THE ROLE OF THE INTERNATIONAL CRIMINAL COURT (ICC) IN ENHANCING THE ADJUDICATION OF JUSTICE

A CASE STUDY OF THE GENOCIDE IN KENYA

BY

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DECLARATION

I Brenda A. Juma, declare that this research on "The role of the international criminal court in Enhancing the adjudication of justice. (A case study of the genocide in Kenya). Is my entire effort and has not been submitted to nay other institution of learning for any form of award.

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DEDICATION

I dedicate this work to my dearest parents Mr. Michael Saulo and Wilfrida Juma, my ever amazing sisters Amelia, Dorcas and Emma and to my beloved brother Collins. Not forgetting very special friends Patricia Ondoa, HENRY Ssabiti and Samson Echoa.

I cannot begin to thank you enough for your special contribution to the successful completion of this degree

May God reward and bless you abundantly.

APPROVAL

This is to certify that this dissertation has been submitted for examination with my approval as a university lecturer and supervision.

Signature..... Date: 5-6-2014

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My heartfelt thanks and God Bless.

STATUTES

The Charter of the United Nations.

The International Criminal Court Act Of 2010.

Hague convention (1899) and 1907)

The Geneva Conventions Act

The Rome Statute of the International Criminal Court 2002

The Genocide Convention of 1951

The Ratification of Treaties Act of 1998.

ABBREVIATIONS

ICC	International Criminal Court
ICTR	International Criminal Tribunal For Rwanda
ICTY	International Criminal Tribunal for Yugoslavia
ILC	International Law Commission
ICJ	The International Court Of Justice
UN	The United Nations
HRC	Human Rights Committee

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CHAPTER ONE

Introduction

Conflicts and their consequences continue to plague the global society in this millennium as it did in the past. It is somewhat a surprise that the lessons of history seem not to have had an impact on the emergence and occurrence of armed conflict peace and security are a concern for all, that even where armed conflict breaks, certain rules of conduct must apply and that non-combatants and civilians must be protected. Conflicts continue to occur and war crimes and activities continue to be committed, and it is more evident in Africa than any where else where the majority of civil conflicts occurs[1].

The concept of criminal prosecution for war crime is not recent. Historically war criminals were prosecuted in the national courts. The accused was normally a captured member of the enemy troops and the process amounted to victor's justice. International criminal justice was a more recent innovation. In 1474, Peter Von Hagenbach was tried and convicted for at societies committed in the war that led to the occupation of Breisach.

The notion of international criminal justice was delayed by the intransigency of the principle of state sovereignty that was first promulgated in the peace of Westphalia1648. While states were comfortable with prosecuting war criminals in their domestic jurisdiction, they were wary of submitting their citizens to the jurisdictions of other states with the occurrence of violent armed conflict the perpetration of gross human rights violations and Humanitarian Rules and their

[1] Dr Koffi Arnan, former secretary General of the UN. The statement is published in the official UN website, http://www.un.org/ human rights

enforcement[2]. The first proposal to establish an international court to prosecute for violations of the Geneva Convention on the Amelioration of the condition of the wounded in the Armies in the field of 1864 was not accepted as the proposal was then too radical for its time.

With the development of rules on conduct of war, there arose a basis on which individuals could be prosecuted for their infraction. The international military tribunal that conducted the ***Nuremberg trials was set up after the 1943 Moscow Declaration where the allies affirmed their determination to prosecute war criminals and the Agreement for the prosecution and punishment of major war criminals of the European Axis together with its annexure of the charter of the international military tribunal which were adopted in 1945.***

The tribunal relied on **Hague conventions of (1899 and 1901)** for the definition of war crimes even though the conventions only provided for the state responsibility for violations of the law in providing the bias for prosecution of war crimes. Tokyo trials similarly reflect the role of law in proving the basis for prosecution of war crimes.

The international military tribunal of Tokyo was established to investigate, prosecute and punish war criminals. Definition of c rimes was similar to that of the chapter on the establishment of the Nuremberg tribunal. The impact of these two tribunals was that international criminal justice could be achieved through prosecuting war criminals[3] .

Later the tribunals were to further the deterrence theory and promote the development of international criminal justice. The ICTY was established to prosecute was criminals that were responsible for serious violations of

[2] Elizabeth Muli "the domestication of the Rome statute: a case study of the international crimes bills in Kenya(the 2008) Moi university Law journals

[3] M Cherif Bassiaini "Negotiating the treaty of Rome the establishment of an international criminal court (1999)32 council international law journal 443.

international Humanitarian law committed in the former Yugoslavia since 1991. The ICTR similarly was charged with the prosecution of genocide and other violations of IHL committed in Rwanda in 1994.

The world needed to bring an end to impunity by prosecuting perpetrators of certain universal jurisdiction over genocides, crimes against humanity and war crimes and was evident in the statutes of the ad hoc tribunals of former Yugoslavia and Rwanda, However these ad hoc tribunals mandate and jurisdiction was limited in temporal application and restricted geographically. Hence, there was need for establishing a permanent court capable of trying individuals for the most serious crimes,[4]

Thus the international criminal court (ICC) at the Hague was established on 1st July 2002, via the Rome statute. The statute was a culmination of international efforts to create a legal framework for the establishment of an international court that would undertake the criminal prosecution of alleged perpetrators of atrocities and crimes. The jurisdiction of the ICC over serious crimes was an expression of states intent to end impunity for the violations of IHC. In this sense the court lends legitimacy to the contention that certain crimes attract universal condemnation. [5]

Therefore it is the duty of all states to ensure prosecution perpetrators whether in domestic courts 08 in international tribunals or even in the court itself at the Hague.

International human rights regimes are thus intended to supplement rather than to substitute for, the national protection of human right and to induce states to remedy those deficiencies.

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[4] Christopher Kaith Hall "The first proposal for a permanent international criminal court, (1998) international review of the red cross

[5] M. Cherif Bassiouni "from Versailles to Rwanda in 75 years: the need to establish a permanent international court (1997) Harvard Human Rights Journal.

1.2 BACKGROUND OF THE STUDY

The ICC was created with the mandate to assume jurisdiction where gross and widespread violence and violations of human rights had been committed and the national courts unable or unwilling to respond to these commission of international crimes necessitating the need for international action in the form of the prosecutions.

In January 2008, protests over Kenya's disputed presidential election broke into violence. In the two months that followed an estimated 1500 people were killed. The 2007 general elections were characterized by widespread violence, maiming, sexual violence and tie loss of lives.

The Kenyan case caught the attention of the international community due to the ethnic nature of violence, ethnic cleaning bordering to the possibility of a genocide and the other factor being the possible involvement of the state and its agents[6].

Uhuru Kenyatta and William Ruto the current president and his deputy of the republic of Kenya were among accused of having orchestrated the violent clashes.

It is important therefore to undertake this study as this is the first sitting head of state in the history of the ICC's proceeding that the prosecutor has sought to bring to trial at the Hague.

The world is therefore watching to see how the question of sovereignty and the rule of law will be handled by the ICC in ensuring that perpetrators are brought to justice.

[6] http:// www. Global post. Com/dispatch/ news/regions/africal/Kenya/140206/uhuru-Kenyattas-trial case- study-whats- wrong- ICC

1.3 STATEMENT OF THE PROBLEM

Despite having a comprehensive legislative framework on criminal law in Kenya, the Penal Code Act the trial on indictment act and a new constitution just promulgated the government has not succeeded or is seen unwilling to either arrest or prosecute the perpetrators of the post election violence.

The current president Uhuru Kenyatta under the Kenyan contribution is exempted from being prosecuted for any crime has also played a hand in the government's inability to create a local tribunal to hold accountable those responsible for the forcing the ICC to step in. **The study will therefore examine the impact of the principle of sovereignty in the role of the international criminal court in adjudication of justice.**

1.4 PURPOSE OF THE STUDY

The study is geared towards findings out how the rule of law, issue of sovereignty and the ICC in effecting justice in the Kenyan case.

1.5 SCOPE OF THE STUDY

The study intends to look at the role of ICC in adjudicating justice, the question of sovereignty and the challenges that the ICC faces in effecting this role.

1.6 OBJECTIVES OF THE STUDY

1.6.1 General objectives

The general objectives of the study is to examine the role of the international criminal court in achieving criminal justice in Kenya after the past election violence.

1.62 Specific objectives

The specific objectives of the study include;

1. To examine the issue of sovereignty and its impact on the ICC.
2. To examine the applicability of the rules of law, international criminal law in ensuring that justice is achieved
3. To examine the exercise of ICC's jurisdiction in the post election violence in Kenya.
4. To identity challenges faced by the ICC in the exercise of its mandate in Kenya.
5. To come up with conclusions and recommendations

1.7 SIGNIFICANCE OF THE STUDY

The study is intended to find out the impact and challenges of the ICC in effecting justice as well as suggesting solutions to overcome the said challenges.

1.8 RESEARCH QUESTION

1. What is the role of the international criminal court in enhancing the rule of law.
2. What impact does the principle of sovereignty have on the rule of the international criminal court in adjudicating justice.
3. What are the challenges faced by the ICC in pursing the aforementioned.
4. What are the possible measures that can be taken for effective delivery by the ICC

1.9 HYPOTHESIS

The study is based on certain assumptions which are necessary for enabling consumption of the research findings set forth herein:
First the writer assumes that human rights are universal and that no state will question the legality of this position. This is necessary in order to find a justification for a universal jurisdiction in relation to safeguarding the universal human rights.

In addition, there is an assumption that international law is dynamic and can be modified to accommodate application of human rights. Essentially this assumption is informed by the fact that representatives of states have the competence to negotiate international agreements that are able to create new laws as well as to prescribe old laws by getting new arrangements. As such, the legality as to creation of the new court shall not be challenged.

The study further assumes that the decisions of the court are binding on all parties to a given dispute in the court and that people, states and the international community shall respect and uphold the decisions of the international criminal court.

1.10 METHODOLOGY

This section deals with ways how data was collected, analyzed and interpreted. The research mainly relied on the content analysis and reviews of textbooks, journals, government publications and achieves, judicial decisions, NGOs publications, newspapers, report from libraries and articles from the internet.

1.11 LITERATURE REVIEW

This section draws related materials from related sources of researches made in the past in different place both nationally and internationally.
The international criminal court in its publication[7] **UNDERSTANDING THE INTERNATIONAL CRIMINAL COURT,** has explained in details the structure of ICC crimes within its jurisdiction and how it operates.

First and most importantly, the publication has emphasized the mission of the ICC by reiterating the provision of the preamble to the Rome statute with the effect that, the ICC is not substitute for national courts. According to the Rome statute it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes.

[7] UNDERSTANDING THE INTERNATIONAL CRIMINAL COURT,

The international criminal court can only intervene where a state is unable or is unwilling genuinely to carry out and prosecute the perpetrators. The primary mission of the international criminal court is to help put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole and thus to contribute to the prevention of such crimes.

Laura Barnett in her paper. The International Criminal Court. History and Role revised 4 November 2008, traces the origin of the modern ICC and its role. One the role of the ICC[8], the author says that the ICC is presided over by three judges the president and two vice president elected for three year renewable term. They are responsible for the general administration of the court except for the office of prosecutor. Beyond the presidency, the ICC is composed of 18 judges at the pretrial and appeals division. The ICC'S other prime administrative body is the Registry which is responsible for the non- judicial aspects of the administration of court.

According to the authors, an ICC investigation may be commenced either by security council pursuant to chapter vii of the UN charter, by a state party or by the prosecutor acting under *proprio motu* power under **Article 13 of the Rome Statute.** The *proprio motu'* jurisdiction is limited by the principles of complementarity. The ICC is a court of the last resort, and the prosecutor must defer to a state with national jurisdiction over an offence unless that state is unwilling or unable to investigate and prosecute.

HANS PETER KARL IN HIS ARTICLE PRECONDITION TO THE EXERCISE OF JURISDICTION STATES. In order to understand the ICC, it is in my view necessary to be fully aware of the limited reach of the

[8] Laura Barnett in her paper. The international criminal court. History and Role revised 4 November 2008,

jurisdiction and admissibility regime of this court. This is a combination of, a quite conservative and state sovereignty o8 rented system of jurisdiction based on the principles of territoriality and the active personality principles combined with, on the other hand, an admissibility regime based on complementarity. **The principle of complementarity as provided for in Article 17 of the Rome statutes is the decisive basis of the entire ICC system.** The complementarity principles entails that judicial proceedings before the ICC are only permissible if and when the states which normally would have jurisdiction are either unwilling or genuinely unable to exercise their jurisdiction. The Rome statutes recognizes the primacy of national prosecutions it thus reaffirms state sovereignty and especially the sovereign and the criminally right of states to exercise criminal jurisdiction[9].

[9] Hans peter karl in his article precondition to the exercise of jurisdiction states.

CHAPTER TWO

2.0 INTERNATIONAL CRIMINAL LAW AND THE ICC

2.1 INTRODUCTION

International criminal law is a body of international values designed both to prescribe international crimes and impose upon states the obligation to prosecute and punish at least some of those crimes[10]. These emanate from sources of international law that includes, treaties, conventions and customary law.

The international criminal proceedings following world war II are credited with launching the modern regime of ICL. Antecedents, however trace back for centuries and across the globe. In particular ICL draws on four main strands of international history nineteenth century prohibitions against piracy, the subsequent regulations of slavery and the slave trade, the once theological and later secular theory of just war and international humanitarian law or the law of war. On this foundation the international community gradually built the norms, rules instruments and institutions that now make up the modern ICC machinery.

The international criminal law system is **based on the principle of universality,** meaning that violation of the international criminal law can be prosecuted by any national court no matter where and against whom the offence took place.

Universal jurisdiction or universality principle is a controversial principle in international law whereby states claim criminal jurisdiction over persons whose alleged crimes were committed outside the boundaries of the prosecuting state regardless of nationality, country of residence or any other relation with the prosecuting country[11].

[10] Blacks Law Dictionary
[11] www.en.wikipidia .org

According to Amnesty international, international, a proponent of universal jurisdiction certain crimes pose so serious a treat to the international community as whole that state have a logical and moral duty to prosecute an individual responsible for it, no place should be safe haven for these who have committed genocide, crimes against, humanity and forced disappearances.

Some of the international criminal conventions dealing with criminal justice include. **Hague Conventions** (1899 and 1907), the main effect of the convention was to ban the use of certain types of modern technology.

The **Geneva Conventions** which consists of four treaties that set the standard for international law, mainly concerned with non combatants and prisoners of war.

There is also the **United National Convention Against Torture**, the **Genocide Convention** adopted to prevent and punish the crimes of genocide and finally the **Rome Statute** that established the ICC.

2.2 HISTORY OF INTERNATIONAL CRIMINAL PROSECUTIONS

2.2.1 Situation before World War 1

Prior to the late 1.800's, the applicability of ICL to individuals was limited to piracy, slavery and certain regulations of armed conflicts.[12] Notwithstanding the history' of the international regulations of armed conflicts, piracy can claim a more widely recognized historical point in the 1500's as a customary international crime. Slavery throughout the ages was thought to be morally

[12] Bassiouni MC, Crimes Against Humanity in international criminal Law, P 514

repugnant by many societies, and it evolved from a 'moral' offence to an international crime.[13]

The prohibition of slavery which is ultimately embodied in customary law was the result of efforts by the European powers that recognized its evil nature and gradually established duties to prohibit, prevent, prosecute and punish those who trafficked in slavery[14]. By making slavery an international crime, states acquired power to search and detain suspected slave vessels, whose goal was to eliminate slavery by obligating each state to make it a crime by creating a universal jurisdiction over it. Thus **Article 5 of the 1980 Convention Relative to the Slave Trade and Importation into Africa of Firearms, Ammunition Spirituous Liquors (General act of Brussels Conference)** the contracting parties obligated themselves to enact or introduce penal legislations to punish serious offences against individuals.

