INTERNATIONAL CRIMES: PROSECUTIONS AND PUNISHMENT

Kingsley N. Ogbaegbe
&
David Ike

Abstract
Various techniques exist, whereby regime may be evaluated in terms of selection of enforcement of decisions from International Criminal Tribunals. One of such possible methods, for example, is to approach the regime from the point of view of its ability to protect the human rights of defendants. Though a fruitful line of enquiry, this is not the framework adopted in this paper. The method adopted and advocated herein is that which is derived from one of the cardinal principles of law, embedded and derived from the rule of law. This is particularly unique and suited for investigating a legal regime, in that the rule of law is ‘an important virtue which legal systems should possess and be accountable thereto. An academic and legal dissect of the concept of international crime, its prosecution and punishment were done, with particular bias to its legitimacy and selectivity, vis a vis the rule of law. Its impact on the African Union, the ICC and other International Instruments were x-rayed with the conclusion that to de-foster selectivity in prosecution and enforcement of crimes of international flavour, regional entities should be vested jurisdiction to pursue matters of prosecution and enforcement for crimes of international magnitude.

Keywords: Prosecution, International Crimes, Punishment, Rule of Law, Human Rights

1. Introduction
International law typically governs the rights and responsibilities of States;¹ criminal law, conversely, is paradigmatically concerned with prohibitions addressed to individuals, violations of which are subject to penal sanction by a State.² The development of a body of international criminal law which imposes responsibilities directly on individuals and punishes violations through international mechanisms is relatively recent. It was not until the 1990s, with the establishment of the ad hoc Tribunals for the former Yugoslavia and for Rwanda, that it could be said that an International Criminal Law regime had evolved. This is a relatively new body of law which is not yet uniform, nor is its courts universal. International criminal law developed from various sources. War crimes originated from the ‘laws and customs of war’, which accord certain protections to individuals in conflict situations. Genocide and crimes against humanity evolved to protect persons from gross human rights abuses including those committed by their own governments. With the probable exception of the crime of aggression with its focus on inter-State conflict, the

Concern of international criminal law is now with individuals and with their protection from wide-scale atrocities.

Timothy McCormack rightly notes that ‘there is a dual selectivity on the part of the international community. This selectivity is first found in relation to the acts the international community is prepared to characterize as “war crimes” and secondly, in relation to the particular alleged atrocities the international community is prepared to collectively prosecute.'

This paper deals with the second part of McCormack’s critique, selectivity ratione personae; offering clear suggestions on changing landscape and pathways to possible solutions to impediment on agreeable grounds for prosecution of heinous national crimes, which undisputedly, dwells on what selective enforcement involves.

Kenneth Kulp Davis helpfully explains selectivity as connoting when an enforcement agency or officer has discretionary power to do nothing about a case in which enforcement would be clearly justified; the result is a power of selective enforcement. Such power goes to selection of parties against whom the law is enforced. Selective enforcement may also mean selection of the law that will be enforced; an officer may enforce one statute fully, never enforce another and pick and choose in enforcing a third. Selective enforcement of the law is not inherently wrong. The idea of prosecutorial discretion is established in many legal systems, in particular those in the Common Law or French-styled ‘civilian’ systems. In ‘civilian’ systems following the German model the legalitatprinzip notionally requires the mandatory prosecution of all offences, but in practice there are frequent exceptions, in particular for minor offences.

The reason for the legalitatprinzip is a worthy one: that political influence or expediency should not interfere with the equal application of the law. However, as Kai Ambos notes, practicality means that ‘even if a strict mandatory prosecution is called for there are mechanisms of factual discretion since no criminal justice system has nowadays the capacity to prosecute all offences no matter how serious they are’. The question is therefore not whether selective prosecution should occur, as it is essentially impossible.

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4 Ibid.
8 Ibid.
9 Ibid.
that it does not, but when selective enforcement is unacceptable. One answer would be when there is a duty to prosecute all such offences. It should not be forgotten that whenever a crime goes unpunished, there is an un-righted wrong to the victim and to the relevant society.

