

**Violence in Africa: the role of accountability in protecting the
right to life**

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DECLARATION

I declare that this dissertation is hereby submitted for the award of Legum Magister (LLM) in Human rights, Faculty of Law, University of Pretoria. I further declare that this dissertation has been properly acknowledged and referenced in accordance with departmental requirements. Further, I declare that I have not used work previously produced by another student or any other person to hand in as my own. Lastly, I declare that I have not allowed, and will not allow, anyone to copy my work with the intention of passing it off as his or her own work.

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Violence in Africa: the role of accountability in protecting the right to life

Introduction

Violence has been embedded as a way of life in Africa over the past decades.¹ Consistent with the outcomes of violence, the right to life has been undermined together with many other human rights. Violence has been used unlawfully on an inter-personal level, and to, *inter alia*, establish new governments, loot state resources and win elections. It then becomes important to understand the nature and trends in which violence occurs so as to identify entry points into the effective promotion and protection of the right to life,² whilst drawing parallels with the phenomenon of accountability.

There is a body of literature on the science and causes of violence globally and in Africa. This dissertation will analyse the nature of violence in so far as it impacts on the right to life, given that there are indications that violence is on a decline, globally.³ This body of literature saying there is a global decline of violence indicates that this is the case due to the following factors: urbanisation; the central role of commerce between parties; and pro-human rights communities, amongst other factors. This dissertation will interrogate whether this is the case for the African continent. This body of material does not examine Africa in detail, this failure to look into the propensity of violence in Africa, in turn; leaves open an opportunity to address the root-causes of violence and factors attributed to the extent of violence on the continent.⁴ And in the event that violence is on a decline, the question will be asked, to what extent are these reasons for the decline of violence applicable to the African continent, why are some not applicable, and also which other reasons may be attributed to the decline. Further, to what extent is accountability, as it will be shown below, responsible for the decline in violence, or the better protection of the right to life? Put differently, given the attributes of accountability and the obligation to investigate and/or sanction the violation of the right to life, are violations of the right to life in Africa being investigated, accordingly?

Impunity is a re-occurring theme on the continent, and is more blatant where violence is involved. Impunity is a barometer of the rule of law, human rights and good governance. Impunity is the adverse of accountability,⁵ in particular, justice- for violations brought about

¹ P Chabal 'Violence, power and rationality: a political analysis of conflict in contemporary Africa' in P Chabal, U Engel and A Gentili (eds) *Is violence inevitable in Africa?: theories of conflict and approaches to conflict prevention* (2005) Brill: Leiden 1.

² M Roux 'Reaction to early warning of gross human rights violations: preventative steps that could be taken by the international community' 3 *Tydskrif vir die Suid-Afrikaanse Reg* (2013) 453.

³ S Pinker *The better angels of our nature: why has violence declined* (2012) Penguin Press: New York. See also other authors such as P Williams *War and conflict in Africa* (2011) Polity Press: Cambridge and C Webel and J Galtung (eds) *Handbook of peace and conflict studies* (2009) Routledge: London. *C.f.* N Whitehead 'Culture, conflicts, and the poetics of violent practice' in N Whitehead (ed) *Violence* (2004) James Currey: Oxford 3 and J Keane *Reflections on violence* (1996) Verso: London.

⁴ See A Mehler 'Area studies, the analysis of conflicts and the evaluation of preventative practice in Africa' in P Chabal, U Engel and A Gentili (eds) *Is violence inevitable in Africa?: theories of conflict and approaches to conflict prevention* (2005) Brill: Leiden 99.

⁵ B Schiff *Building the International Criminal Court* (2008) Cambridge University Press: Cambridge 33-34.

by impunity are corrected by applying justice as a confrontational act of punishment, communal retaliation and deterrence.⁶ Where impunity is rife, lawlessness coupled with a total disregard for human rights is accomplice, hence the loss of life.⁷ This then necessitates an assessment of current accountability mechanisms and to interrogate to what extent do these mechanisms impact on the eradication of impunity- again, as it will be shown below, because accountability is an inherent part of the right to life.⁸ This will be done by exploring the concept and goals of accountability (*justice, truth, deterrence and prevention, and reconciliation*)⁹ in two phases: (1) current accountability mechanisms and (2) the International Criminal Court (ICC).¹⁰ This is done in light of a submission that currently existing accountability mechanisms- truth and reconciliation commissions, commission of inquiries, and domestic courts- designated to stamp out impunity are ineffective, inconsistent, and fail to realise actual justice.¹¹ The inadequacy of current existing accountability mechanisms, as it will be seen in Chapter 2 below, to eradicate impunity then necessitates more dynamic measures to ensure accountability, such as criminal prosecution at an international level, leaning more towards individual accountability.¹²

Holding those responsible for human rights violations to account is essential in confronting past experiences, deterring future perpetrators and pursuing the interests of justice, and for those who have been violated, it brings closure and a sense that justice has been served- therefore, the right to life and accountability are intrinsically linked.¹³ Although not desirable or possible in all respects, accountability is important for many other reasons (providing a

⁶ Y Beigbeder *International justice against impunity: progress and new challenges* (2005) Martinus Nijhoff Publishers: Leiden 1-3. According to Beigbeder, justice is necessitated because its absence, characterised by impartial courts, results in mass violations such as those in North Korea under Kim Jong II, Ethiopia under Mengistu Haile Mariam, Uganda under Idi Amin Dada Oumee, Indonesia under General Suharto and Wiranto, amongst others. See Beigbeder 11. See also A Pellet 'Internationalized courts: better than nothing' in C Romana, A Nollkaemper and J Kleffner (eds) *Internationalized criminal courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (2004) Oxford University Press: Oxford 439-440: who holds that, given what is at stake, the destabilisation of the international community as a whole, international crimes should be met with international justice at all cost.

⁷ R Goldstone 'The role of the International Criminal Court' in R Rotberg *Mass atrocity crimes: preventing future outrage* (2010) World Peace Foundation: Washington, DC 55, A Seibert-Fohr *Prosecuting serious human rights violations* (2009) Oxford University Press: Oxford 5-8 and R Thakur and P Malcontent (eds) *From sovereign impunity to international accountability* (2004) United Nations University Press: New York. See also A Cassese 'The role of internationalized courts and tribunals in the fight against international criminality' in C Romana, A Nollkaemper and J Kleffner (eds) *Internationalized criminal courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (2004) Oxford University Press: Oxford 1.

⁸ See paragraph 2. below.

⁹ J Stromseth (ed) *Accountability for atrocities: national and international responses* (2003) Transnational Publishers: New York.

¹⁰ For purposes of this paper, the ICC is isolated from 'current accountability mechanisms' for it is seen as a new accountability measure, see Chapter 3 below.

¹¹ M Drumbl *Atrocity, punishment, and international law* (2007) Cambridge University Press: Cambridge 68-122, Goldstone (n7) 58-60, M Scharf 'Swapping Amnesty for Peace' 31 *Texas International Law Journal* (1996) 297, Seibert-Fohr (n7) 1-5 and R Boed 'The effect of a domestic amnesty' 33 *Cornell International Law Journal* (2000) 297.

¹² See also Chapter 3 below.

¹³ Drumbl (n11) 128 and Seibert-Fohr (n7) 1-3. However, Drumbl's use of the terms is more concerned with the link between justice (note: not accountability) and a violation. See also G Gahima 'Accountability for atrocity: lessons from Rwanda' 8 *George Journal of International Affairs* (2007) 107.

public forum for grievances to be aired and the confirmation of facts), and has a long lasting effect that will eradicate impunity and any resentment that may still be possessed by those who have been affected.¹⁴

Establishing institutions that will enhance constitutionalism, non-interference with the rule of law and human rights will go a long way in ensuring the promotion of the right to life and (effective) accountability- the right to life is protected in numerous constitutions and constitutional democracies; the rule of law operates on lawfulness and that a violation of life should be authorised at least by law; and the premise of human rights as the right to life. Therefore, it has been shown that all these paradigms hold the right to life central. This can (also) be complimented by an independent and impartial judiciary at domestic and international level such as the ICC.¹⁵ This inherent tribunal will then be mandated with enforcing and developing international law norms. This tribunal, through its mandate, will then ensure that the right to life is sufficiently protected and promoted, and that, in cases of violations, perpetrators are brought to account for their actions.

¹⁴ N Kritz 'Coming to terms with atrocities: a review of accountability mechanisms for mass violations of human rights' 59 *Law and Contemporary Problems* (1996) 127-128 and P Akhavan 'Beyond impunity: can international criminal justice prevent future atrocities?' 95 *The American Journal of International Law* (2001) 8.

¹⁵ See Gahima (n13) 111 and M Bassiouni 'The proscribing function of international criminal law in the processes of international protection of human rights' 9 *Yale Journal of World Public Order* (1982-1983) 205.

Chapter 1: Violence in Africa and the right to life

1. Violence in Africa

1.1. Introduction

Africa has witnessed mass human rights violations,¹⁶ in particular the violation of the right to life.¹⁷ Given the extent to which the right to life has been (and continues to be) violated, and the impunity with which violence is perpetrated, it becomes important to look at current trends of violence on the continent, the importance of the right to life and current accountability mechanism aimed at protecting this right, and interrogate to what extent do these mechanisms promote and protect human rights and, more so, the right to life.

Despite the many forms in which violence manifests itself, there have been submissions that global violence is on a decline,¹⁸ Africa's trends of violence are yet to be cross-examined in light with global trends. These well-thought and documented submissions, one and more recently by Steven Pinker, argue that violence in the world has declined and attribute the decline of violence to five "historical forces", namely: the Leviathan;¹⁹ commerce;²⁰ feminization;²¹ cosmopolitanism²² and the Escalator of reason.²³ Although with reasonable scepticism and suspicion, what is essential in understanding these submissions is that, according to Pinker: "The decline, to be sure, has not been smooth; it has not brought violence down to zero; and it is not guaranteed to continue."²⁴ Put differently, ask yourself: "How bad was the world in the past?"²⁵ Although elaborately covering the historical and projected trends of violence globally, Pinker does not specifically address nor answer whether violence in Africa has declined. This is important because, as stated above, Africa remains one of the most violent of all the continents,²⁶ ravaged with on-going senseless killings and sectarian wars, and mainly due to, one would submit, defective accountability

¹⁶ See D Nanjira 'The protection of human rights in Africa: the African Charter on Human and Peoples' Rights' in J Symonides (ed) *Human rights: international protection, monitoring, enforcement* (2003) Ashgate: Aldershot 216-217 and A Jeng *Peacebuilding in the African Union: law, philosophy and practice* (2012) Cambridge University Press: Cambridge 60-61.

¹⁷ F Ouguergouz *The African Charter on Human and Peoples' Rights: a comprehensive agenda for human dignity and sustainable democracy in Africa* (2003) Martinus Nijhoff Publishers: The Hague 1.

¹⁸ Pinker (n3).

¹⁹ Pinker (n3) 41.

²⁰ Pinker (n3) 90 and 342.

²¹ Pinker (n3) 634.

²² Pinker (n3) 214.

²³ Pinker (n3) 782.

²⁴ Pinker (n3) xxv. Also in part, for the lack of attention paid to the decline, the role the media has played in keeping people informed all the time about violent conflicts, see E Hughes, W Schabas and R Thakur 'Introduction' in E Hughes, W Schabas and R Thakur (eds) *Atrocities and international accountability: beyond transitional justice* (2007) United Nations University Press: New York 1.

²⁵ S Pinker 'Violence vanquished' *The Wall Street Journal* 24 September 2011 <http://online.wsj.com/article/SB10001424053111904106704576583203589408180.html> (accessed on 30 September 2013).

²⁶ Jeng (n16) 61 and P Chabal, U Engel and A Gentili (n1).

mechanisms.²⁷ Understanding “African trends” will inform entry points to better promote and protect (human rights and) the right to life on the continent, and better current mechanisms, if any, that are on the path to enhancing the value of life in Africa.²⁸

Looking at this on-going violence, the right to life has become a vulnerable right on the continent.²⁹ This is despite continued efforts by regional bodies and the international community (United Nations (UN)) to prioritise the right to life through various human rights instruments (namely: the Universal Declaration of Human Rights (UDHR); the International Covenant on Civil and Political Rights (ICCPR); and the African Charter for Human on Peoples’ Rights (African Charter) and commissioned bodies.

This right has been undermined in various ways and by various actors. To maintain the theme of “the right to life”, all unlawful violations of the right to life will be considered in this paper. Further, by placing emphasis only on violence committed by the state, it is inevitable that violence committed by non-state actors, which has equal human rights ramifications to violence by the state, will be compromised. Therefore, if the right to life ought to be prioritised and human rights violations to be remedied, attention must to be paid to all forms of (unlawful) violations and equal attention ought to be paid to violence perpetrated by both the state and non-state actors.³⁰ Put differently, the use of an all-encompassing definition of violence used in this paper will serve to illustrate the extent to which the right to life has and can be violated, and to enable a thorough examination of current accountability mechanisms which are tasked to police these violations- committed by both the state and none state actors.

1.2. The nature of violence

[V]iolent conflict entails the successful contestation of existing order, and its collapse. Put otherwise, violence is employed both by those who wish to upend an existing order and by those who want to sustain it.³¹

Violence, as described by both Pinker and Sofsky, affects the body directly, in the sense that its effects (torn and burnt bodies) make death visible and a dead body resonates more with

²⁷ See Chapter 2 below.

²⁸ Mehler (n4) 99.

²⁹ T W ‘Why South Africa is (a bit) less violent than you think’ *The Economist* http://www.economist.com/blogs/economist-explains/2014/04/economist-explains-5?fsrc=scn/tw/ec/why_south_africa_is_a_bit_less_violent_than_you_might_think (accessed 15 April 2014): “Africans face shorter odds. The continent is the second-most violent region in the world (after Latin America), with a murder rate about double the global average.”

³⁰ A Clapham *Human rights obligations of non-state actors* (2006) Oxford: New York 34-35, Special Rapporteur on the promotion and protection of human rights while countering terrorism: E/CN.4/2006/98, para. 50 and L Zegveld *The accountability of armed opposition groups in international law* (2002) Cambridge University Press: Cambridge 181 and 183 (this right shall be protected by law (Article 6(1) of the ICCPR)).

³¹ S Kalyvas, I Shapiro and T Masoud ‘Introduction: integrating the study of order, conflict, and violence’ in S Kalyvas, I Shapiro and T Masoud *Order, conflict and violence* (2008) Cambridge University Press: Cambridge 1.

different people than any other tragedy, regardless of background.³² Put differently, violence causes permanent physical, sexual and/or psychological harm (killings, displacements, maiming, sex slavery, etc.) to either an individual or group (mass displacements and destruction of property), and leaves an everlasting effect on those who witness it.³³ Africa's history of violence, from the ruthless exploitation and mutilation of Congo Free State people by King Leopold,³⁴ to police hit squads and mob justice in apartheid South Africa, and genocidal rapes and mass murders in Rwanda,³⁵ to name a few speaks volumes to the need to protect and promote the right to life.

The conventional understanding of violence is influenced by many approaches.³⁶ One of these approaches is that violence is a result of a deficit in morality and justice. Another approach takes the form that people are violent because they are financially needy or there exist a huge disparity between the haves and have nots,³⁷ which, according to Pinker, fails to explain why such violence is directed at equally poor people.³⁸ According to Bellamy,³⁹ violence is common in the commission of mass atrocities and indicates the nature of the subsequent conflict. Bellamy says that the presence of one or more of the following factors

³² W Sofsky *Violence: terrorism, genocide, war* (2003) Granta Books: London 9-10, Pinker (n3) 74 and C Nordstrom 'The tomorrow of violence' in N Whitehead (ed) *Violence* (2004) School of American Research Press: Santa Fe 224-227.

³³ E Stanko 'Violence' in E McLaughton and J Munie (eds) *The sage dictionary of criminology* (2001) 316 as referenced in L Ray *Violence and society* (2011) SAGE: London 7 and G Evans *The responsibility to protect: ending mass atrocity crimes once and for all* (2008) Booking Institute Press: Washington, DC 11. Further, according to Ray 8-9, violence manifests itself in two forms, in a narrow 'minimalists' form and a broader 'comprehensive' form. The former regard violence in terms of physical force, the latter regard violence as anything avoidable that infringes on a person's rights or integrity. Another variation of violence: instrumental violence and expressive violence. The former is goal orientated, namely, obtaining money. The latter is gratification orientated with an underlying emotion such as hate (Ray 9-10). See also B Gebrewold *Anatomy of violence: understanding the systems of conflict and violence in Africa* (2009) Ashgate: Cornwall 71 and R Bellelli 'The establishment of the system of international criminal justice' in R Bellelli (ed) *International criminal justice: law and practice from the Rome Statute to its review* (2010) Ashgate: Surrey 5.

³⁴ G Nzongola-Ntalaja *The Congo from Leopold to Kabila: a people's history* (2002) Zed books: London.

³⁵ See J Leatherman *Sexual violence and armed conflict* (2011) Polity: Cambridge, detailing the extent of and link between sexual violence and armed conflicts. According to Leatherman (2), over 500 000 women were sexually violated during the Rwandan genocide of 1994 and over 64 000 internally displaced women were victims of sexual violence in Sierra Leone during its civil war.

³⁶ Pinker (n3) 100-101, C Cramer 'Angola and the theory of War' in P Chabal, U Engel and A Gentili (eds) *Is violence inevitable in Africa?: theories of conflict and approaches to conflict prevention* (2005) Brill: Leiden 17 and Gebrewold (n33) 79: Galtung in his book, as referenced by Gebrewold, is of the view that violence is "the influence that keeps the actual somatic and mental realization below potential realisations" and divides it into three, namely: structural, physical and cultural violence.

³⁷ See M Cooney 'The decline of homicide' 35 *Criminology* (1997) 383: "The link between low vertical status and violent conflict is indirectly reflected in the strong correlation between poverty and inequality, on the one hand, and homicide rates, on the other. Thus, measures of economic deprivation consistently emerge as one of the strongest predictors of aggregate rates of homicide." See also Cramer (n36) 17 and 23-23.

³⁸ See Cooney (n37) 383. Noteworthy, Mehler (n4) 109-110, together with M de Bruijn and H van Dijk 'Natural resources, scarcity and conflict: a perspective from below' in P Chabal, U Engel and A Gentili (eds) *Is violence inevitable in Africa?: theories of conflict and approaches to conflict prevention* (2005) Brill: Leiden 56), support this assertion and state that poverty is central to the causes of violence because it forces the poor to in "a Darwinian struggle for survival and challenge others who compete with them for the use of the resources they need for their own survival".

³⁹ A Bellamy *Mass atrocities and armed conflict: links, distinctions, and implications for the responsibility to prevent* (2011) The Stanley Foundation: Policy Analysis Brief 13.

indicates the potential for mass atrocities: violence intentionally directed at civilians; impunity at an early stage; and a threat to the governing regime. From all these approaches, justice is a common factor in at least two- the second and third factors. This is important because, as it will be seen below in Chapter 2, the absence of accountability is the root of much of the violence and subsequent disregard for the right to life experienced on the African continent.⁴⁰ However, irrespective of which approach is correct or closer to the truth, any form of violence directed solely for unlawful gains and not recognised under any exception in law, should be addressed at its root cause as this will save many lives.⁴¹

1.3. The nature of violence in Africa⁴²

Africa has had conflicts that lasted decades.⁴³ The Democratic Republic of Congo, then Zaire, was thrown into a bloody civil war post-independence (1960) when its northern region of Katanga wanted to secede, with over 100 000 people killed. Two decades later, Burundi, Ivory Coast, Liberia, Sierra Leone and Uganda were all deep in civil wars lasting through to the 1990s. South Africa witnessed a rise in politically motivated killings in the latter 1980s and early 1990s. In 1994, Rwandan genocide happened, and over 800 000 people were killed.⁴⁴ The Horn of Africa has equally witnessed its fair share of violence.⁴⁵ Suffice to say, most of the violence in Africa has been linked with social change, or the need thereof.⁴⁶

[T]here is no sub-region in Africa that is immune from conflicts and large-scale violence.⁴⁷

Often, the use of violence is the source of power and its continued use legitimises lawlessness in Africa. The total disregard for accountability and the judicial system is responsible for many human rights violations witnessed in Africa in recent years, and these violations continue to occur where the rule of law is undermined: “Tyranny begins where law ends.”⁴⁸

⁴⁰ See also F Hirsch ‘Fear and accountability at the end of an era’ 42 *Law and Society Review* (2008) 601.

⁴¹ E Stammes ‘Speaking R2P and the prevention of mass atrocities’ 1 *Global Responsibility to Protect* (2009) 71 as quoted in Bellamy (n39) 1.

⁴² Jeng (n16) 68-83.

⁴³ Jeng (n16) 61, D Nsereko ‘Triggering the jurisdiction of the International Criminal Court’ 4 *African Human Rights Law Journal* (2004) 256-257 and Chabal (n1) 1.

⁴⁴ N Jones *The courts of genocide: politics and the rule of law in Rwanda and Arusha* (2010) Routledge: Oxon 7 and K Moghalu *Rwanda’s genocide: the politics of global justice* (2005) Palgrave Macmillan: New York 1.

⁴⁵ P Woodward *Crisis in the horn of Africa: politics, piracy and the threat of terror* (2013) I. B. Tauris: New York and F Katsuyoshi and J Markakis (eds) *Ethnicity & Conflict in the Horn of Africa* (1994) James Currey Publishers: London.

⁴⁶ Gebrewold (n33) 78: social change driven or hindered by those who seek to benefit from the change or status quo. It is submitted that the role played by social change, and the use of violence therein has far reaching implication on issues such as good governance, human rights, constitutionalism and democracy. Note, Chabal (n1) (1) attributes violence in Africa to “historical ‘progress’” when compared with Europe’s history since the sixteenth century. He says: “The consolidation of the state and transformation in a society cannot be achieved without force.”

⁴⁷ O Obasanjo ‘Preface’ in F Deng and I Zartman (eds) *Conflict Resolution in Africa* (1991) Brooking Institute: Washington, DC xiv, as quoted in Jeng (n16) 31.

⁴⁸ J Locke *Two treaties of government* read with D Orentlicher ‘Settling accounts: the duty to prosecute human rights violations of a prior regime’ 100 *The Yale Law Journal* (1991) 2542. See also M Robinson ‘Genocide, war crimes, crimes against humanity’ 23 *Fordham International Law Journal* (1999) 277-278 and B Ramcharan

The strife in Africa can be attributed to, according to Jeng and Cramer,⁴⁹ different geopolitical circumstances, contrasting political strengths and the manner in which Africans interact with each other and the international community.⁵⁰ According to Jeng and Cramer, although interrelated, causes of violence in Africa vary:

- Territorial boundaries demarcated by colonial powers have remained unchanged, post colonialism, and continues to burden Africa and plague the continent with violence. These borders bind multifaceted Africans together in an uneven manner resulting in havoc. For instance, the conflict between Somali and its neighbours: Somali refuses to acknowledge colonial borders and is content on unifying Somali-speaking people scattered in Djibouti, Ethiopia and Kenya;⁵¹
- Africans are divided and divide themselves according to ethnicity, resulting in violence against each other: “Once individuals see ethnic affiliations as paramount to their survival, loyalty to that group trumps an individual’s otherwise rational encounters with those outside of that group, and the ‘other’ is almost perceived as an unnecessary burden rather than an essential entity for social coexistence. This inward-looking perception of the ‘other’ widens divisions in a heterogeneous society.” However, Jeng and Gentili cautions against easily accepting the notion that Africans fight only because they are different;⁵²
- Bad governance and political exclusion (from political and economic benefits) has led to the marginalisation of certain people, leading to anger and violence.⁵³ This factor is best explained by Adebayo Adedeji in a book chapter titled: *Comprehending African conflicts*.⁵⁴ Adedeji says: “Civil wars and civil strifes are but violent reactions to the pervasive lack of *democracy*, the *denial of human rights*, the complete disregard for the sovereignty of the people, *the lack of empowerment and*

‘The concept and dimensions of the right to life’ in B Ramcharan (ed) *The right to life in international law* Martinus Nijhoff Publisher: The Netherlands 27:

It is almost invariably the conclusion of those who examine situations of political killings, arbitrary and summary executions, disappearance, torture and excessive use of force by law enforcement officials that their underlying root cause is the breakdown of the rule of law. Therefore, in order to protect the right to life effectively in the long term, efforts must be continued to strengthen the rule of law universally.

The role of the rule of law in protecting the right to life is multi-disciplined and overarching. See D Dyzenhaus ‘The past and future of the rule of law in South Africa’ 124 *South African Law Journal* (2007) 736, on the importance of the judiciary on overseeing the rule of law and *Masethla v President of the Republic of South Africa* 2008 1 BCLR 1 (CC) [173]:

The rule of law principle requires that the actions of all those who exercise public power must comply with the law, including the Constitution. It is central to the conception of our constitutional order that those who exercise public power ..., are constrained by the principle that they may exercise only those powers and perform only those functions which are conferred upon them by the law. Their sole claim to the exercise of lawful authority rests in the powers allocated to them under the law.

⁴⁹ Cramer (n36) 17.

⁵⁰ Jeng (n16) 68.

⁵¹ Jeng (n16) 68-71. See also Mehler (n4) 103.

⁵² Jeng (n16) 71-76 and A Gentili ‘Ethnicity and citizenship in sub-Saharan Africa’ in P Chabal, U Engel and A Gentili (eds) *Is violence inevitable in Africa?: theories of conflict and approaches to conflict prevention* (2005) Brill: Leiden 35. Nieberg attests to the role of tribalism and warlordism in the many deaths that occurred in Africa, see M Nieberg *Warfare in world history* (2001) Routledge: London 88. See also Cramer (n36) 29-31 who uses Angola as a case study to determine whether its conflict is caused by ethnicity.

⁵³ Jeng (n16) 76-81. See also Mehler (n4) 103.

⁵⁴ A Adedeji ‘Comprehending African conflicts’ in A Adedeji (ed) *Comprehending and mastering African conflicts: the search for sustainable peace and good governance* (1999) Zed Books: London 3 and Cramer (n36) 22-23.

accountability and, generally, bad governance. These are common characteristics of a divided society. In a divided, violent and conflict-ridden country or society, *justice which encompasses equality and fairplay as the ethical basis of national politics is conspicuous for its absence*. Such an absence is reason enough for political instability and violence, conflict and wars and, inevitably, bad governance. Herein lays the vicious circle.” (emphasis added);⁵⁵

- human rights violations led to frustration for a remedy and if this remedy does not materialise, violence ensues;⁵⁶
- according to Cramer, the scarcity or abundance of resources is also responsible for a fair share of violence occurring on the continent.⁵⁷ Cramer is of the view that resources encourage leaders to use violence to remain in power, and attack dissent;⁵⁸ and
- others.⁵⁹

In addition to, and in an attempt to put Jeng’s assessment into some degree of perspective, Gebrewold explains (through **Figure 1** (see below)) the problem with conflict and violence: there are primary, secondary and tertiary triggers to conflict. Primary triggers are historical in nature, such as colonialism, apartheid and other historical ill. Secondary triggers are current persisting economic and political difficulties, whilst tertiary triggers are the absence of a will to solve these problems.⁶⁰ In figure 1 below, *system* is meant to emulate different environments and the inter-relatedness of each of these environments: local, regional and global.

