ADDIS ABABA UNIVERSITY
COLLEGE OF GRADUATE STUDIES
SCHOOL OF LAW

Jurisdiction of the International Criminal Court (ICC) on Nationals of Non-party States to the Rome Statute

A Dissertation Submitted to the Addis Ababa University School of Law, In Partial Fulfillment of the Requirements for the Degree of Masters of Law LL.M (In Public International Law)

By

Ararso Taddese

Prepared under the supervision of

Dr. Yacob H/Mariam

28 February 2014

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Declaration

I, Ararso Taddese Hora, declare that the work presented in this dissertation is original and has never been presented to any other University or Institution. Where other people's works have been used, these have been duly acknowledged. It is hereby presented in partial fulfillment of the requirements for the award of the LL.M Degree in Public International Law.

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Approval Sheet

Jurisdiction of the International Criminal Court (ICC) on Nationals of Non-party States to the Rome Statute

By

Ararso Taddese

Approved by	**Signature**	**Date**
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Lists of Abbreviations

ASP	Assembly of State Parties
ASPA	American Service member's Protection Act
AU	Africa Union
CICC	Collision for the International Criminal Court
CSO	Civil Society Organization
FRY	Federal Republic of Yugoslavia
GMT	General multilateral treaty
ICC	International Criminal Court
ICL	International Criminal Law
ICT	International Criminal Tribunal
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Yugoslavia
IHL	International Humanitarian Law
IMET	International Military Education and Training
IMT	International Military Tribunal
IO	International Organization
LRA	Lord's Resistance Army
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organization
OTP	Office of the Prosecutor
PICC	Permanent International criminal court
PICJ	Permanent International Court of Justice
PSC	AU Peace and Security Council
SC	Security Council
SCSL	Special Court for Sierra Leone
SFRY	Socialist Federal Republic of Yugoslavia
TFV	Trust Fund for Victims
UK	United Kingdom
UN	United Nation
UNGA	United Nation General Assembly
UNSC	United Nation Security Council
USA/US	United States of America
USSR	United Socialist Soviet Russia
VCLT	Vienna Convention on Law of Treaty
WW II	World War Second

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Abstract

Effective human right protection and providing justice at international level needs the existence of an international institution. Impunity must be eradicated from our world and should have to be replaced with a sense of accountability. This will be effective with the establishment of a permanent international criminal court. ICC is such an international criminal tribunal established by Rome treaty concluded at Rome Negotiation of 1998.

During and after the negotiation, the jurisdictional basis of the court over nationals of non-party states became a very important controversial issue. This dissertation paper analyses the Rome Statute, principles of international law, and existing customary international laws and concludes that the court's exercise of criminal jurisdiction over nationals of non-party states has sufficient legal basis.

In addition, it encourages non-party states to ratify and become a party to the statute, to domesticate provisions of the statute within their domestic legal system, and contribute their effort in the fight against impunity. Because being non-party state to the Rome Statute would not encourage impunity. One of the most important issues in this regard is a state that is not party to the Rome Statute is not protected from being subjected to the criminal investigation of the Court. As the current practice, e.g. the case of Sudan shows us countries that are not party to the Rome statues can be referred to the ICC.

Key words

International criminal court, non-party states, nationals of non-party states, Rome Statute, universal jurisdiction, customary international law

Chapter one

General Overview of International Criminal Tribunals

1.1 Introduction

Until the end of the 19th Century, the comprehensive domestic legal system of national state regulated every action of individuals. Therefore, the law of his/her state subjected and held accountable anyone who violated the law of his/her own state. This idea of subjecting an individual to the law of his/her own state stems from the Westphalia doctrine of state sovereignty, which refers to the concept of the sovereignty of nation-states on their territory, with no role for external agents in domestic structure.[1] During this period, only the national state had the power to apply its own law within its domestic judicial system over its nationals. Nevertheless, the unfortunate reality of the contemporary world has proved that, where many of the most shocking and large scale violent crimes take place; there is no domestic legal system to speak of it.[2] As a result, it became necessary for international legal system to handle such an unfortunate reality of the contemporary world.

The first movement to respond to the most shocking and large scale violent crimes was made after the Second World War (WW II), when the Nuremberg and Tokyo trials were established in 1948, which adjudicated those who were responsible for the atrocities that had occurred during the war. Then, to try war crimes committed in the former Yugoslavia and Rwanda, the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were established on an *ad hoc* basis, which were followed by the Special Court for Sierra Leone (SCSL).

The idea to establish the Permanent International Criminal Court (PICC) came into picture shortly after the establishment of the Nuremburg and Tokyo trials, when the United Nation General Assembly (UNGA) first realized the need for an international court to adjudicate the

[1] Wikipedia, The Free Encyclopedia, (http://en.m.wikipedia.org/wiki/westphelian_sovereignty),
[2] Michael K. Marriott; Potential for Future Growth of the ICC: Possible Expansion Towards Universal Jurisdiction, UC Davis King Hall School of Law, year: 2L

type of atrocities that occurred during the WW II.[3] However, the idea was crashed out because of the global political crises (during the cold war) until late 1980s, when the idea came back to the agenda of the world.[4] Finally, after a long debate by the delegates of states parties to the UN, it became reality in July 1998, when the UNGA adopted the Rome Statute establishing the International Criminal Court (ICC), even though there was still a problem in relation to its jurisdiction over nations of non-party states.

The very important questions to raise at this point are, "What forced the world community to establish the international criminal tribunals?" and "What were the rationales behind the establishment of the international criminal tribunals (ICT)?" Thus, this chapter deals with the arguments supporting the establishment of the international criminal tribunals (ICT), principles of criminal jurisdiction, analysis of the Rome Statute over the ICC's basis of jurisdiction, and issues related to the power to initiate prosecution under the Statute.

1.2 Why International Criminal Tribunals (ICT) needed?

There are many international criminal tribunals established for different reasons, i.e. military tribunals, *ad hoc* tribunals, special courts, hybrid courts, and permanent international criminal court. The rationales behind the establishment of the ICT are multi faceted. It might be for the settlement of international conflicts (peace and security), to fight impunity, fostering state cooperation for justice, and respect for humanity, protection and redress for the victims of international crimes. Thus, International Criminal Law (ICL) supports a paradox, whereby it encompasses peace and security project, and shared moral discourse located in post-sovereign space, yet remains incarcerated within a state-centric image of international law and politics.[5]

[3] *See* U.N. Dept. of Public Info., The International Criminal Court (December 2002), *available at (*http://www.un.org/News/facts/iccfact.htm).

[4] Supra note 2

[5] Dylan Bushnell: Re-thinking International Criminal Law; Re-connecting Theory with Practice in the Search for Justice and Peace, Australian Year book of International Law. Vol. 28

1.2.1 Settlement of International Conflict

An international dispute can be said to exist whenever a disagreement concerning a matter of fact, law or policy in which a claim or assertion of one party is met with refusal, counter-claim, or denial by another involves governments in different parts of the world.[6] It refers to a conflict among states that may endanger the international peace, security, and stability. However, not only the conflict among states (transnational conflict) endangers the existing peace, security, and stability of the international community, but also the internal conflict within a single state between national, ethnic, or political groups may affect the international peace, security, and stability. When the effects of the conflict go beyond the national borders of the state, they may violate the peace, security, and stability of the neighboring states. For example, when there is a conflict within a state, the people will flee or migrate to the neighboring states in search of a stable place to save their lives. Consequently, this may affect the neighboring state's socio-economic situation and its internal security. Therefore, whether it is an international or national conflict, it will endanger or violate peace, security, and stability of the international community. As a result, it needs a mechanism to settle such dispute before or after it has occurred. According to Keith, in the contemporary world, ICT is often regarded as a mechanism of creating and maintaining international peace and security.[7] This peace and security project for the settlement of international disputes were heavily bound up with the 'Nuremberg legacy' and later attempts to legitimize the role of the Security Council in establishing the ICTY for the former Yugoslavia and ICTR for Rwanda.[8]

Providing a sense of justice through prosecutions of international crimes was claimed to facilitate societal reconciliation and provide the preconditions for peace.[9] In this actual world, lasting peace and security would be reached when justice is done. Justice is done when the offenders of the international crimes are prosecuted as it is often expressed in the maxim 'no peace without

[6] J. G. Merrills; International Dispute Settlement, Cambridge University Press, 4th ed., 2005
[7] id
[8] id
[9] Robert C., Hakan F., Darryl R. and Elizabeth W.: An Introduction to International Criminal Court and Procedure, Cambridge University Press(2007), pp. 24

justice'.[10] The UNSC also provided significant support for the interconnection of peace and justice, when it determined for the establishment of ICT in the situations of former Yugoslavia and Rwanda that the prosecution would assist in reconciliation and returning peace to the areas.[11]

Although, the interconnection between justice, and peace and security had a wider support in guarantying the international peace and security in the past, in today's international political arena it is much debated element. One of the central debates concerns the role of international criminal tribunals (ICT) and its contribution to the settlement of peace in conflict-ridden settings while fulfilling criminal justice mandate.[12] The most serious doubt on the international criminal tribunal in promoting international peace and security by rendering justice is that 'to require prosecutions of actively participating individuals in conflict may simply cause conflicting parties to fight to the last'.[13] The most important example widely raised in this regard is the case of Uganda and Sudan.

In the case of Uganda, the arrest warrants issued by the ICC is repeatedly cited by leaders of the Lord's Resistance Army (LRA) as a key obstacle to their signing of permanent peace deal.[14] The statement by Joseph Kony clearly put that "until the warrants are lifted, he and his men will not leave the bush".[15] Similarly, Omer Mohammed Ahmed, Sudanese Ambassador to the UK, said that 'The peace process between the Sudanese Government and Darfur rebel groups has been shattered by the decision to indict President Bashir'.[16]

According to the proponents of the arguments, the arrest warrant issued by the ICC in both case will hinder the proposed peace agreement to end the conflict.[17] However, other scholars and academics had argued that, it rather facilitates and fasten the peace agreements between the

[10] id
[11] id
[12] Fatou Bensouda: Justice and Peace: The Role of the ICC, Politor bis Nr. 54-2/2012, pp 23-26.
[13] id
[14] Anna Dickson, Neil Howard, Jon Lunn, and Arabella Thorp: The international Criminal Court: Current Case and Contemporary Debates, International Affairs and Defense Section, House of Commons Library, 20 April 2009, available at (www.parliament.UK)
[15] id
[16] id
[17] id

conflicting parties in the case of Uganda and Sudan. For example, in the case of Uganda, the ICC warrants has influenced the leaders of LRA decision to come to the negotiating table.[18]

Others argued that, as ICC focused on the prevention and punishment of the most serious international crimes, the court's forward is not to interrupt the negotiation for peace, but to ensure that justice is done in the present and future.[19] Here, I do support the argument that the issuance of arrest warrant by the ICC against criminals of most serious international crimes does not affect any negotiation process among the parties to the conflict. The idea to come to negotiation table is a good thing to be supported by all international community as it may bring a lasting peace between the parties at conflict. However, the persecution of international crimes by the international court is to hold accountable the criminals for their wrongs against the international community and to end impunity. To this end, it prevents others from committing international crimes and contributes to the settlement of the international disputes.

As Simpson[20] has argued, "as long as justice is treated as synonymous with prosecutions alone and peace building is reduced to the process of negotiating peace agreements, then peace and justice will remain at logger heads". He also argued that an alternative approach to transitional justice recognizes the potential for a peace and justice continuum in which diverse accountability mechanisms can contribute to peace building.[21]

Therefore, separating peace from justice and vice versa will bring a principal obstacle to achieving either of them. Those who take this view argue that peace and justice mean different things to different people, and, so, what to be done is to have a flexible approach to ending conflict and creating accountability.[22] As the International Criminal Law (ICL) principle of deterrence proposes, the role of ICC is to settle the present international conflicts and to

[18] id
[19] id
[20] G. Simpson: "One Among Many: The ICC as a Tools of Justice During Transition", in N. Waddell and P Clark (eds), Courting Conflicts? Justice, Peace and the ICC in Africa, 2008, pp. 75
[21] id
[22] Supra note 14

deter/prevent any future conflicts. In doing so, ICT will foster international peace and security by prosecuting and punishing criminals of most serious international crimes.[23]

1.2.2 Fostering State Cooperation for Justice

It is clear that international crimes are crimes that constitute serious violation of international standards on human rights or humanitarian laws, to reach the legal threshold of international crimes. Either these crimes may go beyond the ability of the territorial state or the territorial state may not be willing to prosecute the criminals of such serious international crimes. As a result, the criminals will escape justice and left unpunished for their criminal acts against the international community. Some of the most heinous crimes were committed during different conflict and unfortunately, many of those violations have remained unpunished.[24] Thus, it needs the judicial response of international community.

Under the national court system, the normal response to atrocities is to bring the alleged perpetrator to justice either before the court of the state where the crime is perpetrated, or before the court of the state of nationality of the alleged perpetrator.[25] This is only effective when the perpetrator could be found within the territorial jurisdiction of the concerned state. However, it remain ineffective when the perpetrator has fled and took an exile in another state's territorial jurisdiction. Some countries' courts have prepared themselves for national or territorial courts, whenever the latter fails to take proceedings against accused of serious international crimes or extradite the perpetrator to the courts having the actual judicial jurisdiction over the perpetrator.[26] This will also remain ineffective when the court of the state where the perpetrator is found is unwilling to prosecute or refuse to extradite the perpetrator, may be because of political or other reasons. The case of the former Ethiopian President, Mengistu H/Mariam, who was accused of committing genocide in Ethiopia and did not held accountable for the crime where he lives (in Zimbabwe), is of a good example.

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[23] Rome Statute of the International Criminal Court, Preamble para. 3

[24] ICC Publication, Understanding the International Criminal Court; The Hague, Netherlands, available at (www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng. pdf)

[25] Antonio Cassese(2003); International Criminal Law, Oxford University Press, Oxford. pp. 3-42

[26] id

Therefore, the commitment of States to cooperate for justice to bring perpetrators of an international crime before justice is a good approach. This will become effective by establishing ICT entrusted with the task of trying those responsible for serious atrocities against the international communities. This commitment of state cooperation for justice first appeared after the WW II with the establishment of the Nuremberg and Tokyo Military Tribunals, to bring those responsible criminals for the atrocities committed during the war.

The establishment of the Nuremberg and Tokyo Tribunals did not contribute to stop any future atrocities from being committed, as it was to try only those responsible for the atrocities during the WW II. Followed by this, other atrocities took place in former Yugoslavia and Rwanda, which resulted in the establishment of the ICTY and ICTR, respectively. The establishment of these two tribunals shows the willingness and interests of the international community to cooperate for justice against those perpetrators of the international crimes committed in both Yugoslavia and Rwanda. As both the ICTY and ICTR are limited only to the cases in Yugoslavia and Rwanda, the international community has decided to establish a PICC. As a result, in 1998, the Statutes of the International Criminal Court (ICC) adopted in Rome by the Assembly of State Parties (ASP) to the Statute establishing the ICC.

The Rome Statute affirmed that the commission of most serious crimes of concern to the international community as a whole must not go un-punished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.[27] This indicates that the prosecutions of most serious crimes of concern to the international community need the international cooperation of all states for justice. It also indicates that the ICC is the court of last resort over those most serious crimes of concern to the international community.[28] It exercises its jurisdiction only when the concerned state is unwilling or unable to prosecute the perpetrators.[29] Therefore, the ICC is the court of last resort, which was established by the cooperation of states for justice against the perpetrators of the most serious crimes of concern to the international community and to replace the culture of impunity with

[27] Supra note 23, preamble para. 3

[28] Id, Preamble para. 10 and Article 1

[29] Id article 17(1)a, and also see Kai Ambos; The International Criminal Court and the Traditional Principles of Cooperation in Criminal Matters: The Finish Year Book of International Law, vol. IX(1998), pp. 413-426

culture of accountability. This indicates that ICC was established to foster and enhance state cooperation against impunity.

