ASSESSING THE IMPACT OF CONTEMPORARY INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS IN THE COMMONWEALTH

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DECLARATION

I declare that this thesis is my own work and except where reference has been made and duly acknowledged of existing work. I also declare that this thesis has not been submitted in whole or part to any university or this school for the award of a degree.

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TABLE OF ABBREVIATIONS

AAT	**Administrative Appeal Tribunal**
ANCs	**Accountability Now Clubs**
ASP	**Assembly of State Parties**
AU	**African Union**
BBC	**British Broadcasting Corporation**
CANZ	**Canada and New Zealand**
CARICOM	**Caribbean Community and Common Market**
CHOGM	**Commonwealth Head of Government Meeting**
DPP	**Director of Public Prosecution**
DRC	**Democratic Republic of Congo**
ECHR	**European Convention on Human Rights**
FCA	**Federal Court of Appeal**
ICC	**International Criminal Court**
ICC CA Act	**International Criminal Court (Consequential Amendment) Act**
ICD	**International Crimes Division**
IC ICCA	**International Crime and International Criminal Court Act**
ICTJ	**International Centre for Transnational Justice**
ICTR	**International Criminal Tribunal for Rwanda**
LRA	**Lord Resistance Army**
LTTE	**Liberation Tigers of Tamil Eelam**
MOU	**Memorandum of Understanding**
NCICC	**Nigerian Coalition for the International Criminal Court**
NGOs	**Non-Governmental Organizations**
NPWJ	**No Peace Without Justice**
OTP	**Office of the Prosecutor**
SCC	**Supreme Court of Canada**

SCSL	**Special Court for Sierra Leone**
UKSC	**United Kingdom Supreme Court**
UN	**United Nations**
UNESCO	**United Nations Education Scientific and Cultural Organization**
UNSC	**United Nations Security Council**
UNTS	**United Nations Treaties Series**
UPDF	**Uganda Peoples Defence Force**

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Abstract

The overarching argument of this thesis is that, contemporary international criminal courts and tribunals have, to varying degrees, exerted significant impacts on judicial, legislative, and executive, thoughts, processes, and actions within conflict, post-conflict and non-conflict states in the Commonwealth. This thesis analyzes evidence of these impacts by examining states in the Commonwealth, where contemporary international criminal courts and tribunals have operational and jurisdictional relevance. It does this by categorizing such states into four groups of states, conflict, post-conflict, non-conflict states and states where contemporary international criminal courts and tribunals have made marginal impacts. The thesis evaluates the impacts of contemporary international criminal courts and tribunals in these states by analyzing evidence, garnered from a study of judicial, legislative and executive actions and processes influenced directly or indirectly by contemporary international criminal courts and tribunals with operational and jurisdictional relevance in the Commonwealth.

The thesis also undertakes an assessment of the overall impact of contemporary international criminal courts and tribunals in the Commonwealth on judicial, legislative and executive thoughts, actions and processes. In assessing the impact, the thesis is framed by two overarching arguments which set the tone for the discussions and analysis undertaken here. The first is that, certain factors such as engagement by the different courts and tribunals with states, the role of states actors and institutions; have helped contemporary international criminal courts and tribunals exert marginal to major influences on judicial, legislative and executive thoughts, processes and actions within the Commonwealth. The second overarching argument made in the thesis in assessing the impact of these contemporary international criminal courts and tribunals is that, certain factors such as the poor visibility of international criminal courts and tribunals within Commonwealth States, conflicting visions of justice that these courts and tribunals ought to dispense by relevant stakeholders and the non-transposition of the norms of international criminal law and international humanitarian law within Commonwealth States; have inhibited the impact of these courts and tribunals on judicial, legislative and executive thoughts, processes and actions within the Commonwealth. It concludes by noting that international criminal courts and tribunals have had different levels of impacts on states across the Commonwealth due to the coalescence of the foregoing factors.

CHAPTER ONE

GENERAL INTRODUCTION

I. Background to the Study

States are, in general, vested with the right to investigate and prosecute crimes that occur within their territorial boundaries.[1] However, either due to their inability or unwillingness, states have all-too-often failed to investigate and prosecute all-too-many serious crimes committed within their territorial boundaries. The inaction of most states in this regard has led to the establishment of international criminal courts and tribunals to address certain of these atrocities committed across the globe.[2] In recent times, a number of such international criminal courts and tribunals have been created. Some of these have jurisdiction over serious international crimes committed in some of the states within the Commonwealth. These are, the International Criminal Tribunal for Rwanda (the Rwandan Tribunal),[3] the International Criminal Court (the ICC) and the Special Court for Sierra Leone (the Special Court). These courts and tribunals can only investigate and prosecute a limited number of cases within the confines and constraints of their jurisdictions and circumstances dictated by external factors and considerations.[4]

The establishment and operation of international criminal courts and tribunals has elicited a mixed reaction. They have garnered as much praise and acclaim as they have criticisms.[5] These courts and tribunals have also been assessed on different grounds ranging from their effectiveness, desirability, productivity, and contribution to the jurisprudence of international criminal law. A number of

[1] For more details on the traditional heads of jurisdiction such as territoriality principle, nationality principle, passive personality principle, the protective principle and universal jurisdiction see: Ian Brownlie, *Principles of Public International Law,* (7th edn, Oxford University Press, 2008) 301-306; Robert Cryer, Håkan Friman Darryl Robinson and Elizabeth Wilmshurst, *An Introduction To International Criminal Law And Procedure*, (3rd edn, Cambridge University Press 2010) 46-51; Michael Akehurst 'Jurisdiction in International Law' (1972-1973) 46 British Year Book of International Law 145.

[2] For a detailed examination of the historical evolution of war crimes prosecution, see: Timothy L.H. McCormack, 'From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime', in Timothy L.H. McCormack and Gerry J. Simpson (eds), *The Law of War Crimes National and International Approaches* (Kluwer Law International, 1997) 31-63.

[3] Rwanda Tribunal has been included in this research because it forms an important part of international criminal courts and tribunals currently in operation within Commonwealth States, although Rwanda was not a member of the Commonwealth, in 1994 when the Tribunal was established with jurisdiction over crimes, which occurred in Rwanda in 1994 and in neighbouring territories.

[4] Generally, international criminal tribunals and courts are established to investigate and prosecute a limited number of perpetrators, those who bear the greatest responsibility, and the masterminds of the conflicts. This is reflected in the respective statutes establishing the various international criminal courts and tribunals.

[5] Leslie Haskell and Lars Waldorf, 'The Impunity Gap of the International Criminal Tribunal for Rwanda: Causes and Consequences', (2011) 34 Hastings International and Comparative Law Review 49,75-85 (Leslie Haskell and Lars Waldorf, 'The Impunity Gap of the International Criminal Tribunal for Rwanda'); Makau Mutua, 'From Nuremberg to the Rwandan Tribunal: Justice or Retribution?' (2000) 6 Buffalo Human Rights Law Review 77, 78

different indices have been used in assessing the impact of these courts and tribunals.[6] There is no gainsaying the fact that whatever the outcomes of assessments of these international criminal courts and tribunals, it is clear (from available material, state practice and reports) that international criminal courts and tribunals have had a measure of impact on different aspects of life in many states. These impacts are often not highlighted and are frequently glossed over.

This research is thus set against the background that contemporary international criminal courts and tribunals across the Commonwealth have, to varying degrees, made impacts on judicial, legislative, and executive, thought, processes, and actions within certain of the states that constitute this international grouping. The varying levels of impacts made by these courts and tribunals within the relevant states appear to have been minimised or maximised by the presence of certain factors. The research intends to evaluate the impact that contemporary international criminal courts and tribunals have had on the above-mentioned areas within conflict, post conflict and non-conflict states in the Commonwealth.[7] In assessing the impact of contemporary international criminal courts and tribunals on conflict and post-conflict states, the research is limited to conflict and post-conflict states in the Commonwealth, where the Rwandan Tribunal, the Special Court and the International Criminal Court have operational and jurisdictional relevance. These are Kenya, Nigeria, Rwanda, Sierra Leone and Uganda.

Turning to non-conflict states, it is impossible to examine the impact of contemporary international criminal courts and tribunals on all non-conflict states in the Commonwealth in this research. Consequently, as a result of a preliminary analysis undertaken, the research will examine the impacts of these courts and tribunals on Australia, Canada and the United Kingdom, non-conflict states in the Commonwealth which have had a robust and visible engagement with contemporary international criminal courts and tribunals as gathered from a review of databases (such as Trial[8] and the Domestic Case Law on International Criminal Law Database - DomCLIC)[9] and from government policies.

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[6] The DOMAC Project examines the interaction between national and international courts involved in prosecuting mass atrocities cases. It examines the impact international Criminal Courts and tribunals have had on the rate of prosecution of mass atrocities cases, penalties, reparations and awards and procedural legal standards in cases of mass atrocities in national legal systems. Available at http://www.domac.is/ accessed 12/10/2013.

[7] See generally, Mark Ellis, 'The International Criminal Court and its Implications for Domestic Law and National Capacity Building', (2002) 15 Florida Journal of International Law 215; Mohammed M. El Zeidy, 'The Ugandan Government Triggers the first Test of Complementarity Principle: An Assessment of the First State Party Referral to the International Criminal Court', (2005) 5 International Criminal Law Review 88; Victor Peskin, 'Caution and Confrontation in the International Criminal Court's Pursuit of Accountability in Uganda and Sudan', (2009)31 Human Rights Quarter 655, 675; See also Janine Natalya Clark, 'Peace, Justice and the International Criminal Court: Limitations and Possibilities', (2011) Journal of International Criminal Justice 521, in exploring the possibilities and limitations posed by the role of the ICC as a tool for both peace and justice as opposed to either of.

[8] http://trial-ch.org/en/home.html accessed 04/02/2013.

[9] http://www.asser.nl/default.aspx?site_id=36 accessed 07/02/2013.

The research will also map out the more marginal impacts of contemporary international criminal courts and tribunals across other states in the Commonwealth such as Trinidad and Tobago and New Zealand. Other geo-political regions in the Commonwealth have been left out under this heading for the reasons that follow. States in Africa and Western Europe that have had major engagements with these courts and tribunals have already been classified as conflict, post-conflict and non-conflict states and would be treated accordingly in the research. There are no representations from Asia, because states in the region have not had significant engagement with the courts and tribunal under review as to generate major or marginal impacts across judicial, legislative and executive thought, actions and processes.

II. Overarching Research Question

To what extent, if any, has the establishment of contemporary international criminal courts and tribunals impacted on judicial, legislative and executive thought, processes and actions within conflict, post-conflict and non-conflict states in the Commonwealth?

III. Hypothesis

The working hypothesis of this study is that contemporary international criminal courts and tribunals established to address accountability for serious international crimes have helped to foster the introduction of novel substantive and procedural provisions, and rights within the domestic legal systems of conflict, post conflict and non conflict states in the Commonwealth.

IV. Research Methodology

The research will be undertaken primarily through the desk review of relevant primary and secondary literature. This research chronicles and examines the background, establishment, work, jurisprudence and legacy of contemporary international criminal courts and tribunals in the Commonwealth by examining the statutes, rules of procedure and evidence and the case law, of these courts and tribunals. The research will also undertake a study of national legislation and the domestic institutions that are engaged in the prosecution of serious international crimes in specific conflict, post-conflict and non-conflict states within the Commonwealth. The research will also draw from the expertise, work and presence of Nongovernmental organisations working in the target states within the Commonwealth particularly; in areas where the relevant data and literature are not readily accessible to a researcher undertaking desk research in England.

V. Literature Review

There are a plethora of works providing a detailed analysis of the historical development of international criminal law and the earliest attempts by the international community to assert

jurisdiction over war criminals.[10] Timothy McCormack charts the evolution of international criminal law beginning with an examination of the "earliest extant writings on the strategy of war drafted in the Sixth Century BC by the Chinese Warrior Sun Tzu".[11] William A. Schabas traces the prosecution of war criminals back to the ancient Greeks. He provides a vivid account of the negotiating and drafting history of the International Criminal Court.[12] Adopting a different timeline, Robert Cryer et al[13] examines the modern history of international criminal prosecutions beginning from the largely unsuccessful efforts made at Leipzig at the end of the First World War to bring some alleged perpetrators of various international crimes to account.

Since the failed attempts at Leipzig to prosecute war criminals for serious crimes that occurred during the First World War, a number of international criminal courts and tribunals have been established to prosecute perpetrators of heinous crimes arising from different conflicts. First, at the end of World War II, the victorious allies created the Nuremberg and Tokyo Tribunals to prosecute the serious international crimes that occurred during the Second World War. In the 1990s, the United Nations Security Council created two ad hoc tribunals – namely, the International Criminal Tribunal for the Former Yugoslavia (the Yugoslavia Tribunal) and the International Criminal Tribunal for Rwanda (the Rwandan Tribunal). The former was created to address the "serious violations of international humanitarian law" that occurred in the territories of the former Yugoslavia, while the latter was established to prosecute the genocide that occurred in Rwanda. Since, the establishment of the ad hoc tribunals, the United Nations has created a new subset of courts designed to apply a mix of international and national laws. These new waves of hybrid courts include the East Timor Special Panel,[14] United Nations Mission in Kosovo Regulation 2000/ 64 Courts[15], the Special Court for

[10]See generally, Roberto Bellelli, *International Criminal Justice Law and Practice From the Rome Statute to the Review* (Ashgate Publishing Ltd 2010); Yves Beigbeder, *International Criminal Tribunals: Justice and Politics* (Palgrave Macmillan, 2011).; Roger S. Clark, 'The International Criminal Law System (2010) 8 New Zealand Journal of Public International Law 27,30.

[11] Ibid, note 2 at 31-63

[12] William Schabas, *An Introduction to the International Criminal Court* (3rd edn, Cambridge University Press 2000) 1-21; For further details on the evolution and development of international criminal law, see, Gary Bass, *Stay the Hand of Vengeance: The politics of War Crime Tribunals* (Princeton University Press 2000); For a detailed analysis of the Rome Statute of the ICC, see Leila Nadya Sadat, *The International Criminal Court and the Transformation of International Law* (Transnational Publishers, Inc. 2002).

[13] Ibid, note 1, Chapter 6.

[14] See UNTAET Regulation 2000/11 (6 March 2000) on the Organization of Courts in East Timor and UNTAET Regulation 2000/15 (6 June 2000) on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences.

[15] UNMIK Regulation 2000/6 (On the Appointment and Removal from Office of International Judges and International Prosecutors) first introduced a mixed composition of international judges and prosecutors in Kosovo. Regulation 2000/34 On the Appointment and Removal from Office of International Judges and International Prosecutors extended it throughout the courts in Kosovo. Regulation 2000/64 on Assignment of International Judges and Prosecutors empowers the Special Representative of the Secretary-General to establish Panels of mixed composition of three judges made up of at least two international Judges and these panels became known as Regulation 64 Panels.

Sierra Leone,[16] the Extraordinary Chambers in the Courts of Cambodia[17] and the Special Tribunal for Lebanon.[18] In 1998, efforts at creating international criminal courts and tribunals reached and recorded a high water mark with the adoption of the Rome Statute of the International Criminal Court.[19] All of these international criminal courts and tribunals have been the subject of a vast array of literature.[20]

The courts and tribunals have elicited mixed reactions. Specifically the Rwandan Tribunal has been criticized on a number of grounds, chief among which is its perception as a "victor's justice kind of tribunal" which failed to prosecute crimes committed by the Rwandan Patriotic Front's armed wing, i.e. the Rwandan Patriotic Army.[21] The Rwandan Tribunal also came under intense disapproval for its failure in engaging with the people of Rwandans early on in its operations. Victor Peskin has dealt extensively with the issue of cooperation between such ad hoc tribunals (such as the Rwandan Tribunal) and the relevant conflict or post-conflict states. He notes that state cooperation is intrinsic to the success of the trials conducted by these ad hoc tribunals and sets out in great details the controversy-ridden start in the relationship between the Rwandan Tribunal and the Rwandan government during the process of the creation of that Tribunal by the Security Council, when he analyses "(T)he Struggle to Create the ICTR."[22] He also tackles the issues that had always been at the centre of state (non)cooperation between the Rwandan government and the Rwandan Tribunal.[23]

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[16] The Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, and the Statute of the Special Court for Sierra Leone, were included in the 'Report of the Planning Mission on the Establishment of the Special Court for Sierra Leone transmitted by the Secretary-General to the President of the Security Council by Letter dated 6 March 2002' (8 March 2002) UN Doc S/2002/246, Annexe, Appendix II and its Attachment. In 2002, the Sierra Leonean Parliament promulgated the Special Court Agreement (2000) Ratification Act 2002.

[17] The Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, promulgated on 10 August 2001. See www.ridi.org/boyle/kr_law10-08-02.htm accessed 18/10/2012; For a detailed analysis and overview of internationalized criminal courts of Cambodia, East Timor Special Panels, UNMIK Regulation 64 Panels and the Special Court for Sierra Leone see, Cesare P.R. Romano et al (eds) *Internationalized Criminal Courts Sierra Leone, East Timor, Kosovo and Cambodia* (Oxford University Press 2004).

[18] Agreement Between the United Nations and the Lebanese Republic on the Establishment of a Special Tribunal for Lebanon Annex to the Security Council Resolution 1757 adopted by the Security Council on 30 May 2007 S/RES/1757.

[19] Rome Statute of the International Criminal Court, July 17 1998, 2187 UNTS, 90

[20] See generally, Bassiouni M.C. (ed) *Post-Conflict Justice*, (Transnational Publishers, Inc. 2002); Beigbeder Yves, *International Justice against Impunity*, (Martinus Nijhoff Publishers 2005) ; Carsten Stahn & Larissa van den Herik (eds) *Future Perspectives on International Criminal Justice*, (T.M.C. Asser Press, 2010); Stromseth Jane, (ed) *Accountability for Atrocities: National and International Responses* (International and Comparative Criminal Law Series Transnational Publishers 2003). Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (Beacon 1998); Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* (Transaction 1997); William A. Schabas, *The UN International Criminal Tribunals: Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press 2006) for a general overview of the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone.

[21] Leslie Haskell and Lars Waldorf, 'The Impunity Gap of the International Criminal Tribunal for Rwanda', note 5 at 75-85

[22] Victor Peskin *International Justice in Rwanda and the Balkans Virtual Trials and the Struggle for State Cooperation* (Cambridge University Press, 2008) 151-153

[23] Ibid at 170-184

Carla del Ponte in her narrative highlights the challenges of cooperation and non-cooperation from Rwanda in the prosecution of the 1994 genocide. [24]

Despite the plurality in the number of international criminal courts and tribunals created, some writers have questioned this excessive reliance or resort to criminal investigations and prosecutions to address the perpetration of serious international crimes across states. Mark Drumbl[25] queries the international community's reliance on prosecution and incarceration and states that while it promotes "justice "it is nevertheless "intrinsically limited." He "proposes a broader integration of extrajudicial and extralegal modalities such as truth commissions, legislated reparations, public inquiries, lustration, and the politics of commemoration".[26] Within the Commonwealth group of states, a number of conflict and post-conflict states such as Rwanda, Uganda, Kenya and Sierra Leone have adopted different types of transitional justice mechanisms to address the commission of serious international crimes within their territories.

Rwanda's adaptation of gacaca courts and its subsequent co-utilization with criminal prosecutions before its conventional courts has become the subject of an expansive body of literature. Phil Clark provides a deep insight into gacaca's evolution, the underlying ethos, processes and outcomes. He describes gacaca "...as designed specifically to meet the needs of the post-genocide environment and as a dynamic practice that in the modern context comes in various forms, both state-run and outside of any official political or judicial structure".[27] Bert Ingelaere's[28] evaluation of the gacaca courts in Rwanda begins with a narrative on the conflict. He examines the metamorphosis of the 'old gacaca into the 'new gacaca' and evaluates the weaknesses and strengths of the gacaca. In the same manner, James Ojera Latigo,[29] reviews traditional justice based practices amongst the Acholi people of

[24] Carla Del Ponte & Chuck Sudetic, *Madame Prosecutor: Confrontations with Humanity's Worst Criminals and the Culture of Impunity* (Other Press 2009); see also Kingsley Moghalu, *Rwanda's Genocide the Politics of Global Justice*, (Palgrave Macmillan 2005) which details the political underpinnings of the Rwanda Tribunal and analyses a number of issues raised in Carla Del Ponte's memoir. He provides an analysis of the political undertones that shaped the Rwandan Tribunal's work.

[25] Mark Drumbl, *Atrocity, Punishment and International Law* (Cambridge University Press 2007), 181.

[26] Ibid at 196

[27] Phil Clark, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda* (Cambridge University Press 2010) 50; see also Erin Daly, 'Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda' (2001-2002) 34 New York University Journal of International Law and Politics 355; William A. Schabas, 'Genocide Trials and Gacaca Courts', (2005) 3 Journal of International Criminal Justice 879; Linda E. Carter ‚Justice and Reconciliation on Trial : Gacaca Proceedings in Rwanda, (2007) 14 New England Journal of International & Comparative Law 41.

[28] Bert Ingelaere, 'The Gacaca Courts in Rwanda' in Luc Huyse & Mark Salter (ed) *Traditional Justice and Reconciliation after Violent Conflict Learning from African Experiences*, (International IDEA, 2008).

[29] See James Ojera Latigo, 'Northern Uganda: tradition-based practices' in 'the Acholi region' in Luc Huyse & Mark Salter (eds.) *Traditional Justice and Reconciliation after Violent Conflict Learning from African Experiences*, (International IDEA, 2008) 85, 113-114; Barney Afako, 'Reconciliation and Justice: 'Mato Oput' and the Amnesty Act, 'Accord : An International Review of Peace Initiatives, No II (Protracted Conflict, Elusive Peace : Initiatives to End the Violence in Northern Uganda, ed. Okello Lucima), online at http://www.c-r.org/our-work/accord/northern-uganda/reconciliation-justice.php accessed 10/07/2013; See Kamari Maxine

northern Uganda as well as the contradictions and tension generated between these processes and the exercise of jurisdiction by the International Criminal Court in Uganda. He highlights the strength and weaknesses inherent in the different traditional justice processes.

The establishment and operations of the contemporary international criminal courts and tribunals under review have generated a lot of controversies brought about by their relationship with the states over whom they seek to exercise jurisdiction. Different narratives have arisen in respect of the operations of these courts and tribunals and its long term impact on the various states. In Rwanda, the narratives range from being critical, supportive or sympathetic to the tribunal or the executive government and its policies.[30] Although, the Special Court was insulated from the politicized environment within which the Rwandan Tribunal operated, it has also been criticized within Sierra Leone for what some perceive as its inadequacies, particularly, its overly international nature characterized by foreign staff and its inability to strengthen the Sierra Leonean legal system.[31] For the ICC, the political environment within which it operates is even more charged and tense than that of the Rwandan Tribunal. Its label as a court targeting Africans is one it finds difficult to shed and it has earned it condemnations and criticisms from Africa.[32]

These courts and tribunals have engaged across states in the Commonwealth through outreach to clear misconceptions and misperceptions surrounding their operations, create awareness on transitional justice issues, and build local capacity particularly amongst media and legal professionals.[33] There are growing calls for the ICC to do more across states to support capacity building as increasingly

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Clarke, *Fictions of Justice The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa*, (Cambridge University Press, 2009) 124.

[30] For a critical narrative of post genocide Rwanda, see Scott Straus and Lars Waldorf (eds), *Remaking Rwanda: State Building And Human Rights After Mass Violence* (University Of Wisconsin Press 2011); Reyntjens, Filip 'Rwanda, Ten Years On: From Genocide to Dictatorship', (2004) 103 African Affairs 177-210; Lars Waldorf, "A Mere Pretense of Justice": Complementarity, Sham Trials, Victors Justice at the Rwanda Tribunal' (2009-2010) 33 Fordham International Law Journal 1221; For a different view, see Gerald Gahima, *Transitional Justice in Rwanda Accountability for Atrocity*, (Routledge 2013); Phil Clark and Z.D. Kaufman (eds) *After Genocide: Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond*, (C. Hurst and Co Publishing Ltd 2009).

[31] The Special Court has also been criticised for being overly international in nature, particularly in the early days when it had a large percentage of international staff. Following the Cassese Independent Report in 2006, changes were introduced with more Sierra Leoneans employed at the Special Court. But critics have been quick to point out that the majority of the Sierra Leonean staff employed were at the lower rung of the ladder in support and general services. See, Tom Perriello and Marieke Wierda, 'The Special Court for Sierra Leone Under Scrutiny' International Centre for Transitional Justice March 2006; Mohammed A. Bangura, 'Delivering International Criminal Justice At The Special Court For Sierra Leone: How Much Is Enough?' in Charles Chernor Jalloh (ed), *The Special Court For Sierra Leone and Its Legacy: The Impact For Africa And International Criminal Law* (Cambridge University Press 2014) (hereafter Charles Chernor Jalloh (ed), *The Special Court For Sierra Leone and Its Legacy*) 714-715 .

[32] Joseph M. Isanga, 'The International Criminal Court Ten Years Later: Appraisal and Prospects (2012-2013) 21 Cardozo Journal of International and Comparative Law 235, 247-261.

[33] Jessica Lincoln, *Transitional Justice, Peace and Accountability, Outreach and the Role of International Courts after Conflict,* (Routledge, 2011) (hereafter Jessica Lincoln, *Transitional Justice supra*); See generally, Charles Chernor Jalloh (ed) *The Special Court For Sierra Leone and Its Legacy,* note 31, at 714-715 for a number of issues surrounding the establishment, operations, challenges and legacy of the Special Court.

contemporary international criminal courts and tribunals are being assessed, not merely on their role in establishing the rule of law and criminal prosecutions but also in terms of strengthening and building local capacity.[34]The Special Court in setting out its outreach goals and possible legacy, was overly zealous, as a result it set for itself targets and goals, which in the light of its precarious funding issues were never going to be easily attainable. [35] Overall, it managed to stay true to its core goals of prosecuting those with the most responsibility and convey the message of the court to Sierra Leoneans.[36] The fact that the Special Court succeeded in transmitting its message to the people of Sierra Leone was confirmed by a report published in 2012 by No Peace Without Justice (NPWJ) and the Special Court. The report stated that over 90% percent of those surveyed had heard about the court.[37] While the Rwandan Tribunal on its part, after a late start in engaging with Rwandans, in pursuit of its completion strategy devised varied programmes and initiatives in reaching out to Rwandans.

It is important at this juncture to emphasise that it is not the intention that this thesis will canvass or deal with all of these issues in detail. This thesis will not of course cover the whole province of international criminal courts and tribunals. It will rather focus on one of the perceived gaps in that literature. For, although the literature covers a lot of the normative aspects of the establishment and operation of international criminal courts and tribunals, there appears to be a gap in the area of assessing the extent to which these international criminal courts and tribunals have exerted an impact on the states in the Commonwealth. In its stride, the work will attempt to demonstrate the extent to which certain factors have contributed to the impact that the courts and tribunal have had in the relevant states. In consequence, this research focuses on the three contemporary international criminal courts and tribunal, which have operational relevance within the Commonwealth.

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[34] Diane F. Orentlicher, 'Judging Global Justice: Assessing the International Criminal Court', (2003) 21, Wisconsin International Law Journal 495 at 507; see Brian R. Opeskin, 'Constitutional Modelling: The Domestic Effect of International Law in Commonwealth Countries', (2001) 27 Commonwealth Law Bulletin 1242; On the necessity of the International Criminal Court engaging domestic systems see, Rajan Menon, 'Pious Words, Puny Deeds, "The International Community" and Mass Atrocities' (2009) 23 Ethics & International Affairs 235; William Burke –White , 'Implementing a Policy of Positive Complementarity in the Rome System of Justice (2008) Criminal Law Forum 59;William Burke –White , 'Proactive Complementarity: The International Criminal Courts and National Courts in the Rome Statute of International Justice', (2008) 49 Harvard International Law Journal 53;Lisa J Laplante, 'The Domestication of International Criminal law: A Proposal for Expanding the International Criminal Law Sphere of Influence (2009-2010) 43 John Marshall Law Review 635; Janine Natalya Clark International War Crimes Tribunals and the Challenge of Outreach, (2009) 9 International Criminal Law Review 99.

[35] Jessica Lincoln, *Transitional Justice supra*; See generally Charles Chernor Jalloh (ed.) *The Special Court For Sierra Leone And Its Legacy,* note 31 at 714-715, for a detailed analysis surrounding the establishment, operations, challenges and legacy of the Special Court.

[36] Rachel kerr and Jessica Lincoln, The Special Court for Sierra Leone Outreach, Legacy and Impact, Final Report, War Crimes Research Group, Department of War Studies, Kings College London, February 2008, 31; On the Special Court's Outreach See generally Janine Clark, 'International War Crimes Tribunals and the Challenge of Outreach', (2009) 9 International Criminal Law Review 99, 106-108; Stuart Ford, 'How Special is the Special Court's Outreach Section?' in Chernor Jalloh (ed.) *The Special Court For Sierra Leone and its Legacy, note 31 at* 505-526 .

[37] No Peace Without Justice, 'Impact and Legacy Survey for the Special Court for Sierra Leone', August 2012.

VI. Independent and Original Scholarship Likely to Emerge

A substantial amount of literature does exist on even the substantive and procedural framework of international criminal courts and tribunals. There are projects carrying out studies and evaluation on contemporary international criminal courts and tribunals. There tend to be studies and evaluation of these bodies. There are also a wide array of reports and occasional papers series published by nongovernmental organisations working in the field on a number of issues pertaining to the work of these courts and tribunals. Notable among such studies is the DOMAC project which examined the interface between international and national courts in prosecuting persons for mass violations and situated its research within four identified areas in which international proceedings may impact national proceedings in respect of mass atrocities.[38] As a result, the DOMAC research has focused on the impact of international criminal courts and tribunals on national systems of conflict states. It has also engaged in a comparative analysis of prosecution of mass atrocity crimes in states outside the conflict zone.

This research is distinguished from these in a number of ways. First this thesis is focused on the Commonwealth. The choice of situating the research within the Commonwealth is significant in a number of respects and is also advantageous as such. The Commonwealth member states as presently constituted are drawn from a diverse geo-political context and a range of religious belief systems. There are member states from Africa, Asia, the Caribbean, North America and Western Europe. The diversity of these states allows us to focus in this one study on three of the contemporary international criminal courts and tribunals (namely the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone and the International Criminal Court). The research also benefits from the fact that, predominantly, the member states of the Commonwealth (with the exception of Mozambique, Rwanda and to an extent predominantly francophone Cameroun) all share a similar legal tradition and language, making analysis across the Commonwealth more feasible and valid.

Another fact that strengthens its claim to originality is that the thesis will identify the impact of international criminal courts and tribunals on conflict, post-conflict and non-conflict states within the Commonwealth and do so under four thematic areas. Most of the existing literature in this area has tended to examine the impacts of these courts and tribunals on national prosecutions of serious crimes. The evaluation undertaken here is broader and more encompassing. First, the thesis examines whether there have been a resort by the national courts of Kenya, Nigeria, Rwanda, Sierra Leone and

[38] See DOMAC Publications, Antonietta Trapani, Comparative Analysis of Prosecutions for Mass Atrocity Crimes in Canada, Netherlands, and Australia, August 2009; Alejandro Chehtman, DOMAC/9 June 2011 'Developing Local Capacity for War Crimes Trials: Insights from BIH, Sierra Leone, and Columbia'; Alejandro Chehtman, 'The ICC and its Normative impact on Colombia's Legal System', DOMAC/16/October 2011; Sigall Horovitz, 'Sierra Leone: Interaction Between International and National Responses to the Mass Atrocities', DOMAC/3, December 2009; Sigall Horovitz, 'Rwanda: Interaction Between International and National Responses to the Mass Atrocities', DOMAC/6, September 2010; Sigall Horovitz, 'Uganda: Interaction Between International and National Responses to the Mass Atrocities', DOMAC/18 January 2013.

Uganda to the case law and jurisprudence of international criminal courts and tribunals. The thesis also seeks to ascertain whether or not contemporary international criminal courts and tribunals have influenced judicial action and process in these states under focus. It also goes on to examine the extent and quality of engagement with the international criminal courts and tribunals in states like Australia, Canada and the United Kingdom, which are regarded as non-conflict states. The impact of these courts and tribunals on judicial action and process will also be mapped across two other Commonwealth States, Trinidad and Tobago and New Zealand.

Second, the thesis will also focus on the impact of international criminal courts and tribunals on legislativ*e* thought, processes and actions by analysing national legislation to distil changes to substantive and procedural laws necessitated or brought about by the assumption of certain international legal obligations by the relevant state requiring its conformity to the substantive and procedural laws of international criminal courts and tribunals. Third, the thesis also examines the impact of contemporary international criminal courts and tribunal on the executive arm of government by examining its influences on thought, processes and actions. These are deducible from an examination of certain government policies, directives and public statements. Additionally and fourthly, the research will also identify the areas in which these international criminal courts and tribunals have impacted on national legal systems with respect to developing local capacity directly through training and indirectly through the engagement of staff and archives. This kind of impact often cuts across the judicial, legislative and executive arms of government.

One overarching concern of the thesis will be to identify and analyse the different factors that have facilitated and maximised the impact of international criminal courts and tribunals in each of these four areas within the Commonwealth. The research also identifies a number of factors that have impeded and minimised the impact of international criminal courts and tribunals in each of these areas within the Commonwealth.

VII. Scope and Chapter Analysis

The work covers seven chapters. Chapter 1 which is the preliminary chapter provides the backdrop to the study, identifies the key and ancillary problems warranting the research (as well as the research questions), re-examines the current state of the literature on the topic and accentuates the justification for, and necessity of, the research.

Chapter 2 assesses the impact of contemporary international criminal courts and tribunals on conflict-states under four thematic areas. The overarching argument of this chapter is that, contemporary international criminal courts and tribunals have, to varying degrees, exerted significant impacts on judicial, legislative, and executive, thought, processes, and actions within conflict-states in the

Commonwealth. In this respect the following states in the Commonwealth are addressed, Kenya and Nigeria.

Chapter 3 studies the impact of international criminal courts and tribunals on post-conflict states under four thematic areas. The overarching argument of this chapter is that, contemporary international criminal courts and tribunals have, to varying degrees, exerted significant impacts on judicial, legislative, and executive, thought, processes, and action within post-conflict states in the Commonwealth. In this respect the following states in the Commonwealth are addressed, Rwanda, Uganda and Sierra Leone.

Chapter 4 evaluates the impact of international criminal courts and tribunals on non-conflict states under four thematic areas. The overarching argument of this chapter is that, contemporary international criminal courts and tribunals have, to varying degrees, made an appreciable impact on judicial, legislative, and executive, thought, processes, and actions within non-conflict states in the Commonwealth. The evaluation undertaken in this chapter is in relation to the following states in the Commonwealth: Australia, Canada and the United Kingdom.

Chapter 5 measures the influence of contemporary international criminal courts and tribunals on two states in the Commonwealth, Trinidad and Tobago and New Zealand (other than the countries already discussed in earlier chapters). The overarching argument of this chapter is that, contemporary international criminal courts and tribunals have, to varying degrees, made impacts on judicial, legislative, and executive, thought, processes, and actions outside the conflict, post conflict and non-conflict states discussed in previous chapters.

Chapter 6 examines the factors facilitating and maximising the impact of contemporary international criminal courts and tribunals in conflict, post-conflict and non-conflict states within the Commonwealth on the one hand as well as those factors impeding the impact. The identified factors may include: the positive contribution of external institutions such as the Commonwealth and regional bodies, established state practice of respect for law, the role of local organisations and civil society organisations, the incorporation of relevant international humanitarian law norms into the domestic legal order of the relevant state, the role of state actors and entities and Judges and the cross-fertilization of personnel. The chapter on the other hand will also evaluate factors which inhibit the impact of contemporary international criminal courts and tribunals in the Commonwealth. The identified factors may include: the low visibility of international criminal courts and tribunals, the physical location of the relevant court/tribunal, the non-formal domestication of relevant international law treaties, negative perceptions and misgivings towards the courts and tribunals, conflicting visions of international criminal courts and tribunals and the reluctance of Asia-Pacific region to internalise the norms of international law and the treaties setting up the courts and tribunals.

Chapter 7, which is the concluding part of the research, provides a summary of the work. It emphasizes vital notes made in the course of the development of the thesis, offers practical recommendations, and outlines programme of actions for the international community and states with a view to strengthening the relationship between states (on the one hand) and international criminal courts/tribunals (on the other hand). It is thought that it is only if this is achieved that international criminal courts and tribunals and national legal systems can strengthen and complement each other's role.

VIII. Definition of Precepts

There are certain key precepts used through out the thesis for which it is apt to provide a definition as they frame the thesis and are used consistently in the study. This section thus, provides an understanding on the key precepts used in this study and provides an understanding of the framework within which they are used.

Precept I: Conflict States

According to the Uppsala Database an armed conflict "is a contested incompatibility that concerns government and/or territory where the use of armed force between two parties, of which at least one is the government of a state results in at least 25 battle related deaths in one calendar year".[39] In this study, Kenya and Nigeria, two states in the Commonwealth where contemporary international criminal courts and tribunals have operational and jurisdictional relevance, and currently facing ongoing conflicts have been classified as conflict states. However, Nigeria's classification as a conflict state is limited to the North Central region of the country, which has for a number of months being under a state of emergency and under the siege of the Boko Haram armed group.[40]

Precept II: Post-Conflict States

The term Post-Conflict may be a nebulous one. But for purposes of this research, the definition provided by the United Nations Development Programme will suffice. It defines post-conflict as the aftermath of a conflict and usually applies to a post-war situation, but can also include internal rebellion against an authoritarian regime.[41] It has been suggested that this "dimension of an internal

[39] www.pcr.uu.se/research/ucdp/definitions last accessed 10/17/2014.
[40] See generally International Criminal Court Report on Preliminary Examinations Activities 2012, November 2012; International Criminal Court Report on Preliminary Examination Activities 2013.
[41] United Nations Development Programme (UNDP), Programming for Justice: Access for All, A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice, UNDP 2005, 178.

rebellion does not of necessity fit easily into the conventional notion of war".[42] This study classifies the following states as post–conflict, Rwanda, Uganda and Sierra Leone. In the aftermath of conflicts states are confronted with how to establish security, the rule of law and other accountability measures, governance and institutions and economic development and restoring social cohesion".[43]

Precept III: Non-Conflict States

The term "non-conflict states" in the research is used to refer to states in the Commonwealth not currently embroiled in war, internal conflict or armed struggle. The use of the term denotes the absence of an armed conflict or internal rebellion resulting in deaths. In this study the term refers to the following states: Australia, Canada, Trinidad and Tobago, New Zealand and the United Kingdom.

Precept IV: Commonwealth States

The term "Commonwealth States" is used throughout the thesis to refer to the members that make up the regional association founded on 26th April 1949, when leaders from eight countries, Australia, Canada, India, New Zealand, Pakistan, South Africa, Sri Lanka (then Ceylon) and the United Kingdom adopted what is now known as "the London Declaration". Historically all Commonwealth States had a link to the United Kingdom and were made up of former colonies. As a result of which Commonwealth Members States have the following shared features: similar language, legal traditions, constitutional values and legal challenges.[44] Though, in recent times, with the admission of Cameroun and Mozambique in 1995 and, Rwanda in 2009, this shared connection has become somewhat diffused. Presently, the Commonwealth Association is made up of 53 states. These states are referred to in this study as "Commonwealth States." The Commonwealth Secretariat in London implements the plans and actions of the Commonwealth Association and its various organisations.

[42] Criminal Justice Reform in Post-Conflict States, A Guide for Practitioners, United Nations Office on Drugs and Crimes and United States Institute of Peace, New York 2011, 2

[43] Capacity Development in Post Conflict Countries, Global Event Working Paper United Nations Development Programme (UNDP) 2010.

[44] See John Hatchard and Gary Slapper, 'The Role of the Commonwealth and the Commonwealth Associations in Strengthening Administrative Law and Justice', (2006) Acta Juridica 405, 406; 60 Ways the Commonwealth Makes a Difference, the Commonwealth@60, Serving a New Generation, 2009; See also Amitav Banerji, 'The 1949 London Declaration: Birth of the Modern Commonwealth' (1999) 25 Commonwealth Law Bulletin 1; James S. Read, 'The New Common Law of the Commonwealth: The Judicial Response to Bills of Rights', (1999) 25 Commonwealth Law Bulletin 31; On the nature of the Commonwealth and the historical background to its establishment, see 'Is the Commonwealth an International Organisation?', (1983) 9 Commonwealth Law Bulletin 635.

CHAPTER TWO

THE IMPACT OF CONTEMPORARY INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS ON CONFLICT STATES IN THE COMMONWEALTH

2.1. Introduction

Contemporary international criminal courts and tribunals established to investigate and prosecute serious international crimes have had varying degrees of engagement with conflict states in the Commonwealth. To a great deal, the differing levels of interaction between states and international criminal courts and tribunals determine the degree of influence that these courts exert within the states. Of the three contemporary international criminal courts and tribunals with jurisdictional and operational relevance in the Commonwealth, the International Criminal Court (ICC)[45] has exerted the most influence within the conflict states discussed in this chapter. This is chiefly because of the obligations imposed by the Rome Statute, which established the ICC, on state parties to implement its provisions within their domestic legal systems. This chapter thus, examines the impact of the ICC on the conflict states of Kenya and Nigeria in the Commonwealth.

2.2. The Impact of Contemporary International Criminal Courts and Tribunals on Kenya

This section examines Kenya's engagement with contemporary international criminal courts and tribunals. An evaluation of the impact of contemporary international criminal courts and tribunals on Kenya is limited to the ICC's impact on Kenya because as earlier stated, of all the contemporary international criminal courts and tribunals, the ICC has exerted the most profound influence in that country. Kenya signed the Rome Statute of the ICC on 11th August 1999 and ratified same in 2005. Kenya's obligations under the Rome Statute of the ICC have been incorporated into the body of its national laws by the International Crimes Act 2008 which entered into force on 1st January 2009.[46]

2.2.2. Impact on Judicial Action and Process

This section examines to what extent, if any, the jurisprudence, case law and norms of contemporary international criminal courts and tribunals have had an impact on judicial action and process in Kenya. Kenya is presently a situation country before the ICC. The Prosecutor of the ICC commenced investigations into the crimes committed as a result of the post-election violence of 2007-2008. Other than the ICC process in which Vice President Samoei Ruto and Joshua Arap Sang a Kenyan Broadcaster (and until recently, including President Uhuru Kenyatta) are presently being tried, there are currently no measures within Kenya to address others complicit in the 2007-2008 post-election violence. Attempts to establish a domestic mechanism to try post-election violence failed, resulting in

[45] Rome Statute of the International Criminal Court Article 1, July 17 1998, 2187 UNTS, 90
[46] International Crimes Act, Act No. 16 of 2008 CAP 60; see generally, Antonina Okuta, 'National Legislation for the Prosecution of International Crimes in Kenya', (2009) 7 Journal of International Criminal Justice 1063.

ICC prosecutions.[47] The Kenyan Truth, Justice and Reconciliation Commission released its report where it named those complicit in the post-election violence and recommended different measures such as further investigations or prosecutions as the case may be to be taken in respect of the persons. The publication of the report led to fresh calls for the establishment of a domestic mechanism to address these violations, but as of present, domestic prosecutions are yet to begin.[48] The ICC activities within the domestic process are at the moment limited to the domestic process for cooperation and surrender. The reference to contemporary international criminal courts and tribunals in the Kenyan judicial process stems from the constitutional challenge to the jurisdiction of the ICC within Kenya's domestic system and the surrender proceedings in respect of Walter Barasa[49] who is wanted for contempt proceedings by the ICC in the Kenyan situation. These cases are examined below.

2.2.2. I. Case Challenging the Constitutionality of the ICC in Kenya

In *Joseph Kimani Gathungu v Attorney-General & Five Others*[50] the applicant on the 22nd September, 2010 filed an application challenging the legality of the ICC's operations in Kenya. The applicant contended further that the ICC's investigation and prosecution of the 2007-2008 post election violence was in violation of Kenya's Constitution because the ICC is not amongst the courts or tribunals created by the Kenyan Constitution.[51] The applicant's main contention was that the Constitution of Kenya was supreme to all other laws and that the Rome Statute of the ICC to the extent of its inconsistency with the Constitution was null and void. In this respect, the fact that the ICC is not one of the courts created in the Constitution was an inconsistency with the Constitution.[52]

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[47] See ICC, Office of the Prosecutor, 'Agreed Minutes of the Meeting between Prosecutor Moreno-Ocampo and the Delegation of the Kenyan Government', The Hague, 3 July 2009; See Jalloh Chernor, 'Kenya v. The ICC Prosecutor', (2012) Harvard International Law Journal, 53, 269-285; 'UN rejects Africa bid to halt Kenya leaders' ICC trials'. BBC News Africa, 15 November 2013. Available at http://www.bbc.co.uk/news/world-africa-24961169 last accessed 20/12/13; Brown, S., & Sriram, C.L., 'The Big Fish won't Fry Themselves: Criminal Accountability for Post-Election Violence in Kenya', (2012) African Affairs, 111, 244-260.; Hansen T. 'Transitional Justice in Kenya?: An Assessment of the Accountability Process in Light of Domestic Politics and Security Concerns', (2011) California Western International Law Journal, 42, 1-35; For more on the post-election violence and attempts to create a domestic Special Tribunal International in Kenya, see Crisis Group, 'Kenya: Impact of the ICC Proceedings', Africa Briefing No.84, Nairobi/Brussels, 9 January 2012. International Crisis Group. Available at http://www.crisisgroup.org/en/regions/africa/horn-of-africa/kenya/b084-kenya-impact-of-the-icc-proceedings.aspx accessed 15/2/2013; International Centre for Transitional Justice, 'Prosecuting International and Other serious Crimes in Kenya', International Centre for Transitional Justice, Briefing Paper 30 April 2013. Available at http://www.ictj.org/publication/prosecuting-international-and-other-serious-crimes-kenya last accessed 12/15/2013; Chandra Lekha Sriram and Stephen Brown, 'Kenya in the Shadow of the ICC: Complementarity, Gravity and Impact', (2012) 12 International Criminal Law Review 219

[48] Report of the Truth, Justice and Reconciliation Commission, Appendix 1 List of Adversely Mentioned Persons and Recommendations of the Truth, Justice and Reconciliation Commission and Appendix 2: List of Adversely Mentioned Persons in Official/Public Reports Relating to Politically Instigated Ethnic Violence/Clashes, 2013.

[49] *The Prosecutor v Walter Osapiri Barasa*, ICC-01/09-01/13

[50] *Joseph Kimani Gathungu v Attorney-General & Five Others*, (2010) 5 eKLR.

[51] Ibid, [1-4]

[52] Ibid, [11-12]

The applicant alleged further, that the new Constitution provided for a framework to address criminal infractions and the ICC was clearly outside the province of this framework. The Court however, held that principles such as "equity, social justice, human rights" amongst others which underlie the new Constitution and aid courts in making judicial decisions cannot be realised with Kenya acting alone and, to realise these principles , the ICC has a part to play. Consequently, the court held that the applicant's contention with respect to the actions of the ICC in Kenya cannot be sustained, and dismissed the applicant's motion.[53]

2.2.2.2. Surrender Proceedings

In respect of *Walter Osapiri Barasa v The Cabinet Minister of Interior and National Co-ordination & Six Others*,[54] the facts of the case are that, the ICC on 18th September, 2013, issued a warrant of arrest under seal against the petitioner for three counts of corruptly influencing witnesses and attempting to corruptly influence witnesses.[55] On 2nd October, 2013 the ICC Pre-Trial Chamber II unsealed an arrest warrant in the Kenya situation against Walter Barasa.[56] The ICC's request for the arrest and surrender of the petitioner was transmitted to the Cabinet Secretary, Ministry of Interior and Cooperation of Kenya. The Cabinet Secretary on receipt of the request passed same to the Principal Judge of the High Court of Kenya in line with the provisions of section 29 of the International Crimes Act.[57] Following the publicity generated surrounding the issuance of the warrant of arrest; the petitioner went to court to forestall the execution of the arrest warrants by filing the petition and two motions. The judge in a preliminary ruling on 18th October, 2013, instructed the Director of Public Prosecutions (DPP) to file formal criminal complaints on behalf of the state and made no provision for the petitioner to be informed about the complaint.

At the hearing of the petition, several issues arose for resolution and determination with references to several provisions of the Rome Statute of the ICC. The petitioner stated that a combined reading of article 70 of the Rome Statute of the ICC, rule 162 of the Rules of Procedure and Evidence and section 18 of the Kenya International Crimes Act vests jurisdiction in both the ICC and the high court.[58] The issues canvassed included: the supremacy of the Kenya Constitution in relation to the Rome Statute of the ICC; the constitutionality of the arrest and surrender procedure in the International Crimes Act; the constitutionality of the Cabinet Secretary's decision to request the arrest

[53]Ibid, [17-18]
[54]*Walter Osapiri Barasa v The Cabinet Minister of Interior and National Co-ordination & Six Others* [2013] eKLR
[55] *Prosecutor v Walter Osapiri Barasa*, ICC-01/09-01/13
[56]*Prosecutor v Osapiri Barasa* ICC-01/09-01/13; see also ICC Press Release 02/10/2013, Arrest Warrant Unsealed in Kenya situation: Walter Barasa suspected of corruptly influencing witnesses ICC-CPI-20131002-PR948
[57]See *Walter Osapiri Barasa v The Cabinet Minister of Interior and National Co-ordination & Six Others* [2013] eKLR (2-3)
[58] Ibid, [14]

of the petitioner and whether it can be inferred that special conditions as evinced in section 19(2) exist before the start of arrest and surrender proceedings.[59]

The court in its decision dated 31st January, 2014 made a number of pronouncements on the different issues raised placing reliance on several provisions of the Rome Statute of the ICC. On the issue of supremacy of the constitution and sovereignty of the people in relation to the conventions ratified by Kenya, the judge following a review of the provisions of the Rome Statute, national jurisprudence on treaty making and domestication , and both the 1969 Vienna Convention on the Law of Treaties and the 1986 Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations held that Kenya haven duly domesticated the Rome Statute as part of its domestic laws(excluding the unincorporated parts) the Rome Statute was part of the laws of Kenya and subject to the constitution.[60] On the issues of whether the ICC is obliged to inform a state party before commencing proceedings against its citizen and whether the petitioner ought to be tried in Kenya, the court held that, from a reading of section 4 of the International Crimes Act (which provides for the application of certain parts of the Rome Statute of the ICC) the ICC was not obliged to inform the State Party or the petitioner prior to instituting proceedings and the petitioner did not have a specific right to be tried in Kenya. [61]

In addition, the court found that the petitioner was not entitled to be heard in proceedings at the pre-arrest stage, as a result, the petition was premature.[62] The judge declined the declaratory reliefs sought by the petitioner and extended the right to security pending a determination of the Miscellaneous[63] Criminal Application.[64] The high court on 14th May, 2014 ruled on the Miscellaneous Criminal Application. The judge held that under the provisions of section 30 of the International Crimes Act, where an application for the issuance of an arrest warrant is made as in this case, all that was required of him is an ascertainment and satisfaction that the person is or is suspected of being in Kenya or may come to Kenya and it can be inferred that the person is the same named in the request for surrender. Having satisfied himself on the fulfilment of the requirement of section 30 of Kenya's International Crimes Act; Judge Mwongo ordered that an arrest warrant be issued against Walter Osapiri Barasa.[65] The petitioner subsequently appealed to the Court of Appeal. On 29th May, 2014 the Kenyan Court of

[59] Ibid, [41-130]
[60] Ibid, [42-59]
[61] Ibid, [75-87]
[62] Ibid, [113]
[63] *Republic v. Walter Osapiri Barasa*: Ruling on Miscellaneous Criminal Application Number 488 of 2013
[64] *Walter Osapiri Barasa v The Cabinet Minister of Interior and National Co-ordination & Six Others* [2013] eKLR 131-133
[65] *Republic v Walter Osapiri Barasa*: Ruling on Miscellaneous Criminal Application Number 488 of 2013

Appeal suspended the arrest warrant against the petitioner pending a determination of the substantive appeal against the ruling of the high court judge.[66]

2.3. Impact on Legislative Action and Process

2.3.1. International Crimes Act 2008

The different Commonwealth States have adopted diverse approaches in implementing their treaty obligations under the Rome Statute of the ICC. Kenya like Uganda in passing the International Crimes Act has created a single piece of legislation which embodies both the offences and the cooperation provisions of the ICC regime. The Act in one piece incorporates the crimes within the Court and the normative framework for cooperation under the Rome Statute.

2.3.2. Incorporating the Crimes

The Act criminalizes genocide, crime against humanity and war crime.[67] The crimes are defined in section 6(4) with reference to the Rome Statute of the ICC. However, the International Crimes Act definition of crimes against humanity is broader than article 7 of the Rome Statute, as it covers acts recognised by conventional international law or customary international law which are not covered by the Rome Statute or the International Crimes Act.[68] This broad definition of crimes against humanity is in some ways akin to Canada's approach which embraces customary international law and as a result of this approach, future evolutions in the definition of crimes against humanity will be reflected in Kenya's laws.[69] It is also pragmatic as it obviates the necessity of amending existing laws to reflect new developments in relation to the definition of the crimes. Kenya has not ratified the 2010 amendments to the Rome Statute on war crimes and the crime of aggression.[70] Whenever Kenya ratifies the amendments, the provisions on war crimes will form part of its laws as a result of its approach, while the crime of aggression will have to be incorporated into the international Crimes Act, haven not being part of the crimes codified in the Act.

Other offences codified by the International Crimes Act are offences against the administration of justice in sections 9-17 of the Act. They include: bribery of ICC Judges and officials,[71] obstruction of

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[66] See Tom Maliti, "Kenyan Court of Appeal Suspends Arrest Warrant Against Barasa", International Justice Monitor available at http://www.ijmonitor.org/2014/05/kenyan-court-of-appeal-suspends-arrest-warrant-against-barasa/ last accessed 28/11/2014.
[67] International Crimes Act 2008, s 6(1)
[68] Ibid, s 6(4)
[69] Canada's Crimes Against Humanity and War Crimes Act 2000, C.24, ss 4(3) and 6(3)
[70] Article 8, Para 2 (e) United Nations Reference: C.N.533. 2010. Treaties-6, and Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression in article 8 bis United Nations Reference: C.N.651. 2010. Treaties-8
[71] International Crimes Act 2008, s 9

justice,[72] obstruction of officials,[73] perjury,[74] presenting contradictory evidence,[75] fabrication of evidence,[76] offences pertaining to the making of affidavits,[77] intimidation,[78] and retaliation against witnesses and conspiracy and attempts.[79] Kenya's approach to the incorporation of administration of justice offences has been to replicate the offences in article 70(1) of the Rome Statute of the ICC in individual paragraphs in its implementing legislation as against extending equivalent domestic offences application to the ICC regime as done under the United Kingdom's International Criminal Court Act 2001 (UK ICC Act).[80] In addition to the offences, the International Crimes Act incorporates several provisions of the Rome Statute of the ICC on general principles of criminal law.[81] The general principles incorporated in the Act include: individual criminal responsibility,[82] exclusion of jurisdiction over persons less than eighteen years,[83] responsibility of commanders and superiors,[84] exclusion of statutory limitations over crimes[85] and mental element of crimes.[86] Aside from the foregoing general principles of criminal law incorporated under the Act, the Act also extends the application of Kenyan law on general principles of criminal law to proceedings under the Act, giving persons being tried the option of either relying on defences available under Kenya domestic law or under international law.[87] The Act provides for the provisions of the Rome Statute to prevail over Kenyan law in the event of conflicts in their application.[88]

Section 7 of the Kenya International Crimes Act contains identical provisions with the Uganda ICC Act on the application of general principles of criminal law in domestic proceedings over the core crimes contained in the Rome Statute of the ICC. Both Acts also adopt similar approach in addressing the issue of immunity. Article 27 of the Rome Statute of the ICC is reproduced in section 27 of Kenya's International Crimes Act with slight modifications. Kenya's implementing legislation provides that the immunities which a person enjoys as a result of the person's official capacity will not preclude the provision of assistance to the ICC or the person's arrest and surrender to the ICC.

[72] Ibid, s 10
[73] Ibid, s 11
[74] Ibid, s 12
[75] Ibid, s 13
[76] Ibid, s 14
[77] Ibid, s 15
[78] Ibid, s 16
[79] Ibid, s 17
[80] International Criminal Court Act 2001 C.17, s 54(3), provides a list of equivalent domestic offences to those contained in Rome Statute of the ICC, Article 70(1); See s 61 for similar provisions for Northern Ireland; See also International Criminal Court Act (Scotland) 2001, s 4 for Offences against the administration of justice in Scotland.
[81] International Crimes Act 2008, s 7
[82] Ibid, article 25
[83] Ibid, article 26
[84] Ibid, article 28
[85] Ibid, article 29
[86] Ibid, article 30
[87] International Crimes Act 2008, s 7(2)
[88] Ibid, s 7(2)(b)(i)

The foregoing provisions are however, subject to sections 62 and 115 of the International Crimes Act which addresses situations where a request from the ICC is in conflict with Kenya's obligations to another state or international organisations arising from agreements permitted under article 98 of the Rome Statute.[89] Further, the Act provides that Kenyan courts in proceedings in respect of the core crimes shall apply the Elements of Crime.[90] The use of "shall" indicates that reference to the Elements of Crime in relation to the interpretation and application of the core crimes contained in articles 6-8 of the Rome Statute is mandatory, a marked difference from Uganda's International Criminal Court Act which uses "may" indicating that its use is based on the discretion of the judge.[91]

2.3.3. Jurisdiction

The temporal jurisdiction of the International Crimes Act begins from the 1st of January, 2009. The Act does not have retroactive application. It would have been practical and useful for the Act to have had retroactive application over the serious crimes committed in the course of the 2007-2008 post election violence in Kenya. Jurisdiction in Kenya is founded on the basis of territoriality, the International Crimes Act, incorporates this jurisdictional basis and other grounds which have become an acceptable part of the jurisdictional framework. The jurisdiction of Kenyan courts is laid out in section 8 of the Act. The provisions of section 8 cover both the territorial and extra-territorial jurisdiction of Kenyan domestic courts over crimes against humanity, genocide or war crimes. The Act provides that the core crimes may be prosecuted in Kenya if the offence or acts constituting same were committed in Kenya or after the commission of the offence, the alleged perpetrator is present in Kenya. Other jurisdictional grounds on which domestic courts in Kenya may exercise jurisdiction over the core crimes include: where the alleged perpetrator is either a Kenyan citizen or an employee of the Kenyan Government or a citizen or employee of an enemy state and the victim is a Kenyan citizen or a citizen of a state allied with Kenya in an armed conflict.

The jurisdiction of Kenyan courts over offences against the administration of justice of the ICC is contained in section 18 of the International Crimes Act. Under the provisions of section 18, a person who commits any of the offences against the administration of justice of the ICC may be tried in Kenya if the offence was committed in Kenya or on board an aircraft or vessel registered in Kenya; or the perpetrator at the time of commission of the offence was either a Kenyan citizen or employed by Kenya in a military or civilian capacity or after the commission of the offence, the perpetrator is present in Kenya.[92] The extra-territorial jurisdiction of Kenyan courts over crimes against the administration of justice is much more restrictive in scope as against those over the core crimes.

[89] Ibid, ss 62 and 115; see also Rome Statute of the ICC, Article 98
[90] Ibid, s 7(5)
[91] Uganda International Criminal Court Act 2010, s 19(4)(a)
[92] International Crimes Act 2008, s 18

Before a perpetrator is tried in Kenya for crimes against the administration of justice, there must be a strong connection with Kenya. The Act is however silent on whether consent is required to institute proceedings in respect to both the core crimes and crimes against the administration of justice. A marked departure from the implementing legislation of Australia,[93] Canada,[94] New Zealand,[95] Trinidad and Tobago,[96] Uganda[97] and the United Kingdom[98] which all explicitly require the consent of the Attorney General before proceedings can be instituted under their respective ICC implementing legislation.

2.3.4. Cooperation with the ICC

Kenya's International Crimes Act incorporates extensive provisions on the cooperation regime between the ICC and Kenya. It sets out in details, possible areas of cooperation in the investigation and prosecution of the core ICC crimes.

2.3.4.1. Assistance to the ICC

The ICC may request different forms of assistance from Kenya. The forms of assistance includes: request for provisional arrest, arrest and surrender to the ICC of a person against whom the ICC has either issued an arrest warrant or entered a judgment of conviction, identification of persons and location of items, the taking and producing of evidence, the questioning of any person being investigated or prosecuted, the service of documents, facilitating the voluntary appearance of persons as witnesses or experts, the temporary transfer of prisoners, the examination of places and sites, executing searches and seizures, the provision of records and documents, the protection of victims and witnesses and the preservation of evidence, identification, tracing and freezing, or seizure of proceeds, property and assets, the enforcement of orders and any other type of assistance not prohibited by the law of Kenya with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the ICC.[99] In addition to the listed types of assistance, the Act permits the provision of any other assistance necessary for the investigation and prosecution of crimes within the jurisdiction of the ICC so long as that assistance is not prohibited under Kenyan law. Furthermore, the

[93] This is reiterated in section 16.1 of the Australian Criminal Code Act 1995, which provides that where the conduct constituting an offence took place outside Australia by a person who is neither an Australian citizen or a body corporate registered in Australia, the consent of the Attorney General must be sought before proceedings can be instituted.
[94] Crimes Against Humanity and War Crimes Act, ss 9(3) and (4)
[95] New Zealand International Crimes and International Criminal Court Act, ss 13 and 22
[96] Trinidad and Tobago International Crimes and International Criminal Court Act, ss 13 and 22
[97] Uganda International Criminal Court Act 2010 , s17
[98] United Kingdom International Criminal Court Act 2001 C.17, s 53(3) and s 54(5)
[99] International Crimes Act 2008, s 20(1)(XIII)

Act also permits the rendering of assistance to the prosecutor, the pre-trial and trial chambers in carrying out certain required measures under the Rome Statute.[100]

The Rome Statute in Article 87 sets out the general provisions on assistance including the means for transmitting the requests and the relevant channels through whom such requests may be transmitted. States in their ICC implementing legislation have elaborated on the varied forms of requests that the ICC may make on states.[101] Requests for assistance in the investigation and prosecution of crimes are made through the normal diplomatic channels for carrying out such requests to the Minister of Foreign Affairs and passed on to the Attorney-General or a designate.[102] Kenya's ICC implementing legislation has also adopted the approach of other implementing legislation which designates a person to whom requests from the ICC are to be channelled. The choice of whom to designate is a discretionary right exercised by different states. Although the practice across most of the ICC implementing legislation has been to designate the Attorney General, or Minister of Justice, Kenya's implementing legislation designates both the Minister for National Security and the Attorney General. The Minister responsible for National Security deals with requests for assistance for the arrest and surrender of a person made under Part IV of the Act. While the Attorney General deals with all other types of requests for assistance.[103] In cases of urgency, the formal request procedure specified in section 21 may be varied to allow for such requests to be made through a "written medium" or through the international police organisation or any "appropriate regional organisation".[104] These media are not listed, but these provisions are similar to those of the Uganda ICC Act which lists facsimile and email.[105] These variations do not however obviate the necessity for a formal request as specified in section 21 as the ICC is obliged to make one "as soon as practicable". No timeframe is however indicated.[106] The Attorney-General or Minister depending on whom handles the request is obliged to address and inform the ICC promptly of any decision taken on a request. In cases where the requests for assistance has either been refused or is being postponed, the notification must also set out the reasons for the refusal or postponement as the case may be.[107]

[100] Ibid, s 20(1)(b)
[101] See, International Crimes Act 2008, s 20(1)(XIII); International Criminal Court Act N0. 41 of 2002, s 7(1)(a); International Crimes and International Criminal Court Act, 24(1)(a); For approach by selected African states to incorporation, see generally, Anna Triponel and Stephen Pearson, 'African States and the International Criminal Court: A Silent Revolution in International Criminal Law', (2010) 12 Journal of Law and Social Challenges 65;Olympia Bekou and Sangeeta Shah, 'Realizing the Potential of the ICC: The African Experience", (2006) 6 Human Rights Law Review, 502-505.
[102] International Crimes Act 2008, s 21
[103] Ibid, ss 2 and 21
[104] Ibid, s 22
[105] Ibid, s 21(2)
[106] Ibid, s 22
[107] Ibid, s 26

The Rome Statute of the ICC provides that states must have domestic measures under their laws to comply with requests from the ICC under article 93 of the Rome Statute. As a result, most states ICC implementing legislation incorporates extensive measures for complying with requests from the ICC. The domestic procedures for these varied forms of assistance other than those dealing with arrest and surrender are contained in Part V of the Kenya International Crimes Act. The Attorney General can refuse a request for assistance under Part V of the Act on mandatory and discretionary grounds. The mandatory grounds for refusal are: where the ICC refuses the conditions attached to implementing requests and the ICC has ruled the case to which the request relates inadmissible.[108]

The Attorney General 's discretion to refuse a request for assistance may be exercised to protect national security or third party information and where there are competing requests from the ICC and a state that is not a state party to the ICC pertaining to the same or different conduct.[109] Two common grounds found in Uganda's ICC implementing legislation as well as other Commonwealth States in which the Attorney General or designated authority within the respective Commonwealth State may refuse a request for assistance are grounds of national security or where there are competing requests from both the ICC and a state.[110] The Attorney-General may also postpone the execution of requests from the ICC pending the resolution of certain issues such as: the existence of an ongoing investigation and where the execution of the request would interfere with same,[111] where a ruling on admissibility is pending before the ICC,[112] where there are competing requests from the ICC and a state to which Kenya is under an international obligation,[113] and where the request was made under section 93(1) of the Rome Statute and section 108 applies or a request is made under section 115 to the ICC.[114] ICC request to assist the defendants in the preparation of a defence would be treated in like manner as requests from the Prosecutor.[115]

2.3.4.2. Arrest and Surrender

The Act provides detailed provisions in Part IV on the arrest and subsequent surrender of persons to the ICC. In Kenya's implementing legislation like Uganda, the content of a request for arrest and surrender are not expressly incorporated. Rather, the Act makes direct reference to the provisions of article 91 of the Rome Statute of the ICC. A combined reading of section 28 of the Act and the

[108]International Crimes Act 2008, s 109(1)
[109]Ibid, s 109
[110] Uganda's International Criminal Court Act 2010, s 60(2); Australia's International Criminal Court Act N0. 41 of 2002, s 51(2)(b) and (c) read along with ss 59(4), 60(3) and 148.
[111] Ibid, s 112
[112] Ibid, s 113
[113] Ibid, s 114
[114]Ibid, s 110
[115]Ibid, s 117

provisions of the Rome Statute provides the content of a request for arrest and surrender which may be made to Kenya by the ICC. Where the ICC Pre-Trial Chamber has issued a warrant of arrest, the request must be accompanied by information which describes the person and identifies the person's probable location and a copy of the warrant of arrest.[116] Requests for assistance in relation to persons convicted by the ICC must be accompanied by authenticated copies of the warrant of arrest, the judgment and sentence (if any) and information identifying the person named in the judgment.[117]

2.3.4.2.1. Procedure for Arrest

Requests for arrest and surrender are made to the Minister for Foreign Affairs and passed on to the National Security Minister (Minister)[118] who notifies a judge of the high court to issue an arrest warrant, on satisfaction that the requisite documents and information are contained in the request.[119] The judge to whom the notification has been sent may issue a warrant of arrest if satisfied with the information provided by the applicant that the person is in Kenya or likely to come into Kenya and that the person is the same person named in the warrant.[120] The Minister may apply to the high court at any time to have the warrant cancelled. Where the high court so orders the cancellation of a warrant, it ceases to have effect.[121] Provisional arrest warrants on the other hand are issued by the judge on three grounds: the ICC must have issued a warrant of arrest for the person, or the person must have been convicted in relation to an international crime, the person named in the warrant or judgment is or is suspected of being in Kenya and there is need to issue a warrant urgently.[122] A person arrested on a provisional arrest warrant may be discharged on the orders of the judge, where the Minister's notification of receipt of a formal request for surrender from the ICC is not received within the timeframe set by the judge.[123] The judge under this provision has been given the discretion to set the timeframe. Under Australia's International Criminal Court Act, a timeframe of 60 days is set by the Act.[124]

An arrested person if not discharged has to be brought to court as soon as practicable and may also be granted bail by the court. The Act does not set a timeframe within which an arrested person must be brought before a court. The judge in granting an application for bail must consider the seriousness of the offence, the existence of exceptional grounds that rationalize the grant of bail and safeguards to

[116]Ibid, s, 28 and Rome Statute, article 91(2).
[117] International Crimes Act 2008, s 28 and Article 91(3) of the Rome Statute of the ICC
[118] Ibid, s 21 read in conjunction with section 2 (which defines a Minister).
[119] Ibid, s 29: Reference is made under the provisions of section 29 to article 91 of the Rome Statute of the ICC which provides the requisite documents which must accompany a request for arrest and surrender under the Act.
[120] Ibid, s 30
[121] Ibid, s 31
[122] Ibid, s 32
[123] Ibid, s 34
[124] Ibid, s 26

ensure that Kenya can honour its obligation to surrender the person to the ICC. [125] Where an application for bail has been made, the Minister must notify the ICC and convey any recommendations made by the ICC to the judge before whom a bail application has been made.[126] Finally, where the person is granted bail, then the ICC may request periodic reports of the bail status. The incorporation of bail provisions is in line with the provisions of the Rome Statute of the ICC which terms it "application for interim release". The Rome Statute explicitly states that a person should have the right to apply for bail in a custodial state. However, it sets a high threshold for the court before bail can be granted.[127] This threshold has been incorporated in Kenya's International Crimes Act.