Put differently, violence and conflict are rooted in three levels. The first level is colonialism and state-building processes underlying post-colonialism. The second, and triggering, level is a composition of current challenges, namely, political, societal, and economic challenges. The third level is the absence of solutions to prevent violence and conflict.

⁵⁵ Adedeji (n54) 7. See Gebrewold (n33) 71 notes that violence reproduces itself autopolitically, Hirsch (n40) 601 and Gahima (n13) 108.

⁵⁶ Jeng (n16) 81-83 and Cramer (n36) 23-24. See also A Nollkaemper *National courts and the international rule of law* (2011) Oxford University Press: New York 60, although discussing it within the context of the independence of the courts (see paragraphs 3.3.1., 3.3.2. and 4. below), Nollkaemper is correct in stating that where a violation has occurred, an obligation to provide an effective remedy is given rise to. This then fits in with Jeng’s point that violence is also perpetuated by the failure to provide a remedy where a human right is being violated.

⁵⁷ Cramer (n36) 20-21 and the use of Angola as a case study 27-29. See also de Bruijn and van Dijk (n38) 55 and 57. See also Mehler (n4) 102: political economy of violence. De Bruijn and van Dijk 55 takes this a step further and submit that the scarcity of resources causes extreme violence, at times tied with ethnic origins.

⁵⁸ Cramer (n36) 20.

⁵⁹ See Mehler (n4) 106-108: oil and warfare; trafficking of precious resources; small arms and war as a profession; and declining states.

⁶⁰ Gebrewold (n33) 4-5.

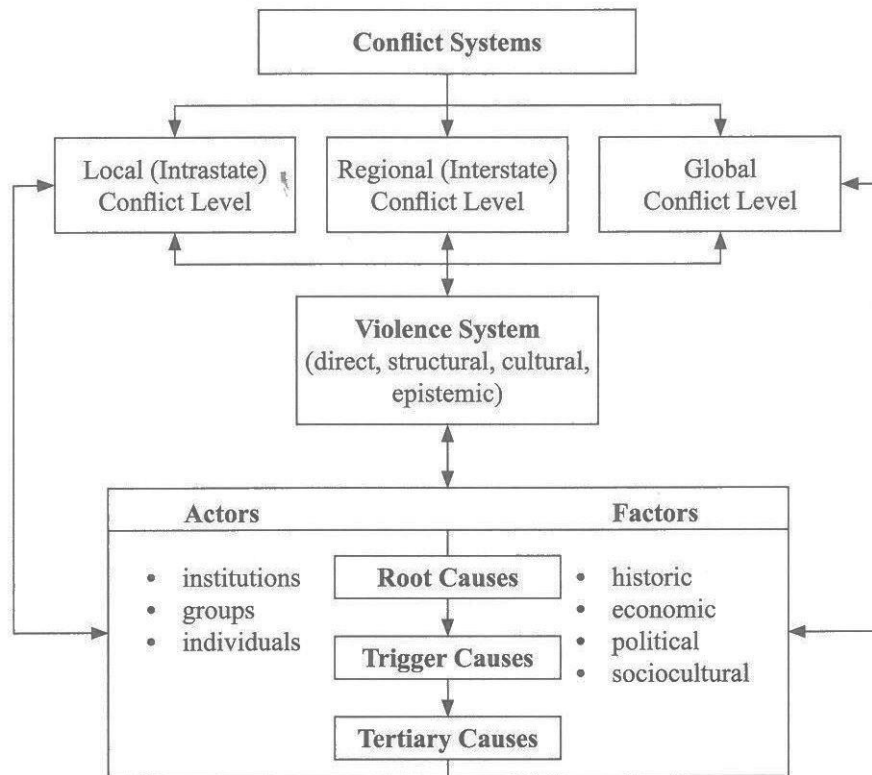


Figure 1.

These, listed factors from Jeng *et al*, paint a very grim picture of an assault on human rights and the right to life.⁶¹

1.4. The decline of violence *per* Pinker

Sofsky describes the twentieth century as “modern ... and barbaric”, and noted that the twentieth century has seen the highest of hopes to end violence and impunity, and also high amounts of human loss as a result of violence and torture- the notion that humans as a race have evolved and improved has been met with nothing but more sophisticated methods of torturing and killing. For the later, Sofsky references the First World War, Soviet and Chinese Camps and other instances of violence in many parts of Asia, Africa and South America. He says this is a generation of mass murderers.⁶²

Studying Rummel’s *Death by government*, where he details murders at the hands of the regimes- democide, brutality is echoed here as well.⁶³ According to Rummel, between the Soviet Union, China, Cambodia, Vietnam and Yugoslavia, nearly 128 million people have been killed from 1861 to 1991. Between Joseph Stalin (Soviet Union); Mao Tse-tung (China); Adolf Hitler (Germany); Chiang Kai-shek (China); Vladimir Lenin (Soviet Union);

⁶¹ Jeng (n16) 88.

⁶² Sofsky (n32) 61-62. See also Nsereko (n43) 256.

⁶³ R Rummel *Death by government* (2008) Transaction Publishers: New Brunswick 3.

Tojo Hideki (Japan); Pol Pot (Cambodia); Yahya Khan (Pakistan); and Josip Broz Tito (Yugoslavia), over 124 million people have been murdered.⁶⁴

Inconsistent with these accounts, by Sofsky and Rummel, it is submitted that violence, on a global scale, is on a decline. This is due to various factors, *inter alia*, such as the strong presence of international law; commerce, evolution; and the advent of human rights. Most notably post the Second World War is the strong influence and significance of law, particularly international law and international humanitarian law, on wars and conflict. Atrocities penalised under international criminal law and state sovereignty would not be an obstruction to limiting global violence: “sovereignty is not a license to kill.”⁶⁵

Norbert Elias argued that there was a revolution of social ‘habitus’, namely: lifestyle, norms and personality, indicated by table etiquette and sexual manners gradually establishing new norms of interpersonal conduct in society.⁶⁶ This, according to Elias, led to diminishing acts of interpersonal aggression and violence.⁶⁷ Marrying what is also held by Pinker, civilisation- “the history of the progress of the human race towards realizing the idea of humanity”- is responsible for the decline of violence.⁶⁸ With the *Enlightenment*, the world witnessed the abolition of judicial torture (the abolition of cruel and unusual punishment), fewer crimes warranting capital punishment (only treason and murder, not sodomy or witchcraft) and the abolition of blood sports.⁶⁹

The urbanisation, commercialisation, industrialisation of and the tolerance for other religions in Europe was chiefly responsible for the decline of violence in that part of the world.⁷⁰ The economy was similarly a driving force in the decline of violence during the Middle Ages- “peace is the natural effect of trade” -Charles Montesquieu. Before the decline, land, which formed the basis of the economy, was a source of conflict. Due to the growth in population and an attitude that money was the root of all evil, conquering the land of others *through brute violence* was the only means available to improving living standards and thus a norm: zero-sum game- only one player gains.⁷¹ However, the economic revolution of the Middle Ages brought with it the *positive-sum* game, “a scenario in which agents have choices that can improve the lots of both of them at the same time.” The implications of the *positive-sum* game on violence are incentive based: “your trading partner becomes more valuable to you alive than dead. You have an incentive, moreover, to anticipate what he wants, the better to

⁶⁴ Rummel (n63) 8. See also Evans (n18) 22-25 and 27-29.

⁶⁵ Evans (n18) 11 and D Pendas ‘Towards world law? Human rights and the failure of the legalist paradigm of war’ in S Hoffmann *Human rights in the twentieth century* (2011) Cambridge University Press: New York 215.

⁶⁶ See also J Fletcher *Violence and civilization: an introduction to the work of Norbert Elias* (1997) Polity Press: Cambridge.

⁶⁷ N Elias ‘The civilizing process’ in L Ray *Violence and society* (2011) SAGE: London 21 and Fletcher (n66). This understanding informed sociological studies on the ‘privatization of violence’: see M Cooney ‘Privatization of violence’ 41 (4) *Criminology* (2003) 1337-1406.

⁶⁸ F Guizot’s *History of civilization in modern Europe* as quoted by M Mazower ‘The end of civilization and the rise of human rights: the mid-twentieth-century disjuncture’ in S Hoffmann *Human rights in the twentieth century* (2011) Cambridge University Press: New York 230-231.

⁶⁹ Pinker (n25).

⁷⁰ Pinker (n3) 77.

⁷¹ Pinker (n3) 90.

supply it to him in exchange for what you want.”⁷² In addition, technology also contributed to the *positive-sum* game: technological advances, such as roads; wheeled carts; compasses; clocks; and windmills, took away from commerce that advocated “one player’s gain is another player’s loss”.⁷³ With the advent of secular universalism challenging the conventional interpretation of religion (religious freedom) and freedom of opinion, free markets based on an individual’s right to private property and laws premised on the promotion and protection of free trade thrived, leading to the decline of fatal confrontations- “People increasingly controlled their impulses and sought to cooperate with their neighbors.”⁷⁴

According to Pinker:

- violence has ceased to be entertainment:⁷⁵
Players with their hands tied behind them competed to kill a cat nailed to a post by battering it to death with their heads, at the risk cheeks ripped open and eyes scratched out by the frantic animal’s claws;
- punishment has become more humane, especially for crimes such as treason, prostitution or sodomy (and then, adultery);⁷⁶
- many people have learned to exercise self-restraint;⁷⁷
- to be elite, one had to use violence, prove oneself worthy of a higher rank/class: “because of the habit of wearing swords, homicide was as common among the upper classes as among the lower.”⁷⁸ However, with the advent of factories and other businesses, ‘good’ behaviour was needed; and as the elite put down weapons (battle-axes), the middle class followed suit. Subsequently, grievances were settled through various government institutions and societies, and the municipal police (1828).⁷⁹ However, Pinker notes that the civilisation of the elite did not eliminate violence in its entirety, save to shift it to a socio-economic level;⁸⁰ and

⁷² G Blainey *The causes of war* (1973) The Free Press: New York 159: nations go to war when they stand to gain more.

⁷³ Pinker (n3) 90-92.

⁷⁴ Pinker (n1) and see also M Ishay *The history of human rights: from ancient times to the globalization era* (2004) University of California Press: California 65.

⁷⁵ Pinker (n3) 81.

⁷⁶ Pinker (n3) 81.

⁷⁷ Pinker (n3) 92-93.

⁷⁸ Pinker (n3) 98-100 and L Stone *Interpersonal violence in English society 1300-1980. Past and Present* (1983) Oxford University Press 25, as quoted in Cooney (n37) 390.

⁷⁹ C.f. Pinker (n3) 99. Pinker notes that mediation institutions are accessible by the elite and middle class, and not the lower class, who resort to mod-justice or self-help, securing justice without the state’s intervention, explaining why violence is linked to the socio-economic standing of those involved. Given that this paper also seeks to sway the manner in which law enforcement and judicial officers deal with violence, it is not worthy to mention that these two bodies are inconsistent in their dealings with the lower class: “reluctant to become involved in their affairs but heavy handed when they do so.” See Pinker (n3) 101-102, Cooney (n37) 391 and 393; explains Hobbesianism and D Black (*The behaviour of law* (1976) Academic Press: New York) explains that self-help is rooted in being poor and marginalised from the legal system, giving rise to violence incidents. See also D Black ‘Crime as social control’ 48 *American Sociology Review* (1984) 34.

⁸⁰ Pinker (n3) 102.

- according to Cooney, statelessness was also key in many deadly conflicts, and as states developed, feuding declined: Elias' theory, which explains the gradual decline of violence through the social hierarchy.⁸¹

1.5. The decline of violence: an African perspective⁸²

With civil wars erupting in Burundi, Ivory Coast, Liberia, Sierra Leone and Uganda in the 1980s and much of the 90's, it is difficult to reconcile Pinker's notion that violence is on a decline globally, with Africa's position.⁸³ Further, the effects of violence have been documented and its effects are known on the continent. The roots thereof have been subjected to many studies and vary from, bad governance; the absence of the rule of law and accountability; and resources. Of concern to the African continent is that, violence has been used to suppress human rights, sustain governments and pursue personal gains. As a result, Africa is lacking behind in development and its human rights record continues to be poor.

Having considered submissions by Pinker *et al*, it is conceivable that violence, based on the importance of and need for commerce, is on a decline even in Africa. Related to this are regional organisations such as Economic Community of West Africa States (ECOWAS), Economic Community of Central African States (CEEAC) and Southern African Development Community (SADC).⁸⁴ These organisations were all established to assist concerned countries with trade and development, and as a result, the stakes of going to war with each other are high, whereas in the event that they do go to war all of them are bound to lose.

1.6. Conclusion

The use of violence has a negative impact on the right to life and other human rights. There are many submissions made concerning the causes of violence. However, what is essential and characterises these submissions is that, unsanctioned violence must be punished, that accountability should follow were unsanctioned violence is found. That being said, Africa has had unsanctioned violence on a large scale, from civil wars to genocides and unlawful

⁸¹ Cooney (n37) 389 and 392. *C.f.* Criticism of the Elias theory for failing to explain the link between death rates and vertical status, radial status, cultural status and normative status, see Cooney (n37) 392. *C.f.* K Walraven 'Empirical perspective on African conflict resolution' in P Chabal, U Engel and A Gentili (eds) *Is violence inevitable in Africa?: theories of conflict and approaches to conflict prevention* (2005) Brill: Leiden 77 is of the view that the lack of interest by both the Western and Eastern bloc in Africa's problems led to conflicts lingering on more than they normally would. Put differently, the lack of meddling in Africa's problems by the superpowers only served to propel on-going wars.

⁸² Walraven (n81) 75.

⁸³ E Starnes *The responsibility to protect and 'root cause' prevention* (2010) Norwegian Institute of International Affairs <http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=127952> (accessed 1 November 2013), who submits that measures such a good governance, judicial reform, human rights, democratic institutions, security reform and economic development programmes play a huge factor in preventing mass atrocities and violence. *C.f.* J Clarke 'The decline of the African military coup' in L Diamond and M Plattner (eds) *Democratization in Africa: progress and retreat* (2010) The John Hopkins University Press: Baltimore 73 who attributes the decline in military coups to democracy.

⁸⁴ Walraven (n81) 91. See also Mehler (n4) 118

executions by both state and non-state parties. Subsequently, violence continues to undermine the rule of law and the right to life. Leading factors for this violence include, divisions among groups of the same tribe; bad governance; and political exclusion. The factors then lead to a cyclical chain of events resulting in more violence.

Given this background, it then becomes impossible to reconcile these submissions with submissions that violence is on a decline globally. The latter submissions are premised on three key factors: *Enlightenment*, human rights, international law and commerce. At this point, commerce appears to be the only factor, on the African continent, positively influencing the prevalence of violence; whilst bad governance continues to propel violence.

2. The right to life⁸⁵

2.1. Introduction to the right to life

The historical foundations to the promotion of the right to life are rather complex and contradictory. Since time immemorial, human life has been held to be sacred but equally casually and easily disposed of.⁸⁶ For example, the Habeas Corpus Act of 1679, providing for personal liberty. A clearer indication of the promotion of the right to life can be traced back to the Seven Years' War (1756-1763) when Jean-Jacques defended "life" and said: "[Life is] an essential gift of nature." Subsequently, with every war or political turmoil (American Revolution war and French Revolution), the right to life was invoked.⁸⁷ The American Declaration of Independence of 4 July 1776 provides that: "[A]ll men are created equal, that they are endowed by the Creator with certain inalienable rights, that amongst these are Life, Liberty and the pursuit of Happiness."⁸⁸

The right to life is universally recognised and promoted. It also assumes different basic definitions such as:⁸⁹

- natural and inalienable attribute of every human being;
- an absolute right;⁹⁰

⁸⁵ C Tomuschat 'The right to life – legal and political foundations' in C Tomuschat, E Lanrange and S Oeter (eds) *The right to life* (2012) Martinus Nijhoff Publishers: The Netherlands 1. See also M Nowak *U.N. Covenant on Civil and Political Rights: CCPR commentary* (2005) N.P. Engel: Germany 120-156. See miscellaneously, J Paust 'The right to life in human rights law and the law of war' 65 *Saskatchewan Law Review* (2002) 411 and N Quénivet 'The right to life in international humanitarian law and human rights law' in R Arnold and N Quénivet (eds) *International humanitarian law and human rights law: towards a new merger in international law* (2008) Martinus Nijhoff Publishers: Leiden 331.

⁸⁶ Exodus 20:13: Thou shall not kill.

⁸⁷ Ishay (n74) 84-87.

⁸⁸ Tomuschat (n85) 4.

⁸⁹ See J Yorke 'Introduction: the right to life and the value of life: orientations in law, politics and ethics' in J Yorke *The right to life and the value of life* (2010) Ashgate: England 4.

⁹⁰ UN Doc E/CN.4/1992/17 [279], Barce Waly Ndiaye: "The Special Rapporteur wishes to reiterate that the right to life is absolute and must be respected even under exceptional circumstances." See Feinberg who describes an absolute right as "a right that would remain in one's possession, fully effective as a ground for other people's duties to one, in all possible circumstances", see M Feinberg 'The right to life and justified infringement' <https://www.msu.edu/~marianaj/Feinberg.pdf> (accessed 07 April 2014) 1. By way of an example, Feinberg explains, again, the implications of "an absolute right to life":

- the most fundamental of all rights;⁹¹
- the supreme right;
- the foundation and cornerstone of all other rights;
- the highest ranking right;
- primordial;
- imprescriptibly;
- cardinal human right;
- the supreme right and the ultimate metaright;⁹²
- irreducible core human right;
- an imperative norm of international law;⁹³
- the immediate gift of God and right inherited by nature in every individual;⁹⁴ and
- “primordial right which inspires and informs all other rights, from which the latter obtain their *raison d’être* and must take their lead”.⁹⁵

The true meaning of the right to life, as *per* definitions above, remains subject to interpretation given the intrinsic problems in defining its scope.⁹⁶ Two schools of thought on the interpretation of the right to life have emerged, *per* Schabas. The restrictive school subscribes to an interpretation in term of the UDHR, the ICCPR, and the European Convention on Human Rights. This school interprets the right to life as concerning the death penalty, extrajudicial executions and other unlawful deprivations of the right to life by the State. The broader school interprets the right to life in concert with socio-economic rights: namely, the right to food, health and water.⁹⁷ Przetacznik better explains these schools by stating that “the former school belongs to the area of civil and political rights, [whilst the] latter to that of economic, social and cultural rights”.⁹⁸

If my right to life is absolute, then there are no circumstances in which it is “subject to legitimate limitation” or in which the correlated duties of others to me in respect to X are suspended. If the right is absolute, then I possess it, and other are bound to me in the appropriate ways in all circumstances *without exception*. (Emphasis added.)

Feinberg continues to say:

This unqualified and exceptionless character of an absolute right implies (among other things) that it can never be in unresolved conflict with the absolute rights of other persons, whether those rights are of the same type (for example, rights to life) or of another type (say, rights to liberty or to property).

⁹¹ Tomuschat (n85) 3, *R v Home Secretary, Ex parte Bugdaycay* (1987) 1 All ER 940 (HL) 5314 (AC), R Smith *Textbook on international human rights* (2010) Oxford University Press: New York 210 and Quéniévet (n85) 331.

⁹² UN Doc A/67/275 (9 August 2012) [12]. General Assembly the report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns.

⁹³ See also W Kälin and J Künzli *The law of international human rights protection* (2009) Oxford University Press: New York 273.

⁹⁴ S Deshta and K Deshta *Fundamental human rights: the right to life and personal liberty* (2004) Deep and Deep Publications: New Delhi 4.

⁹⁵ K Herndl ‘Foreword’ in B Ramcharan (ed) *The right to life in international law* Martinus Nijhoff Publisher: The Netherlands xi.

⁹⁶ Smith (n91) 210.

⁹⁷ W Schabas *The abolition of the death penalty in international law* (2003) Cambridge University Press: Cambridge 8-9. See also Ouguergouz (n17) 91. See also *Ain o Salish Kendra (ASK) v Government and Bangladesh & Ors* 19 BLD (1999) 488.

⁹⁸ F Przetacznik ‘The right to life as a basic human right’ 9 *Human Rights Journal* (1976) 603 as referenced by A Trindade ‘Environment protection and the absence of restrictions’ in K Mahoney and P Mahoney (eds)

Further, the right to life has also been recognised as *jus cogens*- a right from which derogation is not permitted under any circumstances- cementing the promotion of the right to life.⁹⁹ The compatibility of the right to life with such a norm is best envisaged in a report in the *Report of the Economic and Social Council, Protection of Human Rights in Chile*: the right to life is very important to all societies, irrespective of the type or nature of culture practiced or the characteristics. This is the case because the right to life forms part of *jus cogens* in international human rights law. It is encumbered on the state, as part of its many functions, to protect the right to life through various legislative frameworks. Not only that, but is also encumbered on the state to ensure that it promotes the right to life.¹⁰⁰

The implications of having the right to life as *jus cogens* also touch on Article 4 (2) of the ICCPR: “No derogation from Articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.” This would mean that states are under a legal duty to take effective preventative measures to protect the right to life,¹⁰¹ even during a state of emergency,¹⁰² and also to investigate, prosecute and punish violation of this right- all of

Human rights in the twenty-first century: a global challenge (1993) Martinus Nijhoff Publisher: Dordrecht 573. See also Ouguergouz (n17) 91:

The individual’s right ‘to respect of his life’ may here be considered both as a civil right and as an economic and social right. As a civil right, its sole counterpart will be a negative obligation of the State, namely, to refrain from any infringement of this right or to prevent its possible infringement by a third party (duty of diligence). As an economic and social right, it will, on the contrary, entail a positive obligation of the State, namely, to ensure that the individual has adequate standard of living by providing him, for example, with adequate food and medical care; this interpretation is not without interest, bearing in mind that in Africa these two factors have certain influence on mortality rates. Legally speaking, *the right to life would thus appear to be a hybrid; in the former case, it places on the State an obligation to achieve a specific result and in the latter, an obligation to use its best endeavours.* (Footnotes omitted, emphasis added.)

⁹⁹ K Parker and L Beth Neylon ‘*Jus cogens*: compelling the law of human rights’ 12 *Hasting International and Comparative Law Review* (1988-1989) 431. See also V Dimitrijevic ‘Human rights and peace’ in J Symonides (ed) *Human rights: new dimensions and challenges* (1998) Ashgate: Aldershot 63 and Ramcharan (n48) 2, M Bassiouni ‘Searching for peace and achieving justice: the need for accountability’ 59 *Law and Contemporary problems* (1996) 14 and 14-17 and Quénivet (n85) 331. According to Article 53 of the Vienna Convention on the Law of the Treaties (22 May 1969), *jus cogens* is:

[A] norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

See also A Clapman *Human rights obligations of non-state actors* (2006) Oxford University Press: New York 87-91. See also dissenting opinion of Judge Tanaka in *South West Africa (Ethiopia v South Africa)* ICJ Reports (1996) 289: “... surely the law concerning the protection of human rights may be considered to belong to the *jus cogens*.”

¹⁰⁰ UN Doc A/37/564 [22] (1982). This also speak to accountability, as states will be able to entrench the right to life, the protection and promotion thereof, in their respective Constitutions and provide remedies, judicial or otherwise, for the violations thereto. Also, build in, through legislative means, measures punish violations.

¹⁰¹ Ramcharan (n48) 28-29: this duty, or the violation thereof, is attributed to the state under international law. Further, according to Ramcharan, it stand to flow that the right to life is an internationally recognised and guaranteed customary norm (of *jus cogens*) and thus its violation goes against international law, constituting a breach of an international obligation. Ramcharan goes further to invoke Article 55 read together with Article 66 of the UN Charter, to the effect that “if the right to life is being grossly violated, either through deliberate killings or by whatever means the United Nations is entitled to call upon the Government concerned to *account* for the situation and to take such corrective measures as are necessary to remedy it”. (Emphasis added.)

¹⁰² The 1980-1981 Inter-American Commission on Human Rights Annual Report emphasised that the right to life may never be suspended in *all circumstances*, see Ramcharan (n48) 5 and 7, where the author submits that the expansive nature of the right to life warrants protection from *all possible threats*. See also Nowak (n85) 122,

which are accountability prone measures inherent in the right to life.¹⁰³ Under the African Charter, it is submitted that no derogation is expressly permitted under Article 4.¹⁰⁴

The promotion and protection of the right to life compliments the purpose of international law, and *vice versa*:¹⁰⁵ “If international law is unable to fulfil this basic task [of protecting the right to life] then for what does it exist?”¹⁰⁶ This in turn reasons that a violation of the right to life, ought to be protected, at all cost.¹⁰⁷ It has been argued that the right to life, put differently, means the right to guard against (arbitrary) killing.¹⁰⁸

The Inter-American Court of Human Rights in its (1993) Advisory Opinion on *Restrictions to the Death Penalty* advised that the right to life espouses to two principles:¹⁰⁹

- the substantive principle - every human being has an inalienable right to have his life respected; and
- the procedural principle – no human being shall be *arbitrarily* deprived of his right.

It has been submitted that the right to life has been narrowly interpreted, warranting a wider interpretation to cater for the modern concept of the right to life because, firstly, the right to life is an imperative international law norm with strong implications to other rights. These implications can be interpreted in two ways: (1) other rights depend on the pre-existence of

read with Article 15 of the European Convention on Human Rights (ECHR), J Méndez ‘Accountability for past atrocities’ 19 *Human Rights Quarterly* (1997) 260 and Quéniwet (85) 331.

See also United Nations, Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc E/CN.4/1985/4, Annex (1985) [58]:

No state party shall, even in time of emergency threatening the life of the nation, derogate from the Covenant’s guarantees of the right to life ... [This right is] not derogable under any conditions even for the asserted purpose of preserving the life of the nation.

C.f. Human Rights, Terrorism and Counter-terrorism *Fact Sheet No. 32* <http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf> (accessed 8 April 2014), particularly, 29:

In a limited set of circumstances, such as a public emergency which threatens the life of the nation, States may take measures to derogate from certain human rights provisions under the International Covenant on Civil and Political Rights.

¹⁰³ R Pati *Due process and international terrorism: an international legal analysis* (2009) Martinus Nijhoff Publishers: Leiden 245, L Chenwi *Towards the abolition of the death penalty in Africa: a human rights perspective* (2008) Pretoria University Law Press: Cape Town 57 and A Kumari ‘Roles of theories of punishment in the policy of sentencing’ <http://works.bepress.com/cgi/viewcontent.cgi?article=1006&context=krishnaareti> (accessed 20 December 2013).

¹⁰⁴ Article 4: Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right. And Ramcharan (n48) 15-16.

