

**THE ROLE OF THE PROSECUTOR AND THE CHALLENGES
OF PROSECUTION UNDER THE INTERNATIONAL CRIMINAL
COURT WITH SPECIFIC REFERENCE TO NON
COOPERATING STATES**

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Introduction

It was reported that 'Six children walked down a road in the region of Ituri, Democratic Republic of Congo. They were on their way to school when a jeep packed with militiamen sped in front of them. Fighters bearing AK-47s ordered the terrified children into the jeep. They were transported to military training camps and forced to learn to fire machine guns. Three weeks later, the children were in the field, killing and being killed'.-Congo

In another report 'about 4,000 people were living in the Barlonya refugee camp when the massacre took place. Surrounded by rebel forces from the Lord's Resistance Army (LRA), civilians ran to their grass huts for protection only to be burned alive. Survivors recount running from the camp as rebels came with machetes, rocket-propelled grenades, and guns--hacking, hitting, and shooting their family members. Eyewitness reports account for about 200 deaths, making this the most serious single incident of its kind since 1995'. BARLONYA, UGANDA, FEBRUARY 21, 2004

'The LRA explained to us that all five brothers couldn't serve in the LRA because we would not perform well. So they tied up my two younger brothers and invited us to watch. Then they beat them with sticks until the two of them died. They told us it would give us strength to fight. My youngest brother was nine years old'.-a thirteen year old boy in Uganda reporting to human rights watch.

Such kind of atrocities; internal and international armed conflicts, ethnic cleansing and murder have been dominant especially since the last five hundred years. Millions have been displaced, wounded and their human rights have been transgressed. Those in Liberia and Sierra Leone are

indicative of a wider trend of the deliberate targeting of civilians by groups and parties involved in armed conflicts.

But most of the transgressors were not held criminally responsible and their acts were not criminalized until recently. Political and military leaders like, Pol Pot, and Idi Amin have often found themselves able to avoid being held to account for atrocities they committed.

In fact efforts were made to put an end to impunity though not successful. The Nuremberg and Tokyo trials on the aftermath of the Second World War and the ICTY and ICTR established in the cold war politics are examples of such efforts. But these tribunals were not found successful even if they were regarded as important steps to end the culture of impunity. Despite the various efforts made towards the deterrence of the most egregious crimes committed against the international community, the gross human rights violations could not be stopped. This is because there was no internationally constituted international criminal court in which these criminals will be prosecuted

Hence, the increasing number of grave breaches of international humanitarian and human rights law necessitated the prosecution of the individual criminals through internationally constituted courts. Accordingly, the international community reached on an agreement that there should be a permanent international criminal court with a universal competence, the establishment of which would insure the deterrence the most serious crimes under international law from being committed in the future any where in the world. Finally the effort was found fruitful and ICC was created in 1998.

The central theme of this work is to discuss what is accomplished and also what has to be done in the bringing into justice the alleged criminals in to justice and to held them responsible for their misdeeds and there by deterring the most heinous crimes of international concern.

In the first chapter of this work effort will be made to shed some light on the development of international criminal law and international crimes. Responsibility of individuals for international crimes will also be discussed. Then we will dwell up on the history of the prosecution of international crimes through various tribunals starting from the Nuremberg up to the UN ad hoc tribunals of the 1990's at some length.

The main focus of the second chapter is the newly born international criminal court. Here the establishment, nature and jurisdiction of the court together with the debates at the preparation stages are dealt. Further discussions are done on; the organs of the court and the mechanism of triggering the court's jurisdiction by variety of parties are addressed. The investigation and prosecution proceedings are among the central themes of the work. However this paper will not cover international criminal law principles and the court's substantive jurisdiction deeply because these are beyond the scope of this research. Last but not least, the role of the international prosecutor in the prosecution by the court is stated in some detail.

The last chapter will critically assess the challenges the court will face and is actually facing in its prosecution that emanates from either the provisions of the statute or international circumstances and recommends the possible way outs. It emphasizes on the principle of complementarity and state cooperation. It will also address some points that are related to jurisdiction of the court. The approach adapted to amnesties is also included in the chapter.

Chapter one

1. THE CONCEPTION AND DEVELOPMENT OF INTERNATIONAL CRIMES, INTERNATIONAL CRIMINAL LAW AND THE PROSECUTION OF INTERNATIONAL CRIMES

1.1 The conception and Development of International Crimes and International Criminal Law

Atrocities, internal and international armed conflicts, ethnic cleansing and murder have been dominant especially since the last five hundred years. Millions have been displaced, wounded and their human rights have been transgressed. But most of the transgressors were not held criminally responsible and their acts were not criminalized until recently. Even the very existence of international criminal law was questioned by many including some international law writers. International criminal law is "a subject of law that deals with the problem of international and transnational crimes which are constantly increasing in number, intensity and threat to the safety of individuals all over the world".¹

However some of the acts of perpetrators like piracy and slavery were long ago criminalized and recognized as crimes under international law entailing criminal responsibility of the authors of such conducts. There was also a disagreement as to the meaning of international crimes and the contents of international crimes. International crime is defined as;

"an act which the international community recognizes as not only a violation of ordinary state criminal law but one which is so serious that it must be regarded as a matter of international concern".²

International crimes are also simply defined as 'breaches of international rules entailing the personal criminal liability of individuals'.³

¹ M.Cherief Bassiouni,(ed), *International Criminal Law, Enforcement* , (Vol.3,1987),P.1

² Claire De Than and Edwin Shorts, *International Criminal Law and Human Rights*, (2003)

³ Antonio Cassese , *International Criminal Law* , (2003),P.23

International crimes as defined by Bassiouni are;

*“Those international criminal law normative proscriptions whose violations is likely to affect the peace and security of man kind and is contrary to fundamental humanitarian values or which is the product of state action or a state favoring policy”.*⁴

International crimes first developed in customary international law and there-for embodied in conventional international law.⁵ International crimes include using the terms of Cassese; “Violations of international rules as well as treaty provisions”.⁶ Also, he continues “rules intended to protect values considered important by the whole international community and consequently binding all states and individuals”.⁷

These values are laid down in various international instruments like the charter of United Nations, the 1948 UDHR, the 1950 European convention on human rights, the 1966 United Nations covenants on civil and political rights (ICCPR) and United Nations Covenants on Economic Social and cultural Rights (ICESCR) and in various drafts of the International Law Commission (ILC).⁸ ✓

The other point that should be raised in relation to international crime is that there is a need on the part of the international community for the deterrence of these breaches of international rules by prosecuting and punishing the alleged perpetrators.⁹ Furthermore, the offenders will be brought to justice irrespective of the capacity in which they have acted be as a head of as state or otherwise and are not immune from there acts be it civil or criminal liability.¹⁰ This is also seen in the practice of states as previously not a few heads of states were held responsible. To mention

⁴ M. Cherif Bassiouni , *International Criminal Law*,(2003), P.127

⁵ Id at ,P.109

⁶ Supra at note3,P.123

⁷ Ibid

⁸ M. Cherif Bassiouni, *A Draft International Criminal Code and Draft Statute For International Criminal Tribunal*, (1987),P.1

⁹ Lyal S. Sunga, *The Emerging System of International Criminal Law*, (1997),P.2

¹⁰ M.N. Shaw , *International Criminal Law* , (4thed ,1997), P.186

Sadam Hussein of Iraq, Augusta Pinochet of Chile and Slobodan Milosevic of the Former Yugoslavia were held responsible for their acts regardless of the fact that the act to which they are made responsible was committed in their official capacity as a head of a state.

Which lists of acts are recognized as crimes under international law are the point which the writer deems important to discuss in brief. International crimes develop gradually. As has been mentioned earlier the crime of piracy, "which consists of any illegal act of violence detention or any other act of deprivation, committed for private ends by the crew or the passenger of a private ship or aircraft and directed on the high seas against another ship or aircraft or against persons or property on board a ship or aircraft....." Was recognized as crimes in international law to which pirates were held responsible.¹¹ But now piracy is excluded from the list of international crimes for the act of piracy is committed in the high seas.¹² This means as the high-seas falls under the jurisdiction of all states any state which seized the pirates can prosecute it.

The other group of crimes recognized as crimes under international law are war crimes. A war crime is "the result of the willful undertaking of conduct defined as a grave breaches under the First, Second, Third and Fourth Geneva conventions and protocols where such conduct results in the death, great suffering or serious injuries to any protected person's prisoner or civilian".¹³ War crimes are also shortly termed as violations of the laws and customs of war.

In 20th century and for a long time mainly war crimes were regarded as crimes and made punishable. The recognition of war crimes as international crimes has its roots in the spread of Christianity in the early Roman Empire and had gone through various stages from the 13th

¹¹ M. Cherif Bassiouni, (ed) *International Criminal Law , Crimes*, (Vol.1 , 19 86), P.23

¹² Supra at 3 p.24

¹³ Supra at note 11, P.19

century doctrine of just and unjust wars to the 18th and 19th centuries.¹⁴

To start with various efforts were made to outlaw the recourse to war by states as a means of national policy of states, which was the trend in the middle ages and onwards. The recourse to war as a means of national policy was prohibited for the first time in the 1928 Kellogg- Briand pact.¹⁵ The Kellogg-Briand pact had two paragraphs; in the first paragraph states agreed to renounce war as an instrument of national policy where as in the second paragraph they agreed to settle any dispute that would arise between states peacefully.¹⁶

But this could not prohibit states from using force against another fully sovereign state. This is evident from the outbreak of the Second World War in 1939 which took the lives of millions. It is recalled that the Second World War was unprecedented in human history. According to one writer, "the conduct of Germany during the war and above all, its treatments of population of the occupied countries were not only grave violations the laws of warfare but also an outright bid to exterminate the whole nations".¹⁷

After the conclusion of the war the allied and associated powers decided to set up international tribunals for the prosecution of major war criminals of Hitlerite Germany and established international military tribunals for Nuremberg and for the Fareast. The statutes of these two tribunals came up with new classes of international crimes in addition of the restatement of War crimes and Crimes against humanity. Thus, war crimes are defined in the charter as, violations of the laws and customs of war like "murder, ill-treatment or deportation into slave labor or for any other purpose of the civilian population of or in occupied

¹⁴ Supra at note 11, P.777-779

¹⁵ Nina H.B Jorgensen, *The Responsibility of States for International Crimes*, (2000),P.14

¹⁶ Ibid

¹⁷ Supra at note 1,p.2

territory..."¹⁸ Crimes against humanity on the other hand include "murder, extermination, enslavement, deportation and other inhumane acts done against any civilian population or prosecution on political racial or religious grounds, when such conducts are done or such persecutions are carried out in execution of or in connection with any crime against peace or any war crime".¹⁹ Crimes against peace include 'the planning, preparation, initiation, or waging war of aggression, or a war in violation of international treaties...'.²⁰ Thus, the Second World War was a land mark development in the history of international crimes and criminal law.

Following the adoption of the two tribunals a number of treaties conventions and draft rules which define international crimes were produced. In this regard the four Geneva conventions of the international committee of the Red Cross, the General assembly's 1946 resolution and draft code of crimes by the international law commission have to be mentioned. The international law commission draft code of crimes against peace and security incorporates in its list of international crimes aggressions and genocide in addition to war crimes and crimes against humanity and other crimes. Genocide can be committed in peace time as well as during war when members of national, ethnic, racial or religious groups are killed, seriously injured or subjected to conditions calculated to partially or completely destroy the group.²¹ Where as the 1991 ILC draft define crime of genocide to mean any of the following acts 'committed with intent to destroy in whole or in part a national, ethnic, racial or religious group as such, killing members of the group causing serious bodily or mental harm to the members of the group...." ²².

¹⁸ Eduardo Greppi, The Evolution of Individual Criminal Responsibility Under International Law, *The International Review of The Red Cross*, (Vol.81 1999),P.537

¹⁹ Ibid

²⁰ Ibid

²¹ Supra at Note 11,P.21

²² Ibid

Aggression on the other hand is defined as the use of armed force by state against the sovereignty, territorial integrity or political independence of another state or any other manner inconsistent with the charter of UN.²³ The charter of the international criminal tribunals for former Yugoslavia and Rwanda (ICTY) and (ICTR) and the statutes of the international criminal court (ICC) also embrace a list of international crimes in which these tribunals will have jurisdiction. In this respect article five of the statute of ICC provides the crime of genocide, aggression, crimes against humanity and war crimes as international crimes to which individuals will be held responsible and be prosecuted.²⁴

The source of these groups of crimes emanates from the source of public international law as international crimes are regulated by international criminal law which is a branch of public international law. These sources as per article 38 of the statute of International Court of Justice (ICJ) are customary law, treaties, general principles of law, and writings and judicial decisions. These sources are also found in various international instruments like the ILC, UN charter and General Assembly resolutions. As clearly stated by Greppi, "international legal provisions on international crimes are adopted and developed with in the frame work of international humanitarian law, the law of armed conflict, a special; branch of international which has its own peculiarities and which has gone through an intense period of growth ,evolution and consolidation in the last 50 years".²⁵

²³ Ibid

²⁴ The Rome Statute of International Criminal court, adopted,19 98, article5

²⁵ Supra at note,18 P.53

1.2 Criminal Responsibility of Individuals for International Crimes

With the development of the concept of international crimes and the increasing demand of international community of deterring these crimes, there arises always the question of individual criminal responsibility. Traditionally, states alone were subjects of international law and enjoy certain rights and incur liabilities that arise from international law.²⁶ Even when individuals commit international crimes like the violations of the laws and customs of war, they did not incur criminal responsibility as the states to which they are nationals were made responsible.²⁷ Indeed, they escaped criminal liability for they were protected by sovereign immunity.

Authors in the field of international law also had different opinion as to the criminal liability of individuals. However even in earlier times individuals have been held criminally liable and punished. To mention, the year 1444 prosecution of formerly German Emperor Peter Von Hagen Bush, was the first reported international criminal prosecution.²⁸ A Significant development in the concept of 'individual criminal responsibility was seen in the aftermath of the First World War. Thus in the year 1919, the allied powers signed treaty Versailles and decided to bring to justice the alleged war criminals. In article 227 and 228 of the treaty they decided for the prosecution of former German Kaiser William Second of Hohenzollern for supreme offences of international morality and sanctity of treaties.²⁹ This concept was more affirmed by the Nuremberg charter, which provides specifically the responsibility of individuals for crimes against peace, war crimes and Crimes against humanity. Article 1 of the London agreement stated that the Nuremberg

²⁶ Supra at Note 10, P.183

²⁷ Ibid

²⁸ William A. Schabas, *An Introduction to International Criminal Court*, (2001), p. 1

²⁹ Id p.3

and Tokyo international military tribunals are established “for the trial of war criminals whose offences have no particular geographical location whether they are accused individually or in their capacity as members of organizations or groups in both capacities.” ³⁰

The charter of the International Military Tribunal (IMT) for the Nuremberg, also, states that “international law imposes duties and liabilities upon individuals as well as upon states”.³¹ This is because as M.N. Shaw pointed out;

“Crimes against international law are committed by men, not by abstract entities and only by punishing individuals who committed such crimes can the provisions of international law be enforced.” ³²

The question of whether there was individual responsibility for aggressive war, a judge in Tokyo tribunal argued invoking natural law that ‘individuals can not shelter behind the community for responsibility incurred by his own acts’.³³

The resolution passed by the General Assembly in 1946, also proclaims Genocide as a crime under international law bearing individual responsibility. It is further elaborated by a number of international instruments to mention, the 1954 the draft code of offences against the peace and security of man kind pointed out that individuals who are responsible for their act. The 1994 draft of ILC also in its article 3 reaffirms the same principle of international law. Furthermore, the four Geneva conventions of the 1949 and the 1977 protocol to them provided for the criminal responsibility of individuals. A significant step in the lengthy process of developing rules on individual criminal responsibility under international law was taken with the setting-up of the two ad hoc

³⁰ Supra at note 18 p.535

³¹ Michael A. Newton, Comparative Complimentarity; Domestic Jurisdiction Consistent with the International Criminal Court, *Military Law Review*, (2001)

³² Supra at note 10, 185

³³ Supra at note 12, p.5

tribunals for the prosecution of crimes committed, respectively, in the former Yugoslavia (ICTY) and in Rwanda (ICTR). Article one of statute of ICTR states that 'the international tribunal shall have the power to prosecute persons responsible for such violations'.³⁴ The statute of ICTY uses similar words to express the responsibility of individuals. Finally the 1998 statute of international criminal court (ICC) statute pronounces the criminal liability of individuals.

1.3 The prosecution of International Crimes ✓ *preserved*

1.3.1 Back ground

The development of the concept international crimes and the inclusion of individual criminal responsibility for international crimes raised an ever important question of bringing to justice the alleged offenders and punishment so that world peace and security be preserved. As has been mentioned in the previous discussion international crimes and their prosecution are not issues that can be discussed separately. The violation of the most important values of international community; human rights and humanitarian laws necessitates the deterrence of these crimes from international stage by prosecuting the perpetrators through an effective international system.

In international criminal law there are two kinds of enforcement system; direct and indirect.³⁵ While the former is enforcement of international crimes through internationally constituted criminal courts, the later is enforcement by national courts.³⁶ The trend before the establishment of the Nuremberg tribunal seems prosecuting alleged offenders of international crimes through national courts. As clearly stated by

Sharp;

³⁴ The Statutes of The International Criminal Tribunal For Rwanda (ICTR) , Adopted by the Security Council resolution 955 (19 94) of 8 November 19 94, art.1

³⁵ Supra at note 11, p.3

³⁶ Ibid

"prior to world war first war crimes trials reflected the international community's competence to prosecute those suspected of violating the laws and customs of war...the discretion to prosecute suspected war criminals was left to individual states involved in a conflict and prosecution depended up on national legislation".³⁷

This is more evidenced from the first reported prosecution of international crimes in 1474 in Germany; Breisach. That prosecution involved one Peter von Hagenbach of Germany. He was tried before a tribunal of twenty eight judges from the allied states of the Holy Roman Empire.

As stated earlier, the first significant international modern effort to punish war crimes was the Leipzig trials following world war first. In the aftermath of the war, the allied and associated powers signed the treaty of Versailles, in which they decided for the prosecution of formerly Germany Kaiser Wilhelm second. Yet, the Kaiser was left to be prosecuted in supreme courts of Germany because; the crimes on which he was accused were not contemplated in the Netherlands constitution, where he had taken refuge.³⁸

➤ The fear on the part of the international community in the prosecution of international crimes through national jurisdiction is that most of the time national states are unwilling or unable to prosecute their own nationals for such grave crimes under international law. Their incapacity may arise from the refusal of other states on territory the accused is found to extradite. Also, no matter how willing and capable they are to prosecute their own nationals the fulfillment of fair trial standards in international law is doubtful.³⁹

Thus, the world community reached on consensus to prosecute

³⁷ Walter Garry Sharp, International Obligations Search for Arrest of War Criminals; Government Failure in the Former Yugoslavia, *Duke Journal of Comparative International Law*, (Vol.7,2005) P.417

³⁸ Id P.417-18

³⁹ Supra at note 3,P. 328

international crimes through duly constituted international tribunals. In this regard, the establishment of the international military tribunals for the Nuremberg and the far east and the ad hoc tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) came to the fore in the prosecution of international crimes. Hence the writer would like to discuss the prosecution of international crimes through these provisional and ad hoc tribunals in the coming sub title.

1.3.2 The prosecution of international crimes through

Provisional and ad hoc tribunals

As stated earlier, the ever increasing number of grave breaches of international humanitarian and human rights law clicked the minds of many including those in the field, towards the creation of internationally constituted courts for the prosecution of international crimes. This need arises, as has been stated above, when the enforcement of international crimes through national enforcement system was found too difficult. In the previous discussions the writer tried to touch up on the history of the prosecution of international crimes briefly while discussing the development of international crimes and individual criminal responsibility. Thus here the writer would like to proceed directly to the prosecution of international crimes in direct enforcement system, that is, through international tribunals, beginning from the post world war second development of the Nuremberg and Tokyo tribunals to the (ICTY) and (ICTR). Pre world war second prosecutions are not raised here as they were already introduced.

1.3.2.1 The Nuremberg and Tokyo tribunals

Following the end of the Second World War, the allied and associated powers decided to prosecute and to punish individuals accused of crimes. Thus the winners met at London, to establish an international

The winners met at London to establish

MI
military tribunal for the just and prompt trial and punishment of major war criminals of European axis.⁴⁰ The agreement for the prosecution and punishment of major war criminals of the European axis, and establishing the charter of the international military tribunal was formally adopted on 8, august 1945, and was promptly signed by representatives of the four powers.⁴¹ The charter of international military tribunal was attached to the treaty as an integral part. In this attached charter we found in seven paragraphs the constitution of the court, its jurisdiction and the general principles, the composition and competence of the prosecution.⁴² Jurisdiction, GP

The Nuremberg trial was the first historical precedent for bringing to trial and punishing the most dangerous war criminals. In this tribunal, "Not only by words , but also by actions , the statesmen, officials and certain organizations of Hitlerite Germany, guilty of unleashing war of committing other international crimes were sentenced and subjected to strict punishment".⁴³ In the tribunal twenty two German nationals were brought before the trial, twelve of the defendants were sentenced to be hanged, seven to be imprisoned, three acquitted of the charges against them.⁴⁴

✓ The London agreement also resulted in the establishment of the International Military Tribunal for the Far East (Tokyo). The Tokyo tribunal was not firstly conceived.⁴⁵ But two weeks before the conclusion of the conference the allied powers issued Potsdam declaration announcing their will to prosecute the leading Japanese war criminals.⁴⁶

The crimes that fall with in the jurisdiction of the Tokyo tribunal are

⁴⁰ Supra at note 28 p. 5

⁴¹ ibid

⁴² ibid

⁴³ Supra at note 15, P. 44

⁴⁴ Ibid

⁴⁵ Supra at note 3, P. 333

⁴⁶ Ibid

Tokyo

crimes against humanity, war crimes and crimes against peace. Among the twenty eight defendants charged for crimes that fall within the jurisdiction of the court, seven were sentenced to death, sixteen for life imprisonment, one for twenty years and one for seven years.⁴⁷ The impartiality of the two tribunals for a fair trial process was questioned by many for the fact that they were established by the winners of the war. Thus, some argue that the tribunals impose winners' law over the defeated. Also, crimes against peace were not defined in the tribunals. As Sunga puts it, 'the lack of definition of crimes against peace threatened to undermine legitimacy of the Nuremberg proceedings'⁴⁸. Moreover, Jorgenson reads, "one of the main defense contentions at Nuremberg was that aggressive war did not constitute a crime at the time the alleged criminal acts were committed and that there could be no punishment without a previously law (nullum crimen sine lege, nulla poena sine lege)." ⁴⁹

non-refuge activity

Despite the challenges faced by the tribunals they were found significant developments in the history of the prosecution of international crimes through a duly constituted international court.

