THE ROLE OF ICC IN DELIVERING JUSTICE IN AFRICA

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DECLARATION

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DEDICATION

I dedicate this research study to the People of Kenya and Africa at large as they strive together in delivering justice towards its people. I hope the findings of this research project will be of great importance towards the attainment of that goal.

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ABSTRACT

The study has explored the establishment of international criminal court and its effectiveness on delivery of justice. The chief objective of this research is to establish how international criminal court works within its jurisdiction in order to serve its purpose that is delivery of justice. The study specifically aimed to explore how effective the court has acted to deliver justice, challenges that the court it undergoes while delivering justice such as political influence from head of states, financials support and implementing orders issued by the courts. The research methodology utilized primary data from questioner and interviews. Secondary data include publications by scholarly books, journals and articles on international law and journals, statements from international criminal court officials, report from United Nations and nongovernmental agencies. The research was cast in a descriptive survey research which employed explanations useful in gathering information, analyzing, presentation and interpretation for the purpose of clarification. Finding reveals that there are both success and failures although failures supersede success. The study recommends that states and non-state actors should collaborate to ensure the court gets enough support in order to achieve its main purpose of establishment.

CHAPTER ONE

INTRODUCTION

1.1 Background of the study

The International Criminal Court or ICC is an international tribunal that sits in The Hague in the Netherlands.[1] The court was established on July 17, 1998 where 120 countries adopted the Rome Statute which established the International Criminal Court (ICC). The court came into being in July 2002. It is a permanent institution and has the power to exercise its jurisdiction over persons for the most serious crimes of international concern," which include "genocide; crimes against humanity; war crimes; and the crime of aggression." This was due to a believe of the countries in question that global justice would benefit from and be greatly enhanced by the creation of an "international criminal justice regime empowered to prosecute individuals guilty of gross atrocities and human rights violations, including war crimes, crimes against humanity and genocide.[2]

Two realities gave impetus to Africa's strong support for the establishment of the ICC: the carnage that gripped Rwanda in 1994 and the need to find ways to prevent powerful countries from preying on weaker ones. There was urgent need in Africa to squarely confront impunity and the mass violation of human rights, as well as prevent militarily, politically and economically stronger countries from invading weaker ones.

In terms of the latter, the inclusion of "crimes of aggression"— "the planning, preparation, initiation or execution of an act of using armed force by a state against the sovereignty, territorial integrity or political independence of another state,"—was especially attractive to African

[1] United Nations Department of Public Information (2002). The International Criminal Court. Retrieved 5 December 2006.

[2] Boell. (2012). "Perspectives: Political Analysis and Commentary from Africa," p. 21, http://www.boell.de/downloads/2012-08-Perspectives_Africa_1_12.pdf.

countries.[3] Today, 43 African countries are signatories to the Rome State and, of these, 31 are states parties. Increasingly, however, African countries have come to be critical of the ICC and relations between Africa and the court are currently severely strained. In fact, the African Union asked its members to implement a policy of non-compliance and non-cooperation with the ICC. For the court to remain a credible institution for the execution of international justice, it is important that there be reforms on how the ICC operates. However, there is also a need to strengthen African judicial systems.

For example, while the successful prosecution of Charles Taylor by the Sierra Leone Special Court in The Hague for aiding and abetting war crimes augurs well for justice in Africa, it is important to note that it also reveals the fact that even after so many years of independence, African countries have still not developed domestic legal and judicial systems capable of effectively administering justice and safeguarding the fundamental rights of their citizens.

The Taylor affair as well as the situations in Sudan and Kenya reveals serious deficiencies with the administration of justice in Africa. The fact that the ICC has to be called upon to deal with legal issues that ought to be handled effectively by African governments is a sign of African states' collective failure to properly govern themselves and administer justice fairly and timely. Thus, the AU should help its members undertake necessary institutional reforms to create locally focused and culturally relevant legal and judicial systems that can effectively prosecute those accused of impunity and hence minimize the need to call upon the ICC to intervene. Of course, domestic legal systems are better able to deal with critical issues, such as peace and reconciliation; safeguarding the rights and meeting the needs of victims of crime; and making

[3] ICC. (2012). Understanding the International Criminal Court, p. 12, http://www.icc cpi.int/iccdocs/PIDS/publications/UICCEng.pdf.

adequate and effective use of traditional mechanisms for conflict resolution. Unfortunately, the AU has very limited success imposing its will on its members. Thus, it is against this background this study seeks to establish the role of International Criminal Court in Administration of justice in Africa

1.2 Statement of the Problem

Restoring trust in the ICC among Africans is a monumental task that requires the type of robust dialogue, which is currently not taking place between the ICC and African countries. Supporters of the ICC believe that the appointment of former Gambian justice minister, Fatou Bensouda, as chief prosecutor of the ICC should provide an opportunity for the latter to amend its relationship with Africa.

Many Africans are joining their leaders to challenge the moral integrity of the ICC, with some arguing that the court is opting for political expediency instead of the universal justice spelled out in the Rome Statute. Unfortunately, the ICC is yet to adequately and effectively allay the fears of Africans and convince them that the court's work is based exclusively on the belief that "the most serious crimes of concern to the international community as a whole must not go unpunished" and not on political and other unrelated considerations.

At the summit in Addis Ababa, the AU resolved that no sitting African head of state should be required to appear before an international tribunal and demanded that the ICC not proceed with the trial of President Uhuru Kenyatta of Kenya. The AU, however, has not been successful in passing a motion to withdraw African countries from the ICC.[4]

[4] BBC. (2013). "African Union Urges ICC to Defer Uhuru Kenyatta Case," http://www.bbc.co.uk/news/world-africa-24506006.

On the other hand, some African countries like Botswana have disagreed publicly with the AU's decision against cooperation and compliance with the ICC and have argued that African countries ought to keep their obligations under the Rome Statute.[5] In addition, former U.N. Secretary-General Kofi Annan and Nobel Peace Laureate Archbishop Desmond Tutu have urged African countries to remain with the ICC.[6]

While both the AU and the ICC share a common interest in dealing with crimes of impunity, the AU argues that it does not agree with externally imposed strategies to fight these crimes on the continent. Perhaps more important is the fact that while the ICC is simply an international judicial instrument and hence can be apolitical in its decisions, the AU as a political body will address impunity by opting for a political approach, which necessarily calls for "peacemaking and political reconciliation,".[7]With all these claims, indeed, it is revealed they exist gaps in the administration of justice by the ICC in Africa. Then the fundamental question to ask is, 'what is the role of International Criminal Court in the administration of Justice in Africa.

[5] Voice of America. (2013). "Botswana, African Union Disagree Over International Criminal Court Warrants," http://www.voanews.com/content/botswana-african-union-disagree-over-international-criminal-court-warrants-125451843/158470.html.

[6] BBC. (2013). "African Union Urges ICC to Defer Uhuru Kenyatta Case," http://www.bbc.co.uk/news/world-africa-24506006.

[7] Boell. (2012). "Perspectives: Political Analysis and Commentary from Africa," p. 21 http://www.boell.de/downloads/2012-08-Perspectives_Africa_1_12.pdf.

