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Was the ICC Created for Africans? An Examination of Key Prosecutions before the Court Since its Creation

By Aghem Hanson Ekori
University of South Africa

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Abstract- The contributions of African states toward the creation of the International Criminal Court (ICC) cannot be overemphasized and underestimated. Accordingly, African states gave their unflinching support with no reservations before and after the creation of the ICC. Unfortunately, since the ICC came into force on 1 July 2002, almost all the accused before the Court has been African states officials. Despite the prosecutions of mostly African state officials before the ICC, it will be a trite and an affront to criminal justice to conclude that the ICC is targeting only African state officials giving that one of the main aim of the Court is to end impunity for serious international crimes affecting the world. This article examines the major prosecutions before the ICC. In this regard, it examines the prosecution of African officials as seen in the cases before the Court on the one hand, the legality and legitimacy of their prosecution on the other hand. Similarly, the article examines the prosecutions of crimes beyond African. Accordingly, it argues that credit should be given to the African continent for the success of the Court as most of the major prosecutions before the Court are from the African continent despite similar crimes being committed around the world. Finally, the article concludes that even though the Court has been unfortunately prosecuting mostly African officials since its creation, the vision of the Court is beyond Africa as seen in the on-going investigations in Palestine, Afghanistan and Georgia.

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I. Introduction

On 1 July 2002 the Rome Statute creating the ICC came into force.[1] The creation of this Court was a turning point in the fight against impunity for serious international crimes.[2] Accordingly, the main aim of the Court was to put an end to impunity for serious international crimes affecting humanity.[3] Although many states in the world greatly welcome this first ever permanent international criminal court, the contributions of African state toward the establishment of the Court cannot be unnoticed.[4] Indeed, Judge Phillipe Kirsch who was the first President of the Court acknowledged the support from the African continent in his speech to the African Union (AU) on 17 June 2006.[5] Consequently, the Prosecutor, the Judges and Registrar of the Court have all recognized the importance of the relationship between the ICC and African states.[6] Thus, the contributions of African states could be seen before and after the creation of the ICC. Prior to the establishment of the ICC, many African states met at regional level canvassing and entrusting their support for the creation of the Court.[7] Also, in 1998, many African states met in Dakar, Senegal where the *Dakar Declaration* was adopted calling for the creation of an effective, impartial and independence international criminal court.[8] At the Dakar meeting, it was observed that many national legal systems have failed to hold those responsible for serious violation of international crimes before their jurisdiction. In this regard, all participants at the Dakar conference strongly supported the establishment of the ICC.[9] Likewise, in 1998, the African Commission on Human and Peoples' Rights (ACHPR) also calls on all states parties to its Charter to complete all the necessary constitutional procedures that would facilitate the signing and ratification of the Rome Statute creating the ICC.[10] As indicated earlier, the AU initially hailed the ICC when it condemned the perpetration of crimes such

Author: Department of Public, Constitutional and International Law, University of South Africa. e-mail: 48013587@mylife.unisa.ac.za

[1] See Rome Statute of the International Criminal Court circulated as document A/CONF.183/9 of 17 July 1998 and came into force on 1 July 2002 (Rome Statute), available at: https://www.icc-int/resource-library (last accessed 07 August 2021).

[2] See paragraph five of the Preamble of the Rome Statute.

[3] See generally the Preamble of the Rome Statute creating the ICC.

[4] See Ssenyonjo M "The Rise of African Union Opposition to the International Criminal Court's Investigations and Prosecutions of African Leaders"(2013) *International Criminal Law Review* 13, 385-428 at 385-386.

[5] The Judge stated categorically that without Africa the ICC would not exist as it does today and that because of the Court relationship with African states, cooperation with the AU is particularly important to the Court.

[6] See Jalloh CC "Africa and the International Criminal Court: Collision Course or Cooperation? (2012) *North Carolina Central Law Review* Vol. 34, 203-229 at 209.

[7] In 1997 for example, 14 states from Southern African Development Community (SADC) met and outlined 10 principles that they intended to be included in the Statute.

[8] See African Commission on Human and People's Rights Sessions available at: https://www.achpr.org/sessions/resolutions?id=91 (last accessed 07 August 2021).

[9] See Cole RJV "Africa's Relationship with the International Criminal Court: More Political than Legal (2013) *Melbourne Journal of International Law* Vol.14, 670-698 at 673.

[10] See https://www.achpr.org/sessions/resolutions?=91 (last accessed 07 August 2021).

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as war crimes, genocide and crimes against humanity committed in the African continent.[11] Indeed, the support for the ICC was overwhelming all over Africa from the AU to civil societies in the continent.[12] Ultimately, in 1998 at the Rome Conference, 120 states adopted the Rome Statute and 40 of these states were from Africa.[13] Accordingly, Senegal was the first ever state in the world to ratify the Rome Statute creating the ICC.[14] Currently, Africa has 33 states parties to the Rome Statute,[15] 19 are Asia-Pacific States, 18 from Eastern Europe, 28 are from Latin African and the Caribbean State and 25 are from Western Europe and other States.[16]

Despite this full support of the ICC by the AU and many African states, the prosecution of mostly African officials before the Court resulted in debacle between the Court and the AU, and consequently, a change of perception about the Court by some African leaders.[17] Part II of this article will examine the prosecution of African state officials before the ICC. Part III will examine the legality and legitimacy of the prosecution of African state officials. Part IV will examine the prosecution of crimes beyond the continent of Africa. Finally, Part V deals with the concluding remarks.

