

**ANALYSIS OF THE DOCTRINE OF RESERVATION AND THE DEVELOPMENT OF THE
ROME STATUTE**

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ABSTRACT

The Rome Statute established the International Criminal Court (ICC) and vested it with the jurisdiction to hear and determine criminal actions against individuals (but not states or organizations) for four types of crimes: genocide, crimes against humanity, war crimes, and the crime of aggression. Consequently, by Article 12 of the statute, the ICC has automatic jurisdiction over all member states. Besides, Article 120 of the statute provides that no reservation may be made to the statute. However, the drafters of the statute included a rather contradictory provision in Article 124 which tends to restrict the jurisdiction of the ICC with regards to war crimes for member states that desire so for seven years from the time of their signing and ratification of the statute. The invocation of this section by some states orchestrated controversies. This paper provides an analytical approach to the doctrine of reservation, with examples of such invocation of the transitional provision by state parties. The significance of which is that the said provision is a clog in the wheel of justice. It is the view of the writer that the aforementioned provision does not reflect the spirit of the statute. Hence this note considers the deletion of Article 124 as a welcome development- a drive for sustainable development within the international criminal law jurisprudence.

Keywords: Doctrine of Reservation, Rome Statute, International Criminal Court, International Military Tribunal

Introduction: History and Overview of The Rome Statute

The Rome Statute¹ (also referred to as the International Criminal Court Statute) is the founding treaty of the International Criminal Court (the ICC). The ICC was established to visit the atrocities committed by warlords and their likes in the twentieth- century. The issue whether signatory states should be allowed to make reservations to different articles of the statute has raised serious concerns. It has been widely argued that reservation undermines the Statute and in the same vein, is not compatible with the universal application of human rights. The creation of the ICC reflects the real status quo in the world since the fall

¹ The Rome Statute of International Criminal Court, U.N. Doc. A/CONF.183/9 adopted in Rome, Italy on 17 July 1998 and entered into force on 1 July 2002, <https://treaties.un.org/doc/Treaties/1998/07/19980717%2006-33%20PM/volume-2187-I-38544-English.pdf> accessed on 20 November 2020.

of the Berlin Wall and the end of the Cold War between the Eastern bloc and the West in 1989–91 and is a specific achievement in the development of international criminal law and international human rights law². The establishment of the ICC could be traced to Gustav Moynier - one of the founders of the International Committee of the Red Cross (ICRC)- who proposed a permanent criminal court in response to the Franco-Russian War in 1872³.

With the Principles established by the Nuremberg and Tokyo Tribunals after the Second World War, the international community through the UN decided to take action to bring the perpetrators of the most heinous crimes against humanity to justice⁴. The events culminating in the creation of the ICC is not unconnected with the establishment of the International Criminal Tribunals for the Former Yugoslavia⁵ and Rwanda⁶. Both tribunals were created as subsidiary organs of the Security Council and operate according to statutes adopted by that body⁷. Before the emergence of these two tribunals, the legal frameworks for the trial of perpetrators of crimes of international concern were the International Military Tribunal Nuremberg, Germany (IMT) enabled by the London Charter⁸ and the International Military Tribunal for the Far East enabled by its charter⁹. These tribunals were limited in jurisdiction. They were instituted not for conflicts across the globe but specific conflicts.

While the IMT for Nuremberg and Tokyo tribunals were instituted for the ‘prosecution and punishment’ of the war criminals of the Second World War, the ICTR and the ICTY were established for the conflicts in Rwanda and the former Yugoslavia respectively. The only constituted legal structure of cross-border jurisdiction is the International Court of Justice (the ICJ). However, the ICJ’s jurisdiction is not to be exercised over individuals but over states alone. The events portrayed the need for an ICC.

This need was further made obvious by the principle and practice of Universal Jurisdiction. This principle entitles a state to prosecute offenders even in the absence of any link between the crime committed and the

²Zhu Wengi, 'On Co-operation by States not a party to the International Criminal Court' [2006] (88) (861) *International Review of the Red Cross* 87

³Canada’s Human Rights Commitments, 'History of the Rome Statute of the International Criminal Court'. Accessed on 24 November 2020 from <http://humanrightscommitments.ca/2015/12/history-of-the-rome-statute-of-the-international-criminal-court/>

⁴Muhammed Tawfiq Ladan, 'An Overview of the Rome Statute of the International Criminal Court: Jurisdiction and Complementarity Principle and Issues in Domestic Implementation in Nigeria' [2013] (1) (1) *Journal of Sustainable Development Law and Policy* 37

⁵ The International Criminal Tribunal for the Former Yugoslavia is a United Nations’ Tribunal founded by the Security Council and enabled by the Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704, annex, (May 3, 1993), adopted by S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute]

⁶ International Criminal Tribunal for Rwanda [the ICTR] enabled by Statute of the International Criminal Tribunal for Rwanda, adopted by S.C. Res. 955, U.N. Doc. S/RES/955, annex (Nov. 8, 1994) [hereinafter ICTR Statute]

⁷See ICTY Statute, supra note 5, and ICTR Statute note 6

⁸See UN Treaty Series – No 251 the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Signed at London on 8 August 1945 available at https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.2_Charter%20of%20IMT%201945.pdf

⁹International Military Tribunal for the Far East Charter (special Proclamation by the Supreme Commander for the Allied powers at Tokyo January 19, 1946; charter dated January 19, 1946; amended charter dated April 26, 1946, Treaties and Other International Acts Series 1589)

prosecuting state¹⁰. This principle was reinforced by the 4 Geneva Convention of 1948 and their optional protocol of 1977¹¹. The rationale of universal jurisdiction is to avoid impunity and to prevent those who committed serious crimes from finding a haven in third countries. To make this principle effective, states are required to establish universal jurisdiction for war crimes in their national legislation¹². The establishment of these tribunals, their subsequent trials, and the principle of universal jurisdiction, reinforced the traditional principle of individual culpability in international criminal law and laid the foundations for the doctrine to be codified years after in the Rome Statute¹³.

