



# **Relevance of Article 27 of the Rome Statute and the Significance of the Rome Statute in Combating Sovereign Impunity<sup>\*1</sup>**

## **ABSTRACT**

Recent controversies surrounding Article 27 of the Rome Statute and the uphill task involved in the arrest and prosecution of indicted sitting presidents for international crimes have raised fundamental questions in several legal minds. The obvious is that in spite of the provisions of article 27 on irrelevance of official capacity for individual criminal accountability, indicted sitting presidents are hardly arrested and prosecuted. The question is, of what relevance and significance is the Rome Statute and its Article 27 if it cannot be enforced? The aim of this research is to analyse the relevance and significance of Article 27 of the Rome Statute and the Statute itself. The objective is to examine the need to make article 27 functional and effective. The research adopts doctrinal designs using analytical approach with reliance made on Statutes, case law, law reviews and data in web-based sources which will be subjected to content analysis. It found that the Rome Treaty is already a remarkable achievement for multilateralism and that Article 27 of the Rome Statute is a good check on executive arbitrariness that emanates from abuse of sovereignty. At least, with the prosecution of the likes of Charles Taylor, and Ntaganda, it can be confidently argued that the international criminal court is work in progress. Consequently, there is need for States to embrace Article 27 of the Rome Statute and support the International Criminal Court in fighting impunity.

**Keywords:** Relevance, Article 27 of the Rome Statute, Significance, the Rome Statute.

## **1. INTRODUCTION**

The Rome Statute could be likened to a child of destiny. Prior to the signing of the Rome Statute the international community from passivity plunged into activity, commissions formed, some treaties were signed but there was none like the Rome Statute. The signing of the Rome Statute into law in 2002 marked a demonstration of willingness by States to accept the jurisdiction of an international court for the first time in history to prosecute criminals for offenses of an international nature. The Rome Statute established the International Criminal Court (ICC) as a permanent international criminal court for the investigation and prosecution of individuals who commit acts that constitute international crimes as provided under the statute.<sup>2</sup> The ICC is the first treaty-based permanent international criminal court intended primarily to regulate and ensure accountability for international crimes, to prosecute and punish perpetrators of war crimes, genocide and crimes against humanity and crimes of aggression. Among other things, the Statute sets out the crimes falling within the jurisdiction of the ICC, the rules of procedure and the mechanisms for States to cooperate with the ICC. The ICC is established as an independent entity able to try individuals for crimes within its jurisdiction, without a mandate from the United Nations.<sup>3</sup> However, the court is intended to act complementarily with states national courts but under the principle

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<sup>2</sup> Article 1 of the Rome Statute.

<sup>3</sup> On 4 October 2004, the ICC and the United Nations signed an agreement governing their institutional relationship. See: Understanding the International Criminal Court by the Public Information and Documentation Section Registry, International Criminal Court The Hague.

of complementarity, it is enabled to try individuals only when national courts are unwilling or unable genuinely to do so. This principle of complementarity upholds that national courts take priority over the ICC, unless the domestic courts are unable or unwilling to conduct trials.<sup>4</sup> Thus, State Parties to the Rome Statute peremptorily submitted themselves to the jurisdiction of the ICC for the crimes outlined in the Statute. Nonetheless, the ICC may only exercise jurisdiction over Member States for crimes which occurred after the establishment of the ICC in 2002. The Court may not pursue offenses retroactively, unless authorised by the Member State of the individual in question.<sup>5</sup> It is worthy of note that, the United Nations Security Council may also exercise its power under Article 13(b) of the Rome Statute and refer a situation to the ICC Prosecutor for investigation and prosecution as in the case of Sudan and Lybia. Since the signing into law of the Rome Statute, Article 27 of the Statute has received very weighty controversies from and vehement rejection by both State parties and none State parties alike. This is mainly because it categorically states that official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence<sup>6</sup>. It further states that immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person<sup>7</sup>. To this extent, most sovereigns and their agents who are the main perpetrators of international crimes most of the time have vehemently opposed the enforcement of article 27 of the Statute. Thus, neutralizing the effectiveness of the said article 27 so that arresting any indicted sitting president has remained an uphill task till date. Section I of this work introduces the study. Section II discussed The Rome Statute, the International Criminal Court, its structure and jurisdiction. Section III carefully considered Article 27 of the Rome Statute and its Relevance, while section IV is on the Significance of the Rome Statute and the Relevance of the International Criminal Court. Section V is the Conclusion and Recommendations.

## **2. The Rome Statute and the International Criminal Court, Structure and Jurisdiction of the Court**

The signing of the Rome Statute into law in 2002 marked a demonstration of willingness by States to accept the jurisdiction of an international court for the first time in history to prosecute criminals for offenses of international nature. The Rome Statute established the International Criminal Court (ICC) as a permanent international criminal court for the investigation and prosecution of individuals who commit acts that constitute international crimes as provided under the statute.<sup>8</sup> The ICC is the first treaty-based permanent international criminal court. It is intended primarily to regulate and ensure accountability for international crimes, to prosecute and punish perpetrators of war crimes and crimes against humanity. Among other things, the Statute sets out the crimes falling within the jurisdiction of the ICC<sup>9</sup>, the rules of procedure and the mechanisms for States to cooperate with the ICC.

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<sup>4</sup> This might occur where proceedings are unduly delayed or are intended to shield individuals from their criminal responsibility. This is known as the principle of complementarity, under which priority is given to national systems. States retain primary responsibility for trying the perpetrators of the most serious of crimes.

<sup>5</sup> The International Criminal Court: Origins, Jurisdiction and the 'African Bias' South African History Online © 2015 <http://www.sahistory.org.za/article/international-criminal-court-origins-jurisdiction-and-african-bias#sthash.wnQGWFm6.dpuf>, accessed February 22, 2022.

<sup>6</sup> The Rome Statute, Article 27(1).

<sup>7</sup> The Rome Statute, Article 27(2).

<sup>8</sup> Article 1 of the Rome Statute.

<sup>9</sup> Genocide, crimes against humanity, war crimes and aggression under articles 5, 6, 7, 8 and 8 bis of the Rome Statute respectively.

The ICC is established as an independent entity able to try individuals for crimes within its jurisdiction, without a mandate from the United Nations.<sup>10</sup> The court is intended to act complementarily with states national courts but under the principle of complementarity, it is enabled to try individuals only when national courts are unwilling or unable genuinely to do so. The principle of complementarity upholds that national courts take priority over the ICC, unless domestic courts are unable or unwilling to conduct trials.<sup>11</sup> Consequently, State Parties to the Rome Statute peremptorily submitted themselves to the jurisdiction of the ICC for the crimes outlined in the Statute. Nonetheless, the ICC may only exercise jurisdiction over Member States for crimes which occurred after the establishment of the ICC in 2002. The Court may not pursue offenses retroactively, unless authorised by the Member State of the individual in question.<sup>12</sup> It is worthy of note that the Court prosecutes individuals, and not groups or states and no one is exempted from prosecution based on status or Office<sup>13</sup>. Amnesty as well, cannot be used as defence before the Court. It is only those who committed crimes while under the age of 18 that are however exempted from prosecution.