Other than courts of Chivalry in the Middle Ages, there arc practically no other instances of national prosecutions for violating internationally accepted principles, norms and rules regulating the conduct of armed conflicts. International criminal responsibility for violation of the rules governing armed conflict as customary international law is also documented by individual nations. In the context of war, a war crime is a punishable offence under international law for violations of the laws of war by any person or person military or civilian. War be committed armed international armed conflict or internal armed conflicts

Formerly, war crimes were limited to international conflicts but this changed over time as the International Human Rights regime gained momentum. War cranes such as Perfidy have existed for many centuries as customary laws were clarified in the Hague Convention of 1899 and 1907. The modern concept of war crime was further developed under the auspices of the Nuremburg Trials based on the

[13] Bassiouni MC (991) Enslavement as an international crime 23 NYVJ INT –L 445-450

[14] Bassioni ibid p 455

definition of the London Charter that was published on August 8, 1915, Along with war crimes; the charter also defined crimes against peace and crimes against humanity. Which are often committed during wars and in concert with war crimes, but are different offences under international law.

2.2.2 The aftermath of the 2nd World War

1. The Nuremburg Trials

The Nuremberg Trials were a series of military tribunals held by the main victorious Allied forces of World war II, most notable for the prosecution of prominent members of the political, military, and economic leadership of the defeated Nazi Germany. The trials were held in the city of Nuremberg, Bavaria. Germany. In 1915-46, at the Palace of Justice. The first and best known of these trials was the **Trial of the major war criminals** before the international military Tribunal IMT, which tried 22 of the most important captured leaders of Nazi Germany, though several key architects of the war (such as Adolf Hitler Heinrich Himmler and Josef Goebbeis) had committed suicide before the trials began. The initial trials were held from November 20, 1945 to October 1, 1946. The second set of trials of lesser war criminals was conducted under Control Council Law No. 10 at the US Nuremberg Military Tribunals (NM*T); among them included the Doctors' Trial and the Judges' Trial[15].

The International Military Trials in Nuremburg begun in November 1945 and lasted until August 1946. Twenty four major war criminals and six criminal organizations were indicted for conspiracy to commit crimes against peace, planning initiating, and waging war of aggression, war crimes and crimes against humanity. Those indicted included Adolf Hitilar cabinet the leadership of Nazi

[15] http://en.wikipedia. Org/wiki/Nuremberg Trials

party the SS Police the Gestapo the SA and the Genera Staff and the High command of the army.

Verdict were announced on September 30 and October 1' 1946, resulting to 3 acquittals, 12 sentences to death by hanging and 7 sentences to life imprisonment or to lesser terms. The death sentences were carried out on the morning of October 15-16 1946.

2. The Tokyo War Crimes Trials

The International Military Tribunal for the Far East (IMTFE), also known as the **Tokyo Trials,** the **Tokyo War Crimes Tribunal** or simply as the Tribunal, was convened on May 5, 1946 to try the leaders of the Empire of Japan for three types of crimes: "Class A" crimes were reserved for those who participated in a joint conspiracy to start and wage war, and were brought against those in the highest decision-making bodies; "Class B" crimes were reserved for those who committed "conventional" atrocities or crimes against humanity; "Class C" crimes were reserved for those in "the planning, ordering, authorization, or failure to prevent such transgressions at higher levels in the command structure."

The Tokyo trials were not the only forum for the punishment of Japanese war criminals, merely the most visible. In fact, the Asian countries victimized by the Japanese war machine tried far more Japanese-an estimated five thousand executing as many as 909 and sentencing noise than half to life in prison. Twenty-eight Japanese military and political leaders were charged with Class A crimes, and more than 5,700 Japanese nationals were charged with Class B and C crimes, mostly entailing prisoner abuse. China held 13 tribunals of its own, resulting in 504 convictions and 149 executions.[16]

[16] http://en.wikipedia. Org/wiki/Nuremberg Trials

3. The International Criminal Tribunal for Yugoslavia (ICTY)

After the global conflagration that gave rise to the Nuremburg, the cold war had an extreme chilling effect on the growth of the international Criminal law.[17] With the end of the hi-polar hostilities in the early 1990s ethnic tensions which had been quelled in certain parts of the world during the hegemonic Post-war years began bubbling to the surface. In the former Yugoslavia and in Rwanda they exploded into "ethnic cleansing" and genocide. In May 1903. The Tribunal was established by the United Nations in response to mass atrocities then taking place in Croatia and Bosnia and Herzeguvina. Reports depicting horrendous crimes, in which thousands of civilians were being killed and wounded, tortured and sexually abused in detention camps and hundreds of thousands expelled from their homes, caused outrage across the world and spurred the UN Security Council to act. The ICTY was the first war crimes court created by the UN and the first international war crimes tribunal since the Nuremberg and Tokyo tribunals. **It was established by the Security Council in accordance with Chapter VII of the UN Charter.**

The key objective of the ICTY is to try those individual most responsible for appalling acts such as murder, torture, rape, enslavement, destruction of property and other crimes listed in the Tribunals Statute. By bringing perpetrators to trial, the ICTY aims to deter future crimes and, render justice to thousands of victims and their families, thus contributing to a lasting peace in the former Yugoslavia.

Situated in The Hague, the Netherlands, the IC has charged over 160 persons. Those indicted by the ICTY include heads of state, prime ministers, army chiefs-of-staff interior ministers and many other high- and mid-level political, military and police leaders from various parties to the Yugoslav conflicts. Its indictments address crimes committed from 1991 to 2001 against members of various ethnic

[17] www.globalpolicy.org/injustice/yugoindex.htm

groups in Croatia, Bosnia and Herzegovina, Serbia, Kosovo and the Former Yugoslavia Republic of Macedonia. More than 60 individuals have been convicted and currently more than 40 people are in different stages of proceedings before the Tribunal.[18] The highest profile figure indicted by the tribunal was the former Serbian President Slobodan Milosevic. He was indicted in 1999 brought to The Hague to stand trial in 2001. Milosevic died of heart attack in March 2006 while in custody with only 50 hours of testimony remaining in his case.

Undoubtedly, the Tribunal's work has had a major impact on the states of the former Yugoslavia. Simply by removing some of the most senior and notorious criminals and holding them accountable the Tribunal has been able to lift the taint of violence, contribute to ending impunity and help pave the way for reconciliation.

4. The International Criminal Tribunal for Rwanda (ICTR).

The International Criminal Tribunal for Rwanda (ICTR), or the Tribunal penal international pour le Rwanda (TPIR, is an international court established in November 1994 by the United Nations Security Council in Resolution 955 in order to judge people responsible for the Rwandan Genocide and other serious violations of the international law in Rwanda, or by Rwandan citizens in nearby states, between 1st January and 31 December 1994. In 1995 it became located in Arusha, Tanzania, under Resolution 977. (From 2006, Arusha also became the location of the African Court on (Human and Peoples' Rights). In 1998 the operation of the Tribunal was expected in Resolution 1165. Through several resolutions, the Security Council called on the Tribunal to complete its investigations by end of 2004, complete all trial activities by end of 2008, and complete all work in 2012.

[18] http://www.icty.org/sections/abouttheICITY accessed on 9th December 2010

The tribunal has jurisdiction over genocide, crimes against humanity and war crimes which are defined as violations of Common Article Three and Additional Protocol II of the Geneva Conventions (dealing with war crimes committed during internal conflicts).

So far, the 'Tribunal has finished 50 trials and convicted 29 accused persons. Another 11 trials are in progress. 14 individuals are awaiting trial in detention; but the prosecutor intends to transfer 5 to national jurisdiction for trial. 13 others alc still at large, some suspected to be dead. The first trial, of jean-Paul Akayesu, began in 1997. Jean Kambanda, interim Prime Minister, pleaded guilty. According to the ICTR's Completion Strategy, in accordance with Security Council Resolution 1 503, all List-instance cases were to have completed trial by the end of 2008 (this date was later extended to the end of 2009) and all work is to be completed by 2010. It has recently been discussed that these goals may not be realistic and, is likely to change.[19]

2.3 THE ICC, ITS CREATION AND MANDATE

2.3.1 DRAFTING AND ADOPTION OF THE STATUTE OF ICC

The United Nations had in the early 1950s considered the creation of an international criminal court however it was until 1989 after a hiatus of 36 years, that the general assembly, in a special session concerning drugs, took up the suggestion made by Trinidad and Tabogo that a specialized international criminal court should be established to deal with the problem of drug trafficking and requested that the international law commission ILC address the question of establishing an international criminal court.

[19] http://en. Wikipedia. Org/wiki/international criminal Tribunal for accessed on 9th December 2010

The ILC completed a report in 1990 which was not limited to question of drug trafficking and was favorably received by the General Assembly. A comprehensive draft text was produced in 1993 and further modified in 1994.

In 1996, the General Assembly established a preparatory committee on establishment of an international criminal court.

After a series of sessions, this committee was able to submit to diplomatic conference held in Rome, Italy from 15th June -17th July 1998. In both the pre com and at the Rome conference three major groupings of states emerged as no agreements had been reached on certain areas in the draft statute.

The first was the group of so called like minded states, which was largely led by Canada and Australia but also included countries from all regions of the world. It favored a fairly strong court with broad and automatic jurisdiction, the establishment of an independent prosecutor empowered to initiate proceedings and a sweeping definition of war crimes embracing crimes committed in international armed conflicts.

The second group comprised the permanent members of the security council with an exception of UK, which aligned itself with like minded states during both the preparatory negotiations and at Rome, with France which else joined the like minded group. He remaining permanent members and particular USA were opposed to automatic jurisdiction' and to the prosecutor being granted the power to initiate proceedings. By the same token they were eager that the Security Council should have an extensive role by having the power both to refer matters to the court and to prevent cases from being brought before the court. In addition these states opposed giving the court jurisdiction over the crime of aggression and also opposed including any reference to the use of nuclear weapons among

the violations of humanitarian law over which the court was to exercise jurisdiction[20].

The third grouping embraced members of the Non Aligned movement (NAM). This group pressed for the court to have jurisdiction over the crime of aggression and some of them (Barbados, Dominica, Jamaica and Trinidad and Tobago) pressed for the inclusion of drug trafficking whereas others India, srilanka and Turkey supported the inclusion of terrorism they thought were opposed to the court having jurisdiction over war crimes committed in internal armed conflicts, they also insisted upon the death penalty being available under the statute. In addition, they opposed the Security Council being given any role in the creation of court. Under the Statute. In addition, they opposed the Security Council being given any role in the operation of the court.

The task of reconciling these divergent positions fell to a group of distinguished diplomats, and in particular **the Canadian Philippe Kirsch, who chaired the 'Committee of the Whole'** where the major issues were considered formulas that in the event permitted the conference to adopt the Statute by 120 votes to seven (USA, Libya, Israel, Iraq, China, Sudan, Syria) with 20 abstentions. **The ICC Statute entered into force on 1 July 2002, and its first judges were elected in February 2003.**

2.3.2 Jurisdiction of the ICC Generally[21]

The ICC was created in order to have jurisdiction over only 'the most serious crimes of concern to the international community as a whole' (statute, preamble, Para 4) which according to **Article 5(1) of the statute are: genocide against humanity, war crimes, and the crime of aggression**. Generally speaking, this

[20] Report of the international law commission 46 session, 2nd May -22nd July 1994
[21] Sec Generally the various contribution in Cassese, Gaeta, and Jones, 2002, Vol 1pp 335-729

reflects the jurisdiction reach of the ad hoc tribunals, being a combination of ICTY Articles 2-5 and ICTR Articles 2-4, to which the crime of aggression had been added. However, the correlation is made even closer of ICC Article 5 (2) which makes the jurisdiction of the ICC over aggression conditional upon the adoption of a definition, and this is yet to happen. For the moment, the subject matter jurisdiction of the ICC is then, restricted to genocide, war crimes, and crimes against humanity. This cautious approach was adopted in order to facilitate as rapid and widespread acceptance of the statute as possible, thus paving the way for early ratification and allowing the ICC to enter into operation as soon as possible. Once it has established credibility and gained the respect of the international community, the range of international crimes over which the ICC can exercise jurisdiction may be expanded with the consent of state parties.[22] This same concern also accounts for the manner in which key aspects of the 'jurisdictional architecture' of the Statute have been constructed.

The starting point concerns the essential 'preconditions to the exercise of jurisdiction'. **According to Article 12(2) of Statute, the court may exercise jurisdiction only in cases where (a) the alleged crime has been committed on the territory of a state party to the statute, or (b) the state of which the person accused of the crime is a national of a state party to the statute. Of course, this means that court can exercise jurisdiction over individuals who are nationals of states. That had not ratified the statute if the act in question took place in the territory of a state that had ratified the statute.** On the face of it, this is a rather generous approach but ii has to be read

[22] However, like the ICTY and the ICTR, the ICC has jurisdiction only over natural persons (ICC Statute Article 25) and since it cannot exercise jurisdiction over States or over legal entities, such as corporation, its possible future capacity to deal with economic crimes such as money laundering is likely to be limited (see Bassiouni and Blakesley, 1992; Meron, 1998)- although it is not possible that at some future date the jurisdiction of the ICC ratione personae might also be capable of expansion. The concept of personal (individual) criminal responsibility will be explained in detail below.

alongside a series of provisions designed to ensure an appropriate balance between the interests of the state whose nationals are accused of offences, the states in which the alleged offence occurred, and the proper application of international criminal law and international criminal justice.

2.3.3 Article 17 of the ICC Statute (Complementarity Principle)

A critical element of the ICC is that its jurisdiction is complementary to that of national criminal justice systems. It does not replace national courts; over the ICC. According to **Article 17 of the statute, a case is to be declared inadmissible if it is being investigated or prosecuted (or has been investigated) by national authorities, unless the state in question is unable or unwilling genuinely to carry out the investigation or prosecution**.

This flows naturally from principles of state sovereignty and means that the ICC jurisdiction has something of a residual flavor.[23] Politically as is the case of

[23] See Article 17 which provides as regards issues of admissibility as follows:

Issues of admissibility

1. Having regard to paragraph 10 of the Preamble and article 1, the 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 under article 20, paragraph 3;

(d) The case is not of sufficient gravity to justify further action by the Court.

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

Sudan, correctly one may argue that there judicial system has not failed totally, to warrant the intervention of the ICC, but then, the question to be looked into revolves around the intention to subvert justice as already evidenced in the so called War Courts in Sudan for example, that are not keen in trying the real perpetrators of these heinous crimes. More important is the fact that there is no political will to try the perpetrators as the government itself and other state actors like the Army stand accused for war crimes, crimes against humanity and genocide in Darfur.

The aim of the drafters was to construct a court that was independent, fair, impartial, effective, representative, and free from political influence. However, the relationship between the ICC and the Security Council was a source of difficulty during the drafting of the statute and remains a central, yet delicate issue.[24] In particular, the USA sought Security Council control of ICC, arguing that the ICC 'must operate in co-ordination-not in conflict-with the Security Council.[25] However, this approach was widely rejected within the international community on the ground that, in order to have credibility, the court (and its Prosecutor) would have to operate free of political control, be it the control of the Security Council or of Slates parties to the Statute.[26]

This debate finally resolved itself into the question of the so-called 'trigger mechanism' by which the jurisdiction of the ICC can be activated. According to

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(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice:

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings

[24] See generally the various contributions by Kirsch and Holmes, 1998, pp 8-9.

[25] Statement by the Hon Bill Richardson, United States Ambassador to the United Nations (17 June 1998); UN Press Release LI ROM/1 1, 'United States Declares at Conference that UN Security Council Must Play Important Role in Proposed International Criminal Court' (17 June 1998).

[26] For criticism of the America position, see Goldstone, 1998; Wedwood, 1999; Hafner et al, 1999.

