

## THE PRE-TRIAL PROCEDURES AND PRINCIPLES OF THE INTERNATIONAL CRIMINAL COURT\*

### Abstract

*Following the heinous cruelties perpetuated by the Nazi regime during the World War II, the world was baffled by the expanse of brutality human beings could commit against one another. However, there was absence of a universal acceptable international criminal procedural structure to try perpetrators of the atrocities. The consequent Nuremberg criminal proceedings were undertaken based on her own rules of evidence; no acceptable laid down procedure and principles; charges against the accused persons were done ex-post facto and devoid of any country's law. The subsequent atrocities in former Yugoslavia and Rwanda in 1993 and 1994 respectively which in turn led to the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal, Rwanda (ICTR) engineered a positive nod that an international criminal court with attendant procedural provisions was indeed needed to urgently address the escalating issues of atrocities in the international community. Despite the creation of the ICC with attendant procedures and principles and commencement of operations sometime in 2002, legal experts, public affairs analysts and media personnel are yet to appreciate the workings of the ICC. The issues on the pre-trial procedures and principles of the ICC, appears regularly in the literature, media and have entered the public domain, yet it is still not easy to comprehend. At first glance, the sheer number of these publications seems discouraging, in that it might be assumed to confuse than inform. Against this background, this paper attempts to put the ambiguities aside and critically examine the pre-trial procedures and principles of the ICC.*

**Key words:** *Jurisdiction, International Criminal Proceedings, Pre-Trial Procedures and Principles, Complementarity, Confirmation of Charges*

### 1. Introduction

The brain behind prosecutions for international crimes is not new;<sup>1</sup> however, there have been relatively rare prosecutions. Prior to this time, there was little or no impulse accorded to states to impede their citizens for criminal conducts carried out against persons from another State, particularly the ones they are at war with.<sup>2</sup> Thoughtfully, international crimes could be of helping hands for nations to triumph in warfare; meanwhile, offenders of international crimes are most times officials of the armed forces under the employ of States. Consequently, obvious circumstances involving brutal governments in the commission of international crimes against States citizens, prosecutions were hardly embarked upon; the perpetrators of these international crimes are more or less the ones in charge of the judicial apparatus. Furthermore, there was the absence of a fixed structure for the purposes of bringing to book perpetrators of crimes from the international perspective. Irrespective of the foregoing inhibitions and systemic problems, in some instances, States have jointly or otherwise come under one umbrella to enforce international crimes.<sup>3</sup>

Sequel to the atrocities perpetuated by the Nazi regime in course of the World War II, the world was baffled by the expanse of brutality human beings could commit against one another.<sup>4</sup> It must be noted that there was no existent international procedural framework for the prosecution of these crimes, yet international observers agitated for the punishment of Nazi leaders.<sup>5</sup> Consequently, the International

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\*Felix E. EBOIBI, Ph.D (Law), LL.M(Nig.), LL.B(Cal.), BL(Nigerian Law School), Lecturer, Faculty of Law, Niger Delta University, Wilberforce Island, Nigeria. E-mails: felixeboibi@mail.ndu.edu.ng or lixboibi@yahoo.com; Tel:+2348033175431

<sup>1</sup> John Dugard, 'Bridging the Gap Between Human Rights and Humanitarian Law; The Punishment of Offenders', (1998) *International Review of the Red Cross*, 324, pp. 445 – 446 (stating that the first international war crimes trial occurred as early as 1474); see also <<http://scholarship.law.duke.edu/cgi/...>> Accessed 27 February 2017.

<sup>2</sup> *Ibid.* at 453.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> Matthew Lippman, 'The Pursuit of Nazi War Criminals in the United States and in Other Anglo-American Legal Systems' (1998) *California International Law Journal*, 29, pp.1,8. ("The Allied Powers repeatedly condemned Nazi

Military Tribunal at Nuremberg was established by the London Charter and legitimized the conduct of the Nuremberg trials under her own rules of evidence; no acceptable laid down procedure and principles, the perpetrators were indicted for *ex- post facto* crimes and which were unknown to any nation's law; it witnessed the removal of the *tu quoque* (the appeal to hypocrisy, is a kind of logical fallacy. It is a Latin term for 'you, too' or 'you, also')<sup>6</sup> defence; it allowed the use of naturally unacceptable and inadmissible evidence and the total essence of the assemblage was selective and victor's justice. For instance, Article 19 of the Charter of the International Military Tribunal, Nuremberg specified that 'the tribunal shall not be bound by technical rules of evidence... and shall admit any evidence which it deems to have probative value.'<sup>7</sup> Despite the unavailability of clear-cut procedural and punitive provisions in The Hague and Geneva Conventions, the Nuremberg Tribunal made use of the applicable Hague<sup>8</sup> and initial Geneva Conventions.<sup>9</sup> Though the Nuremberg trials may have succeeded positively in acquainting the international community of the Nazi's intolerable conduct but the trials were championed and under the control of the Allies, whose premise for the trials under international law was not obvious. Consequently, the trials attracted massive and exposed criticism as a prejudiced likeness of 'victors' justice.'<sup>10</sup>

The aftermath of the crimes perpetuated by the Hitler's regime, signaled the expansion of prior treaty law for the purpose of establishing array of legal structures to regulate behavior in war time by the four Geneva Conventions of 1949.<sup>11</sup> The grave breaches system was the result of the aforementioned conventions whereby State parties are mandated to outlaw some conducts and should either ensure the prosecution of persons who violate the outlawed conducts in their own States processes or extradite such persons to a different State that is prepared to prosecute them.<sup>12</sup> Notwithstanding, the duty of States to prosecute or extradite,<sup>13</sup> due to unavailability of resources, procedure, evidence and most especially, political will,<sup>14</sup> prosecuting persons who violate outlawed conducts appeared to be very sparse.

Based on the foregoing, quite a number of non-governmental organizations and States realized that the only way to avoid similar atrocities of the Nazi regime in the future was the establishment of a permanent international tribunal. This prompted the commission of an enquiry as far back as 1948 by the United Nations to examine the idea of creating a permanent international criminal court and attendant procedural provisions.<sup>15</sup> Unfortunately, the world was preoccupied by the Cold War hence little or nothing was done to facilitate or enhance the creation of an international criminal court.<sup>16</sup>

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atrocities during World War II and warned that those who perpetrated these barbarities would be prosecuted and punished").

<sup>6</sup> Available at <[www.absoluteastronomy.com](http://www.absoluteastronomy.com); [www.nationmaster.com](http://www.nationmaster.com),> Accessed 27 February 2017.

<sup>7</sup> IMT, Nuremberg Charter, Art. 19. See also <[open.library.ubc.ca](http://open.library.ubc.ca)>, Accessed 27 February 2017.

<sup>8</sup> Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277 (Hague Convention IV).

<sup>9</sup> Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S 343 (Geneva Convention III). See also Theodor Meron, 'International Criminalization of Internal Atrocities' (1995) 89 *American Journal of International Law*, 554, 564.

<sup>10</sup> Michael Biddis, *Victor's Justice; The Nuremberg Tribunal*, (May 1995) 45 *History Today*. See also <<http://scholarship.law.duke.edu/cgi/>... > Accessed 27 February 2017.

<sup>11</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31. Most States are bound by these conventions. For a list of signatories, see International Committee of the Red Cross, *States Parties and Signatories*, <<http://www.icrc.org/ihl.nsf/WebNORM?OpenView>> Accessed 28 November 2011;

See also <<http://scholarship.law.duke.edu/cgi/>... > Accessed 27 February 2017.

<sup>12</sup> Theodor Meron, As above, note 9 at 564. See also <<http://scholarship.law.duke.edu/cgi/>...> Accessed 27 February 2017.

<sup>13</sup> *Ibid* at 555. See also <http://scholarship.law.duke.edu/cgi/>... > Accessed 27 February 2017.

