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AFRICA AND THE INTERNATIONAL CRIMINAL COURT:
CHALLENGES AND THE WAY FORWARD

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Abbreviations

AU	African Union
BIA	Bilateral Immunity Agreement: US Article 98
CAR	Central African Republic
CICC	Coalition for the International Criminal Court
CRS	Congressional Report Service
DRC	Democratic Republic Congo
EAC	East African Community
ECOWAS	Economic Community of West African States
EU	European Union
HRW	Human Rights Watch
ICC	International Criminal Court
ICG	International Crisis Group.
ICJ	International Court of Justice
ICTR	International Criminal Tribunal Rwanda
ICTY	International Criminal Tribunal Yugoslavia
NGO	Non-Governmental Organization
OAU	Organization of African Unity
OTP	Office of the Prosecutor
SADC	South African Development Community
UN	United Nation
USG	United States Government
UNSC	United Nations Security Council

ABSTRACT

Africa and the International Criminal Court: Challenges and the way forward

This research reflects the areas of jurisdictional power of the International Criminal Court (ICC) and the challenges it has been facing in the last 12 years of its life while it is trying to end impunity in Africa. The assessment is based on the main objective of establishing Rome Statue in July 2002 which thrives that all member states of UN have to have the same standard in their respective territories. A lot of controversies and misconceptions are being witnessed on the understandings and implementation of international laws in Africa between ICC and African leaders. It seems such controversies and misconceptions emanate from different prevailing thoughts. African states accuse ICC as a neo colonialist institution targeting African leaders in addition to alleging ICC as playing double standard role in African and the rest of the world for instance ICC investigation and prosecution till now only in Africa despite Israel-Palestine, Iraq , Columbia and Afghanistan where western countries have major interest from the conflict .The study used method of both Primary data, key informant interview and secondary data, cases from ICC investigation and situation under which it described the challenges and perspective of the international criminal court in fighting impunity in Africa .The study used cases which do have direct link with ICC like the current cases on Uganda, DRC, Cote d'Ivoire CAR, Kenya, Sudan Mali and Libya as an input in its arguments and discussions. And the study proved that the non-targeting of African states by ICC and there is no evidence showing ICC is playing double standard role in Africa and the rest of the world rather the UNSC, the political body, playing double standard in its referral and other duties .Thus AU, UNSC, state parties and all African states should cooperate with this independent institution to end major Human Right violation throughout the globe.

Key words: International Criminal Court, Rome Statue.

CHAPTER ONE

1.1. Background

The International Criminal Court (ICC) is a permanent institution having the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in Rome Statute, and shall be complementary to National criminal jurisdictions. The ICC has jurisdiction over War crimes, Crimes against Humanity, Genocide and the Crime of Aggression as per Article 5(1) of the Rome statute.

The jurisdiction and functioning of the Court shall be governed by the provisions of Rome Statute (Article1) and the court is situated in the Netherlands, The Hague. On 1, July 2001, the ICC was formally established when the requisite number of sixty States Parties ratified the Rome Statute.¹

The Rome Statute of the ICC was adopted at a diplomatic Conference in Rome on the 17th July 1998 and came into force on 1st July 2002.² On 14th January 1999, the Senegalese National Assembly authorized its national Government to ratify the Rome Statute, making Senegal, an African country, to become the first state in the world to demonstrate support for the new era of international justice. The Democratic Republic of Congo was also the 60th State to ratify the Rome Statute, thereby allowing it to enter into force.³

As of 1st June 2012, 121 countries are now State Parties to the Rome Statute. Out of these, 33 are African States, 18 are Asia-Pacific States, 18 are from Eastern Europe, 27 are from Latin America and Caribbean States and 25 are from Western Europe and other States.⁴

¹Murithi Tim and Ngari Allan 2011 The ICC and Community-Level Reconciliation: In-country Perspectives Regional Consultation Report. Institute for Justice and Reconciliation Transitional Justice in Africa Program me.

² The Statute of International Criminal Court (adopted on 17 July 1998, entered into force on 1 July 2002) UNTS I 38544. The Treaty is available at < <http://www.treaties.un.org/pages/UNTSONline.aspx?id=2> >

³ICC web

http://www.iccpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx accessed on May 28, 2014

⁴Avocats Sans Frontières (2012) Africa and the International Criminal Court: Mending Fences pp 7

The United States, Russia, China and Israel are not parties to the Statute (though the US, Israel and Russia have signed it without ratifying it). Its staff is drawn from around the world, and in accordance with UN rules on regional representation, it includes a number of Africans⁵. Ethiopia is one of 41 UN member states which have neither signed, nor acceded to the Statute⁶.

The study will focus on the work of ICC since the establishment of Rome statute in 2002 with a particular focus on Africa and the rest of the world in general. So many legal scholars and other political writers have written many controversial issues in relation to Africa and how the court functions and its power to fight impunity according to international law.

Thomas Lubanga Dyilo was the first person arrested and transferred to The Hague to be tried by ICC. He is a Congolese national and was the president of the Union of Congolese Patriots.⁷

Having Lubanga in custody OTP attempts to prosecute two sitting African heads of state, Sudan's Omar Hassan Al Bashir and Libya's Muammar Al Qadhafi, have been particularly contested, and the African Union has decided not to enforce ICC arrest warrants for either leaders. Neither Sudan nor Libya is a party to the ICC; in both cases, jurisdiction was granted through UNSC resolution. (The US abstained from the former SC vote, in 2005, and voted in favor of the latter, in Feb.2011.) Controversy within Africa has also surfaced over ICC attempts to prosecute Kenyan officials in connection with post-election violence in 2007-2008. Although Kenya is a party to the Court, the government has recently objected to ICC involvement⁸.

Firstly, in connection with the above cases and current cases many African writers and scholars argue that the case of all African countries shows that the office of the

⁵Plessis, max du 2010 .The international criminal court and that Africa wants. Available on www.issafrica.org date accessed 21/3/2014

⁶http://en.wikipedia.org/wiki/United_Nations_member_state date accessed 6/24/14

⁷Human Rights watch (2012) First Verdict at the International Criminal Court: The case of the Prosecutor vs. Thomas Lubanga Dyilo Questions and Answers date accessed 15/8/2013.

⁸International Criminal Court Cases in Africa: Status and Policy Issues CRS Report for Congress 2011 Prepared for Members and Committees of Congress <http://www.fas.org/sgp/crs/row/RL34665.pdf> date accessed 12/2/14

prosecutor and ICC are much more biased in relation to African cases. The study will focus on the past and current African leaders and individuals tried by ICC to identify whether or not ICC is biased.

Secondly, ICC as a means of neo colonialism created by the west⁹ also asserts that since 2009 it was arguably the most tumultuous in the ICC's short life span the arrest warrant of the current Sudan president, some perceive as racist really true? OR to make the president and other suspected criminals escape from their evil action.

Thirdly, some perceive ICC as an independent institution trying to prosecute criminals who are not treated at national court all over the world¹⁰. Cases which are pending so far by the court and many more current situations such as the cases of Sudan and Kenya shows us how much ICC or the Office of the prosecutor (OTP) is enjoying the principle of Complementarity under Article 17 of Rome statute.

Fourthly, in contrast to the first and second ideas above, the Court has got not minimal support from state parties, NGO and Civil Society Organization at the formation and after fully functioning its power given by the statute beyond the challenge it faced as Benjiamn B.Frencez, a former Nuremberg prosecutor, addressed to the Rome Conference on June 16, 1998¹¹ as expressed about justice with the following words "Human rights must prevail over human wrongs international law must prevail over international crime". Because power full states in the Security Council were badly opposing the establishment of ICC and power conferred to it by the statute.

The research is the continuation of those great scholars that address or solve the previous and current challenges and perception among African leaders. The paper will give for those opposing and overlapping views the way each opinion can get equal chance to argument and analyze which opinion holds water and investigate another dissenting

⁹Pheko, Mohau 2008 It seems the West's war crimes tribunals are reserved for Africans. Sunday Times, 27 July 2008.

¹⁰Lamony Stephen 2011 "Minister Chinamasa: You are wrong about the ICC" http://www.iccnw.org/documents/OPED_Response_to_Zimbabwe_Minister_Final_4_.pdf date accessed 3/9/2013

¹¹Nsoura.j (2005) payback time in Sudan? Darfur in the international criminal court. Page 58

opinion to address the current challenges and opportunities in ending impunity, as input for African state in their next run to ICC.

The finding will raise questions like whether ICC targeted Africa or not? Is the OTP a politically motivated organ or not? Why member states and non-member states did not cooperate with ICC? Is ICC apolitically established institution to make disproportionate prosecution on Africans? Why not the rest of the world is not prosecuted like Afghanistan, Iraq, Palestine and Colombia great human right violation occurred? Did the UNSC referring cases fairly to dictators intentionally?

The research paper will dig out points of debate in the previous and current situations. Moreover, the work is necessary to dig out previous and current challenges by creating awareness both for Africa and ICC on the area of controversy .What is expected from ICC in order to get trust and confidence from African countries and the rest of the world ?.What makes ICC not to be trusted by its member and non-member states?

In relation to what should be done to get trust and confidence from member and non-member states, the study will give recommendations, a point of agreement and general consensus towards Crime Against Humanity, Genocide, Aggression and War crimes because international law must override international crime that any UN state should accept.

Hence, this paper will have a methodology of purposefully targeted samples of 8 African situations and situations from the rest of the world to compare and contrast the allegation by African leaders and unstructured targeted interview of AU umbrella such as Human rights commission, Peace and Security Council, African court of justice, head and concerned organs.

1.2. Statement of the Problem

The International criminal court is the creation of western powers. Second and related to the first allegation is the argument that the ICC is a tool designed to target Africans, be it leaders or foot soldiers which is an accusation repeatedly raised by African leaders and

writers.¹²The third and the most recent articulated by a renowned African scholar which is more sophisticated but also a related notion that the ICC is part of some new International Humanitarian order in which there is to emphasis on big powers as enforcers of justice internationally¹³.

Fourthly, a theory that was advanced by some African leaders following the issuance of the ICC as a mechanism of neocolonialism policy used by the west against free and independent countries. Certain African leaders have complained that heads of state in their ranks (not rebel, militia leaders who have been charged by the ICC) have been denied pretrial due process and a fair trial in court.

They have accused the OTP of engaging in prosecutorial misconduct by obtaining and using “false, manufactured and corruptly obtained evidence” and “coaching witnesses” to give perjured testimony against particular defendants. They have accused the ICC and OTP of “abusing” and exercising “unchecked powers” and for being “accountable to no one”.

Moreover, AU supported the non-cooperation of African states to ICC alleging the indictment of sitting Head of State particularly during issuance of arrest warrant against the current Sudan president in 2009. In the same manner, on 2013 ICC charged Kenyan leaders that made AU to propose mass withdrawal from Rome Statute of ICC in their Oct, 2013 Extraordinary Meeting. The main complaint is that ICC undermines the sovereignty, stability and peace of the country and the region.

Despite the above problem how UNSC is working for referral cases will it bring last peace in Africa or fueling the conflict that are seen in Africa such as those cases of current leaders of Sudan and Kenya are typical examples. AU and African leaders argue that the prosecution will not bring lasting peace and justice in the horn of Africa rather it enhances the conflict. In addition, referral to ICC by three head of states, like Uganda, DRC and CAR during the past time invited the prosecutor to abuse Africa as they wish.

¹²Pheko, Mohau 2008 It seems the West’s war crimes tribunals are reserved for Africans. Sunday Times, 27 July 2008.

¹³Mammdami .M (2008) The New Humanitarian Order available on <http://insidesectionarism.blogspot.com/2008/10/mahmood-mamdani-new-humanitarian-order.html>.

Furthermore, there is an additional problem with implementing the international law or the Rome Statute, why Africa states and other non-member states are not co-operative to ICC towards arresting suspected criminal. The motive behind US policy towards ICC, did it make problem will all be investigated in terms of political interest, in excluding US citizens from prosecution of ICC that leads to give immunity to criminals by US, under Bilateral immunity Agreement of US Article 98 and the very reason of such big democratic state not to be a member of ICC.

One of the core principles of the Constitutive Act of the AU is to “promote and protect human and peoples’ rights in accordance with the African Charter on Human and Peoples’ Rights and other relevant human rights instruments.” Among the essential functions of the African Commission on Human and Peoples’ Rights is to co-operate with other African and international institutions concerned with the promotion and protection of human and peoples’ rights.¹⁴

Even if AU have such a beautiful Act in the charter AU as an organization have denied the legality and independence of the court in the adverse position those who always strive for justice express that AU is in wrong stand to say ICC as neo colonialist, racist because they argue that there is no justice in the world be perfect. So that ICC is an independent organization having respected professionals working to end immunity throughout the world in accordance to law.

Leading scholars, however, argue that while there are justified concerns over the impact of the global Court in Africa, arguments about neo-colonialism exaggerate the strength of the ICC. Furthermore, these arguments also underestimate the ability of African Governments to manipulate international justice to their own ends.

The main objective of this paper is to create common understanding towards impunity and international law is respected. It will explore main obstacles that are seen both in ICC and member states of African countries in great part as to whether ICC is a biased institution or not. What political motives ICC have beyond prosecuting criminals in the world and related problems will be raised. As a result, the outcome of this research will

¹⁴African union charter preamble Article ,available on www.au.int/en date April 2/2014

address challenges between Africa and ICC, problems to solution by proposing and recommending relevant political and legal arguments that stabilize the hot conflict between Africa and ICC.

1.3. Research Questions

The study tries to investigate and discuss the following controversial issues around International Criminal Court (ICC):

- The allegation brought by African leaders on ICC concerning its impartiality and independence from the influence of the Western countries as institution and allegation that ICC targets African leaders purposely.
- Why AU, member and nonmember states of ICC don't have good will in cooperating with ICC since its establishment?
- The allegations that the Western countries are using ICC as a tool in their neocolonial businesses in free and independent African countries?
- The allegations that ICC plays double- standards in its stated endeavors on giving justice to the ones who are in need of it. The questions are raised ICC is not trying to investigate alleged crimes and human rights violations in Afghanistan, Colombia and Iraq.

1.4. Objective

1.4.1 General Objective

The main objective of this study is to investigate and explore the allegations raised by African leaders on ICC jurisdictions and motives and whether it has been purposely targeting African leaders in the last 12 years.

1.4.2. Specific Objectives

- To explore the jurisdictions of ICC in investigating and prosecuting crimes that have international interests

- To explore whether there is double standard in the activities of ICC
- To explore whether ICC specifically targets African leaders in its investigations and prosecutions
- To explore whether ICC serves the purposes of western countries in their hegemonic activities in Africa
- To explore whether ICC is performing its activities by sticking to provisions given to it by the Rome Statute

1.5. Methodology

In this research relevant secondary data are reviewed from academic journals, books, newsletters and other relevant sources on the topic under study. Interview with key informants are conducted that is the called primary data for representative of the whole sum. Analysis will be based on qualitative method. It is quite sure that social science research employ qualitative because it is easy to such type of research in meeting research question and objectives where a given analysis of politics or law or both overlap, the above method is employed.

1.5.1 Research Area

The research area are AU office in Addis Ababa and Ministry of Foreign Affairs of Federal Democratic Republic of Ethiopia, in Addis Ababa, Academicians from Law School and Political Science department of Addis Ababa university, and Non-governmental organizations (NGO), Institute for security studies, Addis Ababa where the key informants are most likely found .

1.5.2 Sampling Techniques and Sample size of the key Informants

Sampling technique to be used is purposive sampling technique because it is useful to get the experts on the study area easily. The number of key informants to be interviewed is one person from each study area.

1.5.3. Method of Data Collection

Regarding the method of data collection the study was conducted depending on secondary and some primary sources. Secondary data were collected through library searching and internet browsing .The study has focused more on secondary sources such as books working papers and official documents .Theses sources emphasize on the ICC activities in Africa particularly and in general to the rest of the world where the allegation of African leaders is true or not and whether the ICC follows double standard towards weak state especially Africans were accusing ICC as a political tool for the West by using OTP as one instrument that targets African leaders .

In addition primary data was obtained through unstructured key informant interview of participants. The study has employed purposive techniques to select the key informants. Purposeful sampling technique focuses deliberately selecting participants with the their knowledge and understanding on the particular issue .Thus the key informants were selected with the assumption that they have good knowledge, skill, experience on ICC and African relationship since the establishment of the court.

Questions for interview were prepared for key informants' interview. The interviews is recorded and then transcribed to note book. For the secondary data relevant materials are selected from libraries and also from internets sources.

1.5.4 Data Analysis

The data from the key informants' interviews are transcribed to note books from the tape recorders and then the transcribed data analyzed by the investigator of this research. The data from secondary sources will be analyzed by the investigator. In the process of analysis, relationships or differences supporting or conflicting with original or new hypotheses should be subjected to statistical tests of significance to determine the validity data can be said to indicate any conclusions. For our collected Qualitative data (narrative, in depth case analysis). Researcher participation in data collection makes analysis easier. Taking orderly interview record and short notes, separating types of data and putting the search for analytic categories.

Moreover, triangulating the data from both sources final analysis will be conducted by the investigator. After analysis the findings will be compared with the hypothesized assumptions and other works done on the topic under study. Then the results will be discussed and practical recommendations based on the found results will be listed.

1.5.5 Ethical Consideration

The key informants were asked for their consent in written before they start participating in the study by giving their opinions through interview. They will be also informed that they have the right to decline giving interview at any time. The information from the informants will be kept confidentially unless they are willing to the disclosure of that information. The privacy and integrity of the participants will be respected throughout the interview times.

1.5.6 Research Frame Work (Scope of the Research)

As its title shows this research tries to investigate the works of ICC in its jurisdiction in general and Africa in particular in a comparative way. It tries to investigate the challenges faced by ICC since its inception. It also tries to investigate its endeavors to fight impunity and ensuring justice for victims of crimes with international nature. This investigation also looks into the allegations raised against ICC by African leaders that incriminate its activities as double standards and its existence is to serve the hegemonic interest of the West against poor Africa. To deal with these issues this paper tries its best to look into the investigations and executions opened by ICC on countries like DRC, Sudan, CAR, Uganda, Kenya, Libya, Cote d'Ivoire and Mali .

1.6. Significance of the Study

Currently there is a perception by African countries that ICC is not independent and politically biased institution. On the other hand, ICC is considered as a tool for the mitigation of problems related to impunity which is rampant in Africa. So clearly there is misunderstanding on the institution's purposes of existence. So this study is aspiring to investigate those contending understandings on ICC and come up with balanced findings on ICC which contributes to the existing knowledge and understanding behind current

burning issue in Africa. It is expected that this study will come up with balanced findings from the investigation on the purpose of existence of ICC.

1.7. Scope of the Study

The scope of this study is investigating the jurisdictions of ICC and its relation to African continent and African leaders. The cases so far investigated by ICC will be under the scope of this study and also some potential cases for ICC investigations but left alone like that of Afghanistan will be also under the scope of the scrutiny of this study.

1.8. Limitation

Beyond time limitation to the work, some of key respondents were too busy and not willing to give interview both face to face and through e mail that makes my finding difficult.

CHAPTER TWO

2. Literature Review

Introduction

On July 17, 1998, at a diplomatic conference in Rome, the international community adopted the Rome Statute of the International Criminal Court. The Treaty has been hailed by governments, legal experts and civil society organizations as the most significant development in international law since the adoption of the United Nations Charter.¹⁵ It was signed by a number of State parties and it was formally established in July 1, 2001 after the required number of states, which is sixty, ratified the Rome Statute. In July 2002 there were 121 signatory states to ICC out of which 31 were from Africa¹⁶.

The areas on which ICC does have jurisdiction are War crimes, Crimes against Humanity, Genocide and the Crimes of Aggression, although it is unable currently to exercise jurisdiction over the crime of Aggression of Rome Statute 1998. ICC is the first permanent International Court which works on the assurance of accountability for the serious crimes perpetrated and with international concern¹⁷.

The court can only prosecute crimes committed on or after 1 July 2002, the date its founding treaty, the Rome Statute of the International Criminal Court, entered into force. The International Criminal Court was established by a multilateral treaty which states that it can only exercise territorial jurisdiction or personal jurisdiction in relation to states that are parties to the Rome Statute.¹⁸

The court “inherits” the jurisdiction of state parties to the Rome Statute, which gives the court jurisdiction over crimes committed in the territory of a state party and over crimes committed by nationals of a state party.¹⁹ The Prosecutor can initiate an investigation or prosecution in three different ways: States Parties to the Statute of the ICC can refer

¹⁵The Statute of International Criminal Court (adopted on 17 July 1998, entered into force on 1 July 2002) UNTS I 38544. The Treaty is available at < <http://www.treaties.un.org/pages/UNTSONline.aspx?id=2>> September 20/2013

¹⁶ Murithi Tim and Ngari Allan 2011. The ICC and Community-Level Reconciliation: In-country Perspectives Regional Consultation Report. Institute for Justice and Reconciliation Transitional Justice in Africa Program me .available on www.ijr.org.za pp 2

¹⁷Kirsch, Philippe (2001) The International Criminal Court current issues and perspective Law and Contemporary Problems, Vol. 64,

¹⁸ Ibid

¹⁹ Article 13 2(a) and (b) of the Rome statute.

situations to the Prosecutor; the United Nations Security Council can request the Prosecutor to launch an investigation; the Office of the Prosecutor may initiate investigations *proprio motu* (on its own initiative) on the basis of information received from reliable sources

The ICC does not have universal jurisdiction of its own. The court might also come to deal with a case by way of a United Nations Security Council referral. Article 13(b) of the court's Statute envisages a situation where the Security Council, acting under its Chapter VII authority, refers a situation to the ICC for investigation and possible prosecution. The Court is designed to complement existing national judicial systems: it can only exercise its jurisdiction when national courts are unwilling or unable to investigate or prosecute such crimes.²⁰ Primary responsibility to exercise jurisdiction over suspected criminals is therefore left to individual states

There seem to be general agreement or the law that ICC would have jurisdiction only where national courts were unable or unwilling to deal with the crime in a fair way complementary to national criminal jurisdictions.²¹ References to the need to take measures at the national level to ensure the "effective prosecution of the most serious crimes are woven throughout the Treaty, as is the duty of each State to exercise its criminal jurisdiction over those responsible for international crimes."²²

Within this chapter we are going to see over the relationship of Africa and the International Criminal Court in the past and the current situation that triggers Africans to indictment and predicting the future of Africa or ICC with Africa.

Africa and ICC

African countries have been actively involved in the establishment of the International Criminal Court and the Rome Statute since negotiations for the Court began more than 20 years ago. Among other African delegations, South Africa, Senegal, Lesotho, Malawi, and Tanzania participated in discussions regarding the creation of an International

²⁰ Article 17 of Rome statute

²¹ Preamble of Rome statute

²² See preamble and Article 17 complementarity

Criminal Court (ICC) as early as 1993 when the International Law Commission presented a draft ICC statute to the United Nations General Assembly for consideration.²³

47 African states were present during the drafting of the Rome Statute, the founding treaty of the ICC, at the Rome Conference in July 1998; many of these countries were members of the Like-Minded Group that pushed for adoption of the final Statute. Of the 47 African countries involved in drafting the Statute, the vast majority voted in favor of adopting the Rome Statute and establishing the ICC.²⁴

The Rome Statute, the ICC's founding treaty, recognizes that the principle of complementary is the basis of the exercise of jurisdiction by the ICC (Article 1). When the states' national courts are incompetent to try suspected criminals and the states are not willing to try those suspects ICC will come in as a complementary to bring the criminals to justice by Rome Statute 1998.

Since its establishment, the International Criminal Court has opened up several investigations most of them in Africa, indicted individuals alleged to have committed crimes within its jurisdiction and had one conviction.²⁵ However, the focus on Africa has led to criticisms that the Court is conducting selective prosecutions and investigations. The Court's only conviction has also led to criticisms regarding the lengthy court proceedings and whether they are justifiable taking into consideration the operational costs. This literature examines the reasons for the establishment of the International Criminal Court current challenges and perspectives in Africa.

African Union, United States of America, UN Security Council and ICC

Following the announcement of an ICC warrant for the arrest of President Omar Al Bashir, the AU requested an Article 16 deferral of all proceedings against him from the UNSC, citing the fragility of the peace process underway at the time to resolve the conflict in the Sudan. Noting the inability and unwillingness of Sudanese justice system

²³ Africa and the International Criminal Court Coalition for ICC available on www.iccnw.org date June 27, 2013

²⁴ibid

²⁵On 10 July 2012, Trial Chamber I sentenced Thomas Lubanga Dyilo to a total period of 14 years of imprisonment. The time he spent in the ICC's custody will be deducted from this total sentence. He is detained, for the time being, at the Detention Centre in The Hague. Available on www.icc-cpi.int/iccdocs/PIDS/publications/LubangaENG.pdf accessed on date march 24 / 2014

to investigate the crimes committed in Darfur the case was referred to ICC for investigation²⁶. The principle is that it is the responsibility of the states to investigate and prosecute crimes under the jurisdictions of ICC if they have competent and willing justice system to deal with cases. ICC will come into picture if it is proven that the justice systems of the states are incompetent and unwilling to deal with the cases.