Article 13 of the Statute of Court, it can exercise jurisdiction over crimes falling within the scope of the Statute only when a situation has been referred to the Prosecutor **by (a) a state party to statute, (b) by the Security Council acting under Chapter VII of the UN charter,[27] or (c) where the Prosecutor him/ herself initiates an investigation**. This latter route to the seizing of the court was particularly controversial and a number of safeguards- or barriers-were therefore erected to guard against the possibility of an autonomous Prosecutor exercising excessive zeal.

First, under Article 15 the role of the prosecutor is to examine 'information' and lie must seek the authorization of a pre trial Chamber of the court itself if there is to be a thorough 'investigation' of the case. Moreover, Article 16 permits the Security Council by means of resolution adopted under Chapter VII of the UN Charter, to block the 'commencement or continuance of investigations for a period of up to 12 months.'42 These safeguards notwithstanding, the USA maintained its objections to referral of situations by state parties and by Prosecutor, arguing that this rendered members of US armed forces participating in peace-keeping operations around the world open to prosecutions by the ICC and that, in consequence, it might be faced with cases motivated by political hostility.[28]

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[27] In fact, the way of giving power to the security council to refer a situation to the court should be considered as one of the reflections of the establishment of the ad hoc tribunals on the ICC Statute since situations similar to the former Yugoslavian and Rwanda can be referred by the Security council to the ICC. This is also the only exception to the principle of consent of states under which the ICC can exercise jurisdiction. See Cassese, 1999.

[28] See now SC Res 1422 (12 July 2002) which seeks to remove en bloc from the jurisdiction of the court cases 'involving current or former officials or personnel from a contributing state not a party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation' for a 12-month period. The Security council expressed the intention to renew this request annually' for as long as necessary'. This generalized exclusion of jurisdiction over nationals of non-state parties for acts/omission conducted under UN auspices substantially erodes the jurisdictional reach of the ICC established under Article 12 (2) (a) of the statute.

So far the court has in fact been activated by the very States in which alleged crimes falling within the court's jurisdiction have occurred, these being Uganda, Democratic Republic of Congo (DRC), Kenya, Sudan i.e. Western Sudan the Darfur region and the Central African Republic:

These, then, have been instances of so-called 'self-referral' except for Sudan where. The government of El Bashir has strongly refused to admit violation of human rights. However the matter was referred to the court by the Security Council vide resolution 1593(2005). The prosecutor has so far decided to open investigations into the 'situations' existing Kenya, Uganda and the DRC. Furthermore, in Resolution 1593 (2005) of 31 March 2005 the UN Security Council upheld the recommendation made by the UN Commission of Inquiry of Darfur in its report of 25 January 2005 (UN Doe S/2005/60, 5 83-9) to refer the situation in Darfur to the ICC prosecutor thus his verdict of gross violation of human rights against he people of Darfur thus the indictment of El Bashir. However it remains to be seen how the Court is going to capture this man.

2.3.4 Of The Parameter to Invoke Article 17 of The Rome Statute

When the former chief prosecutor of the international criminal court Luis Moreno-Ocampo 44 was sworn in as the Chief Prosecutor of the International Criminal Court ('ICC'), he said that the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major

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u Statement by the Hon Bill Richardson, United States Ambassadors to the United Nations (17 June1998). See also Numberburg, 1999. The US has now entered into series of bilateral treaties with states under the terms of which it is agreed that no US servicemen serving in Un --authorized operations in a state party to the Statute will be transferred to the jurisdiction of the court.

success, of course he was referring to the Rome Statute's complementarity principle,[29] which permits the Court to exercise.

Its jurisdiction over a serious international crime only if no State is willing and able to prosecute the crime itself. The principle cannot be invoked if States some how prove willing and able to prosecute every act of genocide, every act of war crime, and every act of crime against humanity an unlikely possibility.

Conscious of the fact that the ICC is a model of due process, guaranteeing defendants all of the procedural protections required by the International Covenant on Civil and Political Rights ('ICCPR')[30]. Most national criminal-justice systems, by contrast, are far less even-handed particularly those in States that have experienced atrocities serious enough to draw the Court's interest. The so called Specialized Courts in which Sudan intends to prosecute those responsible for the atrocities in Darfur, for example, routinely sentence unrepresented

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[29] He is the first person to occupy the office of the Prosecutor of the ICC and he comes from Argentina, a former distinguished deputy prosecutor during trials of Argentine military officials why had supported the dictatorship that held power between 1976 and 1983. He was to later help found a major human rights non-governmental organization in Argentina.

u See Article 17 of the Rome Statute, it provides verbatim as follows as regards the Issues of admissibility:

1. Having regard to paragraph 10 of the Preamble and article 1, the 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 under article 20, paragraph 3;

(d) The case is not of sufficient gravity to justify further action by the Court.

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

[30] See Albin Eser, 'For Universal Jurisdiction: Against Fletcher's Antagonism', 39 TULSA L. REV. 955, 963 (2004).

defendants to death after secret trials involving confessions obtained through torture, which is nothing but an attempt to hoodwink the world that they are intent on doing something[31]. Complementarity is thus a double-edged sword. On the one hand, ICC deferrals will reflect the willingness of States to take the lead in bringing the perpetrators of serious international crimes to justice. On the other hand, those deferrals will expose perpetrators to national judicial systems that are far less likely than the ICC to provide them with due process, increasing the probability of wrongful convictions and so ICC does act as a safeguard to this. State's failure to guarantee a defendant due process makes a case admissible under Article 17. In this view, the solution to the Sudan dilemma — and others like it — is self-evident: the Court can simply investigate and prosecute the persons responsible for the Darfur atrocities itself— has it has done on the ground that the procedural failings of the Specialized Courts make Sudan 'unwilling or unable' to do so. After all, the Court has the final say regarding admissibility[32]. Besides, the Khartoum government has been held responsible for the atrocities meted against the Darfur people and so there is no way one would expect the same government to try itself.

2.3.5 The Question of "Unable" Clause in Article 17

Inability is a prime feature of the ICC's complementarity regime. Unfortunately, the concept is largely undefined and subject to varied interpretations. The ICC Statute, written to defer to the jurisdiction of domestic

[31] See U.S. Dept. Of state, country reports on human rights practices, sudan (2005) http://www.stategov/g/drl/rls/hrrpt 2005/61594.htm at11 November 2008. Sudan has said that it intends to prosecute the Darfur Genocidaires in its new special criminal court on the Events on Darfur (SCCED)

[32] See U.S. Dept. Of State. country reports on human rights practices, Sudan (2005), < http://www.state.gov/g/drl/rls/hrrpt/2005/61594.htm> at 11 November 2008. Sudan has said that it intends to prosecute the Darfur Genocidaires in its new Special Criminal Court on the Events on Darfur (SCCED

courts, establishes seemingly straightforward conditions for determining whether the ICC will hear a case on inability grounds.[33] Nations are presumed capable to prosecute cases; for the ICC to exercise jurisdiction, the ICC Prosecutor must demonstrate that the state was unable, to effectively pursue domestic prosecution[34]. **Specifically, Article 17(3) of the ICC Statute states that "to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings[35].**

Broadly speaking, complementarity is meant to ensure that the ICC only exercises jurisdiction over cases where the domestic judicial system does not investigate or prosecute the crime, in the case of inability, complementarity is designed to ensure that the ICC will not exercise jurisdiction if a state is able to investigate and prosecute a crime States are generally afforded the opportunity to address criminal wrongdoing, and with good reason. "[T]here are substantial arguments that the fullest cathartic impact of the prosecutorial approach to war crimes occurs when the responsible population itself comes to grips with its past and administers appropriate justice."[36] United States Ambassador to the United Nations John Bolton, an outspoken ICC critic, commented on complementarity, and the benefits of ensuring local justice stating:

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[33] William W. Burke-White, Complementarity in Practice: The International Criminal Court as Part of a System of Multi-Level Global Governance in the Democratic Republic of Congo, 18 LEIDEN J. INT'L LAW, 557, 575 (2005). 50Mohamed M. El Zeidy, The Principle of Complementarity: A New Mach inery to Implement International Criminal Law, 23 Mien. 3. INT'LL. 869, 899 (2002).

[34] See Rome Statute, supra note 102, further Article 19(1) ('The Court shall satisfy itself that it has jurisdiction in any case brought before it'.)

[35] John R. Bolton, Remarks to the Federalist Soc'y: The United States and the International Criminal Court, (Nov.) 14, 2002), available at http:J/www.state.gov/t/us/rm/15158.htm.

[36] I bid

It is within national judicial systems where the international effort should be to encourage the warring parties to resolve questions of criminality as part of a comprehensive solution to their disagreements. Removing key elements of the dispute to a distant forum, especially the emotional and contentious issues of war crimes and crimes against humanity, undercuts the very progress that these peoples, victims and perpetrators alike, must make if they are ever to live peacefully together[37].

However, as Article 17(3) makes it clear, when domestic systems fail and are unable to prosecute criminals, the ICC may assert jurisdiction. A state's failure to act may be a result of poor administration of justice, or a breakdown of State institutions, such as the national judicial system, or of widespread anarchy. The State must be unable to obtain an accused or key evidence and testimony, and its inability must relate to the total, substantial collapse, or unavailability of its judicial system. **Article 17(3), articulates this "unwilling or unable" test and addresses the "failed state" scenario in which a "State's legal and administrative structures have completely broken down."**[38] However, Article 17 covers circumstances where stales are unable to conduct trials meeting international human rights standards.

2.3.6 Ambiguity of "Inability" Terminology

Inability is an ambiguous term, and even members of the court have admitted that the jurisdictional authority stemming from the "unable" terms remains unclear. In an address to the Canadian Department of Justice, the then President of the ICC Phillipe Kirsch explained that, when it comes to the principle of complementarity "[t]he Court will really have to invent, create and define the

[37] I bid
[38] I bid

meaning of a slate that is unable or unwilling to conduct 'genuine' proceedings."[39] If the provision must be left to the court's judges to "invent" and "create," it certainly lacks clarity and is subject to varying definitions. The most popular definition is the one cited by the ICC's website, stating that "[a] country may be 'unable' when its legal system has collapsed."[40] Others contend that:

[t]he criteria for inability are clearly provided in Article 17(3) in [an] objective way. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.[41]

While this definition may be objective it is far from clear, particularly because no established definition for the term "collapsed" exists. According to one scholar, collapsed refers to a legal system that is 'insufficiently organized to gather evidence or is 'otherwise unable to carry out its proceedings.'[42] Another states that "[i] inability is confined to a total or partial collapse of the criminal justice system of the State concerned,"[43] adding more complexity to the terminology by introducing the term "partial collapse" Another believes that inability or collapse refers "primarily to situations in which there is a lack of central government or a

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[39] Phillipe Kirsch, President, Int'l Criminal Court, The International Criminal Court, remarks John Tait Memorial Lecture in Law and Policy (Oct. 7, 2003), available at http://www.canada justice.org/enldept/pub/tait/kirschlecture.html (discussing the meaning of "unable or unwilling" articulated in Article 17 of the Rome Statute).

[40] See Int'l Criminal Court, Frequently Asked Questions, http://www.icc-cpi.int/about/ataglance/faq.html last visited at 15th January, 2009.

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[42] Mireille Delmas-Marty, Interactions Between National and International Criminal Law in the Preliminary Phase of Trial at the ICC, 4 3. INT'L CRIM. JUST. 2, at 5—6 (2006) (citing I.C.C. Office of the Prosecutor, Paper on Some Policy Issues. Sept. 2003, at 4).

[43] Johan D. van der Vyver, Jurisdiction of the International Criminal Court, FREDERICK K. COX INT'L LAW CENTER RESEARCH PORTAL, Sept. 23, 2003, http://law.case.edu/war-crimes-research portal/instant_analysis.asp?id=5.

state of chaos due to conflict or crisis."[44] None of these proposed definitions shed much light on what inability means, rather they simply restate what's already in Article 17. This reinforces the point that the actual content and operation of "unable" is still unclear.

Some uncertainty does exist as to the actual procedure to be followed to assess inability. For the ICC to determine that a state is "unable," it would have to determine that the state's "ability to administer justice is" in question.[45] This assessment would require a determination that "the state lacks effective mechanisms to obtain the accused or the necessary evidence and testimony; or that it is otherwise unable to carry out proceedings."[46]

According to an official ICC policy paper, the provision on inability to investigate or prosecute "was inserted to take account of situations where there was a lack of central government, or a state of chaos due to the conflict or crisis, or public disorder leading to collapse of national systems[47], According to an informal ICC paper,[48] the inability assessment first considers "collapse" or "unavailability" of the national judicial system, and then the state's ability to obtain the accused or the evidence and testimony. Article 17 includes a catchall clause which raises a consideration whether a state is "otherwise unable to carry out proceedings." The factors to consider when determining "inability" include the:

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[44] Supra

[45] Sarah Sewall & Carl Kaysen, The United States and the International Criminal Court: The Choices Ahead, AM. ACAD. OF ARTS & Sd., (2002), http://www.amacad.org/projects/iccarticle.aspx.

[46] MARIANA PENA, AM. NON-GOVERNMENTAL ORG. COALITION FOR THE I NT'L CRIM. CT., THE PRINCIPLE OF COMPLEMENTARITY 2 (2005), available at http://www.amicc.org/docs/.pdf.

[47] THE AMERICAN NON-GOVERNMENTAL ORGANIZATIONS COALTION FOR THE INTERNATIONAL CRIMINAL COURT, THE PRINCIPLE OF COMPLEMENTARITY n.5 (2005).

[48] INT'L CRIM.CT. OFFICE OF THE PROSECUTOR, INFORMAL EXPERT PAPER: THE PRINCIPLE OF COMPLEMENTARITY IN PRACTICE (2003) hereinafter informal paper), available at htt://www.icc-cpi.int/library/organs/otp/complementarity/pdf

1. Lack of necessary personnel, judges, investigators, prosecutor [sic];

2. Lack of judicial infrastructure;

3. Lack of substantive or procedural penal legislation rendering system "unavailable";

4. Lack of access rendering system "unavailable";

5. Obstruction by uncontrolled elements rendering system "unavailable";

6. Amnesties, immunities rendering system "unavailable."[49]

It is clear that the ICC informal paper attempted to define inability. However, this resulted in the addition of several more factors of consideration, factors which vary from the definitions of inability set forth by other experts, court officials, and even official Court documents. Absent a clear definition of "unable," states do not know the current scope of the ICC's jurisdiction or how far it may expand..

Many scholars have sought to fill the void with an aspirational vision of the ICC's jurisdiction. These scholars state that inability refers to the lack of substantive law or1thc existing legislation which does not meet the standards of recognized international human rights. Professor Kevin Jon Heller described this theory as the "due process thesis." This "due process thesis"[50] presents a clear possibility of expanded ICC jurisdiction. The "due process thesis" asserts that the jurisdiction of the ICC may extend to any nation which cannot conduct a trial meeting international standards of "due process" as regards crimes under the ICC Statute they must ensure that their own judicial systems meet international standards. At a minimum, states will have to adhere to standards of due process found in international human rights instruments, particularly as they relate to the rights

[49] INT'L CRIM. CT. OFFICE OF THE PROSECUTOR, INFORMAL EXPERT PAPER: THE PRINCIPLE OF COMPLEMENTARITY IN PRACTICE (2003) [hereinafter INFORMAL PAPER, available at http://www.icccpi int/library/organs/otp/complementarity.pdf

[50] Kevin Jon Heller, The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process, 17 CRIM. L.F. 255. 256

of defendants notwithstanding the various legal systems of the world. This notwithstanding is bound to be a big challenge for the ICC to overcome.

2.4 The ICC and The Promise of Universal Jurisdiction

When finally world leaders agreed to set up the ICC, amidst protest from United States, hopes had been raised that universal jurisdiction was within reach. Pessimists of medieval minds had been proved wrong and the international community was once again beaming with joy that a milestone had been registered in the struggle for humanitarian justice since then.