<sup>14</sup> *Ibid* at 555 – 556. See also <<http://scholarship.law.duke.edu/cgi/>...> Accessed 27 February 2017.

<sup>15</sup> Brigid O'Hara-Forster, Justice Goes Global, *Time Int'l*, 27 July 1998, at 46.

See also <<http://scholarship.law.duke.edu/cgi/>...> Accessed 27 February 2017.

<sup>16</sup> *Ibid*.

Meanwhile, within this span, the continuous occurrence of gross breaches of international humanitarian law persisted, yet there was no international legal framework put in place to prosecute perpetrators.<sup>17</sup>

Sometime in 1989, when the Cold War drew to a close, the International Law Commission, commissioned by the United Nations, commenced her task towards the drafting of a statute for the establishment of an international criminal court. Moreover, the obvious breaches of international humanitarian law that took place in former Yugoslavia and the consequent disintegration, in addition to the Rwandan genocide of 1994, provoked further agitations and confirmed that an international criminal court with attendant procedural provisions was surely desired by the global community and probably with more urgency compared to the past<sup>18</sup>

Considering the absence of international framework adopted to enhance the prosecution of persons who violate international humanitarian law, the world met a brick wall in holding perpetrators liable for outrageous breaches of humanitarian law that took place in the former Yugoslavia and Rwanda. However, the international community was in agreement that the perpetrators of the heinous crimes must not go unpunished. Consequently, by Chapter VII of the United Nations Charter, the United Nations Security Council established the *ad hoc* tribunals: ICTY in 1993 and ICTR in 1994 to hold those responsible for breaches of international humanitarian law in former Yugoslavia and Rwanda respectively.<sup>19</sup>

Due to the absence of a prior established precedent, and a procedural framework that encourages neither the Prosecution nor the Defence to accelerate proceedings at the ICTY and ICTR, the tribunals have experienced significant political manipulations and operational shortcomings. The issue is particularly complex with respect to the ICTY and ICTR: the political environment in which it was created, the very choice to create tribunals for one kind of conflict and not another, the ambiguous role of legislator played by the Security Council, and the conditions in which the judges were elected have muddled the image of the tribunals.<sup>20</sup> These have consequently allowed the demonstration of ‘victor’s justice’ by the ICTY and ICTR.

Irrespective of the above, the evolution of an international criminal procedure may prove to be one of the *ad hoc* tribunals’ most important contributions. The tribunals showed that international criminal justice is, indeed possible and thus, facilitated the creation of the International Criminal Court (ICC). Nevertheless, due to political reasons this idea of creating an international criminal court did not turn into reality until 1998. After years of negotiations, the ICC Statute was validated in course of a United Nations conference held in Rome by 120 States.<sup>21</sup> 33 international governmental affiliations, 160 States and a further affiliation of more than 200 non-governmental organizations (NGOs) were in attendance at the conference.<sup>22</sup> The ICC Statute is the legal framework for the creation of the ICC. The desired 60 States needed to bring the Statute into force was attained in early 2002 and culminated in the creation

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<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*; United Nations Security Council Resolution 827 (1993); United Nations Security Council Resolution 955 (1994); Catherine Cisse, ‘The International Tribunals for the Former Yugoslavia and Rwanda; Some Elements of Comparison’ (1997) 7 *Transnational Law & Contemporary Problems*, pp.103,104 (“The conflicts in Yugoslavia and Rwanda have revealed ... the inadequacy of the national judicial systems to effectively and impartially punish those responsible for violations of international humanitarian law”); U.N Charter, arts 39 – 51.

<sup>20</sup> Claude Jorda, ‘The Major Hurdles and Accomplishments of the ICTY: What the ICC Can Learn from Them’ (2004) 2 *Journal of International Criminal Justice*, pp. 572 – 584; F.E. Eboibi & Ileola Adesina, *The Adhoc Tribunals and International Criminal Justice: Valor or Vanity?* (2012) Vol. 11 *Nigerian Law & Practice Journal*, pp.132 – 154.

<sup>21</sup> M.H. Arsanjani, ‘The Rome Statute of the International Criminal Court’ (1999) Vol. 93, No. 1, *The American Journal of International Law*, pp.22-43. (Of those states in attendance, 120 voted in favour of adopting the statute, seven voted against, and 21 abstained); F.E. Eboibi, *The International Criminal Court: A Quest to End Global Heinous Atrocities And Enhance Sustainable Development* (2009) Vol.4 No.7 *Proceedings of the Fourth International Conference on Sustainable Development*, pp. 115-120, also presented at the Fourth International Conference on Sustainable Development, held on May 5– 8, 2009 at the Conference Centre, University of Lagos – Nigeria.

<sup>22</sup> C. Fehl, ‘Explaining the International Criminal Court: A ‘Practice Test’ for Rationalist and Constructivist Approaches’ (2004) Vol.10, No.3 *European Journal of International Relations*, pp.357-394.

of the ICC. As at today, about 121 States have ratified the Statute and are parties to the ICC. By all standards, the ICC remains the first permanent, treaty based international criminal court. On 1 July 2002, the Court formally turned operative in The Hague, Netherlands.

The idea behind the establishment of the ICC is obvious. The ICC was meant to respond to criticisms such as ‘victor’s justice’ and ‘selective justice’<sup>23</sup> and ensure that everyone would be equal before justice no matter what his/her status is. Moreover, due to incapability or unwillingness of national courts, the perpetrators of serious international crimes were going unpunished. The reasons for this lay with the widespread nature of such violations and involvement of State or military officials and leaders in these atrocities.<sup>24</sup> Following the end of World War II until 1998, the international community has recorded about in 250 conflicts and around 170 million people have died in these conflicts and in violations of tyrannical regimes.<sup>25</sup> But all the perpetrators of these crimes, with few exceptions (e.g some were tried and punished by the ICTY and ICTR), have not been brought before justice and have remained unpunished.<sup>26</sup> These concerns were restated in the Preamble of the ICC Statute:

...Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured, [and later]  
Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes...<sup>27</sup>

To actualize the above noble ideas for the establishment of the ICC, investigations and prosecutions before the ICC are divided into 3 stages/procedure: (1) The Pre – Trial Stage/Procedure (2) The Trial Stage/Procedure (3) Appellate Stage/Procedure. The Pre – Trial Procedure is the crux of this research work. The Pre – Trial operation of the ICC follows a set procedure. This is governed by the ICC Statute, Rules of Procedure and Evidence and the Regulation of the ICC. There is a dedicated Pre – Trial Chamber saddled with the responsibility of resolving all pre – trial issues. What are then the Pre-Trial Procedures and Principles of the ICC? In what circumstances can these principles and procedures be triggered by a State Party, United Nations Security Council, the Prosecutor and the ICC in determining situations and/or cases brought before the ICC? The Pre – Trial Procedures and Principles of the International Criminal Court (ICC) for the purposes of this research work refer to issues that must be determined before the proper commencement of the trial of an accused person. These include; firstly, the determination of the jurisdiction of the ICC, mechanisms for instituting criminal proceedings, complementarity, gravity threshold, investigation, arrest, surrender, and lastly confirmation of charges before trial.

Within just over fourteen years of commencing operations, the aforementioned noble ideas that led to the establishment of the ICC as it relates to the pre – trial procedures and principles of the international criminal court has been compromised from the outset: there are jurisdictional gaps in the determination of the jurisdiction of the ICC, the current State referrals before the ICC are politically motivated and contrary to the basic texts regulating the ICC, there is evidence of selectivity and victor’s justice in the ICC practice thus far etc. These challenges could hinder the development of the ICC.