1.2.3 The Fight Against Impunity

As noted above, the establishment of the ICT shows the interest and commitments of the international community to bring those individuals responsible for the atrocities committed against the international community. Although the idea of prosecution for the international crimes is an old one, actual prosecutions have been relatively rare.[30] This is because of the fact that States are unwilling or unable to prosecute their own nationals holding a high position and participating in the commission of the international crimes. In fact, those who are alleged to have committed international crimes are those individuals having the leadership positions within the state administration, or who have the power to control the domestic judicial system.[31] Moreover, no permanent framework has ever been in place to prosecute international crimes at international level.[32] Despite these all difficulties, states have come together to show their response against the criminals of international crimes in some instances by establishing the ICT.

As the aim of establishing the ICT is to replace the culture of impunity with a culture of accountability.[33] After WW II, the Nuremberg and Tokyo Tribunals raised real expectations about a culture of accountability.[34] In both tribunals, although no international framework existed for prosecuting the crimes, most international observers felt that Nazi leaders should be punished for the atrocities committed during the war.[35] Fifty years after the Nuremberg trials and following the cold war crises, many international courts, and tribunals were established with the aim of ending impunity.

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[30] Malissa K. Marler; The international Criminal Court; Assessing the Jurisdictional Loophole in the Rome Statute, Duke Law Journal, vol. 49, 1999

[31] Id

[32] Id

[33] Philippa Kirsch, Q.C.; The international Criminal Court; Current Issues and Perspectives, Law and Contemporary Problems, vol. 64, number 1

[34] id

[35] id

The aim of ending impunity is to hold the perpetrators accountable for their crimes through a transparent and fair justice system.[36] Thus, ICT is set up to achieve the need to try those responsible criminals for grave breaches of international human right or humanitarian laws: genocide, war crimes, and crimes against humanity, under the condition when national justice is unable or unwilling to play its legitimate role.[37]

The ICC is the first permanent international criminal tribunal established with the aim of ending impunity. The State Parties to the ICC Statute are determined to put an end to impunity for the criminals of international crimes.[38] It represents a vital win for the international community in its fight against impunity.[39] However, it is not the court with primary jurisdiction; it rather used to support national prosecution efforts. National prosecutions are essential in ending impunity and thus, vital to any response.[40] As the court's aim is to fight impunity, its machinery starts to work only when the national judicial systems are unwilling or unable to prosecute the perpetrators. The ICC's mechanisms like the independence of the Office of the Prosecutor (OTP), the principle of complementarity, the rule on admissibility illustrate that the Rome Statute favors the adoption of comprehensive strategies to combat impunity.[41] Hence, the base for its establishment is to fight the culture of impunity and replace it by the culture of accountability.

1.2.4 Respect for Humanity, Protection and Redress for Victims of the International Crimes

The prime objective of the criminal law is maintaining respect for humanity. The conventional account of the criminal law drives from the Liberalism of J. S. Mill. Mill argues from the utilitarian ethic that the justifying purpose of any social rule or institution must be the maximization of happiness, leading naturally to a view of the criminal law as devoted to minimizing human suffering through the prevention of harmful conduct by the most efficient

[36] Clare Lagua Ukuni; Un-triggering the Jurisdiction of the International Criminal Court: The Ugandan Referral of the Situation Concerning the Lord's Resistance Army in Northern Uganda to the International Criminal Court. A Dissertation paper(unpublished), university of Pretoria, Faculty of Law (2008)
[37] Yues Beigbeder; International Criminal Tribunals: Justice and Politics, Palgrave Macmillan (2011)
[38] Supra note 23, preamble par. 4
[39] Supra note 36
[40] id
[41] id

means possible.[42] This 'harm principle' of Mills shows that the construction of criminal law and establishment of criminal tribunal (national or international) is manifestation of the states willingness to show respect for humanity.

The notion of humanity resides at the ontological heart of construction of ICL.[43] The notion of 'humanity' provides a legitimizing promise for a system of ICL and it is reflected in negotiations that have accompanied the establishment of ICT, including the ICC, as well as in the elaboration of the categories of the international crimes.[44] The notion captures something of the idea that there is certain behavior that affects people generally and not just citizens of a particular state.

The ICC has jurisdiction over genocide, war crime, and crimes against humanity. Sarah Viau[45] has raised one question on this point asking, "What do these crimes have in common that triggers the jurisdiction of the ICC?", and she argued that, "Perhaps the answer can be found in the effects of these crimes, which have a wide spread impact on humanity, producing human suffering, terminating life, and violating human dignity."[46] She also argued that, underlying the very idea of these crimes is the notion of humanity, which is a common element that unites all individuals; regardless of what territory they happen to be in.[47] This common elements, (i.e. respect for humanity), according to her, is an interest in avoiding suffering, preserving life, and maintaining dignity.

The notion of respect for humanity propounded for the first time in 1915 on mass killings of Armenians in the Ottoman Empire[48], receiving subsequent reference after the WW I[49], and

[42] Supra note 5
[43] id
[44] id
[45] Sarah Viau; The Jurisdictional Basis of the ICC, Queen's University Library, Kingston, Canada
[46] id
[47] id
[48] Declaration of 28 May 1915 of the Government of France, Great Britain, and Russia, Dispatch of US Ambassador in France, Sharp to the US Secretary of State, Bryan of 28 May 1915, in papers relating to the foreign relations of the US, 1915, supplement (1928)981.
[49] Commission on the Responsibility of the Authors of the War and on Enforcement of Penalities: Report presented to the Preliminary Peace Conference (29 March 1919), American Journal of International Law, 95

during the WW II[50]. It is also a permitted discourse accompanying the establishment of the two *ad hoc* tribunals and the negotiation of the Rome Statute.[51]

Moreover, this concept of humanity incorporates protection for individual rights. In the case of war crimes, criminalizing violations of IHL intends to protect rights of individuals (non-combatants) and to minimize human suffering during the war. For crimes against humanity aims to protect the rights of individuals to their personal security, and while for genocide it is to protect the rights of certain groups to exist as a physical and social entity and the dignity of the individual as a member of the group. Thus, criminalizing international crimes before ICT will be used as a lesson to prevent others from committing similar crimes in the future. Mere framing of rules granting right to individuals, at national or international level, will remain as a count of words on the paper as far as there is no established institution with the power to realize the rights on the paper. By penalizing criminals of international crimes, the ICT will protect individual rights from being violated. An international community realized that, as there is no such institution at an international level, the establishment of an international criminal tribunal is a must to realize protection of individual rights granted by different international documents, like IHL, Geneva Conventions on Human Right and other instruments.

Under the system of criminal law, victims of any crime should be rehabilitated or redressed. The redress may take the form of material or psychological or may be both. However, it should have to follow established substantive and procedural law. To that effect, there should be legally established institution to determine the redress. Therefore, for the victims of an international crime, there should have to be an international institution to determine the redress to the victims. Article 75(2) of the Rome Statute provides that "the court shall establish principles relating to reparations to the victims, including restitution, compensation, and rehabilitation". It may also make an order directly against a convicted person specifying appropriate reparations to, or in respect, of victims, including restitution, compensation, and rehabilitation.[52] Therefore, the establishment of the ICC will help victims of the international crimes to claim reparations and

[50] Declaration of the Four Nations on General Security, signed at Moscow, 30 October 1943, 9 US Department of State Bulletin 308, Statement on Atrocities (entered into force 30 October 1943)
[51] Supra note 45
[52] Supra note 23, art. 75

redress. A recent decision of the Trial Chamber I (*Prosecutor vs. Lubanga case*) is the first reparation decision at the ICC. It sets out basic guidelines for distributing reparations. The decision's basic parameters state that victims are eligible for reparations if they can establish that they are the direct or indirect victim of harm that was proximately caused by Lubanga's enlistment, conscription, and use of children under the age of 15 in Ituri in the Democratic Republic of Congo, from 1 September 2002 to 13 August 2003.[53] Eligible victims include family members of direct victims, as well as those who intervened to help victims or to prevent the commission of these crimes, and other legal entities.[54] Victims did not have to participate in the trial or apply for reparations to be eligible. To that effect, the Chamber gave primary responsibility for the reparations process to the Trust Fund for Victims (TFV), and ordered that a newly constituted Trial Chamber I supervise it.[55]

1.3 General Overview of the Principles of Criminal Jurisdiction

Jurisdiction has been defined as 'the right or authority to apply the law, the exercise of such authority, the limits of territory over which such authority extends'.[56] It refers to the power of the state to enact and enforce its laws with regard to persons and property within its defined territory. It is the power of the state to regulate affairs pursuant to its laws, which involves asserting a form of sovereignty.[57] However, the fact causes difficulties when exercised extra-territorially.

There are three ways of asserting jurisdiction; i.e. legislative, executive, and judiciary. Legislative jurisdiction is the right of a state to pass laws covering matters, which take place throughout its territory.[58] Executive jurisdiction is the right of state to effect legal process coercively, such as to arrest someone, or undertake searches and seizures.[59] Whereas, adjudicative jurisdiction refers to the extent to which domestic courts are able to pass judgment

[53] *Prosecutor v Lubanga , Decision establishing the principles and procedures to be applied to reparations,* ICC-01/04-01/06-2904, 7 August 2012, in case digests update on international criminal court and tribunal, by open society justice initiative, may 2013
[54] Id
[55] Id
[56] Geddes and Grosset (2007), Webster's Dictionary and Thesaurus
[57] Supra note 9
[58] Id
[59] Id

on matters brought before them.[60] At this point, other states may be, rightly or wrongly, more assertive in expressing their concerns about the exercise of the criminal jurisdiction. By passing judgment over offences abroad it is possible that the courts, hence states, are intervening in the domestic jurisdictions of the state in which the offence occurred.[61] This section of the paper will concentrate on the principles of criminal jurisdiction that states have pursuant to international law or customary international law.

1.3.1 Territorial Jurisdiction Principle

Territoriality principle, also known as 'traditional principle', is the least controversial basis of jurisdiction. States, because of their sovereignty, have traditionally exercised a primary right of criminal jurisdiction over offences perpetrated on their territory. The assumption of such jurisdiction has the advantage of immediate accessibility to sources of evidence and relevant witnesses, and subsequent minimization of expenses and judicial time.[62] The territoriality principle operates well only when the elements of the crime have taken place on the territory (including ships and aeroplanes registered in those country) of the prosecuting state.[63] However, it will give rise to the question of primacy between two competing jurisdictions when the crime originates abroad or is completed elsewhere, so long as at least one of the elements of the offence occur in the territories of more than one state. Two principles have generally been applied to address this situation; namely the subjective and objective principles of territoriality.[64]

Subjective territoriality principle asserts that when an element of an offence either commences or ends in any way on their territory, states may validly assert jurisdiction over that offence.[65] The application of this principle has nothing to do with, or pay no attention to the consequence of an offence for the prosecuting state, it is rather connected to the commission of the offence on the territory of state seeking to assert jurisdiction. Thus, it more resembles with the rule of extra-

[60] id
[61] id
[62] Ilias Bantekas and Susan Nash; International Criminal Law, Cavendish Publishing (Australia), second ed., (2003)
[63] id
[64] id
[65] id

territoriality than territorial principle.[66] Although not widely accepted as a general principle of national laws, it was early recognized in two international treaties, i.e. the 1929 Convention for the Suppression of Counterfeiting Currency and the 1936 Convention for the Prevention of Illicit Drug Trafficking.[67]

Objective territoriality principle, on the other hand, allows jurisdiction where conduct committed abroad produces effect in a third state.[68] It was referred as the 'continuing act' doctrine, which stipulates that states enjoy jurisdiction over an offence, which, although committed abroad, is continuing to produce results within the prosecuting state.[69] In general, the application of the territoriality principle, in one way or another, is connected with the place of the commission of the offence and has nothing to do with who the actor is or his/her nationality.

1.3.2 Nationality Principle (Active or Passive Nationality)

States are entitled under international law to legislate with respect to the conducts of their nationals abroad. Nationality is an important basis of jurisdiction in ICL, particularly in relation to armed forces stationed overseas that carry the state's flag abroad with them, and also covers other civilian nationals.[70] It relies on the link between national and the state to which he/she has allegiance. As opposed to territoriality principle, it has nothing to do with the place where the offence is committed, rather than the nationality of the actor (author) of the crime or the nationality of the victims.

The nationality principle will be classified as "active nationality" and "passive nationality" principle based on the status of the person involved in the commission of the crime. The former is jurisdiction exercised by a state over the crimes committed by its nationals against foreign nationals or its own nationals residing abroad. State can exercise Passive personality principle of jurisdiction over crimes committed against its own nationals while they are abroad. In most instances, the assertion of such jurisdiction is controversial, that considerable disagreement

[66] id
[67] id; it is formulated in order to effectively combat illegal activities such as counterfeiting and drug trafficking.
[68] id
[69] id
[70] Supra note 9

remains surrounding the lawfulness of its application and it could lead people to be subjected simultaneously to the laws of many different states.[71]

In applying the nationality jurisdiction, the nationality of the person involved in the offence must be determined first. The relevant time for determining nationality is generally the time of the offence.[72] The fact that the person latter gains the nationality of the state that wishes to prosecute the offence against him/her or committed by him/her does not grant that state the nationality jurisdiction.[73]

1.3.3 Universal Jurisdiction Principle

Unlike the territoriality and nationality principles, which requires certain connections with the prosecuting state based on the place of the commission of the crime or nationality of the offender/victim, universal jurisdiction need no link or connection of the commission of the crime with the prosecuting state. Thus, any state can assert its authority over offences subject to the universal jurisdiction. It refers to the jurisdiction established over a crime without reference to the place of commission, the nationality of the suspect or victim or any other linkage between the crime and the prosecuting state.[74] It is a principle of jurisdiction limited to specific crimes, such as piracy, war crimes, crime against humanity, genocide, and torture.[75]

Crimes under international law (international crimes) have customarily attracted universal jurisdiction in two independent ways.[76] These are;

A) Based on the seriousness, repugnant nature and scale of the offence, as is the case with grave breach of the humanitarian law and crimes against humanity; or

B) On the inadequacy of the national enforcement legislation with regard to offences committed in locations not subject to the authority of any state, such as the high seas.

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[71] id
[72] id
[73] id
[74] id
[75] id
[76] Supra note 62

The purpose of universal jurisdiction was linked with the idea that international crimes affect the international legal order as a whole.[77] Owing to the recognition that such offences affect all states and people, international law grants all states the right to prosecute these international crimes.[78] Countries typically enact legislation granting domestic courts the power to assert universal jurisdiction over particular crimes subject to the universal jurisdiction. International conventions and international customary norms may also provide for the exercise of the universal jurisdiction by State Parties on serious crimes of concern to international community.[79]

1.3.4 Protective or Security Principles

It was unequivocally accepted that every country is competent to take measures in order to safeguard its national interests.[80] Thus, state is entitled to assert protective jurisdiction over extra-territorial activities, committed abroad that threaten state security, such as the selling of state secret, spying or counterfeiting of its currency or official seal.[81] The implication of state sovereignty is the basis for the protective or security principles. The necessity for this principle may be demonstrated by the lack of adequate measures in most of states' legal system through which to criminalize harmful behavior or prosecute persons for acts, which, although committed abroad, are directed against the security of a foreign state.[82]

1.4 Analysis of the Rome Statute over the ICC Jurisdiction

1.4.1 Basis of ICC's Jurisdiction Under the Rome Statute

Beginning in June of 1998, representatives from most of the nations of the world met at Rome to finalize a Statute creating the ICC.[83] After much controversy, the member of the conference finally adopted the Rome Statute establishing permanent international criminal court (PICC) called the ICC. On April 11, 2002, the Rome Statute of the ICC received its sixtieth ratification,

[77] Rosalyn Higgins; Problems and Process: International Law and How We Use It, (Oxford, 1994), pp. 56-63
[78] Supra note 9
[79] It includes crimes like piracy, war crimes, crimes against humanity, genocide, and torture.
[80] Supra note 62
[81] Supra note 9
[82] Supra note 62
[83] Supra note 30, pp. 825

hence entering into force on 1 July 2002 and establishing the first PICC with jurisdiction to prosecute individuals for the most serious crimes of concern to the international community.[84] During the negotiations on the Statute, some of the most controversial issues were proved to be those related to the ICC's basis of jurisdiction.[85] The controversies were related to the inclusion of the crimes over which the ICC assumes jurisdiction, consent of state of the nationality of the suspected individual, consent of the state of territory where the crimes were committed, assumption of the universal jurisdiction by the ICC over those listed crimes, and issues of complementarity of the ICC's jurisdiction.