The critique of selective enforcement relates at the more general level to arbitrariness, part of which is taking irrelevant criteria into account. This also includes discrimination, which is the taking into account of irrelevant and illegitimate criteria. This comprises cases where a political body interferes with a duly authorised prosecutor applying standards applied to all other cases. The underlying value implicated is equality: equality before the law and before courts and tribunals. This is a right accepted at the international level and is clearly an appropriate criterion against which to evaluate a criminal enforcement regime.

There are two aspects of selectivity, namely, *ratione personae*; the first legal, and the second legitimacy-based. The legal element of selectivity challenges was explained by the Appeals Chamber of the ICTY in the ‘Celebići appeal. In the course of rejecting Esad Land’zo’s claim that enforcement was unfairly selective the Appeals Chamber enunciated a general test for a plea of selective enforcement to be accepted at the ICTY. The test was enunciated as requiring the bringing of evidence ‘(i) establishing an unlawful or improper (including discriminatory) motive for the prosecution and (ii) establishing that other similarly situated persons were not prosecuted’. This is a high threshold, similar to that usually adopted in common law systems.

Proving a motive in particular is very difficult, although an improper, (or unlawful) motive may be evidenced by showing that the prosecutor has violated his or her duty of impartiality. The ICTY, ICTR and ICC prosecutors all have an obligation to be independent, and not take instruction from any outside source. This standard concentrates on the prosecutor rather than those defining the jurisdiction. It would not have been possible, for example, for Land’zo to argue in the ‘Celebići appeal that he could not be prosecuted because no similar tribunal had been set up by the Security

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10 Ibid.
16 *Article 16(2) ICTY Statute, Article 15(2) ICTR Statute, Article 42(1) Rome Statute.*
Council for Chechnya, for example.\textsuperscript{17} The ‘ Celebi’ ci Appeal decision expressly noted that ‘in many criminal justice systems, the entity responsible for prosecutions has finite financial and human resources and cannot realistically be expected to prosecute every offender which may fall within the strict terms of its jurisdiction’.\textsuperscript{18} The Appeals Chamber thus put the focus on the charging stage, rather than the earlier stage of defining a court’s jurisdictional ambit. It is the purpose of this paper to convincingly assert that the involvement of regional entities in the prosecution, enforcement and actualization of punishment for international law-based crimes is imperative and desirable.

2. Prosecution of International Crime
The determination whether to prosecute follows adversarial principles, in that the Prosecutor is the only one who may initiate a trial by submitting an indictment; a judge or Chamber cannot do so. Furthermore, the ultimate responsibility for the content of the indictment rests with the Prosecutor.\textsuperscript{19} However, there are also different forms of judicial review. One review common to all international jurisdictions is the confirmation of the indictment.

At the ICTY (International Criminal Tribunal for the former Yugoslavia) and ICTR (International Criminal Tribunal for Rwanda), the Prosecutor must prepare an indictment and transmit it to a judge of a Trial Chamber ‘upon the determination that a prima facie case exists’.\textsuperscript{20} In practice, this determination is subject to an extensive scrutiny process within the Office of the Prosecutor. In practice, this has not been interpreted as an obligation to prosecute and the general prosecution strategy (to focus on those bearing the greatest responsibility) has guided the decisions.\textsuperscript{21} Judicial screening of new indictments was introduced as part of ICTY’s completion strategy.\textsuperscript{22}

The provisions of the ICC Statute are different, stating the conditions under which there can be no prosecution.\textsuperscript{23} The conditions relate to a suspicion of crime sufficient for an arrest warrant, the admissibility of the case, and an assessment of ‘the interests of justice’. A decision not to prosecute is subject to judicial review by the Pre-Trial Chamber under

\textsuperscript{17} Indeed, the broader point was also mentioned by the ’ Celebi’ ci Appeal, para. 618, that the appropriate remedy to a valid claim of selective enforcement of such serious crimes as international crimes is not the overturning of conviction.

\textsuperscript{18} Ibid.


\textsuperscript{20} Art. 18(4) of the ICTY Statute and Art. 17(4) of the ICTR Statute.

\textsuperscript{21} Indeed, Trial Chambers have accepted the withdrawal of indictments in cases where the statutory conditions for the indictment were met but the case did not fall under the (new) prosecutorial strategy, e.g. Sikirica and Others ICTY T.Ch. 5.5.1998.


