities are never repeated.\textsuperscript{162} This could extend to ensuring that persons suspected to have been involved in committing the atrocities are prevented from leadership positions by means of a process of lustration.\textsuperscript{163} This entails the identification of persons responsible for the violations of human rights and preventing them from serving in influential positions under the new regime.\textsuperscript{164} The ICC could have a role of recommending individuals that could be subjected to the process of lustration. Sarkin\textsuperscript{165} argues that the ICC could have a more dramatic effect on the human rights landscape in many states by assisting with prosecutions at a national level, assisting states to implement the transitional and restorative justice process.

It is possible for judicial and non-judicial mechanisms to operate at a complementary level, as was the case in Cambodia,\textsuperscript{166} Sierra Leone,\textsuperscript{167} and Timor-Leste.\textsuperscript{168} The benefits

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of parallel operation of judicial and non-judicial is further recognised by the United Nations. In Cambodia, the lack of political will to prosecute the majority of former Khmer Rouge leaders responsible for the massacres that occurred from 1975 to 1979 implied that there would be few individuals being prosecuted before the Extraordinary Chambers in the Courts of Cambodia (ECCC). The Truth Commission was therefore perceived by the International Commission of Inquiry to be a means of addressing the numerous cases that would not be investigated by the ECCC.

Similarly, in the case of Sierra Leone, the Special Court for Sierra Leone (SCSL) was vested with jurisdiction *ratione personae* limited to ‘the persons who bear the greatest responsibility’ in the perpetration of crimes under its jurisdiction. The SCSL’s limited jurisdiction was complemented by the existence of the Sierra Leonean Truth and Reconciliation Commission (SLTRC), which would address and consider the less serious offenders and matters in relation to child soldiers, who could not be prosecuted under the SCSL.
The fundamental role that can be played by TRCs functioning together with criminal prosecutions, was acknowledged by the International Commission of Inquiry on Darfur, in the formation of a TRC as a complementary strategy in safeguarding justice and accountability for the crimes committed in the region.\textsuperscript{174} The International Commission of Inquiry on Darfur further argued that

\textit{Criminal courts, by themselves, may not be suited to reveal the broadest spectrum of crimes that took place during a period of repression, in part because they may convict only on proof beyond a reasonable doubt. In situations of mass crime, such as those that have taken place in Darfur, a relatively limited number of prosecutions, no matter how successful, may not completely satisfy victims’ expectations of acknowledgement of their suffering. What is important, in Sudan, is a full disclosure of the whole range of criminality.}\textsuperscript{175}

This quotation recognises the limitation of international justice, with reference to the ICC that only seeks to prosecute the most serious perpetrators with the possibility of having no or very little impact on the majority of people that have been affected by the dispute. The citation further highlights the weakness of trials, specifically the absence of an ability to address the expectations of victims. The above extract is significant to all situations before the ICC as the majority of the states that have situations and cases before the ICC


have had going on conflict over a long period of time.\textsuperscript{176} The fact that the conflict has been going on for over a long period of time entails that more needs to be done in order to address the grievances of the people. Thus, this research contends that TRCs must be established in all states that have situations and cases before the ICC. Such a method will not only contribute towards establishing the truth, but will also help to address the root causes of the conflict, hence ensuring that such atrocities are never repeated.

Having functioning TRCs and the ICC’s prosecution at complementary levels will result into a more effective and relevant ICC to the people most affected by the atrocities committed. The reason being that trials are restricted to identifying individual guilt as opposed to giving a detailed account of the atrocities committed.\textsuperscript{177} Ideally, TRCs have the capacity of being vested with a much wider mandate than that of prosecutions.\textsuperscript{178} In relation to this thesis, it implies that more massacres would be investigated and the truth about what really happened would be established. In addition, TRCs can be complementing the work of the ICC hence contributing towards securing the peace, security and the well-being of the world, as provided for under the preamble to the Rome Statute of the ICC.

Sarkin\textsuperscript{179} defines truth as knowing about and officially acknowledging past human rights violations. Victims and society as a whole have a right to know and access information

\textsuperscript{176} International Criminal Court \url{http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx} (accessed on 27 March 2015).

\textsuperscript{177} Luc Huyse ‘Justice’ in David Bloomfield, Teresa Barnes and Luc Huyse \textit{Reconciliation after Violent Conflict} (International Institute for Democracy and Electoral Assistance 2003) 104.


about what really happened during the period of human rights violations.\textsuperscript{180} Truth is important not only for the victims’ families, but the community as a whole because it results into securing closure of the past carnages, thus advancing progress into the future.\textsuperscript{181} Such acknowledgements are essential to victims whose injuries may have been denied.\textsuperscript{182} Such an action is fundamental in any democratic society.\textsuperscript{183} The Inter-American Commission on Human Rights\textsuperscript{184} ruled quite rightly that:

\textit{The value of truth commissions is that they are created, not with the presumption that there will be no trials, but to constitute a step towards knowing the truth and, ultimately, making justice prevail.}

This therefore implies that the need of states that have cases before the ICC, to establish TRCs should not be seen as a way out of individuals escaping with impunity, but for justice’s sake, trials can follow once the truth has been established. Of great significant to this thesis is the fact that the ICC has intervened in a particular state should imply that

\textsuperscript{180} United Nations General Assembly Resolution 60/147 of 16 December 2005 UN Document A/RES/60/147.


more needs to be done to ensure that the affected state is facilitated in ensuring that such killings do not re-occur. The Sierra Leone TRC also recognised that TRCs are better equipped to address and secure the right of truth than criminal prosecutions. Consequently there is no doubt that TRCs have the potential of improving the work of the ICC. Conducting the ICC’s prosecutions in tandem to TRCs established by states that have cases before the Court, would imply that one of the main criticisms of criminal trials would be addressed. Thus, such an approach would imply that victims will be involved in the transitional justice processes leading to lasting peace among affected communities.

Ideally, all persons suspected of committing the most serious offences to international concern must be held responsible. It is on this basis that the ICC seeks to combat impunity. In order for TRCs to successfully operate at a complementary level with the ICC, it is necessary to ensure that the established TRCs do not in any way contradict with the Rome Statute. In this research, this is essential because it endeavours to create a methodology by which TRCs or traditional procedures such as gacaca courts can be merged within the Rome Statute structure. On this basis, TRCs are intended to be part of a state’s undertaking its obligation to protect and prevent atrocities based on the principle of R2P. This means that the TRCs established by states must seek to combat impunity as

opposed to being means by which individuals can escape with impunity by containing clauses of amnesties.

The SATRC was criticised for failure to prosecute those who failed to seek amnesty as well as those that were denied. 188 The TRCs are not courts of law and therefore it is not expected that they should prosecute individuals following allegations. However, TRCs can recommend individuals to be prosecuted where necessary. It is worthwhile to note that the capacity of the SATRC to grant amnesty was deemed inappropriate and unacceptable in international law. 189 As addressed in the introduction to this thesis, amnesties are contrary to the Rome Statute as it is intended to address impunity. 190

Chapter one of this thesis, further highlights the importance of ensuring perpetrators of past human rights violations are held accountable. The implication is that TRCs

established by states that have cases before the ICC will not be expected to grant amnesties to perpetrators, but seek to install a culture of accountability. The undertaking of the ICC’s prosecution and the conducting of TRCs, both institutions operating in tandem will address issues pertaining to truth, justice and reparations. These three factors are aspects of addressing impunity. This implies that TRCs are relevant to the ICC as they are also intended to address issues of impunity that are within the ICC’s framework.

The obligations imposed on states to respect, protect and fulfil the rights of victims cannot all be addressed by means of prosecutions in national courts or in the ICC. These obligations entail three elements: the need to establish facts about past human rights abuses, the need to undertake investigations for the purpose of gathering evidence that should lead to prosecution of the individuals suspected, for the purpose of securing justice, and finally reparation, which involves the state making amends of the abuses of human rights by way of providing payments to victims. These three elements will be better realised if TRCs work in tandem to the ICC prosecutions, all of which, as demonstrated above, can be achieved by means of instituting TRCs to address past human rights violations.


192 The International Covenant on Civil and Political Rights Article 2 (3), the Universal Declaration of Human Rights Article 8, the International Convention on the Elimination of All Forms of Racial Discrimination Article 6, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Article 14, the Convention on the Rights of the Child Article 39, the 1907 Hague Convention Concerning the Laws and Customs of War on Land Article 3, The Protocol I Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts Additional Protocol I Article 91, the Rome Statute 1998 Article 75, the African Charter on Human and Peoples’ Rights Article 7.


The TRCs and ICC’s prosecution operating at a complementary level\textsuperscript{195} in this study, means that the two institutions will each be able to undertake its own mandate.\textsuperscript{196} Such an approach is not supposed to relieve the national courts of their primary duty to prosecute perpetrators of human rights as acknowledged by decisions of TRCs,\textsuperscript{197} and neither is it intended to contradict the current Rome Statute framework, despite the fact that the relationship between TRCs and the ICC was never directly considered by the Preparatory Committee.\textsuperscript{198} The failure of the Rome Statute to clarify the nature of relationship between the ICC, TRCs and other traditional approaches has resulted in several academics undertaking research to consider whether TRCs can operate as an alternative to the ICC’s prosecutions.\textsuperscript{199}

\textsuperscript{196} The International Convent on Civil and Political Rights Article 2 (3) (b), Manfred Nowak \textit{UN Covenant on Civil and Political Rights Commentary} 2nd edition (Kehlman Rhein Engel 2005) 64 paragraph 65.
However, in 2007, the ICC Office of the Prosecutor (OTP) issued a Policy Paper with the aim of clarifying the matter with regard to the future of TRCs and other transitional justice mechanisms.\textsuperscript{200} The Paper confirmed that, the OTP viewed future TRCs as fulfilling a complementary role to trials\textsuperscript{201} as opposed to seeking to wipe out the need for prosecution.\textsuperscript{202} Therefore, TRCs are not intended to be the primary means of addressing offences within the ICC’s jurisdiction.\textsuperscript{203} To the contrary, TRCs and the ICC have several common objectives, such as they are both measures aimed at addressing past human rights violations. They both have the potential of accomplishing the following: the truth surrounding the commission of the atrocities, identification of those responsible, providing acknowledgement of the suffering of victims and establishing responsibility.\textsuperscript{204} On this basis, it is possible for TRCs to be established by states that have cases before the ICC.

\textsuperscript{203} The Rome Statute 1998 Preamble paragraph 4.
The effects of TRCs operating alongside prosecution can lead to a successful transition from a period of past human rights violations. This is because the TRCs will be able to address the limitations of prosecutions by achieving other objectives beyond the ICC’s retribution and deterrence.\textsuperscript{205} Such benefit was further affirmed and acknowledged by the OTP.\textsuperscript{206} Besides TRCs, states that have cases before the ICC can also, where necessary, adopt traditional methods such as Rwanda’s \textit{gacaca} courts.\textsuperscript{207} Similar to TRCs, the traditional measures would function along with the domestic and ICC prosecutions, the concepts of \textit{gacaca} courts as an example of a traditional technique is considered in the next section. The theme underlying this section is the idea that there are occasions when states face challenges such as lack of resources or manpower. Under such circumstances, states are justified in adopting traditional approaches such as \textit{gacaca} courts to address past human rights abuses. Rwanda’s \textit{gacaca} courts therefore, are considered below as an example of a traditional indigenous process that was established for the purpose of addressing offences within the ICC’s jurisdiction.

3.3. 2 Rwanda’s \textit{Gacaca} Courts

This section focuses on \textit{gacaca} courts, an approach that was adopted in Rwanda following the genocide that occurred between April and July, 1994.\textsuperscript{208} Rwanda’s \textit{gacaca} courts process is considered in this chapter because it constitutes a classic example of a situation when a traditional approach was adopted to address the crime of genocide, not

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as an alternative to prosecution, but to complement prosecutions under the ICTR and Rwanda national courts.\textsuperscript{209} The \textit{gacaca} courts were adopted for the purpose of alleviating the backlog of genocide related cases in domestic courts, consequently, several thousands of persons were prosecuted.\textsuperscript{210} This is significant to this study because of the limitations of the ICC and national prosecutions which generally makes, it essential for other ATJ measures to be adopted for the purpose of realising aims beyond deterrence and retribution.

Over 800,000 people were killed\textsuperscript{211} in the Rwandan conflict, which consisted of a majority of Rwanda’s population, including children and neighbours.\textsuperscript{212} This implied a majority of the Rwandan people become genocide suspects.\textsuperscript{213} Different methods were

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adopted to address Rwanda’s past human rights violations, including the ICTR, Rwandan national courts, a domestic military tribunal, and the *gacaca* courts. The situation in Rwanda is important to this study, as it constitutes an example of a situation where different mechanisms were adopted to address past human rights violations.

Before considering the *gacaca* courts in detail, the operations and works of the ICTR, Rwandan domestic courts and the military tribunal are considered. This is relevant in appreciating and justifying the adoption of the *gacaca* courts to address the genocide in Rwanda. The establishment of the ICTR is addressed in chapter one sections 1.2.8 and 1.2.10 of this thesis. The ICTR proceeded with its prosecutions, and by September 2004, only twenty-three cases had been resolved, despite investigations having commenced ten years earlier. This highlights the limitation of international prosecutions and the danger of relying on them.

As illustrated in chapter two, international justice is not deliberately intended to prosecute a large number of perpetrators, but is restricted to a few most serious offenders. As a result, it is imperative for states that have cases before the ICC to establish other means to

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214 Izabela Steflja ‘Challenges of Transitional Justice in Rwanda’


address past human rights abuses in addition to the ICC and national prosecutions.\(^{217}\) Measures must be put in place to ensure that these states do more to address past human rights violations for the purpose of dealing with the root causes of the conflict. This is vital to this study, as it shows the fact that international justice, such as that accorded by the ICC, is not intended to replace domestic justice. For instance, in relation to Rwanda, the ICTY alone would never have managed to address challenges that Rwanda faced following the genocide involving such a large number of suspects. The majority of Rwandese were unaware of the ICTY due to distance and location, therefore, it had very minimal impact on the ordinary people in Rwanda.\(^{218}\)

Besides hearings being conducted at the ICTR and national courts,\(^{219}\) Rwanda adopted the Organic Law No. 08/96 of August 30, 1996, on the Organisation of Prosecution for Offences Constituting the Crime of Genocide or Crimes against Humanity Committed Since October 1, 1990.\(^{220}\) Rwanda’s decision to adopt Organic Law No. 08/96 only reaffirm the expectation and obligation of Rwanda in international law, of ensuring that persons suspected of committing the most serious offences are held accountable. The


\(^{218}\) Mark A Drumbl ‘Law and Atrocity Setting Accounts in Rwanda’ (2005) 31 *Ohio Northern University Law Review* 41, 47.


decision is essential to this thesis as it demonstrates the necessity for states that have cases before the ICC to take measures and ensure persons responsible for committing genocide, war crimes or crimes against humanity are held accountable.

However, despite conducting prosecutions in the ICTR, military tribunals, Rwandan national courts and foreign jurisdictions,\(^{221}\) there was still a large number of people awaiting trial. By 2001, 130,000 people were in prison, accused of crimes of genocide.\(^{222}\) In five years of national genocide trials in Rwanda, only 6,000 people had been tried, less than 5 per cent of the prison population.\(^{223}\) At the rate of disposition of cases, it was estimated that it would take at least 200 years to complete trials of all accused persons.\(^{224}\)

The example of the situation in Rwanda is no different from what has been experienced by states that have cases before the ICC, as will be illustrated in the situation in Uganda,

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in the next chapter. The ICC cannot be left to be the only remedy to conduct prosecutions in these states. In order to ensure the atrocities are never repeated, it is crucial for states to do more to deal with past human rights violations.

In the case for Rwanda, the large number of genocide suspects resulted in creating a problem of overcrowding in prisons. Detention facilities could only hold up to 18,000 people. This information illustrates an example of some of the challenges faced by states in transition. The challenges faced by Rwanda and its reaction will be compared to that of states that have situations and cases before the ICC, particularly Uganda. It is vital to consider these issues so as to determine the possible solutions that can be adopted to address challenges in states before the ICC, to avoid repetition of the atrocities.

The high number of suspects reflects the seriousness and commitment of Rwanda to ensure as many persons as possible were prosecuted for offences committed. The problem of overcrowding implied that it was practically not possible to guarantee of

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229 Chapter 4 this Thesis.
every individual suspected of committing genocide being prosecuted. Consequently, Rwanda resorted to implementing an innovative approach and established 11,000 new gacaca courts for the purposes of trying genocide cases.\(^{230}\) The gacaca courts to an extent contributed towards securing individual responsibility for crimes, thus eliminating the possibilities for collective guilt that can be a significant obstacle to reconciliation,\(^{231}\) thus contributing towards breaking the ‘culture of impunity’ that existed in Rwanda after the violence in 1959, the 1970s and the 1990s.\(^{232}\)

Similarly, to TRCs the gacaca courts emphasized truth telling among other things.\(^{233}\) The government of Rwanda was confident that the gacaca courts would contribute towards establishing the truth about genocide, as well as to enable criminal sanctions to be imposed, in order to promote national reconciliation\(^{234}\) and allowing those perpetrators to be reintegrated back into mainstream society.\(^{235}\) Due to the circumstance that Rwanda was facing,\(^{236}\) the action of adopting gacaca courts can be justified on the basis that the

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benefits of instituting the gacaca courts outweighed the disadvantages. This argument was further reaffirmed by the Rwandan government by acknowledging to this effect that:

"[T]he sheer bulk of genocide suspects and cases due for trial has placed severe strain on Rwanda's criminal justice system which is already crippled by poor infrastructure and the death of professionals during the genocide. Rwanda's prisons are [were] heavily congested, and the cost of feeding and clothing prisoners is [was] a drain on the economy."

The term gacaca means ‘justice on the grass’ in Kinyarwanda, it literally means the ‘grass’ or ‘lawn’. Sarkin further explains in relation to the context of the term that; ‘[t]he name gacaca is derived from the word ‘lawn’, referring to the fact that members of the gacaca sit on the grass when considering matters before them’. The victim and perpetrator would then be urged to come up with a possible solution.

satisfactory to all parties. Therefore, the parties to the dispute had a role to play in attempting to settle the dispute as well as reaching a compromise. Wise leaders in the community facilitated the process. Hence historically, the gacaca was very similar to the informal means of settling disputes referred to as alternative dispute resolution. This means it is possible for traditional approaches such as gacaca courts to be adopted to tackle past human rights abuses.

The situation in Rwanda indicates that it is not always practical to rely on prosecution solely as the means of addressing past human rights abuses. Depending on the circumstances in a particular state, it is better for other measures to be adopted for the purpose of efficiency and reduction on costs. This entails that apart from TRCs, states that have cases before the ICC can also adopt traditional models during transition. Traditional procedures can be modified in such a way that they are retributive in nature. Such a scheme will ensure that a considerable number of individuals are held

accountable, therefore introducing a culture of respect for human rights, the rule of law as well as securing justice for the victims to an extent. 245

Contrary to the Court system whose objective is limited to trying individuals for crimes committed, the gacaca courts took into account the impact of an individual’s actions on society, as well as giving the affected persons the opportunity of giving testimonies. 246

Like TRCs, the process further allowed for participation of the local people in working towards ensuring justice for offences committed. Such community participation is encouraged as the population gets to be informed and kept up to date with the proceedings.

Traditional approaches such as gacaca courts can allow for collection of truth from bottom-up. 247 As explained by Brounéus, the gacaca involved the entire country, villages or neighbourhood, creating their own gacaca with native elected judges and compulsory participation of the local community. 248 The act of involving victims in transitional justice mechanisms and establishing truth based on ‘bottom-up’ approach is imperative in making sure the atrocities are not repeated, since people will be able to remember the

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nature of atrocities committed.\textsuperscript{249} Roberts and McMillan\textsuperscript{250} further argue that the \textit{gacaca} proceedings were intended to address the following: to hold perpetrators to account, to obtain a correct record of the genocide, providing compensation for victims, reintegation of offenders into society as well as promoting a new Rwandan national identity, based on values of equality, democracy and respect for human rights.\textsuperscript{251} This suggests that ATJ measures are essential, and states that have cases before the ICC can benefit greatly from these measures and if effectively employed, they can result in transformation of states.

The need for states that have cases before the ICC to transform into entities that respect and promote human rights values must be in the main interest of the ICC. The ICC can play a role towards making sure that states learn to be more committed and ensure they assume their duty of prosecuting persons suspected of committing the most severe atrocities. The benefits achieved by Rwanda as a result of the creation of the \textit{gacaca} courts are essential for any state in transition, particularly for the African states that have cases before the ICC. Adoption of such approaches can contribute towards peace building and creation of a progressive future based on respect for the rule of law and human rights.

\textsuperscript{249} Priscilla B Hayner \textit{Unspeakable Truths Transitional Justice and the Challenge of Truth Commissions} 2\textsuperscript{nd} edition (Routledge 2011) 1.

\textsuperscript{250} Paul Roberts and Nesam McMillan ‘For Criminology in International Criminal Justice’ (2003) 1 (2) \textit{Journal of International Criminal Justice} 334.


The *gacaca* systems has been criticised\(^\text{252}\) for its failure to meet international standards of due process.\(^\text{253}\) For instance, the nature and proceedings of *gacaca* courts failed to meet the minimum standards of fair trials as guaranteed by the International Covenant on Civil and Political Rights (ICCPR),\(^\text{254}\) the African Charter on Human and Peoples’ Rights,\(^\text{255}\) all treaties that Rwanda had ratified. The *gacaca* courts did not allow for the rights for the defence to be upheld.\(^\text{256}\) It is important to consider the criticisms of the *gacaca* courts in order to take the factors into account when considering the role that the ICC should play under circumstances where states before it establish such an institution. Consequently, the Court will not only be seeking to achieve objectives beyond retribution and deterrence, but also helping states before the Court to address past human rights violations using other mechanisms in addition to prosecution.