The Court is funded by contributions from States Parties and by voluntary contributions from governments, international organisations, individuals, corporations and other entities.<sup>14</sup> Though the seat of the court is in The Hague in the Netherlands, like the International Court of Justice and the *ad hoc* tribunal for the former Yugoslavia, they are not the same. The International Court of Justice is the principal judicial organ of the United Nations for the settlement of disputes between States. Furthermore, the ICC may sit elsewhere whenever the judges consider it desirable. While, the *ad hoc* tribunals for the former Yugoslavia and Rwanda, as well as other similar courts established within the framework of the United Nations to deal with specific situations only have a limited mandate and jurisdiction, the ICC is a permanent autonomous court.

#### a) The Structure of the International Criminal Court

The Court is comprised of four organs. The Presidency is responsible for administration and the presentation of the Court in the public arena.<sup>15</sup> It ensures that sentences issued by the Court are enforced. Three judges, two vice presidents and the President are elected to the Presidency by a total majority of 18 judges for a maximum of two three-year terms. The 18 judges responsible for electing the Presidency fall under the second organ- the Chambers,<sup>16</sup> which consists of three judicial divisions responsible for

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<sup>10</sup> On 4 October 2004, the ICC and the United Nations signed an agreement governing their institutional relationship. See: Understanding the International Criminal Court by the Public Information and Documentation Section Registry, International Criminal Court The Hague.

<sup>11</sup> This might occur where proceedings are unduly delayed or are intended to shield individuals from their criminal responsibility. This is known as the principle of complementarity, under which priority is given to national systems. States retain primary responsibility for trying the perpetrators of the most serious of crimes.

<sup>12</sup> The International Criminal Court: Origins, Jurisdiction and the 'African Bias' South African History Online © 2015 <http://www.sahistory.org.za/article/international-criminal-court-origins-jurisdiction-and-african-bias#sthash.wnQGWFm6.dpuf>, accessed 22 June 2019.

<sup>13</sup> The Rome Statute Article 27(1) and (2).

<sup>14</sup> As of November 2019, 123 State are parties to the Statute of the Court, including 33 African States, 18 Asia-Pacific States, 18 from Eastern Europe, 28 from Latin America and Caribbean States and 25 from Western Europe and other States. Four signatory states—Israel, Sudan, the United States and Russia have informed the UN Secretary General that they no longer intend to become states parties and, as such, have no legal obligations arising from their signature of the Statute. Forty-one additional states have neither signed nor acceded to the Rome Statute. Some of them, including China and India are critical of the Court. Ukraine, a non-ratifying signatory, has accepted the Court's jurisdiction for a period starting in 2013. The States Parties to the Rome Statute [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/.aspx); <https://www.un.org/law/icc/index.html>, accessed 2 February, 2020.

<sup>15</sup> Article 38 of the Rome Statute. The Presidency consists of three judges (the President and two Vice-Presidents) elected by an absolute majority of the 18 judges of the Court for a maximum of two, three-year terms.

<sup>16</sup> Article 39.

conducting Pre-Trials,<sup>17</sup> Trials<sup>18</sup> and Appeals.<sup>19</sup> The third organ of the Court is the Office of the Prosecutor which acts as an independent organ mandated to receive and evaluate information pertaining to situations or alleged offenses within the jurisdiction of the ICC. It decides whether there exists reasonable cause to initiate an investigation into crimes outlined in the Statute.<sup>20</sup> Lastly, the Registry is responsible for providing operational support to the Chambers and the Office of the Prosecutor to ensure fair, impartial and public trials.<sup>21</sup> The Registry is also obligated to safeguard the rights of victims, witnesses and the defence, as set out in the Rome Statute.

**b) Jurisdiction of the International Criminal Court**

The International Criminal Court is the only permanent international criminal court set up to prosecute international crimes. An international crime is such act universally recognised as criminal under the Rome Statute. It is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state that would have control over it under ordinary circumstances.<sup>22</sup> The mandate of the Court is to try individuals and to hold such persons accountable for the most serious crimes of concern to the international community as a whole. The jurisdiction of the court does not extend to states, organisations and corporations. Presently, the known international crimes within the jurisdiction of the ICC under the Rome Statute are the crime of genocide, war crimes, crimes against humanity, and the crime of aggression, having met the conditions for the exercise of jurisdiction by the court<sup>23</sup>. First, the amendment pursuant to the Kampala 2010 conference has entered into force for 30 states parties. Secondly, after 1 January 2017, the Assembly of States Parties has voted in favour of it allowing the Court to exercise jurisdiction over the crime of aggression.

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<sup>17</sup> Composed of seven judges. They resolve all issues which arise before the trial phase begins. Their role is essentially to supervise how the Office of the Prosecutor carries out its investigatory and prosecutorial activities, to guarantee the rights of suspects, victims and witnesses during the investigatory phase, and to ensure the integrity of the proceedings. The Pre-Trial Chambers then decide whether or not to issue warrants of arrest or summons to appear at the Office of the Prosecutor's request and whether or not to confirm the charges against a person suspected of a crime. They may also decide on the admissibility of situations and cases and on the participation of victims at the pre-trial stage.

<sup>18</sup> Composed of six judges. A Trial Chamber's primary function is to ensure that trials are fair and expeditious and are conducted with full respect for the rights of the accused and due regard for the protection of the victims and the witnesses. It also rules on the participation of victims at the trial stage. The Trial Chamber determines whether an accused is innocent or guilty of the charges and, if he or she is found guilty, may impose a sentence of imprisonment for a specified number of years not exceeding a maximum of thirty years or life imprisonment. Financial penalties may also be imposed. A Trial Chamber may thus order a convicted person to make reparations for the harm suffered by the victims, including compensation, restitution or rehabilitation.

<sup>19</sup> Composed of five judges. All parties to the trial may appeal or seek leave to appeal decisions of the Pre-Trial and Trial Chambers. The Appeals Chamber may uphold, reverse or amend the decision appealed from, including judgments and sentencing decisions, and may even order a new trial before a different Trial Chamber. It may also revise a final judgment of conviction or sentence.

<sup>20</sup> Article 42. The Office of the Prosecutor is composed of three divisions: (i) the Investigation Division, which is responsible for conducting investigations (including gathering and examining evidence, questioning persons under investigation as well as victims and witnesses). In this respect, for the purpose of establishing the truth, the Statute requires the Office of the Prosecutor to investigate incriminating and exonerating circumstances equally. (ii) The Prosecution Division has a role in the investigative process, but its principal responsibility is litigating cases before the various Chambers of the Court. (iii) The Jurisdiction, Complementarity and Cooperation Division, which, with the support of the Investigation Division, assesses information received and situations referred to the Court, analyses situations and cases to determine their admissibility and helps secure the cooperation required by the Office of the Prosecutor in order to fulfill its mandate.