Certain provisions of the Statute qualified the ICC's jurisdiction.[86] Unfortunately, the issues of jurisdiction of the ICC appear to be the most sensitive and controversial issues covered by the ICC Statute.[87] The jurisdictional basis of the ICC essentially falls on different models of jurisdiction; a subject matter model, territorial model and nationality of accused model.[88] This section of the paper is devoted to the analysis of the criminal jurisdiction of the ICC under the Rome Statute.

1.4.1.1 Subject Matter Model Of Jurisdiction Of ICC

This model looks into the nature of the crime to trigger the exercise of jurisdiction, and does not depend on any territorial or nationality linkages. It represents a commitment to a certain standard of behavior and set of values (manifest in the type of crimes it addresses), and to holding perpetrator accountable for the commission of the crimes that violates these values.[89]

It best fits and mostly applicable in the states following the federal system of government comprising different autonomous regional governments. Here, the federal government will have an exclusive jurisdiction over limited crimes committed any where throughout the country. Thus, in case the crime was committed within the territorial jurisdiction of one of the autonomous

[84] Supra note 23, preamble par. 4
[85] Supra note 30
[86] See Articles 5, 12 and 13 of the Rome Statute
[87] Nelson Ojukwu-Ogba; The Implication of the International Criminal Court for African State, Journal of Law and Development, University of Benin, Benin City. *E-mail: nelog@uniben.edu.*
[88] See Articles 5, 12(2)(a and b) and 13 of the Rome Statute
[89] Supra note 45

regional government, it will be obliged to submit the case to the federal government for prosecution, except where the federal government has delegated the power to the regional government.

Subject matter model of jurisdiction depends on three bases: the heinous/serious nature of the crime, its widespread impact, and the need to provide a more just and efficient method of holding perpetrators accountable.[90] Genocide, war crime, and crimes against humanity are among the most serious crimes that inflict a widespread impact on the international community. The Rome Statute provides that the most serious crimes of concern to the international community must be punished and that their effective prosecution must be ensured by taking measures at the national levels and through enhancing international cooperation.[91] Thus, according to the preamble (paragraph 4) of the Rome Statute, crimes of serious nature and widespread impact must attract the attention of the international community.

Article 5 of the Rome Statute provides the subject matter jurisdiction of the ICC by providing lists of the crimes over which the court has jurisdiction. It reads as follows:

> *'…the court has jurisdiction in accordance with this statute with respect to the following crimes:*
>
> *a) the crime of genocide*
> *b) crimes against humanity*
> *c) war crimes*
> *d) the crimes of aggression*

This particular provision of the Statute indicates that the court has subject matter jurisdiction over those limited but most serious crimes of concern to the international community.

The other important message of the first sentence of article 5 and paragraph 4 of the preamble of the Statute is that the ICC will exercise universal jurisdiction over those limited most serious crimes of concern to the international community as a whole. The State Parties to the statute affirmed that the most serious crimes of concern to the international community as a whole must

[90] id
[91] Supra note 23, Preamble par. 4

not go un-punished[92] and the jurisdiction of the court shall be limited to the most serious crimes of concern to the international community: genocide, war crimes, crimes against humanity, and crimes of aggression.[93]

1.4.1.2 Territorial Model Jurisdiction of the ICC

According to this model of jurisdiction, the court will assume jurisdiction on crimes committed over the area on which the court have territorial jurisdiction regardless of who the actor is. The ICC will exercise its territorial jurisdiction over crimes of serious concern to the international community committed on the territory, on board a vessel or aircraft of states parties to the Rome Statute or have accepted the jurisdiction of the court in accordance with paragraph three of article 12 of the Statute.[94]

Article 12 of the Statute provides the preconditions to the exercise of jurisdiction of the ICC under article 13 of the Statute. One of the pre-conditions for the exercise of its jurisdiction is the place of the commission of the crimes referred under article 5. The Statute has granted the ICC to have territorial jurisdiction over crimes committed on the territory of the State Parties to the Statute or has accepted the court's jurisdiction with respect to the particular case.[95]

1.4.1.3 Nationality Model Jurisdiction of the ICC

Nationality of the person accused of committing crimes referred under article 5 of the Statute is also a basis for the exercise of jurisdiction by the ICC. The ICC may assume jurisdiction over a person accused of the crimes if he/she is a national of the State Parties to the Statute or have accepted the jurisdiction of the court.[96]

As provided under article 12(1) b, the ICC will exercise only 'active nationality' model of jurisdiction. Because it only follows the nationality of the person accused of the crime regardless of the nationality of the victim. This indicates that, even though the victim is the national of non-

[92] Id
[93] Id, Preamble Para. 4 and Art. 5
[94] Id, Art. 12(1)a
[95] id
[96] id, art. 12(1)b

party state or the crime was committed on the territory of non-party state but the accused is the national of State Party to the Statute, the ICC will exercise its jurisdiction by the nationality model jurisdiction.

1.4.2 Complementarity Principle of the ICC

The establishment of the ICC has created great fear for States that it may override their sovereignty on the exercise of the criminal jurisdiction. However, the jurisdiction of the ICC, though special in nature, is complementary to that of the municipal courts in the effective enforcement of the world order and international criminal justice administration.[97] The ICC Statute encourages states to exercise their jurisdiction over the ICC crimes. It provides that 'the effective prosecution of the ICC crimes must be ensured by taking measures at national level and by enhancing an international cooperation.[98]

Complementarity principle can be defined as a "functional principle aimed at granting jurisdiction to a subsidiary body when the main body fails to exercise its primacy jurisdiction".[99] The aim of the ICC is that the perpetrators of the most serious crimes of concern to the international community must not go unpunished, and to put an end to impunity for the perpetrators of those crimes. It serves as a court of last resort and only exercises its jurisdiction when a state is unwilling or unable to proceed with a prosecution. The Statute does not deprive states of the power to prosecute the perpetrators of international crimes. It rather institutes a court that will do so in the event that states parties neglect to prosecute these criminals or do not possess the means to do so. Thus, the complementarity role of the ICC intends to facilitate a climate that serves to encourage and expand the prosecution for international crimes in domestic courts.[100]

[97] Supra note 87
[98] Supra note 23, Preamble para. 4
[99] X. Philippe; The Principle of Universal Jurisdiction and Complementarity: International Review of the Red Cross; Selected Articles on international Humanitarian Law, vol. 88, number 862, June 2006
[100] Supra note 87

Under this principle, the court cannot exercise its jurisdiction when states parties to the Statute investigate or undertake judicial proceedings in good faith, after a crime covered by the Statute has been committed.[101] It exercises its jurisdiction only when:

- The state in question is unwilling or unable to investigate or prosecute,
- After investigation, the decision of the state not to prosecute a person is motivated by the intention to save the person from being brought before justice, or
- After trial, the proceeding was conducted with the purpose of shielding the person from criminal responsibility, or conducted in violation of the norm of due process recognized by international law.

Thus, though the ICC has jurisdiction over most serious crimes of concern to the international community, it is the second option next to the domestic courts. The principle of complementarity is a compromise between respect for the principle of state sovereignty and the idea to end the culture of impunity[102]. It is a means of attributing primacy of jurisdiction to national courts, but includes a 'safety net' allowing the ICC to review the exercise of jurisdiction if the conditions specified by the Statute are satisfied.[103]

1.5 The Power to Initiate Prosecution under the Rome Statute

There are three means of bringing matters before the court: a referral by a State Party or non-party state on accepting the jurisdiction of the court, a referral by the United Nation Security Council (UNSC) acting under Chapter VII of the Charter of the UN, and the institution of the investigation by the prosecutor acting on his own initiative.

States and the UNSC may refer a case to the court, but do not determine the specific cases and the suspects warranting the investigation. The power to determine is left for the prosecutor, not for political bodies.[104] This indicates that, not all situations referred to the attention of the

[101] Supra note 23, Art. 17 and 20
[102] Supra note 99
[103] id
[104] Supra note 9

prosecutor will be selected for formal investigation. The Office of the Prosecutor (OTP) must analyze the set of events in question to determine whether they meet the legal requirements under article 53 of the Statute to proceed.[105]

1.5.1 State Referral

Article 13(a) of the Statute provides that:

> *'the court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provision of this statute if:*
>
> > *A situation in which one or more of such crimes appears to have been committed is referred to the prosecutor by a State Party in accordance with article 4.'*

Any State Party to the Statute can request the prosecutor to carry out an investigation. States not party to the Statute, up on declaration of accepting the court's jurisdiction with respect to the crimes committed in their territory or committed by their nationals, can also request the prosecutor to carry out an investigation. The prosecutor may start an investigation up on referral of the situation if there is a reasonable basis to believe that the crimes have been or are being committed.

The referral made by the state (whether party or non-party) should specify, as far as possible, the relevant circumstances and be accompanied by such supporting documentations as is available to the state referring the situation.[106] Then the OTP will evaluate the material submitted to it before making the decision on whether to proceed or not.

Until today, five situations were referred to the public prosecutor by states.[107] Among the five situations, states party to the Statute referred three of them, i.e. the Democratic Republic of Congo, Uganda, and the Central African Republic, requesting the prosecutor to conduct an

[105] Supra note 36
[106] Supra note 23, article 14(2)
[107] Supra note 24

investigation.[108] The remaining two situations being investigated by the OTP, were referrals made by the Republic of Cote d'Ivory and Palestine, non-party states that has accepted the jurisdiction of the court over crimes allegedly committed in their territories.[109]

The state referral of the case has both benefit and risks. It can be of benefit to the court in that it may indicate, far from being intrusive and infringing on sovereignty; an international investigation is welcomed and will be supported with full cooperation by the state concerned, including by granting protection to investigators and witnesses.[110] On the other hand, it has a risk that governments will use the ICC as a weapon in conflicts with the enemy by bringing politically trumped charges.[111] There is also the risk that states will over burden the court with cases they could handle themselves.[112]

1.5.2 United Nation Security Council (UNSC) referral

The other way by which the jurisdiction of the ICC can be initiated is by the referral of the case by the UNSC acting under Chapter VII of the UN Charter to address a threat to international peace and security.[113] The OTP once received a referral by the UNSC, will determine whether an investigation be warranted using the same procedure as in the case of state referral. The UNSC referral is different from other types of referrals in that the consent of the state of nationality of the accused or the state on whose territory the crime was committed is not necessary for the court to assert jurisdiction.[114]

The relationship of the court with the UN has created a debate among the delegates of states, which have participated in the negotiation of the Statute asserted that it would undermine the independence of the court. This contentious issue was resolved by article 2 of the Statute by making the court independent of the UN[115]; and the court shall be brought into relationship with

[108] id
[109] id
[110] Supra note 9
[111] Supra note 36
[112] Supra note 9
[113] Supra note 23, article 13(b)
[114] id, art 18(1)
[115] id, preamble par. 9

UN through an agreement to be approved by the Assembly of State Parties to the Statute and thereafter concluded by the President of the court on its behalf. As a result, by the "Negotiated Relationship Agreement between the ICC and the UN", the UN has recognized the court as an independent permanent judicial institution, which has international legal personality and such legal capacity as may be necessary for the exercise of its function and the fulfillment of its purpose.[116]

It was argued that one of the reasons for the special relationship between the ICC and the UNSC for initiating the jurisdiction of the court was to give the UNSC a permanent forum for war crimes trials, without necessitating the intense effort required to set up *ad hoc* tribunals.[117] Additionally, it can contribute to the effort made in the fight against impunity and restoring peace.[118]

The most prominent situations brought to the attention of the OTP for investigation by UNSC, acting under Chapter VII of the UN Charter, are the situations in Darfur, Sudan, and the Libya.[119]

1.5.3 The Power of the ICC Prosecutor to Initiate an Investigation *Proprio motu*

The OTP, up on receiving reliable information about crimes involving nationals of State Party or of state which has accepted the jurisdiction of the court, or about crimes committed in the territory of such states, and concluding that there is a reasonable basis to proceed with an investigation, can initiate an investigation *proprio motu*-on its own motion.[120] Individuals, intergovernmental organizations, NGO's, or other reliable sources can provide such information to the OTP.[121] The prosecutor shall analyze the seriousness of the information received and may seek additional information from any reliable sources that he/she deems appropriate, and may receive written or oral testimony at the seat of the court.[122] In case the OTP decides that there is a

[116] Negotiated Relationship Agreement Between the ICC and the UN, article 2
[117] Supra note 36
[118] id
[119] Supra note 24
[120] Supra note 23, article 15(1)
[121] Supra note 24
[122] Supra note 23, article 15(2)

reliable or reasonable basis to proceed with an investigation after conducting a preliminary examination of the information received, he/she will request the Pre-trial Chamber I to authorize an investigation

During negotiation of the Statute, the power of the prosecutor to initiate an investigation *proprio motu* is the chief point of controversy.[123] The controversy was related to the fact that the prosecutor might institute politically motivated investigations and would not be subject to the oversight that national authorities have over their own prosecutors.[124] To that effect, article 15 of the Statute has put a limitation over the power of the prosecutor that he/she has to seek the authorization of the Pre-trial Chamber to begin an investigation.

In addition, the procedures for investigation and prosecution which ensure both that the case is proper one for the court in terms of evidence and jurisdiction, and that there is no national court able or willing to try the case have the effect of restricting the prosecutor's authority.[125] However, the requirement that the prosecutor should inform all states with jurisdiction before beginning an investigation[126] removes any possibility of a hypothetical maverick prosecutor getting away with pursuing a personal agenda.[127]

[123] Supra note 9
[124] id
[125] id
[126] Supra note 23, article 18
[127] Supra note 9

Chapter Two

The ICC and Positions of States Not Party to Rome Statute

2.1 Introduction

The creation of the permanent international criminal court (PICC) has been seen as a desirable objective for a long time.[128] By the time Rome conference began, there was wide agreement on the general objectives of the court, as it was aimed to replace a culture of impunity for the commission of most serious crimes of concern against international community with a culture of accountability.[129] Nevertheless, the conference was difficult, as it became the theater of a number of conflicts between different legal systems and political interests.[130] As a result, the statute of the ICC could not be adopted by consensus because of the opposition of a few states, notably the US.[131]

As of May 2013, 122 states have ratified the Rome Statute and 34 states are from African continent.[132] Despite the fact that there is continuous and strong support for the ICC across the world, the court does not escape oppositions by states not party to the statute and by some political elite and state actors. The opposition against ICC originally related to the exercise of its jurisdiction against nationals of non-party states. Even though there is sufficient legal basis[133] for the ICC exercise of jurisdiction over nationals of non-party states, non-party states, particularly the US, are unwilling to accept the jurisdiction of the court over their nationals.

[128] Philippe Krisch, Q. C.; "The International Criminal Court: Current Issues And Perspectives", in Law And Contemporary Problems (Winter 2001) Vol. 64, No. 1
[129] Id
[130] Id
[131] Id
[132] Id
[133] See Chapter Three above

Starting from its formation, the ICC has faced different opposition. From its formation, the US, who first signed and later unsigned the statute, strongly challenged the court. Currently, serious voice of opposition against the ICC is being heard from the African Continent.

Arguments raised by the US against the ICC include the following four issues.[134] 1) The ICC cannot assume jurisdiction over nationals of countries not party to the ICC; 2) there is little accountability over the ICC prosecutors; 3) the ICC cannot unilaterally decide whether an American investigation or prosecution was adequate; and 4) the ICC undermines the role of the UN SC in determining acts of aggression.