However, the approach has been criticised for being utterly disproportionate considering the nature of offences concerned.\(^\text{257}\) One of the most compelling criticisms of the *gacaca* systems has been...
The courts system was the high level of state ownership and control over the process and the concurrent absence of community autonomy. Therefore despite the strengths of local initiatives, there can also be challenges, particularly as evident in the gacaca courts system when such processes do not align to the universal acceptable standard. McGregor argues that indigenous processes, for example formal procedures, such as prosecution, can also exclude victims or traditional marginalised groups; this is because even in indigenous approaches, the power is normally invested in the initiators, consequently they this might often control the agenda of the process.

This criticism is also supported by Drumbl who argues in relation to women in Afghanistan of how such informal measures could lead to silencing, disempowering and further victimisation of others. This problem was exemplified in Rwanda’s biased focus on the Hutu atrocities accordingly. The object of gacaca was to use the community as a basis for justice and reconciliation with intentions of restating a ‘collective social and judicial voice in communities deeply divided and traumatised by...
the atrocities of the past.’\textsuperscript{262} The gacaca was not established as an organic response to the genocide, but as simply a policy executed by the Rwandan government.\textsuperscript{263}

In the aftermath of the genocide, the Rwandan judicial system could not cope due to the numerous number of individuals arrested, suspected of involvement in committing genocide. The gacaca courts seemed like the best option to address the problem, considering the level of existing resources. The approach seemed to be the most inexpensive and politically convenient process.\textsuperscript{264} Phil Clark warns against the romanticising of gacaca courts as its formalisation differs from the original traditional form. Phil Clark concludes that the gacaca approach;

\begin{quote}
Is the result of a crucial political compromise among Rwandan policy-makers and an attempt to respond to the specific needs of the post-genocide government.\textsuperscript{265}
\end{quote}

Clark refers to the gacaca courts system not as \textit{indigenous}, but \textit{endogenous} because the post-genocide gacaca process was changed from what it was, and therefore the population regarded it as something new.\textsuperscript{266} Therefore, in establishing a suitable methodology in which ATJ strategies ought to be integrated within the ICC framework, taking into account the weaknesses of these approaches will facilitate the establishing of a suitable approach that conforms to the ICC structure.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{262} Sarah L Wells ‘Gender Sexual Violence and Prospects for Justice at the Gacaca Courts in Rwanda’ (2005) 14 Southern California Review of Law and Women studies 177.
\item \textsuperscript{263} Sarah L Wells ‘Gender Sexual Violence and Prospects for Justice at the Gacaca Courts in Rwanda’ (2005) 14 Southern California Review of Law and Women studies 169-76.
\item \textsuperscript{264} Rama Mani Beyond Retribution Seeking Justice in the Shadows of War (Polity 2002) 118.
\end{enumerate}
\end{footnotesize}
Nevertheless, despite the criticisms, the reasoning for the establishment of the *gacaca* courts justifies the approach.\(^{267}\) It seems that the *gacaca* system was the best possible solution that Rwanda could adopt, considering the lack of resources and the circumstances faced by post Rwanda genocide.\(^{268}\) Yet the process could have been improved had it been less political and more geared towards reconciliation. This would have been done by prosecuting all persons responsible using the mechanisms that were available.\(^{269}\) In Rwanda lower perpetrators were subjected to *gacaca* proceedings that constituted a form of social censure for previous crimes that require an effort at practical or symbolic repair for the damage caused.\(^{270}\) Garland contends with regard to punishment that it is a ‘legal process whereby violators of the criminal law are condemned and sanctioned in accordance with specified legal categories and procedures.’\(^{271}\) The TRCs and *gacaca* courts come into existence by virtue of states adopting relevant laws and rules of procedure intended to enable them to operate. Therefore states that have cases before the ICC must ensure that the appropriate legislation is adopted to that effect.


The only way of ensuring that states that have situations and cases before the ICC address the past human rights violations would be by embracing ATJ measures to fill the gaps left by prosecutions. 272 With reference to Africa, institutions such as the ICC and the AU can have a role to play as part of the duty of R2P to ensure that the states that have cases before the ICC are transformed into entities that uphold the rule of law, respect human rights and develop an edge to ensure that persons suspected of violating human rights are prosecuted. The AU can play a key role in discouraging the culture of impunity. The next section considers the relationship between Africa and the ICC, and the role of the AU towards addressing impunity.

3.4 Africa and the International Criminal Court

This section considers the relation between Africa and the ICC. The analysis of the relationship between the ICC and Africa is based on the AU that is African’s main regional institution that consists of 54 states,273 of which 34 are parties to the Rome Statute.274 This section is intended to highlights the current challenges that the ICC is facing in relation to the situations and cases before the Court. The challenges include the need to ensure cooperation between states and the ICC and the execution of warrants of arrest. The contention is that the effectiveness of the ICC in Africa depends to a great extent, on maintaining a good relationship with the AU.275 Thus, this section highlights the need for the ICC to reform for the purpose of ensuring effectiveness and legitimacy for the sake of securing its future as a permanent International Criminal Court.

There are currently 123 states parties to the ICC, out of which 34 are African states.276 A large number of African states have ratified the Rome Statute, which is a significant achievement due to the challenges faced by the continent. Coincidentally, all situations before the Court are based in African states, resulting in the ICC being referred to as the ‘African Court.’277 It is an indication of Africa’s effort and commitment towards ensuring that perpetrators of human rights violations do not escape with impunity.278 According to Stone and Max du Plessis,279 it is a sign of the following; firstly, post-conflict peace building is endangered by the prevalent lack of accountability among persons responsible for violent conflicts;280 and secondly, normally, national judicial systems are often too fragile to cope with the burden of rendering justice for the most serious offences such as war crimes, crimes against humanity and genocide,281 as illustrated by the situations in Rwanda and South Africa addressed under section 3.3 above. The section below considers the relationship between the ICC and the AU.

3.4.1 The Relationship between the International Criminal Court and the African Union

Since the ICC came into existence, all the situations before the ICC have been based on the African continent. These include the situations in Uganda, the DRC, the Central African Republic, Kenya, Libya and Darfur, in Sudan. In addition, the Office of the Prosecutor of the ICC (OTP) has in the past monitored the situations at the preliminary stages in Afghanistan, Colombia, Cote d’Ivoire, Georgia, Guinea, Honduras, Nigeria, North Korea and Palestine. The prosecutor has

290 The preliminary investigation was made public in 2007.
291 The preliminary investigation was made public in 2006.
294 International Criminal Court Statement by International Criminal Court Deputy Prosecutor ‘International Criminal Court Deputy Prosecutor we are Keeping an Eye on Events in Guinea’ 19 November 2010.
declined to initiate investigations in relation to two situations, in Iraq\textsuperscript{299} and Venezuela.\textsuperscript{300}

Consequently, the AU has criticised the ICC’s focus on Africa, arguing that whilst it is not against international justice, it is very clear that the ICC had opted to make Africa a laboratory, on which to test new international law.\textsuperscript{301} The then African Union Chairperson, deceased Libyan President Muammar Al-Qaddafi referred to the indictment as ‘First World terrorism’.\textsuperscript{302} In addition, the Chairperson to AU Commission, Jean Ping

once expressed Africa’s disappointment with the ICC that, rather than the Court pursuing justice around the world, including situations in Columbia, Sir Lanka and Iraq among others, the ICC was restricting itself to Africa, consequently undermining Africa’s efforts to solve its own problems. As a result, the AU adopted institutional acts intended to express disapproval of the ICC’s investigations in Africa.

For instance, at the AU Assembly on 30 June, and 1 July, 2008, a resolution calling on non-African states, and in particular, European Union states, to stop the practice of arresting and trying Africans for grave offences under the principle of universal jurisdiction was passed. The resolution states that the AU state Assembly recognises that the universal jurisdiction is a principle of international law that is intended to ensure that individuals who commit grave offences such as war crimes and crimes against


303 Max du Plessis The International Criminal Court and It work in Africa Confronting the Myths (Institute of Security Studies 2008) 2.


humanity do not escape with impunity, but are brought to justice, in line with Article 4(h) of the Constitutive Act of the African Union. This implies that every person suspected of committing the most serious offences must be held accountable, regardless of the position held in the country. The resolution further states that:

The abuse of the Principle of Universal Jurisdiction is a development that could endanger international law, order and security," and any attempt to exercise universal jurisdiction against African leaders “constituted a violation of the sovereignty and territorial integrity of these states.308

This means that the AU perceives the ICC’s focus on Africa to be a violation of sovereignty and territorial integrity, particularly the arrest warrant against Al Bashir that was perceived to be part of a “legal campaign” against Africa.309 The AU Peace and Security Council further reiterated this sentiment on 11 July 2008.310 However, the above provision in relation to the abuse of the principle of universal jurisdiction, constituting a development that could endanger international law order and security is misplaced. This is because the ICC does not exercise jurisdiction on individuals on the basis of universal

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jurisdiction. The case of Al Bashir is considered in this study as the origin of the tensions between the ICC and the AU.

The Rome Statute jurisdiction can only be triggered on a number of bases. It can occur on the basis of a connection of a person with a state party, by virtue of being a national of that state, or the person having allegedly committed a crime on the territory of that state or by the Security Council referring a situation to the ICC. This constitutes a lack of understanding within the AU of the basis of the ICC’s jurisdiction. The classic example when universal jurisdiction was exercised is in relation to the case of Pinochet. However this is a matter beyond the scope of this thesis.

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that are not parties to the Rome Statute.\textsuperscript{323} This signifies that the success of the ICC is
determined on the willingness of the states to cooperate.

In 2010, the AU called on the Security Council to suspend the indictment against
Sudanese President Bashir for twelve months.\textsuperscript{324} The AU’s recommendations was that
inter alia, firstly, article 16 of the Rome Statute be amended to enable the UN General
Assembly (GA) to defer cases for one year, in circumstances whereby the Security
Council fails to act on a request for a deferral after a particular period. Secondly, that the
office for the prosecutor was required to re-examine its internal guidelines on the exercise
of prosecutorial powers, to take into account factors promoting peace and thereafter
submit them to the Assembly of States Parties in order to ensure accountability.\textsuperscript{325}

The referral of the situation implied the possibility of the Sudanese President, Omar
Hassan Ahmed al-Bashir being subjected to investigations. This resulted in lobbying by
many in Africa and the Middle East to stay the investigation.\textsuperscript{326} This is because African
leaders realised that prosecution of Bashir, a sitting head of state by the ICC, could set a
precedent, therefore constituting a threat and possibility that the prosecution of others
could follow. To make matters as worse, the ICC was at the same time engaged in the

\textsuperscript{323} Decision on the Prosecution’s Application for warrant of Arrest Against Omar Hassan Ahmad
Al Bashir Al Bashir (ICC-02/05-01/09) Pre-Trial Chamber 1, 4 March 2009, Dapa Akande ‘The Legal Nature of
Security Council Referrals to the ICC and Its Impact on Al Bashir’s Immunities’ (2009) 7 (2) Journal of
International Criminal Justice 334.

\textsuperscript{324} Jeremy Sarkin ‘The Role of the International Criminal Court (ICC) in Reducing Massive Human Rights
Violations such as Enforced Disappearances in Africa towards Developing Transitional Justice Strategies’ (2011) 11
(1) Studies in Ethnicity and Nationalism 131, James A Goldston ‘More Candour about Criteria the Exercise of
Discretion by the Prosecutor of the International Criminal Court’ (2010) 8 (2) Journal of International Criminal
Justice 385, African Union Peace and Security Council Communiqué of the 142nd Meeting, 21 July 2008
PSC/MIN/Comm(CXLII), x 11(i) 2, and Communiqué of the 151nd Meeting 22 September 2008
PSC/MIN/Comm.1 (CLI) xx 7, 8, 2.

\textsuperscript{325} James A Goldston ‘More Candour about Criteria the Exercise of Discretion by the Prosecutor of the International

\textsuperscript{326} Sudan Tribune ‘Arab League Says Sudan Agrees to Investigate Darfur War Crimes’ 23
investigation of the situation in Kenya that was caused by the outbreak of violence following the elections in 2007.\textsuperscript{327}

However, the referral of the situation in Darfur in Sudan to the ICC did not in any way deter atrocities from being committed.\textsuperscript{328} Hence the ICC could not be employed as a conflict management tool in relation to Darfur,\textsuperscript{329} mainly because the referral of the situation did not induce the leaders in Darfur to stop the atrocities or even leading them to step down.\textsuperscript{330} Therefore, the ICC failed in its role of deterrence and neither can it be used as a conflict management tool. The ICC is not intended to stop violence in a particular situation, but to prosecute those responsible.\textsuperscript{331} From this illustration, lessons can be learnt from the situation in Darfur in regards to measures that can be adopted following a Security Council referral to ensure effectiveness in the procedure. The situation in Darfur highlights the flaws in the current framework of the ICC and raises the need for the ICC to reform as proposed by this study.

This actually leads to questions as to whether it is appropriate for the UN Security Council, a political organ, to be referring issues for investigation to the ICC, a judicial organ. Birdsall\textsuperscript{332} argues that the fact that the Rome Statute imposes upon the Security Council the capacity to refer situations to the ICC is problematic, because it politicises

\begin{thebibliography}{99}
\item Cristina G Badesci and Linnea Bergholm ‘The Responsibility to Protect in Darfur the Big Let Down’ (2009) \textit{Security Dialogue} 304, 305.
\item Kurt Mills ‘R2P and the ICC at odd or in Sync?’ (2015) 26 (1) \textit{Criminal Law Forum} 88.
\end{thebibliography}

UN has the responsibility to intervene for the sake of protecting the population. However the Security Council is not the appropriate body to be referring situations to the ICC as not all its five permanent member states are parties to the Rome Statute. It would be better if the ICC recommends to the Security Council for a situation to be referred to the Court other than granting the Security Council a political organ such powers within a judicial institution.

There has been a problem of selective justice within the Security Council in terms of matters that are referred to the ICC. For instance, so far all the Security Council resolutions referring situations to the ICC have exempted non-state parties to the ICC jurisdictions, whereas extending the ICC jurisdiction to a non-party state with reference to the situation in Darfur, Sudan. This clearly is selective, unequal justice and is

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detrimental to the ICC as an international criminal court that is expected to be impartial and legitimate.  

Rather than the Security Council making referrals to the ICC, the Court can be making referrals to the Security Council whenever it needs assistance in situations that it deems appropriate for the Security Council to intervene. This should be the case where the Court has initiated investigations on the basis of self-referrals or prosecutor acting *proprio motu* similar to the situation in Cote d’Ivoire following the ouster of former president Laurent Gbagbo. Only then should the Security Council issue decisions acting under Chapter VII to refer situations to the Court or to compel states to cooperate with the ICC. Such a method would be justified on that basis, that when Security Council refers a situation to the Court, the Court is not obliged to proceed and prosecute, instead the prosecutor has the discretion of deciding whether to proceed or not.

Such a system will lead to a reduction in politicisation within the institution when it comes to selection of cases, because of situations within the ICC’s jurisdiction as a result of state referrals, the ICC prosecutor initiating *proprio motu* or following the Court’s request to the Security Council for a referral. Nonetheless, the issuing of an arrest warrant

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344 The Rome Statute 1998 Article 15.


against al-Bashir by the ICC is not by all means the first time in history when an international court or tribunal has indicted a serving head of state with charges of international crimes.\textsuperscript{348} For instance, the ICTY issued an indictment and arrest warrant for then President of the former Federal Republic of Yugoslavia (FRY later Serbia and Montenegro, now Serbia) Slobodan Milosevic.\textsuperscript{349} An indictment and arrest warrant was further issued by the SCSL against Charles Taylor, while he held office as President of Liberia.\textsuperscript{350} Immunity, if any, accorded to a head of state under national law does not extend to an international criminal court for international crimes.\textsuperscript{351}

Though customary international law offers immunity from arrest to an incumbent head of state facing domestic charges of international crimes.\textsuperscript{352} In addition, there are


\textsuperscript{351} Decision on Constitutionality and Lack of Jurisdiction Special Court of Sierra Leone Appeals Chamber 13 March 2004 paragraph 53, Decision on Immunity from Jurisdiction Taylor (SCSL-2003-01-I) Appeals Chamber 31 May 2004.

international treaties that grant immunity on serving head of states. In reference to Al Bashir’s arrest warrant, this means the immunity accorded to a serving head of state, *ratione personae*, from foreign national criminal jurisdiction (and from arrest) is absolute and pertains, to even under circumstances, where the accused is suspected of committing an international crime.

This is a rule that is recognised and has been reaffirmed by national courts and the International Court of Justice (ICJ). In the arrest warrant decision, the ICJ clarified that personal immunities constitute a bar to the exercise of criminal jurisdiction by domestic courts. The ICJ further ruled that this did not apply to international criminal courts, such as the ICTY, ICTR or the ICC. This means that the ICC was within its rights in seeking to prosecute individuals suspected of committing atrocities in Darfur. As such, there is need to ensure African states are more committed towards addressing past human rights violations as well as respecting human rights. The ICC has a role to play towards ensuring states that have cases before the Court are more committed towards the need to uphold human rights.

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355 Decision of the French Court of Cassation in the Gaddafi case 2001, Decision of the Belgian Court of Cassation in the Sharon case, Decision of a British Court in the Mugabe case, Decision of the Spanish Audiencia Nacional in the case of Kagame, See also other cases in relation to former Heads of State where the relevant authority asserted that international immunities would have applied, while a person is still holding his/her office, International Law Commission Immunity of State Officials from Foreign Criminal Jurisdiction Memorandum Prepared by the Secretariat United Nation Document A/CN.4/596 31March 2008 x 146.
With regards to the ICC, the ICJ argued on the basis of article 27(2) of the Rome Statute which provides that ‘immunities extended to the official capacity of an individual, whether under domestic or international law, does not prevent the Court from exercising its jurisdiction over such an individual.’\(^{358}\) This implies that the ICC can exercise jurisdiction against any person who may be entitled to immunity under customary international law regardless of position, this extends to acts of issuing arrest warrants as was the case in relation to Al Bashir.\(^{359}\)

However the AU’s reaction to the ICC’s act of issuing the warrant of arrest against President Al Bashir does not reflect a clear commitment to the principle of R2P in practice.\(^{360}\) This is because the AU shares similar values of the ICC of ensuring respect of human rights,\(^{361}\) putting an end to impunity,\(^{362}\) and the need to intervene in states where international crimes are believed to have been committed under circumstances whereby the states responsible fail to exercise their duty to prosecute individuals’ involved.\(^{363}\) The implication is that close cooperation between the AU and ICC can contribute towards enhancing the work of the ICC, as part of transitional justice in states that are under investigation by the Court as illustrated in chapter four.

\(^{358}\) Arrest Warrant of 11 April 2000 *Democratic Republic of Congo v Belgium* International Court of Justice 14 February 2002 Section 61.

\(^{359}\) Paola Gaeta ‘Does President Al Bashir Enjoy Immunity from Arrest?’ (2009) 7 (2) *Journal of International Criminal Justice* 323, 324.


\(^{361}\) The African Union Constitutive Act Article 4 (m).

\(^{362}\) The African Union Constitutive Act Article 4(o).

\(^{363}\) The African Union Constitutive Act Article 4(h).
In the ICC decision, the Court held that customary international law on immunity does not extend to the case against Al Bashir and, particularly, customary international law which ‘creates an exception to heads of state’s immunity when an international court seeks a head of state’s arrest for the commission of international crimes.’ This further implies that the ICC is within its right in seeking to prosecute Al Bashir. However the fact remains that the reputation of the ICC can be improved if it is to initiate investigations elsewhere other than Africa. It is clear that currently the ICC is facing challenges in undertaking its mandate and with regards to enforcement.

In order for the ICC to be effective, relevant and legitimate, there is need for the Court to avoid selective enforcement of ICL, therefore eliminating the problem of selective enforcement that currently prevails within the ICC system. The ICC seems keen to bring to justice, by prosecuting perpetrators from weak nations, thus resulting in which discriminating among human rights abusers on the basis of their citizenship. Instead the ICC is supposed to be seen to apply ICL equally as opposed to the double standards, evident in the manner in which the Security Council refers situations to it.

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364 Decision Pursuant to the Article 87(7) on the Failure of the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court With Respect to the Arrest and Surrender of Omar Hassan Ahmed Al Bashir, Al Bashir (ICC-02/05-01/09) Pre-Trial Chamber I, 12 December 2011, Al Bashir (ICC-02/05-01/09) Pre-Trial Chamber I, 13 December 2011.
365 Decision Pursuant to the article 87(7) on the Failure of the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court With Respect to the Arrest and Surrender of Omar Hassan Ahmed Al Bashir, Al Bashir (ICC-02/05-01/09) Pre-Trial Chamber I, 12 December 2011, Al Bashir (ICC-02/05-01/09) Pre-Trial Chamber I, 13 December 2011 Sections 42 & 43.
Schabas further reaffirms the proposition that the ICC seems to be avoiding hard cases and focusing on the easy target in situations based in Africa. Accordingly, the prosecutor has had choices of other situations that could have been selected such as the British atrocities in Iraq, Operation Cast Lead and the ongoing construction of settlements in the West Bank. Therefore, the decisions of the prosecutor has raised doubts about the independence of the ICC and whether it indeed is intended to display an anti-African biasness as claimed by the AU. The views of the AU are justified based on evidence. The AU’s response to the ICC’s bias has been to adopt a rather imprudent decision to confer criminal jurisdiction on the African Court of Justice and Human Rights (ACJHR).
This is because empowering the African Court with capacity to prosecute international crimes committed by any person regardless of status would not necessarily imply that the Court will automatically have the capacity to prosecute international crimes committed in AU member states. Similarly to any other treaty, states need to consent by way of ratification of the protocol. With the ongoing trends, it is unlikely that African states would ratify such a treaty due to lack of commitment to comply with human rights obligations.