A major concern to the formation of the ICC was the protectionist tendencies of states over their nationals who might be indicted by the ICC. States who feared that there might be potentials for war crimes committed by their nationals or on their territory withheld their support for the statute. Article 124 of the Rome Statute, also known as the transitional provision, which was not part of the negotiations, emerged and entered the body of the legislation in the last days of the negotiations. It has been suggested that Article 124 was included in the body of the statute to secure the vote of France in favour of the adoption of the statute and as well as assuage the concerns of other states¹⁴. This explains more of its existence even in the face of Articles 12 & 120 which provides for the automatic jurisdiction and the no reservation clause of the statute respectively¹⁵.

It was expressed that the universal justice system of the ICC would put the US military personnel involved in peacekeeping missions abroad at risk of possible prosecution, hence the US opposed the existence of the ICC¹⁶. The US suggested a ten-year opt-out provision for war crimes for nations that desired it but a seven-year opt-out compromise was reached and enacted in Article 124. Yet the United States' position remains unchanged. In fact, on May 6, 2002, the US withdrew its signature from the Rome statute. Since then, the United States has employed all available strategies and tactics to undermine the workings of the court¹⁷. These are but are not limited to; adverse domestic enactments; diplomatic maneuvers; etc.¹⁸ In recent times, the United States' Donald Trump-led government barred the Prosecutor of the ICC from investigating the actions of CIA agents in the East. What then is the essence of the existence of Article 124 in the Rome Statute when from analysis; it failed, almost totally, in its purpose of ensuring the support of the World's Superpower state? Why the provision was not 'mandatorily' reviewed in the 2010 Kampala review Conference?

Another concern was the usurpation of the Jurisdiction of National Courts: a case of infringement on the sovereignty of states. Nations of the world feared that the establishment of an international criminal court would amount to the usurpation of the judicial powers of the national courts. Thus, while it was possible in the post-second world war era for the General Assembly of the United Nations to adopt the Universal

¹⁰ICRC Advisory Service on International Humanitarian Law: Universal Jurisdiction over War Crimes available at

¹¹Ibid.

¹²Ibid.

¹³The Rome statute, supra note 1, art. 25

¹⁴Shana Tabak, 'Article 124, War crimes and the development of the Rome Statute' 2009 (40) *Georgetown Journal of International Law*, 1069

¹⁵This issue will be addressed further later on in this note

¹⁶See Mark D. Kielsgard, 'War on the International Criminal court' 2005 (8)(701) *New York City Law Review* 713

¹⁷Ibid, at 716

¹⁸ibid

Declaration on Human Rights¹⁹ and the Genocide Convention²⁰ for criminals to be tried by such international penal tribunals as may have jurisdiction, the draft instrument for an international criminal court was postponed indefinitely for further study²¹. The situation lingered for about 50 years²² mainly because of the Cold War between the power blocs. It has been argued that the US' opposition to the ICC is rather hinged on the sanctity of her sovereignty than the protection of her nationals involved in abroad peacekeeping relations.²³

The principal US objections are predicated upon a lack of control by the US because of the autonomous design of the court.²⁴ These objections, according to David J. Scheffer, head of the United States Delegation in Rome are in six folds: the pervasive jurisdiction of the court; failure to provide a ten-year opt-out period for crimes against humanity and war crimes; an autonomous prosecutor who can (with the consent of two judges) initiate investigations and prosecutions in a politically motivated fashion; the lack of a requirement that the Security Council decide before bringing a complaint about aggression; the possibility of expanding the subject matter jurisdiction of the court (to include terrorism and drug crimes); and the prohibition against reservations.²⁵

The United States feared that the doctrine of complementarity confers on the ICC the power to determine a state's willingness to initiate investigations and prosecutions. But a counter-argument is offered that the essence of the ICC is to ensure that the perpetrators of the most serious crimes must not go unpunished. Thus, where these offenders are effectively prosecuted by domestic courts in good faith, the need for ICC's intervention is obviated based on the principle that a defendant should not suffer double jeopardy.²⁶ It appears that from the principle that what is expected of a state party that is conscious of her sovereignty is effective domestic prosecution.

Work was resumed by the International Law Commission (the ILC) on drafting the statute in June 1989 and 1994 the ILC completed and presented its final version of the statute for an International Criminal Court to the United Nations General Assembly.

Consequently, the United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court was convened on 15 June 1998 in Rome, Italy, to "finalize and adopt a convention on the establishment" of an ICC with 160 countries participating in the negotiations, and the NGO Coalition for ICC made up of more than 135 NGOs closely monitoring the proceedings. On 17 July 1998, the five-week convention came to a halt with 120 states voting in favour of the adoption of the draft statute and the establishment of an ICC. However, seven states in attendance voted against the treaty (including the United States, Israel, China, and Qatar) and 21 states declined to vote²⁷. The refusal by some major powers

¹⁹ Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/180, (1948), available at <http://www.un.org/overview.rights.htm>

²⁰ Convention for the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260A (III), (1948) U.N. GAOR, U.N. Doc. A/810 (1948), 78 U.N.T.S. 277 (entered into force Jan. 12, 1951), available at <http://www.unhcr.ch/html/menu3/b/p.genoci.htm>.

