

NECESSITY FOR EVOLVING AN EFFECTIVE MECHANISM FOR THE ARREST OF PERPETRATORS OF CORE INTERNATIONAL CRIMES: SOME REFLECTIONS ON THE ARREST OF FELICIEN KABUGA*

Abstract

The Criminal Prosecution of those responsible for the commission of core international crimes is now an important part of the international agenda. Perpetrators of mass atrocity crimes are now being made to account for their deeds through criminal prosecution. Law enforcement agencies such as the police play a crucial role in the criminal prosecution process. The police are usually saddled with the task of effecting the arrest of perpetrators of crime. So, for any criminal Justice system to function effectively, it must have an organised and effective mechanism for the arrest of perpetrators of crime. This is lacking in the case of international criminal law enforcement. This article critically examines the difficulty in arresting or apprehending perpetrators of core international crimes and its effect on international criminal law enforcement. The paper argues that the difficulty in arresting or apprehending perpetrators of core international crimes constitute an impediment to the effective functioning of the Tribunals and Courts established for the prosecution of perpetrators of mass atrocity crimes. The paper found that due to the absence of an effective mechanism for the arrest of perpetrators of core international crimes, most of them evade or escape arrest and remain unpunished thereby promoting the culture of impunity. The paper also found that the existence of International Criminal Tribunals and Courts, do not deter would be perpetrators of mass atrocity crimes since they are aware of the difficulty in apprehending them. The paper adopted the doctrinal research methodology. The article recommends the amendment of the statute of the international Criminal Court to include a provision mandating Interpol, UN peace keeping force or regional Peace Keeping force on ground in the affected state or region to apprehend indicted perpetrators of mass atrocity crimes and hand them over to the Courts for prosecution.

Keywords: Necessity, Evolving, Mechanism, Arrest, Perpetrators, Core International Crimes.

1. Introduction

International criminal law enforcement right from its inception has been bedeviled by lack of an effective enforcement mechanism. Unlike domestic criminal courts, International criminal tribunals have no enforcement agencies at their disposal. Without the intermediary of national authorities, they cannot seize evidentiary material, compel witness to give testimony, search the scenes where crimes have allegedly been committed, or execute arrest warrants. For all these purposes, International courts must turn to state authorities and request them to take actions to assist the Courts' officers and investigators. Without the help of these authorities, International courts cannot operate.¹

Cassese² aptly captured this in his description of the tribunals as 'like a giant without arms and legs.' Neither the statutes of the *Ad hoc* Tribunals nor that of the International criminal court made any provision for an enforcement mechanism. Perpetrators of mass atrocity crimes have often escaped or evaded arrest and remain at large as fugitives owing to the inability to arrest them. The vehicles for enforcing international criminal law are international criminal Tribunals and Courts. The core or primary mandate of international criminal tribunals and courts is to try and punish all those responsible for the perpetration of mass atrocity crimes such as War Crimes, Genocide, Crime against Humanity and Crime of Aggression without exception.³ In other words, the sole purpose for creating these Courts

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¹ A Cassese, *International Criminal Law*, (2nd edn , Oxford University Press), P. 346.

² A Cassese, 'On the trends toward criminal prosecution and punishment of Breaches of International Humanitarian Law' (1998) 9 *EJIL* 2, P.13.

³ NA Duson, Revisiting the use of Plea Bargaining in International Criminal Trials, *International Review of Law and Jurisprudence* (2023) IRLJ 5 (1), P.105.

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whether *ad hoc* or permanent is to bring perpetrators of mass atrocity crimes to account for their deeds.⁴ The courts are created to end the culture of impunity where some perpetrators escape liability for their actions owing to the refusal of states to prosecute them domestically.⁵

Criminal law by its very nature is coercive. It entails the imposition of responsibilities directly on individuals and punishes violations through the imposition of sanctions. The enforcement of Criminal law necessitates the power of arrest and detention of suspects, to investigate alleged violations, to obtain the testimony of witnesses and victims, and to punish those found guilty. International Criminal Courts and tribunals do not have coercive powers and must rely on the support and cooperation of states. Sadly, most times states are unwilling to cooperate with the courts in apprehending perpetrators, hence these Courts and tribunals are only able to apprehend and try a handful of perpetrators. This article critically examines the difficulty in apprehending or arresting perpetrators of core international crimes and its effect on international criminal law enforcement.