¹⁰⁵ Deshta and Deshta (n94) 1 and S Moyn *The last utopia* (2010) Belknap Press: Massachusetts 176. See also paragraph 1.2.3. below.

¹⁰⁶ Ramcharan (n48) 2.

¹⁰⁷ Beigbeder (n6) 2.

¹⁰⁸ Y Distein ‘The right to life, physical integrity and liberty’ in L. Henkin (ed) *The international bill of human rights* (1980) 115 as referred to in Ramcharan (n48) 4 and Kälin and Künzli (n93) 273. See also Pati (n103) 254.

¹⁰⁹ As referenced in A Trindade ‘Human rights and the environment’ in S Deshta and K Deshta *Fundamental human rights: the right to life and personal liberty* (2004) Deep and Deep Publications: New Delhi 129. It is submitted that both these principle are in part geared towards ensuring accountability for possible violations, more so the procedural principle. This principle is set in such a way that the deprivation of the right to life, ought to be subject to scrutiny as to whether it was arbitrary in nature or not. And if subsequently found to be arbitrary, it will clearly warrant prosecution and punishment.

the right to life for their realisation, put differently, the right to life is a pre-condition for the exercise of other rights;¹¹⁰ and (2) the right to life informs the interpretation of other rights. Secondly, “in the modern sense”, according to Ramcharan, the right to life expands from mere protection against intentional or arbitrary killing to placing a *positive duty* on governments to survival. The author fell short of putting it bluntly and saying: the right to life expands from mere protection against intentional or arbitrary killing to placing a positive duty on governments to *respect* and *ensure* that the right to life is protected.¹¹¹

2.2. *Respect and ensure*

This then brings in another dimension to the right to life, that of an obligation to *respect* and to *ensure*- given the import of the right to life, according to Kabaalioglu, the state must not only *respect* the right to life, it must also *ensure* the right to life.¹¹² These phrases – to *respect* and to *ensure* - are extracted from Article 2(1) of the ICCPR,¹¹³ read together with the necessary subsequent Article, namely Article 6, require meaning.¹¹⁴ On the face of it, these phrases place a duty on state parties to the ICCPR to recognise the rights therein and an “affirmative duty” “... to promote the implementation of human rights and fundamental freedoms proclaimed in the Covenant and to take the necessary steps, including legislation, to guarantee to everyone the real opportunity of enjoying those rights”.¹¹⁵ To conclude this topic, Kabaalioglu says: the highest standards of conduct from the government are required when dealing with the right to life, to respect and ensure. Further, standards should be read separately from preventive and protective measures, they should be read to include the respect for the right to life and means to ensure the realisation of the right to life.¹¹⁶

Thirdly, due to the progressive development of the right to life by the General Assembly, disarmament and safeguards concerning the use of weapons of mass destruction (and the use

¹¹⁰ Smith (n91) 210 and Ouguergouz (n17) 91, Zegveld (n30) 180 and P Sieghart *The international law of human rights* (1983) Clarendon Press: Oxford 130: the essence of this is captured by Sieghart by stating that “... none of the other rights would have any value or utility without it”.

¹¹¹ The 1980-1981 Inter-American Commission on Human Rights Annual Report emphasised that the right to life may never be suspended in *all circumstances*, see Ramcharan (n48) 5 and 7, where the author submits that the expansive nature of the right to life warrants protection from *all possible threats*. (Emphasis added.) *C.f. Osman v United Kingdom* Case No 87/1997/871/1083: The positive obligation to safeguard life must not impose an impossible or disproportionate burden on public authorities.

¹¹² H Kabaalioglu ‘The obligations to ‘respect’ and to ‘ensure’ the right to life’ in B Ramcharan (ed) *The right to life in international law* Martinus Nijhoff Publisher: The Netherlands 160 and 165.

¹¹³ Article 2(1): Each State Party to the present Covenant undertakes to *respect* and to *ensure* to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant ... (Emphasis added.)

¹¹⁴ According to Kabaalioglu, states *respect* the right to life by not violating the right to life. However, notes Kabaalioglu that, to *ensure* is a much more complex scenario. States ensure the right to life by taking affirmative means to see to it that the right to life is enjoyed and exercised. See Kabaalioglu (n112) 165, read with 164.

¹¹⁵ Resolution No. 421(V) of the General Assembly read together with Kabaalioglu (n112) 165, and 164. For the European Commission of Human Rights and other practices on the topic of *ensure* and *respect*, see Kabaalioglu (n112) 167-180.

¹¹⁶ Kabaalioglu (n112) 180.

of force) ought to be achieved in good faith. Fourthly, the right to life ought to be protected adequately in the future- which speaks to the deterrence, a goal of accountability.¹¹⁷

The right to life is read together with the promotion and protection of human rights in general.¹¹⁸ Both are rights and freedoms every individual is entitled to by virtue of moral, natural and international law.¹¹⁹

In addition to the above, according to Ramcharan, there are what the author considers to be “basic submissions on the right to life”:¹²⁰

- “the right to life is closely inter-related with rights such as the right to peace, the right to a safe and healthy environment and the right to development.”;¹²¹
- “the effective protection of the right to life is closely related to, and affected by, implication of human rights standards directed at regulating situations in which threats to life are particularly susceptible;” and
- “protecting the right to life closely is closely related to the promotion and protection of human rights in general.”

Where a violation of the right to life has occurred, states should sufficiently, in a transparent manner, investigate.¹²² With the necessary alterations, the European Court in *Kaya v Turkey* held that:¹²³

The obligation to protect the right to life under Article 2 [of the European Convention on Human Rights], read in conjunction with State’s general duty under Article 1 of the Convention to ‘secure everyone within their jurisdiction the rights and freedoms in (the) Convention’, requires by implication that there should be some form of effective investigation when individuals have been killed as a result of the use of force by, *inter alios*, agents of the State (sic).

¹¹⁷ See paragraph 2.1. below.

¹¹⁸ Ramcharan (n30) 6-7 and Nanjira (n14) 213.

¹¹⁹ Nanjira (n14) 213.

¹²⁰ Ramcharan (n48) 6-7.

¹²¹ The preamble and Article 3 of the UDHR read together with the Declaration on the Right to Peace (General Assembly), Ramcharan (n48) 11-14: in essence, and to purposes of this paper, Ranchman draws links between the right to life and peace on the fact that are both central to the reduction of casualties, *inter alia*, although the former hold more importance than the latter.

¹²² Smith (n91) 212 and *Akkoc v Turkey.*, App. No. 22947/93, 34 EHRR 51 (2002): the European Court of Human Rights held that authorities take reasonable measures to prevent a real or immediate risk to the right to life, and where this right has been violated, an effective investigation into the circumstances leading to the violation must take place. See also S Foster *Q & a: human rights and civil liberties* (2006) Oxford University Press: Oxford 110-111, *McShane v United Kingdom* (2002) 32 EHRR 33 and *Finucane v United Kingdom* (2003) 37 ERHH 29.

¹²³ (1998) 28 EHRR 1 [86]: The contention was the manner in which the brother of the applicant died at the hands of Turkish law enforcement. See D Shelton *Remedies in international human rights law* (2005) Oxford University Press: New York 129-130.

2.3. International and regional instruments and international law and norms: the right to life¹²⁴

The UDHR serves as the benchmark for human rights, agreed upon by all nations (before the General Assembly, with only 8 abstentions). Article 3 of the UDHR states that:

Everyone has the right to life, liberty and security.

Although Article 3 addresses three different rights, in conformity with the purposes of this paper, only the right to life within the context of violence as a violation thereto will be discussed in detail. Article 3 is descriptive of an inherent (positive) right,¹²⁵ which is possessed by human beings.¹²⁶

Article 3 cannot be read in isolation from Article 5 of the UDHR which provides that:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

The spirit in which these provisions are read together is that, often the punishment or torture of an individual result in the loss of life. And further, punishment and torture occurs when one's (right to) liberty is compromised. Further, the UDHR stresses on the duty of states to safeguard human rights of those within their jurisdiction.¹²⁷

Article 6 of the ICCPR:¹²⁸

¹²⁴ Trindade (n109) 129-130 and Quéniwet (n85) 331.

¹²⁵ According to L Rehof 'Article 3' in G Alfredsson and A Eide (eds) *The Universal Declaration of Human Rights: A common standard of achievement* (1999) Kluwer Law International: The Netherlands 91, natural justice dictates that the State must respect the rights of its citizens by virtue of them being human beings.

¹²⁶ What is a positive right? Positive in the sense that it is enforceable against both state and non-state actors. The state has a legal obligation to protect the right to life (the state must take all reasonable measure to protect life (enacting laws to deter people from depriving others of the right to life (Smith (n91) 212, Beigbeder (n6) 1-2 and Ramcharan (n48) 7 (footnote 79): protection from *all threats*) promote the right to life (see Yorke (n89) 4 and Smith (n91) 211)). See also Nowak (n85) 122-124 (read together with Articles 2, 4 and 6(4) of the ECHR, ACHR and ICCPR, respectively) and *McCann, Farrell and Savage v United Kingdom* (1995) 21 EHRR 97, the court was clear with respect to the state's positive obligation to protect all human life and an obligation to protect life from threats made by a third party. See also *Osman v United Kingdom* (1998) 29 EHRR 245. *C.f.* Tomuschat (n85) 6 non-state actor has a duty to refrain from violating another's right to life. See also European Commission of Human Rights *X v Ireland* 6040/73 CD 44 121 and *Kälin and Künzli* (n93) 275, 291-296 (duty to protect) and 296-298 (duty to fulfil). See also A Cassese *International law in a divided world* (1986) Oxford University Press: New York 149 who explains refraining from gross violations as abstaining "from seriously and repeatedly infringing on a basic right ..., and from trampling upon a whole series of rights ..." *C.f.* A negative duty would mean that the state must take all measures "reasonable to prevent unlawful deprivations, including arbitrary deprivation", of the right to life, see Yorke (n89) 4.

¹²⁷ F Hassan 'The theoretical basis of punishment in international criminal law' 15 *Case Western Reserve Journal of International Law* 43.

See also a dissenting opinion by Mr Bertin Wennergren in *Kindler v Canada* CCPR/C/48/D/470/1991 19/34:

"The value of the right to life immeasurable for any human being and the right to life enshrined in Article 6 of the Covenant is the supreme human rights. It is an obligation of State parties to the Covenant to protect the lives of all human beings on their territory and under their jurisdiction. If issues arise in respect of the protection of the right to life, priority must not be accorded to the domestic laws of other countries or to (bilateral) treaty articles. Discretion of any nature permitted under an

Everyone human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his right.

Article 4 of the African Charter on Human and Peoples' Rights¹²⁹ provide as follows:

Human beings are inviolable. Every human being shall be entitled to *respect* for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

2.4. Human rights and its implications on the right to life¹³⁰

Human rights as a discipline is rather abstract and moral in nature for a positivistic approach to issues such as the right to life for the latter is codified in various constitutions and treaties.¹³¹ The interpretation of human rights gives rise to various theories, one of which one has been mentioned immediately above and the other: human rights is laced with the use of open-ended language, with a few exceptions.¹³² Therefore, incorporating and reading-in human rights¹³³ together with the right to life warrants some discussion and analysis.¹³⁴

It thus becomes imperative to understand human rights as a discipline before attempting to explain it within the right to life context. The origins of human rights, or rather international human rights,¹³⁵ can be traced from two principles: the liberty based theory and the rights based theory. Both these theories subscribe to the regulation of the state's relationship to an

extradition treaty cannot apply, as there is no room for it under Covenant obligations. It is worth repeating that no derogation from a State's obligation under Article 6, paragraph 1, is permitted ..."

¹²⁹ See C Heyns 'Civil and political rights in the African Charter' in M Evans and R Murray *The African Charter on Human and Peoples' Rights: the system in practice, 1989-2000* (2002) Cambridge University Press: Cambridge 147-150 and M Shaw *International law* (2008) Cambridge University Press: New York 391.

¹³⁰ See Seibert-Fohr (n7) 3-4: who holds that the protection of human rights, within the realm of armed conflict makes it possible to prosecute other serious violations in general and enhance the enforcement of international criminal law at domestic level. See also B Ferencz 'The future of human rights in international jurisprudence: an optimistic appraisal' 10 *Hofstra Law Review* (1981-1982) 389.

¹³¹ W Osiatyński *Human rights and their limits* (2009) Cambridge University Press: New York 11 and J Dugard and C van der Wyngaert 'Reconciling extradition with human rights' 92 *The American Journal of International Law* (1998) 194. See also F Viljoen *International human rights law in Africa* (2007) Oxford University Press: Oxford 4.

¹³² C Gearty *Principles of human rights* (2004) Oxford University Press: Oxford 5.

¹³³ Gearty (n132) 5 accordingly suggests that safeguards to the laws of interpretations, such a self-restraint, be adopted. Note, Gearty's study is informed by the analysis of the United Kingdom's adjudication of the Human Rights Act of 1998.

¹³⁴ See Dugard and van der Wyngaert (n131) 194 and J Shestack 'Philosophical foundations of human rights' in J Symonides (ed) *Human rights: concepts and standards* (2000) UNESCO Publishing: Paris 32-35. The necessity of this question has been challenged for it is suggested that this question dwells on moral judgements which must be self-evident, see Shestack 33. See also M Freeman *Human rights* (2004) Polity: Cambridge 60-61.

¹³⁵ C.f. M Hansungule 'The historical development of international human rights' in A Chowdhury and J Bhuiyan (eds) *An introduction to international human rights law* (2010) 1 (footnote 2). Prior to 1945, the human rights discourse was classified into three categories, namely: first generation rights- civil and political rights (18th century natural law philosophy); second generation rights- social, economic and cultural rights, 20th century socialist philosophy and third generation rights- group rights, 1970s. See W Menski *Comparative law in a global context: the legal systems of Asia and Africa* (2006) Cambridge University Press: New York 41. However, irrespective of the period of its origin, the focal point remains the pursuance for a universal recognition of human rights and the protection thereof.

individual, and *vice versa*, and the inherent rights of people, respectively.¹³⁶ With the occurrence of the French Revolution in 1789 and the United States Declaration of Independence in 1791, the rights to equality and liberty were born.¹³⁷ Its (international Human rights) function is to “protect universal features of the human being”.¹³⁸

International human rights law substantive context is rooted in the principles of domestic constitutional law embodied in human rights law of various countries.¹³⁹ Buergenthal notes that with the advent of traditional international law, individuals, by virtue of their nationality were entitled to state protection against acts by other states which are in violation of human rights. However, traditional international law did not permit an individual to seek protection from other states against human rights violations perpetrated by his/her own state.¹⁴⁰ This would mean, inadvertently, that a stateless person does not have any protection whatsoever; against acts constituting human rights violations by a state (any state for that matter).¹⁴¹ Developments in this field saw exceptions to the principle of state sovereignty, which in this case,¹⁴² should be interpreted as acts of human rights violations by a state against its own citizen(s).¹⁴³

One finds the following (characteristics) as the correct starting premise in understanding human rights and to be able to incorporate and recognise them as better applicable to the protection and promotion of the right to life.

1. “[T]he justification of moral principles in an attempt to make coherent sense about the principles which govern and should govern the ways human beings treat one another.”¹⁴⁴
2. “[I]f we understand the moral force of human rights principles, we can reinforce the authority of the international law of human rights, which is particularly valuable for an arena still lacking in formal enforcement mechanisms- understanding the moral justifications that underlie of human rights law.”¹⁴⁵

¹³⁶ Smith (n91) 6 and Osiatyński (n131) 11.

¹³⁷ Smith (n91) 6-7. See also paragraph 2.1. above.

¹³⁸ Patrick Machlem as quoted by Hansungule (n135) 1.

¹³⁹ T Buergenthal ‘International human rights in a historical perspective’ in J Symonides (ed) *Human rights: concepts and standards* (2002) UNESCO Publishing: Paris 3.

¹⁴⁰ Buergenthal (n139) 5.

¹⁴¹ Buergenthal (n139) 6.

¹⁴² See others: Symonides (n111) 6-9; A Orford *Reading humanitarian intervention: human rights and the use of force in international law* (2003) Cambridge University Press: Cambridge; A Hehir *Humanitarian intervention: an introduction* (2010) Palgrave Macmillan: Hampshire; and J Pattison *Humanitarian intervention and the responsibility to protect: who should intervene* (2010) Oxford University Press: Oxford.

¹⁴³ Buergenthal (n139) 6. Most notable with this exception is the abuse by superpowers: i.e. Libya. For addition notes on Libya, see G Segell ‘NATO’s first mission to Africa- Darfur’ in F Krishna-Hensel (ed) *Order and disorder in the international system* (2010) Ashgate: Burlington 131.

¹⁴⁴ Shestack (n134) 31. This statement illustrates the conversion of moral principles into (tangible) rights incumbent on and benefiting human beings, which in turn resonates with positivism.

¹⁴⁵ Shestack (n134) 31-32.

The above statement re-enforces what international law strives to accomplish: the realisation of the universality and universal recognition of human rights by both judicial and quasi-judicial institutions, including governments and other state organs.

3. “[U]nderstanding the philosophical foundations of human rights helps us devise a translation formula which will permit men and women to speak to each other across the gulfs of creed and dogma, a necessary exercise if there is to be universal recognition of human rights principles.”¹⁴⁶
4. [U]nderstanding the moral philosophy of human rights also helps us to delineate the structures of human thought in a manner which reveals the implications of thinking and speaking about rights in a particular way, the relationship of rights to one another, the hierarchical ordering of rights and the nature of the conflicts.”¹⁴⁷

Understanding the philosophical foundations of human rights will see the realisation of all the above principles/characteristics and legitimisation of human rights as a best to explain the promotion and protection of the right to life. Human rights, as correctly contended by Freeman,¹⁴⁸ are not attached to humans solely because they are human but are attached for they protect morally valid and fundamental interests against all forms of abuse, especially political abuse. In addition, rights validate any struggle against an unjust and unequal social order.¹⁴⁹

The concept of human rights is highly significant in modern day international law,¹⁵⁰ but also highly contentious, not only in definition but also in scope.¹⁵¹ The most basic understanding of human rights is: inalienable rights one has by virtue of being human.¹⁵² The premise of this understanding is natural law: a higher law than man-made law.

Advent of international law, states and governments were of (main) concern and individual rights were secondary. However, as the international law phenomenon developed, the promotion of human rights became central and international human rights was born: an ‘avant garde’ international law.¹⁵³

The promotion of the right to life speaks to and enhances democracy: “Freedom and liberties are only for the living.”¹⁵⁴ The notion of human rights is that, human life is revered, respected

¹⁴⁶ Shestack (n134) 32.

¹⁴⁷ Shestack (n134) 32.

¹⁴⁸ Freeman (n 134) 61.

¹⁴⁹ Freeman (n 134) 62.

¹⁵⁰ Cassese (n126) 148-150.

¹⁵¹ R Martin *A system of rights* (1993) Clarendon Press: Oxford 24 and Shaw (n129) 265.

¹⁵² J Donnelly *Universal human rights in theory and practice* (2003) Cornell University Press: Ithaca 7 read with S Hoffmann ‘Introduction: Genealogies of human rights’ in S Hoffmann *Human rights in the twentieth century* (2011) Cambridge University Press: New York 2.

¹⁵³ Ramcharan (n48) 1-2.

¹⁵⁴ Deshta and Deshta (n94) 4 and Yorke (n89) 63. And *vice versa*, see Rummel (n63) 23.

and free from violence.¹⁵⁵ Human rights place special emphasis on certain values such as liberty, life, equality and security. Human rights are also positioned to ensure the realisation of these values.¹⁵⁶

Human rights are thought to be moral rights, with prior existence, independent of rules and without sanction from any authority.¹⁵⁷ The extent of rights should not be reduced to the correlating duty of the state or a non-state party,¹⁵⁸ for this will underscore the ensuing right to remedy the violation or empower the possessor. To merely enjoy or be entitled to a right is not sufficient. In the event of a violation, there is also an important component attached to the rights concept, the phenomenon of remedies: enjoyment/entitlement/exercise → violation → remedy/sanctions (clear and specific, with legal effect).¹⁵⁹ Put differently, rights are two dimensional: firstly, violations should be prevented; secondly, a remedy is needed whenever a right is violated.¹⁶⁰

The right to life holds such significant that other rights are measured against it- the right to life is a model right- and is necessary for the enjoyment of *all other rights*.¹⁶¹ This narrative qualifies other with through the right to life.

However, there is literature suggesting that a distinction be drawn between the right to life in the strict sense as envisaged by international instruments and the right to life as the right to living. The latter would then be defined in term of the International Covenant on Economic, Social and Cultural Rights.¹⁶² According to Ouguergouz: the right to life is dual dimensional, and is thus considered a civil right, as well as a socio-economic right. As a civil right, the

¹⁵⁵ P Lauren *The evolution of international human rights: visions seen* (2003) University of Pennsylvania Press: Philadelphia 5.

¹⁵⁶ Donnelly (n152) 11.

¹⁵⁷ Martin (n151) 74-75 and L Henkin, G Neuman, D Orentlicher and D Leebron *Human rights* (1999) Foundation Press: New York 1-6.

¹⁵⁸ The lines between state and non-state actors get blurred when a state concludes a treaty, with obligations, and the such obligations get violated: state responsibility. See *A v United Kingdom* ECHR [1998] 2692.

¹⁵⁹ Donnelly (n152) 8 and Kabaalioglu (n112) 166: “a right is given effect by affording remedies for its violations.”

¹⁶⁰ Kabaalioglu (n112) 166, see also Article 2(3) of the ICCPR:

Each State Party to the present Covenant undertakes:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted.

¹⁶¹ Przetacznik (n98) 603 as referenced by Trindade (n109) 129. The right to life implies the right to food, see *Shantistar Builders v Narayan Khimalal Totame* (1990) 1 SCC 520: “The right to life is guaranteed in any civilized society. That would take within its sweep the right to food ...” and L Chenwi ‘Taking the Death Penalty Debate Further: The African Commission on Human and Peoples’ Rights’ in J Yorke *The right to life and the value of life* (2010) Ashgate: England 89. See also *Thangal v Union of India* 1990 (1) KLT 580: “The right to life is much more than a right to animal existence and its attributes are manifold, as life itself. The rights to sweet water and the right to free air are attributes of the right to life, for these are the basic elements which sustain itself.”

¹⁶² Przetacznik (n98) 585-609 as referenced in Ramcharan (n48) 4.

right to life attracts a negative obligation from the state, to refrain from interfering with this right or to prevent the infringement of this right by any third party. And as a socio-economic right, the right to life attracts a positive obligation from the state, to ensure that all right bearers are afforded adequate standards of living. This could be realised by providing sufficient food and health care to right bearers. Put differently, “*the right to life would thus appear to be a hybrid; in the former case, it places on the State an obligation to achieve a specific result and in the latter, an obligation to use its best endeavours*”.¹⁶³

This narrative has been criticised for proliferating rights, creating labels for rights and being vague in definition and content,¹⁶⁴ and also creating a hierarchy of rights.¹⁶⁵ It is argued that given that all human rights are only realisable when the right to life is protected, it holds that the right to life take priority on the list of rights and in the jurisprudence of human rights law.¹⁶⁶

2.5. Threats to the right to life¹⁶⁷

Herndl notes nuclear weapons, armed conflicts, internal disturbances, arbitrary and summary executions, torture, enforcement and involuntary disappearances, excessive use of force by law enforcement personnel and death from hunger and diseases as leading threats to the right to life.¹⁶⁸

The English Magna Charta (1215) is the earliest statute to prohibit the arbitrary deprivation of life to the following extent:

No freeman shall be taken or imprisoned, or be disseised of his freehold, or liberties, or free custom, or be outlawed, or exiled, or any other wise destroyed; nor will we pass upon him, nor condemn him, but by lawful judgement of his peers, or by the law of the land.

For purposes of this paper, a violation of the right to life, as discussed in paragraphs 1., 2.1., 2.2. and 2.4. above, will be considered to be the intentional setting into motion, by violent means, events that will result in the loss of life.¹⁶⁹

¹⁶³ Ouguergouz (n17) 91. See also Article 2 of the ECHR and Foster (n122) 96.

¹⁶⁴ Ramcharan (n48) 4. Ouguergouz (n17) 92 qualifies it by stating that the economic and social aspect of the right to life is sufficiently addressed in Article 16 of the African Charter (Every individual shall have the right to enjoy the best attainable state of physical and mental health).

¹⁶⁵ T Orlin ‘The right to life/ the right to die: the rights, their interrelationship and the jurisprudential problems’ in T Orlin, A Rosas and M Schelin *The jurisprudence of human rights law: a comparative interpretive approach* (2000) Institute for Human Rights: Finland 73-74, P Weil ‘Towards relative normativity in international law’ 77 *American Journal of International Law* (1983) 413 and T Meron ‘On a hierarchy of international human rights’ 80 *American Journal of International Law* (1986) 1.

¹⁶⁶ Orlin (n165) 74.

¹⁶⁷ Kälin and Künzli (n93) 276-279.

¹⁶⁸ Herndl (n95) xi and Ramcharan (n48) 2 and 7-8.

¹⁶⁹ Mindful of the fact that the intention deprivation of food, exposing someone to extreme temperatures and contaminating with a disease will result in the loss of life.

Ramcharan lists a series of question with regards to threats to the right to life, some of these questions will be answered in subsequent chapters:

- how to outlaw the gravest threats and assaults?
- how to make the criminal under international law?
- how to develop techniques, approaches, and, perhaps, even institutions, to deal with such violations at the international level- how possible, to advance the principle of universal jurisdiction in the field?
- how to promote the rule of law
- how to develop forms of urgent action by the international community to deal effectively with gross violations?
- how to stop co-operation among repressive governments in training torturers and killers and in perfecting their macabre techniques?
- how to develop additional codes of conduct, e.g. for the military?
- how to promote human rights in the training of the police, security personnel and the military?
- who to reinforce and strengthen the international accountability and responsibility of governments (as well as of insurgent groups)?

2.6. Prevention and accountability

The protection of the right to life goes beyond what is prescribed in international conventions and must be considered an international norm for which all state abides by.¹⁷⁰ Checks and balances defuse power, resulting in less deaths.¹⁷¹ And as stated above, both prevention and protection are inherent to the right to life.¹⁷² Therefore, adequate accountability mechanism, and the protection of the right to life are interwoven, see chapter 2 below.

2.7. The right to life: not absolute¹⁷³

Given what has been said above, and emphasis paid to indications about the absolute nature of the right, it is equally worth noting that the right to life is *not* absolute. This submission is premised on two grounds: (1) rights come with duties and the dereliction of duties, justifies the violation of the right to life;¹⁷⁴ and (2) there are justifiable grounds for taking a life, put differently, there are justifiable ground to not protecting the right to life- the limitation of resources.¹⁷⁵ Therefore, the right to life *cannot* be absolute.¹⁷⁶

¹⁷⁰ Herndl (n95) xi.

¹⁷¹ Rummel (n63) 1-2 and 22.

¹⁷² Trindade (n109) 130 and N Jayawickrama *The judicial application of human rights: national, regional and international jurisprudence* (2002) Cambridge University Press: Cambridge 256-257.