1.3 Objectives of the Study

The main objective is to establish the role of International Criminal Court in the administration of Justice in Africa. Specifically, the study will address the following objectives:

1.3.1 To establish how the ICC works effectively within its jurisdiction to achieve its purpose.

1.3.2 To examine the role and effect of the ICC beyond its own investigations and prosecutions.

1.3.3 To find out the politics of the ICC's interventions in Africa and the prosecutorial strategies

1.4 Literature review

1.4.1 Overview of ICC

The International Criminal Court (ICC) is the first permanent international court designed to prosecute the most heinous offenders of human rights. Unlike the International Court of Justice, the ICC is a criminal court with the power to try individuals for committing grave atrocities. The main goals of the ICC include putting an end to impunity for the worst crimes that impact the international community, bringing justice to victims and perpetrators, and deterring future acts of violence.[8] Proponents of the permanent court also believe that bringing peace to war-torn communities should be a goal. In 1998, 160 governments gathered to create the Rome Statute which regulates the operations and existence of the ICC. The court began operations in 2002 when the 60th country ratified the Rome Statute.[9] The court is an independent entity and is not an organ of the United Nations, although it retains an important relationship with the UN

[8] ICC - CPI, "ICC - About the Court," ICC - CPI, 2010, http://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx.

[9] A group of 10 states ratified the statute together in a special UN ceremony and therefore were all designated the 60th State Party.

Security Council.[10]The functions of the court are divided into four offices: the Presidency, the Registry, Chambers and the Office of the Prosecutor. The Presidency ensures that administrative tasks are completed such as judicial appointments or the enforcement of sentences imposed by the Court. The Registry is responsible for public outreach, witnesses, defense, and victim protection and ensures that trials are fair, impartial and public. The Registry is also responsible for supporting the Office of the Prosecutor and Chambers with administrative and staff support. Chambers consists of the 18 judges which are assigned to the Pre-Trial, Trial or Appeals Division and preside over cases in their division. Judges are elected by States Parties. The Office of the Prosecutor is an independent organ of the court which serves to investigate, analyze, and prosecute the crimes that fall into the Court's jurisdiction.[11]

The Court sits in The Hague, the Netherlands and has handled cases in the situations of Kenya, Uganda, the Democratic Republic of the Congo, the Central African Republic, Mali, Cote d'Ivoire, Sudan, and Libya. The ICC Office of the Prosecutor is also currently investigating situations in Afghanistan, Guinea, Georgia, Colombia, Honduras, Korea, and Nigeria.[12] Situations encompass all cases that are related in the same country. Situations can be brought to the ICC in three different ways. First, any country that is a State Party to the Rome Statute can refer a Situation, as occurred with Mali.[13] Second, the UN Security Council can refer a Situation to the ICC as was done in the case of Libya. Third, the Office of the Prosecutor can begin an investigation under *proprio motu* powers. *Proprio motu* refers to 'one's own initiative.' It is the independent judgment of the Prosecutor to decide which crimes to investigate. Article 15 of the

[10] ICC-CPI, "Understanding the ICC" (ICC Outreach, 2013), 3–7.
[11] Ibid.
[12] "Situations and Cases," accessed November 6, 2013, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx.
[13] The UN Security Council referred the Situation of Libya to the ICC in 2011 after the human rights violations, especially against civilians, in the armed conflict in Libya caused an international uproar.

Rome Statute states that the Pre-Trial Chamber must approve the investigation, but the Prosecutor has little oversight aside from this.[14]The establishment of the ICC is considered a significant accomplishment for human security advocates, especially middle powers like Canada, Sweden, and Norway who formed the Human Security Network, but the advancement of their agenda requires much more than the dispensation of international justice to victims. In instances where the Court decides to open an investigation and proceeds with a case while hostilities and violence are ongoing, or tensions from the past conflict are still palpable, its practices need to be informed by a human security-based approach[15].

Despite past and present war and conflict in other world regions, the ICC's prosecutorial interventions are currently focusing exclusively on African cases: the Democratic Republic of the Congo (DRC), Central African Republic (CAR), Sudan (Darfur), Uganda (Northern), Libya, Côte d'Ivoire and Kenya. The cases have come about as a result of a combination of self-initiated interventions by the ICC's First Chief Prosecutor, Luis Moreno Ocampo, two UN Security Council referrals, and the submission by individual African governments (specifically, CAR, DRC and Uganda) of cases to the Court. Nevertheless, the current Afro-centric focus of ICC prosecutorial interventions has created a distorted perception on the African continent about the intention behind the establishment of the Court. The reality is that African countries voluntarily signed up to be subject to the jurisdiction of the ICC, and some have therefore asked why those who share this perception now question the Court for doing its work.

[14] Rome Statute of the International Criminal Court," United Nations, November 10, 1998, 11–12, http://www.un.org/law/icc/.
[15] Chazal, N. (2014). 1 The Rationale of International Criminal Justice. *Criminal Justice in International Society*, 19.

While African countries were initially supportive of the ICC, the relationship degenerated 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. 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[16].

In an ideal world, the Prosecutor would only investigate past atrocities, not current conflicts. He would deal with situations in which the hostilities had been resolved and robust peace processes were in place. In this scenario the ICC would find it easier to fulfill the expectations of its founders that it 'put an end to impunity for the perpetrators of [genocide, war crimes and crimes against humanity] and thus contribute to the prevention of such crimes' (Rome Statute 1998).
But this will not be a reality for years to come[17]. The ICC is a fledgling organization, and is only under its statute to deal with crimes committed since 1 July 2002. It will be many years yet until conflicts that gave rise to such crimes are sufficiently resolved to cope with the challenges posed by an investigation into the conduct of the warring parties many of whose leaders will be senior government or opposition figures in a post-conflict environment.

Even after the ICC has been operational for a long time, it will still be under pressure to intervene in live conflicts, as the threat of international prosecution is one of the more effective tools available to the international community to change the calculations of warring parties.

[16] Nouwen, S. M. (2013). *Complementarity in the line of fire: the catalysing effect of the International Criminal Court in Uganda and Sudan*. Cambridge University Press.
[17] Chazal, N. (2014). 1 The Rationale of International Criminal Justice. *Criminal Justice in International Society*, 19.

That being the case, the ICC is frequently going to find itself in the middle of peace processes. So how should the international community balance the range of competing, and often conflicting, public policy goals in such situations? Unlike many of the other international tribunals, which have generally been set up after the crimes have already taken place, most of the ICC's cases require it to prosecute individuals involved in ongoing conflicts. The philosophy that underpins the Court is that having an international institution that promises accountability regardless of nationality will help to prevent and resolve conflicts, aid transitions, bring justice to victims, and, most importantly, deter future crimes. In essence, as Archbishop Odama observed, it is about stopping "human beings killing fellow human beings" on a massive scale[18].

The mission of the ICC is to dispense justice, but the Court must also consider the opportunity it has to advance the human security agenda by being both sensitive and proactive regarding the security risks that it may produce or exacerbate when intervening in a given country. In what follows, I briefly describe the human security agenda as it pertains to the ICC, discuss the Court's potentiality as a human security agent, and identify some areas where its work in fostering human security can be improved. I show that the ICC's overall performance in advancing the human security agenda is poor and this weakness could compromise its ultimate goal of securing global justice, which is understood as holding perpetrators accountable for their actions and offering meaningful remedies to those affected by conflict. Ultimately, the Court must ensure that its mission of achieving justice is done while promoting the security of the very people it seeks to represent.

[18] Fehl, C. (2014). *Growing Up Rough: The Changing Politics of Justice at the International Criminal Court*. PRIF.

While the mandate of the ICC is very clear, it also operates in multiple domains where equally valid claims compete. The investigation and prosecutions of perpetrators are conducted in environments that in many cases are still affected by violence and fear. The demands for retributive justice compete with the concerns for the security of victims and families. The work of the ICC faces unavoidable trade-offs that emanate not only from the claims of justice and peace, but also from the multi-dimensionality of the human security agenda and from the different timings of its instruments[19]. Trying to adjudicate among competing claims is a difficult task and to the extent that a criterion is needed to determine specific courses of action, I argue here that the ICC's decisions should be informed by human security preoccupations. The prosecution of perpetrators is the primary role of the ICC[20]. But the ICC has the opportunity to assume the responsibility of being a human security agent, and in the process offer better short-term protections for those who risk their lives to engage with it, and empower civil society to pressure their own state institutions toward reform and improvement in the rule of law. To this end, scholars should assess the Court's effectiveness in carrying out this twin agenda of justice and human security, not just prosecution[21]. Ultimately, human security is the intersection between justice and peace. Justice that is derived from the protection and empowerment of the peoples it serves will be much more effective in aiding peace processes in post-conflict settings.