<sup>21</sup> Article 43.

<sup>22</sup> *In re List and Others*, US Military Tribunal at Nuremberg, 19 February 1948(1958) 15 Ann.Dig 632 at 636. See also: K Kittichaisaree, *International Criminal Law* (Oxford: University Press 2001) 1.

<sup>23</sup> Articles 5, 6, 7, 8 an 8 bis of the Rome Statute.

**i) The Crime of Genocide**

Genocide signifies “the destruction of a nation or of an ethnic group” and implies the existence of a coordinated plan, aimed at total extermination, to be put into effect against individuals chosen as victims purely, simply and exclusively because they are members of the target group.<sup>24</sup>

Genocide is the deliberate killing of a very large number of people from a particular ethnic group or nation. It is an act committed with the intent to destroy, in whole or part, a national, ethnic, racial or religious group. There was no specific reference to the term “Genocide” in the Nuremberg charter or the judgment of Nuremberg Tribunal, but what is now known as genocide was in fact prosecuted by the Nuremberg Tribunal under the heading of crimes against humanity. That was the only prosecution of perpetrators of this crime until the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) in the 90s.<sup>25</sup>

According to the convention on the prevention and punishment of the crime of Genocide,<sup>26</sup> genocide means any of the following acts committed with intent to destroy, in whole or in part: a national, ethnic, racial or religious group, as such:

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

Article 3 of the convention clearly stated out that genocide, conspiracy to commit genocide, direct and public incitement to commit genocide; attempt to commit genocide and complicity in genocide are punishable under the crime of genocide. The International Criminal Tribunal for the Former Yugoslavia (ICTY) adopted this definition in its Article 4. Articles II and III of the 1948 Geneva Convention have similar provisions. The same provision is also replicated in Article 2(2) of the Statute of the International Criminal Tribunal for Rwanda (ICTR).<sup>27</sup> According to the International court of Justice (ICJ) Statute genocide is:

“a crime under International Law” involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations....”<sup>28</sup>

<sup>24</sup> Raphael Lemkin: *Axis Rule in occupied Europe* (1994) cited in

<http://www.psbOrg/wgbh/pages/frntline/shows/ruranda/reports/desterhe.html> accessed 23 June 2019. He was the first person to put forward the theory that genocide is not a war crime and that the immorality of a crime such as genocide should not be confused with the amorality of war. Lemkin opines that the expression “Mass murder” which was being used at the time to describe what had happened in Nazi-Germany was an inadequate description of the totally new phenomenon witnessed in Nazi-occupied territories. It was inadequate because it failed to account for the motive for the crime, which arose solely from “racial, national or religious, considerations and had nothing to do with the conduct of the war. It is a crime against humanity that affects not just the individual or nation in question, but humanity as a whole.

<sup>25</sup> K Kittichasaree, *Supra* (n 22) 67.

<sup>26</sup> Article 11 of The Convention on the Prevention and Punishment of the Crime of Genocide 1948. The Convention was adopted universally by the General Assembly on December 9, 1948. It entered into force on January 13, 1951, 112 contracting parties, including the UK. It was made an offence in English Law by the Genocide Act 1969.

<sup>27</sup> K Kittichaisaree, *supra* (n 22) 68.

<sup>28</sup> ICJ Rep. 1951, 15 at 23.

The Rome Statute which is of moment in this work in its Article 6 states that “genocide” means any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group:

- (a) Killing members of the group;
- (b) causing serious bodily or mental harm to members of the group;
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Though there are several brutal killings around the globe, generally within the context of the larger category of crime against humanity, there have been only four internationally recognised examples of genocide recorded<sup>29</sup> during the course of the twentieth century.

### **ii) Crimes against Humanity**

Under the Rome Statute, Crimes against humanity include any of the following acts committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:<sup>30</sup>

- (a) murder;
- (b) extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of Fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

### **iii) War Crimes**

War crimes within the jurisdiction of the International Criminal Court include grave breaches of the Geneva Conventions of 12 August 1949 and other serious violations of the laws and customs applicable in international armed conflict and in conflicts “not of an international character” listed in the Rome Statute, when they are committed as part of a plan or policy or on a large scale.<sup>31</sup> These prohibited acts in summary include: murder; mutilation, cruel treatment and torture; taking of hostages; intentionally directing attacks against the civilian population; intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historical monuments or hospitals. They also include pillaging; rape, sexual slavery, forced pregnancy or any other form of sexual violence; conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.

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<sup>29</sup> The destruction of Armenians by the Ottoman Empire, (the young Turks in 1915-16 during the WWI), that of the Jews by Nazi Germany, the killing of millions of Cambodians by the Khmer Rouge regime in Cambodia in the mid – 1970s and in 1994, that of the Tutsis by the Hutu racists in Rwanda (The Rwanda genocide). See: K Kittichaisaree, *supra* (n 22). 1.

<sup>30</sup> Rome Statute, Article 7

<sup>31</sup> *Ibid*, Article 8

#### iv. Crime of Aggression

Prior to the recent definition of the crime aggression, the Rome Statute upon entering into force did not define aggression but only included it among the international crimes within the ICC's jurisdiction. The Statute provided that the court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with Articles 121 and 123 of the ICC Statute, defining the crime and setting out the conditions under which the court shall exercise jurisdiction with respect to this crime. The provision shall be consistent with the relevant provisions of the charter of the United Nations.<sup>32</sup>

The 2010 Review Conference of the Rome Statute held in Kampala, Uganda, officially defined the crime of aggression and adopted it as a crime within the jurisdiction of the ICC.<sup>33</sup> Thus the invasion, military occupation, and annexation by the use of force, blockade of the ports or coasts, if by its character, gravity and scale, it constitutes a manifest violation of the Charter of the United Nations, is Aggression.<sup>34</sup> Consequently, the crime of aggression became a crime within the jurisdiction of the ICC after January 2017 following a two-thirds majority by States Parties and ratification by at least 30 States Parties.

Aggression in International Law is the use of armed force by a country against the sovereignty, territorial integrity, or political independence of another country, or in a manner inconsistent with the Charter of the United Nations.<sup>35</sup> The first amendment adopted at Kampala Uganda criminalises the use of certain kinds of weapons in non-international conflicts whose use were already forbidden in international conflicts.<sup>36</sup> The second amendment specifies the crime of aggression.<sup>37</sup> In accordance with United Nations General Assembly Resolution 3314, the amended Rome Statute of the International Criminal Court in its Article 8bis<sup>3</sup> defines "Aggression" as:

the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.<sup>38</sup>

Article 8bis<sup>3</sup> (2) of the amended Rome Statute further states that "Act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. It further states that any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression namely:

- (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- (c) The blockade of the ports or coasts of a State by the armed forces of another State;
- (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

<sup>32</sup> The Rome Statute of the International Criminal Court, Article 5(2).