¹⁷³ Feinberg (n90); and A Jachec-Neale 'The right to take life: killing and death in armed conflict' in J Yorke *The right to life and the value of life* (2010) Ashgate: England 119: who address the legitimacy of violating the right to life in an armed conflict and comes to the conclusion that the combatant's right to life can be until they are no longer participating in combat.

¹⁷⁴ Feinberg (n90) 2.

¹⁷⁵ See *Osman* (n111).

¹⁷⁶ Feinberg (n90) 1.

2.8. Violence and the right to life

It goes without saying that violence undermines the sanctity of the right to life and many other human rights.¹⁷⁷ And given the high value attached to the right to life, violence ought to be quelled and accountability ought to follow from incidences where it is found that violence was used unlawfully and unnecessarily.

2.9. Conclusion

The right to life has historical significance attached to it. With time, it has become important and better protected. The recognition of this right assumes different definitions in different jurisdictions and conventions. Through these definitions, the potency thereof cannot be overlooked as it is apparent. Equally, these varied definitions give rise to different interpretations, the leading two being that the right to life is the foundation of all other rights; and the other being that the meaningful interpretation of other rights occurs through the interpretation of the right to life. However, what is also contested is the interpretation of the right to life, is it a socio-economic right or a civil-political right. The right to life espouse respect (for the right) and an obligation on role players, including the state, to ensure that this right is protected.

The recognition of the right to life as a *jus cogens* right has further entrenched the importance of the right to life in the international law discourse, and further ensured that this right is better protected. This protection is in keeping with the ICCPR and the African Charter. Further, the ICCPR contains important wording proving the essence of the right to life. The words *respect* and *ensure*, add authority to the obligation of both state and non-state actors to promote and protect the right to life. In addition to the ICCPR and the African Charter, the UDHR recognises the right to life. The understanding of this right cannot be discussed in isolation from human rights as a discourse. This discourse gives valuable context, substantive to otherwise, to the right to life. The attachment of the *right* to life to a human signifies that the right to life is a natural right, parallel from a treaty *right*. One core right to the human rights discipline is the right to life, and it ought to note that a violation of a *right* is always, especially in cases where the right significant, attached to a remedy. As it will be shown in the next chapter, an effective remedy, it is submitted, to a violation of the right to life is criminal accountability through a reliable tribunal that is able to recognise and hold the right to life as important. The discussion on the importance of the right to life should not be considered outside the scope of the fact that the right to life is not absolute.

¹⁷⁷ Merry (n9) 41 and Jeng (n16) 88. According to Bassiouni (n99) 6, the twentieth century alone accounts for over 170 million deaths, civilians, and 33 million deaths, military.

When we neither punish nor reproach evildoers, we are not simply protecting their trivial old age, we are thereby ripping the foundations of justice beneath new generations. – Solzhenitsyn

3. Accountability: political, criminal and public accountability¹⁷⁸

3.1. Defining accountability¹⁷⁹

There are two basic understandings of the definition of accountability: accountability is answerability,¹⁸⁰ and “an agency relationship”.¹⁸¹ The former indicates responsibility for actions and responsibility to those who imposed the expectation to be held accountable.¹⁸² Agency is established either by an obligation to act on behalf of another;¹⁸³ or being empowered to act in a certain way;¹⁸⁴ or, it is submitted, by virtue of binding oneself to act in a certain way.¹⁸⁵

¹⁷⁸ See B Farley ‘Drones and democracy: missing out on accountability’ 54 *South Texas Law Review* (2012) 385 and R Keohane ‘The concept of accountability in world politics and the use of force’ 24 *Michigan Journal of International Law* (2003) 1125.

¹⁷⁹ M Bassiouni *Introduction to international criminal law* (2003) Transnational Publishers: Ardsley 676-677 (hereafter Bassiouni (n179 (2003))), indirectly submits that accountability (justice) is premised on historical national criminal justice systems, social contract, which, in modern days, has links with international criminal justice. See also R Mulgan “‘Accountability’: an ever-expanding concept?” 78 *Public Administration* (2000) 555, M Bassiouni ‘Combating impunity for international crimes’ 71 *University of Colorado Law Review* (2000) 409 (hereafter Bassiouni (n179 (2000))) and D Roche *Accountability in restorative justice* (2003) Oxford University Press: New York 25 (and 41): “[accountability is] the absence of, or at least the inadequacy of mechanisms requiring decision-makers to explain their conduct.” For accountability as a mechanism of dealing with other forms of harm suffered and as a means to separate oneself from an era of human rights abuses and corruption, see Hirsch (n40) 600 and Bassiouni (n15) 205. See also “full accountability”, which entails “appropriate trial and punishment of each responsible individual for the actual crime committed, together with appropriate reparations made by perpetrators to victims”, M Morris ‘International guidelines against impunity: facilitating accountability’ 59 *Law and Contemporary Problems* (1996) 29. *C.f.* “The meaning of accountability has *mistakenly* been used interchangeably with words such as responsibility, responsiveness and answerability. [There is a] relationship between accountability and these words and ... while these concepts are related to each other they are not synonymous, and if these words are used interchangeably it will be a source of confusion in the accountability debate. The debate will be more confusing if there is a lack of clarity about ‘who is accountable to whom and for what’,” (emphasis added) J Cheung ‘Police accountability’ 78 *The Police Journal* (2005) 6. See also Mulgan 570.

¹⁸⁰ Cheung (n179) 3 read with 8 and Mulgan (n179) 555: “accountability is more than the ‘element of account’: accountability includes ‘being held to account’.”

¹⁸¹ Farley (n178) 393.

¹⁸² Cheung (n179) 4 read with 6 and Mulgan (n179) 555: responsibility is two folded, “to *account for* certain specified or implied performance ... and to accept *sanctions* for the failure to carry out [or acting *ultra vires*] duties designated by the higher authority.

¹⁸³ Farley (n178) 393: “A [the agent] is obligated to act on P’s [the principle] behalf.”

¹⁸⁴ Farley (n178) 393-394: “P [the principle] is empowered to positively or negatively sanction A [the agent] for A’s action or inaction.”

¹⁸⁵ When A (the agent) ratifies different human rights instruments, such as the UDHR, Article 2 of the ICCPR (“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals ...”) and

According to Mulgan, accountability bears the following characteristics:¹⁸⁶

- 1) it is *external*, in that the account is given to some other person or body outside the person or body being held accountable;
- 2) it involves *social interaction and exchange*, in that one side, that calling for the account, seeks answers and rectification while the other side, that being held accountable, responds and accepts sanctions;
- 3) it implies *right of authority*, in that those calling for an account are asserting rights of superior authority over those who are accountable, including the rights to demand answers and to impose sanctions.

For a rather informed understanding of accountability, it would be best to analyse the goals of accountability, namely, *justice* (correcting wrongs by affirming that behaviour which violates agreed standards of international law is wrong and warrant response and condemnation: impunity is unacceptable; and obtaining punishment for perpetrators and redress for victims);¹⁸⁷ *truth* (as an essential component of “meaningful accountability” through the investigation and accurate account of events made available to the public);¹⁸⁸ *deterrence and prevention* (the certainty of punishment that will discourage others and enhance the rule of law and foster a culture of accountability);¹⁸⁹ and *reconciliation* (building the rule of law).¹⁹⁰ These goals are a more elaborate and encompassing benefit to the definition of accountability. Elaborate in the sense that they envisage principles that can be assessed independently from one another, and encompassing in the sense that they stand to cover all

African Charter, then A has bound himself to a duty P (the principle) not to violate any of these instruments or their provisions designed to protect P. See also Méndez (n102) 259-260.

¹⁸⁶ Mulgan (179) 555.

¹⁸⁷ See also S Ratner and J Abrams *Accountability for human rights atrocities in international law: beyond the Nuremberg legacy* (2001) Oxford University Press: New York 155, J Stromseth ‘Introduction: goes and challenges in the pursuit of accountability’ in J Stromseth (ed) *Accountability for atrocities: national and international responses* (2003) Transnational Publishers: New York 5 and 7-8 and A Borain ‘Transitional justice’ in C Villia-Vicencio and E Doxtader *Pieces of the puzzle: keywords on reconciliation and transitional justice* (2004) Institute for Justice and Reconciliation: Cape Town 67.

¹⁸⁸ See below, P Valdez ‘The right to truth’ in W James and L van der Vijver (ed) *After the TRC: reflections on truth and reconciliation in South Africa* (2000) David Phillip Publishers: Cape Town 52, Stromseth (n187) 8, and also D McGoldrick ‘The legal and political significance of a permanent International Criminal Court’ in D McGoldrick, P Rowe and E Donnelly (eds) *The permanent International Criminal Court: legal and policy issues* (2004) Hart publishing: Oregon 466.

¹⁸⁹ See K Cronin-Furman ‘Managing expectations: international criminal trials and the prospects for deterrence of mass atrocities’ *International Journal of Transitional Justice* (2013) 1, also, Cronin-Furman draws parallels between punishment and deterrence and says that the international community is more concerned with the latter. See also Ratner and Abrams (n187) 155, Stromseth (n187) 9 and Report of the Secretary-General *The rule of law and transitional justice in conflict and post-conflict societies* S/2004/616 23 August 2004 3-4.

¹⁹⁰ See also Ratner and Abrams (n145) 155 and Bassiouni (n179 (2003)) 706. For a narrow definition of accountability- truth, justice and redress- see Bassiouni (n99) 18-19. See also Stromseth (n9). See also Ratner and Abrams (n187) 155 who goes further to say, accountability also envisages the rehabilitation of offenders, and a condemnation of heinous crimes, and Bassiouni (n99) 26. R Carver ‘Zimbabwe: Drawing a line in the past’ 37 *Journal of African Law* (1993) 79-80: accountability is telling the truth; removing human rights violators from positions of authority and bring them to justice; and redress. The South African Concise Oxford Dictionary defines accountability as: “required or expected to justify actions or decisions.” See also B Broomhall *International justice & the International Criminal Court: between sovereignty and the rule of law* (2003) Oxford University Press: Oxford 55.

forms of violence and threats to the right to life, as discussed above, subsequently warranting redress.

Put differently, the goals of accountability are:

- Justice:¹⁹¹ according to John Rawls, justice is inviolable, the first virtue of all social institutions and informs the basis of human rights.¹⁹² Thus, making justice the cornerstone of all pro-accountability institutions and a necessity were human rights are found to have been violated is key in eradicating impunity and protecting the right to life.

Justice is often understood in two forms, retributive justice and restorative justice.¹⁹³ Restorative justice is a “process whereby both the victim and perpetrator of a crime are brought back in harmony with the community”.¹⁹⁴ Retributive justice is understood to mean, showing disapproval by punishing those who have violated moral and social order- to some extent, the punishment is harsh: the perpetrator killed and thus should be killed too.¹⁹⁵ In this instance, punishment is used as repayment to the society. Unlike retributive justice, restorative justice has undertones of reconciliation, see below, but equally identifies with Rawls by distinguishing between the violator of human rights and the one whose human rights have been violated.

Therefore, justice, as a principle of accountability, requires that where a violation is discovered, the victim be identified and separated from the perpetrator. And the latter dealt with- “be brought to justice”.¹⁹⁶

¹⁹¹ See Bassiouni (n179 (2003)) 684-685 for a brief history on justice and the difference between social justice within the international and national justice system context and Stromseth (n187) 7-8. *C.f.* Borain (n187) 67-72 who lists components of restorative justice as: *accountability* (adherence to the rule of law, beyond punishment for a just society), *truth recovery* (to take into account the or give context violations occurred), *reconciliation* (the process of seeking peace, preceded by accountability, truth and institutional reform), institutional reform (to give space for truth and reconciliation) and reparations; and Roche (n179).

¹⁹² J Rawls *A theory of justice* (1999) Oxford University Press: Oxford 3. *C.f.* Freeman (n134) 73-74.

¹⁹³ McGoldrick (n188) 459 and Stromseth (n187) 7 who describes justice as the “central goal in the quest for individual accountability” and as a step to “right the wrong”. See also ‘reparative justice’- apology and restitution, J Quinn ‘Transitional justice’ in M Goodhart (ed) *Human rights: politics & practice* (2009) Oxford University Press: New York 362-363 and Schiff (n5) 32-35

¹⁹⁴ Quinn (n152) 359 and 416. In contrast to retributive justice, victims are central to the process. Schiff (n5) 32 adds that restorative justice is the alternative to retributive justice.

¹⁹⁵ D Ntsebeza ‘Can truth commissions in Africa deliver justice’ in A Bösl and J Diescho (eds) *Human rights in Africa: legal perspectives on their protection and promotion* (2009) Macmillan Education Namibia: Windhoek 379 and Quinn (n152) 356-357. Quinn’s assessment of retributive justice is more in-depth and expansive, identifying all the principles of accountability (*truth, deterrence and punishment and reconciliation*, and strengthening the justice system) within the meaning of justice.

¹⁹⁶ Human Rights Committee, Concluding Observations on the Rights to the Human Rights Committee: Mexico UN Doc CCPR/C/79/Add.109 [9] (1999); *Bleir v Uruguay* UN Doc A/37/40 [15] (1982); *Tshitenge Muteba v Zaire* UN Doc A/39/40 [13] (1984); *Thomas v Jamaica* UN Doc CCPR/C/49/D/321/1988 [11] (1993); and Human Rights Committee, General Comment No. 6: The Right to Life (Art. 6) [3] UN Doc HRI/Gen/1/Rev.1 at 6 (2 July 1982): “The protection against arbitrary deprivation of life which is explicitly required by the third sentence of article 6 (1) is of paramount importance. The Committee considers that States parties should *take measures* not only to prevent and *punish deprivation of life by criminal acts*, but also to prevent arbitrary killing

- Truth: the right to truth, internationally recognised and extending to both judicial and non-judicial bodies,¹⁹⁷ results from human rights violations and also serves as an effective remedy for such violations- essential in building a future.¹⁹⁸ And an indispensable component of accountability.¹⁹⁹

Mahmood Mamdani submits that there is a broader truth, one that captures the violence during apartheid and the relation between beneficiaries and victims, and that the TRC's truth "was established through narrow lenses, crafted to reflect the experience of a tiny minority: on the one hand, perpetrators, being state-agents; and on the other, victims, being political activists".²⁰⁰ For purposes of sufficiently addressing the principle of *truth*, only the notion of a broader truth ought to be extracted from the above. This notion, ties in with the *justice* principle, in the sense that it is all encompassing (covers all violations committed within a political context and otherwise) and separates the victim from the perpetrator.

- Deterrence and punishment.²⁰¹

Deterrence, the threat of being punished causing a potential perpetrator to desist from committing the violation, not of the punishment itself.²⁰² It is through prosecution and

by their own security forces." (Emphasis added.) Read together with *Saker v Algeria* UN Doc CCPR/C/86/D/992/2001 [11] (2006).

¹⁹⁷ Its legal authority is still subject to discussion, with submissions that it (the right to truth) stems from the right to a remedy; the right to receive and impart information; and the right to due process. Submission to the effect that the right to truth is autonomous and equally credible like the above mentioned rights, or any other right for that matter, have been made. See E González and H Varney (eds) *Truth seeking: elements of creating an effective truth commission* (2013) International Center for Transitional Justice: New York 4. See also UN Human Rights Commission, Human Rights Resolution 9/11 (2008) "Right to truth" A/HRC/RES/9/11 24 September 2008. See also *The Citizen 1978 (Pty) Ltd and Others v McBride* 2011 4 SA 191 (CC), particularly [34] and [46].

¹⁹⁸ González and Varney (n197) 3 and Stromseth (n187) 8.

¹⁹⁹ Méndez (n102) 268.

²⁰⁰ M Mamdani 'A diminished truth' in W James and L van der Vijver (ed) *After the TRC: reflections on truth and reconciliation in South Africa* (2000) David Phillip Publishers: Cape Town 59. Mamdani's peculiar definition of the truth, post an event, is informed by the refusal by the commission to categorise some people as victims because they did not fit into the set scope (see below).

²⁰¹ Cronin-Furman (n189) 6. See also Bassiouni (n179 (2003)) 680-682, who draws parallels "between the policies and goals of punishment in national criminal justice systems and those in the international criminal justice system". According to Bassiouni, national legal systems have institutions and personal dedicated to enforcing criminal justice on a regular basis, thus having a direct contribution to the deterrence and punishment aspect. However, international legal systems do not have such pre-existing institutions, neither does it have structures to this effect, subsequently casting doubt upon its deterrence effect. However, Bassiouni submits the question of effective or present or proved deterrence is of less significance given the following criteria (not exhaustive): "(1) the absence of prosecutions for major crimes, such as genocide, crimes against humanity and war crimes, and (2) the absence of other forms of accountability." It is submitted that this criteria should be surmised into one, namely, that inadequacies of other forms of inclusive accountability is responsible for the absence of prosecution for the major crimes listed above. This submission is justified below and in the subsequent chapter. Further by Bassiouni (n179 (2003)) 682: when he states that notoriety and enforcement of international norm, through an international criminal tribunal can address the question of effective deterrence. *C.f.* Méndez (n102) 275 and 276.

holding individuals criminally responsible that punishment becomes real and the aim to deter is realised.²⁰³ The absence of fear of prosecution (impunity) and the need to ensure that there are consequences, are linked, and lead to frustration and anxiety.²⁰⁴

The deterrent effects for new international crimes have been doubted considerably.²⁰⁵ This is comprehensible because effective deterrence does not occur overnight; it is a long and protracted effort and, to a certain extent, depends on, *inter alia*, the strengthening of the rule of law; reinforcement of new behavioural norms and patterns of accountability; and addressing social grievances linked to conflicts.²⁰⁶ It is submitted that the primary focus of punishment should be prevention.²⁰⁷ Who should be a primary subject of this punishment, for deterrence purposes, is also a contested question, see individual accountability below.²⁰⁸

- Reconciliation:²⁰⁹ although the previously discussed goals of accountability are removed from anything less serve and deterring, the effects of reconciliation, in the overall picture of accountability, cannot be underscored- serves to rehabilitate society and the perpetrator.²¹⁰

Tsosie, in a paper titled *Acknowledging the past to heal the future: the role of reparations for native nations*, talks of requirements for “effective reconciliation”.²¹¹ Tsosie says, for “effective reconciliation”: the first step is an acknowledgement of wrongdoing, such as an apology and a commitment to make things right. Then the second step involves material changes in the economy, the social sphere and political structures. This is important because it speaks to tangible changes that indicate reconciliation.²¹² It has been submitted, rightfully so, that accountability forms the basis of and informs peace and reconciliation.²¹³

Accountability also addresses the rule of law,²¹⁴ democracy/ constitutionalism and promotes human rights²¹⁵ and good governance.²¹⁶ Without accountability, the rule of law is

²⁰² See L Sadat *The International Criminal Court and the transformation of international law: justice for the new millennium* (2002) Transnational Publishers: New York 51, Akhavan (n14) 12 and R Hood and C Hoyle *The death penalty: a worldwide perspective* (2008) Oxford University Press: New York 321, although this discussion is informed by the deterrence effect of the death penalty on capital offences, and Stromseth (n187) 9.

²⁰³ Stromseth (n187) 9.

²⁰⁴ Bassiouni (n99) 18: prosecution in the pursuance of peace is deterring in nature, and Hirsh (n34) 601.

²⁰⁵ Stromseth (n187) 9 and Méndez (n102) 275 and 276: given that the future behaviour of actors cannot be predicted, deterrence by punishment cannot be guaranteed and thus is unrealistic.

²⁰⁶ Stromseth (n187) 9.

²⁰⁷ Akhavan (n14) 11.

²⁰⁸ Akhavan (n14) 10.

²⁰⁹ Stromseth (n187) 10.

²¹⁰ Stromseth (n187) 10.

²¹¹ R Tsosie *Acknowledging the past to heal the future: the role of reparations for native nations* <http://apps.law.asu.edu/Repository/2008/06/23043614.pdf> (accessed 23 November 2013).

²¹² Tsosie (n211).

²¹³ Bassiouni (n99) 19. See also Orentlicher (n48) 25746-2547, 2549 and 2550 and McGoldrick (n188) 46.

²¹⁴ Stromseth (n187) 11, Broomhall (n190) 54, B Roling 'Criminal Responsibility for Violations of the Laws of War' 12 *Revue Beige de Droit International* (1976) 22 (also cited in A Cassese 'On current trends towards criminal prosecution and punishment of breaches of international humanitarian law' *European Journal of International Law* (1996) 9):

compromised, especially in transitional governments.²¹⁷ These governments are often forced to choose between confronting the past (without fear or favour) or looking into the future (forgetting about previous transgressions).²¹⁸

Although there is still a need for more literature on the relationship between the rule of law and international law,²¹⁹ the former is understood to mean the legitimacy of state practice and

The exemplary punishments served the purpose of restoring the legal order, that is of reassuring the whole community that what they had witnessed for so many years was criminal behaviour. And this is the foremost, *essential function of criminal prosecution: to restore confidence in the rule of law*. The legal order is the positive inner relation of the people to the recognized values of the community, which relation is disturbed by the commission of crimes. If crimes are not punished, the confidence in the validity of the values of the community is undermined and shaken. (Emphasis added.)

See also M Rosenfeld 'The rule of law and the legitimacy of constitutional democracy' 74 *Southern California Law Review* (2000) 1307.

²¹⁵ Akhavan submits that through vindicating human rights norms, future atrocities may be prevented "through the power of moral example to transform behaviour", see Akhavan (n14) 10 and Bassiouni (n15) 205. This narrative, is not only correct but, is interesting in the sense that it confirms and compliments Pinker's narrative: when humans strive towards a pro-human rights narrative, this discourages those who want to perpetuate human rights violations. For accountability, good governance and democracy, see Farley (n178) 395 and Méndez (n102) 257 for accountability and peace-making and peace building. Méndez further explores the use of accountability as a vehicle for transition into democracy and away from pre-conflict situations. See also Mulgan (n179) 556, accountability as a 'dialogue'.

²¹⁶ See H Sano 'Good governance, accountability and human rights' in H Sano and G Alfredsson (eds) *Human rights and good governance: building bridges* (2002) Martinus Nijhoff Publishers: The Hague 123 and 124. Sano's approach, although relevant for this paper and warranting mention, runs from a different end: "Does human rights improvement coincide with a reinforcement of good governance, i.e., is human rights part of good governance accountability?" See also H Olasolo *Essays on international criminal justice* (2012) Hart Publishing: Oxford 16 who submits that the intervention of the ICC in situations where violations are on-going stands to improve the rule of law and good governance, and Nollkaemper (n56) 5, who when discussing the applicability of the (international) rule of law mentions that accountability in terms of law is central to the rule of law. This is so because accountability ensures the limitation of power. See also B Mangu 'Separation of powers, independence of the judiciary, and good governance in African Union member states' <http://www.cpahq.org/cpahq/cpadocs/Good%20Governance%20in%20African%20Union%20Member%20State.s.pdf> (accessed 21 March 2014) 1, 7-8 and 13. According to Mangu, "good governance implies or requires transparency, equality, justice, promotion of and respect for human rights ..."

²¹⁷ E Lutz and C Reiger 'Conclusion' in E Lutz and C Reiger *Prosecuting heads of state* (2009) Cambridge University Press: New York 275.

²¹⁸ N Roht-Arriaza 'Conclusion: combating impunity' in N Roht-Arriaza (ed) *Impunity and human rights in international law and practice* (2005) Oxford University Press: New York 281.

²¹⁹ Broomhall (n190) 54 and Cassese (n7) 9: who, correctly, ties in the pursuit of those who violate human rights, by international tribunals, with the 'rule of international law'. He holds that this strengthens the 'rule of international law'. Please note that the author seems to suggest that the rule of law could be expressed in 'the rule of law', 'the rule of international law' and 'the rule of international humanitarian law'. In a confusing manner, Chimni explains the 'rule of law' to mean that all persons should comply with constitutional procedures, and 'international rule of law' to meaning "actors in the international system should abide by existing rules of international law". The difference between 'international rule of law' and 'rule of law, according to Chimni, is the plain in which they function. The former is on an international plain, and the latter is at a domestic plain. However, they suffer from the same difficulties, domestic or international; see B Chimni 'Legitimizing the international rule of law' in J Crawford and M Koskeniemi (eds) *The Cambridge companion to international law* (2012) Cambridge University Press: Cambridge 290 and 292-3. In essence, there is no substantial distinction between these terms, save where they are applied. See A Boyle and C Chinkin *The making of international law* (2007) Oxford University Law Press: New York 15, discussing the challenges and constraints between an international rule of law and powerful nations. See also R Bhattacharyya 'Establishing a rule-of-law international criminal justice system' 31 *Texas International Law Journal* (1996) 57 and H Aust *Complicity and the law of state responsibility* (2011) Cambridge: Cambridge University Press 53.

institutions, such as law making, adjudication enforcement and constitutional order.²²⁰ Similarly, the consolidation and relation between the rule of law and democracy, strengthens justice – countries that are democratic and observe the rule of law are more likely to insist on and ensure justice.²²¹

Recent developments in an effort to protect human rights have been largely centred around accountability and accountability (protection) mechanisms.²²² It can be said that accountability mechanisms should be designed in a manner that enables them to deal with *post-facto* events- punish- and also assume a preventative character- deter.²²³ Accountability mechanisms must be credible, fair and exhaustive of the truth, as much as possible.²²⁴

Accountability is the converse of impunity.²²⁵ Impunity, propelled by amnesties (*de jure*) or the failure to enforce legal norms or the imposition of laws (*de facto*),²²⁶ is the key propellant of violence and instability in Africa, in a cyclical nature.²²⁷ Both amnesties and inability to enforce legal norms question the effective nature of current accountability mechanisms and,²²⁸ to some extent, the justice systems in Africa.²²⁹ Put differently, with on-going human rights violations, in particular the right to life, and seemingly an increase in violence on the continent, measure aimed at addressing accountability on this continent seem to be

²²⁰ Broomhall (n190) 52-53.

²²¹ Lutz and Reiger (n217) 289: "... states that have joined the ICC are more likely to indict and prosecute their leaders for human rights ... crimes in their domestic courts."

²²² J Méndez 'International human rights law, international humanitarian law, and international criminal law and procedure: new relationships' in D Shelton (ed) *International crimes, peace, and human rights: the role of the International Criminal Court* (2000) Transitional Publishers: New York 65. See also Bassiouni (n15) 205.

²²³ Article 25(3)(c), (d), (f):

In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime;

(f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions.

See also Olasolo (n216) 8 and 15: the ICC stand to intervene in both cases, *ante-* and *post-facto*. Further, the ICC can also intervene when the situation is on-going, to stop the violations.

²²⁴ Bassiouni (n99) 23.

²²⁵ Bassiouni (n99) 26, McGoldrick (n188) 459, Beigbeder (n6) 1 and Bassiouni (n179 (2003)) 705.

²²⁶ Bassiouni (n99) 26-27, see also Méndez (n222) 66.

²²⁷ See also Akhavan (n14) 30.