2. Core International Crimes

Core International Crimes refer to a set of crimes that are considered to be the most serious under international law. These crimes are considered to be of concern to the entire international community. International Criminal Justice provides an accountability mechanism for these crimes that are of serious concern to the international community.⁶ These crimes are defined and prohibited in international treaties, such as the Geneva Conventions, the Genocide Convention and the Rome Statute of the International Criminal Court. Those that commit or perpetrate these core international crimes can be prosecuted by International Criminal Courts or tribunals. The most common examples of core international crimes include War Crimes, Genocide, Crimes against humanity and the Crime of Aggression.

2.1 War Crimes

War crimes can be understood as serious violations of the laws and customs of armed conflict, or International Humanitarian Law.⁷ The term 'War Crimes' is employed in relation to serious violations of the laws and customs of war. These are serious violations of international humanitarian law that endanger protected persons or objects, or breach important values.⁸ War Crimes include violations of established protections of the laws of war (*jus in bello*), and include failure to adhere to norms of procedure and rules of war. Violations of the laws and customs of War take their roots in international humanitarian law that declares certain behaviour in the course of armed conflict, whether international or non-international, absolutely impermissible, such as killings of civilians, outrages upon personal dignity, inhuman treatment etc.⁹ In *Prosecutor v. Tadic*,¹⁰ The International Criminal Tribunal for Yugoslavia (ICTY) Appeals chamber held that 'an armed conflict exist whenever there is protracted armed violence between Governmental authorities and organized armed groups or between such groups within a state. International humanitarian law applies from initiation of such armed conflicts and extends beyond the cessation of hostilities until in the case of internal conflicts, a peaceful settlement is reached.' The tribunal went further to hold that 'an armed conflict is distinguished from internal disturbances by the level of organization of the parties to the conflict.'¹¹

⁴ Ibid.

⁵ Ibid.

⁶ I Marchuk, *The fundamental Concept of Crime in international Criminal law, A comparative law Analysis*, (London, Springer Heidelberg New York Dordrecht, 2014), P.70.

⁷ R Cryer et al, *An Introduction to International Criminal Law and Procedure* (Cup, Cambridge 2007) P.2

⁸ JM Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law*, Volume 1: Rules, ICRC, Cambridge University Press, Cambridge, (2005b), P.140

⁹ I Marchuk, (n 6), P. 72

¹⁰ Case No: IT-94-1 (Appeals chamber), Decision of the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, Para. 70.

¹¹ Supra.

International humanitarian law originally established two regimes to govern armed conflict, whether international or non-international. That means that these two regimes have slightly different applicable law. While international armed conflicts (IAC) are covered by the four Geneva Conventions and Additional Protocol I, thereto, non-international armed conflicts (NIAC) are covered by a sole provision common to all the four conventions and called Common Article 3.¹² Common Article 3 to the Geneva Convention prohibits certain serious violations of human rights and human dignity in armed conflicts not of an international character. The 1997 Additional Protocol II to the Geneva conventions amplifies and strengthens common Article 3 for the protection of victims of non-international armed conflicts. Thus, the purport of common Article 3 and Additional Protocol II is to extend the principles applicable in international wars to non-international armed conflicts.¹³ However, the ICC statute contains the first and only comprehensive codification of war crimes as at today.¹⁴ The statute in an elaborate fashion, tries to capture all Acts and omissions characterized as war crimes in contemporary international law.

2.2 Crimes against Humanity

The concept of Crimes against humanity was first articulated as an international offence in Article 6 (C) of the charter of the Nuremberg Tribunal in 1945.¹⁵ The provision states that:

Crimes against humanity namely: murder, extermination, enslavement, deportation, and other inhuman acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of, or in connection with any other crime within the jurisdiction of the tribunal, whether or not in violation of the domestic law of the country where perpetrated.