\textsuperscript{23} Art. 53(2) of the ICC Statute.
the same terms as a decision not to commence an investigation. The Prosecutor may reconsider a decision not to prosecute. Here equally, the decision whether to prosecute is subject to discretion and no obligation to prosecute is prescribed. The prosecutorial strategy regarding cases to pursue applies. The question of prosecutorial discretion, including its limits and judicial supervision, has been the subject of considerable debate, often with reference to domestic practice. The question of improperly exercised (selective) discretion was raised in Delalic´ et al. The Appeals Chamber concluded that the ICTY Prosecutor has a broad discretion concerning initiation of investigations and preparations of indictments, but also that there are limitations, particularly the statutory requirements of prosecutorial independence and equality before the Tribunal (that is to say the law). Since it was not established that the Prosecutor had any discriminatory or otherwise unlawful or improper motive, the challenge was dismissed.

3. Punishment for International Crime
The ICTY and ICTR have emphasized that sentencing is an essentially discretionary responsibility; no sentencing scales for the different crimes are provided. Consequently, the ICTY Appeals Chamber has repeatedly refused to set down a definite list of sentencing guidelines. While emphasizing the principle of equal treatment, that is to say consistency, the Appeals Chamber has also concluded that a comparison with the sentences imposed in other cases before the Tribunal is often of limited assistance; the previous decision must relate to the same offence and the circumstances be substantially similar. In fact, the sentencing practice of the ICTY and ICTR has not been consistent, neither within the same Tribunal nor between them.

Most important for sentencing at the Tribunals is the gravity of the offence, including considerations regarding the form and degree of the participation of the accused in the crimes and the circumstances of the case. Lacking any formal hierarchy of crimes, advocated by some as necessary for sentencing, the Tribunals have taken a case-by-case approach. Due to the special mens rea requirement, however, genocide has generally

24 Ibid., Art. 53(3); see section 17.5.
25 Ibid., Art. 53(4).
27 Delalic´ et al. ICTY A.Ch. 20.2.2001 paras. 596–618.
31 Art. 24(2) of the ICTY Statute and Art. 23(2) of the ICTR Statute.
been regarded as more serious than crimes against humanity and war crimes. Similarly, persecution has been considered ‘inherently very serious’, justifying a more severe penalty. Although not uncontroversial, crimes against humanity and war crimes are seen as equally serious in principle. However, the Tribunals’ broad acceptance of cumulative convictions reduces the legal importance of a hierarchy of crimes. Moreover, the form of responsibility is also important and both Tribunals have established that aiding and abetting generally warrants lower sentences than co-perpetration. But an abstract ranking and comparison are not decisive; the punishment always depends on the facts of the case. Additionally, the Tribunals are required to take into account the individual circumstances of the accused and give credit for time already spent in detention. Similar provisions and principles are applicable to the ICC, although the RPE give some further direction.

In practice, and in spite of the general seriousness of the crimes, the final sentences imposed by the ICTY and ICTR have had a very broad span from three years to life. Life sentences have been meted out in a number of ICTR cases regarding genocide and more rarely by the ICTY for, inter alia, crimes against humanity.

4. Selectivity, Legitimacy and the Rule of Law
The relatively narrow legal limits placed on prosecutorial discretion do not exhaust the ways in which selectivity is used to critique international criminal law. A broader legitimacy/rule of law-based evaluation can be made of international criminal law. Gerry Simpson notes that ‘each war crimes trial is an exercise in partial justice to the extent that it reminds us that the majority of war crimes remain unpunished. If Yugoslavia, why not Somalia, if Rwanda, why not Guatemala?’ Similar concerns have also led to sharp comments from the more positivistically inclined. Alfred Rubin makes the point pithily: ‘unless the law can be seen to apply to George Bush (who ordered the invasion of