The characterization of the ICC as unfairly targeting Africans is not supported by the facts. While all situations under ICC investigation to date are in Africa, the majority of these came about as a result of voluntary referrals by the governments of states where the crimes were committed.

Since its establishment ICC has opened eight investigations on cases related to African countries (DRC, Uganda, Central African Republic, Sudan, Kenya, Libya, Cote d'Ivoire and Mali). Of these eight cases under investigations four were referred to the court by the concerned state parties of the countries under investigation (Uganda, DRC, Central African Republic and Mali) and two cases were referred by UNSC (cases of Darfur in Sudan and that of Libya) and the other two were initiated in *proprio motu* (initiation by prosecutor) by the prosecutor of ICC cases of Kenya and Cote d'Ivoire.²⁷

A small group of African leaders, primarily from North African states that are not ICC states parties, have meanwhile actively sought to exploit unevenness in the application of international justice to present the ICC as a new form of imperialism that should be opposed. AU officials have played a prominent role in this effort, likely reflecting, at least in part, the disproportionate influence within the AU of North African states that are not ICC states parties, including Libya and Algeria.²⁸ This change in position tracks a broader 'push-back' against the ICC on the continent. It is not possible to identify with clarity or certainty the reasons for this apparent change of heart is due to so many reasons but

²⁶Nsoura.j (2005) Payback time in Sudan? Darfur in the international criminal court PP 58-60.

²⁷Situations and Cases, INT'L CRIM. CT., <http://www.icc-cpi.int/Menu/ICC/Situations+and+Cases/> (last visited July 13, 2013) and http://en.wikipedia.org/wiki/International_Criminal_Court accessed 17 July 2013

²⁸Elise Keppler 2011. Managing Setbacks for the International Criminal Court in Africa Journal of African Law, page 1 of 14 © School of Oriental and African Studies, pp 6

things are becoming worst at the time president Omar Hassan Al- Beshir of Sudan arrest warrant was ordered in 2009²⁹.

From the reviewed literature it can be understood that Africans' perception of ICC is not healthy. They perceive ICC as an organ created to prosecute African leaders and as a creation of Western neocolonialist countries to use as a tool to dominate Africa and make it under their hegemonic sphere. Due to this perception, ICC is facing challenges on legitimacy by African leaders. The other side of narrative is the importance of ICC in ending impunity and assuring accountability in the world in general and Africa in particular³⁰.

There are various complaints against ICC from the voices within Africa concerning its legitimacy and jurisdiction in the continent. The first complaint is based on the thinking that ICC is the tool for Western hegemony on the continent.³¹ And the second suggestion also emanates from the first one which suggests ICC is an institution which targets and discriminates Africa says AU commission Jean Ping 2009.³²

The third suggestion bases its argument on the effects of the investigation and prosecution by ICC on peace and stability in the continent. It is argued that the interventions of ICC affects negatively the efforts of conflict resolutions and peace building in the continent and Sudan and Libya are taken as example on how the ICC intervention affected the conflict resolution efforts. Based on the premises AU requested the Security Council to defer the ICC's investigation on current president of Sudan by invoking Article 16 of the Rome Statute.³³

Thus, the current feelings of Africans on ICC on their perception that the court has focused Africans has started calling for the empowerment of African Court on Human

²⁹ICC-PIDS-CIS-SUD-02-002/11_Eng Updated: 28 March 2012 On 4 March 2009, Pre-Trial Chamber I issued a warrant of arrest for Omar Al Bashir for charges of war crimes and crimes against humanity.

³⁰Snitzer, Katherine Ann, "Peace Through Justice? Evaluating the International Criminal Court" (2012). Honors Projects. Paper 15. http://digitalcommons.macalester.edu/intlstudies_honors/15

³¹http://www.iccnw.org/documents/OPED_Response_to_Zimbabwe_Minister_Final_4_.pdf

³²African Union press release, Decision of the Meeting of African States Parties to the Rome Statute of the International Criminal Court, Addis Ababa 14 July 2009.

³³www.un.org/News/Press/docs/2005/sc8351.doc.htm March 120/2014

and Peoples' Rights to deal with serious crimes of international concerns as an alternative to ICC .

The fourth complaint is based on ignoring of Security Councils of the calling of Africans on peace to be given more attention than justice (AU meeting 2009). In addition, reason of objection is that the council (with its skewed institutional power) seems to play double-standards while it is dealing with cases to be sent to ICC. It could send the case of Sudan to ICC but it didn't take the same measure when it came to the case of Columbia, Sri Lanka and Iraq³⁴.

The fifth objection is that, the court has designed to proceed against a sitting head of state of a country that is not party to the Rome Statute. The complaint essentially implicates questions about head of state immunity under customary international law as read with Articles 27 and 98 of the Rome Statute "it says that the statute applies to all persons without distinction based on official capacity". These objections have been expressed in various ways by African governments including those that are party to the Rome Statute, as well as in decisions taken by the AU and statements by its leaders³⁵.

Similarly, Mamdani 2008 in his Article has proclaimed the more sophisticated but also related notion that the ICC is part of some new 'international humanitarian order' in which there is to Mamdani the worrying emphasis 'on big powers as enforcers of justice internationally. Part of his thesis is that the ICC is a component of this new order, an order which draws on the history of modern Western colonialism', and that the ICC shares an aim of 'mutual accommodation' with the world's only superpower a fact which to Mamdani is clear if we take into account the four countries where the ICC has launched its investigations: Sudan, Uganda, CAR and Congo, given that all of these are places where the US has no major objection to the course chartered by ICC investigations Mamdani, concludes this line of reasoning by stating its name notwithstanding, the ICC is rapidly turning into a Western court to try African crimes against humanity. It has targeted governments that are US adversaries and ignored actions the United States

³⁴ Plessis, Max du (2008) The International Criminal Court and its work in Africa: Confronting the myths, ISS Paper 173,

³⁵ (Ethiopian Herald wed/23, 2013) published.

doesn't oppose, like those of Uganda and Rwanda in eastern Congo, effectively conferring impunity on them.³⁶

There is suspicion on the main US government objectives policies towards Africa and ICC. There are questions on the interests of US concerning the investigations on some countries like Sudan³⁷. United States and its allies objected to the UNSC referral to the ICC because of its stated objections to the ICC's jurisdiction over nationals of states not party to the Rome Statute. However, the United States had at one time supported a version of the Rome Statute that would have allowed the UNSC to refer cases involving non-states parties to the ICC, but would not have allowed other states or the Prosecutor to refer cases³⁸.

The United States abstained on Resolution 1593 which is not equivalent to a veto in the Security Council because the Resolution included language that dealt with the sovereignty questions of concern and essentially protected US nationals and other persons of non-party States other than Sudan from prosecution. The abstention in the SC did not change the fundamental objections of the Bush Administration to the ICC³⁹.

African leaders spoke their concerns on the impartiality of ICC. Rwandan President Paul Kagame complained that ICC targeted weak African countries. To similar effect but in more strident language are the claims by Rwanda's President Paul Kagame portraying the ICC as a new form of 'imperialism' that seeks to 'undermine people from poor and African countries, and other powerless countries in terms of economic development and politics. The danger with each of these arguments is that they will find traction not surprisingly with dictators and their henchmen who seek reasons to delay or resist being held responsible under universally applicable standard of justice⁴⁰.

³⁶Mammdani. M (2008) The New Humanitarian Order <http://insidesectionism.blogspot.com/2008/10/mahmood-mamdani-new-humanitarian-order.html>

³⁷ International Criminal Court Cases in Africa: Status and Policy Issues Congressional Research Service 2009.

³⁸ *ibid*

³⁹ *Ibid*

⁴⁰ Agance France Press, July 31, 2003 published

But compounding matters is the fact that each of the arguments is not substantiated by the true facts, or perhaps worse even if unwittingly so, is a distortion of the true facts. As one commentator has pointed out, the danger is that ‘the rhetoric of condemnation that the ICC is an agent of neocolonialism or neo-imperialism, that is it anti-African may so damage the institution that it is simply abandoned’⁴¹.

It is therefore important to stress that such claims of ‘unfair’ targeting are ultimately devoid of substance. As well the political motive of three head of states in Africa Uganda, DRC, CAR also shows that how head of states are using ICC as tool for political motive. The above mentioned head of state at time they were in conflict with gruelia fighters and freedom fighters the mechanism to eradicate those opposing group was referring the situation to ICC even though there was crime commission of crime by both the government and opposition group. Under which after referral to the ICC the court tried to investigate the both side commission that is the government and the opposition.⁴²

A state that has ratified the Rome Statute may refer a situation to the prosecutor where any of these crimes appears to have been committed if the alleged perpetrator is a national of a state party or if the crime in question was committed on the territory of a state party or a state that has made a declaration accepting the jurisdiction of the court.⁴³The Uganda, DRC and CAR referrals demonstrate how in terms of Article 14 of the statute any state party may refer to the ICC a ‘situation’ in which one or more crimes within the jurisdiction of the court appear to have been committed. So long as the preconditions to the court’s exercise of jurisdiction have been met, namely, that the alleged perpetrators of the crimes are nationals of a state party or the crimes are committed on the territory of a state party⁴⁴.

The ex -Prosecutor of the ICC, Luis Moreno Ocampo, has received a letter signed by the President of the DRC referring to him the situation of crimes within the jurisdiction of the Court allegedly committed within the territory of the DRC since the entry into force of the Rome Statute, on 1 July 2002 The referrals particularly by Uganda and the DRC

⁴¹ Nicole Fritz, Business Day, 13 Aug 2008. Black-white debate does no justice to a nuanced case,

⁴²Plessis, Max du (2008) The International Criminal Court and its work in Africa: Confronting the myths, ISS Paper 173,<http://www.issafrica.org/uploads/PAPER173.PDF> March 13/2014 pp 5

⁴³ Article 13 of Rome statute.

⁴⁴ Amnesty international Report 2005

demonstrate how there have been attempts by African states to use the ICC for political ends. It is no secret that the Ugandan and the DRC governments had their own reasons for inviting the ICC to do business in their respective countries. These appear to have been to employ the court to prosecute rebel bands within their own territories.⁴⁵

While there has been criticism directed at the ICC prosecutor for too tamely complying with these self-referrals in order to ensure cases before the court, there is a double irony in suggesting that these African situations are evidence of the ICC's meddling in Africa. Assertions about the court's apparently over developed appetite for African atrocities, or intimations of US behind the scenes machinations in the court's choice of African investigations, are complaints that do not match the facts or the processes adopted by the OTP⁴⁶.

A reflection on the OTP's screening process and the self-referrals by Uganda, DRC and the CAR suggest rather that Africa is in the court's sights because African states parties with serious consideration, one may fairly assume, of their rights and responsibilities as states parties to the Rome Statute, and/or because of their own strategic objectives have chosen that outcome, and the court has accepted that there is a reasonable basis for initiating an investigation. It should be noted that in the case of Côte d'Ivoire a referral by a state party was not possible as the country is not a state party to the Rome Statute.⁴⁷

The invitations made by the independent governments of Uganda, DRC and CAR to the ICC to investigate situations in their respective states, are invitations made by states parties to the Rome Statute. By ratifying the statute these three states showed their acceptance (morally, and legally under international law) of the Rome Statute's ideals. The prosecutor had obtained the evidence from the UN and other sources on the condition of confidentiality, but the judges ruled that the prosecutor had incorrectly applied the relevant provision of the Rome Statute and, as a consequence, 'the trial

⁴⁵ Ibid

⁴⁶ Heinrich boll stiftung (2012) A fractious relationship: Africa and the international criminal court. Africa's Relations with the ICC: A Need for Reorientation?

⁴⁷ ibid

process has been ruptured to such a degree that it is now impossible to piece together the constituent elements of a fair trial.⁴⁸

The prosecutor announced the opening of an investigation into the situation in Central African Republic in May 2007, following a referral in December 2004. The OTP received information from Central African Republic authorities, non-governmental organizations and international organizations regarding alleged crimes. As is the case in the other investigations, the focus has been on the most serious crimes, most of which were committed between 2002 and 2003. The situation in CAR has been noteworthy for the particularly high number of crimes involving sexual violence⁴⁹.

Furthermore, referral by head of states to their respective states and later on calling for further investigation and lastly arresting their officials shows how much the states have motive to attack their adversaries or front fighters in their country like LRA from Uganda.⁵⁰

Lastly, the Objection to the above idea is that the ICC has got not minimal support in Africa while insuring human rights violation in the continent from the beginning of the debate on the Rome Statue a lot African states had supported the idea after that more than half of the continent have agreed to the ratification Kofi Annan in 1998, former UN Secretary General at the signing of the Rome Statute of the International Criminal Court said the establishment of the Court is still a gift of hope to future generations, and a giant step forward in the march towards universal human rights and the rule of law.”⁵¹

In the same manner the signing of the statue also done by more than 30 states which assert that Africa is in need of abolishing impunity and punishing perpetrators of grave crimes that is surrendering its own jurisdiction to ICC with the will and wish of it. The suggestion that the ICC is the creation of Western powers couldn't be further from the truth. It is only by ignoring the history of the court's creation and the serious and engaged involvement of African states in that history that one can assert that the ICC is a western

⁴⁸Plessis, Max du 2010. The International Criminal Court and that Africa wants monograph institute for security studies pp 24-30

⁴⁹Plessis, Max du (2008) The International Criminal Court and its work in Africa: Confronting the myths, ISS Paper 173, <http://www.issafrica.org/uploads/PAPER173.PDF> March 13/2014 pp 1-24

⁵⁰ ibid

⁵¹Fact sheet one, Amnesty international USA 2007-2008

court. The assertion is also negated by the court's composition. While the ICC is situated in Hague, its staff is drawn from around the world and in accordance with UN rules on regional representation, includes a number of Africans⁵². As pointed out earlier, of the 18 judges first appointed to sit on the ICC, four are from Africa, the deputy president of the court is an African, Akua Kuenyehia, and the deputy prosecutor is Fatou Bensouda, a highly respected Gambian who was formerly attorney-general and then minister of justice in her home state. In addition, Medard Rwelamira, a citizen of South Africa and Tanzanian by birth was the first director of the secretariat of the Assembly of States Parties, before his untimely passing in 2006⁵³.

The ICC is not a tool designed for use specifically in the least developed and developing countries in Africa and Asia. This view is humbling to Africans more generally, but more specifically does no justice to the high ideals and hard work that marked African states' participation in bringing the ICC to life in Rome⁵⁴.

Thus, contrary to the view that the ICC was shoved down the throats of unwilling Africans who were dragged screaming and shouting to Rome and who had no alternative but to follow their Western masters under threat of withholding of economic aid if they did not follow, a closer inspection of the historical developments leading up to the establishment of the court portray an international will of which Africa was a part, to enforce humanitarian norms and to bring to justice those responsible for the most serious crimes of concern to the international community.⁵⁵

We have also seen how African states contributed extensively to the preparations leading up to, during and after the diplomatic conference in Rome at which the Statute of the ICC was finalized. In the period leading up to the Rome diplomatic conference, various ICC related activities were organized throughout Africa. Some 90 African organizations joined the NGO Coalition for an International Criminal Court (CICC), and lobbied in

⁵² Plessis, Max du (2010). The International Criminal Court and that Africa wants monograph institute for security studies pp 6

⁵³ Ibid

⁵⁴ Mochochoko, Phakiso, 2005. Africa and the International Criminal Court, in E Ankumah and E

⁵⁵ ibid

their respective countries for the early establishment of an independent and effective international criminal court⁵⁶.

Also forgotten by those who would label the court ‘Western’, is the active and important role played by the Southern African Development Community (SADC) in its support for the ICC, a role described earlier and which need not be repeated here. It is enough to stress that on the basis of commonly agreed principles, SADC ministers of justice and attorneys-general issued a joint statement that became a primary basis for the SADC’s negotiations at Rome⁵⁷.

And then, African involvement during the Rome conference itself meant that African states had a significant impact on the negotiations; in particular helping to ensure a court independent from Security Council control, staffed by an independent prosecutor, and with inherent jurisdiction over the core crimes of genocide, crimes against humanity and war crimes⁵⁸.

In sum, the Southern African Development Community under the dynamic influence of post-apartheid South Africa took important positions on human rights, providing a valuable counter-weight to the Europeans in this field⁵⁹.

Aside from the fact of continent wide ratification of the Rome Statute, African commitment to the ICC, and to the cause of international justice, has been demonstrated by for instance the strategic partnership agreement signed at the EU-Africa summit in Lisbon in December 2007 which proclaims a joint commitment that ‘crimes against humanity, war crimes and genocide should not go unpunished and their prosecution should be ensured’⁶⁰. This commitment reflects an understanding that responsibility for the prosecution of core international crimes in Africa, (and for raising awareness of these issues) is broader than the ICC alone.

⁵⁶Mochochoko, P 2005. Africa and the International Criminal Court. In E Ankumah and E Kwakwa (eds), African perspectives on international criminal justice. Ghana: Africa Legal Aid.

⁵⁷Maqungo, Sivu 2000. The establishment of the International Criminal Court: SADC’s participation in the negotiations, African Security Review 9(1)

⁵⁸Mochochoko, P 2005. Africa and the International Criminal Court. In E Ankumah and E Kwakwa (eds), African perspectives on international criminal justice. Ghana: Africa Legal Aid.

⁵⁹Schabas, W 2007. An introduction to the International Criminal Court. 3rd ed.

⁶⁰Plessis, Max du (2008) The International Criminal Court and its work in Africa: Confronting the myths, ISS Paper 173, <http://www.issafrica.org/uploads/PAPER173.PDF> March 13/2014 pp 2-3

It is a commitment which was earlier reflected by the African Commission on Human and Peoples' Rights in its 2005 Resolution on ending impunity in Africa and on the domestication and implementation of the Rome Statute of the ICC, such as the arrest of three Congolese military commanders also shows as how much ICC has got acceptance and commitment towards impunity in some states even though member and non-member state have duty to surrender and arrest criminals within their jurisdiction despite the court lacks police force to implement arrest warrant of the current case of Sudan leader.

Thus, suggestions that the court is a western creation, or anti-African, must defeat the overwhelming evidence of African involvement in the court. The African support for the ICC described above thus leads to an important conclusion that the court, and the Rome Statute which underpins its substance and processes, was regarded by Africa's states parties as being an institution for the benefit of Africa. That is, the court has been regarded by the majority of Africa's leaders as supportive of African ideals and values, including the goal of ridding the continent of its deserved reputation as a collage of despots, crackpots and hotspots where impunity for too long has followed serious human rights violations.⁶¹

Despite intensified attacks on the ICC in Africa, the court nevertheless continues to enjoy strong support across the continent. It is well known that African governments were actively involved in establishing the ICC it tries to argue that the strong commitment to establish and make efforts on the challenges created is more expressed in such away he says "More significantly, most African states are parties to the court and African states are continuing to ratify the treaty. In June 2011, Tunisia acceded to the treaty, bringing the number of African states that have joined the court to 32 out of 54 states in Africa.⁶² In addition, at the ICC's first review conference in May and June 2010 in Kampala, Uganda, African governments were clear that they continue to support the court's work. Continued efforts by states parties and civil society to support the ICC in that ICC states parties have undertaken important efforts to support the ICC at AU meetings, and made

⁶¹Lamony, Stephen 2011 Op-ed: "Minister Chinamasa: You are wrong about the ICC" http://www.iccnw.org/documents/OPED_Response_to_Zimbabwe_Minister_Final_4_.pdf
⁶²Elise Keppler 2011 Managing Setbacks for the International Criminal Court in Africa. Available on [www.hrw.org/.../Managing%20Setbacks%20for%20the%20ICC%20in%](http://www.hrw.org/.../Managing%20Setbacks%20for%20the%20ICC%20in%20) June 27, 2014 pp 9-13

clear that suspected war criminals are not welcome in their territories. These efforts, along with clear, regular affirmations of support in domestic, regional and international fora, are all the more important in the wake of the July 2010 AU decision and the visits by President al-Bashir to Chad and Kenya⁶³.

⁶³ Ibid

CHAPTER THREE

3. Introduction to ICC and Prosecution of OTP

Introduction

The Rome Statute establishing the International Criminal Court added an independent and permanent justice component to the world's efforts to achieve peace and security. The Rome Statute offers a solution, creating global governance without a global government with its international law and courts; a new paradigm in international relations, utilizing law as a global tool to promote peace and international security, and to put an end to impunity, thereby preventing or at least trying to prevent future crimes.⁶⁴

Therefore, this chapter mainly focuses on the establishment of an international criminal court, jurisdiction, complementarity, and structure of the Court as well as the individual criminal responsibility under international law, especially criminal responsibility of individuals under the international criminal court Statute.

3.1 Establishment of the ICC

Established in 2002⁶⁵, the ICC is a permanent court to try individuals who commit the world's most serious crimes: genocide (the extermination of a group of people based on race, class, or creed), war crimes (violations of the Geneva Conventions), and crimes against humanity (systematic abuses based on political, social, or cultural differences).⁶⁶ The Court will determine its jurisdiction over the crimes of aggression (as yet undefined) at Kampala Review Conference where in 2010, against international expectations, agreement on the definition of the crime of aggression was reached.⁶⁷

It was the culmination of decades of work by the United Nations (particularly the International Law Commission), non-governmental organizations, certain states and individuals.

⁶⁴Speech by:Fatou Bensouda, Prosecutor, (ICC) September 21, 2012 Council on Foreign Relations available on videos of international criminal court you tube.

⁶⁵www.icc-cpi.int/EN_Menus accessed on April 11, 2014

⁶⁶ Article 6-8 of the Rome statute

⁶⁷Amendments on the crime of Aggression to the Rome Statute of the International Criminal court Kampala, 11 June 2010 Resolution RC/Res.6 of the Review Conference of the Rome Statute. Available www.icc-cpi.int

It was preceded by the Nuremberg Tribunal 1945, the Tokyo Tribunal 1946, the International Tribunal for the Former Yugoslavia 1993, and the International Criminal Tribunal for Rwanda 1994. All these tribunals were concerned with prosecuting those who have committed “core” international crimes, which for our purposes can be defined as: war crimes, genocide, crimes against humanity, and crimes against the peace or waging a war of aggression. The ICC, both in form and substance, reflects many of the characteristics of these earlier tribunals.⁶⁸

The International Criminal Court confers jurisdiction, as per its statute, when the crimes specified under Art.5, (i.e. the crimes of genocide, crimes against humanity, War crimes, and the crime of aggression when specifically defined and the condition of exercising it clearly set out) are alleged to have been committed within the territory of a state party to the court or by the national of a state party to the court article 12(2) or when the crimes were allegedly committed either in the territory or by a national of a state who has accepted the jurisdiction of the court.⁶⁹

3.2 Types of Jurisdiction by Rome Statute

The mandate of the Court is to try individuals rather than States, and to hold such persons accountable for the most serious crimes of concern to the international community as a whole, namely the crime of genocide, war crimes, crimes against humanity, and the crime of aggression, when the conditions for the exercise of the Court’s jurisdiction over the latter are fulfilled.⁷⁰

The Rome Statute distinguishes between these two related concepts, Jurisdiction and Admissibility. Jurisdiction refers to the legal parameters of the Court’s operations, in terms of subject matter (Jurisdiction *rationemateriae*), time (Jurisdiction *rationetemporis*) and space (jurisdiction *ratione loci*) as well as over individuals (jurisdiction *ratione personae*).⁷¹ The question of admissibility arises at a subsequent stage, and seeks to

⁶⁸Some Features of the International Criminal Court: International Centre for Criminal Law Reform and Criminal Justice Policy Beijing – August 2005.

⁶⁹Art. 12 (3) of Rome Statute.

⁷⁰ Understanding the international criminal court available on www.icc-cpi.int.

⁷¹ Article 12(1-3)

establish whether matters over which the Court properly has jurisdiction should be litigated before it.

3.2.1 Subject Matter (*Ratione Materiae*) Jurisdiction

Subject matter jurisdiction refers to the crimes which the Court may prosecute: genocide, Crimes against Humanity, War Crimes, and Aggression.⁷² As per Article 5(1) of the treaty however the crime of aggression has not gained definition in the treaty it will be decided by the assembly of the state to be held in 2017 under which agreement is reached in Kampala, Uganda 2010 Rome statute Amendment.⁷³

3.2.2 Temporal (*Ratione temporis*) Jurisdiction

The Court is a prospective institution in that it cannot exercise jurisdiction over crimes committed prior to the entry into force of the Statute.⁷⁴ In the case of States that become parties to the Statute subsequent to its entry into force, the Court has jurisdiction over crimes committed after the entry into force of the Statute with respect to that State. However a state may declare the acceptance of the treaty without being member to ICC.⁷⁵ Accepting state shall cooperate with the court without delay.