[19] Kaye, D., & Raustiala, K. (2016). The Council and the Court: Law and Politics in the Rise of the International Criminal Court. *Texas Law Review, Forthcoming*, 16-13.

[20] Nouwen, S. M. (2013). *Complementarity in the line of fire: the catalysing effect of the International Criminal Court in Uganda and Sudan*. Cambridge University Press.

[21] Fehl, C. (2014). *Growing Up Rough: The Changing Politics of Justice at the International Criminal Court*. PRIF.

For experts on human rights, it is clear that the protection of individuals from violations of human rights and humanitarian law requires appropriate mechanisms to enforce the law. For decades, international law lacked sufficient mechanisms to hold individuals accountable for the most serious international crimes. Naturally, like any other crimes, punishment for grave breaches of the Geneva Conventions or for violations of the Genocide Convention or the customary law of war crimes and crimes against humanity depended primarily on national courts. The problem is that it is precisely when the most serious crimes were committed that national courts were least willing or able to act because of widespread or systematic violence or because of involvement of agents of the State in the commission of crimes[22]. If you look at the past to the best known historical events of that kind-Nazi Germany, Rwanda, the former Yugoslavia, Cambodia-the governments themselves or their agents were involved in the commission of those crimes. And so the failures of national courts in these contexts protected perpetrators with impunity. To prevent impunity in those situations, it is necessary to enforce international justice when national systems are unwilling or unable to act. The first actions taken by the international community were to create ad hoc tribunals in such situations. The first tribunals were, of course, those of Nuremberg and Tokyo after World War II. Then, more recently, the United Nations set up tribunals for Rwanda and the former Yugoslavia. These tribunals were extremely important. They were pioneers. They showed that international justice could work, but they all possessed several limitations.

The Court's subject matter jurisdiction covers the most serious international crimes. In that sense, although obviously the ICC deals with the most serious violations of human rights, it is not a

[22] Kendall, S. (2014). 'UhuRuto'and Other Leviathans: The International Criminal Court and the Kenyan Political Order. *African Journal of Legal Studies*, *7*(3), 399-427.

human rights court in the traditional sense. It is a criminal court. It is a criminal court that is limited to genocide, crimes against humanity, and war crimes. The crimes contained in the Statute are well established in customary and conventional international law as well as national laws. The Statute also provides that the Court has jurisdiction over the crime of aggression, but the Court will not exercise this jurisdiction until both a definition of aggression, and conditions for the exercise of jurisdiction are agreed upon. This has to happen through an amendment to the Statute, agreed to by the States Parties. Such amendment could occur at the earliest at a review conference to be held in 2009[23].

Aggression was seen by many States as a symbolic crime-a crime that certainly was central to proceedings after World War II. It was a general view among States that if aggression were not committed, many other crimes would not be committed and therefore aggression had to be part of the Statute. However, there was no agreement on how aggression should be defined and there was certainly no agreement how to move from a declaration of aggression by States as an act covered by public international law to proceedings covering individuals having been involved in their crimes under international criminal law. Even where the Court has jurisdiction, it will not necessarily act[24]. This is the fundamental point that has to be understood about the ICC. The ICC is a court of last resort. It is intended to act only when national courts are unwilling or unable to carry out genuine proceedings. This is known as the principle of complementarity. Under this principle, a case will be inadmissible if it is being or has been investigated or prosecuted by a

[23] Kaye, D., & Raustiala, K. (2016). The Council and the Court: Law and Politics in the Rise of the International Criminal Court. *Texas Law Review, Forthcoming*, 16-13.
[24] Kendall, S. (2014). 'UhuRuto'and Other Leviathans: The International Criminal Court and the Kenyan Political Order. *African Journal of Legal Studies*, *7*(3), 399-427.

State with jurisdiction. In addition, a case will be inadmissible if it is not of sufficient gravity to justify action by the Court[25].

Arrest warrants have also been issued in the situation in Uganda for five members of the Lord's Resistance Army, including its leader Joseph Kony. In that case, the alleged crimes against humanity and war crimes contained in the warrants include sexual enslavement, rape, intentionally attacking civilians, and the forced enlistment of child soldiers. The arrest warrants were initially issued under seal because of concerns about the security of victims and witnesses. The warrants were only made public once the Pre-Trial Chamber was satisfied that the Court had taken adequate measures to ensure security[26]. This illustrates a major difference between the ICC and other international tribunals, which by and large were dealing with crimes that had been committed in the past in the course of conflicts that were over. The ICC deals with crimes that continue to be committed in the course of conflicts that are ongoing. As a result, the ICC faces many challenges in particular in relation to its field activities and security.

Ratification patterns of the Rome Statute provide strong support for the credible commitments by various governments. Democracies with no recent history of civil war are quite likely to join the ICC and that these countries constitute the Court's principled supporters who themselves are highly unlikely ever to find their nationals indicted Both a dearth of conflict as well as credible domestic mechanisms for handling war crimes make this group willing to support the ICC secure in the knowledge that they will be highly unlikely ever to be subject to its jurisdiction. This group is more than two and a half times more likely to ratify the Rome Statute than are no

[25] Tiemessen, A. (2014). The International Criminal Court and the politics of prosecutions. *The International Journal of Human Rights*, *18*(4-5), 444-461.
[26] Kendall, S. (2014). 'UhuRuto'and Other Leviathans: The International Criminal Court and the Kenyan Political Order. *African Journal of Legal Studies*, *7*(3), 399-427.

democracies without recent civil war experience. What is surprising from some perspectives, is that none democracies with recent civil war experience are highly likely to ratify the Statute quickly. According to Ratification Model, none democracies with civil wars are nearly three times more likely to ratify than are none democracies without recent civil war experience. Of course, countries with practically no chance of their nationals appearing before the ICC highly accountable governments with no recent history of violent civil conflict are also very likely to ratify: more than twelve times more likely to do so than authoritarian regimes that similarly have no civil wars since 1990. These findings show that, despite their completely different institutions and experiences, peaceful democracies and civil-strife ridden none democracies tend to display similar ratification propensities. By contrast, democracies with a recent history of civil war are far less likely to ratify the Rome Statute. A currently democratic country that experienced civil war between 1990 and 1997 is about 62 percent less likely to ratify the Rome Statute than is a none democracy without a recent past of civil violence. This finding supports credible commitment theory: the least credible but most violence-prone governments have joined the principled but none vulnerable governments in ratifying the ICC treaty most readily[27].

Overall, the evidence that states are motivated to ratify the Rome Statute in order to enhance their ability to make a credible commitment to refrain from atrocities in the future is consistently supported by the ratification evidence[28]. Furthermore, these findings are consistent with results reported elsewhere that none democracies experiencing civil war in the recent past are also more likely actually to implement statutes to cooperate with the ICC as well+70 Many states seem to behave as though they have a motive to tie their hands through ICC jurisdiction+ If this is in fact

[27] Chapman, T. L., & Chaudoin, S. (2013). Ratification patterns and the international criminal court1. *International Studies Quarterly*, *57*(2), 400-409.
[28] Chapman, T. L., & Chaudoin, S. (2013). Ratification patterns and the international criminal court1. *International Studies Quarterly*, *57*(2), 400-409.

the case, we might also expect an ICC commitment to influence the prospects for peace a proposition we explore in the following subsection. Obviously, credibility is impossible to observe. But we can assess the impact of ICC ratification on the presumed behavioral consequences of credible commitment making. If the ICC really does help governments make credible commitments to their political opponents, ratification should, ceteris paribus, increase the likelihood of peace. The act of hands-tying should raise the ex post costs of committing atrocities by both government and opponents, providing space for a truce, trust building, and eventually a negotiated settlement[29]. At least this is the hope of many who view the Court as an institution that can contribute to justice and stability.