2.3.4.2.2. Procedure for Surrender

The high court is charged with the task of determining whether a person brought before it should be surrendered to the ICC in relation to the international crimes for which the person is being sought. In determining eligibility for the surrender of a person, the court must be satisfied that: the warrant of arrest or a copy of the judgment has been produced before the high court, the person has been identified as the same named in the warrant of arrest or the judgment of conviction, due process was observed in effecting the arrest and that the rights of the person have been observed.[128] A violation of due process and procedural rights during arrest can only be raised by the person against whom the breach has occurred.[129] This is also the situation in both Trinidad and Tobago and New Zealand's implementing legislation, where only the aggrieved party can raise the issue of a violation of due process and an infraction of procedural rights. In such states, where such violations occur, they go to the root of the matter and may affect the proceedings.[130] However, in jurisdictions such as the United Kingdom, where such violations or infractions can be raised either by the aggrieved person or the court, the occurrence of the violations or infractions does not nullify the process.[131] A person, whose surrender is being sought, will not be surrendered if the person can justify the application of section 51(1) of the Kenya ICC Act which places a mandatory restriction on certain persons from being surrendered.[132]

[125] Ibid, s 35
[126] Ibid, s 36
[127] Rome Statute of the International Criminal Court, Article 59(3)-(5)
[128] International Crimes Act 2008, s 39(1)-(3)
[129] Ibid, s 39(4)
[130] See both Trinidad and Tobago's International Crimes and International Criminal Court Act, s 43 and New Zealand's International Crimes and International Criminal Court Act, s 43
[131] International Criminal Court Act 2001 C.17 s 5(6)-(9)
[132] International Crimes Act 2008, s 39 (5)

A person may consent to being surrendered, a situation which obviates the necessity of holding a hearing. The court in accepting the person's consent must satisfy itself that the person is present in court, represented by a legal practitioner and has freely consented to the surrender.[133] In Uganda, consent to surrender is made before a registrar; there is no provision for a legal practitioner.[134] The United Kingdom ICC Act codifies different features and requirements for making a valid consent to surrender from most of the implementing legislation across Commonwealth States. Under the United Kingdom ICC Act, consent to surrender must be in writing and may be made on behalf of a person. [135] The mandatory language used in section 41 of Kenya's International Crimes Act, means that all of the conditions must be met before the high court can accept consent to surrender as validly given. Where a person is deemed eligible for surrender by the court or the person has consented to surrender, the court issues a warrant of detention and sends a copy to the Minister, who issues the surrender order, where this is not done within two months, the person may apply to be discharged.[136] The Minister upon the receipt of a warrant of surrender may do one of the following: order that the person be surrendered, issue a temporary surrender under section 45, refuse surrender if it falls within the restricted grounds in section 51[137] or postpone surrender under section 52 of the Act.[138]

The Minister can refuse surrender on mandatory or discretionary grounds. The mandatory grounds for refusing surrender are: where the ICC has either determined that the case is inadmissible or has notified the Minister of its decision not to proceed with the request.[139] A ruling of inadmissibility by the ICC is both a mandatory ground for refusing a request for surrender and assistance under the Act.[140] The discretionary grounds for which the Minister may refuse surrender include: (a) where there are competing requests from the ICC and a non-party State to whom Kenya owes a subsisting international obligation over the same conduct [141] and (b) where there are competing requests between the ICC and a non-party State to whom Kenya has a subsisting international obligation over different conducts.[142] The Minister in making a decision whether to surrender or extradite the person must take into account the date of the requests, the interest of the requesting state (where the crime was committed and nationality of the victim and perpetrator) and the likelihood of a prospective surrender between the ICC and the State.[143] In addition to the above factors, where the competing requests

[133] Ibid, s 41
[134] Ibid, s 35: Also persons arrested under provisional warrants may also consent to surrender see ss 35(4) and (5)
[135] International Criminal Court Act 2001 C.17, s 7(4)
[136] International Crimes Act 2008, s 42
[137] The restrictions imposed by section 51 include where there have been previous proceedings against the person, the ICC determines that the case is inadmissible and section 62(2) applies.
[138] International Crimes Act 2008, s 43
[139] Ibid, s 51(1) read together with sections 53(3), 55(3), 56(2) and section 62(2)
[140] Ibid, s 109(1)
[141] Ibid, s 51(2)(a) read together with sections 57 and 59(4)
[142] Ibid, s 51(2)(b) read together with section 60(3)
[143] Ibid, s 59(5)

relates to different conducts, the Minister must take into account the seriousness of the offence for which the ICC seeks surrender.[144] The foregoing is closely modelled on the provisions of article 90 of the Rome Statute of the ICC. The approach taken by states in incorporating these provisions has been to replicate as closely as possible the provisions in the Rome Statute. Appeals against a high court decision either allowing or disallowing surrender may be brought by any of the parties to the court of appeal within 15 days.[145]

Besides, the foregoing grounds of refusal highlighted above, in relation to offences against the administration of justice, the Minister or the Attorney-General may refuse the request where in their opinion, the request to surrender will lead to the person being unfairly treated.[146] This was one of the grounds raised by Walter Osapiri Barasa when he urged the court to refuse his surrender to the ICC on grounds that he will be unfairly treated.

2.3.5. Impact on Executive Action and Process

The ICC has had a visible impact on executive action in Kenya and this is attributable to Kenya being a situation country. This state of affairs has generated a lot of correspondence and engagement between the ICC and Kenya.[147] The engagement and interaction between the Kenyan Government and the ICC has influenced and shaped executive actions and processes in Kenya. These influences are examined below.

First, following Pre-Trial Chamber II authorization of investigation in March 2010, the Registrar of the ICC visited Kenya where she held meetings with national authorities. During her visit she exchanged letters with the Kenyan government which set out the parameters and logistics needed for the court's operation in Kenya.[148] The exchange of letters was necessary for the court to assess the needed logistic and support in carrying out investigations and provide protection to its witnesses.

Second, the Vice-President (until recently the President as well) is currently on trial in The Hague. The President and Vice-President have both participated in on-going proceedings at The Hague over

[144] Ibid, s 60(4)
[145] Ibid, s 63
[146] Ibid, s 19(2)
[147] Press Release: 30/09/2009, ICC Prosecutor Supports Three Prong-Approach to Justice in Kenya, ICC-OTP20090930-PR456, In the intervening period between the opening of preliminary investigations in the situation in Kenya in 2008 and the eventual request for authorization to open investigation in 2009, there were a lot of discussions and negotiations between the Office of the Prosecutor and the Government of Kenya over the establishment of a domestic mechanism to address the violations. The failure of the attempts to establish domestic mechanisms led to the triggering of the jurisdiction of the ICC by the Prosecutor of the Court. On the role of civil society in Kenya's quest for accountability for human rights violations see, Bjork, C. & Goerbetus, J., 'Complementarity in Action: The Role of Civil Society and the ICC in Rule of Strengthening in Kenya', (2011) 14 Yale Human Rights and Development Law Journal, 205-230.
[148] Press Release, The Registrar exchanged letters with the Kenyan Government on the operational and legal framework essential for the court's operation in its territory, 03/09/2010 ICC-CPI- 20100903-PR571.

the situation in Kenya. Although, they both complied with all summons to appear in proceedings, the Prosecutor of the ICC consistently accused the executive of non cooperation in the cases. On 7th October, 2014 President Kenyatta, was at The Hague to attend a status conference as a result of allegations made by the prosecutor that the Kenyan Government was not cooperating with it on request for access to vital evidence needed to prosecute the case against President Uhuru Kenyatta. Following the dismissal of charges against President Uhuru Kenyatta on 5th December 2014, only the trial of the Vice President and Arap Sang the Broadcaster are proceeding in the situation in Kenya.

Accordingly, proceedings at The Hague in relation to President Uhuru Kenyatta (prior to the dismissal of the charges against him) and his Deputy dominated the discourse and became a fixture on the agenda of the African Union. On 8th July, 2013 the African Union wrote to the President of the ICC, conveying a decision of the 21st Ordinary Session of the Assembly of Heads of State and Government of the African Union which requested for a deferral of the Kenya situation to national mechanisms in Kenya in line with the complementarity principle. On 10th September, 2013 the African Union again wrote a letter to the ICC President requesting that President Uhuru Kenyatta and his Deputy be allowed to choose the sessions they wished to attend in light of their constitutional obligations. The Court in its reply dated the 13th of September, 2013 noted that the issues raised by the African Union can only be addressed before the court formally and not by the President.[149]The proceedings at The Hague from the Kenya situation ensured that the issue remained on the agenda and even stoked the fire of the ICC/AU confrontation. In October, 2013 at the Extraordinary Session of the Assembly of Heads of State of the African Union, H.E. President Uhuru Kenyatta decried the activities of the ICC in Africa.[150] In November, 2013 the United Nations Security Council, put the issue of a deferral of the ICC proceedings in Kenya to a vote. Members of the Security Council voted against a deferral of the situation in Kenya. The ICC on the 5th of December, 2014 withdrew the charges against President Uhuru Kenyatta in proceedings that had become dominated by repeated adjournments and accusations.

2.3.6. Impact on Kenya

It is perhaps fitting to say at this stage, that it is still early days in assessing the impact of the ICC in Kenya nonetheless; the court has initiated certain programmes across different segments of Kenya. However, the Court has not been as active in Kenya as it was in Uganda and so its influences in these regard are minimal. These outreach activities have made marginal impacts on different focus areas of the ICC outreach strategy in Kenya and they are examined below.

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[149] http://www.icccpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/pr943/130913-VPT-reply-to-AU.pdf accessed 04/02/13

[150] Speech by H.E. President Uhuru Kenyatta at the Extra Ordinary Session of the Assembly of Heads of State and Government of the African Union, Addis Ababa, 12 October 2013.

The ICC's Initial outreach activities in Kenya were geared towards establishing links and networks with victims and affected communities. To this end, the ICC established and forged alliances with specific organisations working on ground in the affected communities.[151] In Kenya, civil society organizations have pushed and contributed immensely to the calls for accountability for post-election violence. They have been vital to the establishment and forging of alliances between the victims and the Court. Although civil society organisations have been active in Kenya in the quest for accountability for post-election violence much of the engagement between the ICC and the executive arm of government in Kenya have been fostered by the ICC through direct and indirect action necessitated by ongoing proceedings in the Kenya situation.[152] The Court beginning from 2009 conducted several missions to Kenya to create relationships with the victims of the crimes with local civil society organizations and community leaders serving as links between the Court and the victims. Reaching out to the victims became even more imperative, following the decision of Pre-Trial Chamber II of the ICC directing the Victims Participation and Reparation Section to reach affected communities and make representations to the court.[153] The Victims Participation and Reparation Section and the ICC Outreach Unit held joint missions and facilitated meetings between the Common Representative for the victims and the victims. As a result a total of 233 victims were authorized to participate in the trials. [154]

The establishment of links with local networks and partners revealed the need for the Court to engage with the members of the media in Kenya. Consequently, in 2010 the Court established its media outreach to Kenyan journalists. The goal of the media outreach was to inform the journalists about the Court and its judicial process and also ensure that local news reporting on the ICC were correct. The ICC Outreach Unit in its 2010 report outlined the various ways in which the Court reached out to members of the Kenyan media. The Outreach Unit carried out training sessions for 87 national and international journalists from print, TV and online media. In September 2010, the Outreach Unit in collaboration with Internews Agency conducted a half-day training for 28 Kenyan radio broadcasters drawn from stations in Nairobi, the Rift Valley, Kisumu and Eldoret. The following month three senior editors and one representative from the Internews agency were invited to The Hague for a four-day training which held from 10-15 October 2010. The Outreach Unit in the period also engaged in consultative meetings with members of the Kenya Editors Guilds and Senior Reporters. In these sessions 20 editors and 12 senior reporters were enlightened on the Court, its mandate and

[151] International Criminal Court Outreach Report 2010 (Public Information and Documentation Section), 71

[152] Bjork, C. & Goerbetus, J., 'Complementarity in Action: The Role of Civil Society and the ICC in Rule of Strengthening in Kenya', (2011) Yale Human Rights and Development Law Journal, 14, 205-230.

[153] See Situation in the Republic of Kenya Order to the Victims Participation and Reparations Section Concerning Victims' Representation Pursuant to Article 15(3) of the Statute, ICC-01/09 (10 December 2009) [9]; International Criminal Court Outreach Report 2010(Public Information and Documentation Section), 71.

[154] Press Release 21/09/2011Kisumu: Registry and the common legal representatives for victims consult with Kenyan Victims ahead of the Confirmation of Charges Hearing in the case *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* ICC-CPI-20110921-PR724

processes.[155] Further, on 3rd December, 2010 the ICC Outreach Unit launched a radio outreach programme in Kenya to inform the public about the court and its processes in four different languages across different radio stations.[156]

The ICC in 2011 and 2012 also organised programmes specifically for female lawyers in Kenya as part of its "Calling African Female Lawyers " campaign[157] and an outreach session with women to mark the international women's day and shed light on the current judicial process in the cases originating from the Kenya situation.[158] Furthermore, the ICC in February and September 2010 distributed 750,000 printed texts on frequently asked questions about the court in Kenya.[159] In subsequent years, the Court has not provided details of its outreach programmes in Kenya.

An examination of the available evidence of judicial, legislative and executive thoughts, actions and processes in Kenya, reveal that the ICC has forged significant alliance with members of civil society organisations and the media in Kenya. This working relationship has been vital to its making contacts with victims of the Court and establishing its cases against those indicted by the Court, although, most of the cases in the Kenyan situation have collapsed as a result of inadequate evidence and witness attrition. High levels of interaction have also been recorded with the executive arm of government which has not produced marked impacts on executive action and process. This is understandable as the executive arm of government in that country has been involved in proceedings before the Court.

2.4.1. Nigeria and Contemporary International Criminal Courts and Tribunals

This section focuses squarely on the impact of the ICC on legislative and executive action / process in Nigeria. This narrow focus is attributable to the fact that of the three contemporary international criminal courts and tribunals with operational and jurisdictional relevance in the Commonwealth, the ICC has, by a very wide margin, had the most appreciable impact on Nigeria. Indeed, Nigeria is presently a situation country undergoing preliminary examination before the ICC. From a review of the available evidence, the ICC is yet to make any impact on judicial action and process in Nigeria. Consequently this section will only be reviewing the impact of the ICC on legislative and executive action/process in that country.

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[155] 2010 Outreach Report *supra* 73-74.

[156] Press Release 03/12/2010 The ICC launches Outreach Programme radio campaign in Kenya ICC-CPI-20101203-PR606

[157] Press Release 01/08/2011 Judge Joyce Aluoch engages with legal and academic communities in Kenya and Rwanda ICC-CPI-20110801-PR706 ICC.

[158] Press Release 09/03/2012 The ICC Outreach Programme in Kenya joins women in Eldoret, Uasin Gishu County to mark International Women's Day. ICC-CPI-20120309-PR771.

[159] ICC, OTP Weekly Briefing 4-10 May -Issue 36 P. 1-2; See also Press Release 04/09/2010 ICC distributes 200,000 copies of the booklet Understanding the ICC ICC-CPI-20100904-PR572.

2.4.2. Impact on Legislative Action and Process

In 2012, the Federal Government of Nigeria submitted a Bill for Crimes Against Humanity before the National Assembly. The salient features of the Bill are examined. "The Bill seeks to provide for the establishment of the International Criminal Court to complement national criminal jurisdictions in Nigeria."[160] The Bill sets out three objectives in its Part I which include: providing mechanisms under Nigeria's laws for the prosecution of the core crimes of genocide, crimes against humanity and war crimes; giving effect to certain provisions of the Rome Statute; and enabling Nigeria cooperate with the ICC. Further, the Bill designates the Attorney-General as the person to exercise all function, duties or powers ascribed to Nigeria as a State Party.[161]

2.4.2.1. Incorporating the Crimes

The offences that the Bill aims to incorporate into Nigerian Law are contained in Part 2 of the Bill. The Bill provides that a person who either in Nigeria or outside commits genocide, crimes against humanity and war crimes is guilty of an offence. Section 4 codifies the five distinct offences and the elements of crime that constitute the crime of genocide under the Rome Statute of the ICC. Section 5 incorporates 11 distinct offences constituting crimes against humanity which were previously not criminalized in Nigerian Law. Section 6(3)(a) codifies war crimes that are grave breaches of the Geneva Conventions. Eight distinct offences which constitute war crimes under this subdivision are codified. Section 6 (3)(b) codifies other serious war crimes that are committed in the course of an international armed conflict and codifies 26 distinct offences which constitute war crimes under this sub heading. Section 6(3)(c) codifies war crimes that are serious violations of article 3 Common to the Geneva Conventions and are committed in the course of an armed conflict that is not an international armed conflict and codifies four distinct offences constituting war crimes under this sub division. Section 6(3)(d) codifies war crimes that are other serious violations of the laws and customs applicable in an armed conflict that is not an international armed conflict and codifies twelve distinct offences. The approach to incorporation of the core crimes and the elements that constitute the offences is similar to that of Australia, which provides a detailed and comprehensive codification of the core crimes. [162]

Furthermore, 6(4)(c) provides that paragraph (c) and (d) apply to protracted armed conflicts within a state boundary between government forces and an armed group or as between armed groups. The Bill in addition provides for the application of the element of crimes adopted or amended in article 9 of the

[160] Explanatory Memo to the Rome Statute of the International Criminal Court (Ratification and Jurisdiction) Bill 2005
[161] Crimes Against Humanity, War Crimes, Genocide and Related Offences Bill 2012, s 3
[162] Australia's International Criminal Court (Consequential Amendments) Act 2002 Act No. 42 of 2002, Division 268.

Rome Statute.[163] Also included in the Bill are offences against the administration of justice of the ICC which are known in several Commonwealth jurisdictions as inchoate offences. The offences include conspiracy to commit any of the offences within or outside Nigeria,[164] aiding and abetting,[165] giving of false evidence before the ICC or in relation to request from the ICC,[166] bribery and corruption of a judge,[167] bribery and officials of the ICC,[168] conspiracy to pervert the course of justice[169] and interference with witnesses or officials.[170] The consent of the Attorney-General is required before proceedings are instituted under the Bill.[171] Typically in Nigeria and other Commonwealth States, criminal cases are prosecuted by the government through the Attorney General who is the Chief Law Officer.[172]

The defences are set out in Part III of the Bill. The Bill provides for a person charged with an offence to rely on defences contained under Nigerian or international law. In the event of conflict between the provisions of international law and domestic law on the application of defences, the Bill expressly provides that the provisions of international law will prevail.[173] This provision is consistent with the implementing legislation of other Commonwealth States such as Kenya, Uganda and Trinidad and Tobago whose implementing legislation provide for the application of both general principles of law recognised under their respective domestic law and international law either expressly enumerated in the Act or incorporated by reference to the Rome Statute of the ICC. A number of the general principles of law on defences contained in the Rome Statute of the ICC are replicated with necessary modifications in the Bill. [174] Other principles codified include: defence to superior order which is ruled out as a defence for the core crimes;[175] responsibility of commanders[176] and the defence of state or diplomatic immunity.[177]

The defence of state or diplomatic immunity is provided for in section 20 of the Bill. The provisions of section 20 of the Bill are made subject to section 308 of the 1999 Nigerian Constitution. Section 308 of the Nigerian Constitution provides immunity from prosecution for the President, Vice-President and, State Governors and Deputy Governors from any court process whilst in office.

[163] Crimes Against Humanity, War Crimes, Genocide and Related Offences Bill 2012, s 7
[164] Ibid, s 8
[165] Ibid, s 9
[166] Ibid, s 10
[167] Ibid, s 11
[168] Ibid, s 12
[169] Ibid, s 13
[170] Ibid, s 14
[171] Ibid, s 16
[172] Constitution of the Federal Republic of Nigeria 1999, s 174
[173] Crimes Against Humanity, War Crimes, Genocide and Related Offences Bill 2012, s 17(1)- (2)
[174] See sub sections 3-6 which rules out the defence that an offence was committed because it is not an offence at the time and place of commission, replicate autrefois acquit or autrefois convict or pardon.
[175] Crimes Against Humanity, War Crimes, Genocide and Related Offences Bill 2012, s 18
[176] Ibid, s 19
[177] Ibid, s 20

Section 20 being subject to the provisions of section 308, preserves the immunity provided for these office holders. These categories of public officers cannot be tried under the Bill and surrendered to the ICC. Aside from the office holders whose immunity are provided for in section 308 of the 1999 Constitution, other citizens of Nigeria or of a state party to the Rome Statute of the ICC who ordinarily would enjoy immunity would not be entitled to claim same under the Bill to prevent surrender to the ICC.[178] However, a citizen of a non –party State with whom Nigeria has a subsisting agreement made under article 98 of the Rome Statute or whom Nigeria owes obligations which derive from international law who normally enjoys immunity as a result of official capacity or position will be entitled to claim immunity to prevent surrender to the ICC.

The Bill does not provide for retroactive application and so the temporal jurisdiction is set at the day following when the Bill enters into force.[179] The practical import of this is that, prior crimes committed by members of Boko Haram can only be prosecuted under existing domestic legislation, which criminalizes acts of terrorism, or under the Geneva Conventions Act.[180] This Bill should be amended to provide for retrospective application to ensure that Nigeria is able to assume jurisdiction in line with the complementarity principle of the Rome Statute of the ICC. The retrospective application of the Bill would ensure that there is no impunity gap for crimes committed by members of Boko Haram and accomplices. States such as Canada, Trinidad and Tobago and New Zealand have all incorporated retrospective jurisdiction over the core crimes in their respective ICC implementing legislation.[181]

The extra-territorial jurisdiction of Nigerian Courts over international crimes is laid out in section 22 of the Bill. Nigerian High Courts have jurisdiction over offences committed outside Nigeria, if at the time of the commission of the offence; i) the alleged perpetrator was a Nigerian citizen or permanent resident, or ii.) the victim of the alleged offence was a Nigerian citizen or permanent resident, or iii.) after the time the offence is alleged to have been committed, the person is present in Nigeria. The jurisdictional grounds for the exercise of extra-territorial jurisdiction are much restrictive in terms of scope in comparison to other implementing legislation across the Commonwealth. Two approaches are discernible from states implementing legislation: Australia, Trinidad and Tobago and New Zealand have adopted very broad universal jurisdiction over the core crimes[182] and the second approach is that adopted by Canada, Kenya, Uganda and Nigeria by providing additional

[178] Crimes Against Humanity, War Crimes, Genocide and Related Offences Bill 2012, s 20(1)
[179] Ibid, s 21
[180] Geneva Conventions Act
[181] See Crimes Against Humanity and War Crimes Act 2000, ss 4 and 6; Trinidad and Tobago International Crimes and International Criminal Court Act, s 8; New Zealand International Crimes and International Criminal Court Act, s 8
[182] Australian Criminal Code Act 1995, s 15.4 and International Criminal Court (Consequential Amendments) Act 2002 Act No. 42 of 2002, s 268.117 ; Trinidad and Tobago International Crimes and International Criminal Court Act, s 8; New Zealand International Crimes and International Criminal Court Act, s 8

jurisdictional grounds to the principle of territoriality. However, Canada's and Kenya's additional jurisdictional grounds are broader than those of Uganda and Nigeria. Canada and Kenyan implementing legislation incorporate additional jurisdictional grounds under which their respective national courts can exercise extra-territorial jurisdiction. These additional jurisdictional grounds include: where the alleged perpetrator was a citizen of a state that was engaged in armed conflict against Canada or Kenya, or was employed in a civilian or military capacity by such a state and if the victim of the alleged offence was a Canadian or Kenyan citizen or a citizen of a state that was an ally of Canada or Kenya during an armed conflict.[183]

2.4.2.2. Cooperation with the ICC

The Bill incorporates extensive provisions on the cooperation regime between the ICC and Nigeria. It sets out in details, possible areas of cooperation in the investigation and prosecution of the core ICC crimes.

2.4.2.2.1. Assistance to the ICC

The forms of assistance that the Nigerian government may extend to the ICC relate to requests for provisional arrest, arrest and surrender of persons to the ICC (the Bill provides for a distinct procedure when dealing with request for arrest and surrender),the identification of persons and location of items, the taking and producing of evidence, the questioning of any person being investigated or prosecuted, the service of documents, facilitating the voluntary appearance of persons as witnesses or experts, the temporary transfer of prisoners, the examination of places and sites, executing searches and seizures, the provision of records and documents, the protection of victims and witnesses and the preservation of evidence, identification, tracing and freezing, or seizure of proceeds, property and assets and any other type of assistance not proscribed by the law of Nigeria with a view to aid the investigation and prosecution of crimes within the jurisdiction of the ICC and the enforcement of its orders following conviction.[184] The Rome Statute, in Article 87, sets out the general provisions on assistance including the means for transmitting the requests and the designated diplomatic channel through whom such requests may be transmitted. The provisions of the Bill are broader than the general provisions contained in article 87.

Requests for assistance are made in writing directly to the Attorney General who also doubles as the Minister of Justice.[185] And so the Minister of Justice is always referred to as both the Attorney General and the Minister of Justice. Nigeria's ICC implementing Bill adopts a similar approach to that

[183] See Canada 's Crimes Against Humanity and War Crimes Act, 2000, C. 24, s 8 and Kenya's International Crimes Act 2008, s 8; Uganda International Criminal Court Act 2010 , s 18
[184] Crimes Against Humanity, War Crimes, Genocide and Related Offences Bill 2012 s 24
[185] Ibid, s 24(1)

of Uganda, where requests for assistance are made in writing directly to the Minister of Justice (Minister).[186] In cases of urgency, the Bill permits the use of any other means including facsimile or electronic mail.[187] In cases where facsimile or electronic mail is used in transmitting the request for assistance, it must be followed by a formal request.[188] The Attorney General is required to notify the ICC promptly of its decision to any request, with the notification setting out the reasons for the decision in cases of refusal or postponement of the request.[189]

The Rome Statute of the ICC provides that states must have domestic measures under their laws to comply with requests from the ICC under article 93 of the Rome Statute. Consequently most implementing legislation has incorporated extensive measures for complying with requests from the ICC. The domestic procedures for these varied forms of assistance other than those dealing with arrest and surrender are contained in Part V of the Nigerian Bill.[190] The Attorney General can refuse a request for assistance under Part V of the Bill on mandatory and discretionary grounds. The mandatory grounds for refusal are: a ruling of inadmissibility by the ICC in a case to which the request pertains, an advice by the ICC that it no longer wishes to proceed with the request, including the application of Article 98(1) of the Rome Statute, where the requested assistance is either prohibited under Nigerian law or prohibited in Nigeria under a pre-existing legal principle and the ICC objects to the terms subject to which Nigeria was willing to provide the assistance.[191] The mandatory grounds for which the Attorney General must refuse assistance are more expansive than the mandatory grounds for refusing arrest and surrender under Part VI. They are however similar to the implementing legislation of other states such as Uganda[192]and Trinidad and Tobago.[193]

The discretionary grounds for refusal of assistance include: where there are competing requests from the ICC and a state and the Attorney General following consultations with the ICC decides to proceed with the state's request in line with section 56 of the Bill or the refusal is permitted under Part VII of the Bill.[194] The Attorney General may postpone the request where an admissibility issue is pending before the ICC, where executing the request would interfere with ongoing investigation or prosecution in Nigeria, where the Attorney General is consulting with the ICC under section 20(2) and where there are competing requests from the ICC and a State and the Attorney General in consultation with the ICC and state decides to postpone the execution of the request. The discretionary grounds under which the Attorney General may refuse or postpone a request of assistance from the ICC are also in

[186] International Criminal Court Act 2010, s21
[187] Crimes Against Humanity, War Crimes, Genocide and Related Offences Bill 2012 s 24(2)
[188] Ibid, s 25(4)
[189] Ibid, s 27
[190] Ibid, ss 28- 45
[191] Ibid, s 46(1)
[192] International Criminal Court Act 2010, s 60(1)
[193] Trinidad and Tobago's International Crimes and International Criminal Court Act, s 114(1)
[194] Crimes Against Humanity, War Crimes, Genocide and Related Offences Bill 2012 s 46(2)

tandem with the provisions of Uganda,[195] Trinidad and Tobago[196] and New Zealand[197] 's ICC implementing legislation.

2.4.2.2.2. Arrest and Surrender

The provisions on arrest and surrender are contained in Part VI of the Bill. A request for arrest can be made where a person is alleged to have committed an offence or there is a subsisting judgment of conviction against the person.

2.4.2.2.2.1. Procedure for Arrest

A copy of the warrant of arrest, requisite information identifying the person being sought and the probable location of the person must accompany requests for arrest and surrender. Most ICC implementing legislation in the Commonwealth do not elaborate on the requisite documents that must accompany a request for arrest and surrender. The Bill adopts this same approach by referencing article 91 of the Rome Statute, which sets out the needed documents.[198] Where the request is in relation to a person already convicted, the request must be sent along with a warrant of arrest, the judgment and sentence imposed if any. Complete requests for arrest and surrender received by the Attorney General are passed onto the high court. The high court on receipt of the request shall where it is accompanied by a warrant, endorse same for execution by a police officer or where there is a subsisting judgment issue a warrant for the arrest of the person by a police officer.[199] Requests for the provisional arrest of a person must be accompanied by requisite information identifying the person and probable location, statements of the crimes for which the person is sought and the facts constituting the crime and the existence of a warrant or a judgment of conviction against the person. Both Australia's International Criminal Court Act[200] and Uganda's International Criminal Court Act[201] include an additional requirement in form of a statement that a request for surrender of the person will follow.

The completed request for provisional arrest is passed on to the Inspector General of Police with instructions to arrest the person named in the request. The Inspector General of Police is obliged to notify the Attorney General of compliance with the directives. The process of issuing a provisional

[195] Uganda's International Criminal Court Act 2010, ss 60(2) and 61(1)
[196] Trinidad and Tobago's International Crimes and International Criminal Court Act, ss 114(2), 115(1), 117-119
[197] New Zealand's International Crimes and International Criminal Court Act, ss 113-115
[198] See Uganda's International Criminal Court Act 2010, s 26; Under both New Zealand and Trinidad and Tobago's implementing legislation, there is no reference to article 92 of the Rome Statute, both legislation simply use the phrase "supporting documents", see New Zealand International Crimes and International Criminal Court Act, s 33 and Trinidad and Tobago's International Crimes and International Criminal Court Act, s 33.
[199] Crimes Against Humanity, War Crimes, Genocide and Related Offences Bill 2012 s 52; See article 91 of the Rome Statute for the requisite documents needed to accompany a request for arrest and surrender from the ICC.
[200] International Criminal Court Act N0. 41 of 2002, s 19
[201] International Criminal Court Act 2010, s 29

arrest warrant under the Bill does not require an input from the courts and is similar to the procedure under Uganda's ICC implementing legislation.[202] The specified process however, differs from the ICC implementing legislation of Trinidad and Tobago, New Zealand and Australia where, provisional arrest warrants are issued by the courts.[203] The ICC implementing legislation of both Trinidad and Tobago and New Zealand provide additional powers to the Attorney General and Minister of Justice to cancel provisional arrest warrants and discontinue proceedings instituted pursuant to a provisional arrest warrant. [204] On receipt of a formal request, the Attorney General sends a notice to the high court and proceeds as with a formal request for arrest and surrender.[205]

The Attorney General must refuse a request for the arrest and surrender of a person where the ICC has decided to discontinue with the request on any ground including a determination that article 98 applies.[206] The Attorney General's discretion to refuse a request for arrest and surrender from the ICC may be exercised where there are competing requests for surrender and extradition, the Attorney General in arriving at this decision must take into account the procedure set out in article 90 of the Rome Statute of the ICC and section 55 of the Nigerian ICC Bill. [207] The Attorney General may also postpone the execution of a request for arrest and surrender where there is a pending admissibility challenge, where the request would interfere with ongoing investigations or prosecutions and where the Attorney General is in consultation with the ICC over the application of article 98.[208] The proposed grounds for refusing and postponing a request for arrest and surrender under the Bill are identical to the grounds set out in the Uganda's ICC Act.[209]

Where there are competing requests from the ICC and states for the arrest and surrender of a person pertaining to the same conduct priority is given to the ICC's request where (a) surrender of the person is sought by the ICC and the requesting state is a party to the Rome Statute and (b) where the requesting state is a non-party State, and Nigeria has no subsisting international obligation to extradite the person to the requesting state.[210] In situations where the requesting state is a non-party State to the Statute and Nigeria has an obligation under international law to extradite to that state, the Attorney General in making a decision either to surrender to the ICC or extradite to the state, will take into

[202]Uganda's International Criminal Court Act 2010, s 29(1) and 29(5)
[203] Trinidad and Tobago's International Crimes and International Criminal Court Act, s 36; New Zealand's International Crimes and International Criminal Court Act, s 36; International Criminal Court Act N0. 41 of 2002, ss 21(2) and (3)
[204] Trinidad and Tobago's International Crimes and International Criminal Court Act, s 37; New Zealand's International Crimes and International Criminal Court Act, s 37
[205] Crimes Against Humanity, War Crimes, Genocide and Related Offences Bill 2012 s 56; See article 92 of the Rome Statute for the requisite documents needed to accompany a request for provisional arrest and surrender from the ICC.
[206] Crimes Against Humanity, War Crimes, Genocide and Related Offences Bill 2012 s 53(1)
[207] Ibid, s 53(2)(a) and (b)
[208] Ibid, s 54
[209] International Criminal Court Act 2010, ss 27 and 28
[210] Crimes Against Humanity, War Crimes, Genocide and Related Offences Bill 2012 s 55(2) and (3)

cognizance, the following factors: (a) the respective dates of the requests, (b)the interests of the requesting state (including the place of the commission of the offence and the nationality of the perpetrator and victim) and (c) the possibility of a future surrender by the state to the ICC .[211] These same factors will be taken into consideration by the Attorney General in deciding whether to surrender or extradite where there are competing requests from the ICC and one or more state for different conducts and Nigeria has a subsisting international obligation to extradite to one or more state.[212] The Bill has replicated as close as possible the provisions of article 90 of the Rome Statute of the ICC.

A person arrested must be brought to court within 48 hours. The Nigerian Bill in contrast to Kenya's implementing legislation stipulates the timeframe within which an arrested person may be brought before a court. The Kenya ICC implementing legislation simply provides for the person to be brought to court as soon as practicable. [213] Under the Nigerian Bill, either on the judge's motion or on the request of the arrested person, the judge may determine whether due process was followed in the arrest or if there was a violation of the person's rights and where infractions have occurred the judge will make a declaration to that effect to the Attorney General who transmits same to the ICC.[214] In both Australia's and Kenya's implementing legislation, the infraction can only be raised by the aggrieved person and where so raised, it may nullify the arrest process.[215] However, under the Bill, the judge other than making a declaration of the violation of due process to the ICC cannot prevent the surrender of a person on this basis and also cannot grant reliefs to a person who has suffered infractions.[216] A person provisionally arrested, must be released from custody on the orders of the judge, if after 60 days, the Attorney General has not sent a notice of receipt of a formal request for arrest and surrender, unless, in the interest of justice the judge extends the period for receipt of notice.[217] The provision is relatively similar to equivalent provisions in both Australia and Trinidad and Tobago's implementing legislation.[218]

The Rome Statute explicitly states that a person should have the right to apply for bail in a custodial state. However, it sets a high threshold for the court before bail can be granted.[219] The Rome Statute

[211] Crimes Against Humanity, War Crimes, Genocide and Related Offences Bill 2012 s 55(4)
[212] Ibid, s 55(6)
[213] International Crimes Act 2008, s 35
[214] Crimes Against Humanity, War Crimes, Genocide and Related Offences Bill 2012 s 57
[215] See section 39(4) of the Kenya International Criminal Court Act 2008, where the violation of due process can only be raised by the person who has suffered the violations. Under the Australian International Criminal Court Act No. 41 2002, section 23, where the Magistrate is not satisfied on all the surrounding issues concerning the arrest of the person including whether due process was followed, the Magistrate may order his release, and this does not preclude his re-arrest.
[216] Crimes Against Humanity, War Crimes, Genocide and Related Offences Bill 2012 s 57(4)
[217] Ibid, s 58
[218] International Criminal Court Act N0. 41 of 2002, s 26; International Crimes and International Criminal Court Act, s 38
[219] Rome Statute of the International Criminal Court, article 59(3)

provides that before bail (which it terms "application for interim release") is granted, the competent authority" in this case the judge must take into consideration the "gravity of the alleged crimes, the existence of "urgent and exceptional circumstances" that justify the grant of bail and "necessary safeguards" to ensure that the state would be able to surrender the person to the ICC. [220] The provisions add further that where a request for bail is made, the ICC Pre-Trial Chamber must be informed and make recommendations to the state. The "competent authority" must take into consideration any recommendations made by the ICC Pre-Trial Chamber.[221] These provisions of the Rome Statute of the ICC are replicated in the Bill.[222]

2.4.2.2.2.2. Procedure for Surrender

The judge before whom an arrested person is brought will issue a delivery order if satisfied that there is a subsisting warrant of arrest or judgment of conviction and the person is the same one as named in the warrant or judgment.[223] Delivery orders issued by the judge are transmitted to the Inspector General of Police for execution and a notification sent to the Attorney General.[224]In contrast to the Nigerian ICC Bill, under the implementing legislation of Kenya, New Zealand and Trinidad and Tobago the decision of the court confirming surrender is communicated to the Attorney General or Minister who is vested with the responsibility for executing court orders.[225] Although in practical terms, the Attorney General or Minister as the case may be will require members of the police force to execute and enforce court orders. Under the Bill, a delivery order can only be executed by the Inspector General of Police following the expiration of the period which the applicant may ask for a review or where the applicant has asked for one pending a determination of the proceedings.[226] Persons may at any time notify the judge of their consent to being surrendered provided they are present before the judge when the consent is given and the consent has been freely given.[227]

The Attorney General may within 14 days make an appeal against the decision of a judge to refuse to make a delivery order.[228] Most implementing legislation provide for a right of appeal by either the person whose surrender is sought or the designated authority responsible for treating requests for arrest and surrender. The Court of Appeal may either make a delivery order or refer the case to the high court for a delivery order.[229] If the Court of Appeal dismisses the appeal, the person shall become

[220] Rome Statute of the International Criminal Court, article 59(4)
[221] Ibid, article 59(5)
[222] Crimes Against Humanity, War Crimes, Genocide and Related Offences Bill 2012 s 59
[223] Ibid, s 60(1)
[224] Ibid, s 60(2) and (3)
[225] See Kenya's International Crimes Act 2008, s 39; New Zealand's International Crimes and International Criminal Court Act, s 43; Trinidad and Tobago's International Crimes and International Criminal Court Act, s 43.
[226] Crimes Against Humanity, War Crimes, Genocide and Related Offences Bill 2012 s 60(6)
[227] Ibid, s 61
[228] Ibid, s 63(1) and (2)
[229] Ibid, s 63(4)

discharged.[230] A person against whom a delivery order has been made and is not delivered within 60 days may be discharged by the court at the request of the person except reasonable cause is shown for the delay.[231] The judge may also authorise the discharge of a person whose surrender is no longer required by the ICC.[232]

In addition to the foregoing, the ICC may also make a request for the transit of persons through Nigeria en route to the ICC for trial or to another state for enforcement. Where the person makes an unauthorised landing within Nigeria, the person may be held for up to 96 hours while the ICC makes a request for the person's transit.[233] These provisions are a replication of article 89(3) of the Rome Statute of the ICC.

2.4.3. Impact on Executive Action and Process

The ICC has exerted significant influence on executive action in Nigeria which is currently undergoing preliminary examination by the Office of the Prosecutor (OTP) of the ICC. The Office of the Prosecutor made its examination of the situation in Nigeria public on 18 November 2010.[234] This has resulted in a lot of engagement between the ICC and Nigeria. The impact of the ICC on executive action and process within Nigeria is summed below.

First, it was the executive branch of the Federal Government which introduced the Bill discussed above that seeks to make legislative changes to enable Nigeria comply with the obligations imposed on it by the Rome Statute of the ICC. Under Nigeria's domestic laws, treaties are only effective where the National Assembly has incorporated them into the country's corpus of law. A Bill for the ratification of the Rome Statute of the ICC was introduced in the National Assembly in 2005. Unfortunately progress stalled on this Bill before the end of the life of that particular Assembly in 2007.[235] The failure to pass that Bill into law in that particular Assembly meant that the process had to begin afresh. On 17th July, 2012 the Federal Government submitted a differently entitled Bill into the National Assembly, the "Crimes Against Humanity, War Crimes, Genocide and Related Offences Bill 2012. The Bill is currently before the National Assembly, but is from all indications likely to expire, yet again, at the end of the life of the current legislature in May 2015. [236]

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[230] Ibid, s 63(5)
[231] Ibid, s 64
[232] Ibid, s 65
[233] Ibid, s 67
[234] Seventh Report of the International Criminal Court, to the United Nations (2010/2011) A/66/309, Para 83
[235] Rome Statute of the ICC (Ratification and Jurisdiction) Bill 2005 which is 'A Bill for an Act to enable effect to be given in the Federal Republic of Nigeria to the Rome Statute of the ICC and for purposes connected with'. The House of Representatives passed the Bill on June 1st 2004. The Senate passed the Bill on the 19th of May, 2005. The Bill never got passed the harmonization stage when the term of the Assembly ended, which meant the process had to begin afresh with a new assembly.
[236] See generally, A.O. Enabulele, 'Implementation of treaties in Nigeria and the status question: whither Nigerian courts', (2009) African Journal of International and Comparative Law 326; Chilenye Nwapi,

Second, interactions and correspondences and ensuing cooperation between the OTP of the ICC and the Federal Government also illustrate the impact of the ICC on executive action and process in Nigeria. The ICC's preliminary examination of the situation in Nigeria has moved to the last stage of the preliminary examination process, the admissibility stage. The Prosecutor is presently examining whether genuine national proceedings are taking place in respect of the detained Boko Haram suspects.[237] In July 2012, the Prosecutor and senior officials of the ICC were in Nigeria and met with the President, Attorney General, Inspector General of Police, officials from Plateau and Kaduna and various commissions on sectarian violence in Nigeria. [238] The OTP in its 2012 preliminary report acknowledged the support and cooperation of the Nigerian government in facilitating the visit and providing relevant information[239] and also reported that the acts of Boko Haram amounted to crimes against humanity of murder and persecution.[240] The OTP has gone further in its 2013 preliminary report to make a finding of the existence of a non-international armed conflict between Boko Haram and Nigeria.[241]

On 5th November 2013,when the President of the ICC met with the President of Nigeria accompanied by Judge Akua Kuenyehia they discussed issues of mutual concern, the relationship between the African Union and the ICC. They also met with the Deputy-Speaker of the House of Representatives (the lower house of the National Assembly) and discussed the status of Nigeria's draft legislation implementing the Rome Statute.[242] The OTP and the Nigerian government officials have continued with their engagement and correspondences. In 2013 , on 29 July to 1 August 2013, the OTP conducted yet another mission to Abuja were it engaged with government officials on the investigation and prosecution of alleged Boko Haram crimes in Nigeria.[243] These meetings have yet to yield impact on executive action and process, however from the meetings and interactions, it is clear that the executive is working with and facilitating the work of the ICC in Nigeria and, on this note, the OTP has alluded to Nigerian government's cooperation.

Third, Nigeria as a State Party to the ICC has been influenced to the extent where it has to ensure that it has had to comply with obligations imposed by the Rome Statute. On 15th July, 2013 the ICC Trial Chamber received a notification that President Al Bashir of Sudan was in Nigeria for a Special

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'International treaties in Nigerian and Canadian courts', (2011) African Journal of International and Comparative Law, 38

[237] International Criminal Court Report on Preliminary Examinations Activities 2012, November 2012, Para 96; see also Ninth Report of the International Criminal Court for 2012/2013 13 August 2013 A/68/314 Para 95.

[238] Eighth Report of the ICC A/67/308 14 August 2012 Report for 2011/2012 Para 84; See also 2012 Report on Preliminary Examinations Activities 2012, November 2012, Para 93 .

[239] International Criminal Court Report on Preliminary Examinations Activities 2012, November 2012, Para 93.

[240]International Criminal Court Report on Preliminary Examinations Activities 2012, November 2012, Para 89.

[241] International Criminal Court Report on Preliminary Examination Activities 2013, Para 224.

[242] ICC Press Release 06/11/2013 ICC President concludes official visit to Nigeria ICC-CPI-20131106 – PR961.

[243] International Criminal Court Report on Preliminary Activities 2013, Para 224-225.

African Union Summit. The Prosecutor of the ICC in its notification to the pre-trial chamber had credited the Nigerian President's Spokesman as stating that President Al Bashir had not been invited and besides the African Union had taken a position on Sudan and Nigeria had assumed the same common position.[244] That same day the chamber issued a decision requesting Nigeria to arrest him and surrender him to the court.[245] On 15th July 2013, the Nigerian Coalition for the International Criminal Court (NCICC) called for the arrest and surrender of President Al Bashir to the ICC.[246] Following calls for his arrest, President Al Bashir left Nigeria on Monday afternoon, less than 24 hours after he arrived in the middle of a two-day summit. The NCICC had already filed a suit at a high Court in Abuja, requesting the court to compel the Federal Government to arrest and surrender President Al Bashir to the ICC.

On the heels of this visit of President Al Bashir to Nigeria, the President of the Assembly of State Parties (ASP) in a letter to Nigeria's Minister for Foreign Affairs, reminded Nigeria of its commitment as a State Party to cooperate with the court and called on Nigeria to comply with its obligations.[247] Nigeria in her defence before the ICC, stated that President Al Bashir had not being invited by the Nigerian government, but had attended. Nigeria maintained further, that President Al Bashir left the country as the authorities were contemplating the actions to take having regard to the country's obligations.[248] The ICC found Nigeria's defence satisfactory and took no further steps. Although Nigeria did not arrest President Al Bashir, but the very fact that he did not stay until the end of the summit and the defence put up by Nigeria, means that it is unlikely that President Al Bashir would again be visiting Nigeria anytime soon.

Fourth, Nigeria has taken advantage of its status as a State Party to the Rome Statute of the ICC, by fielding its citizen for appointment. In 2011, Nigeria put forward the candidature of Judge Chile Eboe Osuji and was elected by the Assembly of State Parties to serve a nine years term as a judge at the ICC. This was the first time Nigeria was having its citizen elected as a judge of the ICC after failing to have the same candidate elected by the Assembly of State Parties in 2009.

2.5. Conclusion

Contemporary international criminal courts and tribunals with operational and jurisdictional relevance in the Commonwealth States of Kenya and Nigeria have produced different kinds of impact ranging

[244]See the *Prosecutor v Omar Hassan Ahmad Al Bashir*, on the Decision Regarding Omar Al Bashir's visit to the Federal Republic of Nigeria No. ICC-02/05-01/09 15 July 2013, Para 5
[245] In the Prosecutor v Omar Hassan Ahmad Al Bashir, Decision Regarding Omar Al Bashir's visit to the Federal Republic of Nigeria No. ICC-02/05-01/09 15 July 2013, Para 8
[246] NCICC Press Statement, NCICC Calls for Immediate Arrest and Surrender to ICC of President Al Bashir
[247] Press Release 16/07/2013 ICC-ASP-20130716- PR933
[248] The Prosecutor V. Omar Hassan Ahmad Al Bashir, Decision on the Cooperation of the Federal Republic of Nigeria Regarding Omar Al Bashir's Arrest and Surrender to the Court, No. ICC-02/05-01/09 (5 September 2013) Para 12

from major to marginal and in certain instances none on judicial, legislative and executive thoughts, actions and processes. A discernible trend across most of the Commonwealth States in the research including Kenya and Nigeria under focus in this chapter is that more often the states themselves have generated significant impacts on the courts and tribunals. Kenya as a state has exerted significant impact on the ICC in relation to the non provision of cooperation with the ICC. The Prosecutor continues to grapple with issues of non-cooperation and witness attrition in the Kenyan situation.[249] Following witness attrition, the case against President Uhuru Kenyatta suffered repeated adjournments [250] before the charges against him were dismissed on 5th December 2014. While in the *Prosecutor v. Samoei Ruto and Joshua Arap Sang*, the ICC Trial Chamber V (A) on 17th April 2014 granted the prosecution's requests to compel the attendance of eight witnesses to testify before the trial chamber either through video- link or at a specified location in Kenya. The Government of Kenya has been requested under the decision to enforce the appearance of the witnesses before the trial chamber. [251]

With respect to the impact of the ICC on judicial action and process, the ICC has produced significant impacts on Kenya. In Kenya, the norms and jurisprudence of the ICC has been deployed in both domestic proceedings challenging the constitutionality of the ICC and, in surrender proceedings against Walter Osapiri Barasa wanted by the ICC on allegations of crimes against the administration of justice of the ICC. In Nigeria, the ICC has not had any impact on judicial action and process. In relation to the impact on legislative action and process, the ICC has produced significant impacts in Kenya with the enactment of the ICC implementing legislation. This legislation provides far reaching changes and imposes a number of obligations on different state actors within that country. Nigeria is yet to pass implementing legislation however; there has been one pending before its National Assembly since 2012. It remains to be seen if this Bill would be passed before the end of the current assembly in 2015. If it is not passed, it would mean that all the legislative steps earlier taken would have to begin afresh.

[249] Statement by the Prosecutor of the International Criminal Court Mrs. Fatou Bensouda at the press conference at the conclusion of the Nairobi segment of ICC Prosecutor's visit to Kenya, Nairobi 25/10/2012 at Nairobi Serena Hotel, Alamanda Room available at http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otpstatement251012.aspx; On witness intimidation and interference see, Institute for War and Peace Reporting, Blake Evans-Pritchard, Simon Jennings 'Action Urged on ICC witness Protection', ACR Issue 385, 28 Mar 14 at http://www.iwpr.net/report-news/action-urged-icc-witness-protection last accessed 07/06/2014; and BBC News Africa, 'Claims of witnesses in Kenya ICC trial 'disappearing' 08 February 2013 available at www.bbc.co.uk/news/world-africa-21382339 last accessed 06/07/2014.

[250] Situation in the Republic of Kenya, in the Case of the *Prosecutor v Uhuru Muigai Kenyatta*, ICC-01/09-02/11

[251] Situation in the Republic of Kenya, in the case of the *Prosecutor v Samoei Ruto and Joshua Arap Sang*, Decision on Prosecutor's Application for Witnesses Summonses and resulting Request for State Cooperation ICC-01/09-01/11, Para 193.

It is even more important that Nigeria takes steps to establish domestic mechanisms to try the alleged crimes resulting from Boko Haram's activities in Northern Nigeria and Abuja following the categorization by the OTP as crimes against humanity and the on-going conflict between the Nigerian government and Boko Haram as a non-international armed conflict. Establishing domestic mechanisms in line with the principle of positive complementarity would forestall a repeat of the Kenyan situation; where the ICC had to intervene.

With regards to the impact of the ICC on executive action and process, the high levels of engagement and correspondences generated between the ICC and Kenya has not generated proportionate impact on executive action and process. The impact on executive action and process is limited to the continued participation of the Vice President in on-going proceedings at The Hague. Similarly, in Nigeria, repeated engagements and correspondences between the ICC and Nigeria is yet to produce tangible impacts on executive action and process. The impact of the ICC's outreach activities is yet to be felt within both countries, in Nigeria there are no available evidence of engagement between the ICC and the key actors in the domestic legal system other than between members of the executive and government officials. The message and activities of the ICC are yet to percolate amongst members of the media and legal professionals. Although, there are no available surveys of the impact of the ICC outreach activities in Kenya, but the fact that the current President and his Deputy won election against the backdrop of an ICC case indicates that the ICC seems not to have had much impact in affecting people's opinions in Kenya. However, in terms of the wider impact of the ICC on Kenya, 233 victims have been authorized to participate in the proceedings.

In conclusion, this chapter has analysed evidence from conflict states in the Commonwealth to map the domestic impacts of international criminal courts and tribunals on judicial, legislative and executive thoughts, actions and processes. The evidence reveals varying degrees of influence of international criminal courts and tribunals within the Commonwealth.

CHAPTER THREE

THE IMPACT OF CONTEMPORARY INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS ON POST-CONFLICT STATES IN THE COMMONWEALTH

3.1. Introduction

Contemporary international criminal courts and tribunals established to investigate and prosecute serious international crimes have had varying degrees, of engagement with states that are either currently embroiled in, or which are emerging from, violent conflicts. The differing levels of interaction between such states and the relevant international criminal courts and tribunals has to a large extent minimised or maximised the impact of these courts within these states. For example, the International Criminal Tribunal for Rwanda (Rwandan Tribunal)[252] and the Special Court for Sierra Leone (Special Court)[253] have had marked impacts on Rwanda and Sierra Leone. This is largely connected to the fact that both the Rwandan Tribunal and the Special Court were created to address violations that occurred in specific situations and context in Rwanda and Sierra Leone respectively, while as a result of the International Criminal Court (ICC) regime, state parties have significantly altered their substantive and procedural legal framework to comply with the obligations imposed by the Rome Statute of the ICC.[254] This chapter focuses on the impact of the Rwandan Tribunal, the Special Court and the ICC on the post-conflict states of Rwanda, Sierra Leone and Uganda in the Commonwealth.

3.2. Rwanda and Contemporary International Criminal Courts and Tribunals

Introduction

This section examines the impact of the Rwandan Tribunal on Rwanda's, judicial, legislative and executive action and processes. The restriction of this discussion to the impact of the Rwandan Tribunal to that country is borne out of the fact that Rwanda is not a party to the Rome Statute of the ICC[255] and its engagement with the Special Court has been relatively marginal, (and has thus far been

[252] Statute of the ICTR, Annex to S.C Res. 955, U.N. Doc. S/RES/955 (Nov. 8 1994)

[253] The Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, and the Statute of the Special Court for Sierra Leone, were included in the 'Report of the Planning Mission on the Establishment of the Special Court for Sierra Leone transmitted by the Secretary-General to the President of the Security Council by Letter dated 6 March 2002' (8 March 2002) UN Doc S/2002/246, Annexe, Appendix II and its Attachment. In 2002, the Sierra Leonean Parliament promulgated the Special Court for Sierra Leone Agreement (2000) Ratification Act 2002.

[254] Rome Statute of the International Criminal Court, July 17 1998, 2187 UNTS, 90

[255] Rwanda is not a party to the Rome Statute of the ICC and the government is an avowed critic of the ICC. President Kigame Paul of Rwanda has publicly stated that Rwanda cannot be party to the ICC. See (D. Kezio-Musoke, 'Kagame tells why he is against ICC charging Bashir', Daily Nation, 3 August 2008, online at http://www.allafrica.com/stories/200808/20/57.html accessed 07/10/2013

limited to housing those convicted by the Special Court at its Mpanga Prisons under the terms of a Sentence Enforcement Agreement entered into with the Special Court).[256] Although Rwanda is not a party to the Rome Statute, it has not been indifferent to the ICC regime. For instance, one of the suspects wanted in the situation in the DRC, Bosco Ntaganda voluntarily surrendered himself to the United States Embassy in Kigali on 18th March, 2012 following which the Rwandan government and the United States authorities facilitated his transfer to the custody of the ICC.[257] Rwanda has also being vocal in the political debates on the ICC within the African Union, with President Kagame verbalizing his stiff opposition to the ICC for having all the cases on its docket from the African continent.[258]

3.2.1. Impact on Judicial Action and Processes

The thrust of this section is to examine to what extent if any, the Rwandan Tribunal's jurisprudence has influenced judicial action and processes within Rwanda. A deep examination of judicial actions and processes in Rwanda reveals evidence of the direct or indirect influence of the Rwandan Tribunal on the judicial process and system in Rwanda. Most of the influence on Rwanda is a product of the Rwandan Tribunal's completion strategy[259] first adopted by Resolution 1503 of 28 August 2003[260] and subsequently modified by Resolution 1534 of 2004.[261] The resolutions both provided for the Rwandan Tribunal to transfer cases to national jurisdictions and develop a completion strategy in preparation for its winding up.[262] Despite Rwanda embarking on judicial reform, the Rwandan Tribunal Trial Chamber in 2007 declined the Prosecutor's request for referral to Rwanda in a string of cases.[263] The denial of the Prosecutor's request for referrals precipitated further judicial and legal reforms in Rwanda resulting in subsequent successful referrals by the Rwandan Tribunal to Rwanda.

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[256] Amended Agreement Between the Special Court for Sierra Leone and the Government of Rwanda on the Enforcement of Sentences of the Special Court of Sierra Leone.

[257] BBC News Africa, ' Bosco Ntaganda: Kagame promises to help transfer to ICC, at http://www.bbc.co.uk/news/world-africa-21878010 accessed 17/01/2015.

[258] [258] His Excellency Paul Kagame, President of the Republic of Rwanda (D. Kezio-Musoke, 'Kagame tells why he is against ICC charging Bashir', Daily Nation, 3 August 2008, online at www.//allafrica.com/stories /200808 /20/57.html .See also AFP, Rwanda's Kagame Says ICC Targeting Poor African Countries, 31 July 2008.

[259] Cecile Aptel, 'Closing the U.N. International Criminal Tribunal for Rwanda: Completion Strategy and Residual Issues', (2007-2008) 14 New England Journal of International and Comparative Law 169.

[260] UNSC Res 1503 (28 August 2003), UN Doc. S/RES/1503 availablehttp://www.ictr.org/ENGLISH/Resolutions/s-res-1503epdf last accessed 10/09/2013.

[261] UNSC Res 1534 (26 March 2004), UN Doc. S/RES/1534 availablehttp://www.ictr.org/ENGLISH/Resolutions/s-res-1534epdf last accessed 10/09/2013.

[262] In September 2003, the President of the Rwandan Tribunal submitted a detailed completion strategy report to the Secretary General of the United Nations which was annexed to the Letter of the Secretary General of the United Nations to the President of the Security Council S/2003/946 available at http://www.unictr.org/Portals/0/English/FactSheets/Completion_St/s-2003-946.pdf last accessed 10/09/2013.

[263] The cases in which the prosecutor tried to refer to national courts in Rwanda which were rejected include: the *Prosecutor v Munyakazi* Case No. ICTR-97-36-Rule 11 bis, Decision of the Prosecutor request for Referral of Case to the Republic of Rwanda (Referral Bench) 65 (October 8 2008); *Prosecutor v Gaspard Kanyarukiga*, Case No. ICTR-2002-78- Rule 11 bis, Decision on Prosecutor's Request for referral to the Republic of Rwanda (Referral bench) 78-80(June 6, 2008).

The judges of the Rwandan Tribunal in both sets of cases chart a vivid narrative of legal and judicial reforms in Rwanda's legal system. These two sets of cases demonstrate direct impact of the norms and jurisprudence of the Rwandan Tribunal on judicial action and process in Rwanda and are considered below.