3.2.3 Territorial (*Ratione loci*) Jurisdiction

The Court has jurisdiction over crimes committed on the territory of States parties, regardless of the nationality of the offender. This general principle is set out in Article 12(2) (a) of the Statute. It also has jurisdiction over crimes committed on the territory of States that accept its jurisdiction on an ad hoc basis and on territory so designated by the Security Council. The 1948 Genocide Convention provides some precedent for the idea that an international criminal court will have jurisdiction over crimes committed on the territory of a State party. Article VI of the Convention envisages just such an eventuality. Territory, for the purposes of criminal law jurisdiction, is a term that needs to be defined by different context. Obviously, it will extend to the land territory of the State .The

⁷² Article 5(1)

⁷³ On 11 June 2010, at the Review Conference of the Rome Statute, held in Kampala, Uganda, from 31 May to 11 June 2010, the ... In respect of a State Party ... Available On www.icc-cpi.int/iccdocs/.../AMENDMENTS/CN.651.2010-ENG-CoA.pdf

⁷⁴ Article 11(1)

⁷⁵ Article 12 par 3

Statute also considers the concept of territory to include crimes committed on board vessels or air craft registered in the State party.⁷⁶

This is a rather common and widely accepted extension of the concept of territorial jurisdiction. Logically, territorial jurisdiction should extend to the air above the State, and to its territorial waters and, possibly, its exclusive economic zone.⁷⁷

3.2.4 Personal (*Ratione Personae*) Jurisdiction

The International Criminal Court will also have jurisdiction over nationals of a State party who are accused of a crime, in accordance with Article 12(2) (b). Again, the Court can also prosecute nationals of non-party States that accept its jurisdiction on an ad hoc basis by virtue of a declaration,⁷⁸ or pursuant to a decision of the Security Council.⁷⁹ Creating jurisdiction based on the nationality of the offender is the least controversial form of jurisdiction and was the absolute minimum proposed by some States at the Rome Conference. Cases may arise where the concept of nationality has to be considered by the Court. In accordance with general principles of public international law, the Court should look at whether a person's links with a given State are genuine and substantial, rather than it being governed by some formal and perhaps even fraudulent grant of citizenship.

3.3 Complementarity

Complementarity was introduced in the ILC discussions. In later negotiations states frequently discussed “the principle of complementarity” referring to “the entirety of norms governing the complementary relationship between the ICC and national jurisdictions”. It was noted that the term complementarity was not an established legal principle”. The term which is not the one actually used in the Statute means a complementary relationship.⁸⁰ Complementarity is an essential component of the court's structure and a means by which national justice systems are accorded an opportunity to prosecute international crimes domestically. The ICC is one component of a regime a

⁷⁶ Article 12(2) a

⁷⁷ Schabas, William (2004) Introduction to the International Criminal Court, 2nd ed., Cambridge: Cambridge University Press, , xii, 48

⁷⁸ Article 12(3)

⁷⁹ Article 13(b)

⁸⁰ Stigen Jo 2008 The Relationship between the International Criminal Court and national jurisdictions: the principle of complementarity, The Raoul Wallenberg Institute human rights library; vol. 34) pp 417.

network of states that have undertaken to do the ICC's work for it; to act, as domestic international criminal courts in respect of ICC crimes. Because of the ICC's system of complementarity we can therefore expect national criminal justice systems to play the important role of doing the ICC's work by providing exemplary punishments which will serve to restore the international legal order.⁸¹

One of the most powerful arguments for the International Criminal Court is not that it will be a global instrument of justice itself arresting and trying tyrants and torturers worldwide but that it will be a backstop and trigger for domestic forces for justice and democracy.⁸²

The complementarity principle preserves national criminal jurisdictions as primary while allowing the ICC to step in when states fail to act to prevent a person accused of having committed Genocide, War Crimes or Crimes against Humanity from escaping justice altogether.

3.3.1 Article 17: When can the ICC exercise its complementary jurisdiction?

The circumstances in which the ICC can proceed with an investigation or prosecution are set out in Article 17, which this rule concerned complementarity the principle that the ICC should take a case only where national court systems are “unwilling or unable genuinely” to carry out an investigation or prosecution as per Article 17(1) (a) of the statute. This Court shall not, however, replace national justice systems. States remain the primary enforcers of international criminal law, and the ICC is only a court of last resort established to complement national systems where they fail to conduct adequate investigations and prosecutions. First, when has a state failed to conduct adequate criminal proceedings? And second, when, among all the instances of such failure, should the ICC, with its limited resources, interfere? The answer to both questions lies in the principle of complementarity which governs the ICC's exercise of jurisdiction. The essence of the principle is that the ICC shall only exercise jurisdiction over a case when no state proceeds genuinely with it and ICC interference in that particular case will serve

⁸¹The International Criminal Court that Africa wants by Max du Plessis Monograph 172 August 2010 2010, Institute for Security Studies available on www.issafrika.org pp43 accessed on date September 2/2013

⁸² Ibid

the interests of justice. This sums up the two aspects of complementarity, which this book refers to as the tests of admissibility and prosecutorial discretion. The two tests just described are the second and third of three tests that a case must pass before the ICC will actually handle it. The three tests are: the jurisdictional test, the admissibility test and the discretionary test.⁸³

3.4 Admissibility

Article 17 provides that a case will be inadmissible before the ICC if it is already being investigated or prosecuted by a state that has jurisdiction over it, or if it has been investigated by a state and the state has decided not to prosecute the person concerned. However, the ICC can find the case admissible if the state that asserts its jurisdiction is unwilling or unable genuinely to carry out the investigation or prosecution or if the decision not to prosecute resulted from its unwillingness or inability to prosecute. In addition, a case will be inadmissible if the person concerned has already been tried for the same conduct or if the case is not of sufficient gravity to justify further action by the ICC⁸⁴.

The test for unwillingness, set out in Article 17(2), is whether the proceedings themselves, or a decision not to prosecute, are aimed at shielding the person concerned from justice. The factors which the ICC must consider in making its determination include whether the proceedings are being conducted independently or impartially, with full respect for the accused person's due process rights and consistently with intent to bring the accused to justice. States should be aware that certain procedural or evidentiary rules that effectively prevent the proper investigation and prosecution of some crimes, may lead the ICC to determine that the state is "unwilling" to take action ⁸⁵

Article 17, paragraph (3) of sets out the test to determine "inability." It provides that, in order to determine inability of a state to prosecute in a particular case, the ICC "shall consider whether, due to a total or substantial collapse or unavailability of its national

⁸³Stigen Jo.2008The relationship between the International Criminal Court and national jurisdictions: the principle of complementarity by (The Raoul Wallenberg Institute human rights library ; vol. 34) 2008 pp 417

⁸⁴Schabas, William (2004) Introduction to the International Criminal Court, 2nd ed., Cambridge: Cambridge University Press, , xii, 48

⁸⁵ Human Rights watch 2001 Vol 13.No 4 pp14

judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.”⁸⁶

Domestic implementation of the complementarity principle under the complementarity principle, states parties that have the proper legal basis for prosecuting ICC crimes will be able to exercise their national jurisdiction over their nationals rather than having to surrender them to the ICC. Implementation of the Rome Statute into domestic law provides an excellent opportunity for states parties to review and amend their national law to ensure that they are able to exercise their jurisdiction over these crimes. At a minimum, this will require that states parties incorporate the “ICC crimes” into their national law, remove any barriers to prosecution of these crimes and guarantee all accused persons a fair trial “according to the principles of due process recognized under international law.”⁸⁷

3.5 Definitions of ICC Crimes

Article 5 lists the crimes over which the ICC will have jurisdiction, namely genocide, war crimes and crimes against humanity. The ICC will also have jurisdiction over the crime of aggression once states parties have defined it. Articles 6, 7, and 8 define the three crimes Article 5 for the purposes of the ICC. The Statute defines each of these crimes except for aggression.⁸⁸The crime of genocide is unique because the crime must be committed with 'intent to destroy'. Crimes against humanity are specifically listed prohibited acts when committed as part of a widespread or systematic attack directed against any civilian population.⁸⁹The Statute provides that the Court will not exercise its jurisdiction over the crime of aggression until such time as the states parties agree on a definition of the crime and set out the conditions under which it may be prosecuted.

⁸⁶ Ibid pp15

⁸⁷Schabas, William (2004) Introduction to the International Criminal Court, 2nd ed., Cambridge: Cambridge University Press, , xii, 48

⁸⁸ Article 5(2)

⁸⁹ Article 7para 1

In June 2010, the ICC's first review conference in Kampala, Uganda adopted amendments defining "Crimes of Aggression" and expanding the ICC's jurisdiction over them. The ICC will not be allowed to prosecute for this crime until at least 2017.⁹⁰

3.5.1 Genocide

Involves any of a number of acts, including killing, causing serious bodily or mental harm, imposing measures intended to prevent births, and forcible transfer of children to another group, “committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group” article 6. The provision is essentially a copy of Article II of the Genocide Convention. The definition set out in Article II, although often criticized for being overly restrictive and difficult to apply to many cases of mass killing and atrocity has stood the test of time. The decision of the Rome Conference to maintain a fifty year old text is convincing evidence that Article 6 of the Statute constitutes a codification of a customary international norm.⁹¹

3.5.2 Crimes against Humanity

Are defined as certain acts “when committed as part of a widespread or systematic attack directed against any civilian population”. Article 7 defines the following acts as crimes against humanity: murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment in violation of fundamental rules of international law, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and other grave forms of sexual violence, persecution, enforced disappearance, apartheid, and other inhumane acts.

The United Nations General Assembly decided to define the most egregious form of crime against humanity, namely genocide, as a distinct offence that could be committed in time of peace as well as I war time .⁹²

⁹⁰On 11 June 2010, at the Review Conference of the Rome Statute, held in Kampala, Uganda, from 31 May to 11 June 2010, the ... In respect of a State Party ... Available On www.icc-epi.int/iccdocs/.../AMENDMENTS/CN.651.2010-ENG-CoA.pdf

⁹¹Schabas, William (2004) Introduction to the International Criminal Court, 2nd ed., Cambridge: Cambridge University Press, , xii, 48

⁹² Ibid

3.5.3 War Crimes

For the purposes of the Rome Statute cover acts committed during international and non-international (internal) armed conflicts. The definition includes acts such as grave breaches of the 1949 Geneva Conventions, including willful killing or torture of protected persons or extensive destruction of protected property; other serious violations of the laws and customs applicable in international armed conflict; serious violations of common article 3 of the 1949 Geneva Conventions, including intentional attacks on or violence against civilians and other serious violations of the laws and customs applicable to non-international armed conflict as per Article 8 of Rome statute.

Article 10 states that the definitions of these crimes and other provisions of Part 2 of the Rome Statute cannot be interpreted as limiting or prejudicing in any way existing or developing rules of international law.

3.6 Structure and Administration of the Court

The seat of the Court is The Hague,⁹³ but it may sit elsewhere if it considers this desirable.⁹⁴ The Netherlands was the only State to offer its services, despite rumors that circulated before and during the Diplomatic Conference about Rome, Lyon and Nuremberg as possible candidates. The Hague is already the seat of the International Court of Justice as well as of the International Criminal Tribunal for the Former Yugoslavia and other international judicial organizations. Its candidacy must have seemed so unbeatable to possible competitors that they declined even to throw their hats into the ring.⁹⁵ The Court has also set up offices in the areas where it is conducting investigations.⁹⁶

The International Criminal Court is composed of four ‘organs’: the Presidency, the Divisions, the office of the Prosecutor and the Registry. There are three Divisions: the Appeals Division, the Trial Division and the Pre- Trial Division. The term ‘Division’

⁹³ Article 3(1)

⁹⁴ Ibid

⁹⁵ Schabas, William (2004) Introduction to the International Criminal Court, 2nd ed., Cambridge: Cambridge University Press,

⁹⁶ Understanding the international criminal court available on www.icc-cpi.int/Menu/ICC/schedule. Accessed on 26/6/2013

rather than ‘Chamber’ was used in order to resolve a dispute about whether there should be one or several pre-trial chambers.

3.6.1 The Presidency

The Presidency consists of three judges (the President and two Vice-Presidents) elected by an absolute majority of the 18 judges of the Court for a maximum of two, three-year terms. The Presidency is responsible for the administration of the Court, with the exception of the Office of the Prosecutor. It represents the Court to the outside world and helps with the organization of the work of the judges.

The current president is Sang-Hyun Song, who was elected on 11 March 2009. The Presidency is also responsible for carrying out other tasks, such as ensuring the enforcement of sentences imposed by the Court.⁹⁷

3.6.2 Appointment of Judges

The eighteen judges of the court are elected by the Assembly of States Parties, of whom three make up the Presidency. Any State party may propose one candidate for the Court in any given election. That candidate need not be a national of the nominating State but must be a national of a State party. But there can be only one judge of any given nationality at any one time. Judges are to be of ‘high moral character, impartiality and integrity’, a phraseology that is rather typical of international instruments.

They must also be qualified for appointment to the highest judicial offices in their respective States⁹⁸ and are to have an excellent knowledge of and be fluent in at least one of the working language so far the Court, namely, English or French. The Statute allows for an ‘advisory committee’ on nominations.⁹⁹

The Statute requires a degree of expertise in the subject matter of the Court. Here it creates two categories of candidates, those with criminal law experience and those with international law experience. Specific reference is made to international humanitarian law

⁹⁷ Wikipedia http://en.wikipedia.org/wiki/International_Criminal_Court Accessed on April 11, 2014

⁹⁸ Article 36(3) a

⁹⁹ Article 36(3) c

and the law of human rights. During an election there are two lists of candidates, one with the criminal law profile ('List A'), the other with the international law profile ('List B'). A nominee for the Court who meets both requirements may choose the list on which he or she will appear. At the first election, a minimum of nine and a maximum of thirteen judges had to come from the criminal law profile, and a minimum of five and a maximum of nine from the international law profile.¹⁰⁰

3.6.3 About the Chambers

The 18 judges, including the three judges of the Presidency, are assigned to the Court's three judicial divisions: the Pre-Trial Division (composed of seven judges), article 39(2)(b) (iii) the Trial Division, (composed of six judges), article 39 2(b) ii and the Appeals Division (composed of five judges). article 39 (2) (b) I They are assigned to the following Chambers: the Pre-Trial Chambers (each composed of one or three judges), the Trial Chambers (each composed of three judges) and the Appeals Chamber (composed of the five judges of the Appeals Division).¹⁰¹

3.6.4 Pre-Trial Chambers

The Pre-Trial Chambers, each of which is composed of either one or three judges, resolve all issues which arise before the trial phase begins.¹⁰² Their role is essentially to supervise how the Prosecutor carries out his or her investigatory and prosecutorial activities, to guarantee the rights of suspects, victims and witnesses during the investigatory phase, and to ensure the integrity of the proceedings. The Pre-Trial Chambers then decide whether or not to issue warrants of arrest or summons to appear at the Prosecutor's request and whether or not to confirm the charges against a person suspected of a crime. They may also decide on the admissibility of situations and cases and on the participation of victims at the pre-trial stage.¹⁰³

¹⁰⁰ Article 36(5)

¹⁰¹ ICC web site www.icc-cpi.int/EN_Menus accessed on April 11, 2014

¹⁰² Article 39(2)(b) (iii)

¹⁰³ ICC Web www.icc-cpi.int/EN_Menus accessed on April 11, 2014

3.6.5 Trial Chambers

Once an arrest warrant is issued, the alleged perpetrator arrested and the charges confirmed by a Pre- Trial Chamber, the Presidency constitutes a Trial Chamber composed of three judges to try the case.¹⁰⁴ A Trial Chamber's primary function is to ensure that trials are fair and expeditious and are conducted with full respect for the rights of the accused and due regard for the protection of the victims and the witnesses. It also rules on the participation of victims at the trial stage.

The Trial Chamber determines whether an accused is innocent or guilty of the charges and, if he or she is found guilty, may impose a sentence of imprisonment for a specified number of years not exceeding a maximum of thirty years or life imprisonment. Financial penalties may also be imposed. A Trial Chamber may thus order a convicted person to make reparations for the harm suffered by the victims, including compensation, restitution or rehabilitation.¹⁰⁵

3.6.6 The Appeals Chamber

The Appeals Chamber is composed of the President of the Court and four other judges¹⁰⁶. All parties to the trial may appeal or seek leave to appeal decisions of the Pre-Trial and Trial Chambers. The Appeals Chamber may uphold, reverse or amend the decision appealed from, including judgments and sentencing decisions, and may even order a new trial before a different Trial Chamber. It may also revise a final judgment of conviction or sentence.¹⁰⁷

3.7 Office of the Prosecutor and its Prosecution

The prosecutorial arm of the Court is a separate and independent organ.¹⁰⁸ Its mandate is to receive and analyze information on situations or alleged crimes within the jurisdiction of the ICC, to analyses situations referred to it in order to determine whether there is a reasonable basis to initiate an investigation into a crime of genocide, crimes against

¹⁰⁴ Article 39 2(b) ii

¹⁰⁵ ICC web www.icc-cpi.int/EN_Menu accessed on April 11, 2014

¹⁰⁶ Article 39 (2) (b)

¹⁰⁷ ICC web www.icc-cpi.int/EN_Menu accessed on April 11, 2014

¹⁰⁸ Article 42(1)

humanity, war crimes or the crime of aggression, and to bring the perpetrators of these crimes before the Court.

The ICC prosecutes individuals, not groups or States. Any individual who is alleged to have committed crimes within the jurisdiction of the ICC may be brought before the ICC.¹⁰⁹ In fact, the Prosecutor's prosecutorial policy is to focus on those who, having regard to the evidence gathered, bear the greatest responsibility for the crimes, and does not take into account any official position that may be held by the alleged perpetrators.

3.7.1 Office of the Prosecutor how it works

The Office of the Prosecutor is an independent organ of the Court. In order to fulfil its mandate, the Office of the Prosecutor is composed of three divisions: (i) the Investigation Division, which is responsible for the conduct of investigations (including gathering and examining evidence, questioning persons under investigation as well as victims and witnesses). In this respect, for the purpose of establishing the truth, the Statute requires the Office of the Prosecutor to investigate incriminating and exonerating circumstances equally. (ii) The Prosecution Division, which has a role in the investigative process, but whose principal responsibility is the litigation of cases before the various Chambers of the Court. (iii) The Jurisdiction, Complementarity and Cooperation Division, which, with the support of the Investigation Division, assesses information received and situations referred to the Court, analyses situations and cases to determine their admissibility and helps secure the cooperation required by the Office of the Prosecutor in order to fulfil its mandate.¹¹⁰

3.7.2 Election of the Prosecutor.

The Office of the Prosecutor is headed by the Prosecutor, who is assisted by one or more Deputy Prosecutors. The Prosecutor and the Deputy Prosecutors are required to be of different nationalities. Both the Prosecutor and the Deputy Prosecutors are to be persons 'of high moral character' with 'extensive, practical experience' in criminal prosecutions.

¹⁰⁹Article 25 (2) says A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

¹¹⁰Understanding the international criminal court available on www.icc-cpi.int/Menus/ICC/schedule accessed 26/6/2013

They must be fluent in at least one of the working languages of the Court. Selection of a Prosecutor proved to be more difficult than election of the judges of the Court. Early on, it was agreed that it was highly desirable for this highly sensitive position to be filled by consensus rather than by a volatile and unpredictable ballot.¹¹¹

The Prosecutor is elected by secret ballot of an absolute majority of the Assembly of States Parties. The Deputy Prosecutors must also be elected by the Assembly of States Parties, but from a list of candidates proposed by the Prosecutor. The Prosecutor submits a list of three candidates for each position of Deputy Prosecutor to be filled. The term of both Prosecutor and Deputy Prosecutors is nine years. As of 16 June 2012, the Prosecutor has been Fatou Bensouda of Gambia who had been elected as the new Prosecutor on 12 December 2011. She has been elected for nine years. Her predecessor, Luis Moreno Ocampo of Argentina, had been in office from 2003 to 2012¹¹²

3.8 The Registry

The Registry is responsible for the non-judicial aspects of the administration and servicing of the Court. The principal administrative officer of the Court is the Registrar, and he or she heads the Registry.¹¹³The Registrar's staff is to demonstrate experience with various judicial systems, in addition to geographic representativity and gender balance. The Statute specifically provides for the use of 'gratis personnel' offered by States parties, intergovernmental and non-governmental organizations to assist with the work of any of the organs of the Court. Gratis personnel are to be employed only 'in exceptional circumstances'.¹¹⁴This includes, among other things, "the administration of legal aid matters, court management, victims and witnesses' matters, defense counsel, detention unit, and the traditional services provided by administrations in international organizations, such as finance, translation, building management, procurement and personnel".¹¹⁵

¹¹¹ Article 42(4)

¹¹² Wikipedia http://en.wikipedia.org/wiki/International_Criminal_Court Accessed Feb 26 2014.

¹¹³ Article 43(1)

¹¹⁴ ICC Web www.icc-cpi.int/EN_Menu accessed on April 11, 2014

¹¹⁵ Article 43(6)

CHAPTER FOUR

4. Analysis of Situation of African Cases and the Rest of the World and AU, UNSC and US behind the Court

The International Criminal Court (ICC), governed by the Rome Statute, is the first permanent, treaty based, international criminal court established to help end impunity for the perpetrators of the most serious crimes of concern to the international community.¹¹⁶

The Court may exercise jurisdiction over such crimes only if they were committed on the territory of a State Party or by one of its nationals. These conditions, however, do not apply if a situation is referred to the Prosecutor by the United Nations Security Council, whose resolutions are binding on all UN member states, or if a State makes a declaration accepting the jurisdiction of the Court.¹¹⁷

The Prosecutor can initiate an investigation or prosecution in three different ways: States Parties to the Statute of the ICC can refer situations to the Prosecutor¹¹⁸; the United Nations Security Council can request the Prosecutor to launch an investigation¹¹⁹; the Office of the Prosecutor may initiate investigations *proprio motu* (on its own initiative)¹²⁰ on the basis of information received from reliable sources. In this case, the Prosecutor must seek prior authorization from a Pre-Trial Chamber composed of three independent judges.

The ICC is a court of last resort. It will not act if a case is investigated or prosecuted by a national judicial system unless the national proceedings are not genuine, for example if formal proceedings were undertaken solely to shield a person from criminal responsibility. In addition, the ICC only tries those accused of the gravest crimes.

¹¹⁶ ICC http://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx accessed Sep 2/2014

¹¹⁷ Ibid

¹¹⁸ Article 13(a)

¹¹⁹ Article 13(b)

¹²⁰ Article 13(c)

21 cases in 8 situations have been brought before the International Criminal Court. Pursuant to the Rome Statute, the Prosecutor can initiate an investigation on the basis of a referral from any State Party or from the UNSC.¹²¹

To date, four States Parties to the Rome Statute Uganda, the Democratic Republic of the Congo, the Central African Republic and Mali have referred situations occurring on their territories to the Court. In addition, the Security Council has referred the situation in Darfur, Sudan, and the situation in Libya – both non-States Parties. After a thorough analysis of available information, the Prosecutor has opened and is conducting investigations in all of the above-mentioned situations. On 31 March 2010, Pre-Trial Chamber II granted the Prosecution authorization to open an investigation *proprio motu* in the situation of Kenya. In addition, on 3 October 2011, Pre-Trial Chamber III granted the Prosecutor’s request for authorization to open investigations *proprio motu* into the situation in Côte d’Ivoire.¹²²

4.1 Situation by Referral of State Parties

Article 14(1) of Rome statute a State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear 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. Article 14(2) As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.¹²³

currently the court had three of African states have referred their cases to ICC according to Article 14 of the Rome statute since establishment court sate parties has referred to ICC four cases .DRC , Uganda , CAR ,Mali.