The historical origin of Crimes against humanity trace back to World War I.¹⁶ The mass killing of Armenians committed with the instigation and support of the Young Turk Government were widely condemned by the Allied powers as ‘Crimes against civilization and humanity in the 1919 Report of the Commission on the responsibilities of the Authors of war and on Enforcement of penalties for the violations of the laws and customs of war.’¹⁷

Prior to The Nuremberg Charter, reference to the ‘laws of humanity and the dictates of public conscience’ was expressly made in the preamble to the 1907 Hague Convention IV, otherwise known as the Martens clause, the aim of which was to extend additional protection to both combatants and civilian populations where the law was silent or in development until such time as more comprehensive rules were adopted.¹⁸ Under general international law, crimes against humanity cover action that share a set of common features. First they are odious offences in that they constitute a series of attack on human dignity or a grave humiliation or degradation of one or more persons.¹⁹ That is why many concepts underlying this category of crimes derive from or overlap with those of fundamental rights.²⁰ Indeed, while International criminal law concerning War Crimes largely derives from or is closely associated with International Humanitarian Law, International Criminal Law concerning crimes against Humanity is to a large extent founded upon International Human Rights Law. They constitute inhuman acts of extra-ordinary magnitude and savagery.²¹

¹² Avocats Sans Frontiers, *International Criminal Law*, Training Manual, 2016.

¹³ MO Unegbu, *From Nuremberg charter to Rome Statute: International Humanitarian Law*, (Enugu, Swaap press Nig. Ltd. 2005) P.191.

¹⁴ Ibid.

¹⁵ Article 6 (c) of the Charter of the Nuremberg Tribunal.

¹⁶ CM Bassiouni, *Crimes Against Humanity International Law*, (2nd edn, Kluwer Law International, The Hague, 1999).

¹⁷ I Marchuk, (n6). P.82

¹⁸ I Bantekas, *International Criminal Law*, (4th edn, Hart Publishing, Oxford and Portland, Oregon 2010) P. 185

¹⁹ A Cassese, *International Criminal Law and Procedure*, 2nd edn. (Oxford University Press, 2008) P. 82.

²⁰ Like the Right to Life, to dignity of Human Person, to Liberty, to fair hearing etc.

²¹ UU Chukwumaeze, ‘International Criminal Justice: Recent Developments in International Humanitarian Law’ Unpubl. PhD Thesis, Abia State University Uturu, 2009, P. 365

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Crimes against humanity are extant and are currently punishable under the Rome Statute of the International Criminal Court 1998.²² Under the said Statute, Crimes against humanity include murder; extermination; enslavement; deportation or forcible transfer of population; torture; rape; sexual slavery, enforced prostitutions, forced pregnancy, enforced sterilization or any other form of sexual violence; persecution based on racial, religious, gender, ethnic or Cultural grounds; apartheid etc.

2.3 Genocide

This is an aspect of Crimes against humanity as it consists essentially of extermination, but it has over the years acquired an identity of its own.²³ Being as old as humanity, the Crime of genocide was not called its proper name until 1944. It was often termed ‘Mass Murder’.²⁴ The term “Genocide” was coined by Raphael Lemkin, a polish lawyer in his famous book ‘*Axis Rule in occupied Europe*’ in 1944.²⁵ The word derives from Greek ‘genos’ meaning (race or tribe) and Latin ‘cide’ meaning (to kill) and literally means ‘Killing of a race’.²⁶ Lemkin defines the Crime of genocide as ‘the destruction of a nation or of an ethnic group’ that entails the existence of a coordinated plan of different actions aiming at the destruction of essential foundations of the life national groups, with the aim of annihilating the groups themselves’.²⁷

In 1948, the United Nations adopted the convention on the prevention and punishment of the Crime of Genocide.²⁸ The convention defines Genocide as;

- 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 in whole or in part;
- d. Imposing measures intended to prevent births within the group; and
- e. Forcibly transferring children of the group to another group.