3.2.1.1. Cases where the Prosecutor's Request for Referral were denied

From 2007 to 2008, the prosecutor of the Rwandan Tribunal made several requests for the referral of a number of cases to Rwanda, which as earlier stated were all declined by both the Rwandan Tribunal Trial and Appeals Chambers.[264] The first of the cases decided by the Rwandan Tribunal referral chamber was *the Prosecutor v. Munyakazi.*[265]The following issues arose for determination at the trial: whether the case fell within the classes of cases that could be transferred to national authorities i.e. the alleged perpetrator was either an intermediate or low ranked accused, whether Rwanda had jurisdiction over the case, the non-imposition of the death penalty and the existence of an adequate penalty structure and the likelihood of the accused receiving a fair trial.[266] The trial chamber noted that the case fell within the category that could be referred to national authorities for trial. Although the trial chamber held that Rwanda had jurisdiction to try the case and had abolished the death penalty, it however declined to refer the case on two main grounds, the likelihood of imposing life imprisonment in solitary confinement and the fact that the accused would not receive a fair trial in Rwanda.[267]

On the issue of fair trial, the chamber picked issues with the fact that the high court in Rwanda was composed of a single judge and the trial chamber was of the view that going by the past reactions of the Rwandan government to unfavourable decisions from the Rwandan Tribunal and indictments by foreign judges, a single judge would be more susceptible to pressures from the executive. Consequently, the chamber held that the composition of the high court would prevent the defendant from enjoying a fair trial in Rwanda.[268] The chamber also highlighted the difficulties facing defence teams in securing the attendance of both witnesses residing within and outside Rwanda due to fear and intimidation from the government. A number of incidences of witness harassments were cited from external sources such as Human Rights Watch Report and the United States Department Report to buttress the point.[269]

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[264] See generally, William Schabas, 'Anti-Complementarity: Referral to National Jurisdictions by the United Nations International Criminal Tribunal for Rwanda', (2009) Max Planck Year Book of United Nation Law, Vol. 13, Issue 1, 29-60.
[265] The *Prosecutor v Munyakazi,* Case No. ICTR-97-36-Rule 11 bis, Decision of the Prosecutor request for Referral of Case to the Republic of Rwanda (Referral Bench) 65 (October 8 2008)
[266] Ibid, Para 7
[267] Ibid, Paras 14-16 and 32
[268] Ibid, Paras 33-49
[269] Ibid, Paras 60-66

In the appeal, the prosecutor raised a number of grounds of appeal: the first related to the penalty structure in the Rwandan legal system. In this regard, the appeal chamber found (in concurrence with the trial chamber), that the likelihood of life imprisonment in isolation rendered the penalty structure inadequate and consequently dismissed this ground of appeal.[270] The second ground of appeal was on the independence of the Judiciary in Rwanda. The Prosecutor drew attention to the decisions of the Rwandan Tribunal Trial Chamber in *Kanyarukiga* and *Hategekimana* cases (supra) where the chamber held that the constitution of a court by a single judge did not preclude the defendant from enjoying a fair trial. The appeal chamber allowed this ground of appeal.[271] The third ground of appeal relating to securing the attendance of witnesses and ensuring their protection was dismissed. Here, the appeal chamber noted that video link was an inadequate substitute for defence witnesses appearing in person and being subject to the same treatment as the prosecution witnesses.[272] In the end, the appeal chamber upheld the refusal of the trial chamber to refer the case to Rwanda.[273]

In *Prosecutor v Gaspard Kanyarukiga,*[274] the crux of the case was whether the defendant would receive fair trial in Rwanda as contained under Rule 11bis of the Rules of Procedure and Evidence.[275] Rule 11bis of the Rules of Procedure and Evidence of the Rwandan Tribunal regulates the referral of cases from the Tribunal to states for trials in national courts of where the offence was committed, where the accused was arrested or a state with jurisdiction that is willing and able to prosecute the cases. Under the rule, the trial chamber before referring a case must be satisfied that the accused would receive a fair trial and that the death penalty would not be applied. In the case, in determining the issue of whether the defendant would receive a fair trial, a number of subsidiary issues were raised. The issues raised under the rubric of fair trial include: the existence or otherwise in Rwanda of procedural and substantive provisions which guarantee the fair trial rights of defendants, "judicial independence, impartiality and capacity of judicial officers,[276]" "presumption of innocence,[277]" "right to an effective defence encompassing availability of counsel,[278] access to legal aid,[279] working conditions of the defence team,[280] availability and protection of both witnesses residing in and outside

[270] *The Prosecutor v Munyakazi,* Case No. ICTR-97-36-Rule 11 bis, Decision of the Prosecutor's Appeal Against Decision on Referral UnderRule11bis (October 8 2008) Para 21
[271] Ibid, Paras 22-31
[272] Ibid, Paras 32-45
[273] Ibid, Para 51
[274] *The Prosecutor v Kanyarukiga,* Case No. ICTR-2002-78-R11bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda
[275] Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda adopted on 29 June 1995 as amended.
[276] *The Prosecutor v Kanyarukiga* Case No. ICTR-2002-78-R11bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, Paras 34-42
[277] Ibid, Paras 43-45
[278] Ibid, Paras 54-55
[279] Ibid, Paras 56-58
[280] Ibid, Paras 59-62

Rwanda,[281] arrest and conditions of detention which also covered unlawful and arbitrary arrest,[282] the physical state of the place of detention[283] and life imprisonment with solitary confinement".[284] Having considered the main and subsidiary issues and the arguments put forward by both the prosecutor and the defence, the trial chamber noted that: Rwanda had undertaken substantial judicial reforms, had a satisfactory legal framework criminalizing the acts and the death penalty had been abolished. It however declined to refer the case on the basis that the defendant would not receive a fair hearing in Rwanda due to: (i) the fact that the defence would not be able to secure the attendance of witnesses outside and inside Rwanda due to fear of intimidation and (ii) the possibility of the defendant being sentenced to life imprisonment with solitary confinement.[285]

The prosecutor appealed against the decision of the trial chamber on two main grounds, which were both dismissed by the appeal chamber.[286] First, the prosecutor contended that the trial chamber erred when it held that the possibility existed of the defendant being subjected to life imprisonment with solitary confinement under the Abolition of Death Penalty Law, consequently, Rwanda's penalty structure did not meet the criteria of Rule 11bis.[287] The appeal chamber in dismissing this ground of appeal held that both the Transfer Law and the Abolition of Death Penalty Law were vague giving rise to ambiguities and as a result of this, there was the likelihood of life imprisonment with solitary confinement been applied to transfer cases.[288] The prosecutor in his second ground of appeal stated that the trial chamber erred when it held that Kanyarukiga's right to a fair trial could not be guaranteed in Rwanda as a result of the working conditions of defence lawyers in Rwanda and the difficulties associated with securing the presence of witnesses either residing in or outside Rwanda due to fear of intimidation and harassment.[289] The appeal chamber dealt with the second ground of appeal on two sub-grounds, the working conditions of the defence and the ability of the defence to obtain the testimony of witnesses. The appeal chamber in dismissing the first sub-ground of appeal noted that although these issues on their own were not enough to prevent a referral under Rule 11bis, they however highlight the difficult working environment for the defence in Rwanda which in turn has implications on the overall fairness of the trial.[290] The appeal chamber equally dismissed the

[281] Ibid, Paras 63-81
[282] Ibid, Paras 87-88
[283] Ibid,Paras 89-92
[284] Ibid, Paras 94-96
[285] Ibid, Para 104
[286] *The Prosecutor v Gaspard Kanyarukiga* Case No. ICTR 2002-78-R11bis Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11bis.
[287] Ibid, Para 6
[288] Ibid, Paras 15-17
[289] Ibid, Para 18
[290] Ibid, Paras 18-22

second sub-ground of appeal and held that the defendant would not be able to present witness testimonies on the same terms as the prosecution.[291]

In *Prosecutor v. Ildephonse Hategekimana*[292] the Prosecutor's request for the referral of the case to Rwanda was declined by the trial chamber on three grounds namely: that command responsibility under which criminal liability was being attributed to the accused was not criminalized under Rwanda's legal framework, Rwanda's inability to ensure that witnesses for the accused will be subject to the same terms as the prosecution witnesses and the possibility of Mr. Hategekimana being subjected to life imprisonment with solitary confinement.[293] The prosecutor appealed against the decision of the trial chamber on three main grounds. [294]

First, the prosecutor stated that the trial chamber erred when it held that command responsibility was not a form of criminal liability under Rwandan law.[295] The appeal chamber granted this ground of appeal holding that the trial chamber should have considered the existence of command responsibility under both the Gacaca Law and Organic Law No. 33bis/2003.[296]The second ground of appeal by the prosecutor was that the trial chamber was in error when it held that Hategekimana will be unable to secure the attendance of witnesses under the same terms as the prosecution.[297] With respect to the second ground of appeal, the appeal chamber acknowledged that the trial chamber had made errors of judgment when it held that Rwanda had not taken action either to enter into mutual criminal assistance agreements or to obtain the testimony of witnesses residing outside Rwanda and for failing to attach weight to the availability of monitoring and revocation mechanisms present in Rwanda's judicial system. The appeal chamber however, dismissed this ground of appeal because of the fact that Hategikimana's right to secure the attendance of witnesses in comparable terms to the prosecution could not be guaranteed and on this basis it was of the view that the defendant would not receive a fair trial in Rwanda.[298] The prosecutor in his third ground of appeal submitted that the trial chamber was in error to hold that the defendant would be subjected to life imprisonment in solitary confinement under the Transfer Law without recourse to the Abolition of Death Penalty Law.[299]The third ground of appeal was equally dismissed by the appeal chamber on the ground that despite attempts by Rwanda to clear the ambiguity surrounding the punishment regime under both the Transfer Law and the

[291] Ibid, Paras 26-27,35
[292] *The Prosecutor v Iledephonse Hategekimana*, Case No. ICTR-00-55B-R11 bis, Decision on Prosecutor's Request for Referral of the case of Iledephonse Hategekimana to the Republic of Rwanda of 19 June 2008.
[293] Ibid, Para 78
[294] *The Prosecutor v. Iledephonse Hategekimana*, Case No. ICTR-00-55B-R11bis, Decision on Prosecution's Appeal Against Decision on Referral Under Rule 11bis.
[295] Ibid, Para 6
[296] Ibid, Paras 12-13
[297] Ibid, Para 14
[298] Ibid, Paras 30, 39-40
[299] Ibid, Para 31

Organic Law Abolishing the Death Penalty, it could not be ascertained if the draft law intended to cure the defects had come into force and on this basis the ambiguities still persisted.[300]

The denial of the Prosecutor's request for referral precipitated judicial and legislative reforms introduced by the Rwanda government keen to prosecute genocide cases that could be referred to it by the Rwandan Tribunal. These, largely legislative reforms are examined below on the discussion on the impact of the Rwandan Tribunal on legislative action and processes in Rwanda. These decisions by the Rwandan Tribunal have become the subject of a burgeoning literature providing nuanced views of the decisions.[301]

3.2.1.2. Cases where the Prosecutor's Request for Referrals were granted

The more recent attempts by the Prosecutor to refer cases to national courts in Rwanda proved more successful, particularly, in *Prosecutor v Jean-Bosco Uwinkindi.*[302] In the case, the defence argued that presumption of innocence was already negated by the accused's conviction and subsequent sentence by a gacaca court.[303] The prosecutor pointed out that the conviction of the accused by the gacaca court had been carried out by the judge who was unaware; of a subsisting Rwandan Tribunal indictment and that in addition that judgment had been vacated. After a consideration of both arguments raised, the trial chamber held that in light of the vacation of the gacaca judgment, the accused would not be subject to double jeopardy if transferred to Rwanda.[304]

In previous referral decisions, two issues have consistently cropped up these are the penalty structure providing for life imprisonment with special measures and the ability of the defence to secure the attendance and protection of its witnesses. These issues were also addressed in this case. On the first issue, the Uwinkindi Trial Chamber was satisfied that the death penalty or life imprisonment with special measures was no longer part of the penalty structure in Rwanda.[305] With respect to the latter issue, the prosecutor highlighted the various amendments to the Transfer Law which provides for

[300] Ibid, Paras 39-40
[301] Amelia S Canter, ' For these Reasons, the Chamber Denies the Prosecutor's Request for Referral": The False Hope of Rule 11bis' (2008-2009) 32 Fordham International Law Journal 1614; Erik Mose, 'The ICTR's Completion Strategy, Challenges and Possible Solutions' (2008)6 Journal of International Criminal Justice 667;Cecile Aptel, "Closing the U.N. International Criminal Tribunal for Rwanda: Completion Strategy and Residual Issues" 14 New England Journal of International and Comparative Law (2007-2008)169; Mohammed M. El Zeidy, 'From primacy to Complementarity and backwards: (re)-visiting rule 11 bis of the ad hoc tribunals', (2008) International and Comparative Quarterly, 403;Jesse Melman, 'The Possibility of a Transfer(?): A Comprehensive Approach to the International Criminal Tribunal for Rwanda Rule 11Bis to Permit Transfer to Rwandan Domestic Courts', (2010-2011) 79 Fordham Law Review 1271; William Schabas,' Anti-Complementarity : Referrals to National Jurisdictions by the UN ICTR', (2009) Max Planck Year Book of United Nations Law Vol. 13 Issue 1, 29-60.
[302] *The Prosecutor v Jean-Bosco Uwinkindi* Case No. ICTR 2001-75-Rule 11bis Decision on Prosecutor's Request for Referral to the Republic of Rwanda.
[303] Ibid, Paras 22-26
[304] Ibid, Paras 27-35
[305] Ibid, Para 51

enhanced protection for witnesses in Rwanda. The amendments provide witnesses with immunity for anything said during the course of the trial, as well as immunity from search, seizure or detention with particular reference to witnesses from outside Rwanda.[306] In addition, under the amendments witnesses residing abroad can provide testimonies in proceedings either through depositions, before a judge of a foreign jurisdiction or through video link hearings.[307]

In the case, the prosecutor also led evidence to show that Rwanda had embarked on a reform of its Victims and Witness Support Unit and had subsequently established a national Witness Protection Unit within its Judiciary.[308] The referral chamber in June 28 2011 granted the referral, noting that in the last two years, Rwandan Laws had undergone substantive amendments which will ensure that referred cases would be prosecuted in line with international standards contained in the Rwandan Tribunal 's Statute and other applicable human rights mechanisms.[309] Finally the trial chamber added that, assurances by the African Commission on Human and Peoples Rights to monitor cases transferred to Rwanda made a case for referral more compelling, particularly when examined in the light of all the amendments embarked on by the Rwandan government. The appeal chambers confirmed the referral of the case on 16 December 2011.[310]The prosecutor of the Rwandan Tribunal has appointed a monitor in respect of the case of Jean Bosco Uwinkindi currently going on at the Rwanda High Court.[311]

Similarly in the *Prosecutor v Bernard Munyagishar*i ,[312] the Prosecutor filed a request, pursuant to Rule 11 bis, to transfer the case to the Republic of Rwanda.[313] The Chamber in referring the case held that Rwanda had over time made substantial amendments to its laws, demonstrating its ability and readiness to prosecute referred cases in line with acceptable international standards.[314] In addition, the trial chamber gave a number of conditions attached to the grant of the prosecutor's request for referral. The attached conditions included: the appointment of an independent organisation to monitor the case, confirmation from the President of the Kigali Bar Association that the accused will be assigned an experienced lawyer and a written assurance from Rwanda's Prosecutor General that witnesses who appear in the transfer case will not be subject to prosecutions otherwise prohibited by

[306] Ibid, Para 61
[307] Ibid, Para 62
[308] Ibid, Paras 97-132
[309] Ibid, Para 223
[310] *Jean Uwinkindi v The Prosecutor* Case No. ICTR-01-75-AR11bis, Decision on Uwinkindi' s Appeal against the Referral of his Case to Rwanda and Related Motions. See generally, Taylor Friedlander, 'Mediation as the Key to the Successful Transfer of the Case of Jean- Bosco Uwinkindi from the Jurisdiction of the ICTR to the Republic of Rwanda (2013) 13 Pepperdine Dispute Resolution Law Journal 453, 472-480
[311] Seventeenth Annual Report of the International Criminal Tribunal for Rwanda to the General Assembly and the Security Council A/67/253-S/2012/594 (2011/2012) Para 43.
[312] *The Prosecutor v Bernard Munyagishar*i, Case No. ICTR-2005-89-Rule 11bis, Decision on the Prosecutor's Request for Referral to the Republic of Rwanda
[313] Ibid, Para 2
[314] Ibid, Paras 219 – 220

the Transfer Law. [315] These stated conditions were not given in the earlier case of Uwinkindi and subsequently formed the crux of the prosecution's appeal. [316] The defendant appealed on ten grounds challenging the decision of the referral chamber to refer his case to Rwanda for trial.[317] On appeal, the appeal chamber granted the first ground of appeal and requested the prosecution to file an amended indictment to reflect the fact that the accused would not be tried under a joint criminal enterprise mode of liability in Rwanda. The other nine grounds of appeal were dismissed by the appeal chamber.[318] The appeal chamber granted the prosecution's appeal and set aside the two conditions.[319] In the aftermath of these referrals, the Rwandan Tribunal has also referred six cases of the nine fugitives yet to be apprehended to national courts in Rwanda.[320]

Aside from the above referrals from the Rwandan Tribunal, Canada has recently following a protracted legal tussle in its court system transferred a genocide suspect to Rwanda for trial in its national court. [321] With respect to transferred cases, the Rwandan Tribunal plays the role of an international standards setter ensuring that the trials are carried out in adherence to internationally recognised standards. And as the Rwandan Tribunal prepares to wind up its activities, the recently established International Criminal Tribunal Residual Mechanism will oversee all residual issues of the Rwandan Tribunal such as supervising and monitoring sentences of convicts.[322]

3.2.1.3. Domestic Trials for War Crimes in Rwanda's Military Courts

The Rwanda Patriotic Front's alleged catalogue of violations began prior to the end of the genocide and continued after the genocide and war had ended, and it had formed a government of national unity in Rwanda. The crimes committed by the Rwanda Patriotic Front in 1994 are within the mandate of the Rwandan Tribunal with jurisdiction over crimes from January 1 –December 31 1994. The exact

[315] Ibid, Paras 219 – 220
[316] *The Prosecutor v Bernard Munyagishar*i Case No. ICTR-2005-89-Rule 11bis, Decision on Bernard Munyagishari's Third and Fourth Motions for Admission of Additional Evidence and on the Appeals against the Decision on Referral under Rule 11bis.
[317] *The Prosecutor v Bernard Munyagishar*i Case No. ICTR-2005-89-Rule 11bis, Decision on Bernard Munyagishari's Third and Fourth Motions for Admission of Additional Evidence and on the Appeals against the Decision on Referral under Rule 11bis.
[318] Ibid, Para 98.
[319] Ibid, Paras 99, 121-122.
[320] *The Prosecutor v Kayishema Fulgence* ICTR-01-67; *The Prosecutor v. Munyarugama Pheneas* ICTR-02-79;*The Prosecutor v Ndimbati Alloys* ICTR-95-1; *The Prosecutor v. Ntaganzuwa Ladislas* ICTR-96-9; *The Prosecutor v. Ryandikayo Charles* ICTR-95-1 and *The Prosecutor v. Sikubwabo Charles* ICTR-95-1D; On steps taken by Rwanda to ensure transfer see, Jamil Ddamulira Mujuzi , 'National Prosecution of International Crimes : Cases and Legislation steps taken in Rwanda's Efforts to Qualify for the Transfer of Accused from the ICTR', (2010) Journal of International Criminal Justice 8(1) 237;Nicola Palmer, 'Transfer or Transformation?: A Review of the Rule 11Bis Decisions of the International Criminal Tribunal for Rwanda', (2012) 20 African Journal of International and Comparative Law 1.
[321] *Mugesera v. Canada (Minister of Citizenship and Immigration)* (2005) 2 S.C.R. 100, 2005 SCC 40; Norway has also extradited Charles bandore to Rwanda for trials in its national court.
[322] International Residual Mechanism for Criminal Tribunals established UNSG Res/1966/S/RES/1966/2010.

number of Hutu victims of the Rwanda Patriotic Front/Army remains a moot point with figures ranging from 25,000 to 30,000 deaths at the lower end of the scale. Although these figures pale in insignificance to the over 800,000 Tutsis and moderate Hutus killed in the genocide, the failure to prosecute these crimes has been described as one of the sour points of the Rwandan Tribunal resonating echoes of Nuremberg where atrocities of both parties to the conflict were not prosecuted.[323] Hopes for the Rwandan Tribunal's trial of Rwanda Patriotic Front crimes were more or less dashed when in 2005; the prosecutor handed over the Rwandan Tribunal's case files on the Rwanda Patriotic Front crimes to the Rwanda Patriotic Front dominated Rwandan authorities.[324] On 8th June, 2010, the Office of the Prosecutor transferred 25 cases of persons investigated by the Rwandan Tribunal but not indicted to Rwanda bringing the total number of transferred case files to 50. [325] These case files contained information on those who the Rwandan Tribunal had investigated but not indicted).

Thus in 2008, Rwandan began domestic trials of Rwanda Patriotic Front massacre of Rwandan Archbishop, three Bishops and nine other Clergy at Kagbayi in June 1994.[326] The trials were conducted from June 17 to October 24 2008 with critics deriding the prosecution of the cases as weak.[327] Two lower level captains who pleaded guilty were convicted and two high ranking officers charged along were acquitted. On appeal, the military court reduced the sentence from eight to five years on grounds of mitigating circumstances.[328] Critics called the trials a sham.[329]Despite the public perception of the trials, the Rwandan Tribunal's Prosecutor had stated in clear terms that he would not be seeking for fresh indictments for Rwanda Patriotic Front crimes.[330] The negative consequences of these alleged failure on the part of Rwanda, the Rwandan Tribunal and international criminal justice, has been surmised to include fuelling the notion of victor's justice, painting an inaccurate picture of

[323] The number of Hutus allegedly killed by the Rwanda Patriotic Front is a moot point and varies. Alison Des Forges estimates the number of Hutus killed at about 25,000- 30,000 in 1994 in Alison Des Forges, Leave None to Tell the Story: Genocide in Rwanda (1999) Human Rights Watch 734; Reyntjens, Filip 'Rwanda, Ten Years On: From Genocide to Dictatorship', (2004) 103 African Affairs 177, 178; Lars Waldorf, "A Mere Pretense of Justice": Complementarity, Sham Trials, Victors Justice at the Rwanda Tribunal'(2009-2010) 33 Fordham International Law Journal 1221-1222.

[324] ICTR Newsletter 3 July 2005, 1

[325] ICTR Newsletter May-June 2010, 6

[326] U.N.SCOR, 63rd Sess., 5904th mtg. at 11, U,N. DOC. S/PV.5904 (June 4 2008). For more information on RPF crimes see the United Nations Secretary General 's Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935, 95, U.N.DOC.S/1994/1405 (Dec. 9, 1994) Para 146- 150; RPF Never Ignored to punish soldiers Guilty of War Crimes available at http://www.minijust.gov.rw/spip.php/article133 accessed 10/07/2013.

[327] For a critical overview of the trials see, Lars Waldorf, 'A Mere Pretense of Justice: Complementarity, Sham Trials, Victors Justice at the Rwanda Tribunal' (2009-2010) 33 Fordham International Law Journal 1221, 1224-1228.

[328] Leslie Haskell and Lars Waldorf, 'The Impunity Gap of the International Criminal Tribunal for Rwanda: Causes and Consequences', (2011) 34 Hastings International and Comparative Law Review 49 at 61-66.

[329] Ibid, 69-70.

[330] U.N. SCOR, 64th Sess., 6134th mtg. at 33, U.N.DOC.S/PV 6134, June 4 2009; see also Jallow Hassan, 'Prosecutorial Discretion and International Criminal Justice', (2005) 3 Journal of International Criminal Justice 145; Jallow Hassan 2008, Statement at the 59044th Meeting of the United Nations Security Council, S/PV.5904. June 4 at http://www.securitycouncilreport.org/site/c.gIKWLeMTIsG/b.3974145/accessed 4/6/2013.

the events, a missed opportunity to strengthen Rwanda's judicial system, the undermining of the tribunal's legacy and the setting of a bad precedent for international justice.[331]

As the Rwandan Tribunal winds down one of its greatest criticisms remains its perceived failings in trying members of the Rwanda Patriotic Front.[332] The Rwandan Tribunal has been slammed in writings and reports by the academia, nongovernmental organizations and aid agencies for its perceived failure or deliberate act of turning away its eyes at the atrocities committed by the Rwanda Patriotic Front/Army either prior to the genocide and or afterward. In this sense, there are indications that these violations are not isolated or sporadic acts by roguish soldiers of the Rwanda Patriotic Front/Army but a form of victors' revenge on the Hutus. To what extent this failing will cast a shadow on the work of the Rwandan Tribunal is as yet unclear.

3.2.2. Impact on Legislative Action and Process

The introduction of a number of laws in Rwanda is borne out of the overarching quest of the Rwandan government to investigate and prosecute the crimes committed during the genocide in its national courts.[333] Two of these laws are considered below.

4.2.2.1. The Organic Law on Transfer

Following the adoption of the Rwandan Tribunal's completion strategy in 2003, Rwanda desirous of prosecuting genocide cases particularly from the Rwandan Tribunal, enacted the Organic Law on Transfer of Cases to govern the transfer of cases both from the Rwandan Tribunal and other States to Rwanda. [334] The Transfer Law designated the High Court of Rwandan with a single judge presiding as

[331] Leslie Haskell and Lars Waldorf, 'The Impunity Gap of the International Criminal Tribunal for Rwanda: Causes and Consequences', (2011)34 Hastings International and Comparative Law Review 49 at 75-85

[332] Makau Mutua: From Nuremberg to the Rwandan Tribunal: Justice or Retribution? *Supra,*77, 78; For a different perspective on these alleged failings, see generally, Phil Clark and Z.D. Kaufman (eds) *After Genocide: Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond*, (C. Hurst and Co Publishing Ltd 2009).

[333] Organic Law No. 08/96 of 30 August 1996 on the Organisation of Prosecutions for Offences Constituting the Crime of Genocide or Crimes against Humanity Committed since October 1 1990 criminalized genocide and related offences in Rwanda; Organic Law No. 40 /2000 of 26/01/2001, Setting up Gacaca Jurisdictions and Organising Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Between October 1 1990 and December 31, 1994; Organic Law No. 16 /2004 of 19/06/2004,Establishing the Organisation, Competence and Functioning of Gacaca Courts Charged with Prosecuting and Trying the Perpetrators of the Crime of Genocide and other Crimes Against Humanity Committed Between October 1 1990 and December 31, 1994; Organic Law No. 13/2008 of 19/05/2008 Modifying and Complementing Organic Law No. 16/2004 of 19/6/2004 Establishing the Organization, Competence and Functioning of Gacaca Courts Charged with Prosecuting and Trying the Perpetrators of the Crime of Genocide and Other Crimes Against Humanity, Committed between October 1, 1990 and December 31, 1994.

[334] Organic Law No. 11/2007 of 16/03/2007 Concerning Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from Other States.

the court for trial of all cases transferred to Rwanda.[335] This provision of a single judge was a common issue that kept recurring in several of the referral cases. The defence continuously picked issues with the designation of a single judge presiding in the first instance drawing comparisons with the Rwandan Tribunal, where three Judges presided in the first instance. The Prosecution and the Government of Rwanda sought to justify this practice, adduced evidence to show that it was a common practice across several countries in the region and beyond, where single judges presided over cases in the first instance.[336]

The Transfer Law sets out in detail the rights of an accused person in article 13 of the Organic Law on Transfer. The rights elaborated in article 13 are a rehash of the rights set out in a number of human rights instruments such as the International Covenant on Civil and Political Rights (ICCPR)[337], which is referenced in article 13. The rights guaranteed include: the right to fair hearing; presumption of innocence; the right to an adequate time and facilities to prepare a defence; access to a counsel or where the accused is indigent, free legal representation; right to examine prosecution witnesses and the right to have witnesses attend the trial and be examined the same way as witnesses for the other side. The trial chamber of the Rwandan Tribunal in the referral cases had always maintained that there was a difference between the elaboration of the rights within instruments in Rwanda and the Rwanda's consequent compliance with same. In all cases where the Prosecutor's request for referrals were rejected by the trial chamber, the crux of the issue was the failure of the prosecution to prove that the rights of the accused to fair trial were guaranteed in Rwanda, despite being enshrined within domestic legislation.[338]

Furthermore, the rights of witnesses and defence counsel are also enshrined in the Organic Law on Transfer. Witnesses in transfer cases are entitled to protection from the high court who may direct that they be placed under comparable protective measure to those enshrined within the Rwandan Tribunal Rules of Procedure and Evidence. Under the law the Office of the Prosecutor General is vested with responsibility of providing physical assistance to witnesses to aid their presence in the trials, including security and medical assistance.[339] This type of assistance fell within the purview of acts of the Victims and Witnesses Support Unit directly administered by the Office of the Prosecutor General.

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[335] Transfer Law, Article 2.

[336] The *Prosecutor v Munyakazi* Case No. ICTR-97-36-Rule 11 bis, Decision of the Prosecutor request for Referral of Case to the Republic of Rwanda (Referral Bench) 65 (October 8 2008) Para 35; In *The Prosecutor v. Kanyarukiga* Case No. ICTR-2002-78-R11bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, Paras 39-40, the referral chamber in contrast to the Munyakazi chamber decision, had no issues with a single judge presiding over genocide cases as it was a regional practice and international human rights instruments have no specific number of judges who may preside over cases.

[337] International Covenant on Civil and Political Rights, United Nations Treaty Series, Vol. 999, 171

[338] The *Prosecutor v Munyakazi* Case No. ICTR-97-36-Rule 11 bis, Decision of the Prosecutor request for Referral of Case to the Republic of Rwanda (Referral Bench) 65 (October 8 2008) Para 40

[339] Transfer Law, Article 14

Again in many of the referral cases, the issue of the non-suitability of placing the witness protection programme under the direct exerting influence of the Prosecutor-General was severely canvassed by the defence, Human Right Watch and the International Criminal Defence Association the latter two served as amicus curiae in the referral cases.[340]

In addition, the Law provides a limited form of protection for witnesses residing outside Rwanda, by giving them "immunity from search, seizure and arrest or detention in the course of testifying at trials.[341] Defence teams on the other hand were given immunity from search, seizure, arrest or detention in the course of their duties and in certain cases entitled to "security and protection".[342] Under the law, the maximum penalty prescribed was life imprisonment.[343] The law as it were in relation to penalties did not seem to pose a problem on the face of it, however when read together with the provisions of the organic law which abolished the death penalty in Rwanda, it raised issues of the lack of an adequate penalty structure as will be seen below, the Organic Law on the Abolition of the Death Penalty, replaced the death penalty with life imprisonment with special measures. The criticisms of the law and the fact that as it stood in its original form prevented referrals being made from the Rwandan Tribunal to Rwanda, ultimately led to the amendment of the law in 2009.[344]

The 2009 Organic Law amends four of the articles in the 2007 Organic Law on Transfer to facilitate referrals from the Rwandan Tribunal. The first amendment is in article 1 and it amends the existing provisions of article 2 of the 2007 Organic Law which designated a single judge of the high court to preside over referral cases. What the amendment does is to add a rider that where the cases are complex, the President of the Court may constitute a quorum of three or more judges to preside over the case. Article 2 adds a significant amendment to the 2007 Organic Law on Transfer by providing immunity to persons from prosecution for anything said or done in the course of trials.[345] This is significant in the light of the Genocide Ideology Law which criminalised utterances deemed as negating genocide. [346] There were always risks that the accused and defence would run foul of this law. Finally, the 2009 Organic Law on Transfer amended article 14 of the 2007 Organic Law on Transfer by inserting article 14 bis which provides alternative means for witnesses residing outside Rwanda who are incapable or averse to give evidence personally in Rwandan courts to do so. These

[340] The *Prosecutor v Munyakazi* Case No. ICTR-97-36-Rule 11 bis, Decision of the Prosecutor request for Referral of Case to the Republic of Rwanda (Referral Bench) 65 (October 8 2008) Para 62; *The Prosecutor v. Jean Baptiste Gatete,* Case No. ICTR-2000-61-R11bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda (November 17, 2008) Para 61
[341] Transfer Law, article 14
[342] Ibid, article 15
[343] Ibid, article 21
[344] Organic Law N0. 03/2009/OL of 26/05/2009, Organic Law Modifying and Complementing the Organic Law No. 11/2007 of 16/03/2007 concerning the Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and Other States.
[345] Amended Transfer Law, Article 13 (amended by 2009 Organic Law on Transfer, Article 2)
[346] Law No 18/2008 of 23/07/2008 relating to the Punishment of the Crime of Genocide Ideology.

means include: depositions made in Rwanda or outside before a presiding officer or a person designated by the judge; through video link taken at the trial and by a judge outside Rwanda recording the testimony. These amendments are specific and addressed the concerns raised in the referral cases and provided the impetus for the successful referrals of cases from the Rwandan Tribunal to Rwanda.

3.2.2.2. The Organic Law Abolishing the Death Penalty

In 2007, the Rwandan Parliament passed the Organic Law Abolishing the Death Penalty which provided expressly for the abolition of the death penalty in article 2.[347] Further the Law provided for the replacement in all previous Legislative Acts which provided for the death penalty with life imprisonment or "life imprisonment with special provisions".[348] The specific conditions attached to life imprisonment were elaborated in the law to include: being kept in isolation to serve a life term and the prevention of a convicted person from enjoying certain benefits which they hitherto had access to such as conditional release or rehabilitation.[349] The crimes punishable with life imprisonment in isolation were listed to include: torture, murder, genocide and crimes against humanity.[350] The criticisms levelled against Rwanda's imposition of life imprisonment in isolation by the Rwandan Tribunal, reinforced the need for further legal reforms in Rwanda.

Consequently in 2008, Organic Law No. 66/2008, modified the Rwandan Organic Law Relating to the Abolition of the Death Penalty (which provided for the imposition of life imprisonment in isolation)[351] Specifically Article 1 of the Organic Law modified Article 3 of the Abolition of the Death Penalty Organic Law and provides that life imprisonment with special circumstances will not apply to transfer cases. Invariably, the amendment of the law to exclude the application of life imprisonment in isolation as well as other changes including the establishment of a national witness protection unit within the Supreme Court precipitated the grant of referrals to Rwanda 's National Courts.

3.2.3. Impact on Executive Action and Process

The Rwandan Tribunal has incontrovertibly helped to shape the policies and responses of the executive arm of government in Rwanda in both positive and negative ways and has generated significant levels of correspondence between them in the process. Despite, the rocky start that plagued the relationship between the Rwandan Tribunal and the Rwandan government they have been able to

[347] Organic Law No. 31/2007 Relating to the Abolition of the Death Penalty, Official Gazette of the Republic of Rwanda (July 25 2007)
[348] Ibid, article 3
[349] Ibid, article 4
[350] Ibid, article 5
[351] Organic Law No. 66/2008 of 21 November 2008 Modifying and complementing Organic Law No. 31/2007 of 25/07/2007 relating to the Abolition of the Death Penalty, Official Gazette of the Republic of Rwanda, 1 December 2008.

find common grounds and worked together to achieve the mandate of the Rwandan Tribunal which are summed up below under different categories.

First, the impact of the Rwandan Tribunal on the executive arm of government in Rwanda can be seen in the dynamics relating to the provision of cooperation/non-cooperation that has been displayed over the years in their relationship. The issue of non-cooperation and its effects on early trials before the Rwandan Tribunal is indicative of the influence Rwanda wielded over the Rwandan Tribunal. However, the provision of cooperation by the Rwandan government to the Tribunal is an evidence of the impact of that Tribunal on executive action and process in Rwanda. As an international institution, the Rwandan Tribunal relies in part on the cooperation of states to carry out its work. The cooperation of the Rwandan government with the Rwandan Tribunal proved even more vital and intrinsic in the prosecution of the 1994 genocide suspects. The Rwandan Tribunal and Rwanda's relationship began on a contentious ground.[352] That contentiousness persisted through the earliest years of the Rwandan Tribunal with both parties playing out their bickering and counter –accusation in the media.

One such drama ensued in 1999 following the release by the Rwandan Tribunal Appeal Chamber of Jean-Bosco Barayagwiza[353] on grounds of violations of his fair hearing rights during the process of his arrest and subsequent transfer to the Rwandan Tribunal. Following the decision by the appeals chamber, Rwanda made threats to cut ties with the Rwandan Tribunal.[354] The Rwandan Tribunal's prosecutor subsequently filed an application for review or reconsideration to the appeals chamber. The appeals chamber granted the application of the prosecutor, reversed its decision granting a release and stated in addition that the due process violation would be remedied in the event of a conviction by a reduced sentence or compensation in the case of an acquittal.[355]Following these developments, Rwanda maintained its relationship with the Rwandan Tribunal.[356]

However, in December 2000, following the announcement of the then Prosecutor, Ms Carla Del Ponte, that her office was to begin investigations into alleged war crimes committed by members of the Rwanda Patriotic Front/Army, fresh conflicts arose between the Rwandan Tribunal and the Rwandan government.[357] She alleges in her memoir that her persistence in prosecuting Rwanda

[352] The Rwanda Government raised several objections to the Statute of the Rwanda Tribunal, which ultimately led to Rwanda then a non-permanent member of the United Nations Security Council voting against the adoption of the Resolution establishing the tribunal. For more details on the objections raised by the Rwandan government to the establishment of the Tribunal, see, Madeline H. Morris, 'The Trials of Concurrent Jurisdiction: the Case of Rwanda', (1997) 7 Duke Journal of Comparative and International Law 349,353-357.
[353] Barayagwiza v. Prosecutor, Case No. ICTR-97-19.
[354] W.A. Schabas, 'Barayagwiza v. Prosecutor (Decision and Decision (Prosecutor's Request for a Review or Reconsideration) Case No. ICTR-97-19-AR72 (2000) 94, American Journal of International Law 563, 565-566.
[355] Barayagwiza v. Prosecutor, Case No. ICTR-97-19, Decision (Prosecutor's Request for Review or reconsideration) (Appeals Chamber), 31 March 2000
[356] Carla Del Ponte, Madame Prosecutor: Confrontations With Humanity's Worst Criminals and the Culture of Impunity (New York: Other Press 2009) 64-86.
[357] ICTR Press Release of 13 December 2000 http://www.ictr.org/ENGLISHPRSSREL/2000/254htm

Patriotic Front/Army crimes was the crux of the tenuous relations between the Rwandan Tribunal and the Rwandan government.[358] Thus, following these attempts, to bring perpetrators on the Rwanda Patriotic Front side of the divide to account, the Rwandan government's relationship with the Rwandan Tribunal once more became frosty. The relationship between the Rwandan government and the Rwandan Tribunal also had rippling effects on trials at the Rwandan Tribunal, for in 2002, the government supported a boycott of trial proceedings by two main Rwanda genocide survivor groups.[359] In the two cases where the problem arose, the trial chamber ordered that the witnesses be removed from the witness list and the trial proceeded without their testimony.[360] Rwanda on its part derided the actions of the prosecutor and reiterated the obvious failure of the international community to prevent the genocide which was eventually stopped by the Rwanda Patriotic Front/Army.[361] The registrar facilitated the resolution of the impasse with the government.[362]

As this on and off and undulating but largely contentious relationship played out, it was wished by many that prudence would prevail at some point. It came in the form of a political solution with the separation of the Office of the Prosecutor of both the Rwandan and Yugoslavia Tribunals. A new Prosecutor Hassan Bubcar Jallow was appointed to the Rwandan Tribunal in August 2003 and assumed office in September 2003.[363] Carla Del Ponte maintains that had she been given a choice she would have stayed on at the Rwandan Tribunal.[364] These distractions did little to endear the Rwandan Tribunal to the people for whom it had been created in the first place. With the appointment of a new prosecutor and the adoption of the Rwandan Tribunal' s completion strategy (which both put to an end fears that new indictments would be issued against the Rwanda Patriotic Front by the Rwandan Tribunal) the strain on the relationship eased considerably.[365]

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[358] Carla Del Ponte, Madame Prosecutor: Confrontations with Humanity's Worst Criminals and the Culture of Impunity (New York: Other Press 2009) Chapter 9.

[359] For background information on the conflict and frosty relationship see International Federation for Human Rights, Victims in the Balance-Challenges ahead for the International Criminal Tribunal for Rwanda' (November 2002); Rwanda Tension with International Court', 39 Africa Research Bulletin: Political, Social and Cultural Series (August 2002), pp 14975-14976; See also David P. Rawson, Prosecuting Genocide: Founding the International Tribunal for Rwanda, (2007) 33 Ohio Northern University Law Review 641, 649.

[360] Seventh Annual Report of the International Criminal Tribunal for Rwanda to the General Assembly and the Security Council 2002 A/57/163-S/2002/733 (2001/2002) Para 86.

[361] Reply of the Government of Rwanda to the report of the Prosecutor of the ICTR to the Security Council, at 5, U.N.DOC.S/2002/842 (July 26, 2002).

[362] Seventh Annual Report of the International Criminal Tribunal for Rwanda to the General Assembly and the Security Council 2002 A/57/163-S/2002/733 (2001/2002) Paras 86 and 87.

[363] Ninth Annual Report of the International Criminal Tribunal for Rwanda to the General Assembly and the Security Council 2004, A/59/183-S/2004/601, at 3.

[364] Carla Del Ponte, Madame Prosecutor: Confrontations With Humanity's Worst Criminals and the Culture of Impunity (New York: Other Press 2009) Chapter 9.

[365] Lars Waldorf, 'Transitional Justice: War Crimes Tribunals and Establishing the Rule of Law in Post – Conflict Countries', (2009-2010) 33 Fordham International Law Journal 1221, 1224-1228 on RPF crimes and accountability for same.

Available evidence indicates that following the adoption of the completion strategy in 2003, growing levels of cooperation was recorded in the relationship between the Rwandan Tribunal and the Rwandan government. Since the Jean Bosco Barayagwiza incident, the Rwandan Tribunal has acquitted nine accused persons and the Rwandan government has not ceased cooperation with the Rwandan Tribunal. The completion strategy has further engineered incidences of cooperation between the executive arm of government and the Rwandan Tribunal. In all the cases where the prosecutor made a request for referral to Rwanda, Rwanda has always applied to be part of the proceedings as Amicus Curiae. In these cases, Rwanda's brief in addition to highlighting its capacity and intent to prosecute cases of genocide referred from the Rwandan Tribunal,[366] has also reaffirmed the prosecution's case as both parties have a common goal, the referral of cases to Rwanda.

Second, the Rwandan government and the Rwandan Tribunal have over the years, entered into a number of collaborations. One such is the establishment of the Rwandan Tribunal information and documentation centre (Umusanzu mu Bwiyunge) in Kigali in 2000. The building housing the centre is a bequest from the Rwandan government to the Rwandan Tribunal. The Information and Documentation Centre is at the core of the Rwandan Tribunal's activities in Rwanda. From one centre in Kigali, the Rwandan Tribunal and the Rwandan government have established 10 mini centres across the Provinces in Rwanda. The mini centres are housed in the premises of courts and only with the executive and the Rwandan Tribunal working together could this have been possible. Aside from collaboration in establishing mini centres, in pursuance of the Rwandan Tribunal completion strategy, the Rwandan Tribunal and the Rwandan government have engaged in the implementation and execution of mutually beneficial projects aimed at strengthening the Rwandan Justice system. In 2011, three representatives from the Supreme Court of Rwanda were on a technical visit to Arusha on the invitation of the Registrar of the Rwandan Tribunal in relation to the execution of the Supreme Court of Rwanda's German Government sponsored Video-Conference Facility Project. [367]

Third, the executive arm of government has on several occasions had cause to make or introduce legislative changes to Rwanda's laws to comply directly or indirectly with the legal and normative framework of the Rwandan Tribunal. The Rwandan Tribunal set out bench marks for evaluating the competence of national legal systems to receive and prosecute cases from it. These criteria include the ability of the defendants to receive fair trials in line with international norms of human rights and more specifically in relation to the sentencing of the defendants.[368] Rwanda, desirous as it was of prosecuting cases from the Rwandan Tribunal, has over the years engaged in constitutional and legal

[366] In the *Prosecutor v. Ildephonse Hategekimana,* Case No. ICTR-00-55B-I Decision on Requests by the Republic of Rwanda, the Kigali Bar Association, the ICDAA, and ADAD for Leave to Appear and Make Submission Amici Curiae 4 December 2007 granted the request of Rwanda to appear as Amici Curiae in the case; *Uwinkindi* Para 18; In *Prosecutor v Kanyarukiga* (see Decision on the Republic of Rwanda to appear as Amicus Curiae (TC) 9 November 2007.
[367] ICTR Newsletter July-August 2011, 6-7
[368] Rule 11 bis of the ICTR Rules of Procedure and Evidence 1995 as amended.

reform to bring its laws in line with international minimum standards of fair hearing. Thus, in 2007, in preparation for referrals to Rwanda, the executive arm responded with a series of legal and constitutional reforms like the introduction of the Organic Law on Transfer and the Organic Law Abolishing the Death Penalty.[369] These laws were informed by the perceptible desire of the Rwanda executive to prosecute within its territories suspected genocide perpetrators. This overarching desire has been the driving force behind judicial reforms in Rwanda. Consequently, the referral of cases by the Rwandan Tribunal to Rwanda has produced reactionary results necessitating Rwanda to take positive steps to be adjudged competent in carrying out prosecutions of those guilty of grave violations.

3.2.4. The Impact of the Rwandan Tribunal on Rwanda

The Rwandan Tribunal like all International criminal courts and tribunals established at different levels are often created to achieve and serve different purposes. Chief amongst is the prosecution of alleged war criminals. [370] Some of the oft-cited impacts of the Rwandan Tribunal are the restoration of peace and the arrest and prosecution of the architects of the genocide.[371] The jurisprudence emanating from the Rwandan Tribunal cases and their relevance in the development of the body of law is extensively documented in academic literature.[372] But beyond its jurisprudence,[373] the Rwandan

[369] Organic Law No. 11/2007 of 16/03/2007 Concerning Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from Other States and Organic Law No. 31/2007 Relating to the Abolition of the Death Penalty, Official Gazette of the Republic of Rwanda (July 25 2007).

[370] Jane Stromseth, 'Pursuing Accountability for Atrocities after Conflict: What Impact on Building the Rule of Law?' (2006-2007) 38 Georgia Journal of International Law 251, 258-260; On the deterrent value of criminal prosecutions see David Wippman, 'Atrocities, Deterrence, and the Limits of International Justice', (1999) 23 Fordham International Law Journal 47; Payam Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities, (2001) 95 American Journal of International Law 7; Jean Galbraith, 'The Pace of International Criminal Justice', (2009-2010) 31 Michigan Journal of International Law 79, 91-92; Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies U.N. Doc. S/2004/616 (Aug. 23, 2004) Para 38 on the role of the Rule of Law and transitional Justice in Conflict and Post-Conflict Societies.

[371] Timothy Gallimore, 'The Legacy of the International Criminal Tribunal for Rwanda and its Contributions to Reconciliation in Rwanda', 14 New England Journal of International & Comparative Law (2008) 239, 250-251; Dennis Bryon, 'Looking at Legacy and Looking Back on the Legacy Symposium', 14 New England Journal of International and Comparative Law (2007-2008) 319; R. Byrne, Promises of Peace and Reconciliation: Previewing the Legacy of the International Criminal Tribunal for Rwanda, (2006)14(4) European Review 485.

[372] Payam Akhavan, "Justice and Reconciliation in the Great Lakes Region of Africa: The Contribution of the ICTR, (1998) 7 Duke Journal of Comparative and International Law 325;Parker Patterson, 'Partial Justice: Successes and Failures of the International Criminal Tribunal for Ending Impunity for Violations of International Criminal Law', (2010-2011) 19 Tulane Journal of International and Comparative Law, 369, .370-37; p.376-387, the writer notes that the Rwandan Tribunal has succeeded in holding accountable the leaders of the 1994 Rwandan Genocide and also reviews the landmark decisions of the Tribunal.

[373] See generally , Sigall Horovitz, 'How International Courts Shape Domestic Justice Lessons from Rwanda and Sierra Leone', (2013) 46 Israel Law Review 339, 345-355 on the impact of the ICTR on Rwandan legal norms, prosecution rates and trends, Rwandan sentencing practices, judicial capacity, training activities and infrastructural development; Stephen J. Rapp, 'Achieving Accountability for the Greatest Crimes- The Legacy of the International Tribunals', (2006-2007) 55 Drake Law Review 259 at 273

Tribunal has made impact on Rwanda through a number of initiatives. These initiatives and their impacts are considered below.

The Rwandan Tribunal has contributed to increased awareness on international criminal justice issues through community outreaches and the various initiatives it embarked on. The Rwandan Tribunal employed outreach as a means to clear public misconceptions about it and its work in Rwanda. As for the most part, the Rwandan Tribunal was in its early years beset by a number of problems and controversies which did more harm than good to its public image in Rwanda. These include financial irregularity, and mismanagement of the Tribunal's funds,[374] the slow pace of trials and the huge cost of prosecuting cases at the Tribunal. Accordingly the Rwandan Tribunal embarked on outreach (albeit a little late for which it has been criticised) to bridge the gap that existed between it and the people of Rwanda, so it employed outreach as a means of providing information to provide a better picture of its image in Rwanda and also provide training for members of Rwanda's media and legal professions.[375] The different sections of the Rwandan Tribunal have been involved with the development and facilitation of these programmes in Rwanda.

In 1998, the Rwandan Tribunal established links with media practitioners in Rwanda by establishing a Radio Rwanda Bureau with the precincts of the Tribunal[376] and following a 2003 agreement between the Tribunal and the *Office Rwandais de l'Information (ORINFOR)* the stationing of a journalist from the station at the Rwandan Tribunal.[377] Specific programmes designed for Rwandan media professionals include: training seminars and conferences,[378] facilitating visits of Rwandan

[374] First Annual Report of the International Criminal Tribunal for Rwanda to the General Assembly and the Security Council 1996, A/51/399 -S/1996/778, paragraph 71; Report of the Secretary-General on the Activities of the Office of Internal Oversight Services, A/51/789.

[375] The Rwandan Tribunal's record of prosecution and engagement with Rwandans as at 2002 was miserly and left much to be desired. As at 2002, the Tribunal was credited as having over 800 employees and after having expended over U.S.$540 million, the Tribunal had convicted eight persons and acquitted one, see Peter Uvin & Charles Mironko 'Western and Local Approaches to Justice in Rwanda', (2003) 9 Global Governance 219, 220; see also Victor Peskin, 'Courting Rwanda The Promises and Pitfalls of the ICTR Outreach Programme' (2005) 3 Journal of International Criminal Justice 950, 951-953 critiquing the Rwandan tribunal's late start in engaging with Rwandans through outreach. See generally Gérard Prunier, *The Rwanda Crisis History of a Genocide* (C. Hurst & Co Publishers Ltd 2nd Revised Edition 1998);Jose Alvarez, "Crime of States/Crimes of Hate: Lessons from Rwanda",(1999) 24 Yale Journal of International Law, 365.

[376] Fourth Annual Report of the International Criminal Tribunal for Rwanda to the General Assembly and the Security Council 1999 A/54/315-S/1999/943 (1998 /1999) Para 108.

[377] ICTR Newsletter July 2003 Vol. 1 No. 2,7; see also Tenth Annual Report of the International Criminal Tribunal for Rwanda to the General Assembly and the Security Council 2005 A/60/229-S/2006/534 (2004 - 2005) Para 61.

[378] Eight Annual Report of the International Criminal Tribunal for Rwanda to the General Assembly and the Security Council 2003 A/58/140-S/2003/707 2003 (2002 -2003) Para 68. In 2006, the ICTR in collaboration with the School of Journalism and Communication of the National University of Rwanda held a joint workshop for journalists from various media organizations in Rwanda on the Rwandan Tribunal Media Case and several issues arising there from, see ICTR Newsletter November 2006 , 3

journalists to Arusha regularly on important occasions such as issuing of judgment or beginning of new trials.[379]

However its most ambitious programme is in respect of legal professionals. In 2000, the Rwanda Tribunal began facilitating visits to Arusha of judges and legal professionals' in Rwanda.[380] The Rwanda Tribunal in 2005 embarked on training and seminars for a diverse pool of people engaged in the justice sector.[381] The scope, range and intensity of the training heightened in 2007 in preparation for the first set of referral cases. The Rwandan Tribunal embarked on a robust programme of activities to engage legal professionals and develop their competence in prosecuting cases from it. The Tribunal also engaged with the Rwandan Bar Association and held training for its members for four consecutive years from 2007- 2011 on international criminal law.[382] Other programmes carried out over the years include: seminars for the judges of national judiciary,[383] training for Rwandan Prosecutors and Legal Officers.[384] Specific programmes created for students include annual scholarship programme which provided funding for six students from the National University of Rwanda working in the area of international criminal justice to carry out research on their thesis at Arusha, training in advocacy skills and online legal research of which students and lecturers have benefitted from over the years.[385]

The Rwandan Tribunal has also hosted public events aimed at public enlightenment. In August 2006, the Rwandan Tribunal held three awareness programmes across the Northern, Eastern and western Provinces of Rwanda.[386] In November 2009, the Rwandan Tribunal launched a youth sensitisation project aimed at raising awareness amongst the youth of the Great Lakes region on the role of the Rwandan Tribunal in combating impunity and promoting accountability in the region. The project consisted of essay writing and drawing competition for the youths in the region.[387] Winners were selected from the region in various categories and awards given out in 2010.[388] The following year as

[379] ICTR Newsletter February-April 2004 (Special Edition) 9
[380] ICTR Newsletter February-April 2004 (Special Edition) 9; See also Sixth Annual Report of the International Criminal Tribunal for Rwanda to the General Assembly and the Security Council 2001 A/56/351-S/2001/863 (2000/2001) Para 146.
[381] ICTR Newsletter December 2005-January 2006; ICTR Newsletter August 2006, 5
[382] ICTR Newsletter Aug-Sep 2007, 4-5; ICTR Newsletter May 2009, 7; ICTR Newsletter September 2009, 11 and ICTR Newsletter May –June 2011, 9
[383] ICTR Newsletter April 2007, 4-5
[384] Thirteenth Annual Report of the International Criminal Tribunal for Rwanda to the General Assembly and the Security Council 2011 A/63/209-S/2008/514 (2007/ 2008) Para 61; Adama Dieng, 'Capacity Building Efforts of the ICTR' (2010-2011), Northwestern University Journal of International Human Rights, 403-422, 412.
[385] ICTR Newsletter June-July 2006 7; ICTR Newsletter April 2008 .9; Seventeenth Annual Report of the ICTR Para 57
[386] ICTR Newsletter August 2006, 4
[387] See Tribunal's Youth Sensitization Project Enters Second Phase, ICTR/INFO-9-2-631.EN, March 3, 2010 available at www.unictr.org/Default.aspx?TabId=155&id=1120&language=en last accessed 6/08/2013.
[388] ICTR Awards Winners of the Youth Essay and Drawing Competition on UN Day, ICTR/INFO-9-2-654.EN, available at www.unictr.org/Default.aspx?TabId=155&id=1171&language=en- accessed 6/8/2013.

part of the United Nations day celebration events, the Rwandan Tribunal launched a Cartoon Book for youths in East Africa region aimed at enlightening youth on genocide and distributed same across primary and secondary schools in the region.[389]

In its 2010 to 2011 annual report, the Rwandan Tribunal estimates that it engaged in capacity building activities for over 700 legal professionals in Rwanda to strengthen the Rwandan capacity to undertake the investigation and prosecution of cases referred from the Rwandan Tribunal. [390] Undoubtedly, the Rwandan Tribunal's range of programmes have impacted positively on Rwanda's judicial officers, legal practitioners, court administrators and media practitioners, there are however, no available independent studies in measuring the impact of these training programmes. Since, 2012, there have been no reports of capacity training for members of Rwandan Legal Profession in its annual reports as the Rwandan Tribunal prepares to close its operations in 2015.[391]

In addition, the Rwandan Tribunal has in a number of instances provided Rwanda with technical support in a number of areas. Two examples are considered. First the Rwandan Tribunal provided technical support to Rwanda prior to the establishment of the witness protection unit. Aside from technical support, the Rwandan Tribunal has also helped in providing training to members of the Rwandan Witness Protection Unit. The Rwandan Tribunal organized a three-day training workshop on witness protection at the behest of the Rwandan government on 16th November, 2009 at Arusha. The workshop familiarized Rwandan Officials on the Rwandan Tribunal witness protection programmes and provided them with assistance in the development of a national witness protection unit.[392] In 2010, the Rwandan Tribunal Witness and Victims Support Service held a similar training for members of the Rwandan Judiciary.[393] The Rwandan Tribunal has also assisted Rwanda with technical know how in the provision of Video-Tele-Conferencing facilities at the Supreme Court.[394] The Rwandan Tribunal in partnership with the Rwandan government on 25th May, 2012 launched the Video- Tele-Conferencing facilities at the Rwandan Supreme Court in Kigali. The facilities will facilitate the taking of testimonies from witnesses residing outside Rwanda or unable to attend court proceedings in Kigali.[395]

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[389] ICTR Launches a Cartoon Book for East African Youth, October, 24 2011 available at www.unictr.org/Default.aspx?TabId=155&id=1233&language=en accessed 6/08/2013.
[390] Seventeenth Annual Report of the International Criminal Tribunal for Rwanda to the General Assembly and the Security Council 2012 A/67/253-S/2012/594 (2010/ 2011) Para 65.
[391] Eighteenth Annual Report of the International Criminal Tribunal for Rwanda to the General Assembly and the Security Council 2013 A/68/270-S/2013/460 (2012/2013) Para 69.
[392] ICTR Newsletter November 2009, 8
[393] ICTR Newsletter October 2010, 7
[394] Adama Dieng, 'Capacity Building Efforts of the ICTR' (2010-2011) Northwestern University Journal of International Human Rights, 403, 405
[395] ICTR Newsletter May-June 2012, 10

Along similar lines, the indirect exacting influence of the Rwandan Tribunal has led to the development and upgrading of Rwanda's prison infrastructure. The Rwandan government has engaged in infrastructural upgrade in preparation to receive convicts from the Rwandan Tribunal haven signed an agreement on enforcement of sentences with the United Nations on 4th March, 2008.[396] The Rwandan Tribunal has however not referred any of its convicts to Rwanda to serve out their prison terms rather pursuant to an agreement between the Special Court and the Rwandan government; nine convicts from the Special Court are serving out their prison terms in Mpanga Prisons in Rwanda.

The Rwandan Tribunal has made significant levels of impact on legislative, judicial and executive actions and processes. Several laws whose nature and character have been shaped by the exerting influence of the Rwandan Tribunal have been introduced in that country. Over the years, the Rwandan government has consistently embarked on judicial and legal reforms to bring its domestic system within the standards set by the Tribunal for its judicial system to be adjudged as adequate to undertake the prosecution of genocide cases referred from the Tribunal.

3.3. Uganda and Contemporary International Criminal Courts and Tribunals

Of the three contemporary international criminal courts and tribunals with operational and jurisdictional relevance in the Commonwealth, the ICC has had a more profound impact on Uganda. This section reviews and examines evidence of the impact of the ICC in Uganda. This does not detract from the fact that the Rwandan Tribunal has had some measure of impact on Uganda, as in the wider Great Lakes Region. Uganda and Rwanda are neighbours with unfolding events in Rwanda often producing a rippling effect in Uganda which is home to a great population of the Rwandan Refugees.

3.3.1. Impact on Judicial Action and Process

The establishment in 2011 of the International Crimes Division (ICD) is attributable to the role of the ICC.[397] Uganda in a bid to give effect to the principle of complementarity enshrined in the Rome Statute of the ICC created the ICD.[398] Although the ICC and Uganda have had significantly high

[396] Thirteenth Annual Report of the International Criminal Tribunal for Rwanda to the General Assembly and the Security Council 2008 A/63/209-S/2008/514 (2007/ 2008) Para 56.

[397] Linda Carter, 'The Failure of the ICC: Complementarity as a Strength or Weakness?', (2013) 12, Washington University Global Studies Law Review, 451 ascribing some of the developments in Uganda such as the ICD to partly the complementarity regime. P. 462

[398] On complementarity, see generally, Claus Kreb, 'Penalties, Enforcement and Cooperation in the International Criminal Court' (1998)6 European Journal of Crime, Criminal Law and Criminal Justice 442;J.K. Kleffner, The Impact of Complementarity on National Implementation of Substantive International Criminal Law, (2003)1 Journal of International Criminal Justice86-113; M. Neuner (ed.) , *National Approaches to the Implementation of International Criminal Law in Domestic Law* (Berlin: Berliner Wissenschafts Verlag, 2003);Benjamin Perrin, 'Making Sense of Complementarity the Relationship Between the ICC and National

levels of interaction and engagement, its impact on judicial action and process within Uganda, has not been as robust and marked. Ugandan courts have not deployed the norms and Jurisprudence of the ICC within that country's domestic legal system. The case of *Thomas Kwoyelo* is the only case of serious international crimes that has come before the ICD, it has however been bedevilled by legal and constitutional constraints emanating from Uganda's domestic laws.

Kwoyelo a former LRA member was arrested in Congo in March 2009 and has been held by security operatives at different places first in an undisclosed location and subsequently at Gulu and Luzira Maximum security prison before his trial at the ICD. Kwoyelo's case is a tricky one. He had applied for amnesty under the Ugandan Amnesty Act before he was formally charged. He was subsequently charged with 12 counts of violations of Uganda's 1964 Geneva Conventions Act. His alleged violations included wilful killing, taking hostages and, extensive destruction of property in the Amuru and Gulu Districts of northern Uganda.[399] When his trial commenced on 11th July, 2011, the Prosecutor submitted an amended indictment which included the initial 12 counts in the earlier indictment and an additional 53 alternative counts brought under Uganda's Penal Code.[400]

Following the defence preliminary objections, a reference was made on the 25th of July, 2011 to the Constitutional Court for consideration of the preliminary objections raised by the defence. The case came up on 16th August, 2011, before the Constitutional Court which heard the oral submissions of the defence's objections. The issues raised in the oral submission included inter alia: whether Kwoyelo was being denied equal treatment under Uganda Amnesty Act by being denied amnesty; whether Uganda's Amnesty Act is unconstitutional and thus should not bar Kwoyelo's case from proceeding; and whether Kwoyelo's detention in an undisclosed location when he was first taken into custody is unconstitutional.[401] In its ruling on the 22nd August, 2011 the Constitutional Court held that the Ugandan Amnesty Act was constitutional and that Kwoyelo's case should be stopped on the grounds that he was treated unequally before it.[402] An appeal has been lodged before the Ugandan Supreme Court on the decision of the Ugandan Constitutional Court by the Director of Public

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Jurisdictions' (2006) Vol 18, No. 2 Sri Lanka Journal of International Law, 311-318; See Kevin Jon Heller, 'The shadow side of complementarity: the effect of article 17 of the Rome Statute on national due process', (2006) Criminal Law Forum, 255; Carsten Stahn, 'Complementarity: a tale of two notions', (2008) Criminal Law Forum 87; Rod Rastan, 'Testing Co-operation: The International Criminal Court and National Authorities', (2008) 21 Leiden Journal of International Law, 431;Carsten Stahn and Mohammed M. El Zeidy, *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press 2011).

[399] *Uganda v Kwoyelo Thomas*, High Court of Uganda (War Crimes Division), Case No. 02/10, Indictment, August 31, 2010.

[400] *Uganda v Kwoyelo Thomas*, High Court of Uganda (International Crimes Division), Case No. 02/10, Amended Indictment, July 5 2011, http://www.judicature.go.ug/index.php?option=com accessed 10/01/2013.

[401] See JLOS, "Justice at Crossroads"? A Special Report on the Thomas Kwoyelo Trial", http://www.jlos.go.ug/uploads/Special accessed 10/01/2013.

[402] *Thomas Kwoyelo V. Uganda*, Constitutional Court of Uganda, constitutional petition no. 036/11 judgement, September 22, 2011, [23-24]. For reactions to the decision of the Ugandan Constitutional Court, see AI ' Court's decision a setback for accountability for crimes committed in northern Uganda conflict', AI Index AFR 59/015/2011, 23 September 2011.

Prosecutions. The Kwoyelo decision has serious implications for Uganda as a nation and in its pursuit for accountability. [403] Kwoyelo remains in detention and the appeal is pending before the Supreme Court. The continued detention of Kwoyelo and the government's insistence on trying him increasingly continues to pose more questions than answers. What is the justification for granting amnesty to other LRA members and rejecting Kwoyelo's application?

3.3.2. Impact on Legislative Action and Process

One direct impact of the ICC on legislative action and process in Uganda is the implementation of the ICC Act 2010 by the Uganda. The Uganda ICC Act was first drafted in 2005, but not passed into law. In 2010, prior to Uganda's hosting of the Review Conference of the Rome Statute of the ICC, the bill was rushed to Parliament, was passed into law on 10th March, 2010 and assented to on the 25th of May, 2010.[404]

3.3.2.1. International Criminal Court Act 2010

3.3.2.1.1. Incorporating Crimes

Uganda signed the Rome Statute of the ICC on 17 March 1999 and ratified same in 2002. The International Criminal Court Act 2010 incorporated Uganda's obligations under the Rome Statute into the body of its national laws. Uganda ratified the Rome Statute before it passed an implementing legislation, taking a different approach from other Commonwealth States of Australia, Canada, and United Kingdom who all passed an implementing legislation into their national laws before ratifying the statute.[405] This approach by Uganda, Kenya, Nigeria and other states is often the reason why several state parties to the Rome Statute of the ICC are yet to implement the provision of the Rome Statute of the ICC into national laws. Prior to the implementation of Uganda's ICC Act, the only applicable legislation criminalizing certain crimes within the ICC Act was the Geneva Conventions Act providing a partial framework for serious international crimes i.e. grave breaches of the Geneva Conventions and Additional Protocol I. Consequently, Uganda through the implementation of the ICC Act 2010, in one breathe fulfils its obligations under the Rome Statute and creates a wholesale incorporation of serious international crimes within its domestic legal system. Accordingly, for the first time in Uganda a domestic statute codifies the crime of genocide, war crimes and crimes against humanity in article 5 of the Rome Statute of the ICC.

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[403] For an in-depth analysis of the potential pitfalls of the decision on Uganda, see JLOS, "Justice at Crossroads", 9; see also James Ellis and Dan Kuwali 'Uganda' (2011) Year Book of International Humanitarian Law Volume 14 Correspondents' Report.

[404]The International Criminal Court Act 2010, the Uganda Gazette No 39 Volume CIII dated 25th June 2010, assented on 25th May 2010.

[405]For examples of States incorporation of core crimes in their domestic legislation, See Olympia Bekou, 'National Prosecution of International Crimes: Cases and Legislation', (2012) Journal of International Criminal Justice 10 (3), 677.

Uganda's ICC Act does not expressly define the crimes of genocide, crimes against humanity and war crimes; rather it adopts the definition of the crimes under the Rome Statute of the ICC.[406] In relation to the crime of genocide, the Uganda ICC Act criminalizes genocide and conspiracy to commit same as defined in article 6 of the Rome Statute of the ICC.[407] The Uganda ICC Act criminalizes crimes against humanity by adopting the definition in article 7 of the Rome Statute of the ICC.[408] Whilst it codifies war crimes, in line with article 8 (2)(a)(b)(c) and (e) of the Rome Statute of the ICC,[409] Uganda has not ratified the 2010 amendments to the Rome Statute on war crimes and the crime of aggression.[410] Whenever Uganda ratifies the amendments, it would have to amend its implementing legislation to reflect the amendments to war crimes and incorporate the crime of aggression. The pragmatic approach adopted by both Canada and Kenya's ICC implementing legislation which defines the core crimes in relation to conventional or customary international law, obviates the necessity of their amending their respective ICC implementing legislation to reflect the changes to war crimes under the Rome Statute of the ICC. [411]

Aside from the core crimes, the Uganda ICC Act codifies a number of acts within the rubric of offences against the administration of justice such as: bribery of judicial officers,[412]bribery of officials of the ICC,[413] giving false evidence in proceedings before the ICC in Uganda or outside,[414] fabricating evidence before the ICC;[415] conspiracy to defeat the course of justice[416]and interference with witnesses or officials before the ICC.[417] Uganda has adopted the approach of most Commonwealth countries to the incorporation of offences against the administration of justice by creating identical offences in article 70(1) of the Rome Statute of the ICC in its implementing legislation.[418] The consent of the Director of Public Prosecutions is required before any suit can be instituted in a court in Uganda for both the core crimes and the crimes against administration of justice of the ICC.[419] The incorporation of a consent regime to the institution of criminal proceedings is a common feature of Commonwealth States, with the grant of consent either vested in the Attorney General or the Director

[406] Rome Statute of the ICC, articles 6,7 and 8
[407] International Criminal Court Act 2010, s 7
[408] Ibid, s 8
[409] Ibid, s 9
[410] Article 8, Para 2 (e) United Nations Reference: C.N.533. 2010. Treaties-6, and Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression in article 8 bis United Nations Reference: C.N.651. 2010. Treaties-8.
[411] Canada's Crimes Against Humanity and War Crimes Act 2000, C.24, ss 4(3) and 6(3); Kenya's International Crimes Act 2008, s 6(4)
[412] International Criminal Court Act 2010, s 10
[413] Ibid, ss 11-12
[414] Ibid, s 13
[415] Ibid, s 14
[416] Ibid, s 15
[417] Ibid, s s16
[418] Kenya's International Crimes Act 2008, ss 9-17; Trinidad and Tobago's International Crimes and International Criminal Court Act, ss 15-21
[419] International Criminal Court Act 2010, s17

of Public Prosecutions. For the International Criminal Court, it also helps to prevent an abuse of the extended jurisdiction provided for both the core crimes and crimes against the administration of justice through the institution of proceedings without connections or link to Uganda.

In addition to the incorporation of the core crimes and offences against the administration of justice of the ICC, the Uganda ICC Act sets out the principles of liability and defences recognised in general international law and reinforced in the Rome Statute of the ICC in relation to the core crimes of genocide, crimes against humanity and war crimes.[420] These general principles include: individual criminal responsibility;[421] exclusion of jurisdiction over persons under 18 years;[422] responsibility of commanders and other superiors;[423] statute of limitations;[424] mental elements of crime.[425] Aside from the foregoing general principles of criminal law incorporated under the Act, the Act also extends the application of Uganda Law on general principles of criminal law to proceedings under the Act, giving persons being tried the option of either relying on defences available under Uganda domestic law or under international law.[426] Where there is any inconsistency between the provision of the Rome Statute of the ICC and Uganda Law on general principles of law, the provisions of the former will prevail.[427]

Section 19 of Uganda's International Criminal Court Act contains identical provisions with Section 7 of Kenya's International Crimes Act on the application of general principles of criminal law in domestic proceedings over the core crimes contained in the Rome Statute of the ICC. Both Acts also adopt similar approach in addressing the issue of immunity. Article 27 of the Rome Statute of the ICC is replicated in section 25 of Uganda's International Criminal Court Act with slight modifications. Uganda's implementing legislation provides that the immunities which a person enjoys as a result of a person's official capacity will not preclude the provision of assistance to the ICC or the person's arrest and surrender to the ICC. The foregoing provisions are however, subject to sections 24(6) which provides for the Minister to consult with the ICC where conflicts arise between the obligations to arrest and surrender to the ICC and commitments and agreements made to another state permitted under article 98 of the Rome Statute of the ICC.

