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# INTERNATIONAL CRIMINAL COURT (ICC) PROSECUTION OF AFRICANS FOR WAR CRIMES AND CRIMES AGAINST HUMANITY: A WITCH-HUNT?

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**ABSTRACT:** *Since the post-Cold War era began in 1991, several political leaders, government officials, high-ranking military officers, warlords and armed groups have initiated, planned, aided and abetted and, committed grave atrocities during armed conflicts, post-election violence, insurgency etc. In order to put an end to the evil culture of impunity in the new millennium, hold the perpetrators of international crimes accountable for their actions and, get justice for the victims of the crimes, The Hague-based International Criminal Court (ICC) was founded in 2002. Africa as a region presently has 33 State parties to the Rome Statute of the ICC, thus making it the largest bloc in the Court of 123 State parties. But no sooner had most African State parties supported the establishment and operations of the ICC than they stopped cooperating with it under the umbrella of the African Union (AU). The unabated hostility between the AU and the ICC centres on the indictment and prosecution of sitting African presidents which enjoy immunity based on customary international law and, the disproportionate indictment, prosecution, and conviction of Africans for war crimes and crimes against humanity. This paper critically examines the allegations by most African States parties to the Rome Statute that, the ICC has an African bias and that it pursues 'selective justice'. The research methodology adopted for this study is the historical approach with the qualitative method of secondary data collection.*

**KEYWORDS:** Crimes Against Humanity, Genocide, Immunity, International Crimes, International Criminal Court, Indict, Prosecution, War Crimes

## INTRODUCTION

Since the post-Cold War era began in 1991, egregious international crimes have been initiated, plotted, aided and abetted and, committed by political leaders, government officials, senior/junior military officers, warlords, armed groups to mention a few – the 100 days Rwanda genocide (1994); Bosnian War (1992-1995) Srebrenica massacre (1995); sexual assault against women during and after the Second Congo War (1998-2003); the Darfur genocide in Sudan (2003), the torture of prisoners in Iraqi Abu Ghraib prison (2004), the maiming of unarmed civilians' hands and limbs during the Sierra Leone Civil War (1991-2002); the hideous killings in Kenya's (2007-2008) and Côte d'Ivoire's (2010-2011) post-election violence; the gassing of Syrian men, women and children with chemical weapons in Ghouta (2013) and Douma (2018) etc. While some of the perpetrators of these grave atrocities have been apprehended and prosecuted in either an *ad hoc* international criminal tribunal or special court, others have or are yet to be formally charged, tried and punished by the permanent International Criminal Court (ICC).

The International Criminal Court (ICC) was founded in July, 2002 at The Hague, Netherlands, to end impunity in the regions of the world, hold the perpetrators of international crimes accountable for their actions and, get justice for the victims of the crimes committed. Africa as a region has the largest number of member countries in the ICC. Precisely 34 African States were signatories to the Rome Statute of the ICC (now 33 African States following the exit of Burundi which took effect in October 2017). At first, these African State parties all supported the establishment of the Court. But not long after the Court was formed and accordingly started performing its judicial functions, most of them under the aegis of the African Union (AU) stopped cooperating with it. The growing tension between the AU and the ICC stem, first and foremost, from the legal question on the indictment and prosecution of sitting African presidents which enjoy immunity according to customary international law and lastly, the disproportionate indictment, prosecution and conviction of Africans for war crimes and crimes against humanity.

To thoroughly examine the allegation made by most African State parties to the Rome Statute that, the ICC witch-hunts Africans and thus pursues 'selective justice', this research paper has been compartmentalised into the following sub-headings: international criminal tribunals as the precursor of the International Criminal Court (ICC); the formation, organs and jurisdiction of the International Criminal Court (ICC); International Criminal Court (ICC) prosecution of Africans for war crimes and crimes against humanity: a witch-hunt?; conclusion and lastly; recommendations.

## INTERNATIONAL CRIMINAL TRIBUNALS AS THE PRECURSOR OF THE INTERNATIONAL CRIMINAL COURT (ICC)

"Proposals for the establishment of a permanent international criminal tribunal dates as far back as 1872, when Gustav Moynier, one of the founders of the ICRC, discussed the idea" (Hall 1998 cited in Crawford 2012:678). "After the conclusion of the First World War, a commission set up by the Allied Powers recommended that as the defeated powers had violated the law of war, high officials, including the Kaiser, be prosecuted for ordering such crimes and on the basis of commanding responsibility. It was also suggested that an Allied High Tribunal be established to try violations of the laws and customs of war and laws of humanity. Accordingly, the Treaty of Versailles, 1919 noted that the German government recognized the right of the Allied and Associated Powers to bring individuals accused of crimes against the laws and customs of war before military tribunals (article 228) and established the individual responsibility of the Kaiser (article 227). In the event, the Netherlands refused to hand over the Kaiser and only a few trials were held before German courts in Leipzig with, at best, mixed results" (Shaw, 2008:399)

### The Nuremberg and Tokyo Trials

The Second World War (1939-1945) was a global war where international crimes were committed by the vanquished Axis powers. Hence, the victorious Allied powers, in order to prosecute and punish the major war criminals of the European axis, particularly government officials and senior military officers from Nazi Germany, decided at the London Conference on August 08, 1945, to set up an International Military Tribunal (IMT) with the London Charter at the Palace of Justice in Nuremberg, Germany.

