“Rounding Up the Usual Suspects”: Exclusion, Selectivity, and Impunity in the Enforcement of International Criminal Justice and the African Union’s Emerging Resistance

Ifeonu Eberechi∗, 1
Dalhousie University, Halifax, Nova Scotia, Canada

Abstract
Despite the overwhelming ratification of the statute of the International Criminal Court (ICC) by African states, recent attempts to prosecute the perpetrators of egregious crimes in the region have come under a sustained opposition from its regional body, the African Union (AU). In fact, the blunt accusation is that international criminal justice has become an instrument of colonization. Within the context of the AU’s claim, this article engages the question of selective enforcement of international criminal accountability, ironically beginning with the Nuremberg trial. Without necessarily justifying the senseless perpetration of heinous crimes in Africa, this article argues that an international justice regime complex that is perceived to be skewed in favour of the West engenders a crisis of legitimacy and ultimately robs it of the much needed cooperation from the region.

Keywords
international criminal justice; African region; selectivity; universal jurisdiction

International law should not be wielded as the big stick by strong nations used to pummel the weak ones. We are against selective justice. If we have to be fair, the Georgian president, who is being accused by Russia of genocide, must face similar justice.2

AU Chairperson, Jean Ping

Introduction
International criminal justice is founded upon, among other things, the idea that perpetrators of heinous crimes will be held individually criminally accountable by the international community. The establishment of the International Criminal

∗ LL.M. Formerly an in-house attorney with the law firm of Chuma Nwosu and Co., Port Harcourt, Nigeria. E-mail: eberechife@yahoo.com.
Court (ICC), which has been hailed as “the most innovative and exciting development in international law since the creation of the UN” and described as “the holy grail of the international criminal law movement” reflects this notion. The Preamble to the Statute of the ICC contains an affirmation that, “the most serious crimes of concern to the international community as a whole must not go unpunished” and a determination “to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.” In his concluding remarks at the end of the 1998 Rome Conference, Kofi Annan, the then Secretary-General of the UN, summed up the mission of the Court by declaring that “now at last... we have a permanent court to judge the most serious crimes of concern to the international community as a whole.”

This article interrogates the concept of individual criminal accountability as established in Nuremberg and the subsequent international criminal tribunals, and identifies a parallel existence of impunity within the corpus of international criminal justice. It argues that among the legacies of the first international criminal prosecution was impunity: while the defeated Nazi officials were prosecuted for crimes committed during the war, the victorious Allied Powers enjoyed immunity, despite having committed crimes that were also egregious.

By pointing out this paradox, this article argues that despite the establishment of the ICC, the enforcement of international criminal justice has been selective, targeting only the “uncivilized” nations. For instance, this article discusses the North Atlantic Treaty Organization’s (NATO) alleged atrocity in the former Yugoslavia in 1998 and the refusal of the ICTY to “open an investigation” of its members despite significant evidence which justified doing so; the United States’ refusal to ratify the treaty of the ICC; and the failed attempt by Belgium to prosecute top government officials of the United States because of fierce diplomatic threats from the US government. Finally, this article argues that the emerging resistance of the African Union (AU) to the enforcement of international criminal justice in the African region finds legitimacy in the failure of the international community to prosecute officials of some Western states and a growing concern that international criminal justice has become another instrument of colonisation.

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4) Mandel, supra note 1 at 207.
5) Paragraphs 4 and 5.
6) Mandel, supra note 1 at 207, quoting Statement by the United Nations Secretary-General Kofi Annan at the Ceremony held at Campidoglio Celebrating the Adoption of the Statute of the International Criminal Court, 18 July 1998.
1. From Consent to Suspicion: The International Criminal Court (ICC) and the African Region

The African region has been in the news, particularly for what commentators usually describe as the wrong reasons. Apart from accounting for the highest statistics of violent conflicts in the world\(^7\) with the attendant severe human rights violations and commission of egregious crimes,\(^8\) attempts by the “international community”\(^9\) to enforce international criminal justice against alleged perpetrators of heinous crimes in Africa have met stiff resistance from the AU.\(^{10}\) The earliest

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\(^8\) The reports of NGO's and the media speak volumes of this. By 2006, an estimated 3,9 million deaths had been reported in the Democratic Republic of Congo (DRC) resulting from armed conflict, with another 1,66 million people internally displaced, while 1,200 people continue to die every day from violence, disease and starvation. Furthermore, estimated 30,000 children had been conscripted as soldiers by the various armed groups in the conflict, constituting more than 40 per cent of the force. See Alina I. Apreotesei, *The International Criminal Court: Starting with Africa* (PhD Dissertation, Peter Pazmany Catholic University Budapest, 2008 (Unpublished)) 9, quoting Amnesty International, “Children at War: Creating Hope for their Future” AI Index: AFR 62/017/2006. In the Central African Republic (CAR), while the number of deaths arising from its internal armed conflict is yet to be determined, more than 70,000 citizens are now refugees in neighbouring countries, excluding another 200,000 people who have been transformed into internally displaced persons. *Ibid.*, citing Amnesty International, “Central African Republic: Civilians in Peril in the Wild North,” AI Index: AFR 19/003/2007. In Darfur region of Sudan, there are reports of between 180,000 and 300,000 people killed and more than 2.4 million people displaced as a result of armed conflict in the country. See Anna Cryer, “The Hybrid Model of International Dispute Resolution: Why Sudan's Case should be Heard in the Hague and at Home” (2005) 2 *Eye on the ICC* 33. In Uganda, the UNICEF estimated that between 1986 and 2002, more than 32,000 children have been abducted by the Lord’s Resistance Army (LRA), a rebel group involved in armed conflict in the country. As at 2007, up to 1.6 million people remained internally displaced, while so many others have been killed, abducted, enslaved, and raped. See Apreotesie, *Ibid.*, at 9–10.

\(^9\) Except otherwise expressly stated, the phrase “international community,” which is used inter-changeably with the term, “the West,” in this thesis refers to the United States and the developed European states.

\(^{10}\) The establishment of the AU in July 2002 to replace the ineffective Organisation of African Unity (OAU) could not have been possible but for “the end of the Cold War, globalization and the need for a fundamental change of the iniquitous international economic system.” See Pusch Commey, “African Union – What Next?” *New African*, 1 no. 410 (September 2002) 12–17. By the early 1990s, African leaders had not only recognised the structural weakness that had prevented the OAU from delivering on its mandate of enhancing peace and security of the African region, but had also observed the increasing lack of interest on the part of the United Nations Security Council and the West in responding promptly to African problems, particularly security matters. It was, therefore, for the above factors that 43 African leaders attending the extraordinary OAU summit in Libya in September decided to establish the AU. The Constitutive Act of the AU was adopted during the 2000 Lomé summit while the AU was established during the OAU’s 5th extraordinary summit held at Sirtre, Libya in March 2004. The formal launch of the birth of AU took place in Durban, South Africa, on July 8, 2002 in a meeting described by one commentator as “an array of personalities, representing Africa’s ruling elite, from the reprobates to the respected, from heroes to villains, and from the eccentric to the power-drunk demagogues.” See Samuel M. Makiinda and Wafula F. Okumu, *The African Union: Challenges of Globalization, Security, and Governance* (New York: Routledge 2008) 28–32.
indication of this emerging opposition occurred in 2005 when the indictment of the then Liberian President Charles Taylor for international crimes was rejected by the AU, which warned that such a move would “create credibility problems for us (Africans) in conducting affairs in our continent or elsewhere.” Only recently, tension between the international community and the AU deepened following the indictment of Sudanese President Omar Hassan Ahmad al Bashir for war crimes and crimes against humanity by the International Criminal Court (ICC), with the former accusing the latter of selective justice, and of turning Africa into “a laboratory to test international law.” Rising from its recent meeting in Sirte, Libya, the AU reiterated its earlier decision that all members “shall not cooperate… for the arrest and surrender of President Omar El Bashir of Sudan” and expressed “concern over the conduct of the ICC Prosecutor.” While human rights scholars saw this decision as “a gift to a dictator”, many Africans hailed it as “a signal to the West that it shouldn’t impose its ways on Africa.”

To be sure, the establishment of the ICC in 1998 was embraced by the African region as an important development in combating the scourge of impunity for international crimes, particularly on the Continent. On 2 February 1999, Senegal, an African state, became the first nation in the world to ratify the statute of the ICC, which “symbolically capped Africa’s early support for the idea of a permanent international criminal court.” Further evidence is in the number of states that have ratified the Statute of the Court, which presently stands at thirty

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out of the fifty-three states that make up the African Region.\footnote{African Union Online http://www.africa-union.org/root/au/memberstates/map.htm last viewed 13-04-09.} In fact, only eight African states have either not signed or ratified the Rome Statute,\footnote{Bekou and Shah, \textit{supra} note 18 at 3.} while thirteen states have signalled their support for the treaty through their signatures.\footnote{Jalloh, \textit{supra} note 16 at 447.} By ratifying, not only did these states consent to international prosecution of their citizens accused of heinous crimes, (which, as explained later, is subject to the principle of complementarity), but also undertook to cooperate with the ICC in this regard. However, this earlier rush of enthusiasm for the ICC has recently given way to scepticism and even hostility, as evidenced by the AU’s resistance to the al-Bahir prosecution mentioned above.\footnote{“AU Chief Accuses UN Crimes Court of Selective Justice” Online: Africa http://www.ngguardiannews.com/af/area/article01//indexn2.htm last viewed 28-01-2009.} In fact, the current feeling within the AU is that international criminal justice has become an instrument of colonization.\footnote{Nicole Fritz, “When International Justice Is Feared as Colonisation by Law” Online: Global Policy Forum, http://www.globalpolicy.org/intljustice/general/2008/0525opencase.htm last viewed 10-10-2008.}