Further, the Act provides that Ugandan courts in proceedings in respect of the core crimes may apply the Elements of Crime. The use of "may" indicates that reference to the Elements of Crime is based

[420] Ibid, s 19(1)
[421] Rome Statute of the ICC, article 25.
[422] Ibid, article 26
[423] Ibid, article 28
[424] Ibid, article 29
[425] Ibid, article 30
[426] International Criminal Court Act 2010, s19 (1)(b) and (c)
[427] Ibid, s 19(3)

on the judges' discretion. In both Kenya[428] and the United Kingdom[429] the Elements of Crime is a mandatory interpretive document in domestic proceedings before their respective national courts.

3.3.2.1.2 Jurisdiction

The temporal jurisdiction of the International Criminal Court Act begins from the 25th June, 2010. The Act does not have retroactive application. It would have been pragmatic and useful for the Act to have had retroactive application over the serious crimes committed in the course of the conflict between the Lord's Resistance Army and the Ugandan Government. This omission has resulted in a gap in the law in Uganda. Thomas Kwoyelo (former LRA commander being tried before Uganda's ICD) was indicted under the Geneva Conventions Act[430] rather than under the International Criminal Court Act. The likelihood of trying Kwoyelo under the Geneva Conventions Act is itself in doubt because, the Geneva Conventions Act, criminalizes grave breaches which occur in an international armed conflict, whereas the conflict between the LRA and the Ugandan Government is in the nature of a non-international armed conflict. Accordingly, the Geneva Conventions Act would only be applicable if an international element such as the complicity of the Sudanese State can elevate the conflict to that of an international armed conflict.[431] All these issues remain speculations, as they have not yet arisen in the case as a result of constitutional and legal challenges raised by Thomas Kwoyelo.

The extra-territorial jurisdiction of Ugandan courts over both the core crimes of genocide, war crimes and crimes against humanity and crimes against the administration of justice of the ICC are set out in section 18. Section 18 vests Ugandan courts with jurisdiction where the offence was committed outside Uganda, the alleged offender subsequently enters Uganda. In addition, section 18 provides for extra-territorial jurisdiction of Ugandan courts if at the time of the commission of the offence, the alleged offender: (a) was a citizen or permanent resident of Uganda, (b) employed by Ugandan in a civilian or military capacity and if the victim was a citizen or permanent resident of Uganda. The extra-territorial jurisdiction provided under section 18 is in line with that provided in Canada's and Kenya's implementing legislation, however it is not as expansive. Both Canada's and Kenya's implementing legislation incorporates additional jurisdictional grounds under which their respective national courts can exercise extra-territorial jurisdiction. These additional jurisdictional grounds include: where the alleged perpetrator was a citizen of a state that was engaged in armed conflict against Canada or Kenya, or was employed in a civilian or military capacity by such a state and if the

[428] International Crimes Act 2008, s 7(5); Australia's International Criminal Court (Consequential Amendments) Act 2002 Act No. 42 of 2002, is silent on the general principles of criminal law including defences.
[429] United Kingdom International Criminal Court Act 2001 C.17, s 50(2)(a)
[430] Geneva Conventions Act No. 31 1964.
[431] James Ellis and Dan Kuwali 'Uganda' (2011) Year Book of International Humanitarian Law Volume 14 Correspondents' Report 1, 4-5.

victim of the alleged offence was a Canadian or Kenyan citizen or a citizen of a state that was an ally of Canada or Kenya during an armed conflict.[432]

3.3.2.1.3. Cooperation with the ICC

The Uganda ICC Act incorporates extensive provisions on the cooperation regime between the ICC and Uganda. It sets out in details, possible areas of cooperation in the investigation and prosecution of the core ICC crimes.

3.3.2.1.3.1. Assistance to the ICC

The forms of assistance includes request for the arrest and surrender of persons to the ICC (the Act provides for a distinct procedure when dealing with request for arrest and surrender), identification of persons and location of items, the taking of evidence and producing of evidence, the questioning of any person being investigated or prosecuted, service of documents, facilitating the voluntary appearance of persons as witnesses or experts, the temporary transfer of prisoners, examination of places and sites, executing searches and seizures, provision of records and documents, protection of victims and witnesses and the preservation of evidence, identification, tracing and freezing, or seizure of proceeds, property and assets, enforcement of orders and any other type of assistance not prohibited by the law of Uganda with a view to aid the investigation and prosecution of crimes within the jurisdiction of the ICC.[433] Furthermore, the Act permits the provision of certain kinds of assistance required by the ICC Prosecutor, Pre-trial and Trial Chambers.[434] The Rome Statute in Article 87 sets out the general provisions on assistance including the means for transmitting the requests and the relevant channels through whom such requests may be transmitted. The Ugandan ICC implementing legislation incorporates in detail the general provisions contained in article 87.

Requests for assistance are made in writing to the Minister of Justice (Minister).[435] The Minister is required to notify the ICC promptly of its decision to any request, with the notification setting out the reasons for the decision in cases of refusal or postponement of the request.[436] The Rome Statute of the ICC provides that states must have domestic measure under their laws to comply with requests from the ICC under article 93 of the Rome Statute. Consequently most implementing legislation incorporates extensive measures for complying with requests from the ICC. The domestic procedures for these varied forms of assistance other than those dealing with arrest and surrender are contained in

[432] See Canada 's Crimes Against Humanity and War Crimes Act, 2000, C. 24, s 8 and Kenya's International Crimes Act 2008, s 8
[433] International Criminal Court Act 2010, s 20(1)(a)(XIV)
[434] Ibid, s 20(1)(b)
[435] International Criminal Court Act 2010, s21
[436] Ibid, s 24

Part V of the Uganda ICC Act. The Minister can refuse a request for assistance under Part V of the Act on mandatory and discretionary grounds.

The mandatory grounds for refusal are: a ruling of inadmissibility by the ICC in a case to which the request pertains, an advice by the ICC that it no longer wishes to proceed with the request and where the requested assistance is prohibited under Uganda Law.[437] Discretionary grounds for refusal of assistance includes: where there are competing requests from the ICC and a state,[438]and where the Minister has made a decision that Part VII of the Uganda ICC Act (contains provisions on national security) applies to the request. The ICC implementing legislation of most states in the Commonwealth contain similar provisions on the exercise of the designated authority's discretion in refusing a request for assistance from the ICC.[439] The Minister may postpone the request where an admissibility issue is pending before the ICC, where executing the request would interfere with ongoing investigation or prosecution in Uganda, where the Minister is consulting with the ICC under section 24(6) and where there are competing requests from the ICC and a state and the Minister in consultation with the ICC and state decides to postpone the execution of the request.[440]

Requests for assistance are a two way street. As the Minister on the other hand, may also request the assistance of the ICC for the transmission of statements, documents or other types of evidence obtained in the course of an investigation or trial by the ICC and the questioning of any person detained on the orders of the ICC.[441]

3.3.2.1.3.2. Arrest and Surrender

The provisions on arrest and surrender are contained in Part IV of the Uganda ICC Act. Requests for arrest are made where the ICC Pre-Trial Chamber has issued a warrant of arrest. The content of a request for arrest and surrender are not expressly incorporated in Uganda's International Criminal Court Act. Rather, the Act makes direct reference to the provisions of article 91 of the Rome Statute of the ICC. A combined reading of Uganda's ICC Act and the provisions of the Rome Statute provides the content of a request for arrest and surrender which may be made to Uganda by the ICC. A copy of the warrant of arrest, requisite information identifying the person being sought and the probable location must accompany requests for arrest and surrender. Where the request is in relation to a person already convicted, the request must be sent along with a warrant of arrest, the judgement

[437] Ibid, s 60(1)
[438] International Criminal Court Act 2010, s 60(2)
[439] Uganda's International Criminal Court Act 2010, s 60(2); Australia's International Criminal Court Act N0. 41 of 2002, s 51(2)(b) and (c) read along with ss 59(4) and 60(3) and s 148
[440] International Criminal Court Act 2010, s 61(1)
[441] Ibid, Part IX, ss 97-99

and sentence imposed if any.[442] Requests for the provisional arrest of a person must be accompanied by requisite information identifying the person and probable location, statements of the crimes for which the person is sought and the facts constituting the crime and the existence of a warrant or a judgment of conviction against the person. In addition, a statement that a formal request for the person will be made by the ICC must support the request.[443] This is also a requirement under Australia's implementing legislation,[444] however, in the implementing legislation of New Zealand and Trinidad and Tobago, this last condition is dispensed with.[445]

3.3.2.1.3.2.1 Procedure for Arrest

Requests for arrest and surrender are made in writing to the Minister (Minister for Justice). Uganda's ICC implementing legislation has also adopted the approach of other implementing legislation which designates a person to whom requests from the ICC are to be channelled. The choice of whom to designate is a discretionary right exercised by different states. The practice across most of the ICC implementing legislation has been to designate the Minister of Justice, the Attorney General or the Minister for foreign Affairs; Uganda's implementing legislation designates the Minister for Justice. However, in cases of urgency, the Uganda ICC Act permits the use of any other means including facsimile or electronic mail. In cases where facsimile or electronic mail is used in transmitting the request for arrest and surrender, it must be followed by a formal request.[446] Complete requests for arrest and surrender received by the Minister are passed onto a registrar for endorsement or for the issuance of a domestic warrant.[447] The Minister has to notify the Director of Public Prosecutions (DPP) of the transmission of the request from the ICC to a registrar.[448] This is important, as the consent of the DPP is a condition precedent to the institution of any proceeding under the Act.[449] In both Australia and Trinidad and Tobago this power is vested in the Attorney General.[450]

The registrar on receipt of the request from the Minister will if there are grounds to believe that the person named in the warrant is in or on the way to Uganda and the request is supported with a warrant of arrest, endorse it for execution by a police officer or where the request is for a convicted person and it is not followed by a warrant of arrest, issue a warrant of arrest for execution by a police officer in

[442] Ibid, s 26 read in conjunction withArticle 91 of the ICC Statute
[443] Ibid, s 29 read in conjunction with Article 92 of the ICC Statute
[444] Australia's International Criminal Court Act N0. 41 of 2002, s 19
[445] New Zealand International Crimes and International Criminal Court Act 2000 , s 36 and Trinidad and Tobago International Crimes and International Criminal Court Act 2006, s 36
[446] International Criminal Court Act 2010, s 21
[447] Ibid, s 26(1)(a)
[448] Ibid, s 26(1)(b)
[449] Ibid, s 17
[450] Australia's International Criminal Court Act N0. 41 of 2002, s 20 and Trinidad and Tobago International Crimes and International Criminal Court Act 2006, s 33

Uganda.[451] A request for provisional arrest may be made by the ICC in cases of urgency to the Minister, the Minister if satisfied that the request has been sent along with proper information and relevant documentation, transmits same to the Inspector General of Police with directives for the arrest of the person.[452] The process of issuing a provisional arrest warrant under Uganda's ICC implementing legislation differs from most ICC implementing legislation of states such as Trinidad and Tobago, New Zealand and Australia where provisional arrest warrants are issued by the courts.[453] Once the Minister receives a formal request for the arrest and surrender of a person provisionally arrested, the Minister informs the registrar and proceeds with the request as in cases where a formal warrant of arrest was provided under section 26.[454]

The Minister has a mandatory right to refuse a request for the arrest and surrender of a person where the ICC has ruled on the inadmissibility of the case to which the request relates or the ICC has decided to discontinue with the request.[455] The Minister's discretion under the Act to refuse a request for arrest and surrender may be exercised where there are competing requests for surrender and extradition, the Minister in arriving at this decision must take into account the procedure set out in article 90 of the Rome Statute of the ICC and section 41 of the Uganda ICC Act.[456] The Minister may also postpone the execution of a request in consultation with the ICC where: an admissibility decision is pending, if the request would interfere with ongoing national investigations or prosecutions for a different conduct and where the Minister and the ICC are involved in discussion as to the existence of existing obligations under article 98 of the Rome Statute. Under this section, the Minister makes the decision on whether to surrender or not only on the stated grounds. As typically the decision to surrender is largely a judicial one made by the courts. The Minister's discretion may be exercised prior to the transmitting of the request to the registrar or after transmitting same.[457]

A person arrested may apply for bail from the registrar. The Rome Statute explicitly states that a person should have the right to apply for bail in a custodial state. However, it sets a high threshold for the court before bail can be granted.[458] The Rome Statute provides that before bail (which it terms "application for interim release") is granted, the "competent authority" (in this case the judge) must take into consideration the "gravity of the alleged crimes, the existence of "urgent and exceptional circumstances" that justify the grant of bail and "necessary safeguards" to ensure that the state would

[451] International Criminal Court Act 2010, s 26(2)(a)-(b)
[452] Ibid, s 29(1)
[453] Trinidad and Tobago's International Crimes and International Criminal Court Act, s 36; New Zealand's International Crimes and International Criminal Court Act, s 36; International Criminal Court Act N0. 41 of 2002, ss 21(2) and (3).
[454] International Criminal Court Act 2010, s 29(5)
[455] Ibid, s 27(1)(a) and (b)
[456] Ibid, s 27(2)(a) and (b)
[457] Ibid, s 28
[458] Rome Statute of the International Criminal Court, article 59(3)

be able to surrender the person to the ICC. [459] The provisions add further that where a request for bail is made, the ICC Pre-Trial Chamber must be informed and make recommendations to the state. The "competent authority" must take into consideration any recommendations made by the ICC Pre-Trial Chamber.[460] Finally, where the person is granted bail, then the ICC may request periodic reports of the bail status.[461] These provisions of the Rome Statute of the ICC are replicated in Uganda's ICC Act. Where an application for bail is made, the Minister must consult with the ICC and convey recommendations made by the pre-trial chamber to the registrar assigned the case. Where, the registrar does not receive the recommendations of the ICC Pre Trial Chamber within seven days, the registrar may proceed on the application under Uganda's Magistrate Court's Act.[462] Canada's Extradition Act also contains similar provision specifying a timeframe for which the court may receive bail recommendations from the ICC Pre-Trial Chamber. [463]

A person provisionally arrested, must be released from custody on the orders of the registrar, if after 60 days, the Minister has not sent a notice of receipt of a formal request for arrest and surrender, unless, in the interest of justice the registrar extends the period for receipt of notice.[464] This provision varies slightly across the different states in the Commonwealth. In both Australia and Uganda, the respective ICC implementing legislation sets the timeframe of 60 days for which formal notice ought to be received from the Attorney General or Minister.[465] In Kenya, New Zealand and Trinidad and Tobago, the judge sets the timeframe for receipt of formal notice from the Minister.[466]

3.3.2.1.3.2.2. Procedure for Surrender

Where the registrar authorises the remand of a person under an arrest warrant, the registrar may issue a delivery order for execution by the Inspector General of Police. If the person against whom a delivery order has been issued is in custody, the registrar orders the person's continued detention and if not the person is committed to custody.[467] Under Uganda's ICC implementing legislation, the responsibility for executing the delivery order and liaising with the ICC rests with the Inspector General of Police. Whereas in Kenya, Trinidad and Tobago and New Zealand copies of warrant of detention issued by the courts after determining a person's eligibility for surrender are passed on to the designated Cabinet Minister or Attorney General for the issuance of a surrender order. The

[459] Ibid, article 59(4)
[460] Ibid, article 59(5)
[461] Ibid, article 59(6)
[462] International Criminal Court Act 2010, s 31
[463] Canada's Extradition Act, s 18(1.1)
[464] International Criminal Court Act 2010, s 32
[465] See Australia's International Criminal Court Act N0. 41 of 2002, s 26;Uganda's International Criminal Court Act 2010, s 32
[466] Kenya's International Crimes Act 2008, s 34; New Zealand International Crimes and International Criminal Court Act, s 38; Trinidad and Tobago's International Crimes and International Criminal Court Act, s 38
[467] International Criminal Court Act 2010, s 33

designated Cabinet Ministers are responsible for executing the surrender orders.[468] The Minister or the Attorney General acts as an intermediary between the ICC and the national courts. Similarly, the registrar in any proceeding under this part cannot inquire into the validity of any warrant or order given by the ICC.[469] This provision is explicitly stated in the Rome Statute of the ICC. [470]Persons may at any time notify the registrar of their consent to being surrendered provided they are present before the registrar when the consent is given and the consent has been freely given.[471] The vesting of this responsibility on the registrar who across Commonwealth jurisdictions is a court administrator means that a formal surrender trial does not take place in Uganda. This much is garnered from the provisions of surrender by consent, which makes no requirement for the person to give consent in the presence of a legal practitioner. While in Kenya consent to surrender is made in court and a legal practitioner must represent the person at the time of giving the consent.[472]

Where the registrar refuses to make a delivery order, the registrar gives an order remanding the person in custody for fourteen days and notifies the Minister. The Minister may appeal to the high court against the decision of the registrar not to make a delivery order. Most implementing legislation provide for a right of appeal by either the person whose surrender is sought or the Minister or Attorney General against the decision of the court. In Uganda, right of appeal lies to the high court because, the proceedings take place before a registrar whereas in other states where the proceedings are conducted before a high court judge in the first instance, appeals lie to a higher court such as the court of appeal.[473] Where the high court allows the appeal, it may make a delivery order or remit the case to the registrar to make a delivery order. Where the high court dismisses the appeal, the person shall be discharged.[474] The court may on request discharge a person against whom a delivery order has been made and is not delivered within 60 days except reasonable cause is shown for the delay.[475]

Where there are competing requests from the ICC and states for the arrest and surrender of a person pertaining to the same conduct the following will apply where (a) surrender of the person is sought by the ICC, priority is given to the ICC's request where the requesting state is a party and (b) where the requesting state is not a party, and Uganda has no subsisting international obligation to extradite the

[468] Kenya's International Crimes Act 2008, ss 42-43; Trinidad and Tobago's International Crimes and International Criminal Court Act, ss 43, 45-47; New Zealand's International Crimes and International Criminal Court Act, ss 43, 45 and 47
[469] International Criminal Court Act 2010, s 34
[470] Rome Statute of the International Criminal Court, article 59(4)
[471] International Criminal Court Act 2010, s 35; Also persons arrested under provisional warrants may also consent to surrender International Criminal Court Act 2010, s 35(4) and (5)
[472] Kenya's International Crimes Act 2008, s 41
[473] See Trinidad and Tobago's International Crimes and International Criminal Court Act, s 67
[474] International Criminal Court Act 2010, s 37
[475] Ibid, s 38

person to the requesting state.[476] In instances where the requesting state is a non-party State to the Statute and Uganda has an obligation under international law to extradite to that state, the Minister in making a decision either to surrender to the ICC or extradite to the state, will take into cognisance, the following factors: (a) the respective dates of the requests, (b)the interests of the requesting state (including the place of the commission of the offence and the nationality of the perpetrator and victim) and (c) the possibility of a future surrender by the state to the ICC .[477] These same factors will be taken into consideration by the Minister in deciding whether to surrender or extradite where there are competing requests from the ICC and one or more state for different conducts and Uganda has a subsisting international obligation to extradite to one or more state.[478]

3.3.3. Impact on Executive Action and Process

The ICC has exerted significant influence on executive action in Uganda in comparison to other Commonwealth States. One reason for this marked impact of the ICC in Uganda in relation to other Commonwealth States is the fact that Uganda is a situation country. The impact of the ICC on executive action and process within Uganda is summed below.

First, the executive arm of government in Uganda began its relationship with the court in a profound way, when in December 2003 President Museveni referred the situation in northern Uganda to the ICC.[479] The announcement of the referral by the then Prosecutor of the ICC was carried out at a joint press conference between him and President Museveni in January 2004 in London.[480] The joint press conference depicted at the time a robust relationship between the Prosecutor of the ICC and the executive in Uganda. Having referred the situation in northern Uganda to the ICC, the Government of Uganda continued somewhat paradoxically to explore other avenues toward a resolution of the conflict. On the heels of the referral, new peace talks emerged between the rebellious Lord's

[476] Ibid, s 41(1)-(3).
[477] International Criminal Court Act 2010, s 41(4) Act read in conjunction with the Rome Statute of the ICC., Article 90(6).
[478] International Criminal Court Act 2010, s 41(5) and (6) read in conjunction with the Rome Statute of the ICC, article 90(7).
[479] C. Kress, 'Self Referrals and Waivers of Complementarity", (2004), 2 Journal of International Criminal Justice, 944-6 ; P. Gaeta, 'Is the Practice of Self Referrals" a Sound Start for the ICC? (2004), 2 Journal of International Criminal Justice, 951-952; Mohammed M. El Zeidy, 'The Ugandan Government Triggers the first Test of Complementarity Principle: An Assessment of the First State Party Referral to the ICC', (2005) 5 International Criminal Law Review.88; William A. Schabas, 'First Prosecutions at the ICC', (2006), 25 Human Rights Law Journal, 25-40; Payam Akhavan, 'The Lord's Resistance Army Case: Uganda's Submission of the First State Party Referral to the ICC',(2005) 99(2) American Journal of International Law, 406; Payam Akhavan, 'Self-referrals before the International Criminal Court: are states the villains or the victims of atrocities', (2010) Criminal Law Forum, 103; Darryl Robinson, The Controversy over Territorial State Referrals and Reflections on International Criminal Law Discourse', (2011) 9(2) 355; Nidal Nabil Jurdi The international Criminal Court and National Courts: A Contentious Relationship (Ashgate 2011) chapter 5.
[480] Press Release President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC ICC-20041029-44.

Resistance Army (LRA) and the government, which subsequently negotiated a new amnesty deal with the rebels. The unfolding events within Uganda did not deter the ICC.

In 2005, the Prosecutor of the ICC unsealed arrest warrants against five suspects from the LRA which had been embroiled in a protracted conflict between it and the Government of Uganda. The arrest warrants issued by the ICC were for Joseph Kony and four other LRA top commanders.[481] Following the issuance of the arrest warrants, criticisms were levelled against the ICC for being partial and having singled out the LRA for prosecution, despite mounting evidence of government infractions across northern Uganda in a bid to quell the LRA insurgency. Accusatory fingers point at the fact that the referrals were announced at a joint conference between the government and the prosecutor indicating bias. The Government on the other hand has continued to insist that members of the Uganda People's Defence Force (UPDF) are routinely made to face justice in military courts for their atrocities.[482] The Ugandan government has also been accused of using the ICC instrumentality as a mere weapon in its battle against the LRA.[483]

Second, the signing of bilateral agreement between the executive arm of government in Uganda and the ICC, in the aftermath of the referral, is another example of the impact of the ICC on executive action and process in Uganda. At the time of the referral, Uganda had only signed and ratified the Rome Statute of the ICC; it was yet to implement same. In order for the ICC to operate in Uganda, an agreement setting out the framework of cooperation between the court and Uganda was therefore imperative. This was one of the earliest acts between the ICC and the Ugandan Government.[484]

Third, the impact of the ICC on executive action and process in Uganda is also buttressed by the rippling effect of the ICC arrest warrants on national and local peace processes in Uganda. Although providing cooperation with the Court and generating a significant level of correspondence, the executive arm of government in Uganda has tended to shift position from time to time in its relationship with the Court. Evidence of this abounds in public statements and speeches credited to the President or his cabinet members. For instance, when the LRA and the government were engaged in negotiations under the 'Juba Peace Talks', the LRA allegedly demanded the withdrawal of ICC

[481] *Joseph Kony*, ICC-02/04-01/05, 8 July 2005; *Vincent Otti*, ICC-02-04, 8 July 2005; *Okot Odhiambo*, ICC-02-04, 8 July 2005; *Dominic Ongwen*, ICC-02-04, 8 July 2005 and *Raskia Lukwiya* ICC-02/04-01/05, 8 July 2005. Following the death of Raskia Lukwiya, the arrest warrant against him was withdrawn. There have been recent news that Vincent Otti was killed on the orders of Joseph Kony. On 16th January 2015, Dominic Ongwen was surrendered to the ICC and transferred to the Court's detention centre on 21st January 2015. He made his initial appearance before the Court on the 26th of January 2015 and on the 6th of February 2015,his case was severed from that of Kony and the others who remain at large despite concerted efforts.

[482] See Audrey Kim, 'American Non Governmental Organisation Coalition for the International Criminal Court, Update on the ICC and Uganda: Outstanding Arrest Warrants and Efforts at National Justice ', (2012) available at www.amicc.org/hrcolumbia.org last accessed 10/10/2014.

[483] Mathew Happold, 'The International Criminal Court and the Lord's Resistance Army', (2007) 8 Melbourne Journal of International Law, 159; William A. Schabas, 'Prosecutorial Discretion v Judicial Activism', 6 JICJ (2008) 731-761 at 752-753.

[484] Report of the International Criminal Court for 2004 A/60/177, Para 36

arrest warrants as a condition for negotiations and peace deals.[485] Sources indicate that President Museveni had allegedly agreed to these concessions,[486] the ICC on its own was quick to refute any of these and noted that once referred, the effects of a referral cannot be undone.[487] Stakeholders have been quick to point to the influence of the ICC arrest warrants over the Juba peace process. In 2006, during a visit to the court, Mr. Amama Mbabazi the then Ugandan Minister for Security noted in his speech the positive impact of the arrest warrants, which unwittingly became a tool of negotiation, the threat of which led the LRA to enter into peace negotiations with the government. Jan Egeland, then the United Nations Under-Secretary-General for Humanitarian Affairs also expressed similar sentiments.[488] Overtime, the peace talks moved on against the backdrop of the ICC arrest warrants. Although the final agreements was never signed, it seemed the ICC 's intervention ultimately led to significantly reduced levels of hostilities as the LRA had been forced out of Uganda over the arrest warrants.[489]

Fourth, the deployment of government resources to host the first ICC review conference in 2010, demonstrates significant influence of the ICC on executive action in Uganda. From 31 May to 11 June 2010, for eleven days, Kampala (the capital of Uganda) became the focus of international media and public attention, as it hosted dignitaries from all over the world. The review conference, the first in the history of the Court, generated significant interest. The hosting of this conference by the Government of Uganda tasked its economic, intellectual and manpower resources. It was also a public demonstration of solidarity and unity of purpose and objective with the goals and aspirations of the court. In fact, the Ugandan International Criminal Court implementation Act otherwise known as the International Criminal Court Act 2010 was passed into law on the eve of the hosting of the Review Conference. The Review Conference was rounded up after two weeks with over 4600 representatives of states and intergovernmental and non-governmental organizations in attendance at the conference.

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[485] C. Opolot, 'LRA Wants Warrants Stopped', New Vision Kampala, Uganda, (20 September 2006) available at http://www.newvision.w.ug/D/8/13/522293/LRAwant

[486] Jeevan Vasagar, 'Lord's Resistance Army Leader is Offered Amnesty by Uganda', The Guardian, London, UK 5 July 2006, 14; Manisuli Ssenyonjo (2007) The International Criminal Court and the Lord's Resistance Army Leaders: Prosecution or Amnesty ?' International Criminal Law Review, 7, 361; Marieke Wierda and Michael Otim, ' Justice at Juba: International Obligations and Local Demands in Northern Uganda', 21 in Nicholas Waddell and Phil Clark (eds) *Courting Conflict? Justice, Peace and the ICC in Africa*, Royal African Society 2008; Terry Beitzel and Tammy Castle, 'Achieving Justice Through the International Criminal Court in Northern Uganda: Is Indigenous/Restorative justice a Better Approach? (2013) International Criminal Justice Review 23(1) 41-55.

[487] See generally, Michael P. Scharf & Patrick Doud, 'No Way Out? The Question of Unilateral Withdrawals or Referrals to the ICC and Other Human Rights Courts', (2008-2009) 9 Chicago Journal of International Law, 573.

[488] See briefing by the Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator on the Situation in Africa (United Nations document, S/PV.5525, 15 September 2006); Report on Activities of the Court ICC-ASP 5/15 17 October 2006 Assembly of State Parties Para 40

[489] William A. Schabas, 'Complementarity in Practice: Some Uncomplimentary Thoughts', (2008) Criminal Law Forum 5,19-22; Barney Afako , "Negotiating in the Shadow of Justice" in Accord II Initiatives to End the Violence in Northern Uganda 2002-09 and the Juba Peace Process, A Supplement to Protracted Conflict, Elusive Peace, 2010, 22.

3.3.4. Impact of the ICC in Uganda

Beyond, the evidence adduced in the foregoing sections of the impact of the ICC on legislative, judicial and executive actions and processes in Uganda, the ICC has since the referral made marked influences on Uganda through its many activities which have sought to bequeath a legacy to Ugandans.[490]

The ICC has helped to increase the awareness of international criminal justice and transitional justice issues through community outreach and other programmes. In 2005, the ICC held a workshop for delegates from local councils in the nine districts affected by the conflict in October 2005.[491] In the aftermath of the unsealing of arrest warrants in the Ugandan situation[492], the ICC held a series of workshops across Uganda and in the affected areas in 2006 for different categories of people such as magistrates and other judicial authorities,[493] local government leaders from the district affected by the conflict [494], local leaders [495], traditional, clan and cultural leaders [496], police officers [497] and stakeholders.[498] The ICC has designed outreach activities for different groups of persons across Uganda. These include: persons with disabilities, the elderly, youths, civil society groups, local leaders and the general public.[499] The ICC has also created programmes specifically for women, students and media practitioners in Uganda. The ICC's outreach has engaged the students in secondary schools through the organisation of inter-school quiz competition on issues related to the work of the ICC,[500] role plays in schools and the establishment of functional school outreach clubs in schools.[501]The court also provided specialized training for teachers on the work and role of the

[490] See Michael Otim and Marieke Wierda , 'Uganda: Impact of the Rome Statute and the International Criminal Court', ICTJ Briefing Paper (May 2010) available at www.ictj.org/static/Publications/ICTJUGRSRC-ImpactofICCbp2010.pdf accessed on 12/11/2014.

[491]Press Release ICC holds workshop in Uganda on Public Outreach ICC-CPI-20050818-107

[492] Press Release ICC Warrant of Arrest unsealed against five LRA Commanders, ICC-CPI-20051014-110 On 13 October 2005.

[493] Press Release ICC holds seminar with Ugandan Judicial Authorities ICC-CPI-20051026-111.

[494] Press Release ICC holds workshop in Northern Uganda with new local government leaders ICC-CPI-20060621-141.

[495] Press Release ICC holds workshop with local leaders in Amuria district ICC-CPI-20060828-158.

[496] Press Release ICC Facilitates workshop in Adjumani District ICC-CPI-20061028-170; Press Release ICC holds meeting with representatives of Lango Cultural Leaders in northern Uganda ICC-CPI-20060822-153; Press Release ICC holds workshop with Acholi traditional Leaders on 22 and 23 March 2006 ICC-CPI-20060324-128; ICC holds informative Workshop in Northern Uganda with Lango Cultural Leaders ICC-CPI-20060621-142; Press Release ICC Holds Informative Workshop in Northern-Eastern Uganda with Iteso Cultural leaders ICC-CPI-20060705-145; Press Release ICC holds workshop with Clan leaders from Uganda's Amuria district ICC-CPI-20070201-199.

[497] Press Release ICC-Workshop for Uganda's Police Officers ICC-CPI-071707-232

[498] Press Release ICC holds workshop with stakeholders from Uganda's Teso Region ICC-CPI-20070207-200.

[499] International Criminal Court Outreach Report 2010(Public Information and Documentation Section), 13

[500] Press Release 18/06/2009 Schools competition on the International Criminal Court concluded successfully in the Soroti district north-eastern Uganda ICC-CPI-20090618-PR423.

[501] International Criminal Court Outreach Report 2010 (Public Information and Documentation Section), 13-14

court.[502] The programmes for university students include public debate on the theme of the International criminal justice system,[503] public lectures and presentations, debates, quiz competitions and moot trials and other informative sessions. As well as engaging and interacting with them, the outreach unit also gave out copies of legal text and informational materials to universities.[504]

The ICC's outreach to legal professionals in Uganda has focused on bringing awareness about the various opportunities within the court to the knowledge of members of the legal profession one of which is the possibility of having their names on the Court's List of Counsel[505] and the campaign to increase the number of African female lawyers on the court's list of counsel.[506] The ICC established its media outreach programme in Uganda in 2005. Over the years, the ICC media outreach programmes have evolved to cover a broad range of activities such as training and workshops for Ugandan journalist geared at ensuring that news report about the court are precise and correct.[507] A handful of these training took place in 2007 and since then; there have been no information about further training from the Court's website.[508]

The Trust Fund for Victims established under article 79 of the Rome Statute of the ICC has been active in Uganda since it sought and received judicial approval from the ICC Pre-Trial Chamber II in 2008.[509] It has carried out assistance and development projects under its non-judicial assistance mandate.[510] The Trust Fund for Victims assistance are implemented in partnership with local nongovernmental and international organisations, faith–based and cultural institutions and cooperative organisations carrying out community based physical rehabilitation, psychological rehabilitation and material support programmes. Trust Fund for Victims physical rehabilitation assistance focused on treatment and medical rehabilitation of persons who suffered violent acts such as acts of torture and physical abuse, resulting in deep scarring, mutilation, amputation and disfigurement. The Trust Fund for Victims through its implementing partners has, since 2007, provided plastic and reconstructive surgery, prosthetics and orthotics devises and physiotherapy and counselling to victims across the

[502] ICC reaches out to teachers from the Lango and Teso sub-regions of northern Uganda ICC-CPI-20080623-PR328.
[503] ICC organizes public debate at Gulu University northern Uganda ICC-CPI-20080404-PR303
[504] International Criminal Court Outreach Report 2010 (Public Information and Documentation Section), 13-14
[505] Press Release 19/04/2010 ICC meets with Legal Practitioners in Kampala ICC-CPI-20100419-PR515
[506] ICC-CPI-20110509-PR661 ; International Criminal Court Outreach Report 2010(Public Information and Documentation Section), 14-15
[507] ICC Press Release ICC conducts training sessions for Journalists from northern Uganda ICC-CPI-20070829-239
[508] ICC Press Release ICC conducts training sessions for Journalists from northern Uganda ICC-CPI-20070829-239; ICC Press Release ICC-Dialogue with media houses from northern Uganda ICC-CPI-20071119-267.
[509] Scott Bartell, 'Update on the Transitioning Phase in Northern Uganda', in *Empowering Victims and Communities Towards Social Change*: Programme Progress Report, Summer 2012, The Trust Fund for Victims 32, .33.
[510] Since actual trials have not began, all assistance in the Ugandan situation has been implemented under the Fund's non judicial assistance mandate from funds generated from other sources other than fines as defined in Regulation 47 of the Trust Fund for Victims Regulations.

northern part of Uganda. [511] In addition to physical and psychological rehabilitation, victims have benefitted from the Fund's material assistance programme such as livelihood projects, improved agricultural assistance, animal husbandry projects and vocational training programmes. Due to cessation of hostilities in northern Uganda, the Trust Fund for Victims material assistance programme is being phased out.[512] The Trust Fund for Victims 2013 summer report estimates that 39750 victims have benefitted from the Trust Fund for Victims funded projects. Of that number, over 1600 victims with physical scarring have received rehabilitative assistance in the fabrication of prostheses and orthotics.[513]

From the foregoing, it can be surmised that the ICC has made an appreciable degree of impact on legislative and executive actions and processes in Uganda and on the wider Ugandan society. Its influence on legislative action and process has been significant like other states that have implemented the provisions of the Rome Statute. The ICC in Uganda has influenced a number of executive actions and processes. However, in recent times, President Museveni has become a fierce critic of the Court and on several occasions openly criticized the Court as a tool of western oppression and regime change in Africa.

3.4. The Impact of Contemporary International Criminal Courts and Tribunals in Sierra Leone

Introduction

Of the three contemporary international criminal courts and tribunals with operational and jurisdictional relevance in the Commonwealth, the Special Court established to address the violations that arose in the Sierra Leonean conflict has exerted the most influence on Sierra Leone. Sierra Leone has had limited interaction with the Rwandan Tribunal. In relation to the ICC, Sierra Leone signed the Rome Statute of the ICC on 17th October, 1998 and in 2000 ratified same. Despite having ratified the Rome Statute of the ICC in 2000, Sierra Leone is yet to take steps to incorporate the treaty into its domestic laws. An evaluation of the impact of contemporary international criminal courts and tribunals in Sierra Leone is hence, limited to an analysis of the influence of the Special Court on judicial, legislative and executive actions and processes in Sierra Leone.

[511] Judicael Elidje, Lisa Sulis and Johanna Huhtanen, 'Empowering Victims and Communities' in *Empowering Victims and Communities Towards Social Change*: Programme Progress Report, Summer 2012, The Trust Fund for Victims 14,17.

[512] Ibid, 21- 22

[513] Changing Lives Overcoming Stigma, Vulnerability and Discrimination Programme Progress Report Summer 2013 The Trust Fund for Victims 12.

3.4.1. Impact on Judicial Action and Process

The thrust of this section is to examine to what extent if any, the jurisprudence and norms of the Special Court has made impacts on judicial action and process within Sierra Leone. The establishment of the Special Court as a hybrid mechanism created to apply a mix of international and domestic law was received with a lot of expectations and acclaim.[514]

The adoption of Rule11bis by the 11th plenary of the judges was adopted to allow for transfer of cases from the Special Court to other jurisdictions.[515] The action did not precipitate the reaction generated by the same decision of the Rwandan Tribunal in Rwanda, because the Special Court had a slim docket and from the beginning, the prosecutorial strategy was to prosecute a limited number of persons i.e. "those bearing the greatest responsibility".[516] Financial constraints also affected the number of persons indicted by the Special Court who throughout its years of operation was constantly plagued by inadequate financial resource.[517] The only outstanding case to date which remained on the docket of the Special Court and which was transferred to the Residual Special Court for Sierra Leone (Residual Special Court) is the case of the fugitive, Johnny Paul Koroma. The Lomé amnesty also effectively closed the door on national prosecutions within Sierra Leone.[518] As a result of the foregoing, the Special Court did not exert influence on judicial action and process in Sierra Leone.

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[514] On hybrid tribunals, see generally, Laura A Dickinson, 'The Promise of Hybrid Courts', (2003) 97 American Journal of International Law 295;Parinaz Kermani Mendez, 'The New Wave of Hybrid Tribunals: A Sophisticated Approach to Enforcing International Humanitarian Law or an Idealistic Solutions with Promises? (2009) Criminal Law Forum 53.

[515] The Special Court for Sierra Leone, Vol. VI- Special Court Monthly Newsletter June 2008.

[516] See Article 1 of the Statute of the Special Court for Sierra Leone and Article 1(1) of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone which mandated the Court to try 'those bearing the greatest responsibility". See generally on analysis of the prosecutor's interpretation of 'those bearing greatest responsibility' and its overall impact on trials in Sierra Leone, Charles Chernor Jalloh, 'Special Court for Sierra Leone: Achieving Justice', (2010-2011) 32 Michigan Journal of International Law, 395, 413- 426 and David Crane, 'Dancing with the Devil: Prosecuting West Africa's Warlords: Building Initial Prosecutorial Strategy for an International Tribunal after Third World Armed Conflicts', (2005-2006), Case Western Reserve Journal of International Law ,5-7.

[517] Daphna Shraga , The Second Generation UN-Based Tribunals: A Diversity of Mixed Jurisdictions in *Internationalized Criminal Courts : Sierra Leone, East Timor, Kosovo and Cambodia* (eds) Cesare P.R. Romano, Andre Nollkaemper And Jann K. Kleffner (Oxford University Press 2004); Chandra Lekha Sriram, 'Wrong-Sizing International Justice', (2005-2006) Fordham International Law Journal 472, P.481-483; James Cockayne, 'The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals', (2005) 28 Fordham International Law Journal 616; See generally on the Special Court for Sierra Leone, Stephen J. Rapp, 'The Compact Model in International Criminal Justice: The Special Court for Sierra Leone', (2008-2009) 57 Drake Law Review 11; Beth Dougherty, 'Right-Sizing International Criminal Justice: the Hybrid experiment at the hybrid Experiment at the Special Court for Sierra Leone', (2004) International Affairs 80,(2) 318-327.

[518] Abdul Tejan- Cole, Painful peace: Amnesty Under the Lomé Peace Agreement in Sierra Leone, (1999) 3 Law, Democracy and Development; William A. Schabas, 'Amnesty, the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone' 11 University of California Davis Journal of International Law and Policy (2004-2005) 145; Abdul Tejan- Cole, "The Special Court for Sierra Leone: Conceptual Concerns and Alternatives", (2007)1 African Human Rights Law Journal 107; William A. Schabas, 'Internationalized Courts and their Relationship with Alternative Accountability Mechanisms: The Case of Sierra Leone' in *Internationalized Criminal Courts : Sierra Leone, East Timor, Kosovo And Cambodia* (eds) Cesare P.R. Romano, Andre Nollkaemper And Jann K. Kleffner (Oxford University Press 2004).

3.4.2. Impact on Legislative Action and Process

The impact of contemporary international criminal courts and tribunals on legislative action and process within Sierra Leone is limited to the influence the Special Court has exerted within that country. The Sierra Leone Parliament has had to pass into national laws, Acts giving effect to the Special Court. These include: the Special Court Agreement, (Ratification) Act 2002, amended by the Special Court Agreement, 2002 (Ratification) (Amendment) Act, 2002 and in December 2011 on the heels of the closure of the court, the Residual Special Court for Sierra Leone Agreement (Ratification) Act in 2011.

3.4.2.1. Special Court Agreement, 2002(Ratification) Act 2002 and the Residual Special Court for Sierra Leone Agreement (Ratification) Act

The Special Court Agreement sets out the relationship between the Special Court and the Sierra Leonean government.[519] The Agreement designated the Attorney-General as the channel for receipt of requests for assistance. The types of requests the Special Court was authorised to make under the Act included: requests for identification and location of person, service of documents, arrest or detention of persons and the transfer of indictees to the Special Court.[520] However, the Agreement provided in addition that nothing in the Act would preclude the provision of assistance or cooperation of an informal nature to the Special Court.[521] This was to cover other forms of assistance not specifically mentioned. The Sierra Leonean authorities were obliged to treat request for assistance in strict confidentiality when required to except where in order to execute same, disclosure was necessary.[522] The Act required the Attorney-General to inform the Special Court promptly of any decision reached in respect of any request for assistance as well as the reasons for such decisions. Under the agreement, warrants of arrest issued by the Special Court were given the same force of law as domestic warrants.[523] The agreements also provided for the issuance of warrants of arrests against prisoners which were executed by the arresting officer presenting same to the Director of Prisons or the Officer in Charge whose task it was to deliver the prisoner into the custody of the arresting officer.[524]

With the closure of the Special Court, the Government of Sierra Leone and the United Nations again entered into another agreement subsequently ratified by the Sierra Leonean Parliament, which

[519] Special Court Agreement, 2002 (Ratification) Act 2002, Supplement to the Sierra Leone Gazette Vol. CXXXIII No.22 (25 April 2002) http://www.sc-cl.org/linkclick amended by The Special Court Agreement, 2002 (Ratification) (Amendment) Act, 2002, Supplement to the Sierra Leone Gazette No. 69 (21 November 2002) http://www..sc-cl.org/linkclick accessed 10/01/2013.
[520] Special Court for Sierra Leone Agreement, s 15(2)
[521] Ibid, s 15(3)
[522] Ibid, s 17
[523] Ibid, s 23
[524] Ibid, s 27

provided for the establishment of the Residual Special Court for Sierra Leone.[525] Article 11 of the Agreement restates the wording of article 17 of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone. It provides for the cooperation framework between the Residual Special Court and the Government of Sierra Leone. The government is obligated to comply promptly with request for assistance by the Residual Special Court such as identifying and locating of persons; service of documents and arrest and transfer of persons to the Court amongst others.

The Sierra Leone legal system does not criminalize serious international crimes as the offences prosecuted by the Special Court were contained in the Statute of the Special Court.[526] Only offences against the administration of justice of the Special Court;[527] illegal possession of property[528] and money laundering[529] were contained in the Special Court Agreement Act ratified by the Sierra Leonean Parliament. The ICC Statute remains unimplemented in Sierra Leone.

3.4.3. Impact on Executive Action and Process

The Special Court has helped to shape and influence executive action/process. In the process, it has also generated significant levels of correspondence between it and the Government of Sierra Leone and its agencies. The impact of the Special Court on executive action and process in Sierra Leone is discussed below under a number of areas.

First, the Special Court and the executive arm of government in Sierra Leone have engaged directly in the creation of agreements. The establishment of Agreements and Memoranda of Understanding (MOU) to regulate their working relationship illustrates the extent of the impact of the Special Court on executive action in Sierra Leone. These MOUs were crucial to the Special Court in carrying out its mandate effectively in Sierra Leone. The Special Court Agreement sets out the relationship between the Special Court and the Sierra Leonean government.[530] With the imminent closure of the Special Court, the UN and the Government of Sierra Leone signed the agreement on the Establishment of Residual Court for Sierra Leone in August 2010.[531] The Sierra Leone Parliament in December 2011 passed the Residual Special Court for Sierra Leone Agreement (Ratification) Act into Law. [532]

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[525] Residual Special Court for Sierra Leone Agreement (Ratification) Act Supplement to the Sierra Leone Gazette Vol. CXLIII, No.6 dated 9th February 2012.
[526] Statute of the Special Court for Sierra Leone, Articles 2-5
[527] Special Court for Sierra Leone Agreement, ss 37-42
[528] Ibid, s 43
[529] Ibid, s 44
[530] SCSL Agreement, 2002(Ratification) Act 2002, Supplement to the Sierra Leone Gazette VOl, CXXXIII No. 22 (25 April 2002) http://www.sc-cl.org/linkclick amended by The SCSL Agreement, 2002 (Ratification) (Amendment) Act, 2002, Supplement to the Sierra Leone Gazette No. 69 (21 November 2002) http://www..sc-cl.org/linkclick.
[531] Eighth Annual Report of the President of the Special Court for Sierra Leone (2010/2011), 51
[532] Ninth Annual Report of the President of the Special Court for Sierra Leone (2011/2012), 7

In relation to MOUs, two such strategic MOUs were created between the Special Court and two national institutions in Sierra Leone, the Sierra Leone Prison Service and the Sierra Leone Police Force. The Special Court entered into a MOU with the National Prison Service to facilitate the deployment of prison staff to the Special Court detention facilities.[533] As a result of this, national staff of Sierra Leone Prison Service served as correctional officers at the detention facilities which had housed the indictees of the court from 2002 when they were transferred from the custody of the national authorities to the Special Court for trial, they remained at the detention facilities of the Special Court until their transfer to Mpanga Prisons in Rwanda, where they will serve out their term. The renewal of the MOU between the Special Court and the Sierra Leone Prison Service in June 2005, led to an increase in both the number of seconded staff to the Special Court and the frequency in rotation of staff seconded.[534] The Special Court 's MOU with the Government of Sierra Leone on the secondment of Sierra Leonean Police Officers, resulted in the secondment of police officers to the Office of the Prosecutor and the security section. [535]

Besides MOUs on the secondment of national staff to the Special Court, the Special Court and the Sierra Leone government also created an MOU to delineate the terms regulating the handover of the Special Court detention facilities as those convicted by the Special Court are serving their sentences in Rwanda. The signed MOU paved the way for the formal handover of the detention block to the government.[536] This handover of the detention facilities to the Sierra Leone Prison Service was the second time, the Special Court and the National Prison Service would exchange facilities. Prior to the Special Court building its complex, the Government of Sierra Leone through the Prison Service provided the Special Court with the use of the Bonthe Island facility (the building which formerly housed a minor offences prison for the Sierra Leone Prison Service) to house detainees and for judicial proceedings while the New England Complex was under construction. The Special Court on completion of its New England Complex handed over the Bonthe Island facilities to the Sierra Leone Prison Service. [537]

Second, the provision of cooperation by successive executive arms of government in Sierra Leone is a demonstration of its impact on executive action. The Sierra Leone government under President Tejan Kabbah, provided cooperation to the fledgling Special Court, irrespective of the fact that when it made its request for the establishment of a court, the court he wanted was one to try the violations committed by members of the Revolutionary United Front (RUF).[538] However, when the Special Court was created, it was given a mandate to try all violations that had resulted from the conflict.

[533] Second Annual Report of the President of the Special Court for Sierra Leone (2004/2005), 32
[534] Second Annual Report of the President of the Special Court for Sierra Leone (2004/2005), 36
[535] Second Annual Report of the President of the Special Court for Sierra Leone (2004/2005), 24
[536] Press Release Freetown, Sierra Leone, 19 May 2010.
[537] Press Release Freetown, Sierra Leone, 20 July 2006.
[538] President Kabbah's Letter to Kofi Annan, dated 12th June 2000. See UN Doc.S/2000/786/, annex.

When indictments were released, all major groups including the pro-government Civil Defence Force (CDF) were affected. Most of the suspects were apprehended by Sierra Leonean authorities and transferred to the Bonthe Island detention facilities which was then in use by the Special Court before their transfer to the Court's detention facility in Freetown.

The level of cooperation extended to the Special Court by the Sierra Leonean government, is illustrated further with the arrest of a then serving Cabinet Minister and close ally of President Tejan Kabbah, Chief Sam Hinga Norman, a man many Sierra Leoneans perceived as a hero.[539] During his trials, there were calls for President Tejan Kabbah to be summoned to testify.[540] There have been suggestions, that President Tejan Kabbah distanced himself from the proceedings at the Special Court because of his relationship with Chief Sam Norman Hinga. This distance created between him and the Special Court, many commentators have been quick to point out impaired the views of Sierra Leoneans on the court.[541] This seeming distance between the government and the Special Court carried on despite change within the political landscape of Sierra Leone, with the 2007 election of H.E. Ernest Bai Koroma as President of Sierra Leone. The election of President Ernest Bai Koroma did not produce a radical shift in government policies or attitude towards the Special Court. Rather the government has been criticized along same lines as President Tejan Kabbah for its inability to prosecute the atrocities committed during the war by mid-level perpetrators.[542] It is doubtful if the local courts in Sierra Leone would have declared the amnesty invalid, but the issue never arose in national courts as no proceedings were attempted. With the amnesty in place, national proceedings could not be brought against the mid-level perpetrators.

Third, incidences of interaction between the Special Court and the executive arm of government in Sierra Leone demonstrate the impact of the Special Court on executive action and processes in Sierra Leone. On 10 March 2004, the Special Court's new court house was formally opened by the then President, Tejan Kabbah and the then UN under Secretary General for Legal affairs Mr. Hans Correll.[543] In 2004, the President of the Republic of Sierra Leone, Tejan Kabbah and his Vice-

[539] First Annual Report of the President of the Special Court for Sierra Leone (2002/2003), 14-15; Jane Stromseth, 'International Criminal Court and Justice on the Ground', (2011) 43 Arizona State Law Journal 427, 433-434; For more on the arrest and transfer of some of the indictees of the special Court for Sierra Leone see, David Crane, 'The Takedown: Case Studies Regarding "Lawfare" in International Criminal Justice: The West African Experience', (2010-2011) 43 Case Western Reserve Journal of International Law, 206-212.

[540] Foreword by William A. Schabas *The Special Court For Sierra Leone And Its Legacy : The Impact For Africa And International Criminal Law* (ed) Charles Chernor Jalloh (Cambridge University Press 2014).XXVII; Lydia Nkansah 'Justice within the arrangement of the Special Court for Sierra Leone versus local perception of justice: a contradiction or harmonious? (2014) African Journal of International and Comparative Law 103, 109.

[541] Tom Perriello and Marieke Wierda, 'The SCSL under Scrutiny', International Centre for Transitional Justice, March 2006, 20

[542] See Sigall Horovitz, "Sierra Leone: Interaction between International and National Reponses to the Mass Atrocities", DOMAC/3, December 2009, 40.

[543] Second Annual Report of the President of the Special Court for Sierra Leone (2004/2005), 4-5

President President Solomon Berewa were in attendance at the National Victims Commemoration Conference on Truth Justice and Reconciliation held in March. [544]

This level of interaction and engagement between the executive and the Special Court continued following a change in leadership. Not surprising, when the government of Ernest Bai Koroma was appointed, he met with the Prosecutor,[545] the Registrar and Deputy Registrar.[546] In February 2008, President Ernest Bai Koroma was represented by Ambassador Kanu, Deputy Permanent Representative for the Sierra Leone Permanent Mission to the United Nations when the Special Court convened a meeting of experts to address residual issues. [547] More recently, members of the executive arm of government in Sierra Leone worked closely with the Special Court on the legacy /site project to develop multiple uses of the court complex.

3.4.4. Impact on Sierra Leone

In 2004, the Registrar of the Special Court approved the establishment of a legacy-working group, which was eventually set up in 2005 with a mandate to set out and actualise specific projects with a view to the court bequeathing a lasting legacy on Sierra Leone. [548]

The Special Court helped to increase awareness on international criminal justice issues through community outreach. The Special Court outreach activities began immediately after its formal establishment and the appointment of both the prosecutor David Crane and the Registrar Robin Vincent in 2002.[549] They devised creative means of engaging in outreach early on such as town hall meetings[550] across different districts with leaders, ex-combatants and school children.[551] In January

[544] Second Annual Report of the President of the Special Court for Sierra Leone (2004/2005), 25
[545] Fifth Annual Report of the President of the Special Court for Sierra Leone (2007/2008), 31
[546] Fifth Annual Report of the President of the Special Court for Sierra Leone (2007/2008), 37
[547] Fifth Annual Report of the President of the Special Court for Sierra Leone (2007/2008), 38; See also Press Release Freetown, Sierra Leone, 18 February 2008
[548]Third Annual Report of the President of the Special Court for Sierra Leone (2005/2006), 6; For more background details on the legacy of the Special Court, see V.O. Nmehielle and C.C. Jalloh, 'The Legacy of the Special Court for Sierra Leone', 30(2) Fletcher Forum of World Affairs (2006) 107; Charles Chernor Jalloh, 'The Contribution of the Special Court for Sierra Leone', (2007) 15 African Journal of International and Comparative Law, 184. See also Sigall Horovitz, 'How International Courts Shape Domestic Justice: Lessons From Rwanda and Sierra Leone', (2013) 46 Israel Law Review 357-364 on the impact of the SCSL on Sierra Leone's legal norms, prosecution rates and trends, sentencing practices, judicial capacity, national witness protection scheme, training activities and employment of Sierra Leoneans by the Court.
[549] Varda Hussain, "Sustaining Judicial Rescues: The Role of Outreach and Capacity Building Efforts in War Crimes Tribunals, (2005)45 Virginia Journal of International Law. 547; Norman Henry Pentelovitch, "Seeing Justice Done: the Importance of Prioritizing Outreach Efforts at International Criminal Tribunals", Georgetown Journal of International Law (2007-2008) 445;Stuart Ford , How Special is the Special Court's Outreach Section? In *The Special Court For Sierra Leone And Its Legacy : The Impact For Africa And International Criminal Law* (ed) Charles Chernor Jalloh (Cambridge University Press 2014)505-526; Sara Darehshori, 'Lessons for Outreach From the Adhoc Tribunals, the Special Court for Sierra Leone, and the International Criminal Court', 14 New England Journal of International and Comparative Law (2007-2008) 299.
[550] Press Release Freetown, Sierra Leone, 27 September 2002.
[551] Press Release 16 October 2002; See also Press Release, Freetown, Sierra Leone 21 November 2002.

2003, an Outreach Section was created within the Registry with an Outreach Coordinator and other staff made up of Sierra Leoneans. The Outreach Section carried out several programmes and initiatives to reach out to Sierra Leoneans. These included: community outreach activities, video screening of trials and weekly summaries of court proceedings, conferences and seminars, radio broadcasts and programmes, school visits and guided tours of the Special Court.

The Special Court programmes were also aimed at different sections of Sierra Leonean populates such as women, children and students. The outreach to students included radio programmes 'kids talking to kids', creation of human rights and peace clubs in schools, quiz and debating competitions within schools. The Special Court reached out to universities through the establishment of Accountability Now Clubs (ANCs) in universities, organisation of national moot competition on international humanitarian law for students of tertiary institutions; [552] institution of funded internship programmes[553] and organisation of lectures on international humanitarian law and international law culminating in their inclusion in the curriculum of Sierra Leonean Universities.[554]

The Special Court provided training for legal, security, correctional and court management staff internally either employed directly by the Special Court or on secondment from national institutions and external staff of key national institutions such as the Sierra Leone Police, the National Prison Service and staff of the National Archives. A range of training was provided over the years, from various sections of the court, particularly the Office of the Prosecutor, the Registry, Security and Court Management Section. [555] In the Special Court 2012-2013 annual report, the number of beneficiaries from the Sierra Leonean Police Force who attended training carried out by the Office of the Prosecutor was put at over 500 police officers. [556] The available evidence from the Special Court points to a limited engagement with the national judiciary in Sierra Leone. The long time effect of these training particularly on the staff employed by the Special Court in Sierra Leone has been called into question as many doubt if a number of those local staff employed by the Special Court and international agencies would return to work in Sierra Leone. In this sense, the Special Court is seen as not being beneficial to the development of local capacity in Sierra Leone.[557]

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[552] Fourth Annual Report of the President of the Special Court for Sierra Leone (2006/2007), 25
[553] Second Annual Report of the President of the Special Court for Sierra Leone (2004/2005), 34-35
[554] Sixth Annual Report of the President of the Special Court for Sierra Leone (2008/2009), 47
[555] For a range of training provided by the Special Court, see the Sixth Annual Report of the President of the Special Court for Sierra Leone (2008/2009), 45.
[556] Tenth Annual Report of the President of the Special Court for Sierra Leone (2012/2013) 24
[557] Chandra Lekha Sriram, 'Wrong-Sizing International Justice', (2005-2006) Fordham International Law Journal 472, P.502-503; Yuval Shany, 'How Can International Criminal Courts Have a Greater Impact on National Criminal Proceedings? Lessons from the First two Decades of International Criminal Justice in Operation', (2013)46 Israel Law Review 431; Alejandro Chehtman, 'Developing local capacity for War Crimes Trials: Insights from BIH, Sierra Leone and Colombia (2013) 49 Stanford Journal of International Law 297;David Cohen, Hybrid Justice in East Timor, Sierra Leone, and Cambodia: Lessons Learned and Prospects for the Future", (2007) 43 Stanford Journal of International Law 1,6; Lindsey Raub, Positioning Hybrid

Aside from the foregoing a number of other programmes and initiatives were recorded under the legacy section of successive annual reports. Some of the initiatives include the publication in 2008 of an integrated glossary of Legal Terminology in four main languages, Krio, Limba, Mende and Themne.[558] Other publications made by the Special Court include: 20,000 copies of booklets on International Humanitarian Law; 15,000 copies of booklets on "the Special Court Made Simple"; transcribed Braille versions of the International Humanitarian Law Booklet and, the Sierra Leonean Constitution;[559] a compilation of briefings of factual findings from the court's cases and a Case law Digest which embodies all the decisions reached by the court. [560] From available data as reported in successive Special Court annual reports, it is estimated that about 15 persons benefitted from a skills and vocational training programme in tailoring established by Justice Winters in 2008. [561] The last published information about this project was in the seventh annual report of the Special Court. In subsequent years following, the Special Court annual report was silent on this particular project. [562]

In 2009 the Office of the Prosecutor led the Special Court in setting up the Sierra Leone Legal Information Institute, which provides free access to legal information on Sierra Leone. [563] In November 2009, the Special Court Victims and Witness Section organized a one month training course for 38 Police Officers in Witness Protection, preparatory to the establishment of a National Witness Protection Unit. The National Witness Protection Unit was formally established in February 2011 within the National Criminal Investigations Division. [564] In 2012, the Special Court formally handed over the refurbished former Witness and Victims Section to the unit and equipments under the court's liquidation policy and terms of an MOU with the government.[565] The Special Court's court records have been archived, a copy of the court records were transferred to The Hague in December 2010 and a copy made for the Sierra Leonean government, which is now housed within the new Peace Museum. These records will provide court users, students, researchers and members of the general public access to the records and jurisprudence of the court which may be deployed within the national court's system. Another component of the archiving project was the training of national staff from national archival institutions to ensure that these records are maintained and protected for posterity. [566]

Tribunals in International Criminal Justice', (2009) 41 New York University Journal of International Law and Policy 1014 ; Ellen Emilie Stensrud 'New Dilemmas in Transitional Justice: Lessons from the Mixed Courts in Sierra Leone and Cambodia' (2009) Journal of Peace Research, Vol 46 No. 1, 5.

[558] Press Release Freetown, Sierra Leone, 6 November 2008.

[559] Sixth Annual Report of the President of the Special Court for Sierra Leone (2008/2009), 42

[560] Tenth Annual Report of the President of the Special Court for Sierra Leone (2012/2013),

[561] Sixth Annual Report of the President of the Special Court for Sierra Leone (2008/2009), 49

[562] Seventh Annual Report of the President of the Special Court for Sierra Leone (2009/2010), 51

[563] Ninth Annual Report of the President of the Special Court for Sierra Leone (2011/2012), 16

[564] Ninth Annual Report of the President of the Special Court for Sierra Leone (2011/2012), 36c

[565] Tenth Annual Report of the President of the Special Court for Sierra Leone (2012/2013), 39-40

[566] Eighth Annual Report of the President of the Special Court for Sierra Leone (2010/2011), 47

The site project is one of the key legacies of the Special Court, prior to the closure of the Special Court, and for many years, from its annual reports, emphasis had been placed on the Site Project and its consistent feature on the court's legacy section indicate its importance to the Special Court and even the government of Sierra Leone as one of the enduring legacies of the court. The Special Court and the Sierra Leonean government worked together in setting out the probable uses for the court's premises. Different agencies and bodies within Sierra Leone now use the court's premises. The detention facility was taken over by the Sierra Leonean National Prison Service and now houses female prisoners and children born to inmates.[567] While the newly established National Witness Protection Unit is located in the old office used by the Special Court Witness and Victims Section. In addition, lecture and office space for students and staff of the Sierra Leone Law School is provided within the precincts of the former Special Court registry compound.[568]

Finally, the former court premises now hosts the Sierra Leone New Peace Museum. The United Nations Peace Building Fund approved a grant for the establishment of the Peace Museum. The Museum provides information on the conflict and the subsequent peace process; houses a memoriam to honour the victims of the conflict and copies of the archive of the Special Court and the Truth and Reconciliation Commission. In March 2011, the Peace Museum opened with an exhibition at the Special Court's premises prior to the closure of the court.[569]

3.5. Conclusion

Contemporary international criminal courts and tribunals with operational and jurisdictional relevance in the Commonwealth States of Rwanda, Uganda and Sierra Leone have produced different kinds of impact ranging from major to marginal on judicial, legislative and executive thoughts, actions and processes. These impacts have been brought about by the engagement and subsequent correspondences generated between these courts and the different states. Although in certain instances, the engagements of these institutions and the states have failed to produce any impact on the relevant states.

With respect to the impact of the courts on judicial action and process, the Rwandan Tribunal made major impacts on judicial action in Rwanda. In Rwanda, the impact has been generated through the engineering of legal and judicial reforms in that country. In Uganda, the ICC has had marginal impact on judicial action and process. The norms and jurisprudence of the ICC has not been deployed in that country, however, the establishment of the International Crimes Division within the national judiciary is attributed to the influence of the ICC borne out of Uganda's perceptible ambition to prosecute cases

[567] Sixth Annual Report of the President of the Special Court for Sierra Leone (2008/2009), 45

[568] Ninth Annual Report of the President of the Special Court for Sierra Leone (2011/2012), 36

[569] Press Release Freetown, Sierra Leone, 29 April 2011; See also Eighth Annual Report of the President of the Special Court for Sierra Leone (2010/2011), 48- 49.

within its domestic legal framework. In Sierra Leone, the Special Court has not produced any significant impact on judicial action and process. The interpretation of the Prosecutor of "those bearing the greatest responsibility" ensured that the court had a slim docket and shut out any prospect for a referral from the Special Court to the Sierra Leonean judiciary. The absence of the possibility of a referral meant that the completion strategy of the Special Court would not generate response any where near that of Rwanda fuelled by the prospect of national prosecutions.

In relation to legislative action and process, contemporary international criminal courts produced significant impacts across the post conflict states examined. Again in Rwanda, there were examples of direct influence of the Rwandan Tribunal on legislative action and process as the executive introduced legislation to bring its judicial process in conformity with the standards set by the Tribunal. Two such legislation examined where the Organic Law Abolishing the Death Penalty and the Organic Law on Transfer. The laws have been subject to changes and modifications over the years and in 2013, the Rwandan Parliament passed a new Organic Law on Transfer completely repealing and amending the 2007 Organic Law on Transfer. In addition, the handing over of case files on the Rwanda Patriotic Army/Front crimes by the prosecutor resulted in domestic prosecutions in Rwanda for the alleged crimes. In Sierra Leone, the national laws ratifying the agreement entered into between the United Nations and the Government of Sierra Leone on the establishment of the Special Court were examined as examples of impact on legislative action and process in that country. In Uganda, the ICC implementing legislation was examined. The legislation provides far reaching changes and imposes a number of obligations on that country.

The impact of contemporary international criminal courts and tribunals on executive action and process was however much more difficult to tease out from the various incidences of engagement between the executive and the different courts and tribunals. This is because; the courts and tribunals have had a number of incidences of engagement with the executive arm of government which did not necessarily produce any impact. Rwanda as a state on the converse generated significant impacts on the Tribunal two examples are the provision and non provision of cooperation with the Rwandan Tribunal and the application of the Rwandan executive to act as amicus curiae in the referral cases that came up before the Tribunal. The ability of Rwanda to halt proceedings at the Tribunal over disagreement indicates the level of influence, the country through its executive wielded over the Tribunal in the investigation and prosecution of the 1994 genocide. However, incidences of impact of the Rwandan Tribunal on executive action and process include: collaborations with the executive in the establishment of the Information and Documentation Centre in Kigali, and across the provinces and the introduction of laws.

In Uganda the ICC has produced major and marginal impact on executive actions and processes such as the self referral of the situation in the country to the ICC; the rippling effects of the ICC arrest

warrants in halting the activities of the LRA; the hosting of the ICC review Conference in 2010 and the signing of a bilateral agreement between the executive arm of government and the ICC. As a result of the location of the Special Court in Sierra Leone, there were a lot of incidences of engagement between it and the executive arm of government in that country which necessarily did not translate into impact. However, two examples of evidence of impact of the Special Court on executive actions and processes in Sierra Leone are the signing of bilateral agreements between the Special Court and the Sierra Leonean government and its agencies and the provision of cooperation extended to the Special Court by successive executive governments in Sierra Leone.

Finally, these courts and tribunals have produced varied degrees of impacts across the different states where they have had jurisdictional and operational relevance. The Rwanda's Tribunal's engagement in Rwanda, has led to an increased awareness on transitional justice issues, capacity building and development of students, media and legal professionals in Rwanda and provision of technical assistance with the establishment of the national witness protection unit and the establishment of a video-tele-conferencing facility within the Rwandan Supreme Court. In Uganda, the Trust Fund for Victims has produced significant impacts on Uganda. In terms of capacity development programmes, the ICC has been limited in Uganda. This is a general issue with respect to the ICC.