Moreover, recently, comments credited to legal experts, public affairs analysts and media personnel on the workings of the ICC have irresistibly shown a lack of understanding of the pre-trial procedures and principles of the ICC. For instance, issues of individuals and groups filing legal suits before the ICC

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<sup>23</sup> K.J Fisher, ‘A Review of Bringing Power to Justice? The Prospects of the International Criminal Court by J. Harrington, M. Middle, R. Vernom’ (2006), (2006 -2007) 38 *Ottawa Law. Review*, 117(book review).

<sup>24</sup> P. Kirsch, ‘The Role of the International Criminal Court in Enforcing Criminal Law’ (2007) 22 *American University International Law Review*, pp.540-542.

<sup>25</sup> M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, (2<sup>nd</sup> Revised edition London, Kluwer Law International, 1999) p.554.

<sup>26</sup> *Ibid.*

<sup>27</sup> Adopted by the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998 (Hereinafter Rome Statute).

like the ordinary national courts;<sup>28</sup> quest to file and defend cases of corruption before the ICC outside the subject matter jurisdiction of the ICC; lodging complaints against individuals before the ICC rather than situations and inability to differentiate between a crime of treason and crimes under the jurisdiction of the ICC.<sup>29</sup> Against this background, the necessity for a review of the pre-trial procedures and principles of the international criminal court from a critical perspective comes into focus. Considering that some of the challenges linked with the current pre-trial practice before the ICC based on the ICC current case load can also arise in subsequent cases before the court, there is need to understand these.

## 2. Jurisdiction of the ICC: A Determining Factor before Taking Any Cogent Step

Specifically, in determining whether to institute criminal proceedings before the ICC, a Member State, International organizations, Security Council of the United Nations (UNSC), ICC Prosecutor and ICC must ensure that the ICC has jurisdiction to entertain such a situation.<sup>30</sup> As a result of hard negotiations, it was agreed that the ICC's jurisdiction may be exercised when an international crime is perpetrated on the domain of a member State to the ICC Statute or when the wrongdoer is citizen of the member State, or when the situation under consideration is referred to the ICC by the UNSC or when a Non-Party Nation *ad hoc* accepts the court's jurisdiction.<sup>31</sup> Consequently, by Article 11 and 12 of the ICC Statute, jurisdiction before the ICC are in the form of temporal (*rationes temporis*) jurisdiction, personal (*ratione personal*) jurisdiction, territorial (*ratione loci*) jurisdiction, acceptance of jurisdiction by a non State Party (*ad hoc* jurisdiction) and subject matter (*ratione materiae*) jurisdiction.<sup>32</sup>

Jurisdiction is a serious lawful matter that is the foundation for bringing war criminals that perpetrates international crimes envisaged by the ICC. The ICC is under an obligation to determine whether it has jurisdiction before it can exercise juridical and punitive power on such perpetrators, principally should the crimes committed are not perpetrated in the domain of a member State to the ICC Statute and they are not subjects of a member State to the ICC Statute. Jurisdiction as a concept is capable of defining acceptable lawful reactions through perturbed regimes or the international community to international crimes.<sup>33</sup> The temporal jurisdiction of the ICC is spelt out in Article 11 of the ICC Statute. Here, the ICC cannot exercise retrospective jurisdiction: it is only empowered to go after crimes perpetrated on or, after 1 July 2002, the day wherein the Statute adopted in Rome on 17 July 1998 entered into force. Retrospective assumptions of jurisdiction of offences itemized in Article 5 of the ICC Statute that were criminal under international law but committed prior to that date are ruled out.<sup>34</sup> The ICC Pre - Trial Chamber I addressed the question of the temporal jurisdiction of court in respect to the case of *Lubanga*, where it held thus:

Considering that the 'Statute entered into force for the (Democratic Republic of Congo) on 1 July 2002, in conformity with article 126(1) of the Statute, the (Democratic Republic of Congo) having ratified the Statute on 11 April, 2002,' the second condition would be met pursuant to article 11 of the statute if the crimes underlying the case against Mr. Thomas Lubanga Dyilo were committed between 1 July

<sup>28</sup> *Abdul-Hussain Khadimul Qa'eem*, '12 Reasons Islamic Movement (IMN) Should File Case at International Criminal Court (ICC)', available at <http://newsrescue.com/12-reasons-islamic-movement-imn-should-file-case-at-international-criminal-court-icc/#ixzz45o9kH9m7> (Accessed 14 April 2016); Press Release, 'Dasukigate: Falana drags suspects to ICC' available at <http://www.premiumtimesng.com/news/headlines/197270-dasukigate-falana-drags-suspects-to-icc.html> Accessed 14 April 2016.

<sup>29</sup> Newsexpress, 'Biafra: Buhari charged with war crimes at the International Criminal Court' available at <http://newsexpressngr.com/news/detail.php?news=19720&title=Biafra:-Buhari-charged-with-war-crimes-at-the-International-Criminal-Court> Accessed 14 April 2016.

<sup>30</sup> F.E. Eboibi, 'Jurisdiction of the International Criminal Court: Analysis, Loopholes and Challenges' (2012) *Nnamdi Azikiwe University Journal of International Law and Jurisprudence*, 28-46, available online at <http://www.ajol.info/index.php/nauji...> Accessed 20 January 2017.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.* See also [scholarship.law.duke.edu & iccnw.org](http://scholarship.law.duke.edu & iccnw.org) (Accessed 24 February 2017)

<sup>34</sup> Sharon A. Williams, *Jurisdiction ratione temporis*, in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article – 2<sup>nd</sup> ed.*, Germany, Verlag C.H Beck OHG, Wilhelmstrabe, 9, 80801, 2008, p. 544. See [www.ccsenet.org](http://www.ccsenet.org) (Accessed 24 February 2017). See also F.E. Eboibi, As above, note 30.

2002. As the case against Mr. Thomas Lubanga Dyilo referred to crimes committed between July 2002 and December 2003, the Chamber considers that the second condition has been met.<sup>35</sup>

The exception to this is where pursuant to Article 12(3) of the ICC Statute, concerning preconditions to the exercise of jurisdiction by the ICC, that Non Member State has made a declaration, with the ICC Registrar, acquiescing the ICC jurisdiction with respect to the 'crime' in question.<sup>36</sup> Such declarations, formulated in accordance with the said article, may seem retroactive in their characteristics.<sup>37</sup> On 27 February 2004, a similar declaration was made by Uganda titled 'Declaration on Temporal Jurisdiction.' By this declaration, Uganda agreed for the ICC to assume jurisdiction for offences perpetrated upon the coming into force of the ICC Statute on 1 July 2002.<sup>38</sup> The ICC Pre-Trial Chamber III, having taken note of the Uganda declaration before confirming the arrest warrant against Joseph Kony, presumably affirmed the lawfulness of the declaration.<sup>39</sup> The aforementioned limitations of the ICC jurisdiction could be seen as rational, if not, past occurrences would have been entertained by the ICC. Though, from the negative perspective, it exempts perpetration and perpetrators of crimes from being prosecuted before the date the ICC Statute commenced or entered into force.<sup>40</sup>

The ICC Statute bestow personal jurisdiction on natural individuals to the exclusion of organizations or States.<sup>41</sup> Trials in *absentia* are impermissible. Consequently, for the ICC to assume personal jurisdiction, the defendant ought to be in the custody of the ICC.<sup>42</sup> The ICC assumes jurisdiction with regard to citizens of a member State who are indicted of a crime based on Article 12(2) (b) of the ICC Statute, irrespective of the location the conducts were exhibited. For citizens of Non-member States that acquiesced to the jurisdiction of the ICC on *ad hoc* basis through the lodgment of declaration before the ICC Registrar, prosecution can as well be undertaken by the ICC,<sup>43</sup> or based on the UNSC resolution. The Nationality of the offender's basis of the ICC's jurisdiction is the minutest disputable aspect of the ICC jurisdiction, especially as it was the least decisive suggested by few States at the Rome Conference.<sup>44</sup>

The present indictments at the ICC appear to have been based on territory, rather than the nationality of the accused. In the situations in Uganda, the Democratic Republic of Congo and Sudan (Darfur), shows absence of issues about whether or not the defendants are citizens of a member State. Nor was the ICC empowered by the UNSC to assume jurisdiction in respect to the conducts of citizens of Sudan perpetrated outside Sudan, even though these could be necessary to the Darfur conflict.<sup>45</sup> The ICC Statute provision exempting individuals of nation States below eighteen years of age as at the time the

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<sup>35</sup> *Prosecutor v. Lubanga* (ICC-01/04-01/06-8, Decision on the Prosecutor's Application for a Warrant of Arrest, 10 February 2006, para. 26. See also F.E. Eboibi, As above, note 30.