²²⁸ Which, according to Roht-Arriaza, "must be put into effect relatively quickly, before the new government loses the widespread legitimacy it enjoys, before the political unity engendered by opposition to the old regime evaporates and apathy sets in, before the old guard can recognize, and before the new government is overwhelmed by intractable economic and social problems", see Roht-Arriaza (n218) 282.

²²⁹ Bassiouni (n99) 4-5.

unsuccessful. The absence of effective accountability mechanisms in Africa is immoral, an insult to victims and survivors, and a violation of international law norms.²³⁰

Accountability has always been envisaged, to some extent, by law.²³¹ It has been argued, correctly so, by Ratner and Abrams, that individual criminal liability is founded on *international human rights law* - international laws, both international treaties and conventions, aimed at protecting human rights by prohibiting conduct that goes against these laws; *international humanitarian law* - laws governing armed conflicts and protecting those involved in these conflict; *international criminal law* – laws assigning criminal responsibility for certain serious violations of international law; and *domestic law*.²³² This is a move away from the convention of state liability,²³³ whereby an act is imputed to the state and not the individual who performed the act, which has existing since the inception of international law. This move was motivated by the fact that all crimes are committed by natural persons, individuals, and that, the deterrent effects of international criminal law can only materialise if the individual is the objective.²³⁴ Further, given that one of the aims of international criminal law is to punish, it is therefore common-cause that personal culpability should follow.²³⁵

²³⁰ Kritz (n14) 129.

²³¹ S Ratner, J Abrams and J Bischoff *Accountability for human rights atrocities in international law: beyond Nuremburg legacy* (2009) Oxford University Press: New York 2. *C.f.* It is argued that international law had little to do with the development of accountability as a principle, because it (international law) had concerned itself mainly with relations between states. Accountability ought to be understood as a separate discourse, see Ratner, Abrams and Bischoff (n231) 4 and 6.

²³² Ratner and Abrams (n187) 9-14 and A Cassese *International criminal law* (2008) Oxford University Press: Oxford 6. See also Seibert-Fohr (n7) 2 read together with 3: “the idea of criminal punishment for grave violations of international law originally developed in the area of international humanitarian law.” See also I Bantejas and S Nash *International criminal law* (2007) Routledge: London. *C.f.* M Bassiouni ‘The discipline of international criminal law’ in M Bassiouni (ed) *International criminal law: sources, subjects and contents* (2008) Martinus Nijhoff Publishers: Dordrecht 128, who submits that international criminal law should be resorted to only in certain cases, as it is the most “coercive forms of authority any society has”.

²³³ *C.f.* H Kelsen ‘Collective and individual responsibility in international law with particular regard to the punishment of war crimes’ 5 *California Law Review* (1943) 533.

²³⁴ Y Simbeye *Immunity and international criminal law* (2004) Ashgate: Aldershot 67 and Hassan (n127) 47.

²³⁵ I Bantekas and S Nash *International criminal law* (2007) Routledge-Cavendish: London 15-16, Simbeye (n234) 67, Kelsen (n233) 532 and 542 and Hassan (n127) 50 who submits that punishment was a leading factor in developing international criminal law post-World War Two.

3.1.1. State Sovereignty as an obstacle²³⁶

The importance of state sovereignty, which forbids the interference of states in the affairs of another state, coupled with the determination of states to determine their own path will forever serve as a measure to what extent a state is willing to bring human right violators to justice.²³⁷ State sovereignty concerns, *inter alia*, political order in the international arena (statehood),²³⁸ supremacy of the law, and considerations of the social, political and legal processes of nation building.²³⁹ The convergence of the accountability (read rule of law) and sovereignty, for the effective implementation of international criminal justice, the interest of the right to life and human rights, will see a decline in sovereignty- for a compromise of this nature is required if the right to life is to be fully realised.²⁴⁰ However, it is submitted by Simbeye that, in some instances, the implementation of international criminal justice is devoid of state sovereignty because in some cases, there is no direct link between state sovereignty and the international criminal violation committed.²⁴¹

3.2. Violence, impunity and human rights

Given the extent to which impunity is entrenched in Africa, coupled with lawlessness and the disregard for human rights, there is a need for an introspection of current accountability

²³⁶ L Dembowski 'The International Criminal Court: complimentarily and its consequences' in J Stromseth (ed) *Accountability for atrocities: national and international responses* New York: Transitional Publishers 139 speaks of "[piercing] the veil of states' rights in order to reach those who bring about the worst kinds of human suffering and carnage" and Cassese, as quoted in *The rule of law and international accountability* 57:

"Judicial reckoning, while necessary in order to uphold and enforce the international rule of law, should run parallel to steps taken on the political level. The prosecution and punishment of war criminals by an international criminal tribunal (whether ad hoc or permanent) cannot be a substitute for robust action by the United Nations where required to restore international peace and security. As long as the ideological, political and military leaders behind the serious violations of international humanitarian law still remain firmly in power, flaunting with impunity their rendezvous with justice, this can only result in discrediting the work of international criminal tribunals.

[Put differently, so] long as states retain some essential aspects of sovereignty and fail to set up an effective mechanism to enforce arrest warrants and to execute judgements, international criminal tribunals may have little than normative impact. Thus, we are once again reminded of the limits posed by international politics on international law."

See also Cassese (n214) 11 and Simbeye (n234) 88.

²³⁷ Broomhall (n190) 59 and A Greenawalt 'The pluralism of international criminal law' 86 *Indiana Law Journal* (2011) 1095.

²³⁸ R Falk *Human rights horizons: the pursuit of justice in a globalizing world* (2000) Routledge: New York 67-85, Simbeye (n234) 3 and Broomhall (n190) 59.

²³⁹ S Tierney 'Sovereignty and the Idea of Public Law' in E Christodoulidis and S Tierney *Public law and politics: the scope and limits and constitutionalism* (2008) Ashgate: Aldershot 19. For further reading on state sovereignty, see S Tierney 15-25, in reply to M Loughlin *The idea of public law* (2003). *C. f.* State sovereignty has been deemed the toughest obstacle to the implementation of human rights, protecting state violators and weakening already existing efforts: see Freeman (n134) 59, 127-128, 157 and 207-208 and Cassese (n7) 11. Better illustrating state sovereignty as a threat to human rights (and extradition) are questions posed by Falk (n238) 67:

If the doctrine of sovereignty could be erased from the minds of political leaders, would it reduce those forms of human suffering associated with extreme governmental failure? Would such an erasure strengthen sentiments of human solidarity upon which an ethos of collective responsibility ...?

For the evolution of state sovereignty, see Falk (n238) 72-76.

²⁴⁰ Broomhall (n190) 58 and Cassese (n7) 11.

²⁴¹ Simbeye (n234) 88.

mechanisms on the continent: what are their shortcomings. And as stated above, violence and impunity all threaten the right to life and subsequently led to the violation of other human rights.

3.3. Current mechanisms of accountability²⁴²

3.3.1. Introduction

The eradication of impunity and mass atrocities requires the establishment and strengthening of criminal prosecutions, however, this is also reliant on precise international law norms aimed at protecting human rights. Since the early 1980s, there have been moves to pursue human rights violations through criminal norms and direct human rights violations to various criminal courts. These moves have not proved to be as effective as it has been envisaged due to many domestic and political constraints, thus the need to shift the fight against impunity to an international plain.²⁴³

As indicated above, accountability mechanisms are designed to realise, *inter alia*, truth, justice, and reconciliation and their importance, in the greater accountability scheme, cannot be over emphasised.²⁴⁴ It is submitted that current accountability mechanisms, except for the ICC,²⁴⁵ fall short of fully encompassing accountability as a principle, and in sense, protect human rights. Further, that they have failed to address violence effectively.²⁴⁶

As stated above, failure to address impunity thoroughly can be seen to be condoning or tolerating it. This coupled with the failure to protect and promote human rights can only mean that justice, truth, deterrence and punishment and reconciliation are not a priority in Africa, as far as accountability mechanisms employed currently.

²⁴² O Thomas, J Ron and R Paris "The effects of transitional justice mechanisms." (2008) *Center for International Policy Studies, CIPS Working Paper*, retrieved from http://www.humansecuritygateway.com/documents/CIPS_Transitional_Justice_April2008.pdf (accessed 30 October 2013). See also Roht-Arriaza (n218) 282. See also Bassiouni (n179 (2003)) 675 (read together with footnote 11).

²⁴³ Méndez (n222) 66 and Bassiouni (n15) 205.

²⁴⁴ Bassiouni (n179 (2003)) 674 and 704-705.

²⁴⁵ See Gahima (n13) 111, Pellet (n6) 439, Stromseth (n187) 3, and Sadat (n202) 50: says "a cornerstone of the effort to combat impunity has been the additional framework of the criminal law: the condemnation of certain behaviour as *criminal*, not simply a breach of treaty or customary international law obligations, and the imposition of individual criminal responsibility."

²⁴⁶ Bassiouni (n99) 11, Gahima (n13) 110 ("existing mechanisms would appear to have relative or no impact at all on ensuring respect for human rights"), M Morris 'Facilitating accountability: the potential value of international guidelines against impunity' 4 *ILSA Journal of International & Comparative Law* (1998) 401 and Méndez (n222) 65: "Protection mechanisms are present in some of the most important international human rights treaties, and in certain regions of the world these mechanisms have become sophisticated and enjoy acceptable levels of effectiveness. But the reality of egregious human rights violations, especially those that are massive and systematic, and the pervasive impunity enjoyed by perpetrators, have led to impatience with the limitations of existing mechanisms." See also Cassese (n7) 1 and Bassiouni (n99), together with footnote 7-9.

Accountability may take the form of an international prosecution; investigatory commission;²⁴⁷ truth commission; domestic prosecution; civil remedies²⁴⁸ and reparation for victims.²⁴⁹ It is worth mentioning that all these mechanisms are also aimed at eradicating impunity and protecting human rights.

When dealing with alternative means of accountability, other than criminal accountability, a balance has to be struck between:²⁵⁰

- 1) exposing the truth about atrocities;
- 2) national stability; and
- 3) punishing those responsible for these atrocities.

3.3.2. International Prosecution²⁵¹

Prosecution at an international plain is ‘compulsory’ for the violation of *jus cogens*.²⁵² Prosecution at this plain is important for it targets those at senior positions,²⁵³ those who direct or indirectly participated in the violence, and who may have otherwise evaded accountability due to flaws inherent in the national courts.²⁵⁴ Such prosecutions were first witnessed in Nuremberg (Nuremberg trials (1945), established by the allies after the Second World War), then Tokyo (Tokyo trials (1946), established the allies in post-war Japan), Yugoslavia (the ICTY (1993), established by the UN Security Council) and Rwanda (the ICTR (1994), established by the UN Security Council (1994), Sierra Leone (the Special Court of Sierra Leone (2002) established by the UN) and the ICC (2002), established by parties to the Rome Statute).²⁵⁵

²⁴⁷ See also Roht-Arriaza (n218) 282-286.

²⁴⁸ See also Roht-Arriaza (n218) 288-290

²⁴⁹ Bassiouni (n99) 27. See also Roht-Arriaza (n218) 290-291.

²⁵⁰ L Berat and Y Shain ‘Retributive or truth-telling in South Africa? Legacies of the transitional phase’ 20 *Law & Social Inquiry* (1995) 166. See also Ratner and Abrams (n187) 156-159, Méndez (n102) 256, and Gahima (n13) 107. Ratner and Abrams consider them as follows:

- 1) the advantages and disadvantages of criminal and non-criminal responsibility;
- 2) if trials are the way to go, will they be held by domestic courts or international courts;
- 3) should international actors be allowed to influence the process; and
- 4) the nature of sanctions involved.

²⁵¹ Bassiouni (n99) 27-30 and 32. See also L Condorelli and T Boutruche ‘Internationalized criminal courts and tribunals: are they necessary?’ in C Romana, A Nollkaemper and J Kleffner (eds) *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (2004) Oxford University Press: Oxford 427 and W Schabas *The UN international criminal tribunals: the former Yugoslavia, Rwanda and Sierra Leone* (2006) Cambridge University Press. C.f. B Brown ‘Primacy or complementarity: reconciling the jurisdiction of national courts and international criminal tribunals’ 23 *Yale International Law Journal* (1998) 386: who submits that internationally constituted *ad hoc* tribunals will always suffer shortcoming attached to the limited and narrow mandates, giving an impression that they are unfair.

²⁵² Bassiouni (n179 (2003)) 706.

²⁵³ Bassiouni (n179 (2003)) 706.

²⁵⁴ See also Quinn (n152) 357. See also Bassiouni (n179 (2003)) 675 (together with footnote 9).

²⁵⁵ See also D McGoldrick ‘Criminal trials before international tribunals: legality and legitimacy’ in D McGoldrick, P Rowe and E Donnelly (eds) *The permanent International Criminal Court: legal and policy issues* (2004) Hart publishing: Oregon 9 and Quinn (n152) 358

3.3.2.1. International Criminal Tribunal for Rwanda²⁵⁶

The ICTR is tasked with prosecuting those responsible for the genocide that occurred in Rwanda in 1994. The ICTR was not structured, in its establishment,²⁵⁷ to deter future human rights violations,²⁵⁸ a major flaw for any accountability mechanism.

The ICTR has been hailed as a viable form of international prosecution, having contributed to peace building in post-war society and fostering a culture of accountability (after and together with the ICTY) and preventing future atrocities.²⁵⁹

3.3.2.2. Sierra Leone²⁶⁰

The Special Court of Sierra Leone was established by the UN, and later ratified by the Security Council, to try those responsible for crimes against humanity and war crimes that occurred during the Sierra Leone's civil conflict. Amongst those tried, the most prominent was Liberia's former president, Charles Taylor. Taylor was charged with backing rebel forces in Sierra Leone, amongst other crimes. Out of fear of new violent tension in the region, Taylor's trial was moved to The Hague. Similar to the ICTR, the Special Court of Sierra Leone was not intended to deter future crimes. Due to this shortcoming, gross human rights violations continued to occur in the West African region.²⁶¹

3.3.3. Domestic criminal prosecutions²⁶²

Domestic criminal prosecutions (national trials) remain central to accountability and at times are usually the first point of reference because both witnesses are and the evidence is in the

²⁵⁶ See Akhavan (n14) 22-27, O Fiss 'Within reach of the state: prosecuting atrocities in Africa' 31 *Human Rights Quarterly* (2009) 62-63 and Letter from the Permanent Representative of Rwanda Addressed to the President of the Security Council (28 September 1994) UN Doc S/1994/115: in which the Rwandan government proposes the establishment of a tribunal to prosecute those responsible for the genocide.

²⁵⁷ Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994: "Believing that the establishment of an international tribunal and the prosecution of persons responsible for the above-mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed." See also C Igwe 'The ICC's favourite customer: Africa and international criminal law' 41 *The Comparative and International Law Journal of Southern Africa* (2008) 297-302: for the historical context of the ICTR and B Ferencz 'International criminal courts: the legacy of Nuremberg' 10 *Pace International Law Review* (1998) 223-225.

²⁵⁸ Cronin-Furman (n189) 3.

²⁵⁹ Akhavan (n14) 8 and 9. See also P Akhavan 'Justice and Reconciliation in the Great Lakes Region of Africa: the contribution of the International Criminal Tribunal of Rwanda' 7 *Duke Journal of Comparative and International Law* (1997) 325.

²⁶⁰ Fiss (n265) 63-64 and Igwe (n257) 302-304: for the historical context of the Special Court of Sierra Leone. See also, briefly, Stromseth (n165) 13: discussing the truth and reconciliation commission.

²⁶¹ Fiss (n265) 63 and Igwe (n257) 307.

²⁶² Kritz (n14) 132-134, Méndez (n222) 72 and Bassiouni (n99) 32-34. See also Roht-Arriaza (n218) 286-288 and Cassese (n7) 5.

country where the violation occurred,²⁶³ and states are obligated, under international law, to investigate and prosecute human rights violations.²⁶⁴ Domestic criminal prosecutions are also supported by the principle of complementarity,²⁶⁵ as envisaged by Article 1 of the Rome Statute of the International Criminal Court, see paragraph 4.5. below.²⁶⁶

Pursuing domestic prosecutions provide legitimacy and credibility for the new government,²⁶⁷ and translate into an umbrella effect of the rule of law (of the transitioning country).²⁶⁸ the transition from an authoritarian or undemocratic dispensation to a pro-human rights dispensation involves efforts and means to establish and protect the rule of law. However, the manner in which this transition occurs is a contentious issue because if it is treated without due sensitivity, the rule of law will be compromised, again. Equally, being overly sensitive about the need for transition might appear as if impunity is tolerated or condoned, and also undermine attempts to resuscitate the rule of law.

Domestic court have the inherent advantage of being sensitive to cultural structures²⁶⁹ and has the authority to investigate, through its police force, prosecute through its justice system

²⁶³ Bassiouni (n99) 32, Stromseth (n187) 4, Cassese (n7) 4, Seibert-Fohr (n7) 4, Q Wright ‘The scope of international criminal law: a conceptual framework’ 15 *Virginia Journal of International Law* (1975) 561 and Morris (n179) 30. See also Nollkaemper (n38) 5; M du Plessis, A Louw and O Maunganidze ‘African efforts to close the impunity gap: lessons for complementarity from national and regional actions’ 241 *Institute for Security Studies Paper* (2012) 2: domestic justice is meaningful and essential; and H Duffy ‘Towards eradicating impunity: the establishment of an international criminal court’ 26 *Social Justice* (1999) 121.

²⁶⁴ Beigheder (n6) 1 and 13, Greenawalt (n237) 1078 who notes the interpretative role domestic courts play in identifying rules of customary international law and matching them with national legal obligations, Stromseth (n187) 15, Fiss (n265) 67 and Seiber-Fohr (n3) 12. With regards to the ICCPR, the Human Rights Committee has held that State parties have an obligation to bring perpetrators to justice, see *Barbato v Uruguay* UN Doc A/38/40 (1983) 124 [11]; *Baboeram et al v Suriname* UN Doc CCPR/C/24/D/146/1983 (1985) 172 [16]; *Miango Muiyo v Zaire* UN Doc A/43/40 (1988) 218 [11]; Human Rights Committee *General Comment No. 13: the nature of the general legal obligation imposed on states parties to the Covenant (Art. 2)* UN Doc CCPR/C/21/Rev. 1/Add. 13(26 May 2004 [18], read together with *Bleier v Uruguay* UN Doc A/37/40 (1982) 130 [15] and *Tshitenge Muteba v Zaire* UN Doc A/39/40 (1984) 182 [13].

²⁶⁵ See M El Zeidy ‘The principle of complementarity: a new machinery to implement international criminal law’ 23 *Michigan Journal of International Law* (2001-2002) 869, Méndez (n222) 72 and Stromseth (n187) 4. C.f. Kritz (n14) 141.

²⁶⁶ Article 1 of the Rome Statute of the International Criminal Court:

An International Criminal Court (“the Court”) is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be *complementary* to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute. (Emphasis added.)

²⁶⁷ Kritz (n14) 132-134.

²⁶⁸ N Roht-Arriaza ‘Introduction’ in N Roht-Arriaza (ed) *Impunity and human rights in international law and practice* (1995) Oxford University Press: New York 4. As well articulated by Gahima (n13) 107-108: “The Rwandan government debated how accountability could be best secured and addressed concerns of timeframe, scope, and the appropriate role of domestic versus international prosecutions. The government had to balance the need for justice with the need for national stability. In the end, the example of Rwanda shows that accountability cannot promote the rule of law or ensure durable peace unless the core causes of conflict are addressed and resolved. The Rwandan experience suggests that post-conflict areas need democracy before they can see full national reconstruction.”

²⁶⁹ Kritz (n14) 132-134

and give effect to the outcomes.²⁷⁰ However, domestic law is often incapable of thoroughly prosecuting perpetrators in the event that they hold, or in some cases, held, positions of authority- proving to be an ineffective mechanism against impunity.²⁷¹ Domestic prosecutions have been partisan-like,²⁷² “entirely absent, woefully inadequate, or in certain cases, simply a shroud for impunity”, proving to be incapable of protecting human rights and providing justice.²⁷³ A weak legal system, coupled with a total disregard for the rule of law, often results in impunity.²⁷⁴

One other leading cause of criticism against domestic prosecution, as a measure of accountability, is its failure and shortcoming in fully incorporating international crimes into its domestic legislation,²⁷⁵ coupled with the lack of political will to do so- rendering locals who commit international crimes out of reach.²⁷⁶ This further limits the jurisdiction of domestic courts to try international crimes and undermine means to prevent impunity.²⁷⁷

As pointed out by Nollkaemper, accountability in domestic courts can only be confirmed and ensured when courts are impartial and independent.²⁷⁸ And if this, and all other accountability yardsticks are not met, it is submitted that, international accountability becomes a compulsory point of reference.²⁷⁹

3.3.4. Truth commissions²⁸⁰

For many victims of violence, human rights advocates and others, amnesties represent the basest of ‘pragmatic’ accommodations for former despots, murderers and torturers. For such individuals or organisations, amnesties are a byword for lawlessness, the tolerance of impunity and the triumph of political expediency.²⁸¹ They are a crude

²⁷⁰ Beigbeder (n6) 13.

²⁷¹ Ratner, Abrams and Bischoff (n231) 2, Cassese (n7) 4 and Gahima (n13) 109 and 111-112, where the ICTR has not been able to domestically prosecute any member of the (then) government, and Beigbeder (n6) 2-3.

²⁷² Gahima (n13) 111-112.

²⁷³ Duffy (n263) 121, Fiss (n265) 67, Stromseth (n187) 4, and Morris (n246) 401-402 read with Morris (n179) 28: who explains in detail the importance of financial, human and physical resources, which are overtly lacking at the domestic prosecution level, and which are crucial to achieve “full accountability”.

²⁷⁴ Bellelli (n33) 6.

²⁷⁵ Incorporating international crimes such as war crimes, piracy, crimes against humanity and genocide into domestic legislation gives domestic courts wider jurisdiction and the ability to directly enforce international law norms. It is incumbent on States, as part of an obligation owed to the international community, to protect and enforce basic human rights- *erga omnes* obligations. See Bantekas and Nash (n235) 11, read together with *Belgium v Spain (Barcelona Traction Light and Power House Co Ltd)* (1970) ICJ Reports 3, Second Phase, 32.

²⁷⁶ Beigbeder (n6) 2-3.

²⁷⁷ Wright (n263) 574 and Bantekas and Nash (n235) 12.

²⁷⁸ Nollkaemper (n38) 5 and 53-54, Bassiouni (n179 (2003)) 675, Fiss (n265) 67 and Beigbeder (n6) 13. See also discussion above on the frustration from the failure to provide a remedy.

²⁷⁹ See chapter 3 below.

²⁸⁰ Kritz (n14) 141-144, Sadat (n202) 53, Bassiouni (n99) 20-21 and González and Varney (n197) 9. *C. f. Méndez* (n222) 278

²⁸¹ *C.f.* Igwe (n257) 295 and 296: who is of the view that international criminal law “sometimes inhibit settlement of political conflict”. This position is also emulated by Sadat (n202) (48): “Persecuting perpetrators of human rights atrocities from the former regime, it is argued, may plunge fragile societies back into chaos or

barometer for the blunt exercise of military and political power, as dictatorial regimes or bloodied insurgents do their utmost to ensure that those who ordered or carries out the most unspeakable of atrocities are never held accountable. In return for dubious promises to desist from such activities in the future, victims and societies are asked to forget the past actions of such individuals and organisations and to move on for the sake of the broader common good.²⁸²

Truth commissions (and truth telling as a nation healing process)²⁸³ are established to serve peace and bring about reconciliation,²⁸⁴ and attests to the truth component of accountability.²⁸⁵ Truth commission are, by their nature, *ad hoc*, independent and victim-centred inquiries intended and authorised by a government to mainly investigate violations committed during a conflict or abusive period of time. Truth commissions are usually sanctioned by the new government. Secondary, truth commissions report on their findings with recommendations on how to possibly prevent seminar violations from occurring again in the future.²⁸⁶

Truth commissions are said to have the following characteristics:²⁸⁷

1. they focus on a prior event;
2. they attempt to ascertain holistic facts;
3. extensive time frames; and
4. nationally mandated.

Their disadvantage and advantage, at the same time, is that they eliminate the prosecution element in violations of human rights.²⁸⁸ The right to truth is an obligation owed by the state to its citizen and, as extended by Valdez, by virtue of the international community having established the ICTR and ICRC, the international community. The truth also demonstrates

bring about an endless cycle of recrimination.” This has been argued in the case of President Omar Al Bashir of Sudan, in that he is needed for a long term political solution between Sudan and South Sudan, as opposed to having him in prison for alleged human rights violations. See also T Mbeki and M Mamdani ‘Courts can’t end civil wars’ *The New York Times* 6 February 2014 http://mobile.nytimes.com/2014/02/06/opinion/courts-cant-end-civil-wars.html?_r=2&referrer= (accessed 18 March 2014).

²⁸² L Mallinder *Amnesty, human rights and political transitions: bridging the peace and justice divide* (2008) Hart: Portland 1.

²⁸³ Berat and Shain (n250) 166.

²⁸⁴ Bassiouni (n99) 32 and Berat and Shain (n250) 166.

²⁸⁵ Above and Bassiouni (n179 (2003)) 711: they are designed to discover the ensure truth, see also González and Varney (n197) 4.

²⁸⁶ M Freeman *Truth Commissions and procedural fairness* (2006) New York: Cambridge University Press 18 as quoted in E Wiebelhaus-Brahm ‘Truth commissions’ in W Schabas and Nadia Bernaz (eds) *Routledge handbook of international criminal law* (2013) Routledge: Oxon.

²⁸⁷ Wiebelhaus-Brahm (n286) 372, Bassiouni (n99) 32 and Quinn (n152) 359-360. See also Ratner and Abrams (n187) 228-229 and Kritz (n14) 141: “... (4) in some cases, establishes a s formal basis for subsequent compensation of victims and/or punishment of perpetrators.”

²⁸⁸ Wiebelhaus-Brahm (n286) 372, Bassiouni (n99) 32 and Quinn (n152) 359-360.

equality before the law.²⁸⁹ This right has affiliation to rule of law and democracy, consequently central to the principle of accountability.²⁹⁰

Truth commissions have been hailed for their ability to bring closure to the victims of human rights and their families (*reconciliation*), thus fostering the *truth* and (restorative) *justice* components of accountability - through the resolution of certain cases.²⁹¹ Through truth commissions, the rule of law for the successor government can be established.²⁹²

Ratner *et al* submits that truth commissions cannot be criticized as a weak accountability mechanism because they are grounded on holding those who violate human rights responsible.²⁹³ A commendable feature of truth commissions is their focus on institutions that played a role the violation of human rights, and historical and socioeconomic factors leading up to violations.²⁹⁴ The extent to which victims participate is also commendable.²⁹⁵

The TRC also frustrated justice by presenting those who benefited from apartheid outside the law (scope) as victims as well, thus desensitising them to apartheid wrongs and enraging the victims,²⁹⁶ and are not substitutes for prosecution, especially for *jus cogens* crimes.²⁹⁷

Presented as benefits over retributive justice, by Quinn, truth commissions:²⁹⁸

1. have a broader focus than trials and covers widespread violations;
2. are educational, through the many means they employ to disseminate information, the truth;
3. are specific in truth finding and/or reconciliation;
4. are less costly, the South African TRC exhausted a budget of only R196 million (some \$25 million).