<sup>33</sup> Review Conference of the Rome Statute concludes in Kampala, ICC-ASP-20100612-PR546. [https://asp.iccpi.int/en\\_menus/asp/reviewconference/pressreleaserc/Pages/review%20conference20thkampala.aspx](https://asp.iccpi.int/en_menus/asp/reviewconference/pressreleaserc/Pages/review%20conference20thkampala.aspx), accessed 29 June 2022.

<sup>34</sup> Article 8bis<sup>3</sup>

<sup>35</sup> B A Garner, 7th edition (West Group) 66.

<sup>36</sup> It has been ratified by 16 states parties and is in force in four of them.

<sup>37</sup> It has been ratified by 13 states parties and is in force in three of them.

<sup>38</sup> As adopted by the Assembly of States Parties during the Review Conference of the Rome Statute, held in Kampala (Uganda) between 31 May and 11 June 2010.

- (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

However, the Nuremberg Tribunal did not define aggression but it distinguished between aggressive actions and aggressive wars. Article 1 of the United Nations General Assembly Resolution defined "Aggression" as the use of armed force by a State against the sovereignty, territorial integrity, or political independence of another State, or in any other manner inconsistent with the charter of the United Nations, as set out in this Definition.<sup>39</sup> Article 2 of the same charter adds that the first use of armed forces by a State in contravention of the charter shall constitute *prima facie* evidence of an act of aggression although the Security Council may, in conformity with the charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.<sup>40</sup> Thus Article 2 empowers the Security Council to decide whether the first use of armed force is an act of aggression or not. It also introduces a distinction between low intensity conflicts and the other types of conflicts, with the former not qualifying as aggression. However, Article 3 of the UN definition illustratively lists, in a non-exhaustive manner, incidents which qualify as acts of aggression.<sup>41</sup> Meanwhile, Article 4 of the definition still gives the Security Council the discretion to decide whether other acts may constitute aggression under the provision of the UN charter. Nonetheless, under Article 5 of same no consideration of whatever nature be it political, economic, military, or otherwise, may justify an act of aggression.

#### **(h) Conditions for ICC's Exercise of Jurisdiction**

Article 5(2) of the Rome Statute in its provision states that the definition of the crime of aggression and the condition for ICC's exercise of jurisdiction with respect to the crime shall be in accordance with the relevant provisions of the UN Charter. Article 39 of the Charter gives the Security Council the responsibility of establishing the existence of an act of aggression.<sup>42</sup> Pursuant to Article 15*bis*, of the amended Rome Statute there are other ways aggression cases could also commence.

If there is a State Party referral or the Prosecutor acting *proprio motu* concludes on reasonable ground that there is a case of aggression giving a reasonable basis to proceed, he or she would first ascertain whether the Security Council has made a determination of an act of aggression. If the Security Council has made such a determination, the Prosecutor could proceed. But, if, six months after notification, the Security Council has made no such determination, then the Pre-Trial Division of the ICC could authorize the commencement of an investigation, assuming jurisdiction.

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<sup>39</sup> *United Nations General Assembly Resolution* of 3314 of 14 December 1974.

<sup>40</sup> *Ibid.*

<sup>41</sup> They include invasion, attack, military occupation (however temporary), or annexation by the armed forces of one state by another; bombardment of one state by another; blockade of ports; attack on land, sea or air; allowing the territory to be used by another state to attack a third state; and sending, or being substantially involved in sending, armed bands, groups, irregulars, or mercenaries to carry out armed attack against another state of such gravity as to amount to the acts listed in the preceding paragraphs of this Articles. See: K Kittichaisaree, *Supra* (n 22 ) 209.

<sup>42</sup> Article 13 of the Rome Statute is on the exercise of jurisdiction. Article 14 is on Referral of a situation by a State Party. Under Article 15 the Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court. Article 15 *bis*5 deals with Exercise of jurisdiction over the crime of aggression (State referral, *proprio motu*). Article 15 is on exercise of jurisdiction over the crime of aggression (Security Council referral).



The Security Council exercising its power to refer a situation to the ICC Prosecutor under Article 13(b) must first make a decision establishing that an act of aggression has been committed by a State before proceedings against the aggressor. When the ICC receives a complaint relating to this crime, it shall first request the Security Council to determine whether or not an act of aggression has been committed by the state whose national is concerned. The Security Council shall make a decision on this request within a specific time frame. Failure on the side of the Security Council to do this, three options are made available for the ICC.

In the first option, the ICC may proceed. Under the second option, the ICC must request the UN General Assembly to make a recommendation within a specific time-frame and if the General Assembly fails to do so, the ICC may proceed. The third option would authorise the ICC to request the UN General Assembly either to make a recommendation or to seek an advisory opinion of the International Court of Justice (ICJ) within a specific time-frame. In the absence of such recommendation or request, the ICC may proceed only if the State party referring a situation to the ICC pursuant to Article 14 of the ICC statute, has been held by ICJ, acting in conformity with its competence over contentious cases under Article 36 of its statute, to be a victim of an act of aggression in violation of the UN Charter.

The first approach is that the Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years. In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.<sup>43</sup>

The second approach is similar to the first one. The ICC shall exercise its jurisdiction over the crime of aggression subject to a determination by the UN Security Council in accordance with Article 39 of the UN Charter that an act of aggression has been committed by the State in question. After receiving a complaint related to this crime, the ICC shall first seek to discover whether the Security Council has made a determination with respect to the alleged aggression by that state. In the absence of any, the ICC will request, subject to the provisions of the ICC statute, the Security Council to make such determination. If the Security Council does not make such determination or within twelve months of the request from the ICC, has not adopted a resolution under chapter VII of the UN Charter to request the ICC to defer investigation or prosecution as provided by Article 16 of the ICC statute, the ICC shall proceed with the case in question.<sup>44</sup>

The third approach provides that a complaint of an act of aggression or directly related to it, may not be brought before the ICC unless the Security Council has first determined that a State has committed the act of aggression.<sup>45</sup> In this way, the Security Council can realistically determine which use of force is or is not an act of aggression. One example in support of this contention is Nigeria's military action in Liberia through the Economic Community of West African Monitoring Group (ECOMOG), which was welcomed by the Security Council after the armed intervention had taken place.<sup>46</sup> Another example could be the use of force by NATO<sup>47</sup> against the Federal Republic of Yugoslavia in 1999 to end the Kosovo crisis. Although the military action was undertaken without prior approval of the Security Council, the council did not condemn the action but passed a resolution authorizing members and international organizations to set up a security presence in Kosovo under the UN auspices after NATO had secured its military victory.<sup>48</sup> In other words the security council accepts the genuine military intervention of a state in another state's conflict without the prior information to the security council provided the Security

<sup>43</sup> Rome Statute Article 15 *bis*<sup>5</sup>.