1.5 Justification of the study

1.5.1 Academic Justification

The Court having been in the justice system for more than a decade has managed to define its role and strategies in the global system. A lot has been discussed on the court's value in pursuing justice. The theme here is justice. The academic sources covering Argentina, Cambodia, Uruguay, Chile, El Salvador, Guatemala, Haiti, South Africa, Algeria and Sierra Leone mention amnesties as a means of securing peace in favor of justice. To bridge the knowledge gap, this study endeavors to establish the role of ICC in administration of justice in Africa. Countries like Uganda, Kenya, Sudan, Rwanda and Democratic Republic of Congo will be looked into.

1.5.2 Policy Justification

This research will be instructive to governments, non- governmental organizations, peace mediators, human rights advocates and academics and as they develop policies to address the

[29] Chapman, T. L., & Chaudoin, S. (2013). Ratification patterns and the international criminal court1. *International Studies Quarterly*, *57*(2), 400-409.

court's legacy in state parties. It will also be a reminder that the consultation of individuals prompts a deeper understanding of the ICC which is essential to building its reputation.

1.6 Theoretical Framework

The theories relevant to this study include political realism and political idealism theory.

1.6.1 Political Realism theory

This is a win –lose approach sometimes also called settlement because of its temporary nature. This is because the people or parties at the lose end are still aggrieved therefore laying and waiting for an opportunity to pounce and change their situation. For example the use of the legal means like litigations where the prosecutor is to rule in favor of the perpetrator by removing of the bargaining chip of amnesty from the negotiating table which is an incentive for peace settlements, will encourage the perpetrator to remain in power in order to shield him/herself from prosecution. Some analysts observe that in such cases, "*it is difficult to tell victims of these conflicts that the Prosecution of a small number of people should take precedence over a peace deal that may end the appalling conditions they endure and the daily risks they face*".[30]

Generally there are two issues here to be considered. First if the ICC is unable to convict perpetrators of atrocity crimes then its credibility will be tarnished and the victims would thirst for justice thus creating a breeding ground for more violence. And second, perpetrators no longer fear the ICC because they know that they will invariably be able to secure actual or de facto immunity in a peace deal, regardless of the atrocities they have committed in the past.

[30] Nick Grono and Adam O'Brien, "Justice in Conflict? The ICC and Peace Processes," in Courting Conflict?

1.6.2 Political idealism theory

This is a win –win approach where a resolution is arrived at in favor of both parties. Burton argues that in this kind of situation, the solution arrived at must take into account that the gains of one party must be seen as losses to the other party. This comes about when a mutual solution is arrived at by both parties and they must be willing to live with it in the long term. This win-win solution comes about through negotiations or mediations where the two parties find a common ground for a lasting solution.

1.7 Research Methodology

The methodology to be adapted in this study will be analytical and qualitative. Structured open-ended questionnaires will be prepared to be used in interviews to encourage the free flow and sharing of information. The assessment of their knowledge on the role of the court in administering justice will be done. As a reflection of the different views different countries have on the ICC, the Ugandan, Democratic Republic of Congo, and South Sudan nationalities had to be interviewed in Nairobi Kenya. The analytical approach will be based within the context of ICC documents and cases dealing with the international and domestic law such as treaties, the constitutive Act of the African Union, Constitutions, the UN Charter and other similar documents in order to gauge its actual impact on its success in bringing peace, justice, and accountability. A focus on library research will also be applied. This will be inform of reading literature written by scholars such as articles, journals, books and assessing internet information.

1.7.1 Primary source of information

The primary source of information will be based on the questionnaire and interviews.

1.7.2 Secondary source of information

Scholarly books and articles on justice administration, international law and journals, statements from ICC officials, reports from UN agencies and nongovernmental organizations, population studies conducted in the Democratic Republic of Congo, Uganda, Central African Republic and Kenya will be reviewed.

1.8 Chapter Outline

Chapter one has discussed the background of the study, research problem, research objectives. Chapter two will be on the concept of the Rome Statute, functions of international law: jurisdiction and complementarity, the politics of the international criminal justice, veto power and the support of NGOs to the ICC. Chapter three will cover the ICC's focus on Africa, Africa's view of the International Criminal Court and the Rome Statute, relationship of the African Union with the ICC and immunity. Chapter four will discuss the analysis of the role of International Criminal Court in promoting Justice in Africa. Chapter five will be on the summary, Conclusions and Recommendations.

CHAPTER TWO

INTERNATIONAL LAW AND THE ROME STATUTE

2.0 Introduction

International law is a body of rules laid out in agreements between states. These rules are like guidelines bound to make states behave in appropriate ways.[31] It is an essential tool for abolishing war which is now a necessity. The Rome statue, a bilateral treaty falls under the international convention of treaties. It also falls under the Jus Cogens rule which has a binding principle law on genocide, war against humanity, piracy, slavery and war crimes. The first time international law was applied to an individual rather than a state was at the Nuremburg trials of Nazi war criminals in 1945 and 1946. This had the aim to prevent future abuses and help form the basis for the global human rights regime which formed the foundation for the future international trials. This response to fight atrocities also led to the Universal Declaration of Human Rights, a document that holds only symbolic and moral (not legal) weight. As the cold war came to an end, more violent conflicts seemed to spring up internally. Calls for justice were made as the global political environment was now more receptive.

> *"While ending the cold war did not lead to an era of peace and tranquility, however, it did have the desirable effect of reducing incentives to cover up atrocities and keep mass murders in power for strategic purposes," and activism and media attention encouraged a "return to the precedent of Nuremburg and the notion of international criminal prosecution".*[32]

[31] Allen, Trial Justice, 4-5.
[32] Katherine Ann Snitzer, Peace Though Justice?: Evaluating the International Criminal Court April 2012.

2.1 Mission of the International Criminal Court

The Rome Statute of the International Criminal Court entered into force on 1 July 2002, with the satisfaction of Article 126 of the Statute.[33] Its preamble recognizes a relationship between the aims of justice and maintaining peace and security affirming that grave crimes must not go unpunished. The countries which have signed and ratified the Statute are called state parties and are represented by the Assembly of state parties which meets at least once a year to set the general policies for the administration of the Court and review its activities. The courts survival depends on the funding provided by states mostly from the EU region, cooperation of states in leading investigations with the court and enforcing arrest warrants.

This court is the first of its kind, a permanent and universal international tribunal empowered to prosecute violations of the international humanitarian law unlike the previous temporary judicial bodies like the International Criminal Tribunal for former Yugoslavia (ICTY) and The International Criminal Tribunal for Rwanda (ICTR) which were established by the UNSC and had jurisdiction unlike that of the Court's which is limitless. The Special Court for Sierra Leone (SCSL), The Extra- ordinary Chambers in the Courts of Cambodia (ECCC) and The Special Tribunal for Lebanon (STL) were specifically brought to light to deal with a timeline of violence. Most atrocities occur during violence as opposed to peaceful times. The courts impact on peace processes has been a serious debate since its inception. This is because a number of factors out ride the ICC's role in promoting peace and justice. First it lacks legitimacy; it's controlled by power politics during investigations period and the implementation of the arrest warrant. It is a fact that it will never remain immune to realpolitik, as the case of Syria has portrayed.

[33] 53Article 126(1) provides that "This Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations".

