**International Journal of Doctrine, Judiciary and Legislation**

Volume 4, Issue 1, 2023
Print ISSN: 2682-4213
Online ISSN: 2682-4221

# Selectivity in the Prosecution of War Crimes

DOI: 10.21608/IJDJL.2023.120034.1156

Pages 361-395

**Sherine Mohamed Ahmed**

Master of Laws, The University of Law, The United Kingdom

Associate member at The Chartered Institute of Arbitrators in London (ACIArb)

Former UN volunteer

**Correspondance:** Sherine Mohamed Ahmed, Master of Laws, The University of Law, The United Kingdom - Associate member at The Chartered Institute of Arbitrators in London (ACIArb) Former UN volunteer.

**E-mail:** Sheriineemohamed1996@gmail.com

**Received Date:** 05 May 2022**, Accept Date :** 06 January 2023

**Citation:** Sherine Mohamed Ahmed, Selectivity in the Prosecution of War Crimes, International Journal of Doctrine, Judiciary and Legislation, Volume 4, Issue 1, 2023, Pages (361-395)

**المجلة الدولية للفقه والقضاء والتشريع**
**المجلد ٤، العدد ١، ٢٠٢٣**

# الانتقائية في محاكمات جرائم الحرب

الصفحات ٣٦١-٣٩٥

معرف الوثيقة الرقمى: 10.21608/IJDJL.2023.120034.1156

**شرين محمد**

حاصلة على الماجستير من جامعة القانون - لندن - المملكة المتحدة

**المراسلة:** شرين محمود، أستاذ مساعد القانون العام، حاصلة على الماجستير من جامعة القانون - لندن - المملكة المتحدة.

**البريد الإكترونى:** Sheriineemohamed1996@gmail.com

**تاريخ الإرسال:** ٠٥ مايو ٢٠٢٢، **تاريخ القبول:** ٠٦ يناير ٢٠٢٣

**نسق توثيق المقالة:** شرين محمود، الانتقائية في محاكمات جرائم الحرب، المجلة الدولية للفقة والقضاء والتشريع، المجلد ٤ ، العدد ١ ، ٢٠٢٣ ، صفحات (٣٦١-٣٩٥)

## Abstract

The issue of selectivity is deeply rooted in International criminal law, and in particular in the prosecutions of war crimes. upon taking a glimpse at the history of war crimes prosecution, it is apparent that this selectivity is not a newly emerging issue. The establishment of the International Criminal Court (ICC) was to put an end to impunity, however, some claim that the ICC is losing its public confidence with the arising claims of double standards and selectivity especially by the African Union (AU) due to the recent tensions between the ICC and the AU. The reasons for such selectivity include the interplay between law and realpolitik especially under the United Nations Security Council, the funding and influence of some states on the establishment of the court, some state practices, and at last, the influence of the peace vs justice dilemma which is characterized as a short-term solution that ignores the concepts of retribution and closure to victims of war crimes. The study stresses the need to put an end to such selectivity that leads to impunity and explores the role that the United Nations General Assembly and Mass media could have as catalysts to ensuring peace and accountability. The study is library-based and thus done through extensive research in academic articles, books, and treaties (for example Rome statute – Geneva conventions of 1949 – International military tribunal charter – United Nations charter).


**Keywords:** International Criminal Law – Impunity – International Criminal Court– Criminal Justice.


## الملخص

تعد الانتقائية في القانون الجنائي الدولي قضية متأصلة، وبالأخص في محاكمات جرائم الحرب. فبالنظر الى محاكمات جرائم الحرب في التاريخ المعاصر يتضح لنا أن تلك المشكلة ليست حديثة الوجود. لقد نشأت المحكمة الجنائية الدولية كوسيلة للحد من الافلات من العقاب في القانون الجنائي الدولي ولكن في الأونة الأخيرة قد تعالت الأصوات في الأصداء الأكاديمية بأن المحكمة الجنائية الدولية بدأت أن تفقد مصداقيتها أمام المجتمع الدولي وبالأخص في ضوء إدعاءات الاتحاد الأفريقي المتزايدة بإزدواجية المعايير لدى المحكمة. فالتوتر الحالي بين الإتحاد والمحكمة توالد لعدة اسباب منها التداخل ما بين القانون والسياسة الدولية وبالأخص تحت مظلة مجلس السلم والأمن بالأمم المتحدة، وأيضا التمويل و اثر معضلة المفاضلة ما بين اعتبارات السلام أم العدالة والتي تتصف بكونها حل قصير الأمد يتغاضى عن اعتبارات االقصاص لضحايا جرائم الحرب. تؤكد الدراسة على الحاجة الى الحد من الانتقائية التي تؤدي بدورها الى الافلات من العقاب وتتناول الدراسة كذلك دراسة دور الجمعية العامة للأمم المتحدة والاعلام وامكانية استخدامهما كمحرك لضمان ارساء السلام ومحاسبة الجناة. هذه الدراسة مكتبية وتعتمد في الأساس على بحث ودراسة المقالات الأكاديمية، الكتب، المعاهدات (مثل النظام الأساسي للمحكمة الجنائية الدولية – معاهدات جنيف ١٩٤٩ – ميثاق المحكمة العسكرية الدولية لنورمبرج – وميثاق الأمم المتحدة).

**الكلمات المفتاحية:** القانون الجنائي الدولي – الافلات من العقاب – المحكمة الجنائية الدولية – العدالة الجنائية.

## Introduction

International criminal law is a relatively new subject in comparison with other branches of international law[(1)]. It is considered as a still-growing subject whose solid start dates back to the aftermath of World War II, with the tribunals established by the allies to prosecute Nazi and Japanese war crimes[(2)]. The establishment of international tribunals for the prosecution of heinous war crimes committed at times of conflicts marked a new era of international justice and recognition of individual responsibility[(3)] under international law.

There have been multiple critics that there is selectivity when it comes to prosecuting war crimes or in the broader concept, the prosecution of international crimes[(4)]and that some crimes are prosecuted while other crimes – especially if they were committed by one of the permanent members of the United Nations Security Council- are ignored.

This article aims at assessing whether international justice has been served through the critical analysis of the allegations of selectivity in the prosecution of war crimes under the ad hoc tribunals established by the allies in 1945, United Nations Security Council in the 90s, and at last, the International Criminal Court (ICC) that has been under various critics concerning the issue of selectivity[(5)]. It also aims at assessing the authenticity of the allegations made by the African Union that the ICC is biased against African states[(6)].

The academic discussions on the topic of selectivity in the prosecution of international crimes strengthen the importance of addressing this deeply rooted problem after the African Union's solid steps into establishing its tribunal to prosecute international crimes and the growing threats of withdrawal from the Rome statute[(7)]. Thus, the impact of selectivity has started to become an obstacle in the path towards progress in the prosecution of heinous war crimes and has led to questions of the legitimacy of the entire system[(8)].

[(1)]Antonio Cassese and Paola Gaeta, Cassese's International Criminal Law (3rd edn, OUP 2013) ch 1.

[(2)]Ibid ch 14.

[(3)]Ibid ch 1.

[(4)]United States et al. v. Araki et al., Judgment (IMTFE, 4 Nov. 1948), as cited in Asad G Kiyani, 'The Three Dimensions of Selectivity in International Criminal Law' (2017) 15 J Int'l Crim Just 624, 624.

[(5)]William A Schabas, 'Victor's Justice: Selecting Situations at the International Criminal Court' (2010) 43 J Marshall L Rev 535, 8.

[(6)]Dominique Mystris, 'Africa and the ICC: Perceptions of Justice' (2017) 15 J Int'l Crim Just 1052, 1052. see also BBC news, < https://www.bbc.com/news/world-africa-38826073 > accessed on 9 August 2021.

[(7)]Mandiaye Niang, 'Africa and the Legitimacy of the ICC in Question' (2017) 17 Int'l Crim L Rev 615, 618. See also Rowland J V Cole, 'Africa's Relationship with the International Criminal Court: More Political than Legal' (2013) 14 Melb. J. Int'l L. 670.

[(8)]Birju Kotecha, 'The International Criminal Court's Selectivity and Procedural Justice' (2020) 18 J Int'l criminal justice

The objectives of this research are going to be discussed first by addressing some preliminary questions which include a brief elaboration of the concepts of Jus ad bellum and Jus in bello and, the basis of criminal responsibility in chapter 1. Then it explores different forms and examples of selectivity in the history of prosecution of war crimes (Nuremberg, ICTY) in chapter 2. the study then discusses the role of the ICC as the main institution and player in that field, thus chapter 3 aims at discussing the current situation under the ICC and examples of that selectivity taking into consideration the allegations made by the African Union that the ICC is biased against African states, the study then explores in chapter 4 the reasons behind the selectivity prevalent in war crimes prosecution including the role of the United Nations Security Council (UNSC) as the institution responsible for the maintenance of peace and security throughout the globe and assessing the impact of the veto right on the issue of selectivity. And the justifications of selectivity using the peace vs. justice dilemma. Chapter 5 discusses the available solutions to the issue of selectivity and the role that the United Nations General Assembly and the mass media have in putting an end to such impunity and strengthens the need of taking the issue of selectivity in the prosecution of war crimes seriously due to its long-term consequences on the rule of law and the existence of the ICC.

## Literature review

International criminal law is an interplay between law and politics. The objective of this article is to challenge the increasing influence of politics on the prosecution of war crimes. The issue of selectivity in this matter is the claim that some war crimes are prosecuted, and others are not. Kenneth Davis describes selectivity as "the situation in which an enforcement agency or officer chooses to use his discretionary power to do nothing about a case in which action would be clearly justified and expected".[9]

selectivity is deeply rooted in international criminal law and specifically in prosecuting war crimes. Gerry Simpson notes that "each war crime trial is an exercise in partial justice to the extent that the majority of war crimes remain unpunished"[10].

There are different types of selectivity according to Robert Cryer, which are first, selectivity by stealth[11] which considers the limits of judicial discretion and parameters of liability,

107, 108.

[9]Ovo Imoedemhe, Unpacking the tension between the African Union and the International Criminal Court: the way forward, A.J.I.C.L. 2015, 23(1), 74.