1.3.2.2 The UN *ad hoc* tribunals ✓

The International Tribunal for the Former Yugoslavia (ICTY) and the International Tribunal for the Rwanda (ICTR) were created on 11 February 1993 and 8 November 1994 by resolution 827 and 955 adopted by UN Security Council respectively.⁵⁰ These tribunals are established on an *ad hoc* basis in response to the massive violations of humanitarian law including murder, mass killing, ethnic cleansing, rape, and the like that took place in the territories of the former Yugoslavia and Rwandan

⁴⁷ Supra at note 15, p. 45

⁴⁸ Supra at note 9, p. 41-42

⁴⁹ Supra at note, 15, P. 19

⁵⁰ The Statute of (ICTY) and (ICTR)

republics.⁵¹ The ICTY has jurisdiction over Grave breaches of the Geneva Conventions of 1949; violations of the laws or customs of war; genocide, and crimes against humanity.⁵² The tribunals mandate is to prosecute persons responsible for such crimes in order that such violations be halted and effectively redressed, that an end be put to such crimes, that perpetrators are brought to justice and that peace be restored and maintained.⁵³

The statute of Rwanda tribunal was an adaptation of the statute of the Yugoslav tribunal to the circumstances of Rwanda. ICTR has a temporal jurisdiction from 1, 1994, to December 31, 1994. Article one of the tribunal states that;

"the international tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of Rwanda and Rwandan citizens in the territory of neighboring states, between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present statute,"

Like that of the ICTY, ICTR can prosecute genocide, crimes against humanity and violations of article 3 common to the Geneva conventions and additional protocol II.⁵⁴

What is surprising is that these two tribunals have a common prosecutor and a common appellate chamber. A famous writer in the field of international criminal law once stated as to the decision to link the two bodies;

"The choice of a single prosecutor was particularly ill -advised because no person no matter how talented can oversee two major sets of prosecutors separated by 10,000 miles. The idea that one

⁵¹ Bartram S. Brown, Primacy or Complementarity ; Reconciling The Jurisdiction of National Courts and International Criminal Tribunals , *Yale Journal of International Law* ,(19 98)

⁵² Articles, 2, 3, 4, 5 of ICTY

⁵³ Sonja Boelaert-Souminen, The International Criminal Tribunal For the Former Yugoslavia and the Kosovo Conflict, *The International Review of the Red Cross*, (vol. 82, No. 837-840, 2000), p. 232

⁵⁴ Articles 2, 3, 4, 5 of ICTR.

*can shuttle between The Hague, Netherlands and Arusha, Tanzania as part of normal work schedule is nothing short of absurd.”*⁵⁵

Nonetheless, the prosecutor of these ad hoc tribunals was assigned to investigate and prosecute persons responsible for violations international humanitarian law. The prosecutor is empowered to act independently as a separate organ of the tribunals and shall not seek or receive instructions from any government or any source. As per articles 18 and 17 of ICTY and ICTR respectively the prosecutor was given the power to initiate investigations and prosecutions ex officio or on the basis of information obtained and decided whether there is sufficient basis to proceed.

The relationship between the jurisdiction of national courts and that of international criminal courts was raised for the first time by these tribunals. While national courts have concurrent jurisdiction, these tribunals have primacy over national courts.⁵⁶ One writer stated that,

*“On its face the statute of ICTY like that of ICTR seems clearly to resolve the jurisdictional conflict in favor of the international tribunal”.*⁵⁷

Further more the statute imposes up on states a general obligation to cooperate with the tribunal. Article 29 of ICTY specifically provides that;

“All states shall cooperate with the international tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.”

It was reported that, as of march 2007, ICTY Since the very first hearing the Tribunal has indicted a total of 161 individuals, and has already completed proceedings with regard to 100 of them: five have been acquitted, 48 sentenced (seven are awaiting transfer, 24 have been

⁵⁵ Supra at note4 ,p.452

⁵⁶ Art19of ICTY , and Art18 of ICTR

⁵⁷ Supra at note 50

transferred, 16 have served their term, and one died while serving his sentence), 11 have had their cases transferred to local courts.⁵⁸ Another 36 cases have been terminated (either because indictments were withdrawn or because the accused died, before or after transfer to the Tribunal)⁵⁹. Proceedings are on-going with regard to 61 accused: 13 are at the appeals stage, two are awaiting judgment by a Trial Chamber, 26 are currently on trial, 14 are at pre-trial and six are still at large.⁶⁰

The ICTR on the other hand, so far, has finished 21 trials and convicted 28 accused persons. Another 11 trials are in progress.⁶¹ 14 individuals are awaiting trial in detention; but the prosecutor intends to transfer 5 to national jurisdiction for trial. 18 others are still at large, some suspected to be dead. The first trial, of Jean Paul Akayesu, began in 1997. Jean cambanda, interim Prime Minister, pled guilty. ⁶²

ICTY and ICTR like that of the Nuremberg and Tokyo tribunals could not escape criticisms for instance, these tribunals are limited, by jurisdictional basis for they were established to exercise jurisdiction only on those regions. However, the establishment of the ad hoc tribunals undoubtedly represents a major step in that direction. Moreover, it sends a clear signal to the perpetrators and to the victims that such conduct will not be tolerated.

All in all, the international community strove too hard to deter international crimes from the scene starting from the late 15th century up to the early 1990's *ad hoc* tribunals'. Despite all these efforts; the violation of international values could not be minimized. Even the world peace and order was disturbed by dictators in various parts of the world in Africa

⁵⁸ The International Criminal Tribunal for the former Yugoslavia retrieved from [http://en.wikipedia.org/ International Criminal Tribunal for the former Yugoslavia](http://en.wikipedia.org/International_Criminal_Tribunal_for_the_former_Yugoslavia)

⁵⁹ Ibid

⁶⁰ Ibid

⁶¹ The International Criminal Tribunal for Rwanda, Retrieved from; [http:// en .wikipedia .org/wiki/ International Criminal Tribunal for Rwanda](http://en.wikipedia.org/wiki/International_Criminal_Tribunal_for_Rwanda) >

⁶² Ibid

and Latin America. However, the dream of international community came true. Finally after the adoption of the Rome statute of the international criminal court in 1998. The history of the creation of the ICC will be discussed in the next chapter.

Chapter Two

2. The Prosecution of International Crimes Through Permanent International Criminal Court

2.1 Establishment of International Criminal Court

2.1.1 Introductory Remarks

Despite the various efforts made towards the deterrence of the most egregious crimes committed against the international community, the gross human rights violations could not be stopped. In short, serious breaches of human rights and humanitarian laws have become dominant features of the contemporary world. The international community including penalists strove too hard in creating an international stage for the prosecution of international crimes and bringing to justice the criminals. Provisional and *ad hoc* tribunals were created, as stated earlier, bilateral and multilateral conventions had been adopted. Yet, the atrocities had even been exacerbated. To this several ethnic cleansings, internal and international armed conflicts in various parts of the world can be mentioned. Men like Hitler and Pol pot the leaders of violent movements are never judged for their misdeeds.

Even though, the provisional and *ad hoc* tribunals were important steps along the road to the possible establishment of permanent international criminal court, nevertheless, they were never proved successful, as stated in the previous chapter, to put an end to the culture of impunity for the perpetrators of the most serious crimes, for a wide variety of reasons. Among the reasons are, the *ad hoc* tribunals were temporally and territorially limited, selective as they cover only specific situations, and as they were created only after the violation had already been

committed they were in effect retrospective.¹ Because they were territorially limited, while prosecution was going on Yugoslavia for example, other perpetrators were seen killing masses in other parts of the world.

Hence the fundamental principle that “any individual who has committed a crime under international law shall be tried, sentenced and punished according to universally accepted norms of international criminal law and justice must take precedence over any other consideration whether of politics administrative convenience or historical accident” could not be respected.²

Accordingly, the international community reached an agreement that there should be established a permanent international criminal court with a universal competence, the establishment of which would help insure that international criminal law functions not only to punish the guilty on a non-discriminatory basis but also to deter the crimes under international law from being committed in the future anywhere in the world.³ To put this in other terms, with a view to enhancing the fight against impunity and struggle for peace and justice in contemporary situations of the conflict, the world community felt that the permanent international criminal court should be established.⁴

The effort to create permanent international criminal court, of course, can be traced back to the early 20th century, with the League of Nations and was continued by the United Nations.⁵ The League of Nations efforts were linked to permanent international criminal court, whose jurisdiction

¹ Lyal S. Sunga, *The Emerging System of International Criminal Law*, (1997), p.331

² Ibid

³ Ibid

⁴ Ibid

⁵ M. Cherif Bassiouni, Establishing an International Criminal court, a Historical Survey, *Military Law Review*; (Summer, 1995)

was limited to the enforcement of the 1937 terrorism convention but it never entered into force as only a single state, India, had ratified it.⁶ The effort to create permanent international criminal court was further continued by the UN GA, starting from the 1940's up to the 1980's. But these initiations became tied up in cold war politics and never proved successful.⁷ It was stated that, "the struggle against impunity was 'replete' with disappointments and delays especially up to the 1990's".⁸

After the end of the cold war, the General Assembly requested the International Law Commission (ILC) to put the question of an international criminal court, in agenda following the suggestions in the General Assembly by Trinidad and Tobago a specialized international criminal court be established to deal with the problem of drug trafficking.⁹ The ILC was requested to conduct its work within the framework of its projection going on since 1947 of preparing a draft code of crimes against the peace and security of mankind.¹⁰

In 1993 the ILC had prepared a draft statute following the request of General Assembly in 1992, that it shall prepare a draft statute for permanent international criminal court.¹¹ The commission finished its draft in 1994 and submitted it to the UN GA; which established an *ad hoc* committee to pursue the work towards the creation of permanent international criminal court.¹² The commission finished its draft in 1994 and submitted it to the UN GA, which established an *ad hoc* committee to pursue the work towards the creation of permanent ICC.¹³ In the year

⁶ Steven .R. Ratner ,S. Jason Abrams; *Accountability for Human Rights Atrocities in International Law, Beyond the Nuremberg Legacy* (1997),p.177

⁷ Ibid

⁸ Von Hebel, Herman A.M., John G Lammers., Jolien Schukking , *Reflections on International Criminal Court*,(1999),p.1

⁹ Supra at note 6 p.178

¹⁰ Roy S. Lee(ed), *The International Criminal Court; The Making of The Rome Statute; Issues Negotiations, Results*, (1999),p. 1

¹¹ Supra at note 6, p. 178

¹² Id p.2-3

¹³ Supra at note 5,

1996 a preparatory committee was established whose task paved the way for a diplomatic conference of plenipotentiaries on the establishment of ICC. ¹⁴ The conference convened at Rome from 15th June -17 July 1998 to adopt the Rome statute of ICC. Finally, the Rome statute was adopted and had entered into force four years after its adoption, in July 1,2002 after the minimum requirement of 60 ratifications was complied. ✓

The statute laid down in 126 articles , important international criminal law principles including *nebis in idem*, *nullum crimen sine lege*, individual criminal responsibility, the principle of non -retroactivity, and *nulla poena sine lege*. The statute also contains a number of provisions designed to address the plight of women and children in a situation of armed conflict. It also recognizes rape, sexual violence as war crimes and crimes against humanity. Thus half of the statute is devoted to international criminal justice system.

Generally, ICC is established, as is stated in the preamble, “to put an end to impunity for the perpetrators of the most serious crimes, and future generations to establish an independent permanent ICC in relation with the UN system, with jurisdiction over the most heinous crimes of concern to the international community as a whole”.

2.1.2 Nature and Jurisdiction of the Court

International criminal court is the first permanent treaty based international institution established by states parties to the statute. The creation of a permanent ICC indicates,

“The real status quo in the world since the fall of the Berlin wall and the end of cold war between the eastern bloc and western in

¹⁴ Supra at note 6 p.178

1981-91 and is a specific achievement in the development of international human rights law.”¹⁵

Included in the preamble of the statute, “the ICC is established for the purpose of investigating and prosecuting individuals who committed the most serious crimes of international concern and to end impunity for the perpetrators of atrocities that deeply shock the conscience of humanity”.

The court will have jurisdiction over the most serious crimes of international concern listed under article 5 of the statute. Intense discussions were made during the negotiation in Rome conference as to the list of crimes that should fall under the court’s jurisdiction.¹⁶ This is due to several delegations belief that if wide ranges of crimes are included this would hinder a significant number of states not to ratify because not so many states will agree on the definition of the crimes.¹⁷ Accordingly, it was decided that the statute should embrace those existing core crimes under customary international law namely crimes of genocide, crimes against humanity and war crimes.¹⁸

Although the crime of aggression is included in article 5 of the statute, the court will not exercise jurisdiction over this crime as it was not yet defined because delegations failed to reach on an agreement as to its definition.¹⁹ The crime of genocide, crimes against humanity and war crimes are defined in articles 6,7 and 8 respectively, as follows. The Crime of Genocide, is concerned with the intended annihilation of protected group be international ethnical or racial or religious.²⁰ Acts of genocide may only be committed with intent to destroy in whole or in part a

¹⁵ Zhu Wenqi, On Cooperation By States Not Party to the International Criminal Court; *International Review of the Red Cross*, (vol.88 No. 861,2006),p. 88

¹⁶ Claire de Than, Edwin Short, *International Criminal Law and Human Rights*, (2003),p.319-320

¹⁷ Id. P.320

¹⁸ ibid

¹⁹ Rome statute of the International Criminal Court, adopted in 1998,entered in to force, July 1,2002 (here in after the Rome statute) article 5(1)cum5 (2)

²⁰ Supra at note 16,p. 320

particular group.²¹ Crimes against humanity occur not only during internal and international conflicts but also in peace time as well.²² The enumerated list of offences under ICC has been extended and the meanings of these crimes have been set out separately in article 7(2).

War crimes as reiterated in the previous chapter have been recognized as an offence under customary international law and various international treaties.²³ War crimes include the grave breaches of the Geneva conventions namely, willful killing, torture cruel or inhuman treatment including biological experiment.²⁴ War crimes jurisdiction will only apply where the actions are part of a plan or policy or as part of large scale commission of crimes.²⁵ Therefore, ICC may have jurisdiction over armed conflicts, which are not only of an international nature but may also include serious violations during domestic conflicts.²⁶

According to Bassiouni, these crimes conform to the existing international criminal law and fall within the meaning of *jus cogens* which are binding on all states and are norms that carry out obligations from which no state may derogate.²⁷ Furthermore the court will exercise its jurisdiction over those crimes committed after the entry into force of the statute.²⁸ With respect to the state that accedes to the treaty, sub article two of article 11 provides if a state becomes a party to this statute after its entry into force the court may exercise its jurisdiction only with respect to crimes committed after the entry into force of the statute for that state or that state has made a declaration pursuant to relevant provisions of the statute relating to accession to the court's jurisdiction.

²¹ Ibid

²² Ibid

²³ Id at p. 324

²⁴ Ibid

²⁵ Ibid

²⁶ Ibid

²⁷ M. cherif Bassiouni, *An Introduction to International Criminal Law*, (2003), p. 507

²⁸ Article 11(1), the Rome statute

In addition, according to ne bis in idem principle as reiterated in article 20 of the statute no person may be prosecuted twice for the same act. Also, *Nullum crimen sine lege* also known as the principle of legality is provided in article 22, as "a person shall not be responsible under the statute unless the conduct in question constitutes at the time it take place a crime with in the jurisdiction of the court."

The statute also embraces relevant provisions governing the court's relation to obligations of state parties and pre conditions to the exercise of the jurisdiction. In order for the ICC to exercise its jurisdiction, the conduct in question must have occurred on the territory of a state party or by one of its nationals in accordance with article 12(2). In other words a case is subject to ICC jurisdiction if the crime was committed on a territory that belongs to a state party or the crime is committed by the national of state party. Thus, the principles of territoriality and nationality jurisdiction are applicable. Article 12(2) reads in cases of referrals by state parties or by the prosecutor *proprio motu*,

"the court may exercise jurisdiction if one or more of the following states are parties to the statute or have accepted the jurisdiction of the court in accordance with paragraph three; a) the state on the territory of which the conduct in question occurred or, b) the state of the person accused of the crime is a national". ✓

Some writers commented up on article 12(2) (b) that uses the term 'accused', as the term is used in the statute where there has been an indictment ^{charge} by the pretrial chamber, a stage which occurs after the investigation by the prosecutor.²⁹ While the intention was that the term jurisdiction in article 12 should have the extensive meaning including also investigations by the prosecutor, article 12(2) (b) does not reflect that understanding. Another instance where by the court can exercise jurisdiction is when a state not party to the statute accepts the exercise

²⁹ Supra at note 8 p. 61

of jurisdiction by the court and the crime has been committed in that territory or the accused is one of its nationals.³⁰ In addition, the court can exercise its jurisdiction on a national of non state party when the later commits a crime on the territory of a state party or against its citizens and refers to the ICC the situation involving a non state party.³¹

In relation to its jurisdiction, ICC is based on the principle of territoriality and not on universality of criminal jurisdiction.³² While the reach of the court's jurisdiction is universal, it does not represent the theory of universality except for referral from the Security Council which is not linked to the territoriality of any state whether they are parties to the statute or not parties.³³ As stated by one writer;

*"The conference participants quickly rejected a scheme of universal jurisdiction under which nationals of any state, regardless of whether their state was a party to the treaty, could be tried before ICC for international crimes."*³⁴

The statute; like that of ICTY/ICTR, recognizes the principle of individual criminal responsibility and renounce the defense of superior order. To that effect article 27 reads "This statute shall apply to all persons without any distinction based on official capacity." Even in stronger terms article 27 states;

"in particular, official capacity as a head of state or Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this statute, nor shall it, in and of itself, constitute a ground for reduction of sentence."

³⁰ Supra at note 27 p.503

³¹ Ibid

³² Id p. 504

³³ Ibid

³⁴ Melissa K. Marler, The International Criminal Court; Assessing Jurisdictional Loopholes in the Rome statute, *Duke Law Journal*, (vol.49,No.3 1999),p.834

Further more, as stated above; ICC is a treaty based organ. Therefore, pursuant to treaty law principle it will bind only states that are parties to the statute. But this is not the case with ICC. The statutes of ICC deviate from the general treaty law principle. More than a treaty the Rome statute changes international law in a way that will be binding on at least in some cases on non signatories.³⁵ By virtue of article 13(b) the courts jurisdiction will be triggered not only by state parties or *ex officio*, but also when Security Council refers to the prosecutor pursuant to chapter VII of the UN charter. Consequently, as the Security Council's decisions are binding on all member states, whether parties to the statute or non state parties when Security Council refers situations, all such situations under all states will fall under the courts jurisdiction.

The court's jurisdiction is limited by the very nature of the court. ICC, unlike the two UN ad hoc tribunals does not have primacy over national courts rather it is founded up on the principle of complementarity where by it is subsidiary to national courts.³⁶ The preamble of the statute reads "ICC established under the statute shall be complementary to national courts. Hence national courts have primary right and obligations to prosecute international criminals." The principle of complementarity will be discussed deeply in the third chapter of this paper.

Generally the statute of ICC is created with a view to deter and punish those who might escape justice in national courts. These being the nature of the court, the statute assign different organs to properly and effectively conduct the prosecution proceedings discussed below. The court is composed of four main organs; the presidency; the pretrial, trial appeal division; the office of the prosecutor, and the Registry. Hence, this

³⁵ Czarnetzky John M. Ronald J. Rychlak, An Empire of Law? Legalism and International Criminal Court, *Notre dam Law .Rev.*(2003)

³⁶ *Supra* at note 7 ,p. 68

writer deems it relevant to discuss these organs in brief before dealing with prosecution in the court.

2.2. Organs of the Court ✓

ICC is composed of four organs as laid down in article 34 of the statute namely; The presidency, The three judicial divisions; The pretrial, trial and appeal division, The Office of the Prosecutor and The Registry. Each of these organs have been established and given their proper organizational area and administrative divisions.

The presidency; as mentioned in article 38 is composed of the first and second vice presidents who are responsible for the proper administration of the court with the exception of the office of the prosecutor and other functions accorded to it in the statute. The president and the first and second vice presidents are to be elected by an absolute majority of the judges and serve for a term of three years and can be reelected once.

In accordance with article 36(1) the court shall consist of 18 judges, who are to be elected from persons of high moral character. The presidency however may propose the increase in number of judges' depending on the work load, and if later found vital their number may be reduced depending on the work load.

The pretrial, trial and appeal divisions are to be established only after the election of the 18 judges. This is enshrined in article 39 of the Rome statute. As per the same provision, the appeals division is composed of the president and four other judges. The trial division consists of not less than six judges and will deal exclusively with indictments and pretrial matters. The pretrial division on the other hand consists of not less than six Judges. The statute of ICC provides for the impartiality and independence of ICC Judges in article 40 and in instances where their impartiality is questioned may be disqualified from participation up on

request by the prosecutor or by the investigated party. The statute also provides that the assignment of judges to division is based on the nature of the function to be performed by each division and the qualification and experience of the Judges elected to the court in such a way that each division should contain an appropriate combination of experts in criminal law and in international law.