This definition was adopted by both the Statute of the International Criminal Court and the Statutes of the International Criminal Tribunals for Yugoslavia and Rwanda. The Principal propelling cause that compelled the convention was the extermination of millions of Jews and members of other ethnic and religious groups during the Nazi holocaust.²⁹ The convention which is probably the most important of all conventions³⁰ classifies genocide as a crime under International Law irrespective of whether it is committed in time of war or in time of peace and the contracting parties undertake to prevent and punish.³¹

2.4 The Crime of Aggression

Aggression was first considered as an international crime of individuals in 1945 when the London Agreement was adopted. The first international trial for aggression under the name of ‘Crimes against peace’ was before the Nuremberg Military Tribunal following the Second World War.³² In December 1974, the United Nations General Assembly adopted a resolution defining the crime of aggression. The resolution states that ‘Aggression is 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’.³³ The 1974 definition was intended to serve as a guide for the Security Council in determining acts of aggression and therefore did not precisely elaborate under what particular

²² Which entered into force on July 1, 2002.

²³ I Okoronye, *Terrorism in International Law*, Whytem Publishers Nigeria, 2013, P. 40.

²⁴ I Marchuk, (n6) P. 87.

²⁵ Lemkin, (2005) (Originally Published in 1944), P. 79.

²⁶ I Marchuk, (n6) P. 87.

²⁷ Lemkin, (n25), P. 79.

²⁸ Adopted December 9, 1948 and entered into force on January 12, 1951.

²⁹ Articles II of the Genocide Convention.

³⁰ GA Res. 260 A, 3 UNGAOR, UNDOC A/810 (1948).

³¹ Article 1 of the Genocide Convention.

³² Article 6(a) of the IMT Charter.

³³ General Assembly Resolution 3314 (XXIX) December 14, 1974.

circumstances an individual would incur personal liability as a result. It did however strongly suggest that the criminality of aggression is to be sought at the level of state action.³⁴

The Assembly of State Parties to the Rome Statute of the ICC finally agreed on a definition of the crime of aggression in 2010 after years of deliberations.³⁵ The Kampala Amendments to the Rome Statute defined the Crime of Aggression as follows:

Crimes of aggression for the purpose of the Statute means the planning, preparation, initiation or execution, by a person in position effectively to exercise control over or to direct the political or military act 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.³⁶

Sequel to this amendment, the ICC now has Jurisdiction for the crime of aggression over member states that have ratified or accepted the amendment. The Court does not however have jurisdiction over ICC member States or their nationals that have not ratified or accepted the amendment in the case of self-referral or *Proprio motu* investigations.³⁷

3. Who is Felicien Kabuga?

The Rwanda genocide, also known as the genocide against the Tutsi, occurred between 7th April and 15th July 1994 during the Rwandan civil war. The genocide was conceived by extremist elements of Rwanda's majority Hutu population who planned to kill the minority Tutsi population and anyone who opposed those genocidal intentions. It estimated that more than 800,000 civilians, primarily Tutsi, but also moderate Hutu were killed during the campaign. As many as 2,000,000, Rwandans fled the country during or immediately after the genocide.³⁸ On 28 September 1994, Rwanda formally requested the United Nations to establish a tribunal to try perpetrators of mass atrocity arising from the civil war.³⁹ Security Council Resolution 955 was subsequently adopted on 8 November 1994 establishing the International Criminal Tribunal for Rwanda (ICTR). The ICTR indicted a total of 95 individuals.⁴⁰

Felicien Kabuga was first indicted by the International Criminal Tribunal for Rwanda (ICTR) on 26 November 1997.⁴¹ He is a businessman, President of the *Comite Provisoire of the fonds de Defence Nationale* (FDN), and President of the *Comite d' Initiative of Radio television libre des mille collines* (RTLTM). He was considered the richest man in Rwanda before the 1994 genocide. He made his fortunes from tea in the 1970s and ventured into many other sectors at home and elsewhere. He was close to the ruling MRND Party, and related by marriage to President Juvenal Habyarimana who died on 6 April 1994.⁴² He was indicted for genocide, complicity in genocide (in the alternative to genocide), direct and public incitement to commit genocide, attempt to commit genocide, conspiracy to commit genocide, and crimes against humanity (Persecution, Extermination). He was the financier of the RTLTM, a radio

³⁴ C Antonopoulos, Whatever happened to the crime of peace? (2001) 6 *Journal of Conflict and Security Law*, P. 39.