An opposition from African continent against ICC is a currently debated hot issue among various scholars, political elites, and state actors. African states have played an active role in the establishment of the ICC and Africa represents the largest regional grouping of countries with in the Assembly of State Parties (ASP). However, the relationship between the court and African states has been severely endangered after the court has indicted and issued an arrest warrant against President of Sudan for committing international crimes in Darfur. This breakdown of their relationship goes to its tips when the AU has adopted a decision calling its member states not to cooperate with ICC's decision to arrest and surrender President Al-Bashir of Sudan. The various allegations by African states against ICC include the following two principal complaints:[135] that it is a creation of western powers; and it is a tool designed to target Africans.

This chapter will provide the positions of non-party states on the ICC. It deals with issues relating to the arguments raised against the court and actions taken to escape from the ICC's prosecution. Even though there are many states not party to the statute, this paper is only limited and deals with the positions of the US and AU. This selection is based on the role they possibly play in an international law and on the strong arguments they have forwarded in support of their opposition.

[134] Rickert Paul R.; "The U.S. And The International Criminal Court (ICC)", (2006) Liberty University, Helms School of Governance, available at (http://works.bepress.com/paul_rickert/7)

[135] Max Du Plessis; The International Criminal Court And Its Work In Africa: Confronting The Myths, ISS Paper 173, November 2008

2.2 The US and ICC

US signed the 1998 Rome Statute during the Presidency of Bill Clinton.[136] He signed the statute knowing that the Senate would not consent to ratify it, and that many Senators had expressed their grave doubts about the wisdom of the involvement of the US in the institution.[137] He also signed the statute acknowledging the instrument's "significant flaws", and recommending that the next president of the US will not submit the treaty for the Senate's consideration "until US's fundamental concerns are satisfied".[138] Lee A. Casey writes that it was for the first time in history, since July 4, 1776, that US signed a treaty acknowledging the superior authority of an institution neither elected by the American people nor accountable to them for its action.[139]

Surprisingly, although President Clinton signed the statute on December 2000 with much reservation in its content and with explicit directions to the next president, President Bush sparked controversy in the international community with his purported "un-signing" of the Rome Statute by a letter to UN,[140] which was apparently without any precedents.[141] He took this action because of the fact that the mere signature of treaty does have effects under international law, i.e. by signing a treaty a state agrees to refrain from actions that would defeat the objects and purposes of that treaty.[142] This indicates that US wants to escape from the obligations and commitments resulting from the signing of the statute. To that effect, US have raised different issues against the ICC and have designed different congressional actions used to help its nationals escape prosecution of the ICC.

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[136] Lee A. Casey; "The Case Against The International Criminal Court", In Fordham International Law Journal, Vol. 25, Issue 3, Article 15, (2001)

[137] id

[138] id

[139] id

[140] Press Statement, Rechard Baucher; US Department Of State. ICC: Letter To UN Sec. Gen. Kofi Annan (May 6, 2002)

[141] Luke A. Mclaurin; "Can The President "Unsign" A Treaty?", In Washington University Law Review, Vol. 84:1942{2006}, Pp. 1941-1982

[142] Id, see also Vienna Convention, Art. 18

2.2.1 Objections Raised by the US Against the ICC

The ICC, the first PICC with jurisdiction to prosecute individuals for the most serious crimes of concern to the international community, got strong support from the UN, many human right organizations, and most democratic nations of the world.[143] US, initially supported the idea of creating an ICC and was a major participant at the Rome Conference, however, at the end voted against the statute[144] and opted not to be party to the Statute. US firmly opposed the court, have designed measures, which formally renounce any US obligations under the statute.[145] The Bush Administration objects to the court on a number of grounds, including:[146]

- The Court's assertion of jurisdiction (in certain circumstances) over citizens, including military personnel, of countries that are not parties to the treaty;
- The perceived lack of adequate checks and balances on the powers of the ICC prosecutors and judges;
- The perceived dilution of the role of the U.N. Security Council in maintaining peace and security; and
- The ICC's potentially chilling effect on America's willingness to project power in the defense of its interests.

The primary objection forwarded by US in opposition to the statute is the ICC's possible assertion of jurisdiction over the US soldiers charged with "war crimes" resulting from legitimate uses of force, or other American Officials charged for conducts related to the foreign policy

[143] CRS Report RL31437, International Criminal Court: Over View And Selected Legal Issues, Report For Congress, June 5, 2002
[144] id
[145] id
[146] CRS Report For Congress; International Criminal Court In Africa: Status And Policy Issue, Congressional Research Service, September 12, 2008

initiatives.[147] The US has argued that, the nation that should be bound to observe a treaty is only a nation that has ratified it.[148]

US also argued that the ICC purports to subject citizens of non-party nations to its jurisdiction, thus binding non-party nations.[149] Thus, ICC would then be in a position to interpose itself into the policy making process of the US through the threat of criminal prosecution against the American leaders, officials, officers, soldiers, and including ordinary American citizens.[150] As a result, such threat of criminal prosecution could inhibit the conduct of US officials in implementing US foreign policy.[151] In this way, US argued that the court might be seen to infringe upon the sovereignty of the US.[152]

Despite the fact that US objected to the jurisdiction of the ICC over nationals of non-party states, it has supported the exercise of the ICC jurisdiction over non-party state nationals only when the UN SC acting under Chapter VII of the UN Charter referred the situation.[153] To that effect, US had proposed a mandatory role of the UN SC in deciding when the ICC should assert jurisdiction, which majority of countries refused to adopt on the ground that it would mirror the uneven prosecution of war crimes and crimes against humanity under the present system of *ad hoc* tribunals.[154]

Secondly, US objected to the ICC on the ground that the court prosecution may be politicized. The US argued that the ICC's flaws might allow it to be used by some countries to bring politically motivated charges against American citizens, who, due to the prominent role played by the US in the World affairs, may have greater exposure to such charges than citizens of other nations may.[155] The US also protests the jurisdiction of the court based on the fear that American Peacekeepers overseas may be subjected to the court's jurisdiction, even if the US does not ratify

[147] CRS Report RL31495: US Policy Regarding The International Criminal Court, Updated August 29, 2006
[148] id
[149] id
[150] Supra Note 136
[151] Supra Note 147
[152] id
[153] id
[154] id
[155] id

the statute.[156] This is because of the fact that one of the precondition to the exercise of the ICC's jurisdiction is based on the commission of the crime over the territory of party state or state that have declared to be bound by the ICC's jurisdiction.[157] Thus, US feared that if US soldiers commit war crime on the territory of foreign State Party to the ICC or states that have consented to the ICC jurisdiction, the US soldier will be subjected to the court's jurisdiction.

Thirdly, US opposed the court on the ground of lack of adequate check and balance on the powers of the ICC prosecutors. US argued that the OTP, an organ of the ICC that is not controlled by any separate political authority, has unchecked discretion to initiate cases, which could further lead to politicized prosecution.[158] US negotiators at Rome had proposed that the UN SC to check possible overzealous prosecutors and to prevent politicized prosecutions.[159] However, US proposal has failed to be approved, because, majority took the view that the UN SC, with its structure and veto power, would pose greater danger of politicizing the ICC prosecution, and, thereby, guaranteeing impunity for some criminals while prosecuting others based on the national interest of the powerful nations.[160] With this position, I think US want to use its *veto* in the UN SC, as a permanent member of the SC, to help its nationals escape prosecution and allow prosecution of other's nationals for its own national interest.

Fourthly, US had opposed the ICC arguing that the court undermines the role of the UN SC in maintaining international peace and security in relation to the determination of the definition of crimes of aggression. US argued that the Rome Statute gives the court the authority to define and punish the crimes of aggression, which is solely the prerogative of the SC under the UN Charter.[161] US and other opponents of the ICC argued that the lack of agreement among ASP as to the definition of the crime of aggression suggests that any definition adopted only by the

[156] Dauglass Cassel; "The Rome Treaty For An International Criminal Court: A Flawed But Essential First Step", In Brown Journal Of World Affairs 41 (Winter/Spring 1999)
[157] Supra note 23, Art. 12(2)
[158] Supra Note 147
[159] id
[160] id
[161] Supra Note 156

majority member states of ICC may not be sufficiently grounded in international law to be binding as *jus cogens.*[162]

US also criticized the ICC for lack of due process guarantees for the accused. US argued that the court would not offer the accused Americans with due process guaranteed for them under the US constitution, such as the right to a jury trial.[163] In general, based on the objections raised above, US did not ratify the Rome Statute and still did not succeed to the statute. To this effect, the US has adopted different congressional actions to help its citizens escape the ICC investigation and prosecution.

2.2.2 Congressional Actions Taken by US Against the ICC

US, opposing to the jurisdiction of the ICC on the nationals of non-party states and fearing the threat of ICC criminal prosecution against its nationals, took some legislative actions, which help its nationals to escape ICC prosecution for their criminal acts committed overseas. Senator Jesse Helms of North Carolina, the Chairman of the Senate's Foreign Relation Committee, announced six points over which he would seek assurance from the Secretary of States, which includes:[164]

> (1) The United States will never vote in favor of the Security Council referring a case to the ICC under Article 13(b).
> (2) The United States will not provide any assistance to the ICC or to any other international organization in support of the ICC either in funding, in-kind contributions, or other legal assistance.
> (3) The United States will not extradite any individual to the ICC, or, directly or indirectly refer a case to it.
> (4) The United States will include in all of its bilateral extradition treaties a provision that prohibits a treaty partner from extraditing U.S. citizens to the ICC.

[162] Supra Note 147
[163] id
[164] Patricia Mcneracy; "The International Criminal Court: Issues For Consideration By The United States' Senate", In Law And Contemporary Problems, Vol. 64, No. 1, (Winter 2001), PP. 181-192

(5) The United States will renegotiate all of its status of forces agreements to include a provision that prohibits a treaty partner from extraditing U.S. soldiers to the ICC, and will not station American forces in any country that refuses to accept such a prohibition, and

(6) The United States will not permit a U.S. soldier to participate in any NATO, U.N., or other international peacekeeping mission until the United States has reached agreement with all of our NATO allies, and the U.N., that no U.S. soldier will be subject to the ICC's jurisdiction.

As a result, US Senate has introduced legislations that would address many of these issues. The legislations passed by the Senate on the opposition of the ICC include:- the American Service members' Protection Act (ASPA); the Nethercutt Amendments; and the National Defense Authorization Act for FY2007.

American Service members' Protection Act of 2002 (ASPA): is intended to shield members of the US Armed Forces and other covered personnel from the jurisdiction of the ICC.[165] It prohibits cooperation with the court by any agents or entity of the federal government, or any state or local governments and prohibits agents of the ICC from conducting any investigative activity related to the ICC on the US soil (section 2004).[166] It also put restriction on the US participation in UN peacekeeping operation missions (section 2005).[167] Additionally, it prohibits military assistance to any country that is member of the ICC, except for NATO countries and major non-NATO allies (section 2007)[168]. Under its section 2008, it authorizes the President to use "all means necessary and appropriate" to bring about the release of covered US and allied persons, who are being detained or imprisoned by or on behalf of the ICC.[169]

ASPA also contains certain waivers and exceptions over those restrictions and prohibitions provided above. It provides for presidential waiver of restriction on US participation in UN peacekeeping missions, if the ICC has agreed not to seek to assert jurisdiction over any covered US or allied persons with respect to their action in an official capacity, or if satisfactory protection can be achieved through UN SC measures, or if the US national interest justifies the

[165] Supra Note 147
[166] id
[167] id
[168] id
[169] id

participation.[170] Prohibition of military assistance is waived if it is in the US national interest or that the state in question has entered into an agreement with US "pursuant to Article 98 of the Rome Statute" preventing the ICC from proceeding against US personnel present in such country.[171] NATO and major non-NATO allies are exempted from the prohibition.[172]

Prohibition on the cooperation with the ICC can be waived if there is a reason to believe that the accused is guilty as charged, if it is in the US national interest, and the investigation and prosecution by the court is not related to the covered US or allied persons with respect to their actions in an official capacity.[173]

The Nethercutt Amendment:- the 108th Congress of US included a provision in the FY2005 Consolidated Appropriate Act (HR.4818/P.L. 108-447), which is known as the Nethercutt Amendment. It prohibit the use of funds made available under the Economic Support Fund heading to provide assistance to countries who are members of the ICC and who have not entered into a so called "Article 98" agreement.[174] This provision was re-enacted by the 109th Congress as part of the FY2006 Consolidated Appropriate Act (H.R. 3057/P.L. 109-102). The FY2005 authorized the president to waive the prohibition with respect to NATO Members and major non-NATO allies without a prior notice to the congress, if he determined that waiver was in the US national security interest.[175] However, the Nethercutt Amendment (re-enacted by the 109th Congress) require the president to give the Congress notice before he invokes a waiver and it also extends the waiver to such other countries if he determines and reports to the appropriate Congressional Committees that it is important to the national interest of the US.[176]

National Defense Authorization Act for FY2007:- it modifies ASPA to end the prohibition on International Military Education and Training (IMET) assistance to countries that are member of the ICC and that have not implemented Article 98 agreements.[177] It was enacted as a result of the

[170] id
[171] id
[172] id
[173] id
[174] id
[175] id
[176] id
[177] id

perceived negative consequences flowing from the cut-off of the IMET assistance to affected allies.[178] To that effect, the report of the House Armed Service Committee authorized the president to waive ASPA funding restrictions and should be invoked where necessary to "impede undue influence on the US partner nations" by third-party governments that might occur in the absence of US engagement efforts made possible through IMET.[179]

2.2.3 Criticisms Against the Position of the US on the ICC

There are a number of criticisms posed against the US accusation of the court's exercise of jurisdiction against non-party state nationals. US argued that the ICC's exercise of its jurisdiction over nationals of non-party is in violation of international law rule applicable on law of treaty, and thus binding non-party states to the statute.[180] However, ICC supporters have criticized the US's argument arguing that the ICC has jurisdiction over individuals, not states and thus, non-party states are not obligated to do anything under the statute.[181] However, the complimentarity principles of the ICC may put pressure over the concerned state to try its nationals within its domestic court. This does not amount to impose an obligation on non-party states, as there is no responsibility arising from failing to do so under the Rome Statute.

Some ICC supporters have asserted that crimes covered by the Rome Statute are already prohibited under international law either by treaty or under the concept of “universal jurisdiction” or both.[182] Therefore, all nations may assert jurisdiction to try persons for these crimes.[183] The ICC, they argue, would merely be exercising the collective jurisdiction of its members, any of which could independently assert jurisdiction over the accused persons under a theory of “universal jurisdiction”; the Nuremberg trials serve as an example of such collective jurisdiction.[184] Thus, the exercise of ICC's jurisdiction over nationals of non-party states is lawful.

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[178] id
[179] id
[180] Vienna Convention on the Law of Treaty of 1969, article 18. See also supra note 247
[181] Supra note 147
[182] id
[183] id
[184] id

Moreover, the statute provides that the prosecutor should notify, all State Parties and those States that, taking into account the information available, would normally exercise jurisdiction over the crimes concerned, about the allegation brought against the accused.[185] Thus, on the notification, US may block any investigation and prosecution against its national by requesting the court to try the accused before its own domestic court in good faith. However, if the intention behind the request is in bad faith to help the accused escape justice, the court will not stop the investigation or prosecution. This will help non-party states to stop the court's investigation and prosecution against its nationals and try them under its own domestic court. Therefore, US's allegation has no legal basis as the statute already addressed its fundamental concern.