The Nuremberg Trials started on November 20, 1945, with a panel of judges from Great Britain, France, US and USSR. Presided over by the British judge, Sir Geoffrey Lawrence, the Tribunal indicted 24 Germans among who were Hermann Göring, Martin Bormann, Rudolph Hess and Joachim von Ribbentrop. They were indicted on a 4 count-charge i) conspiracy; ii) crimes against peace; iii) war crimes and; iv) crimes against humanity. Out of the 24 Germans that were indicted, only 22 were tried because Robert Ley had committed suicide while Gustav Krupp von Bohlen was deemed mentally and physically unfit to stand trial (Goss, 2019). It was argued in the defence of the 22 Germans standing trial that, their actions during WWII were not crimes as at the time. Thus, criminalising their conduct after the war was over with *ex post facto* law was not appropriate. Furthermore, some of the defendants claimed that they only acted on the orders of their superior therefore, they as subordinates should not be held accountable for their actions. But none of their arguments flew in the IMT.

On October 01, 1946, the panel judges gave their verdict. 12 persons were convicted and sentenced to death by hanging, 7 got jail terms (from 10 years to life imprisonment) while 3 were acquitted. Hermann Göring committed suicide with cyanide in his prison cell the night before the day he was to be executed. Martin Bormann who was convicted *in absentia*, was not in the custody of the IMT. It was later discovered that he had died in May 1945. Thus, on October 16, 1946, only 10 defendants were hanged (Marek, 2015; Goss, 2019).

On January 19, 1946, the International Military Tribunal for the Far East (IMTFE), also called the 'Tokyo Trials', was set up after a proclamation was made by General Douglas MacAuthur (the supreme commander of the Allied powers in the Pacific region during WWII) in Tokyo, Japan. With a panel of judges from 11 countries – Australia, Canada, China, France, Great Britain, India, the Netherlands, New Zealand, the Philippines, US and USSR, the Tokyo Trials was officially opened on May 03, 1946, and closed on November 12, 1948. During the Tokyo Trials, 28 top Japanese government officials and military officers were indicted and prosecuted. Before the proceedings were over, 2 defendants died while 1 was found incompetent to stand trial. In the end, only 25 Japanese defendants were convicted – 7 (including General Tōjō Hideki of the Imperial Japanese Army (IJA)) were sentenced to death by hanging which was carried out on December 23, 1948. 16 got life imprisonment, 1 got a 7-year jail term and the last person, 20 years behind bars (Merk, 2010).

The Nuremberg Trials (1945-1949) and the Tokyo Trials (1946-1948) were the first trials in modern history where high-rank military officers and government officials were tried and found guilty for the crimes committed. Both trials also contributed to the development of international criminal law. Nevertheless, the Nuremberg and Tokyo Trials set the bad precedence of the 'politics of international justice'. Not a single political leader or senior military officer from the Allied powers was tried for violating international humanitarian law, not even from the US that detonated an atomic bomb in the Japanese cities of Hiroshima and Nagasaki on August 06 and 09, 1945, respectively.

**The International Criminal Tribunal for the Former Yugoslavia (ICTY)**

From the early 1990s, ethnic cleansing, genocide, war crimes, crimes against humanity and other atrocities were committed during the armed conflicts that engulfed the Balkans – Croatia (1991-1992), Bosnia and Herzegovina (1992-1995) and, Kosovo (1998-1999). Hence, the United Nations Security Council (UNSC) adopted resolution 827 on May 25,

1993, for the establishment of the *ad hoc* International Criminal Tribunal for the Former Yugoslavia (ICTY) at The Hague, Netherlands.

The ICTY was mandated to prosecute persons responsible for serious violations of international humanitarian law in the territory of the former Yugoslavia since 1991. Such violations of international humanitarian law included the Geneva Conventions (1949). On December 22, 2010, the UNSC adopted another resolution, resolution 1966, which created the Hague-based International Residual Mechanism for Criminal Tribunals (MICT) which continued the functions of the ICTY after it was dissolved.