The Special Court generated a lot of impact on Sierra Leone through increased awareness in Sierra Leone on transitional justice issues; the establishment of the Sierra Leone legal Information Institute and a national witness protection unit; the archiving project and the Peace Museum. However, in terms of other areas particularly in capacity building; the Special Court was found wanting. The Special Court recorded very little training or engagement with judicial officers and legal practitioners from Sierra Leone's national legal system. The available evidence lends credence to this. Its capacity building activities were limited to providing training for security officers and members of Sierra Leonean Witness and Victims Protection Unit.

In conclusion, this chapter has analysed evidence from post-conflict states in the Commonwealth to map the domestic impact of international criminal courts and tribunals on judicial, legislative and executive thoughts, actions and processes. The evidence reveals varying degrees of influence of international criminal courts and tribunals within the Commonwealth.

CHAPTER FOUR

THE IMPACT OF CONTEMPORARY INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS ON NON- CONFLICT STATES IN THE COMMONWEALTH

4.1. Introduction

Contemporary international criminal courts and tribunals established to investigate and prosecute serious international crimes have had varying degrees of engagement with non-conflict states in the Commonwealth. To a great deal, the differing levels of interaction between states and international criminal courts and tribunals determine the degree of influence that these courts exert within the states. Of the three contemporary international criminal courts and tribunals with jurisdictional relevance in the Commonwealth, the International Criminal Court (ICC)[570] has exerted the most influence within the Non-conflict Commonwealth States. This is chiefly because the Rome Statute establishing the ICC imposes on state parties the obligations for the state parties to implement its provisions within their domestic legal systems.

However, the International Criminal Tribunal for Rwanda (Rwandan Tribunal)[571] has also exerted significant influences in Canada and the United Kingdom, largely as a result of the trial of some alleged genocide perpetrators living in Canada and the United Kingdom's attempts at extraditing genocide suspects to Rwanda for trial. Australia, Canada and the United Kingdom have also had different levels of engagement with the Special Court for Sierra Leone (Special Court), [572] through the provision of financial assistance to the Special Court. This chapter examines the impacts the Rwandan Tribunal, the Special Court and the ICC have made on different aspects of life within the Non-conflict Commonwealth States of Australia, Canada and the United Kingdom.

4.2. Australia and Contemporary International Criminal Courts and Tribunals

Australia was one of a number of states such as Canada and the United Kingdom that carried out prosecutions of war criminals in the aftermath of the Second World War eventually terminating criminal proceedings in 1961.[573] In 1988, Australia amended its 1945 War Crimes Act and established

[570] Rome Statute of the International Criminal Court Article 1, July 17 1998, 2187 UNTS, 90
[571] Statute of the International Criminal Tribunal for Rwanda, Annex to S.C Res. 955, U.N. Doc. S/RES/955 (Nov. 8 1994)
[572] The Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, and the Statute of the Special Court for Sierra Leone, were included in the 'Report of the Planning Mission on the Establishment of the Special Court for Sierra Leone transmitted by the Secretary-General to the President of the Security Council by Letter dated 6 March 2002' (8 March 2002) UN Doc S/2002/246, Annexe, Appendix II and its Attachment. In 2002, the Sierra Leonean Parliament promulgated the Special Court Agreement (2000) Ratification Act 2002.
[573] See: Gillian Triggs, 'Australia War Crimes Trials: a moral necessity or a legal minefield?', 16 Melbourne University Law Review 382, 383 (1987); see also, Gideon Boas, 'War Crimes Prosecutions in Australia and

a war crimes special investigation unit to facilitate prosecution of World War II criminals alleged to be residing in Australia at the time. The failure of the three cases instituted under the Act; *DPP v. Polyukhovich*,[574] *Malone v Berezowsky*[575] and Heinrich Wagner[576] led to the closure of the special investigations unit and an end to the prosecution of alleged World War II criminals in Australia.[577]This marked a closure of an era in Australia's war crimes prosecution history with a track record that leaves much to be desired.[578]

Following the establishment in the 1990s of the International Criminal Tribunal for the former Yugoslavia (Yugoslavia Tribunal) and the International Criminal Tribunal for Rwanda (Rwandan Tribunal), Australia enacted the International War Crimes Tribunal Act of 1995[579] to facilitate cooperation with these international tribunals. Three years after enacting the International War Crimes Tribunal Act, Australia signed the Rome Statute of the ICC on 9th December, 1998 and ratified same in 2002. In addition to the establishment of the legal framework implementing the Rome Statute, Australia has also engaged with international criminal courts and tribunals in other ways, for instance through the provision of financial assistance. This section examines the influence of contemporary international criminal courts and tribunals on judicial, legislative and executive actions and processes in Australia.

4.2.1. Impact on Judicial Action and Processes

Available evidence from Australia reveals three strands of judicial proceedings that have been influenced by the norms and jurisprudence of international criminal courts and tribunals. The first strand is in relation to World War II crimes, which are outside the province of this thesis, the second strand, are those cases instituted against the Australian Government by indigenous people. Although, these strands of cases were instituted prior to the establishment of the contemporary international criminal courts and tribunals under review, their relevance lies in the import of their decisions on Australian Law and the subsequent impact of the ICC regime on the judgments rendered in those cases. The third strand of cases are those decided under Australian Immigration and Citizenship laws in determining whether to exclude persons from the protection afforded by the provisions of article

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Other Common Law Countries: Some Observations', (2010) Criminal Law Forum, 313,.315-323 for an overview of Australia's engagement with war crimes prosecutions.

[574] *DPP v Polyukhovich* (No 2)(1993) 171 LSJS 1

[575] *Malone Berezowsky*, (1993) 161 LSJS 227

[576] *R v Wagner* (1993) 66 A Criminal R 583

[577] Gillian Triggs, 'Implementation of the Rome Statute for the International Criminal Court: A Quiet Revolution in Australian Law', (2003) 25 Sydney Law Review 507, 518 for more on Australia's prosecutions of serious crimes under the War Crimes Amendment Act; Gillian Triggs, 'Australia's War Crimes Trials: All Pity Choked', in Tim McCormack and Gerry Simpson (eds) *The Law of War Crimes* 124. See also Michael Kirby, 'War Crimes Prosecution-An Australian Update', (1993) 19 Commonwealth Law, p. 781-786.

[578] Katherine L. Doherty & Timothy L.H. McCormack "Complementarity as a Catalyst for Comprehensive Domestic Penal Legislation (1999) 5 U.C. Davis Journal of International Law & Policy 147, 153.

[579] International War Crimes Tribunal Act No. 18 1995

1F(a) of the Refugee Convention.[580] As a result of the foregoing, this section examines the second and third strands of cases.

4.2.1. I. Cases Brought by Indigenous People

In 1999, two cases, *Nulyarimma V. Thompson*[581] *Buzzacott V. Hill, Minister for the Environment Et al (FCA*[582]*)* came before the Full Federal Court of Australia.[583] The cases originated from two separate facts but because they both contained a claim for genocide, they were heard together before the Full Federal Court of Australia. *Nulyarimma v. Thompson*, was an appeal against a decision of the Australian Capital Territory Supreme Court in which Crispin J upheld the refusal of the registrar to issue arrest warrants against four politicians including the then Prime Minister and Deputy Prime Minister in relation to the formulation and support of a "Ten Point Plan" and the Native Title Amendment Act 1998.[584] While the second case *Buzzacott v. Hill* arose from an application to strike out proceedings instituted by Kevin Buzzacott in the South Australian Registry of the Federal Court of Australia on behalf of the Arabunna people against the Minister for Environment and the Minister for Foreign Affairs and Trade and the Commonwealth of Australia. Mr. Buzzacott claimed that the respondents' failure to apply to UNESCO for the listing of his people's land in the Lake Eyre Region on the World Heritage List amounted to genocide.[585]

The crux of the issue in both cases was the possibility of genocide under customary international law being recognised as an offence in Australia, in the absence of domestic legislation criminalizing same.[586]Justices Wilcox and Whitlam both held that although genocide was a crime under customary international law, however, in the absence of specific legislation, the offence of genocide was not recognisable in Australian courts.[587] Justice Wilcox opined further that except an implementing legislation is enacted, the ratification of a convention does not directly affect Australia's domestic law irrespective of whether the legislation has received parliamentary approval as in the Genocide Convention.[588] Consequently, Justice Wilcox held in relation to the first proceeding that without an enabling legislation, the offence of genocide could not be recognised in Australian courts. [589]

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[580] Convention Relating to the Status of Refugees 1951 UNTS, Vol. 189, 137
[581] *Nulyarimma v. Thompson,* A5 of 1999
[582] *Buzzacott v. Hill*, AS 23 of 1999
[583] *Nulyarimma v. Thompson,* A5 of 1999 and *Buzzacott v. Hill,* AS 23 of 1999 (1999) FCA 1192
[584] Ibid, [2]
[585] Ibid, [3]
[586] For more details on the proceedings instituted by Australia's indigenous people see generally, Kristen Daglish, 'Case Comment The crime of genocide: Nulyarimma v. Thompson', (2001). International and Comparative Law Quarterly; Sean Peters, 'The Genocide Case Nulyarimma v Thompson', (1999) Australian International Law Journal, 233 ;Thomas Feerick, 'The Crime of Genocide in Australia An Exegetic Analysis', (2000) Australian International Law Journal, 47.
[587] *Nulyarimma v. Thompson* A5 of 1999; and *Buzzacott v. Hill*, AS 23 of 1999 (1999) FCA 1192 [17 and 49]
[588] Ibid, [20]
[589]Ibid, [32]

In relation to the second proceeding, the *Buzzacott* case, a civil claim based on the assumption that genocide is a crime within Australia, the learned judge found that assumption questionable, with the court drawing from the conclusion earlier reached in *Nulyarimma* that genocide was not a crime within Australia, and on that basis the court held that the claim for genocide in the second proceeding could not succeed. [590]The prosecution of these strand of cases by the indigenous people and the court's response revealed a deep lacuna in the Australian Law on genocide. Australia's Rome Statute implementation regime has responded to these cases. And as will be explained below, the International Criminal Court Act (ICCA) [591] specifically incorporates the crime of genocide into Australia Law, laying to rest the ghost in *Nulyarimma* and *Buzzacott*).[592]

4.2.1.2. Exclusion of Persons under the Refugee Convention

These set of cases have been significantly influenced by the norms and jurisprudence of contemporary international criminal court and tribunals.[593] Two of such cases are examined below.

In *SZITR v Minister for Immigration and Multicultural Affairs*,[594] the applicant a Sri Lankan national while in the Sri Lanka National Army, had used force in obtaining information from detained Liberation Tigers of Tamil Eelam (LTTE) resulting in injuries to the detained fighters being interrogated. The applicant subsequently migrated to Australia and applied for a protection visa which was denied by the Minister's delegate on grounds of complicity in the commission of crimes against humanity and war crimes. [595] The Administrative Appeals Tribunal (AAT) in ascertaining whether the applicant had committed a war crime or crimes against humanity had recourse to the jurisprudence and norm of the ICC and considered the definitions and application of crimes against humanity and war crimes in article 7 and article 8(2) of the Rome Statute.[596] The tribunal concluded that there were 'serious reasons for considering that' the applicant had committed crimes against humanity and war crimes consequently in line with article 1F(a) of the Refugee Convention, Australia, was not obliged to provide protection for him as evinced within the Refugee Convention.[597]

[590]Ibid, [33]
[591] International Criminal Court Act N0. 41 of 2002
[592] Andrew D Mitchell, 'Genocide, Human Rights Implementation and the Relationship Between International and Domestic Law: Nulyarimma v Thompson (2000) 24 Melbourne University Law Review 15.
[593] For an in-depth analysis of Australia's practice in this area see, Joseph Rikhof, 'War Criminals Not Welcome; How Common Law Countries Approach the Phenomenon of International Crimes in the Immigration and Refugee Context, (2009) International Journal of Refugee Law 21(3): 453; Joseph Rikhof, The Criminal Refugee: *The Treatment of Asylum Seekers with a Criminal Background in International and Domestic Law* (Republic of Letters Publishing 2012) Chapter 3.
[594] (2006) 44 AAR 382; (2006) FCA 1759 Federal Court of Australia (Moore J).
[595] *SRYYY V Minister for Immigration and Multicultural and Indigenous Affairs* (2003) AATA 927 (19 September 2003) [1]
[596] Ibid, [44-46]
[597] Ibid, [63-64]

On 17th March, 2005 the Federal Court of Australia set aside the decision of the tribunal and remitted the case back to the tribunal.[598] The tribunal at the retrial, again had to determine whether the applicant was a person who deserved protection by Australia as provided for in article1F (a) of the Refugee Convention and in making this decision, the tribunal articulated the norms of the ICC and held that the applicant's conduct amounted to crimes against humanity of torture as set out in Article 7(1)(F) of the Rome Statute. On the issue of defences, the tribunal also drew from the provisions of the Rome Statute of the ICC by restating the inapplicability of the defence of superior orders in article 33 to crimes against humanity and the tribunal noted that the failure of the applicant to raise the defence of duress under Article 31(1)(d), meant he could not rely on same. Consequently, the tribunal concluded that Australia did not owe the applicant an obligation to protect him as evinced in the Refugee Convention.[599]

The applicant's appeal to the Federal Court of Australia for judicial review of the tribunal's decisions was dismissed. The Federal Court of Australia also relied extensively on the provisions of the Rome Statute in construing whether the lower courts erred in applying the more expansive description of the mental element of torture article 30 (2) as against the provisions of article 7(2)(e).

In *SZCWP v Minister for Immigration and Multicultural Affairs*,[600] the provisions of the Rome Statute of the ICC were also vigorously canvassed in the case. The applicant who had been part of the Maoist organisation seeking a change in government in Nepal had advocated violence which led to the commission of crimes against humanity and war crimes under articles 7 and 8 of the Rome Statute of the ICC. As a result of this, his application for a Protection (Class XA) visa was refused by a delegate of the Minister for Immigration and Multicultural and Indigenous Affairs and affirmed by the Administrative Appeals Tribunal.[601]The decision was based on the fact that there were serious reasons for considering that the applicant had committed a crime against peace, a war crime or a crime against humanity. The AAT concluded that there were serious reasons for considering that the applicant did commit and was, within the meaning of the Rome Statute of the ICC, criminally responsible for committing crimes against humanity and war crimes.[602] The case split the judges 2 to 1. Both the majority and minority decisions in the case relied extensively on the norms and principles of the Rome Statute of the ICC.

Judge Wilcox in his minority judgment dealt with the issue whether the applicant was a person who fell within Article 1F of the Refugee Convention and he reviewed the provisions of the Rome Statute

[598] *SRYYY v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) FCAC 42
[599] *SRYYY v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) AATA 320 (5 April 2006) [131-134]
[600] *SZCWP v Minister for Immigration and Multicultural Affairs* (2006) FCAFC 9 Federal Court of Australia.
[601] Ibid, (Wilcox, Gyles and Downes JJ) [1 and 2]
[602] *(SZCWP v Minister for Immigration and Multicultural Affairs 2006)* FCAFC 9 Federal Court of Australia Wilcox, Gyles and Downes JJ Para 26

and the Elements of Crime on crimes against humanity against the background of evidence adduced and held that the evidence did not support the commission of crimes against humanity.[603] He reached the same conclusion on the issue of war crimes by evaluating both the provisions of the Rome Statute and Elements of Crime on War Crimes, the AAT findings and evaluations, and submissions of counsels and held again that the evidence did not support the commission of war crimes by the applicant.[604]

On the other hand, Downes J and Gyles J in their majority decision drew a different conclusion and held that the application be dismissed. Downes J in his decision began by setting out the provisions of the Rome Statute on the definition of crimes against humanity and war crimes and individual criminal responsibility under article 25.[605] Downes J went further to consider the issues which were whether the applicant had committed war crimes or crimes against humanity by referring to the provisions of the Rome Statute.[606] He set out the issues in the case to be three, first that the evidence did not support the findings of the tribunal, second that the tribunal misdirected itself to some of the provisions of the convention and third that the tribunal did not give sufficient specific and careful consideration to some of the elements required by the Convention. He disagreed with these findings and dismissed the case.[607]

4.2.2. Impact on Legislative Action and Process

A resultant effect of the legal and normative framework of international criminal courts and tribunals on Australia's body of laws is the introduction of new laws with concomitant obligations flowing from the provisions. Specifically, the establishment of the Yugoslavia and Rwandan Tribunal[608]has led to the introduction in Australia of the International War Crimes Tribunal Act and a Rome Statute implementation regime which on its part has led to the introduction of new legislation and the amendment of pre-existing legislation in Australia. The legislation introduced under the ICC regime will be discussed below and where appropriate reference will be made to the International War Crimes Tribunal Act.[609]

Australia implemented the Rome Statute of the ICC into its domestic law through the enactment of two distinct pieces of legislation- the International Criminal Court Act 2002 (ICCA)[610] and the International Criminal Court (Consequential Amendments) Act 2002.[611] The International Criminal

[603] Ibid, [29-49]
[604] Ibid, [50 -74]
[605] Ibid, (Gyles and Downes JJ) [108-110]
[606] Ibid, (Downes J) [114-115]
[607] Ibid, (Downes J) [117-122]
[608] For the relevance of this thesis, the examination of the ad hoc tribunals is limited to the Rwandan Tribunal having operational and jurisdictional relevance within the Commonwealth.
[609] International War Crimes Tribunals Act No. 18 1995.
[610] International Criminal Court Act N0. 41 of 2002
[611] The International Criminal Court (Consequential Amendments) Act 2002 Act No. 42 of 2002

Court (Consequential Amendment) Act 2002 amended the Australian Criminal Code with the insertion of a new chapter 8 incorporating both the core crimes of genocide, crimes against humanity and war crimes and, crimes against the administration of justice of the ICC within Australia's legal system. The co-operation regime in the Rome Statute is incorporated into Australian Law by the ICCA 2002.

4.2.2.1. International Criminal Court Act[612]

This Act, one of the two introduced by Australia upon its ratification of the Rome Statute of the ICC, incorporates Australia's obligations to cooperate with the ICC. The Rome Statute of the ICC deals in-depth with cooperation and related matters. Different states have taken various approaches to implementing their obligations under the Rome Statute of the ICC.[613] Australia's approach has been to place all provisions in respect of its obligations to cooperate in a single legislation. [614] While most states such as New Zealand, Trinidad and Tobago, Uganda, United Kingdom and Kenya have placed both the provisions on the crimes and those on the obligations to cooperate in a single legislation. The crimes within the jurisdiction of the ICC are incorporated into Australia's Criminal Code via the International Criminal Court Consequential Amendment Act 2001.

4.2.2.1.1. Cooperation Regime

The ICC may make a request to Australia for assistance in respect of an investigation or prosecution in the following areas: assistance with the arrest and surrender of a person, the identification and whereabouts of a person or item, the taking of evidence, the questioning of any person being investigated or prosecuted, the service of documents, facilitating the voluntary appearance of persons before the ICC, the temporary transfer of prisoners to the ICC, the examination of sites, the execution of searches and seizures, the provision of records and documents, the protection of victims or witnesses, the preservation of evidence, the identification, tracing and freezing or seizure of proceeds of crime.[615] The 1995 War Crimes Tribunal Act contained similar provisions on cooperation; however, the enumerated areas are not as broad as those contained in the ICC Act. For instance, the

[612] International Criminal Court Act N0. 41 of 2002
[613] The United Kingdom's International Criminal Court Act 2001 (United Kingdom) 2001, C.17 in a single legislation implements the crime and cooperation regime of the Rome Statute of the ICC. Canada, on the other hand through the enactment of its Crimes Against Humanity and War Crimes Act , C.24 2000 defines the crimes and amends other key legislation to address all issues pertaining to its obligations under the Rome Statute of the ICC.
[614] See Gideon Boas, 'An Overview of Implementation by Australia of the Statute of the International Criminal Court, *supra*, 179, 184-186 for a discussion of the content of the International Criminal Court Act which incorporates Australia's cooperation obligations under the Rome Statute of the ICC.
[615] International Criminal Court Act N0. 41 of 2002, s 7(1)(a)

War Crimes Tribunal Act did not contain provisions for cooperation in examination of sites, transfer of prisoners and preservation of evidence. [616]

In addition, the ICC Act permits the provision of any other form of assistance not prohibited under Australian law necessary to facilitate the investigation and prosecution of crimes.[617] The ICC Act also authorises the provision of informal assistance to the ICC.[618] The scope and nature of this informal assistance are not elaborated on in the Act. The Rome Statute in Article 87 sets out the general provisions on assistance including the means for transmitting the requests and the relevant channels through whom such requests may be transmitted. The ICC implementing legislation of most states is broader than the general provisions contained in article 87. Other than slight differences in style or language, the different types of request incorporated in ICC implementing legislation across Commonwealth States are same.[619]

Except in cases of urgency, requests for assistance are made in writing to the Attorney-General or through the International Criminal Police Organization or a comparable regional organisation.[620] Under the War Crimes Tribunal Act, requests were also made in writing to the Attorney General. [621] Australia's ICC implementing legislation has also adopted the approach of other implementing legislation which designates persons to channel and treat requests from the ICC. Under Australia's implementing legislation, the Attorney General receives the request and treats same. This is also the practice in both the United Kingdom and Uganda where the Secretary of State and the Minister of Justice both receive and treat requests under their respective ICC implementing legislation. [622] While in both Trinidad and Tobago and New Zealand, requests are channelled through the diplomatic channel to the Minister in Charge of Foreign Affairs and then passed on to the appropriate designated Cabinet Minister. [623] Requests for cooperation must be executed in accordance with the procedure specified under the ICC Act[624] and in case of problems with the execution of a request; the Attorney General must consult with the ICC.[625]

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[616] International War Crimes Tribunals Act No. 18 1995,s 7; See Gillian Triggs 'Australia's War Crimes Trials' in Timothy L.H. McCormack and Gerry J. Simpson (eds) in *The Law of War Crimes supra,* 121, 144-148 for an in-depth analysis of the 1995 War Crimes Tribunal Act.
[617] International Criminal Court Act N0. 41 of 2002, s 7 (1)(b)
[618]International Criminal Court Act N0. 41 of 2002, s 7(2)
[619] See, International Crimes Act 2008, s 20(1)(XIII); International Criminal Court Act N0. 41 of 2002, s 7(1)(a); International Crimes and International Criminal Court Act, 24(1)(a)
[620] International Criminal Court Act N0. 41 of 2002, s 8
[621] International War Crimes Tribunals Act No. 18 1995,s 8
[622] International Criminal Court Act 2001 C.17, Part 2 s 2(1) and International Criminal Court Act 2010, s21.
[623] International Crimes and International Criminal Court Act, s 25 and International Crimes and International Criminal Court Act, s 25
[624] International Criminal Court Act N0. 41 of 2002, s 10
[625] Ibid, s 11

4.2.2.1.2. Arrest and Surrender

The ICC Act codifies in Part 3, the legal and normative framework for arrest and surrender. Requests for arrest and surrender made by the ICC to Australia of a person against whom the ICC Pre-trial Chamber has issued a warrant of arrest, must include information describing the person sought, probable location and an authenticated copy of the warrant of arrest.[626] Where the request for arrest and surrender is in relation to a person who has already been convicted, the request must include authenticated copies of the warrant of arrest, the judgement of conviction (where there is a subsisting one) and information showing that the person sought is the same referred to in the judgement.[627] Requests for the provisional arrest of a person must include information providing the identification and location of the person, a concise statement of the crimes and facts constituting the crimes, statements indicating the existence of a warrant of arrest or a judgement of conviction and that a request for surrender of the person will follow.[628] Australia's detailed and comprehensive implementation of the Rome Statute is reflected in all its provisions. The ICC implementing legislation of most Commonwealth States rarely provide details and specifics on the nature and content of supporting documents, which ought to accompany a request from the ICC for the arrest and surrender of a person. The legislation in some cases reference article 91 of the Rome Statute of the ICC which provides an in-depth background on the content of a request for arrest and surrender.[629]

4.2.2.1.2.1. Arrest Procedure

The Attorney General on receipt of a request for the arrest and surrender of a person with the requisite information and supporting documents may notify any magistrate, by written notice in the specified form that the request has been received.[630] The notification of a magistrate of the existence of a request for arrest and surrender by the Attorney General falls within the exercise of the Attorney General's discretionary powers. The procedure in cases of requests for provisional arrests is similar except that the need to provide supporting documentation when notifying the magistrate is obviated.[631] The Attorney General must in both cases first exercise his or her discretion by signing a certificate that it is appropriate to act on the ICC's request for either an arrest warrant or a provisional arrest.[632] The magistrate on receipt of the notice is obliged to issue a warrant of arrest in the prescribed format on behalf of the ICC and inform the Attorney General of the issuance of the warrant.[633]

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[626] Ibid, s 17
[627] Ibid, s 18
[628] Ibid, s 19
[629] See, New Zealand's International Crimes and International Criminal Court Act, s 33 and Trinidad and Tobago's International Crimes and International Criminal Court Act, s 33.
[630] International Criminal Court Act N0. 41 of 2002, s 20
[631] Ibid, s 21
[632] Ibid, s 22
[633] Ibid, ss 20(3) and (4) and 21(2) and (3)

An arrested person must be promptly informed in writing of the crimes for which the person is accused and brought before a magistrate.[634] A magistrate before whom an arrested person is brought, must be satisfied that the person is the same named in the warrant and was arrested in accordance with the Act. If the magistrate is not satisfied on any of these issues raised, the magistrate orders the release of the person from custody. The release does not preclude the person from being rearrested. On the other hand, once the magistrate is satisfied with these matters, the magistrate orders the remand of the person in custody or where there are special circumstances to justify, the person is granted bail. In determining whether to grant bail, the magistrate takes the following into consideration: the gravity of the alleged offence; the presence of pressing and exceptional circumstances that justify the grant of bail and whether necessary safeguards exist to ensure that Australia can fulfil its responsibility to surrender the person to the ICC.[635]

The incorporation of the foregoing bail provisions is in line with the provisions of the Rome Statute of the ICC on bail which sets a high threshold for the courts before bail can be granted.[636] In addition, to incorporating the high standards of assessment before the grant of bail, the ICC Act also implements the following: obligations requiring a custodial state to notify the ICC of any bail application made, conveying to the magistrate any recommendations made by the ICC in respect of bail applications and furnishing the ICC with periodic reports on a person's bail status.[637] Although most of the ICC implementing legislation across the Commonwealth replicates in almost identical terms the provisions of the Rome Statute on bail, slight variations exist. Under both the Trinidad and Tobago and New Zealand implementing legislation there are neither provisions for resort to the ICC for recommendations in respect of bail applications nor provisions for filing of periodic reports to the ICC on the bail status of persons granted bail.[638]

The Attorney General is obligated to order the release of a person remanded in custody or on bail if after 60 days, no formal request for surrender has been received and the person does not consent to the surrender. In making the order, the Attorney General must also take into consideration the following: the seriousness of the offence; the presence of urgent and special circumstances that justify the grant of bail and whether necessary safeguards exist to ensure that Australia can fulfil its responsibility to surrender the person to the ICC. [639] A person arrested on a provisional arrest warrant and for whom no formal notice has been received after 60 days, must be brought before a magistrate. The magistrate must order the release of the person except where the magistrate is certain that the notice will be

[634] Ibid, s 23(1)
[635] Ibid, s 23
[636] Rome Statute of the International Criminal Court, article 59(3)-(4).
[637] International Criminal Court Act N0. 41 of 2002, s 24; Rome Statute of the International Criminal Court, article 59(5)-(6)
[638] Trinidad and Tobago International Crimes and International Criminal Court Act 2006, s 39 and New Zealand International Crimes and International Criminal Court Act 2000, s 39.
[639] International Criminal Court Act N0. 41 of 2002, s 25

received within a reasonable timeframe.[640] This provision varies slightly across the different states. In Kenya, New Zealand and Trinidad and Tobago, the judge sets the timeframe for receipt of notice from the Minister.[641] In contrast in both Australia and Uganda, their respective ICC implementing legislation sets the timeframe for which notice ought to be received as against leaving same to the discretion of the court or judge.[642]

4.2.2.1.2.2. Surrender Procedure

The Attorney General may issue a warrant in writing in the prescribed statutory form for the surrender of a person remanded under a warrant of arrest to the ICC.[643] A warrant for surrender must only be issued, after the Attorney General has in the exercise of his or her absolute discretion, endorsed a certificate to that effect.[644] Where the person whose surrender is sought by the ICC, is in prison in Australia for a different offence, the Attorney General may in consultation with the ICC either issue a surrender warrant which will take effect at the end of the term of imprisonment in Australia or issue a temporary surrender warrant under agreed terms with the ICC.[645] In Australia, the decision to surrender rests with the Attorney General, whereas in other jurisdictions, such as Kenya, New Zealand, Trinidad and Tobago that decision is made by the court and the Attorney General or Minister is expected to carry out the court's decision. Although in certain instances as specified in the respective ICC implementing legislation, the designated Cabinet Minister may refuse to issue a surrender order after a court has deemed a person eligible for surrender.[646]

The Attorney General may refuse a request for surrender either on mandatory or discretionary grounds. Where the ICC has held the case to be inadmissible, the Attorney General is bound to refuse the request.[647] The Attorney General's discretion to refuse a request from the ICC may be exercised: where there are competing requests from the ICC and a foreign country not a party to the Rome Statute for either the same or different conduct constituting the alleged ICC offence, and Australia has a subsisting Extradition Agreement with the country.[648] A request for arrest and surrender may be postponed by the Attorney General where: there is a pending admissibility ruling before the

[640] Ibid, s 26
[641] Kenya's International Crimes Act 2008, s 34; New Zealand International Crimes and International Criminal Court Act, s 38; Trinidad and Tobago's International Crimes and International Criminal Court Act, s 38.
[642] See Australia's International Criminal Court Act N0. 41 of 2002, s 26;Uganda's International Criminal Court Act 2010, s 32
[643] International Criminal Court Act N0. 41 of 2002, s 28
[644] Ibid, s 29
[645] Ibid, s 30
[646] See Kenya's International Crimes Act 2008, s 39; New Zealand's International Crimes and International Criminal Court Act, s 43; Trinidad and Tobago's International Crimes and International Criminal Court Act, s 43.
[647] International Criminal Court Act N0.41 of 2002, s Section 31(1); See also International Criminal Court Act N0. 41 of 2002, ss 33(4), 35(3) and 36(3)
[648] International Criminal Court Act N0.41 of 2002, s 31(2); See also International Criminal Court Act N0. 41 of 2002, ss 39(6) and 40(3)

ICC,[649]the request might interfere with on-going investigation or prosecution in Australia[650] and if the request will involve a conflict with Australia's existing international obligations.[651]

Where there are competing requests from the ICC and a foreign country for the surrender or extradition of a person for the same conduct that forms the basis of the crime before the ICC, the Attorney General must notify the foreign country and the ICC and make a decision in line with section 38.[652] The Attorney General must give priority to the ICC where the ICC has ruled that the case is admissible and that determination takes into consideration, the investigation and prosecution carried out by the foreign country in relation to its request for extradition. The ICC makes such a determination on receipt of the notification of the foreign country's extradition request. Prior to the ICC making such a determination, extradition proceedings may begin under the Extradition Act, however no person may be extradited until the ICC makes the determination that the case is inadmissible. The ICC however, has to make an expedited decision.[653] Where there are competing requests from the ICC and a foreign state that is not a party to the Rome Statute for the same conduct, priority is given to the ICC's request if: Australia is not under an international obligation to extradite the person to that foreign country and the ICC has held that the case is admissible. Where on the other hand, Australia has a subsisting international obligation to extradite to that foreign country, the Attorney General must determine whether to surrender or extradite the person.[654] The extradition process may continue where Australia has no subsisting extradition arrangement with the foreign country and where the ICC has not ruled on the admissibility of the case.[655] However, no person may be extradited until the ICC determines that the case is inadmissible.[656] This does not apply where the ICC does not make an expedited decision.[657]

In making the decision whether to surrender or extradite, the Attorney General must take into account the following: the respective dates of the requests, interests of the foreign country including if the crimes was committed in its territory and the nationalities of the victim and perpetrator and the possibility of the perpetrator being surrendered to the ICC at a later date by the foreign country.[658] Where there are competing requests from the ICC and a foreign country for the surrender or extradition of a person for conduct other than that which the ICC seeks the person's surrender, priority is given to the ICC's request where there is no subsisting obligation to extradite to that foreign country. Where however there is a subsisting international obligation, the Attorney General must

[649] Ibid, ss 32(1)(a), section 33(5), 35(2) and 36(2)
[650] Ibid, s 32(1)(b) and 34
[651] Ibid, s 32(1)(c) and section 12(4)
[652] Ibid, s 37
[653] Ibid, s 38
[654] Ibid, s 39(2)
[655] Ibid, s 39(3)
[656] Ibid, s 39(4)
[657] Ibid, s 39(5)
[658] Ibid, s s 39

determine whether to surrender the person or extradite taking into consideration; the factors contained in section 39(7) as well as giving special consideration to the relative nature and gravity of the offence.[659]Section 41 places an additional responsibility on the Attorney General to respond formally to the ICC on any decision reached in respect of the extradition requests.

4.2.2.2.1.3. Other Requests

The Rome Statute of the ICC provides that states must have domestic measure under their laws to comply with requests from the ICC under article 93 of the Rome Statute. Consequently most implementing legislation within the Commonwealth incorporates extensive measures for complying with requests from the ICC. The procedure for other types of requests other than for arrest and surrender are contained in Part IV of the ICC Act.[660] Requests for cooperation under part IV other than request for transit must be supported by certain documentation.[661] These include: a concise statement of the purpose and essential facts underlying the request and detailed information to assist with providing the request.[662]

The ICC Act places restrictions on the Attorney General in certain situations from providing assistance to the ICC. The situations are enumerated in the Act. First, where the request involves the disclosure of information provided to Australia on a confidential basis by a foreign country, intergovernmental or international organisation, the Attorney General must refuse to assist the ICC. Section 142 places an additional requirement that the consent of such third party must be received before any disclosure is made. Where the third party refuses, then the Attorney General must also decline the request for assistance. If, the third party consents, the Attorney general must disclose the information in accordance with Part 8 of the Act (which deals with the protection of Australia's national security interests). Second, the Attorney General may refuse a request for cooperation: on grounds of national security interests. The Act in Part 8 covers the treatment of national security issues vis a vis provision of assistance to the ICC. Requests for cooperation which in the opinion of the Attorney General involves the disclosure of information which would prejudice Australia's national security interest is dealt with in the procedure specified in section 148 and 149. If after consultation with the ICC as specified in article 72 paragraph 5,[663] there is no resolution, and the Attorney General has decided that there is no means of disclosing the information or document, without prejudicing Australia's national security interests, the Attorney General, must notify the ICC in accordance with article 72(6) of the Rome Statute.

[659] Ibid, s, s 40
[660] Ibid, s 49
[661] Ibid, s 50(1)
[662] Ibid, s 50(1)
[663] Ibid, s 148

The other scenario, where the Attorney General may refuse requests for assistance is where there are competing requests from the ICC and a foreign country not a party to the Rome Statute for either the same or different conduct that forms the basis of the crime under the jurisdiction of the ICC.[664] The grounds for postponing the requests are similar to those dealt with under request for arrest and surrender. The grounds include: where the request would interfere with on-going investigations or prosecutions in Australia,[665] where there is a pending admissibility case,[666] where there are competing requests from the ICC and a foreign country[667] and where the request involves a conflict with Australia's international obligations.[668]

4.2.2.2.2. International Criminal Court (Consequential Amendments) Act 2002

4.2.2.2.2.1. Amendments

The ICC (Consequential Amendments) Act 2002(otherwise known as the ICC CA Act) amends a number of existing pieces of legislation in Australia. Schedule 1 of the Act amends the Criminal Code Act 1995 with the inclusion of a new Division 268 with the title-'Genocide, Crimes against Humanity, War Crimes and Crimes against the Administration of Justice of the International Criminal Court'.[669] The Act creates the substantive offences prosecuted by the ICC which includes: genocide,[670] crimes against humanity[671] and war crimes.[672] A number of offences against the administration of the ICC are created in the Act.[673] In addition, the Act broadened the scope of the definition section of the Criminal Code Act to take into account the new offences created by Division 268.

Aside from the Criminal Code, the Act amended a number of other legislation although not as substantially as the Criminal Code. Schedule 2 amends the Director of Public Prosecutions Act,[674]with the inclusion of the ICC Act 2002 to comprise the list of legislation which the Director of Public Prosecution may carry out proceedings; Schedule 3 repeals Part II of the Geneva Conventions Act 1957 which provided for the grave breaches regime under the four Geneva Conventions of 1949[675] or of Additional Protocol I of 1977 ; Schedule 4 amends the Migration Act 1958 to incorporate the ICC Act in the list of legislation wherein, a non-citizen, may on the authorisation of the Attorney-General be allowed to enter or remain in Australia for purposes under the ICC Act; Schedule 5 amends the

[664] Ibid, s 51(2)(b) and (c) read along with ss 59(4) and 60(3)
[665] Ibid, s 52(1)(a) in addition to s 54
[666] Ibid, ss 52(1)(b) and 55
[667]Ibid, s 52(1)(c) and in addition s 56(2)(a)
[668] Ibid, s 52(1)(e) and in addition s 12(4)
[669] Australia Criminal Code Act No. 12 of 1995
[670] Ibid, subdivision B
[671]Ibid, subdivision C
[672] Ibid, subdivisions D, E, F, G and H
[673] Ibid, Subdivision J
[674] Director of Public Prosecutions Act No. 113 of 1983
[675] Genocide Convention Act No. 27 of 1949.

Mutual Assistance in Criminal Matters Act [676] by extending the application of existing legislation which allows the Attorney General to obtain financial information on requests from foreign countries to include the ICC; Schedule 6 amends the Telecommunications (Interception) Act[677] which permits certain interceptory measures to be taken for proceedings under the ICC Act and Schedule 7 amends the Witness Protection Act [678] to enable the ICC requests the inclusion of person into the National witness Protection Programme.[679] The Act fulfils two significant functions, the comprehensive codification of serious international crimes within the same legislation and the criminalization of genocide in Australia. [680]

4.2.2.2.2.2. Incorporating the Crimes

The definition of crimes under the Act echoes the provisions of the Elements of Crime of the Rome Statute of the ICC. Sub division B of Division 268 codifies the five distinct offences that constitute the crime of genocide. Sub division B has lain to rest the controversy that genocide is not a crime within Australia.[681] Sub division C enacts sixteen distinct offences which constitute crimes against humanity in line with the Elements of Crime of the ICC.

The provisions on war crimes contained in subdivisions D, E, F, G and H of Division 268 are the most extensive of the core ICC crimes passed by the Act. Sub division D codifies war crimes that are grave breaches of the Geneva Conventions and of Protocol 1 to the Geneva Conventions. Eleven distinct offences which constitute war crimes under this subdivision are enacted. Sub division E codifies other serious war crimes that are committed in the course of an international armed conflict and codifies 34 distinct offences which constitute war crimes under this sub heading. Sub division F incorporates war crimes that are serious violations of article 3 Common to the Geneva Conventions and are committed in the course of an armed conflict that is not an international armed conflict and codifies seven distinct offences constituting war crimes under this sub division. Sub division G codifies war crimes that are other serious violations of the laws and customs applicable in an armed conflict that is not an international armed conflict and codifies eighteen distinct offences including the elements of crime.

[676] Mutual Assistance in Criminal Matters Act No. 85 of 1987
[677] Telecommunications (Interception) Act No. 114 of 1979 as amended.
[678] Witness Protection Act No. 124 of 1994 as amended.
[679] See Carrie La Seur, '*supra* at 207-209.
[680] See Gideon Boas, 'An Overview of Implementation by Australia of the Statute of the International Criminal Court (2004) 2 Journal of International Criminal Justice, 179, 186-189 for a discussion of the content of the International Criminal Court Consequential Amendment Act which sets out the crimes of genocide, crimes against humanity and war crimes in Australia.
[681] For more details on the proceedings instituted by Australia's indigenous people see generally, Kristen Daglish, 'Case Comment The crime of genocide: Nulyarimma v. Thompson', (2001). International and Comparative Law Quarterly; Sean Peters, 'The Genocide Case Nulyarimma v Thompson', (1999) Australian International Law Journal, 233; Thomas Feerick, 'The Crime of Genocide in Australia An Exegetic Analysis', (2000) Australian International Law Journal, 47.

Sub division H codifies war crimes that are grave breaches of Protocol I to the Geneva Conventions and enacts seven distinct offences under this sub division.[682]

Australia has not ratified the 2010 amendments to the Rome Statute with respect to war crimes and the crime of aggression.[683] Australia's detailed and comprehensive codification of the crimes in the International Criminal Court (Consequential Amendments Act) means that whenever it ratifies the amendments, it would have to expressly amend its laws to incorporate the provisions. Finally crimes against the administration of justice of the ICC are codified in sub division J. Australia again adopts the comprehensive and detailed approach to incorporation of the core crimes with respect to crimes against the administration of justice. It sets out the elements and the penalty of the different acts which amount to crimes against the administration of justice.

Australia's International Criminal Court (Consequential Amendments Act) is silent on the general principles of criminal law including applicable defences to the crimes created by the new Division 268 of the Australian Criminal Code.[684] This silence also extends to the non-incorporation of any provision on article 27 of the Rome Statute of the ICC which provides that immunities enjoyed by a person as a result of the person's official capacity shall not be a bar to the ICC exercising jurisdiction over such person.

4.2.2.2.2.3. Jurisdiction

The jurisdiction of Australian courts over the core crimes and the crimes against the administration of justice are set out in section 268.117 and sections 15.4 and 15.3 of the Criminal Code Act. Section 268.117 of the ICC CA Act provides for the inclusion of the core crimes of genocide, crimes against humanity and war crimes in the extended geographical jurisdiction provided under section 15.4 of the Criminal Code irrespective of where the offence was committed. Flowing from this provision, Australian courts can exercise jurisdiction over the core crimes of genocide, crimes against humanity and war crimes irrespective of where the crimes were committed in disregard of traditional concepts of jurisdiction. It is also immaterial that the result of the alleged conduct occurred outside Australia.[685] Although the Rome Statute does not incorporate universal jurisdiction,[686] most states have however, implemented broad jurisdiction to prosecute the core crimes within their ICC implementing legislation. With respect to the crimes against the administration of justice of the ICC, the extended

[682] Carrie La Seur, *supra* at 212-213 for more analysis on the war crimes content of the ICC CA Act.
[683] Article 8, Para 2 (e) United Nations Reference: C.N.533. 2010. Treaties-6, and Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression in article 8 bis United Nations Reference: C.N.651. 2010. Treaties-8.
[684] Australia's International Criminal Court (Consequential Amendments) Act 2002 Act No. 42 of 2002, is silent on the general principles of criminal law including defences. The applicable defences will be those contained in Australia Criminal Code Act No. 12 of 1995.
[685] Australian Criminal Code Act 1995, s 15.4
[686] The ICC has jurisdiction over crimes committed in the territory of a state party or by a national of a state party. Rome Statute of the ICC, article 12.

jurisdiction provided under section 15.3 is more restrictive in scope than the one in section 15.4 which pertains to the core crimes. The extended jurisdiction provided under section 15.3 requires a territorial nexus between Australia and the crimes committed. For Australian courts to exercise jurisdiction over the crimes against the administration of the ICC, the conduct must have been carried out by an Australian citizen or body corporate, some of the act constituting the alleged conduct must have taken place in Australia or on board a ship or aircraft registered in Australia.[687]

The Attorney General plays a vital role in the implementation of the ICC regime in Australia and is vested with broad powers to make decisions. Under the ICC CA Act in section 268.121 proceedings can only be instituted with the written consent of the Attorney General.[688] The requirement of the Attorney General's consent before proceedings can be instituted in Australia will help to prevent an abuse of the broad form of extra-territorial jurisdiction incorporated under the Act and Criminal Code. The decision of the Attorney General to give or refuse to give consent is final and cannot be challenged or quashed.[689] The exercise of the Attorney General's power to give or withhold consent was tested in 2011 when an Australian citizen attempted to institute proceedings for war crimes and crimes against humanity against the Sri Lanka President a day before his scheduled arrival for the 2011 Commonwealth Heads of Government Meeting (CHOGM) hosted by Australia.[690] The case had been filed in Melbourne Magistrates Court under a private citizen's prosecution, but required the consent of the Attorney General as stipulated in Section 268.121(1) of the Criminal Code before the case could proceed. The Attorney General subsequently declined consent and moved to quash the indictment.[691] The Attorney General exercising his broad powers under the International Criminal Court Act quashed the indictment. The case simply reaffirms the provisions of section 268.122 of the Australian Criminal Code schedule 1.[692]

4.2.3. Impact on Executive Action

Over the years following the establishment of the ICC, successive governments, have maintained support for the court. The impact of contemporary international criminal courts and tribunals on executive thoughts and actions can be summed under the following categories:

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[687] Australian Criminal Code Act 1995, 15.3

[688] This is reiterated in section 16.1 of the Australian Criminal Code Act 1995, which provides that where the conduct constituting an offence took place outside Australia by a person who is neither an Australian citizen or a body corporate registered in Australia, the consent of the Attorney General must be sought before proceedings can be instituted.

[689] Australian Criminal Code Act No. 12 of 1995, Division 268.122.

[690] Anna Hood and Monique Cormier, 'Prosecuting International Crimes in Australia: The Case of the Sri Lankan President', (2012) 13 Melbourne Journal of International law 1, 2.

[691] See Aja Styles and Michael Gordon, 'Sri Lankan PM Will Not Answer War Crimes Claims', Sydney Morning Herald (online), 26 October 2011 available at http://www.smh.com.au/wa-news/sri-lankan-pm-will-not-answer-war-crimes-claims-20111025-Imi4chtml?skin=text-only accessed 10/09/2013.

[692] Anna Hood and Monique Cormier, 'Prosecuting International Crimes in Australia: The Case of the Sri Lankan President', (2012) 13 Melbourne Journal of International law 1, 4-9.

First, Australia's continued financial support to contemporary international criminal courts and tribunals particularly the Special Court and the ICC, is a demonstration of its impact on executive action in Australia. On 1st October 2005, Australia's Minister for Foreign Affairs, Mr. Alexander Downer, issued a media release affirming Australia's support for the Special Court. It pledged a $100,000 to support the operations of the Special Court. [693] In relation to the ICC, aside from regular contributions to the court's annual budget, Australia also provides voluntary support for other programmes of the court such as the Trust Fund for Victims, The Trust Fund for Least Developed Countries and its Internships and Visiting Professionals Programmes. In 2010, at the Review Conference of the ICC, Australia made two monetary pledges of €100,000 to the Trust Fund for Victims and €50,000 to the Trust Fund for Least Developed Countries which it has fulfilled.[694] In 2011, during the Commonwealth Law Ministers Meeting, the Attorney General and Foreign Minister announced a donation of $250,000 from the Australian Government as part of Australia's commitment to international criminal justice to support the work of the ICC. The announcement coincided with the visit of the President of the ICC, Judge Sang-Hyun Song. [695]

Second, following the establishment of the ICC, Australia has continued to show commitment to that body by continuously engaging it. Australia has provided assistance to states to help them ratify and implement the Rome Statute and has contributed to the court's Trust Fund for the least Developed Countries.[696] The impact of the ICC on executive action and process in Australia is demonstrated by the country's continued engagement with the ICC and its active participation at meetings of the Assembly of State Parties. In 2009, it submitted a joint statement with Canada and New Zealand under an informal coalition known as CANZ States. In their joint statement, they pledged continued support for the ICC and at the same time acknowledged the fact that the ICC is dependent on states to carry out its role and in this respect, they called on states to take the necessary steps to meet their obligations to cooperate with the court including enacting where necessary domestic measures.[697]

Third, Australia has always aligned with ICC official views on issues of concern within the ICC particularly as it touches on Kenya's request for a deferral of ongoing ICC proceedings at The Hague.

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[693] Andrew Thomas (ed), 'Australian Practice in International law 2005' (2007) 26 Australian Year Book of International Law, 327, 362.

[694] See Statement on behalf of Canada, Australia and New Zealand at the Ninth Session of the Assembly of State Parties to the Rome Statute of the International Criminal Court by H.E. Jim McLay, Permanent Representative of New Zealand on Monday 6 December 2010, 2-3.

[695] Australia Boosts support for the International Criminal Court Media Release, Attorney-General, The Hon. Robert McClelland MP, Minister for Foreign Affairs, The Hon Kevin Rudd MP, 14 July 2011 (www.foreignminister.gov.au/releases/2011/kr_mr_110714.html) accessed 06/10/2014.

[696] Australian Government Department of Foreign Affairs and Trade, www.dfat.gov.au/un/international-law.html See also Alexander Downer, 'Upholding the "Sword of Justice": International Law and the Maintenance of International Peace and Security', Text of Speech given to the Joint Meeting of the Australian and New Zealand Society of International Law and the American Society for International Law, Canberra, 28 June 2000, available at www.foreignminister.gov.au/speeches/2000/000628 accessed on 06/10/2014.

[697] See Statement of Canada, Australia and New Zealand at the Eighth Session of the Assembly of State Parties, International Criminal Court November 19, 2009.

The issue had always being a moot point, but had never quite made it to the voting table and had never being part of the agenda of the Security Council. However in November 2013, following the extra-ordinary session of the African Union which was held at Addis Ababa in October 2013, the following month in November, the issue of a deferral was finally placed on the agenda of the United Nations Security Council. Australia voted against the measure. The statement by Australia's Ambassador and Permanent Representative to the United Nations is quite instructive and displays how the ICC has shaped government response and policies. He stated thus: "Australia deeply regrets that a vote was called today this was unnecessary". He went on to state that "we consider that Security Council action under article 16 of the Rome Statute to defer an investigation or prosecution of the ICC should only be taken in exceptional circumstances, when the proceedings themselves threaten international peace and security, and alternative options have been exhausted. This threshold was not met on this occasion, and therefore we were not able to support the resolution".[698]

From the foregoing, it can be said that contemporary international criminal courts and tribunals have exerted significant levels of impact on judicial, legislative and executive actions and processes in Australia. The norms and jurisprudence of contemporary international criminal courts and tribunals have been deployed in proceedings to determine exclusion of persons from the protection of the Refugee Convention under article 1F(a). Its influence on legislative action and process has been significant like other states that have implemented the provisions of the Rome Statute. The ICC in Australia has also influenced a number of executive actions and processes.

4.3. The Impact of Contemporary International Criminal Courts and Tribunals in Canada

Introduction

Canada like Australia and the United Kingdom have had a common past of engaging with war criminals and attempts at bringing them to accountability. The quest in prosecuting World War II criminals in the 1980s also gripped Canada and thus a need to ascertain the exact number of World War II criminals living in Canada at the time led to the establishment of the Deschênes Commission in 1985. The Deschênes Commission Report eventually recommended the prosecution of about 20 cases and the institution of certain legislative and administrative procedures such as amendments to the Criminal Code and Extradition Act. However, because the conduct of criminal prosecutions of these persons more than forty years after the crimes took place proved difficult, the government

[698] Explanation of Vote on the Resolution to Defer International Criminal Court Proceedings related to Kenya UNSC Statement by HE Mr Gary Quinlan, Ambassador and Permanent Representative to the United Nations http://www.gov.au/Australia-unsc/2013/11/explanation-of-vote-on-the-resolution-to-defer-international-criminal-court-proceedings-related-to-kenya (15 November 2013)

focused on the utilization of denaturalization and deportation measures as means of addressing the presence of alleged war criminals in Canada.[699]

Canada signed the Rome Statute of the ICC on 18th December, 1998. On 29th June, 2000 Canada's Parliament passed the Crimes against Humanity and War Crimes Act. Following this, on 7th July 2000, Canada ratified the Rome Statute of the ICC.[700] The discussion under this section will proceed by examining the impact of both the Rwandan Tribunal and the ICC, on judicial, legislative and executive thought, action and process in Canada.

4.3.1. Impact on Judicial Action and Process

Contemporary international criminal courts and tribunals have influenced the domestic prosecution of cases in Canada under two strands of prosecution. The first are those under its immigration procedure, embracing exclusion cases under the Refugee Convention, the denaturalization process, and the prosecutions of alleged genocide perpetrators.[701]

4.3.1.1. Cases under the Immigration Procedure

4.3.1.1.1. In *Mugesera v. Canada (Minister of Citizenship and Immigration)*[702] , the crux of the case, was a speech delivered by the applicant in Rwanda prior to the 1994 genocide. In the aftermath of the genocide, the applicant fled Rwanda first to Spain from where he and his family emigrated to Canada as Permanent Residents. In 1995, the Minister of Citizenship and Immigration commenced proceedings under section 27 of the Immigration Act as a result of the speech he had made in Rwanda.[703] The Minister contended that the respondent's speech amounted to incitement to commit murder; incitement to genocide and hatred and a crime against humanity. The Minister also contended that he misrepresented a material fact in his application for permanent residence by filling no to the question whether he had been involved in crimes against humanity, although this last ground was subsequently abandoned.[704] The case went through a number of applications for judicial review to the Federal Court of Appeal (FCA).[705]At the Federal Court of Appeal, the court held that the speech did

[699] Grant Purves, Political and Social Affairs Division, 'War Criminals: The Deschênes Commission', Current Issue Law Review 87-3E, Revised 16 October 1998, Parliamentary Research Branch, 1-16.
[700] Canada played an active role in the negotiation of the treaty of the Rome Statute of the International Criminal Court and was the first state in the world to enact an implementing legislation within its domestic legal system. For a general insight into the drafting process see, 'Philippe Kirsch, Q.C., 'The International Criminal Court: Current Issues and Perspectives', (2001) 64, Law and Contemporary Problems 3, 5-8.
[701] Convention Relating to the Status of Refugees Can. T.S. 1969 No. 6 (Refugee Convention)
[702] *Mugesera v. Canada (Minister of Citizenship and Immigration)* (2005) 2 S.C.R. 100, 2005 SCC 40.
[703] Ibid, [2-4]
[704] Ibid, [25]
[705] Ibid, [27-29]

not amount to incitement to murder, hatred or genocide. Consequently, the allegation of crimes against humanity was unfounded.[706]

On appeal, the Canadian Supreme Court had to examine the substance and legal categorization of the speech, and whether the FCA erred in law in holding that Mr. Mugesera's speech did not incite to hatred, murder and genocide and consequently did not amount to crimes against humanity.[707] In the case, the Supreme Court drew attention to the fact that international law is being deployed as an aid in domestic proceedings because genocide as a crime is rooted in international law.[708] As a result, the Canadian Supreme Court in evaluating the elements of the crime of genocide and incitement to genocide relied heavily on the jurisprudence of contemporary international criminal courts and tribunals particularly those of the Rwandan Tribunal. The Supreme Court held with respect to incitement to genocide, that because it is an inchoate offence, the Minister does not have to show that the speech resulted in murder.[709]

The Supreme Court in making a case for elucidation of its decision in *R v. Finta*, drew attention to the jurisprudence of international criminal tribunals in the application of customary international law. The Supreme Court noted further that although the decisions of international tribunals were not binding on national courts, they were however, of significant import in the application of domestic provisions which incorporate customary international law. Consequently Finta's decision being at variance with the jurisprudence of contemporary international tribunals needed to be revisited.[710] Placing reliance on the recent jurisprudence of the ad hoc tribunals, particularly, the Rwandan Tribunal in *Prosecutor v. Akayesu* [711] where the Rwandan Tribunal held that the requirement of discriminatory intent is only applicable to persecution rather than for all crimes against humanity as earlier held by the Supreme Court in R v. Finta, the Supreme Court held that Finta should no longer be followed to the extent that it requires a discriminatory intent for all crimes against humanity.[712] The decision of the Supreme Court in the case provides a much needed reconsideration of the decision of the Canadian Supreme Court in R v Finta which has been criticized for setting a difficult evidentiary threshold for domestic war crimes prosecution and also highlights the importance and normative value attached to decisions of international tribunals in domestic systems.[713]

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[706]Ibid, [31]
[707]Ibid, [33]
[708]Ibid, [82]
[709]Ibid, [85]
[710](2005) 2 S.C.R. 100, 2005 SCC 40, [119-126]
[711] Case No. ICTR-96-4-A (Appeals Chamber) 1 June 2001 [460- 469]
[712] (2005) 2 S.C.R. 100, 2005 SCC 40, [142-144]
[713] See generally, Fannie Lafontaine, *Prosecuting Genocide, Crime Against Humanity and War Crimes in Canadian Courts* (Scarborough, Ontario Carswell, 2012); William A. Schabas, 'National Courts Finally Begin to Prosecute Genocide, the Crime of Crimes', 1 (2003) Journal of International Criminal Justice 39.

4.3.1.1.2. In *Ezokola v Canada (Citizen and Immigration*[714]*),* the appellant was a senior representative of the Government of the DRC to the UN. He resigned from his post in 2008 and thereafter sought refugee protection for himself and his family in Canada.[715] The Refugee Board excluded the applicant from the definition of refugee under art.1F(a) of the Refugee Convention, which is incorporated in section 98 of the Immigration and Refugee Protection Act.[716] It held that, although the government of the DRC was not an organization with a limited and brutal purpose, it had committed crimes against humanity as defined by the Rome Statute.[717] The applicant was excluded on grounds of complicity in the crimes committed by the Government of the DRC owing to his position within the government he had "personal and knowing awareness" of the government's crimes.[718]

The Federal Court held that an appellant could not be held complicit in the crimes of the government without express or circumlocutory proof showing that he had participated in the crimes of the government.[719] The Federal Court in addition certified the question of whether complicity can arise by association to the Federal Court of Appeal for determination. The Federal Court of Appeal rejected this reasoning of the Federal Court and held that a senior officer who remained albeit voluntarily in a position and continue to protect the government's interests with the knowledge of such crimes was indicative of personal knowledge and participation in the crimes. The Federal Court of Appeal held that the Board should have applied the "personal and knowing participation" test rather than the "Knowing and awareness" test and remitted the case back to a different panel to apply the correct test.[720]

The Supreme Court propagated an input based test in ascertaining complicity to be adopted by the Board and held that persons should only be excluded from the refugee protection for complicity if it can be shown that such persons had made a "knowing and significant" input to the commission of the crimes.[721] In addition, the Supreme Court had this to say that recourse must be had to international criminal law and its jurisprudence in determining whether an individual should be excluded from refugee protection under article 1F(a) of the Refugee Convention.[722] On the sources of international criminal law, the Supreme Court restated the dictum of Lord Brown of Eaton-Under-Heywood J.S.C. in *R. (J.S) (Sri Lanka) v Secretary of State for the Home Department,*[723] thus:

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[714] *Ezokola v Canada (Citizen and Immigration)* 2013 SCC 40
[715] Ibid, [11-14b]
[716] S.C.2001, c.27
[717] *Ezokola v Canada (Citizen and Immigration)* 2013 SCC 40, [15]
[718] Ibid, [19]
[719] Ibid, [22]
[720] Ibid, [23-27]
[721] Ibid, 28-29 and 103]
[722] Ibid, [42-46]; See also *Mugesera V Canada*, note 702 at 82 and 126
[723] (2010) UKSC 15, (2011) A.C. 184 (J.S) at Para 9

> It is convenient to go at once to the (Rome) Statute, ratified as it now is by more than 100 states and standing as now it surely does as the most comprehensive and authoritative statement of international thinking on the principles that govern liability for the most serious international crimes (which alone could justify denial of asylum to those otherwise in need of it.[724]

The Supreme Court went on to point out the relevance of the jurisprudence of the ad hoc tribunals as sources of international criminal law when it noted that the Rome Statute could not be relied on exclusively in determining complicity, because the Rome Statute was not a wholesome reflection of international criminal law, more so, implicit in the text of article 1F(a) is the reference to international instruments.[725]

Canadian, Australian and United Kingdom Courts have adopted a practical and contemporary approach to the definition of 'international instruments' to keep pace with new instruments adopted at the international level significantly different from 1951 when the Refugee Convention was first adopted. Consequently, the courts have allowed reference to international instruments to embrace the statutes of both the Rwandan and Yugoslavia Tribunals and the Rome Statute of the ICC. In different decisions across the jurisdictions the courts have drawn a distinction between the applications of these instruments in refugee proceedings to determine exclusion as against its use in determining criminal liability.[726]

4.3.1.2. Cases brought under Canada's Crimes Against Humanity and War Crimes Act

4.3.1.2.1. *In Her Majesty the Queen V. Désiré Munyaneza,*[727] Mr. Munyaneza was charged with seven counts of genocide, crimes against humanity and war crimes.[728] He was the first person to be prosecuted under Canada's legislation implementing the Rome Statute, the Crimes against Humanity and War Crimes Act 2000.[729] The accused was charged with two counts of genocide defined under

[724] *Ezokola v Canada* (Citizen and Immigration 2013 SCC 40, [48]
[725] Ibid, [50 - 51]
[726] For a detailed analysis of the practice and jurisprudence of domestic courts in exclusion proceedings see Joseph Rikhof, The Criminal Refugee: *The Treatment of Asylum Seekers with a Criminal Background in International and Domestic Law* (Republic of Letters Publishing 2012) Chapter 3; See Harb v Canada (Minister of Citizenship and Immigration) 2003 FCA 39;Ventocilla v Canada (Citizenship and Immigration) 2007 FC 575, other cases decided under Article 1F where the jurisprudence and norms of contemporary international criminal courts and tribunals were iterated; see generally M. Kingsley Nyinah, 'Exclusion Under Article 1F, 12 International Journal of Refugee Law 12, Special Supplementary Issue (2000) 306.
[727] *Her Majesty the Queen V. Désiré Munyaneza,* (2009) QCCS 2201; See also (http://www.ccij.ca/programs/cases/index.php?DOC_INST=12) last accessed on 15/10/2014
[728] Ibid, [6]
[729] Crimes Against Humanity and War Crimes Act, (2000) Chapter 24.

section 6(3) and 6(4) of the Act. [730] The court made reference to the jurisprudence of the Rwandan Tribunal on the specific acts which amount to "serious bodily or mental harm".[731] The court also adopted the definition of sexual violence in *Prosecutor v. Akayesu*.[732] The court noted that the offence of genocide comprised a physical and mental element. It made reference to the jurisprudence of the Rwandan Tribunal in highlighting the mental element component of the crime of genocide. The court relying on *Prosecutor v Semanza*[733] noted that a person who commits genocide must possess the physical intent to destroy the group beyond its language, culture which sets out its identity.[734] The court held that this intent may be demonstrated by the systematic commission of heinous acts against the specific ethnic group while other groups are excluded from the treatment.[735]

In relation to the two counts of crimes against humanity and the counts of war crimes the court articulated the jurisprudence of the Rwandan Tribunal.[736] It made specific reference to *Prosecutor v. Karamera*[737] where the Rwandan Tribunal Appeal Chamber had taken judicial notice of the genocide in Rwanda.[738] Following the receipt and analysis of the testimony, the judge was able to draw factual inferences of specific acts committed by Munyaneza during the period. Factual evidence showed that Munyaneza had been at the vanguard of the anti–Tutsi campaign in Butare in Rwanda. He used the cars at his disposal in committing and perpetrating genocidal acts. He was involved in looting, sexual violence and murder against Tutsis in the Prefecture in April, May and June 1994.[739]He was subsequently found guilty of seven counts of genocide, crimes against humanity and war crimes.[740] On 22 May 2009, Justice André Denis of the Superior Court of Quebec convicted Désiré Munyaneza of seven counts of genocide, crimes against humanity and war crimes for acts of murder, sexual violence and pillage committed in Rwanda in 1994 on 29 October 2009, Mr Munyaneza was sentenced to life in prison. [741]

The appellant appealed to the Quebec Court of Appeal,[742]which classified his grounds of appeal into five categories. Under the first categorization, the appellant contended that the three war crimes for

[730] *Her Majesty the Queen V. Désiré Munyaneza,* (2009) QCCS 2201, [69-70]
[731] Para 84 referred to *Prosecutor v. Akayesu,* Trial Chamber, ICTR, Case No. ICTR-96-4-T, September 2, 1998 [504].
[732] Ibid, [688]
[733] *Prosecutor v Semanza, Trial Chamber*, ICTR, Case No. ICTR-97-20-T, May 15, 2003 [315, 319]
[734] Her Majesty the Queen *v Désiré Munyaneza,* (2009) QCCS 2201, [98]
[735] *Prosecutor v Akayesu, Trial Chamber,* ICTR, Case No. ICTR-96-4-T, September 2, 1998 [523]
[736] Her Majesty the Queen *V. Désiré Munyaneza,* (2009) QCCS 2201,[108- 112 and 131- 154] .
[737] *Prosecutor v Karamera Appeal Chamber,* ICTR, Case No. ICTR-98-44-AR73(c) June 16, 2006 [26 and 32]
[738]*Her Majesty the Queen v Désiré Munyaneza,* (2009) QCCS 2201, [115 and 134]
[739]Ibid, [2057-2076]
[740] Ibid, [IX 1 and 2]
[741] See, Fannie Lafontaine, 'Canada's Crimes Against Humanity and War Crimes Act on trial: an analysis of the Munyaneza case', (2010) Journal of International Criminal Justice, Vol. 8(1), 269 for an analysis of Canada's approach to incorporation of the crimes and the sentencing provisions as applied in the Munyaneza case.
[742] *Désiré Munyaneza v. Her Majesty the Queen 2014 QCCA, 906*

which he was charged were not war crimes in international law or Canadian law in 1994.[743]The court after reviewing the jurisprudence of both the Rwandan and Yugoslavia Tribunals and the statutes held that the offences (murders, sexual violence and pillage) which had been committed in a non-international armed conflict and formed the constituents' acts of the three war crimes counts for which he had been indicted and convicted were part of international law in 1994.[744] Other classification of the grounds of appeal included claims by the appellant that the indictments were vaguely drafted and as a result he was prevented from providing a full defence; [745]alleged irregularities in the conduct of the case;[746] the judge's assessment of general and specific evidence and the rationality of the decision reached in light of the overall evidence adduced.[747] The court dismissed all the grounds of appeal.[748]

In *Her Majesty the Queen V. Jacques Mungwarere*[749]*,* 6th November 2009, Royal Canadian Mounted Police (RCMP) Officers arrested Jacques Mungwarere in Windsor Ontario on suspicion of complicity in the 1994 Rwanda genocide. He was formally indicted on May 26, 2010 on one count of genocide and one count of crime against humanity.[750] The crux of the trial was whether the prosecution had adduced enough evidence to prove that at the time of the constituent acts of murder, the accused possessed the necessary intent to commit genocide and or crimes against humanity. In outlining the essential elements of genocide, the judge deployed the provisions of international conventions and the jurisprudence of the Rwandan Tribunal in Kayishewa and Kunyindana.[751] After 26 weeks of trial on 5 July 2013, Mungwarere was found not guilty by Judge Charbonneau because the prosecution had failed to prove all the essential elements of the accused crimes beyond reasonable doubt[752]

4.3.2. Impact on Legislative Action and Process

4.3.2.1. Crimes against Humanity and War Crimes Act[753]

The Crimes Against Humanity and War Crimes Act (Act) received the Royal assent on 29th June, 2000 and Canada subsequently ratified the ICC Statute on 7 July 2000. The Act came into force on 23rd October 2000. On 29th June 2000, Canada became the first country in the world to pass an implementing legislating incorporating the provisions of the Rome Statute into its domestic system.