<sup>36</sup> Sharon A. Williams, As above, note 34 at p.544. See also "Is There a Court for Gaza?", Springer Nature, 2012. See also F.E. Eboibi, As above, note 30.

<sup>37</sup> William A. Schabas, *An introduction to the International Criminal Court*, (3<sup>rd</sup> edn, New York, Cambridge University Press, 2007) at p. 7. See also <v-scheiner.brunel.ac.uk> Accessed 24 January 2017.

<sup>38</sup> *Ibid.*

<sup>39</sup> Situation in Uganda (ICC-02/04-53), Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended, para.32. Situation in Uganda (ICC-02/04-55), Warrant of Arrest for Raska Lukwiya, 8 July 2005, para. 20; Situation in Uganda (ICC-02/04-56), Warrant of Arrest for Okot Odhiambo, 8 July 2005, para. 22; Situation in Uganda (ICC-02/04-57, Warrant of Arrest for Dominic Ongwen, 8 July 2005, para. 20, cited in *ibid.* See also F.E. Eboibi, As above, note 30.

<sup>40</sup> Omer Y. Elagab, 'The Darfur Situation and the ICC: An Appraisal'(2008) Vol.1, No.3 *Journal of Politics and Law*, p. 47, See also William A. Schabas, As above, note 37 at p.68. See also <www.ccsenet.org> Accessed 24 January 2017; F.E. Eboibi, As above, note 30.

<sup>41</sup> Rome Statute, Arts. 1, 25(2). See also <works.bepress.com> Accessed 24 January 2017; F.E. Eboibi, As above, note 30.

<sup>42</sup> *Ibid.*, Art. 63(1). See also <works.bepress.com> Accessed 24 January 2017; F.E. Eboibi, As above, note 30.

<sup>43</sup> *Ibid.*, Art. 12(3); Rule of Procedure and Evidence, adopted by the Assembly of States, First Session, New York, 3-10 September 2002, Official Records ICC-ASP/1/3, pp.10-107, Rule 44; F.E. Eboibi, As above, note 30.

<sup>44</sup> See also F.E. Eboibi, As above, note 30; Omer Y. Elagab, As above, note 40.

<sup>45</sup> Sharon A. Williams & William A. Schabas, *Article 12, Preconditions to the Exercise of Jurisdiction*, in Otto Tiffterer, *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article – 2<sup>nd</sup> ed.*, Germany, Verlag C.H Beck OHG, Wilhelmstrabe, 9, 80801, 2008, p.558; See also William A. Schabas, As above, note 37 at p. 71; F.E. Eboibi, As above, note 30; Omer Y. Elagab, As above, note 40.

crime was committed is an exception to the already established concept of jurisdiction over nationals.<sup>46</sup> Less explicit, but certainly just as imperative, is the exclusion of jurisdiction over persons benefiting from forms of immunity.<sup>47</sup>

The ‘territorial principle’ reflects the global community’s recognition that without the power to control acts or things located in its territory, a State could not exist.<sup>48</sup> The ICC Statute embodies the requirement of a territorial nexus. By virtue of Article 12(2)(a) of the ICC Statute, the court is empowered to adjudicate on offences perpetrated on the domain of member States, irrespective of the nation State of the perpetrator. Moreover, based on Article 12(3), the ICC can assume jurisdiction over offences perpetrated on the domain of nations that acquiesce to the jurisdiction of the ICC on *ad hoc* basis, plus a situation where authority is given to the ICC under Article 13(b) subject to Chapter VII of the Charter of the United Nations.<sup>49</sup> Thus if a listed offence is perpetrated in State A, a member State to the ICC Statute by a national of State B, whether or not State B is a State Party, State A will have enabled the ICC to take jurisdiction, whether the alleged offender is present in State A or in another custodial State Party.<sup>50</sup> A critical look at the current case load at the ICC, no apparent problems concerning territorial jurisdiction have arisen. In confirming the arrest warrants brought against the Five leaders of the Lord’s Resistance Army in Uganda and for Thomas Lubanga in Congo,<sup>51</sup> it was stated by the Pre-Trial Chamber that the crimes in question were alleged to have been perpetrated on the domain of the nation State that referred the situation.<sup>52</sup> In the same vein, Resolution 1598 of the UNSC empowered the ICC to enforce offences perpetrated in Darfur.<sup>53</sup>

Article 12(3) of the ICC Statute portrays a situation where a non-nation state accepts the jurisdiction of the ICC from an *ad hoc* perspective, irrespective of the territorial and personal jurisdiction that is attached to a party to the ICC Statute upon ratification of the ICC Statute. Such a nation in accordance to Article 12(3) of the ICC Statute is obliged to lodge a declaration to the Registrar of the ICC signifying an acceptance of the ICC jurisdiction ‘with respect to the crime in question.’ A nation of that category is referred to as ‘accepting nation.’<sup>54</sup>

Generally, a declaration allows for an extension of the ICC jurisdiction, and ICC statutory application, in circumstances where a nation not party to the ICC Statute has a nexus to the alleged crimes(s).<sup>55</sup> The underlying premise of the declaration is to enable a nation not party to the ICC Statute to agree to the exercise of the ICC jurisdiction from an *ad hoc* perspective, eliminating quest for the insistence on nations to accede to the ICC Statute.<sup>56</sup> Its applicability is therefore dependent upon the express consent of relevant nation, though it should be noted that deference to the sovereignty of non-State Parties can be ‘bypassed’ in respect to situations referred by the UNSC to the ICC Prosecutor pursuant to Article 13(b) of the ICC Statute.<sup>57</sup> The declaration is given in circumstances where the acceptance of this

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<sup>46</sup> ICC Statute, Art. 26. See also F.E. Eboibi, As above, note 30; <v-scheiner.brunel.ac.uk> Accessed 24 January 2017.

<sup>47</sup> Sharon A. Williams & William .A. Schabas, As above, note 45; William .A. Schabas, As above, note 37 at p. 72-75; See also ICC Statute, Arts. 27 & 98; F.E. Eboibi, As above, note 30

<sup>48</sup> Thomas Buergenthal & Sean D. Murphy, Public International Law in a Nutshell, 205 (2002) cited in Lance Phillip Timbreza, ‘Captain Bridgeport and the maze of ICC Jurisdiction’ (2007) 10 *Gonzaga Journal of International Law*, p.349. See also F.E. Eboibi, As above, note 30.

<sup>49</sup> W. A . Schabas, As above, note 37 at 75. See also F.E. Eboibi, As above, note 30.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*

<sup>53</sup> Available at <v-scheiner.brunel.ac.uk> Accessed 24 January 2017.

<sup>54</sup> F.E. Eboibi, As above, note 30. See also <staging.fdu.edu> Accessed 24 January 2017 and "Is There a Court for Gaza?" Springer Nature, 2012.

<sup>55</sup> Steven Freeland, ‘How Open Should the Door Be?- Declarations by non-States Parties Under Article 12(3) of the Rome Statute of the International Criminal Court’ (2006) 75 *Nordic Journal of International Law*, pp.217 – 218; Carsten Stahn, Mohammed M. El Zeidy and Hector Olasolo, ‘The International Criminal Court’s *Ad hoc* Jurisdiction Revisited’ (2005) 99 *American Journal of International Law*, p. 422

<sup>56</sup> *Ibid.* See also F.E. Eboibi, As above, note 30.