ICC is a valiant effort by the international community to forestall acts of recklessness with regard to human rights.[51] For a long time most governments were reluctant to enforce human rights standards for their citizens because the international community had no ways of making them accountable. I am optimistic that the environment has undergone tremendous change hence no government can afford to ignore the impact of International Criminal Court and for Khartoum, Harare and other rogue regimes it's a question of time.

The establishment of ICC is a laudable effort towards universal jurisdiction. Rummaging through the history of international law, one can succinctly observe that the movement has always been from state sovereignty towards universal jurisdiction. Article 1 of the statute establishes the court as having jurisdiction over serious international crimes. The jurisdiction of ICC is best described as complimentary to that of national courts. However, it remains to be seen whether

[51] Part of the preamble of the Rome statute justifies the reason for the establishment of the ICC as being a result of international communities' Determination to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole.

states will stick to the decisions of ICC as is the case currently with the indictment of the Sudanese president.[52]

In summary, ICC is a perfect reflection of what the international community should expect of universal jurisdiction. While jurisdiction of ICC is universal, its scope of operation is limited to serious international crimes defined under the statute. My concern is that abusive governments may apply creativity in interpreting the statute and mischievously conclude that international crimes not destined as serious in nature do not draw international wrath as can be said to be the case with Robert Gabriel Mugabe of Zimbabwe. Consequently, certain essential aspects of human rights may not be given due attention. Over the current ICC, what the international community deserves is an institution which determines challenges to every right known by the international community as an important aspect of human rights law.

2.5 Universal Jurisdiction; Rekindling Faith In International Human Rights Regime

Notwithstanding the preceding discussion, the changing politics of the world arc leaning in your of universal jurisdiction. It seems that the Berlin Wall once constructed around state sovereignty has begun to crumble and hopes are high that future developments will ensure that ere is no unreasonable barrier to espousing a human rights claim at the international court. In act, away from doctrinal confusion, manipulation, and uncertainty, there is a transparent trend way from the idea of unconditional sovereignty and toward a concept of responsible and accountable sovereignty. There is a growing sense that

[52] Article 1 provides that 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. That the court is going to act with respect to certain crimes only is a source of worry because it shall imply that crimes international crimes top which the court's jurisdiction do not extend are not serious, at least according to the standards set by the Rome Statute.

governmental legitimacy that validates the exercise of sovereignty should involve adherence to minimum norms and a capacity to act effectively to protect the rights and welfare of citizens.[53]

Questions are being raised as to the rationale of universal jurisdiction at this stage in human rights movement. It is in pragmatic response to such a question that a group of eminent scholars[54]' reckon that globalization is central to universal jurisdiction. They note that globalization reflects a widespread perception that the world is rapidly being moulded into a shared space by economic and technological forces. Consequently, developments in one region of the world can have profound consequences for individuals or communities on the other side of the globe. This is the basic reason for global concerns with political, economic and human rights matters whenever and wherever they take place.[55]

Be it as it may be, tremendous progress has been made in relation to the promotion of human rights globally. Nevertheless, accounts of human rights violations continue to be a major feature in many states, more so in Africa. In a majority of these situations, human rights violations al-c directly and singly attributable to public authorities and their agents.[56] The police department has been very notorious for human rights violations just to point out among other state actors. This revelation that governments are the ones responsible for large

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[53] See H Steiner and P Alston International Human Rights in Context. Law, Politics, Morals (2"' Edition) (2000) at p582.

[54] David Held, A. MeGrew, D. Goldblatt and J. Perraton 'Global Transformations'(1999) as quoted in H Steiner and P Alston (2m1 Ed.), ibid, at p 1307

[55] The scholars further make an instructive observation that globalization is also associated with a sense of political fatalism and chronic insecurity in that the sheer scale of contemporary social and economic change appears to outstrip the capacity of national governments or citizens to control, contest or resist that change. Consequently, the limits to national politics are forcefully dictated by globalization.

[56] T Ojienda 'Alice's Adventures in Wonderland: Preliminary Reflections on the Jurisdiction of the East African Court of Justice' (2004). The East African Journal of Human Rights and Democracy vol.2 No. 2. I-Ic writes that:

given the poor regional human rights records, it is doubtful whether the leaders of the respective [East African] states would be willing to vest the EACJ [East African Court of Justice with more than that authority it has in respect to human rights to put it in a position higher than the national courts to be able to question the misdeeds of political players in the respective states

scale human rights violations creates high doubts in the minds that any justice can be realized in circumstances where the judicial institutions in charge of enforcing rights are heavily sanctioned politically. more and significant judicial authorities in the regional judicial. Institutions One author observes that states arc reluctant to vest for fear of their political survivals. He rightly notes that a number of states have performed dismally in the human rights field and consequently, their governments fear that empowering regional judicial institutions may expose serious cases of human rights violations which they have resolved to conceal as is the ease with the ICC.

2.6 Institutions of criminal law

Today the most important institution is the international criminal court as well as several tribunals for the former Yugoslavia.

International criminal tribunal for Rwanda apart from these institutions exist judicial bodies with both international and national judges.

Special court for sierva leone (investigating the crimes committed in the sierra Leone civil war)

Extraordinary chambers in the courts of Cambodia (investigating the crimes of Red Khmer era

The war crimes court at Kosovo.

2.7 CONCLUSIONS

International criminal law is a subset of international law. As such, its sources are the same as those that comprise sources is in Art 38(1) of the 1948 statute of the international court of justice and comprise treaties customary international law, general principles of law (and as a subsidiary measure judicial decisions and the most highly qualified juristic writings. The ICC statute contains an analogous, thought not identical, set of sources that the ICC may rely on.

CHAPTER THREE

3.0 THE QUESTION OF SOVEREIGNTY AND THE RULE OF LAW

3.1 INTRODUCTION

This Chapter will mainly seek to define what sovereignty and rule of law is and explore the available notions of sovereignty from different conventions and other sources.

3.2 What is sovereignty?

In international relations, Sovereignty of a state is of paramount importance in ascertaining the limits to observe in inter territory dealings. Categorically articulated by a Swiss Philosopher Emerich de Vattel[57], Sovereignty is the most precious of all rights that belong to a nation. It is of cardinal importance to consider the definitions adopted by different scholars through out time.

To start with, the **Blacks Law Dictionary** defines Sovereignty as the:

"Supreme, absolute, and uncontrollable power by which any independent state is governed supreme political authority; paramount control of the constitution and frame of government and its administration; the self sufficient source of political power, from of government and its administration; the self sufficient source of political power from which all specific powers are derived; the international independence of a state, combined with the right and power regulating its internal affairs without foreign dictation: also a political society, or a state which is sovereign and independent"

[57] joseph Chitty (1993) The Laws of Nations

Sovereignty in the simplest terms is the power that the state exercises without accountability which entails making laws, application of the enacted laws, imposition of taxes and the power to go to war and make peace while having the right to make treaties. Sovereignty in the government context means the Public authority, which directs what to be done by the citizens. The term sovereignty when used to refer to a state it means one, which governs itself independently of any foreign power. The sovereignty will always change according to the context in which it has been used. When referring to the state power, sovereignty means the state lawful control of over it territory against external against external control and exclusive authority to apply the law in the territory[58]. '5Loosely speaking, a sovereign state is one, which is free and independent.

3.3 Westphalia notion of Sovereignty

The Westphalia concept has its history in the Peace o1 Wesiphuhia treaty signed in 164. Hereby major European powers agreed to respect and abide by the notion 01 territorial integrity. The agreement was to the effect that the interests of state superseded those of individual. In the interstate relations, states of states superseded in the interstate relations, states become institutionalized as a primary adherence on different roles

The Westphalia sovereignty is base on two salient principles. To start with territoriality and secondly, he exclusion of external actors from the affairs of the domestic structures

The essential nature of the Westphalia peace agreement is often said to have greatly contributed to the cease nature of major European states from improving authority on relatively weaker states. The nations of the Westphalia sovereignty is best summarized in the following principles

- The principle of states existing in legal equality

[58] In the context of Rights and Duties of states the restatement of the law third

- The principle that a state should observe non interference in the affairs of another
- In realizing, the determination of political self sovereignty of states is a key fiber
- The international relations system has its pillars in the sovereignty of states

In. considering sovereignty as a vital feature in the inter state relations, it is imperative to comprehend the notion that such element exists in the affairs of the state only. Sovereignty as doctrine of international law is not applicable in individual to individual relationship. To achieve such analysis the Montevideo Convention on the rights and duties of states is subject of the following discussion.

3.4 The Montevideo Convention on Sovereignty

The rights, duties and statehood were clearly spelt out in the Montevideo Convention on the Rights and Duties of States. The treaty is of wider application which extends not only to the signatories but to all subjects of international law since it envisages the principles of international customary law and the existing norms. Article1 [59] of the Convention states the four elements of statehood, which have been recognized as applicable elements of customary international Law. In the Convention the following traits define a state (a).a defined territory (b) capacity to enter into relations with other states and(c) a government. According to Article 3[60] the political existence of a state is independent of recognition by other states. In essence it means that a state is an independent person under

[59] Article 1 of the Montevideo convention
[60] I bid

international law and slates must respect the existence of such independence. The above mentioned notion is famously) known as the declarative theory of statehood. International legal personality has overtime been used by colonized groups to attain their own governance and self-determination.

State and statehood has also been defined by the Badiminter Committee, which states that state must have a territory, a population, and a political authority. In the very words of the Badimininter Committee. The existence of' a state is a matter of tact while it's recognition by other states is declaratory.

3.5 The Modern Trend and Exercise of the Notion of Sovereignty.

The notion of sovereignty has taken a different shape in recent years. Ii has taken to main forms to be realized: through intergovernmental or supranational. In international poi tics, the two are used to enhance cooperation in international politics.

Intergovernmental is a method of decision making by states in which power is owned by the states but decisions are made. in agreement. In pursuit of similar interests, the states remain as independent units but engage in pool sovereignty until such an interest is achieved. Supranational approach encompasses member states only jointly agreeing to exercise their sovereignty. Under Supranational approach, different laws are made in a regional level which if states agree to it supersedes the provisions of the national law.

3.5.1 What is Legal Sovereignly?

Under the international law perception. legal personality means establishing the status of the an independent political entity of the state in the independent political entity of the state in the international arena. As a general rule in the

affairs of international community all state equal. Vattel explores the equality of states grounded on the principle that just as men are equal before the law similarly slates should be equal in the affairs of the international forum. i-fe further suggested that the size of a: state compared to another could not be used to deprive a state its inherent sovereignty. Recognition is the basic joining thread which helps in having a basic understanding of legal state sovereignty. All available literature seems to agree that for a state to acquire sovereignty. recognition by other members of the international community is paramount. Clearly stated without recognition a state is not sovereign. The legitimacy of sovereignty is achieved through recognition. Recognition as a matter of principle supersedes other elements in establishing the existence of sovereignty. In the past states like India have played a key role in the League of 1'Jations without having a defined territory. Member states make decisions to recognize states as legal entities with juridical equality. International affairs are governed on an understanding that that they share relationships which have to always be adhered to. Worth noting is that the sovereignty of a state must be recognized by the United Nations. Under Article 2[61]. equality all states is recognized by the member states and the law respects such equality while prescribing the punishment on a state which violates Article [62]. It is the sole duty of the Security Council under Article 6 to expel a member from the organization if it is found to have breached the sovereign existence of another.

In recent years, there has been a contention on the extent and what specifically entails state sovereign and whether such contention has been largely taken to ascertain whether the doctrine of sovereignty has any applicability in protection of human rights. There are authorities that have clearly defined the extent to

[61] Article 6 of the United Nations Charter
[62] Article 2 of the United Nations Charter.

which sovereignty has never been part of the human rights. It has been unlikely to define sovereignty without an attempt to consider whether there was protection of human rights under the international law. To the exclusive use of the states sovereignty has to be achieved with jurisdiction being a yard stick upon which the sovereignty of a stale is exercised. Jurisdiction as defined by the Permanent Court of International Law to mean the exclusive exercise of powers within the limits fixed under international law. Essentially, it follows such authority recognized both in customary law and general as well as under any treaty law. So in the confines of liternational law sovereignty can be said to be the power 10 everything that is not forbidden under international law[63].The yard stick is whether such a state has any international recognition of duties by both the international community and international law and international customary law.

3.6 Rule of Law

Many institutions identify fair, impartial, and accessible justice system and a representative government as key elements of the rule of law.[64] According to Kanyeihamba, the term 'rule of law" is used to mean independent, efficient and accessible judicial and legal systems, with a government that applies fair and equitable laws equally, consistently, coherently, and prospectively to all of its people Rule bf law is the exercise of state power using, and guided by. published written : standards embody widely-supported social values, avoid particularism, and enjoy broad-based public support.

Hence where rule of law is strong, peeple uphold the law not out of fear but because they have a stake in its effectiveness. Virtually any state, after all, can

[63] PCLJ, Judgment, Lotus case

[64] The World Bank, Initiatives in Legal and Judicial; Synopsis of world Development Reports (1995-2005) Kanyeihamba G.W.; Constitutional law and Government in Uganda (1975).

enact laws; corrupt and repressive regimes can legislate at will. Genuine rule of law, by contrast, requires the cooperation of state and society, and is an outcome of complex and deeply rooted social processes. Wrongdoers face not only legal penalties, but also social sanctions such as criticism in the news media, popular disapproval, and punishments from professional and trade associations. An approach that relies solely upon detection and punishment may work for a time, but will do little to integrate laws and policies with social values, or to create broader and deeper support for the system[65].

3.6.1 Aristotle's Theory of Rule of Law

In his masterpiece, The Politics Aristotle sets out. an ethical purpose as the chief end of the state. He suggests that the real purpose of the state ought to be the moral improvement of its citizens, it being an association of men living together to achieve the best possible life[66] For him, the state alone was self-sufficing so much to provide all the conditions within which the highest type of moral development can occur.

He argued that to be truly self-sufficing or to achieve its purpose, the state ought to be a good state that is, one in which an ideal rule reigns. According to Aristotle: an ideal rule is constitutional and never despotic. So in any good state the law must be the ultimate sovereign and not a person or individuals. The law must be supreme since its impersonal authority is less subject to passion than men can claim to be. This impersonal quality of the law that no man however

[65] Kanyeihamba, G.W., Judicial Activism and the quest for I-luman Rights in Uganda" (2003) Makerere law Journal
[66] George H. Sabine. A History of Political Theory, Fourth Edition, Revised by Thomas Landon Thorson (Hinsdale, Illinois: Dryden Press, 1973). P, 102.

good can attain proves that even the wisest ruler cannot dispense with the law. Law is reason unaffected by desire.

In addition, Aristotle contended that in a political relationship that permits of freedom both the ruler and ruled have legal status and that the subject[s] never wholly resign judgment and his responsibility. It is only rule of law that is consistent with the dignity of the subject. Sabine highlights three elements explaining Aristotle's understanding of rule of law:

First, it is rule in the public or general interest as distinguished from a functional or tyrannical rule in the interest of a single class or individual.. Second, it is lawful rule in the sense that government is carried on by general regulations and not by arbitrary decree, and also in the vaguer sense that the government does not flout standing customs and conventions of the constitution. Third, constitutional government means the government of willing subjects as distinguished from a despotism that is supported merely by force.

The researcher notes that Aristotle's theory of rule of law is relevant for it provides the study with a framework through which we can base to find out whether Uganda has promoted rule of law. Resultantly we will be able to explain and understand the hold of' rule of law in Uganda in relation to the furtherance of good governance.

3.6.2 Dicey and the rule of law

As to Dicey understood rule of law as the supremacy of law consisting of three concepts or principles. These concepts as they related to England were: "No man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the courts of the land. This means that in any legal order, no one can be arbitrarily throwing

jail if no law has been broken. Neither a person nor his or her goods can be interfered with unless a law is broken. Society is ruled by law. The correlative of this is that the government can only do things that are authorized by or within the law. Dicey contrasts England, being ruled by law, with every other system of government where the ruling power (the executive) exercises wide, arbitrary or discretionary powers of constrain over its citizens as demonstrated in matters of arrest, of temporary imprisonment, expulsion from its territory and the like with discretion comes arbitrariness[67]".