<sup>44</sup> K Kittichaisaree, *Supra* (n 22) 218 – 219.

<sup>45</sup> International Law Commission's Draft Statute for an International Criminal Court, Article 23 (2).

<sup>46</sup> K Kittichaisaree, *Supra* (n 1) 218 – 219.

<sup>47</sup> North Atlantic Treaty Organization consisting of USA, Canada, Britain and 26 other European Countries established by the - North Atlantic Treaty 1949 for purposes of collective security.

<sup>48</sup> K Kittichaisaree, *Supra* .

Council is later duly informed (State of emergency) and it is consistent with the UN Charter provisions to maintain international peace. It is however worthy of note that Article 103 of the UN Charter stipulates that if there is a conflict between the obligations of the UN members under the UN charter and their obligations under any other international agreement, their obligations under the UN charter prevails. However, where the issue of consistency is not settled by the consensus of the international comity of States including the permanent members of the council, the ICC might be accused of usurping the Security Council's charter authority and therefore acting *ultra vires* its own judicial competence.

This study finds that there is a lot of bureaucracy in the international criminal court justice system for the prosecution of alleged act of aggression. This is likely to delay and possibly deny justice to victims. Secondly, vesting the responsibility for establishing the existence of an act of aggression only on the Security Council is likely to lead to fixation or manipulation of opinion among the Security Council which is unhealthy for justice. Article 16 of the Rome Statute gives the UN Security Council the power to delay investigation or prosecution by the ICC Prosecutor for twelve months through a Chapter VII resolution requesting the Prosecutor to abstain from investigating the situation. With this the Security Council can permanently bar the Prosecutor from commencing investigation by determining that such investigation is a threat to the peace within the meaning of Article 39 of the UN Charter. It can also be interpreted in this way: as long as there is a situation threatening international peace and security, the Security Council may bar any investigation. By this, the research envisages a situation whereby there could be obvious cases of aggression but the determination of existence of such act will depend on the political interests of the members of the Security Council. There may be serious acts of aggression against a particular state and until there is a consensus among the Security Council that an act of aggression has taken place it is said not to constitute an act of aggression. That is to say that even if every other person including the victim state convinces itself that an act of aggression has taken place in its territory, without the Security Council's consensus there is no crime of aggression committed.

### **3. Article 27 of the Rome Statute and its Relevance**

Article 27 of the Rome Statute stressing on the irrelevance of official capacity as a defence for international crimes provides thus:

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

The primary goal of international criminal justice is to end impunity for the grievous breaches of human rights as well as preventing re-occurrence of crimes against humanity as during the Nazi experience. Before the Rome statute came into force, apart from the Nuremberg experience, the track record of criminal justice enforcement in relation to Heads of States whether sitting or emeritus was very poor if not rare. Consequently, there were instances of crimes against humanity and gross human right violations without criminal accountability. Arbitrariness and rascality are as offensive to the rule of law as they are never palatable in law. Might is not always right. Article 27 of the Rome Status serves as a check on the inherent rascality and arbitrariness that often emanates from abuse of sovereignty. A perusal of Article 27 of the Rome Statute shows that the said article is a consolidation and emphasis of customary international law. The rule of customary international law is developing in terms of which the immunity of sitting heads of state may not be recognized in cases of international crimes.

It is clear that customary international law requires that Heads of States enjoy functional immunity<sup>49</sup> and personal immunity to protect certain group of persons for the sake of the smooth conduct of international relations.<sup>50</sup> This rule with regard to immunity was recognised in *Pinochet* 3<sup>51</sup> when Lord Browne-Wilkinson noted that “the immunity enjoyed by a head of state in power ... is a complete immunity attaching to the person of the head of state.” Also Prominent decisions of the International Court of Justice such as *Congo v. Belgium*<sup>52</sup> and *Germany v. Italy*<sup>53</sup> have confirmed that under customary international law diplomats and heads of states enjoy personal immunity with regard to acts performed in the fulfillment of their functions. The traditional rationale is to prevent states from interfering with the fulfillment of foreign states’ sovereign activities in their territories. However, since *Congo v. Belgium* involves charges of crimes against humanity against the former foreign minister of the Congo, it therefore does not create precedent for the immunity of heads of state in matters that do not involve international crimes. This judgment has been extensively criticized on the basis that it was not sensitive to the progressive developments in international law and international criminal law and that the traditional law on immunity does not apply in cases of crimes against humanity.<sup>54</sup> The dissenting opinions of Judge Christine van den Wyngaert<sup>55</sup> in *DRC v. Belgium* and Judge Cancado Trindade<sup>56</sup> in *Germany v. Italy* have been particularly influential in this regard.

In considering the relevance of article 27 of the statute one of the pertinent questions to be addressed is, do sitting Heads of State charged with international crimes enjoy functional immunity therefore making Article 27 of the Rome Statute entirely irrelevant? It is submitted that since the commission of an international crime is not and cannot be regarded as an official state function, such an act must always be regarded as a private act by the person concerned. Consequently, to the extent that committing an international crime is not a state function, neither the perpetrator nor the State of which the perpetrator is a national can claim functional immunity.<sup>57</sup> This principle was recognised in the *Bouterse* case<sup>58</sup> before

<sup>49</sup> Mia Swart en Karin Krisch, An Analysis of the Standoff between the African Union and the International Criminal Court, *African Journal of International Criminal Justice* <https://www.elevenjournals.com/tijdschrift/ad2014/0>, accessed February 12, 2022.

<sup>50</sup> A Cassese, *International Law*, (Oxford University Press, New York, 2005) 38.

<sup>51</sup> *Pinochet* (No 3) [1999] 2 All E.R. 97.

<sup>52</sup> Arrest Warrant Case (Democratic Republic of the Congo v Belgium), 14 February 2002 ICJ.

<sup>53</sup> Case Concerning Jurisdictional Immunities of the State (Germany v Italy - Greece Intervening), 3 February 2012 ICJ.

<sup>54</sup> S Wirth, ‘Immunity for Core Crimes? The ICJ’s Judgment in the *Congo v Belgium* Case’, *EJIL*, Vol 13, No. 4 (2002); M Swart, ‘*DRC v Belgium*: A Step Backwards?’, *SA Public Law*, Vol 17, No 2, (2002) 305-319.

<sup>55</sup> Dissenting Opinion of Judge Van den Wyngaert. Arrest Warrant Case (Democratic Republic of the Congo v Belgium), 14 February 2002 ICJ.

<sup>56</sup> Dissenting Opinion of Judge Cancado Trindade, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening).