²¹ Roy S. Lee, 'An Assessment of the ICC Statute' [2001] (25) (3) *Fordham International Law Journal* 749

²² *Ibid.*

²³ Kielsingard, *supra* note 16, 710 & 713

²⁴ *Ibid.* 710

²⁵ *Ibid.* See also Public Affairs Section, US Embassy, Vienna, Aus., Fact Sheet: United States Policy on the International Criminal Court, at <http://www.usembassy.at/en/download/pdf/icc.pdf>

²⁶ See the Rome Statute, *supra* note 1, art 20(3)

²⁷ Canada's Human Rights commitments, *supra* note 3. For the details on the proceedings culminating in the coming into force of ICC Statute see the Official Records of the United Nations Diplomatic Conference of

such as the US, China, and Russia to join, the lack of cooperation by some states parties such as South Africa, as well as recent defections or the threat thereof have also put strains on its global authority²⁸.

On 11 April 2002, nine states ratified or acceded to the Statute of the ICC, raising the number of states that had ratified or acceded to it from 57 to 66 at one stroke²⁹. Thus, on July 1, 2002, the Rome statute came into force and the ICC was established³⁰. As of the time of this note, 123 countries of the world are state parties to the ICC. Out of them, 33 are the African States, 19 are the Asia-Pacific States, 18 are from Eastern Europe, 28 are from Latin American and the Caribbean States, and 25 are from Western European and other States³¹.

So was the making of the Rome Statute and the coming into existence of the ICC³². Since its inception and commencement of operation in 2003, the ICC has lived up to its name. The Court has conducted investigations and trials in connection with some of the world's most brutal conflicts and has not shied away from investigating individuals at the highest level of power, such as presidents in office³³. The creation of a worldwide permanent international criminal court could be described as one of the most significant events in the history of contemporary international relations and international law³⁴. Part I of this note has been dedicated to exploring briefly the history of the Rome Statute to show the relevance of the inclusion of Article 124.

It has also shown that the emergence of the ICC filled a vacuum in the International law Jurisprudence. Unlike the International Court of Justice (the ICJ), the ICC has jurisdiction over natural persons than states, thus the enthronement of international individual criminal responsibility. This part has discussed the history of the Rome Statute and laid the foundation of the criticism against the inclusion of the transitional provision in the latter part of this note. Part II discusses the jurisdiction of the ICC along 4 standpoints viz; subject matter; the principle of complementarity; the setting comprising of the time the crime took place (temporal Jurisdiction) and the place (ratione loci) the crime was committed; and the person(s) involved (ratione personae). It is intended to be shown under this part the importance of the adjudicatory powers of the ICC over these 4 international crimes.

Plenipotentiaries on the Establishment of an International Criminal Court A/CONF.183/13 (Vol.11) available at https://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf

²⁸European Parliament, 'International Criminal Court: Achievements and challenges 20 years after the adoption of the Rome Statute' available at

[https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/625127/EPRS_BRI\(2018\)625127_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/625127/EPRS_BRI(2018)625127_EN.pdf)

²⁹Wengi, supra note 2, at 88

³⁰This is in accordance with Article 126 which provides, 'This Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations'.

³¹ For the list of the states mentioned see

https://asp.iccpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx [last visited 25 November 2020]

³²The attempt made here is not to provide a conclusive and exhaustive narrative as to the history of the ICC and its enabling statute. For more details on the negotiations, drafting and proceedings see United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Court, June 15-July 17, 1998, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, U.N. Doc. A/51/22 (Apr. 14, 1998) See also Phillippe K., and John t. H., "The Rome Conference on an International Criminal Court:- The Negotiating Process", (1999) 93 A.J.I.L.2.

³³European Parliament, supra note 28

³⁴Wengi, Supra note 2, 88

It is also intended to be shown that the principle of complementarity of the ICC with domestic courts does not erode the latter of its adjudicatory powers of its territory and or nationals. The point is that what is expected of the state party in question is to ensure 'effective' prosecution. The nexus between the jurisdiction of the court and the setting of the crime likewise the perpetrators was highlighted under this part. The concluding part discusses the doctrine of reservation vis-à-vis the development of the Rome Statute. The essence of which is to show that Article 124 of the Rome Statute outlived its usefulness. It is argued that the concession of a seven-year opt-out regime to ensure the support of the five permanent members of the United Nations Security Council (the P-5) was a partial failure. Article 124 restrictions on jurisdictions only succeeded in relieving France's concerns regarding the ICC and led to France's ratification of the treaty. However, it failed to secure the support of the United States even when a seven-year concession was made in place of her ten-year suggestion. To date, only two states have invoked this provision: France³⁵ and Colombia³⁶.

France withdrew her invocation on August 13, 2008³⁷, while Columbia's seven-year restriction elapsed on October 31, 2009. Article 124 was scheduled for mandatory review in Kampala, in 2009³⁸. Unfortunately, Article 124 was retained after the Review Conference in Uganda in 2010. However, it was scheduled for review later in 2015. The said provision was deleted on November 26, 2015, by a resolution of the Assembly of Heads of States³⁹. This development is subject to Article 121(4)⁴⁰. The latter provides that an amendment shall enter into force for all states parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them⁴¹.

In the main, the status quo prevails. It is suggested that the deletion of Article 124 reflects the true intentions to punish international war criminals which is one of the cardinal principles of the ICC. This note lends support for the adoption, ratification, or acceptance of the amendment to Article 124. This part will also consider the invocation of this provision by the duo states of France and Columbia. It will

³⁵ See France Declarations to the Rome Statute of the International Criminal Court, pt. III, June 21, 2000, available at <http://treaties.un.org/doc/Treaties/1998/11/19981110%2006-38%20PM/Related%20Documents/CN.404.2000-Eng.pdf> ("According to Article 124 of the Statute of the International Criminal Court, the French Republic declares that it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in Article 8 when a crime is alleged to have been committed by its nationals or on its territory.").