He further urges that no man is above the law, meaning that whatever man of his rank or condition is, he is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals. This means not only that everyone is accountable if they break the law but also that everyone, regardless of rank or condition, will be subjected equally to the same law and he subject to the same law courts. This position is contrasted with the exemption of officials or others from obeying the same law which governs other citizens or from the jurisdiction of the ordinary tribunals or courts take for instance the Ugandan constitution gives immunities to some class of people which shall be a point of analysis.

Lastly A.V. Dicey argues that the law must he the instrument of a just government of the rule of law that is a government not built on justice is a clear violation of rule of law. These three concepts of "rule of law" as set out by Dicey demonstrate a much deeper and broader definition than other scholars definition of the term does. "Rule of law" seems to describe the parameters of the law and how the legal system upholds the law. I will examine the following principles to judge whether a country has good governance by the rule of law:

[67] AN. Dicey's An Introduction to the Study of the Law of the Constitution (eighth edition; 1914)

These basic principles have always formed the basis of the rule of law for the last two centuries and modifications have been made to suit changing circumstances. In 1959, the International Coalition for Jurists (ICJ) met in Geneva and formulated certain principles for determining circumstances in which rule of law can be said to be in existence. The first principle according ICJ is the existence of a strong government, that all government actions must be backed and conditioned by the law, equality before the law, there exists independence of the judiciary, respect Of human rights, representative government, fair process of judicial adjudication and natural justice, a fair and effective system of administrative law, respect for international law or the law of nations because all the countries relate to one another and no country lives in a vacuum and that the state should promote and enhance the social and economic well being of the people[68] .

3.7 Immunity from jurisdiction

With the treaty of Westphalia 1648 the modem state emerged with its centralization of legislative, judicial and enforcement of power. The need for protection of representatives of foreign states led to the development of diplomatic immunity for the ambassadors and members of a foreign embassy. The visits of personal sovereigns required development of diplomatic principle of inviolability of their person and immediate possessions and entourage as well as immunity from suit in the local court. The visits of warships of friendly states to National Ports required the recognition of the ships immunity from local jurisdiction. From

[68] Kituo Cha Ktiba Occasional publication (2005). The Independence of the Judiciary and rule of law; strengthening constitutional activism in East Africa. Edited by Frederick W. Jjuko, (2ed) MPK, Publishers Kampala

these separate regimes, a parallel concept of state immunity developed to provide protection from national courts powers for the legal entity of the state itself[69].

Sovereign immunity and Diplomatic immunity are the exceptions to the right of a state. Diplomatic immunity refers to the immunity of states official representatives in foreign countries. The basis of immunity is thus based on the Latin phrase "*par in parern non habet* imperium" i.e., the tacit understanding is that since states are equal one can not exercise authority over an equal.[70] Of pivotal importance to point out is that, historically a Sovereign and his State were regarded as synonymous. Consequently, the ruler, sic sovereign of a foreign state enjoys complete immunity and this principle extends to acts done in his private capacity[71]. It was in formulating the immunity from jurisdiction of the national court for warship that the general principle of state immunity was first established by Chief Justice John Marshall when he declared that the jurisdiction of a state within its territory was exclusive and absolute, but did not encompass foreign sovereign[72].

In the classic instructive case of: The schooner exchange vs. McFadden,[73] Marshall C.J referred to the jurisdiction of a state within its own territory as being 'necessarily exclusive and absolute', in his words:

This full and absolute territorial jurisdiction being alike the attribute of every sovereign and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One

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[69] Malcolm D. Evans (Ed) international Law (2nd Ed, 2003)

[70] F. X Njenga, International aw and World order problems (2001).

[71] Mighellv Sultan of Jahore (1894) 1QB 149.

[72] I bid

[73] (1812) Cranch (US)

sovereign being in no respect amenable to another, and being bound by obligation of the highest character not to degrade the dignity of his. Nation by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter sovereign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, one reserved by implication, and will be extended to him. This perfect equality and absolute independence of sovereigns, and this common interest compelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of part of that complete exclusive territorial jurisdiction, which has been stated to be attribute of every nation.[74]

The instances which were then enumerated were the exemption of the person of the sovereign from arrest or detention within a foreign territory, the immunity of foreign ministers, and the passage of foreign troops under license. In an earlier period the immunity would be seen to attach to the person of the visiting sovereign, but in the view of the Supreme Court the immunity clearly extends to the various organs of the visiting Nations and the sovereign himself if considered somewhat in a representative capacity. I shall argue herein that the duty of the international community to respect and uphold human rights transcends state borders and invoking the concept of state sovereignty as a defence cannot reasonably suffice where a state has failed to guarantee her people the fundamental human rights recognized under the regime of international law.

3.7.1 Types of State Immunity

International Law recognizes two basic types of immunities from jurisdiction in relation to officials of states[75]:

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[74] Ian Brownlie, Principles of International Law (6th Ed, 2003).

[75] Supra note 10

3.7.2 Immunity Ratione Personae

This is the immunity granted to certain State officials solely because of the very sensitive positions that they hold. These positions are regarded sensitive because they are necessary for the maintenance of both public and international relations[76]. Therefore any interference with the proper carrying out of the official duties by the respective officers is shielded by the grant of immunity. This immunity extends both to the official and private acts of the State officials as the subjection of either of these acts to the jurisdiction of the receiving state may result in the interference of performance of obligations. It should be noted that this kind of immunity is granted only for the sole purpose of enabling the State official to effectively carry out his duties and as such, this immunity lapses when the official ceases to carry out his obligations as stipulated by his terms of service. Immunity from jurisdiction ratione personae was well brought out in The Arrest Warrant Case[77] which concerned the issue by a Belgian Magistrate of an international warrant for the arrest of the incumbent Congolese Foreign Minister for his alleged involvement in grave breaches of The Geneva Conventions and additional Protocols and crimes against humanity.

The I.C.J upheld Congo's complaint that the issue of the arrest warrant was a violation of the immunity from criminal jurisdiction and personal inviolability which an incumbent Foreign Minister enjoys under international law. The court based this decision on the functions exercised by a Foreign Minister such as representing the state in international negotiations and meetings and acting on

[76] The Vieima Convention to Diplomatic Rights entrenches this point in its preamble by providing that the functions of certain key offices of the state are so important to the maintenance of international relations that they require immunity for their protection and facilitation.

[77] Arrest Warrant of 11 April 2000 (Democratic Republic of Congo V. Belgium) ICJ Reports 2002 p3.

behalf of and to bind the state in treaty relations, which functions required that a Foreign Minister should be able to travel internationally freely and be in constant communication with his Government and its Diplomatic Missions around the world. Therefore, Foreign Ministers enjoyed complete personal inviolability and absolute immunity from criminal jurisdiction ratione personae throughout the duration of their office.

3.7.3 Immunity Ratio Materiae

Unlike immunity Ratione personae which is enjoyed by virtue of the office held, immunity ratione materiae relates to the acts performed by State officials, that is, it attaches to the official acts of State officials. The importance of this distinction is that immunity ratione materiae relates to the nature of act in question. Thus a state official can claim immunity even after he has left office for the official acts he performed while still in office. Immunity ratione materiae therefore does not lapse upon one leaving office. However this properly construed does not mean that those leaders who while in office met atrocities to the governed can escape liability.

3.7.4 Contemporary conceptualization of territorial jurisdiction

This principle simply put is to the effect that a state has jurisdiction over all matters arising in its territory. This is so irrespective of whether the individuals concerned are nationals, friendly aliens or enemy aliens and was for example the primary ground for Scotland's assertion of jurisdiction in the Lockerbie case[78].

[78] Libya Arab Jamahiriya v UK and US 1992 ICJ Rep Para.22. In this case Libya had applied to the court indication of interim measures of protection which is similar to temporary injunctions because of alleged threats made by the UK and US as a response to allegations that Libya nationals were responsible for the destruction of aircraft over Lockerbie in

This rule accords with international practice and greater part of the criminal and civil jurisdiction exercised by states is based on this principle. Some doubts remain as to when an act can be said to have been 'taken place' on the territory of a state, but these have been substantially reduced by the development of the 'objective' and 'subjective' approaches.

3.7.5 Objective territoriality

A state will have jurisdiction over offences which are completed in its territory, even though some element constituting the offence or civil wrong took place abroad. In the Lotus case[79] for example, a collision between The Lotus, the French ship and a Turkish vessel resulted in the death of eight persons on the Turkish vessel. France objected to the exercise of jurisdiction by Turkey over the French officer on watch. However after noting that the Turkish vessel resulted was to be assimilated to Turkish territory, the Permanent Court of International Justice (PCIJ) decided that Turkey was entitled to exercise jurisdiction by virtue

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1988. During the hearing the of Libya's application the security council adopted enforcement measures and the court took the view that it was bound to dismiss Libya's claim because of mandatory security council resolution which decisively characterised Libya's conduct as threat to international peace (SC Res.748.) This acceptance by the Court of Security Council supremacy in what was clearly a legal dispute and that was already before the court illustrates very powerfully that matters of legal obligation can become entwined with political necessity in the system of international law. As to whether this decision of the Court bodes well for the future of the ICI as mechanism for the enforcement of international law remains to be seen especially if the courts jurisdiction can be ousted by any reference of a matter to the council. It is hoped that the court will not renounce its jurisdiction if the Council is only considering a dispute as opposed to when it has actually made a concrete determination of the very question before the Court. This was evident in judge Lauterpatchs separate opinion in the case concerning the application of the convention on the prevention and punishment of the crime of genocide (Bosnia v Yugoslavia (Serbia and Montenegro) 19931CJ Rep 325) and the exercise of jurisdiction in the Congo Case (2000).

[79] The S.S Lotus, 1927 P.C.I.J. (Ser. A) No. 10.

of the fact that a constituent element in the offence of manslaughter —death had occurred on the Turkish territory.

3.7.6 Subjective territoriality

A state will have jurisdiction over all offences and matters commencing in its territory even if some element or the completion of the offence takes place in another state. This principally seeks to limit the doctrine of exclusive territoriality. In the United Kingdom, the territoriality of jurisdiction is regarded as of fundamental importance as was made clear in Compania Naviera Vascongado v Steamship Cristina[80] when the court emphasized the absoluteness of the Court reach within it the territory.

3. 8 Immunity of Heads of State

During earlier times when International Law closely identified a Head of State with his State, the absolute doctnne of sovereign immunity prevailed. This is where the sovereign was completely immune from foreign jurisdiction in all cases regardless of the circumstances[81]. However with the increased involvement of States in commercial activities, it was felt that this doctrine of absolute immunity would give the respective States an unfair advantage over the competing private enterprises who engaged in similar activities. This therefore led to the adoption of the Doctrine of Restrictive Immunity where States enjoyed immunity in

[80] (1938)AC 485

[81] This was the approach taken in the Parlement Beige Case [1879] 4 PD 102 129, where the courts held that the suit against a Belgian ship engaging in commercial activities of carrying mail could not succeed because of state immunity.

governmental activities only, jure imperil, but not in commercial activities, jure gestionis.[82]

Therefore, as the restrictive doctrine in relation to states developed, more distinct rules in relation to immunity of Heads of State also developed. The general principles in Customary International Law regarding the immunity of a Head of State are that the Head of State enjoys complete personal inviolability and absolute immunity from criminal jurisdiction ratione personae[83]. This would even apply to actions they perfonn during their tenure of governance. As regards civil jurisdiction, acts performed by the Head of State in his official capacity as an organ of the State will be subject to the immunity of the State itself. For acts performed in his private capacity, a Head of State will enjoy immunity from civil jurisdiction subject to the similar exceptions listed in Article 31 of the Vienna Convention on Diplomatic Relations'05. When a Head of State leaves office, he will enjoy subsisting immunity ratione materiae for his official acts[84].

3.8.1 Extent of State Immunity

The rampant increase in the perpetration of serious international crimes that offend international public order by a number of State officials has raised a lot of questions especially as regards immunity. The issue whether State Immunity constitutes a bar to proceedings involving international crimes has been the

[82] In The Empire of Iran Case (1963) 45 I.C.R. 57The Federal Court of Germany adopted the restrictive policy and denied the Iranian ship immunity from jurisdiction because it was involved in commercial and not governmental activities.

[83] This is reflected in section 20 of The State Immunity Act of 1978 of U.K which equates the position of a foreign head of state with the head of a diplomatic mission.

[84] These exceptions include action relating to private immovable property unless he holds it on behalf of the sending state action relating to succession in which he is involved as an executor or administrator as a private person and not on behalf of the sending state and action relating to any professional or commercial activities exercised by him outside his official functions

subject of much debate. This controversial issue has been well brought out by Sir Arthur Watts[85] who succinctly stated that;

For international conduct which is so serious as to be tainted with ciminality to be regarded as attributable only to the impersonal state and not to the individuals who order or perpetrated it is both unrealistic and offensive to common notions of justice.

This suggests that as pertains serious crimes under International Law, the perpetrator, a state official, should not be permitted to claim and enjoy the immunities that he would have otherwise been entitled to. This has therefore led to the evolution of individual criminal responsibility under international law for international crimes[86]. The general principle in relation to international crimes is that as regards immunity ratione personae, the relevant official will not be immune from the international proceedings that will follow.

However in The Arrest Warrant Case [87], the I.C.J concluded that under customary international law no exception to immunity ratione personae existed in respect of war crimes or crimes against humanity. However it established certain circumstances in which availability of immunity ratione personae of incumbent office holders would not prevent their prosecution;

1. Where the office holder in question is prosecuted by the courts of his own state;

2. Where immunity is waived by the office holder's state;

3. When the office holder leaves office, he may be prosecuted by the court of another state in respect of his acts prior to or subsequent to his period of office, or for his private acts during his period of office; and

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[85] This is similar to the provision embodied in Article 39(2) of the Vienna Convention on Diplomatic Immunities.
[86] Chanaka Wickremasinghe, 'Immunity of State Officials and International Organizations' (2006) International Law 2nd Edition Oxford
[87] Supra note 23

4. By certain international criminal courts, provided that they have jurisdiction[88]

Once such an official leaves office he will enjoy immunity ratione materiae as pertains official acts only but not in respect of the relevant international crimes. This was clearly brought out in The Pinochet Case[89].

In September 1973, General Pinochet, the Commander In Chief of the Chilean Army, seized power in Chile and installed himself as the Head of State. He retained power until 1990, when he stepped out in favour of a democratically elected Government. It was alleged that he had maintained himself in power by systematic and institutionalized use of torture as an instrument of state policy akin to the policy of pursuing policies geared towards impoverishment of his people. In October 1998, he visited the U.K in a private capacity. He was arrested by the Metropolitan Police on an international warrant issued by a Spanish examining Magistrate. This would fail under the principle of universality which is a principle the ICC has .been relying on to bring perpetrators of crimes against humanity to face justice.

The Crown Prosecution Service, acting on behalf of the Kingdom of Spain, applied for his extradition to Spain. General Pinochet opposed the application and applied for a writ of habeas corpus. He argued that the English Courts had no jurisdiction over offences committed by a foreigner abroad. He further argued that even if it had jurisdiction, he had state immunity as a former Head of State for acts committed in the exercise of his official functions. The court on a majority basis held that individual responsibility for serious crimes in international law cannot be opposed by reliance upon immunity ratione materiae of former Heads of State. That form of immunity only covers official acts in order to ensure that

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[88] Supra note 33.

[89] The Rt. Hon The Lord Mjllet: The Pinochet Case-Some Personal Reflections in Evans .M. (ed), International Law, 2d Edition Oxford, 2006.p 7.

the immunities of the state itself are not undermined by proceedings against its former I-lead of State but cannot be invoked in respect of an individual's own criminal responsibility in international law.