The ICTY commenced its preliminary session at The Hague on November 17, 1993. Structured into three departments – the Chambers, the Office of the Prosecutor and, the Registry, the trial of former Yugoslav president, Slobodan Milošević, started on February 12, 2002. He was indicted on May 24, 1999, while he was still a president. Thus, he became the first sitting president of a country to be indicted and tried in an international criminal tribunal for a 66 count-charge which included genocide, war crimes and crimes against humanity. Before his trial came to a close, he died of a heart attack in his prison cell on March 11, 2006 (Simons, 2017).

On February 12, 1994, Duško Tadić was arrested by German authorities in Munich, Germany, and was transferred to The Hague-based ICTY on April 24, 1995. Convicted of war crimes and crimes against humanity, he was given a 25-year jail term by the Trial Chamber on November 11, 1999, which was reduced by the Appeals Chamber to 20 years on January 26, 2000. Tadić was later given an early release from prison on July 17, 2008 (ICD, 2013). On December 18, 2003, Dragan Nikolić was sentenced to 23 years by the Trial Chamber which was reduced to 20 years on February 04, 2005, by the Appeals Chamber after pleading guilty to murder, torture and aiding and abetting rape at the Sušica camp in Vlasenica, Eastern Bosnia (Sense Tribunal, 2005). On July 20, 2009, Sredoje Lukić was sentenced to 30 years in prison for war crimes and crimes against humanity in Višegrad, Eastern Bosnia. The sentence was later reduced to 27 years by the Appeals Chamber on December 04, 2012 (IRMCT, 2013). On August 02, 2001, the Bosnia Serb, Radislav Krstić, was sentenced to 46 years behind bars after he was convicted by the Trial Chamber for aiding and abetting genocide i.e. the 1995 massacre of about 8,000 Muslim men and boys in Srebrenica, Bosnia. But on April 19, 2004, the Appeals Chamber reduced his sentence to 35 years.

For the fugitives General Ratko Mladić and Goran Hadžić, they were apprehended and extradited to The Hague in May 2011 and July 2011 respectively. Mladić was sentenced to life in prison on November 22, 2017, for genocide, war crimes and crimes against humanity. The Bosnia Serb leader, Radovan Karadžić, who was indicted for genocide in 1995 was arrested in July 2008. His trial started in October 2009 and on March 24, 2016, he was convicted of genocide and sentenced to 40 years in prison. The International Residual Mechanism for Criminal Tribunals would rule on March 20, 2019, on his appeal to the 40 years jail term for his role in the Bosnian War (1992-1995) that left about 100,000 people dead and 2.2 million others displaced (France 24, 2019). As for the Bosnian Croat commander, Slobodan Praljak, he dramatically committed suicide in the courtroom by consuming potassium cyanide in November 2017 when his appeal for his 20 years sentence was upheld (France-Presse, 2018).

ICTY indicted 161 persons from present day Bosnia and Herzegovina, Croatia and Serbia for torture, rape, ethnic cleansing, genocide, war crimes and crimes against humanity. In total, the Tribunal heard the testimony of 4,650 witnesses and sat for 10,800 trial days. The Tribunal was officially closed on December 31, 2017, ending 24 years of indictment, investigation, prosecution and conviction (Diplomatic Magazine, 2017).

**The International Criminal Tribunal for Rwanda (ICTR)**

A year after the ICTY was set up, the UNSC, acting under Chapter VII of the UN Charter, adopted resolution 955 on the 8th of November, 1994, which established the *ad hoc* International Criminal Tribunal for Rwanda (ICTR). The creation of the ICTR became necessary after about 800,000 Tutsi and moderate Hutu were killed during the Rwanda Civil War that broke out following the death of the president of Rwanda, Juvenal Habyarimana and the president of Burundi, Cyprien Ntaryamira. Both presidents died after the same plane carrying them was shot down as it was about to land in Kigali International Airport on April 06, 1994.

The ICTR which commenced its proceedings fully in 1995, was mandated to prosecute persons for genocide and other serious violations of international humanitarian law in the territory of Rwanda and neighbouring states from January 01 – December 31, 1994. Set up in Arusha, Tanzania, the ICTR structural organs like the ICTY were – the Chambers, the Office of the Prosecutor and, the Registry.

The ICTR sat for 5,800 days, hearing the testimony of over 3,000 witnesses. 93 individuals were indicted which included high-ranking military officers, government officials, politicians, businessmen, religious and media leaders. The Tribunal convicted 61 persons, including former Prime Minister Jean Kambanda, former Army Chief-of-Staff Gen. Augustin Bizimungu and former Defence Ministry Chief-of-Staff Col. Théoneste Bagosora. Regarding former Prime Minister Jean Kabanda case, it was the first time a former Head of Government would be convicted by an international criminal tribunal (Leithead, 2015; Kelley, 2016). Another major conviction worth mentioning was Jean-Paul Akeyesu, the Mayor of Taba, Rwanda, who was found guilty on charges of genocide in 1998. In total, 14 persons were acquitted by the Tribunal.