[10]Gerry Simpson, 'War Crimes: A Critical Introduction' in T.L.H.McCormack & G.J. Simpson (eds.), The Law of War Crimes: National and International Approaches (1997) 1, 11 as cited in Robert Cryer, 'The Boundaries of Liability in International Criminal Law, or Selectivity by Stealth' (2001) 6 J Conflict & Sec L 3,3

[11]Robert Cryer, The Boundaries of Liability in International Criminal Law, or "Selectivity by Stealth", (2001) 6 Journal of

secondly, selectivity ratione personae which consists of two aspects, legality, and legitimacy[12] and at last selectivity in domestic law. This article aims at assessing war crimes prosecutions in different periods of history with taking into consideration as a solid ground the formerly mentioned types of selectivity.

The history of the prosecution of war crimes started with the international military tribunal widely known as the Nuremberg tribunal and the international military tribunal for the far East which were both labelled and criticized as a practice of victor's justice, as the victors of that time prosecuted the defeated with complete disregard to war crimes committed by the Allies (including the nuclear bombing of Hiroshima and Nagasaki). The dissent regarding this selectivity was publicized by a few judges and especially by Justice Pal. According to Robert Cryer, one of the consequences of victor's justice is the concept of "tu quoque" which means 'you also' that was raised by Admiral Karl Donitz, the head of the German navy, this concept is not a defence, however, is still a platform on which to argue selectivity in the prosecutions[13].

The study then takes a leap in history to the establishment of the International criminal tribunal for Yugoslavia (ICTY). And considers allegations and critics to the ICTY and the issue of selectivity and one-sidedness of the prosecutions. The ICTY has been criticized by Marjorie Cohn for not prosecuting or investigating allegations of war crimes perpetrated by NATO personnel in Kosovo. The ICTY has been called a hoax by Professor Mandel and a political trial by other academics. The article considers the presence of selectivity ratione personae and selectivity by stealth in the prosecutions of the ICTY due to the limitation of the indictment of Milosevic to the conflict in Kosovo, as there was no mention of the more serious crimes committed by Milosevic concerning Croatia and Bosnia[14].

Legitimacy is described as a crucial characteristic for any functioning legal system and in turn according to Bassiouni, he noted that "without at least a semblance of legitimacy, the international legal system has little chance of securing states' compliance"[15]. Thomas Franck has noted that "a legitimate law or legal institution is one adhering to generally accepted

Conflict & Security Law 3–31 as cited in Elies van Sliedregt, 'One rule for Them - Selectivity in international criminal law', 2021, 34 Leiden J Int'L 283, 283.

[12]Ibid at 284.

[13]Robert Cryer, ProsecutingI nternational crimes: Selectivity and the International criminal Law Regime (cuP, Cambridge, 2005) 200 as cited in Andre Vartan Armenian, 'Selectivity in International Criminal Law: An Assessment of the Progress Narrative' (2016) 16 Int'l Crim L Rev 642, 649.

[14]Marjorie Cohn, 'No Victors' Justice in Yugoslavia: NATO Must Be Held Accountable for Its War Crimes' (1999) 56 Guild Prac 146.

[15]Mahmoud Bassiouni, 'Challenges Facing a Rule-of-Law Oriented World Order', (2010) Santa Clara Journal of International Law 8(1) 7. As cited in Andre Vartan, 2015, n (13) 645.

principles of right process"[16]. And thus, by taking into consideration the above-mentioned criteria for legitimacy, it is noted that legitimacy and coherence are the criteria for assessing institutions. And on this basis, the ICC's practices are assessed by taking into consideration the war initiated against the ICC by some states and in particular the African states.

Andre Vartan believes that the ICC is a progress in international criminal law[17] and a leap towards the future, however, the ICC has been under fire for claims of bias by the African Union and described as an organizational failure by Professor Douglas Guilfoyle due to the lack of successful convictions suggesting that the low rate of convictions is a systematic dysfunction[18] which is agreeable.

**Human rights watch has noted that**

"The reality that justice unfolds on an uneven international landscape has generated genuine frustration. This is a landscape that needs to change so that the leaders of the world's most powerful states, as well as those from smaller, weaker states, are subject to the reach of the law for the worst crimes under international law". [19]

There have been recent debates in the ICC as to whether or not it has jurisdiction to core crimes and relevant in this matter, war crimes committed during the Palestinian – Israeli conflict. The ICC took a positive step in considering that it has jurisdiction and that there is solid ground for believing that war crimes have been committed. However, we argue here of the problematic delay to consider these facts and prosecute these crimes, with the belief in the deterrent nature of prosecutions in preventing the perpetration of similar crimes or at least in mitigating the number of crimes, and thus we consider the fact that this delay may have been one of the reasons for a consequent decade of more war crimes committed at the same conflict.

Karl Zemanek has noted that there are new forms of war crimes under modern warfare, the ICC has not taken any steps to address such crimes. Which further fans the allegations of selectivity and double standards.[20]

The United Nations security council has been criticized by William Schabas[21] for the

[16]Thomas Franck,' Fairness in International Law and Institutions', Clarendon Press, (1995), p. 35. As cited in Ovo Imoedemhe, 2015, n (9) at 75.

[17]Andre Vartan, 2016, n (13) at 623.

[18]Douglas Guilfoyle, Lacking Conviction: Is the International Criminal Court Broken? An Organisational Failure Analysis, 2019, 20 Melb. J. Int'l L. 401.

[19]Human Rights Watch, "Letter to AU Heads of State in Advance of Libya Summit' 25 June 2009, available At < http://www.hrw.org/en/news/2009/06/25/letter-au-heads-states-advance-libya-summit > accessed 10 June 2021, as cited in Ovo Imoedemhe, 2015, n (9) at 86.

[20]Karl Zemanek, 'War Crimes in Modern Warfare' (2014) 24 Swiss Rev Int'l & Eur L 207.

[21]William A Schabas, 'Victor's Justice: Selecting Situations at the International Criminal Court' (2010) 43 J Marshall L

misuse of the veto power, as it is a political body driven by political interests of great powers and has the ability to refer situations to the ICC and yet hardly practices that ability, according to Ovo Imoedemhe, the UNSC is the body practicing selectivity against African states and not the ICC[22]. Thus it is noted that the UNSC is considered as one of the main reasons for the increasing selectivity in the prosecution of war crimes.

Academics argue[23] that sometimes justice is not in the interests of peace, however, this view is opposed by many other academics as Cheriff Bassiouni who noted that the prevalence of peace over justice focuses on the short-term solution rather than the long-term consequences of that approach, which – upon research- is understandable and thus it is observed that justice should prevail as a means for establishing peace.

Robert Cryer has noted that some state practices lead to selectivity which includes the US and the UK's national statutes that exempt their soldiers abroad from being prosecuted for war crimes.

Thus, to conclude all the above, it is observed that the issue of selectivity is deeply rooted in international criminal law and that it affects the future progress of the court and that many notable academics believe that the ICC is losing its moral authority and public confidence. We also conclude that there is no bias against African states in particular considering the high number of self-referrals.

## Chapter 1: Preliminary questions

Before starting to discuss what selectivity in the prosecution of war crimes means, and its examples, there are some preliminary questions that need to be addressed, and of these questions is, what is a just war?

There are two dimensions for answering this question, the first of which Is Jus ad Bellum, which answers the question of what a just war is. And the second is Jus in Bello, which answers the question of how the war is conducted.

### Jus ad bellum and Jus in bello

Modern legal thinking has started with the just war theory[24]. With the philosophy of Immanuel Kant and his ideas on peace and the prohibition of using force[25]. this concept traces back in history to the fourth century[26] and is commonly associated with St. Augustine

Rev 535.

[22]Ovo Imoedemhe, 2015, n(9).

[23]For example, Bartlomiej Krzan, 'International Criminal Court Facing the Peace vs. Justice Dilemma'(2016) 2 ICJ 81.

[24]Janik R, International Law and the Use of Force Cases and Materials (Routledge 2020)22.

[25]Ibid.

[26]Christian Enemark and Christopher Michaelsen, 'Just War Doctrine and the Invasion of Iraq' (2005) 51, Australian Journal of Politics and History 4(545), 545.

who is considered as the originator of this thinking[27].

‘’The passion for inflicting harm, the cruel thirst for vengeance and relentless spirit, the fever of revolt, the lust of power, and such things, all these are rightly condemned in war”.

St. Augustine[28]

St. Augustine has identified three basic principles to assess whether a war is just or not, and they are; whether it was perpetrated by the right authority (Auctoritas), whether there has been a just cause (Justa causa) and if it has proceeded a violation of the rights of the party that initiated the war, and at last, the presence of the right intention (Recta Intentio)[29].

Modern legal thinking has added three other principles to these mentioned above to assess whether a war is just, and they are, whether entering the war was the last resort, whether there was a proportionate cause, and whether there was a reasonable prospect of success[30].

The distinction between Jus ad Bellum and Jus in Bello is that the first of them aims at discussing whether the war is just and trying to give legal basis to it to minimize states’ resort to violence, and the other is concerned with a de facto situation aiming at preventing humanitarian crises during the conduct of the war.

In recent years, there has been growing use of lawfare, which means that states tend to abuse jus in Bello to achieve military or political ends[31]. And there have been growing calls from academics and jurists for the reconsideration of the relationship between Jus in Bello and Jus ad Bellum, and that the ICC which is the center of discussion when it comes to the prosecution of war crimes[32], is well suited for such discussion. The Hague peace conferences and the Geneva conventions that started in 1860 were significant points towards accountability and the idealistic notions of International criminal law and International Humanitarian Law. The history of international law divides the notion of war crimes into the pre-World War II era, which is described as the jus ad Bellum epoch, and after the Geneva conventions with the emergence of a new epoch where aggression was no longer acceptable, and the Jus contra bellum interval started[33]. The new era of International, criminal law

[27]Janik R, n(24).

[28]Christian Enemark and Christopher Michaelsen, Australian Journal of politics and history, 2005, n(26).

[29]Janik, R, 2020, n(24).

[30]Christian Enemark and Christopher Michaelsen, Australian Journal of politics and history, 2005, n(26) 546. see also Paul Christopher, The Ethics of War and Peace (Englewood Cliffs, NJ, 1994), 87-96.

[31]Thomas S Harris, ‘Can the ICC Consider Questions on Jus Ad Bellum in a War Crimes Trial’ (2016) 48 Case W Res J Int’l L 273, 273.

[32]Ibid at 274.

[33]Zsolt Spindler, ‘Just War Theories from Jus Ad Bellum to Jus Post Bellum - Legal Historical and Legal Philosophical Perspectives’ (2019) 4 Kazan U L Rev 23, 241,242. See also international committee for the red cross < https://www.icrc.

marked the demise of the just war theory and the rise of the nation-state, and the Jus post-Bellum[34]. where grave breaches of the Law of armed conflicts are considered war crimes.