Therefore it has been thought that the way a sovereign state treats its own nationals is not a purely internal matter. As with the Pinochet Case, the moral justification is that some crimes are so great that they are not crimes against domestic law and order but crimes against humanity itself. Those who commit them do not merely offend against their domestic law, but are enemies against mankind as it ought to be with those who pursue polices that lead to the suffering of the people they govern.

3.8.2 Sovereignty and the Maintenance of World Order

A realist may argue that sovereignty is based less on a set of principles than on the ability of a political group to establish domestic control over its territory and defend it from external attack. As Robert Art and Robert Jervis point out, the anarchic environment of international politics not only allows every state to be the final judge of its own interests, but also requires that each provides the means to attain them.124 Yet the very foundation of the nation state system, its diplomatic procedures, treaties, international laws, wars and all other institutions that provide for communication and interaction among states, rests on the mutual recognition among government leaders that they each represent a specific society within an exclusive jurisdictional domain[90].

[90] J. Samuel Barkin, Bruce Cronin, "The State and the Nation: C ging Norms and the Rules o overeignty in International Relations," International Organization, Vol. 48 No. 1, (winter: 1994), pp. 107-130. Available at < http://www.jstor.org > at 21 October 2008. See also Article 2(1) of the UN Charter.

Diplomatic recognition and legitimating are prerequisites for participation in the system as a full member. This type of legitimacy is essentially a political rather than a legal or moral function. Thus a nationalist group claiming to represent a population and territory that takes military action in support of its claims is considered terrorist. As such it is generally condemned and opposed, often militarily, by the world community. At the same time, a state, however much it is disliked, is recognized as having the right to defend its claims with military force.

Changes in the content and understanding of sovereignty can greatly affect the ways in which states are constrained or enabled to act in their international relations. As Anthony Giddens points out, the sovereignty of the nation state does not precede the development of the state system. State authorities were not originally empowered with an absolute sovereignty destined to become confined by a growing network of international connections. Rather, the development of state sovereignty depended (and still depends) on a monitored set of relations between states. "International relations are not connections set up between pre-established states," Giddens argues, "which could maintain their sovereignty without them: they are the basis upon which nation states exist at all." [91] The concept of sovereignty in international relations has been ascribed to two different types of entities: states, defined in terms of the territories over which institutional authorities exercise legitimate control. On the other hand, there are nations, defined in terms of communities of sentiment that form the political basis on which state authority rests. While they are institutionally and structurally alike, these two ideal types differ fundamentally in the source of their legitimization as sovereignty entities.

[91] See Antony Giddens , The Nation-State and Violence (Berkeley: University of California Press, 1987), p 263.

3.8.3 The Traditional Doctrine of Non-Intervention

During the hey days of the 'horizontal' system of sovereign and independent states, international law limited itself to regulating interstate relations, such as war, diplomacy and the protection of foreigners. By contrast, the international law of human rights and recent developments in areas such as environmental law and the law relating to commerce and trade, pose a threat to the traditional notion of 'internal affairs' of states by regulating matters between the state and its citizens, and to some extent, also between citizens. [92]

The UN Charter does not contain an explicit and specific rule of non-intervention. What it contains is an article that prohibits 'the threat or use of force against the territorial integrity or political independence of any state"[93] What needs to be stressed here is that the UN Charter does not prohibit the use of force per se. It makes a fundamental distinction between offensive and defensive resort to force. The prohibition refers only to the former. According to Article 51, states have a right to self defense, both individually and collectively. The only Article in the UN charter that deals explicitly with interventions is Article 2(7)[94]. This article does not however concern the relations between individual states. It applies only to the itself and is designed to regulate the relations between the UN and its constituent member states.

[92] This and particularly the latter case, has been made possible by the development of the law of conflict of laws or Private International Law. This branch of international law seeks to regulate relations and agreements entered into by individuals across state borders. In this regard, different national laws, based on the doctrine of comity, apply to ensure that justice is attained in a forum court as would be arrived at were the different states' courts to seize of the matter between the parties concerned. This has in turn enhanced commerce and mobility of individuals worldwide.

[93] See Article 2(4) of the UN Charter.

[94] It provides in the present charter shall authorize the united nationals to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Member to submit such matters to settlement under the present Charter, but principle shall not prejudice the application of enforcement measures under Chapter VIII

The crux of the article is an emphasis on domestic jurisdiction, that is, the right of sovereign state to control their won internal affairs. Thus, internal affairs in UN member states have not been deemed to be within the organization's competence. This prohibition is however qualified by reference to Chapter VII. According to Articles 41 and 42, provided the situation is one that constitutes "a threat to peace, breach of peace, or act of aggression".

Although the UN Charter strictly speaking, lacks an explicitly principle of non-intervention that applies to the behavior of states towards each other, the UN General Assembly has on several occasions adopted a negative attitude to interventions. The declaration on the inadmissibility of intervention in the Domestic Affairs of States and the protection of their independence and sovereignty[95], AND Declaration of principles of International law concerning friendly Relations and Co-operation among states in Accordance with the charter of the UN,[96]

No state or group of states has the right to intervene, directly or indirectly, for any reason whatever, in the internal affairs of any other state. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the state, or against its political, economic and cultural elements, are in violation of international law[97].

These resolutions reaffirm the principles of sovereignty and non-intervention in what amounts to an unqualified general principle of non-intervention;

3.9 Limits to Sovereignty

There are important and widely acceptable limits to state sovereignty and to domestic jurisdiction in international law. First, the Charter highlights the tension between the sovereignty, independence, and equality of individual states,

[95] General Assembly Resolution 2131 (XX), 1970)
[96] General Assembly Resolution 2625 (xxv), 1970))
[97] I bid

on the one hand, and collective international obligations for the maintenance of international peace and security, on the other.[98] According to Chapter VII, sovereignty is not a barrier to action taken by the Security Council as part of measures in response to "a threat to the peace, a breach of the peace or an act of aggression". In other words, the sovereignty of states, as recognized in the UN Charter, yields to the demands of international peace and security. The status of sovereign equality only holds effectively for each state when there is stability, peace and order among states.

Second, state sovereignty may be limited by customary and treaty obligations in international relations law. States are legally responsible for the performance of their international obligations, and state sovereignty cannot therefore be an excuse for their non-performance. Obligations assumed by states by virtue of their membership in the UN and the corresponding powers of the world organization presuppose a restriction of the sovereignty of member states to the extent of their obligations under the Charter. Specifically, Article 2(2) stipulates that 'all members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter'.

Furthermore, Chapter 1 obliges member states to achieve international cooperation in solving problems of an economic, social, cultural, or humanitarian character and in promoting and encouraging respect for human rights and for fundamental freedoms for alt, without distinction as to race, sex, language or religion)[99] This article further recognizes the UN as a center for harmonizing the actions of states in the attainment of these common ends.[100] Thus, the Charter elevates the solution of economic, social, cultural and humanitarian problems, as well as human rights, to the international sphere. By definition, these matters

[98] Christopher M. Ryan, "Sovereignty, Intervention, and the Law: A Tenuous Relationship of Competing Principles", Millennium: Journal of International Studies 26 (1997), p. 77
[99] See Article 1(3) of the UN Charter.
[100] Article 1, paragraph. 4.

cannot be said to be exclusively domestic, and solutions cannot be located exclusively within the sovereignty of states. Sovereignty therefore carries with it primary responsibilities for states to protect persons and property and to discharge the functions of government adequately within their territories.[101]

The quality and range of responsibilities for governance have brought about significant changes in state sovereignty since 1945. In particular, since the signing of the UN Charter, there has been an expanding network of obligations in the field of human rights. These create a dense set of state obligations to protect persons and property, as well as to regulate political and economic affairs. Sovereignty is incapable, then, of completely shielding internal violations of human rights that contradict international obligations.[102]Similarly, Article 2(7) of the Charter is also subject to widely accepted limits. In the first place, this article is concerned chiefly with the limits of the UN as an organization. In the second place, the words "essentially within the domestic jurisdiction of states" refer to those matters that are not regulated by international law. As the ICJ has concluded, "The question whether a certain matter is or is not solely within the domestic jurisdiction of a state is an essentially relative question; it depends on the development of international relations". The ICJ has further concluded that it hardly seems conceivable that terms like "domestic jurisdiction" were intended to

[101] The intention of the international community in drawing the Charter is captured in the preamble paragraphs and Article 1 of the Charter which stipulates the purposes of the United Nations which includes the promotion of human rights and fundamental freedoms of peoples of all nations. This precedes the concept of sovereignty, which is provided for under Article 2, as a principle for the pursuit of the said purpose among other objectives.

[102] As Annan suggested in his opening remarks at the 1999 General Assembly: That States bent on criminal behaviour should know that frontiers are not the absolute defence. See Kofi .A. Annan, " the Secretary General opening speech to the 54th Session of the General Assembly," September 20th 1999. this respect events of the last ten years can bear witness to this with the creation of the International Criminal Court-ICC.

have a fixed content, regardless of the subsequent evolution of international law. Sovereignty has been eroded by contemporary economic, cultural, and environmental, factors. Interference in what would previously have been regarded as internal affairs by other states, the private sector, and non-state actors, has become routine. However, the pre-occupation here is not these routine matters but the potential tension when the norm of state sovereignty and egregious human suffering coexist. The limits on sovereignty discussed above are widely accepted. They originate in the Charter itself, and in the broader body of international law. In recent decades, additional challenges to the notion of state sovereignty have emerged: continuing demands for self determination, a broadened conception of international peace and security, the collapse of state authority, and the increasing importance of popular sovereignty.

3.9.1 Challenge to the Twin Principle of Sovereignty and Non- Intervention

The above description of the traditional principle of non-intervention does not seem to capture its present stat-us and scope. The principle has undergone important changes, and that it is no longer the case that states have a right not to be interfered with solely because of their constitutional independence. It would seem that states have to pass a test that is considerably more severe in order to enjoy protection under the principles of non-intervention. This has given the principle its modern shape. The scope of the non-intervention principle has significantly decreased due to a number of challenges but more significantly due to the universal human rights challenges.

3.9.2 The Universal Human Rights Challenge

For a long time, human rights were part of the reserved domain of states. That is a matter which was not, in principle, regulated by international law. The principle

of non-intervention as traditionally understood has in practice provided a shelter from external efforts at terminating gross and systematic violations of universal human rights. This is demonstrated by the extreme case where the 'sovereign' territorial state claims as an integral part of its sovereignty, the right to commit genocide, or engage in genocidal massacres against peoples under its rule.[103] This is not to say that human rights have never been a proper issue for interstate relations. The UN Charter contains several provisions that deal with human rights. Suffice it here to mention.

Article 1(3)[104], the Universal Declaration of Human Rights,[105] and the two International

Covenants on Human Rights 1966.[106]

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[103] For example, Wagalla Massacre in Kenya, the killing of Kurds in Iraq under Sadam Hussein

[104] The Charter provides that; to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.

[105] General Assembly, in its Resolution 217 (111) of 1948, adopted the Universal Declaration of Human Rights which affirms the Charter's pledge towards human rights. In the preamble, the Declaration affirms the nexus between peace and human rights, especially in paragraph (I) which reads: "... the inherent dignity and ... equal and inalienable rights of all members of the human families is the foundation of freedom, justice and peace in the world". Paragraph (4) goes ahead to affirm that "... disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind". See Resolution 217 AI(1 11), G.A. 10 December
Rd 1984. Official Records, 3 Session (A1810). The Declaration was initially perceived to be mere moral statements of rights, but its provisions have now crystallized into customary international law, consequently acquiring the status of jus cogens from which no derogations are permissible. See Daniel C. Prefontaine Q.C and Joanne Lee, The Rule of Law and the Independence of the Judiciary, paper prepared for World Conference on the Universal Declaration of Human Rights, Montreal, December, 7, 8, and 9, 1998. Available at http://www.icclr.law.ubc.ca > at 21 March 2008.

[106] See the International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in

These together with others confirm the universal character of human rights. What is important however is that the UN has traditionally left the prerogatives of state sovereignty to take precedence over those of human rights when the two have come into conflict. Owing to this precedent, the ICC finds itself on the siege since many of the rogue regimes flourish at the alter of this precedent. Proponents of the right of humanitarian intervention have persistently argued for the lessening of state privileges. They argue that by virtue of the development of international law regarding human rights, the Charter and the variety of resolutions confirm the existence of humanitarian intervention. Like their opponents, they invoke the Charter's articles to justify their view. Article 1 of the Charter enlists the major purposes of the United Nations, the maintenance of peace and principle of equal rights, principle of self-determination and the promotion of human rights. Article 1(3) affirms the link between the respect of the principle of self- determination and the promotion of human rights.

The preamble to the Charter explicitly refers to the will of the people of the world and its determination "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in equal rights of men and women."[107] Commenting on the preamble's statement, Professor Reisman sheds light on the importance of human rights which, in his view, outweigh the restriction on the use of force by saying: it is significant that, in the following paragraph of the preamble, there is a commitment to ensure, by the acceptance of principles and the institution of methods, that armed forces shall not be used save in the common interest. Hence the preamble statement of the Charter confirms that the

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accordance with Article 49 thereof; and the International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly, Resolution 2200A (XXI) of 16 December 1966 and entered into force on 3 January 1976 in accordance with Article 27.

[107] See Reisman and Myres McDougal, "Humanitarian Intervention to Protect The Ibos", R. Lillich, Humanitarian Intervention And The United Nations, 1973, P. 172. Quoted in Arab Quarterly Review. Available at < http://www.jstor.org > at 21 October 2008.

use of force in common interest such as for self defence or humanitarian purposes continues to be lawful.[108]

With such emphasis on the protection of human rights, the issue becomes clearer that "the use of force for urgent protection of such rights is no less authorized than other forms of self help.[109]The interpretation of the Charter in such a way is more in line with the Charter's commitment to the protection of human rights. The Charter of the United Nations does not deal only with the governments and states or with politics and war, but with the simple elemental

needs of human beings whatever their race, their colour, or their creed. The Charter reaffirms the international community's faith in fundamental human rights. The individual's freedom in the state is thus seen as an essential complement to the freedom of the state in the world community of nations. The social justice and the best possible standards of life for all are stressed as the essential factors in promoting and maintaining world peace.

In cases of human rights violations, sovereignty is never a defence. In cases of gross violations of human rights, it has no role to play. It does not impede the Security Council from concluding that such violations create a threat to the peace and to draw the appropriate consequences in accordance with Chapter VII of the Charter. It cannot even protect Heads of States from international prosecution.[110]

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[108] I bid

[109] I bid

[110] Contrary to the usual fundamental principle prevailing in international law, the "veil" constituted by the State can be pierced and the international penal responsibility of the officials, including the Head of the State, is entailed (this is not so for all other international wrongful acts committed by a State: in these cases officials enjoy "jurisdictional immunities" the Pinochet case is a striking example of what is at stake here. See also Article 27 of the 1998 Rome Statute of the International Criminal Court, it provides as follows:

Irrelevance of official capacity

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

Now, things are different if the violated human rights rule is not only merely "binding" upon the State, but also is of a "peremptory" nature.

As a matter of definition, a peremptory rule is "a norm accepted and recognized by the international community of States as a whole as a norm for which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same Character".[111] This is important. As a matter of definition, these rules, and respect thereof, are of concern for "the international community of States as a whole".

As a consequence, the International Law Commission (ILC) of the UN, in its draft Articles concerning the international responsibility of States, has specified that, in such a case, "all other States" (not only the State whose national directly endures a prejudice) are "injured" by tile internationally wrongful act thus committed, and it has called such a violation a "crime" under international law. In Article 19 of its draft, the ILC has defined a crime as being 'an internationally wrongful act which results from the breach of an obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole'.[112] Among the examples of such State crimes, the ILC cites, e.g.: 'a serious breach on a widespread scale of an obligation of essential importance for safeguarding the

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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.