³⁵ J Veroff, 'Reconciling the Crime of Aggression and Complementing: Unaddressed Tensions and a Way forward' *Yale Law Journal*, Vol. 125, Number 3, (2015-2016) PP. 560-795.

³⁶ Art 8 bis (1) of the statute, Inserted by Resolution RC/Res 6 of 11 June, 2010

³⁷ The Crime of Aggression, Available at [http://www.coalition for the ICC.org/explore/ICC-crimes/crime-aggression](http://www.coalitionfortheicc.org/explore/ICC-crimes/crime-aggression), accessed 30 January, 2024.

³⁸ Rwanda genocide 1994, *Encyclopedia Britannica*, Available at [http:// www.britannica.com>event](http://www.britannica.com/event), accessed 7/3/2024.

³⁹ Letter dated 28 September 1994 from the Permanent Representative of Rwanda to the United Nations addressed to the President of the Security Council; UN DOC S/1994/1115.

⁴⁰ See Wikipedia, the *free Encyclopedia*; list of people indicted in the International Criminal Tribunal for Rwanda:<http://en.wikipedia.org/wiki/International-Criminal-Tribunal-for-Rwanda> accessed 4/3/2024.

⁴¹ L Mudge, Trial of Rwanda Genocide Suspect Begins in the Hague, Available at <http://www.hrw.org/news>, accessed 7/3/2024.

⁴² B Mutahi, Rwanda genocide: How Felicien Kabuga evaded capture for 26 years, Available at <https://www.bbc.com/news/world-Africa-52758693>

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and Television Station which during the genocide instructed people to erect barriers and carry out searches, named persons to be targeted and pointed out areas to attack. He is also accused of aiding and abetting the *Interanhanwe*, a militia group attached to the ruling Party who hunted down and slaughtered Tutsi men, women and children.⁴³ Felicien Kabuga evaded arrest and lived as a fugitive for 26 years. He was arrested in May 2020 in his hideout in a suburb of the French capital and is currently being tried by the International Residual Mechanism for Criminal Tribunals (IRMCT).⁴⁴

4. Some specific cases of Difficulty in apprehending perpetrators of Core International Crimes by International Criminal Tribunals and Courts.

The experience of the ICTY, ICTR and ICC in relation to securing the arrest of indicted suspects has been similar. They have all witnessed difficulty in apprehending perpetrators that are indicted. For instance, Dragon Nikolic was the first person to be indicted by the ICTY and a warrant of arrest issued against him in 1994 but he was not arrested until six years later, precisely in 2000.⁴⁵ General Ratko Mladic was arrested on the 26 May 2011, Sixteen clear years after being indicted.⁴⁶ Radovan Karadzic one of the most prominent indictees was a fugitive for more than a decade and was finally arrested in Serbia in July 2008.⁴⁷ Ante Gotovina evaded arrest for years before he was arrested in 2005 in Tenerife (Spain). The ICTY was able to apprehend almost all indicted persons except Goran Borovnica with the assistance of NATO forces in Bosnia. The NATO implementation (then stabilization) Force (SFOR) was entitled to arrest suspects in the territories in which they were mandated to operate in the former Yugoslavia. Beginning in 1996, NATO forces arrested indictees and transferred them to the Tribunal.⁴⁸ But until NATO was mandated to apprehend indicted perpetrators, apprehending them was quite difficult for the ICTY.