Accusations of selectivity, targeting of the African continent and lack of credibility has been rained upon the Court contrary to the support it provides to the universal criminal justice without biasness. In spite of all these pitfalls facing it, the court still has the capability to contribute to procuring international justice and peace which depends on its platform of indicting perpetrators and the lobby of state members. The International Criminal Court (ICC) was established to: achieve justice for all, put an end to impunity, help end conflicts and mend the loopholes of the ad hoc tribunals so as to take over the responsibility when national judicial systems refuse and are unable to act, and to deter future war criminals.[34] These reasons are discussed in depth as follows.

2.2.1 Justice for All

Most of the victims' population composes of majorly women and children who experience the wrath of human rights violations/ abuses when international or state conflicts occur. The court's presence therefore, makes sure that the victims get justice for the heinous crimes committed against them in their society. This mostly occurs when the perpetrators are high ranking government officials who might corrupt the national judicial system to work in their favor. This situation was exemplified in the prosecutions that took place after World War I when the German military personnel alleged to have committed war crimes were either acquitted or sentenced to modest terms of punishment after being put on trial by their domestic courts**.** This therefore opened the flood gates for mass crimes which have continued to occur since World War I hence increasing the number of victims affected. It has been estimated that at least 170

[34] Sara Anoushirvani, The Future of the International Criminal Court: The Long Road to Legitimacy Begins with the Trial of Thomas Lubanga Dyilo, 22 PACE INT'L L. REV. 213, 214 (2010). See also United Nations, Rome Statute of the International Criminal Court, available at http://untreaty.un.org/cod/icc/general/overview.htm.

million individuals have been victims of crimes of humanity, war crimes and genocide.[35] The prosecution of the perpetrators who have committed heinous crimes against these victims by the ICC is therefore an important step in the healing process for these victims.

2.2.2 End Impunity

Senior officials or heads of states throughout history have evaded the justice system after committing international crimes. The ICC prevents such dubious behaviors and future atrocities by ending impunity through the prosecution of these leaders Therefore; it helps in the implementation of the responsibility to protect which was put forward by the UN General Assembly in 2005.[36] For instance Laurent Gbagbo in the Ivory Coast and Robert Mugabe in Zimbabwe are weary of the court because they are culprits for violence in their states respectively. [37]Leaders like Paul Kagame of Rwanda and Bashar – al Assad of Syria might also be in this line up for future prosecutions. Pol Pot a Cambodian communist revolutionary who led the Communist Party of Kampuchea (CPK), otherwise known as the Khmer Rouge (1963 until 1997) was responsible for the murder of more than a million Cambodians in the mid-1970s and was unable to be prosecuted by the Cambodian government who turned him to the United Nations (U.N.) to be put on trial. Sadly this didn't bear fruits because China had vowed to veto this resolution, should they proceed with the prosecution. Other examples are Idi Amin Dada who came to be known as the "butcher of Uganda" for his brutal rule in the 1970s, Mobutu Sese Seko of DRC and Adolf Hitler of Germany.

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[35] Meron, supra note 6, at 558.

[36] 57United Nations, 'General Assembly of the UN, Paragraph 139 of the World Summit Outcome Document',2005, at http://www.responsibilitytoprotect.org/index.php?option=com_content&view=article&id=398.

[37] 58Erzbischof Tutu: Südafrika sollte Mugabe mit Gewalt drohen', Die Welt, 27 December 2008; and 'Côte d'Ivoire: pourquoi Gbagbo résiste', Afrique en Ligne, 14 December 2010, at http://www.afriquejet.com/afrique- de-l%27ouest/coted% 27ivoire/cote-d%27ivoire:-pourquoi-gbagbo-resiste-2010121464078.html.

2.2.3 Limitations of the Ad Hoc Tribunals

In the aftermath of the Rwandan and Yugoslavia genocide, the U.N. Security Council established ad hoc tribunals to bring individual perpetrators to justice. These were the first international tribunals to be created after the Nuremberg and Tokyo tribunals. These tribunals sadly had limitations to the jurisdiction of crimes that were committed. This meant that, the perpetrators who committed atrocities without the jurisdictional boarders were immune to the tribunals' prosecution. In addition the interpretation and application of international criminal law procedures differed in each state creating gaps in the system.

2.2. 4 National Courts on Prosecution of Perpetrators

The national courts rarely prosecute their high ranking nationals and in some cases go a far as shielding these individuals who occupy military or political positions from prosecutions as a result of being intimidated, threatened and corrupted. This is mostly experienced in cases where a country is emerging from a war or armed conflict which has affected it judicial system to conduct fair prosecutions while others may have unfair procedures which would put the defendants at an extreme disadvantage. In cases where courts have the legislation authority to prosecute individuals that are non - citizens, they may back down as seen in the case of Canada refusing to prosecute Pol Pot. In such cases, the Court's existence is crucial in ensuring the prosecution of individuals who commit or allow heinous crimes to be committed regardless of their rank or seniority in their national governments.

2.2.5 Enforcement of International Criminal Law by Deterring Potential War Criminals

Since the Second World War, there have been approximately 250 conflicts which have culminated with about 70 million causalities. In the past era, the absence of an International Criminal Court meant that the perpetrators would commit impunity and get a gate pass because

they would not be held accountable for their actions. Those who occupied seniority positions or posts of influence likewise were also immune to prosecutions because their domestic courts were less willing to prosecute them because of their positions thus acting as benchmark to acquaint them of their crimes. However, with the establishment of the Court, such individuals would be held accountable for their actions regardless of their position in the government. It is hoped that the indictments and trials at the international criminal court would eventually lead potential perpetrators to think twice about committing international crimes.

2.2.6 No Other International Courts that have Jurisdiction over International Crimes

Before the establishment of the Court, the International Court of Justice was the only permanent international Court. However, this Court only dealt with disputes between States which focused mainly on civil or political issues. It did not have jurisdiction to prosecute perpetrators of international crimes. The European Court of Human Rights only adjudicates over State Parties that violate the European Convention of Human Rights. Moreover, its jurisdiction is limited to the human rights violations that occur in Europe and also does not have criminal jurisdiction.

Though the Inter-American Court has limited jurisdiction, it only adjudicates to specific human rights violations that occur in States that are members of the Organization of American States. It too does not have criminal jurisdiction. Similarly, the African Court of Human Rights jurisdiction is restricted only to human rights violations that occur in States that are members of the Africa Union**.** It was therefore imperative to create an international criminal court that would have the jurisdiction to try international crimes regardless of the location where these crimes occur.

2.2.7 The impact of the International Criminal Court

The impact of the Court can be seen in the increasing number of States that are ratifying the Rome Statute, increased Court's prosecutions and investigations including preliminary investigations in several parts of the world. In 1998, when the ICC treaty was adopted, seven countries: US, China, Libya, Iraq, Israel , Qatar and Yemen voted against it but today a majority of states have ratified the treaty.

2.2.8 International Recognition of the Court

The situation seems to be changing as a good number of states have accepted the legitimacy of the court which shows its great influence in the provision of peace and international justice. Following the 2011 spring revolution in the Middle East and North Africa, Tunisia decided to join the statute and both Qatar and Egypt are in the consideration stage. The Palestine leaders are also very aware of the court's potential to promote justice and peace given the fact that it became a state. Currently there are 122 States that have ratified the Rome Statute. 34 are African States, 18 are Asia Pacific States, 18 are from Eastern Europe, 27 are from Latin American and Caribbean States and 25 are from Western European and other States**.** Out of the five UNSC permanent members; The U.S, Russia, France, Britain and China, only France and Britain have ratified the statute though they all support the court's work. For instance they reinforced the Sudan and Libyan cases in 2005 and 2011 respectively. Russia with its vetoing habits against referrals to the court, managed to file a complaint against Georgia. The United States for example was all in for the Court's foundation initially but later felt increasingly antagonistic towards it and refused to ratify the Statute. Its absence as a hegemonic state is a major blow to its legitimacy though it did so to protect itself. The antagonism was seen in the policies adopted by the United States to undermine the Court's effectiveness. It went forward to sign The Bilateral

Immunity Agreements (BIA) with other State Parties which granted the U.S. immunity from prosecutions. Those States that refused to sign the agreement were punished by cuts made in the US military aid and additional economic support funds. However it has progressively increased its cooperation over the years. In 2013, president Barrack Obama signed a bill which would reward informants possessing information which could lead to the arrest/conviction in any country, or the transfer to or conviction by an international criminal tribunal of any foreign national accused of committing international crimes as defined under the statute of such tribunal.