II. The Prosecution of African State Officials before the Court

Even though the ICC is responsible for prosecuting international crimes under its jurisdiction throughout the world, it has been prosecuting mostly African officials for more than two decades since it came into force. Accordingly, more than 90 percent the case before the jurisdiction of the Court are from African. Consequently, some of the perpetrators indicted by the Court that was on spotlight and the headlines of international media have been in the *Al Bashir* case,[18] the *Kenyatta* case,[19] the *Laurent Gbagbo* case,[20] and the *Ntaganda* case.[21] In this regard, this section examines the Appeals Chamber decisions regarding Al Bashir in the *Jordan* case, the *Ntaganda* case and the *Gbagbo* case.

a) The Al Bashir Trial in the Jordan Case

Former President Al Bashir was indicted by the ICC when he was the current president of Sudan. The ICC has issued two separate warrants of arrest for Al Bashir on 4 March 2009 and 12 July 2010 respectively.[22] These warrants for Omar Al Bashir list ten counts on the basis of his individual criminal responsibility under Article 25(3)(a) of the Rome Statute as indirect co-perpetrator as follows:[23] (i) five counts of crimes against humanity which include murder as per Article 7(1)(a), extermination as per Article 7(1)(b), forcible transfer in accordance with Article 7(1)(d), torture as per Article 7(1)(f), and rape as per Article 7(1)(g); (ii) two counts of war crimes which include intentionally directing attacks against a civilian population as per Article 8(2)(e)(i), and pillaging as per Article 8(2)(e)(v); and (iii) three counts of genocide which include genocide by killing as per Article 6(a), genocide by causing serious bodily or mental harm as per Article 6(b), and genocide by deliberately inflicting on each targeted group conditions of life aimed at physical destruction of the group as per Article 6(c).[24] This matter was referred to the Pre-Trial Chamber II on March 2012 by the Court President and Al Bashir has never appeared before the ICC for these charges against him.[25] It is imperative to note that Sudan is not a state party to the Rome Statute. Al Bashir has equally travelled to many countries after these warrants were issued by ICC but the authorities of these countries failed to cooperated with ICC regarding his arrest and surrender to the Court.[26] One of these countries is Jordan which is state party the Rome Statute. Accordingly, the dominant issue before the ICC's Appeals Chamber in the Jordan judgment was whether former President Al Bashir as head of state of

[11] See Assembly of heads of State and Government Thirty-Sixth Ordinary Session available at: https://au.int/en/decisions/assembly-heads-state-and-government-thirty-sixth-ordinary-session (last accessed 07 2021).
[12] Cole (2013) *Melbourne Journal of International law* at 674-676.
[13] See https://www.achpr.org/sessions/resolutions?=91 (last accessed 07 August 2021).
[14] Senegal was the first state in the world to ratify the Rome Statute available at: https://www.icc-cpi.int/Pages/item.aspx?name=pr1462 (last accessed 07 August 2021).
[15] African states to the Rome Statute available at: https://asp.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/african%20states.aspx (last accessed 07 August 2021).
[16] See the States Parties to the Rome Statute available at: https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last accessed 07 2021).
[17] See generally Aghem HE "The AU Debacle with the ICC: The Creation of the African Criminal Court" (2021) *International Journal of Law and Society* (*IJLS*) Vol. 4, No. 2, 67-76.
[18] See *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09.
[19] See *The Prosecutor v. Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11 (2014).
[20] See *The Prosecutor v. Laurent Gbagbo and Charles Goude,* No.ICC-02/11-01/15.
[21] See *The Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06.
[22] See *The Prosecutor v. Omar Hassan Ahmad Al Bashir* No. ICC-02/05-01/09 OA2 06-05-2019 (2019) [12].
[23] See *The Minister of Justice and Constitutional Development v.The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016) [3].
[24] See Al Bashir Case available at: https://www.icc-cpi.int/darfur/albashir#icc-timeline (last accessed 09 August 2021).
[25] *The Prosecutor v. Omar Hassan Ahmad Al Bashir* No. ICC-02/05-01/09 OA2 06-05-2019 (2019) [13]
[26] See for example the decision of the Supreme Court of Appeal in South condemning the non-cooperation by the government to arrest and surrender Al Bashir when he visited the country for an AU summit at *The Minister of Justice and Constitutional Development v. The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016) [103].

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Sudan, enjoys immunity before the ICC, which Jordan was obligated to respect without the waiver from Sudan.[27] The Appeals Chamber decision, based on Articles 27(2) and 98 of the Rome Statute, has an impact on the obligations between states parties.[28] The Appeals Chamber noted that in circumstances where the Court requests a state party to arrest and surrender a head of state or state officials of a state party to the Rome Statute after the issuance of a warrant of arrest has been issued by the Court against the person, then the requested state party cannot refuse to comply with the request on grounds that the official enjoys immunity under international law or domestic law. This is because of the consequences of the vertical effects of Article 27(2) of the Rome Statute in relation to cooperation by state party. In addition, all states parties to the Rome Statute have consented by virtue of their ratification of the Statute to waive the immunity of their officials vertically in their relationship with the Court.[29] Conversely the Appeals Chamber noted, with regard to states parties' horizontal effect by virtue of Article 98 of the Rome Statute that the ICC does not recognise any immunity since it is a procedural rule. Therefore, there is no immunity to be waived.[30]