³⁶ See Columbia Declarations to the Rome Statute of the International Criminal Court, para.5, (Availing itself of the option provided in article 124 of the Statute and subject to the conditions established therein, the Government of Colombia declares that it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by Colombian nationals or on Colombian territory.) accessed on November 22, 2020, at https://treaties.un.org/Pages/ShowMTDSGDetails.aspx?src=UNTSOONLINE&tabid=2&mtdsg_no=XVIII-10&chapter=18&lang=en

³⁷ See France Withdrawal of Declaration, Reference: C.N.592.2008.TREATIES-5 (Depositary Notification) August 13, 2008, available at <http://treaties.un.org/doc/Publication/CN/2008/CN.592.2008-Eng.pdf>

³⁸ State parties accepted a proposal for a review conference to be held in Kampala, Uganda in the first semester of 2010 in line with art. 124 ("the provisions of this article shall be reviewed at the Review Conference convened in accordance with article 123, paragraph 1.")

³⁹ See Amendment to Article 124 annexed ICC-ASP/14/RES.2 available at https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP14/ICC-ASP-14-Res2-ENG.pdf

⁴⁰ Ibid. para 2

⁴¹ The Rome Statute, Supra note 1, art 121 paras. 4

conclude on the note that to achieve an optimal level of cooperation by state parties, the amendment to the transitional provision should be widely ratified and no form of the reservation should be entertained in respect of those crimes listed in the statute. This, however, will commence the journey to a ‘more just world’.

The Relevance of The Rome Statute: Jurisdictional Issues

According to Part 1 of the Statute, the ICC shall have international personality and may exercise its functions and powers as provided in the statute on the territory of any state party and by special agreement on the territory of any other state⁴².

The Jurisdiction of the ICC can be approached from the following standpoints; 1) the Subject matter (*ratione materiae*) which deals with the make-up of the crimes for which the jurisdiction of the court can be activated; 2) Principle of Complementarity which entails that the ICC shares the same jurisdiction on international crimes as the National court and thus would not try or investigate any matter that has been tried or for which investigation has been commenced on by national courts; 3) Setting which includes the temporal jurisdiction (*ratione temporis*) which deals with the time the crime in question was committed and the place (*ratione loci*) which deals with the place the crime was committed, and 4) the person(s) involved (*ratione personae*).

1. Subject Matter Jurisdiction (*Rationes Materiae*)

The ICC has jurisdiction over all serious crimes of international concern in so far as they fall within the following categories: a) the crime of genocide (b) crimes against humanity; (c) war crimes, and (d) the crime of aggression⁴³. The purpose of this is to uphold the protection of human rights and to hold those responsible for the commission of these crimes accountable to enthrone a more just world. The crimes listed in Article 5 were not left without definitions. Definitions and delimitation of the crimes constitute the makeup of Articles 6, 7 & 8 including the recently added *8bis* of the statute. The provisions were derived from some other subsisting treaties to bring it within the purview of the adjudicatory powers of the ICC. These include treaties include⁴⁴: The Four Geneva Convention of 1949 and their Additional Protocols of 1977, the Torture Convention, the Genocide Convention, the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda, and other conventions dealing with specific crimes of enslavement and apartheid.

a. The Crime Of Genocide

The crime of Genocide is defined under the statute in Article 6 drawing verbatim from the Genocide convention⁴⁵. The crime of Genocide became of international concern with the extermination of eight million European Jews by the German Nazis. Informed by his personal experience, Raphael Lemkin coined the term, ‘genocide’ from the combination of the Greek word, ‘genos’ meaning ‘race, nation or tribe’ and the Latin suffix ‘cide’ from ‘caedere’ meaning to kill. Lemkin’s work, ‘Axis Rule in Occupied Europe’, greatly influenced the definition of the crime in the Genocide Convention which was adopted by the drafters of the Rome Statute⁴⁶. According to the Statute, *Genocide means any of the following acts*

⁴²Ibid. art.4

⁴³Ibid. art. 5

⁴⁴ Ladan, supra note 4, 39

⁴⁵See the United Nations Convention on the Prevention and Punishment of the Crime of Genocide, approved and proposed for signature and ratification or accession by General Assembly Resolution 260 A (III) of 9 December 1948 entered into force 12 January 1951 per Article 13

⁴⁶For a detailed discourse on the crime of Genocide, see Martin Mennecke, ‘The Crime of Genocide and International Law available at <https://www.niod.nl/sites/niod.nl/files/International%20Law.pdf>; Claus Krieb,

committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such⁴⁷:

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

The Darfur-Sudan Genocide⁴⁸ is a recent case resulting in the ethnic cleansing of hundreds of thousands of civilian lives in Western Sudan. On March 31, 2005, the United Nations Security Council by resolution 1593 referred the situation in Darfur-Sudan to the Prosecutor of the ICC for investigation and prosecution. The investigation led to the indictment of officials of the Government of the Republic of Sudan: Mr. Omar Al Bashir (the President), Mr. Ahmad Harun and Mr. Abdel Hussein; militia leader Mr. Ali Kushayb, and rebel leader Mr. Abdallah Banda⁴⁹.

b. The Crimes Against Humanity

The crimes against humanity are defined in Article 7 as part of a widespread or systematic attack directed against the civilian population resulting in any or all of the acts listed in paragraphs 1 (a-k). An earlier writer suggests that the events of September 11 which witnessed the Twin Towers decimated and the loss of about 3000 civilian lives could qualify as a crime within the meaning of Article 7 (1) (a)⁵⁰. Support would be in place for this submission if it is reasoned from the view that the perpetrators of that heinous crime knew that their 'systematic attack' was channeled towards a civilian population.