When Bosco Ntaganda surrendered to the U.S. Embassy in Rwanda, the embassy assisted with his transfer to The Hague to stand trial for war crimes and crimes of humanity committed in the Democratic Republic of Congo**.** The US sent troops to Uganda to help capture Joseph Kony who is alleged to have committed war crimes and crimes against humanity in northern Uganda. An additional five million dollars was put up as bounty on whoever had information regarding his whereabouts.

2.2.9 Jurisdiction of the ICC

Jurisdiction refers to the power of a state to affect persons, property and circumstances within its territory. The principle of universality which gives the ICC the jurisdiction irrespective of nationality, locality or offence of a state sets the extent and the limits while putting in mind the rules of international criminal law. The ICCs jurisdiction is limited to crimes of genocide, crimes against humanity, war crimes, and the crime of aggression. It may be invoked in three major ways pursuant to the Rome Statute: A case can be referred to the ICC prosecutor to investigate like in the case of the LRA in Uganda where president Museveni referred Kony to the ICC, the Democratic Republic Congo, the Central African Republic and Mali. Secondly the United Nations Security Council (UNSC) acting in terms of Chapter VII of the UN Charter may refer

alleged crimes to the ICC Prosecutor like in the case of Darfur in Sudan and the situation in Libya of which both non-States Parties and lastly the Prosecutor can initiate investigations proprio motu under Article 15 of the Statute on the basis of alleged crimes. The first and the last situations can only be exercised when the state or the nationality of the accused individual to be investigated by the ICC is a party to the Rome Statute. Sadly nations like China, Egypt, India, Indonesia, Iran, Pakistan, Russia, and the United States are not parties to the statute but they can temporarily accept jurisdiction of the ICC if they so wish.[38]

Once the establishment of jurisdiction has been attained, the Court then follows the other protocols required by the international criminal law in terms of protecting the accused persons. It's important to note that the ICC only has jurisdiction and is permitted to prosecute crimes committed after the Statute entered into force.[39] For the SC to be involved under Chapter VII1[40], the situation must be a threat to international peace or a breach of that peace, or an act of aggression. In addition, the Court can only secure jurisdiction over individuals who are indirectly responsible such as the military commanders/superiors and not entities like armed/criminal groups, States and companies. The major focus of the court is on those who have had a leading role in committing international crimes no matter their rank or status. Some of the worst crimes perpetrated since the year 2002 have been committed in states that are not parties to the Court; hence they fall out of the court's jurisdiction. Examples of these states include Sri Lanka, Myanmar and Iraq.

[38] Article 12 (3) of the Statute
[39] Article 11 (1) of the Statute
[40] Articles 39 to 51 of the United Nations Charter

2.2.10 Complementarity in the Rome Statute

The court also operates on the principle of complementarity which requires every state to exercise its criminal jurisdiction over perpetrators.[41]The provision of this principle in the Statute originated in the 1994 International Law Commission (ILC) Draft Statute[42] where its stated in paragraph 10 of the preamble that:

> "..The International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions"; and the preamble and Article 1 of the Rome Statue provides "An International Criminal Court is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute'.[43]

A misunderstanding of this principle only occurs when both courts; the international and the local are entitled to prosecute the same crimes thus deciding which court should take the lead becomes a problem. This is where the principle of complementarity is applied to help provide road map. This principle asserts that the jurisdiction of a case can only happen when a case has not been investigated or prosecuted by the other court. In this case the international court can only prosecute if the national court hasn't had the upper hand.[44] It should be noted that the primary responsibility of prosecution, remains with the domestic jurisdiction over the individuals

[41] Arts 1 and 17 Rome Statute; M Benzing 'The complementarity regime of the International Criminal Court: International criminal justice between states sovereignty and the fight against impunity' (2003) 7 Max Planck Yearbook of United Nations Law 591,592.

[42] The Draft Statute for an International Criminal Court was adopted by the ILC at its forty-sixth session in 1994, and was submitted to the General Assembly as a part of the ILC's Report covering the work of that session (1994 ILC Draft).

[43] Rome Statute (n 1), Preamble, para. 10 and art. 1

[44] Taylor G. Stout, Reporter, International Judicial Monitor; an international law resource for Judiciaries, justice sectorprofessionals, and the rule of law community around the world

responsible for international crimes.[45] Since the ICC and national courts have concurrent jurisdiction over the most serious crimes in violation of international criminal law and humanitarian law, this principle helps remove any obstacle that can bring conflict between the two jurisdictions.

The principle of complementarity is spelled out in paragraph 10 of the Preamble to the Rome Statute and in Articles 1, 15, 17, 18, and 19 of the Rome Statute. In article 17 which deals with issues of admissibility it is stated;

> that, a nation is "unwilling" when: (i) national authorities are shielding the accused from criminal responsibility; or (ii) national authorities have unduly delayed the proceedings, manifesting an intent to not bring the accused to justice; or (iii) the national proceedings are not conducted independently or impartially, manifesting an intent to circumvent justice. In addition, a nation is "unable" to prosecute when, primarily as a result of the collapse of its judicial system, it is not in a position to: (i) detain the accused or have him surrendered by the authorities holding him in custody; or (ii) collect the necessary evidence; or (iii) carry out criminal proceedings. The principle of complementarity applies regardless of the manner in which ICC proceedings are initiated, whether by a state party, the U.N. Security Council, or the ICC Prosecutor.[46]

Complementarity ensures that the states incorporate the Court's laws into their domestic/ national law. For instance, the enhancement of international cooperation and Article 93(10), allowing States to make requests to the ICC for assistance in matters such as: identification of

[45] Linda E. Carter, The principle of complementarity and the International Criminal Court: The Role of Ne Bis in Idem,,8SANTA CLARA J. International Law 165(2010)

[46] Article 17 of the Rome Statute

persons, collecting evidence, and victim protection, suggests that the Rome system is interdependent and mutually reinforcing.[47]

2.2.11 Complementary and jurisdiction over senior State officials

The principle of complementarity requires States to amend their national laws by rejecting immunity of government officials. The Rome Statute requests States to remove criminal immunity under their national laws protecting government officials, including a head of States or governments, a member of a Government or parliament, an elected representative or a government official. Article 27(1) provides:

> "This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence". Further Article 27(2) of the Rome Statute states that "immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person".[48]

2.2.12 The Politics of International Criminal justice

International criminal justice has for so long been rebuked by advocates who are shy to acknowledge the presence of politics in their legal environment. Most states use the ICC for their political motives which go against the principles of international criminal justice. Power politics impact on the functioning of the court. The big five are capable of carrying out an ICC arrest

[47] Office of the Prosecutor, Report on Prosecutorial Strategy (2006) at 5, available at http://www.icccpi.int/library/organs/otp/OTP_Prosecutorial-Strategy-20060914_English.pdf.
[48] Appeal Judgment, ICC-01/09/11-1066, para.61

warrant and also delay investigations or prosecutions through the UNSC subject to the conditions in article 16 of the statute. For example the UNSC used the court as a diplomatic tool to target the Darfur crisis as opposed to using alternative means which would have been fatal to their relations. State leaders also use the Court as a political instrument to act against rebels in order to reinforce their regime and authority which will lead to an unjust international legal system as the court will only focus on one side.[49] Examples are the cases of Joseph Kabila in the DRC 2004, Yoweri Museveni in Uganda 2004, Francois Bozize in CAR 2005 and the Mali government in 2012.