However, submissions by Ratner *et al* and Quinn cannot be accepted. Truth commissions have many shortcomings which are of concern to the eradication of impunity and the better protection of the right to life. Amnesties, which is forgiveness given by the state for crimes against public interest after conviction,²⁹⁹ only seek to protect those who commit human rights violations, saying to the victims, you are helpless and powerless.³⁰⁰ Further, they pose a

²⁸⁹ Valdez (n188) 56 and 57

²⁹⁰ See also Roht-Arriaza (n218) 292-293 and Farley (n178) 395.

²⁹¹ Ratner, Abrams and Bischoff (n231) 270-271, M Bassiouni 'Preface' in M Bassiouni and C Abraham (eds) *Siracusa Guidelines for international, regional and international fact-finding bodies* (2013) Intersentia: Cambridge xiv.

²⁹² Ratner, Abrams and Bischoff (n181) 271.

²⁹³ Ratner, Abrams and Bischoff (n231) 271.

²⁹⁴ Wiebelhaus-Brahm (n286) 376.

²⁹⁵ Wiebelhaus-Brahm (n286) 376.

²⁹⁶ Mamdani (n200) 60-61.

²⁹⁷ Mamdani (n200) 60-61, Bassiouni (n99) 21 and Bassiouni (n179 (2003)) 711.

²⁹⁸ Quinn (n152) 360.

²⁹⁹ Bassiouni (n99) 26.

³⁰⁰ Kritz (n14) 128-129.

threat to international criminal justice.³⁰¹ The reluctance to prosecute is often well-founded in having more important priorities to address, thinking something else is more of significance to the society than to prosecute: such as reconciliation. Further, costs involved in prosecuting are also, at times, a mitigating factor. Given the length, extent and at times the brutal nature of the struggle against apartheid institutionalised racism, oppression, the South African Truth and Reconciliation Commission (TRC) was seen as a transitional forum from divisions of the past.³⁰²

3.3.4.1. Case study: South Africa³⁰³

Truth commissions which look at larger patterns of abuse/violation and often generalise about events, without evidentiary truth. The TRC has to be credited for its open and transparent process. Its sessions were covered on radio, tv and print media, and its findings were widely published and made available.³⁰⁴ It is submitted that the TRC never envisaged combating impunity, neither was it intended to establish a culture of accountability- for punishment was not there. The mandate of the TRC was to recreate scenes of human rights violations and reconcile perpetrators with their victims and their families.³⁰⁵

The TRC was very limited in mandate and selective in addressing human rights violations, it only addressed killings, abduction and torture, excluding other apartheid violations:

The TRC held individual state officials criminally responsible, but for only those actions that would have been defined as crimes under apartheid law. It distinguished between the law-driven violence of the apartheid state – pass laws, forced removals, and so on – as legal if not legitimate, and the excess violence of its operatives, as illegal.³⁰⁶

Put differently, “... the TRC focused on torture, murder and rape, all outside the law, ignoring everything that was distinctive about apartheid and its machinery of violence”³⁰⁷ and

³⁰¹ See Bassiouni (n179 (2003)) 683 and 684, see also paragraph 4.3. below for international criminal justice.

³⁰² Ntsebeza (n195) 380 and O Bubenzer *Post-TRC prosecutions in South Africa: accountability for political crimes after the Truth and Reconciliation Commission's amnesty process* (2009) Martinus Nijhoff Publishers 1.

³⁰³ Promotion of National Unity and Reconciliation Act 34 of 1995. See also A Sachs *The strange alchemy of life and law* (2009) Oxford University Press: New York, Fiss (n256) 59-60 and González and Varney (n197) 18-19. C.f. M Mamdani *When does reconciliation turn into a denial of justice* (1998) HSRC Publishers: Pretoria, D Ntsebeza ‘We can’t prosecute everybody, ... [but] we can’t not prosecute anyone’ in International Human Rights Clinic *Prosecuting apartheid-era crimes? A South African dialogue on justice* <http://www.law.harvard.edu/programs/hrp> (accessed 17 February 2014) 83 and Ntsebeza (n195) 375.

³⁰⁴ Valdez (n188) 53.

³⁰⁵ Morris (n179) 33: “Even where fully successful in their own terms, truth commissions alone- which provide neither for criminal liability nor reparations- cannot provide anything approaching full accountability.”

³⁰⁶ M Mamdani in F Meintjies ‘The TRC and CODESA failed South Africa: It’s time we reflected on this’ <http://www.sacsis.org.za/site/article/1783> (accessed 27 September 2013). See also Ratner and Abrams (n187) 232.

³⁰⁷ Mamdani (n200) 60.

contrary to the process of accountability, which envisages all forms of human rights abuses.³⁰⁸

Truth commissions are a struggle between ‘peace’ and justice, especially during transition periods. This struggle is framed in extreme dichotomies of their forgiving and forgetting though blanket amnesty law in order to attain reconciliation; or pursuing perpetrators of atrocities and risking political stability. This is not correct. Stability, political or otherwise, cannot be at the mercy of amnesties. Transitional justice cannot ensure by forgetting serious violations. The confrontation of past violations can only inform how violations in the future are dealt with.³⁰⁹

Surely, no one can argue that peace is unnecessary and not preferable to state of violence. But the attainment of peace is not necessarily to the exclusion of justice, because, frequently, justice is necessary to attain peace.³¹⁰

South Africa’s TRC efforts were closely linked to democratisation, and the preservation thereof.³¹¹ Further, its effectiveness (full disclosure) was premised on the threat of prosecution,³¹² it still failed to prosecute those who escaped the “amnesty for truth” process- and this is obviously in contravention of international law.³¹³ South Africa’s amnesty program merely requested that perpetrators confess to their crimes, fully.³¹⁴ Of course there is correlation between ‘truth’ and prosecution, both as agent of accountability: Before accountability can be achieved there must be mechanisms and institutions to ascertain the truth or the reality of a situation. Therefore, as well as being related to a general sense of accountability, there can be a relation between prosecutions and the search for the truth.

³⁰⁸ N Kollapen ‘Accountability: the debate in South Africa’ 37 *Journal of African Law* (1993) 3.

³⁰⁹ Mallinder (n282) 2, Méndez (n222) 259 and Kollapen (n308) 3.

³¹⁰ Bassiouni (n99) 8.

³¹¹ Berat and Shain (n250) 167, 170 and 171 and Valdez (n188) 56.

³¹² Kritz (n14) 143.

³¹³ E Lutz and C Reiger ‘Introduction’ in E Lutz and C Reiger *Prosecuting heads of state* (2009) Cambridge University Press: New York 5. See also *AZAPO and Others v The President of the Republic of South Africa and Others* 1996 (4) SA 672 (CC) [17]:

That truth, which the victims of repression seek so desperately to know is, in the circumstances, much more likely to be forthcoming if those responsible for such monstrous misdeeds are encouraged to disclose the whole truth with the incentive that they will not receive the punishment which they undoubtedly deserve if they do. Without that incentive there is nothing to encourage such persons to make the disclosures and to reveal the truth which persons in the positions of the applicants so desperately desire. With that incentive, what might unfold are objectives fundamental to the ethos of a new constitutional order. The families of those unlawfully tortured, maimed or traumatised become more empowered to discover the truth, the perpetrators become exposed to opportunities to obtain relief from the burden of a guilt or an anxiety they might be living with for many long years, the country begins the long and necessary process of healing the wounds of the past, transforming anger and grief into a mature understanding and creating the emotional and structural climate essential for the reconciliation and reconstruction” which informs the very difficult and sometimes painful objectives of the amnesty articulated in the epilogue.

See also Kollapen (n308) 1 and M Bennun ‘Some procedural issues relating to post-TRC prosecutions of human rights offenders’ 16 *South African Journal of Criminal Justice* (2003) 17.

³¹⁴ Kritz (n14) 135-136.

Another issue, which will not form part of this paper, is whether truth commissions fulfil the complementarity requirement/ principle.³¹⁵ Amnesties serve to obscure serious human rights violations from prosecution.³¹⁶ Part of them giving amnesties and being incapable of passing judicial sentences, truth commissions renegade on punishing and deterring violators.³¹⁷ Amnesties without accountability encourages abuse in the future and does not speak to impunity,³¹⁸ and this is exactly what the TRC did.

The extent, and only extent, to which truth commissions can be considered is when they are a stepping stone to further and vigorous prosecutions, not as alternative to prosecutions.³¹⁹ It should also be noted that, the aims of criminal justice are not exclusively to punish, but also to restore law and order and rehabilitate victims,³²⁰ meaning that mechanisms such as truth commissions can co-exist and function with institutions such as the ICC.³²¹

3.3.5. Commission of inquiries³²²

Commission of inquiries, or investigative commissions, are often designed to find facts and make recommendations on an event that has occurred, and also attest to the truth component of accountability.³²³ They, to some extent, provide the background to future prosecutions and document the violation of human rights.³²⁴ Equally, recommendations made by commission of inquiries could easily be ignored by the authority that established the inquiry, bearing in

³¹⁵ McGoldrick (n188) 467. Due to the fact that the ICC does not make provision for amnesties, political pardons and asylums, Igwe (n257) 311 submits that the granting of amnesties, in terms of the TRC, proves that a state is unable and unwilling to exercise its jurisdiction, in terms of Article [17] (not Article 16 as submitted by the author). This is a fair and logical submission.

³¹⁶ L Mallinder 'Amnesties' in W Schabas and Nadia Bernaz (eds) *Routledge handbook of international criminal law* (2013) Routledge: Oxon 430. See also Igwe (n257) 311 noting how the South Africa's TRC would be have been inconsistent with the Rome Statute had it occurred whilst the Rome Statute was active, and Carver (n189) 71, for who over encompassing the term amnesty was used in Zimbabwe to cover crimes that would ordinarily fall outside the ambits of the amnesty.

³¹⁷ Ratner, Abrams and Bischoff (n231) 271.

³¹⁸ Kollapen (n308) 2. *C.f.* Mallinder (n316) 419 and 429-430: Mallinder is of the view that the TRC carved a way to truth telling through the transitional period, without creating impunity, by insisting that those who were not truthful be liable for prosecution. Also noting that very few prosecutions, for those who did not apply for amnesty, took place after the TRC.

³¹⁹ Lutz and Reiger (n217) 286-287 and Sadat (n202) 53: who submits that truth commissions are precursors to accountability measures, and are in no way, prejudicial to the application of criminal law. *C.f.* Wiebelhaus-Brahm (n286) 376: "Truth commissions are frequently described as alternative to criminal prosecution in situations where trials are not feasible for political or practical reasons. Perpetrators may remain politically powerful and able to resist efforts to prosecute. *De factor* or *de jure* amnesties may be in place. In addition, perpetrators' technical expertise may be needed for the continued functioning of the state. Finally, courts may not have the capacity to prosecute or may be complicit in past abuses. Yet, truth commissions are not substitutes for criminal prosecution. The [Inter-American Commission for Human Rights (*Consuelo et al. v Argentina*, report No.28/92, Cases 10.147, 10.181, 10.240, 10.262, 10.262, 10.309, and 10.311, 2 October 1992) [50]] has held that truth commissions do not fulfil a state's obligation to compensate victims and punish perpetrators."

³²⁰ Schiff (n5) 2 and 31. *C.f.* Hassan (n127) 51 contends that international criminal tribunals are concerned with the rehabilitation of offenders, only deterrence.

³²¹ Bantekas and Nash (n235) 13.

³²² Bassiouni (n99) 30-31.

³²³ Above, see also González and Varney (n197) 4.

³²⁴ Bassiouni (n179 (2003) 709.

mind that some of the recommendations made may be that prosecution should be employed against certain actors. Further, commission of inquiries function within a defined and limited scope. The terms of reference can be very narrow, to the extent that perpetrators evader accountability.

3.3.6. Non-confrontational means

Giving consideration to the fact that criminal accountability is not always possible in all cases, other mechanisms parallel to the notion of justice must be considered, and that when appropriately applied, these alternative mechanisms can serve an important function.³²⁵ *Ubuntu*, as expressed in the preamble of South Africa's Interim Constitution of 1994,³²⁶ does not address the key elements of accountability, with which the right to life could be better protected and promoted. Or with which the challenges to the right to life could be addressed. Further, other non-criminal sanctions would include excluding perpetrators from public office or positions of influence, and means such as *ubuntu* remain an individual prerogative, which the state or any authority cannot enforce.³²⁷ This, it is submitted, has no application and is of no effect to modern-day Africa.³²⁸

3.4. Conclusion

Although human rights violations seem to continue unabated, means and measures to contain these violations should be an ever present feature. Further, these measures should also extend to punishment and deterring violence.³²⁹ As already stated above, Africa has witnessed mass human rights violations warranting criminal prosecutions. Such prosecutions are deeply rooted in the culture of impunity rampant in African judicial systems and primarily focused at ridding Africa of persistent violent conflicts. The prosecution of those who have committed human rights violations is essential in confronting past experiences and pursuing the interests of justice, and for those who have been violated, it brings closure. Although not desirable or possible in all respects, prosecuting human rights violations is important for many other reasons (providing a public forum for grievances to be aired and confirming facts), and has a long lasting effect that will eradicate impunity (see previous chapter) and any resentment that may still be possessed by those who have been violated.³³⁰ Further, it is submitted that justice for victims should form part of the transition- transition is not dependent on the prosecution (or the lack thereof) of perpetrators, neither will prosecutions prevent the implementation of reconciliation policies.³³¹

³²⁵ See also Kritz (n14) 138-141. See also McGoldrick (n188) 457.

³²⁶ "These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimisation."

³²⁷ Kritz (n14) 139 and Bassiouni (n179 (2003)) 677.

³²⁸ L. Graybill 'Pardon, punishment, and amnesia: three African post-conflict methods' 27 *Third World Quarterly* (2004) 1117.

³²⁹ J. Burton *Violence explained* (1997) Manchester University Press: Manchester 3.

³³⁰ Kritz (n14) 127-128 and Akhavan (n14) 8.

³³¹ Orentlicher (n48) 25746-2547, 2549 and 2550. See also McGoldrick (n188) 466:

International tribunals are better positioned to deter future atrocities on a global scale,³³² with sufficient care for long term justice and accountability.³³³ International tribunals are also primary developers and enforcers of international criminal law norms- identifying loopholes in the current system and introducing new crimes.³³⁴ International tribunals further command universal jurisdiction.³³⁵ However, international tribunals rely on compliments from states since these courts do not have enforcement powers.³³⁶ Equally, prosecuting violators is not the only agenda of international tribunals. They also have a reconciliatory role and the duty to restore and maintaining peace.³³⁷

By the same token, prosecuting violators at domestic level serves to enhance the legitimacy and credibility of the new regime- setting the tone for accountability- and rejuvenates the domestic judicial system.³³⁸ With the introduction of international tribunals, and in particular the ICC, the prosecution of Africans continues to be a difficult task marred with squabbles between the international community and African leaders and scholars.³³⁹ This contention has since cast doubt over the credibility of the court.

And often, the costs of setting up and maintaining these mechanisms can be too high.³⁴⁰ Therefore, given the inefficiency of these mechanisms, and the absence of judicial intervention in the face of atrocities,³⁴¹ “criminal responsibility of individuals for certain gross violations of human rights and humanitarian law is now beyond dispute.”³⁴²

It is submitted that these current accountability mechanisms are ineffective in addressing violence and the violation of human rights and the right to life.³⁴³ Their shortcomings, including their failure to prosecute international criminal law violations, are not helpful in

“Depending on the particular case and the approach of the particular court, prosecutions can provide a detailed historical record of the broader social and political context for mass crimes. The ICTY and ICTR cases have done this. This social process may be necessary and significant part of reconciliation. From this perspective, trials are not just means to punish, but a narrative that rescues the memory and truth in a given society about what happened, and provide a solid basis for real reconciliation”.

C.f. Orentlicher (n48) 2548 and Ratner and Abrams (n187) 156. Objections raised by Ratner and Abrams are valid, that in cases those who were responsible for the violence still wield great power and influence.

³³² Bassiouni (n15) 207-211 and Kelsen (n233) 562.

³³³ Schiff (n5) 35.

³³⁴ Goldstone (n7) viii-ix.

³³⁵ *C.f.* Du Plessis, Louw and Maunganidze (n263) 4: the ICC does not exercise universal jurisdiction, its jurisdiction is extend only to crimes committed on the territory of a state that has accepted the court's jurisdiction (territorial jurisdiction), or to nationals of state that has accepted the jurisdiction of the ICC (active nationality principle), or by referral by the UN Security Council as *per* Chapter VII powers.

³³⁶ Not only the institution (ICC), but international criminal justice in its entirety will only be credible with the backing of powerful countries, see Akhavan (n14) 30. See also M Bassiouni (n179 (2003)) 673.

³³⁷ Kritz (n14) 131 and United Nations Security Council Resolution 955 (8 November 1994).

³³⁸ Kritz (n14) 132-133.

³³⁹ C Murungu *Immunity of state officials and prosecution of international crimes in Africa* (2011) LLD thesis, University of Pretoria. See also paragraph 4.9. below.

³⁴⁰ McGoldrick (n188) 455.

³⁴¹ Olasolo (n216) 2 and 8.

³⁴² Ratner and Abrams (n187) 151 and Bassiouni (n15) 193 and 196.

³⁴³ Bassiouni (n99) 7-8, Greenawalt (n237) 1097-1098 and Bassiouni (n179 (2003)) 674-675.

fully protecting the right to life and realising accountability,³⁴⁴ and only serve as tools for impunity and political expediency.³⁴⁵ Thus, necessitating a new avenue to confront and prevent human rights violations.³⁴⁶

However, not all hope is lost in these mechanisms, and it ought to be emphasised that exclusive (international) criminal accountability, by itself, is incapable of addressing all the ills and contempt to the rule of law- and better yet, half a loaf of bread is better than none, but it still half a loaf.³⁴⁷ And that, turning to mechanism such as the ICC is, at times, out of necessity- for independence from local influence, reinforced commitment and availability of resources.³⁴⁸ The ICC is a measure of necessity for reasons that it overcomes limitations inherent in domestic criminal justice processes. Lastly, the ICC serves to deter people from committing serious crimes of international concern.

³⁴⁴ M Bassiouni 'Accountability for violations of international humanitarian law and other serious violations of human rights' in M Bassiouni (ed) *Post-conflict justice* (2002) Transnational Publication: New York 3.

³⁴⁵ Mallinder (n282) 1, Gahima (n13) 112, Méndez (n222) 256, Stromseth (n187) 2, Morris (n246) 402: who points out that a compromise of this nature, compromises the extent to which accountability is sought, leaving behind bitterness and possibilities of reoccurrences, and Bassiouni (n344) 7.

³⁴⁶ Bassiouni (n144) 674, 675 and 676. See also J Zalaquett 'Confronting human rights violations committed by former governments: principles applicable and political constraints' in N Kritz (ed) *Transitional justice: how emerging democracies reckon with former regimes* United States Institute of Peace: Washington, DC 3 and Greenawalt (n237) 1096.

³⁴⁷ Lutz and Reiger (n318) 4-6, Cassese (n7) 5 who stresses the indispensability of having national courts overseeing the prosecution and punishment of perpetrators, Bassiouni (n15) 209, Fiss (n256) 67, Méndez (n102) 273-274 and 276 (read with 275): who refers to flaws in all mechanisms, and point to the fact that, although critical of reconciliatory mechanisms, for reasons that (1) true reconciliation cannot be imposed by law, (2) reconciliation require knowledge of facts, and (3) reconciliation requires reparations for victims; reconciliation goes a long way in bringing together societies torn by conflict and better suited to avoiding the recurrence of violations; and Stromseth (n187) 14-15: who highlights that all mechanisms suffer from one fault or another. What is needed is a mechanism that is best position, not totally flawless, to address the protection and promotion of the right to life, impunity and accountability, "[n]o none approach to accountability will be best for all societies, of course, and new circumstances and challenges will undoubtedly arise. We can learn a great deal, however, by examining specific cases ... regarding the goals sought, the mechanisms chosen, the relationship between criminal and non-criminal accountability processes, the effectiveness of different mechanisms in meeting key goals, and –in particular- ways to develop constructive and complementary relationships between domestic and international actors and mechanism. The dynamic, if sometimes uneasy, relationship between international and domestic accountability efforts has been central ..., and will be growing importance in the future as the ICC takes its place in the architecture of accountability mechanism." See also Morris (n179) 33: "... there are those approaches to accountability that are not inherently compromises but are second-best when adopted in lieu of, rather than in conjunction with, other mechanisms of accountability. These include lustration and truth commissions, both of which may serve important functions, but since they provide neither for criminal liability nor for reparations, they cannot provide anything approaching full accountability."

C. f. Méndez (n102) 276.

³⁴⁸ Fiss (n256) 65-66 and Cassese (n7) 1. See also Morris (n246) 401-402. See also 'The rule of law and transitional justice in conflict and post conflict societies' UN Doc S/2004/616 [47]. Amnesty International 2007-2008 Fact Sheet One http://www.amnestyusa.org/pdfs/IJA_Factsheet_1_International_Criminal_Court.pdf (accessed 4 December 2013) and Hirsch (n40) 601-602.

Chapter 3: International Criminal Court

The twentieth century was marred by the Holocaust, the killing fields of Cambodia, the genocide in Rwanda and the mass killings in Srebrenica, the latter two under the watch of the Security Council and United Nations peacekeepers. Genocide, war crimes, ethnic cleansing and crimes against humanity: the brutal legacy of the twentieth century speaks bitterly and graphically of *the profound failure of individual States to live up to their most basic and compelling responsibilities*, as well as the collective inadequacies of international institutions.³⁴⁹ (Emphasis added.)

4. International Criminal Court³⁵⁰

4.1. Introduction

It is clear that there has been a failure by the law and international community in preventing and prosecuting human rights violations and eradicating impunity, both globally and, particularly, in Africa. Further, that those mechanisms put in place to address impunity have failed as well, and that the disregard for the right to life in Africa is on-going in the face an obligation to prosecute human rights violations of any nature, and at least *jus cogens*.³⁵¹

However, there is a new trend that is set on addressing human rights violation and insisting on effective accountability by the international community through an international tribunal: the desire to end impunity, the need for justice and the duty to prosecute violations.³⁵² A trend

³⁴⁹ United Nations General Assembly 'Implementing the responsibility to protect: report of the Secretary-General' (12 January 2009) UN Doc A/63/677 [5].

³⁵⁰ T Ingadottir (ed) *The International Criminal Court: recommendations on policy and practice: financing, victims, judges and immunities* (2003) Transnational Publishers: New York; R Mackenzie, C Romano, Y Shany and P Sands *The manual on international courts and tribunals* (2010) Oxford University Law Press: Oxford 157; L Reydams and J Odermatt 'Mandates' in L Reydams, J Wouters and C Ryngaert (eds) *International prosecutors* (2012) Oxford University Press: Oxford 108-110: who analysis the ICC's mandate, objectives and jurisdiction; Bassiouni (n99) 29-30; Bassiouni (n344) 3; Fiss (n256) 60-62; Schiff (n5) and Beigbeder (n6) 7. See also Greenawalt (n237) 1079-1083. *C.f.* L Green 'Is there an international criminal court?' 21 *Alberta Law Review* (1983) 252, who articulated criticism against the formation of an international criminal court, prior to the Rome Statute. Two of his main concerns were: the level of distract of foreign judges and fear that this court might try heads of states or of governments; and Simbeye (234) 15 who questions the formation of the ICC and parties thereto. Simbeye holds that participants to the establishment of the ICC might have moulded the court to their "own individual design".

³⁵¹ Bassiouni (n179 (2003)) 706 and Gahima (n13) 110.

³⁵² Orentlicher (n48) 2537, Bassiouni (n344) 3, Seibert-Fohr (n7) 1-2, Bassiouni (n179 (2003)) 675-676, 678, 684 and 'conceptualising prosecution in international law' in paragraph 4.2. below, Broomhall (n190) 54-55 (the enforcement of international criminal law is pushing this trend of accountability), Méndez (n222) 65, Ratner, Abrams and Bischoff (n231) 6, Dembowski (n236) 136-137, *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte* [1999] 2 All ER 97, Broomhall (n190) 56, Olosolo (n216) 9, M Jouet 'Reconciling the conflicting rights of victims and defendants at the International Criminal Court' 26 *Saint Louis University Public Law Review* (2007) 249, T Meron *Human rights and humanitarian norms as customary law* (1989) Oxford University Press: Oxford 208-209, Brown (n251) 384, Stromseth (n187) 1 and 2, Gahima (n13) 108, T Meron 'Introductory remarks' in M Polity and G Nesi (eds) *The Rome Statute of the International Criminal Court: a challenge to impunity* (2001) Ashgate: Aldershot 65, Simbeye (n234) 1 and 15, Akhavan (n14) 27 and 30, Morris (n246) 401, Morris (n179) 29, Bassiouni (n15) 193, Méndez (n102) 255 and 259, Sadat (n202) 47 and Fiss (n256) 59: who notes that these attempts at effective accountability "are international in character", despite both the victims and perpetrators being African. For an interesting discussion on the relation

indicative of a progressive notion of accountability, set on improving and protecting human rights and the right to life.³⁵³

All forms of human rights violations deserve to be confronted and dealt with, in any manner possible. Failure to do this will only sow a seed for future conflicts, entrench and perpetuate the already existing culture of impunity, and given Africa's background, undermine the rule of law, democracy and strides made in the human rights discourse.³⁵⁴ Criminal accountability, it is submitted, is the most effective way of addressing human rights violations and delivering justice. Criminal accountability, supported by international law and the international community, through the ICC, is best positioned to inculcate a pro-accountability- *justice, truth, deterrence and punishment* and *reconciliation*- narrative in society.³⁵⁵ Of course, this submission is made mindful of other complementary factors such as the background already laid by *ad hoc* tribunals set up by the UN Security Council, domestic courts, truth commissions and commission of inquiries.

International criminal law, as a body of international laws designed to prescribe conduct that is prohibited, requires that accountability should follow from the transgression of such rules.³⁵⁶ And an international prosecution of those who violate international norms and human rights is not likely to be considered political revanchism,³⁵⁷ for it concerns itself with "the survival of mankind in both its universality and diversity".³⁵⁸ Put differently, the

to between the violation of *jus cogens* and the duty to prosecute, see Broomhall (n190) 56 together with Roht-Arriaza (n268) 5: the author submits that this relationship is premised on strengthening post-transitional administration. See also above, the rule of law. See also Cassese (n7) 8. See also Article 4(1) and 7 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Each State Party shall ensure that all acts of torture are offences under its criminal law. Article 7 states that if a state party does not extradite a person accused of committing a crimes under the Convention, the state party shall present such a person to its competent authorities for the purpose of prosecution. *C.f.* M Osiel 'Why prosecute? Critics of punishment for mass atrocity' 22 *Human Rights Quarterly* (2000) 118.