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[743] Ibid, Para 15
[744] Ibid, Para 45
[745] Ibid, Paras 68-72
[746] Ibid, Para 99-101
[747] Ibid, Paras 208- 387)
[748] Ibid, Para 388
[749]Excerpt of the case by Volunteers from the Canadian Centre for International Justice available at www.ccij.ca/programs/cases/index.php?DOC_INST=19 accessed 26/10/2014; R v. Jacques Mungwarere, 2013 ONCS 4594
[750] Ibid, Para 1
[751] (Case No. ICTR-95-1-A (Para 36)
[752] R v. Jacques Mungwarere *supra* note 750 at Para 1261
[753] (2000) Chapter 24, 2000

4.3.2.1.1. Incorporating the Crime

The crimes of genocide, war crimes and crimes against humanity as well as conspiracy to commit any of the crimes are defined twice under the Act. First the act defines those committed within Canada[754] and goes on to define those committed outside Canada.[755] Sections 4 and 6 of the Act define genocide and Crimes against humanity in accordance with "customary international law or conventional international law or general principles of law" irrespective of whether or not the act at the time it was committed was a crime in the place of commission. War crimes are defined according to customary international law or conventional international law" irrespective of whether or not the act at the time it was committed was a crime in the place of commission.[756] Kenya has also adopted this approach of defining the core crimes in line with customary international law or conventional law to take into account future evolutions and developments in the area.[757]

The constituents' acts of crimes against humanity defined by the Act are similar to those contained in article 7 of the Rome Statute. The definition of genocide replicated in the Act modifies the chapeau to article 6 of the Rome Statute. The list of protected groups are not reproduced, rather resort is had to "identifiable group of persons". The distinction between the core crimes committed within and outside Canada lie in the application of customary international law.[758] For genocide, crimes against humanity and war crimes which take place within Canada, 17th July 1998 is set out as the date for reference to customary international law.[759] While reference to customary law in respect of the core crimes committed outside Canada predates 17th July 1998 and extends as far back as 1945.[760] Canada has not ratified the 2010 amendments to the Rome Statute on war crimes and the crime of aggression.[761] Whenever Canada, like Kenya ratifies the amendments, the provisions on war crimes will form part of its laws as a result of its approach, while the crime of aggression will have to be incorporated into the international Crimes Act, haven not being part of the crimes codified in the Act.

Offences against the administration of justice are codified in sections 16 to 23 and section 26. The offences against the administration of justice codified include: obstructing justice,[762] obstructing officials in the execution of their official duties,[763]bribery of judges and officials of the court,[764]

[754]Crimes Against Humanity and War Crimes Act, s 4(1)
[755]Ibid, 6(1)
[756] Ibid, ss 4(3) and 6(3)
[757] Kenya's International Crimes Act 2008, s 6(4)
[758] Fannie Lafontaine, note 725
[759] Crimes Against Humanity and War Crimes Act, s 4(4)
[760] Ibid, ss 6(4) and 6(5)
[761] Article 8, Para 2 (e) United Nations Reference: C.N.533. 2010. Treaties-6, and Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression in article 8 bis United Nations Reference: C.N.651. 2010. Treaties-8
[762] Crimes Against Humanity and War Crimes Act, s 16
[763] Ibid, s 17
[764]Ibid, s 18

perjury,[765] giving of contradictory evidence by witnesses in proceedings before the court,[766] fabricating of evidence,[767] offences relating to affidavits[768] and intimidation of persons in relation to proceedings before the ICC.[769] Canada's approach to the incorporation of administration of justice offences has been to replicate the offences in article 70(1) of the Rome Statute of the ICC in its implementing legislation. The provisions of the implementing legislation of most Commonwealth States mirror Canada's approach although with variations in style, language and the framing of the relevant conducts being proscribed. Despite these differences, the essential elements and constituents of the offences remain the same. Canadian citizens, who commit the above listed offences or attempts or conspires to commit them outside Canada, would be deemed to have committed them in Canada.[770] In same vein Canadian citizens who attempt, conspires or commits acts of retaliation against witnesses or members of their family outside Canada would be deemed to have committed them in Canada.[771]

3.2.1.2. Jurisdiction

The extra-territorial jurisdiction of Canadian courts over the core crimes is laid out in section 8 of the Act. Jurisdiction in Canada, as in most Commonwealth States, is largely territorial.[772] A 1987 amendment to the Criminal Code allowed Canadian courts to exercise jurisdiction over war crimes and crimes against humanity committed outside Canada and whether or not the perpetrator or victim is a Canadian, so long as the perpetrator is present in Canada,[773] this provision has been repealed by section 42 of the Crimes against Humanity and War Crimes Act. The Criminal Code vests Canadian courts with extra-territorial jurisdiction over sexual offences committed outside Canada by a citizen or permanent resident as defined in section 2(1) of the Immigration and Refugee Protection Act.[774] Under section 8 , Canadian courts have jurisdiction over offences committed outside Canada, if at the time of the commission of the offence, the alleged perpetrator was a Canadian citizen or employed by Canada in a military or civilian capacity; ii . the person was a citizen of a state that was engaged in armed conflict against Canada, or was employed in a civilian or military capacity by such a state; iii the victim of the alleged offence was a Canadian citizen, or iv. The victim of the alleged offence was a citizen of a state that was allied with Canada in an armed conflict or after the time the offence is alleged to have been committed, the person is present in Canada. The consent of the Attorney General

[765] Ibid, s 19
[766] Ibid, s 20
[767] Ibid, s 21
[768] Ibid, s 22
[769] Ibid, s 23
[770] Ibid, s 25
[771] Ibid, s 26
[772] Criminal Code, s 6(2)
[773] Criminal Code, ss 7(3.71)-7(3.77)
[774] Criminal Code, s 4.1

in writing is required for instituting proceedings under the Act.[775] The requirement of the Attorney General's consent before proceedings can be instituted in Canada will help to prevent an abuse of the jurisdictional grounds set out in the Act, although the extra-territorial jurisdiction provided under the Act is not as expansive as the broad form of extra-territorial jurisdiction incorporated under Australia, Trinidad and Tobago and New Zealand implementing legislation.[776]

4.3.2.1.3. Defences

The Canadian Criminal Code provides for the application of defences available under common law rules and principles to all proceedings for offences under the Criminal Code Act or any other Act of Parliament, except where it has expressly been prohibited.[777] An accused person in a proceeding under the Act may rely on the defences available under Canadian laws or under international law either at the time the offence was committed or when the proceedings were instituted.[778] The scope of applicable defences available to an accused person in a proceeding under the Act, is limited by the provisions of sections 12-14 of the Act and section 607 of the Criminal Code.[779] The limitations include the denial of the defence of *autrefois acquit*, *autrefois convict* or pardon to an accused person previously tried in a foreign court, and where the proceedings were not impartial or independent but meant to shield the person from criminal responsibility.[780] The limitations also rule out a defence that the offence was committed in compliance with the law in force at the place of commission.[781] The application of the defence of superior order is restricted except where the accused was under a duty to obey the orders of a superior, the accused did not know that the order was unlawful and the order was not manifestly unlawful. Further subsection 2 of section 14 provides that orders to commit genocide and crimes against humanity are manifestly unlawful.

4.3.2.2. Amendments

The Crimes against Humanity and War Crimes Act aside from introducing new provisions and incorporating obligations under the Rome Statute of the ICC, amends three other legislation. These legislation cover different areas of cooperation between the ICC, the tribunals and Canada. These amendments are examined below.

[775] Crimes Against Humanity and War Crimes Act, ss 9(3) and (4)
[776] Australian Criminal Code Act 1995, s 15.4; Trinidad and Tobago's International Crimes and International Criminal Court Act, s 8 and New Zealand's International Crimes and International Criminal Court Act, s 8
[777] Criminal Code, s 8(3)
[778] Crimes Against Humanity and War Crimes Act, s 11
[779] Ibid, s 11
[780] Ibid, s 12
[781] Ibid, s 13

4.3.2.2.1. The Extradition Act

The Canadian Extradition Act[782] was first amended to allow surrender from Canada to both the Yugoslavia and Rwandan Tribunals and subsequently to incorporate the ICC. The definition section of the Extradition Act has been amended to reflect the ICC. Accordingly, reference to "state or entity" in the Act under which Canada may enter into an extradition agreement includes the ICC or tribunal.[783]The surrender of a person to the ICC will follow the extradition process specified in the Act with some amendments.[784] The amendment prohibits persons who are the subject of a surrender request from the ICC or any international criminal tribunal established by the United Nations Security Council from claiming immunity under common law or statute from arrest or extradition under the Act.[785]

Requests for the provisional arrest or extradition of a person are made directly to the Minister (Minister of Justice) and transmitted to the Attorney General.[786] Canada unlike most states rather than create a distinct process for surrender to the ICC chose to amend its Extradition Act to incorporate the requirements and obligations to arrest and surrender under the Rome Statute of the ICC. Consequently, the surrender process is a streamlined version of its state to state extradition process. The Minister on receipt and approval of a request for a provisional warrant of arrest authorizes the Attorney General to apply for a provisional arrest warrant.[787] A judge before whom the Attorney General makes an *ex parte* application for a provisional arrest warrant, issues a provisional arrest warrant if satisfied that it is in the public interest, the person is resident in Canada, is present in Canada or on the way to Canada and there is a subsisting warrant against the person or the person has been convicted.[788] Amendments to the Extradition Act provides for the Attorney General to apply to the judge to extend the timeframe where persons arrested on a provisional arrest warrant on request from the ICC before an issuance of the Minister's authority to proceed. The Attorney General may apply to the judge to extend the timeframe for the issuance of authority to proceed for a period not exceeding 30 days.[789] The Minister on receipt of a request for extradition may issue an authority to proceed[790] following which the persons is arrested on the application of the Attorney General.[791]

[782] Extradition Act 1999, C. 18
[783] Ibid, s 2
[784] Ibid, s 3; See also Extradition Act ss 12, 13, 15, 16, 18 and 40 for the extradition process in Canada
[785] Extradition Act, s 6 amended by Crimes Against Humanity and War Crimes Act, s 48
[786] Ibid, s 11
[787] Ibid, s 12
[788] Ibid, s 13(1)
[789] Ibid, s 14; Crimes Against Humanity and War Crimes Act, s 49
[790] Ibid, s 15
[791] Ibid, s 16

The Crimes Against Humanity and War Crimes Act also amends the Extradition Act to take into account the provisions of the Rome Statute of the ICC on bail.[792] Accordingly, a judge before whom a person arrested following a request by the ICC is brought shall order the remand of the person, except where the judge is satisfied that there are pressing and exceptional grounds which justify the grant of bail. [793] The exceptional circumstances are not enumerated in the Act. An application for bail of a person shall be adjourned at the request of the Attorney General pending the receipt of the recommendations of the Pre-Trial Chamber of the ICC. If the recommendations are not received within six days, the judge may proceed to hear the application.[794] These provisions on bail are consistent with the approach adopted by most implementing legislation. States in implementing the provisions on bail have opted to reproduce substantially the provisions of the Rome Statute of the ICC on bail.[795] However, only Uganda has incorporated similar provisions on timeframe within which the recommendations of the ICC Pre-Trial Chamber must be received by the court in a custodial state.[796] A decision made by a judge in an application for bail may be confirmed, varied, reviewed or substituted at the Court of Appeal. The surrender of a person committed may be ordered by the Minister within 90 days.[797]This period may be extended in certain circumstances such as where the request is from the ICC with a pending admissibility hearing. [798]

The Extradition Act in sections 44, 46 and 47 provides grounds where the Minister may refuse to order the surrender of a person to an extraditing partner. These grounds Include: where it would be unjust to order extradition, where the extradition request was made to prosecute the person on discriminatory grounds, the conduct for which extradition is sought is punishable by death under the extraditing partner's applicable law, the prosecution is statute barred in the extraditing partner's state, the conduct for which extradition is sought is a military or political offence, the person has been previously convicted or acquitted for the conduct, the person was convicted in absentia and at the time of the commission the person was less than eighteen years old.[799] The Crimes Against Humanity and War Crimes Act in section 52 amends the Extradition Act by excluding the application of these discretionary grounds under which the executive may refuse the surrender of a person as set out in sections 44, 46 and 47 to ICC requests. The amendment creates a new section which provides that the grounds for refusal set out in sections 44, 46 and 47 do not apply to request for surrender made by the

[792] Rome Statute of the ICC, article 59(2)-(6)
[793] Extradition Act, s 18(1)
[794] Ibid, s 18(1.1)
[795] See Australia's International Criminal Court Act N0. 41 of 2002, s 24; New Zealand's International Crimes and International Criminal Court Act, 39; Trinidad and Tobago's International Crimes and International Criminal Court Act, 39.
[796] Uganda's International Criminal Court Act 2010 , s 31
[797] Extradition Act, s 40(1)
[798] Ibid, s 40(5)(a)
[799] Ibid, ss 44-47.

ICC.[800] The amendment of the Extradition Act on this ground is to bring Canada's laws in line with the Rome Statute of the ICC. The Rome Statute does not recognise the traditional grounds for which states may refuse to surrender, it was important for these traditional grounds to be excluded from the ICC regime.

Finally, the amendments introduced by the Crimes Against Humanity and War Crimes Act incorporates provisions of the Rome Statute of the ICC on unscheduled landings in Canada of persons en route to the ICC. The provision provides for peace officers to hold individuals for up to ninety-six hours before receipt of consent to transit from Canada to the ICC.[801]

4.3.2.2.2. Mutual Legal Assistance in Criminal Matters Act

The Rome Statute of the ICC provides that states must have domestic measure under their laws to comply with requests from the ICC under article 93 of the Rome Statute. Consequently most implementing legislation incorporates extensive measures for complying with requests from the ICC. Canada's Crimes Against Humanity and War Crimes Act amends the Mutual Legal Assistance in Criminal Matters Act[802] to bring the ICC regime within its framework. The ICC is included in the interpretation section of the Act[803] and is also incorporated in the schedule to include state or entity from which Canada may receive and act on requests for assistance. The amendment also incorporates provisions dealing with requests by the ICC for seizures of proceeds of crimes and enforcement of orders of forfeiture, reparation or fines by the ICC.

Requests by the ICC, for Canada to enforce an order for the restraint or seizure of proceeds of crime are made to the Minister who may authorize the Attorney General to take steps to enforce the order.[804] The Attorney General on receipt of the Minister's authorization files a copy of the order in a Superior Court of Criminal Jurisdiction in the province where the property is located and once so filed, the order becomes enforceable as a warrant or order issued under the Canadian Criminal Code.[805] The ICC may also make request for the enforcement of orders of reparation, forfeiture or imposition of fines. The procedure is similar as all requests are made to the Minister who authorizes the Attorney General to enforce them.[806] The Attorney General is required before filing an order to ensure that a person has been convicted for an offence within the jurisdiction of the ICC and the conviction and order are not subject to appeal.[807] All proceeds collected as a result of enforcement orders are kept in

[800] Ibid, s 47.1
[801] Ibid, s 76; Crimes Against Humanity and War Crimes Act, s 53; Rome Statute of the ICC, Article 89(3)(e)
[802] Mutual Legal Assistance in Criminal Matters Act 1988 C.37
[803] Ibid, s 2(1)
[804] Ibid, s 9.1(1)
[805] Ibid, s 9.1; See also Crimes Against Humanity and War Crimes Act, s 57
[806] Ibid, s 9.2(1)
[807] Ibid, s 9.2(3)

the Crimes Against Humanity Fund set up under section 30 of the Canada War Crimes and Crimes Against Humanity Act.[808]

The provisions of the Criminal Code apply to requests for search and seizures in Canada under the Act, save where there are inconsistencies between the Criminal Code and the Act.[809]Where the request of a state or entity for a search or seizure or any other investigative act is approved by the Minister, the Minister shall provide any competent authority with the requisite information or document needed to apply for the search warrant or any other warrant. The competent authority subsequently makes an ex parte application for a search warrant or any other warrant as applicable to a judge of the province where the competent authority believes the evidence may be found.[810] The judge, before whom the application is brought, may issue a search warrant authorizing peace officers to execute them within the province.[811] The Minister may also grant approval to a state or entity to obtain evidence regarding the commission of an offence. The applicable procedure is similar to the process for obtaining warrants. The Minister provides any requisite information or document to the competent authority who makes an ex parte application to a judge within the province where the evidence is located for an order to gather the evidence.[812]A judge before whom an application is made under section 17(2) may make an order for the gathering of evidence, where the judge is satisfied that there are reasonable grounds to believe that an offence has been committed; and (b) evidence of the commission of the offence or information that may reveal the whereabouts of a person who is suspected of haven committed the offence will be found in Canada.[813]

Under the Act, an arrest warrant may be issued in two scenarios. First, by a judge who made an order for gathering evidence under section 18(1) or an order for the receiving evidence or statement by means of video link under section 22(2) or another judge may issue a warrant for the arrest of a person named in the order personally served who failed to comply with the order where the person was going to give material testimony or that the testimony will aid the prosecution of the offence.[814]The procedure for request to examine sites within Canada is similar to those highlighted above. The Minister on grant of approval to a state or entity to examine a site within Canada must furnish the competent authority with the documents or information vital for applying for an order. The application for an order to examine a site is made ex parte to a judge in the province where the competent authority provided with the relevant documents or information locates the site.[815]

[808] Ibid, s 9.2(5); Crimes Against Humanity and War Crimes Act, s 30
[809] Ibid, s 10; See also Crimes Against Humanity and War Crimes Act, s 58
[810] Ibid, s 11; See also Crimes Against Humanity and War Crimes Act, s 59
[811] Ibid, s 12 and also Crimes Against Humanity and War Crimes Act, s 60
[812] Ibid, s 17 and Crimes Against Humanity and War Crimes Act, s 62
[813] Ibid, s 18 and Crimes Against Humanity and War Crimes Act, s 63
[814] Ibid, s 23(1)
[815] Ibid, s 23 and Crimes Against Humanity and War Crimes Act, s 69

4.3.2.2.3. The Witness Protection Programme Act

Canada's Crimes Against Humanity and War Crimes Act also amends Canada's Witness Protection Programme Act bringing the ICC and witnesses who cooperate with it within the purview of the pre-existing witness protection programme. This is achieved through the introduction of the following amendments and provisions into the Witness Protection Programme Act. First, an amendment of section 3 extends the measures available to witnesses who cooperate with law enforcement officials under the domestic system to those witnesses who assist the ICC in its investigations and prosecutions. [816] Second, the ICC is included along with tribunals as having authority to recommend persons for admission into the witness protection programme.[817] In the event that a recommended person, is refused admission into the programme, the amendment provides for notifying the recommending law enforcement agency or international criminal court or tribunal.[818] Finally the amendment also provides for the Minister to enter into agreements to have witnesses working with the international criminal court or tribunal to be admitted into the witness protection programme. This arrangement precludes an admittance of a person into Canada without the approval of the Minister of Citizenship and Immigration.[819]

4.3.3. Impact on Executive Action and Process

Contemporary international criminal courts and tribunals have had varying degrees of impact on executive actions and processes in Canada. The available evidence of this impact is surmised under the following heads.

First, Canada's continued financial support to contemporary international criminal court and tribunal particularly the Special Court and the ICC, is a demonstration of its impact on executive action in Canada. Aside from regular contributions to the court's annual budget, it also provides voluntary support for other programmes and initiatives of the court.

Second, since 1998 Canada has created an integrated program to address war crimes within its system.[820]However, the scope of the war crimes programme is now broader than when it was first introduced as part of the Deschênes Commission recommendations with more conflicts occurring across the globe. Initially the war crimes programme was confined to World War II prosecutions, now it is more encompassing with a multiplicity of international war crimes tribunals and various conflicts taking place across the globe. During 2010-2011 fiscal year a total of 215 persons were refused entry

[816] Crimes Against Humanity and War Crimes Act, s 71
[817] Ibid, s 6(1)(a); Crimes Against Humanity and War Crimes Act, s 72
[818] Ibid, s 10(a); See also Crimes Against Humanity and War Crimes Act, s 73
[819] Ibid, s 14(3) and Crimes Against Humanity and War Crimes Act, s 74
[820] Canada's War Crimes Program Annual Report 1998-1999, 2-4

into Canada because of complicity in war crimes or crimes against humanity. While in the same period, 17 persons were removed in Canada for complicity in war crimes and crimes against humanity after exhausting remedies.[821] Through, the programme, Canada is utilizing immigration process rather than criminal trials which are complex and expensive to address war criminals. Despite these, two, trials have proceeded in Canada for war crimes committed in Rwanda under Canada's Crimes Against Humanity and War Crimes Act. Canada's resort to immigration process in dealing with war criminals in Canada has also attracted criticism from some quarters.[822]

Third, Canada has gone on to provide technical support to countries to aid their ratification of the Rome Statute. In 2000, Canada provided funding for two Canadian based centres, the International Centre for Criminal Law Reform and Criminal Justice Policy and Rights and Democracy for the production of manuals to assist states in drafting their national implementing legislations. Canada has also provided support to other states in the implementation of the Rome Statute through its Global Peace and Security Fund, Rule of Law and Accountability Program amongst others worked with partners to strengthen national criminal justice systems to enable them give effect to the principle of complementarity.[823] Canada has also provided financial support for the establishment of the Justice Rapid Response Mechanism which became operational in 2009. The Justice Rapid Response Mechanism consists of both states and non-state participants who provide support and funding for the mechanism which maintains a roster of professionals and experts in criminal justice and allied issues who can be deployed to provide services either in states or international organisations such as the ICC. Canada has also at different times chaired both the coordinating group and the Executive Board of the Justice Rapid Response Mechanism. Following a pilot training course and initial certification it now has a roster and responded successfully to initial request for assistance.[824]

Fourth, the Rwandan Tribunal has also made impacts on Canada necessitating requests for assistance in domestic proceedings by the defence in genocide proceedings in Canada. In August 2011, Jacques Mungwarere (the second person prosecuted under Canada's Crimes Against Humanity and War Crimes Act) filed a motion before the Rwandan Tribunal for access to the Rwandan Tribunal proceedings in respect of two convicts, Elizaphan Ntakirutimana and his son Dr. Gerard

[821] 12th Report Canada's Program on Crimes Against Humanity and War Crimes Program 2008-2011, 5, 8-9
[822] UN Committee against Torture June 2012 Concluding Observations on Canada State Party Report; See also Statement by Dr. Lutz Oette Counsel for the organization Redress to the Standing Committee on Citizenship and Immigration 5 October 2012.
[823] See General Debate Statement by Canada Delivered by Alan H. Kessel, The Legal Adviser at the Review Conference of the Rome Statute of the International Criminal Court 31 May- June 11 2010. See Statement on behalf of Canada, Australia and New Zealand at the Ninth Session of the Assembly of State Parties to the Rome Statute of the International Criminal Court by H.E. Jim McLay, Permanent Representative of New Zealand on Monday 6 December 2010, 2.
[824] See Statement on behalf of Canada, Australia and New Zealand at the Ninth Session of the Assembly of State Parties to the Rome Statute of the International Criminal Court, November 19, 2009; Justice Rapid Response 2009 Coordinating Group Meeting Report, 2-4; Justice Rapid Response Annual Report 2012,3.

Ntakirutimana sentenced to 10 and 25 years respectively by the Rwandan Tribunal. The defendant made the application as a result of the similarities with the events with which the accused where charged and convicted with those for which he had been charged in Canada.[825] On 28th March 2012, the defendant made a further request to access materials in fifteen cases for his defence. The Prosecutor was quoted as seeking a dismissal of the motions in one of the responses as the Rwandan Tribunal law and jurisprudence did not provide for individuals in foreign jurisdictions to make such requests from the tribunal directly. [826]

In the same vein, in 2011, the Rwandan Tribunal varied the protective measures enjoyed by two witnesses hitherto known as "GAP" and "GFC" in proceedings before the Rwandan Tribunal. The variation allowed the Rwandan Tribunal to provide confidential disclosure to Canadian authorities with the witnesses' particulars and testimonies of the witnesses in an earlier proceeding before the Rwandan Tribunal. [827]

Contemporary international criminal courts and tribunals have exerted significant levels of impact on legislative, judicial and executive actions and processes in Canada. Canada was the first state to enact comprehensive legislation incorporating its obligations under the Rome Statute of the ICC. Under this legislation Canada has carried out two genocide trials in its national courts. The norms and jurisprudence of contemporary international criminal courts and tribunals have also been deployed in immigration proceedings to determine exclusion of persons from the protection of the Refugee Convention under article 1F(a). The ICC in Canada has influenced a number of executive actions and processes.

4.4. United Kingdom and Contemporary International Criminal Courts and Tribunals

4.4.1. Introduction

Like Australia and Canada, the United Kingdom has had significant levels of engagement with contemporary international criminal courts and tribunals with operational and jurisdictional relevance in the Commonwealth. These engagements have led to significant impact in that country. In relation to the Rwandan Tribunal, the United Kingdom courts have deployed the jurisprudence of the Rwandan Tribunal in extradition proceedings against suspected genocide perpetrators now residing in the United Kingdom. In 1991, the United Kingdom enacted the War Crimes Act, followed by the United Nations (International Tribunal) (Rwanda) Order 1996 Statutory Instrument. Two years later the United Kingdom signed the Rome Statute of the ICC on 30th November, 1998 and ratified same

[825] Hirondelle News Agency, ICTR/Canada - Genocide Accused in Canada Requests Assistance From ICTR, 24.08.11
[826] Hirondelle News Agency, ICTR/Canada-Genocide Accused in Canada Renews Application for Access to ICTR Records, 28.03.12
[827] Hirondelle News Agency, ICTR/Canada-ICTR Protected Witnesses to Testify Under their Identities in Canada, 30.05.11

on 4th October, 2001. Pursuant to this, the United Kingdom enacted the International Criminal Court Act 2001. The ICC Act incorporates the provisions of the Rome Statute into national laws in England, Wales and Northern Ireland. While the ICC Act (Scotland) incorporates the Rome Statute in Scotland.[828] Much of the United Kingdom's interaction with the Special Court has revolved round the provision of financial assistance and the signing of an agreement to enforce sentence. Charles Taylor convicted by the Special Court is serving out his prison term in the United Kingdom under the terms of a Sentence Enforcement Agreement entered into between the Special Court and the United Kingdom.[829] This section examines the impact of contemporary international criminal courts and tribunals on judicial, legislative and executive thought, processes and actions in the United Kingdom.

4.4.2. Impact on Judicial Action and Process

Like Australia and Canada, the United Kingdom in the aftermath of the Second World War engaged in the prosecution of war criminals. However, domestic war crimes trials stopped in the 1950s and in the following period the United Kingdom entered a phase of judicial inaction in this area. Despite in-action on the part of the judiciary, in 1991, the War Crimes Act was passed.[830] A single case, R v. Sawoniuk[831] was prosecuted under the 1991 War Crimes Act. The trial of the defendant in 1991 under the Act resulted in the conviction of the defendant for war crimes dating back to more than forty years. The temporal, material and territorial jurisdiction of the 1991 War Crimes Act was severely restrictive. As a result, of its limited temporal jurisdiction it could not be used in the prosecution of the genocide-related cases that occurred in the 1990s. Despite this limitation, two different strands of cases are discernible in the United Kingdom's judicial processes that have been influenced by contemporary international criminal courts and tribunals. These are extradition proceedings in relation to alleged Rwanda genocide perpetrators residing in the United Kingdom and the determination of application of the exclusion grounds under article 1F(a) of the 1951 Convention relating to the Status of Refugees.[832]

[828] The International Criminal Court (Scotland) Act 2001, 2001 ASP 13, was passed by the Scottish Parliament on September 24 2001 and came into force on 17 December 2001.
[829] Agreement between the Government of the United kingdom of Great Britain and Northern Ireland and the Special Court for Sierra Leone on the Enforcement of Sentences of the Special Court for Sierra Leone, Treaty Series No. 21 (2007).
[830] War Crimes Act 1991 C.13. The Act had jurisdiction over persons who had committed acts of murder, manslaughter or culpable homicide constituting a violation of the laws of war and if committed in German or German-Occupied territory between 1939 and 1945. The persons must subsequently have become British citizens or residents as at March 8 1990. The accused citizenship at the time the offence was committed was irrelevant.
[831] *R v. Sawoniuk* (2000) All ER (D) 154
[832] Convention Relating to the Status of Refugees 1951 UNTS, Vol. 189, 137

4.4.2.1. Extradition Proceedings in the United Kingdom

The seminal case on extradition between the Rwandan government and the United Kingdom is the case of *Brown and Others v. Government of Rwanda and another*.[833] The facts leading to this case are that in August 2006, the Rwandan government issued arrest warrants for the appellants as a result of their involvement in the 1994 Rwanda genocide. In December 2006, the arrest warrants were signed by a district judge and the four accused persons namely, Vincent Bajinya aka Brown, Celestine Ugirashebuya, Charles Munyanesa and Emmanuel Ntezirayo were arrested and extradition proceedings against them commenced at the City of Westminster Magistrates Court. In extradition hearings, on 6th June, 2008, the district judge ordered that the case be referred to the Secretary of State for extradition. The Secretary of State signed the appellants' extradition orders in August 2008.[834] The appellants appealed against the decision of the district judge to send the matter to the Secretary of State under section 103 of the Extradition Act and also appealed against the decision of the Secretary of State to sign the Extradition Orders under section 108 of the Extradition Act. The four appellants' alleged that they would not receive a fair trial in Rwanda.[835] The appeal judges in the case embarked on a detailed analysis of Rwanda's laws and the Rwandan Tribunal jurisprudence.

The judges began by setting out the rights of the accused in the Rwanda Organic Law on Transfer.[836] The judges began a review of the jurisprudence of the Rwandan Tribunal, in *Prosecutor v Munyakazi*, in which the trial chamber on the 28 of May 2008 declined the prosecutor's request to refer the case to Rwanda for trials.[837] The extradition proceedings had taken place around about the same time the referral cases were going on before the Rwandan Tribunal. The Appeal Judges alluded to this when they noted that the judge at the first instance had been given a copy of the judgment in the *Munyakazi* case but had not taken it into consideration in arriving at a decision.[838]

Following the Munyakazi decision, the Rwandan Tribunal Chamber declined the prosecutor's request for referral in the cases of *Prosecutor v. Kanyarukiga*,[839] *Prosecutor v. Hategekimana,*[840] *Prosecutor v*

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[833] *Vincent Brown aka Vincent Bajinja, Charles Munyaneza, Emmanuel Nteziryayo, Celestin Ugirashebuja v The Government of Rwanda, The Secretary of State for the Home Department* (2009) EWHC 770 (Admin); (2009) All ER (D) 98 (Apr); For an analysis of the decision see Mark Drumbl, 'The Prosecution of Genocide v. The Fair Trial Principle', (2010) Journal of International Criminal Justice, 8(1), 289: The decision reached in the case, remains, a sticky point for many proponents of accountability for serious crimes.
[834] *Vincent Brown aka Vincent Bajinja, Charles Munyaneza, Emmanuel Nteziryayo, Celestin Ugirashebuja v The Government of Rwanda, The Secretary of State for the Home Department* (2009) EWHC 770 (Admin); (2009) All ER (D) 98 (Apr). Para 1 of the joint Judgement of the High Court.
[835] Ibid, [3]
[836]Ibid, [35-36]
[837] Ibid, [37-41]
[838] Ibid, [42]
[839] *The Prosecutor v Kanyarukiga* Case No. ICTR-2002-78-R11bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda (October 30 2008)
[840] *Prosecutor v Iledephonse Hategekimana*, Case No. ICTR-00-55B-R11bis, Decision on Prosecutor's Request for Referral of the case of Iledephonse Hategekimana to the Republic of Rwanda of (19 June 2008).

Gatete [841]and *Prosecutor v Kayishema.*[842]These cases have been discussed extensively earlier on in Chapter 3. The judges in discharging the appellants and setting aside the Secretary of State order for extradition noted that in successive cases, the Rwandan Tribunal haven considered the difficulties and challenges of defendants charged with genocide and the likelihood of presenting a defence, had concluded that defendants would not receive a fair trial in Rwanda, flowing from this the judges were of the opinion that a return of the appellants to Rwanda would occasion injustice to them.[843] The decision of the court and the United Kingdom government's inability to try them under the ICC Act 2001 (which at the time had jurisdiction over extraterritorial crimes that occurred after 2001) brought into sharp focus, the overarching need for legislative reform in the United Kingdom to address war crimes committed in the 1990s. This much needed reform was brought in by the Coroners and Justice Act in 2009 and is discussed extensively in this chapter. In 2014, renewed efforts to have the four men whose extradition Rwanda earlier sought and a fifth extradited began in Westminster Magistrates Court. As at time of writing, the five alleged genocide suspects are yet to be extradited to Rwanda.

4.4.2.2. Exclusion Cases under the 1951 Refugee Convention

The second strand of cases that have been affected by the jurisprudence of contemporary international criminal courts and tribunals are those decided in excluding persons from the provisions of article 1F(a) of the 1951 Convention on the Status of Refugees. Across all the jurisdictions within the Commonwealth when determining exclusion, the Rome Statute and the jurisprudence of the ad hoc tribunals have been articulated in these proceedings.[844]

In R (on the application of JS) (Sri Lanka) (Respondent) v. Secretary of State for the Home Department (Appellant[845]), The respondent a 28 Year old Sri Lankan joined the Liberation Tigers of Tamil Eelam (LTTE) at the age of 10 in 1992. He rose through the ranks and at 18 he was made a leader of a unit in charge of transporting military equipment and members of the intelligence Division

[841] *The Prosecutor v Gatete,* Case No. ICTR-2000-61-R11bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda (November 17, 2008)
[842] *The Prosecutor v Kayishema* Case No. ICTR 01-67-R11bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda (December 16 2008)
[843] *Vincent Brown aka Vincent Bajinja, Charles Munyaneza, Emmanuel Nteziryayo, Celestin Ugirashebuja v The Government of Rwanda, The Secretary of State for the Home Department* (2009) EWHC 770 (Admin); (2009) All ER (D) 98 (Apr). [47 and 148]; For critique and analysis of the decision, see Mark A. Drumbl 'Prosecution of Genocide v. The Fair Trial Principle Comments on Brown and others v. The Government of Rwanda and the UK Secretary of State for the Home Department', (2010) 8 Journal of International Criminal Justice Volume 1 289; see also Phil Clark & Nicola Palmer, The International Community Fails Rwanda Again 1 (Oxford Transitional Justice Working Research Working Paper Series, 2009), available at http://www.csls.ox.ac.uk/documents/ClarkandPalmer_Rwanda_Final.pdf accessed 1/02/2013.
[844] For a detailed analysis of the practice and jurisprudence of domestic courts in exclusion proceedings see Joseph Rikhof, The Criminal Refugee: *The Treatment of Asylum Seekers with a Criminal Background in International and Domestic Law* (Republic of Letters Publishing 2012) Chapter 3.
[845] *R (on the application of JS) (Sri Lanka) (Respondent) v. Secretary of State for the Home Department (Appellant)* 2010 UKSC 15.

of the LTTE. From 2004 to 2006, he was the second in command of the Combat Unit of the Intelligence Division. In October 2006, he was sent to Colombo to live under an assumed name and remained there until December 2006 when he learnt his identity had been discovered. He subsequently left the country and arrived in the United Kingdom in 2007 where, he sought asylum.[846] His application for asylum and humanitarian protection was rejected on grounds of article 1F(a).[847] The Court of Appeal quashed the appellant (the Home Secretary)'s decision on 30 April 2009.[848]

At the Supreme Court, the case raised a number of issues such as joint criminal enterprise of the LTTE to which the respondent belonged and the issue of command responsibility under article 28 of the Rome Statute and the subsequent disqualification of the respondent under Article 1F(a) of the Refugee Convention. The crux of the issue was whether the applicant was complicit in the crimes of the LTTE. In determining these issues, the Supreme Court had recourse to the Rome Statute and jurisprudence of international criminal courts and tribunals. Lord Brown's statement captures succinctly the influence of the Rome Statute. Lord Brown stated thus:

> It is convenient at once to go to the ICC Statute, ratified as it is now by more than a hundred States and standing as now surely it does as the most comprehensive and authoritative statement of international thinking on the principles that govern liability for the most serious international crimes (which alone could justify the denial of asylum to those otherwise in need of it). [849]

Lord Brown went on to canvass the provisions of the Rome Statute of the ICC as it relates to war crimes and crimes against humanity which article 1F(a) dwells on. He addressed the definition of crimes against humanity and war crimes in articles 7 and 8 of the Rome Statute and concluded that on the basis of the definition, the Secretary of State had enough evidence and was right to hold that the LTTE and the Intelligence Division had been guilty of same.[850] Having found the LTTE guilty of crimes, the Supreme Court moved on to determine if the applicant was complicit in the LTTE crimes. The Supreme Court reviewed the provisions of the Rome Statute on individual criminal responsibility under article 25, the mental element under article 30 and command responsibility under article 28.[851] The Supreme Court also reviewed the jurisprudence of the Yugoslavia Tribunal and the case of Gurung in which the Home Secretary's decision had been based.[852] The Supreme Court criticized the

[846] Ibid, [4]
[847] Ibid, [5]
[848] (2009) EWCA Civ 364; 2010 2 WLR 17
[849] R (on the application of JS) (Sri Lanka) (Respondent) v. Secretary of State for the Home Department (Appellant) 2010 UKSC 15 [9]
[850] Ibid, [10]
[851] Ibid, [11-13]
[852] Ibid, [21]

approach taken in Gurung, where membership of an organisation was held to constitute complicity.[853] The Supreme Court in its place held that an accused would be disqualified under article 1F(a) if there has been voluntary and substantial input to the ability of an organisation to commit war crimes and was aware of that fact.[854] The court dismissed the appeal and asked however for the Home Secretary to reconsider the case on the basis of the evaluations made.[855]

4.4.3. Impact on Legislative Process and Action

International Criminal Court Act 2001

The International Criminal Court Act 2001 (United Kingdom)(hereafter United Kingdom ICC Act)[856] incorporates the obligations of the Rome Statute in England and Wales and Northern Ireland, while the International Criminal Court (Scotland) Act 2001 incorporates the obligations of the Rome Statute of the ICC into Scotland's national laws. Under the United Kingdom's ICC Act in contrast to most ICC implementing legislation across the Commonwealth, national courts in the United Kingdom have been vested with a fairly restrictive jurisdiction over the core crimes. National courts across Australia, New Zealand and Trinidad and Tobago under their respective ICC implementing legislation exercise broad universal jurisdiction over the core crimes of genocide, crimes against humanity and war crimes subject to the consent of the Attorney-General. In Canada, Kenya and Uganda, universal jurisdiction is subject to both a presence requirement and consent regime. The United Kingdom's ICC Act incorporation of a "residency" as against a "presence" requirement for crimes committed outside the United Kingdom severely restricts the exercise of jurisdiction over core crimes which occurred outside its territory.

4.4.3.1. Amendment

The United Kingdom's ICC Act amends both procedural and substantive provisions of different legislation. A detailed list of amendments is contained in Schedule 10 to the Act. The amendment includes: slight amendments to the Army Act,[857] the Air Force Act,[858] Geneva Conventions Act,[859] The Naval Discipline Act[860] and The Geneva Conventions (Amendment) Act.[861] The Act however, repeals the whole of The Genocide Act.[862] The United Kingdom ICC Act also amended the 1989

[853] Ibid, (Lord Brown) [29] and (Lord Hope) [44-46]
[854] Ibid, [35 and 38]
[855] Ibid, [40]
[856] The International Criminal Court Act 2001 C.17
[857] Army Act (3 & 4 Eliz.2.c. 18) 1955
[858] The Air force Act 1955 (3 & 4 Eliz.2.C. 19)
[859] Geneva Conventions Act 1957 (C.52)
[860] The Naval Discipline Act 1957 (C.53)
[861] The Geneva Conventions (Amendment) Act 1995 (C. 27)
[862] The Genocide Act 1969 (C.12)

Extradition Act to bring the United Kingdom's laws in line with the Rome Statute of the ICC. The Rome Statute does not recognise the traditional grounds for which states may refuse extradition, and it was important for these traditional grounds to be excluded from the ICC regime. Consequently, as part of the amendment, whenever any of the offences incorporated in Part 5 of the Act are committed and the extradition of a person is sought, for purposes of surrender to that state, the conduct shall be deemed to have taken place in the state seeking surrender. The conduct would be treated as a Part 5 offence if in the United Kingdom it would be regarded as one irrespective that in the place of commission it does not amount to an offence. In addition offences under Part 5 will not be treated as offences of a political character.[863]

Prior to the enactment of the United Kingdom International Criminal Court Act in 2001, the legal regime for prosecuting international crimes in the United Kingdom consisted mainly of the Geneva Conventions Act of 1957, the Genocide Act 1969 and the War Crimes Act of 1991. Of the three pieces of legislation, only the 1991 War Crimes Act had ever been judicially applied in the courts resulting in a single conviction in 2000.[864]Under section 79 of the Act, the provisions incorporating the ICC crimes in the Act do not apply in Scotland except some of the cooperation agreement.

4.4.3.2. Incorporating the Crimes

Part 5 of the United Kingdom ICC Act incorporates the core crimes of genocide, crimes against humanity and war crimes into domestic law.[865] The core crimes of genocide, crimes against humanity and war crimes are defined in reference to articles 6, 7 and 8(2) of the ICC Act and the Elements of Crime.[866] The United Kingdom and Australia have both taken the same approach with respect to the incorporation of the core crimes by restricting them to the definitions as contained in the Rome Statute of the ICC and the Elements of Crime. The definitions of the crime are set out in schedule 8 to the International Criminal Court Act 2001. Australia in contrast, in defining its crimes and setting out its provisions adopted a comprehensive definition of the crimes as contained in the Elements of Crimes of the ICC. Consequently, Australia's provisions on the definition of the crimes and the

[863] International Criminal Court Act 2001 C.17, ss 71-73

[864] See generally, Robert Cryer 'Implementation of the International Criminal Court in England and Wales' (2002) International and Comparative Law Quarterly 733; Robert Cryer and Olympia Bekou, 'International Crimes and ICC Cooperation in England and Wales', (2007) 5 Journal of International Criminal Justice, 441; D Turns, 'Prosecuting Violations of International Humanitarian Law: The Legal Position in the United Kingdom' (1999) 4 Journal of Armed Conflict Law, 1-39.

[865] Robert Cryer and Olympia Bekou, 'International Crimes and ICC Cooperation in England and Wales', 441, 443-445 on interpreting ICC Crimes in the ICC Act 2001 in England and Wales.

[866] International Criminal Court Act 2001, C.17, s 50, In Scotland, the crimes are incorporated in the International Criminal Court (Scotland) Act, s 1. The Scottish Law incorporates the core crimes of genocide, war crimes and crimes against humanity.

constituents are extensive and lengthy.[867] The United Kingdom has not ratified the 2010 amendments to the Rome Statute on war crimes and the crime of aggression.[868] In addition, the Act retains the offences created in section 1 of the Geneva Conventions Act, but amends the provision to bring it in line with the Act by providing that proceedings for the offences can only be instituted with the consent of the Attorney General and even where the offences occurred outside the United Kingdom, they may be tried in any part of the United Kingdom.[869]

Section 51 criminalizes genocide, crimes against humanity and war crimes. Further section 52 sets out the general principles of law applicable to the crimes codified in section 51 (with the exception of section 65 which introduced into United Kingdom's domestic legislation the doctrine of command responsibility mirrored in close terms after article 28 of the ICC Statute). In setting out the general principles of law in relation to the core crimes codified in section 51, section 52 creates "ancillary offences"[870] which are in turn defined in section 55.[871] The ancillary offences also known as inchoate offences include:[872] aiding, abetting, counselling or procuring the commission of an offence, incitement to commit an offence, attempting or conspiring to commit an offence and assisting an offender or concealing the commission of an offence.[873]

Another subset of crimes criminalized by the ICC Act are offences against the administration of justice in article 70(1) of the Rome Statute of the ICC which are replicated in identical terms in schedule 9 to the Act.[874] These offences are already covered by existing United Kingdom legislation[875]and the Act recognises this implicitly by providing that they should be treated in like manner as corresponding offences under domestic law and at the same time enjoins domestic courts to be guided by any relevant decision of the ICC or international jurisprudence.[876] The approach of the United Kingdom's International Criminal Court Act to incorporating the offences against the administration of justice thus, differs considerably from other states.

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[867] See, The International Criminal Court (Consequential Amendments) Act 2002 Act No. 42 of 2002 which inserted Division 268 into the Australian Criminal Code Act No. 12 of 1995. Division 268 incorporates the core crimes and the constituent offences.
[868] Article 8, Para 2 (e) United Nations Reference: C.N.533. 2010. Treaties-6, and Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression in article 8 bis United Nations Reference: C.N.651. 2010. Treaties-8
[869] International Criminal Court Act, s 70
[870] Ibid, s 59 for the provisions on Northern Ireland
[871] Ibid, s 62 defines ancillary offences in Northern Ireland.
[872] Ben Brandon, 'the United Kingdom', in *The Prosecution of International Crimes, A Practical Guide to Prosecuting ICC Crimes in Commonwealth States* (eds) Ben Brandon and Max du Plessis, Commonwealth Secretariat 2005 UK, 224.
[873] International Criminal Court Act 2001, s 55
[874] Ibid, schedule. 9
[875] Ibid, s 54(3), provides a list of equivalent domestic offences to those contained in Rome Statute of the ICC, Article 70(1); See s 61 for similar provisions for Northern Ireland; See also International Criminal Court Act (Scotland) 2001, s 4 for Offences against the administration of justice in Scotland.
[876] International Criminal Court Act 2001, s 54(2)

The grounds for the exercise of extra-territorial jurisdiction under the 2001 United Kingdom ICC implementing legislation are restricted to crimes committed by citizens, residents or persons subject to United Kingdom service law.[877] The Act's rather vague and repetitive definition of United Kingdom resident as a person resident in the United Kingdom did little to expatiate on the scope of extra-territorial jurisdiction under the Act as implemented in 2001.[878] Proceedings for all of the offences can only be instituted with the consent of the Attorney General.[879] The requirement of the Attorney General's consent before proceedings can be instituted in the United Kingdom will help to prevent an abuse of the jurisdictional grounds set out in the Act, although the extra-territorial jurisdiction provided under the Act is restricted to citizens, residents or persons subject to United Kingdom Service law. It failed to include the presence requirement which is contained in most of the implementing legislation across the Commonwealth. [880]

The ICC Act does not expressly provide for the general principles of liability and defences open to a defendant under the Act, rather the Act in section 56(1) provides recourse to United Kingdom domestic law in issues of criminal liability by providing that "in determining whether an offence under this part has been committed, the Court shall apply the principles of the law of England and Wales." This resort to municipal law by the United Kingdom ICC Act has led to commentators opine that it might lead to conflicting outcome in courts because of differences between criminal liability under domestic law and the ICC statute.[881]

4.4.3.3. Arrest and Surrender

Requests for arrest and surrender of persons alleged to have committed a crime within the jurisdiction of the ICC are made to the Secretary of State who subsequently transmits same to an appropriate judicial officer along with accompanying documents.[882] If in the opinion of the Secretary of State, a judicial officer in Scotland should treat the request, the request is passed to the Scottish Ministers who in turn transmits them to a judicial officer.[883]

[877] Ibid, s 51 and s 54(4;) s 58, provides similar provisions in respect of Northern Ireland.
[878] Ibid, s 67(2)
[879] Ibid, s 53(3) and s 54(5)
[880] Kenya's International Crimes Act 2008, ss 8 and 18; Uganda's International Criminal Court Act 2010, s18 and Canada 's Crimes Against Humanity and War Crimes Act, 2000, s 8; see generally, Cedric Ryngaert, 'The International Criminal Court and Universal Jurisdiction : A Fraught Relationship?'(2009) 12 New Criminal Law Review 498.
[881] Robert Cryer and Olympia Bekou, 'International Crimes and ICC Cooperation in England and Wales', 441, 446
[882] International Criminal Court Act 2001, Part 2 s 2(1)
[883] Ibid, s 2(2)

4.4.3.3.1. Arrest Procedure

The judicial officer endorses the warrant for execution in the United Kingdom upon satisfaction that the warrant was issued by the ICC and the request is accompanied by a warrant of arrest.[884] Where the request is for a convicted person it is accompanied by a copy of the judgment, information identifying the person as the one named in the judgment and a copy of the sentence if any along with the time already served.[885] Where however, the request from the ICC is for a provisional arrest, the Secretary of State transmits the request to a constable and directs that the constable apply for a warrant for the arrest of the person. Applications for provisional warrants by constables are made on oath stating that there are grounds to believe that the ICC has made a request for provisional arrest on the basis of urgency , and that the person is in or on his way to, the United Kingdom.[886]

The procedure for provisional warrants of arrest in Scotland is similar to England and Wales. The Secretary of State transmits the requests to the Scottish Ministers. The Scottish Ministers in turn direct the procurator fiscals to apply for a warrant of arrest providing similar information on oath as a constable in England and Wales.[887] Where the application is successful, the appropriate judicial officer issues a warrant for the arrest of the individual named and notifies the Secretary of State or the Scottish Ministers.[888] Persons arrested under a provisional arrest warrant must be brought before courts in the United Kingdom as soon as practicable. If in the intervening period, the ICC issues a request for arrest and surrender under section 2, the courts would proceed under section 2 of the United Kingdom Act. Where however, requests for arrest and surrender are not received from the ICC within the stipulated time in the Rules of Procedure and Evidence of the ICC, the arrested person is released.[889]

4.4.3.3.2. Surrender Procedure

The procedure for the surrender of persons arrested under the United Kingdom Act is contained in Section 5 and is termed "delivery". A competent court on satisfaction makes a delivery order that the warrant was endorsed or issued under section 2 of the Act and that the person brought before the court is the person named or described in the warrant.[890] However, in situations where challenges are made to the admissibility or jurisdiction of the case before the ICC, the court may adjourn the proceedings pending a resolution of the challenges.[891] The courts are not to delve into issues as to whether due

[884] Ibid, s 2(3)
[885] Ibid, s 2(4)
[886] Ibid, ss 3(1) and (2)
[887] Ibid, s 3(3)
[888] Ibid, s 3(4)
[889] Ibid, s 4
[890] Ibid, ss 5(1) and (2)
[891] Ibid, s 5(4)

process was followed in the issuance of the warrant or the existence of evidence proving that the person committed the crime.[892] The court may on its own motion or on that of the arrested person determine whether due process was followed in the arrest or whether there was a violation of the person's rights and where infractions have occurred the court shall make a declaration to that effect to the Secretary of State or Scottish Ministers (whichever is appropriate) who transmits same to the ICC.[893] In the ICC implementing legislation of Kenya and Australia, issues of infractions can only be raised by the person and may nullify the arrest process.[894] The court other than making a declaration of the violation of due process to the ICC cannot prevent the surrender of a person on this basis and also cannot grant reliefs to a person who has suffered infractions.

Provisions are made under the Act for individuals to consent to being delivered to the ICC or state of enforcement where the person has already being convicted by the ICC. Consent must be given by the person or where due to physical or mental condition or youth the person is unable to give consent by a representative acting on behalf of the person. It must be in writing and signed before a justice of the peace or a sheriff.[895] The procedure for consent to surrender differs from a number of other implementing legislation because of the requirement of writing. Most implementing legislation are silent on the means of giving it other than it being made in the presence of the judge or registrar depending on who is vested with the responsibility of presiding over surrender hearings.[896] Once consent to surrender has been given, the courts may make a delivery order and the person is deemed to have waived the right to a review of the delivery order.[897]

Where, however, the court refuses to make a delivery order, the person is remanded in custody and the Secretary of State or the Scottish Minister whichever is appropriate is notified. If the court is informed without delay that an appeal has been lodged against the order in accordance with sections 9 and 10, the remand order will continue in effect where the court is not informed, the person is discharged.[898] Appeals against the decision of the court not to issue a delivery order lie from the competent court to the high court up to the House of Lords. Options open to the courts on appeal include: making a delivery order, remitting the case back to the lower courts to issue a delivery order

[892] Ibid, s 5(5)
[893] International Criminal Court Act 2001, ss 5(6)-(9)
[894] See Kenya International Criminal Court Act 2008, s 39(4), where the violation of due process can only be raised by the person who has suffered the violations. Under the Australian International Criminal Court Act No. 41 2002, s 23, where the Magistrate is not satisfied on all the surrounding issues concerning the arrest of the person including whether due process was followed, the Magistrate may order the release, this does not preclude the re-arrest of the person.
[895] International Criminal Court Act 2001, s 7(1)-(3)
[896] Kenya's International Crimes Act 2008, s 41; Uganda's International Crimes Act 2008, s 35; Trinidad and Tobago's International Crimes and International Criminal Court Act, s 45
[897] International Criminal Court Act 2001, s 7(4)
[898] Ibid, s 8

or dismissing the case.[899] Where a court issues a delivery order, the person is either committed into custody or on bail to await the instructions of the Secretary of State on the execution of the order and the Secretary of State or the Scottish Ministers is notified where appropriate.[900] The Secretary of State may only give directions for execution of the delivery order after the expiration of fifteen days except where the person has waived the right to a review under section 13 or consented to delivery under section 7.[901] The procedure for waiver of right to a review of a delivery order is similar to consent to surrender.[902]

Where an application for bail is made, the court must inform the Secretary of State who consults with the ICC and conveys any recommendations made by the ICC in respect of the bail application to the court. In case of proceedings taking place in Scotland, the Scottish Ministers act as intermediaries between the courts and the Secretary of State. Accordingly all communications in ICC related proceedings including bail notifications are channelled to the Secretary of State through the Scottish Ministers. The Secretary of State in turn informs the ICC and conveys recommendations to the Scottish Ministers who passes them on to the court.[903] The court in determining bail applications will take into consideration recommendations made by the ICC, the gravity of the offence, whether there are exceptional factors which justify the grant of bail and the existence of measures that will facilitate the surrender of the person at a later date.[904] And where the person is granted bail, the ICC may request periodic reports of the bail status.[905] The incorporation of bail provisions is in line with the provisions of the Rome Statute of the ICC which terms it "application for interim release".[906] Most ICC implementing legislation in the Commonwealth implement in detail the provisions of the Rome Statute on bail.[907]The Act provides two scenarios where the discharge of persons may be ordered prior to delivery. First persons not delivered within 40 days after a delivery order may on application be discharged[908] and second, persons whom the ICC has informed the Secretary of State that their delivery is no longer needed may be discharged on the orders of a judicial officer.[909]

In addition to the foregoing provisions on arrest and surrender, the Act provides for the surrender or transfer of persons to the ICC or another state en route to the United Kingdom. Requests made by the ICC and granted by the Secretary of State are treated as requests made under section 2 of the Act,

[899] Ibid, s 9; See, s 11 for provisions against refusal to issue a delivery order in Scotland
[900] Ibid, s 11
[901] Ibid, s 12
[902] Ibid, s 13
[903] Ibid, s 18(1) and (2)
[904] Ibid, s 18(3)
[905] Rome Statute of the International Criminal Court, article 59(6)
[906] Ibid, article 59(3)-(6)
[907] Australia International Criminal Court Act N0. 41 of 2002, ss 23 and 24; Kenya's International Crimes Act 2008, ss 35 and 36; Trinidad and Tobago International Crimes and International Criminal Court Act 2006, s 39 and New Zealand International Crimes and International Criminal Court Act 2000, s 39
[908] International Criminal Court Act 2001, s 19
[909] Ibid, s 20

however, persons transiting are not entitled to bail.[910] Where an unscheduled landing is made, the ICC may be obliged to make a request for the transit of the transferee. In the case of an unscheduled landing, the person cannot be held for more than ninety-six hours unless the request for transit of the person is received within the time frame from the ICC. The same provisions apply to Scotland with slight modifications in respect of the Scottish Ministers having to notify the court in place of the Secretary of State. [911]

The provisions on diplomatic immunity are contained in section 23 of the Act. Under the provisions, a citizen of a state party to the ICC Statute is precluded from pleading immunity to avoid surrender to the ICC.[912] With respect to citizens of non-party States to the ICC to whom immunities usually attach, they will be able to claim such immunities to prevent surrender to the ICC except where the ICC obtains a waiver from the Secretary of State. The Secretary of State's waiver must contain the following: that the state is or is not a state party to the ICC Statute and that there has been a waiver as evinced to citizens of non-party States to whom immunities usually attach.[913]In addition, the Secretary of State may in discussion with the ICC and the state in question decide not to hold proceedings against persons who but for the provisions of section 23 are entitled to diplomatic immunity.[914]

4.4.3.4. Other Forms of Assistance

Part 3 of the United Kingdom ICC Act incorporates the obligations of the United Kingdom to offer assistance to the ICC during investigations or prosecutions.[915] All requests for assistance from the ICC are directed to the Secretary of State. The Act incorporates a broad range of forms of assistance: the ICC may seek from the United Kingdom. The forms of assistance includes: questioning a person being investigated or prosecuted,[916] taking or production of evidence,[917] service of process,[918] the transfer of prisoner to give evidence or assist in investigation,[919] entry, search and seizure,[920] the taking of fingerprints or non-intimate samples,[921] orders for exhumation,[922] the provision of records and documents obtained from proceedings or investigations in the United Kingdom pertaining to crimes within the jurisdiction of the ICC,[923]investigating and identifying "proceeds of ICC Crimes",

[910] Ibid, s 21
[911] Ibid, s 22
[912] Ibid, s 23(1)
[913] Ibid, s 23(2) and (3)
[914] Ibid, s 23(4)
[915] Ibid, s 27
[916] Ibid, s 28
[917] Ibid, ss 29-30
[918] Ibid, s 31
[919] Ibid, s 32
[920] Ibid, s 33
[921] Ibid, s 34
[922] Ibid, s 35
[923] Ibid, s 36

and assistance with investigating, identifying and seizing the proceeds of ICC crimes.[924] The Act disallows the production of a document or disclosure of information, which will be prejudicial to the national security interest of the United Kingdom. Hence, a certificate signed by or on behalf of the Secretary of State stating that, it would be prejudicial to the interest of the United Kingdom to produce such document or disclose information is a decisive proof of the fact.[925]Further the Act authorises the Secretary of State to give directions for the verification of any evidence or material obtained under Part 3[926] and any material or evidence obtained by another person other than him shall be transmitted along with the necessary verification to the ICC.[927]

4.4.3.5. Coroners and Justice Act 2009, Chapter 3

Under the United Kingdom ICC Act, Courts in the United Kingdom can only exercise jurisdiction over acts committed outside the United Kingdom that occurred after 2001 and if the accused subsequently become a United Kingdom national or resident. This meant that suspects complicit in genocide that occurred prior to 2001 could not be tried in the United Kingdom. This situation was exacerbated by the decision of the United Kingdom court in *R v. Brown*.[928] This jurisdictional limitation in the ICC Act necessitated a change, which came in the form of an amendment introduced by the Coroners and Justice Act 2009. The Coroners and Justice Act 2009, in Chapter 3 amended the ICC Act 2001. Section 70 provides a detailed amendment of the ICC Act in three areas.

First it addresses the issue of retroactivity. It introduced new sections 65A and 65B. The new section 65A provides for the retrospective application of the International Criminal Court Act 2001 to January 1 1991.[929] In addition it limits the application of the retrospective jurisdiction to crime against humanity or a war crime under article 8.2(b) or e engaged in by a person before September 2001 except where the act had at the time of commission had been proscribed by international law.[930]A reason adduced for this exclusion of crimes against humanity and war crimes, is that as far back as 1991, not all the province of these areas of crimes were known and clear cut unlike genocide which replicates many of the provisions of the 1949 Genocide Convention. In addition the war crimes excluded are those outside the province of grave breaches of the Geneva Convention of violations of

[924] See International Criminal Court Act Scotland Part 2 for identical provisions.
[925] International Criminal Court Act 2001, s 39
[926] Ibid, s 40
[927] Ibid, s 41
[928] *Vincent Brown aka Vincent Bajinja, Charles Munyaneza, Emmanuel Nteziryayo, Celestin Ugirashebuja v The Government of Rwanda, The Secretary of State for the Home Department* (2009) EWHC 770 (Admin); (2009) All ER (D) 98 (Apr)
[929] Amended section 65A(1)
[930] Amended section 65A(2)

common article 3. To which many states including the United Kingdom had already subscribed. [931] States such as Trinidad and Tobago, New Zealand set their temporal jurisdiction over crimes against humanity with the establishment of the Yugoslavia Tribunal which exercised jurisdiction over crimes against humanity, [932] although not all states implementing legislation incorporate retrospective jurisdiction.[933] Having this retrospective legislation proved particularly useful in states such as Canada and the United Kingdom which have turned out to be safe havens for genocide perpetrators where genocide perpetrators have been eager to reside. This has enabled Canadian courts to prosecute genocide cases that occurred outside Canada in the 1990s.

Second, the Coroners Act also modified the penalties in respect of the offences. The offences of Genocide and grave breaches of the Geneva Convention earlier criminalized under the 1957 Genocide Convention and the 1959 Geneva Conventions provided for a maximum term of 14years imprisonment except where murder was involved life imprisonment were amended by the ICC Act, to 30 years if the offence did not include murder. The amendment introduced by section 70(3) of the Coroners and Justice Act through the insertion of section 65B provides for the punishment of a pre-existing offence of genocide or war crime committed in an international armed conflict between 1 January 1991 and 1 September 2001. A suggestion proffered for the amendment is that, the sentence was reduced to ensure compliance with article 7 (1) of the European Convention on Human Rights (ECHR) which proscribes the imposition of a more stringent punishment than when the offence was committed.[934] Pre-existing offence is defined in section 65B(5) to include any conduct criminalized by the ICC Act and at the time the offence was committed also amounted to a crime under the Genocide Act or the Geneva Conventions Act.

Third, the Coroners and Justice Act 2010 provided a clearer and broader definition of a United Kingdom resident for purposes of jurisdiction.[935] The International Criminal Court Act 2001 provided a vague and woolly definition of a "United Kingdom resident" by providing that a "United Kingdom resident is a person resident in the United Kingdom". The amendment provides a proper definition of a "resident". It also widens the scope of the definition bringing within the ambit of the International Criminal Court Act, individuals who would before now not be regarded as residents. The new definition of residency for purposes of the United Kingdom ICC Act include: "an individual who has

[931] For an in-depth discussion of the amendments introduced into the United Kingdom International Criminal Court Act by the Coroners and Justice Act 2009, C.25 see: Robert Cryer and Paul David Mora, 'The Coroners and Justice Act 2009 and International Criminal Law: Backing into the Future?', (2010) 59 International and Comparative Law Quarterly, 807

[932] See Trinidad and Tobago International Crimes and International Criminal Court Act, ss 8(1)(b) and 8(4), New Zealand International Crimes and International Criminal Court Act, s 8(4)

[933] In Uganda the International Criminal Court Act 2010, sets 25 June 2010 as the Commencement date.

[934] Robert Cryer and Paul David Mora, 'The Coroners and Justice Act 2009 and International Criminal Law: Backing into the Future?', (2010) 59 International and Comparative Law Quarterly 803, 809

[935] Ibid, 810-813

indefinite leave to remain in the United Kingdom; an individual who has made an application for such leave whether or not it has been determined; an individual with indefinite leave to enter or remain in the United Kingdom for purposes of work or study; an individual who has made an asylum claim or human rights claim whether or not it has been granted; an individual named in an application for indefinite leave to remain, an asylum claim or human rights claim as a dependent of the individual making the application if the application or claim has been granted or the individual is in the United Kingdom whether or not the claim has been decided; an individual who would be liable to removal or deportation but cannot be removed or deported because of section 6 of the Human Rights Act 1988 or for practical reasons; an individual against whom a decision to make a deportation order has been made, has appealed against the decision whether or not it has been decided and is in the United Kingdom; an individual who is an illegal entrant and liable to removal and an individual who is detained in lawful custody in the United Kingdom.[936]

Despite these amendments, there is still inaction on the part of the United Kingdom in prosecuting alleged war criminals. In 2012, news report following a freedom of information request by the BBC revealed that the Home Office had investigated and, identified several hundreds of individuals suspected of war crimes and crimes against humanity.[937] In 2012, the Daily Mail reported on a known genocide suspect who was working in London as a Mini-cab driver and who because of human rights concerns that had been raised in an earlier case could not be deported although his application for asylum had been denied by the United Kingdom Border Agency.[938]

4.4.4. Impact on Executive Action and Process

The impact of contemporary international criminal courts and tribunals on executive action in the United Kingdom is summed up below.