2. Re-defining the Traditional Narrative: Selectivity and Exclusivity in International Criminal Law

In most traditional narratives of international criminal law, prosecution of perpetrators of international crimes, at least since the Nuremberg trials, is demonstrative of the equality of all persons before the law from which no derogation is permissible.\footnote{Claire Nielsen, “From Nuremberg to the Hague: The Civilizing Mission of the International Criminal Law” (2008) 14 \textit{Auckland Univ. L.R.} 81, 85.} As a component of natural justice, equality of enforcement ensures the legitimacy of criminal justice through coherent and consistent application of law to all persons and in every circumstance.\footnote{Robert Cryer, \textit{Prosecuting International Crimes: Selectivity and the International Criminal Law Regime} (Cambridge: Cambridge University Press, 2005) 194.} However, contrary to this narrative, enforcement of international criminal justice is replete with cases of exclusion, which can be summarised into two categories. According to Timothy McCormack, “there is a dual selectivity on the part of the international community. This selectivity is first found in relation to the acts the international community is prepared to characterise as ‘war crimes’ and secondly, in relation to the particular alleged atrocities the international community is to collectively prosecute.“\footnote{Timothy L. H. McCormack, “Selective Reaction to Atrocity: War Crimes and the Development of International Criminal Law” (1996) \textit{60 Albany Law Review} 681, 683.} Kenneth Kulp Davis offers an instructive definition of selectivity as: “When an enforcement agency or officer has discretionary power to do nothing about a case in which enforcement would be clearly justified, the result is a power
of selective enforcement. Such power goes to selection of parties against whom the law is enforced. Selective enforcement may also mean selection of the law that will be enforced: an officer may enforce one statute fully, never enforce another and pick and choose in enforcing a third.”27

For the African region, although selective enforcement of criminal justice, per se, is neither inherently wrong, nor, subject to few exceptions, a defence in law,28 its pattern of occurrence evokes a sense of Western subjugation, colonialism, racism and exclusionism. As the succeeding examples show and as part of the reasons for the emerging AU’s resistance, the political and economic status of states implicated in gross violations of human rights has always defined the attitude of the international community towards the enforcement of international criminal justice vis-à-vis such states. Thus, while states in the African region are subjected to international criminal investigation or prosecution for their alleged involvement in international crimes, political expediency has always trumped the prosecution of powerful Western states despite their participation in similar crimes.29 Consequently, the predominant concern raised is that Africa is the primary target of international criminal justice. According to Robert Cryer, “when a law, general on its face, is in practice enforced only against a group or groups, the effect is the same as if it were targeted at those groups by its term.”30

3. Nuremberg: A Legacy of Impunity

The Allies have done or are doing some of the very things we are prosecuting the Germans for. The French are so violating the Geneva Convention in the treatment of prisoners of war that our command is taking back prisoners sent to them (for reconstruction work). We are prosecuting plunder and our Allies are practising it. We say aggressive war is a crime and one of our allies asserts sovereignty over the Baltic States based on no title except conquest.31

The traditional narrative has always correctly traced the origin of the modern day international individual criminal accountability to Nuremberg, and also acknowledged that the successful establishment of a permanent international criminal

28) In the Ćelebići appeal, Esad Landžo had argued that the enforcement against him was unfairly selective. While rejecting his argument, the Appeal Chamber of the ICTY laid out a general test for a plea of such nature to be accepted by the Tribunal. There must be evidence (1) establishing an unlawful or improper (including discriminatory) motive for the prosecution and (2) proving that other persons similarly situated have not been prosecuted. See _Prosecutor v. Delalić, Mucić, Delić and Landžo_, Judgment, IT-96-21-A, 20 February 2001 (Ćelebići Appeal), para. 611.
30) _Ibid._, at 194.
court represents significant progress in the development of this norm. This narrative further argues that the obligation of states to prosecute or cooperate with international tribunals in the prosecution of perpetrators of international crimes is not simply treaty-based, but has, since Nuremberg, assumed the status of customary international law from which no derogation is permissible. The current insistence by the international community on the prosecution of the Sudanese President, and others in the African region who are alleged to have perpetrated heinous crimes is predicated on this premise. The familiar argument is that failure to prosecute these people would not only exalt impunity, but would mark a return to the pre-Nuremberg era when justice was only for the strong and might was always right.

However, while the above assertions, to the extent that they highlight the imperative for criminal accountability, represent the mission of international criminal justice, they are by no means incontrovertible, especially in the light of historical facts. Grossly omitted from the preceding argument is the fact that one of the characteristics of Nuremberg trial was the legitimization of impunity by the four victorious allied nations – the United States, the United Kingdom, the Soviet Union, and France – whose prosecution of the defeated Germans has been variously described as “victors’ justice,” “disguised vengeance,” and “collective vengeance.” One of the issues that arose during the meeting of the Allies in London was whether only the Nazis and Italians would be subjected to investigation and prosecution before the Nuremberg Tribunal. This discussion became important following strong allegations that certain Soviet officials had committed heinous crimes on the Eastern Front during the war. As agitations by members of the Allied Powers for the prosecution of Soviet officials intensified, the Soviet leaders threatened to remove their troops from the territories under the control of the Allies. Faced with this threat, the remaining Allied countries backed

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32) Nielsen, supra note 24 at 90.
34) Aryeh Neier, War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice (United States: Random House, 1998) 15. McCormack defines “victors’ justice,” in the context of Nuremberg trial as “the imposition of structures and the processes for the collective prosecution of alleged atrocities by Axis Power individuals with no willingness to countenance the subjugation of Allied Power individuals to the same or similar procedures.” See McCormack, supra note 26 at 717.
38) Ibid.
down and agreed to limit the jurisdiction of the Tribunal to crimes committed by Germany and Italy.\(^\text{39}\)

The crimes for which the Germans were prosecuted were as heinous as those committed by the Allies but for which the latter did not stand trial. The Allies did not see themselves as having committed any crime during the war despite their gross violations of laws of war.\(^\text{40}\) For instance, the Soviet Union sat in judgement against the Nazis accused of war crimes for which the Soviet Union was responsible, such as the disappearance of approximately 15,000 Polish prisoners, including between 8,300 and 8,400 Polish officers.\(^\text{41}\) There was also the bombing of Dresden in February 1945 by the British, when the war was almost over, which cremated tens of thousands of civilians, in violation of laws of war.\(^\text{42}\) In March 1945, there was the firebombing of Tokyo by American planes which claimed between 80,000 to 100,000 civilian lives,\(^\text{43}\) while the atomic bombs dropped on Hiroshima and Nagasaki by America killed an estimated 300,000 people and rendered the cities desolate.\(^\text{44}\)

The description of the Nuremberg trial as a victor’s justice is also re-enforced by other allegations. The conduct of the trial has been characterised by some as having not complied with the principle of fair hearing, with specific accusation of bias against the accused persons on the part of the judges and that the applicable law was designed to ensure conviction at all cost.\(^\text{45}\) For instance, there was strong reliance on affidavit evidence and the issue of inequity in the funding of the

\(^{39}\) Ibid.

\(^{40}\) David Luban, “The Legacies of Nuremberg” in Mettraux, supra note 35 at 659. As Taylor succinctly put it:

Victor were about to judge the vanquished. There was no alternative: “The world-wide scope of the aggressions carried out by these men has left but few real neutrals.” Therefore, the “dramatic disparity between the circumstances of the accused and the accusers” underlined the victors’ responsibility for a “fair and dispassionate” trial and judgement.

See Telford Taylor, “The Nuremberg Trials” in Mettraux, supra note 35 at 387. Birkett identifies three more reasons to justify the notion of victors’ justice: (1) The Tribunal was composed entirely of representatives of the victorious nations which raise the question of fair trial; (2) The defendants were under the effective control of the Allies whose authority over them was absolute; and (3) The law under which the defendant were charged was laid down by the Allies who nominated judges to administer on the accused. See Norman Birkett, “International Legal Theories Evolved at Nuremberg” in Mettraux, supra note 35 at 300.


\(^{42}\) Neier, supra note 34 at 16.

\(^{43}\) Ibid.


parties. With respect to the applicable law, despite the Tribunal’s ruling, there is little doubt that crime against humanity and peace with which the Nazis were charged were defined by the Allies in London “with the actions of the Nazis in mind.”

Like the Nuremberg tribunal, the Tokyo Tribunal, to critics, is victors’ justice: “I think we can say that to some extent the Tokyo trial itself provided a wholesome example of a concept of Anglo-Saxon justice.” The Potsdam Declaration of July 26, 1945 called for “stern justice” against the indicted Japanese. Rather than being prosecuted for committing the conventional war crimes – the crimes covered under the various conventions signed at The Hague and in Geneva – the Japanese were indicted for crimes against peace and against humanity. While a majority of the accused were convicted in a majority judgment, a minority opinion issued by the Tribunal is very instructive. In his dissenting judgment, Justice Pal denied the existence of crimes against peace under the international law and noted that, in the absence of a clear definition, the concept of aggression was vulnerable to “interested interpretation.” He questioned the fairness of the trial proceedings and accused the prosecution of hypocrisy, citing the involvement of the Allies in colonialism and the use of nuclear weapons against Hiroshima and Nagasaki. However, his opinion was criticized by Judge Jaranilla who, among other things, argued that the atomic bombings were justified as they brought an end to the war. To most commentators, the appointment of Jaramilla as one of the judges of the Tokyo Tribunal and his position on critical