To further understand the responsibility, and the shift from state responsibility to individual responsibility under International Criminal Law, reference must be given to the basis of Criminal responsibility under International criminal law.

**The basis of Criminal responsibility in International Criminal Law**

There are five basic principles for the exercise of criminal jurisdiction by states over alleged offenders -or in this matter, war criminals- and these are mentioned briefly[35].

Territoriality, if the crimes were perpetrated on a state's territory, it is understandable that the state would exercise its jurisdiction because of its sovereignty.

Active personality, or in clear words, the nationality of the perpetrator (temporal).

Passive nationality, or the nationality of the victim, as a form of protecting its nationals.

Vital Interests (protective jurisdiction), a state may extend its jurisdiction under International Law to prosecute crimes that pose a threat to its vital national interests.

At last, the most controversial principle of criminal jurisdiction, the Universality principle, means that a state may exercise its jurisdiction even beyond the above-mentioned principles, and at times, without even a nexus between the state and the crime. It is only limited to crimes that are defined by international law (Delicta Juris Gentium)[36]. The universality principle is controversial because it conflicts with the principle of state sovereignty, however, it is present, de facto, and has been used in multiple cases ( The prosecution of Efrain Rios Mont by Spain[37] – and the prosecution of Adolf Eichmann by Israel)[38] and it also traces back in history to 1949 as under the Geneva conventions, states are not only empowered to punish war crimes, they are obliged to do so, and that responsibility is not limited to the injured/accused state but to all signatory states, which further implies that the Universality principle is a legitimate basis for states to prosecute war crimes under the Geneva convention[39], that occurred not only under their traditional jurisdiction but even without a connection, as the ultimate goal is the maintenance of peace and security and the primacy of International Law.

org/en/doc/war-and-law/ihl-other-legal-regmies/jus-in-bello-jus-ad-bellum/overview-jus-ad-bellum-jus-in-bello.htm > accessed on 11 July 2021.

[34]Ibid.

[35]Yoram Dinstein, 'Universality Principle and War Crimes, The' (1998) 71 Int'l L Stud Ser US Naval War Col 17, 17-19.

[36]Yoram Dinstein, (1998) n(35) at 18.

[37]Alicia Robinson, 'Challenges to Justice at Home: The Domestic Prosecution of Efrain Rios Montt' (2016) 16 Int'l Crim L Rev 103, 113.

[38]Matthew Lippman, 'The Trial of Adolf Eichmann and the Protection of Universal Human Rights under International Law' (1982) 5 Hous J Int'l L 1.

[39]Yoram Dinstein, (1998) n(35) .

States may also extend their jurisdiction under the principle of the responsibility to protect (R2P), which emerged after the Rwandan genocide and the Srebrenica crises. and the failure of international law to prevent such atrocities. The R2p challenges the long-established understanding that human rights are a national question rather than an international matter[40].

**War crimes Under the Rome Statute**

The establishment of the ICC under the Rome statute was evidence that universality is the new norm. The ICC does not have universal jurisdiction, but its reach is universal except for referrals from the UN security council that are based on the theory of universality[41], article (7) of the Rome statute listed war crimes and divided them into war crimes during international conflicts and war crimes that do not have the international nature.[42]

What is selectivity in the prosecution of War crimes:

Selectivity is the claim that international criminal law is applied unequally to -at sometimes- equally notorious international crimes.[43] There have been multiple critics and cries that have echoed about the issue of selectivity since modern international tribunals were established after the second world war with the fact that these tribunals have not prosecuted all parties to a conflict, and thus the issue of selectivity and double standards is deeply rooted in International criminal law.[44]

According to Robert Cryer, the issue of selectivity could be divided into:[45]

1. Selectivity Ratione Personae: Which includes two aspects which are the Independence of the prosecutor and claims about legitimacy which in turn includes critics regarding the selection of cases and whether it is motivated by power, patronage, or political influence.
2. Selectivity by stealth: Which includes claims regarding limiting the judicial discretion and the parameters of liability.
3. Selectivity in domestic law: Which refers to selectivity in domestic prosecutions of international crimes that have often been limited to discredited past regimes or foreigners and not nationals who are for example, still in power. This brings us back to the dilemma of not prosecuting all parties to a conflict, but rather focusing on a defeated/ past-regime party.

[40]Halil Rahman Basaran, 'Responsibility to Protect: An Explanation' (2014) 36 Hous J Int'l L 581.

[41]M Cherif Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice' (2001) 42 Va J Int'l L 81. (117).

[42]UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, article (7).

[43]Asad G Kiyani, 'The Three Dimensions of Selectivity in International Criminal Law' (2017) 15 J Int'l Crim Just 624, 629.

[44]Ibid at 628-630.

[45]Elies van Sliedregt, 'One rule for Them - Selectivity in international criminal law', 2021, 34 Leiden J Int'L 283, 284 – 286.

These aspects of selectivity are going to be assessed in-depth with examples by classifying them into Selectivity before the establishment of the ICC, and Selectivity under the ICC.

## Chapter 2: A history of selectivity

The trial of Peter Van Hagenbach is considered as a mark in history and the first step towards the recognition of war crimes, this trial dates back to 1474 when Peter Van Hagenbach was tried in front of an ad hoc tribunal by the Holy Roman empire[46]. Since then, multiple historic events have helped shape International criminal law as we know it now, and in particular, the constituents of war crimes. The emergence of international criminal law and the basis for individual responsibility[47] -and in particular, command responsibility- for the perpetuation of war crimes is consistently tied to the establishment of the Tokyo tribunal and the Nuremberg tribunal as the solid emergence of international criminal tribunals dates back to the aftermath of World War II and the establishment of the Nuremberg tribunal and the IMFTE to prosecute Nazis and Japanese for war crimes and crimes against peace[48].

### The International Military Tribunal for the Far East and The International Military Tribunal

Claims about the selectivity in the prosecution of war crimes began long before the establishment of the ICC[49]. The establishment of the IMT or what is more popular as the Nuremberg tribunal was a major step on the path towards universal jurisdiction, and a new era where human life was valued after the horrendous atrocities of the first and second world wars. However, the Nuremberg tribunal and the international military tribunal for the far East (IMFTE) are often referred to as an exercise of victor's justice[50].

Some argue that it is unrealistic to assess trials that occurred in 1945 and 1946 by human rights standards that are prevalent now, however, this does not change the fact of the one-sidedness of the trials and the prosecutions,[51] as according to judge Pal, the European allies in the pacific conflict were just as egregious as the Japanese, and there seemed to be no political will of prosecuting the war crimes committed by the allies during world war II.[52] Judge Pal, one of the judges at the Tokyo tribunal was very active in publicizing his

[46]Heller K and Simpson G, *The Hidden Histories of War Crimes Trials* (Oxford University Press 2013)42-70.

[47]Marco Bocchese, 'Jus Pro Bello: The Impact of International Prosecutions on War Continuation' (2017) 27 Wash Int'l LJ 645, 646.

[48]Ibid.

[49]Critics to the IMT and IMFTE that will be discussed in that chapter.

[50]William A Schabas, 'Victor's Justice: Selecting Situations at the International Criminal Court' (2010) 43 J Marshall L Rev 535, 535.

[51]Ibid.

[52]Int'l Military Tribunal for the Far East Judgement, dissentient opinion of Judge Pal, paras. 37 & 152 as cited in Mark A Drumbl, 'Memorializing Dissent: Justice Pal in Tokyo' (2020) 114 AJIL Unbound 111, 113.

dissent as to the selectivity practiced at that time. It should also be noted that justice Pal was not the only judge to criticize the IMFTE as several other judges of the eleven IMFTE judges submitted separate dissenting opinions about the IMFTE tribunal, and this includes Sir William Web[53].

The notorious crimes committed by the Nazis against occupied territories and especially against the Jewish people were notorious, and so were the war crimes committed by the Japanese, but the one-sidedness of the prosecution failed to put to trial, equally notorious acts committed during the world war including the Katyn massacre[54], the destruction of the cities of Dresden and Hamburg[55] and the nuclear bombing of Hiroshima and Nagasaki[56].

It can not be denied that nuclear weapons and their use in armed conflicts are equally grave or even more aggravating in nature, and thus it seems rather selective that the first time in history such weapons were used went by unpunished. The bombing of Hiroshima and Nagasaki was under multiple critics regarding their proportionality and targeting civilian populations, and the use of weapons whose impact lasts for decades. The United States which was responsible for one of the greatest war crimes in modern history was not put to trial and no perpetrators of these crimes were put to trial.

At the Nuremberg tribunal, the judges were appointed by the allies[57], and thus they were designated by their governments which raises questions as to whether there were instructions from their governments regarding the selection of the defendants. It should also be noted that even the charter of the IMT was limited in jurisdiction to crimes committed by the Axis powers and thus exempting the prosecution of the Allied forces. [58]

Another critic of the IMFTE is that two of the major war criminals convicted became prime minister and minister of foreign affairs of Japan[59]. which brings into question the legitimacy and the impact of politics on the prosecution of war crimes. As justice was not served to both sides of the conflict, the Japanese were not authentically convicted for major war crimes and the Allies were never convicted for war crimes.

[53]Ibid.

[54]Allan Gerson, '72 Years Later: Still Seeking Accountability for the Katyn Forest Massacre' (2011) 44 Case W Res J Int'l L 605.

[55]Andre Vartan Armenian, 'Selectivity in International Criminal Law: An Assessment of the Progress Narrative' (2016) 16 Int'l Crim L Rev 642, 649.

[56]Marjorie Cohn, 'No Victors' Justice in Yugoslavia: NATO Must Be Held Accountable for Its War Crimes' (1999) 56 Guild Prac 146, 147.

[57]William A Schabas, (2010) n(50) 537.

[58]United Nations, Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement"), as cited in Stuart Ford, 'Fairness and Politics at the ICTY: Evidence from the Indictments'
(2013) 39 NCJ Int'l L & Com Reg 45, 60-61.

[59]M Cherif Bassiouni, 'Combating Impunity for International Crimes' (2000) 71 U Colo L Rev 409, 415.

**Selectivity and the International Criminal Tribunal for the Former Yugoslavia**

The issue of selectivity in the prosecution of war crimes was once again in the spotlight after NATO's intervention in the Kosovo war. And especially after allegations of war crimes committed during its 11-week aerial bombardment of Yugoslavia.[60] The United States was once again under attack when the NATO intervention's proportionality was brought to question after the destroying of civilian airports, bridges, railroad lines, hospitals, and educational institutions thus sabotaging the infrastructure of these territories[61].