<sup>57</sup> Art. 13 (b) of the ICC Statute States: “The Court may exercise its Jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of the statute if..: (b) A situation in which one or more of such crimes appears

jurisdiction by the accepting nation or State is 'required' pursuant to Article 12(3) of the ICC Statute. As a consequence, the accepting nation has a connection with the crime(s), either as the nation whose domain the offence was (allegedly) committed or as the nation of the perpetrator of the offence.<sup>58</sup> The accepting nation is under an obligation to assist or collaborate with the ICC based on Part 9 of the ICC Statute. Thus, where the accepting nation does not assist or collaborate with the ICC, there is no mention of any implication.<sup>59</sup>

Moreover, to hear a case, the ICC must exercise subject matter jurisdiction.<sup>60</sup> The ICC cannot by consent assume jurisdiction outside the subject matter jurisdiction of the court.<sup>61</sup> This implies that anything done outside the subject matter jurisdiction of the ICC is a nullity.<sup>62</sup> Subject matter jurisdiction is set by the Constitution and/or Statutes. The ICC subject matter jurisdiction is; (1) the crime of genocide (2) crimes against humanity (3) war crimes and (4) the crime of aggression.<sup>63</sup> Although, Article 5 (1) (d) of the ICC Statute lists the crime of aggression as a crime within the subject matter jurisdiction of the ICC. It must be noted that it must be read with paragraph (2) of that provision:

The court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with Article 121 and 123 defining the crime and setting out the conditions under which the court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.<sup>64</sup>

The implication of the foregoing is that crimes outside the aforementioned being touted by the media, legal experts etc as basis for agitations for the ICC to assume jurisdiction over perpetrators seem unachievable, unless the ICC Statute is amended to reflect same. For instance, the public domain is dominated by agitations for the ICC to assume jurisdiction over acts of terrorism simpliciter, corruption and fraud contrary to the ICC Statute. This is not tenable as explained earlier. Irrespective of the above, it is clear that the final terms of the ICC Statute, including some of the more controversial issues covered in Articles 11 & 12 of the ICC Statute, were the product of compromise. It is therefore, completely understandable that the terms of the ICC Statute, as well as other texts, contain ambiguities and give rise to some difficult and unclear questions of interpretation. By virtue of Article 11, Temporal Jurisdiction, the ICC does not have complete jurisdiction over the crimes listed in Article 5 of the ICC Statute after its statute comes into force with respect to States that ratify or accede or otherwise accept to be bound after that date. Its temporal jurisdiction for such a State Party begins after the entry into force for the State.<sup>65</sup> The ICC's temporal jurisdiction in Article 11(1) & (2) of the ICC Statute should be made broader by amending the Article and expressly encompassing the crimes listed in Article 5 of the ICC Statute, as long as they were recognised as crimes under international law at the time of the commission.<sup>66</sup> Similarly, in Article 11(2) of the ICC Statute, arguably, the restriction therein is inappropriate because once a State becomes a Party; there is no legal problem in extending back in time the jurisdiction of the ICC where the crimes are universally condemned.<sup>67</sup> States that become Parties

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to have been committed is referred to the prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations"; F. Lattanzi, *The Rome Statute and State Sovereignty, ICC Competence, Jurisdictional Links, Trigger Mechanisms*, in F. Lattanzi and W.A Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court*, vol. 1, 11Sirente, Italy, 1999, p. 60. See also F.E. Eboibi, As above, note 30.

<sup>58</sup> ICC Statute, Art. 12 (2). See also F.E. Eboibi, As above, note 30.

<sup>59</sup>William A. Schabas, As above, note 37 at p.75; Sharon A. Williams and William A. Schabas, As above, note 45. at p. 958. See also F.E. Eboibi, As above, note 30.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*

<sup>63</sup> ICC Statute, Art. 5(1); (Art. 6 defines the crime of genocide; Art. 7 defines crimes against humanity; Art. 8 defines war crimes). See also F.E. Eboibi, As above, note 30.

<sup>64</sup> ICC Statute, Art. 5(2).

<sup>65</sup> Sharon A. Williams, As above, note 37 at p.540 - 544. See also Rome Statute, Art. 11(2). See also F.E. Eboibi, As above, note 30.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*



after the entry into force of the Statute, application should be retrospectively. In such circumstances, the ICC would not have been criticized for *ex-post facto* criminalization.<sup>68</sup>

Moreover, under Article 12 of the ICC Statute currently in force, there still remains a danger that the perpetrator might go unpunished and application of law on selective basis ('selective justice') is still a relevant concern and there is too much possible political intervention by the UNSC. The current conditions of the exercise of jurisdiction of the Court is not effective, and when a crime is not committed by a State Party national or on its territory, and when there is no UNSC referral and no *ad hoc* acceptance of the Court's jurisdiction, perpetrators might go unpunished. In addition, the ICC Statute enables the UNSC to refer any situation to the ICC no matter the State in question (both State Parties and non States Parties) to the ICC Statute.<sup>69</sup> Hence, the concern of 'selective justice' is still relevant. One would question why the ICC can exercise jurisdiction over any situation and prosecute the alleged criminals when there is a UNSC referral, but cannot do the same on its own without the UNSC referral (approval). Consequently, it is recommended that Article 12 of the ICC Statute be amended to equip the ICC with international jurisdiction to entitle the ICC to exercise jurisdiction over crimes wherever they are committed by anyone and against any national in the world, of course relying on complementarity regime.<sup>70</sup> There would also be no need for a UNSC referral in order to authorize the ICC with jurisdiction when it does not have one, this would have greatly limited political intervention into international criminal justice and increase the deterrent effect of international criminal law.<sup>71</sup>

### **3. The ICC and Institution of Criminal Proceedings: Political Intrigues and Complexities**

Having determined the jurisdiction of the ICC as the first pre-trial procedure and principle of the ICC, another procedure to be determined is the ICC mechanism for instituting criminal proceedings. The issue of how a case would be instituted, the so called 'trigger mechanisms' to equip the ICC with jurisdiction was along other jurisdictional issues of 'the most complex and most sensitive' nature. However, either of the understated three ways can be used to institute matters at the ICC: (1) State Party referral; (2) UNSC referral and (3) Investigation instituted by the ICC Prosecutor (*proprio motu* powers). At the Conference held in Rome, these three mechanisms survived the scrutiny, hence their inclusion in the final ICC Statute.<sup>72</sup> A 'situation' can only be referred by a State or UNSC to the ICC, the decision to determine which particular case or suspect to be prosecuted is solely that of the ICC Prosecutor and not political bodies. Where a nation that is a party to the ICC Statute refers or submits a situation to the ICC Prosecutor, this is known as State Party referral.<sup>73</sup> Generally, the ICC Statute provides a fundamental procedure for the referral of situations to the ICC Prosecutor by a State Party. The gamut of Article 13(a) of the ICC Statute underscores the referral of a situation to the ICC Prosecutor by a State Party in conformity to Article 14 of the ICC Statute.<sup>74</sup>

The referral must be in writing.<sup>75</sup> Thereafter, the ICC possibly assumes jurisdiction in respect to the situation.<sup>76</sup> There are however, three laid down stages of the referral process: firstly, a nation ensures that it is a party to the ICC Statute, in addition, the nation agrees to the ICC prevailing jurisdiction in respect to crimes stated therein; secondly, a nation that is a party to the ICC Statute particularly refers a situation to the ICC and consequently 'triggers' the exercise of the ICC jurisdiction and thirdly, the

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<sup>68</sup> *Ibid*

<sup>69</sup> F.E. Eboibi, As above, note 30.

<sup>70</sup> *Ibid*.

<sup>71</sup> *Ibid*.