¹²¹ ICC http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx accessed April 14, 2014

¹²² ICC [webwww.icc-cpi.int/EN_Menus](http://www.icc-cpi.int/EN_Menus) accessed on Sep 11, 2014

¹²³ Article 14(1)&(2)

4.1.1. Situation of Uganda

The ongoing conflict in Uganda pits the government of President Yoweri Museveni and the military known as the Uganda People's Defense Force (UPDF) against the Lord's Resistance Army (LRA). The conflict has been raging for twenty years, and one of the reasons why it has been difficult for the government to negotiate with the LRA is because the insurgents have no clear political, economic, or territorial agenda. The main area where the conflict has occurred is in the north, in an area known as Acholil and (the Acholi are the dominant tribal group in the region). The widening economic and political gap between the north and the south and the militarization of politics constitute for the conflict in northern Uganda.¹²⁴

The Ugandan government referred the situation in its country to the Prosecutor in December 2003, and an investigation was initiated in July 2004. The investigation has focused on northern Uganda where numerous atrocities have been committed against the civilian population. The crimes under investigation include crimes against humanity and war crimes. In July 2005, the Court issued warrants for the arrest of five senior commanders of the Lord's Resistance Army (one of whom is now deceased), including its leader, Joseph Kony. The Office of the Prosecutor continues to seek the cooperation of relevant members of the international community for the arrest and surrender of the remaining commander's¹²⁵. In October 2005, the ICC unsealed arrest warrants for five high commanders of the armed uprising group the Lord's Resistance Army (LRA). They are charged with crimes against humanity and war crimes. None of the charged men has been arrested yet.¹²⁶ Proceedings against Lukwiya were terminated after his death, but the case against the other four, who remain at large, is being heard by the Court. Kony and the LRA have refused to negotiate a peace deal with the government of President Yoweri Museveni unless the indictments are quashed and the case dropped. The ICC and human rights groups, such as Amnesty International, have opposed any offers of amnesty to

¹²⁴Doom and Vlassen 2008, State Co-operation and International Criminal Court Bargaining Influence in the Arrest and the Surrender of Suspects .Leiden Journal of International Law, 21 (2008), pp. 457–476 Foundation of the Leiden Journal of International Law Printed in the United Kingdom .

¹²⁵ Plessis Max du 2008 The International Criminal Court and its work in Africa confronting the myths • ISS Paper 173

¹²⁶ Fact sheet one 2007-2008 Program for International Justice and Accountability Amnesty International USA 24/6/2013

Kony and the LRA even if they were to sign a peace accord with the government.¹²⁷ The tension between justice and peace has been brought into sharp relief by the LRA. Opinion is divided on what should be done. According to Richard Dicker of Human Rights Watch, Kony agreed to “take part in peace talks” because he was “prodded in part by arrest warrants issued by the ICC for him and his senior commanders.” However, it appears that Kony feigned good faith but never intended to sign the peace deal. He used the talks as bait to rearm. Still, the larger question remains unanswered – would it have served the dual purposes of justice and peace if Kony had signed the peace accord and silenced the guns?¹²⁸ Articles 16 and 53 of the Rome Statute seem to open the door to amnesty where either a “prosecution would not serve the interest of justice” or where the UN Security Council can request a deferral of an investigation or prosecution for a renewable twelve months pursuant to a resolution adopted under Chapter VII of the UN Charter. This suggests that the Court can suspend action on a case on the grounds of international peace and security. There is a risk that both clauses can be used as a political subterfuge against the judicial process. That is why in 2007 the Prosecutor of the ICC adopted a strict and narrow interpretation of Article 53 of the Rome Statute¹²⁹

4.1.2 Situation of Democratic Republic Congo

In March 2004, Democratic Republic of the Congo authorities referred the situation in the country involving crimes within the jurisdiction of the Court to the Office of the Prosecutor. An investigation was opened in June 2004 and, having analyzed the crimes within the Court’s jurisdiction and identified the gravest crimes, the Office of the Prosecutor has focused its initial investigations in the Ituri region. In February 2006, the Court issued a warrant of arrest for Thomas Lubanga, president of the Union of Congolese Patriots (an armed group operating in Ituri province) on charges of enlisting, conscripting and using child soldiers. Lubanga was arrested and surrendered to the ICC in March 2006.¹³⁰

¹²⁷Mutual, Makau (2011) The International Criminal Court in Africa: Challenges and Opportunities NOREF Working Paper, Norwegian Peacebuilding Centre (www.peacebuilding.no), pp 5-7

¹²⁸ *ibid*

¹²⁹ *ibid*

¹³⁰ *ibid*

In July 2007, the Court issued a warrant for the arrest of Germain Katanga, former senior commander of the Patriotic Forces of Resistance in Ituri. He is charged with crimes against humanity and war crimes. Katanga has since surrendered to the Court by the Congolese government. The third person to be surrendered to the Court was Mathieu Ngudjolo Chui, a colonel in the Congolese armed forces and alleged former leader of the National Integrationist Front. The charges against him, which are yet to be confirmed, are in respect of war crimes and crimes against humanity. Following a decision of the Pre-trial Chamber, the cases against Chui and Katanga have now been joined.¹³¹

On 28 April 2008, the Pre-trial Chamber unsealed warrant arrest against Bosco Ntaganda, former deputy chief of general staff for military operations of the *Forces patriotiques pour la libération du Congo*. He is alleged to have enlisted, conscripted and used children under the age of 15 years for active participation in hostilities in Ituri between July 2002 and December 2003. Ntaganda is still at large.¹³²

The complexities of the Congolese conflict defy quick or easy successes for the ICC. National elections in 2006 capped a decade of war that began with Laurent Desire Kabila's 1996-1997 campaign to liberate the country (then called Zaire) from the repressive rule of Mobutu Sese Seko. Because the most violent period of Congo's wars occurred from 1996 to 2003, many serious crimes fall outside the Court's temporal jurisdiction. While the armed conflict formally ended with the signing of a peace agreement in 2002, fighting has continued unabated in the north and east, marked by the commission of additional mass atrocities. The wars in eastern Congo have been described as the deadliest since World War II with estimates that 5.4 million conflict-related deaths have occurred between August 1998 and April 2007. All sides have committed flagrant violations of international humanitarian law, including targeting civilians for murder, rape and other forms of sexual violence, forced displacement, recruiting child soldiers, and abducting civilians. Armed conflict in the Congo has assumed both an international

¹³¹ Decision Establishing a Calendar according to the date of the Confirmation hearing: 27 June 2008, Situation in the democratic republic of Congo in the case of Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui (hereinafter, Katanga and Chui) (01/04-01/07-459), Pre-Trial Chamber I, 29 April 2008.

¹³² Plessis, Max du (2008) The International Criminal Court and its work in Africa: Confronting the myths, ISS Paper 173,

and domestic character at different times. High-ranking officials from DRC and neighboring countries, many of whom continue to serve in positions of power, are alleged to have been involved. Perpetrators enjoy near total impunity¹³³

But the ICC is not the only means of justice in the DRC. It is indeed meant to be a last resort. One alternative means of justice for the DRC is for the national criminal justice system to be strengthened considerably (perhaps using international assistance) so that the DRC could carry out the prosecutions itself. If that were to occur it would be wonderful for the DRC and a welcomed triumph to the object and purpose of the ICC, which is to bring an end to impunity for international crimes. In any event the ICC is only responsible for the most serious crimes of international concern and the national system has to deal with the other crimes. May be ICC involvement in the DRC would invite support from various quarters for the strengthening of the DRC criminal justice system in any event.¹³⁴

4.1.3 Situation of Central African Republic

The CAR is one of the poorest countries in the world with a history of instability and dictatorship. Since obtaining its independence from France in 1960, CAR has been trapped in a cycle of military coup attempts and violent power transitions, leaving the country fragmented, underdeveloped and violent.

In 2002–2003, the widespread violence committed by all parties, including Bemba's troops, prompted local human rights organizations affiliated with the International Federation for Human Rights to investigate serious crimes in the most affected neighborhoods of the capital. In February 2003, the evidence was sent to the newly established ICC with the suggestion that the situation be investigated. Then, in December 2004, Boziz'e's government officially referred the situation to the Court. Two and half years later, in May 2007, the ICC prosecutor opened an investigation into the situation in

¹³³Democratic Republic of Congo: Impact of the Rome Statute and the International Criminal Court .The Rome Statute Review Conference June 2010, Kampala. Available at www.ictj.org

¹³⁴Maungo Sivuyile 2003 Trial and Error Challenges facing the International Criminal Court : African Security Review 12(4)

CAR, and, in 2008, the ICC Pre- Trial Chamber issued the first arrest warrant in the situation against Jean-Pierre Bemba¹³⁵.

In 2002, Patasse invited Jean-Pierre Bemba, the Congolese warlord and head of the Movement for the Liberation of Congo, to help put down a coup attempt. Bemba, a former DRC vice-president, was indicted and arrested by Belgian police while there and turned over to the ICC on charges of war crimes and crimes against humanity in the CAR. Bozize had self-referred Bemba's case to the ICC; Bemba is now on trial at The Hague.¹³⁶

Central African Republic in May 2007, the ICC Prosecutor began investigating allegations of rape and other violence committed in the Central African Republic. The Prosecutor stated that rapes and sexual violence perpetrated by armed individuals appeared to be a central feature of the conflict in the CAR. The ICC began monitoring the situation in the country in 2005 after the CAR government and the *Cour de Cassation*, CAR's highest criminal court, requested that the ICC do so¹³⁷ although the CAR state and judiciary have been cooperative with the ICC, the case has political overtones. Some analysts suspect that the CAR and the DRC are in cahoots to remove Bemba from the scene. It is curious that the CAR has not referred the case of Patasse himself to the ICC. Bemba's supporters in the DRC and Belgium, where he has a large following, have organized demonstrations to denounce the ICC¹³⁸

Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido are suspected of offences against the administration of justice allegedly committed in connection with the case *The Prosecutor v. Jean-Pierre Bemba Gombo*, consisting of corruptly influencing witnesses before the ICC and presenting evidence that they knew to be false or forged. Fidèle BabalaWandu and Aimé Kilolo Musamba were transferred to the ICC Detention center on 25 November

¹³⁵Outreach Evaluation: The International Criminal Court in the Central African Republic *The International Journal of Transitional Justice*, 2010, 1–22, <http://ijtj.oxfordjournals.org/>

¹³⁶ The International Criminal Court in Africa: Challenges and Opportunities Makau Mutua Noref Working Paper, Norwegian Peacebuilding Centre (www.peacebuilding.no), September 2010

¹³⁷ Fact Sheet One 2007-2008 Program for International Justice and Accountability Amnesty International USA

¹³⁸Mutua Makau 2010 *The International Criminal Court in Africa: Challenges and Opportunities* Noref Working Paper, Norwegian Peacebuilding Centre (www.peacebuilding.no),

2013; following their arrests. Fidèle Babala Wandu and Aimé Kilolo Musamba's first appearance before the ICC was held on 27 November 2013. Jean-Pierre Bemba Gombo appeared with them as well. Following his arrest, Jean-Jacques Mangenda Kabongo was transferred to the ICC detention center on 4 December 2013 and he made his first appearance before the ICC on 5 December 2013. The decision on the confirmation of the charges will be made in writing in due course. Narcisse Arido will be surrendered to the Court upon completion of the relevant national judicial proceedings in France¹³⁹

4.1.4 Situation of Mali

The Republic of Mali is a landlocked country in Western Africa, bordering Algeria to the North, Niger to the East, Burkina Faso and Côte d'Ivoire to the South, Guinea to the South-West, and Senegal and Mauritania to the West.¹¹ Mali is divided into eight regions and one district each administered by a governor. The regions are Gao, Kayes, Kidal, Koulikoro, Mopti, Ségou, Sikasso, Timbuktu and the capital district Bamako. Just as the great majority of the other eight Sahelian countries¹⁴⁰.

As of around 17 January 2012, an ongoing non-international armed conflict continued in the territory of Mali between the government forces and different organized armed groups, particularly the *Mouvement national de libération de l'Azawad* (National Movement for the Liberation of Azawad, MNLA), al-Qaeda in the Islamic Maghreb (AQIM), Ansar Dine and the *Mouvement pour l'unicité et le jihad en Afrique de l'Ouest* (Movement for Oneness and Jihad in West Africa, MUJAO) and 'Arab militias', as well as between these armed groups themselves absent the involvement of government forces.¹⁴¹

The armed conflict in Mali can be separated into two phases. The first phase began on 17 January 2012 with the attack by MNLA on the Malian Forces military base in Menaka (Gao region). This phase ended on 1 April 2012 when the Malian Armed Forces withdrew from the north. The second phase commenced immediately when non-State armed groups seized control of the North. This phase of the conflict is characterized

¹³⁹ ICC web ICC-PIDS-TCT-01-037/14_Eng updated 15 January 2014

¹⁴⁰ Taken from situation of Mali Article 53(1) Report January 16 2013 OTP

¹⁴¹ *ibid*

primarily by armed clashes between the different armed groups, trying to gain exclusive control over the territory in the North, as well as by sporadic attempts by governmental forces to combat such armed groups and retake territorial control¹⁴²

Mali signed the ICC Statute on 17 July 1998 and ratified it on 16 August 2000, for which reason the ICC has jurisdiction over crimes committed on the territory of Mali or by its nationals as of 1 July 2002. Since the alleged crimes were committed in the territory of Mali, the ICC has jurisdiction *ratione loci* and may investigate crimes committed within the entire territory of Mali. In addition, Article 5 of ICC Statute provides for jurisdiction *ratione materiae* over certain core crimes: genocide; crimes against humanity; war crimes; and the crime of aggression¹⁴³

This finding leads to admissibility without more if national proceedings are absent with regard to the incident and individuals under investigation. In the situation in Mali this appears to be the case, and, in any event, Malian courts in the North are unable to prosecute alleged crimes due to a withdrawal of judicial services. It remains to be seen if the Malian State will initiate its own criminal proceedings in the future once it re gains control over certain territory, and whether these proceedings would be aimed at complementing the ICC's proceedings or whether Mali might try to draw the cases back to its own judicial system under the principle of positive complementarity and challenges the ICC's admissibility¹⁴⁴

For the credibility of independent investigations it is yet indispensable that the OTP investigates both sides of the conflict. Crimes committed by the government cannot be ignored, especially given the self-referral by Mali and potential (negative) implications. The handling of these alleged criminal offenses has to be very carefully monitored; genuine investigations and prosecutions, either by the ICC or national Malian authorities,

¹⁴² *ibid*

¹⁴³ Criminal Law Forum (2013) 24:475–499 Ignaz Stegmüller Faculty of Law, Franz von Liszt-Institute for International and Comparative Law, Justus Liebig University Giessen.

¹⁴⁴ *ibid*

have to take place. Only proceedings against all actors, including the government side, might achieve deterrent effects.¹⁴⁵

The situation in Mali was referred to the Court by the Government of Mali on 13 July 2012. On 16 January 2013, the Prosecutor opened an investigation into alleged crimes committed on the territory of Mali since January 2012¹⁴⁶

4.2 Situation Referred by UNSC

Article 13 Exercise of jurisdiction The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:(b) 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 of the Charter of the United Nations.¹⁴⁷

4.2.1 Situation of Sudan

Sudan, Africa's largest country by land mass, has been a troubled state since its creation by colonial expansion policy of the British. A number of factors a deep divide between the Arabized north and the black African south, religious and racial conflicts, competition over scarce resources, and dictatorship by a violent but weak state. The long running conflict between the north and the south has abated for now, but the government of President Omar al-Bashir has been credibly accused of war crimes, crimes against humanity, and genocide in Darfur, the western region that is home to black African Muslims. The UN estimates that The Darfur conflict pits the fundamentalist Islamic regime against fellow Muslims. The conflict seems to be highly racialized Darfurians are black and driven by a struggle over resources¹⁴⁸.

Local rebel groups took up arms against the government, accusing Khartoum of neglecting the region and favoring certain ethnic factions over others; disputes over land

¹⁴⁵ Ibid

¹⁴⁶ ICC web ICC-PIDS-TCT-01- 037/14_Eng updated 15 January 2014

¹⁴⁷ Article 13(b) of Rome statute

¹⁴⁸ Mutual, Makau (2011) The International Criminal Court in Africa: Challenges and Opportunities NOREF Working Paper, Norwegian Peacebuilding Centre (www.peacebuilding.no), pp 5-8

and access to natural resources became violent. The Sudanese government responded to the insurgency by bombing villages from the air and supporting Janjaweed militias, composed of members of Arabic speaking nomadic tribes, with weapons and equipment for coordinated attacks on the ground. The resulting campaign of ethnic cleansing has killed more than 200,000 civilians and displaced more than 1.6 million people. Some 200,000 additional refugees have fled across the border into Chad to escape the violence.¹⁴⁹

Sudan: The Prosecutor v. Ahmad Muhammad Harun (“Ahmad Harun”) and Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”). In 2005, the U.N. Security Council passed a historic resolution calling for the ICC to investigate the crimes committed in Darfur. The Resolution was adopted by a vote of 11 in favor, none against, and with four abstentions the United States, China, Algeria, and Brazil. While Sudan is not a party to the ICC and has not consented to its jurisdiction, the Court argues that the Resolution is binding on all U.N. member states, including Sudan. Under the ICC Statute, the ICC was authorized, but not required, to accept the case.¹⁵⁰

In 2007, the ICC issued arrest warrants for Ahmad Harun, former Sudanese interior minister, and Ali Kushayb, Janjaweed militia leader. They bear responsibility for 51 counts of alleged war crimes and crimes against humanity, including persecutions, murder, forcible transfer, rape, torture, and destruction of property and pillage in Darfur, Sudan.¹⁵¹ In 2009, the ICC issued a warrant of arrest for al-Bashir for war crimes and crimes against humanity. On 12 July 2010, the ICC issued a second warrant of arrest for al-Bashir on three counts of genocide in Darfur. In addition to al-Bashir, five other Sudanese officials have been charged with war crimes and crimes against humanity¹⁵²

More generally, and regrettably, the Sudanese president has also received strong vocal public support from the Arab League. In 2009, the African Union even passed a resolution despite Botswana’s strong objections to reject the ICC’s arrest-warrants against al-Bashir. Nigeria, the continent’s most populous state, openly supported the AU

¹⁴⁹ Lee Feinstein and Tod Lindberg, 2009 Means to an end : U.S. interest in the International Criminal Court pp70

¹⁵⁰ International Criminal Court Cases in Africa: Status and Policy Issues CRS Report for Congress March 7, 2011 www.crs.gov

¹⁵¹ Fact sheet 2007-2008 Program for International Justice and Accountability Amnesty International USA.

¹⁵² ICC web www.icc-cpi.int/EN_Menu accessed on April 11, 2014

resolution. In April 2010, al-Bashir was easily re-elected in a vote boycotted by the opposition and marred by widespread fraud and intimidation. Eventually, the African Union and the United Nations both sent peacekeeping forces to Darfur, but they have been hampered by the Sudanese government and notoriously ineffective. In fact, “the only stringent collective measure was the referral of the situation to the ICC by the Security Council on March 31, 2005”¹⁵³

4.2.2 Situation of Libya

On February 26, 2011, UNSC Resolution 1970 referred the situation in Libya since February 15, 2011, to the ICC crimes committed. This action provides the ICC with jurisdiction over war crimes, crimes against humanity, and genocide occurring in Libya since that date, even though Libya is not a state party to the Court. The United States voted in favor of the resolution, the first time it has done so in referring an issue to the ICC. The Prosecutor indicated in opening a formal investigation in March that he would focus on the role of the government and security forces in ongoing violence, but warned that members of armed opposition groups could also be held criminally liable for abuses¹⁵⁴.

On June 27, ICC judges issued arrest warrants for Libyan leader Muammar al Qadhafi, his son Sayf al Islam al Qadhafi, and intelligence chief Abdullah al Senussi, having found “reasonable grounds” to believe that they are responsible for crimes against humanity, including murder and “persecution.” In his application for the warrants, filed on May 16, the Prosecutor alleged that Qadhafi “conceived and implemented, through persons of his inner circle” such as Sayf al Islam and Al Senussi, “a plan to suppress any challenge to his absolute authority through killings and other acts of persecution executed by Libyan Security Forces. They implemented a State policy of widespread and systematic attacks against a civilian population, in particular demonstrators and alleged dissidents¹⁵⁵.

¹⁵³Kastner 2007 cited with in the paper of Snitzer, Katherine Ann, "Peace Through Justice?: Evaluating the International Criminal Court" (2012). Honors Projects. Paper 15. http://digitalcommons.macalester.edu/intlstudies_honors/15

¹⁵⁴Report for Congress International Criminal Court Cases in Africa: Status and Policy Issues March 7, 2011.

¹⁵⁵ICC Pre-Trial Chamber I, Office of the Prosecutor, Situation in the Libyan Arab Jamahiriya: Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif al-Islam Gaddafi and Abdullah al-Senussi, May 16, 2011

In December the ICC judges requested further information from the Libyan authorities regarding Saif al-Islam Gaddafi's status, including whether and when Libya intends to surrender him to the court. Libya was supposed to provide that information by January 10, 2012, but it requested a three-week extension due to the security situation in Libya. The court granted an extension of about two weeks, requiring Libya to file these submissions by January¹⁵⁶. Ratification or accession to the Rome Statute by a state also creates ICC jurisdiction over genocide, war crimes and crimes against humanity committed by individuals within that state's territory and by its nationals; article 12 (2) a-b Libya, however, has not ratified or acceded to the Rome Statute. Alternatively, the ICC may also exercise jurisdiction when a state lodges a declaration under article 12(3) of the Rome Statute, accepting jurisdiction with respect to a particular crime in question, which Libya also has not done Article 12(3) Rome statute .

4.3 Situation by OTP

The third mechanism the situation to the Court is by the initiation of the ICC Prosecutor (*ex-officio* initiation).

4.3.1 Situation of Kenya

In the weeks following Kenya's contested presidential election on 27 December 2007, more than one thousand people were killed, thirty-five hundred were injured and approximately three hundred and fifty thousand displaced. The violence was perpetrated by actors on both sides of the political and ethnic divide, and included arson, rape, torture and murder.¹⁵⁷

The mediation process also established a commission of inquiry to investigate the post-election violence. The Waki Commission (named after the commission's chairman, Justice Philip Waki) was tasked with ascribing responsibility for crimes that had occurred following the elections. The commission placed the names of those regarded as primarily responsible for the violence in a secret envelope, and recommended further investigation.

¹⁵⁶Libya: The ICC and Saif al-Islam Gaddafi Questions and Answers January 2012.

¹⁵⁷Heinrich Böll Foundation 2012 A fractious relationship: Africa and the international criminal court Published by the Southern Africa

The commission also recommended that the Kenyan government establish a special national mechanism to dispense justice in relation to the post-electoral violence; and that if this could not be accomplished, consideration should be given to referring the Kenyan situation to the International Criminal Court (ICC)¹⁵⁸.

In February 2009, the Kenyan parliament voted against a bill to establish a special tribunal as recommended by the commission, and the coalition government took no further action. Subsequently, Luis Moreno Ocampo, the first prosecutor of the ICC, reviewed extensive documentation from the Waki Commission and, in accordance with the powers granted to him under Article 15 of the Rome Statute of the ICC, exercised his right to initiate an investigation without referral from the state party (i.e. the Kenyan government) or the UN Security Council. Ocampo's request to commence investigations into the Kenyan situation was authorized by the pre-trial chamber in March 2010¹⁵⁹.