<sup>57</sup> See also: Advisory Report on the Immunity of Foreign State Officials 17, Advisory Committee on Issues of Public International Law, 2001, available at <[http://cms.webbeat.net/ContentSuite/upload/cav/doc/cavv-report-nr-20-immunity\\_foreign\\_officials.pdf](http://cms.webbeat.net/ContentSuite/upload/cav/doc/cavv-report-nr-20-immunity_foreign_officials.pdf)>, accessed 20 July 2019.

<sup>58</sup> Prosecutor-General of the Supreme Court v Desiré Bouterse LJN: AA8395, Amsterdam Court of Appeal (*Gerechtshof*), 20 November 2000, consideration 4.2 available at <[www.rechtspraak.nl](http://www.rechtspraak.nl)>. Mr Bouterse is allegedly responsible for the torture and summary execution on 8/9 December 1982 of fifteen prominent persons in Paramaribo, Surinam by the military on his orders. Bouterse’s counsel argued that his client cannot be prosecuted in connection with the offences concerned because he held the position of Head of State at the time. The Amsterdam Court of Appeal ordered the prosecution of Mr Bouterse on the basis of universal jurisdiction. The Court held that Bouterse could be prosecuted because the case concerned torture, which was already a crime subject to universal jurisdiction under customary international law in 1982. In addition, the Court held that Bouterse could be prosecuted on the basis of the Torture Convention. In 2007, relatives of the victims succeeded in bringing proceedings before a military court against Bouterse and 24 accomplices for the 1982 December murders. Although Bouterse denied direct involvement in the murders, he accepted political responsibility and offered a public apology in March 2007. In April 2008, a military court ruled that all suspects involved in the

the Amsterdam Court of Appeal. The irrelevance of official capacity before international criminal courts has become entrenched in international law since the International Military Tribunal at Nuremberg. The statutes of many of the international criminal court tribunals, including the ICTY,<sup>59</sup> ICTR<sup>60</sup> and Special Court for Sierra Leone<sup>61</sup> have set aside head of state immunity as well as other forms of immunity to which senior state officials have traditionally been entitled.

It is unequivocal that Article 27 of the Rome Statute regards official capacity as irrelevant as a defence to criminal responsibility in international criminal law. It can be argued that whereas customary international law on immunities may protect heads of state and senior state officials in respect of certain acts, it does not protect such officials from prosecution for international crimes especially acts of torture. The law of immunities in international law with regard to criminal acts that do not qualify as international crimes is well-established. The attempts and threats of African countries and some others to withdraw from the ICC might have strategic value in terms of expressing an African position. However, such withdrawal will not lead to the achievement of the AU's own commitment to abolish impunity as expressed in its Constitutive Act. Article 27 of the Rome Statute is already a nightmare to both sitting presidents who are perpetrating crimes against humanity in their states as well as prospective presidents who may be contemplating such. Therefore, no matter how long they prolong their stay in office, the law will take its course whenever they leave office. The significance of imputing criminal responsibility on individuals including sovereigns and high ranking government officials in international criminal law cannot be over emphasised.

#### **4. Significance of the Rome Statute and the Relevance of the International Criminal Court**

The significance of the Rome Statute and the relevance of the International Criminal Court lay in what they symbolise and stand for both positively and negatively. On the positive side, despite some incompatibilities with national constitutions and seeming self contradictions between articles 25(4), 98 and 27 all of the Statute, the Rome Treaty is already a "remarkable achievement for multilateralism." At least, with the prosecution of former Heads of States such as Charles Taylor, other war criminals held accountable, especially the recent convictions of the likes of Ntaganda, it can be confidently argued that the international criminal court is work in progress. Furthermore, in comparison to the *ad hoc* tribunals in response to specific violations, the Rome Statute is a clear commitment to take a stand and thus takes an unusual step forward from the usual passivity that plagues States. In putting the Court together, the international community had adopted the fact that behind every State act of international crimes, some individuals are responsible<sup>62</sup> and that in the interest of justice those individuals who planned, commanded the doing of the act or carried out the act should be punished individually irrespective of their official status. While international crimes always have consequences for individuals, they also affect the regional

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1982 December murders had to stand trial, including Bouterse. In November 2008, the trial of Bouterse began but faced repeated delays. On 19 July 2010, Bouterse became the President of Suriname. On 4 April 2012, about two months before the verdict in the trial, the National Assembly passed an amendment to extend the 1992 Amnesty Law to include the period during which the murders were committed. Therefore, amnesty was granted to Bouterse and the other 24 suspects for the 1982 December murders. On 11 May 2012, the military court in charge of the case adjourned the trial of Bouterse until a constitutional court has reviewed the constitutionality of the new Amnesty Law. As there is not yet a constitutional court in Suriname and Bouterse himself would appoint the justices of this court, it is very unlikely that the trial will resume soon.

<http://www.internationalcrimesdatabase.org/Case/1082/Bouterse>, accessed February 22, 2021.

<sup>59</sup> Art 7(2) of the Statute of the ICTY.

<sup>60</sup> Arts 6(2), 29(3) and (4) of the Statute of the ICTR recognises functional immunity but it is clear that no immunity is provided to cover private acts.

<sup>61</sup> Art 6(2) of the Statute of the Special Court for Sierra Leone. The agreement establishing the Special Tribunal for Lebanon does not contain any clause removing immunities. Since the Extraordinary Chamber on the Courts of Cambodia (ECCC) is trying Cambodians the issue of international immunities is not of relevance for this court.

<sup>62</sup> See also: Gareth Evans The International Criminal Court: Prospects for the future, [http://www.epc.eu/events\\_rep\\_details.php?cat\\_id=6&pub\\_id=565](http://www.epc.eu/events_rep_details.php?cat_id=6&pub_id=565), accessed 18 March 2019.

and national stability of the country in which these crimes were perpetrated, thereby threatening the peace, security and well-being of the wider world. States have been responsible for prosecuting and punishing these crimes in a first instance, but some States are unable or unwilling to do so, for which then international criminal law and international criminal institutions are needed. The International Criminal Court could be said to be a Global Court for the powerless. Around the globe, victims of genocide, crimes against humanity and war crimes are demanding justice and redress.<sup>63</sup> The Rome Statute established the International Criminal Court (ICC). By making the ICC and Rome Statute system of international justice truly global, individuals suspected of committing these universally abhorred crimes can be held to account in courts of law around the world. Consequently, the fundamental aim of the ICC is to punish individual perpetrators, bring justice to the victims and to create a culture of responsibility rather than impunity in order to achieve a deterrent effect. Though for some researchers and practitioners the ICC is considered a potentially counter-productive actor in peace negotiations, but in spite of obvious limits and challenges, the ICC has made some achievements and still has its inherent potential.