NATO used cluster bombs and depleted uranium weapons condemned in multiple health reports, the civilian casualties to these attacks were condemned by the UN high commissioner for human rights stating that: "people are not collateral damage" and that NATO officials could face war crime charges[62].

Spanish captain Adolfo Luis Martin de la Hoz, who participated in the NATO bombardment reportedly said upon returning that NATO consciously chose non-military targets. There have been varying opinions as to the authenticity of this controversial statement, however, there were no solid actions taken to investigate the validity of these allegations.[63]

Another incident that was under criticism during the Kosovo war and the conflicts in Yugoslavia was the April 1999 bombardment of three major industrial plants in Pancevo, where the mayor of Pancevo reportedly stated that the US was aware of the consequences of that bombardment considering the fact that the US built that factory and thus was well aware of the presence of Carcinogen vinyl chloride monomer (VHM), the release of this in air and land contaminated the Danube river and the level of contamination in the air reached 10,600 times more than the accepted levels. Which once more questions the proportionality of these attacks and questions their impact on the civilian lives of residents of Pancevo.[64]

However, the ICTY declined to investigate these grave violations which once more reflects the light on the issue of selectivity in the prosecution, Unlike the situation at the Nuremberg tribunal. The ICTY prosecutor was appointed and was to act independently which seemed like a significant development,[65] but the institution was, in fact, an emanation of the security council dominated by the permanent five members, which includes the United States which further questions the impartiality of the controversial decision not to investigate the

[60]Marjorie Cohn, 'No Victors' Justice in Yugoslavia: NATO Must Be Held Accountable for Its War Crimes' (1999) 56 Guild Prac 146, 146.

[61]Ibid at 147.

[62]Ibid.

[63]Ibid.

[64]Ibid at 147 - 148.

[65]William A Schabas, (2010) n(50) at 537.

allegations of war crimes committed by the NATO during the Kosovo war[66]. This increased feeling of injustice and selectivity, Serbs in particular were not impressed by claims of the ICTY's neutrality[67]. When applying this to Robert Cryer's classification of the types of selectivity this falls under the Selectivity Ratione Personae.[68]

Selectivity in the prosecution of war crimes in the Kosovo war was also mentioned when Milosevic's indictment was only limited in content to the conflict in Kosovo and did not include the more substantial allegations related to Croatia and Bosnia[69] which according to Robert Cryer's classification of types of selectivity constitutes selectivity by stealth.[70] These shortfalls in the prosecution of war crimes prove the selectivity criteria prevalent in international criminal law, the international community willingly chose to establish a tribunal to prosecute international crimes committed during the Yugoslav conflicts and yet also willingly chose to ignore the allegations of war crimes committed by the NATO at that same conflict. As a result of which many academics communicated their dissent, professor Hayden has accused the ICTY of being a 'scam designed by the US to prosecute those it viewed as its enemies'[71]. Professor Mandel has described it as a hoax[72], professor Bassiouni called it a truce, not peace nor reconciliation[73], and there were even calls that it was a "show trial" as the prosecutor appears to have been influenced by political considerations in deciding whom to charge and whom not to charge. Academics were not the only critics of the ICTY, as there were even claims as to the relevance of ethnicity in the prosecutions as some estimate that there were weak cases against Bosnians and Kosovan Albanians which further calls into question the impartiality of the ICTY and compliance with the procedural standards by the prosecutor[74] as the more trials become political, the less likely they are fair[75]

[66]Andreas Laursen, 'NATO, the War over Kosovo, and the ICTY Investigation' (2003) 17 Am U Int'l L Rev 765, 778- 779 see also Press Release, Office of the Prosecutor for the Int'l Criminal Tribunal for the Former Yugoslavia, Prosecutor's Report on the NATO Bombing Campaign (June 13, 2000), available at < www.un.org/icty/pressreal/p5I0-e.htm > accessed on 10 June 2021.

[67]Andreas Laursen, 'NATO, the War over Kosovo, and the ICTY Investigation' (2003) 17 Am U Int'l L Rev 765, 11-13 .

[68]van Sliedregt E (2021). One rule for Them - Selectivity in international criminal law. Leiden Journal of International Law 34, 283, 284.

[69]Andreas Laursen, (2003) n(66).

[70]Ibid.

[71]Robert Hayden, Biased "Justice " Humanrightsism and the International Criminal Tribunal for the Former Yugoslavia', 47 CLEV. ST. L. REV. 549, 551-52. As cited in Stuart Ford, 'Fairness and Politics at the ICTY: Evidence from the Indictments' (2013) 39 NCJ Int'l L & Com Reg 45, 46.

[72]Stuart Ford, (2013) n (58).

[73]M Cherif Bassiouni, 'Combating Impunity for International Crimes' (2000) 71 U Colo L Rev 409, 419.

[74]Ibid at 53.

[75]Ibid at 57.

because the focus shifts from a determination of guilt through a fair trial to the relevance of the political consequences of the trial. And thus, the ICTY seems to have crossed the boundary between a predominantly legal process into a predominantly political trial. these critics do not in any way underestimate the grave nature of the crimes prosecuted by the ICTY. however, it questions the legitimacy and the legality of the procedures. Sure, these were notorious crimes but the relevant question here is why these crimes only while claims of NATO war crimes on that same conflict have not been taken seriously?

Selectivity under ad hoc tribunals was not only limited to the IMT, IMFTE, or the ICTY, it also included the special tribunal for Lebanon that was established to investigate and prosecute the attack that has led to the assassination of the Lebanese president at that time Rafik Hariri[(76)]. The special court for Lebanon was under criticism as it was established to prosecute the assassination, however, it ignored the credible allegations of war crimes committed on that same territory the following year during the conflict between Israel and Hezbollah[(77)]. This selectivity as to who to prosecute and when the international community willfully chooses who and what to prosecute brings to question the double standards in the prosecution of war crimes.

## Chapter 3: Selectivity and the ICC What are the reasons behind this selectivity?

It cannot be denied that the establishment of the ICC was a much-needed step towards accountability for atrocities perpetrated during conflicts, however, it is evident that there have been some shortcomings in the prosecution of war crimes in the last century[(78)], shortcomings that are not entirely the ICC's fault but critics to the United Nations security council and the performance of its role as the peacekeeper and the UN instrument envisaged with all means -even military means- to avoid such atrocities, and at last, failures of states to cooperate with the ICC. In this chapter, we aim at assessing selectivity under the main player in establishing and enforcing international criminal law in the international community.

The ICC has been under a significant amount of criticism when it comes to the issue of selectivity or the double standards in the prosecution of war crimes, selectivity is no longer an abstract concern as it was when justice Pal communicated his dissent about the Allied hypocrisy in the far east as there are different patterns and forms of selectivity.[(79)] International criminal justice is supposedly a protective mechanism protecting citizens where the state is

[(76)]Special court for Lebanon website < https://www.stl-tsl.org/en/about-the-stl > accessed on 7 August 2021.

[(77)]William A Schabas, (2010) n(50), 543.

[(78)]Thomas Obel Hansen, 'A Critical Review of the ICC's Recent Practice Concerning Admissibility Challenges and Complementarity' (2012) 13 Melb. J. Int'l L. 217.

[(79)]Asad G Kiyani, 'The Three Dimensions of Selectivity in International Criminal Law'(2017) 15 J Int'l Crim Just 624, 625.

unable or unwilling to prosecute the crimes committed[80].

ICC's jurisdiction extends to the commission of war crimes under article (8) of the Rome statute,[81] however, there is growing criticism regarding the ICC's prosecutions of war crimes especially from the African Union which has repeatedly criticized the ICC as being biased against African states[82]. In this section, we aim, first to explore the allegations of the ICC's selectivity and second to consider whether the ICC is biased against African states or not.

When applying Robert Cryer's aspects of selectivity, it is undeniable that there are many signs of the presence of selectivity depending on the nationality of the perpetrators and that there is little chance that the jurisdiction of the ICC will apply one day to the nationals of the US or Russia for instance[83], the same way it applies to African states. And thus, the question becomes not of the gravity of the war crimes committed but rather the nationality of the perpetrator and how powerful that state is.

The office of the prosecutor (OTP) is the engine room of the ICC, and the selection of cases is forever linked to the court's legitimacy[84] which means that the OTP's selections and the legitimacy of the court are mutually dependent and reinforcing which further means that these selections could either enhance and increase the court's perceived legitimacy or diminish it[85]. Accordingly, these selections are pivotal to the progress or even the continuity of the ICC as a major player in international criminal law, and as the court envisaged with the ability to prosecute war crimes and other atrocities committed during the times of conflict and the darkest times of humanity.

For over a decade, the legitimacy and confidence of the perceived legitimacy of the court are being questioned[86] and the selectivity in enforcement is becoming unacceptable to many states especially in the African continent. Which alone constitutes around 16.72 % of the population[87]. The recent practices of the OTP have proven a pattern of problematic selection according to the alleged perpetrator's group identity, ethnicity, nationality, or political affiliation[88].

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[80]UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, article 17.
[81]Ibid, article 8.
[82]Stuart Faurd, 2013, n (58), 107.
[83]Ovo Imoedemhe, 'Unpacking the tension between the African Union and the International Criminal Court: the way forward' (2015) 23 AJICL (1) 74, 86 – 87.
[84]Birju Kotecha, 2020, n(8) 107.
[85]Ibid.
[86]Ibid at 108.
[87]African population < https://www.worldometers.info/world-population/africa-population/ > accessed on 12 June 2021.
[88]Ovo Imoedemhe, (2015) n(9) at (74) see also Birju Kotecha,' The International Criminal Court's Selectivity and Procedural Justice' (2020) n (8) at 109.

Unlike the previous ad hoc tribunals, that dealt with the defeated parties during the aftermath of a conflict, The ICC is a permanent court[89] and thus could further be used -hypothetically- as an instrument for defeating enemies during an ongoing conflict[90], which implies that politics plays a major role in the considerations of the ICC. the nature of the crimes and conflicts prosecuted by the ICC cannot be taken out of context, politics does play a major role in international law, however, there is a fine line between a merely political instrument and a powerful judicial tribunal that is envisaged by the means of prosecuting perpetrators of war crimes.

According to Leventhal[91], for a procedure to demonstrate fairness, some characteristics need to be prevalent, which are consistency, impartiality, accuracy, correctability, ethicality, and representation of the interest groups.

And thus, to establish that the ICC is considered fair, these six characteristics need to be present.