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46) Ibid.
47) In rejecting the argument that the offences for which the accused were prosecuted constituted ex post facto criminalisation, having not existed prior to the adoption of the Charter of the Tribunal, the Tribunal referred to the Hague Conventions, for the war crimes, and to the 1928 Kellog-Briand Pact, for crimes against peace. The Pact was an international treaty which prohibited the use of war by states as a means of settling international disputes. See William A. Schabas An Introduction to the International Criminal Court, (3rd ed.) (Cambridge: Cambridge University Press, 2007) 6.
48) Cryer and Friman, supra note 45 at 95. Until the defeat of Germany, crimes against peace and against humanity were not part of the “conventional war crimes” known to international law. However, at the end of their meeting in London, the Allies created the crimes against peace, defined as “…planning, preparation, initiation, or waging of a war of aggression, or war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the establishment of any of the foregoing;” and crimes against humanity as “…inhumane acts committed against any civilian population, before or during the war…..” See Richard H. Minear, Victors’ Justice: The Tokyo War Crimes Trial (Princeton: Princeton University Press 1971) 7.
49) Minear, ibid., at 3, citing Joseph B. Keenan (1949).
50) Ibid., at 8.
51) Ibid.
52) After eight hundred and eighteen court sessions on 417 days, 419 witnesses and 779 affidavits, the Tribunal sentenced seven men, including Tojo and Hirota to death by hanging; sixteen persons to life imprisonment; one person to twenty years imprisonment; and one person to seven years. One accused person was deemed unfit for trial, two defendants had died during the long proceeding, while three persons were acquitted. ibid. at 6.
53) Cryer, Friman, et al., supra note 45 at 98.
54) Ibid., at 98.
issues concerning the accused persons are suspect. As one of the victims of the Bataan Death March, one of the crimes with which the accused were charged, his appointment undoubtedly compromised one of the hallowed principles of natural justice – *nemo judex in causa sua* – “you cannot be a judge in your own case,” and could only have happened because “the victors were in charge.” Arguably, his bias against the defendants was manifested by his view that the sentences imposed by the Tribunal were too lenient.

The above analysis is neither an attempt to under-emphasize the egregious nature of crimes committed by the parties tried before the tribunal, nor to present “a variation of the *tu quoque* argument.” Rather, it is to make the point that although the Nuremberg trial marked the beginning of the evolution of individual criminal accountability for the perpetration of international crimes, it “provided a background against which various international crimes would be committed without the possibility of prosecution particularly for the winning or stronger countries notwithstanding the impunity with which such campaigns may have been committed.”

More than half a century after Nuremberg, the administration of international criminal justice has continued on the path of impunity and selectivity except for the poor and weak states or regions, particularly Africa. As was evident, the decision of the Allies not to prosecute the Soviet officials due to threats exposed the vulnerability of international criminal justice to political manipulation, which is demonstrated in the further analyses that follow in this article. Although this does not diminish the guilt of the Nazis, it does point to the Western political influence and interest that have continued to shape the entire landscape of international criminal law enforcement. However, as states and regions begin to justify their resistance to the enforcement of international criminal justice by legitimate reference to the impunity of the Superpowers, as is presently the case in Africa, the prophesy of one of the accused persons at the Nuremberg trial comes to mind. Hermann Goering had predicted that the Tribunal before which he and others were facing trials would be a failure: “you will see – this trial will be a disgrace in 15 years.”

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58) Bakayana, *supra* note 44 at 326–27.
60) Guenael Mettraux, “Judicial Inheritance: The Value and significance of the Nuremberg Trial to Contemporary War Crimes Tribunals” in Mettraux, *supra* note 35 at 599.
4. The United States’ Invasion of Vietnam

The Cold War which began in the late 1940s was an era in which the overriding focus of the United States’ policy was to defeat communism at whatever cost.61 The Vietnam war had begun in 1964 following a claim by the Johnson administration that two U.S. destroyers had been attacked by North Vietnamese torpedoes in the Gulf of Tonkin.62 Emboldened by media propaganda that had described the purported attack as a national disgrace, and armed with one of the most sweeping resolutions of the U.S. Congress in history, Johnson launched a reprisal bombing against Northern Vietnam63 “to ensure that each and every communist was killed man, woman or even child.”64 Mamdani notes that the failure of each U.S. military strategy led to the adoption of another with “each concluding with a public announcement of a grisly ‘body count’ of number of Vietnamese Communists killed.”65 At the end of the war, the U.S. had dropped an estimated 2.1 million tons of bomb over the small and poor state—“the same tonnage that the Allied Powers dropped on Germany and Japan during World War II.”66 The impact of this on the impoverished country was predictably devastating both in term of human and infrastructural loss.67 The war itself found no justification under international law both in its commencement and execution.68

Clearly, this was a case for which an international tribunal ought to have been established to try the top officials of the U.S. for international crimes, in accordance with the principles established in the Nuremberg. The prosecution of the U.S. for international crimes committed in Vietnam would have not only consolidated the gains of the Nuremberg trial, but re-enforce the notion of the rule of law in the enforcement of international criminal justice.69 It was an

61) Bakanaya, supra note 44 at 327.
62) Mahmood Mamdani, Good Muslim, Bad Muslim: America, the Cold War, and the Roots of Terror (New York: Pantheon Books, 2004) 64.
63) Ibid.
64) Bakanaya, supra note 44 at 327.
65) Mamdani, supra note 62 at 65.
66) Ibid., at 66.
67) Bakanaya, supra note 44 at 327.
68) Mamdani, supra note 62 at 66.
69) Fuller gives a classic definition of the rule of law thus:

(1)A system of governance operates through general norms, and all or most of the norms partake of the following properties: (2) they are promulgated to the people who are required to comply with them; (3) they are prospective rather than retrospective; (4) they are understandable rather than hopelessly unintelligible; (5) they do not contradict each other and do not impose duties that conflict; (6) they do not imposed requirements that cannot possibly be fulfilled; (7) they persist over substantial periods of time, instead of being changed with disorienting frequency; and (8) they are generally given affect in accordance with their terms, so that there is a congruence between the norms as formulated and the norms as implemented.

opportunity for the international community to prove that no nation, no matter how highly placed, would be allowed to subject humanity to the horror and abuse to which Vietnamese had been subjected by the U.S.70

According to Article 56 of the United Nations (UN) Charter, states are requested to cooperate with the UN in order to meet its obligations. Similar provisions are contained in the various statutes of the international criminal tribunals. However, the actions of the U.S. and its allies such as Israel and Western states have, in some cases, been nothing except impunity. As the current U.S. military involvement in Iraq shows, wars are declared and fought without regard to international law as long as it is consistent with the national interest of these nations, and, in so far as this interest triumphs, “the so called collateral damage could be wished away.”71

5. United States’ War in Iraq

The terrorist attack of 9/11 against the United States fundamentally changed the complexion of the American governments’ foreign and domestic security policy.72

In what is popularly referred to as the “war on terror,” the US has usurped the power of the UN to authoritatively determine (at least for the purposes of enforcement) what state poses a danger to the US’s security and that of the world, including the definition of such danger. For instance, the government adopted a policy of pre-emptive military strikes against countries considered as “high-risk enemies” in exercise of right of self defence – a policy which was serious criticized by international law scholars who considered it unknown to the UN Charter.73 The relevant provision is Article 51 of the Charter which permits the use of force by a state by stating that nothing in the Charter “shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations.”74 While some scholars argue that intrinsic in the right of self-defence is the prior occurrence of an actual attack, others hold a contrary view.75

In declaring war on Iraq, the U.S. claimed that Iraq, particularly its President, Saddam Hussein, was a source of imminent danger with plans to attack the U.S. with weapons of mass destruction.76 In 2003, and without authorisation by the UN, the U.S. invaded Iraq, inflicting severe damage, including the killing of a

70) Bakanaya, supra note 44 at 327.
71) Ibid.
73) Ibid.
74) Emphasis supplied.
75) For an discussion about the legality of Iraqi War in the context of the United Nations Charter, see Mandel, supra note 1 at 10.
76) Moghalu, supra note 72 at 159.
large number of innocent civilians.\textsuperscript{77} It is reported that between 2003 and 2004, more than 100,000 Iraqi civilians had been killed by the U.S. military.\textsuperscript{78} Another report issued in 2006 estimated that about 2.5% of the Iraqi population, most of who are males within the ages of 15–44, have died since 2003 when the U.S. invaded the country.\textsuperscript{79}

The U.S. invasion of Iraq in 2003 and the concomitant crimes committed therein are undoubtedly breaches of the rules of international law similar to the Iraq’s invasion of Kuwait in 1991. For instance, while the conduct of U.S.’s bombing was without regard to collateral damage, the proportionality of its action raised serious concern among commentators who accused the U.S. of massive war crimes.\textsuperscript{80} Although the U.S., through its military spokesman Brig. Gen. Vince Brooks defended its actions by invoking the soldiers’ “inherent right to self-defence” – “while we regret the loss of any civilian lives, at this point they remain unavoidable, as they have been throughout history”\textsuperscript{81} – many scholars and international groups remained critical. Amnesty International, a highly respected international non-governmental organisation, condemned the U.S.’s use of cluster bombs and the bombing of a TV station, questioned the exposure of civilians to danger, and called for investigations into civilian deaths, particularly those that occurred at the Karbala checkpoint and the shooting of demonstrators in Falluja.\textsuperscript{82}

Technically, the U.S.’s invasion amounted to a crime of aggression – the same crime for which the Nazis and the Japanese were prosecuted by the Allies after World War II. Although Article 5 of the ICC makes aggression a crime but only in escrow,\textsuperscript{83} the existence of the crime as part of customary international law has been acknowledged. In dismissing the objection of the defence to the jurisdiction of the IMT that the crimes for which they were being tried were unknown to international law, the Tribunal held, among other things, that the crime against peace\textsuperscript{84} had existed prior to 1945 and, therefore, punishing the defendant for


\textsuperscript{78} Ibid.


\textsuperscript{80} Bakayana, supra note 44 at 328.

\textsuperscript{81} Mandel, supra note 1 at 8.

\textsuperscript{82} Ibid.

\textsuperscript{83} Article 5(2) states that “the Court shall exercise jurisdiction over crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crimes.” See Statute of International Criminal Court, Online: http://untreaty.un.org/cod/icc/statute/romefra.htm last viewed 14-07-2009.