The Court has the potential to provide international justice and peace since it has an ethical aim of prosecuting criminals, and it is gaining in legitimacy. It could attract States that want to show their support in checking crimes against humanity and for the defence of human rights. The Court sometimes works independently from State leaders. On its own initiative it is focusing on the actions of regime leaders in Kenya and Ivory Coast. Though there is an allegation that the ICC is only focusing on Africa, it has also considered investigating crimes committed in other regions of the world, such as South America, Asia and the Middle East<sup>64</sup>. The work of the ICC could create a long-term deterrent effect by instilling in potential criminals the fear of the consequences of their acts, especially once they are no longer in positions of power. The ICC is one important element, in the never-ending struggle between traditional power politics and indispensable efforts to strengthen the rule of law in international relations. This study is of the view that International Criminal Court is essentially work in progress.

The ICC has the potential to protect children and advance justice for them. Children are often victims of international crimes and they suffer terribly by crimes under ICC jurisdiction. Hundreds of thousands of children are conscripted and forced to take part in war crimes. The ICC's very first verdict was against Congolese militia leader Thomas Lubanga for enlisting and recruiting children under the age of 15 to actively participate in hostilities.<sup>65</sup> The exposure and responses to war related stressors interfere when children are still developing physically, emotionally, cognitively and socially.<sup>66</sup> For example when Ongwen of the Lord's Resistance Army was 14 years old, his abilities to commit cruelty were already increased significantly and Kony would call him a role model for other child soldiers. He was in charge of

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<sup>63</sup> The warrant of arrest for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud was issued on 27 March 2018. He was surrendered to the ICC on 31 March 2018 on charges of crimes against humanity and war crimes allegedly committed in Timbuktu, Mali. The surrender follows an arrest warrant issued by Pre-Trial Chamber I ("Chamber") on 27 March 2018. He is in the Court's custody. The confirmation of charges hearing took place from 8 to 17 July 2019. On 30 September 2019, Pre-Trial Chamber I issued a confidential decision confirming the charges of war crimes and crimes against humanity brought by the Prosecutor against Mr Al Hassan and committed him to trial. The redacted version of the decision was published on 13 November 2019. On 21 November 2019, Trial Chamber X was constituted and will be responsible for conducting the trial in the Al Hassan case. <https://www.icc-cpi.int/cases>, accessed 22 December 2021.

<sup>64</sup> C A Taku; "Has the International Criminal Court Inappropriately Targeted Africa" [www. Iccforum.com](http://www.Iccforum.com) , accessed 26 March 2022.

<sup>65</sup> On 7 November 2019, ICC Trial Chamber VI found Bosco Ntaganda guilty, beyond reasonable doubt, of 18 counts of war crimes and crimes against humanity, committed in Ituri, DRC, in 2002-2003. This verdict is currently subject to appeals. On 9 November 2019, Bosco Ntaganda was sentenced to 30 years of imprisonment. Among his charges were enlisting and recruiting children under the age of 15 to actively participate in hostilities.

<sup>66</sup> J A Shaw, 'Children exposed to war/terrorism' *Clinical Child and Family Psychology Review*, Vol. 6 No.4, (2003) 238.

field operations and known to have carried out lots of brutality such as boiling people alive, leading brutal abduction raids etc.<sup>67</sup> This confession is one out of many other hundreds thus:

“I was abducted when I was 8 years old and came back in 2010. I had nightmares of fighting. I was beating myself on the walls, screaming, running. Watching the screen it was like I was looking at myself. Feelings came back of being tortured by carrying heavy loads.”<sup>68</sup>

Most children have been forcibly recruited as soldiers in an armed group. When they fail to carry out their tasks, this often results in extreme forms of punishment. Regardless of their role within the group, violence becomes a daily feature. The Rome Statute and the ICC have come as an international solution to deal with perpetrators of these international crimes.

On the negative side, however, the robust opposition of the US to the ICC had blocked a true advance toward full effective multilateralism. The US had taken every possible protective measure, to ensure that its own citizens would never be charged at the ICC and consequently mounted a crusade against the ICC among other countries. The US is insisting that its government will never allow Americans to be tried by a foreigner. This imperfect commitment to the principle of universality coupled with the overwhelming pressure on countries not to ratify or only to do so after they had signed a bilateral agreement to refrain from referring US citizens to the Court had a severe impact. Significantly, the EU has completely resisted the US pressure and most EU Member States have declined such bilateral agreements. One of the major objections to the ICC by China, India, and the United States is that the Rome Statute of the International Criminal Court imposes obligations on non-States Parties and therefore violates Article 34 of the Vienna Convention on the Law of Treaties. Under the said article a treaty does not create either obligations or rights for a third State without its consent. China and India, rather argue that the Rome Statute should contain an opt-in mechanism, which would permit States to accept ICC jurisdiction for certain duration or for particular conduct.

It is submitted that the argument that the Rome Statute imposes obligations on non-States parties without their consent, is not well taken. The Rome Statute applies only to individuals, not to States. Article 1 of the Statute clearly sets forth that the ICC “shall have the power to exercise jurisdiction *over persons* for the most serious crimes of international concern...” Furthermore, Article 12 allows States to voluntarily accept or reject the jurisdiction of the ICC. In addition, Part 9 of the Statute, which addresses cooperation and assistance, imposes obligations only on States Parties. In particular, Article 86 of the Statute instructs that “*States Parties* shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.”<sup>69</sup> Thus, this objection is without merit.

The ICC is lacking in terms of providing stable international justice and peace. The ICC does not seem to have prevented potential criminals from being violent, whether they live in States Parties or non- State Parties territory. Nonetheless for the fact that some potential criminals seem to fear the ICC, there could be a change in the future. By indicting heads of government, the ICC marks the end of impunity for leaders who do not take steps to protect their citizens, or actively do them harm. The ICC however, helps implement the concept of ‘responsibility to protect’ agreed upon by the UN General Assembly in 2005.<sup>70</sup> Its existence could also encourage militia groups to reduce violence, encourage national courts to

<sup>67</sup> S Nolen & E Baines, “The making of a monster” the Globe and Mail, 2009 4 <http://www.theglobeandmail.com/news/world/the-making-of-a-monster/article20389116>, accessed February 3, 2022.

<sup>68</sup> From a formerly abducted child, 16 years old from Northern Uganda, Barlonyo. *Ibid*.

<sup>69</sup> Steven W Becker, The objections of larger nations to the international criminal court <https://www.cairn.infor/publication-de-steven>, accessed 8 June 2019.