35 E.g. Tadic ICTY A.Ch. 26.1.2000 para. 69. Earlier decisions, however, considered crimes against humanity as more serious and carrying a higher penalty than war crimes, e.g. Tadic ICTY T.Ch. II 14.7.1997 para. 73, and Erdemovic ICTY A.Ch. 7.10.1997 (majority) paras. 20–6.
36 Ibid.
38 Art. 24(2) of the ICTY Statute, Art. 23(2) of the ICTR Statute, and r. 101 of the respective RPE.
39 Art. 24(2) of the ICTY Statute, Art. 23(2) of the ICTR Statute, and r. 101 of the respective RPE.
40 E.g. Akayesu ICTR A.Ch. 1.6.2001, and Stakic ICTY T.Ch. II 31.7.2003 (but replaced on appeal by a fixed-term sentence of forty years: A.Ch. 22.3.2006).
Panama) as well as Saddam Hussein (who ordered the invasion of Kuwait), it will seem hypocritical again."

In a similar key, Ian Brownlie has recently lamented: ‘political considerations, power and patronage will continue to determine who is tried for international crimes and who not.’ What these critiques share is an ideal of legitimacy and the rule of law.

5. African Union Situation on Selectivity
Selectivity mostly can be perceived to be an African Union major concern, as AU argues that international criminal tribunals prefers targeting Africa and their suggestion clearly to have alleged crime cases tried at either African sub-regional level or international level, what remains important is not who tries the crimes but rather that the perpetrator(s) are held accountable for their criminal acts. This critic is of the view that if any mechanism can offer justice than it could be explored and issues of selectivity enforced on part of AU state will be reduced. Howbeit, in current circumstances wherein the trials can be compromised then probably the international tribunal can offer the solution acceptable at African Union level. Imperatively, what is important for the victims and society is that justice is achieved through any mechanism that works best and transparent at either the national or international level.

Though the International tribunals are considered by most African leaders as a ‘political mechanism’ to align African States, it is necessary to remember that crimes have been acted out in a number of African countries as well as in other countries that are being investigated by the international tribunals. Therefore, the need for accountability from the perpetrators who have committed unacceptable crimes of international concern. International law enforcement tritely operates on the principle of complementarity, if the national and sub-regional mechanisms can offer justice to the victims without being compromised, then we can, for instance, advocate for the expansion of the jurisdiction of the East Africa Court of Justice and African Commission on Human and Peoples’ Right to try the heinous crimes, perhaps this approach can ease out issues of selectivity in enforcement, as African state and AU will feel a sense of level play in the prosecution of its former leaders.

6. Enforcement Challenges of International Tribunal Decisions
A major challenge is that sentence imposed by a Tribunal or the ICC can only be served in a State which has declared its willingness to enforce the sentence. Ironically, this can only be a voluntary undertaking by States and may have conditions attached, for example regarding the nationality of the prisoner, acceptance of only a limited number of prisoners, or retention of a right to accept or reject in each individual case. Another

42 Alfred P. Rubin, International Crime and Punishment (Fall 1993) 34 NI 73, 74.
44 Art. 27 of the ICTY Statute, Art. 26 of the ICTR Statute, and Art. 103 of the ICC Statute.
challenge is that separate enforcement agreements with detaining must be agreed with tribunal. The Tribunal President or the (collective) ICC Presidency designates the State of enforcement in the individual case. 45

The enforcing State may not modify the length of the sentence. Consequently, the State may not decide questions of pardon, commutation of sentence and early release, without the approval of the Tribunal or Court. 46 At times disapproval of an impending domestic measure may cause a transfer of the enforcement to another State. 47 The conditions of imprisonment will be in accordance with domestic law, but subject to the supervision of the respective Tribunal or Court. 48 The ICC Statute additionally requires compliance with ‘widely accepted international treaty standards governing treatment of prisoners’ and no better or worse treatment than other prisoners convicted of similar offences. 49

The ICC Statute also provides for the obligatory enforcement of fines, forfeiture orders and reparation orders by national authorities at the request of the Court. 50

Here too, the State of enforcement must not modify the fines or orders. Enforcement by national authorities is also foreseen concerning restitution of property or the proceeds thereof to victims at the ICTY and ICTR. 51

The ICC Statute distinguishes between international cooperation and enforcement in spite of the close relationship between the two. While enforcement of prison sentences differs in that it is voluntary, enforcement of the other specified orders is not and it has been argued that certain cooperation provisions of Part 9 should apply by analogy also to obligations regarding the latter. 52