Courtenay Griffiths QC who was the lead counsel in the ex-President Charles Taylor of Liberian the Special Court for Sierra Leone states that 'Right, as the world goes, is only in question between equals in power, while the strong do what they can and the weak suffer what they must. He's trying to say that certain personalities from certain countries will never find themselves indicted by the tribunal. Example is the case of President Kim Jong of North Korea who was found to have committed crimes against humanities is still pending. As observed the "coalition of the willing" (COW) which is led by the US is usually needed to enforce the ICC arrest warrants. For example the warrant of arrest of President al – Bashir was seen as both politically and legally to be legit by the US. It has continued to impose its presence in Africa through military means like the creation of AFRICOM in 2007 which was believed to be a means of access to the Africa's oil and mineral resources challenging China's commercial influence in the region which seems to be backfiring since most leaders in the present regime seem to be favoring China over the West for developmental issues. Kenya being the first on the list signed an

[49] WW Burke-White, 'Complementarity in practice: the International Criminal Court as part of a system of multi-level global governance in the Democratic Republic of Congo', Leiden Journal of International Law, 18, 2005, pp 557–590.Conflict: Justice, Peace, and the ICC in Africa, London: Royal African Society, 2008, pp 37–45.

agreement with China for the railway gauge. Its invasion of Iraq and Libya could attest to the fact that they see themselves as the superior power hiding behind the cocoon of 'humanitarian' intervention to protect civilians. These invasion allegations were poorly received by the Office of The Prosecutor(OTP) whose response was that the chain of events happened on the said territories of which Iraq was not a state party(remember Sudan and Libya are not state parties too) and had not lodged a declaration of acceptance of jurisdiction under article 12(3).

The OTP further added that the coalition force had no intent to destroy as defined in the genocide norms and that they didn't meet the criteria set out in article8(1). To quote the prosecutors own words:

> The number of potential victims of crimes within the jurisdiction of the Court in this situation – 4 to 12 victims of willful killing and a limited number of victims of inhuman treatment – was of a different order than the number of victims found in other situations under investigation or analysis by the Office. It is worth bearing in mind that the OTP is currently investigating three situations involving long-running conflicts in Northern Uganda, the Democratic Republic of Congo and Darfur. Each of the three situations under investigation involves thousands of willful killings as well as intentional and large-scale sexual violence and abductions. Collectively, they have resulted in the displacement of more than 5 million people. Other situations under analysis also feature hundreds or thousands of such crimes.[50]

Being a permanent member of the Security Council and is amongst those who hold the vet power, the US is untouchable in all respects whatsoever and it greatly supported resolution 1970which referred to the situation in Libya even though Libya is not a state party to the court.

[50] prosecutor's decision on Iraq, page 9, available at http://www.icc-cpi.int/organs/otp/ otp_com.html.

The indictment and bombing of the ex -Libyan leader, Muammar Al Gaddafi during the NATO war profusely raised questions because Libya resembled the cases of Syria and Yemen and that of the King of Bahrain where similar acts of war crimes and crimes against humanity had been committed and were left in peace. In the case of Syria, the people wished the ICC could help them get justice even though it's not a state party to the statute. This request was vetoed by Russia while china abstained unfortunately .According to Jacqueline Geis and Alex Mundt in their book:

> The Impact of Timing of International Criminal Indictments on Peace Processes and Humanitarian Action", they noted that "although the ICC was established as an impartial arbiter of international justice, both the timing and nature of its indictments issued to date suggest that the intervention of the ICC in situations of ongoing conflict is influenced by broader external factors".[51]

2.2.13 Veto power and the Court

Article 27 of the UN Charter states that:

1. Each member of the Security Council shall have one vote.

2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.

3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.[52]

[51] Jacqueline Geis and Alex Mundt "The Impact of Timing of International Criminal Indictments on Peace Processes and Humanitarian Action

[52] Article 27 United Nations Charter

When the United Nations Charter was established five countries: China, France, Russia, the United Kingdom and the United States were given important roles in the maintenance of international peace and security. A special status therefore was granted to them for being the Permanent Members at the SC in form of 'veto power'. Should any of these members have an opinion of a negative vote in the 15-member Security Council, the resolution or decision would not pass. And if a member doesn't fully agree with the decision and doesn't wish to cast a veto, it may choose to abstain from the vote. Since its inception, all the five permanent members have been able to exercise the right of veto at one time or another.

In the developments referring to the Syrian crisis, Russia and China managed to veto the UN Security Council resolution to block the International Criminal Court from investigating possible war crimes in Syria, prompting angry responses from the proposed supporters who said the two countries should be ashamed of themselves.[53] This will be the fourth time these countries have used their veto power as permanent council members to deflect action against the government of President Bashar Assad. In such a case the Court can't be blamed if the Syrian people don't get the prospects of peace and justice that they seemingly deserve. These veto countries should be held responsible for whatever outcome befalls the Syrian people. The court is very ready to do its part but the roadblock seems to be stagnant.

This resolution would have referred the Syrian crisis, to the world's permanent war crimes tribunal for investigation of possible war crimes and crimes against humanity, without specifically targeting either the government or the opposition. China's reasoning was that a referral to the ICC won't lead to an early resumption of peace talks. The U.S. Ambassador Samantha Power had this to say "Sadly, because of the decision by the Russian Federation to

[53] The guardian May 22, 2014

back the Syrian regime no matter what it does the Syrian people will not see justice today. They will see crime, but not punishment.[54]Syria not being a state party to the Rome Statute that established the International Criminal Court only had the Security Council for referral. The U.S., Britain and France vowed to keep pursing justice despite this unfortunate defeat.

Another example is that of Kim Jong the Korean President. He's been blamed for systematic torture, rape deliberate starvation and other human rights abuses. These atrocities have been documented in the United Nations report and a pursuant of his arrest seems next to impossible by an international tribunal. This is because his prosecution will likely be vetoed by China, North Korea's closest political ally and trade partner. A recommendation that the UN refer the report to the ICC threatens to put Beijing in an awkward diplomatic position and as one of the five permanent members of the council; China vowed to exercise its rights of veto power.

2.2.14 Support of Non- Governmental Organizations to the International Criminal

Court Nongovernmental organizations (NGOs) play a vital role in cooperating with the International Criminal Court. This can be before, during and after an investigation process. They contribute to the Court's work of prosecuting war crimes, crimes against humanity, and genocide at the international level. To help the court promote justice and peace, the NGOs contribute by informing the media and the general public about the courts activities. They also inform the OTP about the crimes committed specific cases, the historical and political context of human rights abuses, or the capacity or will of a state to investigate or prosecute crimes. This kind of information might help the prosecutor to open an investigation. For example In the Ivory Coast after the 2010 elections, the NGOs relented that it be investigated for crimes.

[54] The guardian note 64

The publication of reports on human rights crimes that may fall under the jurisdiction of the International Criminal Court is usually done by the NGOs. If by any chance they believe that the abuses they have managed to document are serious enough to merit investigation by the Court, they make a point of sending the most solid reports on the most serious crimes to the Prosecutor. For example they played a vital role in the DRC investigations. The then prosecutor, received communications regarding the situation in Ituri including two detailed reports from nongovernmental organizations.