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.

[111] Article 53 of the 1969 Vienna Convention on the Law of Treaties

[112] This notion of "state crime" is strongly criticized by some states (including the United States and France) and many writers. I am among its most ardent supporters since I think it constitutes substantial progress towards recognizing community interest at the universal level, superseding national egos (see Alain Pellet, "Can a State Commit a Crime? Definitely, yes", European Journal of International Law, 1999, vol. 10, No. 2, p. 426.

human being, such as those prohibiting slavery, genocide and apartheid'.[113] It is thus clear that the enforcement of human rights transcends states' borders, thereby limiting the concept of state sovereignty.

[113] Seemingly captured in Article 7 of the Rome Statute.

CHAPTER FOUR

4.0 CHALLENGES FACED BY THE ICC IN ACHIEVING PEACE

4.1 INTRODUCTION

This Chapter will examine the challenges faced by the ICC in its pursuit of justice regionally and in Kenya

4.2 Slow Wheels of Justice

The ICC is in its infancy. The Court has never concluded a single case since its inception. It is currently hearing its first cases, all from four African countries — Uganda, the CAR, Sudan, and the Democratic Republic of Congo (DRC). Additionally, the ICC has authorized its Prosecutor, Luis Moreno-Ocampo, to open an investigation on Kenya. The Court applies the principle of universality to exercise jurisdiction over the most egregious offences. However, the ICC has faced numerous challenges in the four countries analysed here. The slow wheels of justice at the ICC have been a frustration to victims, and (while there is generally hope and optimism for the Court in most of the target states) there has also been resistance to and obstruction of its work.

For example, a number of senior government officials in Kenya have sent mixed signals about their willingness to cooperate with the Court, and in Sudan the Court has faced outright hostility. But the ICC has made some progress in Uganda, the Central African Republic, and Kenya. These states present different challenges for the ICC, including how it relates to their respective internal political processes, and raise questions about the role of external players and partners such as states and other stakeholders.

4.3 Perception that ICC is a Barrier to Peace and Reconciliation

Many commentators have expressed their concern that the ICC stands as an obstacle to reconciliation and the resolution of conflicts.[114]

In the past, many countries, including South Africa, Chile and to some extent, Great Britain in relation to Northern Ireland, have granted amnesties in order to end conflicts. The fear is that, as the ICC becomes involved in ongoing recent conflicts, wars will be fought longer, peace processes will be disrupted and the leaders will be reluctant to relinquish power if facing indictment. Ultimately, the argument is that removing the possibility for amnesty removes incentives for settlement, and may even encourage leaders to remain in power. The amnesty versus prosecution debate is at issue in at least two of the situations currently under investigation by the ICC prosecutor. In Darfur, the arrest warrant issued for the Sudanese President, al-Bashir is feared by some as a potential threat to the peace process and as endangering humanitarian and peacekeeping operations on the ground.[115]

In Uganda, some observers hold that the ICC arrest warrants were critical in bringing Joseph Kony and others to the negotiating table. 1-lowever, the LRA leaders are now demanding to be shielded from prosecution in exchange for their further participation in the peace process. As such, international and Ugandan opposition to the role of the ICC is mounting. Thus far, the prosecutor has refused to withdraw the warrants.

[114] Roberts (2001)
[115] Arieff Margesson and Browne (2008)

4.4 Problem of Securing the Arrest and Transfer of wanted Suspects

The court generally has no executive powers and no police force of its own; it is totally dependent on the full, effective and timely cooperation form state parties. As foreseen and planned by its founders, the Court is characterized by the structural weakness that it does not have the c9mpetencies and means to enforce its own decisions.[116]With regard to Uganda, warrants of arrests concerning five members of the LRA were unsealed in October 2005. The fact that the arrest warrants have not been executed highlights the critical dependency of the ICC on effective cooperation. Another situation noticeable is the arrest warrant issued against the Sudanese President al-Bashir by the ICC has not been effected notwithstanding his visits to other countries including Kenya during the promulgation of the new constitution. This particular event puts in doubt the cooperation of Kenya once the arrest warrants of the perpetrators of the post election violence are finally issued by the ICC. Sudan has signed but has not ratified the Rome Statute.[117] Subject to the level of capacity and cooperation in the states involved, this has the potential to cause indeterminate delays in bringing suspects to trial.

4.5 Difficulties in Investigations in Conflict Zones

The Court faces difficulty in carrying out investigations and collecting evidence regarding mass crimes committed in regions which are thousands of kilometers away from the Court, which is difficult to access, unstable and unsafe. Due to the problem of accessing conflict zones this has greatly hampered the court's effective

[116] Hans Peter Kaul, The ICC Key Features and Current Challenges

[117] Tim Allen (2006) Trial Justice: The International Criminal Court and the Lords Resistance Army p.91

implementation of its mandate. In Kenya, the Court is already facing a threat of the credibility of the evidence it will rely on prosecuting the masterminds of the post election violence. Many a politician has questioned the credibility sought to be relied on by the prosecutor arguing that the evidence is not credible or conclusive. The prosecutor has been accused of only relying on the evidence of the Kenya National Human Rights Commission (KNHCR) and the Commission of Inquiry into the Post Election Violence (CIPEV) without carrying his own independent investigations.

4.6 Lack universal Ratification of the Rome statute

Currently the Rome Statute has 139 signatures while only 106 of the States have ratified the Statute. Most countries have not yet incorporated or domesticated within their national laws crimes under the Rome Statute. For instance Sudan has not ratified the Statute and this posed a great challenge for the prosecutor to initiate investigations in Darfur until the United Nations Security Council referred the situation non to the Court.

4.7 Prosecution by the ICC is one of the few credible threats faced by leaders of warring parties

One of the main challenges for international policymakers in their efforts to resolve conflicts is that they often lack incentives or sanctions of sufficient credibility to influence the calculations of the warring parties.

To take Sudan as an example, President Bashir is well aware that, for all its rhetoric, the international community will not deploy peacekeepers to Darfur without the consent of the Khartoum regime. Threats of economic sanctions have proved meaningless to date, as Khartoum is protected by its veto-wielding commercial partners, China and Russia. Talk of no-fly zones has come to nothing, and arms embargoes have been breached with impunity. And in recent

months, despite the close attention of the UN and international community over the last three years, Khartoum has once again ramped up its offensive operations against the rebels in Darfur.

But Bashir is genuinely concerned about the threat posed by the ICC investigation there. It is one of the reasons for his vehement opposition to the deployment of a UN peacekeeping force in Darfur, as he fears UN troops may end up executing ICC arrest warrants against members of his regime.

Similarly, in Uganda past efforts to negotiate peace with the murderous Lord's Resistance Army (LRA) have come to naught. But in the months following the unsealing of ICC arrest warrants in October 2005, the LRA's leader Joseph Kony and his deputy Vincent Otti initiated peace talks with the Ugandan government. While other factors – such as the mounting success of the Uganda People's Defence Force (UPDF), and a tailing off of Khartoum's support, and possibly Kony's own illness – played a role, it is clear the ICC warrants have been at the forefront of Kony and Otti's considerations.

Bashir and Kony, and other culpable leaders such as Laurent Gbagbo in Côte d'Ivoire and Robert Mugabe in Zimbabwe, are all aware that ICC prosecutions differ from other policy tools in that they are not time-limited, nor are they dependent on the inconsistent political will of world leaders. The indictment and trial of Slobodan Milosevic, the arrest of Charles Taylor and the attempted extraditions of Augusto Pinochet and Hassan Habre have all sent a chill up the spines of leaders responsible for atrocity crimes (Scheffer 2005).[1]

4.8 Fear of prosecution can lead to entrenchment of culpable leaders

Of course, the prospect of ICC prosecution works both ways. While it can act as a deterrent to potentially abusive leaders, the threat itself can cause such leaders to entrench themselves to ensure that they do not fall into the clutches of the Court.

This calculation clearly underlies much of Bashir's opposition to the deployment of UN peacekeepers in Darfur. Robert Mugabe also fears being hauled up before an international court for crimes against humanity, and is doing everything in his power to ensure he does not meet that fate.[2]

Hence, in the short term, the leverage gained by the threat of prosecution has to be weighed against the likely entrenchment of threatened government leaders. The dilemma is that the benefit of threatened ICC prosecution as a policy tool in a specific conflict is largely spent once a formal investigation commences.

The picture is different over the longer term. One of the key features of the ICC is that it is a permanent court. Trying to outlast a permanent court may prove a challenge even to someone of Bashir's or Mugabe's staying power. Slobodan Milosevic thought he was safe in Serbia from the clutches of the (non-permanent) International Criminal Tribunal for the Former Yugoslavia – and he was proved wrong, to his own cost. Even well-entrenched leaders like Bashir and Mugabe are not entirely safe from coups or declining political fortunes, given enough time and pressure.

4.9 The ICC must secure convictions to ensure its credibility and effectiveness

There are two issues here. The first is the bigger picture one that if the ICC is unable to convict perpetrators of atrocity crimes because its prosecutions are consistently trumped by peace processes, then its value as a deterrent will be compromised. The threat of prosecution will only be credible if it is regularly and consistently carried out. Perpetrators will not fear the ICC if they know that they will invariably be able to secure actual or de facto immunity in a peace deal, regardless of the atrocities they have committed in the past.

The second issue is the practical one that until it gets some convictions under its belt, the ICC's deterrent value will be more theoretical than actual.

The Prosecutor has been in office since mid-2003. In three years he has commenced three formal investigations. In the Uganda investigation, the Court has issued arrest warrants against five LRA commanders, one of whom was killed in a clash with the Ugandan army in July 2006 but none of whom has been arrested. Progress in the Darfur investigation has been painstaking, with no warrants or arrests as yet.

In the DRC the Court has arrested one alleged perpetrator, Thomas Lubanga, leader of a Ugandan-backed militia in DRC's war-torn Ituri region. Lubanga has been charged with conscripting children and forcing them to fight in the DRC's civil war. While welcoming these charges, and Lubanga's arrest, many rights groups have argued that the charges do not go far enough, and that the evidence exists for Lubanga to be charged with responsibility for systematic rapes, torture and summary executions.

However, while it is essential that the Court demonstrate in time that perpetrators of such crimes will be brought to account, the short-term imperative must be for the Court to demonstrate its effectiveness by getting its first conviction. The Prosecutor is right to proceed against Lubanga on those charges for which he has the strongest evidence – even if that means that other heinous offences aren't added to the charge sheet for now. Additional charges can and should be brought against Lubanga later. And other parties to that conflict are likely to be charged soon, at which time more broad-ranging charges can be laid.

4.10 The ICC's effectiveness is dependent on the domestic and international support it receives

The ICC does not have its own police force. It relies on the governments in those countries in which it is investigating to provide it with the assistance it needs. It depends on these governments to provide it with access, to protect its investigators and witnesses, and to arrest suspects. It also requires international support when domestic support is insufficient or lacking.

In Uganda's case, the ICC has received good cooperation from Ugandan authorities, and almost none from the international community. If the international community had provided real assistance in executing the warrants – in the form of intelligence and enhancement of the Ugandan special forces' capabilities – then the LRA leadership may well have been arrested, and it would not be necessary to talk of trading peace for justice.

In Sudan there will be no such government cooperation, as the targets of an investigation are senior figures in the government itself, and the regime is utterly opposed to the investigation. As a result, the Prosecutor is almost entirely dependent on international backing. But to date the international community has long displayed a lack of political will in dealing with Khartoum. This is going to be an ongoing challenge for the Prosecutor. He will soon have to challenge the regime to meet its obligation to cooperate. And as Khartoum is currently conducting a renewed military campaign in Darfur, he should also be publicly reminding Sudan's leaders that they will be held responsible for any atrocities committed during this campaign. This will likely result in Khartoum halting even its token efforts at cooperation, but as those efforts are directed at delaying the investigation, not facilitating it, that will not be a high price to pay. And it may have the benefit of shaming the international community into providing more substantive assistance and pressure.

4.11 The Prosecutor's job is to prosecute

The role of the Prosecutor is to investigate and prosecute those he believes on credible grounds to be most responsible for atrocity crimes.

While that may appear to be self-evident, the position is not so straightforward when those he is prosecuting are engaged in peace talks. As has been starkly demonstrated in Uganda, in such situations the Prosecutor will face vociferous calls to abandon his investigation or prosecution to enable a peace deal to be

made. But if such political decisions have to be made, they should not be made by an institution with a justice mandate. Instead they should be made by the institution with political and conflict resolution mandate, namely the UN Security Council, which has explicit authority under Article 16 of the Rome Statute to put ICC investigations and prosecutions on hold for a 12-month renewable period.

In any event, perhaps fortunately for the Prosecutor, his options in such circumstances are somewhat constrained. Under Article 53 of the Rome Statute, the Prosecutor can stop a prosecution if it is in the interests of justice to do so. The interests of justice are different from the interests of peace, although there may be significant overlap. As the Rome Statute evidences a very strong presumption that the kinds of crimes under the Court's jurisdiction require effective criminal punishment, the fact that negotiations are underway would not in themselves be sufficient for the Prosecutor to stop his prosecution (Seils and Wierda 2005). At very least he would likely require a peace deal with robust accountability mechanisms for the individuals under prosecution. Robust accountability here almost certainly does not mean customary reconciliation and accountability ceremonies.

In the event that a state goes further, and exercises its own criminal jurisdiction, in the form of genuine domestic prosecutions of the perpetrators, then the ICC would no longer have the jurisdiction to proceed, as the Rome Statute gives priority to such domestic prosecutions on the principle of 'complementarity'.[3]

4.12 Impunity should always be a last resort

The crux of the whole peace and justice debate is what should be done when a prospective peace deal is made conditional on a halt to ICC prosecutions.

To give a recent example, here is what the BBC reported on 6 September 2006 about the LRA peace talks.

Mr Otti said that LRA fighters would not surrender unless the ICC charges are dropped. "No rebel will come out unless the ICC revokes the indictments," he said' (BBC Online 2006).

The dilemma here is that, unless leaders subject to ICC prosecutions face utter defeat, they are unlikely to agree to end the conflict if that means they will be prosecuted and imprisoned. In these circumstances the overriding policy issue is whether the important but uncertain prospect of deterring future perpetrators and reducing future conflicts takes precedence over more certain benefits of an immediate end to an ongoing conflict.

The LRA conflict has exacted a horrendous toll on the people of northern Uganda over the last 20 years, with some 25,000 children kidnapped to become child soldiers, porters or sex slaves, and some 1.7 million Ugandans forced to life in squalid internally-displaced persons (IDP) camps. Almost a thousand people are dying a week in northern Uganda from conflict-related disease and malnutrition (Ministry of Health of Uganda, 2005) If a peace deal can bring an end to these horrors, when all other options have failed, then it has to be seriously considered – even if the cost is a degree of impunity for the perpetrators.

There are provisos. The most important is that such deals often fail to produce peace. Failed amnesty agreements brokered with the likes of Foday Sankoh in Sierra Leone and Jonas Savimbi in Angola, and their violent aftermath, demonstrate the potential costs of impunity.

But deals have been done in the past that have offered limited or full immunity from prosecution, and have helped bring an end to conflict and instability. One obvious example is the one made with Charles Taylor to get him out of Liberia and bring an end to the conflict there. In mid-2003, rebel groups were advancing on Monrovia, shelling the city and attempting to starve it into submission. Taylor declared his intention to stay and fight the rebels – but Nigeria's offer of asylum

nsured Taylor fled Liberia in July. His departure enabled the deployment of West African peacekeepers, bringing a degree of peace to the country, and saving many ives. Certainly that was the view of Nigeria's President Obasanjo, who claimed, By giving this one man asylum I have saved thousands of lives. What more does he international community want?' (Power 2003).[4]

n a different context, in South Africa, outgoing leaders were given amnesty as part of a truth and reconciliation process in an effort to bring 34 years of apartheid to an end. The likely alternative was many more years of conflict.[5] In Mozambique, after sixteen years of civil war ended in 1992, the Parliament adopted a general amnesty pursuant to which reconciliation processes took clear precedence over accountability. Since then Mozambique has become one of Africa's most successful states.