The Prosecutor's request to open an investigation in Kenya was approved by ICC judges in March 2010. Kenya is a party to the ICC, but it was the first instance in which ICC judges authorized an investigation based on a recommendation from the Prosecutor, as opposed to a state referral or U.N. Security Council directive. The investigation was related to post-election violence in Kenya in 2007-2008, in which over 1,000 individuals were killed. A government of national unity was formed following the disputed elections, and the issue of accountability for abuses has remained a sensitive one in Kenyan politics.¹⁶⁰

4.3.2 Situation of Côte d'Ivoire.

On 3 October 2011, Pre-Trial Chamber III granted the Prosecutor's request for authorization to open investigations *proprio motu* into the situation in Côte d'Ivoire with respect to alleged crimes within the Court's jurisdiction, committed since 28 November 2010, as well as with regard to crimes that may be committed in the future in the context

¹⁵⁸ Ibid pp 18

¹⁵⁹ Ibid pp 18

¹⁶⁰ International Criminal Court Cases in Africa: Status and Policy Issues July 22, 2011 Congressional Research Service available at www.crs.gov. date 20/6/2013

of this situation. On 22 February 2012, Pre-Trial Chamber III expanded its authorization to include crimes within the Court's jurisdiction allegedly committed between 19 September 2002 and 28 November 2010. Côte d'Ivoire had accepted the Court's jurisdiction on 18 April 2003 and this was reconfirmed by the Ivoirian Presidency on 14 December 2010 and 3 May 2011. On 15 February 2013, Côte d'Ivoire ratified the Rome Statute.¹⁶¹

The Prosecutor v. Laurent Gbagbo (Pre-trial stage)

Laurent Gbagbo is charged with four counts of crimes against humanity (murder, rape and other sexual violence, persecution, and other inhuman acts) allegedly committed in the context of post-electoral violence in the territory of Côte d'Ivoire between 16 December 2010 and 12 April 2011. The confirmation of charges hearing took place on 19-28 February 2013. On 3 June 2013, Pre-Trial Chamber I adjourned the hearing on the confirmation of charges and requested the Prosecutor to consider providing further evidence or conducting further investigation with respect to the charges presented against Laurent Gbagbo. On 16 December 2013, the ICC Appeals Chamber confirmed the decision adjourning the confirmation of charges hearing in the case. Following this decision, Pre-Trial Chamber I established a new calendar for further proceedings, including on the disclosure of additional evidence and submissions of the Prosecutor, Defence and victims participating in this case. Mr Gbagbo is in the Court's custody.¹⁶²

The Prosecutor v. Simone Gbagbo (Pre-trial stage)

Simone Gbagbo is charged with for four charges of crimes against humanity (murder, rape and other sexual violence, persecution, and other inhuman acts) allegedly committed in the context of post-electoral violence in the territory of Côte d'Ivoire between 16 December 2010 and 12 April 2011. On 1 October 2013, Côte d'Ivoire challenged the admissibility of the Simone Gbagbo case. Pre-Trial Chamber I will issue a decision on this issue in due course. Mrs Gbagbo is not in the Court's custody.¹⁶³

The Prosecutor v. Charles BléGoudé (Pre-trial stage)

¹⁶¹ ICC web ICC-PIDS-TCT-01- 037/14_Eng Updated: 15 January 2014 available on www.icc-cpi.in

¹⁶² Ibid

¹⁶³ Ibid

Charles BléGoudé is charged with four counts of crimes against humanity (murder, rape and other sexual violence, persecution, and other inhuman acts) allegedly committed in the territory of Côte d'Ivoire between 16 December 2010 and 12 April 2011. MrBléGoudé is not in the Court's custody.¹⁶⁴

4.4. Situations from the Rest of the World

The Court is currently analyzing situations outside of Africa, for instance in Colombia, Afghanistan and Georgia. The ICC prosecutor is also examining whether the ICC has jurisdiction over the Palestinian territories and any crimes that may have occurred there since 1 July 2002.

4.4.1 Colombia Situation

Colombia ratified the ICC Statute on 5th August 2002. President Pastrana did so just a few days before handing power over to President-elect Alvaro Uribe. He also appended to the ratification act a declaration under Article 124 of the Statute, according to which the ICC would lack jurisdiction over war crimes committed in Colombia for a period of seven years. The reason for the reservation was, arguably, to facilitate the peace negotiations with the FARC and other groups, and had previously been agreed with Uribe. However, this decision was adopted without previous consultations with other political forces or civil society, and it was heavily criticized.¹⁶⁵

The crimes have typically occurred in the context of efforts to exercise control over territories of strategic military and/or economic importance. A large number of murders related to the armed conflict have allegedly been committed against specific groups within the civilian population, including members of indigenous and Afro-Colombian communities¹⁶⁶

The Situation in Colombia has been under preliminary examination since June 2004. The OTP has received 114 communications under Article 15 in relation to the situation in

¹⁶⁴ Ibid

¹⁶⁵ Chehtmancheht man 2011 The ICC and its Normative impact on Colombia 's legal system 16,octob2011 available on www.domac.is

¹⁶⁶ Ibid

Colombia. Of these, 20 were manifestly outside the Court's jurisdiction and 94 are analyzed in the context of the preliminary examination. On 2 March 2005, the Prosecutor informed the Government of Colombia that he had received information on alleged crimes committed in Colombia that could fall within the jurisdiction of the Court. Since then, the Prosecutor has requested and received additional information on (i) crimes within the jurisdiction of the ICC and (ii) the status of national proceedings.¹⁶⁷

However, the Court only has jurisdiction over war crimes since 1 November 2009, in accordance with Colombia's declaration pursuant to article 124 of the Rome Statute. Upon ratification, Colombia made use of the exception set up by Article 124 to defer the ICC's jurisdiction over Colombia with respect to war crimes for seven years, until November 2009. Moreover, under article 17 of the Rome Statute, the Court will not exercise its jurisdiction over a case if national courts are genuinely able and willing to try that case.¹⁶⁸

The military involvement of the US in Colombia is founded on the bilateral relations between both countries. The US, as part of the so-called War on Drugs and other counter insurgency initiatives against the chronic armed conflict, has deployed its troops to provide direct assistance in the delicate Colombian situation. Thus, if the Court were to open a case in Colombia it would be the first country under examination by the ICC where nationals charges of atrocity crimes against US could be tried by the Court. Nevertheless, both governments signed a Bilateral Immunity Agreement (BIA), also known as an Article 98 agreement¹⁶⁹. Under this agreement, Colombia cannot transfer US citizens to the Court without the consent of the US. Luis Moreno-Ocampo has declared that for the time being the ICC will not intervene in Colombia because Colombian courts are carrying out fair proceedings to ensure that crimes under the ICC's jurisdiction do not go unpunished. Indeed, the visits and talks of the ICC Prosecutor have encouraged the Colombian judicial system to work efficiently for the first time in decades.¹⁷⁰

¹⁶⁷ Ibid

¹⁶⁸ The ICC 's Colombia investigation : recent developments and domestic proceedings Updated June 16, 2009 A program of the United Nations Association of the United States of America www.amicc.org

¹⁶⁹ ICC web <http://www.iccnw.org/pressroom/factsheets/FS-BIAsSept2003.pdf/>>.

¹⁷⁰ Ibid

4.4.2 Palestine Situation

In the wake of the Israel-Gaza 2008–09 armed conflict and recently commenced process at the ICC, the Court will soon face a major challenge with the potential to determine its degree of judicial independence and overall legitimacy. It may need to decide whether a Palestinian state exists, either for the purposes of the Court itself, or perhaps even in general.¹⁷¹

The ICC, which currently has 113 member states, has not yet recognized Palestine as a sovereign state or as a member. Moreover, although the ICC potentially has the authority to investigate crimes which fall its subject-matter jurisdiction, regardless of where they were committed, it will have to assess its jurisdiction over a non-member state, in this case Israel. Despite having signed the Rome Statute that founded the Court and having expressed “deep sympathy” for the Court’s goals, the state of Israel withdrew its signature in 2002, in accordance with Article 127 of the Statute.¹ At any rate, a signature is not tantamount to accession, and accordingly Israel was never a party¹⁷²

Reason for ICC prosecutor not to intervene with the Israel and the Palestine conflict is that it is no more hidden that US and other power full states were assisting Israel which is a proxy war towards this Islamic state it has problem in two ways.

“The ICC already is said to have encountered difficulties in reviewing the Prosecutor’s exercise of discretion in a few highly politicized international conflicts the recent Israel-Gaza conflict and present judicial process serve as a prime examination.”¹⁷³

The second reason identified by the then prosecutor was that the case of shifting the matter from justice, human rights to whether Palestine is a state under the international community and the UN

¹⁷¹Benoliel Daniel *Perry Ronen 2010 Israel, Palestine and the ICC Michigan Journal of International Law [Vol. 32:73 .

¹⁷² Ibid

¹⁷³ Ibid

In the period between December 27, 2008 and February 13, 2009, the ICC Office of the Prosecutor (OTP) received 326 communications from individuals and Non-Government Organizations (NGOs), notably from Palestinian groups, repeatedly demanding an investigation of the events. After arguing that the ICC was unable to take the case because it had no jurisdiction over Israel as a non-signatory to the Court's statute, Chief ex- Prosecutor Luis Moreno-Ocampo apparently changed his mind on February 2, 2009¹⁷⁴.

Even though the prosecutor decides that neither the Palestine nor Israel is a state party to ICC it needs the admissibility or the UNSC referral for the prosecutor to open an investigation shortly after it the palatine authority "That followed a declaration lodged by the Palestinian National Authority under Article 12(3) of the Rome Statute, which empowers non-member states to accept the Court's jurisdiction. Prosecutor Moreno-Ocampo announced shortly thereafter that the ICC was exploring ways to prosecute Israeli commanders over alleged war crimes in Gaza, this at a time when the Court was presumably examining the case for Palestinian jurisdiction over alleged crimes committed in Gaza."¹⁷⁵

However the office of the prosecutor then despite of the declaration by the Palestine Authority the admissibility of the jurisdiction refused to open an investigation alleging that United Nations bodies (in particular, the Secretary General and General Assembly) or the ICC Assembly of States Parties (made up of 121 states that have ratified the Rome Statute of the ICC (Rome Statute)) decide that Palestine qualifies as a state for the purpose of acceding to the Rome Statute¹⁷⁶

Amnesty International in its April 2012 report ¹⁷⁷ tries to argue the case of Palestine comparing the case with cot d'Ivoire where by , Cote d'Ivoire, which has not ratified the Rome Statute, made a declaration accepting the jurisdiction of the ICC on 18 April 2003. according to the report which seems sound argument however the argument is not

¹⁷⁴ ibid

¹⁷⁵ Ibid

¹⁷⁶(See: <http://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf>).

¹⁷⁷ About Amnesty international predicable Report 2012

supported by the Rome statute treaty that declaration can only be made by state under article 12(3) that Palestine is not considered as state under the interpretation of OTP.

NGO and human right activities speak in the name of the victims by bringing another debating issue. "Given that access to justice for victims of war crimes by both sides is at stake, Amnesty International is calling for an independent judicial determination of the issue by the ICC judges, rather than a political determination by external bodies where the matter will likely remain unresolved indefinitely while victims continue to be denied justice. Furthermore, delegating this decision to a political body undermines the vital independence of the Court and exposes the ICC to political influence over justice issues."¹⁷⁸

On 3 April 2012, the ICC Prosecutor declared himself unable to determine that Palestine is a "state" for the purposes of the Rome Statute and referred such decision to the United Nations. On November 2012, the UN General Assembly voted in favor of recognizing Palestine as a non-member.

The Court's refusal to investigate the situation in Palestine despite its perceived ability to meet the requirements for investigation indicates that the Court's actions were motivated by factors other than admissibility. Some scholars, such as John Dugard, a professor of International Law and a former Special Rapporteur for the UN Commission on Human Rights and the International Law Commission, cite US opposition to the investigation as the Court's reason for refusing to investigate. Indeed, the US has opposed numerous attempts to hold Israel accountable for its illegal actions and voted against passing a UN resolution granting Palestine statehood in November 2012. As such, the Court may have been reluctant to investigate the situation in Palestine out of fear of US discontent rather than inadmissibility observer status state.¹⁷⁹

¹⁷⁸Amnesty international Report April 4/ 2012. Amnesty International's response to the ICC Office of the Prosecutor's statement that it cannot investigate crimes committed during the Gaza conflict

¹⁷⁹ The International Criminal Court Confronting challenge on the path to Justice Henry M .Jackson school of international studies task force report 2013 University of Washington.

4.5 AU, UNSC and US Relationship with the Court and their Politics behind the Court.

4.5.1 Introduction to AU AND ICC

The African Union is an intergovernmental organization consisting of 52 African States. Established on July 9, 2002, the AU was formed as a successor to the Organization of African Unity (OAU). The most important decisions of the AU are made by the Assembly of the African Union, a semi-annual meeting of the Heads of State and Government of its Member States. The AU's secretariat, the African Union Commission, is based in Addis Ababa, Ethiopia.¹⁸⁰

Africa is made up of 54 sovereign and independent states, 34 of African states which have agreed to be bound by the Rome Statute and are obliged under international law not only to cooperate with the ICC but also not to act in a manner which would defeat its object and purpose. Among African states there are a number of different positions on the ICC. Notably, relatively few states have adopted outright negative stances towards the ICC. Those that have done so, such as Sudan and to some extent Kenya, are often motivated by domestic considerations related to the ICC's current caseload, or possible future prosecutions. In contrast, a number of states have come out independently in support of the ICC (most vocally Botswana), while others have voted by choosing to refer crimes committed in their territory to the ICC: Uganda, DRC, Central African Republic, Ivory Coast and Mali. However, the nuances of different positions held by African states on the ICC have been lost in the consensus based decision making process at a continental level.¹⁸¹

¹⁸⁰www.africa-union.org/root/au/memberstates/map.htm march 18/2014

¹⁸¹Positive Reinforcement: Advocating for International Criminal Justice in Africa May 2013 southern Africa Litigation Centre

Collision of AU AND ICC

African countries were actively involved in the creation of the ICC and played a crucial role at the Rome conference when the Court's statute was drafted and adopted. To date, Africa represents the largest in regional grouping of countries within the ICC's Assembly of State Parties.

Some observers have praised the ICC's investigations in Africa as a crucial step against impunity on the continent, but ICC actions have also provoked debates over the court's potential impact, its perceived prioritization of Africa over other regions, its selection of cases, and the potential effect of prosecutions on peace processes. Notably, critics have accused the ICC of potentially jeopardizing political settlements that may keep the peace in the pursuit of an often abstract "justice." Supporters of the Court reject these criticisms, and hope that ICC investigations will contribute to Africa's long-term peace and stability.¹⁸²

While African countries were initially supportive of the ICC, the relationship curbed in 2008 when President Omar Al Bashir of Sudan was indicted by the Court. Following this move, the African Union (AU), which is representative of virtually all countries on the continent, adopted a hostile posture towards the ICC. that in view of the fact that the request by the African Union has never been acted upon, the AU Member States shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar Al Bashir of the Sudan .¹⁸³

The AU called for its member states to implement a policy of non-cooperation with the ICC and this remains the stated position of the continental body. On 3 July 2009, the African Union Assembly of Heads of State and Government (Summit) adopted a decision on the International Criminal Court's indictment of the President of Sudan (decision), Omar Hassan Al Bashir.)¹⁸⁴The essence of the decision was that African states would not

¹⁸² International Criminal Court Cases in Africa: Status and Policy Issues CRS Report for Congress 2011 Prepared for Members and Committees of Congress.

¹⁸³ Thirteenth Ordinary Session of the Decision on the Report of the Commission on the Meeting of African States Parties to the Rome Statute of the International Criminal Tribunal (ICC) – Doc. Assembly/AU/13 (XIII)e Assembly in Sirte, Great Socialist People's Libyan Arab Jamahiriya on 3 July 2009 Assembly/AU/Dec.245(XIII) available on www.africanunion.org

¹⁸⁴ Permanent Mission to the United Nations or the Government of the Republic of South Africa. AU Summit Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), Assembly/AU/Dec 245(XIII), July 2009

cooperate with the ICC in the execution of the arrest warrant issued against Al Bashir. The decision placed African states party to the Rome Statute establishing the ICC, in the unenviable position of having to choose between their obligations as member states of the AU on the one hand, and their obligations as states party to the Rome Statute, on the other.

The AU has accused the ICC of targeting Africa

- The AU has called for African states not to cooperate with the ICC in respect of arrest warrants for Bashir.
- The AU accuses the ICC of undermining its efforts of promoting peace and security.
- The AU has indicated its intention to approach the International Court of Justice (ICJ) for an advisory opinion on the question of immunity.
- The AU intends to vest the African Court of Human and Peoples Rights with international criminal jurisdiction.

The AU's criticisms against the ICC are not an accurate reflection of the support for international criminal justice in Africa. Individual state support has been shown by a number of countries.

The AU blames the ICC for the actions of the Security Council. The ICC and the Security Council are two independent and completely separate institutions and cannot be considered as a single entity. The ICC cannot be blamed for decisions made by the Security Council and cooperation with the ICC by African states should not be withheld because of unpopular decisions taken by the Security Council.¹⁸⁵

The ICC and the AU share a convergence of mandates to address impunity and to ensure accountability for violations, atrocities and harm done in the past. Where the organizations diverge is in the fact that the AU is a political body, while the ICC is an international judicial institution. This divergence informs the different ways the two organizations go about "addressing impunity and ensuring accountability for past

¹⁸⁵ Positive Reinforcement: Advocating for International Criminal Justice in Africa May 2013 Southern Africa Litigation Centre www.southernafricalitigationcentre.org Fatou Bensouda prosecutor of ICC is cited in it.

violations, atrocities and harm done”. The AU, by its very nature, will gravitate first to a political approach to dealing with the past, emphasizing solutions based on peace making and political reconciliation. Conversely, the ICC will pursue international prosecutions, because this is written in its DNA, the Rome Statute.¹⁸⁶

The former chairperson of the AU Commission (2008–12), Jean Ping, even stated that frankly speaking, we are not against the ICC. What we are against is ex-prosecutor Ocampo's justice, cited with in the paper of Chatham House Report 2013¹⁸⁷.

4.5.2 Relationship of ICC with UNSC

Unlike the International Court of Justice, the ICC is legally independent from the United Nations. However, the Rome Statute grants certain powers to the United Nations Security Council, which limits its functional independence.

The Security Council is the UN's primary and most powerful organ for carrying out the UN's central mission of keeping peace in the world. Article 1 of the UN Charter lists as the organization's first Purpose: “To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace,.....”¹⁸⁸

It is with this primary purpose in mind that the great powers of 1945 were given permanent seats on the Council under Article 23 of the Charter as those countries best able to perform this central role. As criteria for electing the non-permanent members of the Council (six in 1945; ten since amendment of the Charter in 1965), the General Assembly was directed due regard in the first instance to the contribution of Members of the UN to the maintenance of international peace and security and to the other purposes

As outlined in the charter, the two main bodies of the United Nations are the General Assembly, composed of all member nations, and the Security Council. The Council

¹⁸⁶Heinrich Böll Foundation 2012 A fractious relationship: Africa and the international criminal court Published by the Southern Africa pp 6

¹⁸⁷ Africa and the international criminal court Max du Plessis, Tiyanjana Maluwa and Annie O'Reilly July 2013

¹⁸⁸www.un.org/en/documents/charter/index.shtml

consists of the five victors from World War II (known as “The Big Five”) as permanent members China, France, the United Kingdom, the USSR (now Russia), and the United States and 10 other countries, elected by the General Assembly, that serve 2-year terms. The Security Council is the principal UN organ responsible for ensuring peace, and its decisions are binding on all member states. The five permanent members were given individual veto power over issues brought before the Council. Other special agencies like the WHO (World Health Organization), UNICEF (UN International Children's Emergency Fund), UNESCO (UN Educational, Scientific, and Cultural Organization), and the World Bank provide needed help across the world and have improved the lives of millions. Today, nearly 200 nations are members of the United Nations¹⁸⁹.

Article 24 of the Charter grants the Council “primary responsibility for the maintenance of international peace and security.....” and under Article 25 of the Charter, Members of the United Nations agree to accept and carry out the decisions of the Security Council.... The Council is charged with both settling disputes peacefully if possible using the powers granted in Chapter VI of the Charter, and meeting threats to peace by concerted action under Chapter VII which is abroad responsibility and power given to it.¹⁹⁰

Under the Rome Statute of Article 13, the Security Council may use this power to refer a state to the ICC for investigation and prosecution, even if that state is not party to the Rome Statute or defer an ongoing investigation temporarily in the interests of international peace and security. African states’ positions on the ICC are a combination of complaints about, inter alia, the make-up of the Security Council, the powers given to the council under the Rome Statute, and the way the powers of referral and deferral are exercised.¹⁹¹

4.5.3 United Nations Security Council’s Power under the Rome Statute

By creating the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993, and the International Criminal Tribunal for Rwanda (ICTR) in 1994, the Security Council established its power to direct international criminal prosecutions as a tool for

¹⁸⁹ UNSC www.ourdocuments.gov/doc.php?doc=79

¹⁹⁰ www.un.org/en/documents/charter/chapter5.shtml - 13k

¹⁹¹ Positive Reinforcement: Advocating for International Criminal Justice in Africa © 2013 Southern Africa Litigation Centre

promoting international peace and security under Chapter VII, Article 41 of the UN Charter, a power confirmed by decision of the Appeals Chamber of the ICTY. The decisions of the ICTY and ICTR have played a large part in developing the jurisprudence of international criminal justice, while the establishment and successful functioning of the tribunals gave tremendous impetus to the effort to create a permanent international criminal tribunal after it had languished for many years in the International Law Commission.¹⁹²

UNSC influence with in ICC

The ICC has often drawn criticism for appearing to cater to the desires of powerful nations, especially the United States, Russia, and China, when selecting which situations to investigate. The ICC, however, maintains that its choice of cases is based solely on a situation's ability to meet the three requirements for investigation: (1) jurisdiction, whether the situation occurs in member state (if not, the Court can only investigate the situation following a UNSC referral) and involves crimes that fall within the Court's mandate, (2) admissibility, whether the government is unable or unwilling to prosecute offenders (in contrast to a country calling for national prosecutions via the complementarity principle of Article 17 and whether crimes committed meet the threshold of gravity, and (3) the interests of justice, the belief by the Court that an investigation would promote justice in the situation. Nonetheless, many examples of cases forgone or retained "under consideration" for long periods of time, such as Palestine, Colombia, and Syria, have been cited as situations protected from investigation by powerful nations.¹⁹³

The Security Council itself played no role in the creation of the ICC, although its members were active participants in the negotiations at the final Diplomatic Conference in Rome in 1998. The great majority of states favored giving the Security Council power to refer situations to the ICC, although a significant minority did warn of the dangers of politicizing the Court and undermining its independence. The powers of referral and

¹⁹²Moss Lawrence 2012 The UN Security Council and the International Criminal Court, Friedrich Ebert Stiftung.

¹⁹³The International Criminal Court Confronting challenge on the path to Justice Henry M. Jackson school of international studies task force report 2013 University of Washington.pp39

deferral of ICC prosecutions granted to the Security Council by the Rome Statute can significantly affect the credibility and legitimacy of the Court.

Article 13 of the Rome Statute allows the Security Council to refer to the Court situations that would not otherwise fall under the Court's jurisdiction (as it did in relation to the situations in Darfur and Libya, which the Court could not otherwise have prosecuted as neither Sudan nor Libya are state parties). Article 16 allows the Security Council to require the Court to defer from investigating a case for a period of 12 months. Such a deferral may be renewed indefinitely by the Security Council. This sort of an arrangement gives the ICC some of the advantages inhering in the organs of the United Nations such as using the enforcement powers of the Security Council but it also creates a risk of being tainted with the political controversies of the Security Council.¹⁹⁴

Contrary to frequent misconceptions, the ICC is not a UN court or part of any other political body but rather it is an independent institution and exercises purely judicial functions. The Court however has a relationship with the UN Security Council. During the negotiation debates, states were careful to ensure that the independence given to the Prosecutor does not override the authority of the UN Security Council which is, after all, the highest peacekeeping authority in the world.¹⁹⁵

So while the principle of the independence of the Prosecutor is respected, the ICC also has a relationship with the UN Security Council written into the Statute. When the Security Council refers a situation to the ICC, the Court will have jurisdiction independent of the nationality of the accused or the location of the crime. The Security Council also has the power to defer an investigation or prosecution for one year in the interests of maintaining international peace and security.

¹⁹⁴Wikipedia accessed on date 17 March 2014

¹⁹⁵Du Plessis max and Louw Antoinette 2007 The investigation and prosecution of 'core international crimes' and the ICC in Africa and Institute for Security Studies.

4.5.4 The Relationship of ICC with US

The Role and Objections of the US with Regard to the Establishment of an International Criminal Court

In the wake of the World War II international tribunals, the newly formed United Nations General Assembly, at the request of the United States, in 1946 affirmed the broad principles of Nuremberg. Stimson and Jackson passionately championed the universal accountability of individuals for war crimes and aggression began to take root in the theory if not the practice of international law. The idea for the creation of a permanent international criminal court gained momentum in the United Nations in the optimistic postwar environment of international cooperation. In 1948 the United States lobbied for the inclusion of language in the Genocide Convention that would call for the establishment of such a court.¹⁹⁶

The US was a driving force behind the establishment of the ad hoc Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), generally seen as important steps leading to the establishment of the ICC. It was similarly instrumental in the process which led to the Rome Conference. Observers who saw this as an indication of the potential role of the US during the negotiations.¹⁹⁷ It is one of the seven countries which voted against at the UN conference for the establishment of the court.¹⁹⁸ The US despite significant involvement in the drafting of the Rome statute is now the only western democracy now opposed.

On July 17, 1998, just a few months before Pinochet's arrest, 120 countries agreed to the text of a treaty establishing the ICC. Those in favor included all of NATO allies, with the exception of Turkey. Supporters of the Court saw the treaty, with all of the compromises that were adopted in order to make it a reality, as a necessary extension of national jurisdiction in those extreme cases where local justice is unavailable to deal with the most

¹⁹⁶ Feinstein Lee and Lindberg Tod.2009 Means to an end : U.S. interest in the International Criminal Court pp27

¹⁹⁷Zwanenburg Marten 1999 The Statute for an International Criminal Court and the United States: Peacekeepers under Fire? * EJIL 10 (1999), 124–143

¹⁹⁸ The other countries were China, Iraq, Libya, Yemen, Qatar and Israel. See New International Criminal Court Set Up available on http://www.telegraph.co.uk/news/u_knews/1390655/New-international-criminal-court-set-up.html

serious crimes. Seven countries voted against the treaty, including the United States. For the United States' closest allies, US opposition to the treaty was deeply disappointing.¹⁹⁹

The US is not a party to the Rome Statute. The US signed the Statute on December 31, 2000, but at the time, the Clinton Administration had objections to it and said it would not submit it to the Senate for its advice and consent to ratification. The Statute was never submitted to the Senate. In May 2002, the Bush Administration notified the UN that it did not intend to become a party to the ICC, and that there were therefore no legal obligations arising from the signature²⁰⁰.