The US's accusation of the politicized prosecution of the ICC is criticized by the ICC supporters based on the principle of complimentarity, which will ensure that the ICC does not take jurisdiction over a case involving an American citizen, unless the US is unwilling or unable genuinely to investigate the allegation itself.[186] ICC supporters disputed the likelihood of the occurrence of the politicized prosecution by the ICC, and express confidence that politicized prosecution would be dismissed.[187] ICC's Chief Prosecutor determination, in his letter explaining his reason for declining to launch an investigation against US nationals, seems to demonstrate a reluctance to launch investigation against US based on the allegations regarding its conduct in Iraq.[188] Additionally, the statute requires the State Parties to select prosecutor of high competence and extensive practical experience in prosecuting criminal cases by a majority of vote.[189] Thus, it was argued that this is not a system calculated to select the prosecutor prone to politically motivated prosecutions.[190]

The US also accused the court for the lack of check and balance on the ICC's prosecutor. This was challenged by the ICC supporters that the statute does contain some restraints on the prosecutor, including a provision that the prosecutor must seek permission from a Pre-trial

[185] Supra note 23, article 18(1)
[186] Supra note 147
[187] id
[188] id. See also letter from Luis Moreno Ocompo, Chief Prosecutor, International Criminal Court, (February 9, 2006), available on [http://www.icc-cpi.int/library/organ/otp/OTP_letter_to_sender_re_Iraq-9_ferruary_2006.pdf]
[189] Supra note 156
[190] id

Chamber I to carry out a self motivated prosecution, and a provision for the removal of the prosecutor by vote of the ASP.[191] It is also argued that the independency of the prosecutor is a vital in order to ensure just result, free from political control.[192]

On the objection of the US based on the usurpation of the UN SC in defining the crime of aggression, it was provided that all State Parties will have the opportunity to vote on a definition of aggression, which must comport with the UN Charter. Thereby preserving the role of the UN SC.[193] With respect to the lack of due process in the statute, the statute contains a comprehensive set of procedural safeguards that offer substantially similar protections to the US Constitution.[194] Some also argued that the US Constitution does not always afford American citizens the same procedural rights when they may be tried overseas, where the foreign governments are not bound to observe the US Constitution.[195]

Finally, the Congressional Actions taken by the US Congress is unlawful under the international law of treaty. Article 18 of the 1969 VCLT provides that the state that has signed a treaty and not ratify the same must refrain from taking any actions that violates the object of the treaty concerned. Thus, as far the intention of the US Congress in enacting legislation is to preclude the US nationals from ICC's prosecution which is against the court's objective, i.e. the fight against impunity, US is violating its international obligation recognized under international law of treaty. However, this will be reconciled only if US can try its individual accused of committing the ICC crimes.

2.3 African Union (AU) and the ICC

After the creation of the ICC, based on the regional groupings, African states represent the highest number in the ICC's ASP. African states played an influential role in the negotiations of the Rome Statute before and during the 1998 Rome Conference. Majority of countries represented at the Rome Conference, including the African States, felt that it would benefit

[191] Supra note 147
[192] id
[193] id
[194] id
[195] id

global governance to create an international criminal justice regime empowered to prosecute individuals guilty of gross atrocities and human rights violations.[196] The reality of the Rwandan genocide of 1994 also convinced many African governments of the need to support international criminal justice initiatives to confront impunity and persistent mass human right violations on the continent.[197] This support of African states for the ICC was reflected by the decision of three African states referral of the situation presented on their territory to the ICC. The referral made by the Government of Uganda, Democratic Republic of Congo, and of Central African Republic will represent a good evidence of the support of African states for the ICC.

Despite such good support and relationship between African states and the ICC, the support for the ICC began to decrease as of July 2008, when the ICC issued an arrest warrant against Omar al-Bashir, the sitting president of Sudan, because of his criminal responsibility for committing genocide, war crimes, and crimes against humanity in Darfur region of Sudan. In the history of the ICC, this became a new event for it was issued against a sitting head of state and against non-party nationals. This created a misconception among African states that led them to oppose the court. The opposition against the ICC reached its highest point when the AU adopted a decision in response to the ICC's arrest warrant issued against President of Sudan, Omar al-Bashir.

2.3.1 Issues Raised by the AU on the ICC

Despite the fact that African states played a great role in the formation of the ICC, they are highly opposing and accusing the ICC that it has exclusively focused on the African states. This has created negative perceptions among African governments regarding the underlying intention behind the establishment of the court.[198] The various allegations made against the ICC by the African states and African scholars include that:[199]

- The ICC is creation of the western powers,

[196] Tim Murithi; "Africa's Relations With The ICC: A Need For Reorientation?", In Perspective01/2012, Political Analysis And Commentary From Africa; A Fructious Relationship: Africa And The International Criminal Court, Heinrich Boll Stiftung, Capetown.
[197] id
[198] id
[199] Supra Note 136

- The ICC is designed to target Africans, be they are leaders or foot soldiers,
- The ICC is part of some new international humanitarian order in which there is the worrying emphasis on big powers as enforcer of international justice, and
- The ICC is removing incentives for peaceful settlement efforts of dispute among the conflicting parties.

The arguments got support in the statement made by the former Chairperson of the AU Commission, Jean Ping. He reportedly expressed Africa's disappointment with the ICC in noting that, rather than pursuing justice around the world, including in cases such as Colombia, Sri Lanka, and Iraq, the ICC was focusing only on Africa and was undermining rather than assisting African efforts to solve its problem.[200] While confirming that AU is not against international justice, Jean Ping has argued that 'it seems that Africa has become a laboratory to test the new international law'.[201]

A renowned African scholar, Mohmood Mamdani,[202] argues that the ICC is a new order that draws on the history of modern western colonialism, and that it shares an aim of 'mutual accommodation' with the world's only super powers.[203] This argument of Mamdani looks convincing when seen from the fact that all the cases before the ICC were from states where the US had no major objection to the ICC's investigation.[204] He concludes that, the ICC is rapidly turning into western court to try African crimes and targeted governments that are US adversaries by ignoring actions against other state that US does oppose.[205]

The other persistent criticism of the ICC's action in Africa has been that by prosecuting active participants in ongoing or recently settled conflicts, the court is endangering the fragile peace process.[206] The particular and prominent example in relation to this argument is the case of Uganda and that of the Sudan. It was argued that the ICC's interventions have acted as an

[200] id
[201] id, In Sitting British Broadcasting Corporation (BBC) News 2008
[202] id
[203] id
[204] id
[205] id
[206] Supra Note 147

impediment to achieving final peace agreements.[207] The AU's strong condemnation of the ICC's arrest warrant against the President of Sudan was premised on its conviction that the decision would significantly undermine an ongoing peace process aimed at ending the conflict in Darfur and promoting long-lasting peace, reconciliation, and healing process in Sudan.[208]

Other criticism of the AU against the ICC was that the court is selectively targeting African states. This view was associated with the fact that all extant situations and cases before the court involve only African states. This triggered the argument that Africa is the unfair target of the ICC intervention.[209] The AU also suggests that the selective application of international justice tools is to achieve the interest of most powerful states at the expense of weaker states in the international system.[210]

Additionally, AU contends that the principle of 'universal jurisdiction' was misused as a political tool to target African leaders, a violation of the sovereignty and territorial integrity of African states.[211] These all have resulted in a number of decisions, aimed at asserting the African region's opposition to what is perceived as attempts by stronger states to exercise their power over weaker African states, ostensibly to find ways in which Africa's interest can be protected within the international system.[212]

2.3.2 AU's Decision to Block ICC's Action in Africa

Despite the fact that 34 AU member states are parties to the ICC, the AU stands at the opposite side of the ICC and has adopted a number of decisions reflecting its opposition. This opposition of the AU has started in July 2008, following the ICC prosecutor's application of arrest warrant against the sitting President of Sudan for committing war crime, crime against humanity, and genocide in the Darfur region of South Sudan. Following the prosecutor's application of the

[207] id
[208] Conference Report On Advancing International Criminal Justice In Africa: State Responsibility The African Union And The International Criminal Court, Organized By Center For Citizen's Participation On The African Union (CCP-AU), 14-16 November 2011, Nairobi-Kenya
[209] id
[210] id
[211] id
[212] id

arrest warrant, the AU Peace and Security Council (PSC) adopted a decision on 20 July 2008[213] that begins by reiterating the PSC's commitment in combating impunity and promoting democracy, the rule of law and good governance, and condemning the gross violation of human rights in Darfur.[214] It further emphasized that the search for justice should be pursued in a way that does not impede or jeopardize efforts aimed at promoting lasting peace, thereby pointing to the "wrong timing" of the prosecutor's application for Bashir's arrest warrant.[215]

Before the ICC delivered its decision on the prosecutor's application, the AU Heads of States and Governments met in Addis Ababa, Ethiopia, in February 2009, which resulted in adopting the AU Summit Decision of February 2009. The decision mainly endorsed the PSC communiqué and reiterated the call for an article 16 deferral of the Sudan case by the UN SC.[216] Additionally, the decision cautioned that the indictment would jeopardize the efforts underway for peace process in the Sudan.[217] However, the UN SC failed to defer the case and the ICC issued the arrest warrant for President al-Bashir in March 2009. This became the water shade moment for the AU's relationship with the ICC.[218]

Following the ICC's arrest warrant, the AU's decision adopted at its July 2010 summit in Kampala, Uganda, regarding the ICC raises significant concern, which restates the call for non-cooperation by AU Member States with ICC, in effecting the arrest warrant against al-Bashir.[219] The decision also rejected the opening of the ICC liaison office in Addis Ababa, Ethiopia, and has criticized the conduct of the ICC prosecutor on the basis that he "has been making egregiously unacceptable, rude, and condescending statements" in the case against al-Bashir and "other situations in Africa".[220] The AU Commission also pressed for languages to be included in

[213] AU Peace And Security Council Communiqué PSC/Min/Com (CXLII) 21 July 2008
[214] id. Par. 2
[215] id
[216] id. Par. 10
[217] AU Summit Decision On The Application By The International Criminal Court (ICC) Prosecutor For The Indictment Of The President Of Republic Of Sudan, Assembly /AU/Dec. 221(XII) February 2009
[218] id
[219] Max Du Plessis, Tiyanjana Maluwa And Annie O'Reilly; Africa And The International Criminal Court, International Law 2013/01, (Www.Chathamhouse.Org) (Assessed On November 23, 2013)
[220] Assembly Of The African Union, "Decision On The Meeting Of African States Parties To The Rome Statute Of The International Criminal Court (ICC)," Assembly/AU/Dec.245(XIII), Sirte, July 3 2009

the decision that threatened to impose sanction on ICC African State Parties that did not heed the AU's call for non-cooperation in arresting President al-Bashir.[221]

Most recently, on 12 October 2013, Assembly of AU adopted a decision on Africa's relationship with the ICC. The October 2013 decision of the Assembly of AU provides that "no charges be commenced or continued before any international court or tribunal against any serving AU Head of State or Government or anybody acting or entitled to act in such capacity during their term of office.[222] To that effect, it addresses that any AU Member State that wishes to refer a case to the ICC may inform and seek the advice of AU.[223] It notably requested the African State Parties to the ICC to propose relevant amendments to the Rome Statute and inscribe on the agenda of ASP the issue of indictment of African sitting head of state or government by the ICC and its consequence on peace, stability, and reconciliation in AU Member States.[224]

It also provides that the trials of President Uhuru Kenyatta and Deputy President William Samoei Ruto should be suspended until they complete their terms of office and ordered Kenya to request the ICC to postpone and suspend proceedings against its president and deputy president, respectively.[225] It further orders President Kenyatta not to appear before the ICC until such time as the concerns raised by the AU and its member states have been adequately addressed by the UN SC and the ICC.[226]

2.3.3 Misconceptions of Africans Against the ICC

Following a number of prosecutions of African nationals accused of committing the ICC crimes by the court, Africans support for the court is surprisingly decreasing. This action of the court on

[221] Assembly Of The African Union, "Decision On The Progress Report Of The Commission On The Implementation Of Decision Assembly/AU/Dec. 270(XIV) On The Second Ministerial Meeting On The Rome Statute Of The International Criminal Court (ICC)", Assembly/AU/Dec. 296(XV), Kampala, July 27, 2010, Par's. 5,8 And 9

[222] Briefing Paper On Recent Setbacks In Africa Regarding The International Criminal Court (Nov., 2010), By Human Right Watch

[223] Assembly of the African Union, "Decision on the Africa's Relationship with the International Criminal Court (ICC)". Ext/Assembly/AU/Dec. 1(Oct. 2013), Par. 10. I

[224] id. Par. 10. Viii

[225] id. Par. 10. Vi And Vii

[226] id. Par. 10. Ii And X

African continent has created some sort of misconceptions in the minds of Africans. Africans accused the court that it was the creation of western powers targeting Africans, which takes the form of modern colonization of African states by western powers. They also accuse the court's intervention in Africa as an obstacle to the peaceful settlement process underway in Africa. However, none of the accusations against the court by Africans is supported by true facts.

- **Is ICC really the creation of western power?** As reputedly raised above, African states have played an influential role before and during the Rome negotiation and represent the highest regional groupings in the ASP of the court. This indicates that African states contributed extensively to the preparations leading up to, during and after the diplomatic conference in Rome at which the Rome Statute of the ICC was completed.[227] Thus, the assertion that the ICC is the creation of the western powers, and is a tool designed for use specifically in least developed and a developing country in Africa[228] is far from truth. It is only a misunderstanding of the history of the court creation by Africans. One's assertion of the assumption that the ICC is a western court is only by ignoring the serious and engaged involvement of African states in the history of the court.[229]

- **Is ICC really targeting Africans?** The true basis for this assertion is that the court has exclusively working on African cases. Thus far, the court is trying a number of cases from Africa based on the referral of the situation to the OTP by individual governments from Africa, UNSC referral, and self-initiated intervention by the ICC's Chief Prosecutor.[230] This work of the court focusing on African nationals is not because of the court's intention to prosecute Africans, it is rather because of the real situations that happened, and are still happening on the continent. This does not mean that similar situations had not happened on other continents, but they failed to meet the requirements to proceed in the course of examination of the gravity of the situation by the prosecutor.

[227] Supra Note 136
[228] Id
[229] Id
[230] Supra Note 196

This created a distorted perception amongst African Governments regarding the underlying intention behind the establishment of the court.[231]

Africans are also accusing the court that it is selective justice and raise a question that "why there are no cases from outside the African continent before the court?"[232] However, the statute provides that the prosecutor should not initiate an investigation unless there is a "reasonable basis" to proceed.[233] Thus, the prosecutor will proceed after examining the gravity of the situation brought into his/her intention. As a result, the cases from African continent met the requirement to proceed with them. This does not reasonably lead to concluding that the ICC is targeting Africans. Additionally, while in light of the fact that African countries have voluntarily signed the treaty to be subject of the court's jurisdiction, it is impossible to conclude that the ICC is established solely to prosecute African cases and targeting Africans.[234]

- **Is ICC really an obstacle to the peaceful settlement process in Africa?** One of the most persistent criticisms of the ICC's action in Africa has been that by prosecuting active participants in ongoing or recently settled conflicts, the court is endangering fragile peace process.[235] The concerns between justice and peace have been particularly prominent in Uganda and Sudan.[236] However, in both situations it was argued that the threat of ICC's prosecution served as an important ingredient in a political solution for the conflicting parties and was a factor in bringing the parties to the negotiation table.[237] Others also argued that the prosecution of a small number of people should not endanger the fragile peace process.[238] The reality is that, in both situations, the peace process was not interrupted by the court's threat of prosecution. In both Uganda and Sudan, the conflict was successfully settled peacefully, even without lifting up the ICC's prosecution. More importantly, despite the allegation of the AU that the ICC's

[231] Id
[232] Id
[233] Supra note 23, Article 53(1)
[234] Supra Note 196
[235] Id
[236] Id
[237] Id
[238] Id

intervention would jeopardizes the effort for peace process; South Sudan successfully got its dependence and became newly established sovereign state.