7. Selectivity in International Criminal Law

Although the emergence of the international criminal law regime can be dated to the 1990s, the creation of the regime occurred against a backdrop of claims of selective

45 R. 103 of the ICTY RPE and ICTR RPE, rr. 198–206 of the ICC RPE and regs. 113–15 of the ICC Regulations.
46 Art. 28 of the ICTY Statute, Art. 27 of the ICTR Statute, and Arts. 105(1) and 110(1) of the ICC Statute. Hence, Art. 103(2) of the ICC Statute, and the tribunal enforcement agreements, provide for notifications and consultations on matters which could affect the terms or extent of the imprisonment.
47 See Art. 104 of the ICC Statute and rr. 209–10 of the ICC RPE. Transfer for this reason may also be ordered by the ICTY and ICTR but is not explicitly provided for in the statutes or RPEs.
48 Art. 27 of the ICTY Statute, Art. 26 of the ICTR Statute, and Art. 106 of the ICC Statute.
49 Art. 106(2) of the ICC Statute. Similarly, a standards requirement is included in the tribunal enforcement agreements.
50 Ibid., Arts. 75 and 109. See also rr. 212, 217–22 of the ICC RPE and reg. 116 of the ICC Regulations
51 R. 105 of the ICTY RPE and ICTR RPE.
52 Claus Kress and Göran Sluiter, ‘Enforcement, in Cassese, Commentary, 1752 and 1831.
enforcement of the law. To evaluate the regime fully, it is necessary to look at developments prior to that date, to see the extent to which the modern regime represents an improvement over what went before. State practice reveals highly selective enforcement of international crimes, at least until recently. This has occurred in various ways. The Acts brought in by the United Kingdom and Australia for prosecution of offences committed in the Second World War effectively prevent Allied actions being prosecuted. The UK War Crimes Act 1991 was brought in to deal with Axis offenders found in the United Kingdom, and jurisdiction is limited to offences committed ‘in a place which at the time was part of Germany or under German occupation’. Although this could notionally cover alleged Allied offences such as the bombing of Dresden, the possibility of such charges is beyond remote. The Australian War Crimes Amendment Act of 1988 was expressly selective, limiting jurisdiction to the European sphere of the Second World War, where few Australians fought. Earlier drafts, which could possibly have been used to prosecute Australians, were rejected.

Although both the UK and Australian Acts have now been supplemented by International Criminal Court Acts for more modern offences, the problem remains for offences prior to the entry into force of those acts, both of which apply only prospectively. The Canadian War Crimes and Crimes against Humanity Act permits prosecution for offences prior to the Act’s coming into force so long as the offences were customary at the time of commission. However, this is possible only for offences committed outside Canada. Allegations of offences committed in Canada (such as suggestions that forcible transfers of Aboriginal children in the 1950s amount to international crimes) are not cognisable under the Act.

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58 Ibid.
59 Ibid.
8. The International Criminal Court

Unlike the tribunals already discussed, the ICC was not set up with one conflict in mind. It is not an *ad hoc* reaction to a single conflict. However, the jurisdictional regime of the ICC, alongside its relationship with the Security Council, may mean that it may not fully escape claims of selectivity on the basis of its jurisdiction. This is because unless the Security Council acts, the ICC’s writ does not run throughout the globe.

Some of the States negotiating at the Rome conference wanted the ICC to be empowered to assert universal jurisdiction as of right. There is no reason in law why this could not have been the case.\(^{61}\) Politically, though, this was impossible. It was on this issue that the Rome Conference consensus finally failed.\(^{62}\) As a result, pursuant to Article 12 of the Rome Statute the Court is given jurisdiction first of all over offences committed on the territory of, or by a national of, one of the States party.\(^{63}\) Even this more limited jurisdiction has provoked controversy; the US view is that by asserting jurisdiction over nationals of non-party States the Rome Statute violates international law.\(^{64}\) The US view is unpersuasive. All countries have the right to exercise territorial jurisdiction and there is no evidence of a prohibitive rule of international law which forbids the passing of such jurisdiction to an international organisation that has the necessary fair-trial guarantees.\(^{65}\) As a result of Article 12 the ICC has jurisdiction over a larger personal, temporal and geographical range than the *ad hoc* Tribunals, but States can choose to remain outside of this regime to a large extent by not ratifying the Statute or agreeing to its jurisdiction under Article 12(3) and avoiding conflicts with States party to the Rome Statute.\(^{66}\) Even those who ratify are entitled, by virtue of Article 124, to opt out of the war crimes jurisdiction of the ICC for seven years.\(^{67}\)