\textsuperscript{84} Crime against peace was defined as “planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a Common Plan or Conspiracy for the accomplishment of any of the foregoing.” See Article 6(a) of the IMT Charter,
having committed the crime did not violate the principle of nullum crimen sine lege.\footnote{85} The Tribunal also defined aggression as the “supreme international crime.”\footnote{86} Applying the Nuremberg judgement, American political and military leaders, having violated article 2(4) of the Charter of the U.N. prohibiting unilateral use of force by states, inter se, should have been prosecuted for the supreme crime of aggression, regardless of the provision of Article 5 of the ICC statute, the crime being one that is known to customary international law.\footnote{87} The botched attempt by Belgium to prosecute the top officials of the U.S. for international crimes only re-enforces the notion that international law is selective and targeted by the stronger nations against the weaker ones.

6. Don’t Try Us: Belgium’s Indictment of United States’ Officials and the “Demise” of its Universal Jurisdiction Law

The selectivity of the enforcement of international criminal justice was once again exposed in Belgium. By way of background, in 1993, following a proposal by military judges and various legal academics, the Belgian government amended the country’s penal code in order to exercise jurisdiction with respect to crimes contained in the 1949 Geneva Convention and the 1977 Additional Protocols, regardless of the territoriality of the crime.\footnote{88} In 1999, prompted by various human rights non-governmental organisations (NGOs), and presumably by being a signatory to the Rome Statute, Belgium further amended its law to include the crime of genocide, as defined in 1948 Genocide Convention, and crimes against humanity, as defined in the Statute of the International Criminal Court.\footnote{89} The expansion of Belgian law was a by-product of an internal political process that developed following the 1994 genocide in Rwanda, a former Belgian colony.\footnote{90}

In 2002, a Belgian court with twelve jurors sentenced four Rwandans – two Roman Catholic nuns, a physics professor, and a former government minister – to prison terms of 12 to 20 years over crimes connected with the genocide.\footnote{91}
The country was soon to be inundated with several referrals by private plaintiffs, alleging that genocides and crimes against humanity had been committed by various leaders. For instance, a criminal complaint was filed against the then Prime Minister of Israel, Ariel Sharon, and Mr. Amos Yaron, by twenty-three survivors of the 1982 massacre of the Palestinian refugees by Lebanese militiamen at the Sabra and Shatila, over his involvement in the said massacre. Similarly, another suit was brought against the then Iraqi President, Saddam Hussein, for his attacks against the Kurds in 1991; against Yasser Arafat, the then leader of the Palestinian National Authority, and against the Rwandan president, Paul Kagame. The sitting Prime Minister of the Democratic Republic of Congo (DRC), Abduldaye Yerodia, Cuban President Fidel Castro, and former Iranian President Hashemi Rafsanjani were also sued.

If the successful prosecution of the Rwandans won general applause for what was described as “the triumph of justice,” the indictment of Ariel Sharon was resisted by the Israeli government, which described it as “a blood libel and harsh blow against truth, justice and morality.” Elyakim Rubenstein, Israel’s Attorney General, said “the criminal indictment… is an injustice, not a search for justice… It was submitted solely for political reasons.” In response, Belgian Foreign Minister, Louis Michel, while promising a review of the contentious law, chided his “Israeli friends” for manifesting clear ignorance about the “ethical underpinnings” of the Belgian law. In further reaction, Ariel Sharon cancelled a scheduled official visit to the European Union’s Brussels headquarters and recalled Israel’s newly appointed ambassador to Belgium.

On 7 September, and in accordance with Article 127(1) of the Code on Criminal Investigation, an investigation judge made an order turning the case file to the Prosecutor (ordinance de soi communiqué). At the Court of Appeal’s Chambre de mises en accusation, the issue for determination was whether prosecution of the two accused persons was admissible. In declining jurisdiction to try the two, the court held that Belgian law did not permit trial in absentia. But on further appeal to the Belgium Court of Cassation, it was held that there was nothing in the law that prohibited prosecution in absentia, but that Sharon could not be prosecuted because he enjoyed immunity, being the Prime Minister of Israel.

93) Moghalu, supra note 72 at 91.
94) Roach, supra note 37 at 50.
96) Ibid.
97) Ibid.
98) Moghalu, supra note 72 at 92.
99) Cassese, supra note 92 at 438.
100) Ibid.
101) Ibid.
The case against Mr. Yaron was, therefore, held to be admissible even though he was not within the territory, and was remitted to the Court of Appeal for trial.\footnote{Ibid.}

Although the dismissal of the complaint against Sharon by the court was well grounded in law, the political pressure mounted by Israel betrayed how resistant powerful states can be towards international criminal justice – a point proved by the United States.

The indictment of some U.S. political and military officials for war crimes in connection with the bombing of civilian shelter in Baghdad which killed over 403 people, including 261 women and 52 children,\footnote{Halberstam, supra note 95 at 251.} in the Persian Gulf War of 1991 proved to be a “suicide mission” for Belgian universal jurisdiction. Those indicted were former U.S. President George Herbert Walker Bush, former Vice-President Dick Cheney (who had served as a secretary of defence under President George H. W. Bush), Secretary of State Colin Powell (former Chairman of the Joint Chiefs of Staff), and Gen. Norman Schwarzkopf, the American Military Commander in the Gulf War. Subsequently, other suits relating to the U.S. and British pre-emptive war against Iraq which began in 2003 were filed against President George W. Bush, Powell, and U.S. military commander Tommy Franks.

The indictments of the U.S. officials proved to be “the most important factor that led to the ultimate death of the Belgian law in its potent form – and the inevitable decline of universal jurisdiction.”\footnote{Moghalu, supra note 72 at 92.} In response to the lawsuits, the U.S., through Secretary of State Powell issued a warning to the Belgian government that Belgium was at the risk of losing its status as the diplomatic capital and the host state for NATO by allowing investigation of those who might visit Belgium.\footnote{Ratner, supra note 88 at 890. See also Charles C. Jalloh, “Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction” (2010) 21 Criminal Law Forum, 1 at 56.} In a two-pronged attack, the U.S. made it clear that its officials and the officials of other member states of NATO would never attend any meeting of NATO in Belgium, and that it was withholding its pledge of 70 million dollars for the construction of new NATO headquarters until the suits against U.S. leaders were dismissed.\footnote{Roach, supra note 37 at 51.} According to Rumsfeld, “Belgium needs to recognise that there are consequences for its actions.”\footnote{Moghalu, supra note 72 at 92.}

The reaction of the Belgian government to U.S. threats did not surprise those conversant with the politics of international law. Immediately, Belgian Foreign Minister Louis Michel denounced the suits, describing it as “abuse” by “opportunists,”\footnote{Halberstam, supra note 95 at 251.} while the Belgian Prime Minister, Guy Verhofstadt quickly proposed an amendment to the Belgian law to further limit its scope.\footnote{Ratner, supra note 88 at 890.} On April
6, 2003, slightly more than two weeks after the cases were instituted, the Belgian Parliament approved changes to the law by conferring on the Prosecutor the exclusive power to bring criminal complaint in respect of crimes over which there was no Belgian territorial or other connection, as in the above cases. This amendment was rejected by the U.S. which led to a further amendment by which Belgian courts will entertain a criminal action in the exercise of their universal jurisdiction only if there is a link between Belgium and the crime. \(^{110}\)

Although the merit or otherwise of the indictment of U.S. officials is not part of this discussion, the capitulation of the Belgian government by not proceeding with the charges is unambiguous evidence of how international criminal justice has been often manipulated in favour of the powerful Western nations. According to Ratner, “nearly all of the plaintiffs’ complaints were directed at officials with substantial support among key international actors: to prosecute them would clearly put Belgium in the lion’s den.” \(^{111}\) As proved by the Belgian experience, and as history has continued to record, in a confrontation between international criminal justice and Western nations, the former more often caves in under the weight of the latter’s political pressure. \(^{112}\) As discussed next, this was further demonstrated in the year 2000 when the ICTY Prosecutor refused to open an investigation into the bombing of Kosovo by NATO forces which occurred in 1999.

7. Manipulating International Criminal Justice: NATO’s Bombing of Kosovo and the Decision of the Prosecutor not to Investigate Serious Allegations of War Crimes

In June 2004, Carla Del Ponte, Chief Prosecutor of the ICTY, announced that she would not be opening an investigation into the allegations of war crimes brought against NATO by the Canadian law professor Michael Mandel and others. \(^{113}\) An investigation would not only have determined the existence or otherwise of a prima facie case against NATO for civilian casualties resulting from its Kosovo bombing of 1999 as a possible violation of international law, \(^{114}\) but would have demonstrated the inviolability of the principle of rule of law in the administration of international criminal justice.

The crisis which caused the NATO’s bombing of Kosovo in 1999 started in 1997, when tensions between the majority ethnic Albanians and the minority

\(^{110}\) Ibid., at 891.

\(^{111}\) Ibid.

\(^{112}\) Moghalu, supra note 72 at 92.


Serbs in the southernmost province of the Republic of Serbia led to the emergence of an Albanian guerrilla movement, the Kosovo Liberation Army (KLA). Following the killing of Adem Jashari, a KLA leader, and fifty members of his family including twelve women in a gun battle with the Serbian police in 1998, the group became radicalised, engaging in acts which the United Nations described as “terrorism” against the Serbs. In response, Slobodan Milosevic, then President of the Federal Republic of Yugoslavia (FRY), ordered the Serbian unit of the Yugoslav armed forces which loosely became an ally of several Serbian paramilitary groups such as the “Tigers” of Zeljko Raznatovic (Arkan), and Vojislav Seselj’s “White Eagle” to attack the Albanians, in a war that became a “military and political struggle for independence for Kosovo by the KLA.” The fall-out of the war was an estimated 300,000 refugees and hundreds of people killed with Serb forces accused of “ethnic cleansing” of Albanians. While several attempts to end the conflict including the “Rambouillet,” failed, the crisis intensified, necessitating the intervention of NATO forces.