The office of the prosecutor; headed by the prosecutor acts independently as a separate organ of the court. It is true that an effective international court requires not only a prosecutor who is independent and able to access necessary information but an institutional framework which ensures that he/she is to make vital decisions without undue pressure.³⁷ Its principal task under the statute is to investigate and prosecute crime of genocide, crimes against humanity and war crimes as set out in article 6 to 8. Also the prosecutor is granted the power to initiate investigations and prosecutions *proprio motu* when he/she received information on crimes within the jurisdiction of the court. Accordingly, to perform its obligation the office of the prosecutor is divided into three operational branches.³⁸ The division, jurisdiction, the complementarity and cooperation division (JCCD) is the first branch.³⁹ It provides in depth factual analysis of situations within the jurisdiction of ICC as required under article 53 & 15 of the statute and makes recommendation on issues of jurisdiction, complementarity and cooperation related to the situation under analysis for investigation.⁴⁰ This division is also responsible for negotiating cooperation agreements with the relevant states. The other divisions are investigation division and prosecutorial division.⁴¹ The investigation division is charged with

³⁷ Supra at note 16, p. 96

³⁸ Hans-peter kaul, Construction site for more Justice, The International Criminal Court After Two years; *The American Journal of International Law* (vol.99,No.2,2005), p. 373

³⁹ Ibid

⁴⁰ Supra at note 15, p.96

⁴¹ Supra at note 38, p. 373

opening investigation and is divided internally into a number of investigations groups. The prosecution division comprises of prosecutor and appeal lawyers and their duty is to bring cases to the court and try them⁴². The statute establishes a registry who will exercise the functions under the authority of the president which is headed by the registry. It is assigned to support & service of the Judges and parties during the proceedings.

2.3. Trigger Mechanisms ✓

In order for the ICC to exercise its Jurisdiction the statute sets out the mechanisms for bringing cases to the court, otherwise known as trigger mechanisms. These mechanisms are pointed out in article 13 of the statute. Pursuant to this provision the international criminal court will exercise its jurisdiction whenever, a state party to the statute refers a situation to the court, or whenever the security council acting under its chapter VII power of UN charter refers a situation to the prosecutor and, or the prosecutor decides to initiate investigations in his own initiative (*ex-officio*). Now, the writer would like to discuss these three scenarios, separately at some length.

2.3.1. Referral by State Parties

The statute of the international criminal court allows state parties to it to refer situations to the prosecutor. Article 14 reads “a state party may refer to the prosecutor a situation in which one or more crimes with in the jurisdiction of the court appears to have been committed requesting the prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes”. The word ‘situation’ refers to the over all

⁴² Ibid

factual context in which it is believed that the crime with in the Jurisdiction of the court has been committed.⁴³ In terms of Arsanjani ;

*"The word 'situation' is intended to minimize prejudicing the court by naming individuals at this early stage and to preserve the independences and autonomy of the court in the exercise of its prosecutorial, investigative and judicial functions."*⁴⁴

As per article 14(2) then the referring state should specify relevant circumstances and provide the necessary supporting documentation.

The question of whether all parties or only interested states should be entitled to make a referral was controversial. In other words, whether there should exist a link between the referring state and the crime which has been alleged to have been committed? The statute is silent about this issue. This writer believes that, there should not exist, such a requirement of nationality, territorially, link in order for state party to refer a situation to the court. This is because, the writer believes that setting such a requirement will defeat the very purpose of establishing the court; as set out in the preamble ' most serous crimes of concern must not go unpunished and that their prosecution must be ensured by taking measures at the national level and by enhancing international cooperation'. Moreover, states have primary obligation to prosecute, let alone to refer a situation to the prosecutor.

Professor Cassese stated that there is no such a requirement under the statute that the referring ^{State} ~~sate~~ be national state of the victim or the alleged perpetrators or the state on whose territory the crime has been alleged to have been committed.⁴⁵ Consequently, for him,

"any contracting state, even a state that has no link what so ever with the crime may file the request on the basis that the crimes under the court's Jurisdiction are of universal concerns and any

⁴³ Supra at note 27,p.515

⁴⁴ Supra at note 8, p.65

⁴⁵ Antonio Cassese, *International Criminal Law*,(2003),p.408

state possessing the relevant information may bring them to the attention of the court."⁴⁶

In time of writing this paper, three state parties Uganda, Democratic Republic of Congo and Central African Republic, referred the situations in their countries to the court.

Uganda made the first referral of a situation to the ICC in December 16, 2003.⁴⁷ It was the first time that a state party had invoked article 13 (a) cum 14 of the statute in order to vest the court with Jurisdiction. The situation in Uganda involves, crimes committed in the course of internal armed conflict between the government of Uganda and rebel groups called Lords Resistance Army (LRA), in northern part of Uganda.⁴⁸ Among other crimes attributed to this bodies, are indiscriminate killing rapes, and child abuse including abducting them.

The other referral made pursuant to article 13 (a) is democratic republic of Congo's referral of a situation that crimes committed in northern Ituri during the civil war since 1999 in Congo, including mass killings rapes cannibalism and other gross human rights violations.⁴⁹ DRC referred the situation in April 2004 to the court, as regards events occurring after the entry into force of the statute (July, 1, 2002).⁵⁰ Central African Republic on the other hand made the referral on March 2005.

To sum up, state parties to the statute are allowed to refer situations to the court. But an important question that should be raised here is can the referring state party (assuming it is referring the situation on its own territory) later withdrew its referrals? Or is there anything in the statute to prevent a state from withdrawing the referral, especially before trial has commenced? To this writer, nothing is provided clearly in the

⁴⁶ Ibid

⁴⁷ Mahnoush H. Arsanjani, Michael W. Riesman; *The Law-in-action of the International Criminal Court, The American journal of international law*, (vol.99, No.2,2005) p.391

⁴⁸ Ibid

⁴⁹ Ibid

⁵⁰ Ibid

statute. But article 19 (2) pointed out that state parties may challenge the Jurisdiction of the court on the grounds of admissibility. This means that they may later contend that either they will prosecute themselves or they may raise the issue of peace talks. However, again this article may also be referring to state challenging the admissibility when situations are referred to the court either by the Security Council or *proprio motu*. Thus it seems to this writer that there is no such a specific provision that can prevent or allow withdrawing.

2.3.2. Referral by the Security Council ✓

Another scenario where by, the Jurisdiction of the court can be triggered is when the security council has referred a situation where by crime that fall with in the Jurisdiction of the court have been or is being committed. Article 13 (b) of the ICC statute reiterates, ^{say again or repeating} "the court will exercise its Jurisdiction if a situation in which one or more of such crimes appears to have been committed is referred to the prosecutor by the security council acting under chapter VII power of the charter of UN". ✓

During the preparatory stages of the statute, there was controversy as to should the security council be allowed to involve itself in the ICC ^{- cause a process etc, to begin} initiation of investigations. Some have fear in giving this power to the Security Council because; it would undermine the courts independence and credibility. ⁵¹Again others felt that such a provision was inequitable in that this specific trigger mechanism would only be used against states other than the permanent member of the council. Since the later could use their powers of veto to prevent referral which impinged on their interest.⁵²

Those supporting granting the Security Council among these entities having the power to initiate proceedings before the court pointed out

⁵¹ Supra at note 8,p.65

⁵² ibid

“this would remove the need for the creation of *ad hoc* tribunals in the future as had been done in ICTY/ ICTR.”⁵³ It is in line with the rationale for having permanent international criminal court which is the need to eliminate ad hoc tribunals ⁵⁴as was dealt in the previous chapter of this paper.

Human rights watch supporting the Security Council’s power held that “only if the international criminal court is capable of fulfilling the function that such tribunals might fulfill, if the security council can confer power on the ICC and oblige states in accordance with UN charter on the same basis as it would through the establishment of an ad-hoc tribunal will the need for future ad-hoc tribunals be truly obviated.”⁵⁵ Finally, it was agreed to confer such right to the Security Council. This power of the Security Council is considered consistent with its responsibility for the maintenance of international peace and security under the charter.

In order for the security council to act under its chapter VII power and refer a situation to the prosecutor, that situation must involve serious crimes which amount to a threat to the international peace or breach of the peace or any other act of aggression. The referral of Security Council must be founded up on the council’s concern for its power to address issues of international peace and security as outlined in article 39 of UN charter.⁵⁶ If the situation does not involve threat to peace and security the council will not be able to refer the matter to the ICC. ✓

There was also a controversy as to whether the council should refer ‘matters’, cases or ‘situations, many felt that the council should only be

⁵³ Ibid

⁵⁴ Ibid

⁵⁵ Human Rights Watch , *Justice in the Balance; Recommendations for an Independent and Effective International Criminal Court* , (1998)

⁵⁶ Valerie Oosterveld, Perry Mike, John McManus, *The Cooperation of States With the International Criminal court ;Fordham international law* , (vol.25 ,2001-2002), p.788

empowered to refer general matters or situation rather than a specific case to the court in order to preserve , the court's independence in the exercise of its Jurisdiction.⁵⁷ On this point it was stated that the bringing of individual cases would instead be a matter within the court's discretion, based on investigation which it had carried out pursuant to the referral. ⁵⁸ Others who strongly support the council's referrals of 'cases' argued, that, a referral by the council should put on par with referrals by other states. ⁵⁹

Be this as it may, the council's referral is not in any way to be understood as an obligations on the ICC prosecutor to proceed with investigations. Asked whether they will be abide by the report of the inquiry commission, in relation to the situation in Darfur the chief prosecutor, Luis Moreno Ocampo stated, "our approach and mandate are different from those of the UN commission but we appreciate the work they have done in Darfur".⁶⁰

The Security Council has invoked article (13(b) of the statue for the first time by referring the situation in Sudan Darfur by resolution 1593, in March 2005, after receiving the information it requests from the inquiry commission it establishes for this purpose.⁶¹ The situation of Darfur in relation to the investigation and prosecution by the court will be discussed in third chapter of this paper. To conclude, the Security Council has been given the power to refer situations to the ICC prosecutor.

⁵⁷ Ibid

⁵⁸ Supra at note 10, p.147

⁵⁹ ibid

⁶⁰ News, Sudan tribune

⁶¹ Supra at note 16, p.91

2.3.3. *Ex Officio* Initiation

The other instance where by the court's Jurisdiction will be triggered is when the prosecutor has initiated an investigation in respect of such a crime pursuant to article 15 of the statute. In accordance with article 15, "the prosecutor has been given the power to initiate an investigation *proprio motu* on the basis of information on crimes within the jurisdiction of the court". The granting of this power to the prosecutor is not a new development in international criminal proceedings. As was discussed in the previous chapter, the prosecutor of the UN ad hoc tribunals was empowered to initiate investigations *proprio motu*. Article 18 (1) and 17(1) of ICTY and ICTR respectively, stated that the prosecutor shall initiate investigations *ex officio* or on the basis of information obtained from any source, particularly from UN, 'NGO'S, governmental or inter governmental organizations and the like. Of course, the *ex officio* initiation of investigations by the UN *ad hoc* tribunals' prosecutor and the ICC prosecutor are not the same. This is to mean, the ICTY or ICTR prosecutor got his or her power from the UN Security Council and do not seek any authorization from any other organ. Where as, the ICC prosecutor's power, as he/she got this power from the statute, is restricted to the members states.

Under the draft ICC statute, prepared by ILC, the prosecutor was not allowed to initiate investigations *ex officio*.⁶² A complaint of a state party or Security Council was the only means by which jurisdiction of the court could be triggered. It was after receiving referrals from these two organs that the prosecutor will initiate investigations.⁶³ However, in the middle of the commission's debate one member of the commission suggested that the prosecutor be empowered to initiate investigations *proprio motu*, in the absence of a complaint, if it appeared that a crime apparently fall within the jurisdiction of the court would other wise not

⁶² Supra at note 10, p.175

⁶³ Ibid

be duly investigated.⁶⁴ But the granting of this power was not automatic, and not without controversies. True, some governments like USA strongly opposed the granting of this sensitive power to the prosecutor by raising a number of arguments.

The opponents argued that, allowing the prosecutor to initiate investigations *proprio motu*, without the support of a state or the Security Council, in the present premature development of international law, will not be of any help in achieving the wide spread acceptance of the court.⁶⁵ In addition, they fear that an over zealous or politically motivated prosecutor will target unfairly or in bad faith highly sensitive political situations.⁶⁶ Also, they objected to this power of the prosecutor on the ground that the prosecutor might be overwhelmed by frivolous complaints and would have to waste limited resources at his/her disposal, in addition to him/her, being over loaded with information provided to him/her by thousands of victims and witnesses all over the world and contained by limited resources available to him.⁶⁷

But the proponents of *ex officio* power of the prosecutor consider it as an essential feature of an independent and credible court.⁶⁸ For this later group, such broadened role of the prosecutor would enhance not only his/her autonomy and independence, but also the independence and creditability of the court as a whole which would be able to function on behalf of the international community rather than on behalf of a particular complaint by state or security council.⁶⁹

⁶⁴ Ibid

⁶⁵ Id at p.177

⁶⁶ Id. at p.181

⁶⁷ Supra at note,8,p.66

⁶⁸ Supra at note 10,p.177

⁶⁹ Ibid

They continued, if only states or the Security Council can trigger the court's jurisdiction, the proper functioning of the court will be dependent up on political motivation of this entities.⁷⁰ This is witnessed from the Security Council's action in the 1990's establishment of the UN *ad hoc* tribunals. While the ICTY was established for the powerful states like USA & England interest in the former Yugoslavia, ICTR was established after the death of millions by genocide and followed by angry sounds from human rights advocates that the Security Council decided to establish ICTR to keep its credibility.

According to human rights watch group "history bears witnesses that states or the Security Council were seen being reluctant or unable to lodge complaints or refer situations to the court".⁷¹ The inter state complaint mechanism in human rights instruments is vastly underutilized, no state complaint having been brought to the Inter-American court of human rights, nor to human right committee under ICCPR and only one inter state case has been heard by European court of Human rights .⁷²

The reasons for this reluctance are, the impact on inter state economic political relations and the fear on counter claims. Thus, the group suggested the granting of this power to the prosecutor.⁷³ Finally the supporters argued that as *ex officio* power was granted to ICTY & ICTR Prosecutor; there is no reason not to grant the same power to the ICC'S prosecutor.⁷⁴

To make the *proprio motu* power of the prosecutor acceptable to all it was agreed to put judicial control on him, to mitigate the fear on the part of those states opposing this power that the prosecutor will initiate

⁷⁰ Supra at note 55, p. 55

⁷¹ Ibid

⁷² Ibid

⁷³ Ibid

⁷⁴ Ibid

investigations overzealously or politically motivated.⁷⁵ Thus, article 15(3) came up with the pretrial authorization to initiate investigations. Hence, as per article 15, first, the prosecutor will analyze the seriousness of the information he received from various organs, and if he believes that there is reasonable basis to proceed with an investigation he will submit to the pretrial chamber to request its authorization. If the chamber authorizes him he will commence investigations. ✓

2.4. Prosecution in the ICC ✓

It was earned from the aforementioned discussions that the rationale behind establishing ICC is the need to put an end to impunity for the perpetrators of the crimes that fall within the Jurisdiction of the court by bringing to Justice and prosecuting the alleged criminals. Accordingly, the statute embraces procedures for conducting prosecution. As is common in main criminal Justice systems of the world, namely, adversarial and inquisitorial systems, prosecutions proceedings of international crimes in international tribunals including the ICC involves the investigations pretrial and trial processes and appeals depending upon the circumstances of the case.

In this subtitle this writer would like to discuss prosecutions proceedings in the ICC in brief. Hence the investigation and pretrial stages will be discussed together and the procedure that will be followed in trial will take the next scene.

2.4.1. Investigations and pretrial

Like in ICTY/ICTR investigations in the ICC will be initiated by the prosecutor as discussed earlier, after a situation is referred to the court either by the Security Council or state parties. Investigation will be

⁷⁵ Ibid

initiated if and when the prosecutor determines that there is a reasonable basis to initiate investigation in case of state party or Security Council referral.⁷⁶ Moreover, article 15 requires that, if the prosecutor decides to initiate investigations in his own initiative he will have to seek authorization from the pretrial chamber.

After passing through this stapes the investigation will be commenced in the ICC. Investigations embrace the gathering of evidence and this in turn involves the questioning of suspects, witnesses, or victims. Investigations may be conducted on the territory of state parties as witnesses, victims, or suspects may be found on the territory of state parties. The collection of evidence covers both exculpatory and inculpatory evidence. This is provided in article 54(1) of the statute and intended to preserve the balance between the two benches; the prosecution and defense. For Bassiouni this is in line with the principle of "equality of arms".⁷⁷ This principle is supposed to function as a safeguard for the accused.⁷⁸ He also stated that to-do otherwise would leave the accused in a position of disadvantage with respect to the prosecution and it is to remedy these that the collection of both inculpatory and exculpatory evidence is needed.⁷⁹

During investigation the prosecutor may request by an application the presence of persons being investigated, victims or witnesses to the pretrial chamber. This is envisaged under article 54 of the statute. It adopts the word "application" rather than an indictment to refer the charges for which the persecutor intended to bring the accused to trial.⁸⁰ The application shall contain the name of person and any other relevant information identifying the crimes with which it was believed s/he is

⁷⁶ Article 53 of the Rome statute

⁷⁷ Supra at note 27, p.589

⁷⁸ Ibid

⁷⁹ Ibid

⁸⁰ Supra at. note 10, p.235

responsible for and the reason why the prosecutor believes the arrest is necessary.⁸¹

The statute in article 58(2) regulates the issuance of an arrest warrant. Accordingly, issuance of an arrest warrant will be executed if the chamber is satisfied that the person has committed a crime within the jurisdiction of the court. The arrest of the suspect is necessary in accordance with article 58(b), to ensure the person's appearance at trial or to ensure that the person does not obstruct or endanger the investigation as the court proceedings or to prevent further commission of the crime.

Once the arrest has been effected and the person has been transferred to the seat of the court the accused person makes an initial appearance before the pre-trial chamber which must satisfy itself that the person has been informed of the crimes which he or she is accused of and his or her rights under the statute.⁸² The accused person may apply to the pre-trial chamber for interim release pending trial.⁸³ It is the responsibility of the pre-trial chamber to ensure that the person is not detained for an unreasonable ground prior to trial due to inexcusable delay by the prosecutor and if such delay occurs, the court must consider releasing the person with or without conditions.⁸⁴

Within a reasonable time after the accused person's appearance before the court the pre-trial chamber must hold a hearing to confirm the charges.⁸⁵ The hearing must be held in the presence of the accused, unlike in the ICTY/ICTR where the confirmation hearing will be held

⁸¹ Article 58(1)

⁸² Article 60(1)

⁸³ Article 60(2)

⁸⁴ Article 60(4)

⁸⁵ Annie Wartanian; The ICC Prosecution's Battlefield, Combating Atrocities while fighting for states', cooperation lessons from the UN tribunals applied to the case of Uganda, 36 *Geo. journal of international law*, 1289

without the presence of the suspect or his/her council.⁸⁶ The purpose of the confirmation hearing is to define the scope of the trial in terms of the exact nature of the alleged crime and the precise form of participation attributed to the accused and to shorten the needed trial time.⁸⁷ In addition, it will enable the chamber to determine whether there is sufficient evidence to establish grounds to believe that the person committed each of the crimes charged.⁸⁸

On the other hand the procedure to be followed in the ICTY/ICTR is rather different. The arrest warrant will be issued only after the confirmation of an indictment.⁸⁹ ^{Charge} Primarily, when the prosecutor of ICTY/ICTR determines that, there exists a prima facie case an indictment is prepared and will be forwarded to the judge of the tribunal.⁹⁰ After the indictment is filed the court will held a confirmation hearing.⁹¹ The judge then reviews the indictment or dismisses it or may also request additional evidence.⁹² Upon confirmation the suspect acquires the status of an accused. Here the arrest of the person will be requested only after the confirmation of an indictment. Coming back to the ICC the suspect has been accorded some procedural rights including to be informed of the charges against him and his right under the statute. Accordingly, article 61(3) states that "With in a reasonable time before the hearing the suspect must be provided with a copy of a document containing the charges on which the prosecutor intends to bring him to trial and inform him of the evidence on which the prosecutor intends to rely at the hearing."

⁸⁶ Ibid

⁸⁷ Supra at note 38,P.397

⁸⁸ Supra at note 45,P.416

⁸⁹ Id at P.415

⁹⁰ Ibid

⁹¹ Ibid

⁹² Ibid

On the basis of the hearing the chamber may determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged and based on its determination the chamber may confirm, decline or adjourn the hearing and in the later case request the prosecutor to provide additional evidence or amend it. Accordingly article 61(8) provides, "if the pretrial chamber declines to confirm the charges the prosecutor shall not be precluded from subsequently requesting the confirmation if the request is supported by other evidence". In time of writing this paper the court issued the first arrest warrant for the leaders of LRA ,Uganda ,which was also the first referred case to the court ,on 8 July 2005. The other arrest warrant issued is for Mr. Lubanga, who is the leader of Congolese rebel group, on 10 February 2006.⁹³ The Congolese national authorities transferred Lubanga to ICC custody on March 2006. Lubanga is the first person to be actually arrested by the ICC. The first public pre trial hearing was on 20, March 2006. On Monday 29, January The Hague pretrial chamber of the ICC confirmed charges against him, sending the case to trial.⁹⁴ The chamber found substantial grounds to believe that he is criminally responsible as a co-perpetrator for all the charges made against him for the period beginning September 2002.⁹⁵ Once the charges are confirmed the next step is the conduct of trial proceedings. Here all the relevant evidence is transferred to the trial chamber. ✓

2.4.2 Trial

In the statute of ICC, pursuant to article 63(1) trial must be held only in the presence of the accused. The issue of trial in absentia was one of the

⁹³ Cases Reference the International Criminal Court , <[http://en.wikipedia.org/wiki/International Criminal Court](http://en.wikipedia.org/wiki/International_Criminal_Court)>

⁹⁴ Cases and situations ,Democratic Republic of Congo-CICC.htm, Coalition for the International Criminal Court <<http://amicc.org/sitemap.htm>>

⁹⁵ Ibid

most controversial issues during the preparatory process. Those who come from common law tradition mainly supported no trial in absentia and those who come from civil law held that trials can be conducted in the absence of the accused.⁹⁶ But this is not to generalize that those who supported trials in absentia are only those who are followers of ~~common~~ ^{civil} law and vice versa.⁹⁷

Under exceptional circumstances, however, the accused and his council may be forced to observe the trial from out side the court room through the use of communications technology if required but only for a limited period of time. This is gathered from the reading of article 63(2).