African states for example, have been reluctant to comply with the current measures in place to ensure protection of peoples’ human rights such as the reporting obligations under the African Charter on Human and Peoples' Rights (ACHPR). States including Comoros, Cote d'Ivoire, Djibouti, Equatorial Guinea, Gabon, Guinea Bissau, Liberia, Malawi, Sao Tome and Principe, Sierra Leone and Somalia have never submitted a single report on compliance to the ACHPR to the African commission in the last 25 years. This indicates a lack of commitment to ensure that human rights are respected and protected.

It is nearly 17 years since the 1998 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights

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(1998 African Court Protocol)\(^{380}\) was adopted, yet only 24 out of 54 AU member states have signed and ratified the Protocol.\(^{381}\) The last time a state ratified the protocol was in 2007 despite the fact that all AU members have ratified the African Charter.\(^{382}\) This constitutes evidence to conclude that there is a low level of ratification by African states, which is rather shocking, considering the fact that individuals and NGOs cannot have access to the Court unless the states ratify and sign the protocol, indicating acceptance and consent that the Court has competence to consider cases before it.\(^{383}\)

Therefore, it is very unlikely, and neither is there a guarantee, that states that have not ratified the protocol establishing the African Court as it stands will ratify the protocol after extending the Court’s jurisdiction with criminal jurisdiction. The inclusion of the criminal jurisdiction to the African Court could discourage states from ratifying the protocol for fear of the possibility of officials serving in their governments being threatened or subjected to prosecution by the Court.\(^{384}\) Based on arguments above, it is unlikely that the African Court that lacks effectiveness without criminal jurisdiction can be expected to be effective with criminal jurisdiction.\(^{385}\) For this reason, this study

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contends that a more practical approach of integrating transitional justice strategies within the ICC framework ought to be adopted.

As opposed to vesting criminal jurisdiction in the African Court to prosecute international crimes, the AU instead, can encourage AU member states to strengthen their domestic institutions\textsuperscript{386} to allow for prosecution of international crimes to be undertaken in order to ensure accountability. In addition, African states can be encouraged to adopt ATJ measures, particularly TRCs, or traditional approaches. There is also a need for states collaboration with the ICC to be improved so that issues in relation to human rights violation are addressed and persons responsible are held accountable.

This thesis proposes that the ICC must seek to achieve goals beyond deterrence and retribution. Currently, the Rome Statute does not provide guidance about the goals and priorities that the ICC is intended to achieve by virtue of selecting a particular case beyond the vague mandate of seeking to end impunity for the most serious crimes.\textsuperscript{387} Actually, the first prosecutor, Luis Moreno-Ocampo recognised this problem and early in his tenure, suggested that there was need for the states parties to work together to clarify the goals of the ICC.\textsuperscript{388} However, this is yet to be done. But this study argues that due to the nature of offences that the ICC considers and the circumstances surrounding most states that are subjected to the jurisdiction of the ICC, it will be more prudent for the Court to seek to achieve goals beyond deterrence and retribution.


\textsuperscript{387} The Rome Statute 1998 Preamble.

This can be done by the ICC working closely with TRCs and traditional institutions such as gacaca courts that should be established in all states that have cases before the ICC. This will result in more individuals being held accountable, as well as facilitating with the rebuilding process to ensure that such offences are never repeated. As clearly demonstrated throughout this chapter, there is need for the ICC to reform in order to enhance its effectiveness. The absence of clearly defined objectives and priorities has resulted into challenges with regards to the ICC’s legitimacy,389 such as questioning the reasons as to why the ICC has focused its investigations on Africa.

_The Court finds itself in a dilemma however. Refusing to investigate cases where there is clear prima facie evidence of mass atrocity crimes will itself be seen as politically (self-) motivated. There may be legitimate reasons why the Court should investigate the crimes that provoked a military intervention in the first place, even if that intervention was disproportionate in its response._390

This passage highlights the current limitations of the ICC as a Court. The ICC is expected to do something in relation to the situation in Darfur. However due to the nature of the institution and its establishment, there is nothing that it can do to ensure persons responsible for abuse of human rights are prosecuted.391 This implies that there is need for reforms to be undertaken in the current ICC structure, with the view of enhancing its effectiveness. Reforms can be introduced into the relations of the ICC and the UN

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Security Council for the purpose of making the Court effective. Louise Arbour, former Chief Prosecutor of the ICTY, has noted in her fundamental critique of internationalism that:

*The two referrals by the Security Council to the ICC, in the cases of Darfur and Libya,*\(^392\) *had* have done little to enhance the standing and credibility of the ICC, let alone contribute to peace and reconciliation in their respective regions ... *Security Council referrals expand the reach of accountability to countries that have chosen not to be parties to the Rome Statute that established the ICC. But they do so at a cost that any justice system should find difficult to bear...*Security Council referrals...expose the Court to charges of politicisation, while providing the Court with no compensatory benefits such as additional financial, political or operational support.*[I]*n the end, Council referrals may in fact underscore the Court’s impotence rather than enhance its alleged deterrent effect, given that in Darfur Security Council backing has achieved so little, while in Libya there is a sense in some quarters that the Court withdrew from a contentious arena leaving the indictees to be tried in a judicial system under severe stress.*\(^393\)

Apart from referring the situation to the Court, the Security Council has done little to provide support for the ICC in its attempt to bring Bashir and others to justice.\(^394\) There is a lack of commitment from the Security Council of ensuring progress is made in the

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investigation and undertaking of prosecution in Darfur following the referral. The criticisms of the Security Council are further evident in the Court’s failure to successfully investigate and prosecute individuals. ICC Prosecutor Fatou Bensouda highlighted these concerns in December 2014, in a statement on the situation in Darfur to the Council:

*It is becoming increasingly difficult for me to appear before you to update you when all I am doing is repeating the same things I have said over and over again, most of which are well known to this Council. ...Women and girls continue to bear the brunt of sustained attacks on innocent civilians. But this Council is yet to be spurred into action. Victims of rapes are asking themselves how many more women should be brutally attacked for this Council to appreciate the magnitude of their plight ...In the almost ten years that my Office has been reporting to this Council, there has never been a strategic recommendation provided to my Office, neither has there been any discussions resulting in concrete solutions for the problems we face in the Darfur situation. We find ourselves in a stalemate that can only embolden perpetrators to continue their brutality. Faced with an environment where my Office’s limited resources for investigations are already overstretched, and given this Council’s lack of foresight on what should happen in Darfur, I am left with no choice but to hibernate investigative activities in Darfur as I shift resources to other urgent cases, especially those in which trial is approaching. It should thus be clear to this Council that unless there is a change of attitude and*

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395 International Law ’Meeting Summary with Parliamentarians for Global Action The United Nations Security Council and The International Criminal Court (Chatham House 16 March 2012) 9, *the Prosecutor v Omar Hassan Ahmad Al Bashir*, Decision on the Non-Compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir, ICC-02/05-01/09, 26 March 2013 (Pre-trial Chamber II).
approach to Darfur in the near future, there shall continue to be little or nothing to report to you for the foreseeable future.\textsuperscript{396}

The ICC prosecutor explained the fact that since the referral of the situation to the ICC, the Security Council has never rendered any recommendations or conduct discussions in order to find solutions to stop the killings and conduct prosecutions in Darfur. As a result of the absence of any further support from the Security Council, perpetrators have continued to commit the most serious offences of international concern.\textsuperscript{397} The extract portrays the ICC as a weak and ineffective institution that is incapable of achieving its mandate without the support of states or other institutions. This is the case particularly where atrocities are committed in non-state parties to the Rome Statute.

This indicates that under the current circumstances, the ICC is failing to do what it is expected to do. It further highlights that the ICC needs to be supported in order to be able to undertake its mandate effectively. The challenges that the ICC faces are further illustrated in relation to the situation in Libya.\textsuperscript{398} Therefore, cooperation between the ICC, the states that have situations before it and institutions such as the AU and UN needs to improve. Such an approach would lead to sharing information between the institutions, in the process there will be an improvement in the effectiveness and the enforcement of the principle of R2P, and to avoid situations where the Court is forced to


abandon investigations due to lack of sufficient evidence and cooperation in ensuring progression in the situation, as was the case in relation to Kenya and Sudan. 399

The Security Council Resolution 1593, 400 Operative Clause, paragraph 7, recognises that none of the expenses incurred as a result of the referral of the situation, such as investigations or prosecution are to be borne by the UN. It makes it pointless to refer a situation to the Court without giving it the necessary support to be able to effectively carry out investigations and prosecutions.

The flaws of the ICC structure are further illustrated in the December 2014, prosecutor’s address to Security Council. 401 The report admits that there is clear evidence that there are certain individuals in Sudan who must be brought before the ICC to answer charges of allegations of rape. 402 The judges have concluded that there is enough evidence suggesting that certain individuals in the Sudan ought to be put on trial before the ICC (the “Court”) to answer charges, including allegations of rape. However despite the issuing of the warrant of arrest for certain individuals, such as Omar Al Bashir, Abdel


Raheem Hussein, Ahmad Harun, Ali Kushayb, Abdallah Banda and Abakaer Nourain, they are yet to be arrested and prosecuted before the ICC.

As a result the violation of human rights of innocent civilians has continued in Darfur. The report further admits that despite all these challenges in Darfur the Security Council has never spurred into action, the prosecutor clearly admits that the ICC is currently incapable of proceeding with the situation in the absence of support from the Security Council, by questioning the number of victims that have to be brutally attacked before it can appreciate the magnitude of their plight, and render further support to ensure that something is done. Therefore, there is need for reform within the ICC framework for the purpose of enhancing its effectiveness.

The challenges faced by the ICC render the Security Council’s referrals to the ICC pointless unless they will be followed with support being offered to the Court to ensure effectiveness in executing the mandate. Based on the report, it is clear that there are faults in the system that need to be addressed if the ICC is to maintain credibility, it must be effective and undertake its role of ensuring the most serious perpetrators do not escape with impunity. Hence the ICC’s prosecutor admitted that there was need to define a new

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approach to the Darfur situation, and unless there are reforms in the system, the ICC would continue to be ineffective, because its success depends on states and other international institutions such as the UN and AU. The Security Council’s support to the ICC could include undertaking decisions in order to comply states to cooperate with the Court, particularly in the execution of arrest warrants.

The ICC is a powerful institution that can play a vital role towards R2P with the existence of the support from the states, the UN and the AU. For instance, with regards to the situation in Darfur, it is evident that the ICC requires further support in order to be effective and to bring justice and ensure individuals do not escape with impunity. The Court can be assisted in the executions of arrest warrants. The Security Council can impose sanctions on states that do not comply with the ICC, Such a process will ensure progress in situations before the Court.

In order to encourage equality, the Security Council must avoid excluding certain states from the ICC’s jurisdiction, however such a resolution is unlikely to be adopted in the Security Council as addressed above, not all the permanent members are a party to the Rome Statute. On the other hand, the fact that the ICC is considering all African cases should instead be worrying to the African states. The failure of African states that have cases before the ICC to prosecute perpetrators of international crimes has been perceived

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as a lack of commitment and enthusiasm to ensure persons do not escape with impunity.\textsuperscript{414} It implies that African states must be doing something wrong; it is time African states arose and started getting serious about making sure that persons suspected of committing the most serious offences are held accountable.

African states are to blame for being subjected to the jurisdiction of the ICC for their failure and unwillingness to undertake prosecutions.\textsuperscript{415} The ICC is by no means a neo-colonialism or neo-imperialism institution that is anti-African, and such conclusions can only be damaging to the institution.\textsuperscript{416} It is no wonder Max Du Plessis has argued that the ICC is a tool for justice in a continent where impunity has been emblematic.\textsuperscript{417} A senior African legal advisor in the ICC’s Registry has further argued; \textsuperscript{418}

\textit{No other continent has paid more dearly than Africa for the absence of legitimate institutions of law and accountability, resulting in a culture of impunity. Events in Rwanda were a grim reminder that such atrocities could be repeated anytime. This}

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\textsuperscript{417} Max du Plessis \textit{The International Criminal Court and It work in Africa Confronting the Myths} (Institute of Security Studies 2008) 2.

\textsuperscript{418} Max du Plessis \textit{The International Criminal Court and It work in Africa Confronting the Myths} (Institute of Security Studies 2008) 2.
\end{footnotesize}
served to strengthen Africa’s determination and commitment to the creation of a permanent, impartial, effective and independent judicial mechanism to try and punish the perpetrators of these types of crimes whenever they occur.

There is a tendency among African states to be reluctant in adopting measures to address past human rights violations in their territories.419 For instance, Burundi, following the violence that erupted in 1994 after the shooting down of an aircraft carrying Presidents of Burundi and Rwanda, approximately 300,000 people died as a result of the incident and the conflict that erupted in Burundi.420 Following attempts to reach a peace settlement to end the conflict, the government of Burundi and 13 parties to the conflict signed a peace settlement that provided for a power sharing agreement, referred to as the Arusha Peace and Reconciliation Agreement for Burundi.421 The agreement further provided that the government of Burundi was to make two requests to the UN in relation to establishing accountability for atrocities committed during the violence.422 The following were the requests: firstly, that Security Council forms an international judicial commission of inquiry on war crimes, crimes against humanity and genocide.423 Secondly, that Security Council establishes an

420 Sarah Williams Hybrid and Internationalised Criminal Tribunals Selected Jurisdictional Issues (Hart Publishing 2012) 149.
421 Sarah Williams Hybrid and Internationalised Criminal Tribunals Selected Jurisdictional Issues (Hart Publishing 2012) 149.
422 Arusha Peace and Reconciliation Agreement for Burundi 28 August 2000 Protocol I article 6 (10).
423 Arusha Peace and Reconciliation Agreement for Burundi 28 August 2000 Protocol I article 6 (10).
international criminal tribunal to try and punish those responsible, should the report of the commission of inquiry actually indicate that such offences were in fact committed.\(^{424}\) This illustrates an example of how African states are always keen to be subjected to international justice as opposed to conducting trials at a national level.

Unfortunately, the report of the assessment mission submitted in March 2005, rejected the proposal for establishment of a commission of inquiry as the UN had already established three commission of inquiry in Burundi at the request of the government and that recommendations were never implemented.\(^{425}\) Instead, the report recommended to the UN for the creation of a special chamber for war crimes, crimes against humanity and genocide within Burundi, a court system that was intended to operate alongside a truth and reconciliation commission.\(^{426}\) However to date, despite negotiations between the government of Burundi and the UN being undertaken, the institution has not been established.\(^{427}\) The consequence has been individuals escaping with impunity. Thus this study contends that the ICC should do more to ensure that states address past human violations by adoption of measures alternative to prosecution for the purpose of accomplishing objectives beyond deterrence and retribution.

\(^{424}\) Arusha Peace and Reconciliation Agreement for Burundi 28 August 2000 Protocol I article 6 (11).
It is pointless that the UN should continue funding international justice or even establishing more institutions when there is the ICC in existence. States that have situations and cases before the ICC need to be empowered and encouraged to take an upper hand in ensuring persons responsible for human rights violations are held accountable. In the process, the ICC will be more effective and its work will be legitimate among African states. More recently, however, the Economic Community of West African States (ECOWAS), a regional organisation in West Africa and the African Commission on Human and People’s Rights called on the ICC to intervene in Mali. This is another example of African states’ preference, to prosecution in international courts. This problem is further illustrated in chapter four of this thesis.

International criminal prosecution must take into account local attitudes, circumstances and concerns. This is vital, to ensure effectiveness as well as legitimacy. Despite the criticism of the ICC for its selection of situations in the first decade of its operation, several situations before the Court are state referrals, such as Uganda as illustrated in chapter four of this thesis. Currently, a cultural argument is

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normally raised, More needs to be done by states to address past human rights violations.

The differences between the AU and the ICC can be addressed by introducing ATJ measures within the ICC structure. This is because the AU not only advocates for the adoption of regional solutions in order to address issues of accountability and impunity, and at the same time achieve goals of healing and reconciliation. Truth and Reconciliation Commissions and traditional measures are methods that African states tend to favour because they seek to encourage reconciliation, reparation, truth and participation of victims. There is a possibility that incorporation of ATJ measures in the ICC structure can significantly contribute towards addressing the root causes of the conflict, resulting in transformation of states that have cases before the ICC as illustrated in Chapter four.

3.5 Conclusion

This chapter demonstrates that there are limitations in terms of what prosecutions can achieve during transition, consequently, it would be better for judicial and non-

The establishment of such a technique can be adopted on the basis of the Preamble to the Rome Statute which provides that, the ICC was established ‘for the sake of present and future generations.” This therefore implies that the ICC has a role to play in terms of the future conducts, ensuring such atrocities are never repeated. In order to realise a level of lasting peace and stability, it is necessary for the grassroots approaches to be used in combination with the ICC’s top-down measures.\footnote{Mark Findlay and Ralph Henham Transforming International Criminal Justice Retributive and Restorative Justice in the Trial Process (Willan Publishing 2005) 271-75, Jaya Ramji-Nogales ‘Designing Bespoke Transitional Justice a Pluralist Process Approach’ (2010) 32 (1) Michigan Journal of International Law 1, 61-62.}

The basis of this chapter is the principle of R2P, which demonstrates that states can no longer rely on the doctrine of sovereignty to prevent foreign inferences. Therefore, a state must be held accountable for the welfare of the people within its territory. This
implies that states are under obligation to adopt measures for the purpose of addressing past human rights violations. The fusion of judicial and non-judicial measures will result in the population being involved and educated on the importance of respect for human rights, the rule of law and the need to ensure accountability.

The chapter further indicates that there is an undisputable connection between the ICC and the principle of R2P, because both principles impose on states, the primary obligation to ensure that the population is protected and atrocities are prevented by way of undertaking prosecutions. The existence of this connection has led to the conclusion that the ICC has a role to play where states before the Court establish ATJ measures. This is on the basis that the merging of a non-judicial tool such as a TRC and the ICC would result in enhancing the ICC by making it more effective, and having an impact in states under intervention, thus ensuring that such atrocities are never repeated. Such an approach will further contribute towards strengthening judicial systems of African states.

The case study of TRCs and gacaca courts has highlighted that the ad hoc institutions can be instituted under difficult and different circumstances to address serious offences to international concern such as genocide. The recent proposition by the AU to extend jurisdiction of the African Court to enable it to have jurisdiction over

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criminal matters,441 is evidence of the tension between the AU and the ICC, and the need to ensure that the relationship is improved for the sake of strengthening the effectiveness of the ICC. The relationship between the two institutions is relevant to this study because the majority of state parties to the AU are also parties to the Rome Statute. This implies that the AU could play a role in ensuring that cooperation between the Court and African states is improved.

Sarkin442 argues quite rightly that the ICC has a role to play beyond prosecution443 and particularly the need for the ICC to expand its role into restorative justice. Such an approach accordingly, would lead to the ICC fulfilling its educative and informative prosecutorial functions.444 The ICC needs to ensure that it builds and maintains its legitimacy, thus being accepted and respected for its role with the affected communities.445 In order for the ICC to maintain its credibility as an international court, it is imperative for it to reform its operations.446 The next chapter

is a case study of Uganda, as an example of a state referral before the ICC. The domestic measures adopted by Uganda to ensure individuals suspected of committing human rights violations are held accountable are assessed. This is important to the thesis in attempting to identify the challenges faced by states that have cases before the ICC and therefore ascertaining the way forward.
CHAPTER FOUR
THE INTERNATIONAL CRIMINAL COURT AND ITS WORK IN AFRICA: THE CASE OF UGANDA

4.1 Introduction

This chapter considers the role that Uganda and its national courts have undertaken in addressing accountability for past human rights violations. The progress and effort made in seeking to establish accountability for international criminal offences is assessed. This is undertaken on the basis that Uganda has a primary responsibility for ensuring that individuals suspected of having committing the most serious offences are held accountable.1 So far in this thesis, chapter one has highlighted the general rule in

international law is that individuals suspected of having committed the most serious offences must be prosecuted in either national or international courts. Therefore states have a primary responsibility of prosecuting individuals suspected of having committed international criminal offences.

Ideally, individuals suspected of having committed the most serious offences in Uganda ought to be prosecuted before Ugandan national courts and as a last resort, before the ICC.\(^2\) This principle is further illustrated under chapters two and three of this thesis. In addition, chapter one has assessed whether there exists in international law, a responsibility to protect victims of the most serious offences of international concern and the need to punish the perpetrators.\(^3\) The chapter clarifies and verifies the basis of the principle of R2P that was first ascertained in the Martens clause.\(^4\) As addressed earlier, the principle of R2P exists during war and in time of peace\(^5\) and thus can be extended to the situation in Uganda. In relation to Uganda, it means in addition to Uganda’s duty to ensure that individuals suspected having committed the most serious offences are prosecuted Uganda also has a responsibility to protect victims of the most serious

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\(^5\) The Hague Convention 1907 Preamble.
offences to international concern. Thus, this chapter addresses the implications of Uganda’s duties and responsibilities under international law.

In applying the principles raised in previous chapters of this thesis, the following questions are considered; with reference to the principle of R2P (i) A consideration of the existence and implication of the principle of R2P in relation to Uganda, (ii) What does it mean in relation to the ICC’s role in Uganda? What is the scope of R2P at national and international level? What are the consequences of the existence of R2P upon Uganda in relation to victims? Therefore, this chapter ascertains Uganda’s R2P with reference to the offences committed on its territory and measures adopted to address the past human rights abuses. Consideration of issues raised is important, in establishing a methodology by which ATJ measures can be incorporated within the ICC framework, for the purpose of enhancing the effectiveness and legitimacy of the ICC generally and ensure the atrocities are prevented in the future.