Accordingly, the Appeals Chamber concluded that all states parties of the Rome Statute consent, after ratification, to the inapplicability of the immunities of state officials before the Court both in their vertical relationship with the Court and horizontal relationship between states parties.[31] The Appeals Chamber also noted, with regard to Resolution 1593 and the application of Article 27(2) of the Rome Statute to Sudan that, there are only two regimes of cooperation provided by the Rome Statute. The first rule, which is applicable to states parties, is governed by Article 86 of the Rome Statute while the second rule that is applicable to non-states parties is governed by Article 87(5) of the Rome Statute.[32] The Appeal Chambers held further that Sudan is obliged to fully cooperation with the Court as required by Resolution 1593.[33] Therefore, the cooperation regime for states parties to the Rome Statute is applicable to Sudan's cooperation with the Court and not Article 87(5) of the Rome Statute.[34] According to the Court, there was no immunity for Sudan to waive regarding its request for cooperation to arrest and surrender Al Bashir.[35] Lastly, the Appeals Chamber held that there is no rule under customary international law that recognises immunities of state officials before international criminal court since there is neither state practice nor *opinion juris*.[36] Therefore, Jordan was compelled by the Court to arrest and surrender Al Bashir to the ICC following the request to cooperate with the Court. It is imperative to note that Sudan is not yet a state party to the Rome Statute and the matter was referred to the ICC by the United Nations Security Council through Resolution1593.[37] Accordingly, the *Al Bashir* case made the ICC very popular as the world's international criminal court but very unpopular in Africa. Another important African leader recently prosecuted by the Court is Ntaganda Bosco.

b) The Ntaganda Case

Bosco Ntaganda was the former Deputy of staff and commander of operation forces in the Democratic Republic of Congo (DRC).[38] The ICC issued two arrest warrants with the first on 22 August 2006 which was unsealed on 28 April 2008 and the second on 13 July 2012.[39] Mr Ntaganda was charged for 13 counts of war crimes and five counts of crimes against humanity allegedly committed between 2002 and 2003 in the Ituri district of the DRC.[40] On 8 July 2019, the Trial Chamber VI convicted Mr Ntaganda of the various crimes against humanity and war crimes,[41] and on 9 July 2019, the Chamber notified the defence counsel of Mr Ntaganda about his verdict.[42] The crimes include: (i) murder and attempted murder as a crime against humanity and a war crime; (ii) intentionally directing attacks against civilians as a war crime; (iii) rape of civilians as a crime against humanity and as a war crime; (iv) rape of children under the age of 15 considered as war crime; (v) sexual slavery of civilians as a crime against humanity and as a war crime; (vi) sexual slavery of children under the age of 15 considered as a war crime;

[27] See Aghem HE, "The ICC or the ACC: Defining the Future of the Immunities of African State Officials" (2020) *African Journal of International Criminal Justice* (*AJICJ*), 6:1, 50-72 at 63.

[28] See *The Prosecutor v. Omar Hassan Ahmad Al Bashir* No. ICC-02/05-01/09 OA2 06-05-2019 (2019) [120].

[29] See *The Prosecutor v. Omar Hassan Ahmad Al Bashir* No. ICC-02/05-01/09 OA2 06-05-2019 (2019) [121].

[30] See *The Prosecutor v. Omar Hassan Ahmad Al Bashir* No. ICC-02/05-01/09 OA2 06-05-2019 (2019) [130].

[31] See *The Prosecutor v. Omar Hassan Ahmad Al Bashir* No. ICC-02/05-01/09 OA2 06-05-2019 (2019) [132].

[32] See *The Prosecutor v. Omar Hassan Ahmad Al Bashir* No. ICC-02/05-01/09 OA2 06-05-2019 (2019) [137].

[33] See *The Prosecutor v. Omar Hassan Ahmad Al Bashir* No. ICC-02/05-01/09 OA2 06-05-2019 (2019) [140].

[34] See *The Prosecutor v. Omar Hassan Ahmad Al Bashir* No. ICC-02/05-01/09 OA2 06-05-2019 (2019) [141].

[35] Despite many objections to this view by AU, scholars and commentators, the Appeals Chamber decision still remain in force in this regard.

[36] See *The Prosecutor v. Omar Hassan Ahmad Al Bashir* No. ICC-02/05-01/09 OA2 06-05-2019 (2019) [113].

[37] See the Situation in Darfur, Sudan available at: https://www.icc-cpi.int/darfur (last accessed 11 August 2021).

[38] See *The Prosecutor v. Bosco Ntaganda,* No.ICC-01/04-02/06 A A2 (2021) [27].

[39] See *The Prosecutor v. Bosco Ntaganda*, No.ICC-01/04-02/06 A A2 (2021) [28].

[40] See the Ntaganda Case available at: https://www.icc-cpi.int/drc/ntaganda#icc-timeline (last accessed 09 August 2021).

[41] See *The Prosecutor v. Bosco Ntaganda,* No.ICC-01/04-02/06 (2019) [1].

[42] See *The Prosecutor v. Bosco Ntaganda,* No.ICC-01/04-02/06 (2019) [2].