The jurisdictional regime of the ICC means that absence of universal ratification of the Rome Statute (which is unlikely at present), or Security Council action, some conflicts - such as the crisis in Darfur, Sudan -- will remain outside the remit of the ICC’s mandate. This is unfortunate, although it might be questioned if the inclusion of universal jurisdiction in the Statute would have made much practical difference. Although the ICC


\(^{63}\) Ibid.


\(^{65}\) Marcella David, ‘Grotius Repudiated: The American Objections to the International Criminal Court and the Commitment to International Law’ (1999) 20 MJIL 337


\(^{67}\) Ibid.
would then have had jurisdiction over any conflict, it would not have been able to issue
binding orders relating to the surrender of suspects or evidence to the State most likely
to have such evidence, the nationality or territorial State. The Court might be able to
obtain the suspect where he or she to travel to a State party to the ICC, but investigation
would be almost impossible in this situation.

9. Crimes within the jurisdiction of the ICC
The Court has jurisdiction over ‘the most serious crimes of international concern’: genocide, crimes against humanity, war crimes and aggression (Article 5(1)). The Court
cannot however exercise jurisdiction over the crime of aggression until the Statute has
been amended by the addition of a definition of that crime and the inclusion of
preconditions for the ICC to take jurisdiction (Article 5(2)). Whereas the Statutes of the
two ad hoc Tribunals and the ILC draft statute for the ICC do not provide detailed
definitions of crimes, the ICC Statute defines war crimes and crimes against humanity in
unprecedented detail; the negotiators cited reasons of certainty and the principle of
legality, having in mind also that clear definitions would help to limit unexpected
exposure to prosecution. They also wanted to avoid judicial creativity of too broad a
nature and Article 22(2) therefore provides that the definitions ‘shall be strictly construed
and shall not be extended by analogy’. The definitions of crimes do not represent the
whole picture. The often-stated aim of the process of definition was to codify existing
customary law for the purpose of the new Court and the definitions are therefore by and
large conservative.

But in crystallizing and clarifying those provisions which had not been previously
expressed as written criminal law the process inevitably moved the law along.68 There are
provisions which arguably go beyond a mere codification of existing law as it stood in
1998,69 but some of them have since been referred to as customary law in the
jurisprudence. The Rome Statute has thus contributed to the development of customary
law.70

On the other hand there are provisions which are arguably not as extensive as customary
law allows.71 Article 10 attempts to address this point by providing that the Statute does
not limit or prejudice existing or developing rules of international law ‘for purposes other
than this Statute’. This both mitigates the concern that the Statute will in some way freeze
the development of customary international law and confirms that so far as the Court is

68 Leila Sadat, The International Criminal Court and the Transformation of International Law (New York,
2002) 12,261–74
69 Darryl Robinson, ‘Crimes within the Jurisdiction of the Court’ in Lee, The Making of the Rome Statute,
79 at 117–18.
71 See von Hebel and Robinson, ‘Crimes within the Jurisdiction’ in Lee, The Making of the Rome Statute,
113–16.
concerned it must apply the provisions in the Statute even if customary law creates wider offences.

Special Prosecution Court for Sierra Leone
The creation of the ICC has not exhausted the examples of Tribunals set up with the assistance of international society. There is also the Special Court for Sierra Leone. The jurisdiction of the Special Court for Sierra Leone is subject to similar critiques as the ad hoc Tribunals on the basis that it is a reaction to a single conflict, that in Sierra Leone. Special Court Statute, Article 1(b).