More so, the provision as rightly pointed out by the writer does not require that the attack must be military based. No nexus to an armed conflict is required for crimes against humanity under the Rome Statute⁵¹. Another laudable development under the Rome Statute is that unlike the Nuremberg Charter and the ICTR Statute, the Rome statute does not require the assailant to have discriminatory intent when committing the crimes against humanity under this provision⁵². This distinguishes it from the crime of Genocide in that the crime need not be committed against a group sharing certain qualities such as nationality or religion⁵³. In recent times, several crimes against humanity were committed during the Darfur-Sudan Conflict under the watch of President Omar Al Bashir such as rape, murder, extermination, forcible transfer, and torture of civilians, as well as the pillaging of numerous villages and camps. In like manner, Ahmed Haroun, Sudan's humanitarian affairs minister, was indicted on 27 April 2007 on 20 counts of crimes against humanity and 22 counts of war crimes with regard to the situation in Darfur, Sudan. He is alleged to have coordinated the operations of Sudanese military, police, security, and Janjaweed forces in the Darfur region while he was

⁴⁷The Crime of genocide under international law' [2006] (6) *International Criminal Law Review* 461 available at <https://www.legal-tools.org/doc/8799cd/pdf/&ved=2ahUKEWjt4u7piKLT>; see also *The Prosecutor V Kambanda* Judgement and Sentence, ICTR-95-1-A, 4 September 1998 where it was referred to as 'the crime of crimes'

⁴⁸The Rome Statute, supra note 1, art 6

⁴⁹The situation in Darfur-Sudan has been regarded as the first Genocide of the 21st century see Pigmon, James L., "Evil: Genocide in the 21st Century" (2011). Master of Liberal Studies Theses. 11

⁵⁰See the Twenty-Eighth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1593 (2005) available at

[https://www.icccpi.int/Pages/item.aspx?name=181214-stat-otp-UNSC-](https://www.icccpi.int/Pages/item.aspx?name=181214-stat-otp-UNSC-1593#:~:text=The%20Council%20considered%20that%20the,4.;)

[1593#:~:text=The%20Council%20considered%20that%20the,4.](https://www.icccpi.int/Pages/item.aspx?name=181214-stat-otp-UNSC-1593#:~:text=The%20Council%20considered%20that%20the,4.); see also *The Prosecutor v. Omar Hassan Ahmad Al Bashir* ICC-02/05-01/09 available at <https://www.icc-cpi.int/darfur/albashir?ln=en>

⁵¹ See Roy S. Lee, supra note 10, 756

⁵² Ladan, supra note 4, at 40

⁵³Ibid

⁵⁴Ibid

Minister of State for the Interior from April 2003 to September 2005 during the Darfur conflict⁵⁴. Saif al-Islam Gaddafi was indicted on 27 June 2011 on two counts of crimes against humanity concerning the situation in Libya. Several other persons have been indicted under this provision since the inception of the Rome statute.

c. War Crimes

Article 8 of the Rome statute defines War Crimes bringing it within its jurisdiction⁵⁵. By this provision, the ICC has adjudicatory power over war crimes committed during international conflicts⁵⁶ and when committed during non-international armed conflicts⁵⁷. Thus, the Rome Statute became the first international treaty to attach individual criminal responsibility to war crimes committed in internal conflicts, as opposed to only criminalizing war crimes committed in international conflicts.⁵⁸ It has been suggested that the definition of war crimes under the Rome Statute can be approached under four areas⁵⁹: (1) grave abuses in an international armed conflict as defined in the Geneva Conventions of 1949⁶⁰ - Eight acts are listed under this area. The definition here follows to close the provisions in the Geneva Convention; (2) serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the twenty-six acts enumerated⁶¹; (3) serious violations of Common Article 3 of the Geneva Conventions in non-international armed conflict;⁶² and (4) serious violations of laws and customs applicable in non-international conflicts armed conflict.⁶³ The elements for war crimes under article 8, paragraph 2(c) and (e), are subject to the limitations addressed in article 8, paragraph 2(d), and (f), which are not elements of crimes⁶⁴.

Some writers express the view that to be a war crime, an act must meet two substantive areas: it must be a violate International Humanitarian Law (IHL) (2) that is serious⁶⁵. In other words, to be a war crime, an act must violate IHL, but not all violations of IHL are subject to a criminal penalty – only those that are "serious".⁶⁶ However, there is also the requirement that war crimes can be prosecuted only "as part of a plan or policy or as part of a large-scale commission of such crimes"⁶⁷. The essence of this is to ensure that the International Criminal Court focuses on war crimes that are the "most serious crimes of concern to the international community"⁶⁸ while other "less serious" war crimes would be adjudicated upon by the domestic courts via the principle of complementarity.

⁵⁴ Wikipedia, 'War in Darfur' available at https://en.wikipedia.org/wiki/War_in_Darfur#:~:text=The%20War%20in%20Darfur%2C%20also,they%20accused%20of%20oppressing%20Darfur's; see also BBC News, 'Darfur War Crimes suspect Defiant' 28 February 2007 available at <http://news.bbc.co.uk/2/hi/africa/6404467.stm> accessed on 20 November 2020

⁵⁵This provision is central to the discourse of this note.

⁵⁶The Rome Statute, supra note 1, Art 8(2)(a)

⁵⁷Ibidem. art. 8(2)-(f)

⁵⁸Tabak, supra note 13, 1078

⁵⁹Ibid. See also European Parliament, supra note 28

⁶⁰The Rome Statute, supra note 1, Art 8(2)(a)

⁶¹Ibid. Art 8(2)(b)

⁶²Ibid. Art 8(2)(c)

⁶³Ibid. Art 8 (2)(e)

⁶⁴ Dörmann K, Doswald-Beck L, and Kolb R, "Introduction to Elements of War Crimes Listed in Article 8 of the Rome Statute," Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary (Cambridge University Press 2003)

⁶⁵ Oona A. Hathaway, Paul K. Strauch, Beatrice A. Walton, & Zoe A. Y. Weinberg, 'What is a War Crime' 2019 (44) (1) *The Yale Journal of International Law*, 53 retrieved on November 20, 2020, from <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1695&context=yjil>

⁶⁶Ibid.