In the case of the ICTR, the tribunal indicted a total of Ninety-five (95) persons and as at December 2015 when the tribunal formally closed down, eight persons were still at large as fugitives. The mechanism for International Criminal Tribunal, have also not been able to apprehend them until now. Bizmana Augustin was indicted on 29 August 1998 and a warrant of arrest issued against him.⁴⁹ Mpiranya Protais was indicted and a warrant of arrest issued against him on 28 January 2000.⁵⁰ Felicien Kabuga was indicted and a warrant of arrest issued against him on 26 November 1997.⁵¹ Kayishema Fulgence was indicted and a warrant of arrest issued against him on 4 July 2001.⁵² Munyarugarama Pheneas, was indicted and a warrant of arrest issued against him on 4 March 2002.⁵³ Ndimbati Aloys, was indicted and a warrant of arrest issued against him on 28 November 1995.⁵⁴ Ryandikango Charles was indicted and a warrant of arrest issued against him on 28 November 1995.⁵⁵ Sikubwabo, Charles was indicted and a warrant of arrest issued against him on 28 November 1995.⁵⁶

The case of the ICC is not different. The first person to be indicted by the International Criminal Court was Joseph Kony. He was indicted on 8 July 2005 on 12 counts charge of crimes against humanity and

⁴³ See L Mudge (n 41) P. 2

⁴⁴ See B Mutahi (n 42), P. 2.

⁴⁵ M Simons, 'Serb at Hague Pleads Guilty to Brutalities' *New York Times*, September 5, 2003, Available at <http://www.mytimes.com/2003/09/05/world/serb-at-hague-pleads-guiltytobrutalities.htm/> accessed on 31 January, 2024.

⁴⁶ M Shahabuddeen, *International Criminal Justice at the Yugoslav Tribunal, A Judge's Recollection*, (Oxford University Press, 2012), p. 91.

⁴⁷ G Werle., *Principles of International Law*, (TMC Assia, The Hague, 2009) p. 99.

⁴⁸ R Cryer, *Prosecuting International Crimes, selectivity and the International Criminal Law Regime* (Cambridge University Press 2005) P. 135

⁴⁹ Available at <http://www.unmict.org/genocide/fugitives> accessed on 14 February 2024.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Ibid.

21 counts of war crimes with regard to the situation in Uganda. He is currently at large and his where about is unknown although he is suspected to be in either the Central African Republic or a neighbouring country.⁵⁷ The ICC issued four other warrants of arrest against Raska Lukwiya, Vincent Otti, Okot Odhiambo and Dominic Ongwen on July 8, 2005. Nine criminal charges were issued against Raska Lukwiya in *Prosecutor v. Raska Lukwiya*.⁵⁸ He was not arrested until he died on August 12, 2006. It is sad that someone who allegedly attacked civilians at the refugee camps died without accounting for his evil deeds. His death had denied the people of Uganda justice and truth on why their loved ones were killed.⁵⁹ Okot Odhiambo who was also indicted on July 8, 2005 was not arrested until 2014 when an LRA defector claimed that the Ugandan Military wounded Odhiambo in October 2013 during an ambush in the Central African Republic and that he later died from his injuries. In 2015, Ugandan officials announced that they had exhumed a grave believed to contain Odhiambo's and issued a death certificate stating that he died on 27 October, 2013 near Djemah, Central African Republic. Accordingly, the court terminated proceedings against Odhiambo on 10 September 2015.⁶⁰ Dominic Ongwen, who was also indicted on 8, July, 2005 was not arrested until he surrendered to United States Military advisors assisting Ugandan forces on 6 January 2014 in the Central African Republic. The court took custody of Ongwen on 17 January 2015 and he was transferred to the court's detention center on 21 January 2015. He made his first appearance before the court on 26 January 2015. His trial began on 6 December 2016.⁶¹ Vincent Otti who was also indicted on 8 July, 2005 was not arrested until he died in 2007 by execution on the orders of Joseph Kony. Kony confirmed Otti's death to Rick Machar, a Mediator between the Ugandan Government and the LRA. Because Otti's death has not been independently verified, the court still considers him to be at large as a fugitive and proceedings against him are ongoing.⁶²