When discussing consistency, it is observed that there is inconsistency in the duration of preliminary examinations between the cases or investigations as the duration in the case of Libya was one week, in the case of Afghanistan, the duration was ten years, the duration in the case of Colombia was more than thirteen years, and the duration for the case of the Comoros vessels was two years[92]. Of course, it could be argued that there are practical difficulties that could lead to different durations of the preliminary examinations, however, this does not in any way constitute such drastic inconsistency in the durations from one week to over thirteen years.

Another inconsistency lies in the positive complementarity and is illustrated by the direct comparison between the OTP's selective practices in the interventions in Kenya and Uganda[93]. According to the Rome statute and the complementarity principle, the ICC only initiates the investigations if the state is unwilling or unable to prosecute, however, the

[89]UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, articles 3 and 4.

[90]Thomas S Harris, 'Can the ICC Consider Questions on Jus Ad Bellum in a War Crimes Trial' (2016) 48 Case W Res J Int'l L 273.

[91]Leventhal, 'What Should be Done about Equity Theory?' in K.J. Gergen et al. (eds), Social Exchange Advances in Theory and Research (Springer, 1980), at 40–45. As cited in Ibid at 116.

[92]A. Pues, 'Towards the 'Golden Hour'? A Critical Exploration of the Length of Preliminary Examinations', 15 JICJ (2017) 434, at 443–444 as cited in Ibid 121 – 123.

[93]C.L. Sriram and S. Brown, 'Kenya in the Shadow of the ICC: Complementarity, Gravity and Impact', 12 International Criminal Law Review (2012) 44; W. Burke White, 'Implementing a Policy of Positive Complementarity in the Rome System of Justice', 19 Criminal Law Forum (CLF) (2008) 59–85; O. Bekou, 'The ICC and Capacity Building at the National Level', in C. Stahn (ed.), The Law and Practice of the International Criminal Court (Oxford University Press, 2015) 1245–1258. As cited in Ibid at 133.

culture of encouraging self – referrals contradict the primacy of national prosecutions over war crimes that the complementarity principle is based on[(94)].

Inconsistency is also prevalent in the determination of the "gravity" of the situations and cases, as it seems vague and inconsistent that some cases fall under the umbrella of the "gravity" threshold according to the international community and yet has not been prosecuted, as the case of Palestine, which is a major obstacle in the ICC's path towards progress and its legitimacy as a legal institution from many aspects, as the ICC took three years to determine Palestine's status and five years to determine that there is reasonable basis[(95)]. Which is completely problematic and criticized as a prolonged delay in procedures. The ICC has taken a positive step as it has been determined by the ICC that it has jurisdiction and that there is reasonable ground to believe that war crimes have been committed[(96)]. Yet, it comes to mind the legal maxim that "justice delayed is justice denied"[(97)] and the prolonged delay led to more problematic consequences, and humanitarian crisis, and more war crimes perpetrated including the recent Sheikh Jarrah crisis[(98)]. There is no question that the new era of globalization and the availability of the internet and social media platforms has made it impossible for international entities to deny the presence of a humanitarian crisis. The ICC's selectivity regarding the Palestinian- Israeli conflict has been increasingly criticized as manifesting double standards in the prosecution of war crimes[(99)]. As decades of conflict and war crimes have gone by unprosecuted. Academics argue that with the US backing Israel[(100)], the ICC would not have the opportunity to prosecute Israeli soldiers – not to mention Israeli commanders or heads of state- which further evidences the prevailing selectivity and that the ICC could be used as a means of political stigmatization as the conflicts of the middle east has left the highest number of battle-related deaths in 2012[(101)] and yet the OTP willingly chose to ignore that fact and focus on conflicts in Africa.

[(94)]Nidal Nabil Jurdi, 'The Prosecutorial Interpretation of the Complementarity Principle: Does it Really Contribute to Ending Impunity on the National Legal' (2010) 10 Int'l Crim L Rev 73, 73.

[(95)]Ibid.

[(96)]International Criminal Court website, < https://www.icc-cpi.int/Pages/item.aspx?name=210303-prosecutor-statement-investigation-palestine > accessed on 3 July 2021.

[(97)]William Gladstone, Martin Luther King, and others.

[(98)]Amnesty International, 2021, < https://www.amnesty.org/en/latest/news/2021/05/israel-opt-end-brutal-repression-of-palestinians-protesting-forced-displacement-in-occupied-east-jerusalem/ > accessed on 10 August 2021.

[(99)]Svetlana Sumina and Steven Gilmore, 'The Failure of International Law in Palestine'(2017) 20 Scholar 135.

[(100)]Ibid.

[(101)]Lotta Themnér and Peter Wallensteen, "Armed Conflicts, 1946-2012',50(4) Journal of Peace Research, (2013): 509-21, available at <http://jpr.sagepub.com/content/50/4/509.full.pdf+html> (accessed 15 August 2013). As cited in Ovo Imoedemhe, 2015, n (9) at 79 – 80.

This does not in any way justify the war crimes committed in African states that should be prosecuted, this article aims to shed the light on other equally grave or at times more serious crimes.

The African Union (AU) that was once the biggest supporter for the establishment of the ICC[(102)] has been publicizing its dissent to the recent practices of the ICC especially after the issuance of an arrest warrant against the Sudanese head of state at that time Omar Al Bashir regarding the humanitarian crisis in Darfur which African states have refused. Since then, the AU has been increasingly critical to the ICC and its pattern of selectivity.

The AU has been dissenting the practices of the ICC as being anti-African and that it is using Africa as a scapegoat[(103)] to establish its legitimacy. As Jean-Ping[(104)], the former chairperson of the AU has once noted that:

"We are not against international justice; it seems that Africa has become a laboratory to test the new international law."

The AU claims that it has been asserted that the conflicts in Africa have been fanned to varying degrees by western powers[(105)] and fueled by the weapons illegally supplied by western states and that these states should be held accountable for their actions.

These allegations fail to address the fact that the ICC has failed in prosecuting both sides of the conflict in some situations in Africa and that according to data available on the ICC website at the time of writing this article, the ongoing investigations are 14[(106)], of which 10 investigations are related to situations on the African continent. It should be noted that according to the Rome statute there are three ways of initiating an investigation; self-referral, referral by the UNSC, or referral by the prosecutor. When examining the referrals of African situations, it is noticed that five of these 10 referrals were self-referrals by the states[(107)] which constitute 50% of the ongoing investigations against African situations. the rest of

[(102)]The first state to recognize the Rome statute was an African state (Senegal) United Nations website < https://www.un.org/press/en/1999/19990203.l2905.html#:~:text=L%2F2905-,SENEGAL%20FIRST%20STATE%20TO%20RATIFY%20ROME%20STATUTE%20OF%20INTERNATIONAL%20CRIMINAL,of%20Legal%20Affairs%20announced%20today > accessed on 10 August 2021, along with the support provided by the African Union at that time.

[(103)]The scape goat theory implies that the ICC starts with the weakest states and not the most criminal to establish legitimacy and respect – in other words to sharpen its teeth- but what is a scape goat? It is the practice of transforming the guilt of a whole people into an individual, animal, or object.

[(104)]Jean Ping was former Foreign Minister of Gabon who headed the AU from 2008 to 2012 as cited in Ovo Imoedemhe, 2015, n(9) at 78.

[(105)]Paul Zeleza, Introduction: "The Causes & Costs of War in Africa from Liberation Struggles to the "War on Terror"', in Alfred Nhema and Paul Zeleza (eds), The Roots of African Conflicts: The Causes and Costs, Ohio University Press (2008), p. 22 as cited in Ibid at 87.

[(106)]International criminal court website, < https://www.icc-cpi.int/pages/situation.aspx > accessed on 10 August 2021.

[(107)]Ibid.

the situations are 5 African states and 4 non-African states[108] (Palestine, Georgia, Myanmar and, Afghanistan). Accordingly, it is evident that there is selectivity in the prosecution of war crimes under the ICC however, this does not necessarily constitute bias against African states or that the ICC is using them as a scapegoat. The pattern of selectivity highlighted is willingly ignoring to prosecute some crimes based on how "strong" the state of nationality is. When applying Robert Cryer's dimensions of selectivity, it is noticed that this constitutes selectivity ratione personae concerning the selection of cases prosecuted at the ICC.

Another aspect of criticism or element of the increased impunity and selectivity is within the Rome statute itself.

**Critics to the Rome statute**

Many academics argue that one of the main reasons for impunity for the perpetrators of war crimes, or international crimes in general is the Rome statute itself as there are multiple critics to the Rome statute which will be discussed below.

At first, the previously mentioned point on the vagueness of the "gravity" threshold is of significant relevance here, as it leaves the prosecutor with the discretionary power of selecting which war crimes are "grave" and which are not. And due to the recent practices and the inconsistency in applying this term, this article seems problematic. Another form of vagueness in the Rome statute is article (53) [109]which allows the prosecutor a significant amount of discretionary power to assert whether not prosecuting would serve the interests of justice. There seems to be no explicit insight as to what is meant by the interests of justice[110]. And why would not prosecuting crimes serve the interests of justice? As the role of the ICC -or any other tribunal in that matter- is to assert whether a person is convicted or not through prosecutions and accordingly it contradicts the notion of establishing a court.[111]

It should also be noted that the ICC has also failed to keep up with the new forms and patterns of modern warfare, and the possibility of prosecuting such crimes as modern patterns of warfare makes it difficult to attribute the responsibility for war crimes. The increasing use of lethal autonomous robots and computer network attacks[112] make it almost impossible to attribute the responsibility of such modern attacks. The mere possibility of prosecuting these

[108]Ibid.

[109]UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, article (53).

[110]Birju Kotecha, 2020, n (8) at 115 – 116.

[111]It should also be noted that the OTP investigates both exonerating and convicting aspects.

[112]Computer network attacks or cyber-attacks are a new form of modern warfare that could lead to partially paralyze the infrastructure of a state in a specific sector as the health care sector for instance and this denial of medical service that could lead to significant loss of civilian life see also Karl Zemanek, 'War Crimes in Modern Warfare' (2014) 24 Swiss Rev Int'l & Eur L 207.

new forms of crimes could lead to deterrence from using them.

Another critic of the Rome statute is the relationship between the ICC and the UNSC and the ability of the UNSC -which is merely a political body- to refer situations to the ICC – a judicial body- it is understandable that there was a need to extend the jurisdiction of the ICC to territories that are outside its jurisdiction. However, the reliance on a political body to refer situations to a tribunal seems problematic.