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(vii) persecution as a crime against humanity; (ix) pillage as a war crime; (x) forcible transfer of civilian population as a crime against humanity; (xi) ordering the displacement of the civilian as a war crime; (xii) conscripting and enlisting the children under the age of 15 years into an armed group and using them to participate actively in hostilities as a war crime; (xiii) intentionally directing attack against protected object as war crime; and (xiv) destroying the adversary property as a war crime.[43] On 8 July 2019 Mr Bosco Ntaganda was found guilty beyond reasonable doubt by the Trial Chamber VI of all the 18 counts of war crimes and crimes against humanity committed in Ituri, DRC,[44] and on 7 November 2019 he was sentenced to a total of 30 years of imprisonment.[45] The judgment of the Trial Chamber VI was appealed by Mr Bosco Ntaganda and the Prosecutor.[46] However, their appeal was rejected by the Appeals Chamber which confirmed the decision of the Trial Chamber VI on 30th March 2021,[47] and maintained the 30 years imprisonment. Similarly, Mr Ntaganda also appealed against is joint sentencing decision but the Appeals Chamber once again confirmed the Trial Chamber VI joint sentence of 30 years and his appeal was rejected.[48] It is imperative to note that the DRC is a state party to the Rome Statute since April 2002 and this matter was referred to the ICC by the government of the DRC. Finally, the ICC's decision in the *Ntaganda* case was a victory in the fights against human rights violation and impunity for serious international crimes affecting the world. Similarly, another key prosecutions before the Court was in the situations of Kenya and the Republic of Cote d'Ivoire. These situations were similar because they both concern election violence. However, the situation in Kenya created much tension between the Court and Africa just like the situation in Darfur, Sudan.

c) *The Kenyatta and Gbagbo Cases*

The *Kenyatta* and the *Gbagbo* cases are similar because both investigations were initiated *proprio muto* by the Prosecutor of the ICC. Accordingly, they were indicted for crimes against humanity committed during election violence and they were both current and former heads of state in their respective capacity during the time of the proceedings. These cases are examined below separately.

i. *The Kenyatta Case*

Kenya is a state party to the Rome Statute.[49] As a state party, Kenya is bound to cooperate with the Court in matters pertaining to crimes committed within the jurisdiction of the Court.[50] State parties are also compelled to cooperate with the Court in matters of arrest and surrender to the Court any person or individuals alleged to have committed crimes within the jurisdiction of the Court.[51] Finally, as a state party, any immunity attached to the official capacity or status of the person or individuals has been waived by consent after ratification of the treaty creating the Rome Statute.[52] Accordingly, both personal and functional immunities enjoyed by the state officials of states parties are immaterial before the jurisdiction of the ICC. Kenya ratified the Rome Statute on 15 March 2005,[53] and the matter before the jurisdiction of the Court against President Kenyatta was opened *proprio muto* by the ICC Prosecutor.[54] The investigation began in March 2010 for alleged crimes humanity committed during post-election violence in Kenya between 2007 and 2008.[55] Mr Kenyatta was the Deputy Prime Minister and the Minister Finance at the time of the summons to appear on 8 March 2011.[56] He was accused of five counts of crimes against humanity as an indirect co-perpetrator in accordance with Article 25(3)(a) of the Rome Statute. These crimes include; murder in accordance with Article 7(1)(a), deportation in accordance with Article 7(1)(d), rape as per Article 7(1)(g), persecution as per 7(1)(h), and other inhumane acts in accordance with Article 7(1)(k).[57] On 5 December 2014, the Prosecutor filed a notice to withdraw the charges against Mr Kenyatta because there was no evidence.[58] Finally, on13 March 2015, the Trial Chamber V(B) terminated the proceedings against Kenyatta and his summons to

[43] See *The Prosecutor v. Bosco Ntaganda,* No.ICC-01/04-02/06 (2019) [246].
[44] See the Situation in the Democratic Republic of the Congo available at: https://www.icc-cpi.int/drc (last accessed 11 August 2021).
[45] See *The Prosecutor v. Bosco Ntaganda,* No.ICC-01/04-02/06 A3 (2021) [7].
[46] See *The Prosecutor v. Bosco Ntaganda,* No.ICC-01/04-02/06 A A2 (2021) [30].
[47] See *The Prosecutor v. Bosco Ntaganda,* No.ICC-01/04-02/06 A A2 (2021) [1170].
[48] See *The Prosecutor v. Bosco Ntaganda,* No.ICC-01/04-02/06 A3 (2021) [284].
[49] See Kenya available at: https://asp.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/kenya.aspx (last accessed 14 August 2021).
[50] See generally Article 86 and 87 of the Rome Statute.
[51] See Article 87(1) of the Rome Statute; see also the ICC's Prosecutor Statement regarding failure by Kenya's government to cooperate available at: https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-04-12-2014 (last accessed 14 August 2021).
[52] See Article 27 of the Rome Statute.
[53] See the Situation in the Republic of Kenya available at: https://www.icc-cpi.int/kenya (last accessed on 14 August 2021).
[54] See Article 15 of the Rome Statute.
[55] See Kenya's post-election violence: ICC Prosecutor present cases against six individuals for crimes against humanity available at: https://www.icc-cpi.int/Pages/item.aspx?name=pr615 (last accessed 14 August 2021).
[56] See the Kenyatta Case available at: https://www.icc-cpi.int/kenya/kenyatta (last accessed 14 August 2021).
[57] See the Situation in Kenya: Decision on the confirmation of charges to be issued on 23 January available at: https://www.icc-cpi.int/Pages/item.aspx?name=ma116 (last accessed 14 August 2021).
[58] See *The Prosecutor v. Uhruru Muigai Kenyatta* No.ICC-01/09-02/11 (2015) [4], (the Prosecutor maintained that the evidence was insufficient to prove Mr Kenyatta's alleged criminal responsibility beyond reasonable doubt).