However, if the situation prevailing in Kosovo before NATO’s intervention was serious, the catastrophic impact of NATO’s bombing campaign which lasted for approximately 78 days arguably was no less severe. Not only were there allegations of violations of international rules of war by NATO forces, the impact of its bombing on the civilian population and the proportionality of its force have been a subject of intense controversy. Within two weeks of the commencement of the bombing, some 350,000 refugees had abandoned their homes, fleeing south to Macedonia and Albania for safety. By the time the bombing ended, there were an estimated 850,000 refugees with another 500,000 people internally displaced within Kosovo. On the death toll, it was estimated that between 500 and 1,800 civilian children, women and men were killed by the bombing.

115) Moghalu, supra note 72 at 58.
116) Ibid.
119) Moghalu, supra note 72 at 58.
120) MacDonald, supra note 118 at 270.
121) Moghalu, supra note 72 at 58.
122) This is a city in France where a peace conference was held, at the behest of NATO, in an attempt to resolve the conflict.
123) MacDonald, supra note 118 at 281.
124) Moghalu, supra note 72 at 60.
125) MacDonald, supra note 118 at 281.
126) Mandel, supra note 1 at 60.
Although the consequences of NATO’s bombing on the civilian population were certainly unintended, they were not unavoidable. At the heart of these was the unlawful strategy which was adopted by NATO’s Allied Forces during the campaign. For instance, in order to ensure that none of its soldiers was killed in the war, NATO embarked on what could be described as “coward war” – bombing of targets from above 15,000 feet minimum altitude – which made precision extremely difficult. According to an Amnesty International Report, “aspects of the Rules of Engagement, specifically the requirement that NATO aircraft fly above 15 feet, made full adherence to international humanitarian law virtually impossible.” Again, it was evidence that NATO had bombed civilian targets such as, the bombings of both a civilian train crossing a bridge on April 12, 1999, killing at least ten people and injuring at least fifteen, and the Belgrade headquarters of and broadcasting studios of Radio Televisija Srbije (Radio Television Serbia (RTS)) in which at least sixteen people died.

The intervention of NATO in Kosovo has generated enormous controversy anchored on two legal fronts which touch on the tenets of international law regarding armed conflicts – *jus ad bellum* (when force may be used) and *jus in bello* (how that force may be used). The first borders on the legality of NATO’s use of force without the authorisation of the United Nations. While some scholars argue that NATO’s action is nothing short of a crime of aggression against Yugoslavia, there are those who insist that having regards to the circumstances of the case, the intervention was justified. An in-depth analysis of the legality of NATO’s intervention in Kosovo is not within the scope of this article, but suffice it to say that while there is a broad consensus among scholars on the desirability of a coordinated military intervention in an internal armed conflict based on humanitarian grounds, the circumstances of NATO’s intervention in Kosovo

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131) Colangelo, *supra* note 114 at 1396.
point to an interest that is more “strategic” than “humanitarian.” As Mandel succinctly puts it:

Furthermore, the NATO countries bear an enormous historical responsibility for the violence in Yugoslavia – from the aggressive economic policies that plunged Yugoslavia into depression and civil war into the first place, to the sponsorship of Balkan republics on the basis of ethnic borders that left huge minorities within them waiting only to be turned on by the majorities, to the cultivation of the (official) “terrorist” KLA, to the obstruction of many opportunities for peace, from the Vance-Owen plan in Bosnia right up to Rambouillet, to the Kosovo bombing campaign itself. The need to invent a new role for NATO after the Cold War, the relentless campaign of the US to undermine the UN, the arms industry, weapons testing, a demonstrated war “pour encourer les autres” who think they can oppose America’s will, a war against a weak enemy that could be fought without losing one American life in combat, lucrative reconstruction contracts – not to mention that secure Caspian Sea oil pipeline – and even Monica Lewinsky, all explain this better than humanitarianism.134

The second and, for the purpose of this article, the more important concerns the “how” of NATO’s intervention. It relates to a determination of whether the conduct of parties involved in a war conforms with the rules of international humanitarian law codified in Geneva Conventions of 1949 and the Additional Protocols of 1977, which was what the complaint filed in May 1999, by Mandel and others at the ICTY pursuant to what Article 18 of the Tribunal’s Statute sort to achieve.135

Although the decision to investigate an allegation of crimes is a matter within the discretionary power of the Chief Prosecutor of the ICTY, the circumstances surrounding her refusal to “open an investigation” against NATO leaders and the reasons adduced in justification are less than satisfactory. The report of the Committee established by the Office of the Prosecutor136 on the basis of which the Prosecutor came to her decision is flawed for a number of reasons. First, the membership of the Committee violates all known principles of natural justice. For instance, the Committee’s membership included nationals of NATO member states, including the “main author of the Report,”137 who was a lawyer with the legal branch of the armed forces of Canada. To a bystander, such potential for

135) See Michael Mandel, et al., Notice of the Existence of Information Concerning Serious Violations of International Humanitarian Law within the Jurisdiction of Tribunal; Request that the Prosecutor Investigate Named Individuals for Violation of International Humanitarian and Prepare Indictments Against Them Pursuant to Articles 18.1 and 18.4 of the Tribunal Statute Online: Counter Punch http://www.counterpunch.org/complaint.html last viewed 23-04-2009. Similar Complaints were also filed at the ICTY including one from the Faculty of Law of Belgrade University, one from Greece on behalf of 6,000 Greek citizens, one from England from a group called the Committee for the Advancement of International Criminal Law, one from a Committee of the Russian Duma, and countless letters of support written to the Tribunal. See Mandel, supra note 113 at 111.
conflict of interest might raise the question whether the findings and recommendations of the Committee were tainted with bias. As the facts of the case highlight, some instances of NATO’s conduct during the war raise a legitimate question about the compatibility of the methods and policies utilized by the Allied Forces, which resulted in the loss of civilian lives, with the norms of international humanitarian law.138 According to Colangelo, “NATO’s choice of weaponry, system of target selection, and calculus of military advantage versus civilian casualty have come under heavy criticism.”139 For instance there was evidence that the bombing of such non-military targets as city bridges, factories, hospitals, marketplaces, downtown and residential neighbourhoods, and television stations by NATO was a tactic calculated to “break the will of the people, not to defeat the army.”140 Indeed, it has been argued that the decision was not only based on a misapprehension of the law applicable but also consecrated a regime of impunity by “licensing a certain degree of civilian death or ‘collateral damage’ and the technical methodology permitting those casualties under international law.”141

The test set by the Committee in its Review Criteria for determining the issue of the propriety of further investigation, one of which was whether “prohibitions alleged are sufficiently well-established as violations of international humanitarian law to form the basis of a prosecution”142 exceeded the weight of evidence normally required at the pre-prosecution stage and, thus, rubbed off on the Committee’s recommendation. What the complainants were required to show at this stage was a “prima facie” evidence of commission of international crimes by NATO for the purpose of further investigation, not “proof of guilt,” as the above provision seems to suggest. Although the Prosecutor, for obvious reasons, would have undoubtedly refused to indict and prosecute NATO leaders even if an investigation had been conducted, the legitimacy of the decision would have been better enhanced.

Predictably, in 27 pages and 91 paragraphs, the Committee dismissed all the allegations of war crimes levied against NATO by some of the world’s famous anti-impunity international organisations, like the Human Rights Watch, and the Amnesty International. While some of the findings of the Report may be legally supportable, others are disturbing, and perhaps, reflect the arguable sense of pre-determination with which the Committee conducted its investigation. For instance, in dismissing the allegation of targeted killing of innocent civilians, the Committee, after a finding that approximately 500 civilians were killed in the

138) Colangelo, supra note 114 at 1396.
139) Ibid.
140) Mandel, supra note 113 at 114. In an article published in The Washington Post, on July 11, 1999, Michael Dodds, Madeleine Albright’s authorised biographer wrote: “It is obvious to anyone who visited Serbia during the war that undermining civilian morale formed an essential part of the alliance’s war-winning strategy.” Ibid.
141) Colangelo, supra note 114 at 1394.
142) Report, supra note 136 at 1258, Para 5(a) (emphasis supplied).
NATO bombings stated that this “did not indicate that it (NATO) may have conducted a campaign aimed at causing ‘substantial’ civilian casualties either directly or accidentally.”\(^{143}\) From the ashes of this conclusion arises an important question: under the law of armed conflict and humanitarian law, what number of civilian casualties would be regarded as “substantial” for the purpose of sustaining an allegation of war crime? This author argues that the “quantity” of the civilian victims is not one of the elements of the war crime of targeted killing of civilians, but the circumstances of such death(s).\(^{144}\)

The decision of the Chief Prosecutor not to open an investigation against NATO leaders for international crimes committed in Kosovo was not without the usual Western political component. Initial indications that the Prosecutor might carry out investigation met with resentment by the powerful and influential NATO member states.\(^{145}\) The US, for instance, was reportedly outraged by the idea, while others found the charges “ridiculous” and “did not think that Del Ponte would attempt to make a case against them.”\(^{146}\) Subsequent actions and statements of the US government, the Prosecutor, and other officials of the ICTY exposed the limits of international criminal justice. At a press conference in December 1999, and while assuring every one of her independence and determination to uphold accountability, Del Ponte promised to prosecute NATO leaders should evidence of crimes be confirmed: “If I am not willing to do that, then I am not in the right place,” she said. “I must give up my mission.”\(^{147}\) However, it was not too long before she capitulated, stating that “NATO is not under investigation” and that “no formal inquiry” was being conducted\(^{148}\) – a statement which was made before the Committee submitted its report.