³⁵³ See Olasolo (n216) 8.

³⁵⁴ Orentlicher (n48) 2542-2543, Kritz (n14) 127-128 and McGoldrick (n188) 457.

³⁵⁵ See also Kritz (n14) 128-129 and Stromseth (n187) 9: who goes to length on the aims of the ICC to stand ready to punish and prevent future atrocities. See also Cronin-Furman (n189) 2.

³⁵⁶ Orentlicher (n48) 2549, Bassiouni (n344) 3, Cassese (n7) 3, Greenawalt (n237) 1071, Bassiouni (n232) 3; M Bassiouni 'International crimes: the *ratione materiae* of international criminal law' in M Bassiouni (ed) *International criminal law: sources, subjects and contents* (2008) Martinus Nijhoff Publishers: Dordrecht 129-130 on the genesis of international criminal law; and Ratner, Abrams and Bischoff (n231) 2. See also Bantekas and Nash (n235) 1. *C.f.* It is argued that international law had little to do with the development of accountability as a principle, because it (international law) had concerned itself mainly with relations between states, see Ratner, Abrams and Bischoff (n231) 4 and 6.

³⁵⁷ A Lewis 'At home abroad; Revenge or reconciliation?' 10 April 1990 *The New York Times* <http://www.nytimes.com/1990/04/10/opinion/at-home-abroad-revenge-or-reconciliation.html?pagewanted=all&src=pm> (accessed 14 October 2013).

³⁵⁸ Otto Kirchheimer, as quoted by Orentlicher (n48) 2549. See also Bassiouni (n344) 4 and Gahima (n13) 111-112: "Genuine reconciliation, peace, and stability, in any society emerging from conflict can only be assured if the society is able to deal with its past in a manner that is fair to all the parties to the conflict. It offers an opportunity to bring to justice exiled criminals over whom the country could never get custody. International criminal justice may not always be effective, but where it is, it provides the only credible opportunity for investigation, prosecution, and punishing such crimes that states are unwilling to pursue... *Accountability is only beneficial if it can help to establish a historical narrative to which all victims can relate, a narrative that acknowledges the suffering of all victims.*" (Emphasis added.) See also Bassiouni (n356) 130 for the development norms commonly shared as both values and interests.

parameters and aims of international prosecutions are clearly defined: the contravention of international norms will be met with prosecution. International criminal law has benefited the human rights discourse immensely and, in addition to enhancing accountability, it also strives to prevent and suppress international criminality and reinforce international criminal justice.³⁵⁹ Therefore, the ICC is not exclusively penal, but also seeks to contribute to the political reconstruction and assistance with political transition.³⁶⁰

The ICC provides for, in the wake of the ICTY and ICTR, consistency with regards to international prosecutions, which is important, for any tribunal that seeks to command respect and compliance from those under its jurisdiction.³⁶¹ The ICC, as an international tribunal, is sending a clear message to the international community that impunity will not be tolerated, and that all transgressions are thoroughly followed through.³⁶² The ICC is independent and impartial, as opposed to a retributive tribunal- synonymous with “victor’s justice”.³⁶³ The ICC is the perfect tribunal capable of merging international humanitarian law, international criminal law and international human rights, and prosecutes violations from all these discourses.³⁶⁴

The ICC was solely intended to enforce international law, to see beyond national immunity, which does serve as a restriction at domestic prosecution level, and eradicate impunity.³⁶⁵ The ICC, unlike the temporary tribunals setup by the UN Security Council, is not an *ex post facto* tribunal. Its permanence ensures that it documents human rights violations as they occur and later prosecute them, without geographical limitations.³⁶⁶ Further, the ICC enjoys more independence from the UN Security Council.

To continue to allow defunct accountability mechanism in the face of growing human rights violations in Africa would not only be short-sighted, it would expose how little African leaders care about Africa or Africans care about Africa.³⁶⁷ The ICC’s relentless pursuit of transgressors further extends to domestic situations in the event that a state is unable or unwilling, thus punishment is certain, strengthening the rule of law and reinforcing new

³⁵⁹ Méndez (n222) 70 and F Pocar ‘The Rome Statute of the International Criminal Court and human rights’ in M Polity and G Nesi (eds) *The Rome Statute of the International Criminal Court: a challenge to impunity* (2001) Ashgate: Aldershot 67, R Friedlander ‘The foundations of international criminal law: a present-day inquiry’ 15 *Case Western Reserve Journal of International Law* (1983) 18 and Bassiouni (n344) 3.

³⁶⁰ Schiff (n5) 1.

³⁶¹ Bassiouni (n344) 6 and Greenawalt (n237) 1099 and 1100-1101.

³⁶² Kritz (n14) 129 and Bassiouni (n344) 5.

³⁶³ Kelsen (n233) 562.

³⁶⁴ Méndez (n222) 65 and 73 and Pocar (n359) 67-68. See also the convergence of the right to life with international humanitarian law and human rights law, Quéniévet (n85) 331. See Greenawalt (n237) 1071 who submits, correctly so, that international human rights belongs to international criminal law by virtue of human rights violations imposing an obligation on a state to follow up on the violation. See also Ratner, Abrams and Bischoff (n231) 12-13 on the overlap between the three discourses.

³⁶⁵ Simbeye (n234) 90-91.

³⁶⁶ Duffy (n263) 115. See also Akhavan (n14) 7.

³⁶⁷ Duffy (n263) 116.

norms and patterns of accountability.³⁶⁸ The ICC serves to confront impunity, not condone or redress it, by pursuing justice for victims and survivors of human rights violations.

With the complementarity principle in place, the ICC is only able to act where national systems do not themselves investigate or prosecute or unable or unwilling to do so:³⁶⁹

- the ICC comes with the deterrent element with it, for an effective international justice system, as envisaged in the preamble of the Rome Statute: “The State Parties to this Statute, [d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the *prevention* of such crimes, ...”³⁷⁰ (Emphasis added.) This would mean that national courts would retain jurisdiction, without the ICC’s involvement, until such a time it is appropriate for the ICC to intervene. This sends a message to possible perpetrators that domestic courts will cease to provide safe heavens to them.³⁷¹
- this will encourage and seek to endure that domestic courts prosecute human rights violations, and strengthen domestic prosecution systems.

The persistent failure by domestic courts, absent and inadequate, to deal with human rights violations, has inadvertently encouraged impunity. The ICC’s jurisdiction over international crimes is broad and will ensure that no one slips through the cracks, as the type of crimes defined in the Rome Statute are focused at both governments and private individuals.³⁷²

International crimes are those crimes which disturb human conscience.³⁷³ International crimes are further divided between international crimes in *strict senso* and international

³⁶⁸ See also Ratner and Abrams (n187) 155 and Article 18.

³⁶⁹ Duffy (n263) 116 and 120-121, Akhavan (n14) 27 and Stromseth (n187) 3.

³⁷⁰ Cronin-Furman (n189) 4. See also Olasolo (n216) 8.

³⁷¹ See also Duffy (n263) 116: who, correctly, holds that holding individuals accountable, at national or international level, will send a clear message that certain crimes will not go unprosecuted. See also Dembowski (n236) 139-140 and Olasolo (n216) 19.

³⁷² Duffy (n263) 117 and Hassan (n127) 51.

³⁷³ Simbeye (n234) 37 speaks of an “international customary crime”, which defines as an act which violates a prohibitive norm of international customary law. This is supported by Bassiouni (n344) 7, he submits that some international criminal law norms are part of customary international law, thus applicable to proceedings involving some international crimes- against a defence of immunity. See Meron (n352) 210, 211, and 214-215. See also G Alexander ‘International criminal law’ 5 *Journal of Comparative Legislation and International Law* (1923) 90 and Wrights (n263) 566-567 who uses a different phrase: crimes against international law. He defines a crime against international law as: “... an act which violates a fundamental interest protected by international law committed with conscious or presumptive knowledge that such act or omission is criminal.” In total, according to Bassiouni (n356) 134-135, there are 28 recognised international law crimes, identifies in 267 conventions, including the Rome Statute. These crimes are: aggression; mercenarism; genocide; crimes against humanity; war crimes; nuclear terrorism; theft of nuclear materials; apartheid; slavery and slave related practices; torture and other forms of cruel, inhuman or degrading treatment; unlawful human experiment; piracy; aircraft hijacking and unlawful acts against international air safety; unlawful acts against the safety of maritime navigation and the safety of platforms on high sea; threat and use of force against internationally protected persons; crimes against UN and associated personnel; taking of civilian hostages; use of explosives; unlawful use of mail; financing terrorism; unlawful traffic in drugs and related drug offenses; organised crime; destruction and/or theft of national treasures; unlawful acts against certain internationally protected elements of the environment; international traffic in obscene material; falsification and counterfeiting; unlawful interference with submarine cables; and bribery of foreign public officials.

For purposes of this discussion, it is important to note that international criminal law, as opposed to international law, forms the basis for jurisdiction for international crimes. This is the case because, international law concerns

crimes in the *largo senso*. The former involves the disturbance of peace and security, whilst the later concern narrower international interests, such as piracy.³⁷⁴ International crimes bear the following characteristics:³⁷⁵ they are a conduct prohibited by reason that affects a significant international interest, such as peace and security; and they are a conduct that is harmful and that is deemed offensive to commonly shared interests and values.³⁷⁶

The crimes covered by the ICC include crimes based on international customary rules and treaties- prohibitive norms that are considered important by the international community for the protection of the world.³⁷⁷ These crimes are:

- genocide: according to Article 7, covers murder, extermination, forced disappearance of persons, enslavement, deportation, severe deprivation of liberty, torture, rape, sexual violence and apartheid. It is common cause that attaching criminal accountability for this crimes is also meant to protect the right to life.³⁷⁸ Genocide is also deemed a *jus cogens* crime;³⁷⁹
- war crimes: crimes resulting in the “undertaking of conduct defined as grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention: wilful killing; and others”.³⁸⁰ It is common cause that attaching criminal accountability for this crimes is also meant to protect the right to life.³⁸¹ War crimes have their origins in laws governing the legality of war (*jus ad bellum*) and laws governing the conduct of law (*jus in bello*),³⁸²
- crime of aggression, as contained in Article 5 of the Rome Statute;³⁸³ and
- crimes against humanity- “acts any act when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the

itself only with the law of peace. International law, on the other hand, can be seen as an off spring of international because it concerns itself with the rule of law and the need for punishment. Further, international law transgressions are not directed against individuals, but usually against states- with the only exception being piracy. See Green (n350) 253 and 256, Kelsen (n233) 533, 534, 535, 538-539 and 548 and Hassan (n127) 47. International law is the basis for jurisdiction only for the crime of piracy. See Green (n350) 253 and Hassan (n127) 40-42.

³⁷⁴ Paust (n85), M Bassiouni, M Schart, J Gurulé, L Sadat, B Zagaris and P William *International law cases and materials* (2000) Caroline Academic Press: Caroline 13-14 and Simbeye (n234) 36. See also Article 19(3)(c) of the Draft Article on State Responsibility read with the *Barcelona Traction* ICJ Reports (1970) and Bassiouni (n356) 132-133 and Bassiouni (n15) 197.

³⁷⁵ Bassiouni (n356) 133.

³⁷⁶ Bassiouni (n15) 193.

³⁷⁷ Simbeye (n234) 37 and 59: further states that these rules, both customary and treaty, create obligations binding on states *vis-à-vis* other state parties to the treaty in question (*lex specialis*) or towards each other, respectively. See also T Meron *Human rights and humanitarian norms as customary law* Clarendon Press: Oxford (Oxford) 1 and 5-6. For a distinction between customary and conventional rule, see Meron 7. See also Bantekas and Nash (n235) 3, Schiff (n5) 17 and J Charney ‘The persistent objector rule and the development of customary international law’ 56 *British Yearbook of International Law* (1985) 1.

³⁷⁸ Bassiouni (n15) 200.

³⁷⁹ Simbeye (n234) 58-59. See also Bassiouni (n356) 142.

³⁸⁰ Article 8(2) of the Rome Statute. See also Simbeye (n234) 54-56 and Bassiouni (n15) 199-200.

³⁸¹ Bassiouni (n15) 200.

³⁸² Simbeye (n234) 43. See also Bassiouni (n356) 143-145 and Kelsen (n233) 530.

³⁸³ Simbeye (n234) 51-54. See also Bassiouni (n356) 140-141.

attack, including murder.³⁸⁴ It is common cause that attaching criminal accountability for this crimes is meant to protect the right to life.³⁸⁵ Crimes against humanity are also deemed a *jus cogens* crime.³⁸⁶

When a state ratifies the Rome Statute, it accepts the Court's jurisdiction over all crimes within the scope of the ICC.³⁸⁷ An investigation by the ICC (and subsequent prosecution) is triggered by a variety of stakeholders:

- the UN Security Council;
- prosecutor; and
- a state party.

The ICC is better equipped and enabled to advance the development and enforcement of international criminal norms, particular the crimes within the jurisdiction of the court.³⁸⁸ Staffed with experts, the ICC is able to apply and interpret international law efficiently.³⁸⁹ Amnesty international, a human rights group, lauded the establishment of the ICC and commends, particular, its permanent status. This compliment comes as a result of previous tribunals having only set up after the crimes have been committed, adversely affecting the jurisdiction scope of the tribunal concerned.³⁹⁰

4.2. History of the International Criminal Court³⁹¹

In the wake of mass atrocities, there was a need to strengthen international rule of law, and also a desire to better enforce (the already established and recognised regimes of) international human rights and international humanitarian law, through the establishment of an international tribunal, the ICC.³⁹² Although pressing and almost inevitable at this time, the idea of establishing an international criminal tribunal was not new, Simbeye states that, as early as 1899, there was evidence of a concept advocating for the creation of an international tribunal at the First Peace Conference in The Hague.³⁹³ However, the nature of this court, as anticipated then, would be to settle disputes between state parties.

³⁸⁴ Article 7(1) of the Rome Statute.

³⁸⁵ Bassiouni (n15) 200.

³⁸⁶ Simbeye (n234) 56-57 and Schiff (n5) 20-21. See also Bassiouni (n356) 143.

³⁸⁷ Duffy (n263) 181.

³⁸⁸ Kritz (n14) 129.

³⁸⁹ Kritz (n14) 129.

³⁹⁰ Amnesty International 2007-2008 Fact Sheet One http://www.amnestyusa.org/pdfs/IJA_Factsheet_1_International_Criminal_Court.pdf (accessed 4 December 2013). *C.f.* Igwe (n257) 297, who is of the view that the deterrence factor is not present in Africa, subsequently impunity is spreading from one country to another.

³⁹¹ Dembowski (n236) 136-139, Wright (n263) 574-576, Ferencz (n257) 204 and 225-227 and Simbeye (n234) 8-15. See also Schiff (n5) 2, D Sarooshi 'The statute of the international criminal court' 48 *International and Comparative Law Quarterly* (1999) 387, Friedlander (n359) 18-19 and Bassiouni (n356) 131-132. See also *Report on the Question of International Criminal Jurisdiction by Ricardo J. Alfaro, Special Rapporteur A/CN.4/15* <http://legal.un.org/ilc/sessions/2/2docs.htm> (accessed 14 June 2014) and Ferencz (n129) 389.

³⁹² Dembowski (n236) 136-137 and Igwe (n257) 295.

³⁹³ Simbeye (n234) 8. *C.f.* Friedlander (n359) 18 and Green (n350) 254.

In 1907, during the Second Peace Conference, talks of a permanent international court surfaced again, to no concrete resolution. Then in 1926 the International Law Association (ILA) drafted a statute for an International Penal Court. The court envisioned by the ILA was set to have jurisdiction over violations of international obligations of a penal nature, violations of treaties or conventions regulating conduct during war and violations of laws of war.³⁹⁴

During the Second World War, the London International Assembly proposed that international criminal law be codified and acts such as aggression of war, to be criminalised. The Assembly was also the first to call for individual criminal responsibility, and that rank should not be recognised as immunity.³⁹⁵ Although none of the above proposals were ever immediately implemented, they were the catalysts for international criminal justice together with, *ad hoc* criminal tribunals and forming the modern-day ICC.³⁹⁶ Further, it should be emphasised that the existence of a criminal court is dependent on the establishment of an international criminal code or norm.³⁹⁷

4.3. Conceptualising international criminal prosecutions³⁹⁸

International criminal justice is premised on two systems, namely:³⁹⁹ (1) developing norms that define and prohibit international crimes;⁴⁰⁰ and (2) holding persons, and *not states*, accused of having transgressed an international norm before a judicial body or tribunal.⁴⁰¹

³⁹⁴ Simbeye (n234) 9. See also Article 21 of the International Law Association Draft Statute and Friedlander (n359) 18.

³⁹⁵ Simbeye (n234) 9 and 30-31. See also Articles 1 and 2 of the Draft Convention for the Creation of an International Criminal Court London International Assembly (1943). The realisation of Article 27 in the Rome Statute is a trump over immunities exercised by virtue of rank or occupying a high office. *C.f.* W Schabas *An introduction to the International Criminal Court* (2004) Cambridge University Press: Cambridge 81.

³⁹⁶ Friedlander (n359) 20, Hassan (n127) 50, Schiff (n5) 25 and Simbeye (n234) 89-90.

³⁹⁷ Friedlander (n359) 19.

³⁹⁸ G Slutter, H Friman, S Linton, S Vasiliev and S Zappalá 'Introduction' in G Slutter, H Friman, S Linton, S Vasiliev and S Zappalá (eds) *International criminal procedure: principles and rules* (2013) Oxford University Press: Oxford 1-2, Bassiouni (n179 (2003)) 684 for philosophical considerations on international criminal justice, Méndez (n102) 275, Olasolo (n216) 2 (on the unsustainability of a global legal order that tolerated atrocities), Wright (n263) 564-566 on individual liability and international criminal law and Gahima (n13) 112 for international criminal justice and human rights. See also Bassiouni (n356) 131-132, Bantekas and Nash (n235) 10, C de Than and E Shorts (eds) *International criminal law and human rights* Sweet and Maxwell: London 13-14 and Cassese (n7) 3.

³⁹⁹ Bantekas and Nash (n235) 12 submit that the objectives of international criminal justice are three, namely, prevent; prosecute; and punish. See also Cassese (n7) 11-12 and Bassiouni (n15) 194-195 and 196 sets out the objects of international criminal justice within the evolution of human rights: "... international criminal proscriptions are the *ultima ratio* modality of enforcing internationally protected human rights."

⁴⁰⁰ Bantekas and Nash (n235) 6.

⁴⁰¹ Simbeye (n234) 8, Schabas (n395) 101, Wright (n263) 561, Friedlander (n359) 13-14 and Greenawalt (n237) 1072 and 1085. See also D Luban 'Fairness to rightness: jurisdiction, legality, and the legitimacy of international criminal law' Paper 67 *George Law Faculty Working Papers* (2008) http://scholarship.law.georgetown.edu/fwps_papers/67/ (accessed 13 June 2014) and Article 25 of the Rome Statute: "The Court shall have jurisdiction over natural persons pursuant to this Statute." See also Bantekas and Nash (n235) and Bassiouni (n15) 207-211, who considers the enforcement of international criminal law, namely: direct and indirect enforcement. The former entails the conventional enforcement through prosecutorial and judicial action. The latter obligates States with the opportunity to prosecute or extradite anyone accused of

This is founded on early experiences from the Nuremberg and Tokyo Trial,⁴⁰² and further entrenched by the subsequent *ad hoc* tribunals established by the UN- ICTY and ICTR.⁴⁰³ The ICC speaks more to the latter system. This is done, amongst other things, to determine: the precise norm they have transgressed, if any; affording them due process; their innocence, or otherwise; the appropriate sentence, attached to the punishment and deter principle of accountability, for their transgressions. This prosecution concept, on an international plain, is well captured by Meron: Imposing criminal responsibility on the perpetrators of egregious breaches of human rights should assist in deterring further breaches and secure greater respect for human rights.⁴⁰⁴

International criminal law⁴⁰⁵ translates to sections against those who are implicated in the commission of international crimes.⁴⁰⁶ This is premised on the notion that individual criminal responsibility is effective and efficient as a deterrent mechanism.⁴⁰⁷

However, in the conceptualisation of international criminal law and justice, the role states play should be factored in,⁴⁰⁸ this is the case for a number of reasons, namely:

violating an international criminal law norm(s). See also R Miller 'Far beyond Nuremberg: steps toward international criminal jurisdiction' 61 *Kentucky Law Journal* (1973) 925; B Anbion 'The organization of a court of international criminal jurisdiction' 29 *Philippine Law Journal* (1954) 345; G Finch 'Draft statute for an international court' 46 *American Journal of International Law* (1952) 89; Q Wright 'Proposal for an international criminal court' 46 *American Journal of International Law* (1952) 60; Y Liang 'The establishment of an international criminal jurisdiction: the first phase' 46 *American Journal of International Law* (1952) 73; and Advisory Opinion of the International Court of Justice and Punishment of Genocide, 1951 ICJ 15. *C.f.* International criminal justice is different from the responsibility to protect in the sense that, the latter is founded on (more) humanitarian grounds to intervene in the internal affairs of another state in the wake of gross human right violations, whilst the former is premised on obligations to cooperate with international criminal tribunals and implementing international statutes on international criminal justice domestically, see Bellelli (n33) 7-10. Understandably, the distinction between the two is not explicit, but it remains essential to note the difference given the two factors characterising international criminal justice.

The outcomes of an intervention, based on the responsibility to protect, involve the UN Security Council invoking its Chapter VII powers. See, *inter alia*, S Gumedze 'The African Union and the responsibility to protect' 10 *African Human Right Law Journal* (2010) 135, C Sampford and R Thakur (eds) *Responsibility to protect and sovereignty* (2013) Ashgate: Farnham, W Knight and F Egerton (eds) *The Routledge handbook of the responsibility to protect* (2012) Routledge: New York, D Kuwali *The responsibility to protect: implementation of Article 4(4)* (2011) Martinus Nijhoff Publishers: Boston, and A Bellamy, S Davies and L Glanville (eds) *The responsibility to protect and international law* (2011) Martinus Nijhoff Publishers: Boston. On the other hand, the intervention espoused by international criminal justice, in form of the ICC, is consistent with respecting and upholding the sovereignty of a state, yet within the right to act on human rights violations. See *Tadic* (n424 below) [59].

See also Buergenthal (n139) 6-9; Orford (n142); Hehir (n142); Pattison (n142); and Segell (n143) 131.

⁴⁰² Simbeye (n234) 15 and Greenawalt (n237) 1072-1073. These tribunals were established with the objective to punish those responsible for international crimes: crimes against peace, war crimes and crimes against humanity, Simbeye (n234) 10. See also *France et. al. v Goering et. al.*, 22 IMT 411, 466 (Int'l Mil. Trib. 1946): "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."

⁴⁰³ Bellelli (n33) 11-13 and A Cassese (n7) 4.

⁴⁰⁴ Meron (n352) 209.

⁴⁰⁵ Bassiouni (n179 (2003)) 678-679.

⁴⁰⁶ Bassiouni (n179 (2003)) 682.

⁴⁰⁷ Bassiouni (n179 (2003)) 686 and 687.

⁴⁰⁸ Meron (n352) 209.

- it is the state's responsibility, both international and domestic, to prevent and suppress criminal conducts; and
- the implementation of measures to either hold perpetrators to account, or to eradicate crimes lies solely with state's willingness.⁴⁰⁹

Both these factors tie in with the principle of sovereignty, accountability and the complementarity principle, which is discussed below.

Therefore, ensuring that international criminal justice remains adequate and effect in dealing with threats posed by international crimes, international criminal law will go a long way in securing accountability, protecting human rights and eradication impunity.⁴¹⁰ In addition, what remains essential in the conceptualisation of international criminal law and international prosecutions is that, the root causes of conflict or factors, leading to the violation of human rights, ought to be addressed as well, despite the on-going prosecutions.⁴¹¹

4.4. The International Criminal Court and accountability

The notion of international justice (“deterrence, impunity, legitimacy, accountability, victims, gender, and the relationship between national and international justice”) often comes to the forth when the ICC is concerned.⁴¹² The probability and extent of the ICC being a deterrent has been debated and doubted extensively.⁴¹³ However, given the ICC's ability and determination to address serious international crimes, the persistent prosecution of those who are responsible for human rights violations will contribute to the diminution of impunity, and subsequently, serve as a deterrent.⁴¹⁴ International criminal justice, in its multidimensional form addresses even gender focussed violations. This is particular and relevant to the ICC, through the inclusion of rape as an international crime, *per* Article 7(1)(a) of the Rome Statute.

Punishment, in the international law domain, is directed at maintaining world peace and security, and preserving world order.⁴¹⁵ In the international criminal law domain, punishment is directed at deterring and, mainly, prevention.⁴¹⁶

⁴⁰⁹ Bellelli (n33) 5 and 6 and Greenawalt (n237) 1095.

⁴¹⁰ Bellelli (n33) 5 and Bassiouni (n15) 209.

⁴¹¹ Igwe (n257) 323.

⁴¹² McGoldrick (n188) 456.

⁴¹³ See McGoldrick (n188) 458.

⁴¹⁴ McGoldrick (n188) 459-46 and Cronin-Furman (n189) 1.

⁴¹⁵ Bassiouni (n179 (2003)) 680 and Hassan (n127) 45-47, 48 and 56.

⁴¹⁶ Plato, as quoted in Hassan (n127) 48 and 57:

[N]o one punishes the evildoer under the notion, or for the reason, that he has done wrong, - only the unreasonable fury of a beast acts in that manner. But he who desires to inflict rational punishment does not retaliate for a past wrong which cannot be undone; he has regard to the future, and is desirous that the man who is punished, may be deterred from doing wrong again. He punishes for the sake of prevention...

4.5. Jurisdiction and the multiplicity of crimes

4.5.1. Jurisdiction (and the complementarity principle)⁴¹⁷

As *per* the Preamble⁴¹⁸ and Article 17 of the Rome Statute, the ICC does not undermine nor interfere with domestic means to accountability:

[T]he Court shall determine that a case is inadmissible where:

- (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
- (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted ...; [and]
- (d) The case is not of sufficient gravity to justify further action by the Court.