The US adopted a very conservative attitude opposed to a group of approximately 60 so-called 'like-minded states' working for a strong Court. One of the principal arguments adduced by the US for its position was the fear that US soldiers participating in peacekeeping operations might be subjected to politicized prosecutions before the Court. This fear was expressly stated as a reason for not signing the Statute. In other words, that cases would be brought before the Court by a state or the prosecutor against US peacekeepers or their superiors on the basis of political rather than valid international criminal law considerations. In this context, it is important to note that the US, as the sole remaining superpower, is central to multinational peacekeeping and peace enforcement efforts. As the Although they will not be discussed in this article, these included the claim that the Statute impinges on the sovereignty of (non-signatory) states head of the American delegation remarked, the US 'continues to have a significant responsibility for international peace and security. It is often called upon to execute a Security Council mandate'.²⁰¹

According to the Congressional Report in 2011 which reports to the congress identified the following objection for US non membership .The Bush Administration opposed the Court and renounced any US obligations under the treaty. Objections to the Court were based on a number of factors, including.

¹⁹⁹ Abram Chayes and Anne-Marie Slaughter, "The International Criminal Court and the Future of the Global Legal System," in Sarah B. Sewall and Carl Kaysen, eds

²⁰⁰International Criminal Court Cases in Africa: Status and Policy Issues Congressional Research Service July 22, 2011 20/6/2013

²⁰¹Zwanenburg Marten 1999 The Statute for an International Criminal Court and the United States: Peacekeepers under Fire? * EJIL 10 (1999), 124–143

- The Court's assertion of jurisdiction (in certain circumstances) over citizens, including military personnel, of countries that are not parties to the treaty;
- The perceived lack of adequate checks and balances on the powers of the ICC prosecutors and judges;
- The perceived dilution of the role of the U.N. Security Council in maintaining peace and security; and
- The ICC's potentially chilling effect on America's willingness to project power in the defense of its interests.²⁰²

However, in Case of peace keeping mission the UN and the contributing states and the UN and host state will make an agreement such agreement is said to be known as participation agreement and status of Force agreements (SOFA) such agreement will immune the peace keeping forces from certain prosecution of host state and legal process will to certain extent minimize the fear of US.²⁰³ In the reverse way US position is changed in the case of referral by UNSC of Sudan as to the wording of fact sheet report 2007. Despite the United States' long history of involvement in international justice, the current US administration has opposed the ICC for fear that the Court will be used politically against US nationals. The Rome Statute, however, incorporates safeguards against politically motivated prosecutions. Moreover, the ICC would only investigate cases involving US nationals if the US failed to investigate and, if appropriate, prosecute the individuals responsible. In 2005, the US government opted not to block a UNSC vote to refer crimes committed in Darfur to the ICC Prosecutor. This move signaled willingness on the part of the United States to cooperate with the ICC in the investigation.²⁰⁴

Certain sanctions by US government later on were the following according the report of the congress .The Bush Administration concluded bilateral immunity agreements (BIAs),

²⁰² International Criminal Court Cases in Africa: Status and Policy Issues CRS Report for Congress 2011 Prepared for Members and Committees of Congress 20/6/2013

²⁰³ Zwanenburg Marten 1999 The Statute for an International Criminal Court and the United States: Peacekeepers under Fire? * EJIL 10 (1999), 124–143

²⁰⁴ Fact sheet one 2007-2008 Program for International Justice and Accountability Amnesty International USA available on amnestyusa.org/international_justice

known as “Article 98 agreements,”²⁰⁵ with most states parties to exempt U.S. citizens from possible surrender to the ICC. These agreements are named for Article 98(2) of the Statute, which bars the ICC from asking for surrender of persons from a state party that would require it to act contrary to its international obligations. The U.S. government is prohibited by law from providing material assistance to the ICC in its investigations, arrests, detentions, extraditions, or prosecutions of war crimes, under the American Service members’ Protection Act of 2002²⁰⁶, or ASPA (P.L. 107-206, Title II). The prohibition covers, among other things, the obligation of appropriated funds, assistance in investigations on U.S. territory, participation in U.N. peacekeeping operations unless certain protections from ICC actions are provided to specific categories of personnel, and the sharing of classified and law enforcement information.¹² Section 2015 of ASPA (22 U.S.C. 7433, known as the “Dodd Amendment”)²⁰⁷, however, provides an exception to these provisions.²⁰⁸

As of 11 December 2006, the US State Department reports 102 agreement, the US had secured more than 100 of such BIAs out of which 46 were state parties to the ICC.²⁰⁹ In Africa alone it has managed to secure the agreement of 38 states out of 53 countries in total, out of which 24 are state parties.²¹⁰ As per the American Service members’ protection Act (ASPA), Countries who refuse to sign any such agreement will lose their military aid and other economic assistance.²¹¹ These measures suggest that the ICC has the USA as its most powerful enemy. This is a huge challenge for the court when it investigates cases in which there are serious crimes committed by Americans seriously jeopardize its legitimacy as a judicial organ and it could not proceed to prosecute them because the states would refuse to detain and transfer the persons wanted by the Court. This will seriously undermine its work.

²⁰⁵ Article 98 Available on: <http://www.state.gov/s/l/treaty/c3428.htm>.

²⁰⁶ U.S. law, particularly the American Service Members Protection Act (PL 107-206, <http://www.gpo.gov/fdsys/pkg/PLAW-107publ206/pdf/PLAW-107publ206.pdf>).

²⁰⁷ The Dodd Amendment to ASPA, which was adopted by unanimous consent in the Senate, specifically permits cooperation with the ICC for prosecutions of non-U.S. Citizens. It reads “Nothing in this title shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosovic, Osama bin Laden, other members of Al Qaeda, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity.”

²⁰⁸ International Criminal Court Cases in Africa: Status and Policy Issues CRS Report for Congress 2011 Prepared for Members and Committees of Congress

²⁰⁹ US Opposition to the International Criminal Court, Global Policy Forum available at <http://globalpolicy.org/empire/us-un-and-international-law-8-24/us-opposition-to-the-icc-8-29.html>, <http://www.state.gov/s/l/treaty/c3428.htm>

²¹⁰ Status of U.S. Bilateral Immunity Agreements by Region available at <http://www.iccnw.org/documents/CICCFSBIAstatuscurrent.pdf>

²¹¹ Raj Purohit, “Article 98/Bilateral Immunity Agreements,” posted on 3 June, 2008 See <http://humanrights.foreignpolicyblogs.com/2008/06/03/article-98-bilateral-immunity-agreements/>

Other writers also argue that US has benefited from the ICC in many ways. The first thing is that ICC was created to advance objectives that are quite consistent with the long-term US national interest in a peaceful, democratic and integrated global system. The Rome Treaty, in its final form, promises to advance US interests in three important ways.

First, the ICC will help to deter future gross violations. It will not halt them completely, of course. But over time, its proceedings are likely to cause prospective violators to consider the likelihood that they will face prosecution for their actions. **Second**, by contributing in this way to a more stable and peaceful international order, the ICC can help promote US security interests. What is already true of the Yugoslav Tribunal will be much truer of the ICC, because of its broader jurisdiction, its ability to respond to Security Council referrals, and the perception of its impartiality.

Third, the ICC will reaffirm the view that international law matters, including those laws that protect Americans overseas. For many people in the United States, “international law” is seen either as an abstraction or an unwelcome intrusion into our sovereign affairs. Thus The United States has long been a leading exponent, and will be a prime beneficiary, of this growing international framework of cooperation.²¹²

The US position on ICC is not as such suitable on the current matters it will have two dimension first of all US seems to be softening its stance on the court. When the Security Council voted to refer the issue of Darfur to the ICC in March 2005, the United States abstained rather than vetoing the referral. This act moved the United States "from a posture of active opposition to the very existence of the court to a position much closer to acquiescence in the court's existence even though it had problems with its conception. Some experts say the U.S. position is still ambivalent. It is encouraging that you no longer see a strong effort within the Republican caucus in Congress or within the Pentagon or the State Department to dream up new initiatives to oppose the court²¹³.

²¹²Abram Chayes and Anne-Marie Slaughter, “The International Criminal Court and the Future of the Global Legal System,” in Sarah B. Sewall and Carl Kaysen, eds., *The United States and the International Criminal Court: National Security and International Law*, Rowman & Littlefield, September 2000.

²¹³Hanson Stephanie (2008) Africa and the International Criminal Court available on council on foreign relations www.cfr.org

The US and the ICC Today

The Obama Administration has expressed support for the ICC, especially on Darfur and Libya, and has vowed to end US hostility toward the Court. It now attends ICC meetings and cooperates with the Court on a case by cases basis. While the US is not currently a State Party to the ICC, public opinion polls consistently show strong American support for the ICC with 60-70% in favor of US ratification of the Rome Statute of the ICC.²¹⁴

The attitude of the US towards the Court may have impacted negatively on the pace of ratification. As soon as the US started pressuring States to sign bilateral agreements granting protection from the ICC to US nationals, the pace of ratification also slowed. The misconception of the jurisdiction of the ICC is also slowing ratification.²¹⁵

The abstention by the Bush administration did acknowledge for the first time its recognition of the Court's utility in an actual case of international justice. Properly understood, which it has not been, the Darfur referral constituted an important precedent for the US government and the international community. That initial abstention was followed by several noteworthy actions by the Bush administration and, since then, the administration of Barack Obama: senior Bush administration officials, from the State Department's chief legal adviser to the US permanent representative to the United Nations, took the opportunity to reaffirm US support for the work of the ICC prosecutor in the Darfur case. Officials from the Bush administration repeatedly expressed US opposition to a proposal that the UNSC postpone the possible ICC indictment of Sudan's president, Omar al- Bashir, an option the Sudanese government was actively pursuing through diplomatic channel an indication of the seriousness with which the Court's activities are taken by perpetrators with little or nothing to fear from local judicial systems, and therefore of the leverage the ICC brings to the rights regarding elements of the international community in its dealings with the world's worst human rights abusers.²¹⁶

²¹⁴Basic Facts About the International Criminal Court: A Program of the Columbia University Institute for the Study of Human Rights Updated February 20 2013 available on [www.http:// hrcolumbia.or amicc.org](http://hrcolumbia.or amicc.org).

²¹⁵Maqungo Sivuyiles 2003 Trial and Error Challenges facing the International Criminal Court African Security Review 12(4)

²¹⁶Feinstein Lee and Lindberg Tod 2009 Means to an end : U.S. interest in the International Criminal Court pp2

CHAPTER FIVE

5. Data Presentation and Analysis, Challenges and Perspectives of International Criminal Court

5.1 Data Presentation and Analysis

Within this chapter data collected from secondary and primary source will be presented side by side summarizing of response from participants and existing literature that makes the analysis easy moreover, analysis shall be presented based on existing international laws, politics, and customs. Literature and personal opinion and analysis from the research shall be the finding of the research

Analysis is based on data gathered from AU legal department Mr. Fafree who is a focal person at AU working on ICC, and Dr Salah Mohammed expert of Human Rights at Political Affairs, Foreign Minister of Ethiopia Mr. Retta who is working in a Foreign Affairs of Ethiopia as legal Advisor, Justice Minister Ms. Messay who is working as prosecutor of the Justice Minister. An effort to get Academicians and Research center were not successful because of expert lack of who knows both politics and the law in the area of study and the other problem was the informants willingness to give interview were not successful so data presentation concentrate on collected data and literature. The key informants have already been given the interview guide questions and the interview is collected both in writing and in voice record and transcribed formally.

All respondents from AU and Foreign Ministers have expressed their stand and opinion towards the question in a similar manner except the prosecutor of Justice Minister responded in dissenting opinion with all the question.

First question whether the allegation brought by African states towards ICC is true of them answered that “yes of course ICC only targets African states in its prosecution and investigation they try to compare the case of Africa and the rest of the world where by all the 8 cases and 27 individuals are indicted from Africa however no one else is indicted till now from the other region which shows that Africa is targeted by ICC. The respondents are clearly expressing it the target of Africans despite the many literature and

African leaders support it very well, dissenting opinion based on fact, law and logic author of political lawyer and officials ruling the court testify in such a manner which is more sound and convincing to the whole argument of accusation by African leaders .

“AU officials have also suggested that the ICC is targeting Africans.”²¹⁷ It is a fact that all situations under ICC investigation to date are in Africa, which has been a source of debate among some observers. Furthermore, international justice has yet to be applied evenly around the globe; individuals from powerful states and their allies have been able to evade accountability for serious crimes in violation of international law, for example, in Burma, Chechnya, and Gaza/Israel. However, the number of African cases is also a manifestation of African commitment to justice for the most serious crimes. A majority of the ICC’s situations came about as a result of voluntary referrals by the governments of states where the crimes were committed. We believe Africa should build on support for accountability as opposed to scaling down its resolve because others have failed to demonstrate their commitment or temporarily managed to avoid judicial scrutiny. The AU should indeed work proactively to achieve wider access to justice for the worst crimes, rather than seeking to limit the ICC’s ability to function effectively.²¹⁸ There is also little basis to imply that the Office of the Prosecutor (OTP) is specifically targeting leaders. Of the 28 arrest warrants and summonses issued since 2002, the ICC Prosecutor has commenced proceedings against two sitting heads of state (Sudanese President Omar al-Bashir and Libyan head of state Muammar al-Gaddafi) and one former head of state (former President of Côte d’Ivoire Laurent Gbagbo). Summonses against Uhuru Kenyatta and William Ruto were issued a year before they were elected to office. In the three other situations where the ICC has charged persons (Central African Republic, Democratic Republic of Congo and Uganda), the ICC Prosecutor has so far only focused on crimes committed by armed groups.²¹⁹

²¹⁷ See “ICC accused of ‘exclusively’ targeting Africans,” Mail & Guardian Online, 20 April 2011, <http://mg.co.za/article/2011-04-20-icc-accused-of-exclusively-targeting-Africans> (accessed 3 June 2010). (“We’ve been complaining...about the double standard,’ AU commission president Jean Ping said, referring to the court in The Hague...‘people who are targeted there, all of them, are exclusively Africans.’”)

²¹⁸ Observations and Recommendations on the International Criminal Court and the African Union in advance of the 17th African Union Summit (30 June-1 July) <http://www.lhr.org.za/news/2011/observations-and-recommendations-international-criminal-court-and-african-union-advance-17> Accessed April 12, 2014

²¹⁹ Ibid

Although all eight situations that the ICC has dealt with to date have been on the African continent, there is no evidence to support the argument that there has been “politicization and misuse of indictments against African leaders by the ICC.” The ICC must expand its investigations and prosecutions to situations in other regions, some of which have been in preliminary examination for long-periods. However, that does not mean that the current situations are without basis or that the ICC has been discriminatory in focusing on African situations. Crimes under the jurisdiction of the ICC have been committed in all eight of the situations. Moreover, five of the situations were referred to the ICC by the governments of African countries who claimed they were unable to investigate and prosecute the crimes before national courts (Central African Republic, Côte d’Ivoire, Democratic Republic of Congo, Mali and Uganda). Two situations (Darfur and Libya) were referred by the UN Security Council acting under Chapter VII of the UN Charter with the support of its African members. The only situation where the first ICC Prosecutor decided to seek an investigation on his own initiative was Kenya. The decision was taken after giving the national authorities every opportunity to investigate and prosecute the crimes genuinely before national courts, which they failed to do.²²⁰

Second question for the respondents is that why member and nonmember states were not cooperative to ICC decisions? The answer from the respondents is that “because from the beginning of indictment of both Sudan and Libyan president the referral by UNSC is politically motivated that targets Africa and undermines the peace and reconciliation process in the region even though certain few states support the indictment and arrest of the president”.

Support and cooperation by ICC states parties for the ICC is vital. Without its own enforcement mechanism, the court depends heavily on state cooperation to operate. Accordingly, we call upon African ICC states parties to: Express support for the ICC and cooperation with the ICC at AU summits; Work to avoid further calls by the AU for member states not to cooperate with the ICC or otherwise undermine the ICC’s ability to advance its mission and mandate; Express individual government positions in support of

²²⁰The international criminal court Recommendations to the twelfth session of the Assembly of States Parties. Amnesty International Publications 2013 available on www.amnesty.org.

the ICC where AU action might suggest lack of support;²²¹and Press for the establishment of an ICC liaison office at AU headquarters and conclusion of a memorandum of understanding between the AU and the ICC²²².

African leaders requested the Court to intervene in six of our situations: President Museveni in Uganda referred the situation in Uganda to the Office of the Prosecutor; President Kabila referred the situation in the DRC to the Office of the Prosecutor; President Bozize referred the situation in CAR; Benin and Tanzania voted in the UNSC to refer the Darfur situation; South Africa, Gabon and Nigeria voted in the Security Council referral of the Libya situation to the ICC; and in Ivory Coast both presidents Gbagbo and Ouattara accepted jurisdiction of the ICC. These decisions, taken by African states, reflect leadership and commitment to ensuring that international crimes do not go unpunished.²²³ Most African states support from the beginning but Au has opposed much more not the court however “Strongest opposition to the ICC emanates from the AU, its most formidable challenge comes from the ICC’s relationship with the UNSC and its former ex- prosecutor, Mr Ocampo. Africa needs the ICC, and the ICC needs African States Parties. That is why 34 of the 122 states parties to the Rome Statute are African Union member states. That is also the reason why the AU Summit and the African states parties did not withdraw en masse. The AU has not totally rejected the ICC’s work in Africa. The AU non-cooperation decision on the ICC applies only to a few cases, particularly the case of Sudan’s Al Bashir, and that of Kenya’s Kenyatta. In the case of Sudan’s president, the AU might first wish to exhaust the peace mediation efforts by the High Level Panel led by former South African president, Thabo Mbeki. In the case of Kenya, in line with the principle of complementarity, the AU would like to exhaust the

²²¹ States such as Botswana, South Africa, and Uganda have reaffirmed their commitment to abide by their obligations to arrest ICC suspects in the wake of AU summit decisions calling for non-cooperation. See, for example, “Botswana stands by the International Criminal Court,” Botswana Press Agency, 28 July 2010, <http://www.gov.bw/en/News/Botswana-stands-by-the-International-Criminal-Court/> (accessed 22 September 2014); Godfrey Olukya, “Uganda willing to arrest Sudan President al-Bashir for war crimes,” Associated Press, 14 July 2009, <http://www.chinapost.com.tw/international/africa/2009/07/14/216163/Uganda-willing.htm> (accessed 14 June 2014)

²²² Despite African ICC state party support for an ICC liaison office at AU headquarters, the office was rejected for the time being by the AU heads of state in 2010. Assembly of the AU, Assembly/AU/Dec.296 (XV), Kampala, 27 July 2010, para. 8. We continue to believe a liaison office could play an important role in promoting effective communication and exchange between the AU and the ICC, including by helping to clarify misconceptions. In addition, a memorandum of understanding would allow the ICC and the AU to address matters of mutual importance. Similar agreements exist between the ICC and the European Union, the Organization of American States, and the United Nations.

²²³Positive Reinforcement: Advocating for International Criminal Justice in Africa 2013 Southern Africa Litigation Centre

local judicial process given the new constitutional and judicial dispensation prevailing in Kenya.²²⁴

The third questions to my respondents were “did ICC play double standard towards Africa and the rest of the world?” They said it yes, ICC is too fast in opening an investigation in Africa and too reluctant in cases of other region for example the case of Kenya, situation in Sudan is too fast in its decision and taking measure without addressing national judicial system whereas in the case of Columbia, Palestine and Afghanistan where major US interest is at hand over the court, they raised different reason for not opening cases against those countries.

The UNSC referral power enables the ICC to exercise jurisdiction when a state is a not party to the Rome Statute. It can defer cases for a year continuously. While majority of the permanent UNSC members (USA, China, and Russia) are not state parties to the ICC, Articles 13 and 16 of the Rome Statute confer powers for referral and deferral of cases to the UNSC. These members of the UNSC apply rules on others that do not apply to them. For example, American citizens are shielded from prosecution by the ICC through bilateral agreements between the USA and other states, based on the American Service-Members’ Protection Act.²²⁵

Responding to the question of bias and targeting weaker nations, ex- prosecutor Ocampo says

“I can just investigate crimes committed in the states parties’ territory. If you mention to me one country in my states parties that I’m not investigating, then you can tell me something. The rest of the world is a UN Security Council decision and then you can say there are still double standards. I would not say there are no more double standards in the world. I would say, do you believe it’s not true, what we are saying on Libyan crimes? Is it not true what we say about the crimes committed by Thomas Lubanga, Joseph Kony, Jean-Pierre Bemba or President Bashir? “If you think the crimes are real, you should support the Court; if not, you support the criminals. We have to stop impunity to help prevent future crimes. That is my mission. The issue is, as soon as I have evidence, I move.”²²⁶

²²⁴ ICC and African Union – bones of contentions and way forward Nov-Dec 2013Horn of African bulletin

²²⁵ *ibid*

²²⁶ICC 'We Are Not Targeting Africa Luis Moreno-Campo New African | Thursday, 01 March 2012 17:04 available on<http://www.newafricanmagazine.com/special-reports/other-reports/icc-vs-africa/is-the-icc-fit-for-purpose> accessed on April 2014.

In the other way round ex-prosecutor Mr Ocampo after he quits the office he gave exclusive interview with the radio Netherlands on date early February 2014 issue of Kenya new African newspaper has published it in such a way “the position taken by EU and US was largely interpreted as “neo colonialism “as the ICC cases were more politically oriented than justice focused. The voting partner which saw Uhuru and Ruto winning against their main rival ex-prime minister Raila Odinga who had led the opinion polls for more than five years was a protest by Kenyans against the western interference in the country internal affairs And it was obvious that the EU –US partnership was using the civil societies and the ICC process to bolster the political fortunes of Raila Odinga.” ²²⁷The reflection is on the position of AU as if it is correct on the case ICC is a biased institution.

The other substituting chief prosecutor also stresses that “I will continue to uphold the efforts at the highest standard of this call. My origin as an African has nothing to do with my mandate as prosecutor of the ICC. Of course, I have my strong views about the saying that the ICC is targeting Africa or African leaders. I don’t agree with that. I think the ICC is working for Africa and for African victims. And I don’t think any of us can deny that the atrocities that are happening in Africa are crimes and therefore within the jurisdiction of the ICC. “You have to recall that the ICC is a voluntary organisation. Countries have not been forced to ratify the Rome Statute. They have done that with their eyes open. It is a legal obligation that arises as a result of that action you take by signing and ratifying the Rome Statute. The next step is that this commitment implies that if you cannot [try the case locally], then the ICC comes in. This is the implication which the states have signed and ratified, and this gives the ICC the jurisdiction to intervene. The rights of every individual have to be respected.”²²⁸

“However, some people misunderstand the jurisdiction of the ICC and human rights. We are not a human rights court. We are a court that has been set up to deal with genocide, war crimes, and crimes against humanity. “Therefore every time people say the ICC is targeting Africa, it saddens me, especially as an African woman, and knowing that most

²²⁷ New African March 2014 Newspaper, Kenya: Ocampo’s bomb shell leaves ICC flat on its face.