⁶⁷See The Rome Statute, supra note1, art 8(1)

⁶⁸The Rome Statute, supra note 1, preamble para.4

The emergence of war crimes and its definition in the Rome Statute, which sets out violations of international humanitarian law to be regulated by both international criminal law and domestic criminal law, derived greatly from the proceedings of the ICTY and the ICTR. The provisions of the enabling statute of these tribunals concerning war crimes were interpreted and expounded to encapsulate individual culpability⁶⁹.

One of the greatest oppositions to the inclusion of War crimes as one of the crimes within the jurisdiction of the ICC is the fear by US Department of Defence that US military personnel involved in peacekeeping missions could be targeted⁷⁰. The US feared that the office of the Prosecutor of the ICC could be politically motivated to initiate investigations and prosecutions against the US nationals in peacekeeping missions⁷¹. For instance, in the ICTY, the United States and other NATO military leaders were the subjects of an inquiry by the prosecutor's office in connection with allegations that the seventy-eight-day bombing raid on Kosovo during the spring of 1999 involved war crimes⁷². However, in a report issued by the Chief Prosecutor Carla Del Ponte, a committee established on May 14, 1999, by the Chief Prosecutor to assess criminal allegations and material accompanying them found that the allegations did not merit full investigation⁷³.

As a result, the United States Proposed a ten year opt-out period for war crimes but a seven-year compromise was achieved⁷⁴. Yet it was not enough to secure US' support for the ICC. Critics contend that it is disingenuous for the U.S. to cite this three-year difference as a cause for its refusal to ratify, as it was a product of a compromise in which representatives of the U.S. took an active part⁷⁵.

It has been expressed that Art. 8 contains the most comprehensive treaty provision defining war crimes and it is worthwhile mentioning that it takes into account the jurisprudence of the ICTY and the ICTR⁷⁶

A clear demarcation exists between genocide and war crimes because only the latter category presupposes the existence of an armed conflict⁷⁷. In other words, inclusive within the definition of war crimes is 'armed conflict'. Therefore, the crime of genocide can be committed whether or not there is an armed conflict.

Moreover, in December 2017, three war crimes were added to the jurisdiction of the ICC: employing microbial, biological or toxin weapons; employing weapons that injure by fragments undetectable by X-rays, and employing laser weapons. It is noteworthy that amendments of this sort are subject to article 121(5). By this provision, a state starry who does not want this provision to apply to it may decide not to accept or ratify it. Once they have ratified or accepted the amendments, they are also at liberty to make declarations to opt-out of it. One asks; "are the voluntary nature of adoptions of amendments made in relation to articles 5,6,7, and 8 not academic than practical to the realization of the spirits and essence of these amendments?"

⁶⁹See Prosecutor v. Tadić, Case No. IT-94-1-A, Judgement of the Appeals Chamber, para. 183 (Int'l Trib. For the Former Yugoslavia July 15, 1999). Where the appeal chambers strenuously interpreted article 7 of the ICTY to reverse the decision of the trial chambers and held Tadic individually responsible for the crime of Genocide committed by his group

⁷⁰ See Kielsingard, supra note 16, 714

⁷¹ibid

⁷²ibid, 713

⁷³ibid

⁷⁴Ibid, 714

⁷⁵ibid

⁷⁶See Dire Tladi, 'International Criminal Court' *Max Planck Encyclopedias of international Law* retrieved from <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e42?print=pdf> on January 11, 2021

⁷⁷Mennecke, supra note 20, at 470

The criminalization of war crimes and the expansive definitions offered under this provision solidifies the view that inhuman conduct contrary to applicable law in internal conflicts (and not only in international conflicts) deserves condemnation and punishment.⁷⁸

d. The Crime Of Aggression

With the coming into force of the ICC Statute, the ICC lacked adjudicatory power over the crime of aggression. Though the crime was mentioned in Article 5 as one of the crimes within its jurisdiction, states parties were not united as to the definition suitable for it. Thus, the court had jurisdiction over the three other crimes except for the crime of aggression⁷⁹. Articles 5(2), 121 and 123 together provide that the court will have jurisdiction over the crime of aggression when a suitable definition is accepted by a two-thirds majority of all ICC states parties, at a Review Conference to be held seven years after the entry into force of the statute⁸⁰. The 2010 Kampala Review conference adopted amendments to the Statute and granted the ICC adjudicatory powers over the crime of aggression. However, this was made subject to a decision to be taken after January 1, 2017, by a majority of states parties.

At the sixteenth session of the ASP in New York in December 2017, the 123 States Parties to the Rome Statute made the historic decision to enable the ICC to exercise jurisdiction over the crime of aggression. This marks the first time that humanity has had a permanent international court with the authority to hold individuals accountable for their decisions to commit aggression – the worst form of the illegal use of force⁸¹. The ICC jurisdiction over this crime was activated as of 17 July 2018, which also marks the 20th anniversary of the Rome Statute⁸².

At the seventeenth session of the ASP in The Hague in December 2018, Andorra, Sweden, Poland, Chile, Estonia, Cyprus, Guatemala, Botswana, Peru, Argentina, Ireland, Switzerland, Germany, Costa Rica, Austria on behalf of the EU and Liechtenstein referred to and welcomed the activation of the Court's jurisdiction over the crime of aggression⁸³

Currently, the crime of aggression is defined in Article 8*bis* of the ICC Statute. Under this provision, the definition of crime or aggression consists of two parts⁸⁴. The first part defines the crime as the 'planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression'⁸⁵. The second part defines the act of aggression as 'the use of armed force by a state against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the charter of the United Nations'⁸⁶. The particular acts which would amount to acts of aggression if committed were also listed under the provision⁸⁷.