This chapter focuses on Uganda because it was the first case to be referred to the ICC by way of a state referral.6 This situation is significant to this thesis because it constitutes an

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illustration of the application of the principle of complementarity in practice. Complementarity can be seen in this case as the need for states to ensure individuals that commit the most serious offences are prosecuted. In the absence of prosecutions in national courts, the ICC can intervene to prosecute the most serious perpetrators on the basis of the Rome Statute and the principle of R2P. However, as demonstrated in chapter three, international justice under the ICC unaccompanied, is inadequate in addressing challenges faced by states under transition, due to restrictions of prosecutions. Consequently, this chapter contends that there is need for Uganda to do more to address the past human rights violations as well as challenges that affect the country generally.

The situation in Uganda is a classic illustration of the tension between the need to establish individual criminal responsibility for the most serious offences in international law on the one hand, and the need to appreciate that in certain situations, it is necessary for other mechanisms, including TRCs or traditional approaches to be implemented in

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addition to trials, to address past human rights violations.\textsuperscript{9} Such a process would not only ensure that individuals are held accountable, but would also result in restoring the dignity of victims due to their involvement in the transitional process.\textsuperscript{10} The participation of individuals in the transitional process allows the population to be educated and enlightened on fundamental issues in relation to the importance of respecting the rule of law, human rights, and thus the communities are able to gain values required for ensuring that the atrocities are not repeated.\textsuperscript{11}

Hence, consideration of the situation in Uganda is intended to highlight the challenges faced by Uganda and to assess the impact of the ICC on Uganda. The chapter further considers the challenges of the ICC as it seeks to achieve its objectives of deterrence\textsuperscript{12} and retribution in Uganda. These issues are significant for the purpose of establishing a suitable methodology by which TRCs and traditional measures can best operate alongside the ICC’s prosecutions. Such a method would be beneficial in improving the effectiveness of the Court as illustrated in chapter three of this thesis. Therefore, it would


result in benefits, such as a culture of respect for human rights, accountability and restoration of lasting peace as well as addressing the needs of victims in states that have cases before the Court.

The situation in Uganda concerns the Lord’s Resistance Army (LRA), a rebel group led by Joseph Kony, that was referred by President Museveni formally on the 29 January 2004, in accordance with article 13(a), 14 of the Rome Statute. On 5 July 2004, the

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situation was allocated to the Pre Trial Chamber (PTC) II.\textsuperscript{16} A formal investigation was initiated on 29 July, in accordance with article 53(1) of the Rome Statute.\textsuperscript{17} Following the referral, the Pre-trial Chamber II determined that there was a reasonable basis to believe that between 2002 and 2004, the LRA, allegedly carried out an insurgency against the government of Uganda and the Ugandan army.\textsuperscript{18} Thus, in July 2005, the Pre-Trial Chamber II issued five arrest warrants against senior leaders of the LRA, Joseph Kony, Vincent Otti, Raska Luwiya, Okot Ondiambo and Dominic Ongwen\textsuperscript{19} for the commission of crimes against humanity and war crimes.\textsuperscript{20}

The focus of the ICC on the offences suspected to have been committed by the LRA only constitutes a victor’s justice\textsuperscript{21} because there is evidence suggesting that the Uganda Peoples Defence Force (UPDF) soldiers also committed atrocities.\textsuperscript{22} The concentration of
the ICC on the offences of the LRA only, further illustrates the confines of international justice, particularly its inability to prosecute all persons suspected of having committed the most serious offences. This is contrary to the fundamental principle of ensuring that all individuals suspected of committing atrocities are held accountable as addressed in chapter one of this thesis.

This thesis contends that when it comes to the most serious offences, it is necessary for TRCs or traditional tactics to be adopted in complementary to prosecutions in national courts and the ICC. Such a method will help address the limits of prosecutions by ensuring that as many individuals as possible are held accountable. For this reason, it is crucial for Uganda to adopt a TRC or traditional approaches in addition to prosecutions to enhance the work of the ICC and address the grievances of the victims and attempt by all means to address the root causes of the conflict.
Since the issuing of warrants of arrest, Lukwiya and Otti have since died. Among the remaining three only Dominic Ongwen is in the ICC custody, and first appeared before a single judge of the Pre-Trial Chamber II of the ICC, Judge Ekaterina Trendafilova on 26 January, 2015. Dominic Ongwen was only transferred to the ICC on 20 January, 2015, following an arrest warrant that was issued by the ICC for crimes of humanity and war crimes on 8 July, 2005. The remaining two are at large. This implies that in reality, not all individuals suspected of committing the most serious offences are held accountable.

As addressed in Chapter two of this thesis, one of the objectives of the ICC is to ensure deterrence; the idea is that prosecutions before the ICC are intended to have a deterrent effect. Thus, this study is intended to assess the impact that the ICC has had upon Uganda, and assess how the effectiveness of the ICC can be enhanced. Such findings will be useful not only with reference to Uganda, but to all states that have cases before the ICC.

This chapter assesses the work of the ICC in Uganda since the referral of the situation as well as the impact made. The chapter further scrutinises the role undertaken by the state.

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and the courts in Uganda since the referral of the situation to the ICC. In particular, the challenges faced by Uganda are highlighted with the view of ascertaining how TRCs and traditional measures can be integrated within the ICC structure. Such action is important in ensuring that the root causes of the conflict are addressed and the people are afforded an opportunity to participate in the transition process.

The chapter is divided into three sections: the first section addresses the background to the situation in Uganda, the second section focuses on the ICC and its work in Uganda, progress undertaken by the government of Uganda in ensuring measures are put in place in order to establish individual criminal responsibility for the offences, finally the third section considers the role of national courts in ensuring perpetrators of violence are held accountable. However, before discussing these issues, it is vital to consider the background in relation to the situation in Uganda that is addressed in the next section.

The background is important for the purposes of ensuring effective measures are adopted to prevent future violations once and for all. The history of the conflict indicates that mere trials will not be enough to address Uganda’s past misdeeds. The only way of ensuring the atrocities are prevented in future is for the ICC to operate as part of transitional justice. This will imply Uganda establishing TRCs and adopting traditional approaches in order to achieve truth, justice, restitution and institutional reforms.

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4.2 Background to the Situation in Uganda

This section considers the background in relation to the situation in Uganda. The background is considered for the sake of highlighting the fact that the conflict in Uganda has been going on for a long period of time, during which civilians in northern Uganda have been subjected to regular attacks. As Uganda seeks to deal with the past abuses, as a way of ensuring non-repetition of the conflict, it is necessary for ATJ, particularly


TRCs or traditional measures to be established and to operate alongside the ICC and national prosecutions in order to address the confines of prosecutions.29

As demonstrated under chapter two of this thesis, transitional justice means more than conducting trials. It implies that other than focusing on conducting prosecutions as part of addressing past abuses, forward-looking measures must also be incorporated.30 While prosecutions focus on the perpetrators, TRCs and traditional approaches can allow for victims’ grievances to be addressed. Transitional justice should entail truth, justice by means of prosecution, restitution and rehabilitation as part of reparations for violation of human rights. Such a process will allow for the root causes of the conflict to be addressed and guarantee that the atrocities are never repeated. Therefore, integration of transitional justice strategies within the ICC framework will entail the act of adopting other measures in addition to prosecution.

The background to the situation in Uganda is important to this thesis because it highlights details surrounding Uganda’s referral of the situation to the ICC. Particularly the nature of conflict and offences further highlight the restrictions of the ICC as demonstrated in chapters two and three of this thesis, which can only prosecute the most serious perpetrators and offences committed from the time Uganda become a party to the Rome

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Statute, which was on 12 June, 2002.\textsuperscript{31} Thus, the background to the situation constitutes evidence that human rights violations have occurred in Uganda prior to the year 2002. The history of Uganda is important because it helps to identify the reasons why Uganda has failed to protect its population by preventing atrocities over the decades. Considering the history, thus allows for lessons to be learnt in terms of what can work and that which has previously failed to address the conflicts. Most importantly, the history allows for making of recommendations intended to overcome the conflict and proceed to having peace and stability. These recommendations are provided throughout this chapter.

Uganda has a long political history that encompasses the regimes of Milton Obote (1962 – 1971), Idi Amin Dada (1971 – 1079)\textsuperscript{32} and Yoweri Museveni from 1986 to date.\textsuperscript{33} There are various reasons that have led to the conflicts in Uganda. These include the hatred and divisions between the northern and southwestern parts of Uganda that can be traced back to the time when Uganda was under the British colonial administration.\textsuperscript{34} For

\begin{itemize}
  \item[\textsuperscript{31}]{International Criminal Court ‘Uganda’ \url{http://www.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/uganda.aspx} (accessed on 17 March 2015).}
  \item[\textsuperscript{32}]{Joanna Quinn ‘Comparing Formal and Informal Mechanisms of Acknowledgment in Uganda’ in Henry F Carey and Stacey M Mitchell \textit{T}rials and Tribulations of International Prosecution} (Lexington Books 2013) 239.
\end{itemize}
instance, the people from the south had the opportunity to be employed as civil servants, while the Acholi people from the north were recruited into the armed forces. This resulted in two classes of people, the southern class of more developed and educated people than the northern people. There was an attempt to centralise power that led to the overthrow of Milton Obote through a military coup led by his army commander, Idi Amin on 25 January 1971.

Nevertheless, since Uganda gained its independence in 1962, the country has witnessed all sorts of brutality, including the killing of many thousands of people, tens of


thousands of people being injured, abused and many thousands others losing property, arbitrary arrests and detentions have been committed against persons, depending on ethnic affiliation and societal status.

These facts are significant to this thesis as it constitutes evidence that atrocities have been committed in Uganda over the years, and the fact that the majority of persons responsible have never been held accountable, neither have victims’ needs been addressed. Thus, conducting prosecutions by the ICC or national prosecutions unaccompanied, with other measures will not be sufficient to address the past abuses nor ensure that atrocities are never repeated. As demonstrated in chapters two and three of this thesis, transitional


justice has different pillars, including; reparations, truth, justice, reconciliation and guarantee of non-repetition.\textsuperscript{41}

The brief history of the situation in Uganda has indicated that there are deep-rooted reasons for the conflict in northern Uganda. Adopting TRCs and traditional methods in addition to the national and ICC prosecutions will thus contribute towards addressing the issues as will be demonstrated in this chapter. Such an approach will help tackle the many challenges faced by Uganda such as the absence of prosecution of individuals suspected of committing offences and the failure to address the needs of victims’ to a great extent as will be revealed in this chapter.

More recently since Uganda’s referral of the situation to the ICC,\textsuperscript{42} the government of Uganda has been considering means of addressing the past, particularly how to proceed with reparations.\textsuperscript{43} Sarkin offers recommendations in terms of the types of reparations available and how they ought to be given to victims.\textsuperscript{44} This thesis proceeds to recommend how the ICC and other transitional justice institutions, particularly TRCs and traditional approaches can be used to enhance the work of the ICC in Uganda. This is a


necessary step in the effort to transform Uganda into a state that respects the rule of law, democracy, and human rights.

As demonstrated in chapter three, TRCs have the potential of addressing the need of victims by providing a platform for victims to speak about their grievances. Furthermore, TRCs can provide recommendations on what can be done to address the needs of the victims. Thus TRCs are essential tools that can allow individual participations as well as achieving other benefits such as documentations of the truth that is fundamental as the publication of the reports signifies state’s acknowledgement of the violations. On the other hand, there are benefits of establishing traditional approaches, particularly in the situations such as Uganda where a number of people have been involved in violating human rights. As illustrated in chapter three of this thesis, traditional tactics such as the gacaca courts can allow individual accountability, as many people as possible can be held accountable contrary to trials that are limited in terms of the number of people that can be prosecuted. Traditional procedures further allow other purposes of international criminal law such as rehabilitation to be realised. Such an approach will thus provide a forum in Uganda whereby different pillars of transitional justice are occurring thus effectiveness in the operation of the ICC and Uganda will be transformed into an entity that respects the rule of law and human rights.

Apart from the conflict being a struggle between the government and the LRA, the struggle had also extended to the wider Acholi population that has been the victim of the violence, including among others, indiscriminate killings and the abduction of children
with the intention of forcing them to become fighters, auxiliaries and sex slaves.\textsuperscript{45} In order to address the human rights violations, several attempts to end Uganda’s conflict have been made without success,\textsuperscript{46} for instance, there has been a series of peace initiatives including the Goodwill Peace Mission,\textsuperscript{47} the Bigombe Peace Initiative\textsuperscript{48} November 1993 – February 1994, Kacoke Madit,\textsuperscript{49} the Community of Sant’Egidio peace initiative,\textsuperscript{50} Equatoria Civic Fund Peace Initiative\textsuperscript{51} (1997 -1998), Carter Centre Process\textsuperscript{52}


\textsuperscript{50}Nidal N Jurdi \textit{The International Criminal Court and National Courts A Contentious Relationship} (Ashgate 2011) 138.

(1998 - 2002), Acholi Religious Leaders Peace Initiative (ARLPI)\(^{53}\) and the Northern Uganda Peace Initiative among others.\(^ {54}\)

The government of Uganda has also conducted the Iron Fist operation I in 2002, and Operation II in 2004.\(^ {55}\) This is an operation that was instigated by the UPDF, to overthrow the LRA from its base in southern Sudan.\(^ {56}\) As a result of Operation Iron Fist, the LRA no longer has a permanent base on Southern Sudan territory from which it was able to launch attacks on the territory of Uganda.\(^ {57}\) Uganda has attempted to end the

\(^{52}\) The Carter Centre 14 February 2000, New Reports on Sudan-Uganda Peace Process Emory Report 52, 21, 14


conflict within its territory, though with less success. To ensure the atrocities are not repeated prosecutions need to be undertaken. In addition TRCs and traditional approaches must be adopted to address the needs of the victims.

So far there is no guarantee that the atrocities will not reoccur. For example, the government of Uganda has been criticised for its failure to protect and prevent human rights violations upon its population, because the operation is said to have doubled the number of people displaced\(^{58}\) and made the security situation even worse.\(^{59}\) This is more reason why the government of Uganda must take measures to ensure that in addition to securing justice by means of prosecutions in national courts and the ICC, the needs of the victims must also be addressed by way of reparations. The LRA carried on its campaign that included the abduction of people, mainly children, who were then forcibly recruited into the LRA that consists of 85 per cent children.\(^{60}\) This implies that the operation did not in any way result in an end to the serious atrocities committed by the LRA. This also indicates how individuals have continued to face impunity for the atrocities, leading to even more atrocities being committed. Hence the government of Uganda must set up a TRCs. Lessons can be drawn from successful TRCs as addressed in chapter three of this thesis. Uganda has also established in the past two TRCs: the Oder Commission (1974) and the Odoki commissions (1986). However both were unsuccessful for several reasons.


such as lack of transparency and credibility.\textsuperscript{61} However all of the above initiatives were unsuccessful in ending the conflict.

There has been no successful measures adopted that is intended to focus on the past violations as well as addressing the needs of the victims. Unless Uganda undertakes measures to address the needs of victims Uganda will continue failing in terms of its responsibility to protect, prevent and guarantee non-repetition of the offences. Thus it is essential for prosecutions and reparations to be undertaken for the purpose of addressing the root causes of the conflict. The section below considers the ideology and justifications of the LRA for committing offences since its establishment. These issues are important to the thesis because the situation in Uganda centres on the offences committed by the LRA addressed under section 4.3. They are addressed to highlight the severity and nature of the conflict that was led by the LRA in Uganda and to argue that the ICC prosecutions alone are inadequate in addressing the situation and ensure non-repetition of offences.

\textbf{4.2.1 The Lord’s Resistance Army}

This section addresses the Lord’s Resistance Army (LRA).\textsuperscript{62} As highlighted above, the LRA is one of the groups that was formed to fight against the government of President

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\textsuperscript{62} Kamari Maxine Clarke \textit{Fictions of Justice the International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa} (Cambridge Studies in Law and Society 2009) 124, The American Non-governmental Organization Coalition for the ICC a Program of the UN Association of the USA ‘The Current Investigation by the
Museveni when it came into power in January, 1986.\textsuperscript{63} The LRA has been active in the sub-region of Northern Uganda, the region that is locally referred as the Acholi or Acholiland.\textsuperscript{64} As illustrated above, for decades the Acholi people have been known for being a target of recruitment into armed forces because the area is less developed and the people tend to be less educated. This implies that the government of Uganda as part of its reparations policy must introduce measures intended to develop the area by way of infrastructure, schools, hospitals, universities as well as rehabilitation centres for the victims of the conflict.

As addressed in Chapter Two of this thesis, the ultimate goal of transitional justice is to make the local system sufficiently robust so as to help prevent the occurrence of future


are of atrocities.\textsuperscript{65} Uganda needs to ensure effective policies are established and implemented to transform the region in order to prevent future violations. The current reparations policies,\textsuperscript{66} under way in the country are a first step towards addressing the past and looking towards the future. According to the Agreement on Accountability and Reconciliation 2006 between the government of Uganda and the LRA, the right of reparation is recognised. Particularly, the agreement provides that the government of Uganda is obliged to pay reparations to victims.\textsuperscript{67}

The agreement further provides that the government must formulate reparations policy and the implementation plan.\textsuperscript{68} It is fundamental that this agreement is implemented in order for transitional justice to be useful and accelerate the transformation process in Uganda. The importance of this aspect of transitional justice cannot be under estimated, in fact this was reaffirmed by research conducted by the Office of the High Commissioner for Human Rights that indicated that victims consider reparations and truth as the most important processes required to compensate victims for the abuses that they had been subjected to.\textsuperscript{69} This evidence further indicates the need for the ICC to

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incorporate other transitional justice measures within the ICC framework. Relying on prosecutions only will not be sufficient in addressing the past violations.

The nature of atrocities that have been committed in the region, including many gross violations, demand that the ICC seeks ways to achieve a variety of goals beyond deterrence and retribution. For instance, the LRA has been accused of committing atrocities by killing and brutal treatment of the Acholi people who have been forced into displaced persons camps.\(^70\) Chapter Two of this thesis has clarified that the ICC is part of

transitional justice,\textsuperscript{71} because the Court in its operation seeks to confront past behaviour, particularly the abuse of civilians, woman and children, and to reform the norms of human conduct as a way of seeking to contribute to prevention of the future offences. Therefore, there is no doubt that the ICC acknowledges that the institution is intended to be perceived as one aimed to be part of transitional justice.

As illustrated in Chapters Two and Three prosecutions are one of the pillars of transitional justice. Such an approach would imply that the ICC should play a consultative role in advising Uganda and ensuring that TRCs and traditional approaches are adopted. As well as making sure that any recommendations put forward by these institutions are implemented. These institutions as addressed in chapter three of this thesis would be more effective in addressing the past human rights violations. One of the reasoning for this argument is that the involvement of the population in the transitional justice process will allow for education of the people on human rights, the rule of law as well as the importance of these factors in fostering peace and stability in Northern Uganda.

In reference to Uganda, chapter two of this thesis highlighted that there are international norms and standards entitled to victims of human rights violations. These include the rights to the following; justice,\textsuperscript{72} truth,\textsuperscript{73} reparation,\textsuperscript{74} the duty to prevent future violations


\textsuperscript{72} International Covenant on Civil and Political Rights Article 2, Convention against Torture and Other Cruel Inhuman Degrading Treatment or Punishment Articles 4, 5, 7 and 12, International Convention for the Protection of All Persons from Enforced Disappearance Articles 3, 6, 7 and 11.

\textsuperscript{73} International Covenant on Civil and Political Rights Article 2, International Convention for the Protection Of All Persons from Enforced Disappearance Article 24.
of human rights\textsuperscript{75} and any customary international law.\textsuperscript{76} The key transitional justice attributes have been further reaffirmed by several renown academics\textsuperscript{77} by concluding that the goals of transitional justice include justice, accountability, truth telling, reconciliation, reparation, prevention of future human rights abuse, conflict resolution and conflict prevention.\textsuperscript{78} These goals do not coincide necessarily on their interrelationship, prioritisation or the most suitable types of processes to institute.\textsuperscript{79}

As quite rightly pointed out by Sarkin,\textsuperscript{80} Uganda is a party to numerous treaties that integrate the victims’ rights to remedies and reparations for human rights abuses.\textsuperscript{81} This implies that in addition to securing justice for victims by means of prosecutions, the


\textsuperscript{76} The Universal Declaration of Human Rights 1948.


creation of a TRC can benefit the people in Uganda as TRCs if effectively operated can contribute towards achieving truth, reparations as well as accountability. The TRCs have the capacity to attain accountability, as they are tools that can be used to gather information of individuals suspected of violating human rights. Therefore Uganda is obliged to ensure that a TRC is established in order to achieve goals beyond deterrence and retribution.

Since the ICC is limited in terms of what it can do, this thesis argues that TRCs or traditional procedures must operate in tandem with the national and ICC prosecutions. Such a tactic will ensure that Uganda benefits more as part of the transitional justice process as opposed to merely relying on the ICC. As demonstrated in chapters two and three of this thesis, transitional justice has two main objects: (1) to respond to the suffering from past abuses; and (2) to prevent similar suffering from happening in the future. Therefore it is essential that TRCs and traditional methods must be established in tandem to national and ICC prosecutions for the purpose of realising the level of transformation that will prevent future atrocities in Uganda.

Consequently, throughout this thesis, actions adopted by Uganda to address the past and prevent future atrocities are assessed. Thereafter recommendations are made with regards to what the role of the ICC can be in addition to the current on-going trials. As revealed above, the matter concerning the situation in Northern and Western Uganda was referred

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to the ICC following Uganda’s failure to arrest and prosecute the perpetrators. In the self-referral, the ICC was tasked with locating and arresting the LRA leadership. Thus the ICC commenced its investigations in Northern Uganda in June 2004. A year later the Pre-Trial Chamber I of the ICC issued arrest warrants for five top leaders of the LRA as addressed in the introduction 4.1.