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appear was vacated.[59] Despite the decision to terminate the trial against President Kenyatta, the AU took a firmed position not to further cooperate with the Court.[60]

ii. *The Gbagbo Case*

Ivory Coast is also a state party to the Rome Statute since 2013.[61] However, the case concerning former President Laurent Gbagbo was referred to Court in 2011 when Cote d'Ivoire was not a state party to the Statute and therefor had to accept it jurisdiction in accordance with Article 12(3) of the Rome Statute.[62] Mr Gbagbo was indicted for alleged crimes within the jurisdiction of the court in the context of post-elections violence between 2010 and 2011.[63] Just like the *Kenyatta* case, the ICC Prosecutor opened the investigations *proprio muto* after authorisation by the Pre-Trial Chamber.[64] The trial began on 28 January 2016 and on 15 January 2019, the Trial Chamber I by majority,[65] acquitted Mr Laurent Gbagbo and Mr Charles Ble Goude from all charges of crimes against humanity.[66] Majority of the judges pointed out as reasons for their decision as follow: (i) that the Prosecutor has failed to demonstrate that there was a common plan to keep Mr Gbagbo in power which included the commission of crimes against civilians; (ii) that the Prosecutor has failed to demonstrate that the crimes as alleged in the charges were committed according to organisational policy to attack the civilian population; (iii) that the Prosecutor has failed to demonstrate the existence of the alleged policy to attack a civilian population on the basis of unproven violence and other circumstantial evidence cited; and (iv) that the Prosecutor has failed to demonstrate that the public speeches by Mr Gbagbo or Mr Ble Goude constitute ordering, soliciting or inducing the alleged or that either of the accused knowingly or intentionally contributed to the commission of such crimes.[67] In other words, there was no sufficient evidence provided by the Prosecutor to continue with the case. Lastly, on 31 March 2021, the Appeals Chamber confirmed by majority the acquittal decision of 15 January 2019.[68] These are some of the key African state officials indicted and prosecuted before the ICC.[69] As demonstrated in their proceedings before the Court, it was certain that the alleged crimes against them fall within the jurisdiction of the Court. The next section will examine the legality and legitimacy of their prosecution.

III. The Legality and Legitimacy of the Prosecution of African Officials

The question about the ICC prosecuting mostly African state official should not be viewed as bias against the African continent, but rather, it should be viewed as whether the Court has the legal grounds to prosecute these crimes on the one hand,[70] and whether these crimes have been actually committed by those individuals prosecuted by the Court on the other hand.[71] With regard to the legality of prosecuting African state officials, Article 5 of the Rome Statute limits the crimes within the jurisdiction of the Court to only four which include; the crime of genocide,[72] crimes against humanity,[73] war crimes,[74] and the crime of aggression.[75] As seen from the different proceedings against African state officials, some of them were found guilty of having committed more than one of the crimes within the jurisdiction of the Court.[76] Similarly, non-states parties to the Rome Statute may also access the jurisdiction of the Court by acceptance in accordance with Article 12(3) of

[59] *The Prosecutor v. Uhruru Muigai Kenyatta* No.ICC-01/09-02/11 (2015) [12]; Kenyatta Case: Trial Chamber V(B) terminates the proceedings available at: https://www.icc-cpi.int/Pages/item.aspx?name=pr1099 (last accessed 14 August 2021).

[60] See Decision on Africa's Relationship with the International Criminal Court (ICC), (2015) *AJICJ*, 90-92.

[61] See Cote d'Ivoire available at: https://asp.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/cote_d_Ivoire.aspx (last accessed 14 August 2021).

[62] See generally Articles 12 and 13 of the Rome Statute regarding exercise of jurisdiction.

[63] He was charged for crimes against humanity which include rape, murder, attempted murder, other inhumane acts, and persecution.

[64] See the Situation in Cote d'Ivoire available at: https://www.icc-cpi.int/cdi (last accessed 14 August 2021).

[65] See the *Prosecutor v. Laurent Gbagbo and Charles Ble Goude* No. ICC-02/11-01/15 A (2021) [12].

[66] See the *Prosecutor v. Laurent Gbagbo and Charles Ble Goude* No. ICC-02/11-01/15 A (2021) [8].

[67] See Gbagbo and Ble case: ICC Trial Chamber I file the written reasons for the acquittal available at: https://www.icc-cpi.int/Pages/item.aspx?name=pr1470 (last accessed 14 August 2021).

[68] See the *Prosecutor v. Laurent Gbagbo and Charles Ble Goude* No.ICC-02/11-01/15 A (2021) [1].

[69] Many other proceedings against African suspects are still going on before the jurisdiction of the Court while some have been closed. More than 90 per cent of all the proceedings before the Court have been against African state leaders or individual from Africa. See more on this at: https://www.icc-cpi.int/pages/cases.aspx (last accessed 14 August 2021).