For the scholars of international criminal law, it is very easy to explain the reasons for the Prosecutors’ sudden “somersault.” The US and other members of NATO are major benefactors of the Tribunal. The Tribunal had relied on the assistance of NATO forces in Yugoslavia to apprehend indicted war criminals. For the Prosecutor, insisting on independence and impartiality of the Tribunal in the sense of investigating or prosecuting the NATO leaders would be tantamount to “biting the finger that had fed it,”\(^{149}\) as was corroborated by NATO spokesman Jamie Shea who was quoted as saying in 1999, that: “NATO countries are those that have provided the finance to set up the Tribunal… we want to see war criminals brought to justice, and I am certain that when Justice Arbour goes to Kosovo and looks at the facts, she will be indicting people of Yugoslav nationality.

\(^{143}\) Ibid., 1272.
\(^{145}\) Moghalu, supra note 72 at 60.
\(^{147}\) Moghalu, supra note 72 at 61.
\(^{148}\) Ibid.
\(^{149}\) Ibid.
I don’t anticipate others at this stage.” More importantly, and as discussed shortly, the US is renowned for its opposition to the trial of its citizens by international criminal tribunals, particularly the ICC. Since the prosecution of the citizens of other NATO members absent the US would have been both judicially and politically catastrophic for the Tribunal, deciding not to prosecute all the members became the best option for the Prosecutor.

7.1 International Criminal Justice: Locating the Difference Between Milosevic and NATO Leaders

According to Mandel, the only difference between Milosevic and the leaders of NATO is that the former is an indicted war criminal and the latter are *un-indicted* war criminals. An Amnesty International report identified three basic types of war crimes allegedly committed by NATO members but for which they were not prosecuted. First, the attack on civilian targets such as the Belgrade RTS radio and television building were contrary to Article 52(1) of Protocol 1 of the Geneva Convention (1977). Second, the killing of civilians on bridges (Grdelica, Luzane, and Varvarin) in contravention on Article 57(2)(b) of the protocol. Third, the bombing that killed displaced civilians (Djakovica and Korisa) was contrary to Article 57(2)(a).

The decision of the ICTY to prosecute only the nationals of the former FRY for international crimes once again underscores the selectivity of international criminal justice – one of the legacies of the Nuremberg trial. In 2001, Kostunica Vojislav, the Yugoslav President protested that the Tribunal’s justice was “selective” and vowed not to cooperate with it until it had prosecuted NATO for its crimes against Yugoslavia. Kostunica did cooperate with the Tribunal, albeit under “economic gunpoint,” without the prosecution of NATO. A US legislator had boasted that “you are more likely to see the UN building dismantled brick by brick than to see NATO pilots go before a UN tribunal.” Although the US is not practically subject to the jurisdiction of the Tribunal, nor the International Criminal Court, it funds and supports the prosecution of “the usual suspects.”

8. The United States and the International Criminal Court: Lifting the Veil of the Opposition

The United States, one of the “mothers” of the idea of a permanent international criminal court almost became its murderer, refusing to become a party to the

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155) The US has long been one of the strongest advocates of the desirability of a permanent international court and is credited with the establishment of the two ad hoc tribunals – the ICTY and the ICTR,
Statute of the Court, and ended up in the “group of seven” states that voted against it – others being China, Libya, Iraq, Israel, Qatar and Yemen. The US opposition was based on a number of concerns, but the strongest, supposedly, was that it wanted a Security-Council controlled ICC. Its argument was that as a result of its unique position as a Superpower, it would be routinely involved in international peace missions abroad, and to sign on to the jurisdiction of a Court where the Chief Prosecutor is completely independent, would expose its service people to prosecutions based on politically motivated charges by those who will turn that office into a human rights ombudsman. According to Cohen and Rumsfeld, former US Defence Secretaries:

Our concern is once you have a totally independent international court that is not under the jurisdiction, supervision or in any way influenced, obligated or accountable to a supervisory institution like the U.N. Security Council, then the potential for allegations to be made against our soldiers could be frivolous in nature… You could have charges brought before The Hague and this, I think, would be very destructive to our international participation. It would be intolerable as far as our people are concerned.

The United States has a number of serious objections to the ICC – among them (1) the lack of adequate checks and balances on powers of the ICC prosecutors and judges; (2) the dilution of the UN Security Council’s authority over international criminal prosecutions; and (3) the lack of an effective mechanism to prevent politicized prosecutions of American service-members and officials.

The US’s insistence on Security Council control of the activities of the Prosecutor as a pre-condition for its ratification of the Statute of the Court, though seemingly innocuous, is only a veil behind which the real reasons for objection can be

including the Special Court for Sierra Leone. See Christopher C. Joyner and Christopher C. Posteraro, “The United States and the International Criminal Court: Rethinking the Struggle Between National Interest and International Justice” (1999) 10 Criminal Law Forum 359, 359. However, Mandel argues that the US has always preferred ad hoc tribunals since they are normally subject to the control of the UN Security – a situation which enables it to use its veto as leverage. See Mandel, supra note 1 at 209.


157) Benzing summarises these concerns as follows: (1) danger of frivolous and politically motivated investigations and prosecutions against United States nationals, in particular because of the Prosecutor’s competence to trigger proceedings; (2) inadequate safeguards of fair trial rights of the accused in the procedure of the ICC, in particular the right to be tried by jury; (3) general concerns about the United States sovereignty, in particular the purportedly unlawful jurisdictional reach of the ICC over nationals of non-States Parties; (4) extension of crimes beyond what is recognised by customary international law; (5) a certain uneasiness with the potential inclusion of the crime of aggression; and (6) the perceived lack of influence of the UN Security Council as the primary organ for ensuring international peace and security. See Markus Benzing, “U.S. Bilateral Non-Surrender Agreements and Article 98 of the Statute of the International criminal Court: An Exercise in the Law of Treaties” (2004) 8 Max Planck UNYB 181, 185–6.


159) Ibid.

160) Ibid.

161) Lechterman, supra note 156 at 4.
found. Assuredly, it was not out of its love for the Security Council\textsuperscript{162} nor is it because of an honest belief in the efficiency and effectiveness of the Council in the enforcement of international criminal justice. Rather, it was to enable it use its veto against any potential investigation which it believes would affect its strategic national interest or those of its staunch allies, which means that no prosecution could actually take place without the consent of the US.\textsuperscript{163} Again, to place in the foreground the involvement of its service people in peace missions to justify its objection flies in the face of reality. Without denying the involvement of the US military in peace missions, it must be pointed out that its “genuine” peacekeeping commitments are not more ubiquitous than those or other countries who are parties to the Statute, such as Canada, United Kingdom and Nigeria. For instance, in December, 2000, out of the 37,756 personnel serving in the UN peace operations, only 885 or just over 2 per cent were Americans.\textsuperscript{164} Though unexpressed, the US was actually concerned that its penchant for UN-unauthorised wars would expose its servicemen and leaders to the ICC prosecution in the event that it ratifies the ICC Statute.\textsuperscript{165}

The United States’ second reason opposing the ICC is that the Court “threatens American Sovereignty.” In issue is Article 12 of the Court’s Statute which confers jurisdiction on the Court over the nationals of non-party state for crimes committed in the territory of a state party or on the territory of any State that chose to refer the case to the Court. The U.S. argued that as a treaty-based court, its jurisdiction must be tied to the consent of states expressed either by ratification of the Statute or ad hoc in accordance with the law of treaties.\textsuperscript{166} This argument is legally unsustainable for two reasons. First, under international law, the most fundamental basis for establishing jurisdiction is territoriality.\textsuperscript{167} Thus it would be preposterous for the territorial state to request the consent of a state whose citizen has committed a crime for consent to prosecute – consent which the US in particular will be loathe to grant. Furthermore, there is reasonable consensus that crimes covered by the Statute of the ICC are recognised as subject to the application of the principle of universal jurisdiction for which states are under obligation to either prosecute or extradite to an international criminal court for prosecution.\textsuperscript{168}

\begin{thebibliography}{9}
\bibitem{162} Mandel, supra note 1 at 209.
\bibitem{163} Ibid.
\bibitem{167} Joyner and Posteraro, supra note 155 at 367.
\bibitem{168} Ibid. 368.
\end{thebibliography}
Beyond this, case law is replete with instances where the US has exercised territorial jurisdiction in respect of crimes committed by non nationals, particularly when the foreigner is within its territory. In *Demjanjuk v. Petrovsky*, a federal court in the United States held that “some crimes are so universally condemned that the perpetrators are enemies of all people. Therefore, any nation which has custody of the perpetrators may punish them according to its law.”169 In *United States v. Fawaz Yunis*, the US exercised jurisdiction over a Lebanese citizen suspected of hijacking a Jordanian aircraft in the Middle East.170 Also in *United States v. Layton*, the US exercised jurisdiction over a Guyanese citizen who was accused of murdering a US Congressman in Guyana.171 The US’s jurisdiction in these cases was based on neither territoriality nor nationality but rather demonstrates the fact that the US will construe its criminal jurisdiction broadly when the victims of the crime is its national or when its national interest is affected.172 Finally, the US has supported the establishment of international criminal tribunals that have exercised jurisdiction over nationals of non-party states.173

The inclusion of the crime of aggression in the Statute was also another reason for the United States to mount vigorous opposition towards the ICC, expressing concern that a rogue State may take advantage of the provision to institute prosecution over its “influence” abroad.174 During negotiation, the U.S. expressed concern over the inclusion of the crime, warning of its difficulties: “the inclusion of the crime of aggression is highly problematic on numerous grounds.”175 In his testimony before the US Senate Foreign Relations Committee, Ambassador Schefter expressed his disappointment with the treatment of the crime of aggression, while Senator Jesse Helm was even more belligerent on the subject: “I think I can anticipate what will constitute a crime of ‘aggression’ in the eyes of this court: it will be a crime when the United States of America takes any military action to defend its national interests, unless the U.S. first seeks and receives the permission of the United Nations.”176 Failure by States during the ICC negotiation to adopt