The statute like in the ICTY/ICTR stipulates that, the accused person is presumed to be innocent of all the charges until proved guilty. Article 66(1) stipulates, every one shall be presumed to be innocent until proved guilty before the court in accordance with the applicable law. In addition to this, the burden to prove his/her guilt lies in the prosecutor. To that effect article 66(2) reads "the *onus* is on the prosecutor to prove the guilt of the accused". As a consequence, in accordance with article 66(3) of the statute, in order to convict the accused the court must be convinced of the guilt of the accused beyond reasonable doubt.

In contrast to the ICTY/ICTR where trial proceedings are mainly party driven and thus influenced by adversarial system the judge of the ICC play an active role in conducting trial and seeking truth. The cumulative reading of articles 69(3), 65(4) and 64 gives one the understanding that the trial in ICC has an inquisitorial flavor. As per these provisions, the trial judge may require the attendance of witnesses, production of documents and other evidence. He can order the production of evidence in addition to the already collected evidence prior to trial or presented to trial by the parties. She/he will take all the necessary steps to maintain

⁹⁶ Supra at note 10,P.256

⁹⁷ Ibid

order in the course of hearing in a commission of guilt by the suspect the judge may require the prosecutor to present additional evidence including testimony of witnesses and may rule on the relevance or admissibility of any evidence taking into account the probative value of evidence.⁹⁸

Suspects, witnesses or victims are also given protection during trial by virtue of article 64(8). As per this provision,

“The trial chamber shall have read to the accused the charges previously confirmed by the pre trial chamber”.

The chamber must satisfy it self that the accused understands the nature of the charges. It shall also afford him/her the opportunity to make an admission of guilt pursuant to the relevant provisions of the statute or to plead not guilty.⁹⁹ Before the accused makes an admission of guilt in accordance with article 65(1) (a-c) determine whether the accused understands the nature and consequence of his/her admission, that the admission is voluntarily made by the accused after sufficient consultation with the defense council and the admission of guilt must be supported by all relevant facts of the case.

The chamber may then rule on the accused's admission of guilt if it is satisfied that all conditions under 65(1) are fulfilled. When the chamber is of the opinion that there should exist additional evidence in the interest of justice it may request the prosecutor to present additional evidence including the testimony of witnesses or order the trial be continued under the ordinary trial procedures.

As can be gathered from the reading of article 64(7) trials in the ICC will be held in public unless the court decides otherwise to protect confidential or sensitive information to be given or to protect the victims and witnesses. The accused is also accorded with a right to be promptly

⁹⁸ Ibid

⁹⁹ Art .65(4)Cum 65(3)

informed in detail nature, cause and content of the charges in a language which the accused fully understands or speaks, to have adequate time and facilities for the preparation of the defense and to communicate freely with counsel of accused choosing in confidence to be tried without delay to examine or have examined the witness against him or her and to obtain the attendance and examination of witnesses on her or his behalf and so forth .

The statute of the ICC also recognizes the fundamental rights of parties to lodge an appeal on certain grounds. The appeal may be lodged not only by the defendant but also the prosecutor is entitled to lodge an appeal on certain grounds. The appeal may be against interlocutory decisions as is provided in article 82 of the statute or on the grounds on error of law or error of fact as is provided in article 81.

To conclude one of the underlining reasons for the creation of an ICC is to enhance the effective suppression and prosecution of crimes of international concern. Thus the principle of effective prosecution was carried into and implemented in the Rome statute. The principle of effective prosecution requires that conditions exist to contribute to a reliable outcome at trial, like the trial being conducted by impartial and independent judiciary and prosecutor or speedy trial to achieve a reliable outcome at trial.¹⁰⁰

2.5 The Role; Powers and Duties of the Prosecutor

2.5.1. General

Inherent in criminal prosecutions are investigation of the commission of an alleged offence, the gathering of evidence, pretrial and trial proceedings and further may go through appeal procedures. In these

¹⁰⁰ Simon N.M. Young, Surrendering the Accused to the International Criminal Court, *British Year Book of International Law*, (2000), P.32

criminal proceedings the organ which took the lions share role is the office of the prosecutor headed by the prosecutor. What was most controversial during the preparation of the statute of ICC was that the elaboration of set of principles and rules governing the investigation and prosecution of crimes.¹⁰¹ During the conference delegations were divided in the most sensitive issue of with what powers the prosecutor should be entrusted with.

While some fear to give what they regard as excessive investigative power, for instance, the power to conduct on site investigations with out putting any control on him, others on the other hand argued that without adequate basic investigative and prosecutorial powers the prosecutor would be nothing more than a title incapable of actually performing his/her duties under the statue.¹⁰² In other words the question was whether the prosecutor should be the master of this stage of the proceedings or whether some degree of judicial scrutiny and intervention would be appropriate.¹⁰³

Finally, it was decided that the prosecutor should be vested with a significant power in the prosecution proceedings. In short they decided to make the prosecutor the master of the game. They came up with article 53 of the statute which grants the prosecutor the power to decide whether to initiate an investigations and upon investigations whether there is a sufficient basis for prosecution.

The principal role of the prosecutor is accordingly, like the prosecutor of ICTY/ICTR to investigate and prosecute crimes that fall with in the court's jurisdiction as long as it took place on the territory of a state party or committed by the national of a state party or on states not party

¹⁰¹ Supra at note10, P.229

¹⁰² Id at P.227

¹⁰³ Id atP.227-229

to the statute but that have accepted the court's jurisdiction.¹⁰⁴ In contrast to the complex requirements for the initiation of investigation however, the statute of the two UN ad hoc tribunals were very simple which gave the prosecutor the power to freely decide to initiate investigation out side any judicial scrutiny.¹⁰⁵ But this does not mean that the prosecutor has unlimited choices in initiating investigations. Evidently, the prosecutor's choice to initiate investigations is limited only in the frame work of the situation referred to him/her by the Security Council's decision as the later is responsible for the creation of the tribunals.¹⁰⁶

Besides, the prosecutor of ICTY/ICTR stands in a better position than that of ICC's prosecutor, to effectively play its paramount role in the prosecution proceedings.¹⁰⁷ This is because, as the *ad hoc* tribunals were created by the security council and hence, the latter's decisions are binding up on all states parties to the UN, the prosecutor can demand the cooperation of all state parties, for instance, if he/she wanted the arrest of a suspect all those states are duty bound to hand over that accused to the prosecutor. In contrast, if the prosecutor of ICC wanted the apprehension of that suspect the court can only oblige states parties to the statute. Moreover, while the prosecutor of ICTY/ICTR is benefited from the tribunals' very nature, primacy, ICC's prosecutor is constrained by the principle of complementarity. Primacy enables the U.N. Prosecutor to preempt national investigations and take over at any point when serious violations of international humanitarian law are involved. The ICC, by contrast, operates on the principle of *complementarity*, which makes it presumptively inadmissible to prosecute a case if a state is already engaged in independent investigation or prosecution.

¹⁰⁴ Supra at note 85

¹⁰⁵ Ibid

¹⁰⁶ Ibid

¹⁰⁷ Ibid

True, the prosecutor of ICC is not absolutely free in deciding to initiate investigations. He/she must first secure authorization from the pre trial chamber; hence, he/she is under judicial control. This is when the prosecutor decides to initiate investigations ex officio. In this particular case he/she will have to first determine whether there exists reasonable basis to initiate investigations and if so he will apply to the pre trial chamber requesting its authorization.

Be this as it may, the prosecutor was allowed to choose what countries to investigate, which crimes to focus on, or whom to go after and how many people to go after and also make an independent determination of whether such an investigation is politically prudent.¹⁰⁸ Although state parties and the security council have a role in referring situations, as already mentioned, it is the prosecutor who finally decides save; the judicial control imposed up on him if he decides to initiate investigations proprio motu, whether or not to initiate an investigation after considering whether there exists a reasonable basis to initiate investigations or whether the request needs to be placed on a file for investigations and prosecution.¹⁰⁹

The prosecutors powers and duties are set out in articles 15,42,53,and 54 of the statute these articles are designed not only to set the boundaries of what he /she is allowed to do , but also to provide guarantees in terms of both independence and impartiality of the office of the prosecutor enshrined in relevant provision of the statute ¹¹⁰. In sum, the Prosecutor under the ICC is working under more statutory constraints than the ICTY and ICTR Prosecutor owing to the lack of U.N. authority, the lack of primacy over national courts, and the additional procedural checks on his proprio motu powers. Be this as it may, I would, like to shed some light on the role of the

¹⁰⁸ Ibid

¹⁰⁹ Supra at note

¹¹⁰ Supra at note 85

prosecutor and his /her respective powers and duties at some length starting from his/her power at initiation of investigation, in investigation stages and proceed further to his /her role in the pretrial, and trial proceedings.

2.5.1.1 The powers and Duties of the Prosecutor in

Initiation of Investigations

The dynamic role of the prosecutor as stated by one writer is the key to triggering the prosecution proceedings of the whole court.¹¹¹ As stated above, the prosecutor of ICC has been given the power to decide whether to initiate an investigation or not, after receiving referrals from state parties or the Security Council and even *proprio motu*, but whenever he/she wants to initiate investigations, procedural requirements set out in article 53 of the statute must be fulfilled. Article 53 reads 'The prosecutor having evaluated the information made available to him/her initiate an investigation unless he /she determines that there is no reasonable basis to proceed under the statute'

Hence in deciding whether to initiate an investigation in any of the three trigger mechanisms the prosecutor must first determine that there exists reasonable basis to commence investigations in addition to the requirements listed under 53(1)(a), namely, admissibility, and gravity with regard to the commission of crimes that fall within the jurisdiction of the court. The first condition that he/she must consider is, whether the information made available to him provide reasonable basis to believe that a crime within the jurisdiction of the court has been or is being committed. Secondly, he will have to consider the principle of complementarity as it is the primary obligation of states to investigate and prosecute international crimes, and; thirdly, taking into account the

¹¹¹ ibid

gravity of the crime and the interest of victims there are nonetheless substantial reasons to believe that an investigation would not serve the interest of justice.

Again, if investigations are to be initiated by the prosecutor *proprio motu* the statute draws a distinction between preliminary investigation; also known as inquiry and investigation proper.¹¹² The inquiry consists of a search for information or the gathering of evidence about an alleged crime for the purpose of establishing if there is a reasonable basis to proceed with an investigation.¹¹³ The initiation of an inquiry by the prosecutor on his own initiative is based on any relevant information he/she may have received from any reliable source as well as written or oral testimony at the seat of the court.¹¹⁴ If he/she believes that there exists a prima facie case to initiate an investigation the prosecutor will submit to the pre trial chamber a request for authorization of an investigation.¹¹⁵

There were differing views as regards this discretionary power to decide to initiate investigations or to discontinue an investigation in the interest of justice or on the grounds of age or illness of an individual or to select most important cases which were not of sufficient gravity.¹¹⁶ Not a few delegations strongly opposed such a power for they fear that the prosecutor will decide to initiate investigations overzealously by abusing his power.

However, others held the contrary position. Some were of the opinion that the prosecutors power to prioritize on the basis of gravity as required by the interest of justice does not give him unbridled discretion

¹¹² Supra at note 45,p.408

¹¹³ *ibid*

¹¹⁴ Art.15(2)

¹¹⁵ Art15(3)

¹¹⁶ Supra at note 10, P.229

to pick and choose between cases.¹¹⁷ This is because, even though the ICC will have jurisdiction only over very serious crimes, and it is unlikely that the court will be flooded with cases, it is almost inevitable that at some stage it will be necessary for him to prioritize complaints received.¹¹⁸ Thus, finally it was agreed that if the prosecutor decides not to initiate investigations taking in to account the gravity of the crime or the interest of victims pursuant to article 53(1) (c) s/he is under obligation to inform the pretrial chamber. Further article 53(2) states the pre trial chamber up on receiving a request from state parties or the Security Council may review his/her decision. What is more, the chamber may on its own motion review the decision of the prosecutor not to proceed with prosecutions. This does not however preclude the prosecutor from reconsidering investigation based on new facts.

If he decides to initiate investigations based on referral from states or *ex officio*, the prosecutor will have to inform states or non state parties that would normally exercise jurisdiction over the crimes concerned.¹¹⁹ Certain human rights activists like Human Rights watch, have strongly opposed this duty of the prosecutor to notify states on the ground that there is risk of destruction of evidence or intimidation of victims.¹²⁰ Accordingly, as response to this fear of many the statute came up with a provision which will enable the prosecutor to consider his notification carefully. As a consequence, where he believes that public notification could endanger the security of individuals or lead to the destruction of evidence or the flight of persons, the prosecutor may notify the relevant states on confidential basis and limit the information provided to them.¹²¹ If he decides to initiate investigations based on the Security Council referral there is no such requirement of notification. In this case

¹¹⁷ Supra at note 55 P.85

¹¹⁸ Ibid

¹¹⁹ Art.18(1)

¹²⁰ Supra at note 55, p.85

¹²¹ Art 18(1)

he/she will have to find another mechanism of enabling a state to become cognizant of the referral and the initiation of investigation.¹²²

Within one month of receipt of the notification, a state may inform the court that it is investigating or has investigated its nationals or others within its jurisdiction with respect crimes that falls within the court's jurisdiction.¹²³ At the request of that state then he/she may defer to the state's investigation of those persons unless the pretrial chamber, on the application of the prosecutor decides to authorize the investigation.¹²⁴ Thus there are instances where by the prosecutor may defer investigation. But he/she may request that state to periodically inform him/her the progress of its investigation. By virtue of Article 18(6), the prosecutor pending a ruling by the pretrial chamber or at any time when he/she has deferred an investigation he/she may on an exceptional basis seek authority from the chamber to pursue necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available.

Finally, after all the requirements are fulfilled the prosecutor will conduct investigations. This writer would like to discuss the role powers and duties of the prosecutor in conducting investigations pre trial and trial stages in the coming subtitle.

2.5.1.2 The Powers and Duties of the Prosecutor in Investigations and Prosecution

The powers and duties of the prosecutor during an investigation are set out in article 54 of the statute. As was required in the ICTY/ICTR, the prosecutor has the obligation to investigate all facts and evidence

¹²² Supra at note 45, P.408

¹²³ 18(2)

¹²⁴ Ibid

relevant to enable him determines whether there is criminal responsibility.¹²⁵ The prosecutor of ICTY/ICTR functions in the model of inquisitorial system and has a mandate of gathering evidence both incriminating and exonerating. Like wise the prosecutor of ICC, has a principal obligation to investigate and gather all relevant evidence including exonerating and incriminating of facts. This duty of the prosecutor is established in article (54)(1)(a) of the statute as “in order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under the statute, and in doing so, to investigate incriminating and exonerating circumstances equally.”

The other underlining obligation of the prosecutor is ensuring effective prosecution and investigation.¹²⁶ As mentioned earlier, according to the principle of effective prosecution the statute must be read to avoid or minimize partiality, and delay. In addition, the principle of effective prosecution and investigation is expressed by the respect of the interest of witnesses and victims including age, gender health and taking in to account the nature of the crime in particular where it involves sexual violence, gender violence or violence against children. This obligation of the prosecutor is laid down in article 54(1) (1) (b) of the statute.

The prosecutor must also respect the rights of persons under the statute. This is also related to the notion of effective prosecution. The rights of persons during investigations as pointed out in article 55 in the statute includes the right not to be compelled, not to incriminate himself/ herself or to confess guilt and so forth.

¹²⁵ Ibid

¹²⁶ Supra at note 100, p.

Like the prosecutor of the ICTY/ICTR the prosecutor of ICC is empowered to conduct on site investigation and this power of the prosecutor is provided in article 54(2) (a) cum (b), in accordance with the provisions dealing with state cooperation or as authorized by pretrial chamber. What has to be recalled here is ICC relies on the cooperation of states for investigation and prosecution of crimes. According to one Kaul, the cooperation may be at the request of the prosecutor the national authorities may themselves conduct the investigation or allow the prosecutor to conduct it himself.¹²⁷

During investigation, as stated earlier, the prosecutor may request the arrest of persons being investigated by an application. In this case he/she is required to submit a summary of evidence and the reason why he/she believes the arrest of that person is needed. He may also seek cooperation of any state or inter governmental organizations and enter in to arrangement or agreements as may be required to facilitate the cooperation of states intergovernmental organizations. The prosecutor has been granted the discretion not to proceed with prosecution if there is no sufficient basis for prosecution due to the fact that there is no sufficient legal or factual basis or to seek a warrant pr summon under, or due to in admissibility or because he/she thinks that prosecution is not in the interest of justice taking into account the interest of justice, or victims and witnesses and the gravity of the crime.¹²⁸ In this case as per article 53(3), the prosecutor has to inform the state or the Security Council and the pre trial chamber. The chamber may review the decision of the prosecutor at the request of states or the Security Council. In addition the chamber in its own initiative reviews his /her decision.

¹²⁷ Supra at note38,P.410

¹²⁸ Art53(2)

The prosecutor, upon the authorization of the pre trial chamber may take appropriate investigative steps within the territory of state party. As has been discussed earlier the prosecutor may request the pre trial chamber to hold a confirmation hearing even without the presence of the accused if the latter waived his right or fled. He/she may also continue the investigation, before the hearing, amend or withdraw the charges. At the hearing the prosecutor must support the charge with sufficient evidence during trial he may be requested by the trial chamber to present additional evidence. Here in trial proceedings he has the burden of proving the guilt of the accused.

To put this in a nutshell, the prosecutor of ICC plays a principal role in the investigation and prosecution of international crimes that fall under the jurisdiction of the court. To that effect, he/she is granted the power to initiate and conduct investigations in addition to his/her other powers and duties set out in the statute, thus complying with the principle of effective prosecution to achieve the intended objective of the court. To attain this, however, the prosecutor needs to secure the cooperation of states. It is on the requirement of state cooperation and the problems that will arise in line with this need of cooperation for instance, the unwillingness of states, that this writer would like to stay a bit longer with the reader in the coming chapter ;the challenges of prosecution in the ICC.

Chapter Three

3. Challenges of prosecution under the ICC

Introductory remarks

Until the creation of the ICC, the main point of discussion was the need for the creation of such a permanent court, backed by various efforts towards its establishment. There was a long felt need that there should exist an international stage on which the actors of the most serious crimes of international concern would be held responsible and prosecuted. And this feeling was backed by an effort which was directed towards creating such a stage. Now, that stage, which is a permanent international criminal court, was born in Rome, in 1998. The establishment of such a permanent court is an important step forward for the deterrence of international crimes. It was also believed that, it will help to bring in to being the dreams of many to delete the culture of impunity by replacing the culture of accountability.

Hence, after its birth, the issue that most concerns many has become whether or not it will succeed and be effective in prosecuting such perpetrators. The writer shares the feeling of those who believe that the creation of the ICC is an important step ahead. Nevertheless, the writer also thinks that the court is a way beyond perfection. Rather the court is surrounded by multitude of problems which the writer believes will be challenges to the prosecutor of the court in its endeavor to bring the perpetrators to justice.

With this rationale in mind, in this chapter, the problems that have to do with the complementary nature of the court will be discussed. This part of the work will also try to address questions such as; will the court be successful in the securing international cooperation to conduct investigations and prosecution? How will it reconcile the conflicting

interests to maintain peace by giving amnesty to international criminals and bringing them to justice? How will it cope up with the deferral power given to the Security Council? Finally, cases under the court currently in light of the relevant statutory provisions with due emphasis to the principle of complementarity and state cooperation will be discussed. The challenges which this work focuses on emanates either from the statute itself or from international circumstances.

As pointed out, ICC is created on the basis of the principle of complementarity. According to this principle, the court is established to complement national jurisdiction; and not to replace them. Hereunder the writer will try to shed some light on the idea behind the principle of complementarity and how this principle be a challenge to prosecution as follows.

3.1 Complimentarity as a Challenge to Prosecution

As was discussed previously, a general agreement is reached on the establishment of a permanent international criminal tribunal to adjudicate international crimes. But in doing so, an important question must be raised; the relation ship of that tribunal with national courts. That is whether such a court should be given primacy over national courts or should it be supplementary to them.

At last, as mentioned earlier, it was agreed that the court should supplement national courts and not to prevail over them. Thus in the preamble of the statute of the court it is provided that 'ICC established under the statute shall be complementary to national courts'. According to one writer,

"The court is intended to step in when a person visits human rights crimes upon innocent and the relevant country is

powerless for one reason or another to deal judicially with the matter".¹

This is to mean hence national courts have primary right and obligations to prosecute international criminals, the court will exercise jurisdictions only when national jurisdiction are ^{unable} unavailable or unwilling to exercise it. Complementarity is therefore one of the central features of the court. Newton explains complementarity as;

"The fulcrum that prioritizes the authority of domestic forums to prosecute the crimes defined in article 5".²

This principle is applicable not only to state parties to the statutes but also, to states not party to it, where there is a possibility that these non state parties will be able to prosecute. For instance, Pursuant to article 18(1) where a situation has been referred to the court either by state parties or the security council, the prosecutor is duty bound to inform all state parties and those non state parties taking in to account the information available would normally exercise jurisdictions over the crimes concerned. This is further elaborated as;

"the legal authority of domestic states to proscribe and adjudicate cases involving violations of humanitarian laws so firmly rooted in the international legal regime that the Rome statute makes no distinction between states party and non states party with respect to complementarity.....for every single act by every single accused that could theoretically be subject to the jurisdiction of the ICC there would be one or more sovereign states that have legal authority to investigate and prosecute the case".³

¹ John M. Czarnetzki, Ronald J. Rychlak, An Empire of law? Legalism and the International Criminal Court, *Notre Dame Law Review*, (2001).