[70] See Articles 12 and 13 of the Rome Statute for preconditions to the exercise of jurisdiction and actual exercise of the Court jurisdiction.

[71] See generally Article 5 of the Rome Statute.

[72] See Article 6 of the Rome Statute for greater details.

[73] See Article 7 of the Rome Statute for greater details.

[74] See Article 8 of the Rome Statute for greater details.

[75] See The ICC jurisdiction on the crime of aggression was activated on 17 July 2018 after the Kampala Amendment as noted in Galea I "A Brief Commentary on the Resolution on the Activation of the ICC Jurisdiction over the crime of Aggression" (2018) *Romanian Journal of International Law* 2-27 at 3. Aggression is referred to as the planning, preparation, initiation or execution, by a state official, of an act that its character, gravity and scale constitutes violation of the UN Charter as presented in Galea I "Interpretation of the Kampala Amendment-one of the key Issues for Activating the Jurisdiction of the ICC over the Crime of Aggression" (2017) *Journal of Law and Administrative Sciences* No. 7, 175-191 at 175; Kreb C "On the Activation of the Jurisdiction over the Crime of Aggression" (2018) *J.Const.L* 7-23 at 12.

[76] See for example *The Prosecutor v. Bosco Ntaganda,* No.ICC-01/04-02/06 A3 (2021) [284].

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the Rome Statute.[77] Additionally, with regard to admissibility of crimes before the Court, all the proceedings against African officials were admissible in accordance with Article 17(1)(2) of the Rome Statute. The judicial systems of most of the states are not impartial and therefore, genuinely unable to prosecute these suspected officials domestically.[78] Consequently, the prosecution of African state officials by the ICC was legality justifiable despite much opposition by the AU. Moreover, the issue of immunities before the jurisdiction of the Court and prosecution of serving African leaders with immunity has cause great contention between the ICC and AU especially in the *Al Bashir* and *Kenyatta* cases.[79] Certainly, the prosecution of mostly African state officials before the jurisdiction of the Court has affected the legitimacy and credibility of the court. Accordingly, some African senior leaders seemed to view the ICC as targeting only weaker states.[80] Nevertheless, like vapour these views will soon evaporate as the Court's support from the continent of Africa is still unwavering. Consequently, despite the tension between the AU and the ICC created through the prosecution of mostly African state officials, many African states have continued to support the Court and have promised greater cooperation with the Court.[81] Accordingly, some African states prefer to ratify the Rome Statute instead of the Malabo Protocol creating the African Criminal Court (ACC).[82] The creation of the ACC was fast-tracked because of the unfriendly relationship between the ICC and AU.[83] Be that as it may, some of the reasons why the ICC prosecutes mostly African state officials are as follows: (i) African Membership of the court with 33 African states parties to the Rome Statute; (ii) some of the cases before the Court were referred by the various states concern in Africa;[84] (iii) the African continent serves as a hotspot of crimes which is attractive under the ICC jurisdiction as seen in Article 5 of the Rome Statute; (iv) many African states have inefficient judiciary systems which are also not independent and may not have enough courage and liberty to prosecute their leaders.[85] Indeed, it is not an exaggeration that African states have played a paramount role for the existence of the ICC today justified as follows: (i) they contributed toward the creation of the Court by actively participating in the various committees set before and during the Rome Conference; (ii) African states were among the first states to ratify the Rome Statute; (iii) when the ICC came into force, African officials held senior judicial positions and offices at the headquarter of the Court; and (iv) the African continent served as a hotspot for crimes admissible under the jurisdiction of the ICC. Notwithstanding the noticeable impact of the African continent, the ICC was created prosecute crimes globally. Consequently, the prosecution of crimes beyond the African continent will enhance both the legitimacy and credibility of the Court.

IV. The Prosecution of Crimes Beyond Africa by the ICC

It is without reservations that the ICC has been very successful to prosecute crimes only in the African continent since its existence.[86] However, the Court has on-going investigations beyond Africa. In this regard, this section will examine the situations in Palestine, Afghanistan and Georgia.

a) The Situation in the State of Palestine

Initially, Palestine was not a state party to the Rome Statute. However, on 1 January 2015, the government of Palestine accepted the jurisdiction of the ICC.[87] On 2 January 2015, the State of Palestine acceded to the Rome Statute and the Statute enters into force for the State of Palestine on 1 April 2015.[88] Accordingly, crimes within the jurisdiction of the Court are alleged to have committed in Palestine since13 June 2014 and the territorial scope of this jurisdiction extend to Gaza, West Bank and East Jerusalem as decided by the Pre-Trial Chamber I. On 22 May 2018 Palestine referred the matter to the Prosecutor in accordance with

[77] This was the case of Cote d'Ivoire in the *Gbagbo* case that began in 2003 but later became a state party to the Rome Statute on 15 February 2013.

[78] See generally Article 17 of the Rome Statute for the determination of admissibility and inadmissibility of cases before the jurisdiction of the ICC.

[79] Article 27 of the Rome Statute disregard any immunities enjoyed by state officials or individuals before it jurisdiction once the state ratifies the Rome Statute. Therefore all states parties to the Rome Statute have waived the immunity of their respective state officials vertically in their relationship with the Court and horizontally in their relationship with other states parties to the Statute.