⁷⁸Politi in Tabak, supra note 13, 1079

⁷⁹It was for the reason that the Prosecutor of the ICC, Luis Moreno Ocampo received and declined requests to inquire into U.S. conduct in the war in Iraq. See Kielsgard, supra note 16, 706

⁸⁰Ladan, supra note 4, 39. Article 5(2) is no longer part of the statute.

⁸¹The Global Campaign for Ratification and Implementation of the Kampala Amendments on the Crime of Aggression, 'Status of Ratification and Implementation' Update No. 34 (information as of 27 November 2019) para. 11 accessed on 5 Dec. 2020 from <https://crimeofaggression.info/the-role-of-states/status-of-ratification-and-implementation/>

⁸²Ibid.

⁸³Ibid. para 12

⁸⁴Tladi, supra note 69, para 39

⁸⁵the Rome Statute, supra note 1, art 8 *bis* (1)

⁸⁶Ibid. art 8 *bis* (2). The definition under this provision was derived from the definition of the crime of aggression adopted by the General Assembly and annexed to UNGA Resolution 3314 (XXIX) of December 14, 1914 (GAOR 29th Session Supp 31 vol, 142).

⁸⁷ See the Rome Statute, supra note 1, art 8 *bis* (2) (a-g)

However, the exercise of the jurisdiction over this crime by the ICC has somewhat been restricted to a determination⁸⁸ by the United Nations Security Council except where the situation was referred to the prosecutor by the latter⁸⁹. For the majority of states parties- and other non-party states – the court's jurisdiction over the crime of aggression could not be dependent on prior authorisation by the UN Security Council.⁹⁰ It is noteworthy that in addition to the determination by the UN Security Council there are opt-out provisions for states parties that desire so to limit the court's jurisdiction over this crime on them⁹¹. It is the view of this author that the existence of these provisions in the corpus of this statute undermines and forestalls the needed development not just of the statute but also of the notion of individual criminal responsibility within the international community. Like the deletion of article 124, it is suggested that amendments to the provisions of the subject matter - articles 5, 6, 7, and 8- of the ICC Statute should be made subject to the adoption, acceptance and ratification of seven-eight of the member states⁹².

2. The Principle of Complementarity

The Principle of complementarity is a tool through which the jurisdictional competence between the national system and the ICC is mediated to avoid conflict⁹³.

The ICC is not a substitute for national courts. The court's jurisdiction has been made complementary with national criminal jurisdictions⁹⁴. In other words, it is primarily the domestic legal systems that should exercise jurisdiction over international crimes⁹⁵. It does not erode the domestic courts of the jurisdiction to decide international crimes but the ICC will intervene where it is glaring that a state is "unable or unwilling" genuinely to carry out the investigation and prosecute the perpetrators of most serious crimes of international concern⁹⁶. Likewise, a case is inadmissible where it is being investigated or prosecuted by a state which has jurisdiction over it⁹⁷. This inadmissibility applies also where the State in question, having investigated the matter, has decided not to prosecute the person concerned⁹⁸.

There are views that the recognition of the ICC's jurisdiction implies that state parties are obligated to either prosecute domestically the crimes for which the court has jurisdiction or submit the relevant cases to the ICC⁹⁹. Therefore, "a state which becomes a party to this statute thereby accepts the jurisdiction of the

⁸⁸ Ibid. art 15 *bis* (6) &(7)

⁸⁹ Ibid art 15 *bis* (1)

⁹⁰ Tladi, *supra* note 69, para 40

⁹¹ See the Rome Statute, *supra* note 1, art 15 *bis* (4) & art 121(5). Article 15 *bis* (4) provides: The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.

Article 121(5) provides: 'Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.'

⁹² See the Rome Statute, *supra* note 1, art 121(4) & (6)

⁹³ Tladi, *supra* note 69, para 53

⁹⁴ the Rome Statute, *supra* note 1, para.10 Preamble & art 1

⁹⁵ Ibid. preamble para.6

⁹⁶ Understanding the International Criminal Court, available at <https://www.icc-cpi.int/iccdocs/pids/publications/uicceng.pdf>

⁹⁷ the Rome Statute, *supra* note 1, art 17(1)(a)

⁹⁸ Ibid. art 17(1)(b)

⁹⁹ See Schenck and Benvenuti in Anja Seibert-Fohr, 'The Relevance of the Rome Statute of the International Criminal court for Amnesties and Truth commissions, [2003] (7) *Max Planck UNYB* 553

court with respect to the crimes referred to in Article 5¹⁰⁰. The legal implication of this is that the ICC's adjudicatory power over a state is automatic upon ratification of the statute by the state. It would admit and decide over cases involving the nationals of state parties or non-state parties over a crime of international concern committed within the territory of state parties or non-states parties (in the case where a crime of international concern is committed by a national of a non-state party in its territory or the territory of another non-state party, consent is requisite) or when the situation is referred to it by the UN Security Council¹⁰¹. By Article 20(1), the ICC will decline jurisdiction if it is shown that a defendant before it has been tried in respect of the conduct which formed the basis for which the person has been convicted or acquitted by the ICC¹⁰².