² Michael A. Newton, Comparative Complementary; Domestic Jurisdiction Consistent with The Rome statute of the international criminal court, *Military Law Review*, (2001)

³ Ibid

The court is rather allowed to prosecute and investigate the perpetrators only when the prosecutor passed the admissibility criteria stated under article 17. It reads;

The court shall determine that a case is in-admissible where:

A) The case is being investigated or prosecuted by a state which has jurisdiction over it unless the state is unwilling or unable genuinely to carry out the investigation or prosecution

B) The case has been investigated by a state which has jurisdiction over it and the state has decided not to prosecute the person concerned unless the decision resulted from the unwillingness or inability of the state genuinely to prosecute:

c) The case has already been tried for conduct which is the subject of the complaint and a trial by the court is not permitted under article 20(3)

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

What is meant by unwillingness or inability is provided in sub articles 2 and 3 of the same provision. A state is said to be unable to carryout the prosecution of a suspect, as per article 17(3) when;

“Due to a partial or total collapse of its judicial system either it is not in a position to detain the accused or to have him surrendered by the authorities or bodies that held him in custody or to collect the necessary evidence or to carryout criminal proceedings”.

The inability of a national court may be due to legislative impediments such as an amnesty law or statute of limitations it is impossible for the national judge to commence proceedings against the suspect or the accused.⁴

On the other hand a state is said to be unwilling from the cumulative reading of article 17(2)(a-c); when the alleged perpetrator is in fact prosecuted by national proceedings but for the purpose of shielding the suspect from criminal responsibility or when there has been an

⁴ Antonio Cassese, *International Criminal Law*, (2003), P. 354

unjustified delay in the proceedings showing that in fact the authorities do not intend to bring the person concerned to justice or the proceedings are not being conducted independently or impartially or in any case in a manner showing the intent not to bring the person to justice. To summarize, the court is barred from exercising jurisdiction when a case is being genuinely investigated or prosecuted or was investigated or prosecuted and convicted in a fair trial.

This writer admits that this principle is the cornerstone of the court as it determines the very existence of the court. As most writers in the field argue had it not been for the principle of complementarity, the court would not have come in to existence in the first place because the international community has not yet reached on a stage to accept primacy of an international criminal tribunal over their national jurisdiction. No state in the existing international condition would have signed the statute if the word 'primacy' was inserted in the statute because; Primacy was said to compromise sovereignty. "States are generally leery of this type of jurisdiction because it encroaches upon the principles of national sovereignty".⁵

However, it is also the opinion of the writer that, the complimentary nature of the court will be a huge challenge to the court in its venture to combat the most egregious crimes. As pointed out by a writer in the field

*"Complementarity would so dramatically limit the jurisdiction, role and authority of the ICC that many fear it could become only a meaningless residual authority."*⁶

The problem with complementarity revolves, one way or the other, around the inability or unwillingness requirements which will be discussed below and hence, the writer argues that the court should have

⁵ Patricia A. McKeon , An International Criminal Court: Balancing the Principle of Sovereignty Against the Demands For International Justice, *Saint John's journal of legal commentary*,(1997)

⁶ Bartram S. Brown, Primacy or Complementarity; Reconciling the Jurisdiction of National Courts and International Tribunals, *Yale journal of International law*,(1998)

been given primacy over national courts, if an effective criminal court is needed that would be able to serve its purpose in a better way.

To begin with the inability test, as we have seen above, before attempting to assume jurisdiction, the court has to prove the inability of the state, with primary jurisdiction, to deal with the matter. The problem with these test might arise be incases where states favor prosecutions or do not favor it. First we will discuss when states do not want the prosecution by the court.

States may not favor prosecutions by the court for a variety of reasons. As has been dealt previously, the matter may be referred to the court by other member state of the court or it may be initiated by the prosecutor through his ex officio power. In such case, a state which is in fact unable to prosecute the accused may not be willing to surrender its primary jurisdiction to the court. The reason for this refusal may be not because the state does not want justice to be done but because states in general like to be seen by other states as having an efficient judicial system. They would not prefer to portray themselves as sovereigns with no judicial system or with incapable and inefficient judicial system. Because a good system of administration of justice is an expression of sovereignty and for a state admitting before the international community the inability of its judicial system is a self insult against its national pride. Therefore, even if the ICC determines that a particular state is unable to prosecute certain case, the state will argue back that it is capable of prosecuting the case and therefore it would be the word of the court against the word of state. If the ICC had primacy over national court, as the primary jurisdiction of the court would be a power given to the court by the free will of the state, when the state is required to surrender the suspect to the court, it would not feel that it is surrendering the suspect because it is incapable of administering criminal justice rather it would feel that it is discharging its international treaty commitment.

States may also reject the prosecution by the court alleging that they are able to prosecute to cover the suspect because in the conflict that created the situation government officials may be involved. At this juncture it may be good to raise Ugandan's case by way of illustration. Uganda first referred the situation in the northern part of the country to the court in which some leaders of the LRA, one of whose objective being replacing the current Ugandan government, were implicated. But it was reported that it is conducting peace talks with the leaders of LRA to whom arrest warrants were issued by ICC prosecutor. It was then alleged that Ugandan government started the peace talks when evidences which link the Ugandan authorities in atrocities committed against civilians were revealed.

As stated earlier, this problem will even exist when states themselves refer the situation in their own territory. That is, even when states refer matters to the court the writer fears that, they do so from genuine interest to see the prosecution of suspects, instead they do it from some hidden political motive. To put it in other words states may refer matters to attack their adversaries when they failed to prosecute them selves or shield suspects. It was once stated that,

*"In an internal military struggle where the referring government is one of the parties, it is referring its adversaries to the ICC while apparently retaining jurisdiction over its own putative perpetrators against whom there may also be serious allegations that sound in the statute."*⁷

The point is, even when states portray themselves as incapable of prosecuting international criminals and surrender the criminals to the court it may be for some political purpose.

⁷ Mahnoush H. Arsanjaini; W. Michael Riesman, The Law –In-Action of the International Criminal Court, *The American Journal of International Law* ,(vol.99, No. 2., 2005)

The other instance where the court will assume jurisdiction is when it can prove that a state with primary jurisdiction, though able, is not willing to prosecute the suspected criminal or when the criminal proceeding is projected to protect the accused from the pain of undergoing criminal proceeding and punishment by the ICC. The problem with this proviso is that there is no objective standard, on the part of the court, in which the willingness or unwillingness of the particular state is determined.

Newton stated that;

"The ICC prosecutor and the court must make a subjective assessment whether the sovereign state is genuinely unable or genuinely unwilling to take action on the case".⁸

Nor does there exist an objective means of determining whether a court proceeding, which is conducted by a state court is a sham proceeding. It is to be determined from the surrounding circumstances. In fact if the state with primary jurisdiction expresses its unwillingness, though unlikely, in some unequivocal way, the writer's fear will be only a bad dream.

— case

It is true that states may be unwilling to try and convict a person who has committed the ugliest kind of atrocities for some kind of political purpose. It is also true that states may conduct a fake proceeding to save themselves from criticisms of the international community of letting a criminal free. The problem is that states would not admit in public that they are unwilling to prosecute a certain criminal or the fact that the proceeding that they have conducted is a sham proceeding. As the willingness or unwillingness of a state to prosecute, as well as, the accurate nature of the proceeding is to be determined from different facts and circumstances, the court will come with its own understanding and interpretation of the facts and the state which is accused of

⁸ Supra at note 2.

unwillingness to prosecute or sham proceeding will come with its own understanding of the circumstances. Then it will be the interpretation of the court against the interpretation of the state. The current situation in Darfur will perfectly match with this assertion. while Sudan contends that its judiciary is honest, capable and willing to conduct prosecution for crimes that are committed in Darfur, ⁹ the prosecutor stated, on the one hand, that the prosecution being conducted by Sudanese national courts do not cover crimes against humanity and on the other hand, the judicial system in Darfur is highly affected by the conflict so that it is not able to conduct investigations and prosecutions. ¹⁰[In order to clearly understand these scenarios the writer has separately discussed the situation in Darfur below and readers are consulted to refer that].

Here one may argue saying that; as the court has the final say in determining the willingness or unwillingness of the state or whether the proceeding conducted is intended to shield the suspected criminal, if the court so determines, the state will not have a choice other than surrendering the suspect to the court or breach its obligation in the statute. Nevertheless, having in mind that the court does not have any means of enforcing its determination of the situations other than the moral pressure which may exerted from the other signatory states of the statute of the court, the writer does not suppose that the determination by the court by it self do not make any difference in getting the cooperation from states in its prosecution and the principle, to this writer paves a way to suspects to escape prosecution. This is seen from article 87 of the statute which provides when states fail to comply with a request to cooperate with the court contrary to the provisions of the statute the best the prosecutor can do is referring the mater to the

⁹ *Sudan tribune* <http://www.sudantribune.com/>, march 26,2007

¹⁰ Situation in Darfur, the Sudan prosecutor's application under article 58(7), summary international criminal court , the office of the prosecutor[*ICC_OTP_summary_darfur-200700227_en.pdf*] February 27,2007

assembly of state parties. However the measure to be taken by the assembly of state parties is not clear from the statute.

But if the court had primary jurisdiction, as there will not be a room for interpretation of situations and circumstances, the state will be under strict treaty obligation to surrender the suspect to the court. If it refuses to comply with the request of the court, the state will be under a clear breach of its treaty obligation and the pressure which will be directed against the state from other states will be stronger.

The actual reason for denying complementarity is the importance of sovereignty.¹¹ Some people argue that administering criminal justice is an expression of state sovereignty and giving primary jurisdiction to the court will be tantamount to denying a state of its sovereignty. Therefore primacy to the ICC is totally unthinkable.

However, the writer thinks otherwise as, firstly it is not unusual for states to give up some of their sovereignty. When a court of certain state dismisses a case in which some other state is a defendant because of the sovereign immunity of the defendant state, the forum state is giving up its sovereignty for the purpose of maintaining peaceful relationship with that state. Also a state police refrains to arrest and detain a suspect even after witnessing the commission of the crime, because of his or her diplomatic immunity; the state is again giving up its sovereignty. States give up their sovereignty whenever they deem it is for a better purpose. If, in this case, a state gives up its sovereignty for the purpose of creating a world order which is intolerant of human right violators, mass killers, or those accused of committing genocide, there is no harm to the state.

¹¹ Supra note 4 p. 351

After all state sovereignty is not a value by itself unless it used for the betterment of the lives of the citizens of the state.

In addition when arguing in favor of the primacy of the jurisdiction of the court, the writer is not saying that the entire criminal jurisdiction of the state should be transferred to the court and the court should replace state courts. From the multitude of crimes which are under the exclusive jurisdiction of the state, only very small number of core crimes should be under the primary, not even exclusive, jurisdiction of the ICC. Supporting this view Brown stated that,

*"If states insist upon the totality of their sovereign prerogative no effective international criminal jurisdictions can be created."*¹²

Hence what has to be taken in to consideration is the value at stake; which is a human life. Criminals must not shield in the veils of sovereignty. The other reason on the part of states for denying primacy as stated by Cassese is the fear that the court will be flooded with cases. According to Cassese, the court having a limited number of judges and financial resources and infrastructure, would be unable to cope with a broad range of cases.¹³ But it is the belief of this writer that strengthening the court with infrastructure will solve this problem. It will require only devotion on the part of the international community towards the effectiveness of the court.

The other reason for supporting primacy is that, possibility of impartiality on the part of the national courts to conduct prosecution in fair manner. It has to be recalled that criminal prosecutions should be conducted by an impartial and independent judge. How impartial are national courts in prosecuting? This problem is manifested particularly when the accused and the judge who is trying the case have different ethnic or political background. The judge may be the member of the ethnic group who is the

¹² Supra at note 6

¹³ Supra at note 4 p. 351

victim of the acts by the perpetrators. It is the fear of this writer as it was the fear of many during the prosecution in the *ad hoc* tribunals that proceedings by national courts will not be conducted in fair manner.

To summarize, even if the principle of complementarity is said to be the bridge that carries ICC, these writer believes that this principle may be a challenge to prosecution by the court. Next, as referred above the situation of Sudan will be discussed.

The Situation of Darfur

As mentioned above, the court is currently conducting prosecution in the Darfur region of Sudan. It was stated that the conflict in Darfur, took the lives of more than two hundred thousand people and more than two millions displaced. The Security Council, in resolution 1593, decided to refer the matter to the court's prosecutor in accordance with its article 13(2) power of the statute and in accordance with article 39 of the UN charter for the maintenance of international peace and security.¹⁴

The council first passed resolution (1569, 2004) requesting the secretary General Coffi Anan to establish a commission.¹⁵ He then appointed five members body whose task should be 'to investigate reports of violations of International Law and human rights law in Darfur by all parties to determine also whether or not acts of genocide have occurred and to identify the perpetrators of such violations' with a view to ensuring that those responsible be held accountable. ¹⁶

The commissions mandate is to investigate reports of such violations rather than investigating alleged violations as such committed by all

¹⁴ Hans-peter kaul, Construction Site for More Justice; The International Criminal Court After Two Years, *The American Journal of International Law*, (vol.99.No.2,2005), 380

¹⁵ Report of the Commission of Inquiry on Darfur to the UN Secretary General, pursuant to the security council resolution,1504 of 18 sept.;2004

¹⁶ Ibid

parties.¹⁷ The commission's report revealed that the governments of Sudan and Janjaweed militia are responsible for a number of violations of international human rights law which are very much akin to war crimes and crimes against humanity.¹⁸ In particular the report stated that government officials and militias under their control to mention attacked civilians and destroyed and burned down houses and villages in Darfur. The commission finally submits its report to the Secretary General of UN on January 25, 2005. On March 31, 2005, The Security council decided in resolution 1593 to refer the situation in Darfur since July 1, 2002, to the prosecutor of ICC.

After the situation is referred, the prosecutor has been conducting investigations. In its third report of, june2006, to the Security Council, the office of the prosecutor stated that it has conducted over 40 missions to more than 13 countries, collected evidence and interviewed witnesses.¹⁹ The report revealed that the crimes committed include 'large scale massacres, with hundreds of victims in each incident in addition to hundreds of alleged cases of rape'. It further stated 'in addition to the direct killings there is a significant amount of information indicating that thousands of civilians have died since 2003 as a consequence of the conditions of life resulting from the conflict and ensuing displacement.'²⁰

Sudan has been alleging that it has devised various mechanisms including "the Darfur special court established in June 5, 2005, the two additional courts created in November 2005, national commission of inquiry, committees against rape and special and specialized courts of 2001and 2003respectively".²¹ The report then after carefully reviewing their activities determined that these institutions and courts are not

¹⁷ Ibid

¹⁸ Ibid

¹⁹ Third report of the office of the prosecutor of the international criminal court to the UN security council, pursuant to the UNSCR(1593), 14 June 2006

²⁰ ibid

²¹ Ibid

investigating the indicted for the crimes that fall under the jurisdiction of ICC.²² For instance, although, the government of Sudan announced that 160 suspects had been identified for investigations and prosecutions for war crimes and crimes against humanity the first Darfur special court conducted 6 trials of less than 13 suspects.²³ The cases include 4 incidents of armed robbery, 1 incident of receipt of stolen goods, 2 cases of possession of fire arms without a license, 1 case of intentional wounding, 2 cases of murder, and 1 case of rape'.²⁴ [The third report of the office of the prosecutorto the security coumcil is found in annex one].

On Feb. 27th, 2007 ICC chief prosecutor announced that his office had filed an application naming two individuals and requested the pretrial chamber to issue arrest warrants or summonses to appear.²⁵ In the application, the prosecution stated that "The prosecution has concluded there are reasonable grounds to believe that Ahmed mehamed Harun, former minister of state for the interior government of the Sudan and Ali Mehammed Ali Abd-Al-Rehman (better known in West Darfur as Ali Kushayb), a militia, Janjaweed leader, bear criminal responsibility in relation to 51 counts of alleged crimes against humanity and war crimes, including persecution, torture, murder and rape committed in Darfur in 2003 and 2004".²⁶

The writer has attached in annex two, the summary of the application for full understanding of the intensity of the crimes for which these two persons are accused, the admissibility and related issues.

Sudanese government officials, however, rejected the application, contending that, ICC in The Hague has no jurisdiction over its nationals.

²² Ibid

²³ Ibid

²⁴ Ibid

²⁵ Sudan tribune <http://www.sudantribune.com/>, march 26,2007

²⁶ Supra at note 15

The president of Sudan was heard, stating 'the Sudanese judiciary is honest and qualified to try any Sudanese who committed crimes against humanity'.²⁷ On March 6, 2007 Sudan announced that, it will try three Sudanese on charges of crimes relating to Darfur crisis.²⁸

The prosecutor, however, opposed Sudanese assertion that it would try three Sudanese including Alikushayb, stating that 'The investigations being carried out by the relevant authorities do not cover the same persons and the same conduct which are the subjects of prosecutor's case'. The application further stated, 'although investigations in the Sudan do involve Ali Kushayb, they are not in respect of the same incidents and they encompass a significant narrower range of conduct'.²⁹

Accordingly, the pretrial chamber of ICC issued, its first warrants for war crimes and crimes against humanity in Sudan's conflict for Ahmed Harun and Ali Kushayb on May 2, 2007.³⁰ The prosecutor's success will depend upon Sudanese good will to surrender those persons to the court unless the Security Council took measures. as can easily be inferred from the Darfur case and from what has been discussed up to now, it is clear that in cases where states are not supporting a given investigations or prosecutions for what ever reason, it may be difficult for the prosecutor to conduct investigations and prosecutions.

3.2. Opting out for war crimes

As pointed out in the previous chapter, the court will have jurisdiction over war crimes, crimes against humanity, the crime of genocide, and the crime of aggression. It was also stated that the court will be able to

²⁷ Supra at note 25

²⁸ Ibid

²⁹ Supra at note 10

³⁰ Sudan tribune <http://www.sudantribune.com/>, may2,2007

exercise its jurisdiction over the crime of aggression only after it is defined. But surprisingly the statute comes up with an opt-out close for war crimes. It is provided in article 124 of the Rome treaty which is also known as an opt-out clause or the transitional provision. It reads;

“Notwithstanding article 12, paragraph 1 and 2, a state, on becoming a party to this statute for a period of seven years after the entry in to force of this statute for the state concerned, it does not accept the jurisdiction of the court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or in its territory. A declaration under this article may be withdrawn at any time. The provisions of this article shall be reviewed at the review conference convened in accordance with article 123, paragraph 1”.

As per this article therefore, a national of a state which has opted out for war crimes, may not be subject to the courts' jurisdiction for a period of seven years. There is no doubt that this provision will limit the court's jurisdiction. Many states and human rights organizations have also been opposing this provision starting from its adoption. As one Human Rights Watch representative stated, “this provision sends a message to potential war criminals you have got six-and-a-half years to do the job”.³¹

This provision would, pave a way for a suspects who commit war crimes in the territory of a state party which has opted out for war crimes to escape justice. It is highly likely that this suspect will enjoy immunity from prosecution. The situation is even worse when the national of a state who has opted out for war crimes has committed war crimes on the territory of a state party. In such a case both states, that is, the territorial state and state of nationality can exercise jurisdiction by virtue of article 12(2). The question then that would come to one's mind is, will the decision of the national of state to opt-out for war crimes, bars, territorial

³¹ Melissa k. Marler, The International Criminal Court; Assessing Jurisdictional Loopholes in the Rome statute, *Duke Law Journal*, (vol.49, No.3, 1999)

state from exercising jurisdiction? The statute does not provide for such a scenario. However, the provision under consideration stated that; a state can declare that it does not accept the jurisdiction of the court with respect to war crimes when it is alleged to have been committed by its nationals or in its territory. The provision could be interpreted to mean that the state that has opted out may prevent the ICC from exercising jurisdiction in all cases in which the crime is alleged to have been committed by one of its nationals or on territory. But such an interpretation is not a warranted one, as doing so would allow the state that has opted -out to interfere with the obligations of another state under the statute.

Where the crime is committed on the territory of a non member state, by national of member state that has opted out, the prosecution of such person does not even come into picture. In fact, one may argue that, Security Council may react or that non-member states may exercise universal jurisdiction. But, this is also highly improbable for one thing, as said earlier, Security Council may react only in limited circumstances and states are not under obligation to exercise their universal jurisdiction.

To conclude, an opt-out provision for war crimes will weaken the prosecution by the court. This provision; will in fact have a negative impact on the future success of the court as it opens doors to the perpetrators to escape justice.

3.3 State cooperation

3.3.1 Introductory remarks

International criminal prosecution embrace, the gathering of evidence, the questioning of witnesses, the arrest and surrender of suspects and so on. To do this, all international criminal tribunals, including the ICC, heavily rely upon the cooperation of states to conduct such activities as they do not have their own police or military force and/or enforcement

mechanisms. The cooperation is needed either from a state on whose territory the crime is committed, from a state on whose territory the suspect or witnesses located or evidences found. That is why state cooperation is said to be one of the crucial preconditions for the effective investigation and prosecution of international crimes. Without securing the cooperation of states, the ICC is simply a lion with out teeth. To that end, the Rome treaty enshrines in article 86 the general obligation of states to cooperate fully with the court in its investigations and prosecution. This provision reads 'state parties shall, in accordance the provisions of this statute, cooperate fully with the court with its investigations and prosecutions of crimes with in the jurisdiction of the court.'

There were controversies among delegations as to what kind of cooperation should the court seek from member states. That is, should there exists an 'unequivocal' legal obligation on the part of states to comply with the requests from the ICC or whether the state concerned would decide on how it wished to respond to the courts request? ³² In other words, the issue was whether, the statute should provide cooperation as a matter of legal obligation that the court can rely upon or whether it should have been left to individual states to determine the level of cooperation. There was also a controversy as to should the statute provide obligation to cooperate or to comply with requests from the court.