First, the provision of financial assistance by the United Kingdom government to international criminal courts and tribunals is indicative of their influence on executive action and process in the United Kingdom. In 2003, the United Kingdom stated in its report that it was the third largest contributor to the funds for running the Special Court. [939] In 2007, it made a donation of £160,000, to a BBC World Service Trust project aimed at making the Charles Taylor trial accessible to the people

[936] Ibid, 803; Sarah Williams, 'Arresting Developments? Restricting the Enforcement of the UK's Universal Jurisdiction Provisions', (2012) The Modern Law Review (2012) 75(3) 368 -386, 374-376. The amendments set out a non-exhaustive list of factors that must be taken into account when determining residency.
[937] BBC News UK 'Nearly 100 War Crimes Suspects' in UK last year by Tom Batemen (www.bbc.co.uknews/uk-23495314 last accessed 10/06/2013.
[938] Hirondelle News Agency, 05.11.12- Rwanda/UK-Rwandan Taxi Driver in UK Reported to be Genocide Suspect.
[939] United Kingdom Foreign and Commonwealth Office Annual Report on Human Rights 2003 ,September 2003, 170

of the region.[940] As at 2009, it estimated that of the $183 Million dollars it had cost to run the Special Court, it had made a contribution of about 20 percent. In 2010, the Special Court faced funding crisis, to which the United Kingdom made a further contribution of £2 million and as a result of shortfall in voluntary donation, it worked to get the United Nations to provide a more certain funding for the court.[941]

With respect to the Rwandan Tribunal, in 2005, the United Kingdom made a donation of more than £4.1million pounds to the Rwandan Tribunal's budget. In association with Norway, it sponsored the building of a fourth courtroom to hasten trials, by providing £63,000 and the courtroom was inaugurated on 1st March 2005. [942] The United Kingdom has also been at the fore of deepening the Rwandan Tribunal 'diplomatic and political support' base. Towards this end, the United Kingdom set up and the British High Commissioner to Tanzania chaired the Friends of the Rwandan Tribunal, made up of ambassadors from Norway, Belgium, Germany, France and the United States.[943]

The United Kingdom makes assessed and voluntary contributions to the ICC. In 2004, the ICC's budget was £35.3 million pounds with the United Kingdom contributing £4.4 (11 percent).[944]In 2004, the ASP fixed the ICC's 2005 budget for £46.4 million of which the United Kingdom paid £5.9million making a total of 12.8 percent of the total budget.[945] In 2010, it made a donation of 200,000 pounds to the Special Funds of the Court on relocations. This contribution is earmarked for relocating persons at risk in Kenya.[946] It recalled the commitments entered into at the Review Conference, in 2010 when the United Kingdom reaffirmed its pledge to cooperate with the ICC, reach out to the victims of crimes within the jurisdiction of the Court and provide support for wider ratification of the ICC Statute as well as a donation of £40,000 to the Trust Fund for Victims. In March 21, 2011, the United Kingdom of Great Britain and Northern Ireland announced a donation of 500,000 pounds to the Trust Fund for Victims (TFV) at the Annual Meeting of the TFV Board of Directors at The Hague, Netherland.[947]The following year in 2012, it made a similar donation of £500,000 to the TFV for the second year in a row at The Hague on the 10th anniversary of the ICC on

[940] United Kingdom Foreign and Commonwealth Office Annual Report on Human Rights 2007 , March 2008 ,58.
[941] United Kingdom Foreign and Commonwealth Office Human Rights and Democracy: The 2010 Foreign and Commonwealth Office Report, March 2011,5.
[942] United Kingdom Foreign and Commonwealth Office Annual Report on Human Rights 2009 , March 2010 , 67
[943] United Kingdom Foreign and Commonwealth Office Annual Report on Human Rights 2005 , July 2005 (September 2004 to June 2005), 159
[944] United Kingdom Foreign and Commonwealth Office Annual Report on Human Rights 2004 ,September 2004 ,123
[945] United Kingdom Foreign and Commonwealth Office Annual Report on Human Rights 2005 , July 2005 (September 2004 to June 2005) ,156
[946] Press Release 26/11/2010 ICC welcomes UK contribution for relocating at –risk persons in Kenya, ICC-CPI-20101126-PR601;See also Human Rights and Democracy: The 2010 Foreign and Commonwealth Office Report, March 2011 , 22.
[947] Press Release 21/03/2011, United Kingdom makes contribution to Trust Fund for Victims ICC-TFV-20110321-PR645.

the 9 July 2012.[948] And in 2013, the same gesture was replicated towards the TFV with a donation of 500, 000 as part of the G8 Initiative on preventing sexual violence in conflict on 2 February 2013.[949]

The United Kingdom has also supported initiatives to facilitate ratification and implementation of the ICC by states.[950] Examples of these include a 2004 seminar on human rights and the ICC organised in collaboration with other European States in Yemen to encourage representation from other states in the region in the ICC; a donation in 2004 towards the hosting of the first victims seminar on the ICC in Asia;[951] January 2005, part sponsorship of a seminar on the ICC in Samoa and also, a part sponsorship of the Commonwealth Secretariat in producing a model legislation for common law states to aid ratification of the ICC Statute.[952]

Second the executive arm of government in the United Kingdom and ICC officials have interacted at different levels and for a through the holding of meetings and attending events together. The United Kingdom Government has often made far reaching statements such as contributions to the ICC at these fora. On 24 May 2011, the British Foreign Office Minister, Henry Bellingham paid a visit to the Rwandan Tribunal in the company of the British High Commissioner to Tanzania, Diane Comer. During the visit, the Minister held talks with the President of the Rwandan Tribunal Denis Byron and the Prosecutor Hassan Bubacar Jallow.[953] On 16th November, 2011 the United Kingdom Minister responsible for the International Criminal Court, Africa and Overseas Territories visited the Court, where in a meeting with the ICC officials, the Minister expressed delight at the progress made by the Court in 2011 and in turn the President of the ICC expressed gratitude to the United Kingdom for its continued support to the TFV and the court.[954] The ICC President on 2nd April 2012, met with the Attorney General of the United Kingdom at The Hague to discuss the work of the court and cooperation between them and the President highlighted the support the United Kingdom had provided the court over the years.[955] During the 10th anniversary of the ICC on the 9th July 2012 at The Hague, the Foreign Secretary William Hague met with the Prosecutor of the ICC, and reiterated the United Kingdom's support for ICC investigations.[956] In June 2014, the United Kingdom hosted the

[948] Press Release 10/07/2012, United Kingdom Donates a Second £500,000 to ICC Trust Fund for Victims, ICC-TFV-20120710-PR825.
[949] ICC Press Release 12/02/2013 ICC-TFV- 20130212-PR872
[950] Eighth Report of the International Criminal Court A/67/308 2012 (2011/2012), Paras 104, 108
[951] United Kingdom Foreign and Commonwealth Office Annual Report on Human Rights 2004, September 2004, 124.
[952] United Kingdom Foreign and Commonwealth Office Annual Report on Human Rights 2005, July 2005, 157.
[953] Hirondelle News Agency, 24.05.11, - ICTR/Great Britain-British Foreign Minister Visits the ICTR.
[954] ICC Press Release 16/11/2011, UK Foreign Office Minister, Mr. Henry Bellingham MP visits the ICC, ICC-CPI-20111116-PR743.
[955] Press Release 02/04/2012, ICC-CPI-20120402-PR784
[956] ICC, OTP Briefing Issue 127 4-23 J the 10th anniversary of the ICC on the 9 July 2012

Global Summit to end sexual violence in conflict. In attendance at the summit were over 120 countries and more than 900 delegates.[957]

Third, the United Kingdom has also entered into MOU and bilateral agreements with international criminal courts and tribunals. In November 2004, the United Kingdom signed a Witness Relocation Agreement with the ICC.[958] The United Kingdom in June 2007 passed the International Tribunals (Sierra Leone) Act paving the way for the Special Court and the United Kingdom to enter into a sentence enforcement agreement in July 2007.[959] Also in 2009, the United Kingdom signed a Memorandum of Understanding with the Rwandan Tribunal to facilitate the exchange of information. At the time, it was envisaged by the United Kingdom Government that the agreement will also assist with the investigation into suspected genocaidaires living in the United Kingdom. In the same period, the United Kingdom also reported that it provided financial support to the Rwandan Tribunal to facilitate a training programme aimed at increasing domestic capacity to prosecute cases from the Rwandan Tribunal and other jurisdictions.[960]

4.5. Conclusion

Contemporary international criminal courts and tribunals with operational and jurisdictional relevance in the Commonwealth States of Australia, Canada and United Kingdom have produced different kinds of impact ranging from major to marginal on judicial, legislative and executive thoughts, actions and processes. These impacts have been brought about by the engagement and subsequent correspondences generated between these courts and the different states. Although in certain instances, the engagements of these institutions and the states have failed to produce any impact on the relevant states. Another trend that was observed of the analysis of these engagements is that more often the states themselves have generated significant impacts on these courts.

With respect to the impact of the courts on judicial action and process, the norms and jurisprudence of contemporary international criminal courts and tribunals have been deployed in exclusion proceedings in these states. In states such as Canada, Australia, United Kingdom and New Zealand, the impacts of contemporary international criminal courts and tribunals on judicial action and process have been mixed. Contemporary international criminal courts and tribunals have generated significant impact on judicial action and process in Australia, Canada, and the United Kingdom with respect to proceedings for determining exclusion of persons from the protection of the Refugee Convention.[961] Canada has utilised a number of measures within its domestic system such as genocide trials within its court

[957] https://www.gov.uk/government/policies/preventing-sexual-violence-in-conflict
[958] United Kingdom Foreign and Commonwealth Office Annual Report on Human Rights 2005, July 2005 (September 2004 to June 2005) 157.
[959] United Kingdom Foreign and Commonwealth Office Annual Report on Human Rights 2007, March 2008, 58.
[960] United Kingdom Foreign and Commonwealth Office Annual Report on Human Rights 2009, March 2010, 68
[961] Convention Relating to the Status of Refugees 1951 UNTS, Vol. 189, 137

system and revocation of citizenship or permanent residence status and deportation against those suspected genocide suspects. It has also come under criticism for its reliance on immigration procedures in addressing the issue of genocide suspects.

The United Kingdom has engaged with contemporary international criminal courts and tribunals on different levels resulting in visible impacts across different areas. However, these impacts are not all even. The impact of the engagement is not as significant as it ought to be on judicial action and process. The United Kingdom is currently seen as a haven for genocide perpetrators, following the unsuccessful attempts to extradite four genocide suspects to Rwanda and recent revelations that have brought to the fore several hundreds of suspected genocide or war crimes perpetrators residing in the United Kingdom. Concrete steps ought to be taken to ensure that suspected genocide perpetrators are either prosecuted under the amended International Criminal Court Act or extradited to face criminal prosecutions in places where their acts constituting the alleged offences took place.

In relation to legislative action and process, contemporary international criminal courts produced significant impacts across the three non- conflict states examined. Australia, Canada and the United Kingdom have all enacted legislation to incorporate obligations arising from the statutes of the Rwandan Tribunal, the Yugoslavia Tribunal and the ICC. Canada was the first state in the world to pass legislation implementing the Rome Statute of the ICC. Other states within the Commonwealth that have adopted an implementing legislation with specific regard to the ICC are Cyprus, Kenya, Malta, Samoa, South Africa Trinidad and Tobago and Uganda.[962]

The impact of contemporary international criminal courts and tribunals on executive action and process was however much more difficult to tease out from the various incidences of engagement between the executive and the different courts. As the courts have had a number of incidences of engagement with the executive arm of government, which did not necessarily produce any impact. There have also been instances where the states have on the converse exerted influences on the courts and tribunals. For instance, Australia has always actively supported the establishment of contemporary international criminal courts and tribunals. It displayed its support for the ICC prior to its establishment. During the negotiation of the Rome Statute of the ICC, Australia, aligned with and chaired a coalition of 67 states known as the body of Like-Minded Group formed at some stage in the negotiation of the Rome Statute of the ICC. The group was at the fore of the fight for the establishment of an independent ICC. These early support for the ICC by Australia were almost undermined by the controversy that trailed the ratification of the Rome Statute by the Australian

[962] See examples of Commonwealth States that have enacted implementing legislation include: South Africa in 2002 passed the International Criminal Court Act No. 27 of 2002; Samoa in 2007 passed the International Criminal court Act 2007, No. 26.

Government.[963] Likewise Canada played a vital role in the negotiations leading up to the adoption of the Rome Statute. The Head of its delegation Mr. Philippe Kirsche (who went on to become a Judge of the ICC) was chosen to chair the Committee of the Whole in charge of negotiating the treaty at Rome and the Preparatory Commission which was in charge of preparing supplementary documents after the Conference. Aside from these, Canada was also a member of and chaired the informal group of coalition of like-minded group of states that pushed for a strong and independent ICC.[964] Canada also provided funds for NGOs to attend the negotiation at Rome and contributed to the United Nations Trust Fund set up for developing countries to participate at negotiations at Rome.[965]

However, in terms of specific impacts, these courts and tribunals have influenced executive action and process in the United Kingdom, Canada and Australia as these states have over the years provided financial support to the three contemporary international criminal courts and tribunals with operational and jurisdictional relevance in the Commonwealth. The United Kingdom has also entered into bilateral agreements with both the Special Court and the Rwandan Tribunal. In addition, the Canadian executive has provided funds for the drafting of manuals to aid countries in ratifying and implementing the Rome Statute of the ICC.

In conclusion, this chapter has analysed evidence from conflict and post conflict states in the Commonwealth to map the domestic impact of international criminal courts and tribunals on judicial, legislative and executive thoughts, actions and processes. The evidence reveals varying degrees of influence of international criminal courts and tribunals within the Commonwealth.

[963] See Gillian Triggs, 'Implementation of the Rome Statute for the International Criminal Court: A Quiet Revolution in Australian Law', *supra* at .512-514 for more on Australia's declaration on ratification of the Rome Statute of the ICC. See also Carrie La Seur, 'Implementing the Rome Statute the Australian Experience', supra at 209. On the division in Parliament over the ratification of the ICC in Australia and Australia's subsequent reservations, see also Sarah Joseph, 'The Howard Government 's Record of Engagement with the International Human Rights System', (2008) 27 Australian Year Book of International Law 45 at 45-46 .

[964] See Darryl Robinson, 'Canadian Perspective on the International Criminal Court', (1999) 8 Mich. St. U-DCL. J. Int'l L. 9 at 10.

[965] Canada's War Crimes Program –Tenth Annual Report 2006-2007, 2

CHAPTER FIVE

MAPPING MORE MARGINAL IMPACTS OF CONTEMPORARY INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS WITHIN OTHER COMMONWEALTH STATES

5.1. Introduction

Contemporary international criminal courts and tribunals established to investigate and prosecute serious international crimes have had varying degrees, of engagement with different states in the Commonwealth. To a great deal, these differing levels of interaction between these states and international criminal courts and tribunals determine the degree of influence the latter bodies exert within these states. In previous chapters, the thesis evaluated the impact of contemporary international criminal courts and tribunals within conflict, post- conflict and non–conflict states in the Commonwealth. There are fifty-three states in the Commonwealth and it is impracticable to discuss the impact of contemporary international criminal courts and tribunals on all these states. Haven focused in chapters three and four on the impact of contemporary international criminal courts and tribunals on conflict, post-conflict and non-conflict states, the objective of this chapter is to map the impact of contemporary international criminal courts and tribunals in other states which have had significant levels of interaction and engagement with contemporary international criminal courts and tribunals resulting in some measure of influence on judicial, legislative and executive actions, thoughts and processes.

These other states have been selected from the different geo-political regions in the Commonwealth. These regions are Commonwealth Africa, Asia, the Caribbean and the Americas, Western Europe, and the Pacific states. One state was identified from two of the regions. Trinidad and Tobago was selected from the Caribbean and the Americas and New Zealand from the Pacific. Three geographical regions, Africa, Asia and Western Europe were left out for the reasons that follow. There are no representations from Africa, because most of the states that have had major engagements with contemporary international criminal courts and tribunals have already been discussed in chapters 2 and 3. There are also no representations from Asia, because the states in the region have had limited engagement with contemporary international criminal courts and tribunals. With respect to Western Europe, the United Kingdom had already been discussed in-depth in chapter 4 and the other two states of Cyprus and Malta have had limited engagement with contemporary international criminal courts and tribunals. This has been so despite the fact that implementing legislation is in place in both countries.[966]

Of the three contemporary international criminal courts and tribunals with operational and jurisdictional relevance in the Commonwealth, the ICC has had the most significant impact on all the

[966] Cyprus passed an implementing legislation in 2006 and Malta in 2002.

two states under discussion in this chapter. In addition, to a certain degree the International Criminal Tribunal for the former Yugoslavia (Yugoslavia Tribunal) and the International Criminal Tribunal for Rwanda (Rwandan Tribunal) have influenced New Zealand.[967] This chapter thus examines the impact of the ICC on Trinidad and Tobago and New Zealand.

5.2. The Impact of Contemporary International Criminal Courts and Tribunals on Trinidad and Tobago

Introduction

Of the three contemporary international criminal courts and tribunal with operational and jurisdictional relevance in the Commonwealth, the available evidence indicates that, the ICC has had the most profound and in-depth impact on Trinidad and Tobago. This section examines the impact of the ICC on legislative and executive processes and actions on Trinidad and Tobago. From a review of the available evidence, the ICC is yet to make any impact on judicial action and process in Trinidad and Tobago. Hence this section will only be reviewing the impact of the ICC on legislative and executive action/process in that country.

5.2.1. Impact on Legislative Action and Process

One direct impact of the ICC on legislative action and process in Trinidad and Tobago is the passing into law of its International Crimes and International Criminal Court Act in 2006, making it the first State in the Caribbean to enact legislation implementing the Rome Statute of the ICC.[968] This Act was assented to on the 21st of February, 2006.[969]

5.2.2.1. Trinidad and Tobago International Criminal Court Act

5.2.2.1.1. Incorporating the Crimes

Trinidad's International Crimes and International Criminal Court Act criminalizes genocide, crimes against humanity and war crimes committed within or outside Trinidad and Tobago.[970] The crime of genocide or conspiracy to commit genocide is as defined in section 9(2) which lists five constituents of the offence of genocide.[971] Crimes against humanity are defined in section 10 of the Act along the same line as the definition in the Rome Statute of the ICC.[972] War Crimes are defined with reference to article 8(2)(a) of the Rome Statute pertaining to grave breaches under the four Geneva

[967] U.N. Doc. S.C.RES/827(1993) reprinted in 32 I.L.M.1203 and U.N.Doc. S.C.RES/955 (1994) reprinted in 33 I.L.M. 1600.
[968] Act No. 4 of 2006.
[969] The International Criminal Court Act 2006, Legal Supplement Part A to the Trinidad and Tobago Gazette", Vol. 45, No. 32, 23rd February 2006.
[970] International Crimes and International Criminal Court Act, ss 9-11
[971] Ibid, s 9
[972] Ibid, s 10

Conventions, article 8(2)(b) which covers "other serious violations of the laws and customs applicable in international armed conflict", article 8(2)(c)"which relates to armed conflict not of an international character involving serious violations of Article 3 common to the four Geneva Conventions and article 8(2)(e) of the Rome Statute which relates "to other serious violations of the laws and customs applicable in armed conflict not of an international character".[973] Trinidad and Tobago has ratified the 2010 amendments to the Rome Statute on war crimes and the crime of aggression.[974] However, it has yet to amend its implementing legislation to reflect the amendments to war crimes and incorporate the crime of aggression.

The International Crimes and International Criminal Court Act also codifies several offences against the administration of justice in sections 15-21 of the Act. They include: corruption of a judge, registrar and deputy registrar;[975] bribery of a judge, registrar or deputy registrar;[976] corruption and bribery of ICC officials,[977] giving of false evidence before the ICC or in relation to a request from the ICC,[978]fabricating evidence before the ICC,[979]conspiracy to obstruct, prevent, pervert or defeat the course of justice of the ICC"[980] and interference with witnesses or officials of the ICC.[981] Trinidad and Tobago's approach to the incorporation of administration of justice offences has been to replicate the offences in article 70(1) in sub-paragraphs in its implementing legislation. Both Kenya and Uganda's respective ICC implementing legislation have adopted this approach with slight differences in the framing of the offences against the administration of justice of the ICC. [982]

Aside from these offences, the International Crimes and International Criminal Court Act incorporates several provisions of the Rome Statute of the ICC on the general principles of international criminal law.[983] The general principles contained in the Act include: individual criminal responsibility,[984] exclusion of jurisdiction over persons less than eighteen years,[985] responsibility of commanders and superiors,[986] exclusion of statutory limitations over crimes[987] and mental element of crimes.[988] The Act provides for the application of Trinidad and Tobago law on general principles of law in criminal

[973] Ibid, s 11
[974] Article 8, Para 2 (e) United Nations Reference: C.N.533. 2010. Treaties-6, and Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression in article 8 bis United Nations Reference: C.N.651. 2010. Treaties-8.
[975] International Crimes and International Criminal Court Act, s 15.
[976] Ibid, s 16
[977] Ibid, s 17
[978] Ibid, s 18
[979] Ibid, s 19
[980] Ibid, s 20
[981] Ibid, s 21
[982] Kenya's International Crimes Act 2008, ss 9-17; Uganda's International Criminal Court Act 2010, ss 10-16.
[983] International Crimes and International Criminal Court Act, 12(1) (a)
[984] Rome Statute of the International Criminal Court, article 25
[985] Ibid, article 26
[986] Ibid, article 28
[987] Ibid, article 29
[988] Ibid, article 30

law.[989] It also avails persons in proceedings a choice of either relying on defences available in Trinidad and Tobago domestic law or under international law.[990] In the event of conflict between the provisions of international law and domestic law on the application of defences, the Act expressly provides that the provisions of international law will prevail.[991]

Section 12 of Trinidad and Tobago's International Crimes and International Criminal Court Act contains identical provisions with the provisions of section 12 of New Zealand's International Crimes and International Criminal Court Act on the application of general principles of criminal law in domestic proceedings over the core crimes contained in the Rome Statute of the ICC. Both Acts also adopt similar approach in addressing the issue of immunity. Article 27 of the Rome Statute of the ICC is replicated in section 31 of Trinidad and Tobago's International Crimes and International Criminal Court Act with slight modifications.[992] Trinidad and Tobago's implementing legislation provides that the immunities, which a person enjoys as a result of the person's official capacity, will not preclude the provision of assistance to the ICC or the arrest and surrender of the person to the ICC. The foregoing provisions are however, subject to sections 60 and 120 of the Act which in turn addresses situations where an ICC request for surrender is in conflict with Trinidad and Tobago's obligations to another state. Where this is the case, the Minister may postpone the request for surrender, until the ICC makes a determination as to (i) whether the obligation to that other state falls within article 98 agreements and (ii) whether or not the ICC intends to proceed with the request. [993]

In addition, section 12(4) of the Act, provides that Trinidad and Tobago Courts may apply the Elements of Crime in proceedings in respect of the core crimes. The use of "may" indicates that reference to the Elements of Crime is based on the judges' discretion. In both Kenya[994] and the United Kingdom[995] the Elements of Crime is a mandatory interpretive document in domestic proceedings before their respective national courts.

The consent of the Attorney-General is required before any suit can be instituted in a court in Trinidad and Tobago in relation to the core offences[996] or the offences against the administration of justice of the ICC.[997] The requirement of the Attorney General's consent before instituting proceedings under the Act, acts as a restraint on the unqualified use of universal jurisdiction. This means that frivolous suits or suits which might embarrass the government are not instituted.

[989] International Crimes and International Criminal Court Act, 12(1) (b).
[990] Ibid, s 12(1) (c)
[991] Ibid, s 12(3)
[992] Ibid, s 31
[993] Ibid, s 31 read in conjunction with ss 66 and 120.
[994] International Crimes Act 2008, s 7(5); Australia's International Criminal Court (Consequential Amendments) Act 2002 Act No. 42 of 2002, is silent on the general principles of criminal law including defences.
[995] United Kingdom International Criminal Court Act 2001, s 50(2)(a).
[996] Ibid, s 13
[997] Ibid, s 22

5.2.2.1.2. Jurisdiction

The jurisdiction of Trinidad and Tobago courts over international crimes is laid out in section 8 of the Act. The Act provides that proceedings may be instituted in Trinidad and Tobago for genocide which occurred on or before 31st January 1977. Proceedings for crimes against humanity may be instituted under the Act where they occurred on or before 1 January 1991. With respect to war crimes, the Act prescribes punishment for acts which occurred after the commencement of the Act.[998] The date for the temporal jurisdiction of the crime of genocide relates to the day that Trinidad and Tobago adopted the Genocide Convention[999] and that of crimes against humanity is in relation to the establishment of the Yugoslavia Tribunal. This approach and timeline is identical to New Zealand's approach in setting out the temporal jurisdiction of its courts under its ICC implementing legislation.[1000] Canada has also vested its courts with retrospective jurisdiction over the core crimes; it however adopts a different method. Canada's Crimes Against Humanity and War Crimes Act, sets two retrospective dates over the core crimes. The first is in relation to crimes committed within Canada and the second covers crimes committed outside Canada.[1001] The distinction in the definition lies in the dates for the retroactive application of the Act in respect of the crimes. For crimes committed within Canada, the retrospective jurisdiction of Canadian courts is set at 1998, [1002] when the Rome Statute of the ICC was adopted and for crimes committed outside Canada, the retrospective jurisdiction of Canadian courts is set as far back as 1945. [1003]

Further, the Act vests jurisdiction on Trinidad and Tobago courts over crimes against humanity, genocide, war crimes and the crime of fabricating evidence irrespective of the following: the nationality of the accused person, whether or not any of the acts constituting the offence occurred in Trinidad and Tobago or whether the accused person was in Trinidad and Tobago at the time the offence occurred or at the time the decision to charge the accused was made.[1004] Trinidad and Tobago's implementing legislation, incorporates universal jurisdiction in a broad form over the core crimes and the crime of fabricating evidence. This broad universal jurisdiction adopted by Trinidad and Tobago is similar to that provided in Australia's incorporation of jurisdiction over the core crimes.[1005] Other states such as Canada, Kenya and Uganda require a connection with the prosecuting state and the alleged perpetrator on grounds of citizenship or permanent residence status, employment,

[998] Ibid, ss 8(1)(b) and 8(4)
[999] Convention on the Prevention and Punishment of Genocide 1948, United Nations Treaty Series, Vol. 78, 277
[1000] New Zealand has adopted this procedure for setting out the temporal jurisdiction over the core crimes contained in its implementing legislation; see New Zealand's International Crimes and International Criminal Court Act, s 8
[1001] See Crimes Against Humanity and War Crimes Act, ss 4 and 6.
[1002] Ibid, s 4(4)
[1003] Ibid, ss 6(4) and 6(5)
[1004] Ibid, s 8(1)(c)
[1005] See Australian Criminal Code Act 1995, s 15.4 and International Criminal Court (Consequential Amendments) Act 2002 Act No. 42 of 2002, s 268.117.

custodial state of the victim or the presence of the alleged perpetrator in the state: Trinidad and Tobago dispenses with all these requirement or connections.[1006] In contrast to the broad universal jurisdiction under the Act for the core crimes, with respect to proceedings against the administration of justice, Trinidad and Tobago adopts a more muted form of universal jurisdiction requiring a connection such as the citizenship of the perpetrator, the commission of the acts or omissions in Trinidad and Tobago or on board a registered ship or aircraft in Trinidad and Tobago.[1007] This is the approach adopted by Australia 'in relation to extra-territorial jurisdiction for crimes against the administration of justice requiring a territorial nexus between the crimes and Australia.[1008]

5.2.2.1.3. Cooperation with the ICC

Trinidad and Tobago International Crimes and International Criminal Court Act incorporates extensive provisions on the cooperation regime between the ICC and Trinidad and Tobago. It sets out in details, possible areas of cooperation in the investigation and prosecution of the core ICC crimes.

5.2.2.1.3.1. Assistance to the ICC

The forms of assistance includes: request for the arrest and surrender of persons to the ICC (the Act provides for a distinct procedure when dealing with request for arrest and surrender), identification of persons and location of items, the taking and production of evidence, the questioning of any person being investigated or prosecuted, service of documents, facilitating the voluntary appearance of persons as witnesses or experts, the temporary transfer of prisoners, examination of places and sites, executing searches and seizures, provision of records and documents, protection of victims and witnesses and the preservation of evidence, identification, tracing and freezing, or seizure of proceeds, property and assets, and any other type of assistance not prohibited by the law of Trinidad and Tobago with a view to aid the investigation and prosecution of crimes within the jurisdiction of the ICC.[1009] Furthermore, the Act permits the provision of certain kinds of assistance required by the ICC Prosecutor, Pre-Trial and Trial Chambers.[1010] The Rome Statute in Article 87 sets out the general provisions on assistance including the means for transmitting the requests and the relevant channels through whom such requests may be transmitted. In Trinidad and Tobago, requests for assistance are made to the Foreign Affairs Minister and treated by the Attorney General or a designate.[1011] In cases of urgency, request for assistance may be made using any means that is capable of generating a

[1006] See Canada 's Crimes Against Humanity and War Crimes Act, 2000, C. 24, s 8; Kenya's International Crimes Act 2008, s 8; Uganda's International Criminal Court Act, s. 18
[1007] Section 14 of the International Crimes and International Criminal Court Act
[1008] Australian Criminal Code Act 1995, 15.3 and International Criminal Court (Consequential Amendments) Act 2002 Act No. 42 of 2002, s 268.117
[1009] Ibid, s 24(1)(a)
[1010] Ibid, s 24(1)(b)
[1011] Ibid, s, 25

written record or through the International Criminal Police Organisation or a regional organisation. A formal request must however be made as soon as practicable to the Foreign Affairs Minister.[1012] Requests for cooperation are executed in accordance with the procedure specified by the ICC Act or where the request specifies a procedure not unlawful under the law; the Attorney General must strive to use the specified procedure.[1013] In case of problems with the execution of a request, the Attorney General must consult the ICC[1014] and also inform the ICC of any decision taken in respect of any request for assistance as well as the reasons for the decision.[1015]

5.2.2.1.3.2. Arrest and Surrender

The ICC Act codifies in Part 4, the legal and normative framework for arrest and surrender. The ICC may make requests for arrest and surrender to Trinidad and Tobago for a person who has either been convicted by the ICC or against whom the ICC Pre-Trial Chamber has issued a warrant of arrest or a provisional warrant of arrest .[1016]

5.2.2.1.3.2.1. Arrest Procedure

Requests for arrest excluding provisional arrest warrants are made through the Minister for Foreign Affairs who transmits same to the Attorney General who in turn has a discretionary power to notify or refuse to notify a high court judge to issue an arrest warrant. The Act is silent on whether the exercise of the Minister's discretion is subject to judicial review or not. However, other jurisdictions such as Australia expressly provide in their implementing legislation that the exercise of the Attorney General's discretion to institute proceedings is not subject to judicial review.[1017] Requisite supporting documents, which must include information describing the person sought, probable location and an authenticated copy of the warrant of arrest must accompany the Minister's notice to the high court judge.[1018] These requisite documents are not explicitly identified in the Act. The specifics and nature of the necessary documents are gleaned from the provisions of the Rome Statute in articles 91 and 92. The high court judge on receipt of the notice must issue a warrant of arrest in the prescribed format on behalf of the ICC, if based on information received, the high court judge is satisfied that the person is in or may come to Trinidad and Tobago and is convinced that the person is the same being sought by the ICC.[1019]

[1012] Ibid, s 26
[1013] Ibid, s, 27
[1014] Ibid, s 28
[1015] Ibid, s 30
[1016] Ibid, s 32
[1017] Australian Criminal Code Act No. 12 of 1995, Division 268.122.
[1018] International Crimes and International Criminal Court Act, s 33.
[1019] International Crimes and International Criminal Court Act, s 34

A high court judge may in the absence of a formal request for arrest and surrender from the ICC issue a provisional warrant of arrest against a person, if on the basis of information presented the judge can determine that there is an existing warrant of arrest or judgment of conviction in respect of a convicted person; the person wanted by the ICC is in Trinidad and Tobago or may come into Trinidad and Tobago and as a result of expediency an arrest warrant has to be issued urgently.[1020] Where a high court judge issues a provisional arrest warrant against a person, the applicant for the warrant must promptly present a report detailing the issuance of the warrant and requisite documents to the Minister. The Minister may on receipt of the report discontinue proceedings and order the cancellation of any warrant issued. The Act neither specifies the grounds on which the Minister may discontinue the proceedings nor places an obligation on the Minister to provide justification for any action taken to the high court judge. What is required of the Minister is to inform the high court judge of any steps taken in respect of the warrant.[1021] Where a person has been arrested on a provisional arrest warrant, proceedings can only continue upon notice served by the Minister informing the high court judge that a formal request for arrest and surrender has been received in respect of the person. The high court judge must set a date for receipt of notice from the Minister, failing which it either extends the date or orders the discharge of the person.[1022] This provision varies slightly across the different states. In both Kenya and New Zealand, the judge sets the timeframe for receipt of notice from the Minister.[1023] Whereas, in both Australia and Uganda, the respective ICC implementing legislation sets the timeframe for which notice ought to be received as against leaving same to the discretion of the court or judge.[1024]

An arrested person must be brought before a high court promptly unless the person is discharged. The high court may remand the person on bail, although bail is not as of right under the Act. In determining whether to grant bail, the high court takes the following into consideration: the gravity of the alleged offence; the presence of urgent and special circumstances that justify the grant of bail and whether necessary safeguards exist to ensure that Trinidad and Tobago can fulfil its responsibility to surrender the person to the ICC.[1025] From the provisions of the Act, the decision of the high court judge whether or not to grant bail is a discretionary one and it is not subject to judicial review as bail under the Act is not as of right. The incorporation of bail provisions is in line with the provisions of the Rome Statute of the ICC.[1026]

[1020] International Crimes and International Criminal Court Act, s 36
[1021] International Crimes and International Criminal Court Act, s 37
[1022] International Crimes and International Criminal Court Act, s 38
[1023] Kenya's International Crimes Act 2008, s 34; New Zealand International Crimes and International Criminal Court Act, s 38
[1024] See Australia's International Criminal Court Act N0. 41 of 2002, s 26; Uganda's International Criminal Court Act 2010, s 32
[1025] International Crimes and International Criminal Court Act, 39
[1026] Rome Statute of the International Criminal Court, article 59(3)-(6)

5.2.2.1.3.2.2. Surrender Procedure

The Act places an obligation on the high court judge to determine whether or not persons who have been brought before it as a result of a request from the ICC are eligible for surrender. The high court judge in determining eligibility for surrender must have seen in court a copy of the warrant of arrest or judgment of conviction issued by the ICC; the person named in the warrant or judgment of conviction is the same person to whom the ICC request relates; the person's arrest was effected with regards to due process and a respect for procedural rights and there are no existing restrictions placed on the person's surrender. Infractions of due process and procedural rights of a person can only be raised by the person who has suffered the infractions.[1027] From the provisions of the Act, an inference may be drawn that a high court judge in determining a person's eligibility for surrender may refuse otherwise where infractions and violation of due process have been properly raised in the proceedings. A person may however consent to surrender, thereby obviating the need for a hearing to determine eligibility for surrender.[1028]

The high court must issue a warrant for the detention of a person in an approved place, where the court has either adjudged the person eligible for surrender or the person has consented to same. The Act provides for appeals against a decision of the high court in surrender hearings. Most implementing legislation provide for a right of appeal against a court's decision in a surrender hearing by either the person whose surrender is sought or the Minister or Attorney General depending on who treats requests for arrest and surrender from the ICC. In Trinidad and Tobago, appeals may be brought within 15 days against the high court's decision by any of the parties on grounds of law to the court of appeal,[1029]except where the person whose surrender is sought waives the right to appeal.[1030] The court of appeal in hearing the appeal may reverse, confirm, vary the decision or refer the case back to the high court for reconsideration or rehearing.[1031]

The Attorney General is required to make a surrender order against a person whom the high court has issued with a warrant for detention except where there are 'mandatory restrictions" or "discretionary restrictions under section 55, the Attorney General has postponed the request;[1032] or made a temporary surrender order.[1033] The onus lies on the Attorney General to ensure that all surrender orders issued are fulfilled.[1034]The Attorney General can refuse surrender on mandatory or discretionary grounds.

[1027] International Crimes and International Criminal Court Act, s 43
[1028] Ibid, s 45
[1029] Ibid, s 67
[1030] Ibid, s 70
[1031] Ibid, s 71
[1032] Ibid, s 56
[1033] Ibid, s 49 on rules governing issuance of temporary surrender order.
[1034] Ibid, s 47

Mandatory grounds for refusing surrender are where there have been prior proceedings against the accused person, the ICC has either determined that the case is inadmissible or has notified the Attorney General of its decision not to proceed with the request.[1035] The Attorney General's discretion to refuse surrender may be exercised: (a) where there are competing requests from the ICC and a non-party State to which Trinidad and Tobago has a subsisting international obligation over the same conduct [1036] and (b) where there are competing requests between the ICC and a non-party State to whom Trinidad and Tobago has a subsisting international obligation over different conducts.[1037]

In Trinidad and Tobago, the procedure for dealing with competing requests from the ICC and another state are spelt out in the Act. Where there are competing requests from the ICC and a state party for the arrest and surrender of a person pertaining to the same conduct: priority is given to the ICC's request where, the ICC has held the case to be admissible or the ICC subsequently rules on the admissibility of the case after being informed of the competing request for extradition.[1038]Where the requesting state is a non-party State: priority is given to ICC's request for surrender if there is no subsisting international obligation to extradite and the ICC has ruled on the admissibility of the case.[1039] In situations where the requesting state is a non-party State to the ICC Statute and Trinidad and Tobago has an obligation under international law to extradite to that state, the Attorney General in making a decision either to surrender to the ICC or extradite to the state, will take into consideration, the following factors: (a) the individual dates of the requests; (b)the interests of the requesting state (including the place of the commission of the offence and the nationality of the perpetrator and victim) and (c) the possibility of a future surrender by the state to the ICC .[1040] The Attorney General will take these same factors into consideration when deciding whether to surrender or extradite where there are competing requests from the ICC and one or more state for different conducts and Trinidad and Tobago has a subsisting international obligation to extradite to one or more state.[1041]

In addition to the foregoing provisions on arrest and surrender, the Act provides for the surrender or transfer of persons to the ICC or another state en route Trinidad and Tobago. The ICC must submit a request for transit along with requisite information identifying the person being transferred, a statement of facts, a copy of the warrant for arrest and surrender, and any other information requested by the Attorney General.[1042] Where an unscheduled landing is made, the ICC may be obliged to make request for transit of the transferee.[1043] In the case of an unscheduled landing, the person cannot be

[1035] Ibid, s 55(1) read together with ss 57(4), 59(3), 60(2) and section 66(3)
[1036] Ibid, s 55(2)(a) read together with s 63(4)
[1037] Ibid, s, s 55(2)(b) read together with s 64(3)
[1038] Ibid, s 62 read together with s 61
[1039] Ibid, s 63(1) –(3) read together with s 61
[1040] Ibid, s 63(4) –(6) read together with s 61
[1041] Ibid, s 64
[1042] Ibid, s 136(1)-(3)
[1043] Ibid, s 136(6)

held for more than ninety-six hours unless the request for transit of the person is received within the time frame from the ICC.[1044]

5.2.2.1.4. Domestic Procedure for Other Types of Cooperation

The domestic procedures for the varied forms of assistance other than those dealing with arrest and surrender are contained in Part V of the Act. The Attorney General can refuse a request for these other forms of assistance under Part V of the Act on mandatory and discretionary grounds. The mandatory grounds for refusal are: where the ICC refuses the conditions attached to implementing requests, the ICC has ruled the case to which the request relates inadmissible and the ICC has indicated its desire not to proceed with the requests.[1045] The Attorney General 's discretion to refuse a request for assistance may be exercised: to protect national security or third party information and where there are competing requests from both the ICC and a non-party State to the ICC Statute pertaining to the same or different conduct.[1046] The Attorney-General may also postpone the execution of requests from the ICC pending the resolution of certain issues such as: where there is an ongoing investigation and the execution of the request would interfere with same,[1047] a pending ruling on admissibility before the ICC,[1048] existence of competing requests from the ICC and a state to which Trinidad and Tobago is under an international obligation;[1049] the request was made under article 93(1) of the Rome Statute and section 113(4) applies or a request is made under section 120(2)(c) to the ICC to determine whether article 98(1) applies.[1050]

In addition, under Part V of the Act, there are two scenarios where the Attorney General is obliged to consult the ICC before making a decision in respect of a request for assistance. First, where existing laws in Trinidad and Tobago prohibit a request for assistance, the Attorney General must confer with the ICC to seek alternative means of executing the request.[1051] Second, in cases of competing requests from the ICC and another state to which Trinidad and Tobago owes obligations under this part, the Attorney General shall confer with the ICC and attempt to seek resolution by postponing either or both of the requests or attaching conditions to the fulfilment of either or both requests. Where an impasse ensues, the Attorney General will apply the provisions provided in sections 61-65 dealing with competing interests under Part IV.[1052]

[1044] Ibid, s 137
[1045] Ibid, s 114(1)
[1046] Ibid, s 114(2)
[1047] Ibid, s 117
[1048] Ibid, s 118
[1049] Ibid, s 119
[1050] Ibid, s 115(1)
[1051] Ibid, s 116
[1052] Ibid, s 119

5.2.3. Impact on Executive Action and Process

The ICC's influence on executive action and process in Trinidad and Tobago is significantly higher in comparison to other Commonwealth States in the Caribbean. This is attributable to the fact that, Trinidad and Tobago's role in kick starting the process that led to the establishment of the ICC regime is one it has always celebrated, and one that continues to positively shape its response to the ICC. The impact of the ICC on executive action and process within Trinidad and Tobago is summed up below.

First, Trinidad and Tobago has been at the fore of the ICC Movement. Thus, in 1990, it led the call for the establishment of an ICC to help it prosecute narcotics traffickers prevalent in Trinidad and Tobago and the wider Caribbean at the time. This action roused the consciousness of the international community to the ideals of a permanent ICC.[1053] The call was made by the then Prime Minister, Arthur N.R Robinson to the United Nations. During, negotiations at Rome, Trinidad pushed for a court with jurisdiction over narcotics and the inclusion of the death penalty in the statute.[1054] Failing to have the death penalty on the Rome Statute, Trinidad and Tobago abstained from voting on the Rome Statute.[1055] However, on 6th April, 1999 it became the second state to ratify the Rome Statute of the ICC and the first state in the Commonwealth.

Trinidad and Tobago's role is widely referenced and acknowledged within the state and in the wider Caribbean region. In 1999, the Caribbean Community and Common Market (CARICOM) member states acknowledged this role when they adopted the Port of Spain Declaration on the ICC during a regional conference on the signature and ratification of the Rome Statute in the Caribbean co-sponsored by Trinidad and Tobago, No Peace Without Justice (NPWJ) and Open Society Institute. The declaration specifically 'acknowledged the role played by the President of the Republic of Trinidad and Tobago, H.E. Arthur N.R. Robinson as one of the "first and most effective advocates for the establishment of a permanent international criminal court".[1056]

Second, Trinidad and Tobago's assumption of a leadership role in promoting and encouraging the ratification of the Rome Statute of the ICC in the Caribbean illustrates significant ICC influence in that country. Mindful of playing a vital role within the ICC regime, Trinidad and Tobago in 2010 during the Review Conference of the Rome Statute of the ICC made a pledge to promote the ratification and implementation of the Rome Statute of the ICC in the Caribbean. As a result, in May

[1053] Letter dated August 21, 1989 from the Permanent Representatives of Trinidad and Tobago to the Secretary General (UN GAOR, 44th Sess., Annex 44, Agenda Item 152, UN Doc. A/44/195), 21 August 1989. See Delia Chatoor, 'The Role of Small States in International Diplomacy: CARICOM's Experience in the Negotiations on the Rome Statute of the International Criminal Court', (2001) International Peacekeeping, Vol.7, 295.
[1054] Press Release L/2875, 'Diplomatic Conference Begins Four Days of General Statements on Establishment of International criminal Court', 16 June 1998.
[1055] See Delia Chatoor, 'The Role of Small States in International Diplomacy: CARICOM's Experience in the Negotiations on the Rome Statute of the International Criminal Court', (2001) International Peacekeeping, Vol.7, 295, 301-305.
[1056] Port of Spain Declaration 1999

2011, Trinidad and Tobago held a CARICOM seminar on the ICC at the Port of Spain with representatives from St. Lucia, Suriname, Haiti, Antigua and Barbuda, Belize, Grenada, St. Vincent and the Grenadines and Jamaica to discuss how to strengthen the ICC ratification and implementation efforts in the region. Participants included: A.N.R Robinson (Trinidad and Tobago's former Prime Minister), the Hon. Winston Anderson, Judge at the Caribbean Court of Justice, ICC President Song, ASP President Wenaweser, ICRC officials and coalition representatives.[1057]

Third, Trinidad and Tobago's swift commitment to ratifying the Rome Statute of the ICC is indicative of the impact of the ICC on executive action and process as ratification of treaties is largely though not totally an executive act. Although, during the negotiations at Rome, Trinidad and Tobago was a member of the like-minded group of states who wanted a strong and independent court, it also wanted the court to have jurisdiction over narcotics trafficking and be able to prescribe the death penalty for offences. During the negotiations, it advocated for these provisions along with other Caribbean States. On 16th June, the Attorney General of Trinidad and Tobago addressed the Conference; he made a plea for the inclusion of narcotics and death penalty in the statute.[1058] During the Conference, Trinidad and Tobago continued to make the case for the death penalty on behalf of the Caribbean states. [1059] The same was reiterated on 14 July 1998 as the Diplomatic Conference came to a close.[1060] The Diplomatic Conference at Rome agreed on a resolution that at a future Review Conference it will examine the crimes of terrorism and drug crimes with a view to their addition in the crimes within the jurisdiction of the court.[1061]

Fourth, like a number of other states Trinidad and Tobago refused to enter into a Bilateral Immunity Agreement (BIA) with the United States. In fact they publicly rejected the BIA and denounced the act of the United States in a declaration made with other Caribbean States. Following this, the United States in July 2003 cut military aid and assistance to Trinidad and Tobago.[1062] Trinidad and Tobago in publicly rejecting the BIA demonstrated its willingness to be bound to the norms of the ICC to which it has circumscribed. A number of other states in the Commonwealth did indeed capitulated under pressure from the United States and entered into BIAs. However, in 2006, the United States

[1057] Statement by Ms Marise Warner of the Ministry of Foreign Affairs and Communications of the Republic of Trinidad and Tobago at the General Debate of the Tenth Session of the Assembly of State Party to the Rome Statute of the ICC 14 December 2011, UN Headquarters. See also www.ciccnow.org/?mod=newsdetail&news=4814 last accessed 16/10/2014.
[1058] Diplomatic Conference Begins Four Days of General Statements on Establishment of International criminal Court," (Press Release L/2875) 16 June 1998
[1059] CICC, "Penalties: Conference Escapes Death Penalty Noose," On the Record, 2 July 1998, www.iccnow.org last accessed 12/06/2012.
[1060] Proposal Submitted by Barbados, Dominica, India, Jamaica, Sri Lanka, Trinidad and Tobago and Turkey.(A/Conf. 183/C.1/L.71), 14 July 1998.
[1061] Herman von Hebel and Darryl Robinson, 'Crimes within the jurisdiction of the Court', in the *International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results*, (ed) Roy S. Lee (Kluwer Law International, 1999), 87.
[1062] Letta Tayler, "U.S. at Odds Over World Tribunal: Bush Administration Suspends Aids to Nations that Refuse to Shield Americans from War-Crimes Court," Newsday 16 October 2004.

granted waivers to states that had refused to sign a bilateral immunity agreement and against whom it had suspended military and technical assistance.[1063]

Fifth, Trinidad and Tobago has always taken advantage of being a State Party and sponsored its citizens for positions within the court beginning with the 2003 election of Judge Karl Hudson-Phillips for a nine year term. Judge Hudson-Phillips however resigned in 2007. Following his resignation in 2007, Trinidad and Tobago presented the candidature of Madame Justice of Appeal (retired) Jean Permanand to take up one of the three vacant slots that had arisen from the retirement of three judges including Judge Hudson Phillips of Trinidad and Tobago. Trinidad and Tobago's attempt to have its citizen elected by the Assembly of State Parties in 2007 was unsuccessful. [1064] In 2011, the Assembly of State Parties elected its citizen Judge Thomas Aquinas Carmona to the Court for a term of nine years. He however, resigned following his election as President of Trinidad and Tobago.[1065] And On 1st February 2014, Judge Geoffrey Henderson of Trinidad and Tobago was elected from the group of Latin America and Caribbean States as a judge of the ICC. Trinidad and Tobago has had three of its citizens elected as judges of the ICC whereas there are other larger state parties that have not had their citizens elected as judges.

From the foregoing, it can be said that the ICC has exerted significant levels of impact on legislative and executive actions and processes in Trinidad and Tobago. Its influence on legislative action and process in Trinidad and Tobago has been considerable like other states that have implemented the provisions of the Rome Statute. The ICC has influenced several executive actions and processes in Trinidad and Tobago. Following its earlier reservations as noted, Trinidad and Tobago has emerged as a regional leader and advocate for the universality of the Court in the Caribbean.

5.3. The Impact of Contemporary International Criminal Courts and Tribunals in New Zealand

This section examines the impact of contemporary international criminal courts and tribunals on judicial, legislative and executive thought, processes and actions in New Zealand. The ICC has significantly exerted influence in New Zealand, while the Rwandan Tribunal has had a lesser impact there. Therefore, this section examines the impact of these two judicial institutions on New Zealand.

[1063] Irfan Nooruddin and Autumn Lockwood Payton, ' Dynamics of Influence in International Politics: The ICC, BIAS, and Economic Sanctions (2010) Journal of Peace Research 47(6) 711.
[1064] Statement by H.E. Ambassador Phillip Sealy Permanent Representative of the Republic of Trinidad and Tobago to the UN on behalf of CARICOM members state which are states parties to the Rome Statute of ICC at the 62nd Session of the United Nations General Assembly on Agenda Item 76: Report on the ICC 1st November 2007 United Nations.
[1065] Press Release: 20/03/2013 Resignation of ICC Judge Anthony Carmona ICC-CPI-20130320-PR885.

5.3.1. Impact on Judicial Action and Process

The thrust of this section is to examine the influence of the norms and jurisprudence of the ad hoc tribunals and the ICC on judicial action and processes in New Zealand. Available evidence reveal New Zealand's resort to the norms and jurisprudence of contemporary international criminal courts and tribunals in making decisions on whether or not to exclude persons from the protection of the Refugee Convention by applying the exclusion clause contained in article 1F(a) of the Refugee Convention.[1066]

In *X & Y v. Refugee Status Appeals Authority*[1067] in the case, a person who had been employed on a ship "Yahata" belonging to the Liberation Tigers of Eelam (LTTE) and which had been sunk by the Indian Navy in January 1993. At the time of the incidence, on board the ship were members of the LTTE including one of its founding members as well as arms and explosives. At proceedings before the Refugee Status Appeal Authority, it was held that X was not a refugee because he came within the province of Article 1F of the 1951 Convention Relating to the Status of Refugees Convention. The Refugee Status Appeals Authority had found the LTTE guilty of crimes against humanity and X was held to be complicit in the crimes of the LTTE. X was therefore excluded from the protection afforded under the Refugee Convention on the basis of article1F (a) and (b).[1068] At the High Court, the decision of the Refugee Status Appeals Authority was upheld.[1069] He subsequently appealed to the Court of Appeal, where the crux of the appeal was whether the high court was wrong in affirming the decision of the Refugee Status Appeals Authority in finding X complicit in crimes against humanity.[1070]

The Court of Appeal in overturning the decision of the high court held that both the high court and the Refugee Status Appeals Authority "misdirected themselves as to the proper approach to the issue of complicity in crimes against humanity." The Court of Appeal consequently addressed the issue of complicity and the correct means for addressing article 1F.[1071] In determining the true test for complicity, the Court of Appeal articulated the jurisprudence of Canadian and English Courts and the norms of the Rome Statute of the ICC. Judge Hammond placed reliance on English case law on exclusion which held that membership of an organisation on its own was not enough to base liability for complicity; rather, there must be other connections with principles of liability founded in international criminal law as elaborated in both the Rome Statute of the ICC and Statute of the ad hoc

[1066] See Joseph Rikhof, 'War Criminals Not Welcome; How Common Law Countries Approach the Phenomenon of International Crimes in the Immigration and Refugee Context', (2009) International Journal of Refugee Law 21(3); 453.
[1067] X & Y v. Refugee Status Appeals Authority, M826/97, CIV-2006-404-4213, High Court, 17 December 2007. This was the judicial review of the RSAA Appeal No. 74796 &74797
[1068] X v Refugee Status Appeal Authority & Attorney General (2009) NZCA 488, [2 and 32]
[1069] Ibid, [48-52]
[1070] Ibid, [83]
[1071] Ibid, [55 and 88]

tribunals.[1072] In addition, Judge Hammond reiterated that in determining the meaning of the Refugee Convention, recourse should always be to the Rome Statute of the ICC of which New Zealand is a state party.[1073]

On appeal the Supreme Court[1074] held that, the definition of crimes against humanity as contained in article 1F(a) must be determined from international instruments of which the Rome Statute of the ICC was one of the most relevant.[1075] The Supreme Court of New Zealand also relied on the ICC Statute in attributing criminal liability for crimes against humanity.[1076] The Supreme Court held that X should not be excluded from the protection of a refugee under the Refugee Convention. In addition his activities aboard the Ship in the six months did not meet the requirement for crimes against humanity and in the present scenario, since the arms never reached the intended destination, no crimes against humanity had been completed.[1077] The appeal was dismissed and the respondent's claim for refugee status remitted back to the Refugee Status Appeals Authority for reconsideration in line with the principles set out by the Court of Appeal.[1078]

5.3.2. Impact on Legislative Action and Process

The International Crimes and International Criminal Court Act (IC ICCA) implements both New Zealand's cooperation regime with the ICC and the crimes in one single piece of legislation.[1079] The Act provides two different operative dates for the crimes provisions and the cooperation provisions with the crimes provisions coming into force on 1st October 2000[1080] and the cooperation provisions 1st July 2002.[1081]

5.3.2.1. Amendments

The Act amends the following legislation: the 1968 Diplomatic Privileges and Immunities Act amended by section 183 of the Act with the insertion of section 10D, which empowers the Governor-General of New Zealand to confer on the judges, prosecutor and staff of the ICC privileges and immunities that may be required under article 48 of the Statute; the Extradition Act is amended by section 184 with the insertion of a new section 99(3) which addresses competing requests for

[1072] Ibid, [93-102]
[1073] Ibid, [106].
[1074] Attorney General(Minister of Immigration) v. Tamil X & Refugee Status Appeal Authority (2010) NZSC ,107
[1075] Ibid, [47-48]
[1076]Ibid, [51-53]
[1077] Ibid, [71]
[1078] Ibid, [101]
[1079] See generally J. Hay, 'Implementing the Rome Statute in New Zealand ', (2004) 2 Journal of International Criminal Justice, 533-540.
[1080] International Crimes and International Criminal Court Act, s 2(2).
[1081] Section 2(1) made by Clause 2, International Crimes and International Criminal Court Act Commencement Order 2002 (SR 2002/131)

surrender and extradition from the ICC and one or more countries. Section 3 of the Act amends the Geneva Conventions Act 1958 to ensure that the prescribed penalties under both Acts are uniform; an amendment of section 21P of the Penal Institutions Act 1954 to include calls made between an inmate and a person acting on behalf of the ICC among the list of protected calls. The Proceeds of Crime Act 1991 is amended to bring New Zealand to a situation where it can comply with obligations and request from the ICC to identify, trace, freeze or seize proceeds, property or assets derived from crimes.

5.3.2.2. Incorporating the Crimes

The International Crimes and International Criminal Court Act criminalizes genocide, crimes against humanity and war crimes, whether or not committed within or outside New Zealand.[1082] The crime of genocide or conspiracy to commit genocide is as defined in article 6 of the Rome Statute of the ICC.[1083] Crimes against humanity are defined in section 10 of the Act along the same line as article 7 of the Rome Statute of the ICC.[1084] War Crimes are defined with reference to article 8(2)(a) of the Statute pertaining to grave breaches under the four Geneva Conventions; article 8(2)(b) which covers "other serious violations of the laws and customs applicable in international armed conflict"; article 8(2)(c)"which relates to armed conflict not of an international character involving serious violations of Article 3 common to the four Geneva Conventions and article 8(2)(e) of the Statute which relates "to other serious violations of the laws and customs applicable in armed conflict not of an international character. New Zealand has not ratified the 2010 amendments to the Rome Statute on war crimes and the crime of aggression.[1085] Whenever New Zealand ratifies the amendments, it would have to amend its implementing legislation to reflect the amendments to war crimes and incorporate the crime of aggression.

Further section 11(4) saves the existing war crimes provisions under the Geneva Conventions Act by expressly providing that "nothing in this section will limit the operation of section 3 of the Geneva Conventions Act 1958 (which makes a grave breach an offence under New Zealand Law)".[1086] A number of Commonwealth States have implemented the Geneva Conventions into domestic legal systems and they have adopted different means in retaining the offences created under the Act. New Zealand retains the grave breaches regime and offences by providing for a retaining clause in the ICC implementing legislation.

[1082] International Crimes and International Criminal Court Act, ss 9-11.
[1083] Ibid, s 9
[1084] Ibid, s 10
[1085] Article 8, Para 2 (e) United Nations Reference: C.N.533. 2010. Treaties-6, and Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression in article 8 bis United Nations Reference: C.N.651. 2010. Treaties-8
[1086] International Crimes and International Criminal Court Act, s 11(4)

Other crimes codified by the International Crimes and International Criminal Court Act are offences against the administration of justice in sections 15-21 of the Act. They include: corruption of a judge, registrar and deputy registrar;[1087] bribery of a judge, registrar or deputy registrar;[1088] corruption and bribery of ICC officials;[1089] giving of false evidence before the ICC or in relation to request from the ICC; [1090] fabricating evidence before the ICC; [1091] "conspiracy to obstruct, prevent, pervert or defeat the course of justice of the ICC"; [1092] interference with witnesses or officials of the ICC. [1093] New Zealand's approach to the implementation of the crimes against the administration of justice of the ICC, is replicating the provisions of article 70(1) in its implementing legislation as against extending equivalent domestic offences application to the ICC regime.

Aside from the offences, the International Crimes Act incorporates several provisions of the Rome Statute of the ICC on general principles of criminal law.[1094] The general principles incorporated in the Act include: individual criminal responsibility, [1095] exclusion of jurisdiction over persons less than eighteen years,[1096] responsibility of commanders and superiors,[1097] exclusion of statutory limitations over crimes[1098] and mental element of crimes.[1099] The Act provides for the application of New Zealand law on general principles of law in criminal law.[1100] It avails persons in proceedings a choice of either relying on defences available in New Zealand or under international law.[1101] In the event of conflict between the provisions of international law and domestic law on the application of defences, the Act expressly provides that the provisions of international law will prevail.[1102] The Act places the task of resolving conflicts and inconsistencies in available defences open to an accused person on domestic courts.

Section 12 of New Zealand's International Crimes and International Criminal Court Act contains identical provisions with the provisions of section 12 of Trinidad and Tobago International Crimes and International Criminal Court Act on the application of general principles of criminal law in domestic proceedings over the core crimes contained in the Rome Statute of the ICC. Both Acts also adopt similar approach in addressing the issue of immunity. Article 27 of the Rome Statute of the ICC

[1087] International Crimes and International Criminal Court Act, s 15
[1088] Ibid, s 16
[1089] Ibid, s 17
[1090] Ibid, s 18
[1091] Ibid, s 19
[1092] Ibid, s 20
[1093] Ibid, s 21
[1094] Ibid, 12(1) (a)
[1095] Rome Statute of the International Criminal Court Act, article 25
[1096] Ibid, article 26
[1097] Ibid, article 28
[1098] Ibid, article 29
[1099] Ibid, article 30
[1100] International Crimes and International Criminal Court Act, s 12(1) (b).
[1101] Ibid, s 12(1) (c)
[1102] Ibid, s 12(3)

is replicated in section 31 of New Zealand's International Crimes and International Criminal Court Act with slight modifications.[1103] New Zealand's implementing legislation provides that the immunities, which a person enjoys as a result of the person's official capacity, will not preclude the provision of assistance to the ICC or the person's arrest and surrender to the ICC. The foregoing provisions are however, subject to sections 60 and 120 of the Act which in turn addresses situations where an ICC request for surrender is in conflict with New Zealand's obligations to another state. Where this is the case, the Minister may postpone the request for surrender, until the ICC makes a determination as to (i) whether the obligation to that other state falls within article 98 agreements and (ii) whether or not the ICC intends to proceed with the request.[1104]

In addition, section 12(4) of the Act, provides that courts in New Zealand may apply the Elements of Crime in proceedings in respect of the core crimes. The use of "may" indicates that reference to the Elements of Crime is based on the judges' discretion. In both Kenya[1105] and the United Kingdom[1106] the Elements of Crime is a mandatory interpretive document in domestic proceedings before their respective national courts. The consent of the Attorney-General is required before any suit can be instituted in a court in New Zealand in relation to the core offences[1107] or the offences against the administration of justice of the ICC.[1108] The requirement of the Attorney General's consent to the instituting proceedings under the Act, acts as a restraint on the unqualified use of universal jurisdiction.

5.3.2.3. Jurisdiction

The jurisdiction of New Zealand courts over international crimes is laid out in section 8 of the Act. The provisions of section 8 cover both the temporal and extra-territorial jurisdiction of New Zealand domestic courts over crimes against humanity, genocide or war crimes. The Act provides that proceedings may be instituted in New Zealand for genocide which occurred on or before 28 March 1979. Proceedings for crimes against humanity may be instituted under the Act where they occurred on or before 1 January 1991. With respect to war crimes, the Act prescribes punishment for acts which occurred after the commencement of the Act.[1109] The date for the temporal jurisdiction of the crime of genocide relates to the day that New Zealand adopted the Genocide Convention.[1110]The temporal jurisdiction of crimes against humanity is set on the date the Yugoslavia Tribunal was vested

[1103] See Trinidad and Tobago's International Crimes and International Criminal Court Act, s 31.
[1104] International Crimes and International Criminal Court Act, s 31 read in conjunction with ss 66 and 120.
[1105] International Crimes Act 2008, s 7(5); Australia's International Criminal Court (Consequential Amendments) Act 2002 Act No. 42 of 2002, is silent on the general principles of criminal law including defences.
[1106]United Kingdom International Criminal Court Act 2001, s 50(2)(a)
[1107] International Crimes and International Criminal Court Act, 13.
[1108] Ibid, s 22
[1109] Ibid, s 8(4)
[1110] The Convention for the Prevention and Punishment of Genocide 1948

with jurisdiction. Trinidad and Tobago in setting the temporal jurisdiction of its courts over the core crimes of genocide, crimes against humanity and war crimes, adopted this approach. This method vests domestic court with retrospective jurisdiction over the core crimes. When the United Kingdom enacted its International Criminal Court Act in 2001, the courts were vested with prospective jurisdiction, consequently United Kingdom Courts could not exercise jurisdiction over war crimes and genocide committed in the 1990s. The Coroners and Justice Act, 2009, has now bridged the gap created by the temporal jurisdiction of the United Kingdom courts.[1111]

In addition proceedings may be instituted over the core crimes irrespective of the nationality of the accused person; whether any of the acts constituting the offence occurred in New Zealand or whether the accused person was in New Zealand at the time the offence occurred or at the time the decision to charge the accused was made.[1112] New Zealand's ICC implementing legislation, incorporates universal jurisdiction in a broad form over the core crimes. The approach taken under New Zealand's implementing legislation is in contrast to the ICC implementing legislation of Canada which requires a connection with the prosecuting state and the alleged perpetrator on grounds of citizenship or permanent residence status, employment, custodial state of the victim or the presence of the alleged perpetrator in the state.[1113] In contrast to the broad universal jurisdiction under the Act for the core crimes, with respect to proceedings against the administration of justice, New Zealand adopts a more restricted form of universal jurisdiction requiring a connection such as the citizenship of the perpetrator, the commission of the acts or omissions in New Zealand or on board a registered ship or aircraft in New Zealand.[1114]

5.3.2.4. Cooperation with the ICC

The New Zealand International Crimes and International Criminal Court Act incorporates extensive provisions on the cooperation regime between the ICC and New Zealand. It sets out in details, possible areas of cooperation in the investigation and prosecution of the core ICC crimes. The forms of assistance includes: request for the arrest and surrender of persons to the ICC (the Act provides for a distinct procedure when dealing with request for arrest and surrender), identification of persons and location of items, the taking and production of evidence, the questioning of any person being investigated or prosecuted, service of documents, facilitating the voluntary appearance of persons as witnesses or experts, the temporary transfer of prisoners, examination of places and sites, executing searches and seizures, provision of records and documents, protection of victims and witnesses and

[1111] Coroners and Justice Act 2009, C.25
[1112] International Crimes and International Criminal Court Act, s 8(1)
[1113] See Crimes Against Humanity and War Crimes Act C. 24 2000, s 8 (Canada's implementing legislation which provides extra territorial jurisdiction over the core crimes on grounds of citizenship or the perpetrator or victim, employment by Canada, a state against whom Canada was engaged in an armed conflict or an ally state in an armed conflict and the presence of the perpetrator in Canada.
[1114] International Crimes and International Criminal Court Act, s 14

the preservation of evidence, identification, tracing and freezing, or seizure of proceeds, property and assets, and any other type of assistance not prohibited by the law of New Zealand with a view to aid the investigation and prosecution of crimes within the jurisdiction of the ICC.[1115] Furthermore, the Act permits the provision of certain kinds of assistance required by the ICC Prosecutor, Pre-Trial and Trial Chambers.[1116]

All requests for assistance are made through the Minister for Foreign Affairs and Trade and transmitted either to the Minister of Justice or the Attorney General (or designate).[1117] New Zealand's ICC implementing legislation has also adopted the approach of other implementing legislation which designates a person to whom requests from the ICC are to be channelled. The choice of whom to designate is a discretionary right exercised by different states. The common practice across most of the ICC implementing legislation in the Commonwealth is to designate the Minister of Justice, the Attorney General or the Minister for Foreign Affairs; accordingly, New Zealand implementing legislation provides for requests to be made through the Minister for Foreign Affairs and Trade and transmitted to the Minister of Justice when the request is in relation to the arrest and surrender of a person and in other cases of request for assistance to the Attorney General. In cases of urgency, request for assistance may be made using any means that is capable of generating a written record or through International Criminal Police Organisation or a regional organisation. A formal request must however be made as soon as practicable to the Attorney-General or Minister of Justice depending on who handles the request.[1118] Requests for cooperation must be executed in accordance with the procedure specified by the ICC Act[1119] and the Attorney General or Minister of Justice must confer with the ICC on any problem arising with the execution of a request.[1120]

5.3.2.4.1. Arrest and Surrender

The ICC Act codifies in Part 4, the legal and normative framework for arrest and surrender. The ICC may make requests for arrest and surrender to New Zealand for a person who has either been convicted by the ICC or against whom the ICC Pre-Trial Chamber has issued a warrant of arrest or a provisional warrant of arrest .[1121]

[1115] Ibid, s 24(1)(a)
[1116] Ibid, s 24(1)(b)
[1117] Ibid, s 25
[1118] Ibid, s 26
[1119] Ibid, s 27
[1120] Ibid, s 28
[1121] Ibid, s 32

5.3.2.4.1.1. Arrest Procedure

Requests for arrest excluding provisional arrest warrants are made to the Minister of Foreign Affairs and Trade (authorised diplomatic channel) and transmitted to the Minister of Justice (Minister) who has a discretionary power to notify or refuse to notify a district court judge to issue an arrest warrant. The grounds on which the Minister may decline to inform the district court judge are not stated in the Act. The Act is silent on whether the exercise of the Minister's discretion is subject to judicial review or not. However, other jurisdictions such as Australia expressly provide in their implementing legislation that the exercise of the Attorney General's discretion to institute proceedings is not subject to judicial review.[1122] Requisite supporting documents, which must include information describing the person sought, probable location and an authenticated copy of the warrant of arrest must accompany the Minister's notice to the district court judge.[1123] These requisite documents are not explicitly identified in the Act. The specifics and nature of the necessary documents are gleaned from the provisions of the Rome Statute in articles 91 and 92. The district court judge on receipt of the notice must issue a warrant of arrest in the prescribed format on behalf of the ICC, if based on information received, the district court judge is satisfied that the person is in or may come to New Zealand and is convinced that the person is the same being sought by the ICC.[1124]

A district court judge may in the absence of a formal request for arrest and surrender from the ICC issue a provisional warrant of arrest against a person, if on the basis of information presented the judge can determine that there is an existing warrant of arrest or judgment of conviction in respect of a convicted person, the person wanted by the ICC is in New Zealand or may come into New Zealand and as a result of expediency an arrest warrant has to be issued urgently.[1125] Where a district court judge issues a provisional arrest warrant against a person, the applicant for the warrant must promptly present a report detailing the issuance of the warrant and requisite documents to the Minister. The Minister may on receipt of the report discontinue proceedings and order the cancellation of any warrant issued. The Act neither specifies the grounds on which the Minister may discontinue the proceedings nor place an obligation on the Minister to provide justification for any action taken to the district court judge. What is required of the Minister is to inform the district court judge of any steps taken in respect of the warrant.[1126] Where a person has been arrested on a provisional arrest warrant, proceedings can only continue upon notice served by the Minister informing the district court judge that a formal request for arrest and surrender has been received in respect of the person. The district

[1122] Australian Criminal Code Act No. 12 of 1995, Division 268.122
[1123] International Crimes and International Criminal Court Act, s 33
[1124] Ibid, s 34
[1125] Ibid, s 36
[1126] Ibid, s 37

court judge must set a date for receipt of notice from the Minister, failing which it either extends the date or orders the discharge of the person.[1127]

An arrested person must be brought before a district court promptly unless the person is discharged. The district court may remand the person on bail, although bail is not as of right under the Act. In determining whether to grant bail, the district court takes the following into consideration: the gravity of the alleged offence, the presence of urgent and special circumstances that justify the grant of bail and whether necessary safeguards exist to ensure that New Zealand can fulfil its responsibility to surrender the person to the ICC.[1128]

5.3.2.4.1.2. Surrender Procedure

The Act places an obligation on the district court judge to determine whether or not persons who have been brought before it as a result of a request from the ICC are eligible for surrender. The district court judge in determining eligibility for surrender must have seen in court a copy of the warrant of arrest or judgment of conviction issued by the ICC, the person named in the warrant or judgment of conviction is the same person to whom the ICC request relates and the person's arrest was effected with regards to due process and a respect for his rights and there are no existing restrictions placed on the person's surrender.[1129] However, the person who has suffered the infraction can only raise a violation of due process and rights of the person.[1130] From the provisions of the Act, an inference may be drawn that a high court judge in determining a person's eligibility for surrender may otherwise refuse surrender where infractions and violation of due process have been properly raised in the proceedings. The Rome Statute precludes the Court from ascertaining whether the warrant of arrest issued by the ICC is valid.[1131] A person may however consent to surrender, thereby obviating the need for a hearing to determine eligibility for surrender.[1132] A Person deemed eligible for surrender or who has consented to same is detained under a warrant for detention issued by the district court. The person has within 15 days from the determination to apply for a judicial review. A person whose surrender is not executed within two months may be entitled to request a discharge.[1133]

The Minister is required to make a surrender order against a person whom the district court has issued with a warrant for detention except where there are 'mandatory restrictions" or "discretionary restrictions under section 55 or the Minister has postponed the request[1134] or made a temporary

[1127] Ibid, s 38
[1128] International Crimes and International Criminal Court Act, 39
[1129] Ibid, s 43
[1130] Ibid, s 43
[1131] Rome Statute of the International Criminal Court, Article 59(4)
[1132] International Crimes and International Criminal Court Act, s 45
[1133] Ibid, s 46; see also, s 74
[1134] Ibid, s 56

surrender order.[1135] The onus lies on the Minister to ensure that all surrender orders issued are fulfilled. The Minister can refuse surrender on mandatory or discretionary grounds.[1136] Mandatory grounds for refusing surrender are where there have been prior proceedings against the accused person, the ICC has either determined that the case is inadmissible or has notified the Minister of its decision not to proceed with the request.[1137] The discretionary grounds for refusing surrender by the Minister include: (a) where there are competing requests from the ICC and a non- party State to which New Zealand has a subsisting international obligation over the same conduct [1138] and (b) where there are competing requests between the ICC and a non-party State to whom New Zealand has a subsisting international obligation over different conducts.[1139] The Attorney General may also refuse request for assistance made in relation to offences against the administration of justice in section 23(2) of the Act.