Back home in Rwanda, several *génocidaires* were tried and convicted for genocide in special courts called the 'Gacaca Courts' in local communities which rounded-off its operation in 2012. The ICTR ended all hearings and trials on December 31, 2015. Prior to the dissolution of the Tribunal, the International Residual Mechanism for Criminal Tribunals (MICT), which was formed by the UNSC after it adopted resolution 1966 on December 22, 2010, had from July 01, 2012, taken over some of the functions performed by the ICTR. It is the MICT that would prosecute and sentence the remaining indicted persons by the ICTR when the fugitives are apprehended.

"The ICTR is the first ever international tribunal to deliver verdicts in relation to genocide, and the first to interpret the definition of genocide set forth in the 1948 Geneva Conventions. It also is the first international tribunal to define rape in international criminal law and to recognise rape as a means of perpetrating genocide" (UNICTR, 2015). Nevertheless, the ICTR turned out to be one of the most expensive *ad hoc* international criminal tribunal. Around $2 billion was spent on the operation of the Tribunal (Leithead, 2015).

## THE FORMATION, ORGANS AND JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT (ICC)

The ICC, albeit an initiative of the UN, is an independent specialised intergovernmental organisation (IGO). Historically, the origin of the ICC is traceable to the prime minister of Trinidad and Tobago who in 1989 proposed that the UN create an international court to prosecute international drug traffickers (Luban *et al.*, 2019).

On July 17, 1998, the constituent instrument of the ICC, the 'Rome Statute of the ICC' was adopted by 120 countries at a diplomatic conference in Rome, Italy. For the Rome Statute to enter into force, it had to be ratified by 60 countries. On the 11$^{th}$ of April, 2002, the 60$^{th}$ country submitted its ratification instrument. However, it was not until the 1$^{st}$ of July, 2002, the Rome Statute took effect.

The ICC presently has 123 State parties, and its four structural organs are – i) *the Presidency* – composed of three judges: one as the President and the remaining two as Vice Presidents; ii) *the Chambers* – made up of eighteen judges with three divisions: Pre-trial, Trial and, Appeals; iii) *Office of the Prosecutor (OTP)* – investigates and gathers information on alleged crimes, indicts and prosecutes the perpetrators and; iv) *the Registry* – performs administrative functions.

The ICC as stated in Article 5 of the Rome Statute, has jurisdiction over the crime of genocide, crimes against humanity, war crimes and the crime of aggression that were committed after its establishment in 2002 and not earlier. Pertaining to the situations the ICC look into, there are two ways they have been brought before the Court – i) referral ('self-referral' by a State or referral by the UNSC) and; ii) *proprio motu*.

Article 1 of the Rome Statute states that the ICC is "complementary to national criminal jurisdictions" of State parties. In other words, based on the principle of 'complementarily', the Court can only indict and prosecute individuals for an appalling international crime(s) after the national court of a State party that has jurisdiction has been given ample opportunity to investigate and prosecute the perpetrators of the alleged crime(s) but is unwilling to do so or incapable of getting justice for the victims of the crimes committed (Rome Statute of the ICC 2011, Article 17; Seils, 2016). The said principle of complementarily came into play when the ICC *proprio motu*, indicted and prosecuted Uhuru Kenyatta, William Ruto and Joshua Arap Sang for purportedly orchestrating the 2007-2008 post-election violence that left about 1,200 people dead in Kenya.

Article 13(b) of the Rome Statute empowers the UNSC acting under Chapter VII of the UN Charter to refer a situation to the Court's Prosecutor. In recent past, the UNSC has referred two situations to the ICC. The atrocities committed in Darfur, Western Sudan, in March 2005 with resolution 1593 and that of Libya during the Arab Spring in February 2011 with resolution 1970. Asides its referral power, the UNSC can also defer the investigation on a situation based on the deferral provision in Article 16 of the Rome Statute which the AU requested from the UNSC for the *al-Bashir case* as the arrest and prosecution of the president of Sudan, Omar al-Bashir, could jeopardise the fragile peace process in Sudan.