[80] See Jalloh CC "Regionalizing International criminal Court? (2009) *International Criminal Law Review* 9,444-499 at 466, where the Chairperson of the AU Commission Jean ping asserted Africa seems to have become a laboratory to test the new international law, and President Paul Kagame of the Republic of Rwanda also said that the ICC is made for Africans and poor countries.

[81] See for example Sudan taking first step toward joining the International Criminal Court available at: https://www.google.com/amp/s/www.alijazeera.com/amp/news/2021/8/4/sudan-takes-first-step-towards-joining-international-criminal-court (last accessed 18 August 2021).

[82] See Protocol on Amendment to the Protocol on the Statute of the African Court of Justice and Human Rights of the African Union available at: https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights (the 2014 Malabo Protocol) (last accessed 18 August 2021).

[83] See Aghem (2021) *IJLS* 67-68.

[84] See Situations under investigation available at: https://www.icc-cpi.int/pages/situation.aspx (last accessed 02 September 2021).

[85] See Aghem, (2020) *AJICJ* 68.

[86] See Cases available at: https://www.icc-cpi.int/Pages/cases.aspx (last accessed 20 August 2021).

[87] This was done in accordance with Article 12(3) of the Rome Statute.

[88] See State of Palestine available at: https://asp.icc-cpi.int/ en/_menus/asp/states%20parties/asians%20states/Pages/Palestine.aspx (last accessed 21 August 2021).

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Articles 13(a) and 14 of the Rome Statute.[89] On 20 December 2019, the Office of the Prosecutor (OTP) of the ICC concluded it preliminary examination in the situation of Palestine and declares that based on Article 53(1) of the Rome Statute, all the criteria has been fulfilled to open an investigation.[90] The OTP announced that: (i) there is a reasonable basis to believe that war crimes have been or are being committed in the West Bank, including East Jerusalem and Gaza; (ii) potential cases arising from the situation would be admissible; and (iii) that there were reasonable grounds to believe that an investigation would serve the interest of justice. Accordingly, the OTP found that members of the Israel Defence Forces (IDF) have committed war crimes as follows:[91] (i) wilful killing and wilful causing serious injury to body or health as per Articles 8(2)(a)(i) and 8(2)(a)(iii) of the Rome Statute; (ii) intentionally directing attack on objects and persons as per Articles 8(2)(b)(xxiv) and 8(2)(e)(ii). Similarly, the OTP equally found that it has reasonable basis to believe that members of Hamas and Palestinian armed groups (PAGS) committed war crimes as follows: (i) intentionally directing attacks against civilians and civilians objects based on Articles 8(2)(b)(i)(ii) and 8(2)(b)(e)(i); (ii) using protected person as shields based on Article 8(2)(b)(xxiii); (iii) wilful depriving protected persons of the rights of fair and regular trial as per Articles 8(2)(a)(vi) and 8(2)(c)(ii); (iv) wilful killing, torture and outrages upon personal dignity. Finally, the Prosecutor concluded that both the crimes committed by the IDF and the PAGS are admissible as per Article 17(1)(a)-(d) of the Rome Statute.[92] The investigation is on-going just like the situation in Afghanistan.[93]

b) The Situation in the Islamic Republic of Afghanistan

Currently, the Taliban have takeover and are controlling the Islamic Republic of Afghanistan.[94] Afghanistan is state party to the Rome Statute since 1 May 2003.[95] It instrument of accession to the Rome Statute was deposited on 10 February 2003.[96] Accordingly, the ICC may exercise its jurisdiction over crimes in accordance with Article 5 of the Rome Statute for crimes committed on the territory of Afghanistan or by its nationals after 1 May 2003.[97] Consequently, Article 15 of the Rome Statute authorises the ICC Prosecutor to commence investigation *proprio muto* for alleged crimes committed under the jurisdiction of the Court after authorisation by the Pre-Trial Chamber.[98] In this regard, on 20 November 2017, the Prosecutor filed a request for authorisation of an investigation into crimes allegedly committed in Afghanistan on the one hand, and crimes committed in other states parties since 1 May 2003.[99] These crimes include: (i) crimes against humanity and war crimes allegedly committed by the Taliban and affiliated groups; (ii) war crimes allegedly committed by the Afghan National Security Forces; (iii) war crimes allegedly committed by the United States of America and its Central Intelligence Agency (the CIA).[100] Accordingly, the investigation in the situation of Afghanistan was confirmed by the majority of the Judges of the Appeals Chamber authorising the Prosecutor to proceed with full investigation on 5 March 2020 pursuant to Article 15 of the Rome Statute.[101] Finally, on 7 May 2021, the Government of Afghanistan requested for the OTP to defer its investigation as per Article 18(2) of the Rome Statute.[102] However, the investigation has not yet be concluded just like the situation in Georgia.

c) The Situation in Georgia

Another on-going investigation beyond the African continent is in Georgia.[103] The investigation in Georgia was opened *propio muto* by the ICC Prosecutor,[104] after a request for authorisation was