<sup>72</sup> ICC Statute, Art.s 13, 14 & 15.

<sup>73</sup> See <<http://chicagounbound.uchicago.edu...>>; <[www.alhaq.org](http://www.alhaq.org); [www.allbusiness.com](http://www.allbusiness.com)> Accessed 10 January 2017.

<sup>74</sup> *Ibid*; See also ICC Statute, Art 13(a) & 14.

<sup>75</sup> Rules of Procedure and Evidence of the International Criminal Court, Rule 45.

<sup>76</sup> ICC Statute, Art. 13. See <http://chicagounbound.uchicago.edu...>; [www.alhaq.org](http://www.alhaq.org); [www.allbusiness.com](http://www.allbusiness.com), Accessed 10 January 2017.

ICC assumes jurisdiction over the situation.<sup>77</sup> Where a nation that is a party to the ICC Statute refers a situation to the ICC Prosecutor, before a decision is made whether to commence investigation or not, the ICC Prosecutor analyses the information given to him or her. As earlier noted, the referring State is required to provide available substantiating evidence to the ICC Prosecutor concerning the situation referred to enable him or her conduct investigations.<sup>78</sup> The ICC Prosecutor is obliged to acquaint all nations that are parties to the ICC Statute and other nations who would ordinarily assume jurisdiction in respect to the alleged crime, should the ICC Prosecutor finally decides that there is enough reason to proceed with an investigation.<sup>79</sup> The ICC Statute gives room for a State that can claim jurisdiction an average of one month to notify the ICC Prosecutor of her intention to investigate an alleged offence. Where such notification occurs, the Prosecutor should defer to that State, peradventure the ICC Prosecutor finds out that the State's investigation is not real, the ICC Prosecutor is obliged to request the Pre - Trial Chamber to empower him or her to proceed with an investigation.<sup>80</sup>

Uganda, the Central African Republic, the Democratic Republic of Congo and Mali have all self referred situations based on alleged international crimes perpetrated within their domains to the ICC. Nobody thought that prevailing situations in the domain of nations that are parties to the ICC Statute would be referred to the ICC.<sup>81</sup> Some words of caution however seem appropriate concerning the implementation of the aforementioned general principles in practice. The evolving practice at the ICC in question where a nation that is a party to the ICC Statute on or whose domain a purported offence has taken place or is taking place therein, consequently, refer the situation to the ICC, may be referred to as one of 'Self-referral' and, possibly, one of subsequent waiver of complementarity. At no time during the drafting of the ICC Statute was it imagined that there would be a possibility of a nation referring a case to the ICC against herself.<sup>82</sup> The idea was for nations that are parties to the ICC Statute to refer solely situations happening in other nations. Arguably, the ICC Prosecutor close workings with nations that are parties to the ICC Statute resulted in the first three self referrals (Uganda, the Central African Republic, the Democratic Republic of Congo) before the ICC.<sup>83</sup> The current practice of 'self referral' before the ICC is unnecessary, risky and would consequently pose a lot of difficulties to the development of the ICC. A critical look at the three first three referrals, shows a common attribute in which every one of the nations that referred situation to the ICC, requested the ICC Prosecutor to specifically investigate purported offences perpetrated by insurgents engaged in a war against the central authorities.<sup>84</sup> The act of the Prosecutor or Office of the Prosecutor seeking for State referrals is not tenable in law and consequently illegal. A State Party request for ICC to investigate alleged crimes perpetrated by rebels invariably implies politically manipulating the ICC for the purpose of achieving her national military and political agenda.<sup>85</sup> Another recognizable difficulty in respect to 'self referral' reflects a practice whereby nations that are parties to the ICC Statute instead of assuming their obligations to investigate and prosecute, the ICC is deferred to. Consequently, it is recommended that where a nation that is a party to the ICC Statute self refer a situation to the ICC, such a situation should be sent back and give the State in question a lecture about its responsibilities in addressing impunity, alternatively, the Prosecutor should proceed against both sides of the situation.( the government forces and rebels as well).

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<sup>77</sup> *Ibid*; See also Michael P. Scharf & Patrick Dowd, 'No way Out? The Question of Unilateral Withdrawals or Referrals to the ICC and Other Human Rights Courts' (Winter 2009) Vol.9, No.2 *Chicago Journal of International Law*, pp.576-579.

<sup>78</sup> ICC Statute, Art. 14 (2).

<sup>79</sup> *Ibid.*, Art. 18 (1).

<sup>80</sup> *Ibid.*, Art. 18 (2).

<sup>81</sup> See <<https://academic.oup.com/jicj/article...>> Accessed 17 January 2017.

<sup>82</sup> William A. Schabas, As above, note 37 at 147. See also <<http://chicagounbound.uchicago.edu...>> Accessed 17 January 2017.

<sup>83</sup> *Ibid.*

<sup>84</sup> See <[www.jura.uni-tuebingen.de](http://www.jura.uni-tuebingen.de)> Accessed 17 January 2017.

<sup>85</sup> Paola Gaeta, 'Is the Practice of Self Referrals a Sound Start for the ICC?' (2004) *Journal of International Criminal Justice*, p.952.

The UNSC Referral is the second means of instituting proceedings or triggering the exercise of ICC jurisdiction. The ICC Statute failed to provide detailed provision in respect to UNSC referral. Article 13(b) of the ICC Statute governs UNSC referral. It empowers the ICC to assume jurisdiction in respect to international crimes perpetrated under the ICC jurisdiction based on Article 5. Article 13(b) triggers the ICC jurisdiction and may also equip the ICC with jurisdiction over crimes perpetrated on the domain of non state parties to the ICC Statute. The UNSC may pursuant to Article 13(b) of the ICC Statute trigger the ICC jurisdiction with respect to a nation that has already ratified or acceded to the ICC Statute. Consequently, the situation in Darfur, Sudan and Libya has been referred by the UNSC to the ICC.<sup>86</sup> Because the ICC is solely bound to assume jurisdiction over individuals of nations that have ratified the ICC Statute or citizens that have been alleged to have perpetrated offences on the domain of those nations, it implies an overwhelming exhibition of selective justice by the ICC. This is even made worse where nations that possess great armed forces command (for example the United States, Russia, China, India, Israel, Turkey and others) are not member States to the ICC.<sup>87</sup> Justifying the fact that punitive actions would only be meted against the feeble States while the strong States are let out of the hook. A situation that is capable of eroding the reliability or integrity of the ICC in the estimation of the international community.<sup>88</sup> Precisely why the ICC is selectively investigating and prosecuting only cases from African countries and not doing so in other States where international crimes abound. It goes to show that the practice of international justice at the ICC is a mirage and misconception since the stronger States have decided to remain mute.<sup>89</sup> Arguably, the power of the UNSC to refer situations to the ICC will facilitate the creation of ICC jurisdiction in circumstances where it is not in existence. Moreover, the ICC will in effect be subjected to the political will of non-States parties to the ICC Statute. For instance, out of the five permanent members of the UNSC, only two are parties to the ICC Statute, yet the UNSC is equipped with so much power, which is capable of being used to generate and achieve their political action. The corollary of the foregoing discussion from the perspective of law and logic may be perfectly explained in terms of politics.<sup>90</sup> The inconsistencies outlined above are inexplicable and may undermine the development of the ICC. It is recommended that since powerful members of the UNSC have refused to ratify the ICC Statute, thereby involving itself in selective referral of situations before the ICC, Security Council referral to the ICC be stopped forthwith and in place the United Nations General Assembly be equipped with the power to refer situations to the ICC. Alternatively, Security Council referrals be made subject to ratification by the UN General Assembly for it to be effective.