²²⁸ICC ‘We Are Not Targeting Africa Luis Moreno-Campo New African | Thursday, 01 March 2012 17:04 available on <http://www.newafricanmagazine.com/special-reports/other-reports/icc-vs-africa/is-the-icc-fit-for-purpose> accessed on April 2014

of these conflicts are happened on the continent of Africa. All the victims in our cases are Africans. They are not from another continent. “Why don’t we look at the positive side? Why don’t we look at the fact that African leaders are taking the lead in international criminal justice?”²²⁹ He continued,

“All arrest warrants and summonses have been approved by panels of independent judges. Furthermore, ICC judges determine at the pre-trial stage whether or not the OTP had presented “sufficient evidence to establish substantial grounds to believe that the person committed the crime charged.” In a number of cases, including those against two persons accused of crimes in Kenya’s post-election violence, the Pre-Trial Chamber declined to confirm charges because they were not satisfied that this evidentiary threshold had been met. In the cases against Uhuru Kenyatta and William Ruto, the Pre-Trial Chamber decided that the cases should proceed to trial.²³⁰

The reality that African states are likely to be the frequent users because of a relatively higher prevalence of conflicts and serious human rights violations and a general lack of credible legal systems to address them.²³¹

Case of double standard

With regard to the claim of double standards, it should be noted that although all four situations being dealt with by the Court are in Africa, three are self-referrals (as in the case of Uganda, the Democratic Republic of Congo (DRC), and Central African Republic (CAR), while the fourth, namely Sudan, is a United Nations referral. The self-referrals indicate that it is these states themselves that have asked for the Court’s assistance. These self-referrals can be seen African leaders having a desire to fight impunity and to utilize the Court towards this end. Consequently, it is not the Court that is targeting African states.²³²

While African leaders drive the critique of the Court’s double standards, it may be significant to note that African leaders have not shown much effort in the initiation of cases which go to the Court. As an example, the Palestinian Authority is currently in the process of seeking to have the situation within its territories investigated. Palestine has

²²⁹ Fatou Bensouda speech cited in ICC 'We Are Not Targeting Africa New African | Thursday, 01 March 2012 17:04 available on <http://www.newafricanmagazine.com/special-reports/other-reports/icc-vs-africa/is-the-icc-fit-for-purpose> accessed on April 2014.

²³⁰ Ibid

²³¹ (Jalloh 2007) cited in the paper of Snitzer, Katherine Ann, "Peace Through Justice?: Evaluating the International Criminal Court" (2012). Honors projects. Paper 15. http://digitalcommons.macalester.edu/intlstudies_honors/15

²³² Fighting impunity: The international criminal court and the African union Naefa Kahn, CPS Research Associate Policy Brief 62 September 2009. available on www.cps.org.za.

granted the Court jurisdiction over its territories. Although there are legal complications, and the Palestinian authority is acutely aware of the fact that their members may also be implicated in war crimes, strategically it will highlight the plight of the Palestinians, and if the Prosecutor decides to open an investigation and the pre-trial chamber agrees, then the Palestinian issue, which has always been blocked at the Security Council level, will finally have an international institution dealing with the situation. Instead of using the double standards mantra, the Palestinian Authority has initiated the investigation, thereby using the Court to fight against double standards.²³³ There are reasonable explanations for the fact that all the active situations before the ICC are in Africa: there is a preponderance of conflicts in Africa; and as the biggest regional bloc of states the chances of cases being generated from Africa are high. There are also hostile political conditions and jurisdictional limitations that prevent the ICC from pursuing several deserving cases from other parts of the world (such as Gaza and Syria).²³⁴

Conclusion, major literatures argue and recommend two things “first is to speedily reform the UN as requested by the AU and other emerging regional powers. The other option is to amend the referral and deferral powers in the Rome Statute. The Assembly of the States Parties (ASP) or the UN General Assembly, not the UNSC, should exercise the power of referral and deferral to the ICC. Clearly, these solutions to ‘the arguments on a higher plane’ are desirable, but improbable as states with veto powers are unwilling to relinquish their privileges.”²³⁵ UNSC arrangement and power given to them should be seen clearly in order to maintain peace and security throughout the world under which weak and emerging states be given right of veto power that is good however such to conclude us that all allegation one over the other which complicated as law and politics override that it is the UNSC not the court that plays issue of double standard because of UNSC is a political institution that is full of bias.

To sum up, from the above analysis, the ICC is not a western court unfairly focusing on Africa, it is a global court with historical strong support it would not be the court it is today without the valuable input, involvement and support of the majority of African

²³³ Ibid

²³⁴ Positive Reinforcement: Advocating for International Criminal Justice in Africa 2013 Southern Africa Litigation Centre

²³⁵ ICC and African Union bones of contentions and way forward Nov-Dec 2013Horn of African bulletin

states. The court seek justice for victims of grave crimes , including African victims it needs the ongoing support of African governments ,civil society and the public in order to achieve justice the ICC is in integral and essential part of the fight against impunity all over the world .

5.2 Challenges of International Criminal Court

Introduction

The court has faced three types of challenges since its establishment of it. That are during the establishment and after starting its functioning and currently challenges were identified it shows how much the court is clearing the problems it had and addressing future issue with in challenges

The goals of those who participate in current work on the ICC probably continue to reflect the balance mentioned above: the need to build a strong, fair, effective court, and the need to ensure that the court enjoys as much support as possible. Sixty ratifications are required for the statute to enter into force. The number of signatures that have been obtained so far nearly one hundred is significant, especially in comparison to other treaties that also required significant legislative, if not constitutional changes for most states. The high number of signatures on the ICC statute reflects the states' genuine commitment to pursue this process to completion²³⁶. Besides the substantive challenges the ICC faces by virtue of its appointed task, it also faces generic challenges as a new institution. New institutions such as the ICC are subject to great scrutiny, and need to establish their own credibility to accomplish their assigned tasks. The challenge is similar to that faced by other international tribunals as well as by national constitutional courts exercising the power of judicial review. If a new institution is able to prove itself useful

²³⁶Kirsch, Philippe (2001) The International Criminal Court current issues and perspective Law and Contemporary Problems, Vol. 64, No. 1

to some constituency in its early years, it may draw new cases and establish a reputation for quality.²³⁷

In addition to all these requirements of proof emanating from the legal requirements, there is also the context in which these crimes occur. Usually they occur within the context of massive scale conflicts either of an intra or interstate nature. Often their Prosecution involves the indictment of many individuals. These factors coupled with the requirements of the proving the elements of the crimes pose a great challenge to a prosecutor. To show all these facts before the Courts, the Prosecutor needs to call lots of witnesses, and needs to produce other evidences that are deemed to prove his case. This requires the prosecutor to dedicate resources and efforts in to each case. This fact also has its bearing on the speediness of the trial as more and more of witnesses are called to testify and more and more of time is taken hearing other evidence, then the trial might take long time to complete with a negative impact on the right of the accused to a speedy trial.

5.2.1 Legal Challenges

5.2.1.1 State Cooperation

There is a serious potential problem with the enforcement of decisions of the ICC which the Security Council could remedy. Let us consider, for example, the issue of States cooperating with, and providing judicial assistance to, the ICC.

State cooperation is one of the crucial factors that determine the credibility of the ICC as an independent and impartial institution. In all stages of its activities, the Court relies on the cooperation of states and international organizations to carry out its key responsibilities. Part 9 of the Rome Statute provides the legal framework of international cooperation and judicial assistance on the basis of which States Parties shall cooperate

²³⁷Ginsburg Tom 2009 The Clash of Commitments at the International Criminal Court Available at:http://works.bepress.com/tom_ginsburg/26

fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court²³⁸.

In addition, the Court lack its own enforcement agents and the diverse geographic range of its work entail its dependence on state cooperation to carry out its work. Both the Court and figures familiar with the Court's work have emphasized the importance of state cooperation to its success.²³⁹

Despite lack of cooperation and the very nature of ICC not having enforcement body or organ of the court recognizing one fact international criminal courts are dependent on other organizations, states most importantly to give them things. These things money evidence, access to evidence defendants, witnesses, witness protection court personnel, prison facilities and the enforcement of orders and judgments are all necessary for the courts success and indeed without them the court could not operate or exist.²⁴⁰

The Rome Statute makes it an obligation for party states to cooperate with the ICC. The full cooperation of states is needed for the ICC to meet its expectations and be fully operational, because among other reasons, the ICC does not have its own police and prisons. The ICC is thus only a part of the international criminal justice system. States should investigate the crimes and prosecute them domestically and when that is not possible, the ICC should assist "Cooperation with intergovernmental organizations such as the AU also raise particular challenges for the ICC as such, cooperation is voluntary. Under Article 87(6) of the Rome Statute, the Court may ask any intergovernmental organization for information or documents. The Court may also ask for other forms of cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its competence and mandate".²⁴¹

²³⁸Blattmann Rene and Bowman Kirsten 2008 Achievements and Problems of the International Criminal Court Journal of International Criminal Justice 6, 711-730 doi:10.1093/jicj/mqn056 Oxford University Press., All rights reserved. For permissions, please email: journals.permissions@oxfordjournals.org

²³⁹ The International Criminal Court Confronting challenge on the path to justice Henry M. Jackson school of international studies task force report 2013 University of Washington pp 153

²⁴⁰ Cited with in the paper of Jacob Katzogam 2002 ICC and fair trials difficulties and prospects Yale journal of international Law Vol 27,2002

²⁴¹ Fairness at the International Criminal Court August 2011 An International Bar Association's Human Rights Institute Report Supported by the John D and Catherine T MacArthur Foundation .

Furthermore, in the absence of a framework agreement between the Court and the AU similar to that which currently exists between the ICC and the UN the decision to cooperate will be entirely discretionary. Despite strenuous attempts by the ICC Presidency to complete a framework agreement to facilitate cooperation between the Court and the AU on matters of mutual concern, the Court's efforts in this regard have been snubbed due to the pending arrest warrant against Sudanese President Omar Al Bashir. The AU has also made its lack of support for an ICC Liaison Office palpably clear²⁴²

The ICC has no police force, inter alia, to execute warrants of arrest issued by it. This is a clear illustration that the efficiency of the ICC is largely dependent on state cooperation and the international community. It is inconceivable that the prosecutor of the court would enter a sovereign state without approval from said country to conduct his investigations.²⁴³

However Currently, African regional organization passed a decision binding on state and non-state parties that affects the activity of the court which is noncooperation for arrest of Sudan current president and not to give liaison office at Addis Ababa. In light of the binding nature of the aforesaid provision, state parties are obliged to assist the ICC with any support that it has sought. Cooperation with the ICC includes provisional arrest, and the identification of the where about of the suspects. It is unfortunate that the AU has urged its members (who are also parties to the Rome Statute) not to cooperate with the court in executing warrants of arrest and surrendering of President Al Bashir. Consequently, the court is unable to apprehend the Sudanese and other suspects in the African region. It is thus evident that without the members states support, the ICC would be toothless.²⁴⁴

Article 86 of the Rome Statute stipulates a general obligation to cooperate fully with the Court in its investigation and prosecution of crimes, and in signing the treaty and becoming a party to the statute; states agree to comply with its content. The obligation to

²⁴² Ibid

²⁴³ Retselisitsoe Moses Phooko 2011 How effective the international criminal court has been : Evaluating the work and progress of the international criminal court Notre Dame Journal of international , comparative & human rights law

²⁴⁴ Ibid

cooperate is therefore an obligation created by states themselves, in order to ensure the effective working of the ICC. Internationally, just as nationally, it is not possible to run a fair and effective criminal justice system without control of suspects and access to all relevant facts. If the ICC is to fulfill its purpose to end impunity, it must have full cooperation and assistance of states including regional organizations such as the African Union. In practice, this also means that states are obliged to implement the provisions of the Rome Statute at a national level, and must ensure that there are procedures available for all forms of cooperation, as written in Article 88 of the Rome Statute.²⁴⁵

Of course a state may withhold information or prevent a person from giving evidence if this would prejudice national security. This is one of the few grounds on which a state may refuse to comply with a request of the Court, under Article 93 paragraph (4) another ground may be when a request for assistance is inconsistent with a national law, according to Article 93 paragraph (3). In this case, however, the state shall promptly consult with the Court to try and resolve the matter. For states this means firstly that their own criminal justice systems should be ready and able to deal with international war crimes and crimes against humanity; and secondly that should cooperation be requested by the ICC for a case that has been brought before it, there is a readiness and ability to comply.

5.2.1.2 Challenges in Arresting Individual

An arrest is the act of depriving a person of his or her liberty usually in relation to the purported investigation or prevention of crime and presenting (the arrestee) to a procedure as part of the criminal justice system. Arrest, when used in its ordinary and natural sense, means the apprehension of a person or the deprivation of a person's liberty. The question whether the person is under arrest or not depends not on the legality of the arrest, but on whether the person has been deprived of personal liberty of movement. When used in the legal sense in the procedure connected with criminal offences, an arrest consists in the taking into custody of another person under authority empowered by law,

²⁴⁵The rise of the International Criminal Court, complementarity and domestic prosecution of international crimes by Judge Navi Pillay report from a symposium on The investigation and prosecution of 'core international crimes' and the ICC in Africa Institute for Security Studies, 2007.

to be held or detained to answer a criminal charge or to prevent the commission of a criminal or further offence.²⁴⁶

A seizure or forcible restraint; an exercise of the power to deprive a person of his or her liberty; the taking or keeping of a person in custody by legal authority, especially, in response to a criminal charge²⁴⁷ we can take arrest warrant made by ICC since it starts issuance of arrest warrant in order to bring preparators of crime in Africa with in this section we try to see arrest warrant are the major obstacle for the work of ICC without the participation of stake holders.

5.2.1.3 Challenges in Collection and Preservation of Evidence

Case of Sudan and Uganda can be one of the best example the court has faced in collection and preservation of evidence from many angles in these two areas of investigation

At this investigative phase we are facing problems related to the protection of and access to victims and witnesses. Therefore, the investigation team has been working in countries around Sudan, such as Chad, where they have had easier access to victims and witnesses. We anticipate the Darfur situation will bring the investigation and prosecution of a sequence of cases, rather than a single case dealing with the situation in Darfur as a whole. For the first case to stem from a much focused investigation and to charge the individuals who bear the most responsibility. In regards to the identification of individual criminal responsibility in the current stage of investigation, the prosecution has identified specific cases for full investigation and possible prosecution.²⁴⁸

After the decision to open an investigation was announced by the Prosecutor in June 2005, Sudan informed that they had established a new Special Court to deal with crimes committed in Darfur. Other mechanisms were subsequently opened such as: the National Commission of Inquiry, Ad Hoc Committees and the Committees against Rape. These

²⁴⁶Wikipedia <http://en.wikipedia.org/wiki/Arrest> date 3/27/14

²⁴⁷Legal dictionary <http://legal-dictionary.thefreedictionary.com/Arrest> accessed on date 3/24/14

²⁴⁸The rise of the International Criminal Court, complementarity and domestic prosecution of international crimes by Judge Navi Pillay report from a symposium on The investigation and prosecution of 'core international crimes' and the ICC in Africa Institute for Security Studies, 2007.

actions invoked the complementarity framework under the Rome Statute. However, based on OTP assessments, it does not appear that the national authorities have investigated or prosecuted, or are investigating or prosecuting, cases that are or will be the focus of OTP's attention such as to render those cases inadmissible before the ICC. Ongoing assessment of these national mechanisms will be conducted.²⁴⁹

5.2.1.4 Challenges in Amnesty, Peace, Justice Process

The Amnesty Act Some offenders who have been committing offences in the LRA have been arrested and prosecuted. These arrests and prosecutions have raised legal challenges in one case because of the Amnesty Act. The LRA war has caused untold suffering to the people of Northern Uganda but for purposes of reconciliation and peace, Parliament passed an Amnesty Act in 2000. The Act declared amnesty in respect of any Ugandan who has engaged in war or armed rebellion against the Republic of Uganda since 26 February 1986. The applicant shall not be prosecuted or subjected to any form of punishment for participation in the war or rebellion or for any crime committed in the name of the war or armed rebellion. Those who have participated in the LRA atrocities then escape answering for their offences through simply applying for amnesty. Under the amnesty law, the state has no discretion on the granting of the amnesty as amnesty is automatically granted on application. The challenge is that the person who has committed heinous crimes will not be prosecuted or be prosecutable after applying for amnesty.²⁵⁰

With regard to the peace process in the region, the Prosecutor has remained in close contact with those individuals and groups involved in efforts to mediate with the LRA. It has also been following the recent reports of meetings taking place between the government of Southern Sudan and the LRA, in an attempt to mediate a peaceful solution to the conflict.

“We are not party to those discussions but we continue to work together with the government of Uganda and the other affected states in the region to find a lasting solution involving both peace and justice”. The Prosecutor has also stated that he will not issue

²⁴⁹ibid

²⁵⁰Best practices and challenges encountered when prosecuting and investigating international crimes in Uganda
Richard Buteera Pp64

further warrants against members of the LRA for past crimes. “We therefore encourage national and local efforts to persuade other members of the LRA to return and take advantage of mechanisms for reintegration and reconciliation.” The LRA commanders are today located in Northern Uganda, Southern Sudan and Eastern DRC. “We have seen that they are now very much in the news what with the present peace talks going on which we continue to monitor. We must remind ourselves that they continue to be...²⁵¹a regional threat and therefore require a coordinated regional solution with international support.

5.2.2 Political Challenges

Attacks on the court’s legitimacy and manipulation of the ICC as a political tool continue to affect the court’s credibility and becoming part of challenges that faced since creation of the court and will continue to be affected by it because of diverse justification about the court on case by case and from time to time and from continent to continent. Within this section we shall discuss the political challenges ICC has faced in addition to other challenges.

5.2.2.1 AU as New Political Challenge

The indictment by the International Criminal Court of Sudanese President Omar Al-Bashir for war crimes and crimes against humanity allegedly committed by government forces in Darfur has provoked a crisis in relations between the court and the African Union (AU). It has added further heat to an often angry debate about the court's role in Africa.²⁵²

The AU declaration has not only set a precedent in international justice and open a Pandora’s Box on other African cases before the international criminal court but also presented legal challenges. AU is not a party to Rome Statute and therefore has no audience before the ICC. It is the individual African State Parties who may engage the ICC in one way or the other. Botswana for example has confirmed that it will not abide

²⁵¹The International Criminal Court in Africa: Current cases Fatou Bensouda 2009

²⁵²Kimani mary 2008 International Criminal Court: Justice or Racial Double Standards? Afrik.com http://en.wikipedia.org/wiki/International_Criminal_Court accessed 24/3/2014

by AU's resolution. The AU was therefore on a frolic of its own, at least legally, but it has communicated its political message. Under public international law, the legal force of the AU resolution is questionable since an international treaty ratified by a state is binding on that state unless it decides to withdraw from it altogether. Whereas the strength of the Kenyan cases is increasingly waning, the African Union cannot help the situation. Even if Kenya were to withdraw from the Rome Statute, this withdrawal would only affect the future investigations and prosecutions, not the existing cases before the court. The case against President Kenyatta and his deputy would therefore remain undisturbed. Uhuru and Ruto are ably represented in ICC. The witnesses in their cases are withdrawing and the bundle of evidence thinning by the day. No tact or effort other than their able defense before the court can save their situation.²⁵³

5.2.2.2 Double Standard Issue as a Political Challenge

Definition

A Double standard is the application of different sets of principles for similar situations, or by two different people in the same situation. A double standard may take the form of an instance in which certain concepts (often, for example, a word, phrase, social norm, or rule) are perceived as acceptable to be applied by one group of people, but are considered unacceptable. A double standard can therefore be described as a biased or morally unfair application of the principle that all are equal in their freedoms. Such double standards are seen as unjustified because they violate a basic maxim of modern legal jurisprudence: that all parties should stand equal before the law. Double standards also violate the principle of justice known as impartiality, which is based on the assumption that the same standards should be applied to all people, without regard to subjective bias or favoritism based on social class, rank, ethnicity, gender, religion, sexual orientation, age or other distinctions.²⁵⁴

²⁵³Chelanga Moses 2013 African union shall not save Kenyatta from ICC proceeding May 29, 2013 available <http://www.ilawkenya.com/blawg/african...> accessed on March 25, 2014

²⁵⁴Wikipedia definition http://en.wikipedia.org/wiki/Double_standard accessed 3/30/2014

The biggest political challenge for the Court at this juncture, especially in relation to its legitimacy in Africa, is the “double standard” problem. The idea that everyone is equal before and under the law underpins domestic legal systems, especially in the area of criminal law. The position under international law in relations between states is no different, at least in theory. This is enshrined in the preamble and Article 2(1) of the foundational UN Charter which affirm “equal rights of men and women and of nations large and small” and the “principle of sovereign equality of all” states.²⁵⁵

The accusation of double standards since the issuing of the arrest warrant has come from senior AU representatives as well as institutions within the AU. For instance, the Chairman of the AU Commission raised concerns that the ICC was only targeting Africans to the exclusion of other human rights violations across the globe.

The prosecutor of the ICC has encouraged self-referrals, and the only such referrals have been from African countries. While the ICC has received some 1,700 communications to investigate alleged crimes in 139 countries, 80% of these communications have been found outside the jurisdiction of the court. The indictment is the latest evidence, critics argue, that the ICC, which to date has brought cases solely against Africans, is placing undue emphasis on the continent. Supporters of the ICC worry that such arguments diminish the seriousness of the charges and point out that some of the loudest critics are other African leaders who fear they might one day face similar charges.²⁵⁶

With regard to the claim of double standards, it should be noted that although all four situations being dealt with by the Court are in Africa, three are self-referrals (as in the case of Uganda, the Democratic Republic of Congo (‘DRC’), and Central African Republic (‘CAR’), while the fourth, namely Sudan, is a United Nations referral. The self-referrals indicate that it is these states themselves that have asked for the Court’s assistance. These self-referrals can be seen as African leaders having a desire to fight

²⁵⁵Jalloh, Charles, Chernor 2009. “Regionalizing International Criminal Law?” *International Criminal Law Review* 9 (2009) 445–499.

²⁵⁶Naefa Kahn, 2009 *Fighting Impunity : The International Criminal court and The African union* Published by the Centre for Policy Studies September 2009

impunity and to utilise the Court towards this end. Consequently, it is not the Court that is targeting African states.²⁵⁷

Double standard issue is seen in ICC work in three dimension will be discussed below one it focuses on African states secondly ICC targeted weak judicial system state thirdly it has targeted on fighting immunity. The warrant for the Sudanese president brought concerns about the court's Africa focus to a head. In February 2009, the African Union argued that a legal process would undermine ongoing regional peace efforts in which Mr. Bashir was an active participant. "The search for justice should be pursued in a way that does not impede or jeopardize efforts aimed at promoting lasting peace," AU leaders stated. They also reiterated their concern about a possible "misuse of indictments against African leaders."²⁵⁸

"ICC always targets ... Africans. Does it mean that you have nothing on Gaza? Does it mean you have nothing [on the] Caucasus? Does it mean that you have nothing on the militants in Colombia? There is nothing on Iraq? We are raising this type of question because we don't want a double standard" Jean Ping, the president of the AU Commission, cited within the Article of (Mary Kimani 2009) The ICC "has been put in place only for African countries, only for poor countries," charged Rwandan President Paul Kagame also expressed the same view as Jean ping within the same paper.

This is "not a question of picking on Africa," "The UN Security Council referred Darfur, and the other countries came forward voluntarily." says John Washburn of the American NGO Coalition for the ICC cited within the Article.²⁵⁹

The ICC is hardly an institution that looks anti-African. Its largest block of members 34 of its 122 states is from Africa, and they were central in negotiating the Rome treaty that established the court. Those thirty-four states including Kenya represent a solid majority of Africa's fifty-four nations. The ICC's chief prosecutor is an African Fatou Bensouda

²⁵⁷ Ibid

²⁵⁸ Mary, Kimani 2009, International Criminal Court: Justice or Racial Double Standards?
http://en.wikipedia.org/wiki/International_Criminal_Court 24/3/2014

²⁵⁹ Stephanie, Hanson 2008, Africa and the International Criminal Court available on council on foreign relations www.cfr.org

of Gambia. She assumed the post in 2012 after having served for eight years as the deputy prosecutor. Africans serve among the court's judges and the prosecutor's staff.²⁶⁰

Moreover, the ICC's focus on Africa is largely not of its own doing. In five of the eight countries where it is actively prosecuting suspects Uganda, Mali, Ivory Coast, the Central African Republic, and the Democratic Republic of Congo the African state in question asked the court to intervene, often with significant encouragement from victims and local rights groups. In two other countries Sudan and Libya the UN Security Council asked that the ICC become involved. Only in the case of Kenya did the ICC act entirely on its own initiative.²⁶¹

In fact the focus on Africa largely reflects current limits on the reach of international justice. The court can exercise jurisdiction only when the crime was committed by a citizen of a member state or on the territory of a member state, or if the situation is referred to the court by the UN Security Council. Certain obvious non-African candidates for prosecution are from states that have never joined the court, such as Sri Lanka, North Korea, Uzbekistan, Israel, Palestine, Syria, or Iraq. The Security Council could have given the ICC jurisdiction over crimes in these cases, but the council's permanent members have tended to shield nations they favor from the court's attention. The UN General Assembly, where no state has a veto, lacks the power to grant the court jurisdiction.²⁶²

For a question repeatedly raised by African leaders and scholars do the ICC follow double standard issue in case of Africa and Middle East? The paper of international federation for Human Rights entitled the international criminal court and Darfur Questions and Answers²⁶³ summarized the above debate on double standard it in the following three categories.