Thus the next section addresses the referral of the situation to the ICC and its implications. Particularly, this study seeks to ascertain the extent to which the ICC responds to the suffering of victims from past abuses (that is by means of prosecution and reparations of victims at the end of the case) and to assess the extent to which the ICC prevents similar suffering from happening in future. Such an assessment will be conducted by reference to the law underlining the ICC which is addressed under section 2.4 of the chapter.

4.3 The referral of the Situation to the ICC and its implications

This section considers the referral of the situation in Uganda to the ICC and its implications. These issues are considered as a way of providing a background for the two key concerns that are addressed in this chapter: the manner that Uganda and the ICC have responded to the atrocities committed in Uganda as part of the principle of R2P and obligations under the Rome Statute. As mentioned above, on 16 December 2003, Uganda

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referred the situation concerning the LRA,\textsuperscript{87} to the ICC-OTP in accordance with articles 13(a) and 14 of the Rome Statute.\textsuperscript{88} Paragraph 40 of the Ugandan referral provides:

\textit{Pursuant to article 14(1) of ICC Statute, Uganda requested the Prosecutor to investigate the situation concerning the LRA for the purpose of determining whether one or more specific persons should be charged with the commission of crimes against humanity for acts committed on or after 1st of July 2002.}

Therefore, the Ugandan government referred to the ICC the situation concerning the LRA only, the referral did not mention the possible commission of crimes by the UPDF.\textsuperscript{89} It would have been better for Uganda to refer the situation in Uganda generally as opposed to isolating a specific group. The reason for this is because as addressed in chapter one of this thesis, all individuals that commit the most serious offences are supposed to be held accountable regardless of their status or affiliation.

The fact that Uganda’s referral was restricted to the situation concerning the LRA constitutes selective justice,\textsuperscript{90} which is an injustice itself. In order to ensure the culture of

\textsuperscript{87} Uganda Referral Unofficial Copy International Criminal Court Document Referral paragraph 40 Search for


\textsuperscript{89} International Criminal Court Press Release ‘President of Uganda Refers Situation Concerning the Lord’s Resistance Army to the International Criminal Court' ICC 20040129-44-En 29 February 2004.

\textsuperscript{90} Focus Group on Access to Justice for Conflict- Related Crimes Gulu 18 September 2008, Participation Observation of the Reflection Workshop on the Juba Peace Talks for Religious and Cultural Leaders 10 – 12
impunity is addressed, the Ugandan government would have referred the situation in Uganda generally as opposed to limiting the investigations and possible prosecution to the LRA. This is important to prevent future violations by way of deterrence as illustrated under chapter two of this thesis. The ICC ought to have investigated the situation in Uganda generally. It is for this reason that the ICC interpreted the scope of the referral consistently with the principles of the Rome Statute and consequently went on to analyse crimes within the situation of northern Uganda regardless of whom the offences were committed by. It was necessary in reaffirming the notion that all individuals suspected of having committed the most serious offences of international concern must be held accountable by means of prosecution in national or international courts.

However, despite the existence of evidence suggesting that both the LRA and the UPDF had committed serious human rights violations, the ICC has never issued warrants of arrest against the UPDF. Instead, the Prosecutor has justified himself by arguing that the decision was based on the gravity of offences that the LRA had committed. As reiterated in chapter three, it is not realistic to expect the ICC to prosecute all individuals suspected of having committed serious human rights violations. The

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92 Letter from the Chief Prosecutor to the President of the Court Uganda 4, Sarah MH Nouwen Complementarity in the Line of Fire (Cambridge University Press 2013) 115.
previous chapters of this thesis illustrate that the ICC’s limited mandate in terms of the number of individuals that can be prosecuted, in fact it will only prosecute the most serious perpetrators. It is the responsibility of states where the atrocities are committed to undertake the duty to prosecute as set out under the Rome Statute and the principle of R2P as addressed in chapter three. For this reason the ICC argued:

Some people say that the only way to retain our impartiality is to prosecute both the LRA and the UPDF. However, I think that impartiality means that we apply the same criteria equally to all sides. A major criterion is gravity. There is no comparison of gravity between the crimes committed by the Ugandan army and by the LRA, the crimes committed by the LRA are much more grave than those committed by the Ugandan army.95

Various reasons have been raised to explain the rational for Uganda’s self-referral.96 Among them reasons is that Uganda’s self-referral was not because Uganda was enthusiastic about the need to ensure individuals responsible for the violations were

captured and prosecuted, but rather the self-referral became a strategic tool to help the Ugandan government have more bargaining power in its negotiation strategy with the LRA.\textsuperscript{97} The justification of this argument is that following the referral of the situation to the ICC, Uganda proceeded to adopt legislation intended to pardon the very individuals that had to be investigated,\textsuperscript{98} possibilities of adopting traditional justice mechanisms and national trials.\textsuperscript{99}

Prosecution of suspected individuals would result in victims obtaining justice and as well as a possibility of them receiving reparations,\textsuperscript{100} to encourage cooperation with Sudan, where the LRA operated from, the hope of the Government of Uganda was that targeting the LRA leaders would lead to lower cadres of the LRA to surrender.\textsuperscript{101} The existence of the Amnesty laws\textsuperscript{102} implied a lack of seriousness and doubts regarding the capacity of Uganda to undertake prosecution as will be illustrated below in section 4.5 of this thesis.

The adoption of a wide range of transitional justice strategies is necessary for addressing the most serious offences. This is because offences of genocide, war crimes and crimes against humanity result in having a large number of perpetrators. As illustrated in chapter three with reference to the situation in Rwanda, a wide range of transitional justice

\textsuperscript{100} Kasaija Phillip Apuuli ‘The International Criminal Court’s Possible Deferral of the Lord Resistance Army Case to Uganda’ (2008) 6 \textit{Journal of International Criminal Justice} 803.
\textsuperscript{102} The Amnesty Act 2000.
strategies allows for as many persons as possible to be held accountable. In addition, TRCs and traditional measures can complement prosecutions by addressing the limitation of prosecution. If operated and monitored effectively, they have the capacity to achieve the objectives of reconciliation, reparations, truth and acknowledgement of the violations by the state. As a result, the people are exposed and introduced to human rights and the rule of law.

This study proposes that it should be mandatory for TRCs and traditional justice approaches to be adopted in states that have cases before the ICC. The ICC can have a role to play in ensuring that states and in this case Uganda undertakes its duties of protecting and preventing future violations within the premises of its territorial jurisdiction. Thus on 29 July 2004, the Prosecutor made a determination that there was a reasonable basis to initiate an investigation on the basis of the information that was available in relation to the referral. As addressed above in Uganda’s self-referral, the ICC was asked to locate and arrest the LRA leaders. The ICC commenced its investigations in Northern Uganda in June 2004. A year later, the Pre-Trial Chamber I of the ICC issued the arrest warrants for five top leaders of the LRA. The arrest warrants were unsealed in October 2005, at the same time when the LRA relocated from its base in

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Southern Sudan to Garamba National Park in the Democratic Republic of Congo (DRC).  

There is a need for states to seek to move away from human wrongs to human rights by being more willing to cooperate and not allow perpetrators of fundamental human rights to operate within their territories. This is because as pointed out above, only one of the perpetrators charged by the ICC is facing trial while the rest still remain at large. Integrating ATJ strategies such as TRCs and traditional approaches within the ICC framework will be one way of encouraging states to ensure individuals that commit human rights violations are held accountable. This is because such an approach is broad and allows states to explore a number of options in terms of how it proceeds to address its past abuses and prevent future violations.

In making this determination the ICC made reference to article 17 of the Rome Statute that addresses the principle of complementarity. Article 17 requires a state referring the situation to the ICC to be unwilling to prosecute. However, it has been argued that despite the ICC’s actions, at the time of Uganda’s self-referral, Uganda had an effective and functioning national judicial system that was far from being described as a total collapse or unavailability. To the contrary, Uganda has shown willingness to prosecute the UPDF soldiers for committing the most serious crimes of international concern.


President Museveni stated the willingness of Uganda to prosecute any crimes committed by the UPDF by arguing that if cases involving the Ugandan military personnel were brought to their attention, Uganda would prosecute them.\textsuperscript{108} However, none of the UPDF forces have been prosecuted.

The statement suggests selective willingness,\textsuperscript{109} because as much as Uganda was willing to prosecute crimes committed by the UPDF, and there were also crimes that were committed by the LRA in the same region. Trials ought to have been conducted, on the basis of the necessity to hold all individuals accountable for the atrocities as illustrated in chapters one and two. However, the ICC determined the existence of ‘willingness’ by considering the entire situation in northern Uganda, thus incorporating crimes committed by both the LRA and the UPDF. The ICC prosecutor was obliged to investigate all crimes in northern Uganda.\textsuperscript{110} In assessing ‘unwillingness’ under article 17, the OTP argued that:

\begin{quote}
[A] State is unwilling if the national decision has been made and proceedings are or were being undertaken for the purpose of shielding the person concerned from criminal responsibility; there has been an unjustified delay which is inconsistent with an intent to bring the person concerned to justice; or the proceedings were not or are not being conducted independently or impartially.\textsuperscript{111}
\end{quote}

\textsuperscript{109} Nidal Nabil Jurdi The International Criminal Court and National Courts A Contentions Relationship (Ashgate 2011) 169.
Applying the statement to the situation in Uganda, at the time when the situation was referred to the ICC, there was no indication that Uganda was prosecuting the top leadership of LRA or UPDF or the most responsible persons for war crimes or crimes against humanity. However, there was evidence suggesting that the Ugandan authorities had undertaken investigations in relation to lower level suspects of the LRA on the basis of the treason and anti-terrorism legislation. Uganda’s self-referral was an indication that Uganda had the good intentions of pursuing the LRA to ensure that they would be held accountable for offences committed. The absence of proceedings against the top LRA leadership or UPDF does not necessarily imply that the Ugandan authorities were seeking to shield the perpetrators from prosecution. Thus Jurdi concludes that the Ugandan referral was not admissible on the ground of "unwillingness" but on other grounds.

In reference to ‘inability’, article 17(3) provides three criteria that the ICC can take into account in determining whether the national system is able or not able to prosecute. A national’s judicial system is deemed unable to prosecute if firstly, there is a total or substantial collapse of national judicial system; Secondly, the absence of a national judicial system and thirdly, the state’s inability to obtain the accused or the necessary evidence and testimony or is otherwise unable to carry out its proceedings. The reasoning

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for admitting a particular situation before the ICC is significant because it helps highlight the shortcomings of the legal system in question.

In relation to the thesis, any methodology adopted for the purpose of assessing how transitional justice strategies is incorporated within the ICC should be able to address the weakness of the concerned state. Such an approach will enable the ICC to move beyond deterrence and retribution and contribute towards transforming the concerned state into a democracy that respects the rule of law and human rights. In other words, the involvement of the ICC in a particular state such as Uganda must not be limited to prosecution of top leaders and reparations of a few victims.

However, the ICC should be in the forefront of ensuring that changes are introduced in states before the ICC intended to bring stability and preventing future atrocities. As illustrated in chapter three of this thesis, one of the three pillars of R2P as provided under the draft Outcome Document of the 2005 United Nations World Summit\(^\text{116}\) is that the international community has a responsibility to encourage and assist states in fulfilling its responsibility of protecting its population from genocide, war crimes and crimes against humanity. The ICC can, where necessary, make a recommendation to the UN Security Council\(^\text{117}\) to urge states to introduce and implement policies in place intended to prevent


future atrocities. The role of the ICC should not be restricted to investigations and prosecution, but can extend to the Court exercising an advisory capacity.

Applying the criteria to Uganda, the Ugandan judicial system is neither in substantial nor total collapse. Uganda has had a functional, efficient judicial system regardless of the conflict in its northern territory.\textsuperscript{118} The ability of the Uganda judicial system is further affirmed in paragraphs 24 and 25 of the referral, which provides that the Ugandan Courts have the capacity to grant the captured LRA leaders a fair and impartial trial.\textsuperscript{119} Therefore, the question that should be posed then is; why is the situation in Northern Uganda before the ICC? This thesis proposes that for states that have cases before the ICC, the Court should be able to ensure the states responsible take measures to see to it that the area where the conflict occurred is improved for the purpose of prevention of future atrocities.

For instance, there is need to ensure there is infrastructure in place: courts, schools, hospitals, rehabilitation centres and higher education institutions. The institutions established must be appropriate for the people based in the area. Developing these areas will empower the population and improve their lifestyle as part of the reparations package. The ICC should have a responsibility to ensure that Uganda is transformed into an entity where the rule of law and individual rights are respected. The fusion of alternative transitional justice strategies is about going beyond trials and encouraging


transformation in the states involved. Such an approach will reduce the possibility of similar offences being repeated.

Equally with regards to the term "unavailability" that is not defined in the Rome Statute, it has been argued that a judicial system is unavailable if it is simply non-existent.\(^\text{120}\) However, contrary to the case of the DRC, where there was a total absence of the judicial system in Ituri at the time of the referral as it had been destroyed,\(^\text{121}\) this was not the case for Uganda. According to the Informal Expert Paper on the Principle of Complementarity in Practice\(^\text{122}\) the following factors are to be taken into account in considering the inability test (total or substantial collapse or unavailability of national judicial system);

\begin{itemize}
\item Lack of necessary personnel, judges, investigators, and prosecutors;
\item Lack of judicial infrastructure;
\item Lack of substantive or procedural penal legislation rendering system "unavailable";
\item Lack of access rendering system "unavailable";
\item Obstruction by uncontrolled elements rendering system "unavailable" and amnesties, immunities rendering system "unavailable"\(^\text{123}\)
\end{itemize}

Analysing the factors in relation to the situation in Uganda, it is easy to conclude that the Ugandan judicial system does not lack the necessary personnel, judges, investigators, or


prosecutors. This is because the Ugandan system has a well-structured judicial infrastructure. However the issue should really be about focusing on the area where the situation is based, as opposed to assessing Uganda as a state in general. As pointed out in section 4.2 above that addresses the background to Uganda, it can be concluded that Northern Uganda is predominately underdeveloped. Access to justice is not available to all people that reside in the north due to lack of funding, limited facilities and unavailability of lawyers. Therefore there was no guarantee that fair trials could be conducted there.

The ICC operating as part of transitional justice would imply the ICC undertaking an advisory role and ensuring that the government of Uganda address the judicial challenges faced in the Northern Uganda. Having creditable infrastructure, facilities and the necessary personnel in place can contribute towards preventing future atrocities. Simply having Court buildings can operate as a deterrent factor for fear of the consequence of punishment that may follow should any person act contrary to the rule of law. Such an approach would not only be seeking to address the past by way of prosecutions, but also the future by way of taking measures to protect the population and prevent the atrocities. This is an obligation that is vested with the states, however, the ICC can play a role of encouraging Uganda to address the root causes of the conflicts.

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Hence, the situation in Uganda was admissible before the ICC on the basis of the unavailability of the Ugandan legal system, particularly the inability to arrest the accused since the rebels were based in Southern Sudan and this proved difficult for Uganda to arrest them. Consequently, the justification for Uganda's referral is its inability to arrest the suspects, as opposed to the inability or unwillingness to investigate and prosecute. This constitutes a wide interpretation of the term unavailable. It implies that under the complementarity principle, the possibility of the ICC intervening, proceeding to investigate and undertake prosecutions in a particular case is high. In relation to this study, it implies that there is a high probability that the ICC will always have the capacity to intervene in African states even when the concerned states such as Uganda, are deemed to have competent, effective and operational judicial systems. 

So there is need for states under transition to adopt measures intended to prevent atrocities such as judicial structures, infrastructure, the development of most areas of the state, introduction and encouragement of investment in the area so that people will be able to secure a form of employment and educational institutions. All these factors can contribute towards preventing future atrocities. The referral of the situation to the ICC has further indicated that a state self-referral does not necessary guarantee cooperation or

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the end of impunity as required under the Rome Statute. The lack of cooperation and commitment to prosecute has been manifested following Uganda’s request to have the warrant of arrest withdrawn. This has resulted in three underlying issues that were raised as a result of the referral, that is the debate between peace versus justice, selective justice under international criminal justice and the debate of international versus local justice.

These matters are addressed further under sections 4.4 and 4.5 of this chapter. They are significant to this thesis because they illustrate Uganda’s response to addressing past human rights violation as part of its primary duty. However before considering the issues, the work of the ICC since the referral of the situation is considered in the next section. This is imperative to this thesis when ascertaining how TRCs and traditional approaches can be assimilated into the ICC structure. Throughout the analysis below recommendations of how the ICC can enhance its work, involvement and effectiveness in Uganda are made.

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4.4 The International Criminal Court and Its work in Uganda

This section considers the work of the ICC in Uganda following the state referral. This section is vital to this research because it illustrates how the ICC Rome Statute and the principle of R2P have been applied to the situation in Uganda. The ICC began investigations in Uganda in 2004. On 14 October, 2005, then Chief Prosecutor Luis Moreno Ocampo unsealed the arrest warrants for the five leaders of the LRA, which had been issued and sealed by the Pre-Trial Chamber II of the ICC on 8 July, 2005,\(^{134}\) that was constituted by Judge Tuiloma Neroni Slade (Presiding Judge), Judge Mauro Politi and Judge Fatoumata Dembele Diarra. The warrants were issued on the basis that ‘there [were] reasonable grounds to believe [that the five LRA leaders mentioned under section 4.2.1 above, had ordered the commission of crimes within the jurisdiction of the Court.’\(^{135}\)

By January 2004, an agreement had been concluded between the Office of Prosecutor of the ICC and the government of Uganda for the ICC prosecutor to initiate investigations on the activities of the LRA.\(^{136}\) This implies that Uganda was undertaking its role of cooperation with the ICC to enable the Court to proceed with its investigation and subsequently prosecution. The success of the ICC in Uganda will dependent on Uganda’s

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\(^{136}\) The Rome Statute 1998 Articles 13(a) and 14(1).
ability to cooperate with the ICC. In reference to this thesis, the ICC operating as part of transitional justice can only be successfully achieved if Uganda is committed and willing to protecting its population and preventing future atrocities.

On 9 July 2005, the ICC Pre-Trial Chamber II (the Chamber) issued arrest warrants of five senior leaders of the LRA (Joseph Kony, Vincent Otti, Okot Odhiambo, Raska LukWiya and Dominic Ongwen) who were charged for crimes against humanity and war crimes. The arrest warrants of the five senior leaders of the LRA were unsealed on 13 October 2005, by the ICC Pre-Trial Chamber II and the Requests for Arrest and Surrender. The issuing of the arrest warrants was a vital act for the ICC as this was the first case that the ICC was handling since the adoption of the Rome Statute on 17 July 1998.

137 International Criminal Court ‘Situation in Uganda Warrant of Arrest for Okot Odhiambo’ Pre-Trial Chamber II ICC-02/04-01/05- 56 13 – 10 2005 1/16 8 July 2005.
140 The Rome Statute 1998 Article 7(1)).
141 The Rome Statute 1998 Article 8 (2) (c)).
The issuing of the warrants of arrest, however, portrayed the ICC as a weak institution that lacked powers to execute its warrants of arrest as demonstrated in chapter two. The ICC’s success depends on collaboration with the member states. On this basis the ICC can only function effectively with the help of states. Therefore Uganda is obliged to work together with the Court. Cooperation can further contribute towards deterrence of the most serious offences, thus it is necessary that states oblige.

The five defendants were all accused of allegedly committing war crimes and crimes against humanity, ranging from murder to sexual enslavement. More recently, the ICC has disclosed that new charges have been introduced against Dominic Ongwen following revelation of the atrocities committed in Pajule. The nature of charges listed in the warrant of arrests of the five defendants is essential to the research in order to compare the nature of counts subjected to each defendant to determine the seriousness of the offender to the ICC. It also helps to determine the nature of persons that ought to be

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prosecuted by the ICC. The details of the charges are further intended to encourage Uganda to prosecute less serious perpetrators as part of its initiative of addressing the human rights abuses. Transitional justice strategies that Uganda can adopt include prosecutions in national courts, traditional approaches and TRCs. The nature of strategies that Uganda has adopted so far is addressed further under section 4.5 below.

Eleven years later, only Dominic Ongwen has been arrested and is currently in custody at the ICC awaiting trial. Kony and Odhiambo still remain at large. In order to promote human rights and deter the most serious offences to international concern, Uganda and other states must be willing and show commitment towards protecting the population and preventing future atrocities by apprehending the suspects. There is need for states that have cases before the ICC to do more to address the past human rights violations. This includes the creation of TRCs and adoption of traditional techniques.

As demonstrated in chapter three, these transitional justice strategies, if effectively employed, can contribute towards addressing the confines of prosecution by realising objectives such as reparations, truth and reconciliation. The next section considers measures that have been undertaken by the Ugandan government and Courts to address the past human rights violations, and to prevent future violations. The measures adopted by Uganda are significant to this study as they are intended to imply Uganda’s commitment towards ensuring that the past violations are addressed by way of prosecutions, adoption of TRCs and traditional approaches, reparations, institutional
reforms or memorisation. Uganda’s procedures adopted in addressing the past human
ingiven are fundamental in ensuring that the atrocities end completely.

4.5 The Role of Uganda in addressing Human Rights Violations in Uganda

This section considers the role of the government of Uganda in addressing past human
rights violations following the referral of the situation to the ICC. The response of the
government of Uganda in addressing human rights abuses is critical because national
courts in states where atrocities are committed can only successfully undertake their role
to prosecute where there are relevant factors in place; these include courts, legislation,
procedures and personnel such as prosecutors. This implies that in order for the Ugandan
government to successfully address the past human rights abuses it is imperative for
Uganda that the above factors are available in Northern Uganda. Thus, this section
critically analyses the role undertaken by the government of Uganda in addressing the
past human rights abuses.