[89] See Palestine available at: https://www.icc-cpi.int/palestine (last accessed 21 August 2021).
[90] See the Situation in Palestine Summary of Preliminary Examination Findings available at: https://www.icc-cpi.int/Pages/item/aspx?name=210303-prosecutor-statement-investigation-palestine (the OTP 2021) (last accessed 25 August 2021).
[91] See generally Article 8 of the Rome Statute for the various categories of war crimes.
[92] See generally Article 17 of the Rome Statute for admissibility and inadmissibility before the Court.
[93] See Situations under investigations available at: https://www.icc-cpi.int/Pages/situation.aspx (last accessed 25 August 2021).
[94] Greater details on this are available at: https://www.brminghammail.co.uk/black-country/telford-hotel-house-124-afghan-21464128 (last accessed 02 September 2021).
[95] See Statement of the ICC Prosecutor Fatou Bensouda available at: https://www.icc-cpi.int/Pages/item.aspx?name=200305-otp-statement-afghanistan (last accessed 26 August 2021).
[96] See Afghanistan Ratification Status available at: https://asp.icc-cpi.int/en_menus/asp/states%20parties/asian%20stattes/Pages/afghanistan.aspx (last accessed 26 August 2021).
[97] See Afghanistan available at: https://www.icc-cpi.int/afghanistan (last accessed 26 August 2021).
[98] See generally Article 15 of the Rome Statute regarding the processes of investigation initiated by the Prosecutor.
[99] See the Appeals Chamber Judgment on the *Situation in the Islamic Republic of Afghanistan* No.ICC-02/17OA4 (2020) available at: https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/17-138 (last accessed 26 August 2021).
[100] See the *Situation in the Islamic Republic of Afghanistan* No.ICC-02/17OA4 (2020) [4].
[101] See ICC Appeals Chamber authorises the opening of an investigation in Afghanistan available at: https://www.icc-cpi.int/Pages/item.aspx?name=pr1516 (last accessed 26 August 2021).
[102] See Office of the Prosecutor and high-level delegation from the Islamic Republic of Afghanistan available at: https://www.icc-cpi.int/Pages/item.aspx?name=pr1591 (last accessed 26 August 2021).
[103] See ICC Pre-Trial Chamber I authorises the Prosecutor to open an investigation into the situation in Georgia available at: https://www.icc-cpi.int/Pages/item.aspx?name=pr1183 (last accessed 28 August 2021).
[104] See Article 15 of the Rome Statute.

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granted by the Pre-Trial Chamber.[105] This is because Georgia ratified the Rome Statute on 5 September 2003 and is therefore a state party to the Rome Statute.[106] Accordingly, on 27 January 2016 the Pre-Trial Chamber I authorized the Prosecutor to open an investigation regarding the situation in Georgia.[107] Consequently, the investigations focused on the following crimes committed between 1 July and 10 October 2008:[108] (i) crimes against humanity which include murder, forcible transfer of population, and persecution;[109] and (ii) war crimes which include attack against the civilian population, wilful killing, intentionally directing attacks against peace keepers, destruction of property and pillaging.[110] Finally, the situation Georgia is still under investigation.[111] As indicated earlier, it is only in the African continent that the ICC has successfully prosecute and convicted offenders who have committed serious international crimes under its jurisdiction.[112] Consequently, all the prosecutions beyond the continent of Africa are still on-going.[113]

V. Concluding Remarks

The success of the ICC today is without doubt indebted to the African continent. The justification for this are as follows: (i) African states play a major role toward the creation and adoption of the Rome Statute as Senegal was the first state in the world to ratify the statute; (ii) the prosecution of mostly African state officials before the Court for more than two decades also establishes the legality and capability of the Court as international criminal jurisdiction; (iii) many African officials have served at different judicial office at the Court. For example, the former Prosecutor of the Court, Mrs Fatou Bensouda was an African for almost two decades.[114] In other words, the African continent contributed toward the creation and fruition of the Court by not only providing the raw materials for the court to practise it trade, but also provided the vehicle and fuel for the court to administer justice. Despite these contributions from the African continent toward the success of the Court, the vision of the Court is beyond Africa. Accordingly, the prosecutions of crimes beyond Africa have not only enhanced the legitimacy of the Court but also its credibility as the world permanent international criminal court. Indeed, the on-going investigations in Palestine, Afghanistan and Georgia will eliminate the alleged biased against the African continent. Finally, Sudan recently enacted new laws that will enable its government to ratify the Rome Statute and cooperate with the Court in any of arrest and surrender. Indeed, the ICC was never created for Africans only but African states contributed greatly in the creation of the ICC.

[107] See Georgia available at: https://www.icc-cpi.int/georgia (last accessed 28 August 2021).

[108] See Statement of the Prosecutor of the ICC, Fatou Bensouda following judicial authorisation to commence an investigation into the situation in Georgia available at: https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-27-01-2016-Georgia (last accessed 28 August 2021).

[109] See generally Article 7 of the Rome Statute for the various crimes against humanity

[110] See generally Article 8 of the Rome Statute for the various war crimes.

[111] See Situations under investigation available at: https://www.icc-cpi.int/pages/situation.aspx (last accessed 28 August 2021).

[112] See Cases available at: https://www.icc-cpi.int/Pages/cases.aspx (last accessed 28 August 2021).

[113] See for example the situation in Bangladesh/Myanmar available at: https://www.icc-cpi.int/bangladesh-myanmar (last accessed 28 August 2021).

[114] See Mrs Fatou Bensouda finishes her mandate as ICC Prosecutor available at: https://www.icc-cpi.int/Pages/item.aspx?name=pr1597 (last accessed 29 August 2021).

[114] See Mrs Fatou Bensouda finishes her mandate as ICC Prosecutor available at: https://www.icc-cpi.int/Pages/item.aspx?name=pr1597 (last accessed 29 August 2021).

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