2.3.4 ASP's Response to the AU's November 2013 Decision

AU, by the October 2013 decision of AU Assembly, requested Kenya and African State Parties to the ICC to propose an amendment to article 27 of the Rome Statute regarding the immunity from prosecution of AU acting head of state or government or anybody acting in such capacity during the terms of their office. Kenya, as requested by AU, put the proposal on the agenda of the ASP 12th session held in Netherlands, The Hague, from 20-28 November 2013. The 12th annual meeting of the ICC's governing body was dominated by the discussion on changing the court's rule on the presence at trial of senior government officials while in office.[239] ASP has considered the proposal as a "political campaign that has led to new rules on the appearance of the sitting head of state at trial" and decided "ICC must be defended from political interference".[240] Following days of intensive negotiations, ASP adopted changes to the court's rule on the presence at trial of senior government officials while in office. States agreed to allow those mandated to fulfill "extraordinary public duties at the highest national level" to request excusal from presence at trial and to be represented by their legal counsel.[241] However, it was for the ICC trial judges to decide on any request taking into account a number of factors, including the interest of justice and the nature of the hearing in question.[242] The rule would only apply for persons under summons to appear and the possibility to allow the accused to appear via video in the courtroom was part of the rule changed.[243]

After the conclusion of the ASP's 12th annual meeting on 28 November 2013, Civil Society Organizations (CSO) said, "No immunity remains at the core of the Rome Statute, but such political campaign that has led to new rules to the statute will undermine the independence of the

[239] Official ASP website (http://www.icc-cpi.int/Menus/ASP/?utm)
[240] Id
[241] Id
[242] Id
[243] Id

court".[244] William Pace, convener of the Coalition for the ICC (CICC), stated that "the effort of Kenya and other African Governments to excuse, defer, or exempt heads of government from prosecution as a serious political threat to the integrity of the Rome Statute and ICC, to victims, to witnesses and to the NGO's that support them".[245]

Njonjo Mus, a representative of Kenyan CSO at the Assembly, provided the view of the society on the changes of Rule 134 that it offends the principle of equality and personal attendance at trial as espoused in article 27 and 63 of Rome Statute.[246] Also indicated that the new rule attempts to amend the statute through the back door and it may be challenged in the court in due course".[247]

In general, ASP has rejected the AU's November 2013 decision to amend article 27 of the Rome Statute relating to the immunity of the sitting head of state or government. As commented by different representatives of the CSO's, the proposal will offend the principle of equality of all persons before the law. However, the ASP's decision to allow those mandated with the extraordinary public duties at the highest national level to request the court for excusal from presence at trail and to be represented by their legal council was without any precedent both at national and international judicial systems. It will offend the principle of individual criminal responsibility, which obligated the personal appearance of the accused before the court during the trial. It is also against the objectives of the rules of "denial of bail", as it gives the accused the opportunity to intervene with the evidence and even to destroy it and/or to disappear and fail to attend the trail.

ASP should have to re-consider the consequence of its decision. However, the decision gives the ICC trail judges the discretion to decide over the matter. Therefore, the ICC trail judge should have to use its discretion and consider the possible consequence the decision would pose on the effectiveness of the international justice, on the integrity of the court, on the victims, and witnesses when deciding the matter.

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[244] Coalition for the ICC (CICC) website (http://www.collisionfortheicc.org/?mod=asp12&utm_source=CICC+Newsletterandutm_campaign/)
[245] Id
[246] Id
[247] Id

Chapter Three

Criminal Jurisdiction of the ICC over Nationals of Non-Party States

3.1 Introduction

On July 17, 1998, the Rome Statute (statute) was adopted at the UN Diplomatic Conference of Plenipotentiaries.[248] Kofi Annan, the then Secretary General of the UN, in his word said that it was a 'giant step forward in the march towards universal human rights and the rule of law'.[249] Similar to those ICT established on case-by-case basis (i.e. Nuremberg, ICTY, ICTR and SCSL) and to the domestic court, the ICC judges individuals, not states.[250]

The dramatic midnight vote in Rome on July 17, 1998, called by the USA, overwhelmingly approved the Statute for the ICC by 120 votes to seven, with 21 states abstentions including Ethiopia.[251] USA, China, Libya, Iraq, Qatar, and Yemen were the only seven states in the world voting in opposition to the Rome Statute establishing an ICC.[252] Despite that, the Statute was entered into force on 1 July 2002, when the 60th states ratified the Statute. As of 2013, May 122 states had ratified the Statute.[253]

ICC has jurisdiction over crimes referred to under article 5 of the Statute, which are the most serious crimes of concern to the international community. As the court is a complement to the domestic courts, article 17(1) of the Statute gives primacy jurisdiction to the domestic courts. Thus, it exercise jurisdiction only when the concerned state is unwilling or unable to prosecute the individual suspected of committing the crimes referred to under article 5 of the Statute. In doing so, it aims at ending impunity for perpetrators of international crimes.

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[248] Supra note 37
[249] id
[250] id
[251] Kai Ambos, General Principles of criminal law in Rome Statute, criminal law forum 10: 1-32,(1999), and see also Amen Teferi, The Question is ICC's Probity, October 27, 2013
[252] Michael P. Scharf; "The ICC's Jurisdiction over the Nationals of Non-party States: A Critique of the U.S. Position", in Law and Contemporary Problems, vol. 64: No. 1(2001), pp. 68
[253] ICC Website (http://www.icc-cpi.int/asp/stateparties.html), Visited On November 24, 2013.

During the negotiation, one of the most contentious issues was related to the question of jurisdiction, particularly related to the extent to which the court would be able to exercise its jurisdiction over nationals of non-party states.[254] As Godwin Okekke[255] argued; 'the jurisdiction of the ICC is not binding on the citizens of non party states to Rome Statute and such limitation of the court's jurisdiction portends a grave danger to the existence of all the specie of human race. On the other hand, USA argued that 'international law prohibits the ICC from exercising jurisdiction over the nationals of non party states.[256]

As opposed to some arguments against the ICC's jurisdiction over nationals of non-party states, this thesis will show the legal basis of the ICC to exercise its criminal jurisdiction over nationals of non-party states. To that effect, this chapter provides that the ICC can exercise its authorities over non-party state's nationals by analyzing the provisions of the Rome Statutes itself and the universal nature of the ICC's crimes under customary international norms. It finally provides precedence of the Nuremberg, ICTY, and SCSL, which applied their authorities over nationals of non-party states to the documents establishing them.

3.2 Legal Basis of the ICC Jurisdiction over Nationals of Non-party States

3.2.1 Treaty Based Jurisdiction (Rome Statute)

Treaty is an agreement establishing an International Organization (IO) by negotiating states. A negotiating state, as defined by the 1969 Vienna Convention on the Law of Treaty (VCLT), is a "state which took part in drawing up and adoption of the text of treaty".[257] Treaty, beyond establishing the IO, also determines the power, objects, purposes, and functions of the organization. The organization, once established, will perform its functions and exercise its power within the limits of the power granted to it by the constituting document (treaty). If it goes

[254] Monique Cormier; The Delegation of Territorial jurisdiction and Universal Jurisdiction to the International Criminal Court: Reconciling the Prosecution of Nationals of Non-party States under the Rome Statute with the Absence of State Consents.

[255] Godwin Okekke; The Jurisdiction of the International Criminal court (ICC) in matters Relating to Genocide and War Crimes: A Critical Analysis, in International Journal of Contemporary Laws, vol. 1, no. 1

[256] Ken Obura; Duty to Prosecute International Crimes under International Law: In Prosecuting International Crimes in Africa, Chacha Murungu and Japhet Beigon (editors), 2011, p. 69

[257] Vienna Convention on the Law of Treaty (1969), art. 2(1)e

beyond its authority, it will be blamed for committing '*ultra virus'* act and it should be held accountable for that excessive actions.

Treaties are agreements creating rights and duties between states, but other treaties will also create duties and provide for protection of individuals. The ICC Statute is one of the treaties that create duties and rights of individuals.

A treaty called the 'Rome Statute', which established ICC, determines the jurisdiction of the court. Part 2 of the Statute provides the jurisdiction of the court in relation to crimes within the jurisdiction of the court[258] and preconditions to the exercise of the jurisdiction of the court.[259] Its jurisdiction is limited to the crimes of genocide, crimes against humanity, war crimes, and crimes of aggression. To exercise its jurisdiction, article 12 of the statute provides a precondition to the exercise of its jurisdiction. The precondition is, if the state on the territory of which the conduct in question occurred or the national state of the person accused is State Party to the statute or who has accepted the jurisdiction of the court under article 12(3) of the statute. It actually exercises its jurisdiction when a situation is referred by State Parties or by state who has accepted the jurisdiction of the court (non-party state), by UNSC or initiated by the court's prosecutor *proprio motu.*

Some non-party states, particularly the US, argued that the ICC has no jurisdiction over nationals of non-party states arguing that it violates international law principles. However, as ICC is an independent judicial organ having jurisdiction over serious crimes of concern to international community, there are instances when it exercises jurisdiction over national of non-party states. The statute of the court itself provides the first instance. The statute provides that the court have jurisdiction over crimes, committed on the territory of the State Party or who has accepted the jurisdiction of the court, referred to the prosecutor by the territorial state, regardless of the nationality of the accused or the victim. Secondly, by the UN SC referral of the situation regardless of where or by whom the situation was committed. This section of the paper analyses the treaty-based jurisdiction (Rome Statute) of the court over the non-party states nationals without their express consent.

[258] Supra note 23, article 5
[259] id, article 12

3.2.1.1 Territoriality Principle under Rome Statute as a base for ICC Jurisdiction over Nationals of Non-Party States

Territoriality principle allows the state over whose territory the crime was committed to exercise its territorial jurisdiction whether the accused is of its national or not. There is nothing novel under international law condemning the legality of a state exercising jurisdiction over nationals of another state accused of committing offense (whether or not of a universally condemned nature) in the territory of the former state without the consent of the latter.[260] Thus, under both national and international law, the territoriality principle of assuming jurisdiction is less controversial basis of assuming jurisdiction as it is the customary right of state to exercise territorial jurisdiction.[261]

One basis for ICC to assume jurisdiction is the territoriality model (principle) of jurisdiction. This indicates that the ICC will exercise jurisdiction over crimes referred to under article 5 committed on the territory of State Party or state who has accepted the jurisdiction of the court regardless of the nationality of the accused or the victim. Thus, in case the crime was committed on the territory of such state by nationals of non-party state to the ICC, he/she would be subjected to the jurisdiction of the court.

As the ICC is a complement to the national court, it exercises its jurisdiction only when the situation will be referred to the prosecutor, or the state in question was unable or unwilling to prosecute the accused.[262] But, non party states (particularly US) opposed the ICC's exercise of jurisdiction over nationals of non party states without the consent of the national state arguing that "it would be contrary to the well established principle of international law that a treaty may not impose an obligation on non party states without the consent of those parties".[263] However, some argue that there is no single provision in the statute that requires non-party states (as

[260] Supra note 256
[261] Supra note 255
[262] Supra note 23, article 13 and 17
[263] Dapo Akonde,; The Jurisdiction of the International Criminal Court Over Nationals of Non-parties: Legal Basis and Limits, in Journal of International Criminal Justice 1(2003), pp. 618-650

distinct from their nationals) to perform or refrain from performing any actions.[264] Thus, the statute only imposes duties over individuals, not states.

Dapo Akonde argues that the prosecution of nationals of non-party states might affect the interest of non-party states but this is not the same as saying that obligation was imposed on the non-party states.[265] However, the statute's provision dealing with complementarity creates incentives or pressures for non-party states to take action against their nationals; this is also not imposing an obligation so long as there is no responsibility arising from the failure to take such an action.[266]

By the territorial principles of the ICC, the state referring the situation was delegating its territorial jurisdiction over crimes committed on its territory. However, others argued that the state do not have the power to delegate their criminal jurisdiction over non-nationals to a treaty based ICT unless the state of nationality consents.[267] It is well established in international law that a state has the right to prosecute a non-national for committing crimes on its territory without the consent of national state. A delegation of territorial jurisdiction by state to another state without the consent of the national state is also considered legal under international laws. However, such delegation should have to be supported by a treaty between the delegating state and prosecuting state. Anti-terrorism treaties generally require parties with custody of an alleged offender to prosecute him, if they do not extradite him to a state with jurisdiction.[268] As M. P. Scharf has argued, many other treaties[269] will also provide an obligation on State Parties to extradite or prosecute criminals of concern to that treaty. But, I do not accept that this will be a good precedent for the delegation of the criminal jurisdiction by territorial state to the ICC as it is only concerned with a delegation by one state to another rather than to the treaty based ICT's.

Although there does not appear to be any precedent for the delegation of the territorial jurisdiction to an international court, under the theory advanced by the Permanent Court of

[264] id
[265] id
[266] id
[267] id
[268] See also the 1949 Geneva Convention and 1977 Additional Protocol, the 1952 Genocide Convention and the 1987 Torture Convention
[269] Supra note 263

International Justice (PICJ) in the *Lotus* case,[270] 'as long as there is no prohibitive rule of international law to the contrary, the action of the state is considered lawful.[271] This applies to the delegation of territorial jurisdiction to the ICC[272] that, so long as there is no international law prohibiting such delegation under international law, the delegation of criminal jurisdiction by State Party to the ICC will be lawful.

On the other hand, Dapo Akonde argues that there are important reasons and principles to suggest that delegations of national jurisdiction to the international court, in general, and to the ICC, particularly, are lawful.[273] He argues that, as the majority of the ICC crimes are crimes in respect of which states have universal jurisdiction when the accused is present in their territory, international law permits all states to exercise criminal jurisdiction over those crimes without having any link based on territoriality or nationality to the offences.[274]

The state exercising universal jurisdiction is in effect acting on behalf of the international community as a whole.[275] In doing so, such state is acting individually to protect the collective interest of the international community. To that effect, Dapo Akonde argues that failing the existence of a specific rule to the contrary, it should be that where states are acting individually to protect collective interests and values, they are not prohibited, and should be rather encouraged to take collective action for the protection of those collective interests.[276] Thus, by the same principle those states should be able to act collectively to achieve the same end and this may be done by setting up an international tribunal, which exercise the joint authority of those state to prosecute.[277]

In general, the ICC can exercise its jurisdiction over nationals of non party states based on the territorial jurisdiction provided under article 12(2)a of the statute up on the referral of the situation by territorial state through the principle of delegation of the territorial criminal

[270] SS Lotus Case (France Vs Turkey) [1927] PCIJ (series A) No. 10
[271] id
[272] Supra note 255
[273] Supra note 263
[274] id
[275] id
[276] id
[277] id

jurisdiction. As far as there is no international rule, to the contrary, the delegation of the territorial jurisdiction by the state in question to the ICC should be considered lawful. The rule permitting delegation of territorial jurisdiction to the ICC by State Party to the statute or by states who have accepted the jurisdiction of the ICC can be regarded as a 'structural rule' of international law that does not require the positive consent of national states.[278]

3.2.1.2 UN SC Referral Resolution as a base for the ICC Jurisdiction over Nationals of Non-Party States

UN is an International Organization (IO) established as a result of the WW II atrocities which its predecessor (the League of Nation) was unable to prevent/stop. It is an organization unanimously established by almost all nations of the World ratifying the UN Charter. It is mainly established to maintain international peace and security.[279] It comprises of six permanent organs.[280] Among others, UN SC is the political organ of the UN empowered to maintain international peace and security[281] by a means appropriate to handle the situation. Until today, it has played its part in settling international disputes by taking actions appropriate before, during, or after the dispute has occurred.

After the dispute has already occurred, the UN SC has played an important role in bringing perpetrators of international crimes before justice. Acting under Chapter VII of the UN Charter, the SC has established different *ad hoc* and special ICT's, i.e. the International Criminal Tribunals for Former Yugoslavia (ICTY), the International Criminal Tribunals for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL). Some commentators have criticized these actions of the SC arguing that it is an *ultra virus* act, which goes beyond its authority under the UN Charter. However, the actions taken by the SC are not *ultra virus* acts, they rather fall

[278] id
[279] UN Charter, article 1(1)
[280] id, article 7(1)
[281] id, article 24(1)

under Chapter VII of the UN Charter that the SC has the authority to do so. As Professor Morris explained:[282]

> "*as the ICTY and ICTR are products of the UN SC action under Chapter VII of the UN Charter, the tribunal's jurisdiction is more properly viewed as arising from the powers of the SC to take such steps as are required to restore or maintain international peace and security."*

Thus, the base for the establishment of the tribunals and the underlying authority for the SC's action was a treaty (the UN Charter).[283] Michael P. Scharf also stated that:[284]

> *"Nearly every country on earth is a party to the UN Charter; thus the ICTY and ICTR exercise jurisdiction over nationals of most countries with their implied consent by virtue of their obligation as UN Members."*

Unlike the ICTY and ICTR, the role of the SC is limited in relation to the ICC. ICC is an independent judicial institution established to end impunity for perpetrators of international crimes.[285] As a result, the court should be brought into relationship with the UN through an agreement.[286] However, the UN SC was entitled to bring a situation into the attention of the court's prosecutor for an investigation under article 13(b) of the statute of the court.