The third mechanism for instituting proceedings before the ICC is the *proprio motu* powers of the ICC Prosecutor i.e. the power of the ICC Prosecutor to initiate his or her own investigation. Article 13(c) & 15 of the ICC Statute recognizes the *proprio motu* powers of the ICC Prosecutor. The point is that the Prosecutor may act on his or her own ingenuity or volition in the absence of prescribed referral act or formal duty to initiate. The Prosecutor may not initiate an investigation without any basis of alleged facts. The Prosecutor must respond to information on offences within the ICC jurisdiction received by the Prosecutor. There is no requirement, however, that the information must come from a specific source. The source is irrelevant according to Article 15(1) of the ICC Statute as long as information is in possession of the Office of the Prosecutor and the decision to initiate an investigation is based on such information. Where the Prosecutor concludes based on his preliminary examination by virtue of Article 15(1) & (2) of the ICC Statute, that ‘there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected.’<sup>91</sup> The power to authorize a full investigation is solely the prerogative of the Pre-Trial Chamber. Whilst the ICC Prosecutor is saddled with the decision to initiate

<sup>86</sup> See <<https://www.icc-cpi.int/NR/rdonlyres...>> Accessed 17 January 2017

<sup>87</sup> Hans Kochler, *Global Justice or Global Revenge? The ICC and the Politicization of International Criminal Justice*, Lecture delivered at the Kartoum Friendship Hall, Kartoum, Sudan, 6 April 2009, p. 2, available at <<http://i-p-o.org/koechler-ICC-politiciz...>> Accessed 20 January 2017.

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*

<sup>91</sup> ICC Statute, Art. 15(3). See also <<http://iccnow.org/documents/rome-e...>>;< [www.casematrixnetwork.org](http://www.casematrixnetwork.org)> Accessed 17 January 2017.

an investigation, the power to authorize the commencement of a full investigation rests on the Pre-Trial Chamber. With such an authorization, the Prosecutor may proceed to the consideration of launching a full investigation. The ICC Prosecutor has initiated investigation in respect to the situation in Kenya under his *proprio motu* powers granted under Article 15 of the ICC Statute.

#### **4. Complementarity Principle before the ICC: Does it Supplement or Supplant?**

Upon the institution of criminal proceedings or referral of a situation to the ICC for possible investigation and prosecution through the triggering mechanisms (State Party referral, Security Council referral and Prosecutor's *proprio motu* powers of referral), the pre-trial procedure of the ICC envisages that the ICC must determine whether the national court with jurisdiction is investigating or prosecuting same offences. If the ICC finds in the affirmative, the ICC should defer to the State's jurisdiction. This is the complementarity principle.

The principle of complementarity entails that the ICC supplements, and should not supplant, domestic criminal justice systems.<sup>92</sup> It implies that the ICC must defer to the State where it is possess of jurisdiction and truthfully disposed and capable of conducting the matter through its national process.<sup>93</sup> The principle of complementarity is provided in Article 17 of the ICC Statute, the tenth paragraph of its preamble and in Article 1, where it is stated 'that the ICC established under the statute shall be complementary to national criminal jurisdictions'<sup>94</sup> as supplemented by Articles 18 and 19 of the ICC Statute. Article 17 exhibits substantive tests of admissibility, while Article 18 entails preliminary admissibility rulings and Article 19 encapsulates subsequent admissibility determinations.<sup>95</sup> The ICC complementarity principle is an usher or guard in respect to all investigations and prosecutions embarked upon by the ICC. The principle works in two perspectives: it ensures that ICC jurisdiction is not broadened contrary to the ICC Statute and it allows the ICC to assume jurisdiction of alleged international crimes where States fail in their obligation to investigate and prosecute, either as a result of the States unwillingness or inability.<sup>96</sup>

Article 17 of the ICC Statute established the criteria to be used in deciding admissibility. The Rome Statute gives jurisdiction to national courts except in cases where the national institution is unwilling or unable to investigate or hold proceedings. In those situations, the ICC would have jurisdiction over the case in question. The ICC's current exercise of jurisdiction violates the text and spirit of the preamble and Article 1, which declare that the ICC 'shall be complementary to national jurisdictions.'<sup>97</sup> The ICC's jurisdiction is not complementary, as the Statute does not mandate the ICC Prosecutor to defer to national prosecutions conducted in good faith. Rather, the exercise of jurisdiction is ultimately based on the court's ability to second-guess national prosecutions by faulting the independence and impartiality of the national prosecutions, predicated on the vague notion of 'principles of due process recognized by international law.'<sup>98</sup> The Court's exercise of jurisdiction is therefore outcome-based – the Court simply defers to State criminal jurisdictions in the first instance, but reserves the right, and possesses the authority, to intervene as it sees fit.

#### **5. Bringing International Crime Perpetrators before the ICC: Investigations, Arrest and Surrender**

After the aforementioned procedures, the ICC Prosecutor is to determine if there is a reasonable basis to commence an investigation. This involves some kind of overtore analysis of the evidence available to the ICC Prosecutor. In this respect, the ICC Prosecutor is obliged to consider: whether there is a reasonable basis to start an investigation; whether the alleged conduct falls within the jurisdiction of the court; whether the case is or would be admissible; and whether there are substantial reasons to believe

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<sup>92</sup> Complementarity Principle, available at <[www.haguejusticeportal.net](http://www.haguejusticeportal.net)> Accessed 20 January 2017.

<sup>93</sup> *Ibid.*

<sup>94</sup> ICC Statute, Preamble, tenth paragraph & Art. 1

<sup>95</sup> Complementarity Principle, available at <[www.haguejusticeportal.net](http://www.haguejusticeportal.net)> Accessed 20 January 2017.

<sup>96</sup> Complementarity regime, available at <[law.bepress.com](http://law.bepress.com)> Accessed 24 January 2017.

<sup>97</sup> ICC Statute, Preamble, tenth paragraph & Art. 1

<sup>98</sup> *Ibid.*, Art. 17(3).

that an investigation would benefit the interests of justice.<sup>99</sup> Moreover, the prosecutorial policy and the possibility of a successful investigation will be considered. Upon the satisfaction of all the criteria, the ICC Prosecutor is mandated to apply to the Pre-Trial Chamber for an order to initiate investigations based on his *proprio motu* powers or will initiate investigations unconditionally in the case of a State Party or UNSC referral.<sup>100</sup>

Where the ICC Prosecutor concludes that there is a reasonable basis to Prosecute, upon a concrete accomplishment of investigation, an application for the issuance of an arrest warrant or a summons to appear is made before the Pre-Trial Chamber pursuant to Article 58(2) of the ICC Statute.<sup>101</sup> The application shall contain the name of the person and any other relevant identifying information, a specific reference to the crimes within the jurisdiction of the court that the person is alleged to have committed, a concise statement of the facts, a summary of the evidence and any other information that establishes reasonable grounds to believe that the person committed those crimes and the reason why the Prosecutor believes that the arrest of the person is necessary.<sup>102</sup> Given that the ICC does not have at its disposal its own police, military or law enforcement forces, it has to rely entirely on the assistance rendered by the authorities of the States. Consequently, the effectiveness of the ICC's handling of investigations, gathering information and arrest of suspects would have to be done with the assistance of States. This is entrenched in the international cooperation and judicial assistance under the ICC Statute.<sup>103</sup>

However, the international cooperation and judicial assistance regime encapsulated in Part 9 of the ICC Statute is one of the most complex sections of the ICC Statute. Its real productiveness of ensuring the prosecution of perpetrators of international crimes is questionable and uncertain.<sup>104</sup> This is borne out of the fact that the ICC Statute that created the ICC encompasses statutory hindrances' against the arrest of alleged perpetrators accused of international crimes by the ICC.<sup>105</sup> In practice, domestic extradition laws could arguably, prevent the ICC from entertaining perpetrators of international crimes. States are likely to handle ICC requests for the surrender of suspects as an interstate extradition request.<sup>106</sup> The express refusal of the ICC Statute to out rightly prevent the resort to extradition procedures by States would invariably accord indicted suspects the opportunity to raise disparate defences before the custodial State.<sup>107</sup> The implication of the foregoing is that suspects are likely to remain in states that are not willing to extradite them rather than the ones that are willing to. Hence, the ICC would rather undertake cases where the States are unenthusiastic towards helping on the ground of their unwillingness to investigate and prosecute. The whole idea about international criminal justice being practiced by the ICC is circumvented by subjecting arrest and surrender proceedings to the custodial State national law, thereby acting as a clog.<sup>108</sup>

Upon the surrender of the person to the Court, or the person's appearance before the Court voluntarily or pursuant to summons, the Pre-Trial Chamber shall satisfy itself that the person has been informed of the crimes which he or she is alleged to have committed, and of his or her rights under this statute, including the right to apply for interim release pending trial.<sup>109</sup>

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<sup>99</sup> ICC Statute, Art. 53(1). See also Initiation of Investigation, available at <[www.law.kuleuven.be](http://www.law.kuleuven.be)> Accessed 20 January 2017.