As addressed in chapter three of the thesis, comprehensive transitional justice must
address the following elements: justice, truth and reparation. On this basis there are
various initiatives undertaken by the government of Uganda since the referral of the
situation to the ICC including the renewed peace negotiation\textsuperscript{146} such as the Cessation of
Hostilities Agreement (CHA) in August 2006,\textsuperscript{147} and the Juba Peace Agreements (2006-

\textsuperscript{146} Kasaija Phillip Apuuli ‘The International Criminal Court Arrest Warrants for the Lord Resistance Army and
Peace Prospects for Northern Uganda’ (2006) 49 Journal of International Criminal Justice 183, the Agreement on
Accountability and Reconciliation 29 June 2007
\texttt{http://www.iccnow.org/documents/Annexure\_to\_agreement\_on\_Accountability\_signed\_today.pdf} (accessed on 15
March 2015), Ronald Raymond Atkinson \textit{The Roots of Ethnicity Origins of the Acholi of Uganda} (Fountain
Publishers 2010) 308, Kasaija Phillip Apuuli ‘The International Criminal Court’s Possible Deferral of the Lord

\textsuperscript{147} Kasaija Phillip Apuuli ‘The International Criminal Court’s Possible Deferral of the Lord Resistance Army Case
Legislation such as the Amnesty Act 2000 and the International Criminal Court Act 2010 have been adopted. In the process the challenges that Uganda has faced in seeking to ensure justice, truth and reparations secured in northern Uganda are assessed. Examining the various pieces of legislation is vital in assessing what improvements can be made in ending atrocities. The concerns raised are reflected in view of considering the role that the ICC has in the transition process in addition to the current prosecution.

The overall objective is to set out a clear methodology of how the ICC can be used as part of transitional justice in Uganda. Such an approach is intended to enhance the effectiveness of the ICC as well as transform Uganda into a state where human rights and the rule of law are respected. This section focuses on aspects of the Juba Peace agreements and its consequences, particularly the existence of Amnesty laws and traditional approaches. The section below addresses the Juba Peace Agreement, as this is an important agreement that contains details of how Uganda seeks to address its failure to protect its population against the past abuses and how it intends to prevent future atrocities. These issues are considered in order to draw a methodology by which transitional justice strategies other than prosecutions will be incorporated into the ICC framework.

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4.5.1 The Juba Peace Agreements (2006-2008)

The Juba Peace Agreements (2006-2008),\(^{150}\) were between the Ugandan government and the LRA representatives. They resulted in five signed protocols in 21 months that were intended to end the conflict.\(^{151}\) By implication the ICC’s act of issuing warrants of arrest against the LRA top leaders did have an effect on forcing the LRA to engage in peace negotiation for the first time in over two decades,\(^{152}\) despite not signing the final peace accord.\(^{153}\) As part of the Ugandan government’s effort to reach a peace settlement, the Ugandan government and the LRA reached an agreement on justice and accountability in June 2006.\(^{154}\) The agreement was intended to bring about lasting peace with justice by seeking to secure a balance between the need for peace in Uganda and to prevent impunity as provided for under the Rome Statute.\(^{155}\)

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The inferences of the agreement is that Uganda took measures to address the horrendous atrocities committed against its population and considered the measures that needs to be adopted to make sure the violations are not repeated. Among the other agreements signed were the following: an agreement on Accountability and Reconciliation 2007\textsuperscript{156} and the Annexure to the Agreement on Accountability and Reconciliation 2008.\textsuperscript{157} The agreements provided for three transitional justice approaches: firstly, the establishment of a War Crimes Division of Uganda’s High Court in 2008.\textsuperscript{158} Secondly, the adoption of the traditional approach the \textit{mato oput} as a major means of ensuring accountability and thirdly the Ugandan government also enacted the International Criminal Court (ICC) Act in 2010 that incorporated the ICC crimes and modes of liability into national law.\textsuperscript{159} The three approaches are considered in detail below.

In 2011 the International Crimes Division (ICD), a division of the Ugandan High Court of Kampala was established. The agreement was very comprehensive and it addressed a wide range of issues. The establishment of the ICD was intended to send a signal that Uganda was taking measures towards prosecuting the atrocities committed within its territory. However the rational of establishing the court can be questioned. It would have been more sensible for the court to be established in Northern Uganda, as addressed in chapters one and two of this thesis. The best place to conduct trials is the place where the

\begin{flushleft}
\textsuperscript{156} Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and Lord’s Resistance Army/Movement Juba Sudan \hspace{1cm} \\
\textsuperscript{157} Annexure to the Agreement on Accountability and Reconciliation \hspace{1cm} \\
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atrocities have been committed. This is because as illustrated in preceding chapters of this thesis, the people in the areas most affected are able to follow the proceedings and the trials can constitute a deterrent of similar offences in the area. Consequently, Uganda’s decision to establish the international crimes division in Kampala was perceived to be merely a tool intended to implement the complementarity principle in an attempt to bid and prevent action by the ICC. 160

However, it has been argued that the agreement was intended to challenge the admissibility of the situation in Uganda to the ICC, by claiming that Uganda had the relevant institutions and mechanisms in place to prosecute individuals responsible after having referred the situation to the ICC. 161 This signifies yet again reluctance on the part of Uganda to ensure that persons responsible are held accountable. Uganda’s lack of enthusiasm in making sure trials of suspected individuals were conducted is revealed in its willingness to acquire peace at the cost of justice, evident on the nature of agreements concluded. In order for the root causes of the atrocities to be addressed and to prevent future violations, it is vital for prosecutions to be conducted at the ICC and in Ugandan national courts. Trials are a fundamental element of a transitional justice process.


The Annexure Agreement provided a legal framework that would allow the indicted LRA leaders to be tried. Particularly, it states that ‘a Special Division of the High Court of Uganda shall be established to try individuals who are alleged to have committed serious crimes during the conflict’ (Section 7). The Division further provided for a Registry that among others was intended to ‘make arrangements to facilitate the protection and participation of witnesses, victims, women and children’ (Section 8). It further provided for the creation of a unit to undertake investigations and prosecutions in support of trials and other formal proceedings as set out by the 29 June 2000, Agreement (section 10). All the above initiatives are good for Uganda, although future violations can only be prevented if the agreement is implemented.

The Ugandan government also enacted the International Criminal Court (ICC) Act in 2010 that incorporated the ICC crimes and modes of liability into national law. This means that the relevant legislation required to prosecute individuals that violate the most serious offences of international concern is available in Uganda. The existence of the law implies that preferably perpetrators must be prosecuted in Ugandan national courts. Such an action would constitute a deterrent factor at preventing future atrocities. The enactment of the ICC Act by Uganda further indicates willingness to prosecute perpetrators under the Ugandan legal framework and condemning the atrocities. It is yet to be seen in terms of how Uganda goes about to implement the law.

162 The Annexure Agreement Sections 13a, 14, the Amnesty Act 2000.
implementation of the law is also a key factor (justice) in ensuring that future prevention of such atrocities. As much as Uganda is to be applauded for domesticating the Rome Statute, more still needs to be done by Uganda in ensuring that individuals are held accountable for the atrocities and in order to demonstrate Uganda’s seriousness and commitment towards the fight against impunity. Such an approach can reduce the possibilities of future violations.

The Annexure to the Agreement on Accountability and Reconciliation 2008\textsuperscript{165} was more detailed and intended to provide a framework for implementation of the principles set out in the 2007 agreement. Particularly, the agreement provided for the establishment of a special division of the High Court of Uganda that was intended to prosecute individuals suspected of having committed the most serious offences.\textsuperscript{166} However as highlighted above, there is also need to improve the infrastructure in northern Uganda. This will call for the creations of courts and deployment of personnel, such as prosecutors and lawyers. Uganda still needs to do more by improving the overall role of the judicial system in northern Uganda as opposed to focusing on Kampala.

This implies that despite the Annexure Agreement containing a provision that ‘there is national consensus in Uganda that adequate mechanisms existed or can be expeditiously established to try the offences committed during the conflict’ (Section 3). In reality this

\textsuperscript{165} Annexure to the Agreement on Accountability and Reconciliation \url{http://www.iccnow.org/documents/Annexure_to_agreement_on_Accountability_signed_today.pdf} (accessed on 9 July 2015).

\textsuperscript{166} Annexure to the Agreement on Accountability and Reconciliation \url{http://www.iccnow.org/documents/Annexure_to_agreement_on_Accountability_signed_today.pdf} (accessed on 9 July 2015).
needs to be implemented in order to prevent future violations. The ICC can play an advisory role towards ensuring the implementation by encouraging and supporting Uganda in its implementation of the agreement and policies. The ideal situation ought to be that once the ICC intervenes in a particular state as the case is with Uganda, the goal of the ICC ought to extend to ensuring Uganda is transformed into a law-abiding state. There is need to have external factors such as the ICC to oversee the measures adopted by states once the case is before the Court. As addressed in chapter three, the R2P extend to international institutions such as the ICC, AU and the UN.

Despite having this agreement, the most serious perpetrators in the situation in relation to Uganda still remain at large.\(^\text{167}\) So far no individual has been convicted for the most serious offences in Uganda national courts. Institutions such as the UN and the AU can play a vital role to ensure that Uganda implements the agreements. Implementation will help bring stability and progress in terms of development in northern Uganda. However the document failed to address some fundamental issues such as how the Ugandan government was going to implement the agreement, the jurisdiction of the special Court division of the High Court and the categories of offences that were supposed to be addressed by the traditional approaches.\(^\text{168}\) The absence of fundamental details with regards to the manner in which the prosecutions would be conducted, the existence of a concrete procedure and details of the gravity of the offences that would be addressed among the different mechanisms available under the Ugandan jurisdiction are still a


challenge. For instance specific details of the nature of the offences that would be tried by the national courts and traditional systems, still remains unaddressed.

The existence of loopholes could only indicate Uganda’s lack of commitment in proceeding to prosecute the top leadership of the LRA and persons responsible for the violations generally. Uganda’s actions since the referral of the situation and the issuing of the arrest warrants by the ICC clearly align with the existence of the amnesty laws\textsuperscript{169} that signify Uganda’s willingness to offer amnesty to those that are willing to surrender to the Ugandan authority and those that had not applied for amnesty would be subjected to formal justice.\textsuperscript{170} This clearly is contrary to international law that imposes an obligation on states to prosecute perpetrators of the most serious offences of international concern as addressed in chapters one and two of this thesis.

The failure of Uganda to address critical issues resulted in the ICC seeking clarification on the implication of the Annexure Agreement on the arrest warrants. The Court thus demanded from the Government of Uganda the following: detailed information on the implications of the Annexure [Agreement] on the execution of the warrants,\textsuperscript{171} an explanation on the impact of the Special Division of the High Court and the recourse to traditional justice mechanisms on the execution of the warrants against Kony and his


\textsuperscript{170} William W Burke – White and Scott Kaplan ‘Shaping the Contours of Domestic Justice the International Criminal Court and an Admissibility Challenge in the Ugandan Situation’ in Carsten Stahn and Goran Sluiter (eds) \textit{The Emerging Practice of the International Criminal Court} (Martinus Nijhoff Publishers 2009) 104.

\textsuperscript{171} Kasaija Phillip Apuuli ‘The International Criminal Court’s Possible Deferral of the Lord Resistance Army Case to Uganda’ (2008) 6 \textit{Journal of International Criminal Justice} 810.
commanders. Furthermore, the ICC demanded information on ‘categories of offences and alleged perpetrators that would be subjected to the traditional mechanisms and other alternative justice mechanisms referred to in the Annexure [Agreement].’ Unfortunately despite been given notice to respond, the government of Uganda has never responded. Nevertheless, in order for ATJ measures to be incorporated within the ICC structure it is essential that the state concerned cooperates with the ICC.

Unfortunately, the Juba Peace Accords eventually broke down in 2008 following the ICC’s issuing of the arrest warrants against the LRA top leadership and the ICC Chief Prosecutor's refusal to withdraw the indictments. Joseph Kony failed to turn up to sign the peace agreement, consequently violence resumed in Uganda in April 2008. As of now, the Uganda government still hasn’t done much in prosecuting individuals responsible. Ntegeye and Armstrong argue based on traditional wisdom that warring parties are unlikely to agree to peace if such peace also includes establishing measures to hold them accountable for the offences committed during the conflict. However, justice is an essential element that is imperative in order to ensure the atrocities are never repeated. Currently the Ugandan government has not done much to ensure individuals are

prosecuted for the purpose of addressing past human rights abuses\textsuperscript{177} and prevent future atrocities. This implies when it comes to preventing future atrocities by means of prosecution, the government of Uganda has lamentably failed its population. There is no guarantee to ensure that the atrocities will not be repeated.

Since the referral of the situation in Uganda, a delegation of the LRA in March 2005 has approached the ICC and lobbied for the arrest warrants issued against LRA to be withdrawn.\textsuperscript{178} The government of Uganda who triggered the prosecution by referring the situation to ICC in the first place also requested for the arrest warrants to be withdrawn following the failure of the Ugandan authorities and the LRA to conclude a peace deal, as the rebel leaders had been promised amnesty.\textsuperscript{179} However this action is contrary to the general rule in international law that provides that all individuals must be held accountable for the most serious offences to international law.


The ICC quite rightly was not willing to subordinate the quest for a negotiated peace, as the Court has not withdrawn the warrant of arrests, but proceeded with the investigations and prosecution. \(^{180}\) It is only appropriate that the ICC declined to withdraw the charges, as such an action would not only have constituted a betrayal in the search of justice, but would also have discredited the Court. \(^{181}\) There is no provision in the Rome Statute that allows a state to withdraw a self-referral once it has been referred and admitted by the Court. \(^{182}\) As a result, the arrest warrants have been perceived in Uganda as a barrier to the conclusion of peace talks between the Ugandan authority and the LRA. \(^{183}\)

However, the Uganda authorities need to be enlightened on the importance of justice as part of the transitional justice process. Institutions including the AU, ICC and the UN can further play a vital role in advising the state on the importance of conducting prosecutions as part of transitional justice. The ICC as a permanent International Criminal Court

\(^{181}\) William A Schabas ‘Complementarity in Practice Creative Solution or a Trap for the Court?’ in Mauro Politi and Federica Gioia (eds) The International Criminal Court and National Jurisdiction (Ashgate 2008) 38.
vested with the responsible to prosecute can play a role in advising Uganda. Nonetheless, it would be quite unlikely that the LRA would accept the proposal, as they might be more interested in a more permanent measure, like an amnesty. Though hypothetically, should the ICC ever decide to give in to the demands of the Ugandan government and withdraw the pending warrants of arrest, May provides a positive moral argument in justification of amnesties and pardon over criminal trials in certain situations. ¹⁸⁴ The basis of the argument is on goals of reconciliation, accordingly the idea of amnesty for the purposes of securing peace is reasonable on the basis that an amnesty involves looking beyond the wrongful act to the person’s character, acts and the good of society. ¹⁸⁵

For instance, in the situation of South Africa, amnesty as opposed to conducting criminal trials was the best way forward, to moving the country towards a democracy as illustrated in chapter three of this thesis. Currently, that seems to be the trend in Uganda. However, in order to guarantee non-repetition of the atrocities, Uganda needs to do more than simply grant perpetrators amnesties. Uganda needs to ensure it improves the Uganda legal system throughout the country, and especially in the areas that were affected by the conflict. In the long run, there is need to improve the standard of living among the people in northern Uganda. This can be done by way of collective reparations that would be intended to develop the area. Projects such as the building of schools, universities, hospital, rehabilitation centres must be introduced to address past human rights abuses. The Implementation Protocol to the Agreement on Comprehensive Solutions concluded during the peace talks between the government of Uganda and the LRA in 2007

¹⁸⁴ Larry May Crimes against Humanity a Normative Account (Cambridge University Press 2005) 229.
¹⁸⁵ Larry May Crimes against Humanity a Normative Account (Cambridge University Press 2005) 235.
recognised the government of Uganda as being responsible for meeting the needs of victims.\textsuperscript{186} The existence of the Implementation Protocol to the Agreement on Comprehensive Solutions implies that Uganda must now proceed to act on the promised reparations so that northern Uganda can develop and progress.

Sarkin provides a comprehensive roadmap in terms of how Uganda can go about implementing the agreed reparation policies, as well as details on the different types of reparations available.\textsuperscript{187} Should the proposed reparations policies be followed by Uganda, the probability of preventing future atrocities in northern Uganda will be high as the needs of the victims will be addressed to a large extent. Such an approach will be able to transform Uganda into a state that respects human rights and the rule of law. In addition to justice and reparation, traditional methods can be used as a means of addressing past atrocities in a bid to hold individuals accountable as well as seeking to reconcile the communities and the perpetrators.

Traditional procedures are considered in the next section. They are an important element to this thesis, the contention is that traditional techniques have the capacity of addressing the limitations of prosecutions because the procedure is quicker and cheaper compared to litigation. As demonstrated in chapter three in reference to the Rwanda’s \textit{gacaca} courts, traditional approaches can allow for as many peoples as possible to be held accountable.


The operation really involves the communities as a result it tends to be easy for the population to follow the proceedings. Traditional measures can further help a state to denounce particular actions, hence contribute towards accomplishing the object of deterrence as addressed in chapter two.

4.5.2 The Traditional Approaches
This section considers traditional approaches in Uganda and how they can be used as part of traditional justice to address the past human rights violations and to prevent future atrocities. The advantages and disadvantages of traditional approaches as a measure to adopt in addressing past human rights atrocities are addressed. These issues are essential in establishing means of how traditional approaches can be used to complement the work of the ICC in states that have cases before the ICC. Such an approach will not only enhance the effectiveness of the ICC in Uganda by making it possible to achieve objectives beyond deterrence and retribution but also ensure that as many people as possible are held accountable and reintegrated into the communities where the atrocities were committed.

Traditional approaches are another option available to Uganda; these can be adopted and used as part of the transitional justice process as they were addressed in the June, 2007, Agreement and February, 2008, Annexure.188 Traditional styles can be instrumental tools in seeking to install community healing and reintegration through confession, repentance and compensation, intended at demonstrating remorse and signalling a new start for all.

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In March 2008, a Letter from the Ugandan Solicitor General to the ICC Registrar clarified that the traditional justice approaches would only apply to lower level offenders and that they would not form a part of the formal justice mechanisms applicable to indictees of the ICC. However, this study contends that traditional approaches can prove useful in addressing past human rights violations if used at a complementary level with prosecutions under the ICC and national Courts as illustrated in chapter three. This is because they can help to achieve other objectives necessary for any state under transition as well as addressing the root causes of the conflict and ensuring that similar atrocities are never repeated.

Clark further argues that we cannot rely upon a judicial institution such as the ICC alone to deliver justice. Accordingly, there is more to justice than simply prosecution of individuals responsible for committing the offences. Clark quite rightly argues that justice is a multi-dimensional concept that includes judicial and non-judicial forms as demonstrated in chapter three of this thesis. There are several examples of traditional approaches that exist in Uganda. As demonstrated under chapter three, traditional

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processes can be adopted during transition to address past human rights abuses. Particularly, in Uganda the *mato oput* approach has been adopted to address elements of war crimes referred to as child conscription under the Rome Statute.\(^{194}\) This section however focuses on the *mato oput*, the most popular technique, because a wide range of research has been undertaken with regards to this approach.\(^{195}\)

The government of Ugandan has supported the local justice system of *mato oput*, a traditional form of local justice practiced in the Acholi region of northern Uganda.\(^{196}\) It is an intra-tribal approach intended to help settle disputes.\(^{197}\) The *mato oput* process is

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composed of four modes: (1) the voluntary feature of the legal process, (2) establishment of truth mediation, (3) guilt acknowledgement, (4) reparation and reconciliation by means of symbolic acts and spiritual appeasement.\textsuperscript{198} The prime aim of \textit{mato oput} is to encourage reconciliation through truth-telling and ritual acts.\textsuperscript{199} Thus the emphasis is on the restoration of peace and the well being of all tribes.\textsuperscript{200} The process is voluntary which implies that only those that consent are able to participate in the procedure. The fact that the process is voluntary entails that those who participate are able to talk freely and provide information about specific cases before the \textit{mato oput}. Consequently an aspect of truth can be established though it would be restricted to a particular case.

As the situation stands, there is need to have measures in place to ensure that participants are able to take part freely without been subjected to duress of some sort. The guilt acknowledgement aspect of the \textit{mato oput} implies that the process has the capacity to allow individuals to be held accountable for offences committed. The benefit of a guilt acknowledgement implies that individual responsibility is established which is good as recognised in chapter one of the thesis, as it eliminates the possibilities of the blame being apportioned on a tribe or group of people.


The voluntary nature of the process is further intended to encourage confessions and truth
telling and to eliminate the perpetrator's fear of reprisal by warring members of groups.\textsuperscript{201} However the success of the process depends on the community’s ability to forgive. \textsuperscript{202} On the other hand, the voluntarily nature of the process could be condemned because where the most serious offences have been committed, the state where the atrocities have been committed is expected to take measures towards holding individuals suspected accountable for offences committed as addressed in chapter one. Under international criminal law if states where atrocities have been committed were to proceed in undertaking prosecutions only were perpetrators voluntarily come forward, the implication is that there would probably be no prosecutions undertaken, as no individuals would voluntarily come forward to face prosecution. For this reason \textit{mato oput} is deemed not to be an appropriate measure to use to address past human rights violations.\textsuperscript{203} This is because the only remedy available to address abuses of human rights ought to be prosecution. Perpetrators must never have the luxury of choosing the nature of forum to be used to deal with the atrocities.