One of the most important features of the relationship between the ICC and the SC is that the latter has the right to extend the jurisdiction of the court to nationals of non-party states to the statute.[287] This helps the ICC to have jurisdiction over nationals of non-party states over which the court has no jurisdiction under the statute. This authority of the SC to do so extends to and binds non-party states to the statute,[288] as they are parties to the UN Charter.

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[282] Madeline Morris, High Crimes and Misconceptions: The ICC and Non-party States, in Law and Contemporary Problems, vol. 64: No. 1(2001), at 35-36
[283] Supra note 252
[284] id
[285] Supra note 23, preamble para. 9
[286] id, Article 2
[287] Valentin Zellweger and Matthias Lanz; Towards a Stronger Commitment by the UN Security Council to the International Criminal Court, in Politorbis, No. 54, pp. 27-30
[288] Supra note 36

The referral by the UN SC acting under Chapter VII of the UN Charter is made by a 'Resolution' issued by the SC. Any resolution issued by the SC is binding on all members of the UN. Because member states to the UN have agreed to accept and carry out the decisions of the SC.[289] Thus, when the SC refer any situation to the court, the jurisdiction of the court potentially applies to any individual in the world, regardless of where the crime was committed or the nationality of the accused.[290]

Despite the fact that the SC referral of the situation extends the jurisdiction of the court to the nationals of non-party states to the statute, practically the referrals made by the SC on Sudan and Libya's situation displayed several weaknesses. Firstly, the referrals failed to require all UN Member States to cooperate with the ICC.[291] In fact, under article 25 and article 2(5) of the UN Charter, all UN Members have agreed to accept and carry out decisions of the SC, and have the obligation to refrain from assisting the state against whom the UN is taking an action. However, the referral resolution of the SC adopted a more restrictive approach towards the ICC that the individual resolution stipulates that "states not party to the statute has no obligation under the statute".[292] This restrictive approach of the SC referral resolution gave an opportunity to the Sudan's President Al Bashir, whom the ICC seriously wanted for crimes committed in Darfur of Sudan, to visit states not party to the statute.[293]

The other weakness of the SC referral resolution is lack of follow up and lack of an action by the SC after the referral is made.[294] The lack of action by the SC is particularly evident with respect to the execution of an arrest warrant issued by the ICC.[295] For example, it did not put a pressure on Sudan to carry out an arrest warrant or to initiate domestic proceedings by the resolution.[296] Additionally, it has abstained from reacting to the findings of the ICC Pre-Trial Chamber I that Malawi and Chad have failed to cooperate with the court by not arresting and surrendering Al

[289] UN Charter, art. 25
[290] Supra note 256
[291] Supra note 287
[292] id
[293] id
[294] id
[295] id
[296] id

Bashir to the court when he visited those countries.[297] Surprisingly, Al Bashir has received an official state visit to China (a permanent member of the SC with Veto power), in 2011.[298] This problem is also related to the referral resolution of the SC, in which it failed to require all UN Member States to cooperate with the court.[299]

Even though, the role of SC referral of the situation was widely recognized to be useful and appropriate,[300] it has failed to achieve the object and purpose of the referral. This is because of the fact that the referral resolution is problematic from the very beginning, as it has adopted a very restrictive approach. Thus, for the future, the SC referral resolution should strong and cohesive, and the SC should follow up the referral, as the support of the SC for the ICC is not only in the interest of 'justice' but also in the interest of the international peace and security.[301] Additionally, the SC referral resolution has to meet the purpose and objectives of the referral in line with the provisions of both the ICC statute and the UN Charter.

In general, despite the practical weakness of the SC referral resolution, the SC referral of the situation to the attention of the court will help the ICC to extend its jurisdiction over nationals of non-party states to the statute, as in the case of Sudan. This will help the court to stretch its judicial arms beyond its judicial territory under the statute.

3.2.2 The Elements of Customary International Law within the ICC Statute

3.2.2.1 Introduction

Customary international law becomes relevant in the domestic context where international treaty norms are missing, are not binding on a state, or have become outdated.[302] Although the formation and modification of rules of customary law is generally a long process, it is often the case that customary rules are the first response to problems that need to be solved in international

[297] id
[298] id
[299] id
[300] Supra note 9
[301] Supra note 287
[302] Hannes Vallikivi; Domestic Applicability of Customary International Law in Estonia, in Juridica International VII/2002, p. 28

life.[303] Despite the codification of customary rules, life is constantly changing and new rules of customary law take their place alongside treaties all the time.[304]

There are two elements for a rule to be a customary law.[305] There must be a constant state practice and there has to be an '*opinio juris'* (belief of the states that they have a legal duty in doing so). These two elements are cumulative requirements for new customary rules to be created. Thus, neither practice alone nor *opinio juris* without actual practice can help to create new customary international law. ICJ, in its different contentious cases and its advisory opinions, has confirmed that these two elements are necessary requirements to create new customary international law. For example, in the *Nicaragua* case the court has stated that:[306]

> *"in the field of customary international law, the shared view of the parties as to the content or what they regarded as rule is not enough. The court must satisfy itself that the existence of the rule in the opinio juris of states must be confirmed by practice."*

Similar arguments can be found in many other judgments and advisory opinions of the court.[307] Even though these elements need a quite examination, once a new rule of customary international law emerged, it will bind all states of the world subject only to the "persistent objector" principle, which allows a state which has persistently rejected a new rule, even before it emerged, as such to avoid its application.[308]

Nowadays, there are some multilateral treaties establishing general international laws. Such treaties are regarded as 'general multilateral treaties (GMT)', which means a multilateral treaty which concerns general norms of international law or deals with matters of general interest to states as a whole.[309] However, the problems in relation to GMT, as Professor Grigory Tunkin[310] has raised is; "how the rules of some GMT become binding up on non participating state?" To

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[303] id
[304] id
[305] id
[306] Case Concerning Military and Paramilitary Activities against Nicaragua, ICJ Reports(1986), par. 183
[307] See also the North Continental Shelf Case, ICJ Report, 1969, par.3 at 44, Case of the SS Lotus(1927), or the Advisory Opinion of ICT on Nuclear Weapons(1996)
[308] Supra note 302
[309] International Law Commission (ICL) Year Book (1962) 239
[310] Grigory Tunkin, Is General International Law Customary Law Only? in 4EJIL(1993), pp. 534-541

that effect, Professor Grigory has provided two requirements, which are also provided under article 38 of the Vienna Convention on the Law of Treaty of 1969 (VCLT).[311] Firstly, the treaty must for see the participation of all states. Secondly, when all states are not party to this treaty, its provision may be accepted by non-party states as binding up on them by custom.

A recent dramatic event that created a GMT is the Rome Statute, which established the ICC. The commission of most serious crimes of concern to the international community led international community to establish the ICC. As the statute deals with matters of general interest to the international community, its negotiation has involved the participation of the whole nations. However, finally it has failed to get the ratification of the whole nations. Thus, Professor Grigory has argued that the provisions of the statute are binding on non-parties by customary international law.[312] Additionally, crimes of the court (genocide, war crimes and crimes against humanity) are crimes that are recognized as subject of the universal jurisdiction under the customary international law. The next section analyses whether crimes under the statute are subject to universal jurisdiction under customary international law.

3.2.2.2 Universal Nature of Crimes Under Rome Statute

Some scholars and commentators of international law argue that the Rome Statute was not intended to introduce new concepts to the international law arena; it rather embodied what were already provided under general international laws. For example, Philippe Krisch, the Chairman of the Rome Diplomatic Conference, wrote that:[313]

> *"it was understood that the statute was not to create new substantive law, but only to include crimes already prohibited under international law."*

[311] VCLT, article 38, which reads as 'Nothing in Articles 34-37 precludes a rule set forth in a treaty from becoming binding up on a third states as a customary rule of international law, recognized as such.' Thus, provisions of a treaty may become binding up on non participating states through customary process

[312] Supra note 310

[313] See Scharf, supra note 132 at 79(citing Philippe Krisch and John T. Holmes; The Rome Conference on an International Criminal Court: The Negotiating Process, 93 A.M.J.Int'l. L. 2, 12 no. 19(1999))

This indicates that, ICC try only existing crimes recognized under international laws. Professor Sadat also writes that:[314]

> "*It is [certainly] possible to view that the drafters in Rome merely ascribes writing down already existing customary international law, rather than as legislators prescribing laws for the international community."*

According to Professor Sadat, the Rome Statute did not create new crimes into the arena of the ICL; it rather codified those crimes that already existed under customary international law.

Those crimes referred under article 5 of the statute were considered crimes of *jus cogens* norm[315] by most states and commentators, even though their precise definition had not been completely agreed by all states.[316] Legal literatures disclose that genocide, crimes against humanity, war crimes, piracy, slavery, and torture are *jus cogens* crimes.[317] The legal bases to reach on such conclusion include:[318] (1) international pronouncements, or what can be called international *opinio juris*, reflecting the recognition that these crimes are deemed part of general customary law. (2) Language in preambles or other provisions of treaties applicable to these crimes indicate these crimes' higher status in international law. (3) The large number of states have ratified treaties related to these crimes; and. (4) the *ad hoc* international investigations and prosecutions of perpetrators of these crimes.

Does the nature of crimes referred to under article 5 of the statute is in fact subject to universal jurisdiction under customary international law?

As indicated in chapter one above, in determining whether those crimes are subject to universal jurisdiction or not, there are two alternative tests. The first is based on the seriousness, repugnant nature, and scale of the offence. This indicate that, many of the crimes subject to the universal

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[314] id at 80 (citing Leila Sadat Wexler and S. Richard Carden; The New International Criminal Court: An Uneasy Revolution, 88 Georgetown L.J at 390, 413(2000)

[315] The term *"jus cogens"* means "the compelling law" and as such, a *jus cogens* norm holds the heist hierarchical position among all other norms and principles.

[316] Supra note 256

[317] M. Cherif Bassiouni; International Crimes: *Jus cogens and Obligatio Erga Omnis*, in Law and Contemporary Problems, vol. 59, no. 4(autumn 1996), p. 67

[318] id

jurisdiction are so heinous in degree and wide in scope that they offend the interest of all humanity, and any state may, as humanity's agent, punish the offender.[319] The second is based on the situations in which the territorial state is unlikely to exercise jurisdiction, for example, because the perpetrators are state authorities or agents of the state or on the inadequacy of the national enforcement with regard to the offences committed in locations not subject to the authority of any state.[320]

Piracy, genocide, war crimes, crimes against humanity, torture, and acts of terrorism are crimes subject to the universal jurisdiction.[321] The ICTY and the ICTR have exercised their jurisdiction over the crimes of genocide, war crimes, and crimes against humanity, which beyond any doubt were recognized under customary international law as subject to universal jurisdiction. [322] Likewise, the ICC also have jurisdiction over the same crimes that are recognized by customary international law as subject to the exercise of universal jurisdiction. One different thing that the ICC statute has made is that it added crimes of 'aggression' within the list of crimes over which the court has jurisdiction. But State Parties, unfortunately, failed to agree on its definition and the statute specifies that the court may not exercise jurisdiction over crimes of aggression until the Assembly of State Parties adopt the definition of 'aggression' in accordance with article 121 and 123 of the statute.[323] Thus, except the crimes of aggression, the court can exercise universal jurisdiction over the rest as they are recognized under customary international law as subject to the universal jurisdiction.

In addition to confirming the ICC's jurisdiction over those core crimes authoritatively recognized as crimes of universal jurisdiction by customary international law, the statute has provided that the court has jurisdiction over 'serious crimes of concern to the international community'.[324] As one of the two independent tests underlying universal jurisdiction is the gravity of the offence, the drafters of the statute had employed the gravity requirement to grant the court universal

[319] Supra note 256
[320] id
[321] id
[322] id
[323] Supra note 23, article 15 and 16
[324] id, preamble para. 4 and article 1

jurisdiction over those crimes of concern to the international community. This gravity requirement specifically provided under article 1 of the statute, which reads as:

> *'[t]he court shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in [article 5] of the statute'.*

This particular provision of the statute gives the court universal jurisdiction over crimes referred to under article 5 based on the 'gravity' requirements underlying the universal jurisdiction.

As provided under Article 5 of the statute, genocide, war crimes, crimes against humanity and aggression are crimes of the court. Genocide, which has been described as "the ultimate crime and the gravest violation of human rights to be possibly committed, is now universally recognized as a crime under international law over which any state may exercise universal jurisdiction.[325] In 1946 UNGA Resolution and the 1948 Genocide Convention, genocide was declared an international crime[326] and requires prosecution by the state in whose territory it occurs or in an international court established for this purpose[327]. As a result, genocide is recognized to be subject of universal jurisdiction by the international community. Thus, it is the least controversial, and indeed, the US Delegates at Rome were willing to accept the ICC's universal jurisdiction over it.[328]

A crime against humanity is now widely accepted to be subject of universal jurisdiction.[329] In its comments on the establishment of the ICC, the US emphasized that states have a continuing responsibility to prosecute those who commit crimes against humanity.[330] However, it has been debated on defining it, as there is no definitive definition of the crimes either as a matter of treaty or customary international law.[331] War crimes have been uniformly recognized as crimes of universal jurisdiction under customary international law since the *Nuremberg* trial.[332] However,

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[325] Supra note 256
[326] id
[327] Convention on the prevention and punishment of the crime of genocide, 9 Dec. 1948, article VI
[328] Supra note 256
[329] id
[330] id
[331] id
[332] id

it also faced a debate about the specific types of offences that should qualify as a war crime for this purpose.[333]

On September 1, 2011, Amnesty International preliminary survey of legislations around the world disclosed that, approximately, more than half of the UN member states have provided universal jurisdiction over those crimes of genocide, war crimes, and crimes against humanity in their national laws.[334] Except for crimes against humanity, the US has provided for universal jurisdiction over crimes of genocide and war crimes.[335] This survey indicates that those crimes of the ICC, except the crimes of aggression, have a universal jurisdiction status under international law. Therefore, ICC will exercise universal jurisdiction over those crimes referred under article 5 of the statute regardless of the place of commission or nationality of the perpetrators.

In general, based on all arguments I have raised above, ICC's crimes have a universal nature under customary international law. This universal nature of the crimes of the court will grant the ICC the power to exercise its criminal jurisdiction over nationals of non-party states accused of committing such crimes under the universal principle of jurisdiction recognized by customary international laws.

3.2.3 Judicial Precedent

As a general rule, judicial decisions are not source of international law, but they can be referred to in order to determine the content or the application of treaties, customary international law or general principles of law.[336] Although they are not source in their own right, they can have persuasive authority and/or be of practical utility.[337] Under ICL a number of judicial decisions are worthy of individual comments.[338] The judicial decisions of Nuremberg IMT, ICTY, and SCSL can be of some substantial persuasive authority on the ICC in exercising its jurisdiction

[333] id
[334] Universal Jurisdiction; A Preliminary Survey of Legislation around the World, Amnesty International, IOR 53/004/2011
[335] id, Annex 1: Country Legislation Profile Chart
[336] Ciara Damgaard; Individual Criminal Responsibility for Core International Crime: Selected Pertinent Issues (2008), p. 35
[337] id
[338] id

over nationals of non-party states. This is because of the fact that they emanated from an ICT applying ICL and the judges that sat on the benches of these tribunals were highly respected international lawyers.[339]

There is some important jurisprudence of these courts on the exercise of their criminal jurisdiction over nationals of the state not party to the relevant agreements establishing these tribunals. This section of my paper will deal with the precedents of those courts on the issues of application of their jurisdiction over nationals of non party states, which may, even though not an authoritative source, support the ICC's exercise of jurisdiction over nationals of non party states.