²⁶⁰ Africa Attacks the International Criminal Court January 14, 2014 Kenneth Roth Published in: The New York Review of Books available on www.hrw.org/.../2014/01/14/africa-attacks-international-criminal-court

²⁶¹ Ibid

²⁶² Ibid

²⁶³ The International Criminal Court and Darfur Questions and Answers www.iccnw.org/documents/Q_ADarfurENG_cleanFINAL.pdf · PDF file accessed June 1 2013.

Firstly, it is important to underline that African States currently constitute one-third of the States Parties to the Statute. They have recognized and accepted the ICC jurisdiction over their territory and their nationals. Secondly, it is because they had ratified the ICC Statute and, therefore, accepted its jurisdiction, that three out of four States currently under investigation, have themselves referred the situation to the ICC. They have themselves requested that the Prosecutor opened an investigation into the crimes perpetrated on their territory, thus recognizing their lack of capacity to carry out investigations and prosecutions for those crimes. As far as the situation in Darfur is concerned, the Security Council's involvement was justified by the gravity of the situation in the Western region of the Sudan since 2003. A conflict which has brought about the displacement of over two million people and has made thousands of millions of victims of international crimes, constitutes a threat to international peace and security in the region.²⁶⁴

Finally, the seriousness of the crimes is a crucial criteria for open investigations at the ICC level. According to many international reports, it is possible to assert that crimes which are among the most serious have been perpetrated in a systematic manner in the currently under investigation by the Court.

5.2.3 Financial Challenges

Except as otherwise specifically provided, all financial matters related to the Court and the meetings of the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be governed by this Statute and the Financial Regulations and Rules adopted by the Assembly of States Parties²⁶⁵. The United Nations and the Court agree that the conditions under which any funds may be provided to the Court by a decision of the General Assembly of the United Nations pursuant to article 115 of the Statute shall be subject to separate arrangements. The Registrar shall inform the Assembly of the making of such arrangements.

“It is a self-evident principle that the independence and hence impartiality of a court is only as sure as the independence of its financing....None of us would put faith in the

²⁶⁴Kirsch, Philippe (2001) *The International Criminal Court current issues and perspective Law and Contemporary Problems*, Vol. 64,

²⁶⁵Article 113 of Rome statute

impartiality of a local or national court if it depended upon the largesse of private individuals or corporations, who, by definition, might have an interest in the outcome of particular proceedings.” The ICC is financed out of the general UN budget. Additionally, Article 116 of the Rome Statute also provides for voluntary contributions “from Governments, international organizations, individuals, corporations and other entities.” Rosenthal observes “Thus, the ICC’s very statute openly invites contributions from a whole range of ‘entities,’ any of whom could have an interest in the outcome of proceedings and some of whom, notably “Governments” might even have been parties to the hostilities in which the alleged crimes over which the court claims jurisdiction are supposed to have occurred.²⁶⁶

International justice is not cheap and international criminal courts are dépendent on states or international organisation for thier funding .One of the most difficult Financial challenges for the Court is the necessity to ensure that it focuses on its mandate rather than planning about how to secure resources. If there is not enough financial stability, the Court might redirect some work and preserve sources instead of mitigating human rights violations. Another aspect is the potential political interference in the budgetary process vis-à-vis state interests. Instead of being treated like a highly politicized plat form, the Court should be given the resources it needs to function.²⁶⁷

An additional issue that the Court faces is how to deal with its unforeseen expenses. An out break of human rights violations and conflict might strain the proposed budget for the year. How much justice are the states prepared to pay for? In 2012 the Court’s contingency fund was replenished to 7 million Euros. The possibility to over come this situation might be to approve a supplementary budget similar to contingency fund designed to address the possible eruption of conflict. The budget represents a crucial aspect for fulfilling the Court’s mandate a Broad. When considering the budget, the ASP ought to realize that each case is unique and may require more or less resources. In 2012 due to budget below resources required; the Court had to implement measures almost

²⁶⁶Hoile David (2008) Darfur: The Road to Peace European-Sudanese Public Affairs Council

²⁶⁷Uhalova Katarina 2013The Financial Challenges of the International Criminal Court 14 Novembre 2013 available on <http://www.cdiph.ulaval.ca/blogue/katarina-uhalova>

detrimental to it. These financial resources and associated planning should assist and not hinder Court in functioning effectively and independently.²⁶⁸

5.3 Perspectives of International Criminal Court

Introduction

The permanent ICC avoids the need for the establishment of ad hoc tribunals with all the attendant political and legal difficulties. These are exemplified by consideration of courts established or proposed for Sierra Leone, East Timor and Cambodia. Beyond its permanency in Hague the court is striving for the issuance of international justice that is predictability of the court in fighting impunity that leads states and their individuals to stop committing serious crimes of international nature under the Rome statute .this will have effect in states to try individuals at national court that respects the sovereignty of the states and that have cumulative effect in the justice system of the weak states.

5.3.1 Perspective to Development of the International Criminal Justice

The entry into force of the Statute of the permanent International Criminal Court marks an important milestone in the quest for an international criminal justice system. However, the effectiveness of the ICC will likely depend to a large extent on its developing relationship with the Security Council, member states, nonmember's states, NGO in general the whole organization.

The ICC was established and came to life in the twentieth and twenty-first centuries, which were characterized by important and marking steps of international criminal law and justice. The International Military Tribunals for Nuremberg and Tokyo and subsequent ad hoc international tribunals and hybrid courts all contributed to the path of

²⁶⁸Ibid

international justice, which is now for the ICC to continue and strengthen. In order for the Court to walk an effective and credible path.²⁶⁹

International criminal law has traditionally adopted a broad view of extraterritorial jurisdiction. For example, passive personality jurisdiction is generally frowned upon in international law, yet it is unquestionably available in relation to international crimes. The broadest jurisdiction granted to states in international law, universal jurisdiction, is granted by international criminal law. As jurisdiction involves one state asserting rights to adjudicate events in (and often involving the officials of) other states, this involves an assertion of sovereignty. Thus international criminal law, by accepting universal jurisdiction and limiting material immunities empowers states, enabling them to expand their sovereign rights to events beyond their borders, through the assertion of such a broad form of jurisdiction. Although most international criminal lawyers would accept that in the case of international crimes this is right, it also shows that sovereignty is not always the enemy. Without sovereignty there are no courts, and without courts there are no prosecutions.²⁷⁰

Nearly ten years after the signature of the Rome Statute, the International Criminal Court (ICC) is rapidly proving to be a key actor in international law and international relations. As an international criminal tribunal, it is contributing to the further development of international criminal law, both from a substantial and procedural perspective. Substantially, the Rome Statute provides for the first treaty definition of crimes against humanity, promotes the ongoing quest to define the crime of aggression, and is starting the first test-case for the prosecution of the crime of enrolling child-soldiers. Procedurally, it is making ground-breaking decisions in the field of victim participation.²⁷¹

Ex-prosecutor Luis Moreno-Ocampo Prosecutor of the ICC said in his speech

²⁶⁹ Achievements and Problems of the International Criminal Court René Blattmann* and Kirsten Bowman *Journal of International Criminal Justice* 6 (2008), 711-730 doi:10.1093/jicj/mqn056 Oxford University Press, 2008, All rights reserved. For permissions, please email: journals.permissions@oxfordjournals.org folder best

²⁷⁰ International Criminal Law vs State Sovereignty: Another Round? BY Robert Cryer *The European Journal of International Law* Vol. 16 no.5 © EJIL 2006;

²⁷¹ Fighting impunity in a fragmented world. new challenges for the international criminal court dov.jacobs@eui.eunooora.arajarvi@eui.eu) European university institute , Florence 2008 may23-24

”The Rome Statute created a comprehensive and global criminal justice system: one Substantial law has been codified in one detailed text; the content of different international conventions such as the Genocide Convention and the Geneva Conventions have been incorporated; elements of crimes have been meticulously defined; based on the jurisprudence.... Second different legal and procedural traditions have been integrated into a new international model; victims have been given the right to participate in proceedings; their voices and interests ...thirdly The scope of ICC jurisdiction reaches beyond any national or regional boundary; where as its predecessors were each limited in scope to a particular territory, the ICC is a worldwide criminal justice system. Its jurisdiction extends over crimes committed on the territory or by the nationals of more than a 100 States Parties..... Fourthly Even more important, and the object of strong debate in Rome was the decision of States to give the Prosecutor the ability to trigger the Jurisdiction of the Court. By establishing the *propriomotu* powers of the Prosecutor to open an investigation, the treaty creates a new autonomous actor on the international scene...²⁷²

Lastly, the general torpor of States in relation to prosecution of international crimes, if not their actual reluctance to do so, can be seen from the general level of implementation of international crimes into national legal systems. In addition, concentration on international criminal law as it has been incorporated and interpreted in national law (prior to the Rome Statute) demonstrates that traditionally there have been problems of consistency between States. As we noted above, the use of extraterritorial jurisdiction is far less problematic if the law applied is uniform across States.²⁷³

5.3.2 Perspectives to End Impunity, Atrocity and Major International Crimes

The most obvious purpose of the Rome Statute is expressly reflected in the Statute’s Preamble. Preambular paragraph 4 expresses determination to “put an end to impunity for the perpetrators of these crimes”, and paragraph 5 affirms that “the most serious crimes of concern to the international community as a whole must not go unpunished”. The reference to “impunity” should be understood in light of article 17 on admissibility, which requires that states proceed “genuinely”. Through genuine criminal proceedings impunity will, by definition, be avoided. The Statute is intended to promote genuine

²⁷²Moreno-Ocampo, Luis. “Address by Luis Moreno-Ocampo Prosecutor of the International Criminal Court.” International Conference “Building a Future on Peace and Justice” Nuremberg, 25 June 2007.

²⁷³Cryer Robert 2005 Prosecuting International Crimes Selectivity and the International Criminal Law Regime Published in the United States of America by Cambridge University Press, New York 2005

justice directly by allocating certain cases to it, and indirectly by encouraging genuine national criminal proceedings.²⁷⁴

The brief history of the Court suggests that the threat of prosecution has affected the calculations of rank and file troops and their leaders. For example, Human Rights Watch has reported that, soon after the Court announced its investigation in June 2005, government and rebel military leaders in Sudan warned their troops not to direct attacks at civilians or commit war crimes out of fear of prosecution. As noted, some DRC militia leaders worried about sharing Lubanga's fate. These effects have not been limited to countries where the Court is conducting active investigations. Kenya, for example, experienced widespread violence following its national elections in December 2007. Although more than 1,000 civilians died and more than 300,000 were displaced from their homes, the toll could have been worse, and some accounts indicate that potential prosecution by the Court dissuaded some ethnic leaders from inciting further hostilities.²⁷⁵

To any degree that prosecutions could be a deterrent, then their absence has helped create a culture of impunity. A permanent ICC would increase the probability of prosecution for very serious offences. To that extent it would increase the degree of deterrence and contribute to ending that culture. The argument is that consistent and predictable prosecutions, even if necessarily small in number, can have a limited deterrent effect. They reinforce the normative values inherent in the basic rules of conflict. Indicted leaders effectively become prisoners in their own State. They are also subject to the follies of changing political fortunes. Such changes can be induced to some degree by outside diplomatic and economic pressure. For example, sanctions against Serbia were maintained because indicted persons remain at large or in positions of power. The handing over of Milošević to the ICTY was instrumental in securing \$40 million in

²⁷⁴ Stigen Jo 2008 The relationship between the International Criminal Court and national jurisdictions: the principle of complementarity.

²⁷⁵ Feinstein Lee and Lindberg Tod 2009 Means to an end: U.S. interest in the International Criminal Court pp 89.

additional economic aid. Croatia has gradually been induced to co-operate with the ICTY.²⁷⁶

5.3.3 Perspectives to World Peace, Justice and Stability

Ad hoc tribunals are so far established after the conclusion of bloody conflicts and atrocities in which crimes against the norms of International humanitarian laws, namely crimes against humanity, genocide and war crimes were committed. The Nuremberg Tribunal, the Tokyo Tribunal, the ICTY, the ICTR and the Special Court for Sierra Leone are such adhoc international tribunals. The Nuremberg and the Tokyo tribunals were established by the victorious powers while ICTY and ICTR were established by the UNSC under its Chapter VII mandate. The Special court for Sierra Leone, however, is established by the joint agreement of the GoSL and the UNSG. As it can be understood from the experience of the establishment of these tribunals, they have come in to existence as a result of the wave of condemnation of the atrocities committed by one group from human rights groups, governments, and winners of the war, the UNSC and the international community as a whole.²⁷⁷

Punishment clearly is no purpose in itself. It can only be justified to the extent that it promotes some legitimate underlying purpose which outweighs the pain inflicted on the wrongdoer. The most commonly cited purpose underlying criminal justice is crime prevention. Indeed, preambular paragraph 5 expresses determination to put an end to impunity and thus to contribute to the prevention of such crimes. The preventive effect of combating impunity is, however, assumed without further analysis. Another possible but controversial effect of criminal justice is that it promotes reconciliation. The Statute appears to build on the assumption that a society which has experienced massive human rights violations cannot reconcile unless the guilty are held accountable. The belief or disbelief in such effect in a given situation will have vast implications on the

²⁷⁶The Permanent International Criminal Court Legal and Policy Issues Edited by Dominic Mc Goldrick Peter Rowe and Eric Donnelly the editors and contributors severally 2004 Published in North America (US and Canada) by Hart Publishing c/o International Specialized Book Services.

²⁷⁷ Prosecution of Crimes against Humanity and Genocide in Africa: A Comparative Analysis Fekade Alemayhu 2010

discretionary assessment as to where, i.e. in which conflict area, the ICC should exercise its jurisdiction.²⁷⁸

More generally, the ICC is fast becoming a central figure in global conflict management. Its involvement in ongoing conflicts, such as in the Democratic Republic of Congo, Uganda and Darfur is a real challenge for international policy makers who are facing the acknowledged difficulty of balancing peace, security, the fight against impunity, the protection of victims and the re-establishment of public order in war-torn societies. There is no denying that the success of the ICC is indeed one of the key factors to restoring peace and justice in conflict zones, by contributing to the fight against impunity, and the reaffirmation of the rule of law. Given the moral importance of the institution and the reasons underlying its creation, it is often difficult to find impassionate and objective debate on various important points. However, the ICC can only benefit from a critical, but constructive, analysis on its activities and challenges.²⁷⁹

In recommending that the Security Council refer the situation in Darfur to the ICC, the UN Commission of Inquiry on Darfur argued that there would be several benefits from such a referral: the prosecution of the crimes would be conducive to peace and security in Darfur; the ICC, as the only truly international institution of criminal justice would ensure justice is done because the ICC sits in The Hague, far from the alleged perpetrators' spheres of influence; the cumulative authority of the ICC and the Security Council would be required to compel those leaders responsible for atrocities to acquiesce to investigation and potential prosecution;²⁸⁰

²⁷⁸The relationship between the International Criminal Court and national jurisdictions: the principle of complementarity / by Jo Stigen. 2008

²⁷⁹ Fighting impunity in Fragmented world new challenges for the international criminal court
dov.jacobs@eui.eunoora.arajarvi@eui.eu)European university institute , Florence 2008 may23-24

²⁸⁰Hoile David (2008) Darfur: The Road to Peace European-Sudanese Public Affairs Council

CHAPTER SIX

6. Conclusion and Recommendations

6.1 Conclusion

From the discussion presented above it is clear International criminal law had not been recent phenomenon and crimes of international nature being prosecuted in Ad hoc tribunal has also far to the 21 century during the Nuremberg and Tokyo trials.

ICC which is a permanent court established through a treaty of states has also gone far more than a decade since its establishment and actively pursuing its mandate in fighting impunity throughout the globe. The court confers power on three crimes, Crimes against Humanity, War Crimes, and Genocide for the time being. The Prosecutor can initiate an investigation or prosecution in three different ways: States Parties to the Statute of the ICC can refer situations to the Prosecutor; the United Nations Security Council can request the Prosecutor to launch an investigation; the Office of the Prosecutor may initiate investigations *proprio motu* (on its own initiative) on the basis of information received from reliable sources. The ICC is a court of last resort and not a court of first instance. Ideally, national criminal jurisdiction should take precedence in efforts to address impunity

Since its establishment the court has got not minimal support from Africa except the powerful states of the Security Council members especially US and its allies, that happen because of perception and miss conception towards the mandate of the court most opposing states were having their own justification for not signing the treaty however others were not guinenly evaluating the importance of the court. The ICC does have an important role to play in Africa, and in the rest of the world. The existence of an international criminal court will also encourage States and national courts to exercise their jurisdiction over crimes committed in their territories or by their nationals. As we have discussed deeply through Africa and the international criminal court the relationship of Africa and ICC from time to time is depends mainly on recurrent politics of the continent .If we are going to see from the commencement of the court African states were

actively participating in the establishment of the court and supporting politically the court for diverse reason.

However things are going from good to bad at the moment the court indicts head of states. especially sub Saharan Africa is in great friction from internal to and external problems Sudan during conflict with the now south Sudan .Uganda from preliminary time it government has faced difficult challenges with rebel group of LRA, DRC with great internal conflict child soldier and massacre of millions, central African republic in a state of instability due to internal violence towards the then government crime against sex were committed.

In the same way outside Africa there were great human right abuses in different regions such as Middle East, Asia and Latin America, since the start of act of terrorism throughout the world especially when USA is affected by september11 attack. War against Afghanistan, Iraq, Colombia, Gaza and Syria conflict can be traced back as a few atrocities in the rest of the world under which major crimes committed areas out of Africa are nonmember states with legal and political complication to open for OTP investigation even though they need political decision of third party such as UNSC, nonmember states and regional organizations like AU.

Africa is made up of 54 sovereign and independent states, 34 of which have agreed to be bound by the Rome Statute and are obliged under international law not only to cooperate with the ICC but also not to act in a manner which would defeat its object and purpose.

There are various complaints on ICC from the voices within Africa concerning its legitimacy and jurisdiction in the continent. The current feelings of Africans on ICC on their perception that the court has focused Africans the feelings were to the U.N. Security Council referral to the ICC because of its stated objections to the ICC's jurisdiction over nationals of states not party to the Rome Statute.

The ICC's relationship with Africa and in particular with the AU deteriorated following the arrest warrant issued for President Al Bashir of Sudan, based on a UN Security Council referral to the Court.

The Uganda, DRC and CAR referrals demonstrate how in terms of article 14 of the statute any state party may refer to the ICC a 'situation' in which one or more crimes within the jurisdiction of the court appear to have been committed. Apart from this Sudan and Kenya have negative stance towards the court due to the indictment of their respective incumbent head of states and they are playing their major role in sub-Saharan Africa in defamations of the court. Such problem emanates from two points first from the trigger mechanism of the court, as per Article (12 a and b) of the statute UNSC has power to refer and defer cases to the court this power given to the council shows as to the view of others it is a politically motivated action by powerful states against weak states because most powerful states are part of the UNSC in that states will be subjected to prosecution by their head of states.

The other political manipulation by powerful states is that US which is a member of UNSC and can easily refer to his enemy state. However there is connection between the UNSC and ICC we need to blame UNSC for not referring the situation in other countries for example Palestine even though not fully independent state in eyes of US allies. But most writer and non-lawyer writer were in dilemma to identify where and whom to blame and rather than supporting the institutional independency of the court. As we have discussed in detail ICC is not targeting Africa and African leaders rather ICC is doing his own job with victims and major civil society to end impunity throughout the world. Au should not blame ICC for the work of UNSC double standard not only in case of specific task we had seen a lot decisions and resolution that are politically motivated that is what Africa has to fight by leading the international criminal justice in the continent .by helping the court in every aspect .

6.2 Recommendations

Recommendation goes to three organs of the AU, UNSC and the ICC that have close ties on African affairs.

AU

AU which is a political body representing African states has to work towards the violation of human rights as to the preamble of the AU charter prescribes, AU should not be motivated by one or two countries that claim allegation against ICC rather AU has to work to fight impunity in a flat rate in Africa where massive human right violation is made in Africa than from the rest of the world.

The AU needs to reorient its stance towards the ICC. There will be instances in which the ICC can function as a partner to the AU in terms of addressing the violation of human rights on the continent. The AU should enter into a dialogue with the ICC and utilize the presence of African countries in the ICC Assembly of State Parties to further communicate its views to the Court system.

The AU needs to demonstrate consistency in its words and actions to ensure that it remains a credible institution. The recent turn around decision not to comply with the arrest warrant works against the credibility of the institution. The pressure to reform the Security Council must continue to be prioritized by the AU by struggling to permanent sit in UNSC. In this regard the AU has consistently dealt with the issue as noted in the Summit decisions and should continue to focus on and push for reform of the Security Council.

The AU must encourage its citizens to use the mechanisms of the Court to fight impunity throughout the world. With a liaison office in the AU the AU can encourage communications to the Prosecutor and actively work with civil society to gather information that can strengthen communications. Lastly for AU should find solution for crimes continuously committed in African land.

The AU needs to engage proactively with the Court. As demonstrated, the Court is not targeting African states and the AU has always worked to strengthen the powers of the Court by encouraging ratification. In this regard, the AU should open a liaison office in the AU, as suggested by the Court. The AU should also sign the memorandum of understanding with the Court, which has been in the pipeline for many years.²⁸¹

Beyond these to skip from prosecution of ICC African states and AU has to strengthen National courts that can courageously entertain power full individuals at local international crimes at home land. Furthermore extending the jurisdiction of African Court of Human Rights to entertain what ICC by now looking over currently AU has already decided to establish home grown court that will be encouraged for those states not member of ICC.

UNSC

The UN Security Council needs to acknowledge that it also has an important role to play, to communicate formally with the AU on issues that the Council has raised relating to Sudan and Kenya. A policy of silence will only foment confusion and misunderstanding.

In addition, the UN Security Council has to become part of the solution to reorienting the relationship between the AU and the ICC. The referral power of the UN Security Council implicates the Council directly into the existing crisis situation between the AU and the ICC. It would therefore be a dereliction of the UN Security Council's responsibility, for contributing to the embattled relationship between the AU and ICC, not to contribute towards improving dialogue and understanding between the two institutions. Failure to address this tension means that the politics of international criminal justice will continue to be viewed with suspicion from an African perspective.

Lastly UNSC has to reorient power given to him by Rome statute to refer and defer the cases that need peace justice and stability for example Sudan Libya and Kenya in other way round UNSC should give immediate response at areas of great human right violation is committed like Syria.

²⁸¹Kariri, J.N. 14 July 2009: AU's Decision in Sirte Discourages ICC Supporters. Institute for Security Studies. Cited in the Paper of Fighting impunity: The international criminal court and the African union Naefa Kahn, CPS Research Associate Policy Brief 62 September 2009. available on www.cps.org.za.

ICC

The ICC needs to continue playing an impartial role in the fight against impunity in Africa and the rest of the world and proactively follow up situations in other jurisdictions where crimes have been committed. The court should maintain a diplomatic role in communicating and interacting with various African leaders in bridging the gap created due to miss conception of the court. Bi-lateral talks between Africa and the Courts will assist the Court to explain its investigatory and prosecutorial strategies with the aim of enabling the powers to understand how the Court operates.

Since it is so new, the ICC has to show results (in the form of warrants and convictions) to prove itself a relevant and effective institution. This is essential for it to build a solid reputation, ensure the support of member states, and attract new members.

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ADDIS ABABA UNIVERSITY CENTER FOR AFRICAN AND ORIENTAL
STUDIES

TITLE: Africa and the International Criminal Court: Challenges and the way forward.

Interview Guide for key informants.

1. Have you been convinced that the ICC is performing its activities by sticking to provisions given to it by the Rome statute?
2. Do you think that ICC plays double standard in its dealing with Africa, Afghanistan, Iraq and Colombia?
3. Do you believe that ICC specifically targets African leaders in its investigation and prosecution?
4. Do you feel that ICC is serving the hegemonic neocolonial projects of the West in Africa?
5. Don't you think it is good for Africa to fight against impunity on the crimes perpetrated by its leaders?
6. In your opinion does ICC contribute to justice and peace by furthering accountability of those who perpetrate crimes?
7. What are / would be the possible challenges of ICC in current times and for the future?
8. What perspectives does the ICC contribute to the world in general and specifically to Africa?

THANK YOU

Key informants Name, Institution and position including the Date Interview made.

No	Name	Institution	Position	Date of interview
1	Mr. Fafree M.	AU legal Affairs	Focal person at AU working on ICC	3/3/2014
2	Dr. Salah Mohammed	AU Political Affairs	Expert of Human Rights at Political Affairs,	3/3/2014
3	Mr. Retta	Foreign Minister of Ethiopia	Who is working in a Foreign Affairs of Ethiopia as legal Advisor,	21/4/2014
4	Ms. Messay T.	Justice Minister	Public prosecutor	8/4/2014

For your comment e-mail eshetubelay81@yahoo.com.