**The Legitimacy Crisis of the International Criminal Court (ICC)**

The ICC currently lacks global legitimacy because, regional and world powers such as the US, Russia, India, China and, Israel have either not signed the Rome Statute or signed it but later withdrew their signature. For instance, during the Clinton administration, a US representative on December 31, 2000, signed the Rome Statute. But the Bush administration withdrew the US signature on May 06, 2002. Taking a step further, the Bush administration negotiated Bilateral Immunity Agreements (BIAs) with some countries that guarantee immunity to Americans from the Court's jurisdiction within their territorial boundary (see Ogunnoiki, 2018:47). Israel also signed the Rome Statute on December 31, 2000, but withdrew its signature on August 28, 2002. On November 16, 2016, Russia, a signatory to the Rome Statute, symbolically withdrew its signature.

In Africa, the government of Burundi, South Africa and the Gambia in October 2016 made public its intention to use the exit door out of the ICC which many feared would trigger a domino effect. The withdrawal process which requires the notification of the UN Secretary-General as stated in Article 127 of the Rome Statute would take effect one year after. To President Jacob Zuma's government of South Africa, the Rome Statute hindered South Africa from granting diplomatic immunity to a sitting president according to customary international law.

In June 2015, Sudanese president, Omar al-Bashir was in Johannesburg, South Africa, for the 25$^{th}$ AU Summit. South Africa as a party to the Rome Statute had the obligation to arrest him and hand him over to the ICC to faces charges of genocide, war crimes and crimes against humanity in Darfur, 2003. But the Zuma government failed to do so in recognition of the diplomatic impunity al-Bashir enjoys as a serving president. The North Gauteng High Court gave an interim order to the Zuma government not to allow al-Bashir leave the country while it heard the case filed by the NGO – South African Litigation Centre (SALC) for the arrest of the Sudanese president. But before the Court gave its verdict for the arrest al-Bashir, he had already departed South Africa to Khartoum (Tshabalala, 2015). Hence, South Africa came under heavy criticism which forced the Zuma government to notify the UN Secretary-General on South Africa's withdrawal from the ICC. South Africa's government decision to pullout from the Court was cut short by the North Gauteng High Court in February, 2017. The High Court ruled that the Zuma's government failed to follow the constitutional process of seeking the parliament's approval before notifying the UN Secretary-General. Thus on March 07, 2017, South Africa retracted its notice of withdrawal from the UN Secretary-General.

For the Gambia, President Yahya Jammeh pointed out the failure of the ICC to investigate the European Union (EU) vis-à-vis the death of thousands of African migrants to have attempted crossing the Mediterranean Sea into the EU from Southern Europe (Kuo, 2016). As at December 2016, the president-elect, Adama Barrow, prior to his inauguration, said that he would reverse Yahya Jammeh's decision to withdraw the Gambia from the Court which he did shortly after assuming office in January 2017.

In Burundi, President Jean Pierre Nkurunziza's government notified the UN Secretary-General on Burundi's withdrawal from the ICC after the UN formed a Commission of Inquiry on human rights abuses in Burundi (Nantulya, 2017). On October 12, 2016, the members of Burundi's parliament voted in favour of the withdrawal of the country from the ICC. On October 18, 2016, President Nkurunziza signed into law the bill on the outright pull

out of Burundi from the Court. Burundi thus became the first African country to withdraw from the ICC which took effect on October 27, 2017. Prior to the exit of Burundi from the Court, the ICC Prosecutor on April 25, 2016, announced that the OTP would conduct preliminary examination of crimes against humanity in Burundi from April 25, 2015 – October 26, 2017. On October 25, 2017, the ICC Prosecutor got authorisation to open *proprio motu* investigation of the Burundi situation (ICC, 2017).

Other African countries considering a withdrawal from the ICC are Kenya, Uganda and Namibia. Outside Africa, the President of the Philippines, Rodrigo Duterte on March 14, 2018, announced his plans to pull out the Philippines from the Court after the ICC opened preliminary examination in February 2018 into the Duterte's government crackdown on suspected drug users and peddlers.

The ICC has also started preliminary examination of alleged crimes committed in Afghanistan, Georgia, Cambodia, Iraq and Palestine. But the Prosecutor has not indicted the perpetrators from the aforementioned countries which most African State parties to the Rome Statutes have pointed out to back their claims that the ICC is unfairly targeting Africans and that the UNSC also have a hand in the whole 'politics of international justice'. There is at least a reason to believe the allegations of the ICC 'African bias' and 'selective justice' might be true. The UNSC five permanent members (Britain, China, France, Russia and US) all wield veto power on substantive matters in the Council. In time past and in recent years, they have vetoed several resolutions of the Council in their interest and that of their cronies. For example, Russia and China (which are not State parties to the Rome Statute) have repeatedly since 2014 blocked the referral of international crimes committed in the ongoing Syria Civil War (2011 – ?) to the ICC.