The procedure for dealing with competing requests from the ICC and another state are spelt out in the Act. Where there are competing requests from the ICC and a state party for the arrest and surrender of a person pertaining to the same conduct priority is given to the ICC's request where the ICC has held the case to be admissible or the ICC subsequently rules on the admissibility of the case after being informed of the competing request for extradition.[1140]Where the requesting state is a non-party State, priority is given to ICC's request for surrender if there is no subsisting international obligation to extradite and the ICC has ruled on the admissibility of the case.[1141] In cases where the requesting state is a non-party State to the statute and New Zealand has an obligation under international law to extradite to that state, the Minister in making a decision either to surrender to the ICC or extradite to the state, will take into cognisance, the following issues: (a) the respective dates of the requests, (b)the interests of the requesting state (including the place of the commission of the offence and the nationality of the perpetrator and victim) and (c) the possibility of a prospective surrender by the state to the ICC .[1142] The Minister in deciding whether to surrender or extradite where there are competing requests from the ICC and one or more states for different conducts and New Zealand has a subsisting international obligation to extradite to one or more states, will take these same issues into consideration.[1143] These provisions are a reproduction of article 90 of the Rome Statute of the ICC.

The Act provides for appeals against a decision of the district court holding in determining eligibility for surrender. Appeals may be brought within 15 days against the district court's decision by any of

[1135]Ibid, s 49 on rules governing issuance of temporary surrender order
[1136] Ibid, s 47
[1137] International Crimes and International Criminal Court Act, s 55(1) read together with ss 57(4), 59(3), 60(2) and section 66(3)
[1138] International Crimes and International Criminal Court Act, s 55(2)(a) read together with s 63(4)
[1139] International Crimes and International Criminal Court Act, s 55(2)(b) read together with s 64(3)
[1140] Ibid, s read together with s 61
[1141] Ibid, s 63(1) –(3) read together with s 61
[1142] Ibid, s 63(4) –(6) read together with s 61
[1143] Ibid, s 64

the parties on grounds of law to the high court,[1144] except where the person whose surrender is sought waives the right to appeal.[1145] The high court in hearing the appeal may reverse, confirm, vary the decision or refer the case back to the high court for reconsideration or rehearing.[1146]

Aside from the above provisions on arrest and surrender, the Act provides for the surrender or transfer of persons to the ICC or another state en route to New Zealand. The ICC must submit a request for transit along with requisite information identifying the person being transferred, a statement of facts and a copy of the warrant for arrest and surrender and any other information sought by the Minister.[1147] Where an unscheduled landing is made, the ICC may be obliged to make request for transit of the transferee.[1148]

5.3.2.4.1.2. Domestic Procedure for Other Types of Cooperation

The Rome Statute of the ICC provides that states must have domestic measure under their laws to comply with requests from the ICC under article 93 of the Rome Statute. Consequently most implementing legislation incorporates extensive measures for complying with requests from the ICC. The domestic procedures for these varied forms of assistance other than those dealing with arrest and surrender are contained in part V of the Act. The Attorney General can refuse a request for assistance under Part V of the Act on mandatory and discretionary grounds. The mandatory grounds for refusal are: where the ICC refuses the conditions attached to implementing requests, the ICC has ruled the case to which the request relates inadmissible and the ICC has indicated its desire not to proceed with the requests.[1149] The Attorney General's discretion under the Act to refuse a request for arrest and surrender may be exercised to protect national security or third party information, where there are competing requests from the ICC and a non-party State to the ICC pertaining to the same or different conduct.[1150]

The Attorney-General may also postpone the execution of requests from the ICC pending the resolution of certain issues such as where there is an ongoing investigation and the execution of the request would interfere with same,[1151] a ruling on admissibility is pending before the ICC,[1152] competing requests from the ICC and a state to which New Zealand is under an international

[1144] Ibid, s 67
[1145] Ibid, s 70
[1146] Ibid, s 71
[1147] Ibid, s 136(1)-(3)
[1148] Ibid, s 136(6)
[1149] Ibid, s 114(1)
[1150] Ibid, s 114(2)
[1151] Ibid, s 112
[1152] Ibid, s 113

obligation,[1153] the request was made under article 93(1) of the Rome Statute and section 113(4) applies or a request is made under section 120(2)(c) to the ICC to determine whether article 98(1) applies.[1154]

5.3.3. Impact on Executive Action and Process

New Zealand from the beginning played a crucial role in the establishment of the ICC. Over the years successive governments, have maintained support for the court. New Zealand's continued support and interaction with the ICC has helped in shaping and influencing executive action and processes within New Zealand. The impact of contemporary international criminal courts and tribunals on executive actions and processes is summed below.

First, New Zealand has always actively supported the establishment of contemporary international criminal courts and tribunals. It displayed its support for the ICC prior to its establishment. During the negotiation of the Rome Statute of the ICC, New Zealand, aligned with and chaired a coalition of 67 states known as the body of Like-Minded Group formed at some stage in the negotiation of the Rome Statute of the ICC. The group was at the fore of the fight for the establishment of an independent ICC. Following its establishment, New Zealand has continued to show commitment to the ICC by continuous engagement with the ICC. Many examples abound. A case in point is its continuous and active participation at meetings of the Assembly of State Parties. In 2009, it submitted a joint statement with Canada and New Zealand under an informal coalition known as CANZ States. In their joint statement, they pledged their continued support for the ICC and at the same time acknowledged the fact that the ICC is dependent on states to carry out its role and in this respect, they called on states to take the necessary steps to meet their obligations to cooperate with the court including enacting where necessary domestic measures.[1155]Its support for the ICC is also reflected in financial contributions of both assessed and voluntary contributions to the various funds, seminars and projects of the ICC.[1156]

Second, during the Review Conference of the Rome Statute of the ICC, New Zealand like many other states made certain pledges in respect of supporting the ICC's work, and has consciously worked towards implementing its pledges. One such pledge is promoting the ratification and implementation of the Rome Statute of the ICC. Consequently, New Zealand has continued to provide assistance and support to states in the Asia –Pacific Region towards ratification and implementation of the Rome Statute and its amendments. In 2014, it organised a workshop for the Universality of the Rome Statute

[1153] Ibid, s 114
[1154] Ibid, s 115
[1155] See Statement of Canada, Australia and New Zealand at the Eighth Session of the Assembly of State Parties, International Criminal Court November 19, 2009
[1156] Eighth Report of the International Criminal Court 2012 A/67/308 (2011/2012), Para 108

of the ICC and the Kampala Amendments on the Crime of Aggression in the Pacific Region.[1157] In support of the ratification and implementation of the Rome Statute in the Asia-Pacific region, New Zealand has worked to promote the ratification of the Rome Statute. It has done so in bilateral discussions with representatives of non-party States and has also worked with the Commonwealth Secretariat in respect of Commonwealth related activities on the ICC. [1158]

5.4. Conclusion

Contemporary international criminal courts and tribunals with operational and jurisdictional relevance in the Commonwealth States of Trinidad and Tobago and New Zealand have produced different kinds of impact on judicial, legislative and executive thoughts, actions and processes. These impacts have been brought about by the engagement and subsequent correspondences generated between these courts and the different states. Although in certain instances, the engagements of these institutions and the states have failed to produce any impact on the relevant states.

With respect to the impact of the courts on judicial action and process, the jurisprudence and case law of the Rwandan Tribunal and the ICC have had significant impacts on judicial action in New Zealand in proceedings for determining exclusion of persons from the protection of the Refugee Convention. [1159] While in Trinidad and Tobago contemporary international criminal courts and tribunals have failed to generate any influence on judicial action and process. There has been no resort to the norms and jurisprudence of these courts and tribunals in domestic proceedings in that country. In relation to legislative action and process, contemporary international criminal courts and tribunals have produced significant impacts across the two states examined. Both Trinidad and Tobago and New Zealand have enacted legislation to implement their obligations arising from the Rome Statute. Trinidad and Tobago was the first country in the Commonwealth to ratify the Rome Statute of the ICC. New Zealand in addition has also enacted domestic legislation to cooperate with both the Rwandan and Yugoslavia Tribunals.

The impact of contemporary international criminal courts and tribunals on executive action and process was however much more difficult to tease out from the various incidences of engagement between the executive and the different courts and tribunals. As the courts have had a number of incidences of engagement with the executive arm of government which did not necessarily produce

[1157] See Address by Honourable Judith Collins New Zealand Minister of Justice delivered at the Workshop for the Universality of the Rome Statute of the International Criminal Court and the Kampala Amendments on the Crime of Aggression in the Pacific Region delivered 06 March 2014 at https://www.national.org.nz/news/media-releases/detail/2014/03/06address-to-the-workshop-for-the-universality-of-the-rome-statute-of-the-international-criminal-court accessed 07/08/2014.
[1158] Text of Statement delivered by H.E. Mr. Jim Mclay, Permanent Representative of New Zealand on behalf of CANZ at the Ninth Assembly of the State Parties to the Rome Statute of the International Criminal Court on Monday 6th December 2010, 3.
[1159] Convention Relating to the Status of Refugees 1951 UNTS, Vol. 189, 137

any impact. Trinidad and Tobago and New Zealand have however, made executive decisions influenced by the ICC such as expending money, helping to promote its universality through hosting of conferences and seminars to promote ratification and implementation across the Caribbean and Asia-Pacific regions in the Commonwealth.

In conclusion, this chapter has analysed evidence of the more marginal impacts of contemporary international criminal courts and tribunals on judicial, legislative and executive thoughts, actions and processes in Trinidad and Tobago and New Zealand. The evidence reveals varying degrees of influence of international criminal courts and tribunals within the Commonwealth.

CHAPTER SIX

FACTORS MINIMISING AND MAXIMISING THE IMPACT OF CONTEMPORARY INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS IN THE COMMONWEALTH

6.1. Introduction

The reception and subsequent deployment of the norms and jurisprudence of contemporary international criminal courts and tribunals are often maximised or inhibited across states by the presence of varied factors. The coalescence of these factors in states which range from high/poor visibility of contemporary international criminal courts and tribunals, engagement/non-engagement by these bodies with states, the incorporation/ non-incorporation of international humanitarian law norms across states in the Commonwealth and the role of states, institutions and Non-Governmental Organisations (NGOs) in the articulation of the norms and jurisprudence of these courts and tribunals; have produced major, marginal or in some instances no impacts on states within the Commonwealth.

This chapter will examine these identified factors under two broad streams, those that have maximized the impact of contemporary international criminal courts and tribunals and those that have impeded the influence of international criminal courts and tribunals in the Commonwealth. It will also attempt to evaluate the role organisations and institutions have played in the deployment and articulation of the norms and jurisprudence of contemporary international criminal courts and tribunals in the Commonwealth.

6.2. Assessing the Overall impact of Contemporary international Criminal Courts and Tribunals within Conflict, Post-Conflict States and Non-Conflict States

Contemporary international criminal courts and tribunals have exerted considerable levels of mixed influences ranging from major to marginal and in certain cases insignificant on judicial, legislative and executive thoughts, processes and actions in conflict, post -conflict and non- conflict states in the Commonwealth. For example, contemporary international criminal courts and tribunals have failed to generate any influence on judicial action and process in Sierra Leone and Trinidad and Tobago. There has been no resort to the norms and jurisprudence of these courts and tribunals in domestic proceedings in these states. Likewise in Nigeria, the ICC is as of yet to make impacts on the country's judicial processes and action, but there is yet a slim chance of that happening, if Nigeria is able to go through with its internal processes regarding the ICC implementation Bill, and begin prosecution of Boko Haram members and all those complicit in the various crimes attributed to them, some level of marginal or major impact may be recorded on judicial action and process in Nigeria.

The high courts in Kenya, have in two cases before it articulated the norms of contemporary international criminal courts and tribunals. Albeit it in marginal levels.[1160] Although, in Rwanda, national courts are yet to deploy the norms and jurisprudence of international criminal courts and tribunals in proceedings, however, the Rwandan Tribunal has brought about judicial and legislative reforms in Rwanda. It is anticipated that as cases transferred from the Rwandan Tribunal to national courts in Rwanda proceed, the Rwandan judiciary will be guided by the norms and jurisprudence of contemporary international criminal courts and tribunals.[1161] The results are however different in Uganda, although the norms and jurisprudence of contemporary international criminal courts and tribunals have not been deployed in domestic proceedings, however, the establishment of the International Crimes Division (ICD) is attributable to the role of the ICC.[1162] Uganda in a bid to give effect to the principle of complementarity enshrined in the Rome Statute of the ICC created the ICD which is currently trying the case of Kwoyelo.

In Canada, Australia, United Kingdom and New Zealand, contemporary international criminal courts and tribunals have generated significant impacts on judicial actions with respect to proceedings for determining exclusion of persons from the protection of the Refugee Convention.[1163] As a result of the nature of the exclusionary grounds of crimes against humanity and war crimes, (which are subject of international criminal law and the injunction in article 1F(a) that resort should be had to international law in defining these crimes and attributing criminal liability,) judges in domestic legal systems have placed reliance on the jurisprudence of both the Yugoslavia and Rwandan Tribunals, and the ICC. The domestic courts have also placed extensive reliance on the jurisprudence of fellow Commonwealth States in making judicial decisions. However, when the impact of judicial action and process is viewed against the prism of criminal prosecution the result pales in insignificance. Other than Canada; Australia, New Zealand and United Kingdom have not engaged in criminal prosecution under their respective ICC implementing legislation. The United Kingdom has had a severe case of inaction. Despite amendments providing for the retrospective application of the International Criminal Court Act 2001 to 1st January, 1991 by the Coroners and Justice Act 2009,[1164] domestic prosecutions have not been carried out in respect of the four genocide suspects whose extradition earlier sought by Rwanda gave rise to the seminal case *R v. Brown*.[1165] Domestic prosecutions for serious crimes in the

[1160] In Kenya see the cases of J*oseph Kimani Gathungu v Attorney-General & Five Others*, (2010) 5 eKLR.
[1161] *The Prosecutor v Jean-Bosco Uwinkindi* Case No. Rwandan Tribunal 2001-75-Rule 11bis Decision on Prosecutor's Request for Referral to the Republic of Rwanda.
[1162] Linda Carter, 'The Failure of the ICC: Complementarity as a Strength or Weakness?' (2013) 12 Washington University Global Studies Law Review, 451, 462 ascribing some of the developments in Uganda such as the ICD to partly the complementarity regime
[1163] Convention Relating to the Status of Refugees 1951 UNTS, Vol. 189, 137
[1164] Coroners and Justice Act 2009, C.25
[1165] *Vincent Brown aka Vincent Bajinja, Charles Munyaneza, Emmanuel Nteziryayo, Celestin Ugirashebuja v The Government of Rwanda, The Secretary of State for the Home Department* (2009) EWHC 770 (Admin); (2009) All ER (D) 98 (Apr)

United Kingdom have only taken place in relation to military personnel. [1166] Information has come to light that in 2010, the Crown Prosecution Service on behalf of the Counter Terrorism Command at the Metropolitan Police made four applications for evidence from the Rwandan government which were all turned down. However, the Crown Prosecution Service and the Rwanda government have initiated fresh extradition attempts for the four men and a fifth, Celestin Mutabaruka in March 2014. The Crown Prosecution Service added that they are working on behalf of the Rwandan authorities to have the suspects extradited. [1167]

Turning to the impact of contemporary international criminal courts and tribunals in the Commonwealth; these courts have made major impacts on legislative action and process as Australia, Canada, United Kingdom and New Zealand have all enacted legislation to incorporate obligations arising from the statutes of both the Yugoslavia and Rwandan Tribunals, and the ICC.[1168] Aside from these states a number of other states in the Commonwealth such as Cyprus, Kenya, Malta, Samoa, South Africa Trinidad and Tobago and Uganda have all adopted implementing legislation with specific regard to the ICC.[1169] The path to incorporation and the process itself have been both different and varied interspersed with local peculiarities and variables. Some states in the Commonwealth have led the vanguard and are at the fore of ICC universal ratification and implementation efforts, while other states within the Commonwealth have had to be prodded to engage with the system.[1170]

[1166] In 2006, the United Kingdom prosecuted Corporal Donald Payne a member of the British Military of war Crimes under the United Kingdom International Criminal Court Act. He pleaded guilty and was convicted of inhumane treatment of civilians in Iraq.

[1167] Jon Manel, 'Rwanda "refused UK police request" over genocide suspects, BBC News at www.bbc.co.uk/news/uk-25004725 accessed 12/01/2015.

[1168] For instance Australia enacted the International War Crimes Tribunals Act No. 18 1995, the International Criminal Court Act N0. 41 of 2002 and the International Criminal Court (Consequential Amendments) Act 2002 Act No. 42 of 2002 which introduced substantial amendments into Australia's Criminal Code incorporating the crimes contained in the Rome Statute of the ICC; The United Kingdom introduced two main legislation to reflect the international Criminal court and tribunal regime these are the United Nations (International Tribunal) (Rwanda) Order 1996 Statutory Instrument and the International Criminal Court Act 2001 C.17; Canada passed the Crimes Against Humanity and War Crimes Act, 2000 C. 24 which incorporates Canada's obligations under the Rome Statute and introduces amendments in key legislation such as the Extradition Act 1999 C.18; Mutual Legal Assistance in Criminal Matters Act 1988 C.37 and Canada's Witness Protection Programme Act 1996, C.15; Sierra Leone on its part enacted Special Court Agreement, 2002(Ratification) Act 2002, Supplement to the Sierra Leone Gazette VOl . CXXXIII No. 22 (25 April 2002) and the Residual Special Court for Sierra Leone Agreement (Ratification) Act Supplement to the Sierra Leone Gazette Vol. CXLIII, No.6 dated 9th February 2012 to give effect to the agreement between the Sierra Leonean government and the United Nations establishing the Special Court and the Residual Special Court for Sierra Leone; Kenya, Trinidad and Tobago, Uganda and New Zealand have also enacted national legislation to implement the Rome Statute of the ICC into their respective domestic legal systems.

[1169] See examples of Commonwealth States that have enacted implementing legislation include: South Africa in 2002 passed the International Criminal Court Act No. 27 of 2002; Samoa in 2007 passed the International Criminal court Act 2007, No. 26.

[1170] Australia, Canada, New Zealand and United Kingdom have expended energy in promoting the universality of the Rome Statute of the ICC.

The impact on executive thoughts, actions and processes vary considerably across the Commonwealth from major to marginal. For instance in Kenya, because of ongoing proceedings at the ICC against the Deputy President (until the dismissal of charges also included the President), the executive arm of government has been affected to a great degree. As a result of this the executive arm of government have been involved and participated in the proceedings before the ICC at The Hague. Equally, the ICC has also to varying degree influenced executive actions and process in Uganda. This is illustrated in the following executive acts: the self-referral of the situation in Uganda to the ICC; the introduction of the International Criminal Court Act and the hosting of the 2010 Review Conference of the ICC. With regards to Sierra Leone, the Special Court has had both marginal and major impacts on executive action and process in Sierra Leone. An example of a marginal impact is the entering into specific agreements and Memoranda of Understanding,[1171] while an example of a major impact was the high levels of cooperation and assistance extended to the Special Court in executing its mandate by successive executive governments in Sierra Leone. Turning to Nigeria, although, it is still early days, the executive arm of government has so far cooperated fully with the Office of the Prosecutor (OTP) of the ICC in its preliminary examination on Nigeria. The Prosecutor of the ICC has alluded to this in her reports. [1172]

Australia, Canada, New Zealand, Trinidad and Tobago and the United Kingdom have made executive decisions such as expending money on these courts and tribunals and with particular emphasis on the ICC, helping to promote its universality through hosting of conferences and seminars to promote ratification and implementation across different regions in the Commonwealth.

6.3. Factors that have maximised the Impact of Contemporary International Criminal Courts and Tribunals in the Commonwealth

A number of key factors have helped to facilitate the major or marginal influence of international criminal courts and tribunals within the Commonwealth. These factors will be treated seriatim.

The persistent engagement through outreaches and capacity building programmes by contemporary international criminal courts and tribunals facilitated the generation of impacts on Rwanda and Sierra Leone. Although, the Rwandan Tribunal started late in engaging with Rwanda while the Special Court on the other hand began engaging with Sierra Leoneans early on immediately the court began formal operations through outreaches, town hall styled meetings and programmes to create awareness about the court and transitional justice issues amongst Sierra Leoneans. Nonetheless, their engagements have produced different impacts across both states as a result of sharp differences in

[1171] The Special Court entered into MOUs with both the Sierra Leonean Police Force and Prison Service to regulate the secondment and rotation of security and correctional staff from the respective national institutions to the Special Court.
[1172] International Criminal Court Report on Preliminary Examinations Activities 2012, November 2012, Para 93.

objectives and programmes carried out in the respective states. Following the decimation of Rwanda's legal and judicial system in the aftermath of the genocide, the Rwandan Tribunal's overarching objective was to provide training and capacity development programmes to rebuild and develop the legal system. While the Special Court placed emphasis on outreaches and creating awareness amongst Sierra Leoneans. Although in part, the work of the Special Court in this regard was enhanced by its physical location within Sierra Leone. This was absent in Rwanda. However, with the establishment of the Information and Documentation Centre (which has become the hub of the Rwandan Tribunal's programmes) in Kigali, the Rwandan Tribunal has been able to reach out to various segments of Rwandan Society.

The establishment of the Special Court a mixed tribunal was widely received amidst claims that it would positively impact on the Sierra Leone because of its structure which provided for a synergistic mix of foreign and domestic staff working together. It was thought at the time that this interaction between international and domestic staff would foster cross-fertilization of law. Although, both national and international legal professionals including judges served together, however, in terms of generating real time impact or fostering cross-fertilization is doubtful as the judges were already at the peak of their judicial careers when they were appointed and there is no evidence of their return to the national judiciary. However, with respect to other staff, such as security and correctional personnel seconded from the relevant national institutions in Sierra Leone, there clearly were impacts, as they also benefitted from training and were exposed to acceptable international standards of practice.

The ICC has tried to close the divide between The Hague and states by establishing field offices across the various situation countries to act as a link between the court and the people.[1173] The offices have been quite active in outreaches and programmes in association with NGOs working on the ground. These activities have been largely confined to creating awareness on the court and transitional justice issues. The ICC has carried out few seminars across the globe. There is scope for the ICC to do more and it has been suggested that the ICC in enhancing the notion of "positive complementarity" can play diverse roles within states[1174]such as assisting states with the drafting of laws, organizing training for different sections of the legal profession including the members of the bar and bench; development of manuals on best practices (the ad hoc tribunals have engaged in this); and addressing Parliamentarians and government officials who often set off the process of domestic investigations

[1173] Press Release ICC The Registrar inaugurates the Field Office in Bangui ICC-CPI- 20071018-253, The establishment of the ICC Field Office in Bangui on 18th October 2007, brought to five the number of Field offices in Africa which include Kampala, Uganda; Bunia and Kinshasha in Democratic Republic of Congo and Abéché in Chad. Following exchange of letters between the Registrar of the ICC and the Government of Kenya in 2011, the ICC established a Field Office in Nairobi, Kenya.

[1174] See Rajan Menon, Pious Words, Puny Deeds, "The International Community" and Mass Atrocities, 2 (2009) 3 Ethics & International Affairs 235, commenting on the necessity of the ICC engaging domestic systems.

and prosecutions.[1175] The embracing of these roles by the ICC is important as it has been opined that the achievement of the ICC will also be appraised against its capacity in strengthening domestic legal systems.[1176] It should be noted that the capacity development role of the ICC is not explicitly stated in the court's mandate, is compatible with the objective of complementarity the cornerstone of the ICC.[1177]

A second vital factor that has contributed to the impact of contemporary international criminal courts and tribunals in the Commonwealth, is the role played by Non-Governmental Organisations (NGOs), institutions and states actors in the deployment and articulation of the norms and jurisprudence of international criminal courts and tribunals. With regards to NGOs, they have served as a vital conduit through which the norms and jurisprudence of international criminal courts have percolated within domestic legal systems. Their role is highlighted by their emphasis and focus on ratification of the Rome Statute of the ICC in the Commonwealth. The NGOs through publicity campaigns, training programmes have educated government officials and helped in creating an environment conducive for the fostering and engagement of states with contemporary international criminal courts and tribunals in the Commonwealth. This has led to a number of states ratifying the Rome Statute of the ICC.

Two NGOs that have been quite active in this area are the Coalition for the International Criminal Court (CICC)[1178] and Parliamentarians for Global Action.[1179] The CICC operates globally through national coalitions in different countries helping to advocate for the ratification or accession and implementation of the Rome Statute of the ICC. The CICC has gone about this through the adoption of a focus country for' universal ratification campaign'. The organisation Parliamentarians for Global Action campaigns for the universal implementation of the Rome Statute of the ICC across the globe by working with national parliamentarians and encouraging them to take action within their national parliaments. It focuses on parliamentarians (who are constitutionally empowered to pass laws) and provides them with technical support so that where there is political will to pass an implementing legislation; there would also be the technical expertise to do so. In Nigeria, the Parliamentarians for Global Action provided technical assistance on the drafting of the Bill to implement the Rome Statute into law using the Commonwealth Model Law as a guide.[1180]

[1175] Jeremy Sarkin, 'Enhancing the Legitimacy, Status and Role of the International Criminal Court Globally by Using Transitional Justice and Restorative Justice Strategies', (2011-2012), 6 Interdisciplinary Journal of Human Rights Law, 83 at 91-92; Brian R. Opeskin, 'Constitutional Modelling: The Domestic Effect of International Law in Commonwealth Countries', (2001) 27 Commonwealth Law Bulletin 1242.
[1176] Diane F. Orentlicher, 'Judging Global Justice: Assessing the International Criminal Court', (2003) 21, Wisconsin International Law Journal 495, 507.
[1177] Ibid.
[1178] Coalition for the International Criminal Court available at http://www.iccnow.org accessed 10/08/2014.
[1179] Parliamentarians for Global Action available at http://www.pgaction.org/ accessed 10/08/2014.
[1180] http://www.pgaction.org/campaigns/africa/nigeria.html accessed 10/08/2014.

Moving on from the role of NGOs, the Commonwealth Secretariat has played a vital role in maximising the impact of contemporary international criminal courts and tribunals (for the most part the ICC) in the Commonwealth. This commitment by the Commonwealth to the development of international criminal justice and its norms is reflected in its strengthening of domestic legal systems to prosecute serious crimes through various training programmes for legal professionals and providing states with assistance in legislative drafting. Furthermore, the Commonwealth Secretariat has also drafted a Model Law on the ICC to assist Commonwealth States in fashioning out their own draft legislation.[1181] The Commonwealth Model Law on the ICC served as a guide in Samoa's drafting of its implementing legislation in 2006 which became law in 2007.[1182] In addition, it has also served as a guide in the drafting of Nigeria's Draft Bill on Crimes Against Humanity and War Crimes 2012. As well as drafting a model law, the Commonwealth has hosted and organised several programmes on the ICC.[1183] Furthermore, the relationship between the Commonwealth and the ICC was further strengthened with a Memorandum of Understanding (MOU) entered into at the Commonwealth Law Officers Meeting held in Sydney, Australia on 13th July, 2011. The MOU aims at strengthening and developing cooperation between the ICC and the Commonwealth to jointly support states in ratifying and implementing the Rome Statute of the ICC.[1184]

Concerning the role of states in facilitating the impact of contemporary international criminal courts and tribunals in the Commonwealth, Australia, Canada, New Zealand, Trinidad and Tobago and the United Kingdom have emerged as global and regional leaders in the push for universality of the Rome Statute of the ICC. New Zealand has been quite active in the Asia-Pacific region hosting and organising seminars, conferences and other events promoting ratification and implementation of the Rome Statute of the ICC including the 2010 amendments. Likewise, Trinidad and Tobago has emerged as a regional leader in the Caribbean and energetically promoted the ratification and implementation of the ICC in the region through seminars and workshops. Australia, Canada, New Zealand and the United Kingdom, aside, from assessed contributions payable by state parties to the ICC have over the years financially supported the ICC and its programmes. An examination of the ICC financial statements, reveal that these states are amongst the highest contributors to the purse of

[1181] Commonwealth Model Law, Promotion of International Humanitarian Law within the Commonwealth', (2008) 34 Commonwealth Law Bulletin 663;see also British Red Cross and the United Kingdom Foreign and Commonwealth Office , Promotion of International Humanitarian Law Within the Commonwealth', (2004) 30 Commonwealth Law Bulletin 665.

[1182]International Criminal Court Act No. 26 of 2007; See Olympia Bekou, 'Regionalising International Criminal Court Implementing Legislation: A Workable Solution for the Asia-Pacific Region?', in N. Boister & A Costi (eds.) *Regionalising Criminal Law in the Pacific* (NZACL/ALCPP, Wellington, 2006, 142.

[1183] Press Release 05/10/2010 The ICC President opens Commonwealth meeting on the ICC ICC-CPI-20101005-PR578.

[1184] Press Release 13/07/2011, ICC signs cooperation agreement with commonwealth to jointly support States implementing International criminal law, ICC-CPI-20110713-PR697.

the ICC.[1185] The available evidence from within the relevant states also demonstrates the commitments of these states to promoting international criminal court regime and human rights. So it is not unsurprising that in line with their global role and status, international criminal courts and tribunals have had major impacts across different aspects in these respective states as they seek to live by example. Although, they are not always successful, for instance in the war against terrorism, these states aligning with the United States have often being accused of gross violations that have resulted across Iraq and Afghanistan.

Furthermore, Canada, Australia and New Zealand belong to an informal coalition of state known as "CANZ" and together they have executed projects and programme in support of contemporary international criminal courts and tribunal. Their informal coalition is referenced in speeches made before the Assembly of State Parties to the Rome Statute, where they often issue a joint statement.[1186]

A third factor attributable to contemporary international criminal court and tribunal's influence in states, is that states which enjoy a relative stable democracy with ingrained ideals and values such as respect for the rule of law and human rights are likely to find less resistance to the ideals of contemporary international criminal courts and tribunals as it is generally opined that states with good human rights practices will have no hesitation in ratifying the ICC statute while states with questionable human rights practices will shy away from ratifying the Rome Statute of the ICC.[1187] As a result, contemporary international criminal courts and tribunals have been able to exert greater influences in domestic legal systems where there are considerable levels of conformity with the norms and ideals of international norms. Take the cases of Canada, United Kingdom, Australia and New Zealand they fit this bill. These states were one of the earliest supporters of the ICC, and they all enjoy a stable democracy with ingrained ideals and principles which helped to provide support for ratifying the Rome Statute of the ICC. They are amongst a handful of states that passed implementing

[1185] The following figures in Euros represent the assessed contributions of the following states to the purse of the ICC in 2013; United Kingdom 9,222,092; Australia 3,693,161; Canada 5,313,478; Spain 5,293,983; Japan 19,290,082; Germany 12,715,822; France 9,959, 312; International Criminal Court, Assembly of States Parties ICC/ASP 13/12 Financial Statements for the period 1 January to 31st December 2013Schedule 1 International Criminal Court Status of Contributions as at 31st December 2013(in Euros).

[1186] See: Statement on behalf of Canada, Australia and New Zealand at the Ninth Session of the Assembly of State Parties to the Rome Statute of the International Criminal Court, November 19, 2009; Statement on behalf of Canada, Australia and New Zealand at the Ninth Session of the Assembly of State Parties to the Rome Statute of the International Criminal Court by H.E. Jim McLay, Permanent Representative of New Zealand on Monday 6 December 2010.

[1187] Abadir M. Ibrahim , 'The International Criminal Court in Light of Controlling Factors of the Effectiveness of International Human Rights Mechanisms', (2010-2011) 7 Eyes on the ICC 157, 157-160 . This is not always so For instance Australia voted against the optional Protocol to the Convention against Torture in 2002 adopting the same position as China, Egypt, Libya, Nigeria, Sudan and Japan. Taking same stance with states it was usually in difference to on issues of human rights. In 2007, when the United Nations General Assembly adopted the Declaration on the Rights of Indigenous People, Australia, Canada, United States of America and New Zealand all voted against its adoption and unsurprisingly these states have a large indigenous people. See H. Charlesworth, 'A Negative Vote on Torture Puts Australia in Dubious Company, Sydney Herald (30 July 2002) http://www.smh.com.au/articles/2002/07/29/1027926855706html accessed 10/01/2013.

legislation incorporating the obligations to cooperate with the Rwandan and Yugoslavia Tribunals. These four states in the Commonwealth also undertook a similar approach to ratification and implementation of the Rome Statute of the ICC by first passing an implementing legislation within their respective states before ratifying the Rome Statute of the ICC, distinct from the approach adopted by most other Commonwealth States who have first ratified the Rome Statute of the ICC and later attempted to pass an implementing legislation.

6.3. Factors that have impeded the impact of contemporary international criminal courts and tribunals in the Commonwealth

The low visibility of international criminal courts and tribunals and the remoteness of their physical location have also inhibited their impact across several Commonwealth States. The Rwandan Tribunal came under heavy criticism for its location in Arusha (for which commentators argue that, it created a gulf between the Tribunal and the people of Rwanda whom it was established to serve).[1188] Particularly, in light of the view that war crimes trials are better located in nations where the crimes took place, if the benefits of such trials as healing and reconciliation are to accrue to the people.[1189] Nonetheless, the Rwandan Tribunal tried to overcome this handicap with a number of initiatives and outreaches into Rwanda albeit belatedly. It also succeeded in establishing an office and an Information and Documentation Centre in Kigali and mini centres across high courts in the provinces. On the converse, the location of the Special Court in Sierra Leone was critical to its ability and success in engaging and reaching out to Sierra Leoneans. The ICC has not been as proactive as the Rwandan Tribunal or the Special Court

Tied to low visibility levels are negative perception and attitudes of people to international criminal courts and tribunals. The reaction, acceptance and subsequent internalisation of the norms of an institution is to a great deal dependent on peoples' perception and misgivings towards the institution. This played out in Rwanda in the early days of the establishment of the Tribunal and more recently in Africa and its relationship with the ICC. Within Commonwealth Africa, there is a high level of mistrust for the ICC with the ICC in Africa plagued by issues of public legitimacy and acceptance. The drive towards the formal establishment of the Court enjoyed tremendous support not just globally[1190] but even from within the African continent. This much has been alluded to in an extensive body of literature. In recent times, however, Africa 's support for the court has – as we have seen –

[1188] Kingsley Chiedu Moghalu, 'Image and Reality of War Crimes Justice: External Perceptions of the Rwandan Tribunal', (2002) 26 Fall Fletcher Forum of World Affairs 21,29.
[1189] See Victor Peskin, 'Courting Rwanda the Promises and Pitfalls of the ICTR Outreach Programme', (2005) 3 Journal of International Criminal Justice 950, 951.
[1190] M. Cherif Bassiouni, 'Negotiating the Treaty of Rome for an International Criminal Court', (1999) 32 Cornell International Law Journal.

waned in intensity as virtually every single one of the situation before the court are from the African continent. This has given rise to a growing opposition to the ICC regime from many African leaders and scholars'.[1191] The African Union has emerged as the arrowhead of the regional opposition to the ICC and in its meeting in 2009 it enjoined member states to cease cooperation with the ICC. [1192]

Following the decision of the African Union not to cooperate with the ICC, a number of African states such as Kenya, Djibouti, Malawi, Chad and Nigeria have allowed President Al-Bashir into their territories without arresting or surrendering him to the ICC. In 2011, Malawi had to respond to the ICC why it had failed to honour its obligations under the Rome Statute of the ICC to arrest and surrender President Al Bashir of Sudan. Its response referred to the African Union position wherein it had requested non-cooperation with the ICC over the arrest and surrender of President Al Bashir.[1193]The ICC Chamber found Malawi in breach of its obligations under the Rome Statute of the ICC.[1194]

Closely related is the issue of conflicting visions of international criminal courts and tribunals between victims, and affected communities and international community which all too –often, leads to varied expectations and visions of international criminal court and tribunals. This ultimately leads to a collusion course from the discordant objectives which breed disappointment and frustration, when the seeming goal or vision becomes unrealisable or the institution is being taken in a different direction. This often arises from when the courts and tribunals were established. The different actors have a different vision and objective leading to contestation amongst the different stakeholders with each pursuing its own agenda. The Rwandan's government frustration with the slow pace of trials and the dysfunction with the Rwandan Tribunal led to the creation in the 1990s of specialized units within its high court system and eventually the Gacaca system to try the several thousands of genocide perpetrators.[1195] Competing interests between regional organisations and contemporary international

[1191] His Excellency Paul Kagame, President of the Republic of Rwanda (D. Kezio-Musoke, 'Kagame tells why he is against ICC charging Bashir', Daily Nation, 3 August 2008, online at www.//allafrica.com/stories /200808 /20/57.html ; See also M. Mamdani, 'Darfur, ICC and the New Humanitarian Order: How the ICC Responsibility to Protect" is being turned into an assertion of neo-colonial domination', Pambazuka News (2008) 09-17, Issue 396 (English edn) at http://pambazuka.org/en/category/features/50568 last accessed 10/10/2013. For a balanced treatment of the issue, see, Charles Chernor Jalloh, 'Africa and the International Criminal Court: Collision Course or Cooperation?' 34 North Carolina Central Law Review 203, 209-211 (2011-2012) assessing the veracity of the assertions that the ICC is targeting weak African States; Charles C. Jalloh, Dapo Akande and Max du Plessis Assessing the African Union Concerns about Article 16 of the Rome Statute of the International Criminal Court (2011) African Journal of Legal Studies , Vol. 4, 5

[1192] AU, Assembly/AU/Dec.245 (XIII)

[1193] President Bingu Wa Mutharika www.sudan.tribune.com/spip/php?iframe&page=imprimable&id_article=40711 last accessed 08/10/2013.

[1194]In the *Prosecutor v Omar Hassan Ahmad Al Bashir,* Decision Pursuant to Article 87(7) of the Rome Statute of the Failure of the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, No. ICC-02/05-01/09 12 December 2011.

[1195] See the International Panel of Eminent Personalities (IPEP), Report on the 1994 Genocide in Rwanda and Surrounding Events 18.35 (July 7, 2000) reprinted in 40 ILM 213 (2001).

criminal courts and tribunals has also stymied the influence of these institutions in the Commonwealth. This same conflict is recorded in the relationship between the African Union and the ICC. To the extent that states are placed in a position either to respect their obligations to the ICC or to the African Union.

Another factor that is responsible for the non-deployment of international criminal justice norms and jurisprudence in domestic systems across the Commonwealth is the fact that although judges are appointed from domestic systems, they often end up moving from one international tribunal or court to the other.[1196] They are less likely to return to domestic systems to work within the judiciary. More often judges appointed to international criminal courts and tribunals are often senior judges at the peak or tail end of their careers at their domestic legal system or retiring. An examination of the judges appointed from the three main international criminal courts and tribunals namely the Rwandan Tribunal, ICC and the Special Court from the Commonwealth supports this point. Of the number of judges appointed by the ICC, only two have returned to the judiciary in the domestic system, Judge Harding of Ireland who resigned in 2006 and Lord Justice Fulford of the English Court of Appeal.

The non formal domestication of relevant international law treaties into domestic law by states also inhibits the impact made by contemporary international criminal courts and tribunals in states across the Commonwealth. The non-incorporation of these treaties within domestic system means that they are not recognised in these states and members of the legal profession and those who ought to be familiar with the laws in the course of their day to day activities are unaware of same; despite, the active role played by NGOs and institution in this regards. Given the limited number of cases, international criminal courts and tribunals can realistically prosecute; states ought to be at the vanguard of prosecuting same. However, some of these states may be genuinely constrained by the absence of necessary legislation needed to give effect to these crimes. As a result, states may genuinely be inhibited in their ability to implement requisite legislation to give effect to the Rome Statute within their domestic system due to a number of factors such as conflict with constitutional provisions[1197] and the lack of relevant technical expertise to engage in legislative drafting[1198]which is a pain-staking process that needs the requisite skills to undertake. Beth Simmons also' argues that

[1196] Daniel Terris, Cesare P.R. Romano and Leigh Swigart, 'Toward a Community of International Judges', (2008) 30 Loyola of Los Angeles International & Comparative Law Review 419, 429

[1197] Helen Duffy, 'National Constitutional Compatibility and the International Criminal Court', (2001) 11 Duke Journal of Comparative and International Law 5.

[1198] Mary Victoria Refelō Fa′asau, 'Challenges Faced by Legislative Drafters in Samoa and Other USP Member Countries', (2012) 14 European Journal of Law Reform 191,191-194, 213. See also generally Ming Leung Wai, "Samoa's Experience with the International Criminal Court', (2008) Commonwealth Law Bulletin Vol. 34, No. 4 825-831.

states whose internal processes for ratification of treaties are complex and burdensome, may not be as eager to ratify as other states.[1199]

Finally, states in Asia- Pacific region have traditionally being reticent to the ratification of treaties, this also reflected in the region's ratification and implementation of the Rome Statute of the ICC. Consequently, within the Commonwealth, contemporary international criminal courts and tribunals have made marginal to limited impacts in Asia-Pacific states. This leads to the question is there evidence or justification that these states are being influenced by the way others in the same region or sub region behave towards treaties. In other words is the ratification of the ICC by states influenced by concurring attitudes of its neighbours in the region? The available evidence in this regards points to an affirmative answer as depicted by the region's significantly low representation in the Assembly of State Parties of the Rome Statute of the ICC. [1200] The low response of Asia-Pacific States to the ICC Statute is seen as one of the issues besetting the universal application of the ICC Regime.[1201] A possible reason adduced for the low level of participation from Asia –Pacific states to the ICC regime is that the absence of a regional human rights protection and enforcement framework is in tandem with the reticence of states to engage with the ICC.[1202] A lot of writers have commented on the clear need for Asia-Pacific states to ratify the ICC statute by pointing out a number of apparent benefits such as contribution to the development of the court and opportunities within the court system available to citizens of state parties. [1203]

6.5. Conclusion

The chapter has identified the factors that have facilitated or inhibited the impacts of contemporary international criminal courts and tribunals on judicial, legislative and executive actions and processes in the Commonwealth. The chapter has established that the visibility of courts and tribunals, the facilitating role of states, institutions and non state actors, the incorporation of the treaties, and

[1199] Beth A. Simmons and Allison Danner, 'Credible Commitments and the International Criminal Court', (2010) International Organization 64(2) 233-236

[1200] Natalie Baird, 'To ratify or not to Ratify? an assessment of the case for ratification of International Human Rights Treaties in the Pacific', (2011) 12 Melbourne Journal of International Law 249 decries the low level of ratification of human rights treaties by Pacific States with the exclusion of Australia an New Zealand.

[1201] Song Sang-Hyun, 'Preventive Potential of the ICC', Asian Journal of International Law, 3 (2013) 203, 211-212.; See also Steven Freeland 'International Criminal Justice in the Asia Pacific Region, the Role of the International Criminal Court Treaty Regime, (2013), Journal of International Criminal Justice 11(5), 1029 at 1030-1031 , bemoaning the low level of ratification of the ICC Statute by Asia-Pacific States in contrast to African, American and European regions. See also Motoo Noguchi, 'Criminal Justice in Asia and Japan and the International Criminal Court, (2006) 6 International Criminal Law Review, 585-604 on underrepresentation of Asia in the ICC; see generally, José E. Alvarez Institutionalised Legislation and the Asia-Pacific "Region" (2007) 5 New Zealand Journal of Public International Law 9;Amrita Kapur, 'Asian Values v. The Paper Tiger Dismantling the Threats Posed to Asian Values by the International Criminal Court (2013) Journal of International Criminal justice 11(5) 1059.

[1202]Steven Freeland, 'International Criminal Justice in the Asia Pacific Region, the Role of the International Criminal Court Treaty Regime, (2013), Journal of International Criminal Justice 11(5) , 1029 at 1035.

[1203] Steven Freeland, 'Towards Universal Justice-Why Countries in the Asia-Pacific Region Should Embrace the International Criminal Court,' (2007) 5 New Zealand Journal of Public International Law, 49 at 52-53

established state practice of ratification and implementation of treaties are germane to the degree of influence that contemporary international criminal courts and tribunals have and will exert across states. On the converse, factors such as poor visibility of these courts and tribunal in states; wrong perceptions and mistrust in these courts and tribunals; conflicting visions of justice that these courts and tribunals ought to dispense; the non-incorporation of the norms of these courts and tribunals into domestic legal systems and the reticence or reluctance of Asian-Pacific states to commit to the ICC regime have all been identified as factors inhibiting the impact of contemporary international criminal courts and tribunals in the Commonwealth.

An assessment of the overall impact of contemporary international criminal courts and tribunals on judicial, legislative and executive action and processes across the Commonwealth states examined reveal a mixed result. Across states of Australia, Canada, Kenya, Rwanda, Uganda, United Kingdom and New Zealand, contemporary international criminal courts and tribunals have generated significant influence on judicial action and process manifested in various forms ranging from an articulation and deployment of the norms of these courts and tribunals in domestic proceedings to the courts and tribunals to influencing the content and standards of domestic proceedings as in Rwanda and the establishment of complimentary domestic mechanism in Uganda. At the other side of the spectrum, in states such as Sierra Leone and Trinidad and Tobago, these courts have not been able to influence judicial actions and processes.

Further, the assessment also reveals that these courts and tribunals have influenced to a great extent the nature and character of legislation in conflict, post-conflict and non-conflict states in the Commonwealth. In this respect, the ICC has exerted considerably higher levels of influence on legislative action and processes as states enact the obligations to cooperate with the ICC and the core crimes within their domestic legal systems. The assessment also revealed that the impact of these courts and tribunals on executive actions and processes is not as high in relation to judicial and legislative actions and processes. Finally, the study reveals that the non-conflict states of Australia, Canada, New Zealand, Trinidad and Tobago and the United Kingdom have played a great role in the articulation and deployment of the norms and jurisprudence of these courts and tribunals, and this account for the significant levels of influence they have exerted on executive actions and processes in the relevant states.

CHAPTER 7

GENERAL CONCLUSION

In recent years, a plethora of international criminal courts and tribunals have been established with operational and jurisdictional relevance across the world. Within the Commonwealth group of states, three of such international criminal courts and tribunals, the International Criminal Tribunal for Rwanda (Rwandan Tribunal), the Special Court for Sierra Leone (Special Court) and the International Criminal Court (ICC) have operational and jurisdictional relevance. The engagement and interaction between these courts and tribunals have produced impacts ranging from marginal to major across states in the Commonwealth. Consequently, the thesis has sought to answer the following overarching questions such as what precisely, if at all, is the extent of the domestic impact of international criminal courts and tribunals on legislative, judicial and executive thoughts, actions and processes in the Commonwealth and what are the factors that have facilitated or impeded the impact of these courts and tribunals.

This thesis has undertaken a methodical assessment and discussion of the available evidence relating to the impact of contemporary international criminal courts and tribunals within the Commonwealth. The objective of the evaluation undertaken was to determine to what extent or degree to which it can it be said that contemporary international criminal courts and tribunals have marginally, majorly or in certain instances failed to exert influences on judicial, legislative and executive actions and processes in the relevant Commonwealth States surveyed. In addition, the evaluation was also undertaken to determine to what degree the operation of contemporary international criminal courts and tribunals have led to significant impacts on citizens and communities across the relevant conflict and post-conflict states. The above assessments were carried out by identifying and categorizing states in the Commonwealth that have had engagements and interactions with these courts and tribunals into three groups. First, an examination of the influence of these courts and tribunals on conflict states was carried out, and in this respect, the following states, Kenya and Nigeria were evaluated. The second group of states surveyed were post-conflict states and under this group; the discussion dwelled on the following states Rwanda, Uganda and Sierra Leone. The third group of states assessed were the following non-conflict states, Australia, Canada and the United Kingdom. Although Trinidad and Tobago and New Zealand are regarded as non-conflict states, they were examined under states where contemporary international criminal courts and tribunals have had a more marginal impact.

The literature on international criminal courts and tribunal is large and expansive and in particular several writers have written from various angles on the courts and tribunals presenting various

nuanced perspectives of the courts. [1204] However, there exist a paucity of literature on examining the impacts of these international criminal courts and tribunals in the Commonwealth. Although a sweeping assertion cannot be made that contemporary international criminal courts and tribunals have exerted considerable influences on judicial, legislative and executive processes and actions across all Commonwealth States, they have nonetheless, exerted various degrees of influence across some Commonwealth States. And observed through this holistic lens, international criminal courts and tribunals have exerted varied levels of impact ranging from marginal to major and in certain cases none at all despite engagements and ensuing correspondences between the relevant states and these courts and tribunals. Where there have been major impacts, within states in the Commonwealth, such results are the product of a multiplicity of factors. What the study has done is to present evidence of the varied influence that international criminal courts and tribunals have exerted within the Commonwealth.

At the outset, it is important to draw attention to two issues with respect to the evaluation and analysis of the impact of contemporary international criminal courts and tribunals that has been undertaken. First, the procedures and processes of international criminal courts and tribunals have not been addressed as there is an established array of literature in this regards. Second in analysing the decisions of domestic courts and quasi-judicial bodies examined the salient features of the decisions which reference the jurisprudence of contemporary international criminal courts and tribunals. As a result, the case law analysis undertaken in the thesis is one that buttresses and provides support for the overarching arguments made in the thesis by showing the extent in which judicial action and process has been influenced by the norms and jurisprudence of contemporary international criminal courts and tribunals. No overall quantitative analysis of case law is undertaken in the study. Reliance is placed on the major cases and examples which in themselves establish the intensity of both the major or marginal impacts that contemporary international criminal courts and tribunals have so far had within

[1204] William Schabas, *An Introduction to the International Criminal Court* (3rd edn, Cambridge University Press 2000) 1-21; For further details on the evolution and development of international criminal law, see, Gary Bass, *Stay the Hand of Vengeance: The politics of War Crime Tribunals* (Princeton University Press 2000); For a detailed analysis of the Rome Statute of the ICC, see Leila Nadya Sadat, *The International Criminal Court and the Transformation of International Law* (Transnational Publishers, Inc. 2002); Robert Cryer, Håkan Friman Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, (3rd edn, Cambridge University Press 2010); Timothy L.H. McCormack and Gerry J..Simpson (eds) in *The Law of War Crimes National and International Approaches* (Kluwer Law International, 1997); Roberto Bellelli, *International Criminal Justice Law and Practice From the Rome Statute to the Review* (Ashgate Publishing Ltd 2010); Yves Beigbeder, *International Criminal Tribunals: Justice and Politics* (Palgrave Macmillan, 2011); See generally, Bassiouni M.C. (ed) *Post-Conflict Justice*, (Transnational Publishers, Inc. 2002); Beigbeder Yves, *International Justice against Impunity*, (Martinus Nijhoff Publishers 2005); Carsten Stahn & Larissa van den Herik (eds) *Future Perspectives on International Criminal Justice*, (T.M.C. Asser Press, 2010); Stromseth Jane, (ed) *Accountability for Atrocities: National and International Responses* (International and Comparative Criminal Law Series Transnational Publishers 2003); Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (Beacon 1998) Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* (Transaction 1997); William A. Schabas, *The UN International Criminal Tribunals: Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press 2006) for a general overview of the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone.

the Commonwealth. As a result, a range of judicial actions and processes as well as case law across the Commonwealth was examined.

In Rwanda, a review of both the completion strategy and the case law of the Rwandan Tribunal in this area were carried out. The case law revealed clear impacts of the Rwandan Tribunal on judicial action and process in Rwanda. In certain states such as Trinidad and Tobago and Sierra Leone no impact on judicial action and process could be teased out from the engagement between the applicable courts and tribunals and the states. In states such as Australia, Canada, New Zealand and United Kingdom, the research reviewed the domestic case law on exclusion proceedings that had been influenced by the jurisprudence of contemporary international criminal courts and tribunals. The evaluation revealed significant influences of the jurisprudence of contemporary international criminal courts and tribunal in these states. The articulation and deployment of the norms and jurisprudence of contemporary international criminal courts and tribunals in Kenya was also highlighted in the course of the assessment. In this regard, it examined two cases decided by domestic courts which had placed reliance on the norms and jurisprudence of the ICC.

An evaluation of different legislation that has been influenced directly or indirectly across the relevant states was undertaken. In Rwanda, an analysis of two laws, the Organic Law on Transfer[1205] and the Organic Law Abolishing the Death Penalty[1206] whose nature and details have been shaped by the standards set by the Rwandan Tribunal. With respect to Sierra Leone, two national laws which incorporate and ratify the Agreement between the Government of Sierra Leone and the United Nations on the establishment of the Special Court were examined.[1207] Australia, Canada, Kenya, Uganda, United Kingdom and New Zealand, have all implemented the Rome Statute of the ICC with variations. Accordingly, a study of the implication and impact of the ICC on legislative action and process in these states was carried out by reviewing the salient features of the different implementing legislation. However, despite the process of incorporation, the legislation creates similar obligations on arrest and surrender to the ICC; grounds when a request for assistance including arrest and surrender may be refused and incorporation of the crimes; although there are differences and variations to the incorporation of the crimes. For instance Australia, adopted a wholesale codification of the Elements of Crime providing identical definition in the constituents of the core crimes.[1208]

[1205] Organic Law No. 11/2007 of 16/03/2007 Concerning Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from Other States.
[1206] Organic Law No. 31/2007 Relating to the Abolition of the Death Penalty, Official Gazette of the Republic of Rwanda (July 25 2007)
[1207] Special Court Agreement, 2002 (Ratification) Act 2002, Supplement to the Sierra Leone Gazette VOl . CXXXIII No. 22 (25 April 2002) and the Residual Special Court for Sierra Leone Agreement (Ratification) Act Supplement to the Sierra Leone Gazette Vol. CXLIII, No.6 dated 9th February 2012 to give effect to the agreement between the Sierra Leonean government and the United Nations establishing the Special Court and the Residual Special Court for Sierra Leone.
[1208] See the International Criminal Court (Consequential Amendments) Act 2002 Act No. 42 of 2002 which introduced substantial amendments into Australia's Criminal Code by creating a new Division 268, which

While Canada and Kenya situate the definition of the crimes around conventional law and customary international law, taking into account possible evolutions or developments that might arise under customary international law.[1209]

An assessment of the impacts of contemporary international criminal courts and tribunals on executive actions and process was undertaken by examining specific acts of engagement between states and contemporary international criminal courts, from which an evaluation was made as to whether these acts of engagement have made any influence on executive action and process. Evidence of these impacts was garnered from statements made by both the principal officers of the relevant courts and tribunals, and members of the executive arm of government in relation to these courts and tribunals. These references were distilled from newsletters, press releases and annual reports of contemporary international criminal courts to tease out the impacts from engagement. With specific reference to the various states, statements from government representatives made at different fora, reports from state departments, press releases, periodicals and information on newspaper provided a background of materials to draw out engagement and correspondences between the executive arm of government and contemporary international criminal courts. It should be noted that although there were a number of such engagements, many of these did not produce impact or where they did in most cases the impacts were marginal.

Following a review of the available evidence, an overall assessment of the impact of contemporary international criminal courts and tribunals in the Commonwealth was carried out. In answering the impact question, a study of the decisions of courts and quasi-judicial bodies was engaged in to distil incidences where the norms and jurisprudence of contemporary international criminal courts and tribunals have been deployed within the relevant Commonwealth States. An analysis of the salient and relevant aspects of the cases revealed the deployment of the norms and jurisprudence of contemporary international criminal courts and tribunals. In states such as Australia, Canada, New Zealand and the United Kingdom, the norms and jurisprudence of international criminal courts and tribunals have been relied on extensively in domestic proceedings determining exclusion of persons from the protection afforded under the Refugee Convention. In these proceedings, the norms of contemporary international criminal courts and tribunals have contributed in varying measure to the articulation of the legal reasoning in the cases and arriving at judicial decisions. The odd remains very high that domestic courts within the Commonwealth will continue to apply the norms and jurisprudence of international criminal courts and tribunals in making judicial decisions.

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incorporates the crimes contained in the Rome Statute adopting the definitions and constituent offences provided in the Elements of Crimes of the ICC.

[1209] See Canada's Crimes Against Humanity and War Crimes Act, ss 4(3) and 6(3) and Kenya's International Crimes Act 2008, s 6 (4)

Contemporary international criminal courts and tribunals have made inroads in many states. Perhaps one of the most significant is in the area of legislative action and process. As a result of the operation of these institutions, the character and nature of legislation have been significantly altered. Consequently, contemporary international criminal courts and tribunals have had profound and in-depth impacts on legislative action and processes in certain Commonwealth States. The norms of international criminal courts and tribunals have often been invoked within domestic legal orders across the Commonwealth to persuade the legislature to shape or reshape laws in ways that correspond to the normative orientation certified in international criminal justice system as appropriate. Changes have been made to laws to bring them in line with some of the relevant decisions and norms of international criminal courts and tribunals. It is thus possible to argue to a certain degree that a number of these legislative changes were brought about by compliance with the norms and processes of international criminal courts and tribunals.

It is observed that although, there have been high levels of interactions and engagements between the executive arm and the respective courts and tribunals; their corresponding influence on executive actions and processes within the Commonwealth, have been less marked and perhaps much more marginal than the courts and tribunals corresponding impacts on judicial and legislative action and process within the Commonwealth. Nonetheless as demonstrated in the research, contemporary international criminal courts and tribunals, have exerted significant influences on executive action and process and shaped executive thought in the Commonwealth. The executive arms of government in Australia, Canada, New Zealand and United Kingdom have also financially supported contemporary international criminal courts. A look at the assessed contribution of the above mentioned states also reveal that they represent the highest contributors to the ICC with the exception of France, Japan, and Germany.[1210] Increasingly in these states there are relevant references to contemporary international criminal courts and tribunals in reports of state departments in Canada and the United Kingdom on their internal report and evaluations.[1211]

From the study, a number of conclusions and concrete suggestions can be drawn. Although, the Rwandan Tribunal from available evidence, from 1998 began to engage with the people of Rwanda, its failure to do so at the beginning cost it a lot in terms of its public image and legitimacy in Rwanda. The Special Court learning from the failings of the Rwandan Tribunal in this area, swung into action

[1210] The following figures in Euros represent the assessed contributions of the following states to the purse of the ICC in 2013; United Kingdom 9,222,092; Australia 3,693,161; Canada 5,313,478; Spain 5,293,983; Japan 19,290,082; Germany 12,715,822; France 9,959, 312 ; International Criminal Court, Assembly of States Parties ICC/ASP 13/12 Financial Statements for the period 1 January to 31st December 2013Schedule 1 International Criminal Court Status of Contributions as at 31st December 2013(in Euros).

[1211] United Kingdom Foreign and Commonwealth Office Annual Report on Human Rights 2004 ,September 2004 ,124; United Kingdom Foreign and Commonwealth Office Annual Report on Human Rights 2005 , July 2005, 157; Human Rights and Democracy: The 2010 Foreign and Commonwealth Office Report, March 2011 , 22. ; See Australian Government Attorney General's Department Annual Report 2011, 312

early in the day, devising creative means to engage in outreach and which all surveys are in agreement that it was largely successful. The success of the Special Court in this area reveals the impact of early engagement in generating awareness in states. As the Rwandan Tribunal winds down, it can take a cue from the Special Court, to create deeper impacts within Rwanda through the creative use of the Information and Documentation Centre in Kigali. Already, the centre is equipped with facilities in which researchers and students can access. The present facilities can be expanded by keeping a copy of the archives of the tribunal for accessibility by members of the public. The ICC can learn from the failings and success of both the Rwandan Tribunal and the Special Court to engage with states and their citizenry across the relevant situation and preliminary examination countries.

It was also observed that, there are relatively no evidence of communication whether formal or informal between national judicial institutions and these courts and tribunals, particularly as often, the judicial officers appointed from national institutions which ideally would have aided cross-fertilization go on to other jobs at the international community or are already retired judicial officers. This results in a situation where nationals serving at various capacities and levels at international criminal courts and tribunals do not translate or help in trans-judicial communication between international courts and tribunals officers,and the different states. In the case of the Special Court of Sierra Leone save for security and prison who as seconded national staff from the Police and Prison Services worked closely with the Special Court whilst remaining staff of the respective national institutions, evidence of this does not exist in relation to judicial staff. In this way there are no visible means for the norms and processes of international criminal courts and tribunals to percolate to states within the Commonwealth. The ICC (the Assembly of State Parties) could learn from this and encourage states to ensure that persons who are put forward as judges are not at the peak or tail end of their judicial careers at the domestic level to encourage cross fertilization and trans-judicial communication.

Of the three international criminal courts and tribunals, the ICC's engagement with the relevant states is considerably lower. Although a number of factors such as funds and the need to maintain its independence have been offered there is room for enhanced engagement between the ICC and different states particularly in situation countries as well as countries under going preliminary examination. The ICC should also be seen as complementing the role of organisations to ensure universal ratification, and implementation of the Rome Statute and strengthening of international criminal justice regime. It is also suggested that the ICC should raise and deepen its relationship with the executive arms of government through proactive engagement with the executive. The ICC should be complementing the role of NGOs and institutions such as the Commonwealth and the African Union. It is useful to note that within the Commonwealth group of states, the ICC and the Commonwealth are already collaborating.

Still on the issue of engagement, the ICC has scope to engage in capacity development and offer specialised training to members of the bar and bench across states. Although fund has always been stated as a handicap, the ICC has a pool of qualified staff in law, victims' management and other areas where it could offer technical and specialist assistance to states. A note of caution should be sounded here, these training and assistance must not be a random list of programmes, but should be drawn up and implemented on the basis of a needs assessment first carried out in a relevant state to ascertain the areas where a state needs assistance and training. It is inconceivable that the ICC will be able to prosecute all violations across the globe; hence domestic mechanisms should be strengthened and encouraged. This engagement of the ICC with states will also facilitate its visibility across the Commonwealth and counteract its negative image particularly across Commonwealth Africa that the ICC is an agent of neo-colonialism or imperialism. Engagement alone would not suffice, the ICC should be seen as addressing the conflicts taking place in other geo-political regions of the world, only then can it shed its toga of being an African court.

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