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172) Joyner and Posteraro, *supra* note 155 at 369. See also *United State v. Resiq* 134 F. 3D 1121 (D.C.Cir. 1998), where the conviction of a Palestine for hijacking an Egyptian aircraft in Greece was sustained.
173) Michael P. Scharf, “The United States and the ICC: The ICC Jurisdiction over Nationals of Non-Party States: A Critic of the US Position” (2001) 64 Law & Contemp. Prob. 67, 109. The ICTY indicted officials of Serbia despite the fact that both the US and its NATO allies had maintained at the time that Serbia was not a party to the UN Charter.
a generally acceptable definition of what constitutes aggression ensured that the jurisdiction of the Court over the crime was suspended until the Statute is amended to include the definition and the circumstances under which it can be prosecuted. And no such amendment would be permitted until after seven years of coming into force of the Statute, and it would have to be ratified by at least seven eighths of the State parties to take effect.178

The resistance of the US and other superpowers to the jurisdiction of the Court in respect of the crime of aggression, though predictable, represents part of the selectivity and exclusivity of the international criminal justice.179 The Preamble to the Statute of the ICC affirms that “the most serious crimes of concern to the international community as a whole must not go unpunished” and expressed a determination “to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.”180 The Statute included the crimes in respects of which both the ICTY and the ICTR were already exercising jurisdiction – genocide, crimes against humanity, and war crimes – and omitted the crime of aggression “except as a conspicuously empty heading, an agenda item, over which jurisdiction was renounced until further notice.”181 In legitimizing the exclusion of the crime of aggression and to assuage the apprehension of the Third World States, the US and others presented the difficulty of a generally acceptable definition of the term as propaganda. Nothing can be farther from the truth. The definition of the crime of aggression could not have been more difficult than the other crimes over which there was consensus. In fact, the parameters of aggression as an international crime are fairly knowable and “may comprise various instances, if they exhibit the necessary character of massiveness.”182 In R v. Jones et al, the House of Lords held that, contrary to the ruling of the Court of Appeal in the same case, the definition of aggression is not so vague to be denied the status of a crime.183 The only explanation for the exclusion is that, in

177) Joyner and Posteraro, supra note 155 at 365.
178) Rome Statute, supra note 66, art. 121.
179) Nielsen, supra note 24 at 92.
180) Rome Statute, supra note 83, Preamble.
181) Mandel, supra note 1 at 207.
182) Cassese summarises the instances into six: (1) the invasion of or the attack on the territory of a state, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory or part of a state; (2) Bombardment, or use of any weapon or lethal device, by the armed forces of a state or a non-state entity, against the territory of another state (as long as such bombardment or use of weapon is not isolated or sporadic; (3) Blockade of the ports or coasts of a state by the armed forces, or non-state entity; (4) large-scale attack on the land, sea or air force, or marine and air fleets of a state; (5) the massive use of the armed forces of a state or a non-state entity, which are within the territory of another state with the agreement of the receiving state, in blatant contravention of the conditions provided for in the agreement and the customary rules on the use of force; and (6) the sending by or on behalf of a state or a non-state entity of armed bands, group, irregulars, or mercenaries, which carry out acts of armed force against a state of such gravity as to amount to the acts listed above, or its substantial involvement therein. See Cassese, supra note 85 at 158 n 15.
183) The court wrote as follows:
the “civilizing” mission of international criminal law, the jurisdiction of the international criminal tribunals or court must be limited to those crimes which the “civilised” nations are less likely to commit.\textsuperscript{184} And to ensure that the status quo remains intact, the Statute provides that any subsequent amendment to include the crime of aggression and any other crime shall not be enforced against a State party which did not accept such amendment even when the crime is committed by that State Party’s national or on its territory, and that such State Party is at liberty to withdraw from the Statute with immediate effect.\textsuperscript{185} The implication of this provision is that the crime of aggression may never be prosecuted before the ICC.\textsuperscript{186}

It was suggested, on behalf of the Crown that the crime of aggression lacked the certainty of definition required of any criminal offence, particularly a crime of this gravity. This submission was based on the requirement in Article 5(2) of the Rome Statute that the crime of aggression be the subject of definition before the international court exercised jurisdiction to try persons accused of that offence. This was an argument which found some favour with the Court of Appeal. I would not for my part accept it. It is true that some states parties to the Rome statute have sought an extended and more specific definition of aggression. It is also true that there has been protracted discussion of whether a finding of aggression against a state by the Security Council should be a necessary precondition of the court’s exercise of jurisdiction to try a national of that state accused of committing the crime. I do not, however, think that either of these points undermines the appellants’ essential proposition that the core elements of the crime of aggression have been understood, at least since 1945, with sufficient clarity to permit the lawful trial (and, on conviction, punishment) of those accused of this serious crime. It is unhistorical to suppose that the elements were clear in 1945 but have since become in any way obscure. See Cassese supra note 85 at 155 n 11 (emphasis added).

\textsuperscript{184} Accord to Jackson:

The wrong which we seek to condemn and punish have been so calculated, so malignant and so devastating, that civilization cannot tolerate their being ignored because it cannot survive their being repeated….Civilization can afford no compromise with social forces which would gain renewed strength if we deal ambiguously or indecisively with the men in whom those forces now precariously survive….The real complaining party at your bar is Civilization.

See “Opening Statement of Robert Jackson at the Nuremberg Tribunal”, cited by Nielsen, supra note 24 at 81. This was also corroborated by Keenan thus:

Mr. President, this is no ordinary trial, for we are waging a part of determined battle of civilisation to preserve the entire world from destruction….A few throughout the world, including these accused, decided to take the law into their own hands and to force their individual will upon mankind. They declared war upon civilisation…

See “Opening Statement of Joseph Keenan at the Tokyo Tribunal, cited by Nielsen, supra note 24 at 81.

\textsuperscript{185} Art. 121(5).

\textsuperscript{186} It has been argued that this provision was inserted as an inducement to the US to ratify the Statute. See Mandel, supra note 1 at 208.
8.1. *Skirting International Criminal Justice at all Cost: the US’ Efforts to Exempt its Nationals from the Jurisdiction of the ICC*

The US’s opposition to the ICC is highly entrenched. Its sustained resistance can be explained by reference to its political ideology that sees international criminal justice as what Ralph calls “a tool of statecraft.”\(^{187}\) It is ideology which emerges from existing sense of arrogance, which assumes that citizens of the U.S. are too “first class” to be subjected to prosecution in the same forum with other “second class” citizens” from the rest of the world. The US, therefore, must not be prosecuted before an international court it helped to create for “other purposes.” Henry Kissinger, former US Secretary of State, was “amazed” that the ICTY could actually be used against the country that set it up:

> The complaint alleged that crimes against humanity had been committed during NATO air campaign in Kosovo. Arbour ordered an internal staff review, thereby implying that she did have jurisdiction if such violations could, in fact, be demonstrated. . . .Most Americans would be amazed to learn that the ICTY, created at U.S. behest in 1993 to deal with Balkan war criminals, had asserted a right to investigate U.S. political and military leaders for allegedly criminal conduct.\(^{188}\)

That the influence of the US pervaded the entire negotiation of the Rome Statute like an albatross is beyond doubt. One such influence was reflected in the debate leading to the adoption of the notorious Article 98(2) by which the US sought to “renegotiate the Statute’s jurisdiction scheme so as to make it more amenable in Washington.”\(^{189}\) According to one commentator, “of all debates that took place in the Working Group on Cooperation, none engendered such interest and controversy as the discussions on rules under article 98.”\(^{190}\) Although most of the proposals of the U.S. concerning the proper wording of Article 98 were rejected, the final provisions of the Article have afforded the U.S. the leeway to negotiate agreements that override the jurisdiction of the ICC. As soon as the US lost the battle to stall the adoption of the Statute, it devised other means calculated to shield its citizens from being subjected to the jurisdiction of the ICC. A few examples will suffice and these are outlined in the following sections.


An important step taken by the US as part of its strategy against the ICC was to cajole the UN Security Council to pass a resolution exempting its nationals on

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\(^{187}\) Ralph, *supra* note 164 at 138. He describes it as conceptualisation of a phenomenon as part of State usually exploited by stronger States against weaker ones to extend their leverage. He further argues that the US opposes the ICC because the Court is independent and therefore not subject to US control as would have been the case as part of States.


\(^{190}\) *Ibid.*
peacekeeping operation in Bosnia-Herzegovina from the Court’s jurisdiction, as a pre-condition for its continuous participation in the mission. In June 2002, the US had used its veto power to prevent the adoption of resolution concerning the renewal of the operation, and threatened to veto any future resolution on the issue until its request was granted.\(^{191}\) Although the US contribution to the NATO-UN Stabilisation Force in Bosnia (SFOR) was a paltry 2,400 personnel out of the total force of approximately 15,800, the timing of the US request was very sensitive for two reasons.\(^{192}\) First, some NATO countries who contributed troops to the mission, such as Germany and Ireland did so because of the UN’s endorsement of the operation and, therefore, would have had to pull out if the UN mandate was vetoed by the US as it had threatened, if its request was not granted,\(^{193}\) and this would have substantially affected the mandate which then needed an extension. Second, the request came in mid-June 2002, approximately two weeks to the 30 June, 2002, when the ICC came into force. The calculation therefore was that a combination of the above factors would foist on the Council a situation of helplessness to the advantage of the strategic interest of the US. On 23 June 2002, the SC voted to extend the mission until midnight on 30 June 2002 to give it more time to find a solution,\(^{194}\) and further extended the mandate to until 3 July,\(^{195}\) and then until 15 July 2002.\(^{196}\)

On 30 June, 2002, the SC’s further attempt to extend the mandate of the SFORS for another six months was vetoed by the US which insisted on an exemption clause in the resolution for its military personnel not to be subject to the jurisdiction of the ICC. Despite the controversy which the request generated, it was ultimately granted.\(^{197}\) The SC further extended the exemption for one more year\(^{198}\) and even broadened the exemption in another resolution.\(^{199}\)


\(^{192}\) McGoldrick, supra note 158 at 417.