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.*, Art. 58(1) & (2).

<sup>102</sup> *Ibid.*

<sup>103</sup> Complementarity regime, available at <[law.bepress.com](http://law.bepress.com)> Accessed 24 January 2017.

<sup>104</sup> Bringing war criminals to justice, available at <[bjcl.boalt.org](http://bjcl.boalt.org)> Accessed 20 January 2017.

<sup>105</sup> *Ibid.*; ICC Statute, Art. 59 & 89

<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.*

<sup>109</sup> Rome Statute, Art. 60(1). Also available at <[www.casematrixnetwork.org](http://www.casematrixnetwork.org)> Accessed 17 January 2017.

## 5. Confirmation of Charges before the ICC

The final stage of the pre-trial procedure and principle of the ICC is the confirmation of charges before trial. The confirmation of charges is a process unique to the ICC under which the Pre – Trial Chamber holds a hearing, within a reasonable time after an accused is transferred to or surrenders to the ICC. The suspect appears, in the presence of the Prosecutor, before the Pre – Trial Chamber which then sets the date for the confirmation hearing and makes this date public.<sup>110</sup> The date may be postponed<sup>111</sup> but, in any case, the hearing shall be ‘within reasonable time.’<sup>112</sup> The function of this first hearing is mainly to ensure the rights of the accused.<sup>113</sup> The confirmation procedure can be roughly divided into three elements: The disclosure procedure – here, the Prosecutor is obliged to reveal both exculpatory and inculpatory evidence against the person to the defence to allow the arrested person prepare his or her defence;<sup>114</sup> the filing of the charging document – here the Prosecutor must provide the ‘person’ charged and the Pre – Trial Chamber ‘within a reasonable time,’<sup>115</sup> i.e 30days<sup>116</sup> before the hearing, with a detail description of the charges as set out in Regulation 52 of the Regulations of the ICC together with a list of evidence which shall be presented at the hearing;<sup>117</sup> and the confirmation hearing - It shall in principle, take place in the presence of the Prosecutor and the person charged, unless this person waives her right to be present or is not available; in this case the Pre – Trial Chamber may assign a counsel to the person charged.<sup>118</sup> Sequel to the conclusion of hearing, the Pre – Trial Chamber is mandated to ascertain that there is enough evidence to show notable basis to give credence that crimes alleged against the accused by the ICC Prosecutor was committed by him. In this regard, the Pre-Trial Chamber must do one of three things: (1) confirm the charges and commit the accused to trial; (2) decline to confirm the charges; or (3) adjourn the hearing and request the Prosecutor to consider providing further evidence or amending a charge.<sup>119</sup> Article 61 of the ICC Statute covers the procedure of the confirmation of charges before the ICC, it is the linking interface between the investigation regime and trial phase of the ICC and it determines whether a particular case should be sent to trial. The Pre-Trial Chamber’s I decision confirming the charges against Mr. Lubanga, hitherto, examined the essence of a confirmation hearing.<sup>120</sup> It decided that the confirmation of charges procedure before the ICC is ‘limited to committing for trial only those persons against whom sufficiently compelling charges going beyond mere theory or suspicion have been brought’<sup>121</sup> and that it is ‘designed to protect the rights of the Defence against wrongful and wholly unfounded charges.’<sup>122</sup>

## 6. Conclusion

This paper shows the absence of a general acceptable international criminal procedure for the prosecution of perpetrators of international crimes in the international community prior to the creation of the ICC. The adoption of the ICC Statute is the legal basis for the creation of the ICC with attendant international criminal procedures and principles. Unlike differing opinions by legal experts, public affairs analysts and media personnel about the workings of the ICC, especially with regards to the pre-trial procedures and principles, it follows a set procedure governed by the ICC Statute, Rules of

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<sup>110</sup> Rules of Procedure and Evidence, Rule 121(1).

<sup>111</sup> *Ibid.*, Rule 121(7). *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the postponment hearing and the adjustment of the timetable set in the Decision on the final system of disclosure, 24 May 2006 (ICC-01/04-01/06-126); see also Decision on the postponment of the confirmation hearing, 5 October 2006 (ICC-01/04-01/06-521)

<sup>112</sup> ICC Statute, Art. 61(1).

<sup>113</sup> *Ibid*, Art. 67.

<sup>114</sup> Gauthier de Beco, ‘The Confirmation of Charges before the International Criminal Court: Evaluation and First Application’ (2007) 7 *International Criminal Law Review*, p.472. ; Rules 76 – 84 of the Rules of Procedure and Evidence; Rule 81(4) of the Rules of Procedure and Evidence

<sup>115</sup> ICC Statute, Art. 61(3).

<sup>116</sup> Rules of Procedure and Evidence, Rule 121(3).

<sup>117</sup> ICC Statute, Art. 61(3) (a)&(b); Rules of Procedure and Evidence, Rule 121(3), Regulation of the ICC, Reg. 52.

<sup>118</sup> ICC Statute, Art. 61(1)&(2); *Ibid.*, Rules 122,123 – 126, 125(1).

<sup>119</sup> WCOR, The confirmation of Charges Process at the ICC, October 2008 available at <www.wcl.american.edu> Accessed 10 January 2017.

<sup>120</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges, ICC-01/04-01/06-803, paras.33 - 39, (Pre – Trial Chamber 1, 29 January 2007); see also *ibid*.

<sup>121</sup> *Ibid*, para. 37.

<sup>122</sup> *Ibid*.

Procedure and Evidence and the Regulation of the ICC. The Pre-Trial Chamber is dedicated to entertain issues in respect to the pre-trial procedure and principle of the ICC i.e the determination of jurisdiction, institution of criminal proceedings, complementarity, investigations, arrest, surrender and finally confirmation of charges before trial. The corollary is that the determination to trigger the investigation and prosecution of a situation rather than a case must begin by analyzing the ICC jurisdiction in the form of temporal (*rationes temporis*) jurisdiction, personal (*ratione personal*) jurisdiction, territorial (*ratione loci*) jurisdiction, acceptance of jurisdiction by a non State Party (*ad hoc* jurisdiction) and subject matter (*ratione materiae*) jurisdiction. Thereafter depending on the party who intends to bring the situation to the notice of the ICC, shall refer same through the 3 ways of instituting criminal proceedings; (1) State Party referral; (2) UNSC referral and (3) Investigation instituted by the ICC Prosecutor (*proprio motu* powers). Thereafter, the pre-trial procedure of the ICC envisages that the ICC must determine whether the national court with jurisdiction is investigating or prosecuting same offences. If the ICC finds in the affirmative, the ICC should defer to the State's jurisdiction. This is the principle of complementarity. Should the ICC assumes jurisdiction over the situation, the prosecutor thereby investigates, arrest and ensure that the perpetrator is surrendered before the ICC and finally a confirmation of charges hearing before trial is held.