The UNSC is also envisaged with the ability under article (16) of the Rome statute to defer investigations or prosecutions previously referred to the ICC.

Article (16) of the Rome statute:[113]

Article (16) of the Rome Statute states that:

'No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.'

Article (16) of the Rome statute has been under the auspices of multiple critics, with many academics arguing that the legality of article (16) remains a matter of debate[114].

Accordingly, the ICC seems to be at crossroads between Law and politics and compromising law for the sake of politics contradicts the objectives upon which the court was established as the ultimate goal was to end a culture of impunity. However, the ICC is still considered to be bound -to an extent- by the Rome statute, and thus the increasing impunity shadows criticisms to the other main player in this field; the UNSC as one of the main reasons for impunity, along with other reasons which will be discussed in the following chapter.

## Chapter 4: United Nations Security Council

According to chapter (7) of the UN charter[115], the security council is considered the gatekeeper for international peace and security and the instrument envisaged with all means to ensure the continuity of peace and prevent atrocities like the second world war.

The UNSC can refer -and also defer- situations to the ICC, a practice that is criticized by many academics as listed above[116]. The UNSC is a political body envisaged with immense powers. It should be noted that the UNSC consists of permanent members and impermanent members; the permanent members and the holders of the veto power are (The United States,

[113]Rome statute n(109).

[114]William A Schabas, (2010) n(50) at 540 – 551.

[115]United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, article (7).

[116]Article 16 of the Rome statute, discussed in the previous chapter.

The United Kingdom, France, Russia and, China)[117]. The mere existence of the Veto power contradicts the notions and objectives of the UN charter. According to the UN charter, all states should be equal. And the idea of veto power to the world's most powerful states to shape the future of the rest of states seems imperialistic and outdated. Many academics argue that as the trustee council of the UN[118], it's time to remove the veto power as it leads to the prevalence of the political interests of great powers over justice. And those great powers would decide the targets of their prosecutions to secure their own political interests.

The UNSC is a political body and thus acts accordingly, to be specific, of the five permanent members, the US has been under fire for its exceptionality and impunity for decades using its position as a world power and its veto right[119]. As mentioned before, the UNSC can refer cases to the ICC, the UNSC has used this ability to refer the situations in Sudan and Libya[120] both in the African continent which further fanned the gap between Africa and the ICC. the situations and the war crimes committed in Sudan and Libya had to be prosecuted, this is out of the question, however, it brings the question of why the UNSC only used its influence to refer these two cases and ignored other atrocities elsewhere?

Unlike the ICC, The UNSC is not bound by the Rome Statute, and it can fight selectivity and impunity, however, it has become one of the main reasons for the prevailing culture of selectivity and impunity. This is not a recent issue, as the UNSC acted to stop the atrocities and prosecute the perpetrators of war crimes under the ICTY, and other ad hoc tribunals established with the aim of prosecuting war crimes (and other international crimes). The problematic approach fanning selectivity under the UNSC is the fact that five states determine when to prosecute and when to "let bygones be bygones", who is a friend of the international community and who is the enemy that needs to be stigmatized and prosecuted. Of relevance here, is the case of Palestine again, and it is used as a case study to shortcomings of both the ICC and the UNSC (before the start of an investigation in the ICC).

According to Richard Goldstone who issued the infamous Goldstone report; during the "operation cast lead" by Israel in December 2008, January 2009[121]. The UN fact-finding

[117]United Nations website, < https://www.un.org/securitycouncil/content/current-members > accessed on 10 August 2021.

[118]Organs of the UN https://www.un.org/en/about-us/main-bodies accessed on the 28th of June 2021.

[119]Mark D Kielsgard, 'War on the International Criminal Court' (2005) 8 NY City L Rev 1, 21. See also Andre Vartan Armenian, 'Selectivity in International Criminal Law: An Assessment of the Progress Narrative' (2016) 16 Int'l Crim L Rev 642, 657.

[120]ICC investigations available on its website, n (105) accessed on 10 August 2021.

[121]Report of the United Nations Fact Finding Mission on the Gaza Conflict [hereinafter Goldstone Report], September 15, 2009, as cited in Jennifer Barnette, 'The Goldstone Report: Challenging Israeli Impunity in the International Legal System' (2010) 10 Global Jurist [i], 2-4.

mission on the Gaza conflict concluded that, what occurred in these three weeks was a deliberately disproportionate attack designed to punish, humiliate, and terrorize a civilian population and that this was collective punishment of the civilian population in Gaza, which altogether constitutes war crimes[122]. However, as pure evidence of selectivity, the US has used its influence[123] to select not to prosecute these instances, and thus the UNSC selectively chose to prosecute the Yugoslav war and other conflicts and selectively chose that it was sufficient to send a fact-finding mission for the conflict in Gaza and ignore the findings of the Goldstone report and not to prosecute the aforementioned war crimes.

The Goldstone report was called by the US and Israel as an anti-Israel bias, interestingly, Goldstone himself is a Zionist[124] which in turn questions the claims of anti-Israel bias, and according to the Goldstone report, it was pre-given that Israel had the right to self-defense,[125] what Goldstone dissented was the disproportionate attack on the civilian population. Hence disproving anti-Israeli claims. However, no further actions were taken[126].

Goldstone highlighted the issue of selectivity in the establishment of tribunals by saying that:[127]

'The problem with the UNSC is that it says no in the cases of Cambodia, Mozambique, and Iraq and other places where terrible war crimes have been committed, but yes in the case of Yugoslavia and Rwanda. It is noteworthy that no ad hoc tribunals would be established to investigate war crimes committed by any of the five permanent members of the UNSC or those nations these powerful states might wish to protect'.

The security council, as mentioned before is a council of states' and thus another aspect of selectivity is to be viewed through the lens of state practices that eventually lead to this gap in the prosecution of war crimes.

**State practices**

State practices and in particular US practices have been under fire for decades in fanning

[122]Ibid.

[123]of relevance here, is mentioning the deep relations between the US and Israel, as the US is mostly the first to use its veto power to obstacle any step towards the prosecution of Israeli war crimes, and on the other side of the conflict considers Hamas as a terrorist group. The demand here is to prosecute both sides of the conflict and to shed the light on the one sidedness of the US approach to the Palestinian-Israeli conflict.

[124]Ibid at 6.

[125]Ibid.

[126]Goldstone report, n(120).

[127]Richard Goldstone, in David Hoile, "ICC, A Tool to Recolonise Africa', African Business July 2013, available at http://africanbusinessmagazine.com/special-reports/sector-reports/icc-vs-africa/icc-a-toolto-recolonise-africa> (accessed 24 July 2013). See also Michael Scharf, "The Politics of Establishing an International Criminal Court', 6 Duke Journal of Comparative and International Law (1995):167-74, at 170. As cited in Ovo Imoedemhe, (2020) n(9), 77.

the already existing issue of selectivity[128], as previously mentioned when discussing the issue of Palestine and the US's misuse of its veto right and its status as a great power.

The US has taken extraordinary steps during the establishment of the ICC to ensure that states participate in the Rome statute and in the new era of international criminal law, however, the US has also at the same time taken extraordinary steps to exempt itself from the jurisdiction of the ICC[129]. the US is not a party to the Rome statute[130] and there seem to be no plans from the US -at least at present- to become a party to the Rome statute and accept the ICC's jurisdiction. The US has been relentless in exerting all its efforts to exonerate itself from the jurisdiction of the ICC or even from the mere possibility of prosecution of US military personnel for war crimes committed during military interventions or conflicts[131]. This implies that the US chose not to ratify the treaty it had shaped.

For instance, On May 2002, the US has threatened to veto the security council renewal of the East Timor peacekeeping mission if US soldiers were not shielded from ICC prosecutions,[132] on July of the same year, the security council agreed to the US pressures and approved an exemption that would last for a year providing immunity to its personnel from any ICC prosecutions and in the next year this exemption was extended for another year.

The situation in East Timor was not the only situation that the US insisted to shield its personnel from, which brings to question the legitimacy of such actions as to why US soldiers would be exempted from the ICC if the notion of the establishment of the ICC is to fight impunity.

This was not the only state practice taken by the US to further intensify the scale of selectivity in the prosecution of war crimes, The US issued the American Service members' protection act of 2002[133] to ensure that the jurisdiction of the ICC would not extend to its personnel. The UK has also taken a similar measure to shield personnel from prosecutions by the ICC[134].

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[128]Geoffrey S Corn and Rachel E VanLandingham, 'Strengthening American War Crimes Accountability' (2020) 70 Am U L Rev 309, 309 – 310.

[129]Mark D Kielsgard, 'War on the International Criminal Court' (2005) 8 NY City L Rev 1

[130]Parties to the Rome statute, International criminal court website < https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx > accessed on 10 August 2021.

[131]DavidJ. Scheffer, A Negotiator's Perspective on the International Criminal Court, 2001, 167 MIL. L. REx'. 1, 5 and to Escape the Jurisdiction of the International Criminal Court, 2003, 27 HASTINGS INT'L & COMP. L. REv. 103, 127 as cited in Mark D Kielsgard, 2005, n (128) at 10 and 19.

[132]Mark D Kielsgard, 2005, n (129) at 21.

[133]American Servicemembers' Protection Act of 2002 (ASPA), Pub. L. No. 107-206, 2005, 116 Stat. 899, 903-904 as cited in Mark D Kielsgard, 2005, n (128) at 25.

[134]Elies van Sliedregt, 2021, n (45) at 287.

Of the five permanent members of the UNSC -with the ability to refer situations to the ICC- only France and the UK have ratified the Rome statute[135].

Another reason for selectivity or in clear words, another justification that has been widely used to justify the prevailing selectivity in the prosecution of war crimes is the peace vs. justice dilemma which will be discussed below.

**Peace vs. Justice dilemma**

Some academics argue that sometimes peace is not in the interests of justice[136] and that maintaining, or establishing peace prevails over claims to justice. In this section, the aim is to establish the fact that this justification contradicts the objectives of international law in general and international criminal law.

According to the preamble of the Rome Statute[137], paragraph (2) sheds the light on the suffering of the victims which in turn justifies the argument by some academics that redress for victims of atrocities as war crimes are one of the main reasons for the prevalence of justice interests and the refusal of the trade-off between peace and impunity as the interests of the victims would generally be in favor of convictions[138], however, this can in no way be at the expense of a fair trial to the accused, the argument here is the presence of a fair trial where perpetrators are convicted. Another justification from the Rome statute preamble that supports the refusal of this claim is paragraphs (4) and (5) that recognize that such crimes must not go unpunished which leads to taking into consideration the retributive and restorative aspects that led to the establishment of the ICC.