\(^{193}\) Ibid.

\(^{194}\) SC Res. 1418 (2002).

\(^{195}\) SC Res. 1420 (2002).

\(^{196}\) SC Res. 1421 (2002).

\(^{197}\) S/R/RES/1422 (2002) of 12 July 2002. The legal validity of this resolution has been a subject of intense debate among scholars. The argument revolves around Article 39 of the UN Charter and Article 16 of the Statute of the ICC. Some scholars have argued that there was no “threat to international peace and security” to warrant the invocation of Chapter VII power by the SC as it did in the Resolution. However, McGoldrick argues that international peace and security would have been threatened had the US and other States pulled out of the peace mission in Bosnia. He further contends that it was “in the interest of international peace and security to facilitate Member States’ ability to contribute to operations established or authorised by the United Nations Security Council.” See McGoldrick, supra note 158 at 419.


The position of the US was condemned by many states and openly expressed, while other international organisations were even critical. Expressions of condemnations were made at every available forum. At a special session of the ICC PrepCom on 3 July 2002, approximately 120 states issued a statement of opposition to the US while another statement was issued on behalf of 72 countries, a number of which were not state parties, at an open session of the SC held at the behest of Canada on 10 July 2002. In fact, Canada warned that by succumbing to the US’s request, the credibility of the Council, and the principle that all people are equal and accountable before the law were at stake:

We have just emerged from a century that witnessed the evils of Hitler, Stalin, Pol Pot, and Idi Amin, and the holocaust, the Rwandan genocide, and ethnic cleansing in the former Yugoslavia…. Surely, we must have learned the fundamental lesson of this bloodiest centuries, which is that impunity from prosecution for grievous crimes must end.

Subsequent attempts by the US for a second renewal of S/RES/1422 failed by reason of opposition by other members of the SC, particularly following public outcry resulting from the scandal over abuse of US detainees in Iraq and Afghanistan. In the absence of SC renewal, the US turned to domestic legislation to avoid the exercise of jurisdiction by the ICC over its nationals.

8.3. Article 98 of the ICC Statute and the US’ “Hague Invasion Act”

The United States regarded Resolution 1422 as merely an interim solution, and therefore needed a more sophisticated agreement with States to protect its citizens against the jurisdiction of the ICC. Shortly after extracting the above resolution from the SC, it instructed its embassies to seek bilateral non-surrender agreement with every single sovereign state, citing Article 98(2) and Resolution 1422 as its sources of authority. Article 98(2) provides that:

The court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of the consent for the surrender.

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201) For instance, Resolution 1336 (2003) of the Parliamentary Assembly of the Council of Europe described Resolution 1422 and its renewal as “a legally questionable and politically damaging interference with the functioning of the International Criminal Court.” See McGoldrick, supra note 158 at 419 n. 175 chp. 14.
202) Benzing, supra note 157 at 188.
203) The new debate was whether Article 98 contemplated new agreements or whether it only protected the ones that had existed before the Statute entered into force. Amnesty International argued that the provision only protected pre-existing agreements. See McGoldrick, supra note 158 at 423 n. 191.
The US took a hard line when negotiating bilateral non-surrender agreements. States that needed military aid from the US government were required to sign the agreement to be eligible for such assistance. For instance, in July 2003, the Bush administration suspended military aid to thirty-five states that refused to sign such agreement. Furthermore, the Nethercutt Amendment, which was signed into law in December 2004, widened the restriction to include non-military aid. Thus, aid meant to assist the US allies to promote democracy, fight terrorism and corruption, resolve conflicts and even, in the case of the Caribbean, coordinate disaster response programmes was tied to the agreement. Predictably, most Third World States have signed onto the agreement in order to receive aid from the US government. It is however gratifying to note the current U.S. administration led by President Barak Obama has not renewed this Amendment, suggesting a policy change or, at worse, a softening by the U.S. government.

8.4. American Service Members’ Protection Act

The American Service Member’s Protection Act, which has been dubbed the “Hague Invasion Act,” contains numerous restrictions on interaction by the United States or State governments or courts with the ICC. In respect of cooperation, the Act prohibits the US from responding to requests for cooperation by the Court, from extraditing any person from the US to the Court, from funding the activities of the Court, or conducting investigation for the purpose of proceedings before the Court, among others. The Act, as usual, was controversial, particularly for containing a provision that authorises the US to use “all means necessary, including military force, to rescue a US citizen taken into the court’s custody.” The Netherlands was shocked by this legislation and feared that its territory might be invaded by the US in the event that a US national was being detained in The Hague.

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206) Ralph, supra note 164 at 157.
207) The Act was named after the sponsor of the Bill, George Nethercutt. See “US ‘Nethercutt Amendment’ Threatens Overseas Aid to Allies that have joined the ICC” Online: Coalition for the International Criminal Court http://www.iccnow.org/documents/NethercuttAmend_07Dec04.pdf last viewed 25-04-2009.
208) Ralph, supra note 164 at 158.
209) For instance, Jordan signed the agreement in order to receive $250 million in aid. Ecuador, Columbia, Bulgaria, Croatia, Estonia, Latvia, Lithuania, Serbia and Montenegro, Slovakia, and Slovenia all saw their aid suspended when they refused to sign a non-surrender agreement. Romania signed because it needed the US assistance to become a member of NATO.
211) Mandel, supra note 1 at 210.
213) Benzing, supra note 157 at 189.
214) Ibid.
215) Lechterman, supra note 156 at 3; McGoldrick, supra note 158 at 435.
216) McGoldrick, supra note 158 at 435.
9. Understanding the African Union’s Resistance to the ICC through the Lens of the Selectivity of International Criminal Justice

The influence of the US and the entire West all over the world, particularly in the African Region cannot be over-emphasized. For the US, apart from its status as the world’s Superpower, its actions and positions on global issues usually become reference points for African States. By rejecting the jurisdiction of the ICC, and engaging in acts that, arguably, amount to international crimes, the US and its Western Allies provide legitimate but regrettable justification for the AU’s resistance to the enforcement of international criminal justice in the African region. And the Bilateral Immunity Agreements (BIAs) which most states in African signed in order to receive the US aid compounds this problem further.²¹⁷ For these States, international criminal justice can only be defined within the context of States’ economy – a reminder of Young’s statement that “without economic liberation, there can be no political liberation.”²¹⁸

Conclusions

As noted above, Timothy McCormack observed that “there is a dual selectivity on the part of the international community. This selectivity is first found in relation to the acts the international community is prepared to characterize as ‘war crimes’ and secondly, in relation to the particular alleged atrocities the international community is prepared to collectively prosecute.”²¹⁹ “The history of the enforcement of international criminal justice, particularly since Nuremberg, presents an interesting paradox – accountability and impunity. In what is often regarded as “victors’ justice,” the victorious Allied Powers subjected the defeated Nazi officials to prosecution for international crimes, when Allied officials committed international crimes but were not prosecuted for so doing. On further analysis, the Nuremberg Tribunal, and, in fact, the totality of the international criminal justice system, reveal a continuous pattern of exclusions in which “political considerations, power and patronage will continue to determine who is tried for international crimes and who will not.”²²⁰ Despite serious allegations of commission of international crimes, powerful Western countries such as the United States and its allies and


²¹⁸ Bakayana, supra note 44 at 328, citing R.J.C. Young, Post-Colonialism: An Historical Introduction (2001) 5.

²¹⁹ McCormack, supra note 25 at 683.

NATO member States have enjoyed immunity from prosecution. According to Jallow, “in all those instances (i.e. where prosecutions have been initiated against some senior officials of the U.S. and its allies), the mere announcement of investigations/ and or issuance of indictments immediately led to a high-level political controversies between the concerned governments . . . (and) diplomatic steps were immediately taken and relevant indictments were quashed.”221 Specifically, the United States’ refusal to submit itself to the jurisdiction of the ICC, its legislation targeted against the Court, and its penchant for illegal wars, which have been described as tantamount to “crime of aggression,” combine to raise the legitimate question whether equality of enforcement is part of the core principles of international criminal justice.

For the African region, the failure of the international community to enforce international criminal justice against these “big” States while it exerts enormous pressure on the continent for the prosecution of alleged perpetrators of crimes, is not only a double standard, but, also imperialistic.222 Although the high incidences of armed conflicts in the region with concomitant gross violations of human rights justify the international community’s insistence on individual accountability, the required cooperation needed by the ICC from the region may remain elusive until the international criminal justice is designed to “secure that the law is applied to all those and only those who are alike in the relevant respect marked out by the law itself.”223 To enhance greater cooperation and minimise resistance by the African region, international criminal law must be consistent with respect to its enforcement regardless of the status of States involved. According to Rubin, “unless the law can be seen to apply to George H. W. Bush (who ordered the invasion of Panama) as well as Saddam Hussein (who ordered the invasion of Kuwait) . . . it will seem hypocritical again.”224 But this is just one of the reasons for the AU’s emerging resistance to the enforcement of international criminal law in the African region.

221) Jallow, supra note 105 at 56.
222) Nielsen, supra note 24 at 82. The history of international criminal law highlights the policy of exclusion of the colonized by the colonial masters. According to Anghie and Chimmi, the atrocities committed by colonial powers against colonized people were not subjects of concern to international law until the Holocaust when concern for atrocity emerged. See Antony Anghie and B.S. Chimni, “Third World Approaches to International Law and Individual Responsibility in Internal Conflicts” (2003) 2 Chinese J. Int’l L 77, 88. Also, the French colonial violence against Algeria which led to the massacre of approximately 15,000 in the town of Setif and other similar atrocities against colonies in 1950s and 1960s were never heinous enough for prosecution by the international community. See Nielsen, supra note 24 at 93.