However local procedures as illustrated under the \textit{gacaca} court system in chapter three of this thesis, can be modified into approaches that comply to suit the problem intended to be addressed. This can be further applied to the \textit{Mato oput}. Uganda can benefit enormously if the \textit{mato oput} was used effectively. For instance, the \textit{mato oput} procedure

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enables parties to consume the bitterness of the vengeance of their victims, representing the act of moving beyond hatred, distrust and hostilities.\textsuperscript{204} Thus it is projected to lead to reconciliation and reintegration of the perpetrators back into the community. The argument is that the ICC will only be able to prosecute the top leadership of the LRA and majority of lower level perpetrators will escape with impunity.\textsuperscript{205} Consequently, it has been argued that the \textit{mato oput}, is ideal as it will expand the scope for administration of justice in Uganda and particularly at a local level, by allowing as many perpetrators as possible to voluntarily confess their guilt.\textsuperscript{206}

Currently, as addressed above, Uganda has been reluctant in conducting prosecutions for the past atrocities. Thus as opposed to settling with the amnesty law that are currently in force in Uganda, traditional tactics can play a vital role in ensuring that the atrocities are not repeated. The possibility is due to the nature of the procedures and the beliefs that people have with regards to the \textit{mato oput}. The benefits of traditional approaches are addressed in detail in chapter three. It is better to adopt traditional approaches as opposed to simply granting perpetrators amnesties. Individuals must always be held accountable for offences committed as this helps contribute towards deterrence of these offences. Besides, it is evident that Uganda has failed to prosecute individuals responsible for the

atrocities. Equally, the ICC is incapable of investigating and prosecuting the majority of the worst perpetrators, many of whom are children that the LRA forcibly conscripted.\footnote{Steven Roach ‘Multilayered Justice in Northern Uganda International Criminal Court Intervention and Local Procedures of Accountability in Dawn L Rothe, James Meernik and Pordis Ingadottir (eds) The Realities of International Criminal Justice (Martinus Nijhoff Publishers 2013) 249.}

Uganda needs to set clear procedures in terms of how the \textit{mato oput} would be conducted in northern Uganda. There must also be clear guidelines as to who will be held accountable by means of \textit{mato oput}. Legislation can be adopted with details of the sort of individuals that can be subjected to the \textit{mato oput} procedures. For instance, it could be decided that only children would be subjected to the \textit{mato oput} process. Or the process can be made available to individuals that are willing to give up their arms and apply for amnesty. As opposed to granting individuals amnesty, individuals must be obliged to undertake the \textit{mato oput} process in addition to being considered for amnesty. The most important thing is to have some sort of mechanism in place on how individuals can be held accountable for past human rights violations.

There is need to adopt processes that will be appropriate in addressing the most serious offences of international concern,\footnote{Louise Mallinder ‘Can Amnesties and International Justice be Reconciled?’ (2007) 1 (1) International Journal of Transitional Justice 208 – 230, Allen Trial Justice The International Criminal Court and the Lord Resistance Army ( London Zed Books 2006), Judith Large and Marike Wierda (eds) Building a Future on Peace and Justice Studies on Transitional Justice Peace and Development (The Hague springer 2009).} in any state under transition. Such an approach would benefit states under transition because TRCs and traditional approaches, if operated effectively, have the capacity to achieve other objectives such as truth, reconciliation, peace building, respect for individual human rights and the rule of law. This is because where the most serious offences are committed due to the nature of
atrocities the consequences tend to be existence of large number of victims and perpetrators.

Thus, prosecutions unaccompanied would be insufficient to address the past abuses as well as guarantee non-repetition. Therefore, TRCs and traditional approaches are strategies that can operate together with the ICC and national prosecutions in order to attain targets beyond deterrence and retribution, as well as addressing the root causes of the atrocities. It is possible for such an approach to be adopted on the basis of the Preamble to the Rome Statute which provides that, the ICC was established ‘for the sake of present and future generations.’ This therefore implies that the ICC has a role to play in terms of the future conducts, ensuring such atrocities are never repeated. In order to achieve a level of lasting peace and stability, it is crucial for the grassroots approaches to be used in combination with the ICC’s top down measures.209

In reference to Northern Uganda, as addressed above, there are various traditional approaches. However there is need to come up with an acceptable model rather than one which is outdated and contrary to international standards. An acceptable model that would have elements from the different tribes in northern Uganda can be established following consultation among the Acholi people and key stakeholders, including representations from the following groups and institutions: the Acholi people representing the affected community, the government of Uganda, the judiciary, legal aid

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board, the Human Rights Commission, the civil society organisations, institutions of higher learning, the UN, AU and the ICC.

The government of Uganda ought to have representatives from the following ministries: Justice and Constitutional Affairs, Gender, Labour and Social Development, Finance, Planning and Economic Development and Ministry of Education and Sports. The Acholi communities can have representatives from various groups including farmers, teachers, the religious groups and leaders, elders and the youth. It is important for the representatives from various groups to be balanced in terms of gender and age. It is paramount have an approach that is all-inclusive, as opposed to one that is restricted to male elders within the communities. Having identified the relevant stakeholders, meetings/workshops should be conducted in order for the different holders to come together and identify the role that they can play in relation to the nature of traditional mechanism that ought to be adopted.

In northern Uganda the local communities have contended that adopting communal or ceremonial justice such as the *mato oput* approach would be the best way to ensure reintegration into the community.210 This implies that the local communities in Uganda are already keen to adopt traditional approaches to address past human rights atrocities. Thus conducting meetings with various stakeholders and the community representatives selected by the people will simply be for the purpose of ensuring the approach adopted is

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legitimate and acceptable to the communities most affected. It is critical to have a broad representation of the community by having representatives from different walks of life within the communities. This can help create project ownership by the national stakeholders on the nature of traditional approach that is supposed to be adopted.

The consultation allow the communities and stakeholders to accept the *mato oput* approach as a legitimate means of addressing past human rights violations in northern Uganda.\(^{211}\) The *mato oput* approach normally involves a process of mediation, confession, payment of compensation, followed by a reconciliation ceremony during which two sheep are killed and exchanged.\(^{212}\) Therefore the adoption of the tactic will enable objectives such as reconciliation among the communities to be achieved. In order to curtail the repetition of atrocities, the people must learn to live in harmony with one another once the *mato oput* ceremony has been conducted.

The ICC has indicated its willingness to incorporate and accept local, alternative forms of justice under its complementarity principle that requires the ICC to defer *prima facie* to states unless states are unable and unwilling to investigate and prosecute the crimes themselves.\(^{213}\) However since the situation and cases in Uganda are already before the ICC, the only thing would be to ascertain the role that the ICC can play with reference to *mato oput*. As addressed above only less serious perpetrators should be subjected to the

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mato oput, the rest ought to be prosecuted ideally before the ICC and Ugandan national courts. However even with reference to less serious perpetrators the ICC can play an advisory role and encourage the communities, as well as highlight the importance of having measures in place to address past human rights. The combination of judicial and non-judicial measures will result in the population being involved and educated on the importance of respect for human rights, the rule of law, reparations and the need to ensure accountability.

As demonstrated in chapter three of this thesis, the ICC has a role to play beyond prosecution.\(^{214}\) This can be accomplished by the ICC expanding its role into restorative justice by being more involved with the affected communities as well as the institutions established to address past violations in states that have cases before the Court. As addressed in chapter three of this thesis, such a method will require the ICC to be fulfilling educative, informative and prosecutorial functions.\(^{215}\) The ICC needs to ensure it builds and maintains its legitimacy, thus paving way for acceptance and respect for its


role with the affected communities. In order for the ICC to maintain its credibility as an international court, it should reform its operation.

Hence *mato oput* in Northern Uganda can successfully operate in conjunction with the ICC and national prosecutions. The implication of such an approach is that *mato oput* will be acknowledged as a traditional approach to be used in northern Uganda to address past abuses by means of legislation. This will further be recognised by the stakeholders and more importantly the communities as an acceptable means of addressing the past atrocities in northern Uganda as a result of consultation in the process and proposals raised above. The combination of ICC prosecutions and the *mato oput* indigenous approach will further contribute towards strengthening judicial systems in Uganda as a result of the implementation of the proposed reparations addressed above.

The act of recognising and acknowledging traditional approaches as measures that can be used to address past human rights violations as part of transitional justice in states before the ICC will contribute towards Uganda transforming to a state where human rights and the rule of law prevails. As addressed in chapter three of this thesis, trials at a national and international level can operate at a complementary level with traditional

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procedures. Thus, this thesis contends that the ICC prosecution should be conducted as part of transitional justice by operating in tandem with traditional approaches. In this way the ICC will be able to contribute to peace, and make a difference in states that have cases before the Court. In so doing the people will be closely monitoring the ICC and what it represents. In this way the ICC would not only help deter future violations, but contribute towards empowering and strengthen the judicial systems of states that have cases before the Court.

4.5.3 The Amnesty Act 2000

The Amnesty Act 2000 enacted in January, 2000, by the government of Uganda, provides a blanket amnesty to any Ugandan regardless of age, who at any time since 26 January, 1986, engaged or is still engaging in a war against the government of Uganda by either participating in a combat, collaborating with perpetrators or armed rebellion, committed any crimes or assisted in the conduct of war or armed rebellion. The Minister of Internal Affairs by statutory notice can extend the Act. This indicates that there is no indication that Uganda is keen to prosecute those responsible for human rights violations. It signifies a lack of seriousness on Uganda to address the problem of impunity. It further implies that people in Uganda or elsewhere might not be deterred from committing such offences due to the possibility of being offered an amnesty. This is contrary to the

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222 Amnesty Act 2000 Article 18.
principles of international criminal law that provide that individuals must be held accountable for offences committed as provided in chapter one of this thesis. The importance of establishing individual responsibility was addressed further in Chapter two of this thesis.

The procedure for granting amnesty in Uganda involved perpetrators reporting to a distinguished official, for the purpose of relinquishing the conflict. 223 This involved the act of surrendering any weapon in possession. 224 The Amnesty Act 2000 enables persons to renounce violence in order to return to their communities without fear of being prosecuted. 225 The Amnesty Laws were intended to benefit the very individuals to whom the arrest warrants were issued against. However the ICC warrants rendered the Act inapplicable, thus preventing the establishment of peace in Uganda. 226

In this respect, the ICC’s involvement in northern Uganda has been perceived as a threat to peace, 227 this is because the ICC discouraged the same individuals on whom peace

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depends on by the issuing of the arrest warrants. For instance, more senior LRA members than Thomas Kwoyelo were granted amnesty. These include individuals such as Lt. Col. Charles Arop, who was the former LRA director of operations who surrendered to the Ugandan army in November 2009. Charles Arop was granted amnesty despite being suspected of leading the Christmas massacres in 2008 and 2009 in which at least 620 people died and more than 160 children were abducted in the DRC. Uganda needs to ensure the law is applied uniformly to all persons within its territory.

As opposed to being selective in terms of who gets to be subjected to the amnesty law, former combatants and abductees of the LRA have proceeded to apply for Amnesty and have been successful. By 2011, 24,066 amnesty application had been received by the Amnesty Commission (AC). As of June 2015, more than 27,000 individuals had taken arms against the state and received amnesty. In June 2015, the Government of Uganda extended the amnesty deal for a further two years as way of encouraging rebels to give

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229 Uganda v Kwoyelo HCD-00-ICC Case No 02/2010 2011 Uganda Amended Indictment 1 – 25.


themselves up, obtain amnesty so that Uganda can secure peace.\textsuperscript{234} Clearly this implies that Uganda is not willing to prosecute persons responsible for human rights abuses. Considering the nature of the offences, Ugandan needs to be doing more vis-a-vis the prosecution of suspected offenders in order to ensure non-repetition of such atrocities and install a culture that respects human rights,\textsuperscript{235} as opposed to allowing them to escape without being held accountable, which appears to be the case in Uganda.

The actions of the Ugandan Government in adopting the amnesty legislation contradict the Rome Statute that was established to address impunity. The Statute imposes clear obligations on state parties to prosecute suspects of war crimes, genocide or crimes against humanity.\textsuperscript{236} The adoption of the Amnesty legislation by the Uganda government has indicated a lack of seriousness and commitment towards ensuring that persons that abuse human rights are held accountable for the purpose of deterring similar offences in the future.

The direct implication of the Amnesty Act was that blanket amnesty was offered to rebels who voluntarily disarmed. Advocates of the amnesty Laws have argued that, since the Acholi people were the victims of the LRA atrocities and considering that the LRA’s solders were mostly abducted, the LRA insurgency should be ended by adoption of

\begin{itemize}
\item \textsuperscript{236} Nicholas Waddell and Phil Clark (eds) \textit{Courting Conflict? Justice Peace and the International Criminal Court in Africa} (Royal African Society 2008) 8.
\end{itemize}
traditional dispute resolution institutions\textsuperscript{237} as proposed above. The amnesty was thus perceived to be a tool intended to end the conflict and reconcile those that were involved in committing the atrocities and rebuild the communities.\textsuperscript{238}

However the Amnesty Act and proceeding Acts are contrary to Ugandan\textsuperscript{239} and international law.\textsuperscript{240} This is because, as highlighted under chapters one, two and three of this thesis, where the most serious offences are concerned, states where offences have been committed have a primary obligation under international law to prosecute individuals suspected of violating human rights.\textsuperscript{241} Therefore amnesties do not have an effect on the ICC jurisdictions to prosecute.\textsuperscript{242} Thus, it is not surprising that some former rebels who had initially been pardoned under the Amnesty Act were rearrested under the


\textsuperscript{238} Uganda Amnesty Act 2000 Preamble.

\textsuperscript{239} Geneva Convention IV, the Rome Statute 1998 Articles 287, 123 Uganda Republic Constitution.


Nevertheless a state may adopt amnesty under its domestic laws, but where amnesty\footnote{Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone signed and entered into force 7 July 1999, Sarah Williams ‘Amnesties in International Law The Experience of the Special Court for Sierra Leone’ (2005) 5 Human Rights Law Review 271, Antonio Cassese ‘The Special Court and International Law The Decision Concerning the \textit{Lomé Agreement Amnesty}’ (2004) 2 Journal of International Criminal Justice 1130; William A Schabas ‘Amnesty the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone’ (2004) 11 UC Davis Journal of International Law and Policy 145, \textit{Prosecutor v Kallon Appeals Chamber} Case No SCSL-04-15-PT-060 (13 March 2004) [49] Decision on Challenge to Jurisdiction \textit{Lomé Accord Amnesty}.} involves crimes of universal jurisdiction the adoption of amnesty laws by a state cannot bar another state from exercising jurisdiction.\footnote{\textit{Prosecutor v Kallon Appeals Chamber} Case No SCSL-04-15-PT-060 13 March 2004 [67] Decision on Challenge to Jurisdiction \textit{Lomé Accord Amnesty}, Antonio Cassese \textit{International Criminal Law} (Oxford University Press 2003) 312–16.} Consequently, this research proposes that as opposed to amnesty, the \textit{mato oput} traditional approach must be adopted in Northern Uganda and function together with the ICC prosecution, as opposed to individuals escaping with impunity as was the case in relation to Thomas Kwoyelo.\footnote{\textit{Uganda v Kwoyelo HCD-00-ICC} Case No 02/2010 2011 Uganda Amended Indictment 1 – 25.} The root causes of the conflict, grievances of victims, can only be secured by involvement of the population in a transitional process.

Thus an approach that involves the community such as the \textit{mato oput} is better suited at addressing the root causes of the conflict and ensuring the violations are not repeated. Having considered the prevailing amnesty laws in Uganda, the next section addresses the role and progress that has been made by the national court in prosecuting persons suspected of committing the most serious offences. This section is significant to the thesis...
because as alluded in chapters one and two, it is the primary responsibility of the national courts to prosecute offences committed within their territory.

4.6 The Role of National Courts in establishing Accountability for Human Rights Violations in Uganda

This section addresses the role that Ugandan national courts have undertaken since the referral of the situation to the Court. As earlier alluded, national courts have the primary responsibility of ensuring that atrocities committed on their territories are prosecuted. Accordingly, Uganda has a functioning judicial system based on both formal and informal legal systems.\textsuperscript{247} It has the required infrastructure and personnel. With the necessary commitment, willingness and political support, Uganda has the capacity to prosecute individuals responsible for violation of the most serious atrocities. Unfortunately, the level of development in Uganda does not extend to northern Uganda that, as addressed above, remains predominately underdeveloped. Therefore the adoption and implementations of the proposals raised throughout this chapter can contribute towards transforming northern Uganda into a community where the rule of law and human rights are respected. This highlights the importance of this thesis.

As pointed out in the introduction and chapter one of this thesis, states have a primary duty to prosecute perpetrators suspected of violation of international human rights. Uganda has attempted to build its national judicial capacity to prosecute leaders of the LRA for the offences committed by the establishment the special War Crimes Division, composed of three High Court judges and a unit in the Department of Public Prosecutions, to investigate

and prosecute these crimes. The War Crimes Division of the High Court of Uganda was established in 2009, as part of the Juba Peace Negotiations that resulted in a series of agreements as addressed under section 4.5.1 above. However there is need for these developments to be extended to northern Uganda, the area where most of the atrocities have been committed. This is essential so as to ensure that victims are able to follow proceedings should any be undertaken in Uganda for the atrocities committed.

In particular, the preamble to the agreement on Accountability and Reconciliation of 2007 expresses the commitment between the LRA and the government of Uganda to prevent impunity and promote redress to human rights abuses in light of the Constitution of the Republic of Uganda and its international obligations. Consequently in July, 2008, a principal Judge of the High Court exercised powers on the basis of article 141 of the Republic of Uganda Constitution to create a war crimes division – the special division of the High Court with the view of addressing serious crimes also referred to as international crimes. However it is not enough for courts with the required jurisdiction to be established.

What is yet to be seen in Uganda is the prosecution of perpetrators responsible. Undertaking trials will contribute towards the credibility of the transitional justice in Uganda and reduce the possibilities of similar offences being repeated.

Uganda has an opportunity to put an end to impunity and its past culture of violation of human rights. The proper use of the ICD in Uganda would have ensured that perpetrators are prosecuted and victims would have been afforded an opportunity to obtain justice. Such an approach would have greatly contributed towards deterrence and installing some sort of credibility in the Uganda judicial system. However since this has not been done, Uganda has a chance to create something efficient and legitimate out of the mato oput process. It will be better for Uganda to take serious measures towards the adoption of the mato oput, considering it has not been successful with prosecutions, due to the existence of amnesty laws. Development and implementation of the mato oput approach in northern Uganda will demonstrate the country’s willingness to address past violation. Such a decision will help guarantee non-repetition of the atrocities. Amnesties cannot defer future violations and neither can they address past abuses as they lack the capacity to address the fundamental needs of the victims which includes justice, truth and reparations.

Nonetheless as of January 2015, the ICD has nine cases involving human trafficking and terrorism.\(^{254}\) The case of Thomas Kwoyelo 2011,\(^{255}\) the first war crimes trial before the ICD, unfortunately was subjected to the Amnesty Act, as accordingly Kwoyelo had acquired a legal right to amnesty.\(^{256}\) The Kwoyelo decision highlights a conflict between prosecutions and amnesties. The decision clarifies the challenges of prosecuting individuals where amnesty laws remain in place.\(^{257}\) As long as the amnesty laws exists there will always be a hindrance to Uganda’s quest for peace, security, justice and the need to address the root causes of the conflict for the purpose of ensuring similar offences are not repeated. Therefore this study proposes that, as opposed to states adopting amnesty, the \emph{mato oput} process must be adopted in Uganda and the institution will be able to function at a complementary level with the ICC prosecutions. Such a method will not only enhance the work of the ICC, but improve the chances of ensuring that these dreadful atrocities are never repeated on the Ugandan territory.


\(^{256}\) Uganda v Kwoyelo HCD-00-ICC Case No 02/2010 2011 Uganda Amended Indictment 1 – 25.


4.7 Conclusion

This chapter has demonstrated the efforts of the ICC and Uganda so far in addressing past human rights abuses since the state referral of the situation to the ICC. It has illustrated the seriousness of the situation in Uganda and indicated that the violation of human rights precedes July 2002, which marks the mandates for the ICC’s investigations and possible prosecutions. The background of the situation in Uganda implies that more than mere prosecution in the ICC or Ugandan national courts would be required to address Uganda’s past human rights abuses. This particularly calls for the need to establish TRCs or adopt the mato oput approach to operate alongside the ICC and national prosecutions to address the limitations of prosecutions and ensure that similar offences are not repeated.

As a result of this chapter a number of issues emerge, particularly the conflict in Uganda has been on-going dating back to the time when Uganda was colonised, northern Uganda is the region that has been hit the hardest as a result of the conflict. Despite the government of Uganda referring the situation in Uganda to the ICC, there has been a lack of willingness and commitment to prosecute the perpetrators responsible for the atrocities. Instead the Amnesty Act was passed that allowed a number of perpetrators to benefit and escape without being held responsible for the offences.

However, this study contends that in order to prevent future violations in Uganda it is essential to ensure that measures intended to address the past abuses, protect the population, as well as prevent future violations must be adopted in Uganda. The proposal has been based on the three fold elements that include justice, truth and reparations. So far nothing much is happening in terms of prosecution of perpetrators apart from the pre-trial procedures
underway at the ICC. There is in existence an agreement in relation to reparations as well as
details and propositions in terms of how they can be implemented. Particularly, crucial to this
thesis is the fact that Uganda seems keen on adopting traditional approaches to address the
past atrocities as part of the transitional process. On this basis, this research proposes that the
Ugandan Government welcome the mato oput approach.

Comprehensive consultation with different stakeholders including the representatives from
communities in northern Uganda, Universities, the Ugandan Human Rights Commission, the
ICC, AU and civil societies should be conducted prior to the adoption of the *mato oput* as a
legitimate approach to address the atrocities in northern Uganda. The implication is the *mato
oput* traditional approach will function in tandem to the ICC prosecutions. As a result
objectives beyond retribution and deterrence will be achieved in Uganda.