The peace vs. justice dilemma and the claims that peace prevails over justice is problematic and concentrates on the short-term interests rather than the long-term interests, as not prosecuting war crimes and trading peace for impunity of the perpetration of war crimes leads to complete disregard to the responsibilities of states and personnel participating during the times of conflict under the Geneva conventions and the Rome statute. Thus, this claim disregards the fact that uncertainty of punishment eventually leads to future disregard to international criminal law and has consequences regarding deterrence for the perpetration of future crimes. A law that is not used is a law that does not exist. And again, an example of that was the recent situation in Sheikh Jarrah or in general the decades of war crimes committed during the Palestinian- Israeli conflict.

[135]Parties to the Rome statute, n (109).

[136]Bartlomiej Krzan, 'International Criminal Court Facing the Peace vs. Justice Dilemma' (2016) 2 ICJ 81.

[137]UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998.

[138]Mirjan R. Damaska, What is the Point of Int'l Criminal Justice?, 2008, 83 CHI.-KENT L. REV. 329, 333 – 334. as cited in Lovisa Badagard and Mark Klamberg, 'The Gatekeeper of the ICC: Prosecutorial Strategies for Selecting Situations and Cases at the International Criminal Court' (2017) 48 Geo J Int'l L 639, 658.

The idea that the interests of peace prevail over the interests of justice, contradicts -to some extent- the sanctity of the human life, and the suffering of victims and imposes that -theoretically- it is okay to perpetrate war crimes if, in the end, peace negotiations happen.

Accountability brings closure to a conflict and provides redress to victims[(139)] and eventually leads to peace and reconciliation as justice is both a human and social value. Accordingly, we refuse the claim that justice is sometimes not in the interests of peace.

Many other reasons led to the prevailing culture of selectivity in the prosecution of war crimes and this includes the funding issue[(140)], as a tribunal would not prosecute a state that is funding it and thus after we have established the fact that there is selectivity in the prosecution of war crimes and have investigated the reasons behind this issue it would only be relevant to discuss the future possibilities and the influence factors that can put an end to selectivity.

## Chapter 5: The need to put an end to Selectivity in the prosecution of war crimes

The prevailing culture of selectivity has led to the increase of the already high number of lives lost during conflicts, as established before, a law that is not used is a law that does not exist. And the increasing number of unprosecuted atrocities has its consequences on the international community as a whole.

The ICC, the main tribunal responsible for the prosecution for war crimes, along with the UNSC has failed to put an end to this and has at times increased the gap between the crimes perpetrated and the crimes prosecuted.

In this chapter, we aim at exploring the available options and reforms that could be harnessed to put an end to selectivity, and these options include national prosecution for international crimes using the universality principle, the role of the United Nations General Assembly, UNSC and ICC reforms and at last the role of mass media and electronic platforms in the age of globalization.

**Universality principle**

As mentioned before in the preliminary questions section, the universality principle has the ability to fill in the gap between war crimes perpetrated and war crimes prosecuted as it establishes a solid ground as a basis for jurisdiction and for ending the prevailing culture of selectivity and impunity.

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[(139)]M Cherif Bassiouni, 'Combating Impunity for International Crimes' (2000) 71 U Colo L Rev 409, 409 – 410.

[(140)]Andre Vartan Armenian, 'Selectivity in International Criminal Law: An Assessment of the Progress Narrative' (2016) 16 Int'l Crim L Rev 642, 660 – 661.

The universality principle has been used in many prosecutions, as the prosecution of Adolf Eichmann by Israel and the prosecution of Efrain Rios Montt by Spain. It should also be noted that under the Geneva conventions, states are under the responsibility of prosecuting grave breaches to the convention -which includes war crimes- as grave breaches to the law of armed conflicts constitute war crimes, and thus under common article (1) of the Geneva conventions, states are under an obligation to react to these breaches as erga omens[(141)]. The use of the universality principle in prosecuting war crimes has been recognized by Bassiouni as the preferred technique by those seeking to prevent impunity.

The universality principle offers a novel solid ground for the prosecution of war crimes, for instance, multiple academics and academic debates have been referring to the fact that the universality principle could be used to prosecute war crimes in Syria, and thus put to trial those responsible for the inhumane situation in Syria[(142)].

Syria is not part of the Rome statute[(143)] which explains why it is out of the ICC's reach, and the UNSC has been reluctant in referring the situation in Syria to the ICC. Russia one of the permanent five members of the UNSC is increasingly involved with the Syrian crisis out of political interests. Russia does not support the Syrian uprising and exerts its effort in using its veto right to make sure that Al Assad's regime remains in power[(144)]. There seems to be no political will by the UNSC to refer the situation to the ICC as Russia vetoes any decision that aims at removing Al Assad's regime from political power. which further strengthens the claims regarding the misuse of the veto right mentioned before in chapter (4). After over a decade of horrendous war crimes that include the use of chemical weapons [(145)]against civilian populations. and thus, the use of the universality principle appears to be the last resort and the last hope for the Syrian people to achieve retribution. And to deter others from committing similar crimes.

The suggestion here is to encourage the use of the Universality principle as a last resort for justice in case the ICC and UNSC fail to prosecute war crimes.

The use of the Universality principle has been limited in the recent history. However, it

[(141)]Richard Hyde and Robert Kolb, an introduction to the International law of armed conflicts 2 1-23 (Bloomsbury publishing) (2008) as cited in Thomas S Harris, 'Can the ICC Consider Questions on Jus Ad Bellum in a War Crimes Trial' (2016) 48 Case W Res J Int'l L 273, 283

[(142)]Shelby Black, 'Universal Jurisdiction and Syria: A Treaty Based Expansion of Universal Jurisdiction as a Solution to Impunity' (2018) 21 Int'l Trade & Bus L Rev 177.

[(143)]State parties to the Rome statute, available at < https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx > accessed on 12 August 2021.

[(144)]Philippa Webb, 'Deadlock or Restraint - The Security Council Veto and the Use of Force in Syria' (2014) 19 J Conflict & Sec L 471.

[(145)]Michael P Scharf, 'Responding to Chemical Weapons Use in Syria' (2019) 51 Case W Res J Int'l L 189.

could shed the light on conflicts that are being ignored. If theoretically a state can prosecute the perpetrators of crimes as heinous as war crimes that cannot go by unpunished. That would assist in inducing response from other institutions or states.

**United Nations General Assembly as a catalyst for change**

The United Nations General Assembly (UNGA) constitutes all state parties to the UN charter which are 193 states. And accordingly, the UNGA is a better representative of the international community. The UNGA is well suited to challenge the negative impact of the veto right of the five permanent members of the security council. Pressures from the UN general assembly could eventually lead to putting an end or at least mitigating the influence of the veto power in decision-making at the UN.

Another solution to that problem would be to re-consider the veto power and the structure of the UN security council. After we have established in the previous chapters the impact of the UNSC and in particular the VETO power on the environment of selectivity that is prevalent. Several academics have publicized their opinions and plans on how to "fix" the UNSC or democratize it to ensure that it is fit for its role and objectives. And that it reflects the 21st century. The UN assembly president has recently shed the light on this issue[(146)]

Former UN general secretariat Kofi Annan has suggested reforms to the UN security council in 2005 by providing 2 plans, the first was to add six new permanent members and three new non-permanent members which make the number of states at the UNSC 24 states. The second plan was to create eight new seats in a new class of members[(147)].

It should be noted that Kofi Annan was not the only secretariat general to suggest such reforms, similar remarks have been given by Ban Ki-Moon and Boutros Ghali.

According to article (11) section (3) of the UN charter, the UNGA may call the attention of the UNSC to situations which are likely to endanger International Peace and Security. Which entails the UNGA's right to discuss situations that are being ignored by the UNSC. However, the problematic approach here is that it limits the UNGA discussions to situations that are not being discussed by the UNSC as according to article (12) section (1) the UNGA shall not make any recommendations for disputes or situations that are being discussed by the UNSC unless the UNSC requests so. This situation constitutes selectivity by stealth as it limits the UNGA's right to discuss situations and give recommendations to situations that are not discussed by the UNSC. This problematic approach leads to the prevalence of UNSC members' interests over the interests of justice or retribution.

[(146)]United Nations news. https://news.un.org/en/story/2021/01/1082962 accessed on 7 August 2021.

[(147)]Kofi Annan plan, < https://www.kofiannanfoundation.org/transitions-to-peace/un-security-council-must-be-revamped-2860/ > accessed on 12 August 2021.

The suggestion here is to amend articles (11) and (12) of the UN charter to give way for the UNGA to make recommendations to the UNSC, and to provide a mechanism that mitigates the misuse of the veto power by allowing UNGA members to review decisions that were based on the misuse of the veto power especially if that misuse would lead to prolonging conflicts or denying justice to victims of war crimes and other heinous crimes under the scope of the Rome statute.

Better representation of nations in the UNSC would establish a belief in the legitimacy of the UN which would, in turn, establish better understanding and belief in the legitimacy of the UNSC referrals to the ICC and in turn fewer concerns about its legitimacy or bias. This blockchain of interrelated issues suggested above would enhance the progress of prosecutions of war crimes.

**The Interlink between the ICC and the UNSC**

The UNSC has been under fire specially during the recent years considering the fact that the notion of having permanent members in the UNSC negates the UN charter itself that Is built on the idea that all states are the same. The idea of five permanent members envisaged with the ability to veto decisions that are against their political interests is outdated and imperialistic.

Ideas for UNSC reforms have been echoing for decades both in the academic field and by UN personnel and secretariats yet there seems to be no interest from any of the five members to respond to these reform plans. And depending on philanthropic ideas that UNSC reforms could occur -at least in the near future- would be fictitious and the dependence on that reform as the sole ground for change would lead to even more decades of conflicts and lives lost due to war crimes being committed.

The suggestion here is to mitigate the impact that the UNSC has on the ICC. As mentioned, numerous times the dependence of a judicial body on a political institution is problematic.

As such approach would lead to the status quo. Where a judicial body is bound by the political will of the UNSC permanent members and in turn the interests of great powers during a conflict is prioritized over the loss of human lives during a conflict and the prosecution of perpetrators of gruesome crimes.

The UNSC influence on the ICC needs to be addressed. And the approach suggested here would help mitigate the dependence of ICC on the UNSC. Which paves the way for the urgency of Rome statute reforms.