In the DRC, Bosco Ntaganda was indicted on 22 August 2006. The Congolese Government refused to arrest him and in 2009, he became a General in the Armed Forces in the city of Goma in North Kivu province. In April 2012, he and his troops defected from the military and left Goma to form the March 23 Movement, an armed group that began attacking villages and towns around Goma. On 18 March 2013, following reports of clashes between factions of the March 23 Movement, Ntaganda fled to Rwanda and entered the Embassy of the United States in Kigali. He requested the United States to facilitate his surrender to the court. On 22 March 2013, the ICC took custody of Ntaganda and transferred him to The Hague. His trial began on 2 September 2015.⁶³

In Sudan, Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman were indicted and Warrants of Arrest issued against them on May 2, 2007. Both of them have remained fugitives since 2007.⁶⁴ Omar Hassan Ahmad Al Bashir is the first sitting Head of State to be indicted by the ICC. His warrants of Arrest, were issued on May 4, 2009 and July 12, 2010 respectively. He has remained a fugitive till date as the court is unable to arrest him.⁶⁵ Owing to the difficulty in apprehending Omar Hassan Ahmad Al Bashir and his co-indictees, the ICC Prosecutor, Fatou Bensouda on 12 December 2014, halted investigation into the Sudanese case in order to channel resources to other urgent cases according to her and criticized the UN for failing to push for Bashir's arrest. She warned that without action on Darfur from the Security Council, the case against Bashir and three other indicted suspects

⁵⁷ Available at <https://en.wikipedia.org/wiki/list-of-peopleindicted-in-the-internationalcriminalcourt> accessed on 8 February, 2024.

⁵⁸ *Prosecutor v. Raska Lukwiya*, (Case No. ICC-02/04-01/05055), Warrant of Arrest (July 8, 2005).

⁵⁹ M R Phoko., "How Effective the International Criminal Court has been: Evaluating the Work and Progress of International Criminal Court", *Notre Dame Journal of International and Comparative Law, Volume 1 Issue1 Article 6*, 2011, p. 189.

⁶⁰ Available at <https://en.wikipedia.org/wiki/list-of-peopleindicted-in-the-internationalcriminalcourt> accessed on 8 February, 2024.

⁶¹ Ibid.

⁶² Ibid.

⁶³ Ibid.

⁶⁴ M R Phoko., (n 59) P. 189.

⁶⁵ Ibid.

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would remain deadlocked. She added that the allegations that the Sudanese forces raped two hundred (200) women and girls in Darfur village in late October 2014 should shock the Council into action and concluded that the Councils in-action would only embolden perpetrators to continue their brutality.⁶⁶ In celebration of the halting of investigation, Mr. Bashir in a defiant speech said:

They wanted us to kneel before the International Criminal Court but the ICC raised its hands and admitted that it had failed. The Sudanese people have defeated the ICC and have refused to hand over any Sudanese to the Colonialist court.⁶⁷

This is the pitiable plight of International Criminal Tribunals and Courts. The inability of the courts to apprehend indicted perpetrators has affected in no small way the effective functioning of the courts. A lot of perpetrators indicted by these tribunals and courts are at large roaming the street freely; impunity still persists even with these international mechanisms.

5. Effect of Difficulty in Apprehending Perpetrators of Core International Crimes on International Criminal Law Enforcement.

The Statutes of most international criminal tribunals and courts such as the ICTY, ICTR and ICC are without any provision for an enforcement mechanism. Without an effective enforcement mechanism, apprehending perpetrators of core international crimes has become a tedious task for these tribunals and courts. This difficulty in apprehending perpetrators has hampered the effective functioning of the courts and tribunals in several ways. They include:

5.1 Prosecuting a handful of perpetrators.

International criminal courts and tribunals are established to bring perpetrators of mass atrocity crimes to account for their deeds. In essence, they are to bring to trial all indicted perpetrators without exception. But from the experience of the ICTY, ICTR and ICC, several indicted persons remain at large as fugitives long after they have been indicted. The fact that these courts do not have any enforcement mechanism of their own allows for escape of perpetrators and promotes the culture of impunity rather than curbing it. In most instance, because of the difficulty in apprehending perpetrators, the trials of most of them occur years after the atrocities, if at all,⁶⁸ and sometimes when they do occur, exhibits that will aid the prosecution of the case are usually nowhere to be found and sometimes even those who witness the events or victims are already dead. The courts are only able to prosecute few perpetrators, since only few perpetrators are always apprehended.