## INTERNATIONAL CRIMINAL COURT (ICC) PROSECUTION OF AFRICANS FOR WAR CRIMES AND CRIMES AGAINST HUMANITY: A WITCH-HUNT?

The ICC has come under heavy fire from the AU for indicting and prosecuting a sitting president. The backlash started in March 2009 when the ICC issued an arrest warrant for Omar al-Bashir, the president of Sudan for orchestrating the atrocities committed in Darfur in 2003. In March 08, 2011, Uhuru Kenyatta and William Ruto (who later became the president and vice-president of Kenya respectively in 2013) were among the six that were summoned to appear in the ICC on the 8$^{th}$ of April same year. These and other cases of the ICC issuance of an arrest warrant and summons, indictment, prosecution and conviction of Africans have not only given rise to the allegation that the Court has an African bias but the name-calling of the Court as a 'neo-colonial institution' and the 'International Caucasian Court'.

From May 25-27, 2013, African Heads of State and Government converged at Addis Ababa, Ethiopia, for a three-day Summit to mark the African Union's predecessor, the Oragnisation of African Unity (OAU) 50$^{th}$ anniversary. At the close of the Summit, a number of African leaders accused the ICC of racism and 'hunting' Africans (The Economist, 2013). In the words of the then AU Chairman and Prime Minister of Ethiopia, Hailemariam Desalegn, "[t]he intention was to avoid any kind of impunity…but now the process has degenerated to some kind of race hunting" (AFP cited in Al Jazeera, 2013).

Clearing the air on the matter, the Chief Prosecutor of the ICC, Mrs. Fatou Bensouda from the Gambia, who took over from Luis Moreno-Ocampo from Argentina in June 2012 said:

> *"We are in African countries because African governments are requesting the ICC to investigate and prosecute. We have eight situations, and of those eight, five were at the request of African governments – Uganda, Democratic Republic of Congo, Central African Republic, Cote D'Ivoire, Mali"* (Mwakalyelye, 2014).

She went on to state categorically that those that were not requested directly by the government of an African State were the situation in Sudan and Libya which are not State parties to the Rome Statute of the ICC. Sudan's Omar al-Bashir is wanted for masterminding the atrocities perpetrated in Darfur, Sudan, while Libya's Muammar Qaddafi for war crimes in Libya before his death. Both situations were referred by the UNSC to the Prosecutor of the ICC (Mwakalyelye, 2014). At this juncture, it is important to state that Benin and Tanzania were among the 11 countries that favoured the referral of the Darfur atrocities in Western Sudan to the ICC in 2005 while Gabon, Nigeria and South Africa voted unanimously in the UNSC for the referral of the situation in Libya in 2011 (McConnell, 2013; Nantulya, 2017). As for the Uhuru Kenyatta, William Ruto and Joshua Arap Sang case on the post-election violence in Kenya from 2007-2008, Angela Mudukuti makes us understand that it "is the only situation where the ICC's Office of the Prosecutor acted on its own initiative, but only after Kenya was given ample time and still failed to take action to ensure justice domestically" (New Internationalist, 2014).

In June 2015, the AU formed the "Open-Ended Ministerial Committee on the ICC". In 2016, the continental body charged the Committee to develop urgently a comprehensive strategy that included a 'collective withdrawal' of African State parties to the Rome Statute of the ICC. At the AU 28th Summit on January 31, 2017, the regional body called for the 'mass withdrawal' of African countries from the ICC. This 'mass exodus' strategy which Kenya champions, was not unanimously adopted. Nigeria, Senegal and Cape Verde tendered formal reservations on the strategy while Malawi, Tanzania, Tunisia and, Zambia requested for more time to study it. Legally speaking, the strategy first and foremost is not binding on AU Member States that are parties to the Rome Statute. Lastly, the AU cannot possibly see through the collective withdrawal of the 34 turned 33 African State parties to the Rome Statute because, they independently signed and ratified the Statute. To pull out therefore would also be an independent decision and not a joint effort. The question arising, should most if not all the 33 African States use the exit door out of the ICC is, are these countries national court capable of ending impunity in their country and getting justice for both dead and living victims of the grisly crimes perpetrated?

Presently on the African continent, most African countries judicial system is not only weak but slow. However, the indictment, prosecution and conviction of former Chadian president, Hissène Habré by Senegal in collaboration with the AU, tells us that African countries judicial system can actually function effectively. The Chadian dictator, Hissène Habré, who came to power in 1982, fled to Senegal in 1990 after his was ousted by the incumbent president of Chad, Idriss Déby. He was first indicted in the year 2000 for war crimes, crimes against humanity and rape (the latter charge was later dropped). In 2013, the Extraordinary African Chambers (EAC), a special court in Dakar, Senegal, was set up by Senegal and the AU. His trial began in July 2015 and on May 30, 2016, he was sentenced to life

imprisonment by the EAC. On April 27, 2017, EAC Appeal Court upheld the life sentence of Habré. He is to pay the 7,396 named victims $153 million as compensation. The former Chadian dictator became the first former president of a country to be convicted for crimes against humanity by a court in another country (Maclean, 2018a).