3.2.3.1 The Nuremberg IMT

The international court established to adjudicate international criminals at Nuremberg marked the creation of the first tribunals to evaluate war crimes and crimes against humanity.[340] The Allies initially issued a declaration in Moscow, in 1943, which promised the punishment for Axis war criminals.[341] After a considerable discussion among the Allies during the war, Churchill was persuaded by the US and USSR that a trial of such persons was preferable to their summary execution.[342] As a result, France, UK, USSR, and US met in London to draft the charter of the Nuremberg IMT. Finally, on 8 August 1945, the four Allies signed the London Agreement, which has created the tribunal.[343]

Majority of the international legal scholars were contended the jurisdictional theory of the Nuremberg Tribunal as it was simply the Allied forces exercising their newly attained sovereign authority over Germany.[344] It was undisputed that the Allied forces established jurisdiction over the defeated Nazis through the "Charter of the Nuremberg IMT", which provided the blue print for the Nuremberg Tribunal. As it was established by the winners of the WWII, it was criticized as a 'victor's justice'.

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[339] id

[340] Christopher "Kip" Hale; Does the Evolution of International Criminal Law end with ICC?: A Model International Criminal Court for a State Centric World, in 35 Denv. J. Int'l L. 8 Pol'y (2006-2007), p. 442

[341] Supra note 9

[342] id

[343] id, p 93

[344] Supra note 340

The criticism was because of the fact that the London Agreement concluded among the winners of the WW II established the court and the judges of the court were selected from the nationals of the winners themselves. However, it was established to try nationals of Germany, a state not party to the London Agreement at that time. Professor Scharf and others have argued that the Nuremberg tribunals established to prosecute Nazi leaders after WW II was a collective exercise of the universal jurisdiction by a treaty based international court and can constitute a precedent for the ICC.[345]

In general, the Nuremberg Tribunal established by London Agreement entered between France, US, UK, and USSR has tried German nationals who were responsible for the atrocities committed during the war through the exercise of collective universal jurisdiction. This will provide a precedent for the ICC, in exercising collective universal jurisdiction, to exercise its criminal jurisdiction over nationals of non-party states to the Rome Statute.

3.2.3.2 The International Criminal Tribunals for the Former Yugoslavia (ICTY)

Based on the French and Italian draft resolution, the UN SC approved the resolutions number 808, on 22 February 1993, and resolution number 827 of 25 May 1993, including the Statute of the ICTY.[346] Both resolutions of the SC determined that the atrocities in the Former Yugoslavia constituted a threat to international peace and security.[347] In resolution number 827, the SC has decided to establish international tribunals for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the former Yugoslavia.[348]

The universal membership of the UN means that the question of the authority of the tribunal over nationals of non-members has not been a pressing problem, but the question has arisen in relation to the prosecution of the Federal Republic of Yugoslavia (FRY), a state not member to the UN at that time, by the ICTY.[349] This has put the jurisdiction of the court under question.

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[345] Supra note 263
[346] Supra note 37
[347] id
[348] id
[349] Supra note 345

In 1999, the ICTY issued an indictments for the then President of the FRY, Slobodan Milosevic, and four other senior officials of the FRY in relation to the crimes committed in Kosovo.[350] This was at a time when UN SC and UN GA had decided that the FRY could not automatically assume the membership of the Socialist Federal Republic of Yugoslavia (SFRY) in the UN and needed to apply for new membership to the UN.[351] To the extent that it was not a continuation of the SFRY, the FRY was never a member of the UN and therefore could not retain that membership, because, it was SFRY that was a member of the UN.[352] This indicates that the ICTY had no jurisdiction to try nationals of the FRY, a newly established state that, at that time, not a member of the UN.

The tribunal has indicted the nationals of the FRY, even though FRY was not a member to the UN. To that effect, the Tribunal's statement provided that a "crime committed by any person, whatever his/her nationality, in a country that is part of the SFRY will be tried by the tribunal". This appears to support the competency of the SC to provide for jurisdiction over all nationals in cases where the crime has occurred on the territories of a State Party to UN.[353]

More importantly, many states, including the US, that supported the ICTY, did not regard the FRY as a UN member, and were aware that the consent of the FRY was irrelevant to the exercise of jurisdiction of the ICTY in relation to Kosovo.[354] This will help us to conclude that many states, such as the US, accepted that a treaty based international court could exercise jurisdiction over nationals of non-party states.[355] This will also serve as a precedent for the ICC's exercise of its authority over nationals of the non-party states to the Statute.

3.2.3.3 The Special Court for Sierra Leone (SCSL)

A treaty between Sierra Leone and the UN established the SCSL.[356] It was a hybrid tribunal (national and international), which has been more successful in its fight against impunity.[357] It

[350] id
[351] id
[352] id
[353] id
[354] id
[355] id
[356] Supra note 9, at 150

was established to prosecute persons that have committed serious international crimes in Sierra Leone during a civil war that took place for almost a decade starting from 1991. A request from the President of the Sierra Leone to the SC for the creation of a special court to deal with crimes committed in the civil war led the SC to a resolution[358] requesting the UN Secretary General to enter into negotiation with the Sierra Leone, which was concluded on 16 January 2002[359]. Thereafter, Sierra Leone adopted implementing legislation and the SCSL began its work in July 2002.[360]

SCSL was empowered to try those responsible individuals in the civil war. The court will serve as a precedent for the ICC, as it has tried one non-nationals of the Sierra Leone. There is no single provision in the statute of the court that limits the jurisdiction of the court to the nationals of the Sierra Leone.[361] The court has indicted President Charles Taylor, the Head of State of Liberia, for his participation in the civil war and convicted him for 50 years of imprisonment.

Following the indictment and arrest warrant issued against Charles Taylor, Liberia has instituted proceedings before the ICJ arguing that the court was not empowered to exercise Sierra Leone's territorial jurisdiction over its nationals.[362] On the contrary, the court has strong support of some states (including the US) and the international community acting in support of the indictment of President Charles Taylor.[363]

The SCSL, which was established by the state of Sierra Leone and the UN, had indicted the Liberian Leader (state which was not a party to the agreement establishing the SCSL) will have a persuasive authority over the ICC in support of the exercise of its jurisdiction over nationals of non party states. The court is therefore a significant example of what a US contends that the ICC cannot lawfully do so.[364]

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[357] Supra note 37, at 125
[358] SC res. 1315(2000) of 14.8.2000
[359] Supra note 9, at 150
[360] id
[361] Supra note 345, at 631
[362] id
[363] id
[364] id

Chapter Four

Conclusion and Recommendation

4.2 Conclusion

The reality that our world has experienced in relation to human right violations since the I WW through the II WW in general and the genocide, war crimes, and crimes against humanity in Rwanda and Yugoslavia, in particular, necessitated the establishment of the PICC. Though the effort to establish the PICC commenced earlier, it became successful in 1998 during the Rome Negotiation, when two-third of the world nations signed the Rome Statute, and became effective when the sixth ratification of the statute was secured in July 2002. Though the Rome Statute successfully established the court, it was accused for failing to accommodate the interests of all nations. Thus, it lacks the unanimous consent of all nations that put the effectiveness of the court throughout the world under question.

The point of controversy, which affects the effective functioning of the court, was particularly related to the exercise of the court's jurisdiction over the nationals of non-party states to the Rome Statute. The basis for the ICC's jurisdiction was provided under article 5, 12(2)(a), and 12(2)(b) of the statute. ICC can exercise jurisdiction over crimes of genocide, war crimes, crimes against humanity and crimes of aggression committed over the territory of State Party or non-party states that lodged declaration of acceptance of the ICC's jurisdiction, or committed by nationals of State Parties.

The complementarity principle of the court gives primary jurisdiction to the domestic court of state concerned. Under the issues of admissibility of the case before the court, the case will only be admitted when the state concerned is unwilling or unable genuinely to carry out the investigation or prosecution. This makes the ICC the court of last resort. The investigation for the commission of the ICC crimes referred to under article 5 of the statute will be initiated under three different instances. The first is by the ICC prosecutor on its own motion when the situation was committed on the territory of State Party to the statute.

The second instance is by the state referral of the situation when committed by its nationals or non-national on its territory or when its nationals overseas committed the situation. Under this instance, the state referring the situation to the ICC was delegating its territorial jurisdiction to the ICC. Under the principle of territorial jurisdiction, what matter is the place of the commission of the offence regardless of the nationality of the offender? Thus, whether the offender is nationals of State Party or non-party state, once the concerned state has referred the situation to the ICC, the court will assume the jurisdiction. This implies that ICC will exercise its criminal jurisdiction over nationals of non-party states by the principle of the territorial jurisdiction.

State referral of the situation will also extend the jurisdiction of the court over crimes committed on the territory of non-party states by the nationals of the state referring the situation. This delegation of nationality jurisdiction by state to the ICC helps the court to extend its judicial arms over the territory of non-party states.

Non-party state to the Rome Statute opposed such delegation of the criminal jurisdiction by state to an international institution. They argue that it is without precedent and illegal under the rules of international laws. However, they fail to produce any international instruments declaring such a delegation illegal. Therefore, as far, there is no any prohibitive rule under the international laws, the delegation of criminal jurisdiction to the international institutions in general, and to the ICC in particular is a lawful action under international laws.

The third instance is the referral of the situation by the UN SC, acting under Chapter VII of the UN Charter. SC, a permanent organ of the UN, is empowered with the responsibility to maintain international peace and security. International peace and security will be maintained by taking actions not only before or during the conflict, but also after the conflict was already over. This will be achieved by bringing the criminals before justice. The lasting peace, it is argued that, will be achieved when justice is done. Thus, to successfully bring the lasting peace between the parties at conflict, SC had exercised its power under Chapter VII of the UN Charter in bringing those who violates the international peace and security before justice by establishing an *ad hoc* tribunals (ICTY and ICTR), and the SCSL on case-by-case basis.

However, after the establishment of the ICC the SC was brought into relationship with the ICC to refer a situation that may violate international peace and security, than establishing ad *hoc* tribunals on case-by-case basis. Thus, the SC, the permanent organ of the UN responsible to maintain international peace and security, can refer a matter to the ICC. As UN membership is universal, any resolution issued by the SC is binding on all nations. The referral resolution of the SC of the situation to ICC will bind all non-party states to the ICC. As a result, this referral of the UN SC of any situation to the court will help the court to extend its jurisdiction over nationals of non-party states. This was exemplified by the SC referral of the situation in the Darfur Region of Sudan.

SC is responsible to maintain an international peace and security. Thus, acting under Chapter VII of the UN Charter and as empowered by article 13(b) of the Rome Statute, SC refer situation to the ICC prosecutor to commence an investigation. However, the SC to refer a situation to the ICC, the specific situation must be a threat to the international security or a breach of international peace or an act of aggression in which no consent of state concerned is required.

On the other hand, crimes of the court that are referred to under article 5: genocide, war crimes and crimes against humanity, are crimes that are recognized to be subject of universal jurisdiction. One of the test underlying universal jurisdictions is the gravity of the crime, i.e. the effect of the specific crime under consideration must be serious and heinous to be a subject of universal jurisdiction. To that effect, article 1 of the Rome Statute provides that the court shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern referred to under article 5 of the statute. Thus, the reading of the term '*most serious crimes of international concern'* in the provision in line with the '*gravity test'* underlying universal jurisdiction indicates that ICC can exercise universal jurisdiction over those crimes of the court. Therefore, ICC can exercise its criminal jurisdiction over persons accused of most serious crimes of international concern regardless of the place of commission of the offence or the nationality of the offender.

Additionally, customary international law has provided lists of crimes that are recognized to be subject of universal jurisdiction. Among the lists, crimes of genocide, war crimes, and crimes against humanity are crimes subject to universal jurisdiction under rules of customary

international law and at the same time, they are crimes over which the ICC has a subject matter jurisdiction. Thus, rules of customary international law supports the court to exercise universal jurisdiction over those most serious crimes of international concern referred to under article 5 of the statute.

However, some argued that article 12 of the statute rejects the court from exercising universal jurisdiction based on the consent requirement of the state concerned. Nevertheless, article 12 is inserted into the statute to create a balance between the court's exercise of universal jurisdiction and the sovereign rights of states. Thus, it is giving a priority to domestic court to exercise their jurisdiction over crimes of the court and help the court to secure full interest of the state concerned for the efficient functioning of its investigation and prosecution activities. It does not prevent the court from assuming universal jurisdiction. It rather hinders the court from exercising universal jurisdiction automatically. This was clearly addressed under article 17 of the statute stating that the absence of consent requirement under article 12 will not prevent the court from trying individuals accused of committing crimes of the court. The unwillingness of the state concerned to try such individual before their domestic court gives the ICC an automatic jurisdiction over the accused.

In general, the writer concludes that the ICC's exercise of criminal jurisdiction over most serious crimes of international concern: genocide, war crimes, and crimes against humanity, committed by nationals of non-party states has sufficient legal basis under Rome Statute, international law principles of universal jurisdiction, and rules of customary international laws. Therefore, the objections raised by non-party states to block the ICC criminal jurisdiction over their nationals accused of the courts crimes has no legal support both under international law and rules of customary international law. This indicates that the only deference between State Party and non-party states to the statute is that the former has some extra obligations for being a member than non-party states. However, both party and non-party state nationals are subjected to the investigation and prosecution of the court.

4.3 Recommendations

The prosecution of individuals suspected to have committed international crimes by the ICC when state concerned is unwilling or unable to prosecute the individual should have to be encouraged. This will help the international community to fight impunity. ICC plays an important role to this end representing an international community. However, the court has faced challenges in effectively achieving its objectives of fighting impunity. To that effect, this study will recommend certain possible way out for the court to overcome the challenges and which helps to strengthen the international justice systems.

1. A State Party to the ICC has the duty to cooperate with the court when the latter is conducting its activity. The state's duty to cooperate is specifically related to the duty to arrest and surrender individuals against whom the court issued an arrest warrant and to create a favorable environment when the court is conducting an investigation. However, State Parties have practically failed to cooperate with the Court. This is typically the challenge the Court had faced when President Al Bashir visited State Parties to the ICC in Africa. Participants of the ICC's 2010 Review Conference held in Kampala, Uganda, argued that certain States Parties faced significant obstacles both in terms of their respective national justice systems' ability to cooperate with the ICC, and the possible internal political fallout from such cooperation. In addition, some stressed the inability of the ICC to punish non-cooperative States Parties or to encourage other States Parties to shame or bully other states into cooperating, and expressed the hope that the ASP would act to persuade States Parties to improve their cooperation in the future. Thus, the court should have to create strong measures, may be similar to UNSC measures under the UN Charter, so that they will cooperate with the court. Therefore, article 87(7) of the statute should have to be amended in a way such measures are to be included for the effective cooperation of State Parties.
2. The other challenge of the Court arises from article 98 of the Statute. Article 98 is inconsistent with the object and purpose of the statute for State Parties to enter into or to apply a bilateral non-surrender agreement if the agreement has the effect to provide impunity to such person. This agreement will undermine the integrity of the Court and

contradicts with the obligation to cooperate with the court by State Party under the Statute. If the provision has the intention to protect state's sovereignty, the statute's principle of complementarity is strongly enough to do so. So that, article 98 of the statute should have to be deleted completely.

3. The writer also recommends and encourages non-party states to accede to Rome Statute of the ICC. Being non-party to the statute will not protect their nationals from the ICC investigation and prosecution. Therefore, they better accede to the statute and contribute towards the end objectives of the court to replace the culture of impunity with culture of accountability.

Finally, the work of the Coalition for the ICC ((CICC), an international coalition of more than 2,000 non-governmental and civil society organizations that support the ICC) in convincing non-party states to accede to the statute is a crucial work and should have to be encouraged. Therefore, CICC should have to proceed with its work until all nations successfully accede to the statute.

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