5.2 Limiting the deterrent effect of the courts.

One of the major goals for establishing International criminal tribunals and courts is to deter would be perpetrators of mass atrocity crimes. It is a commonplace that punishment ought to be imposed to prevent both the offender and the population more generally from engaging in prohibited conduct.⁶⁹ The fact that the courts have no mechanism of enforcement limits the deterrent effect of the courts. Perpetrators are not deterred from committing atrocious crimes because they are aware that there is no certainty of their arrest. For instance, the genocide at Srebrenica occurred in 1995. The existence of the fledging ICTY, established in 1993, plainly did not deter it.⁷⁰

⁶⁶ K Abdelaziz., ‘Sudan’s President Omar Al Bashir Claims Victory Over ICC After it drops Darfur War Crimes Investigation’, available at <<http://www.independent.co.uk/news/world/africa/sudans-president-omar-al-bashir-claims-victory-over-icc-after-it-drops-darfur-war-crimes-investigation>>, accessed on 31 January, 2024.

⁶⁷ Omar al-Bashir celebrates ICC Decision to halt Darfur investigation, available at <http://www.theguardian.com/world/2014/dec/14/omar-al-bashir-celebrates-icc-decision-to-halt-darfur-investigatio> accessed on 31 January, 2024.

⁶⁸ T Meron, *The making of International Criminal Justice*, (Oxford University Press, United Kingdom, 2012) P. 145.

⁶⁹ R Cryer *etal*, *An Introduction to International Criminal Law and Procedure*, 2nd edn. (Cambridge University Press, 2011) P. 26.

⁷⁰ T Meron (n 44) P. 145

The absence of enforcement of international criminal law and the small number of offenders that international criminal tribunals have prosecuted, undermined the goal of deterrence as people do not think that they are likely to be punished.⁷¹

6. Conclusion and Recommendations

Implementation of Criminal Justice needs coercive powers. International criminal tribunals and courts, whether *ad hoc* or permanent are most times established without an enforcement mechanism and as such they depend on the cooperation of States to be able to function effectively. But at times States do not cooperate with these tribunals and courts, particularly in the area of helping the courts arrest perpetrators. This has often led to a situation where the courts are only able to try a handful of perpetrators and this defeats the purpose and mission for setting up these courts and tribunals. There is no gainsaying that for these courts and tribunals to function effectively, there must be an enforcement arm that can apprehend indicted perpetrators and hand them over to the courts for trial. The singular reason why the ICTY was able to apprehend all those it indicted was due to the assistance it received from NATO forces on ground in Yugoslavia. The NATO implementation then stabilization force was mandated to arrest suspects in the territories in which they operate in the former Yugoslavia. Beginning in 1996, NATO forces in Bosnia arrested indictees and transferred them to the tribunal.⁷² The ICC is the only permanent criminal court existing currently. For the court to function effectively and fulfil its mandate and curbing the culture of impunity, this paper recommends the amendment of its statutes to include a clear provision making Interpol, UN Peace keeping force or regional peace keeping force on ground in the affected States or region to act as the enforcement arm of the court. That way, all indicted persons can be apprehended and the court will be able to function optimally.

⁷¹ T Faver, *Restraining the Barbarians: Can International Law Help?* (2000) 22 *Human Rights Quarterly* 90, P. 92.

⁷² G Sluiter, *Cooperation of State with International Criminal Tribunals*, in Antonio Cassese, (ed), *The Oxford Companion to International Criminal Justice* (Oxford University Press, 2009) P. 205.