<sup>70</sup> United Nations, ‘General Assembly of the UN, Paragraph 139 of the World Summit Outcome Document’, 2005, at [http://www.responsibilitytoprotect.org/index.php?option=com\\_content&view=article&id=398](http://www.responsibilitytoprotect.org/index.php?option=com_content&view=article&id=398), accessed June 8, 2021.

prosecute criminals, and leaders to change politics within member States. The work of the ICC as an international court could also have an impact on local and regional courts. Some researchers argue that the best way for justice is to empower local courts.<sup>71</sup>

Though the international criminal court has been criticised as having African bias, it is not out of place to say that the work of the ICC could be the reason for discussions by the AU on the creation of a regional criminal court.<sup>72</sup> Researchers have also shown that international law can influence politics.<sup>73</sup> The ICC can still make a positive contribution to justice and peace even if it only provides symbolic justice. It is progressively being recognised worldwide as a legitimate institution and it is attracting some members. Tunisia joined the ICC in 2011 following its fight for democracy. Egypt and Qatar are considering being part of it. Palestinian leaders too are aware of the Court's potential to promote justice and peace, given that Palestine became a State, when it became a member of UNESCO in 2011 and a non-member observer State of the United Nations' General Assembly in 2012. Palestine accepted the Court's jurisdiction on an *ad hoc* basis, pursuant to Article 12(3) of the Rome Statute since June 13, 2014.<sup>74</sup> Palestine acceded to the Rome Statute on January 2, 2015.<sup>75</sup> The Rome Statute entered into force for Palestine on April 1, 2015, with prospective jurisdiction where the International Criminal Court (ICC) held a ceremony on the same date at the seat of the Court in The Hague (the Netherlands) to welcome Palestine as the 123rd State Party to the Rome Statute.

These gestures highlight the international value the ICC promotes. An increasing number of States accept the legitimacy of the ICC, even if some States do not ratify its status. Three out of five permanent members of the United Nations Security Council are not party to the Rome Statute. However, the USA, China and Russia seem to be progressively agreeing with its work. They cooperated and agreed to refer the case of Sudan in 2005 to the ICC, and they also agreed to a referral with the case of Libya in 2011.<sup>76</sup> Although Russia does not always agree to referrals to the ICC, it has made use of the Court, as Russian officials filed a complaint against Georgia.<sup>77</sup> Significantly, though U.S is not a party to the Rome Statute, however, the USA has made palpable progress in terms of cooperation with the ICC. The USA was in fact an observer at the first review conference of the ICC in June 2010. Subsequently, when Bosco

<sup>71</sup> WW Burke-White, 'Proactive complementarity: the International Criminal Court and national courts in the Rome system of international justice', *Harvard International Law Journal*, 49, 2008, pp 53-108; and MC Bassiouni, 'Perspectives on international criminal justice', 50 *Virginia Journal of International Law*, vol 2 ( 2010) 318. For instance, the icc encouraged Nigeria to organise trials to judge members of the terrorist group organisation Boko Haram, and also Kenya to organise domestic trials for war crimes.

<sup>72</sup> 'Africa: leaders' summit to discuss regional war crimes court', *The Star*, 23 January 2013, at <http://allafrica.com/stories/201301231408.html?viewall=1>, accessed 3 April 2019.

<sup>73</sup> BA Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics*, Cambridge: Cambridge University Press, 2009; see also: K Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics*, New York: Norton, 2011.

<sup>74</sup> *The Guardian*, 'US warns European governments against supporting Palestinians at UN', 1 October 2012, at <http://www.guardian.co.uk/world/2012/oct/01/us-warns-europe-palestinians-un>, accessed 4 April 2018. Palestine faces the following difficulties with regard to the icc. First, the USA disagrees with Palestine joining the icc. Second, if it joins, war crimes committed by both Israeli and Palestinians would be investigated. Finally, it is unclear whether war crimes investigated would date back to 2002, when the Rome Statute came into force, or 2011 when Palestine became a state.

<sup>75</sup> Palestine - Campaign for the Rome Statute of the ICC <https://www.pgaction.org/ilhr/rome-statute/med/palestine.html>, accessed 5 May 2019.

<sup>76</sup> C Heyder, 'The UN Security Council's referral of the crimes in Darfur to the International Criminal Court in light of US opposition to the Court', 24 *Berkeley Journal of International Law*, vol 2, (2006) 650-671. See also: J Ralph, *Defending the Society of States: Why America Opposes the International Criminal Court and its Vision of World Society* (Oxford: Oxford University Press, 2007).

<sup>77</sup> Jurist Document, 'Russia to File Complaint against Georgia with International Criminal Court', University of Pittsburgh, 19 August 2008, at <http://jurist.law.pitt.edu/paperchase/2008/08/russia-to-file-complaint-against.php>, accessed 12 October 2019.

Ntaganda, who had been wanted by the ICC since 2006, voluntarily surrendered himself to the US Embassy in Kigali in Rwanda in March 2013, the USA transferred him swiftly to the ICC.

## 5. CONCLUSION AND RECOMMENDATIONS

The relevance of article 27 of the Rome Statute cannot be over-emphasised especially as a check on executive lawlessness inherent in the abuse of sovereignty. Notwithstanding withdrawals by some states<sup>78</sup>, it is a fact that the more States join the Rome statute, the more power the ICC has in those States, as the prosecutor can investigate crimes on his or her own initiative in these States. However, in order to improve the impact of the ICC and make article 27 of the Statute more effective, Member States to the treaty have a crucial role to play in supporting the Court to provide international justice. There is need for a safe environment free from violence for victims of crime willing to testify at the ICC.<sup>79</sup> States are to cooperate with the ICC to implement its arrest warrants. They are to contribute to the ICC'S reparations system for victims of crime in line with positive complementarity while the ICC avoids being present where local systems of justice can operate, but rather encourage local and national courts to deal with criminal justice.<sup>80</sup> Currently, the ICC is the only international institution capable of effective prosecution of international crimes on international scale. The UN Charter as it is presently somehow poses a clog on the implementation and enforcement of article 27 of the Rome Statute. It is therefore suggested that incorporating article 27 of the Rome Statute as part of the UN Charter or adopting it as a Resolution of United Nations Security Council/General Assembly in addition to Chapter VII of the Charter of the UN and as forming part of the exception in article 2(7) of the UN Charter will enhance the implementation and enforcement of individual criminal responsibility of sitting sovereigns. Such incorporation will present criminal responsibility of sitting sovereigns less a sectional concern of few State Parties to the Rome Statute but will become a global concern. There is every need to check sovereigns and their agents who seem to be the major perpetrators of international crimes. Article 27 of the Rome Statute aims at global safety.

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<sup>78</sup> South Africa and some others including African States.

<sup>79</sup> Now victims could give testimony in their own right rather than on behalf of the defense or the prosecution. "Victims are there as victims, supported by an elaborate system of protection and counseling," he noted. They now had the possibility to claim reparations or compensation for their individual cases.

<sup>80</sup> It has done so to a certain extent in Libya: in 2011 it accepted to defer cases to Libya on condition that its judges would be involved, but in 2013 it ordered Libya to hand over Gaddafi's intelligence chief, Abdullah al-Sanussi.