Finally, the statute has come up with, a general obligation to cooperate with the court in article 86, and more specifically, requires member states to comply with its request in arrest and surrender of suspects and other forms of cooperation. To that end, the Rome treaty enshrines in

³² Roy S, Lee (ed) *The International Criminal Court; The Making of the Rome statute; Issues, Negotiations, Results* (1999),p. 1

article 86 the general obligation of states to cooperate fully with the court in its investigations and prosecution. This provision reads:

“State parties shall, in accordance the provisions of this statute, cooperate fully with the court with its investigations and prosecutions of crimes with in the jurisdiction of the court.”³³

As to state parties, the statute provides only a general obligation to cooperate. Cooperation in the ICC scheme is not binding one, except in cases of Security Council referral. The effect of failure to comply with requests from the court is not clear. The relevant provisions of the statute in relation to the mater at hand states that:

“where a state party fails to comply with a request to cooperate by the court contrary to the provisions of this statute, there by preventing the court from exercising its functions and powers under this statute, the court may make a finding to that effect and refer the mater to the Assembly of State Parties or where the Security Council referred the mater to the court, to the Security Council”.³⁴

But the statute is silent as to the measures to be taken by the assembly of state parties. In fact, the provision which lists the task of the assembly of state parties states that the assembly of state parties will consider any question relating to non cooperation.³⁵The effect of such consideration however, is not provided in the statute.

The Rome treaty also devised a mechanism of securing cooperation from states not party to it. For this purpose, article 87(5) provides that ‘the court may invite any state not party to this statute to provide assistance under this part on the basis of an ad hoc arrangement, an arrangement with such state or any other appropriate basis’. It is true that by virtue of general treaty law principles treaties can only bind contracting parties.

³³ Art. 86(the Rome statute)

³⁴ Id, Art. 87(7)

³⁵ Id , Art.112(2)(f)

This is stated in article 34 of the *Vienna convention* on the Law of treaties, adopted on 23 may,1969, which provides a treaty does not create either obligations or rights for a third state with out its consent.³⁶ It is based on this that article 87 comes up with the statement "*the court may invite any state party....*"other wise non-member states are not duty bound to comply with requests from the court for cooperation unless we resort to the obligation of these states to respect and ensure respect for international humanitarian law which is derived from the Vienna conventions.

In relation to international cooperation, a distinction was made by the ICTY'S appeals chamber in the *Blaskic subpoenas decision*, between two models of cooperation; the horizontal and vertical models of cooperation.³⁷ The chamber distinguishes between relation of the national court of different states which in its view is horizontal in nature from the vertical relationship between sovereign states and ICTY. Here I will try to explain these models at some length. By virtue of the horizontal model the relation between states and the international court are shaped on the interstate judicial cooperation in criminal matters.³⁸ According to one writer;

*"The horizontal model assumes the legal assistance between states takes place based the idea that states as entities are equal and that legal communications and assistance in criminal cases are consensus based."*³⁹

As per this model legal proceedings such as rendition of peoples or providing evidence from one state to another can be performed only after

³⁶ Zhu Wenqi, On Cooperation by sates not party to the International Criminal Court , *International Review of the Red Cross*, (vol. 88No.861,2006),p.89

³⁷ Herman A. M. von Hebel John c.lammers, Jolien schukking , *Reflections On International Criminal Court*(1999),P. 97

³⁸ Geert-jan Alexander knoops and Robert R. Amsterdam ,the Duality of State Cooperation With International Criminal Cases , *Fordham International Law Journal*, (vol. 30, 2007) p.261

³⁹ *ibid*

consent of states. Another writer in the field states in relation to Interstate judicial cooperation;

*"If such model is applied to international courts, it follows that the court has no superior authority over states except for the legal power to adjudicate crimes perpetrated by individuals subject to sovereignty. Other wise, the international court can not in any way force states to lend their cooperation, let alone exercise coercive powers with in the territories of sovereign states."*⁴⁰

The vertical model on the other hand deviates from the interstate judicial cooperation in which, the international court is vested with the power to issue binding orders to states. Accordingly, this model assumes that international tribunals have a supra national position authorizing them to force states to cooperate.⁴¹ The vertical model does not embrace any ground to refuse to cooperate, like refusal on the basis of defense of national security and immunities, in contrast, these grounds do have a place in the horizontal model of cooperation.⁴² International tribunals, thus, have the power to issue binding orders against states even when this is against consideration of state sovereignty.⁴³ While cooperation is not mandatory in the horizontal model, there is an absolute obligation to cooperate with the court in the vertical model.

The UN *ad hoc* tribunals (ICTY) and (ICTR) are designed in the vertical model of cooperation, which can be inferred from article 29 of the ICTY. This article imposes upon all states, a general duty to comply with the requests of cooperation from the tribunal .These tribunals adopted this model because, they are created by the UN security council and the security councils decisions are binding on all states.

⁴⁰ Id p. 262

⁴¹ ibid

⁴² Supra at note 37 p. 97

⁴³ Supra at note 4 p. 356

The reading of the provisions of the statute of the ICC in relation to state cooperation reveals that the statute more or less inclined to the horizontal model. For instance, by virtue of article 89(1) which states "the court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 91, to any state on the territory of which that person may be found and shall request the cooperation of that state in the arrest and surrender of such person. State parties shall, in accordance with the provisions of this part and the procedure under their national law, comply with requests for arrest and surrender." Hence, the statute demands states to comply with the courts' request for arrest and surrender of suspects only in accordance with the national procedure law of states, which means, this is drawn in line with the horizontal model. On the other hand, as some writers stated, one can see the features of the vertical model in articles 88 and 99(4). This is because article 88 of the statute for instance demands the state parties to ensure that national procedures are available for all forms of cooperation specified in part 9 of the statute article 99(4) on the other hand endows the prosecutor with the power to conduct on site investigations in the territories of state parties.

Thus, accordingly they say ".....the delegations in Rome have struck a compromise between the familiar models of the ad hoc tribunals, in other words, between national sovereignty and international solidarity".⁴⁴ Nevertheless, effort will be made to assess, provision reflecting each model when the relevant provisions are discussed later.

This work in this section will try to assess whether or not the statute is drawn in a way that will enable the prosecutor secure necessary cooperation from states so that effective prosecution be conducted and make international criminals accountable.

⁴⁴ Supra at note 37p.100

Coming back to what is raised earlier the general readings of the statute leads us to the assertion that the cooperation mechanism employed by the drafters of the statute of ICC is too loose to oblige states to comply with its requests. For instance, mention has been made in previous discussion that the ICC is founded upon the principle of complementarity. It is clear that this principle applies not only to jurisdictional issues but also to all aspects of the relationship between the ICC and national courts, including judicial assistance, extradition and other forms of state cooperation. It was also stated that, the court will step in when states are unable or unwilling to investigate or prosecute a situation in their countries by virtue of the same principle. It therefore means that, it is on the territory of such unwilling or unable states that investigations or prosecutions will be conducted.

But how can one expect a state which is especially unwilling to investigate or prosecute and on whose territory investigation by the court is being undertaken, to cooperate fully with the court? Here, as one can easily understand, it is difficult if not impossible, to get the needed cooperation from, that same state, which is unwilling, to provide the court with its full cooperation. It is highly unlikely that, such state will be found willing to cooperate with the court, if not help the suspect in shielding him or hiding documents.

What is more, this principle brought another problem. In accordance with articles 18 and 19, a duty is imposed upon the prosecutor to inform all member states and non-member states that would normally exercise jurisdiction, of the fact that a situation has been referred to the court by a state party or that investigation has been initiated by the prosecutor ex-officio. This would allow the state concerned to challenge the prosecution based on admissibility test. But pending a ruling by the pretrial chamber, article 18(6) allow the prosecutor to pursue necessary investigative steps for the purpose of preserving evidence, where there is

a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available. This provision is there to address concerns that a lengthy challenge appeal process could be used by states to frustrate and block an investigation by the prosecutor.

However, the prosecutor will conduct investigations and gather such evidence only if he will be able to get cooperation from states. The question then is, are states under full obligation to comply with such requests from states? But as stated above, the cooperation model adopted is that of inter state or horizontal one in which cooperation is based on the good will of states. This would hamper effective prosecution and is of course a considerable challenge of prosecution. Nonetheless, the writer would like to make further discussion in a more detailed manner in selected refusal grounds from cooperation below so as to make the point more clear. These are dependence on national law of states for arrest and detention of suspects, and the defense of national security, and how the statute tried to solve competing requests. These are selected because the writer believes that these are more crucial issues in relation to cooperation. But it does not mean that other provisions dealing with cooperation are irrelevant.

3.3.2 Dependence on National Law of States for the

Arrest and surrender of suspects

While conducting investigations, if the prosecutor thinks that the arrest and surrender of suspects is necessary, he/she can request the pre-trial chamber to effect that. The chamber then, will issue a warrant of arrest of a person after determining whether or not there are reasonable grounds to believe that the arrest and surrender of such suspect is necessary in accordance with article 58 of the statute. To that the statute

demand states that have received a request for the arrest or surrender to take steps to give effect to such requests. Accordingly, article 89, obliges states to cooperate with the arrest and surrender of such person. This provision states that;

“the court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 91, to any state on the territory of which that person may be found and shall request the cooperation of that state in the arrest and surrender of such a person. State parties shall, in accordance with the provisions of this part and the procedures under their national law, comply with request for arrest and surrender.”

It is not difficult to criticize article 89 as it does not set the level of cooperation required of states. States are required to cooperate with such requests only in accordance with their national procedural laws. It is clear that states have different procedural laws. The variation of procedural laws even exists in countries of the same legal system, let alone in different legal systems. According to one writer,

*“....the requirement that arrest and surrender process be made in accordance with requested states national law is rather impractical requirement since there is a considerable variation among states in the evidentiary standards they apply in the field of extradition.”*⁴⁵

The standard set by one state may be too loose and thus will affect suspect's human rights; where as that others' will be too strict and paves the way for the suspect to escape justice. The dependence on national procedural laws for the arrest and surrender of a suspect may also be used by states to guard the suspect from prosecution to say the least.

The statute should have set its own minimum standards and avoid such inconveniences. Of course one may argue that to follow the standards set by the statute and derogate from its national law would be an

⁴⁵ Id at p. 108

infringement of sovereignty. But what has to be considered here is the crimes that were and are committed are international crimes that are most heinous for the conscience of humanity. State Sovereignty should not be used as a safe haven for the criminals who are threats to the international peace and security. It has to be recalled that all states are under international obligation to ensure that the world security be preserved and the suffering of human beings ended.

What should be emphasized also here is that, the arrest and surrender of suspects will be ordered only after the pretrial chamber determines there are reasonable grounds to believe that he/she has committed the crime in question , or to ensure his/her presence at trial and soon. Then it is not clear why the statute leave for states to cooperate with the court to the extent their national procedural law allows them to do so. It is a substantial challenge to the court considering that there is no trial in absentia in the statute.

In relation to the surrender of suspects, the statute tried to solve competing requests by the court and state party or non-state party with regard to the same person and the same conduct from a state party on whose territory the accused is found. When the request emanates from the state party, by virtue of article 90(2) cum (3) the court's request will get priority if the court has determined that the case is admissible or if the court makes such determination after having been notified by the requesting state of the fact that another state has requested the extradition of that suspect. The requested state will proceed to deal with extradition although it can not extradite him until the determination is made.

Reasons for concern lie in cases when the request emanates from a non state party. The requested state will give priority to the court's request only if it is not under an international obligation to extradite the person

to the requesting state and also if the case is admissible. Accordingly, the statute provides that,

“if the requesting state is a state not party to the statute the requested state, if it is not under an international obligation to extradite the person to the requesting state, shall give priority to the request for surrender from the court, if the court has determined that case is admissible”.⁴⁶

Even when the requested state is not under an international obligation, article 90(6), gives it the discretion to prioritize the request from the court or the requesting state based on the respective dates of requests, the interest the requesting state including whether or not the crime is alleged to have been committed in the requesting states territory and nationality of the victims and persons sought.

The statute failed to oblige states to prioritize to requests of the court, at least in cases where that state has no legal obligation to extradite, let alone in cases where states are under treaty obligation with non-member states. On the surrendering of suspects much discretion is given to requested states. It is not clear why the statute in such crucial issue adopts the horizontal model and leaves the choice to states.

3.3.3 The Defense of National Security

The statute allows states, not to cooperate with the court in the production of some documents where such requests touch upon matters of national security. This is gathered from article 93(4) of the statute which states that

“In accordance with article 72, a state party may deny a request for assistance, in whole or in part, only if the request concerns the

⁴⁶ Art. 90(4), Rome statute

production of any document or disclosure of evidence which relates to its national security.”

In fact, it is an indisputable fact that, states have legitimate security interest in their interaction with the international community. It would be unreasonable and indeed irresponsible for an international court to be blind to interests and states such as the protection of national security. The issue of national security come to the for front when war crimes and the crime genocide are committed as this groups of crimes are related in one way or the other with states military activities.

But, the statute relies upon the cooperation of states for the production of such documents, which perhaps, help in proving the guilt or innocence of the accused. Here, it is good to see the ICTY appeals chamber decision in the *Blaskic case* which, stress the fact that

*“Military documents or other evidentiary material connected with military operation may be of crucial importance to prove or disprove the alleged culpability of an accused particularly where command responsibility is involved’. ‘to admit that a state holding such documents may unilaterally assert national security claims and refuse to produce those documents could lead to the stultification of international criminal proceeding ; those documents might prove crucial for deciding whether the accused ~~is~~ innocent ~~is~~ or guilty . The raison d’être of the international tribunal would be undermined.”*⁴⁷

It can also be inferred from article 93(4) that; the type of cooperation adopted in the statute of ICC is that of horizontal model of cooperation, which allows states to refuse cooperation, unlike that of ICTY.

To wind up our discussions the provisions dealing with state cooperation are drafted in a less mandatory manner that will encourage the continuance of the culture of impunity. In the existing situation, it is not

⁴⁷ Supra at note 38, p. 119

impossible for the author of genocide or a war criminal to escape responsibility due to the refusal to cooperate by states on the defense of national security. What is more astonishing, however, is the measure to be taken against a non cooperating state on such grounds. As stated earlier, as per article 87(7) the court may refer the matter to the assembly of state parties or if it is a Security Council referral to the Security Council. But the statute is silent as to what measures will the assembly of state parties take against such states.

3.4 Deferral by the Security Council

In the previous chapter I have discussed the power of the Security Council to refer situations to the court. But we found a counter part provision in article 16 of the statute which reads, ✓

“no investigations or prosecutions may be commenced or proceeded with under this statute for a period of 12 months after the security council, in a resolution adopted under chapter vii of the charter of the united nations, has requested the court to that effect; that request may be renewed by the council under the same conditions.”

Thus; the statute empowers the Security Council to request the prosecutor not to commence or proceed with investigations or prosecutions for a period of 12 months. The writer admits that this provision is included by taking in to account situations where the Security Council conducts peace talks with an endeavor to maintain international peace and security. When it so happens, the intervention of the court by way of conducting investigation for the purpose of prosecution may have an off-putting effect on the peace talk as the party to the peace talk will be unenthusiastic to continue taking part in the peace negotiation, having known that a criminal investigation is being conducted against him by the court.

Yet, the writer foresees two quandaries with regard to this provision. Firstly the provision gives unlimited power of deferral of investigation to the Security Council. That is, the Security Council has the power to demand the deferral of the investigation for a twelve month and request the renewal of the same for as long as the council sees it fit. This power of the Security Council may, the writer fears, give a perpetual opportunity of evading justice to the suspects, even as the case may be, without any fruitful progress in the peace talk.

The other difficulty that this deferral power of the Security Council generates is that, as it is well known the Security Council is a political organ which decides international issues in a political fashion. As a political organ, all member states of the Council do not have equal say in the Council. The weight of the opinion of a member state in the Council is measured not in light of its legal validity rather in light of the political and economic strength of the state which makes the opinion. Because the doctrine of one state –one vote principle does not, in the strict sense of the doctrine, work in the Security Council, states like USA, Britain, China and Russia exert great influence on and fashion the decision of the Council in their interest.⁴⁸ Being cognizant of this fact, the next question is what if the suspect against whom the court intends to conduct criminal investigation is a national of one of these states or a person whom one of these states desires to protect from the court? One can safely argue that by invoking the deferral power of the Security Council and by getting the renewal of the deferral every time it expires, they will make sure that the intended investigation of the court is not conducted.

As ICC came in to being on July 1, 2002, ratified by 90 nations, the US took many steps to enfeeble it complaining that the new court would subject US nationals to a politically motivated prosecution and it insisted that the Security Council should adopt a resolution exempting all UN

⁴⁸ M.N. Shaw, *International Law*, (2003), p. 1084

peace keeping missions from the jurisdiction of the court or at least each renewal of peace keeping operation would include an exemption clause.⁴⁹ When members of the Security Council attempted to deny US' request, the US threatened to use its veto power against any UN peace keeping operation.⁵⁰ Under such threat, the Security Council was forced to adopt Resolution 1422 in July 2002 granting the US a twelve months blanket immunity from the court.⁵¹ And this resolution was renewed twice after that.

From this one can easily understand how the deferral power of the Security Council can be misused for unintended and unwarranted purpose. Therefore the writer argues that the deferral power the Security Council, though it is important, there should be some kind of limitation to it. Giving unfettered power to the council to renew its deferral will be a great challenge, sometimes insuperable, to the court in its combat against impunity to the perpetrators of the most outrageous and flagrant crimes.

3.5 Challenges emanating from non- member states to the ICC

3.5.1 General overview

So far mention has been made on how the complementary principle is a challenge to prosecution in the ICC. It was also discussed that, the provisions dealing with state cooperation are too weak to have a binding effect on states that are not willing to cooperate with the court in its proceedings. In relation to the court's jurisdiction, the effect of opt- out clause for war crimes were raised. The above discussed challenges are challenges that arise from the provisions of the statute. Yet, the court is

⁴⁹ United States and the International Criminal Court
<http://en.wikipedia.org/wiki/United_States_and_the_International_Criminal_Court>

⁵⁰ *ibid*

⁵¹ *ibid*

also surrounded by challenges emanating from external circumstances or existing international relations between the court and the international community. Among these the challenges the court is facing from non-member states is a significant one. Accordingly, in this sub section the response of non-member states to the court, their reasons for their non-membership and the effect of their non- membership will be discussed.

The Court heavily relies upon the support of all states but especially on those powerful and influential states like USA, China, and Russia because these countries have economic and political dominance. However, these countries have not yet ratified the treaty. In fact these states had played a great role in the making of the ICC long ago. USA, for instance, had participated actively in the UN diplomatic conference of plenipotentiaries in Rome.⁵² It helped lead the successful effort to ensure that the ICC's jurisdiction over crimes against humanity included acts in internal armed conflicts and acts in the absence of internal armed conflict. It has also successfully argued the definition of war crimes to include, crimes committed during internal armed conflicts last but not least, articles 18 and 19 of the treaty are results of U.S delegation during negotiation.⁵³ USA even signed the Rome statute, in the Clinton administration, although, it has officially withdrawn its signature by the Bush administration. Also, it has to be recalled that, USA has been praised for its contribution to the creation of ICTY. If that is the case, then what makes these states refrain from joining the court which they have struggled for?

The fundamental concern of the USA was the unfettered power of the court to act with out any oversight by the United Nations Security Council.⁵⁴ The prosecutor is able to initiate prosecution and issue

⁵² David s. Scheffer, The United States and the International Criminal Court (*The American Journal of international law*, (vol.93, No.1, 1999), p.18

⁵³ Ibid

⁵⁴ Supra at note 34 p.632-633

indictment by using his ex officio power. This power of the prosecutor, America argues, can undermine the work of the Security Council which is charged with maintenance of international peace and security and disturb peace and reconciliation processes.⁵⁵

USA also highly criticized the court, for concerns of the court's power to prosecute non – party nationals for crimes committed on the territory of member states. According to the U.S government, this will expose U.S military service members or peace keeping forces for frivolous and politicized prosecutions.

*“The irony of the statute on article 12 was that it left open the potential situations like its peace keeping mission, may by mistake shot civilians being used as human shields or may hit hospitals, and hence, these Americans are highly exposed to prosecution by the court as article 12 allows the court to exercise its jurisdiction over nationals of non-member states”.*⁵⁶

Other fundamental concern of the U.S government is the undefined crime of aggression among others.⁵⁷ This concern of the state seems to spring from its engagement in war in different part of the world with the pretext of self defense freeing people from dictators and disseminating democracy to the rest of the world. The country is concerned that in absence of a precise definition of the crime of aggression, this venture of the state will be confused with aggression.

China on the other hand, opposes the *proprio motu* power of the prosecutor fearing that s/he will influence or interfere with the judicial sovereignty of states in addition to its concerns about article 12 as citizens of non members will be subjected to ICC prosecutions.⁵⁸ It also criticized the court for the inclusion of domestic armed conflict under the

⁵⁵ ibid

⁵⁶ Ibid

⁵⁷ Ibid

⁵⁸ Id.p.582-583

court's jurisdiction with in the definition of war crimes.⁵⁹ India on the other hand opposed the court for its failure to include international terrorism in the crimes covered in the statute.⁶⁰

Their non-membership by itself will be a substantial challenge to the future success of the court. The experiences they have accumulated from their participation in these ad hoc tribunals and in the ICJ could have been a huge asset to the court. In addition, they have many learnt international jurists. If they were members to the court, their jurists would have been a great help by participating at different level in the court, for example as judges and prosecutors. Besides, their membership could have given the court credibility and acceptance by other states. Even if I do not suppose that the non membership of the USA and the other prominent states will bring the demise of the court as it brought the downfall of the League of Nations, I believe that their non membership is a great loss to the court.

What is more, the court will get its fund from the contribution made by states and other international organizations all expenses of the court including expenses for investigation of crimes, for administrative purpose and other expenses are covered by the contribution of the member states.⁶¹ Then, the writer feels that the non member ship of these states is an enormous challenge to the court.

3.5.2 USA's opposition to the ICC

Above, we have seen the effect of non membership of powerful countries on the credibility and acceptance of the court. As said earlier USA is not party to the Rome treaty. USA, however, did not simply sit by not ratifying the statute of ICC. USA is working hard on all directions to

⁵⁹ Ibid

⁶⁰ Ibid

⁶¹ Art.115 of the Rome statute

weaken the world court, which is there to prosecute the actors of crimes against humanity, war crimes and the crime of genocide. Even more the US government is legislating laws that will have effects of protecting its citizens who have committed these egregious crimes, from prosecution.