“[T]he principle of complementarity promotes the primary responsibility of states to criminalise, investigate, prosecute and punish was criminals.”⁴¹⁹ The complementarity principle forms the basis on which the ICC operates.⁴²⁰ And also seeks to balance state sovereignty and accountability:⁴²¹ states will maintain their ability/duty to prosecute crimes because, as stated, domestic accountability mechanism remain central to strengthening accountability and protecting the right to life; however, in the event that state sovereignty is used as a tool to perpetuate impunity, or in the event that they are unable or unwilling, the ICC will take over.⁴²² In *Prosecutor v Duko Tadic a/k/a 'Dule'*,⁴²³ the ICTY held that: the

⁴¹⁷ McGoldrick (n188) 468-469, Greenawalt (n237) 1097-1098 and Duffy (n263) 116 and 120-121, explaining the dual-prosecution and deterrent effect thereof and Dembowski (n236) 135. Generally, see Bassiouni (n232) 673, 674 and 676. However, Bassiouni (n232) 676, see further Bassiouni (n179 (2003)) Chapter 1 sections 3 and 4) submits that this principle is still in its development stages, requiring more substantive and procedural content, thus the need to link up with domestic accountability mechanisms. See also Du Plessis, Louw and Maunganidze (n263) 4 and footnote 317 above. *C.f.* Article 9(2) of the ICTY: The International Tribunal shall have primacy over national courts; and Article 8(2) of the ICTR: The International Tribunal for Rwanda shall have the primacy over the national courts of all States. Simbeye applauds the approach adopted in the both the ITCY and ICTR. He submits that given the threshold of crimes prosecuted by the ICC, it would have been only appropriate that the ICC assume primacy over national courts. See Simbeye (n234) 23 and Brown (n251) 384.

⁴¹⁸ “The State Parties to this Statute: Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions ...”

⁴¹⁹ Igwe (n257) 295.

⁴²⁰ Dembowski (n236) 135.

⁴²¹ Dembowski (n236) 140: “A balance was called for between the need to limit sovereignty in response to atrocities and the need to support sovereignty in the international political arena.” See also Cassese (n7) 11.

⁴²² Igwe (n257) 307 and Dembowski (n236) 139 and 140. In a report by Richardo Alfaro, Special Rapporteur appointed by the International Law Commission to look specifically into the international criminal court, submissions were made that state sovereignty is subordinate to the international law. See *Report on the Question of International Criminal Jurisdiction by Ricardo J. Alfaro, Special Rapporteur A/CN.4/15* <http://legal.un.org/ilc/sessions/2/2docs.htm> (accessed 14 June 2014). A position seemingly adopted by the Trial Chamber in *Prosecutor v Duko Tadic a/k/a 'Dule'* (n424 below) [42]: “sovereign rights of states cannot and should not take precedence over the right of the international community to act appropriately.” See also Bassiouni (n356) 131-132. *C.f.* *Report on the Question of International Criminal Jurisdiction by Emil*

use of state sovereignty to undermine human rights would be an injustice and would be unlawful. The court held that borders should not be used as a defence against actions that undermine humanity.

With the complementarity principle, the ICC *cannot* exercise its jurisdiction on the face of willingness and an ability to prosecute an offender, by a state.⁴²⁴ Ultimately, the end goals of complementarity is to “enhance accountability and to reduce impunity for international crimes. This will in turn enhance prevention and reduce international criminality, thus also enhancing international security, justice, and peace”.⁴²⁵

This exercise (of primary and secondary jurisdiction) is important to ensure that states do not feel undermined and dictated to, on how to deal with human rights violations and how to facilitate prosecutions- complementarily speaks to the balance between state sovereignty and an international regime that guards against the neglect of international commitments and responsibilities, and therefore, state will have the first opportunity to prosecute a suspect.⁴²⁶ Simultaneously, this exercise will ensure that states understand that accountability is primary and that if they are unwilling to undertake the necessary steps, an international mechanism will kick-in.⁴²⁷ Further, this principle is central in the survival, or demise, of the court: states support. The Court requires the cooperation of the international community in enforcing orders.⁴²⁸

Complementarity defines the relationship between the ICC and domestic courts.⁴²⁹ As stated, the complementarity principle is two folded:⁴³⁰

- 1) to ensure accountability (prosecution) all the time; and
- 2) to encourage states to establish pro-accountability jurisprudence and promote accountability through legislative means.

The ICC primarily has jurisdiction over crimes of genocide, crimes against humanity, and war crimes, and exercises this jurisdiction over persons who are nationals of a state-party to

Sandström, Special Rapporteur A/CN.4/20 <http://legal.un.org/ilc/sessions/2/2docs.htm> (accessed 14 June 2014) who felt that states were not yet ready to cede their sovereignty to any international tribunal, especially a tribunal that would exercise criminal jurisdiction. The two reports were in consensus about the need for an international criminal court, the extent to which this court will or should override state sovereignty was the only area of concern and contention. It has been said that the ICC is borne out of sensitivity to the needs of the state and their sovereignty, see Simbeye (n234) 15.

⁴²³ <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm> [58] (accessed 8 April 2014). See also Bassiouni (n15) and Simbeye (n234) 88 and 89-90.

⁴²⁴ Du Plessis, Louw and Maunganidze (n263) 6.

⁴²⁵ Bassiouni (n179 (2003)) 674.

⁴²⁶ Duffy (n263) 116, Igwe (n257) 307, Simbeye (n234) 19 and *Tadic* (n424) [58].

⁴²⁷ Igwe (n257) 307.

⁴²⁸ Igwe (n257) 307-308.

⁴²⁹ Duffy (n263) 120.

⁴³⁰ Igwe (n257) 308.

the Rome Statute triggered by a state-party referral or the Security Council pursuant to Chapter VII of the UN Charter or *propria motu* by the prosecutor.⁴³¹

“In essence, the [ICC] is intended to be a complement to national court systems, only prosecuting those crimes that are referred to it and those that individual countries cannot or will not prosecute themselves. The complementarity aspects of the Rome Statute were intended, at least in part, *to allow for flexible and adaptable national responses to violations of the crimes within the ICC jurisdiction, tailored to each nation’s particular history, culture, and legal system.*”⁴³²(Emphasis added.)

Caution has been exercised towards this principle, by certain countries, out of fear of being second-guessed by the ICC.⁴³³ The essence of the complementarity principle is well captured by Du Plessis, Louw and Maunganidze as follows:⁴³⁴

- this principle strives to create a presumption in favour of action at domestic level; and
- the ICC will rely on domestic mechanism to achieve international justice, once it has commenced wit investigations and prosecutions.

Further, in terms of Article 12(2) of the Rome Statute,⁴³⁵ the jurisdiction of the ICC extends to (1) persons who have committed a crime or crimes in the territory of a state party to the Rome Statute; and (2) persons who are nationals of a state which is a state party to the Rome Statute. Further, for those states that are not members to the treaty, consent accepting jurisdiction of the court may be granted, enabling the court to pursue its nationals.⁴³⁶ This has far reaching implications for states that are opposed to the formation of the ICC, and those that do not which to subject their nationals to the jurisdiction of the ICC, like the US for example.⁴³⁷ More damning to these states is Article 12(3) of the Rome Statute:

If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

⁴³¹ Articles 6, 7, 8, 11, 12, 13 and 24, read together with Article 17 of the Rome Statute.

⁴³² Dembowski (n236) 135.

⁴³³ Dembowski (n236) 135.

⁴³⁴ Du Plessis, Louw and Maunganidze (n263) 5.

⁴³⁵ Article 12(2) of the Rome Statute:

In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

(b) The State of which the person accused of the crime is a national.

⁴³⁶ Article 12 of the Rome Statute.

⁴³⁷ See paragraph 4.9. below.

These Articles form a strong tie and reinforces the jurisdiction of the ICC because the Court can exercise its jurisdiction on either of the fact that the crime occurred was committed on the territory of a party to the Rome Statute or that the perpetrator is a national of state party. It is submitted that primary to this extension is the location of the crime; this targets also mercenaries and persons who commit international crimes under many disguises, including ‘international humanitarian intervention’ which has been abused in recent years, and whose countries of origin are not member states to the Rome Statute. Lastly, complimentarily makes practice sense in respect of the enforcement of international criminal law.⁴³⁸

4.6. Referrals- State, UN Security Council and Prosecutor⁴³⁹

The jurisdiction of the ICC also extends by virtue of (1) state parties referrals; (2) UN Security Council referrals; and (3) the prosecutor’s initiative, according to Articles 13, 14 and 15 of the Rome Statute. According to Articles 13(1) and 14 of the Rome Statute, state parties may refer crimes to the prosecutor for investigation and prosecution. The only caveat is that the referred crime(s) should one of those within the ICC’s jurisdiction. Other than these crime(s) need not be committed within the territory of the state party, nor by a national of the state party making the referral. State referrals bypass the pre-trial chamber, should the prosecutor initiate proceedings *proprio motu*.⁴⁴⁰ The first two state referrals were from the DRC and Uganda.⁴⁴¹

The Security Council, by virtue of its Chapter VII powers, can refer a matter to the ICC.⁴⁴² The referral has a wider jurisdiction than the court because it binds all UN member states under Article 24 of the UN Charter.⁴⁴³ This, endorsed by Simbeye, then means that even countries that are not party to the Rome Statute might find themselves bound it jurisdiction by virtue of being a member of the UN.⁴⁴⁴

4.7. Permanence⁴⁴⁵

The ICC, as a permanent court, does away with the need to establish *ad hoc* tribunals in order to pursue those who violate human rights. *Ad hoc* tribunals were often created by the UN Security Council, bringing into question the legitimacy of *ad hoc* tribunals.

⁴³⁸ Greenawalt (n237) 1097.

⁴³⁹ Nsereko (n43) 266-273. *C.f.* Bassiouni (n232) 128 who raises concerns about the interdependency between crime and politics.

⁴⁴⁰ Article 15 of the Rome Statute.

⁴⁴¹ Nsereko (n43) 267.

⁴⁴² Article 13(b) of the Rome Statute.

⁴⁴³ Article 24(1) of the UN Charter: In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

⁴⁴⁴ Simbeye (n234) 17 and 18-19.

⁴⁴⁵ McGoldrick (n188) 453-456.

The permanence of the ICC ensures certainty, predictability, regularity, consistency, a strong precedent, legitimacy and credibility.⁴⁴⁶ Further, the permanence of the ICC speaks to an ever presence element that will tackle impunity, and that will pursue to hold those who violate the rights of others accountable.⁴⁴⁷

4.8. Accountability and human right⁴⁴⁸

Although the primary objective of the ICC is to bring those who have committed international crimes to account, it remains in its best interest to have due consideration for human rights law: “The theory of international criminality concentrates on human wrongs, while the international protection of human rights focuses on guarantees and statutory protection afforded by treaties and conventions.”⁴⁴⁹

4.9. Resistance from the African community⁴⁵⁰

As indicated above, the wide-reaching jurisdiction of the ICC, primarily by extension of the location where the crime was committed and secondary by extension of the perpetrator being a national of a member state to the Rome Statute, did not sit well with countries such as the United States (US). This led to the US concluding bilateral immunity agreements with various countries, including African countries. These agreements, in the form of the American Service Members’ Protection Act of 2 August 2002,⁴⁵¹ would ensure that states undertake not to surrender any US citizen in their territory to the ICC. This piece of legislation also enables the US President to use force, if necessary, to free any US service member that might be held by the court.⁴⁵² Although this was a US enacted legislation, the fact that the US provides aid, financial and otherwise, to many African countries, this served as incentive for many these countries to conclude these agreements with the US- 17 African countries had concluded these agreements by December 2003.⁴⁵³ This agreement is similar to a resolution reached at the AU’s *Extraordinary Session of the Assembly of the African Union* (AU) in October 2013- see below.⁴⁵⁴ As submitted, by Nsereko and Johansen, these

⁴⁴⁶ McGoldrick (n188) 456.

⁴⁴⁷ Nsereko (n43) 258.

⁴⁴⁸ Friedlander (n359) 22. See also Pocar (n359) 67-74, Bantekas and Nash (n235) 18-19 and Bassiouni (n15) 193 and de Than and Shorts (n398) 12-13.

⁴⁴⁹ Friedlander (n359) 22. See also Pocar (n359), Sadat (n202) 52 and Meron (n352) 67 and 69.

⁴⁵⁰ D Tladi ‘The African Union and the International Criminal Court: The battle for the soul of international law’ 34 *South African Yearbook on International Law* (2009) 57, du Plessis, Louw and Maunganidze (n263) 1 and M du Plessis ‘Bringing the International Criminal Court home – the implementation of the Rome Statute of the International Criminal Court Act 2002’ 16 *South African Journal of Criminal Justice* (2003) 1. See also S Bryce-Pease ‘Botswana pledges its support to ICC’ <http://www.sabc.co.za/news/a/b1e69c00414c8a8896a6973895839b19/Botswana-pledges-its-support-to-ICC-20131001> (accessed 1 October 2013).

⁴⁵¹ See <http://www.house.gov/legcoun/Comps/aspa02.pdf> (accessed 8 March 2014).

⁴⁵² See also Nsereko (n43) 261.

⁴⁵³ Nsereko (n43) 261. Funds were withheld for over 5 African countries that refused to enter into these agreements.

⁴⁵⁴ http://www.au.int/en/sites/default/files/Ext%20Assembly%20AU%20Dec%20&%20Decl%20_E_0.pdf (accessed 18 March 2014).

agreements undermine the integrity of the ICC and the dignity of the countries concerned, and also efforts by the international court to address an international scourge of impunity and also efforts to foster a culture of accountability.⁴⁵⁵

At its inception, the ICC enjoyed support from many Africa countries and the AU, with 24 African countries having ratified the Statute in June 2002.⁴⁵⁶ The ICC enjoyed much support at regional level, particularly from SADC.⁴⁵⁷ SADC went to extreme measures to affirm its support for the ICC, such measures included adopting the ‘Principles of Consensus on the Court’ in 1997 and the ‘Pretoria Statement of Common Understanding on the ICC’ in 1999. These adoptions would then see SADC countries take positive actions to domestically incorporate the Rome Statute; and share information on this process with other member states.⁴⁵⁸

An issue that has proved to be a thorn between the ICC and the AU is the indictment of President Omar al-Bashir of Sudan. The AU had, on previous occasions invoked Article 16 of the Rome Statute to pursue the deferral of the prosecution and investigation of al-Bashir.⁴⁵⁹ Further, on 3 July 2009, the AU resolved that member states should not give effect to the international arrest warrant issued by the ICC for al-Bashir.⁴⁶⁰ This squabble between these two institutions poses many questions and dilemmas for both states and Africans. One of the questions is: which obligation - between that owed to the ICC and the AU - should a member state execute? This obviously goes against state parties’ duty to arrest and surrender suspects to the ICC and to cooperate with the ICC with respect to investigations and prosecutions.⁴⁶¹

⁴⁵⁵ Nsereko (n43) 262 and 273 and R Johansen ‘The impact of US policy towards the International Criminal Court on the prevention of genocide, war crimes, and crimes against humanity’ 28 *Human Rights Quarterly* (2006) 301. Nsereko (n43) 262 (footnote 23) takes the argument further and says that:

By entering into those agreements, state parties incapacitate themselves from co-operating fully with the Court as required under [Article] 86 of the Rome Statute. Yet, [Article] 18 of the Vienna Convention of the Law of Treaties also obliges parties to a treaty to refrain from acts which ‘would defeat the object and purpose of a treaty’.

See also Coalition for the International Criminal Court ‘Is bilateral immunity agreements or so-called ‘Article 98’ agreements’ http://www.iccnw.org/documents/FS-BIAs_Q&A_current.pdf (accessed 17 April 2014).

⁴⁵⁶ See Nsereko (n43) 257.

⁴⁵⁷ SADC consists of the following countries: Angola, Botswana, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

⁴⁵⁸ Nsereko (n43) 257.

⁴⁵⁹ Article 16: Deferral of investigation or prosecution:

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

See also Du Plessis, Louw and Maunganidze (n263) 3.

⁴⁶⁰ Decision on the meeting of African states parties to the Rome Statute of the International Criminal Court (ICC) Doc Assembly/AU/13(XIII) http://www.au.int/en/sites/default/files/ASSEMBLY_EN_1_3_JULY_2009_AUC_THIRTEENTH_ORDINARY_SESSION_DECISIONS_DECLARATIONS_%20MESSAGE_CONGRATULATIONS_MOTION_0.pdf (accessed 18 March 2014) 1-3 and Du Plessis, Louw and Maunganidze (n263) 3.

⁴⁶¹ Du Plessis, Louw and Maunganidze (n263) 6 and 7 who notes some of the impasses this court will have to deal with, which include, the overlapping jurisdiction this court will have with the ICC; the availability of resources; and the obligations African members states already have with the ICC, and those they will have with this court. Article 25(5) of the African Charter on Democracy Elections and Governance reads: Perpetrators of unconstitutional change of government may also be tried before the competent court of the Union.

This, it is submitted, is the most important obligation. African states owe an obligation to their citizens to ensure that serious violations are investigated and prosecuted.

Further, matters stand to be complicated by the prospects of an *African Court of Justice and Human Rights*, which is proposed to address criminal matters within the continent- the AU Commission submits that this court is motivated by *inter alia*, the abuse of the principle of universal jurisdiction and the need to give effect to Article 25(5) of the African Charter on Democracy Elections and Governance.⁴⁶² The prospects of this Court are bleak for various reasons including: the source of funding for the Court be become operational and sustain itself, the procedures to be adopted by the Court, and the already existing mechanism and agreements with the ICC African states have. Therefore, calls for such an institution should be dismissed as it is a means divert attention away from an already existing accountability mechanism.

The latest assault on the ICC by the AU came at the AU's *Extraordinary Session of the Assembly of the African Union* in October 2013.⁴⁶³ At this *Session*, very controversial resolutions were taken, *inter alia*:

- that no charges shall be commenced or continued before any International Court or Tribunal against any serving AU Head of State or Government or anybody acting or entitled to act in such capacity during their term of office.⁴⁶⁴

What kind of system permits for violations to occur on the basis that the perpetrator is a sitting head of state? It is submitted that this cannot be correct. State officials are *not* immune to the ICC's jurisdiction; and it is unlawful for heads of state to be immune from serious human rights violations.⁴⁶⁵

⁴⁶² Du Plessis, Louw and Maunganidze (n263) 6. See also the Protocol on the Statute of the African Court of Justice and Human Rights http://www.au.int/en/sites/default/files/PROTOCOL_STATUTE_AFRICAN_COURT_JUSTICE_AND_HUMAN_RIGHTS.pdf (accessed 13 March 2014). See also Green (n350) 261, who suggested that, a regional system of international criminal law might be more successful than a universal one, This, according to Green, will give regions the opportunity to develop their own views on international criminality and justiciability, and the realisation that there might be an overlap with other regions. Green contends that this might be the only way in which an international criminal court may command universal respect and compliance.

⁴⁶³ http://www.au.int/en/sites/default/files/Ext%20Assembly%20AU%20Dec%20&%20Decl%20_E_0.pdf (accessed 18 March 2014).

⁴⁶⁴ Such a resolution clearly flies in the face of Article 27 of the Rome Statute, which provides that:

- (1) This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official *shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.* (Emphasis added.)
- (2) Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

See also Article 7 of the Nuremberg Charter: The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

⁴⁶⁵ Simbeye (n234) 2.

Further resolutions were:

- that the trials of President Uhuru Kenyatta and his deputy, William Ruto, be suspended by the ICC until they complete their terms of office;
- that any AU Member State inform and seek the advice of the African Union before referring a matter to the ICC; and
- that Kenyatta abstain from appearing before the ICC.

The only way these immunities could be surpassed is for states to surrender, even their own officials, persons wanted for violating international law, as the United Kingdom did with General Pinochet, former head of state of Chile.⁴⁶⁶

4.10. Conclusion

The ICC has positioned itself as a modern day tribunal with the benefit and hindsight of previous *ad hoc* tribunals. The ICC has positioned itself to enforce intentional criminal law and values, including the right to life, cherished by the international community; and to send a strong message that those who violate the rights of others will not be immune from prosecution.⁴⁶⁷ This is set against the backdrop of inefficient mechanisms liable for delivering accountability.

The ICC is also set to fight impunity at all cost, but within the confines of the rule of law, and the total observation of international law. The structure of the ICC directly confronts some of the difficulties experienced by domestic institutions, in the sense that, the notion of “victors’ justice” cannot be argued as a defence or loophole in the pursuit of accountability. However, this is done within the ambits of cooperation between the ICC and domestic courts: complementarity. This cooperation serves to strengthen means to eradicate impunity in all forms it manifests itself, particularly at domestic level. This cooperation is dual-phased: deter or the ICC will deter; and by domestically seeking accountability, legitimacy over the domestic system(s) grows, and the rule of law is restored. Further, the nature of crimes under the jurisdiction of the ICC is illustrious on the extent the ICC is intent on addressing international crimes, and fostering a culture of accountability.

Further, the crimes under the jurisdiction of the ICC are well defined and their elements indicate to crimes of international concern. The prosecution of these crimes is directed at serious human rights violations and violators. The objectives of international criminal justice are well structured to confront and challenge threats to the right to life in the twenty-first century. These objectives are co-ordinated to the extent that the violation of set international norms is met with international prosecution. The multiplicity of avenues for lodging complaints of human rights violations before the ICC speaks to an open forum that has different interests at heart.

The resistance experienced by the ICC from the African community and leaders should be treated with the utmost contempt. Such resistance is intended to cover gross human rights

⁴⁶⁶ *Pinochet* (n352). See also section 23(1) of the (United Kingdom’s) International Criminal Court Act of 2001: Any state or diplomatic immunity attaching to a person by reason of a connection with a state party to the ICC Statute does not prevent proceedings under this Part in relation to that person.

⁴⁶⁷ *Olasolo* (n216) 8.

violations and shield perpetrators from accountability. Africa's position on violence is incompatible with its position on holding perpetrators accountable. Therefore, the ICC should be embraced and appreciated, in this setting. Further, until such time violence on the continent is neutralised and accountability is a norm, the ICC should remain the first point of reference. Therefore, the ICC is the ideal accountability mechanism to eradicate impunity and better current accountability mechanisms.

Conclusion

Since time in memorial, violence has been used to foster ideologies and replace existing orders, and Africa has been no exception to this phenomenon. Apart from other factors canvassed in paragraph 1.2. above as to the causes of violence, when interpersonal violence is addressed, three factors stand out: economic factors; social factors and cultural factors.⁴⁶⁸ As shown above, when economic loss or gain is at stake for all the parties involved in violence, violence is seen to be a measure of last resort, if any.⁴⁶⁹ Further, it has been shown that the marginalisation of a group of people from the daily activities of a society can lead to violence on an interpersonal level. Therefore, to lessen cases of violence the inclusion of all groups creates an environment conducive for peace. Culture also plays an important role in the collective outlook of violence. People of different backgrounds have a predisposition to violence towards each other.⁴⁷⁰ On the African continent particularly, leading causes of violence have been: the arbitrary nature territorial borders have been drawn; the divide of people according to ethnicity; bad governance; and a culture hostile to the human rights discourse. However, as submitted by various authors, see paragraphs 1.4. and 1.5. above, with the advent of human rights and the significance of commerce in various societies, violence has declined, globally.⁴⁷¹

The use of violence is incompatible with the realisation and protection of the right to life. The right to life assumes two principles: a right not to have one's life arbitrarily violated; and the right to have one's life protected, the *respect* and *ensure* effect. And where it is found that the right to life was neither *respected* nor protected, accountability ought to follow as a cardinal characteristic of the right to life.⁴⁷²

Accountability is best explained by its goals- *justice; truth; punishment and deterrence; and reconciliation*. *Justice* reaffirms that norms, upon violation, attract punishment. *Truth* is initiating the necessary investigation into the violated norm. *Punishment and deterrence* entails the legacy of bringing the perpetrator to account and ensuring that similar violations do not occur again in the future. *Reconciliation* is rebuilding accountability structures, the legal order and democracy.

International prosecution has been recognised as a modern mean to confronting human rights violations.⁴⁷³ The role of human rights in international criminal law is primary given the nature of violations that occur outside the context of armed conflict, and thus beyond the reach of international humanitarian law. Human rights serves to fill the gap that exist between international criminal law and international humanitarian law.⁴⁷⁴ Equally, the advent of human rights in both the domestic and international setting cannot be overlooked when

⁴⁶⁸ Cooney (n37) 382-386

⁴⁶⁹ Cooney (n37) 382-384.

⁴⁷⁰ Cooney (n37) 385-386.

⁴⁷¹ Bassiouni (n15) 205.

⁴⁷² Brown (n251) 386

⁴⁷³ Seibert-Fohr (n7) 1.

⁴⁷⁴ Seibert-Fohr (n7) 3 and 4.

considering the decline of violence globally and, to some extent, in Africa. The promotion and protection of human rights by various governments played a pivotal role in the protection of the right to life. Therefore, the relationship between human rights and international criminal justice is important as it forms the basis of the nature of violations, subsequent investigations and the need for punishment, and enforcement. This relationship further informs the standard necessary for the protection for human rights- the right to life.⁴⁷⁵

Although *ad hoc* and domestic prosecutions are advantageous in some respects and laid the foundation for the ICC and international criminal justice, their mandate is very limited and specific, leaving room for unspecified violations or violations outside their scope of jurisdiction.⁴⁷⁶ To effectively promote and protect the right to life involves efficient accountability mechanisms. And when such mechanisms are ineffective, impunity thrives and violations continue to occur. Therefore, it is important to have accountability mechanisms that are channelled to protect the right to life, eradicate impunity and implement international criminal law. The ICC and the Rome Statute are important institutions for regulating serious human rights violations and the development of international crimes. Further, these institutions are important for purposes of consolidating human rights and international criminal law.⁴⁷⁷ International criminal justice is premised on an understanding that serious crimes should not go unpunished and that accountability should be a norm- global justice.⁴⁷⁸

The attitude of African states towards the ICC continues to blur the lines between the need for accountability and political expediency.⁴⁷⁹ For many decades Africa has placed political expediency at the front and at the expense of many lives. This status *quo* cannot be maintained in the face of mass loss of life.⁴⁸⁰ Amnesties and immunities, for whatever reason, are an affront to international law.⁴⁸¹

⁴⁷⁵ Seibert-Fohr (n7) 5, Bassiouni (n179 (2003)) 674 and Bassiouni (n15) 207, 209-210: “The continued resort to international criminal law as a method of enforcing internationally protected human rights will be no more effective with respect to these types of violations than with respect to other international criminal violations unless workable enforcement mechanisms are instituted.”

⁴⁷⁶ Roht-Arriaza (n218) 286-288 and Brown (n251) 386.

⁴⁷⁷ Pocar (n359) 67-68

⁴⁷⁸ Seibert-Fohr (n7) 1.

⁴⁷⁹ G Gallon ‘The Intentional Criminal Court and the challenge of deterrence’ in D Shelton (ed) *International crimes, peace, and human rights: the role of the International Criminal Court* (2000) Transitional Publishers: New York 93, Schiff (n5) 35 and Roht-Arriaza (n218) 286-288. *C.f.* D Sarooshi ‘The peace and justice paradox: the International Criminal Law and the UN Security Council’ in D McGoldrick, P Rowe and E Donnelly (eds) *The permanent International Criminal Court: legal and policy issues* (2004) Hart publishing: Oregon 106.

⁴⁸⁰ Igwe (n257) 322.

⁴⁸¹ Bassiouni (n179 (2003)) 690 and Simbeye (n234) 91.

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