Such decisions should not be entered into lightly. There is a credible school of thought that peace is not sustainable without accountability. The whole field of transitional justice is founded on the premise that accounting for and addressing past abuses is essential to enable societies to heal after a period of repressive rule or armed conflict.

Because justice and peace are each of fundamental importance, one should only be traded off against the other when there is no realistic alternative – that is, when there is a compelling case that the benefits of peace will outweigh the harm done to the cause of accountability. Even though 'amnesty is always on the table in [peace] negotiations' – whether explicitly or implicitly – it must be a last resort, not an opening gambit (Scheffer 1999). [6] Before some form of impunity is offered, all other options should be exhausted. If justice has to be traded off, negotiators need to explore whether other more limited options will suffice – such as a domestic as opposed to international prosecutions, or other robust accountability mechanisms (for example, a truth commission with amnesty

onditioned on full disclosure and acknowledgement of crimes) or asylum in nother country.

n the end, however, the unpalatable reality is that sometimes the cost of ending in ongoing conflict, and the associated death and destruction, will be a degree of mpunity for perpetrators. On such, hopefully rare, occasions, the amnesty or asylum offered should be part of a package of measures to address at least some of the legacies of past abuses. Such measures may include traditional reconciliation ceremonies, broad-ranging truth commissions, and reparations.

Even when amnesties are granted, there are a number of constraints on their effectiveness. For a start, state amnesties for atrocity crimes will not be binding on the Prosecutor. If a state gives an amnesty to an alleged perpetrator of such crimes, then it is effectively 'unwilling or unable' to deal with the case, ensuring the Prosecutor has jurisdiction to continue his investigations.

Second, countries that have ratified the Rome Statute have a binding treaty obligation to 'cooperate fully' with the Court. This includes an obligation to arrest and hand over to the ICC anyone who is the subject of an ICC arrest warrant. In breach of such obligations states may grant amnesties and refuse to comply with the ICC's demands, as Museveni has periodically threatened to do in respect of the LRA leaders, and there is little that the ICC can do about it. But its warrants will still be of international legal effect, and the indictees would be subject to arrest if they ever left the country.

Under international law there may also be a burgeoning duty to prosecute crimes such as genocide, torture and serious violations of the Geneva Conventions. If so, amnesties for such crimes would be of no legal effect (Scharf 1999). Certainly that appears to be the view of Kofi Annan who has stated that 'United Nations-endorsed peace agreements can never promise amnesties for genocide, war

rimes, crimes against humanity or gross violations of human rights' (Annan 004).[7]

'inally, there is Article 16 of the Rome Statute which, as mentioned above, gives he UN Security Council explicit authority to put ICC investigations and prosecutions on hold for a 12-month renewable period, pursuant to a Chapter VII esolution. Strictly speaking, such a resolution does not amount to an amnesty, as it simply puts a temporary freeze on the ICC prosecutions, and does not end hem. But if repeatedly renewed, it would amount to a de facto amnesty. Before it can exercise such a power the Security Council would have to decide that there was a threat to international peace and security – not too difficult a hurdle if the alternative to halting the prosecutions is renewed conflict. This article gives the Security Council the flexibility to accept alternative accountability mechanisms that may not meet the ICC's more rigorous standard, while retaining the threat of renewed prosecution should the peace deal fail.

4.13 The ICC's current investigations

Those are the general considerations. How do they apply to the Prosecutor's current investigations?

The DRC investigation was the first announced by the Prosecutor, and is the most straightforward from a peace and justice perspective. The Prosecutor wisely limited his initial investigations to the situation in Ituri. There were widespread atrocities in Ituri post July 2002, whereas in the rest of the Congo the worst abuses generally took place before then. Also, the key players in the Ituri hostilities do not have strong powerbases in Kinshasa, so there is only minimal risk of the investigation destabilising the government, and hence generating governmental obstruction.

The challenge for the Prosecutor will come when he looks beyond Ituri. One of the options he is considering is whether to investigate the massacres carried out by

ıe Mai Mai militias in the Katanga region. This would cause far more concern for ıe transitional government, as the Mai Mai still retain close links to many senior overnment figures. Having said that, it is the transitional government's policy to .isband the Mai Mai and integrate them into the police and army. That being so, he Prosecutor should not feel constrained in carrying out investigations into Mai Mai abuses and holding those responsible accountable.

'he investigation into the situation in northern Uganda was the second ınnounced by the Prosecutor – and is very much in the news right now. The ICC ndictments of Kony and four of his senior commanders have been important in ɔringing the LRA to the negotiating table, but they are now complicating the ɔeace negotiations.[8]

Balancing the need for accountability with the requirement to offer an inducement to the indicted leaders to make peace is not easy. Kony and Otti still command a force capable of inflicting significant destruction. And until the conflict ends, Museveni has no incentive to end the squalid and miserable conditions of some 1.7 million Ugandans living in IDP camps. Kony and Otti want a deal for personal security that shields them from prosecution. Strong justice and accountability mechanisms must be central to any agreement that can win domestic acceptance and broader international support. Because of constraints on the ICC Prosecutor, an agreement that calls for the indictments to be put on hold would require a UN Security Council resolution to this effect, made pursuant to Article 16 of the Rome Statute. A deal would probably also require the UN to play a significant monitoring and implementation role. Hence, if the parties conclude a robust peace agreement, the least worst option would be for the UN Security Council to suspend the prosecutions and monitor the LRA's compliance. The prosecutions would remain alive, though the Security Council would have the option to renew the suspension annually provided the LRA kept the peace.

Finally, there is the Darfur investigation. Unlike the other two investigations, this one was referred to the ICC by the Security Council. The Sudanese government is implacably opposed to this investigation because it has the potential to undermine its hold on power. While prosecutions of senior government officials would be unlikely to lead to their arrest in the short term, as the government would not comply with arrest warrants and the ICC has no effective way to execute the warrants in Sudan, they would seriously damage the already tarnished credibility of the regime. They would also restrict the ability of the indicted figures to travel outside Sudan. And, unless the figures being prosecuted were the most senior in the government, indictments may lead to them being ditched by the regime in its own self interest, with potentially destabilising consequences.

Hence, as soon as it becomes clear that the Prosecutor is serious about pursuing those in the government most responsible for atrocities, he will face claims that his investigation is blocking peace in Sudan. Khartoum, and some in the international community, will assert that senior government leaders should be given amnesties, so that they can proceed to implement whatever peace agreement is on the table at the time.

Such claims will have to be treated very sceptically. This is a regime that has ruthlessly implemented a large-scale ethnic cleansing campaign over the last three years. It is a regime that has repeatedly made agreements, and then torn them up when it suited its purposes.[9] Until significant costs are threatened, Khartoum has no incentive to stop its current campaign of atrocities - let alone agree to the deployment of a UN force, disarm the Janjaweed militias, and protect civilians in Darfur.

ICC prosecutions are one way of making very clear the price of non-cooperation. The Prosecutor needs to publicly challenge the regime to cooperate. He needs to

expedite his investigations, while at the same time warning the regime that it will be held accountable for any further atrocities.

There is absolutely no basis for the international community to intervene any time soon to halt the investigations or forthcoming prosecutions. On the contrary, it should provide wholehearted support for the Prosecutor's efforts. If in the future there is a real prospect of peace then the UN Security Council may once again be in the invidious position of having to decide whether to put a temporary halt on the investigations. But in light of Khartoum's duplicitous and murderous conduct in the past, the presumption should be very much against any halt to prosecutions, on the very practical grounds that Khartoum, by its conduct in Darfur and in implementing the Comprehensive Peace Agreement with southern Sudan, has displayed absolutely no integrity or willingness to abide by its commitments. Instead of undermining the institution of the ICC, and the powerful threat of accountability, the opportunity should be seized to remind the world that there are real consequences, however belatedly realized, for those responsible for atrocities that shock the conscience of mankind.

4.14 CONCLUSION

This Chapter has analyzed the challenges face by the ICC in its pursuit for justice and they include the slow wheels of justice in the court which has in turn slowed down the process of achieving justice. Others include the misconception that the ICC is a hindrance to peace and stability and reconciliation, the difficulty is carrying out investigations, and the court's incapacity in arresting and effecting its decisions. Lack of universal ratification of the Rome Statute is also another challenge faced by the ICC.

CHAPTER FIVE

5.1 RECOMMENDATIONS

This Research aimed at assessing the ICC's role in ending impunity, its effect on Uganda conflict and consideration arising form other conflicts such as in Darfur, the challenges facing the in its quest for justice and the way forward. However, in analyzing all the above, it is pertinent to note that the issue of peace and reconciliation is so crucial that it can •not be ignored. Consequently, the following recommendations are being proposed;

1) The International Criminal Court must secure conviction to ensure its credibility and require international support to do so.

There is a need for ICC to secure more convictions to ensure its credibility as a deterrent to future perpetrators. Although it has successfully convicted Thomas Lubanga Dyilo, a former leader of the Union of the Congolese Patriots for War Crimes including Enlistment, Conscription and use of Children under the age of 15 as soldiers and sentenced for fourteen years, the Court should convict more people so as to deter the potential perpetrators of Crimes against Humanity, War Crimes, just to mention but a few. This can be done if the Court can have flexibility to conduct Trials in places other than the seat of the Court, subject to effect safeguard for the accused. This will make the process more expeditious and more costly.

Further more, the Court should put in place a mechanism for capturing the suspects other than relying on member countries who may not cooperate. Worse still is the fact that some countries are not signatories to the ICC Treaty and are not willing to lift a finger to help capture perpetrators of heinous crimes. As observed in this Research, this is going to be a challenge and this can be witnessed in Uganda and in Darfur as its extremely difficult to get hold of those

who have been indicted. Therefore the reasonable manner to overcome the a fore mentioned challenge is to put in place a mechanism to wit Armies and Forces mandated for arresting such perpetrators irrespective of their counties territorial integrity.

For instance in Uganda the LRA leader is still elusive for a period of 20 years Whilst the Ugandan forces have recently improved their capabilities, the Lord's Resistance Army has been able to take refuge in neighboring countries. The lack of coordination response by those countries and the broader international community has ensured that the rebel group has been able to continue existing.

It further means that the International Criminal Court cannot arrest those it wishes to prosecute. Now that the peace talks have failed to achieve satisfying outcome, international effort will have to be redoubled to arrest the inductees hence a need for enforcement mechanism.

ii) Impunity should always be a last resort

Due to the on going debate on "Peace Versus Justice," it is vital for the Court to consider Peace and Reconciliation Mechanism as a solution to conflict other than only pursuing justice.

To start with the point that needs to be acknowledged is that peace deals that sacrifice justice often fail to produce peace. Failed Amnesty agreements brokered with the likes of Foday Sankoh in Sierra Leone and Joana Savimbi in Angola and their violent aftermath, demonstrate the potential costs of impunity. In other countries, however, past deals that have offered limited or full immunity from prosecution have helped bring an end to conflict and instability. One obvious example is the deal with Charles Taylor to get him out of Liberia and to bring end to the conflict there, even though Taylor has been sentenced to 50 years in jail now[118]. Given amnesty as part of a truth and reconciliation process in an effort

[118] The Prosecutor vs. Charles Taylor; SCSL-03-0 I

to end 34 years of apartheid In Mozambique, after the 16 years of civil war ended in 1992, the Parliament adopted a genera amnesty for all fighters pursuant to which the reconciliation process took clear procedure over accountability. The country has been largely at pace since. Even in Uganda a number of people who participated in atrocities have been given Amnesty.[119] For instance Thomas Kwoyelo was given Amnesty n the High Court of Uganda for his involvement in Northern Uganda atrocities even though the decision has not been accepted by some people who think that justice has not been seen to be done.

The Rome Statute on the other hand offers ways to reach peace by including robust accountability mechanisms. Such mechanism should aim at combining traditional reconciliation ceremonies and formal legal processes is a way that satisfies both the victims need for justice and meet the statute's standards would be assessed under Article 17 of the Rome Statute, which requires the International Criminal Court, under the principle of complementarity, to defer to a genuine investigation or prosecution by Uganda if such proceeding were to take place.

Furthermore, the Security Council also has the option under Article 1 6 to suspend an International Criminal Court investigation for renewable one year in increment if it considers this in the interest of international peace and stability. Such a decision could be taken if there were a peace deal with adequate accountability measures, even if they did not meet the complementarily requirements.

Uganda vs. Thomas Kwoyelo Alias Latoni; HCT-00-ICD-Case No.2 of 2010

[119] Uganda Vs. Thomas Kweyelo Alia Latini; HCT-00 icd- Case no. 2 of 2010

iii) The Court should ensure that its independence and impartiality is not just heard but seen.

The Statute and the rules of the Court should ensure that the independence and impartiality of the judiciary is guaranteed, as required by international standards such as the United Nations Basic Principles on the Independence of the Judiciary, and that judges are selected in an open process who are experienced in international humanitarian law and human rights or in criminal law. Further more, the Statute and rules of' the Court should ensure that investigations and prosecutions are carried out by an independent and impartial prosecutor, with adequate powers, acting consistently with international human rights standards, particularly the UN guidelines on the role of prosecutions.

In addition the views and concerns of victims and witnesses should be presented and considered at appropriate stage of the proceedings without prejudice to the rights of suspects and accused to a fair trial. If all the above recommendations are seen, then it will help to end the perception among some people that the Court is not independent and that it is influenced by western powers.

iv) The ICC has obligation to prove that the majority of Africans who perceive that the Court only target Africans are wrong.

The Researcher recommend that in order to wash away the perceived bias by the Court towards Africa, the Court should prosecute and bring to justice the perpetrators of heinous crimes to wit Crimes against Humanity, War Crimes, Crimes of Aggression and the Crime of Genocide, all over the world and not selectively. This will also end the perception that the Court is controlled by the Africa. The above perception is premised on the fact that majority of cases before the Court are from Africa. For instance some Africans believe that failure by the ICC to bring Americans who were involved in attacking Iraq hiding behind the veil of seeking for weapons of mass destruction demonstrated beyond reasonable doubt that the Court was being influenced by western powers. Therefore the

Court has a challenge of washing away such perceptions by bringing to book perpetrators of heinous crimes all over the world.

v) There is need for ICC to amend some of the articles in the Rome Statute.

The Researcher also recommends that in order for ICC to attract more countries to become a signatory to the ICC Treaty, it needs to amend article 120 of the Rome Statute which explicitly and without any exception provide that "No reservation may be to this Statute.[120]" This lack of reservation has made other countries to shy away from becoming members to the Treaty. For instance United States of America sees article 120 of the Rome Statute as a weakness and consequently has not signed the Treaty to The Hague because it believes that 'no reservation' clause is directed against the United States and its protective Senate. Therefore this is an obstacle that needs to be dealt with by amending the Statute for the Court to achieve its cardinal goal of reducing impunity in the world.

Further more, the Researcher recommends that the Court should also amend the law to prevent its independent prosecutors not to prevent prosecutors from playing their role in consultation and harmony with the country in question so as not to be seen to be partisan or to bring political pressure to the member countries.

[120] The risks and weaknesses of the International Criminal Court from America's Perspective by John R Bolton, olarship.law.duke.edu/cgi/viewcontent.cgi?article= 1205... icp

5.2 CONCLUSION

This study has analyzed the rule of international criminal court in enhancing the rule of how and the impact that sovereignty has in all this. It has also analyzed the challenges the ICC faces and the possible recommendations for making the international court effective in administering justice.

It should be noted that though ICC is infancy a lot of hope can be seen for his body despite its pitfalls and short comings.

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