American service members' protections act (ASPA), are one of the country's actions to under mine the court and becomes a law on August 2, 2002.⁶² According to section 2004 of this act all forms of cooperation including responding to a request for cooperation, transmittal of letters rogatory from the ICC, extradition, use of appropriated funds to assist the court by agency, entity, local government and even by courts of the USA is absolutely prohibited. Section 2007 of ASPA for example, prohibits U.S military assistance to countries that join the court, but that do not sign impunity agreement, also known as Article 98 agreement with the U.S to send any American sought by the court.

More surprisingly, ASPA under section 2008 also empowers the U.S president to use all means necessary and appropriate to free any American detained by ICC. This is also known as "The Hague invasion act" as it envisages the use of military power in the court's head quarters where suspects being detained, in The Hague.

USA, is also signing bilateral impunity agreements with many states. This agreement prohibits the surrender to the ICC of US military personnel, employees and nationals including of course, the current and former government officials.⁶³ In fact it has succeeded in entering with impunity agreement with around 100 states by June 2005. To force states sign the impunity agreement with it, USA adopted legislations requiring the suspension of military assistance and economic support fund (ESF)

⁶² American Service Members Protection act ,*The American Journal of international law*, (vol.96, No. 4, 2002)

⁶³ Supra note 48

to those states that do not ratify the agreement.⁶⁴ In the year 2003 it stopped military aid to 35 countries. Many international organizations including Amnesty International, Human Rights Watch and European Court of Human Rights, claimed that the impunity agreements are inconsistent with the spirit and purpose of article 98(2) of the Rome statute. This article provides ICC may not proceed with request for surrender that would require the requested state to act inconsistently with its obligations under international agreements. Hence, they say, as article 98 is normally used in international law to refer to status of forces agreement (SOFA), mission agreements and extradition treaties this provision should not create a general exclusion for other states nationals from being handed over to ICC.⁶⁵

But, are USA's activities to undermine the court in line with its obligation under international law? USA strongly opposed article 12 of the statute claiming that this provision will make the nationals of member states to be prosecuted by the court and thus is an invasion of sovereignty. But, is jurisdiction of ICC over non-party nationals an invasion of sovereignty or democracy as the government claims? To this writer, quite the contrary is true. Article 12, helps countries to defend their sovereignty against atrocities committed by foreigners in their soil and there by enable prosecuting states to fulfill the observance and dominance of democracy and in the furtherance of the rule of law by prosecuting such criminals who would have enjoyed immunity from prosecution by the non membership of their national states.

3.6 Peace vs. Justice

The world is full of chaos, and disorders, due to man made and natural disasters. The main source for such disturbances, however, is internal armed conflicts between central government and rebel groups here and

⁶⁴ *ibid*

⁶⁵ *Ibid*

there. During such conflicts various forms of crimes may be committed by either force on innocent civilians. The effect of these is unimaginable. Many will be displaced, killed and the political stability of that state will be in question. What is more the international peace and security will be disturbed. It is natural for that state then that to find mechanisms to put an end to the conflict. One of the ways for stopping it is to start peace talks with the very leaders of who are responsible for such egregious crimes.

The peace talks involve among other things the granting of amnesties from prosecution by either national courts or international tribunals. The underlining principle behind amnesties is to forget and forgive. Amnesties will be given because 'insisting on criminal prosecution can prolong the conflict, resulting in more death, destruction and human suffering.'⁶⁶ Reflecting this reality, during the past several years, a number of states have granted amnesties to the leaders of rebel groups who have been accused of conducting gross human right violations. Mention can be made of sera Leon's situation .In the internal conflict in sera Leon in the 1990's, rebel groups known as RUF were accused of killing an estimated six thousand civilians and mutilating many more. However the famous leader of RUF, Foday Sankoh was given the position of vice presidency in accordance with the agreement made to stop the conflict in the country.

Yet, there arises the interest of victims of the criminal acts of those perpetrators. Here two incompatible interests come to the picture, the need to restore peace by granting amnesties on the one hand and the victims' interest for justice on the other hand. According to one writer,

⁶⁶ Michael p. Scharf; The Amnesty Exception to the Jurisdiction of International Criminal Court, *Cornell international law journal* , (1999)

'For an emerging democracy as in a society in transition from conflict the choice between amnesty and punishment is not an easy one'.⁶⁷

This is because, saying that the suspect must not go unpunished would mean, letting the violence continue at the cost lives of many as the rebels will not cease fire unless they are given amnesties .Giving amnesties on the contrary, would mean denying justice to the victims and future grievance. It will also defeat the very purpose of international criminal law which is discouraging future human right abuses, and the commission of international crimes in the future. As professor Cassese once stated

*"It is doubtful that amnesty would heal open wounds. Particularly when very serious crimes have been committed involving ethnic, religious or political groupsPsychological wounds may fester if attempts are made to sweep past horrors under the carpet. Resentment and hate are temporarily suppressed; sooner or later, however, they resurface and spawn greater violence and crime."*⁶⁸

Of course justice embraces not only prosecution but also the restoration of peace.

The object of this section, however, is not to suggest an answer to the question 'which one should be preferred'? It is to show the writer's fear that amnesties given to international criminals have been and are challenges of prosecution be it in national courts or in international stages. More recently, Uganda started peace talks with the leaders of LRA to lay arms and stop the conflict which lasts more than twenty years, given they be given amnesty from prosecution by the ICC. It has to be recalled here that the prosecutor of the ICC has issued arrest warrants for five LRA leaders and that is why Kony the rebels' leader refused to

⁶⁷ Andreas O'shea, *Amnesty for crime in International Law and Practice*,(2002)p.5

⁶⁸ Supra at note 4, p. 313

negotiate with the government of Uganda unless ICC drops its arrest warrants.

When we come to the statute of ICC, although the preamble of the statute seems to reject amnesties it does not in fact prohibit amnesties. This is inferred from the readings of articles 16 and 53 of the statute. While article 53 allows the prosecutor not to initiate investigations and prosecutions, when he/she thinks that there are reasonable grounds to believe that an investigation would not serve the interest of justice, article 16 requires ICC to defer to the Security Council any proceedings commenced.

As per article 16 The security council has the legal authority to require the court to respect an amnesty if two conditions are fulfilled; that the security council has determined the existence of a threat to the peace, a breach of the peace or an act aggression under article 39 of the UN charter and that the resolution requesting the courts deferral is consistent with the purposes and principles of the United Nations with respect to the maintenance of international peace and security. We can infer from this that the court provides circumstances under which amnesties are considered even by international court. To conclude the ICC is surrounded by various problems that might the court from achieving its end.

Conclusion and recommendation

It was decided that the actors of the most egregious crimes to the conscience of humanity should be prosecuted and brought to justice. This consensus was reached after; the world had witnessed the human right atrocities in most parts of the world, starting from the devastating world wars. The stage that was preferred to prosecute and to give justice to those atrocities is the international criminal court.

International criminal court has jurisdiction over the most heinous crimes of international concern; war crimes, crimes against humanity, the crime of genocide and the crime of aggression. The court will exercise jurisdiction over the crime of aggression only after it is defined.

It was discussed that the court's jurisdiction will be triggered by, state parties, the Security Council or the prosecutor *proprio motu*. In addition to the trigger mechanisms, in order for the prosecutor to be able to initiate investigations the crimes must be committed in the territory of state parties or must be committed by national of state party or the national or territorial state must consent to the jurisdiction of the court.

However, the court is surrounded by challenges that arise either from the statute it self or from international circumstances. The main challenge the writer deems, emanates from the principle of complimentarity. ICC is created to be supplementary to national jurisdictions. Yet, it is the writer's view that the very existence of the principle creates a challenge to the court's prosecution. It puts the court in jurisdictional competition with national courts thereby create culture of impunity. Despite its short comings and problems, however, the writer suggests the court should continue as it is. This is because, not a single state will accept the court with primary jurisdiction being cognizant of the existing attitude of states toward state sovereignty. So, as 'something' is better than 'nothing'

complementarity is the choice to be made. But if the feature success of the court is needed the writer believes states should consider their attitude over and over again.

The importance of state cooperation was also raised. Yet, the statute paradoxically limits the needed level of cooperation from states as it leaves the manner of cooperation to be determined by states national procedural laws including, of course, the arrest and surrender of suspects will be determined by states procedural laws. Hence the writer's fear is that as states procedural laws differ they may not comply with the requests from the court alleging that it is not in line with their procedural laws.

Accordingly, the writer recommends that the statute should at least set some minimum universal standard of its own that might serve in cases of conflict. In addition, it was stated that the statute nowhere provides what measures the court will take against non-cooperating states rather than stating that the non compliance by states will be referred to the assembly of states. The statute, in the writers view, should specifically state the effect of non compliance in clear and stronger terms.

The court will also need cooperation from non member states to the statute. But, some powerful states have not joined the statute including USA, China, and India. It is true that the membership of these states will be a huge asset to the court. Hence, member states must exert efforts and encourage them to join the world court so that the dream of many will come true; justice be done in the world where ever the crime is committed.

In addition, it was stated the court has jurisdiction over war crimes. Surprisingly enough, however, the statute comes up with an opt-out clause to war crimes which will allow state parties to opt out for war

crimes for a period of seven years. It is clear that given the existence of internal and international armed conflicts here and there in the world, this provision would defeat the *raison d'être* of the court. This work suggests then that this provision should be excluded from the statute.

The Rome statute gives the Security Council the power to defer investigations or prosecutions that are already commenced. This power, although, is in line with the council's mandate under the UN charter, the writer suggests must not be unlimited. Otherwise the writer fears, it may be manipulated by some states.

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THIRD REPORT OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT TO THE UN SECURITY COUNCIL PURSUANT TO UNSCR 1593 (2005)

14 June 2006

INTRODUCTION

The present report is submitted by the Prosecutor of the International Criminal Court pursuant to paragraph 8 of Security Council resolution 1593 (2005) and supplements the address given by the Prosecutor on the activities undertaken to implement UNSCR 1593 (2005) since the last report to the Council on 13 December 2005.

In adopting UNSCR 1593 (2005), the Council has affirmed that justice and accountability are critical to achieve lasting peace and security in Darfur. This position is reinforced in resolution 1674 (2006) which concludes that prevention of armed conflict requires a comprehensive approach and that ending impunity, through appropriate national and international mechanisms is essential to ensuring the non-recurrence of abuses.

The Prosecutor outlines in this report the progress in the investigation. In executing his responsibilities, the Prosecutor has a duty to ensure that evidence is collected and handled in a confidential manner, consistent with the Rome Statute and the Rules of Procedure, that due process is afforded to all parties to the proceedings and that particular attention is given to the responsibility of the Court to protect victims and witnesses. The assessment of the evidence will ultimately fall to the Judges of the International Criminal Court.

The swift fulfilment of the mandate of the Office of the Prosecutor (OTP) requires the full and unconditional cooperation of states and organisations, particularly the Government of the Sudan and other parties to the conflict in Darfur, as well as those organisations with significant presences on the ground such as the African Union (AU) and the United Nations (UN).

CONDUCT OF THE INVESTIGATION

The continuing insecurity in Darfur is prohibitive of effective investigations inside Darfur, particularly in light of the absence of a functioning and sustainable system for the protection of victims and witnesses. The investigative activities of the Office are therefore continuing outside Darfur. Since the last report to the UNSC, the OTP has conducted over 40 missions to more than 13 countries, collecting witness statements and other evidence, and concluded 7 new agreements and arrangements with international organisations and bodies regulating the provision of information for the investigation.

In addition, the ICC has established a temporary field presence in Chad in order to access the refugee population from Darfur currently situated in Eastern Chad. The activities of the Office were severely disrupted as a result of clashes between Chadian Government and rebel forces in April 2006. The field office was temporarily closed and staff withdrawn. Operations are expected to resume soon.

Crime Patterns

The investigation team has collated information relating to alleged crimes into a Darfur Crime Database. The analysis of this data, relating to the period October 2002 – May 2006, shows significant variations in the crime patterns reflective of the different phases of the conflict, with violence escalating between October 2002 – April 2003 and peaking during the period April 2003 – April 2005.

The Office has so far documented (from public and non-public sources) thousands of alleged direct killings of civilians by parties to the conflict. The available information indicates that these killings include a significant number of large scale massacres, with hundreds of victims in each incident. The Office has selected several of these incidents for further investigation and analysis. A large number of victims and witnesses interviewed by the OTP have reported that men perceived to be from the Fur, Massalit and Zaghawa groups were deliberately targeted. In most of the incidents where the OTP has collected evidence there are eye-witness accounts that the perpetrators made statements reinforcing the targeted nature of the attacks, such as 'we will kill all the black' and 'we will drive you out of this land.'

In addition to direct killings, there is a significant amount of information indicating that thousands of civilians have died since 2003 as a consequence of the conditions of life resulting from the conflict and the ensuing displacement. These include a lack of shelter and basic necessities for survival as a result of the destruction of homes, food stocks, and the looting of property and livestock, as well as obstacles to the provision of life-saving humanitarian assistance. This type of 'slow death' has particularly affected the most vulnerable groups, including children, the elderly and the sick.

The Office has also registered hundreds of alleged cases of rape. This is likely to be indicative of a practice that was endemic amongst some groups involved in the conflict and in relation to which there are indications of significant under-reporting. The Office has interviewed a number of victims of alleged rapes and has commissioned further expert studies in this area. In May 2006 the OTP organised a workshop on the investigation of sexual and gender crimes,

particularly in the context of Darfur, involving experts from national criminal justice systems, as well as the other international criminal tribunals and non-governmental organisations. The meeting facilitated an exchange of experiences and the identification of best practices in dealing with sexual violence cases.

The available information also highlights a widespread pattern of displacement of civilians, with recent estimates of some two million displaced persons and refugees from Darfur. There was a significant increase in displacement between mid-2003 and mid-2005, consistent with peaks in violence (July-August 2003 and Jan-Feb 2004). The first three months of 2006 have also seen an increase in displacement in specific areas around Sheiria; Gereida; Haskanita and Jebel Marra. West Darfur appears to have by far the highest concentration of displacement, again correlating with the concentration of killings and other forms of violence in that area. There is information and evidence to suggest that the civilian population was forcibly displaced from their homes, in a widespread and systematic manner, for reasons not related to the conflict, and that those populations were denied the opportunity to return.

Destruction of property and looting is a prevalent feature of the crimes in Darfur, with reports of destruction and looting in up to 2000 villages throughout the three Darfur states. The widespread scale of this destruction is evident from the available witness statements, as well as an abundance of aerial and satellite imagery.

Religious property and symbols also appear to have been the target of attacks, with reports of the destruction of mosques (approximately 65 in West Darfur, Dar Masalit) and attacks on other places of worship. Furthermore, there is information indicating that parties to the conflict directed attacks on other non-military objectives, including attacks on medical facilities.

In addition, reports continue of direct attacks on humanitarian workers and peacekeepers, including the killing of African Union peacekeepers in 2005 and 2006. These attacks are not only grave examples of potential war crimes; they also have a direct impact on the delivery of vital services that exacerbates the suffering of the most vulnerable groups in Darfur today.

Parties to the Conflict: Identification of Individual Criminal Responsibility

The Office has gathered information and evidence of crimes alleged to have been committed by all parties to the conflict. In the current phase of the investigation the Prosecutor has identified specific cases for full investigation and possible prosecution. In making this selection, the Prosecutor is governed by the specific requirements of the Statute and Rules of Procedure and guided by objective criteria and general principles of independence, impartiality and non-discrimination. As stated in previous reports, the list of 51 names provided by the International Commission of Inquiry on Darfur remains confidential and represents the conclusions of that Commission acting pursuant to their mandate. It is not binding on the Prosecutor and is not a basis for the identification of those persons to be prosecuted by the Court.

Although any crime falling within the jurisdiction of the Court is serious, the gravity of the crimes is central to the process of case selection. The Office looks at factors such as the scale and nature of the crimes (in particular, high numbers of killings), the systematic character and impact of the crimes, as well as other aggravating factors.

In addition to the gravity of the crimes, the Office has analysed crime patterns based on perpetrating groups, geographical location of alleged crimes, as well as the accessibility of evidence. The impact of ICC investigations and prosecutions on the prevention of future crimes is also an important consideration, and particular attention will therefore be given to investigating the crimes currently affecting the lives and safety of the two million displaced civilians, in an effort to contribute to their protection from further attack and to the delivery of humanitarian aid.

The ICC has jurisdiction over crimes against humanity, war crimes and genocide. Various allegations have been made that some of the groups involved in the commission of crimes in Darfur did so with specific genocidal intent. This issue remains the subject of investigation and the Prosecutor has not, and will not, draw any conclusions as to the character of the crimes pending the completion of a full and impartial investigation.

Identifying those individuals with greatest responsibility for the most serious crimes in Darfur is a key challenge to the investigation. The complexity of the conflict in Darfur exacerbates this challenge, given that it involves multiple parties, varying over time throughout the different states and localities, which are not easily distinguished by uniform or insignia. Given the scale of the alleged crimes in Darfur, and the complexities associated with the identification of those individuals bearing greatest responsibility for the crimes, the Office currently anticipates the investigation and prosecution of a sequence of cases, rather than a single case dealing with the situation in Darfur as a whole. The selection and progress of these cases will be based on the best possible evidence available to the Office at the relevant time. As soon as the Office gathers sufficient information to meet the evidential standards in the Statute, then that information will be presented to, and assessed by, the judges at that time.

ADMISSIBILITY

In previous reports to the Security Council the OTP has referenced the various mechanisms established by the Government of the Sudan to deal with the alleged crimes in Darfur, including: the Darfur Special Court, established in June 2005; the two additional Courts created in November 2005; the ad hoc institutions to support the work of those Courts, including the Judicial Investigations Committee and the Special Prosecutions Commissions, as well as the National Commission of Inquiry, Committees against Rape and the Special and Specialised Courts of 2001 and 2003 respectively (*Annex I* provides a basic diagrammatic overview of these various mechanisms).

During this reporting period the Office has gathered significant amounts of information related to these mechanisms and carefully reviewed their activities to determine whether or not the Government of the Sudan has dealt with, or is dealing with, the cases that the Prosecutor is likely to select for prosecution.

For the purposes of this assessment, 'case' represents a specific incident in which crimes within the jurisdiction of the Court have been committed by identified perpetrators. The OTP assesses national criminal proceedings to determine whether they deal with the specific incidents and

perpetrators that the OTP, following investigation, have determined carry the greatest responsibility for the crimes.

As part of this fact-finding process, the Government of the Sudan facilitated the visit of an OTP delegation to Khartoum in February 2006 for an extensive programme of meetings with representatives of various judicial and investigative mechanisms and Government departments including the Minister of Justice, the judges of the Special Courts and the Chief Justices of each Darfur state, senior officials of the Ministry of the Interior, representatives of the prosecution services and the Judicial Investigations Committee, the Advisory Council for Human Rights, the Committee for Combating Gender-Based Violence, the National Commission of Inquiry and the Wali of South Darfur. The meetings took place in Khartoum and all meetings were formally video recorded.

Initiation and Conduct of Investigations

In assessing the conduct of national proceedings in relation to Darfur, it is instructive to note how cases are investigated and selected for prosecution. In this context, the Special Courts are primarily serviced by the *Judicial Investigations Committee* and the *Special Prosecutions Commissions*.

The Judicial Investigations Committee (JIC) was established by Presidential Order on 19 January 2005 to investigate incidents identified in the reports of the International and National Commissions of Inquiry. The JIC has focused on incidents alleged to have taken place in the areas of Buram and Kass (South Darfur); Kutum, Mallit, Tawila and El-Fasher (North Darfur); and Kulbus, Garsila/Wadi Saleh (West Darfur). According to available information, it appears that no investigations have yet been completed by the JIC and no cases have been presented to the Court as ready for trial.

The Special Prosecutions Commissions (SPC) were established by the Chief Justice of the Sudan in January 2006. There are three Commissions, with one assigned to each Darfur State (and each State Special Court), mandated to look into offences that have taken place after the work of the International and National Commissions of Inquiry. There are reports of investigations into incidents alleged to have taken place in Tama and Hamada (South Darfur) and El-Geneina (West Darfur).

The reported crimes that occurred in Hamada (January 2005) are stated to have taken place in the context of an alleged coordinated operation by Government of the Sudan armed forces and armed militias to deal with rebel elements located in the area. Available information indicates that the incident left over 100 civilians dead, more than 30 women were raped and there was widespread destruction and looting. The President of the South Darfur Special Court has indicated that the case is still under investigation, but there appears to have been limited progress in the collection of evidence and the identification of the perpetrators. He went on to highlight that the investigation faces real challenges due to the lack of access to witnesses located in rebel controlled areas.

In relation to the Tama case, there are recent reports of the acquittal of three individuals on charges of war crimes (including two members of the Border Intelligence Guard) apparently

due to a lack of evidence. These individuals were reportedly convicted of theft and sentenced to two or three year's imprisonment.

In addition to these special investigative mechanisms, the Chief Justice of the Sudan also has the authority to refer specific charges to the Special Courts. At present there is no information indicating that any referrals have been made by the Chief Justice.

Darfur Special Court

The Darfur Special Court has been presented by the Government of the Sudan as an alternative to the prosecution of cases by the International Criminal Court – invoking the complementarity framework underpinning the Rome Statute.

At the time of the establishment of the first Darfur Special Court, the President of the Court highlighted that the subject-matter jurisdiction of the Court would include crimes against humanity and war crimes and that the Court would deal with any perpetrators, regardless of rank or affiliation. Moreover, the Government of the Sudan announced that approximately 160 suspects had been identified for investigation and possible prosecution: 92 from South Darfur, 38 from North Darfur and 32 from West Darfur.