The reason why this thesis proposes the adoption of the traditional approach of *mato oput* in
Uganda as part of transitional justice is due to the events that have transpired since Uganda’s
state referral to the ICC. The referral of the situation by Uganda to the ICC was followed by
the adoption of amnesty and a request by the Ugandan government for the ICC to withdraw
the arrest warrants against the ICC top leadership. These actions all indicate a lack of
commitment and seriousness on the part of the Ugandan government to prosecute persons
responsible for violating human rights. As a result, this has been manifested by the continued
escape with impunity by both serious and less serious offenders.
There should be no excuse for this, as it indicates that Uganda has persisted to allow individuals to escape with impunity. More needs to be done by Uganda to address the abuses to ensure that similar offences are never repeated. The actions adopted by Uganda will determine whether or not the state will be able to finally achieve peace, justice for both victims and perpetrators, security and most importantly, the culture of respecting individual rights and the rule of law. The next chapter concludes the research and offers recommendation on what the government of Uganda can do to effectively address the past abuses and prevent future violations. In addition, recommendations on the role that the ICC can play as part of transitional justice in Uganda are addressed.
CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This chapter concludes the research and makes recommendations. The chapter is divided into three main sections; the introduction, summary of findings and the recommendations that constitute the model and contribution to existing knowledge. The purpose of this thesis is to establish a methodology by which transitional justice strategies ought to be incorporated into the ICC framework. The thesis sought to address three aims which are as follows; firstly, to ascertain the role of the ICC in relation to transitional justice and restorative justice mechanisms, secondly, to establish means by which transitional justice or restorative justice ‘bottom up’ approach could be integrated within ICC’s ‘top down’ approach, leading to alternative transitional measures being used within the ICC framework and thirdly, to consider the mechanisms adopted by domestic courts, specifically progress and effort made in seeking to establish accountability for international criminal offences for the purposes of instituting a model for transitional justice that can be used by states before the ICC.

5.2 Summary of Findings

This section provides a summary of the findings of this thesis by addressing the main issues raised in previous chapters and implications. In order to address the issues raised, the thesis is divided into five chapters and an introduction. The introduction is the research proposal that addresses the fundamental issues about this thesis such as the
objective of the research, research questions, definition of the problem, literature review, methodology and significance of the research.

Chapter one is the history of ICJ and institutions. This chapter has demonstrated the significance of the history of ICJ, which is relevant in order to appreciate the role of the ICC, and how it can be improved. Chapter one establishes that the primary responsibility to prosecute individuals suspected of violating international law lies with the states. It has revealed the importance of the concept of individual criminal responsibility, the idea that every person suspected of committing the most serious offences must be held accountable regardless of status. The principle of international individual criminal responsibility is further developed with the establishment of the ICC that forms the basis of this thesis.

However, despite the existence of the principle of individual criminal responsibility and the creation of institutions intended to put on trial individuals suspected of committing the most serious offences to international concern, what emerges from chapter one is that states are still failing to prosecute persons responsible. Consequently individuals escape without being held accountable. Therefore, chapter one has further underlined the problem and fact that individuals in various parts of the world have continued to violate human rights despite the existence of institutions such as the ICC and national courts that are intended to prosecute such offences. In addition, very few states take measures to ensure that individuals that commit the most horrendous offences within their territories are prosecuted; as a result the majority go unpunished. The existence and persistence of the problem has resulted in the need to ensure the ICC goes beyond its current objectives
of deterrence and retribution. This will imply that in states where the ICC is involved, more needs to be done to address past atrocities in addition to conducting prosecutions. This research strives to enhance the effectiveness in the operation of the ICC by providing a proposition intended to facilitate the Court in attaining its objectives. The research provides means by which TRCs and traditional approaches can be integrated within the ICC’s current structure so that the ICC can have the capacity to accomplish objectives beyond deterrence and retribution hence resulting in an improvement in the effectiveness of the Court.

On this basis, chapter two examines the role of the ICC in relation to ATJ mechanisms. The role of the ICC is scrutinised on the basis of the purposes of ICJ. In addition, the possibility of ATJ measures being able to operate together with the ICC is considered. Chapter two found that it is possible for the ICC prosecutions to be undertaken in tandem to proceedings of TRCs and indigenous approaches. Such a technique is vital to address the limitations of prosecutions that include the inadequacies of trials to address the needs of victims as well as ensure the atrocities are prevented in the future.

The chapter further highlights flaws in the current ICJ framework. The Rome Statute fails to acknowledge that the punishment could seek to achieve other aims such as

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rehabilitation, incapacitation, restorative justice or other purposes of ICJ. In order for the ICC to operate effectively it would need to go beyond deterrence and retribution. This would require post – conflict states to devise transitional arrangements that comply with the ICC agenda. This is vital to ensure as many individuals as possible are held accountable, the needs of victims are addressed and measures are put in place to prevent future violations.

Consequently, such an approach will help improve the culture of respect for human rights, the rule of law and the importance of ensuring individuals are held accountable, thus restoration to long term peace and reconciliation.² What emerges from chapter two is the need for the ICC to always recognise whose justice it is for, as the Court undertakes its mandate of investigation and prosecution. The focus must always be on the state that is before the ICC and ensure it is transformed into an entity that respects human rights and the rule of law. Such an attitude would also make the ICC more relevant to states that have cases and situations before the Court.

Chapter two recognises that in order for the ICC to be more effective, more needs to be done at national/local level. Justice needs to be brought close to those most affected. A localised process enables transitional justice to be more relevant to the communities,³ hence filling in the necessary gaps caused by concentration of prosecution by an

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international Court. The adoption of local level measures to address past atrocities is the best way to guarantee a ‘comprehensive community based approach that includes the opinions and ideas of those whose lives have been most directly affected.’⁴ Such localised measures would enable local communities not only to follow the proceedings, but also participate and understand the language.

In addition, chapter two demonstrates that the establishment and operation of the ICC fits in generally with the justification for the creation of international penal process that tends to emphasize on retribution and deterrence.⁵ However due to the existence of the problem of majority of perpetrators not being held accountable, this study proposes that there is need to incorporate ATJ measures within the ICC framework. Such a policy will make the ICC effective and allow for as many individuals as possible to be held accountable, at the same time address the needs of victims as acknowledged in chapter three of this thesis. The ICC structure as set out in chapter two indicates that majority of the perpetrators will not be held accountable due to restrictions on the number of individuals that the ICC can prosecute. The combination of ATJ measures within the ICC will encourage states that have cases and situations before the ICC to take steps to make sure as many individuals as possible are held accountable.

This thesis is intended to establish a methodology by which TRCs and traditional approaches (transitional strategies) ought to be incorporated within the ICC framework for the purpose of enhancing the effectiveness of the ICC. Chapter two clarifies that it is possible to combine principles of both restorative and retributive justice into accountability mechanisms. The adoption of such an approach within the ICC context would provide means by which the ICC could ensure the involvement of local citizens by taking into account indigenous methods of people in states that have situations and cases before the Court.

This will therefore contribute towards sustainable peace building and stability, thus ensuring that such atrocities are never repeated. Chapter two recognises that despite the existence of measures that have been set up to encourage states to prosecute individuals suspected of committing the most serious crimes as demonstrated in the manner that the ICC is drafted, the reality is that most international crimes remain unpunished. Therefore there is a problem of failure of states to ensure individuals responsible for the most severe

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offences are held accountable. It is for this reason that this research was undertaken in order to establish how the problem could be resolved.

Chapter three is an in-depth study of TRCs and the gacaca courts as examples of some procedures that have been adopted in Africa to address past human rights violations. This chapter proves that they are limitations in terms of what prosecutions can achieve during transition. Consequently, it would be better for judicial and non-judicial measures to be adopted in states that have cases before the ICC. State that are before the ICC should, as part of their duty of R2P, establish TRCs or traditional approaches such as gacaca courts to address past human rights violations. This is significant because TRCs and traditional approaches, if operated effectively have the capacity to achieve other objectives such as truth, reconciliation, peace building and respect for individual human rights.

It is possible for such an approach to be adopted on the basis of the Preamble to the Rome Statute that provides that, the ICC was established ‘for the sake of present and future generations.’ This therefore implies that the ICC has a role to play in terms of the future conducts, by ensuring that such atrocities are never repeated. In order to attain a level of

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lasting peace and stability, it is essential for the grassroots approaches to be used in combination with the ICC’s top down measures.10

The key issue that emerges from chapter three is that the principle of R2P demonstrates that states can no longer rely on the doctrine of sovereignty to prevent foreign inferences. Therefore a state must be held accountable for the welfare of the people within its territory. This implies that states are under obligation to adopt measures in order to address past human rights violations. The combination of judicial and non-judicial measures will result in the population being involved and educated on the importance of respect for human rights, the rule of law and the need to ensure accountability.

In addition, the undisputable connection between the ICC and the principle of R2P emerges in chapter three. The connection is undisputable because both principles impose on states the primary obligation to ensure that the population is protected and atrocities are prevented by way of undertaking prosecutions. The existence of this connection has led to the conclusion that the ICC has a role to play where states before the Court establishes ATJ measures to address past atrocities. This is on the basis that the combination of a non-judicial tools like TRCs or a traditional mechanisms and the ICC prosecutions would result in enhancing the ICC by making it more effective. The implication for such an approach is that the ICC will be able to have an impact in states

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that have cases and situations before the Court. Such a process will further contribute towards strengthening judicial systems of African states.\(^\text{11}\)

The ICC can have a role to play where states before the Court establish ATJ measures as illustrated in chapter four of this thesis.\(^\text{12}\) This will enable the ICC to have an impact in states under intervention, thus ensuring that such atrocities are never repeated. In addition, such an approach will further contribute towards strengthening judicial systems of African states as explained in the case of Uganda addressed in chapter four of this thesis.\(^\text{13}\) For instance, in relation to Uganda, creation of the *mato oput* approach to address past atrocities would imply all individuals are held accountable on the basis of the *mato oput* procedure. This is better than individuals escaping without being subjected to any form of procedure intended to hold them accountable for the offences committed.

The case study of TRCs and *gacaca* courts has highlighted that the *ad hoc* institutions can be established under difficult and different circumstances to address serious offences

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of international concern such as genocide. Chapter three provides opportunities for
institutions such as the AU to support the ICC and states where atrocities have occurred
in order to make sure that states do more than conduct trials to address past human rights
violations.

Chapter three illustrates the fact that prosecutions are inadequate in what they can
achieve during transition. Consequently it would be better for judicial and non-judicial
measures to be adopted in states that have cases before the ICC. The contention
underlying chapter three is that states that are before the ICC should as part of their duty
of R2R establish TRCs or traditional approaches such as gacaca courts to address past
human rights violations. This because TRCs and traditional approaches, if operated
effectively, have the capacity to achieve other objectives, such as truth, reparations,
reconciliation, peace building, respect for individual human rights and the rule of law.

Finally, chapter four is a case study of Uganda as an example of a state referral before the
ICC. This chapter considers the role that Uganda and its national courts have undertaken
in seeking to establish individual accountability for past human rights violations. The
analysis is based on the application of the principles raised in previous chapters of this

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Western Law Review 539, 610.
15 Patricia Lundy ‘Exploring Home-Grown Transitional Justice and Its Dilemmas A Case Study of the Historical
Orentlicher ‘Setting Accounts Revisited Reconciling Global Norms with Local Agency’ (2007) 1 (1) International
Organisation for Economic Co-operation and Development (OECD)/Development Assistance
Committee (DAC), Security System Reform and Governance OECD 2005, Luc Huyse ‘Introduction Tradition-Based
Approaches in Peacemaking Transitional Justice and Reconciliation’ in Luc Huyse and Mark Salter Transitional
Justice and Reconciliation after Violent Conflict Learning from African Experience (International Institute for
Democracy and Electoral Assistance 2008) 1 - 21, Department for International Development (DFID) Security
Sector Reform Policy Brief DFID (2003).
thesis such as the principle of R2P and individual criminal responsibility. The progress and effort made by Uganda in seeking to establish individual accountability for international criminal offences is assessed. The chapter further considers the role and challenges of the ICC as it seeks to achieve its objectives of deterrence\textsuperscript{16} and retribution in Uganda.

With reference to establishing individual criminal responsibility, as illustrated in chapter four, Uganda needs to be willing and committed in order to ensure that individuals suspected of having committed the most serious offences are held accountable. The contention of this thesis is that when it comes to the most serious offences, it is necessary for TRCs or traditional approaches to be adopted by states that have cases before the ICC. If adhered to, TRCs and traditional measures would then operate at a complementary level with trials in national courts and the ICC. Such an approach will help address the limitations of prosecutions by ensuring that as many individuals as possible are held accountable. As illustrated in chapter three, objectives beyond deterrence and retribution can also be achieved. As a result, the state will stand a better chance of ensuring future atrocities are prevented.

Chapter four contends that there is need for Uganda to do more to deal with past human rights abuses as well as challenges that affect the country generally. The brief history of Uganda considered in the chapter has shown that the conflict in Uganda has been ongoing

for decades. Despite Uganda adopting different initiatives intended to address past abuses no measure taken so far has been successful in addressing the past as well as the prevention of future atrocities by meeting the needs of the victims.

The chapter further reveals that the Acholi region has been the most affected by the atrocities.17 Thus there is need for the government of Uganda to take measures in addressing the economic challenges faced in the Acholi region and ensure that life is improved for the people. The chapter has indicated that Northern Uganda is predominately underdeveloped. Access to justice is not available to all people that reside in the north due to lack of funding, limited facilities and unavailability of lawyers.18 Majority of the people that live in the northern part of Uganda are not educated. In addition, there is no guarantee that fair trials could be conducted there.19 As addressed in the chapter the ultimate goal of transitional justice is to make the local systems sufficiently robust so as to help prevent the occurrence of future atrocities.20 Uganda needs to ensure effective policies are established and implemented to transform the region thereby preventing future violations.

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The current reparations policies\textsuperscript{21} that have been proposed are a first step towards addressing the past and looking towards the future. The chapter has exposed Uganda’s lack of commitment in proceeding to prosecute the top leadership of the LRA and persons responsible for the violations generally. This is evident by events that emerged following the ICC’s action of issuing warrants of arrest. Uganda has since proceeded to adopt amnesty laws that signify its willingness to offer amnesty for the most serious atrocities of international concern contrary to international law, as addressed in chapters one and two of this thesis. Thus the thesis highlights the importance of taking into account victim’s needs to be placed at the centre of the transitional justice process, as the only way of ensuring that future atrocities are prevented would be to address the needs of victims as well as improving their lifestyle.

There is also need for Uganda to improve on the manner it views human rights violations. Based on the status quo and events that have developed since the referral of the situation to the ICC. In order for any states to be able to progress and become an entity that respects the rule of law and human rights, measures must be introduced to deal with the past. The adoption of Amnesty laws will not in any way help Uganda in ensuring that future violations are prevented. Instead, the \textit{mato oput} traditional mechanisms must be established to address the past abuses. All individuals must participate in the \textit{mato oput} procedure as a way of dealing with the past. This is regardless of whether a person has

been granted amnesty or not. More details in terms of what needs to be done and how the procedure is to be conducted is addressed in the recommendations below.

More importantly, chapter four validates the existence and importance of traditional approaches in Uganda and their potential in addressing the limitations of the ICC and absence of national prosecutions. The chapter concludes that indigenous measures can be used as part of traditional justice to deal with past human rights violations and to prevent future atrocities in Uganda.

5.3 Recommendations
In this section, conclusions and recommendations in terms of institutional and legal framework for TRCs and traditional approaches to be successfully integrated into the ICC structure in relation to the situation in Uganda is addressed. The recommendations are divided into two: those intended to enhance the role and effectiveness of the ICC in Uganda and those intended for the state of Uganda. Recommendations with reference to the latter are considered first.

5.3.1 Recommendations to Uganda
In order to address the past violations and prevent future atrocities;

(I) There is need for Uganda to improve the standard of living of the people in northern Uganda. This can be done by way of collective reparations whose target would be to develop the area generally. In the long run, this would entail the undertaking of projects such as the building of primary and secondary schools, universities, hospital and rehabilitation centres to address past human rights abuses. The construction of rehabilitation centres and primary schools must be
done as a matter of priority. This is because since the conflict in Uganda had been on going for decades, the people based in the region will have challenges and needs that need to be attended to as a matter of urgency. The involvement of children by the LRA implies that majority of children never had the opportunity of attending primary education. In order to ensure a bright future for the children (former LRA), a strong foundation needs to be established. As part of the reparations, the facilities such as primary, secondary education and the rehabilitation centre must be free for all. This is essential in order to ensure that as many people as possible are able to access basic education and rehabilitation services. The rehabilitation services will further facilitate the former LRA and others affected within the communities to be able to receive services intended to make it easy for them to be reintegrated within the communities.

(II) The hospital services must also be available for free of charge for victims of the conflict. This is critical for the purpose of addressing the mental and psychological needs of the victims.

(III) The government of Uganda as part of its reparations policy must introduce measures that seek to develop the Acholi region by way of infrastructure to improve the judicial system. This would entail conducting court sessions in the region most affected by the war. In the long run, judicial facilities must be built as opposed to relying on the ICC’s prosecutions. The institutions established must be
appropriate for the people based in the area. Developing this area will empower the population and improve their lifestyle as part of the reparations package.

(IV) The government of Uganda must encourage investment in northern Uganda, such an approach will create employment opportunities for the people of northern Uganda thus improving their quality of life.

(V) Consultation must be conducted among key stakeholders with the need to agree on an acceptable model of the *mato oput* approach. In order for Uganda to come up with an adequate model of *mato oput* that aligns to international standards and has elements from the different tribes in northern Uganda, Uganda must identify the key stakeholders that must be involved in the consultative process. By ‘aligning to international standards’, it means, for the purposes of this thesis, that it must not contradict the Rome Statute. This implies that the established *mato oput* method will not be expected to grant amnesty, as it is contrary to international law as demonstrated in previous chapters. The implication is that all persons suspected of committing the greatest offences would be subjected to the *mato oput* processes regardless of whether they were granted amnesty or not.

(VI) The key stakeholders must include representatives from the following groups and institutions; the Acholi people representing the affected community, the government of Uganda, the judiciary, legal aid board, the Human Rights Commission, the civil society organisations, institutions of higher learning, the UN, AU and the ICC.
As explained in chapter four, it is important for the government of Uganda to have representatives from the following ministries; Justice and Constitutional Affairs, Gender, Labour and Social Development, Finance, Planning and Economic Development and Ministry of Education and Sports. The Acholi communities can have representatives from various groups including farmers, teachers, the religious groups and leaders, elders and the youth. Following the identification of the relevant stakeholders, meetings/ workshops must be conducted in order for the different stakeholders to come together and strategize on how to device an acceptable model of the mato oput approach.

Uganda must adopt the mato oput approach formally as a tool to address the past human rights abuses in Uganda. This should be realised by adoption of special mato oput legislation similar to that which was adopted in Rwanda in reference to gacaca courts as addressed in chapter three of this thesis. The legislation must contain details of how the mato oput process would be conducted in northern Uganda. It must be clear that all persons regardless of whether they have been granted amnesty or not must be exposed to the process in order to determine accountable for the past human rights abuses, to allow reintegration into the community and ensure the prevention of future violations.

This means all persons with exception to those that the ICC has issued the warrants of arrest for, must partake in the mato oput process. As highlighted throughout this thesis, it is important for any state to adopt processes to deal with past violations in order to make sure that the atrocities are not repeated. The mato oput approach allows for the involvement of the communities so that the population will be able to easily follow the
proceedings. The *mato oput* indigenous measure will further help Uganda to denounce war crimes and crimes against humanity generally, thus contributing towards achieving the objectives of deterrence as addressed in chapter two.

**5.3.2 Recommendations to the ICC with Regard to the Role of the International Criminal Court.**

The ICC must ensure that states such as Uganda, undertake their duties of protecting and preventing future violations within their territory, by way of adopting the *mato oput* approach to address past abuses and ensure prevention of future atrocities. The involvement of the ICC in Uganda must not be limited to prosecution of top leaders and reparations of a few victims. However the ICC should be in the forefront in ensuring that the *mato oput* technique is adopted formally and implemented in Uganda. The ICC should, if necessary, be able to make recommendations to the UN Security Council to urge Uganda to introduce and implement policies intended to prevent future atrocities.

Therefore the role of the ICC would no longer be restricted to investigations and prosecution, but extended to the Court exercising an advisory role. In addition to the UN, the Court could also rely on the AU to encourage and support Uganda in its implementation of the *mato oput* mechanism in Uganda. The AU will be keen to support such an approach because *mato oput* is an indigenous Ugandan approach. Thus supporting the implementation would simply be intended to improve the lifestyle and

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systems in Uganda. The ICC should have a responsibility of making sure that Uganda is transformed into an entity in which the rule of law and individual rights are respected.

5.4 Concluding Remarks
This thesis has demonstrated and ascertained the extent to which the ICC ought to respond to the suffering of people in northern Uganda from past human rights abuses (that is by means of prosecution and reparations of victims at the end of the case) and the extent to which the ICC can prevent similar suffering from happening in future. The research has further proposed that it should be mandatory for TRCs or traditional justice approaches to be adopted in African states that have cases before the ICC. Incorporation of ATJ strategies is about going beyond prosecutions and encouraging transformation in the states involved. An approach of this nature will reduce the possibility of similar offences being repeated, hence resulting in deterrence of future atrocities.

Therefore, the mato oput measure will operate alongside the ICC prosecutions for the purpose of achieving objectives beyond deterrence and retribution as well as addressing the root causes of the conflict. It is possible for such a process to be adopted on the basis of the Preamble to the Rome Statute that provides that, the ICC was established ‘for the sake of present and future generations.’ This therefore implies that the ICC has a role to play in terms of the future conducts, by ensuring that such atrocities are never repeated. This thesis constitutes a valid contribution to existing knowledge as it provides a model of how Uganda as a state can proceed to ensure atrocities are prevented in future.
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