There are a number of other countries and conflicts that could have such Courts set up for them. Like the two UN Tribunals, though, the Special Court’s jurisdiction applies to both the government and its supporters and to rebels such as the RUF. The Special Court’s Prosecutor, David Crane, has adopted an impressively impartial approach to indictment, indicting parties from all sides for their conduct in the conflict. In doing so, he has surprised many Sierra Leoneans, including some in the government.

There is one set of actors in the Sierra Leone conflict who are treated differently. Article 1(b) places primary jurisdiction over any ‘peacekeepers and related personnel’ in the primary jurisdiction of the sending State so long as they were ‘present in Sierra Leone pursuant to the Status of Mission Agreement in force between the United Nations and the Government of Sierra Leone or agreements between Sierra Leone and other governments or regional organisations, or, in the absence of such agreement, provided that the peacekeeping operations were undertaken with the consent of the Government of Sierra Leone’. Insofar as this covers those peacekeepers present pursuant to express agreements this is not too different from Article 98 of the Rome Statute, but it is more expansive than that provision as it includes those peacekeepers who were in Sierra Leone with the consent of its government, but without such an agreement. This related to the Security Council’s affirmation that sending States had a responsibility to investigate such offences. Should they prove unwilling or unable to do so the Special Court could prosecute them only should the Security Council expressly authorise the Court to do so. This means that some such persons could be immunized from prosecution owing to the operation of the veto. Article 1(b) was probably unnecessary anyway, as there have been no allegations that peacekeepers are among those who ‘bear the greatest responsibility’ for crimes in Sierra Leone, and whom it is the mandate of the Special Court to prosecute.

The temporal jurisdiction of the Special Court for international crimes does not reach back to the beginning of the conflict in Sierra Leone in 1991. Instead, the Special Court

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72 Special Court Statute, Article 1.
74 Special Court Statute, Article 1(c).
75 Special Court Statute, Article 1(a).
has jurisdiction from the date of the Abidjan Peace Agreement (30 November 1996) and is ongoing. This is in some respects arbitrary and means that offences predating the Agreement cannot be punished by the Special Court. On the other hand, the date was deliberately chosen as an apolitical one, one which captured most of the serious crimes in the conflict and was based on the strong pragmatic foundation that the Court was not intended to hear a large number of cases, so should not be overburdened.

10. Conclusion
It would be easy to end this article on a negative note. International criminal law has been, and is still, often enforced selectively. There is no question that the enforcement of international criminal law has fallen short of the standard of perfect compliance with rule of law ideals.

Despite rule of law concepts being hardwired into international criminal law, these have often been honoured in the breach. Even though the Nuremberg and Tokyo IMTs both explained that they were about bringing the law to bear on high-ranking government officials, the lowliest suspects from the victor States were never put before those courts, nor were they intended to be. The practical necessity of ensuring that some States remain co-operative has limited the practical ability of the ICTY and ICTR to investigate all offences subject to their jurisdiction. The need of those Tribunals to ensure their financing is also a factor, and it is likely to be with the ICC and the Special Court for Sierra Leone. The Special Court, being funded by voluntary contributions rather than assessed (mandatory) ones, is in an especially difficult position in relation to its financers. A considerable number of States have been willing to set up a court that has jurisdiction over allegations of offences by their nationals or on their territory. That the ICC is imperfect from the perspective of the rule of law should not blind us to the extent to which the Court represents a quantum leap beyond what went before. As time goes on, and should more States ratify the Rome Statute, a more global regime may come into being which is less susceptible to such critiques. It is practically impossible for the international criminal law regime to achieve perfect compliance with rule of law standards and be perfectly consistent. National criminal law systems do not achieve full compliance with such standards, and they operate in an environment that is far more conducive to fulfilling such criteria.

A practical way forward against the backdrop of selectivity, in the opinion of this article will be to consider suggestion earlier discussed herein, that different continents can have regional or sub-regional courts enshrined with jurisdiction to investigate, try and mete out punish for heinous crimes, subject to proper arrangement for the funding of these proposed courts.

76 For a modern restatement of this, see Article 27 of the Rome Statute.
Consequent from above, selective enforcements by entities like African Union will thereafter not be tenable as foreigners will not necessarily be in charge of these courts or tribunal that are currently advertised by aggrieved leaders as an oppressive and political hammer in hand of international governments.