As the continental body, the AU has for some years been on the establishment of a regional court for Africa. Following the recommendation of Chairperson of the Assembly of the AU and President of Nigeria in person of Olusegun Obasanjo, the African Court on Human and Peoples' Rights (ACHPR) and the Court of Justice of the African Union were merged in July 2004 to form the African Court of Justice and Human Rights (ACJHR) which like the ICC would have jurisdiction over international crimes. On July 01, 2008, the AU adopted the Protocol on the Statute of the African Court of Justice and Human Rights. In June 2014, the continental body adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human rights (a.k.a Malabo Protocol) in Malabo, Equatorial Guinea. Nevertheless, the Court has not been established as the required 15 countries ratification of the Protocol has not been fulfilled.

Unlike the Rome Statute of the ICC, the Malabo Protocol recognises the immunity of sitting presidents from prosecution. Arguably, this immunity of serving presidents from prosecution might become a challenge for the Court following its establishment because, some African leaders suffer from a sit-tight syndrome. Hence, they might never leave power let alone be prosecuted for the purported international crimes committed during their regime.

**Cases of Prosecuted Africans by the International Criminal Court (ICC)**

The ICC over the years has indicted and accordingly issued an arrest warrant for several Africans e.g. Omar al-Bashir and Joseph Kony. However, in this section, only the case of those that were indicted, prosecuted and convicted/acquitted would be analysed.

***Dyilo Case***

On July 10, 2012, the warlord Thomas Lubanga Dyilo was sentenced by the ICC to 14 years imprisonment for conscripting and enlisting child soldiers under the age of 15 into his armed group, Union of Congolese Patriots (UPC), in the Ituri region, North-East of the Democratic Republic of Congo (DRC) from 1999. Dyilo became the first person the Court convicted since it was set up in 2002 (Ogunnoiki, 2019).

***Ntaganda Case***

In the year 2013, Bosco Ntaganda a.k.a 'The Terminator' voluntarily gave himself up at the U.S Embassy in Kigali, Rwanda. At The Hague, Ntaganda is being tried for the central role he played in planning the operations of his Patriotic Forces for the Liberation of Congo (FPLC). He faces a 13-count charge of war crimes and a 5-count charge of crimes against humanity in the Ituri region between 2002 and 2003 (Ogunnoiki, 2019).

***Kantaga Case***

On the 23rd of May, 2014, the leader of the *Force de Résistance Patriotique en Ituri* (FRPI), Germain Kantaga, was sentenced to 12 years imprisonment for war crimes and crimes against

humanity that were committed in 2003 in Bogoro, Ituri region. Having spent six years during his trial, he would only serve half the sentence years (Ogunnoiki, 2019).

***Gbagbo Case***

The former president of Côte d'Ivoire, Laurent Gbagbo was sent to The Hague to stand trial for the killing of over 3,000 Ivoirians in the post-election violence from 2010 to 2011. The charges against him are crimes against humanity which include murder, rape and other inhumane acts. Gbagbo, who was arrested after he was found in the bunker at the presidential palace in Abidjan on April 11, 2011, was sent to the ICC on the 30th of November, same year. Also, to have been sent to the ICC to face same charges for the violence that followed the November 28, 2010, run-off presidential election was Charles Blé Goudé, the former youth minister. He was caught in Ghana on January 17, 2013, and handed over to the ICC on March 22, 2014. Both Gbagbo and Goudé's trial did not start until January 28, 2016, after their case was joined together on March 11, 2015. The 73-year-old Gbagbo and Goudé were acquitted of all charges on January 15, 2019. Laurent Gbagbo became the first former president to stand trial in the Court.

Gbagbo's wife, Simone Gbagbo, though the ICC issued an arrest warrant for her, the government of Côte d'Ivoire refused to hand her over. The former first lady was tried in a court in Côte d'Ivoire for her role in the violence that followed the 2010 presidential election. In 2015, she was convicted and sentenced to 20 years in prison. While serving her 20 years sentence, the incumbent President of Côte d'Ivoire, Alassane Ouattara, granted 800 persons amnesty on August 06, 2018, which included Simone Gbagbo (Maclean, 2018b).

***Kenyatta Case***

The incumbent president of Kenya, Uhuru Kenyatta, his deputy, William Ruto and a radio presenter by the name Joshua Arap Sang were charged for crimes against humanity which were committed during the 2007-2008 post-election violence that led to the death of more than 1,000 people.