With regard to the work of the first Darfur Special Court, there are no significant changes since the last report of the Prosecutor to the Security Council. So far the Special Court has conducted 6 trials of less than thirty suspects. The cases include 4 incidents of armed robbery, 1 incident of receipt of stolen goods, 2 cases of possession of firearms without a licence, 1 case of intentional wounding, 2 cases of murder and 1 case of rape. Eighteen of the defendants were low-ranking military officials (including 8 members of the Popular Defence Forces); the remainder appear to be civilians. The President of the Special Court has stated that no cases involving serious violations of international humanitarian law were ready for trial and that the six cases selected were in fact chosen from the case files lying before the ordinary Courts.

Other Mechanisms

National Commission of Inquiry: The NCOI was established by the President of the Sudan in May 2004 to investigate human rights violations by armed groups in Darfur. The Commission made significant efforts and is reported to have met over sixty-five times and listened to two hundred and twenty eight witnesses, including during a number of visits to Darfur. The Commission recommended further investigations into incidents in Deleig (West Darfur); Tanako, Kass and Buram (South Darfur) and Meleit and Kelebs (North Darfur).

Ad Hoc Committees: Various ad hoc committees have been established in the three Darfur States following from the recommendations of the NCOI. The Governor of South Darfur is reported to have been particularly active in establishing committees to look at incidents in Hamada, Buram, Khor Abeche, Marla and Labado.

Committees against Rape: The Committees against Rape were established by decree of the Minister of Justice in July 2004. No specific investigations or cases have been brought by the Committee so far in relation to allegations of sexual violence in Darfur.

Unit for Combating Crimes against Women: The Unit for Combating Crimes against Women was established by the Minister of Justice in February 2006. Its mandate is prospective with a view to implementing an action plan for eliminating violence against women which is a Sudan wide plan, with Darfur as an immediate focus. This unit, whilst a positive step, is not involved in the investigation or prosecution of alleged crimes as such for the purposes of admissibility.

Tribal Reconciliation

The Government of the Sudan has provided the OTP with a significant amount of information relating to the conduct of traditional reconciliation mechanisms in Darfur as a way of resolving conflicts between tribes. Various tribal meetings are reported to have taken place in Darfur, including Mellit, Shearia and Abata. Such processes are also given a formal role in the context of the Darfur Peace Agreement, with the establishment of a Tribal Reconciliation Committee and the proposed Darfur-Darfur Dialogue. These processes are not criminal proceedings as such for purposes of assessing the admissibility of cases before the ICC, but they are an important part of the fabric of reconciliation for Darfur.

Admissibility Assessment

In previous reports the OTP has highlighted the fact that the admissibility assessment is a *case specific* assessment and not a judgment on the Sudan justice system as a whole. Once the Prosecutor has identified the cases he intends to take forward for prosecution, he must examine whether or not the national authorities are conducting or have conducted genuine national proceedings in relation to those cases.

It is clear that the national authorities face significant challenges to the conduct of effective criminal proceedings in Darfur, particularly in light of the fact that the conflict has destroyed or dislocated the normal criminal justice infrastructure. For example, in North Darfur, as of mid-2005, many members of the judiciary and prosecution service were relocated to El-Fasher leaving most of the State unattended. In the six localities in West Darfur, only three had sporadic prosecution services between 2002 and 2005. Most of the staff were based out of El-Geneina, with restrictive travel due to the security conditions. In South Darfur the conflict displaced many of the twenty seven judges and severely limited the number of cases investigated and brought before the Court.

The Native Courts were also heavily undermined. Whilst these courts focus on civil disputes, they form a part of the infrastructure for peaceful settlement of disputes between farmers and herders in Darfur. In West Darfur there are reports that five heads of the rural Courts were assassinated. In South Darfur a limited number of the ninety three Courts are functioning reportedly due to a lack of security.

The Special Courts appear to remain relatively inaccessible, with judges performing other duties in Khartoum, awaiting the start of trials in Darfur. Limited resources and specialised expertise with reliance on existing infrastructure for investigations is also hampering progress. Some efforts have been made by the Government of the Sudan to rectify these deficiencies, including deployment of forensic teams (May 2005), but these efforts have also reportedly been restricted by the lack of security on the ground.

Many of the investigation mechanisms are reactive to complaints, but there is a reluctance or inability on the part of witnesses and victims to come forward with complaints and in some cases there are allegations of intimidation and harassment of complainants. This is particularly prevalent in the context of rape allegations. The lack of any system for protection of witnesses is also a strong disincentive to complainants and presents a serious obstacle to the conduct of any effective national criminal proceedings.

Conclusion

Based upon the current OTP assessments, it does not appear that the national authorities have investigated or prosecuted, or are investigating and prosecuting, cases that are or will be the focus of OTP attention such as to render those cases inadmissible before the ICC. The Office reinforces the point made in previous reports, that this assessment is on-going and a final determination will be made following a full investigation of the specific cases that are selected for prosecution. This will require the continued cooperation of the Government of the Sudan in providing access to proceedings, to officials and institutions, including in Darfur, and to relevant documentation.

INTERESTS OF JUSTICE

The Prosecutor continues to gather information from various organisations and individuals relevant to the Article 53(2)(c) assessment of the interests of justice. In making this assessment the Prosecutor will explore ways to collect, and take into account, the views of the witnesses and victims of the crimes in a systematic and comprehensive manner.

COOPERATION

Progress in the investigations and prosecution of crimes in Darfur rests in particular on the cooperation that the ICC receives from the Government of the Sudan, the African Union, the United Nations and other organisations with a significant presence in the region. The Security Council has foreseen this in resolution 1593 (2005).

Paragraph 2 of UNSCR 1593 (2005) requires the Government of the Sudan and all other parties to the conflict in Darfur to cooperate fully with, and provide necessary assistance to, the Court and the Prosecutor. Other states and organisations are also urged to cooperate fully.

Paragraph 3 of UNSCR 1593 (2005) invites the Court and the African Union to discuss practical arrangements for facilitating the work of the Prosecutor and the Court, including the possibility of conducting proceedings in the region.

African Union

Previous reports by the Prosecutor to the Security Council have highlighted the slow progress in the cooperation between the OTP and the African Union Mission in the Sudan (AMIS).

Since December 2005, the Office has engaged on a number of occasions with AMIS and the African Union seeking to expedite cooperation. Representatives of the OTP met with AMIS in Khartoum in February and delivered a detailed request for information relevant to the investigation. The Prosecutor has also offered to brief the AU Peace and Security Council (PSC)

on the activities of the Office in Darfur and on the importance of the relationship between the ICC and the AU in reinforcing mutual efforts to ensure justice and accountability.

The Prosecutor welcomes the recent statement of the AU Peace and Security Council in its communiqué of 10 March 2006 supporting cooperation between the AU and the Court in Darfur. The Prosecutor has also received confirmation in writing by Ambassador Konare (AU Commission Chairperson) and Ambassador Kingibe (AMIS Special Representative and Head of Mission) of the commitment of the AU to fully cooperate with the ICC and the determination of the AU to assist in the fight against impunity. In addition, it is anticipated that the Prosecutor will brief the AU PSC in the near future on progress in the context of UNSCR 1593.

These are signals that cooperation will now be forthcoming, but it is important to reiterate that the expeditious assistance of the African Union remains a fundamental component to progress in key aspects of the investigation.

Other States and Organisations

The Office has been closely following the discussions in the Security Council on the distribution of responsibilities between AMIS and a possible future UNSC mandated mission. It is important that all parties to these discussions take into account the need for a clear basis for cooperation with the ICC, in the implementation of UNSCR 1593 (2005), particularly in the context of providing a system for the protection of witness and victims. The cooperation and assistance of the AU and the UN will be essential to any future operations in Darfur, the absence of which will be a real impediment to rapid progress in the investigation.

In March 2006 the OTP concluded an exchange of letters with the Panel of Experts established pursuant to UNSCR 1591 (2005). The exchange of letters grants the Panel access to the information gathered by the Commission of Inquiry, but does not include the list of 51 names that was annexed to the International Commission of Inquiry report. That list remains confidential in the possession of the Prosecutor.

The Prosecutor notes the developments in the work of the UN Sanctions Committee and the listing of individuals for the purposes of sanctions and is closely following the work of these bodies. This list of individuals is in no way connected to the process of identification of individuals for possible prosecution by the ICC. It is important to reinforce the fact that the mandate and activities of the Sanctions Committee and the ICC are distinct and that the work of the ICC is governed by specific evidentiary standards and specific rules of procedure and evidence.

Government of the Sudan

In December 2005 the OTP reported to the Security Council on a series of cooperation requests that had been made to the Government of the Sudan. These included a visit to the Sudan to assess national proceedings relating to Darfur, and the delivery of a written report on matters identified by the Prosecutor to the Sudanese authorities in preparation for the conduct of interviews of officials who due to their positions could provide information relating to the activities of the Government of the Sudan and other parties to the conflict in Darfur.

In response to the first request related to national proceedings, a delegation of the OTP visited the Sudan in February 2006 for an extensive programme of meetings with judges, prosecutors, representatives from the police force and other government departments (a detailed description of the visit and the findings is set out above in the section on Admissibility). The Government of the Sudan cooperated with the Office in allowing unfettered access to the requested officials in meetings that were formally video recorded. In addition to the officials requested by the OTP, the Government facilitated meetings with the Governor of South Darfur and with representatives of the commission demarcating nomadic routes, offering further information on the situation in Darfur. The Government also facilitated a visit by the OTP to Juba, Southern Sudan, in order to meet with officials to discuss the situation relating to the Lord's Resistance Army and efforts to apprehend the five LRA commanders identified in ICC arrest warrants issued in 2005.

At the start of May 2006 the Government of the Sudan provided the OTP with a written report responding to questions submitted by the Prosecutor in February 2006. This report provides information on the various phases of the conflict from the Government's perspective, on matters relating to the military and security structures operating in Darfur, the activities of other parties to the conflict and the legal system governing the conduct of military operations. The written report was supplemented by a meeting between representatives of the OTP and military officers that took place in Khartoum in June 2006. The OTP has sought access to specified underlying data and may make further requests for more detailed information relating to the report.

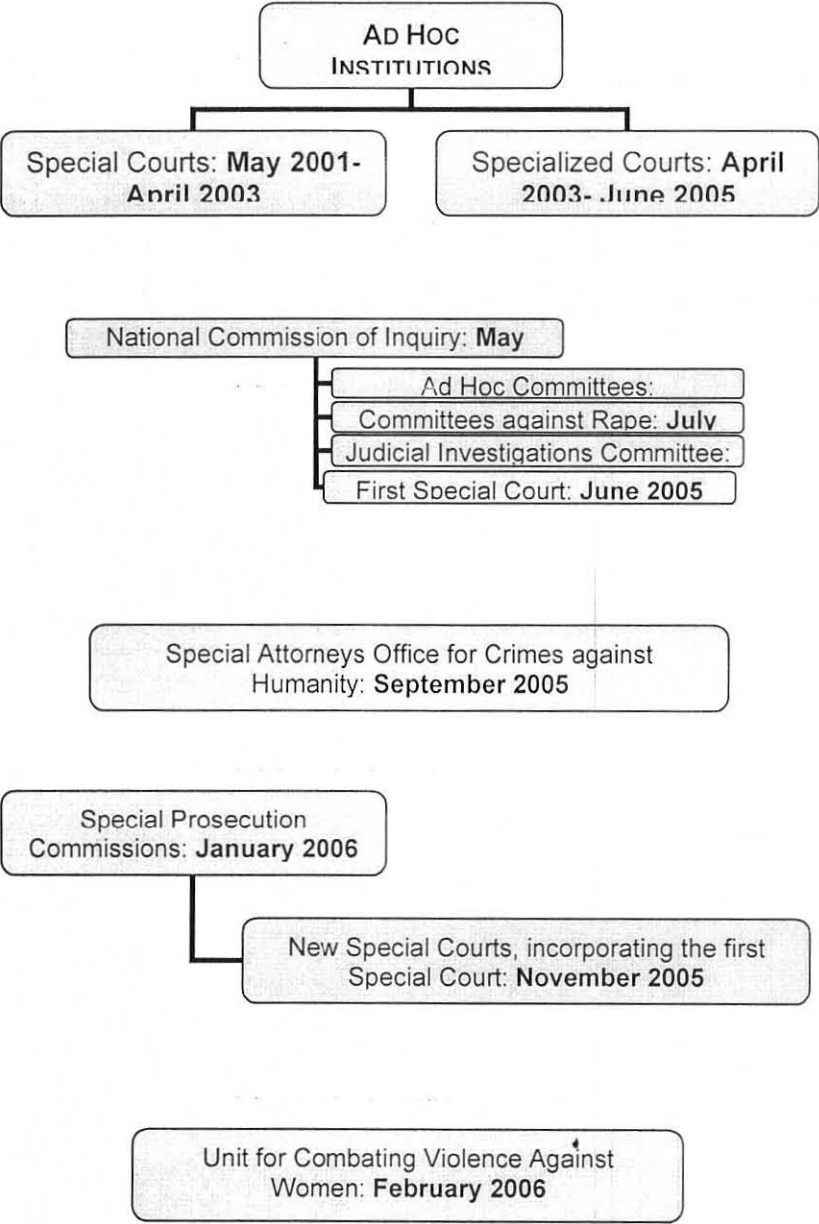
This report was submitted in preparation of the above mentioned interviews, which are extremely important to establish a comprehensive and complete account of the events in Darfur since 1 July 2002. To date the Office has collected information and evidence from outside the Sudan. However, a complete picture of the events requires information and evidence from all parties involved in the conflict to fully test and corroborate the numerous accounts and allegations of crimes. These interviews have not yet taken place. However, the Government of the Sudan recently agreed that the interviews will start in August 2006.

CONCLUSION

The ICC is a complementary international mechanism to deliver justice for the most serious international crimes. The concern of the ICC is to see effective justice for the victims of the crimes in Darfur. This can be achieved either at a national level, where the domestic authorities are genuinely willing and able to prosecute those most responsible for the most serious cases, or by the ICC.

In the coming phase the Office will seek to complete the investigation of those individuals with greatest responsibility for the most serious crimes, including those crimes exacerbating the suffering of the displaced people today, and will assess admissibility of cases. The achievement of these objectives in an expeditious manner requires the full support of the Security Council and the unfettered cooperation of the international community, in particular the Government of the Sudan and all parties to the conflict, the African Union and the United Nations.

ANNEX I





Situation in Darfur, the Sudan
Prosecutor's Application under Article 58(7)
Summary

I. The Application

Over the past 20 months, the Prosecutor (hereafter also referred to as the "Prosecution") has conducted an investigation into crimes within the jurisdiction of the International Criminal Court allegedly committed in Darfur, the Sudan, since 1 July 2002. After completing the necessary investigative steps, the Prosecutor has presented evidence to the judges.

The Prosecution has focused on some of the most serious incidents and the individuals who, according to the evidence collected, bear the greatest responsibility for those incidents. The Prosecution has concluded there are reasonable grounds to believe that Ahmad Muhammad Harun, former Minister of State for the Interior of the Government of the Sudan, and Ali Muhammad Ali Abd-Al-Rahman (better-known in West Darfur as Ali Kushayb), a Militia/Janjaweed¹ leader, bear criminal responsibility in relation to 51 counts of alleged crimes against humanity and war crimes, including persecution, torture, murder and rape committed in Darfur in 2003 and 2004.

On 27 February 2007, pursuant to Article 58(7) of the Rome Statute ("the Statute"), the Prosecution applied to Pre-Trial Chamber I for the issuance of summonses to appear ("the Application") against the named individuals.

The crimes alleged in the Application were perpetrated during attacks upon the villages and towns of Kodoom, Bindisi, Mukjar, and Arawala, in West Darfur, the Sudan.

¹ The term "Militia/Janjaweed" in the Application refers to those forces that were mobilised, armed and funded by the Government of the Sudan to fight in the counterinsurgency in Darfur. The Militia/Janjaweed are described using various terms such as "Janjaweed", "Fursan" "Mujahideen" and "Bashmerga". The term Janjaweed literally means "a man (a devil) on horse".

The Application is a public document, although redacted where necessary to protect the identity of witnesses.

II. Legal Framework

On 31 March 2005, the Security Council, acting under Chapter VII of the UN Charter, adopted Resolution 1593, referring the situation in the Darfur region of the Sudan to the Prosecutor of the International Criminal Court. In accordance with the Statute, the Prosecution conducted an analysis of the situation. On this basis, the Prosecutor opened an investigation into the situation in Darfur, the Sudan on 1 June 2005.

In accordance with its duties under the Statute, the Prosecution has carried out an independent investigation.

III. Scope of the Investigation

Since the start of the investigation in June 2005, the Prosecution has collected statements and evidence during 70 missions conducted in 17 countries. Throughout the investigation, the Prosecution has thoroughly examined incriminating and exonerating facts in an independent and impartial manner. The Prosecution also conducted five missions to the Sudan and obtained information from a number of Government officials.

For the purposes of the Application, the Prosecution has relied primarily on: (1) statements from victims and other eyewitnesses to rebel attacks and attacks by Sudanese Armed Forces and Militia/Janjaweed in the Darfur region; (2) statements from individuals who possess knowledge of the activities of officials of the Sudanese Government and of the Militia/Janjaweed in conducting the counterinsurgency campaign in Darfur; (3) documents and other information provided by the Sudanese Government; (4) the Report of the UN Commission of Inquiry (UNCOI) established under UNSC Resolution 1564 and other materials provided by the UNCOI; and (5) the Report of the National Commission of Inquiry (NCOI) established by the Government of the Sudan in January 2005 and other materials provided by the NCOI.

Victims of alleged crimes committed in the Darfur region were interviewed in other countries because of the ongoing insecurity in Darfur. Under the Statute, the Prosecutor and the Court are obligated to take measures to protect victims and witnesses. To uphold those duties to protect the well-being of victims and witnesses under Article 68(1), the Prosecution determined not to go to Darfur to seek statements from victims.

Throughout the investigation the Prosecution monitored the security of victims and witnesses and implemented protective measures. The Prosecution and the Victims and Witnesses Unit of the Registry will continue to monitor and assess the risks to witnesses.

IV. Summary of Evidence and Information Provided in the Prosecution's Application

Consistent with the requirements of Article 58(2)(d) of the Statute, the Prosecution furnished in the Application "a summary of the evidence" and "other information" sufficient to establish "reasonable grounds to believe" that Ahmad Harun and Ali Kushayb have committed crimes within the jurisdiction of the Court, namely war crimes and crimes against humanity.

a. The Context: The Counterinsurgency Campaign

The Darfur region is comprised of the three Sudanese States at the western border of the Sudan: North Darfur, West Darfur and South Darfur.

The crimes alleged in the Application were perpetrated in the context of a non-international armed conflict in the Darfur region between the Government of the Sudan and rebel armed forces, including the Sudanese Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM), from about August 2002. Both rebel groups mainly recruit from the Fur, Zaghawa and Masalit tribes.

The conflict involved rebel attacks on Sudanese Government installations in Darfur and the counterinsurgency campaign by the Sudanese Government against the rebels.

The turning point in the counterinsurgency strategy occurred after the attack against the Al Fashir airport in April 2003 with unprecedented losses for the Government. Shortly after, the recruitment of Militia/Janjaweed greatly increased, ultimately into the tens of thousands.

A characteristic of the armed conflict in Darfur is that the majority of civilian deaths in the region have been caused during attacks on towns and villages in Darfur carried out by the Militia/Janjaweed either singly or together with Sudanese Armed Forces. The vast majority of attacks carried out by the Sudanese Armed Forces and/or Militia/Janjaweed in Darfur were directed at areas inhabited by mainly Fur, Masalit and Zaghawa tribes.

The Sudanese Armed Forces and Militia/Janjaweed did not target any rebel presence within these particular villages. Rather, they attacked these villages based on the rationale that the tens of thousands of civilian residents in and near these villages were supporters of the rebel forces. This strategy became the justification for the mass murder, summary execution, and mass rape of civilians who were known not to be participants in any armed conflict. Application of the strategy also called for, and achieved, the forced displacement of entire villages and communities.

b. The Personal Responsibility of Ahmad Harun and Ali Kushayb

After the attack on Al Fashir, Ahmad Harun was appointed Minister of State for the Interior of the Government of the Sudan and tasked to head the "Darfur Security desk". State and local Security Committees in Darfur, which were comprised of representatives of the Sudanese Army, the Sudanese Police, the Sudanese intelligence agencies, reported to Ahmad Harun, especially on matters relating to the staffing, funding, and arming of the Militia/Janjaweed in the context of the counterinsurgency.

The most prominent of the coordination tasks entrusted to Ahmed Harun as the head of the "Darfur Security desk" was his management of, and personal participation in, the recruitment of Militia/Janjaweed, to supplement the Sudanese Armed Forces. Ahmad Harun recruited Militia/Janjaweed with full knowledge that they, often in the course of joint attacks with forces of the Sudanese Army, would commit crimes against humanity and war crimes against the civilian population of Darfur and he did so with the aim of furthering them.

Ali Kushayb, was the "Aqid al Oqada," or "colonel of colonels," in the Wadi Salih locality of West Darfur. Ali Kushayb, who commanded thousands of Militia/Janjaweed by mid-2003, personally led Militia/Janjaweed at the attacks upon Kodoom, Bindisi, Mukjar, and Arawala.

The Prosecution alleges that Ahmad Harun and Ali Kushayb joined each other, and others, in pursuing the shared and illegal objective of persecuting and attacking civilian populations in Darfur.

Ahmad Harun's own statements and speeches while in Darfur demonstrate that he had full knowledge that the Militia/Janjaweed were routinely attacking civilian populations and committing crimes against them.

In a statement before the NCOI, Ahmad Harun presented a dilemma: how to discriminate between rebels and civilians? The dilemma, he stated, was that the "rebels infiltrate the villages" and thus that the villages "are like water to fish". Ali Kushayb, like Ahmad Harun was heard to acknowledge openly the objective of targeting civilian communities, based on the rationale that those communities shielded or supported rebels.

Ahmad Harun was often physically present in Darfur to carry out his duties, visiting Darfur on a regular basis beginning in about April 2003. When describing Ahmad Harun, witnesses immediately identified him as the official from Khartoum responsible for mobilising, funding, and/or arming the "Janjaweed" or "Fursan". Witnesses also