In like manner, the ICC will decline to admit a case if it is shown that domestic court has 'effectively' tried the matter¹⁰³. Arguably, this principle creates an avenue for the ICC to negate state's sovereignty when it is shown that the prosecution of its nationals in respect of these crimes listed in the statute was not effectively carried out, or was conducted in a biased manner designed to allow them to evade criminal responsibility¹⁰⁴ thus, violating the principles in the Preamble to the Rome Statute and those of the Charter to the United Nations Article 2(7)¹⁰⁵. Also, domestic courts are precluded from retrying a person for a crime referred to in article 5 for which that person has already been convicted or acquitted by the ICC¹⁰⁶. However, by conceding to the states the right to prosecute their cases involving jus cogens crimes, i.e., by giving them "the first bite of the apple," the ICC is acknowledging the state's sovereign authority¹⁰⁷. It has been argued that the inclusion of this provision is part of the concessions made to the United States during the negotiations of the Rome Statute to secure her support for the ICC, unfortunately, the reverse was the case.¹⁰⁸

3. The Setting: Location and Time as Determinants of the Exercise of the Jurisdiction of the ICC

As a general principle of criminal law, no person shall be tried for an offence unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the ICC¹⁰⁹. Time is of the essence to the exercise of the jurisdiction of the ICC. It follows that the ICC will not admit a case that took place before its inception¹¹⁰. Time and location of the crime as determinants of the jurisdiction of the ICC are intertwined concepts and play an important role in the activation of the court's adjudicatory power. If a state becomes a party to the Rome Statute after it enters into force, the court may exercise its jurisdiction

¹⁰⁰The Rome Statute, supra note 1, art. 12 para 1

¹⁰¹The ICC exercised jurisdiction and investigated the situation in Sudan though Sudan is not a state party to the Rome Statute.

¹⁰²The Rome Statute, supra note 1, art. 17(1)(c)

¹⁰³The Rome Statute, supra note 1, art. 20(3)

¹⁰⁴Kielsgard, supra note 16, 708

¹⁰⁵Ibid

¹⁰⁶The Rome Statute, supra note 1, art. 20(2)

¹⁰⁷Ibid.

¹⁰⁸Kielsgard, supra note 16. 720

¹⁰⁹See the Rome Statute, supra note 1, art 22 (1). For instance, until 2017, the court could not try persons for the crime of aggression because, since its inception in 2002, the crime of aggression is not a crime so defined in the statute though it was mentioned as within its subject matter. The idea is to ensure that the definition of the crime as well as its elements is not left within the conjecture of the prosecution and or the court. This view is reinforced by Article 22, paragraph 2 which provides: "the definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted."

¹¹⁰Ibid. art.11(1)

only concerning crimes committed after the entry into force of the statute or have accepted the jurisdiction of the court under article 12, paragraph 3¹¹¹.

The legal implication of this is that ordinarily, the ICC has no jurisdiction over crimes, howbeit of international concern, which took place before its formation or crimes which took place in the territory of a non-state party except when the latter has accepted the jurisdiction of the ICC for the determination of the particular crime in question in accordance with article 12 paragraph 3. By the provision, a non-state party is expected to lodge a declaration with the Registrar of the Court accepting the jurisdiction of the ICC and shall consequently cooperate with the court without any delay. However, this requirement may not be necessary for the exercise of the jurisdiction of the court for a referral from the UN Security Council acting under Chapter VII of the Charter of the United Nations. Thus, a non-state party need not accept the jurisdiction of the court before the court can exercise its jurisdiction for a situation within that state's territory referred to it by the UN Security Council.

The ICC exercises automatic jurisdiction over crimes of international concern committed in the territory of member states. A state which becomes a party to the Statute accepts the jurisdiction of the court with respect to the crimes referred to in article 5¹¹². Consequently, the court would admit a case commenced *Proprio motu* by the Prosecutor based on the information on crimes within the jurisdiction of the court¹¹³. On the same premise, a state party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the court appear to have been committed requesting the prosecutor to investigate the situation to determine whether one or more specific persons should be charged with the commission of such crimes.¹¹⁴ Crimes committed on a vessel or aircraft registered to a State party are within the territorial nexus of the jurisdiction of the court.

Also, the ICC may exercise its jurisdiction over the nationals of a state party over crimes of international concern committed in the territory of a non-state party¹¹⁵. In the same vein, the ICC can exercise jurisdiction over nationals of a non-Party State committed on the territory of States Parties.

4. The Person(s) Involved (*Ratione Personae*).

The court does not have jurisdiction over persons below the age of 18 as at the time of commission of the offence¹¹⁶

The Doctrine of Reservation and the Rome Statute

Reservation means a unilateral statement, however phrased or named, made by a State or by an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that organization

It is not unusual for state parties to multilateral treaties to invoke the instrument of the reservation to the effect that the entirety of the treaty does not apply to it. By reservation, a state purports to restrict or exclude the legal effect of a particular provision in the treaty which it objects. The central focus of article 124 of the Rome Statute **is to allow State Parties**, upon becoming Party to the Rome Statute, to preclude the Court from exercising jurisdiction over war crimes for a period of seven years.¹¹⁷ The said article reads as follows:

“Notwithstanding article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction

¹¹¹Ibid. art 11(2)

¹¹²Ibid. art 12 (1)

¹¹³Ibid. art 15(1)

¹¹⁴Ibid. art.14(1)

¹¹⁵Ibid. art. 12(2)(b)

¹¹⁶Ibid. art. 26

¹¹⁷ Ibid art 8

of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time. The provisions of this article shall be reviewed at the Review Conference convened in accordance with article 123, paragraph 1.”

The Deletion of Article 124

One of the significant innovations to the Rome Statute was the decision by the Assembly of State Parties of the International Criminal Court (ICC) of the Rome Statute to have Article 124, titled “Transitional Provision” deleted for obvious reasons. This has widely been seen as a welcome development.

Conclusion

The Rome Statute is the founding document of the International Criminal Court, a Court created to prosecute, among other crimes, the most serious crimes of war. Article 124 of the Rome Statute, however, permits States to refuse the ICC jurisdiction over war crimes committed on their territory or by their own nationals for a period of up to seven years. The Principle of Reservation provides flexibility by permitting a state to reserve what is unpleasant to its interest and absorb what it deems fit, instead of denouncing a treaty as a whole. However, it is a fact that reservation as a result of exercise of states’ sovereignty has greatly reduced the efficiency of treaties. The deletion of article 124 of the Rome Statute is therefore a welcome development.