Uhuru Kenyatta who was indicted by the ICC in 2011, became the president-elect of Kenya in April 2013. Having obeyed the summons of the Court to attend a 'status conference' on October 08, 2014, Uhuru Kenyatta became the first sitting president to appear before the ICC (Heuler, 2014). As his trial went on, some of the witnesses began to recant their testimony which some believe they were either bribed or intimidated to do so. The crimes against humanity charges against Uhuru Kenyatta were dropped on December 05, 2014, owing to insufficient evidence and the lack of cooperation by the government of Kenya. For William Ruto and Joshua Arap Sang, the charges against them were terminated on April 05, 2016.

***Bemba Case***

On May 24, 2008, former warlord turned vice president of the Democratic Republic of Congo (DRC), Jean-Pierre Bemba Gombo was arrested in Belgium by Belgian authorities, and was transferred to the ICC. The Court on March 21, 2016, convicted Bemba for war crimes and crimes against humanity which included murder, rape and pillage by the *Mouvement pour la Libération du Congo* (MLC) troops in neighbouring Central African Republic (CAR) between October 26, 2002 and March 15, 2003.

This was first time the Court would convict an individual for sexual assault and other crimes committed by armed men under his command. But on June 08, 2018, the Appeals Chamber of the ICC overturned his 18 years sentence. Though he was acquitted of the charges same year, Bemba was not completely off the hook of the ICC. He was also convicted on the lesser charge of witness tampering. The Court fined Bemba €300,000 (i.e. $350,000) and sentenced him to 12 months behind bars. He however did not serve the prison sentence because of the time he had already spent in jail (Al Jazeera, 2018).

***Al-Mahdi Case***

On September 18, 2015, an arrest warrant was issued by the ICC for Ahmad al-Faqi al-Mahdi who was charged for the war crime of intentionally directing attacks on historical and religious monuments from about June 30 to July 10, 2012. He was arrested and handed over to the ICC by Niger authorities on September 26, 2015.

Al-Mahdi's trial began on August 22, 2016, and on September 27, 2016, he was sentenced to 9 years in prison for overseeing the destruction of centuries old monuments – 9 mausoleums and 1 mosque in the ancient city of Timbuktu, Mali. The destruction took place when the Islamic militant group, Ansar Dine, controlled the area during the Northern Mali conflict in 2012.

On August 17, 2017, the Court ruled that Ahmad al-Faqi al-Mahdi should pay €2.7 million as reparation to the community of Timbuktu (The Guardian, 2017). Al-Mahdi's case was the first case of the admission of guilt by the defendant in the ICC as well as the first time the Court linked the destruction of historical and religious monuments to war crimes.

## CONCLUSION

It is no longer business as usual for political leaders, government officials, high-ranking military officers and their subordinates, warlords and armed groups that commit international crimes and get off scot-free. All thanks to the ICC, impunity is gradually becoming a thing of the past and the victims of horrendous crimes committed from the early 2000s have started getting the long overdue justice and compensation that they deserve. In the light of the findings in this paper, the allegation made by most African State parties to the Rome Statute of the ICC that, the Court is unfairly targeting Africans is unfounded. It is on record that 5 out of the 8 situations investigated by the ICC were referred to the Court by African States based on the self-referral provision in Article 14 of the Rome Statute, 2 were referred to the Court by the UNSC which most if not all the African countries that were non-permanent members of the Council at the time the situations were referred to the Prosecutor of the Court supported, while 1 was a *proprio motu* of the ICC.

## RECOMMENDATIONS

The following are strongly recommended to the ICC, AU and the 33 African State parties to the Rome Statute of the ICC:

i) The ICC should perform the final burial rites for the concern of African State parties to the Rome Statute that, the Court has an African bias by indicting, prosecuting and convicting non-Africans for heinous crimes committed in other regions of the world;

ii) The Office of the Prosecutor (OTP) should save the ICC from future setback by gathering henceforth sufficient evidence on purported international crimes before an arrest warrant/summons is issued for the perpetrators;

iii) The AU should encourage Member States to ratify the Malabo Protocol (2014) for the establishment of the regional court – African Court of Justice and Human Rights (ACJHR);

iv) African State parties to the Rome Statute should abandon the 'mass exodus' strategy being called for in the AU. Rather than leaving the ICC, they should maximise their collective strength as the largest regional bloc in the Court to push for in-house reforms;

v) Respectively, African State parties to the Rome Statute should assiduously work on their judicial mechanisms. Only when they have a functional and effective judicial system will their national court take precedence thus making the ICC a court of last resort;

vi) African States in general should give priority to getting justice for the victims of dreadful international crimes and not the immunity of sitting presidents from prosecution.

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