**Reforms to the Rome Statute**

The ICC is at the core of International Criminal Law and hence if the issue of selectivity is to be addressed in the near future, ICC reform seems to be at the core of discussions. It

should be noted that while the Nuremberg, Tokyo, ICTY, and ICTR dealt only with defeated antagonists in aftermath situations, the ICC can be used as a tool to prosecute current issues which entails the sensitive role it has in helping to shape the closure of a conflict or how the conflict could end. Including -theoretically- the number of years that the conflict can be in. who gets prosecuted during the conflict will depend on the ICC.

The ICC is envisaged with the tools necessary to prosecute nationals of Rome Statute signatory states which -to some extent- explains the reluctancy of some states in signing the Rome statute. Hence if the problematic approach here is the influence that the UNSC - a purely political body- has on the ICC – a judicial body- The suggestion here is to mitigate that influence by allowing independence to the ICC and also by paving the way to the UN general assembly that represents almost all nations to claim the right to submit cases to the ICC.

This suggestion is based on the fact that the UNGA is a better representative to the collective consciousness and interests. Which would in turn make it hard -almost impossible- to base such referral decisions solely on political interests of states as it is impossible for almost all nations to have the same political interest over a conflict which in turn would entail a better method for referral of cases to the ICC.

Rome statute has been a positive step towards the new world system where resorting to war was no longer acceptable. However, the vagueness of some articles in the Rome statute have led to decades of prolonged conflicts, prolonged initial investigations and prolonged proceedings. This vagueness that was referred to earlier during this study could have been avoided if the Rome Statute was drafted in a manner that would entail precise statutes of limitation and precise procedural durations. It is understandable that not all conflicts are the same and that the cooperation of states plays a major role in the situation. However, the argument here is that this reasoning does not justify the drastic inconsistency in procedural matters that is available under the ICC.

Another article that has been under fire is article (16) whose removal seems inevitable if the issue of selectivity is to be addressed. Article 16 -as discussed earlier- allows the UNSC to defer situations from the ICC. This approach allows the UNSC the authority to be the sole body envisaged with all means possible to maintain the current selectivity culture, where the permanent world powers have the authority to control who gets prosecuted and when based solely on political interests.

The interdependence between the ICC and UNSC seems problematic. Calls to UNSC reforms have been publicized by academics and UN secretariates long before the Rome

Statute drafting and hence it is problematic to envisage a body that is already under fire with the power to control an entity -a judicial entity- as the ICC. This interdependence also meant that all veto power states are exempt from ICC Jurisdiction since one cannot be a judge and a convict in the same case it is only logical that great powers would refrain from addressing the issue of selectivity. To maintain their position by the problematic use of the veto power.

The ICC is based on the principle of complementarity. However, the culture of accepting many self-referrals negates the notion of complementarity. Giving way and assistance to national African regimes recovering from recent conflicts to prosecute their nationals for war crimes committed during conflicts would have been a better approach to maintaining ICC legitimacy and avoiding the current tension between the ICC and the African Union. Hence the suggestion here is discouraging the self-referrals culture.

It is worth mentioning that during the past years, and in conflicts as the Darfur conflict for instance the ICC was envisaged with legal authority to succeed, as legal obstacles were relatively minor in comparison with political issues arising from the interlink between the ICC and UNSC. Hence the influence of realpolitik on International Criminal law and on the ICC in particular remains a major obstacle in the path towards progress. And the reforms suggested here aim at expanding ICC authority and limiting such political influence on the admissibility of cases to the ICC.

**Mass Media**

Mass media has an undeniable role in shedding the light on the issue of selectivity, the role of the Mass media in public opinion and feelings was recognized during the ICTR trials. Where it was established that Media had its undeniable influence in fuelling the Rwandan genocide and in increasing the already high number of lives lost during the conflict as it had its impact in "normalizing" hatred and normalizing the gruesome acts that were occurring on the basis that they were attributed to an "enemy". Mass Media was not the sole reason for the Rwandan Genocide. However, it helped shape the history of the Rwandan people by -supposedly- normalizing hate speech and hatred towards other humans.

There have been echoes in the academic arena on the role that mass media has on the issue of hate speech or inducing crimes, if media can inflict such negative effects, it also can use that strength to reflect the growing impunity and selectivity in the prosecution of war crimes. This was apparent as, at this age of globalization, the role of mass media or public opinion expressed on social networking platforms has proven to be an undeniable force. The revolutions that are shaping the 21st century have harnessed that power, the recent conflict in Sheikh Jarrah and the conflict in Tigray, where their people used social media

to shed the light on injustice and war crimes can pressure the UNSC to eventually take an action and to address these issues. As the social pressure rests on the global acceptance of accountability[(148)]. Furthermore, Mass media has its impact in inducing governments to take action, or address issues that are ignored for political reasons. Hence Mass Media could be considered as a key to establishing new norms including that a crime is a crime regardless of the nationality of the perpetrator or the political impact that indictments might have on a country which would in turn shape the future of International Criminal law and the prosecution of war crimes committed. As the need for a change cannot be ignored after the number of lives lost during the recent decades.

**Aut Dedere Aut Judicare**

States play a major role in establishing the legitimacy of an international institution. Without the presence of a consensus amongst states to overcome and put an end to the prevalent culture of selectivity and double standards in international criminal law, no progress would be achieved. As state sovereignty does play a major role in international law, which is understandable, however, respect for international law and international rules is much needed. The suggestion here is to increase the use of the concept "aut dedere aut judicare" which means that states are obliged to either prosecute or extradite.

Upon the issuance of the arrest warrant for Omar Al Bashir, the former Sudanese president, multiple African states have ignored the warrant and refused to comply with their obligations under the Rome statute. They have based that on the allegations of bias against African states which have been discussed previously in chapter (3).

Thus, we suggest enhancing the culture of using this principle, whereby states would be under the obligation to either prosecute or extradite war criminals so that they would be prosecuted.

It should also be noted that there are indirect ways to prosecute war crimes that could be used, including prosecuting war crimes as breaches of human rights obligations[(149)]. As the ultimate goal is the prosecution of these crimes and that they cannot remain unpunished.

**What are the obstacles to the reforms in International Criminal Law?**

The main obstacle towards progress in the field of International criminal law remains the same; the lack of political will especially from world powers for a change in the current status. As any change or reform suggested that might limit the authority of the UNSC and in turn

[(148)]Marina Aksenova, 'Symbolism as a Constraint on International Criminal Law' (2017) 30 LJIL 475, 481.

[(149)]Thomas S Harris, 'Can the ICC Consider Questions on Jus Ad Bellum in a War Crimes Trial' (2016) 48 Case W Res J Int'l L 273, 284.

the rights of the permanent five members is faced with immediate vetoes. And accordingly, the suitable solution would be ICC reforms that aim at drawing the line between politics and International criminal law.

The reluctancy of some states to become members to the Rome statute and to give an international institution the right to extend its jurisdiction to their territories could be addressed by ICC reforms mentioned in the previous paragraphs.

Moreover, some state practices that aim at limiting ICC Jurisdiction and shielding their nationals from war crimes prosecutions through national legislations, an approach that has been used by the United Kingdom and the US previously. The lack of state cooperation is a problem that faces the ICC during the preliminary investigations phase and during court proceedings that can be addressed through reforms in the Rome statute articles for instance, by amending the previously discussed vague articles.

At last, a major obstacle that the ICC is currently facing is that during the recent years, the ICC has been under fire from institutions as the African Union whereas it should be noted that public confidence in the ICC is a starting point and a corner stone towards its success and continuity as an institution envisaged with the ability to prosecute war crimes.

## Conclusion

Retribution and deterrence are considered as the essence and notion of the establishment of international tribunals (ICC or ad hoc tribunals). The need for retribution and accountability is a social norm and serves as a closure to conflicts and victims of war crimes in particular. However, the issue of one-sidedness and selectivity in the prosecution of war crimes needs to be addressed to achieve the above-mentioned retribution upon which international tribunals have been established.

The study concludes that selectivity has its undeniable consequences and the evidence from history is extensive, starting from the Armenian Genocide and the impact of the Louisiana treaty that granted pardon to the Turks for this atrocity, to the stigmatization of the Germans during world war 1 and the disregard to the crimes committed by the other side which according to social studies -amongst other reasons- led to the presence of the Nazi group which ignited yet another world war. Deterrence and reconciliation provide redress and closure to the victims, which is the ultimate goal.

International Criminal law is abstract and should be applied to all sides regardless of the nationality of the perpetrator or the victim, however, the five permanent members of the UNSC seem to be outside that equation, of the five permanent members only the United Kingdom and France have joined the ICC's Rome statute. This is problematic, as the US has

exerted all its effort to exclude its nationals from liability under the ICC, the misuse of the veto right has led to prolonged conflicts in the 21st century, including the Palestinian – Israeli conflict, the conflicts in Tigray, Syria, Libya, Myanmar, Chechnya, and many others.

The loss of human lives in the 21st century is highly concentrated in the Middle East and yet no prosecutions seem to proceed – except for Palestine after a prolonged delay- this problematic approach driven by political interests of states in that region is unacceptable. The need to put an end to the influence of realpolitik on international criminal law cannot be stressed enough.

It is observed that the number of self-referrals to the ICC by African states negates the presence of selectivity or bias against them, yes there is selectivity, however, it is not directed against the African peoples but all third-world countries. The ICC is considered a progress in the path of international criminal law; however, it is evident that there are many shortcomings in its performance and the Rome statute especially article (16) concerning the UNSC's ability to defer situations already referred along with the vagueness of some articles of the Rome statute.

The reasons for that selectivity include the UNSC as formerly discussed and the peace vs. justice dilemma where some academics argue that the interests of peace prevail over justice, however, we do not agree with this opinion characterized by being a short-term solution. Another reason for that selectivity would be some state practices in exempting their nationals from war crime prosecutions or the jurisdiction of the ICC. The funding of the tribunal Is also a problem, as "you cannot bite the hand that feeds".

The provided solutions aim at putting an end to impunity and selectivity under international criminal law as the UNSC reforms can provide a solid ground for it to perform its role and use its ability to refer situations to the ICC. The use of the universality principle or the Aut dedere Aut Judicare would provide an enhancement of state practices in that matter which would, in turn, provide social acceptance and legitimacy for the ICC.

The reforms mentioned aim at mitigating the influence of politics on International criminal law. the major obstacle that remains is the lack of political will of states to end selectivity and the interests of world powers in keeping the status quo. Accordingly, the solution suggested is to limit the impact and influence of politics on International criminal law.