Conclusion

The international Criminal Court has made much progress in promoting peace and international justice. Trials maybe costly and take up a lot of time but the mere fact that they have reached the court is a step in the right direction. In terms of cooperation, the court should seek ways to amend the Rome Statute to duly emphasize Article 98(1) so that Chad, Kenya and Malawi's actions of not complying to arrest a war criminal, Al Bashir should not be repeated and its legitimacy will have heightened.

CHAPTER THREE

INTERNATIONAL CRIMINAL COURT FOCUS ON AFRICA

3.0 Introduction

The proponents of the International Criminal Law propose that the creation of international criminal courts would restrain government officials and warlords from committing crimes against humanity hence achieve justice and facilitate the peace making processes in countries torn by crisis. The court's role impends on helping African states combat impunity in order to foster a culture for the respect of the rule of law. It relies on the fact that the executive and judicial arms of the state system will obey and apply the law equally on everyone powerful or not in international affairs. It also plays the role of a gentle civilizer of state power in weak states that are unable, or unwilling, to bring architects to account but it prefers not to. This is because its intent is not to replace the domestic legal processes but complement them accordingly. The work of the International criminal court in Africa hence prompts many questions like the political implications of its work and what impact if any has it had on the resolution of peace and justice to end impunity? Is the Court's pursuit of retributive and punitive justice an obstacle to peace making and reconciliation efforts, or should it adopt a more nuanced approach.

3.2 Assembly of State Parties of the International Criminal Court

Nicholas Waddell and Phil Clark in their seminal work Courting Conflicts Justice, Peace and the ICC in Africa infer that the fact that the ICC has focused so overwhelmingly on African situations prompts questions about why the gaze of international criminal justice falls in some places and on some people and not on others . The Court's focus on Africa has stirred African sensitivities about sovereignty and self-determination - not least because of the continent's history of colonization and a pattern of decisions made for Africa by outsider. In addition

Alexander Murdoch Mackay a Scottish Presbyterian missionary to Uganda in 1889 observes that, in former years, the universal aim was to steal Africans from Africa. Today the determination of Europe is to steal Africa from the Africans. A hundred and twenty-three years later, Europe appears to still be trying to steal both Africa and the Africans. They are now using their new creation, the International Criminal Court (ICC), to steal Africans from Africa to put on show-trials in Western Europe.

Africa has been prone to a number of civil wars and other forms of violent conflicts, of which some have led to war crimes, crimes against humanity and genocide. Since 1960, it has been marred by major civil wars and it is civilians who suffer the most in these armed conflicts. Sadly this shows that the continent and the international community weren't moved by the Rwandan genocide as it continues to host atrocities. In addition it continues to fight a host of challenges ranging from unconstitutional change of governments to gross violations of human rights, with millions of Africans becoming internally displaced people (IDPs) in their own countries and others are refugees.

The role of the ICC in Africa has generated much comment and mixed reaction among a broad spectrum of Africans. Its relationship with Africa has been seen as biased, double standard and politicized. This conclusion has been reached at because most current cases before the Court are from Africa and so are the suspects. Though this argument of unfairness focus on Africa has been largely dismissed by scholars and critics alike, its mythology is still employed by supporters of the Court and the Office of the Prosecutor.

One underlying issue has been that of Article 16 of the Rome Statute where the deferral power is to be granted by the suspension of proceedings if a request is put up by the United Nations

Security Council (UNSC) in favor of peace demands. This Article has been invoked several times. For example in July 2002, the US (a non-State Party) invoked this Article amidst heavy protest to acquire blanket immunity for all its citizens in peacekeeping missions around the world. Contrary to this, every request from the Africa States Parties made to the United Nations Security Council asking for use of its 'deferral power' under Article 16 of the Rome Statute to request the ICC to suspend proceedings has been denied. On May 22 2014, Russia and China being permanent members of the UNSC used their veto powers to kill a resolution that would have referred Syria's conflict to the court. This is despite clear and vivid evidence of war crimes on a large scale in the region.

This situation raises a lot of concerns but the ICC has been in the forefront to save Africa from its own jaws. Currently Africa has two complacent institutions which are still young in handling the challenges that Africa faces. These are The Africa Court on Human and Peoples Rights and The African Commission on Human and Peoples Rights. This prompts the question of when the African Union will be able to fathom the desires of Africa. So the African governments need to stop using the court as emblems for their own faults to build peace and provide justice to victims. It should be noted that, Africa was greatly involved in the establishment of the court and the adoption of the Rome Statute.

African states were very active then and they still remain the most heavily represented region in the Court's membership in terms of state party ratification of the Statute. Presently, the 54 countries in Africa have signed and ratified the Treaty. In terms of regional representation Southern African Development Community seems to have the most member who are state parties to the ICC. Only Swaziland has yet to even sign the ICC Treaty, while Angola, Mozambique, Seychelles and Zimbabwe have signed, but have not yet ratified. There is no

question as to the level of commitment the ICC is involved in Africa as an equal partner in the pursuit of international justice. In addition, Africa is well represented in the ICC itself. Examining the history of the Court, it's clear that it didn't come in an ideological vacuum. Its aim was to create peace, promote reconciliation and justice with the Responsibility to Protect. Most of the African countries under review are somehow similar in nature as the arm of their central government has been considerably bound to specific areas which affect their performance; states like Kenya, Uganda, and Sudan are amongst the top 20 states rated "critical" in the 2010 Failed States Index. These were later translated to fragile states to lessen the negativity effect. ICC is just filling a gap in the international legal system because there was a need for a permanent International institution with power to try individuals for the most heinous crimes. Its first case just happened to be African and it was a referral brought by Uganda, then the Democratic Republic of Congo/DRC/ in March 2004 followed suit, then Mali, Ivory Coast, and the Central African Republic. When we look at these cases, it means that the countries ICC the permission to intervene in their affairs hence these accusations of biasness are far from the truth. In the case of Sudan and Libya, the UN Security Council asked that the ICC to become involved. It's only in the Kenyan case where the ICC acted entirely on its own. In addition, the Prosecutor has also initiated preliminary examinations in Guinea, and Nigeria, along with several countries outside of Africa, such as Afghanistan, Colombia, Georgia, Honduras, and the Republic of Korea.

In relation to the African continent, it's true to say that most armed conflicts occur in these states as seen historically and the justice systems are weak if not biased. Though this conclusion has been disputed by examples of many other countries where atrocities have been and continue to be committed like in Burma, Venezuela, Colombia, Iraq, Syria, Afghanistan and even Egypt

where crimes against humanity have been committed , I can state that the jurisdictional arm of the court cant prosecute these states because they have not ratified the statute, and in cases like Iraq, Afghanistan and Israel where the United States is held responsible , it has protected its citizens and military personnel by signing a pact – a non - surrender agreement, Article 98 Agreement with over 100 countries. For the cases of Syria, Sri Lanka, North Korea, Uzbekistan, Israel and Palestine which are non-members, the Veto votes from the permanent members has hindered their quest for justice by denying them jurisdiction through the Security Council.

Looking at the concept of justice, we tend to look at the perpetrators and not the victims. What if African perpetrators are being singled out more than others? They are the ones committing the crimes. Perhaps if they were mindful then the selective justice will not be there. The thing is the victims of the crimes who are overlooked are the ones who have the right to complain, not the defendants in the court. Nevertheless, its focus on Africa serves as a perpetual notice to criminals or tyrants that there is a watch dog in The Hague. An African and Historian expert, Stephen Ellis of Leiden University stated that the indictment of a head of state is a political act and it poses some fundamental issues concerning the ICC . He continues by asking whether it's an autonomous court or a political institution. This critic of biased political tendencies was further fuelled by the presences of the court in the Middle East and North Africa which were a referral by the UNSC, the most political tool of all.

3.3 African Union and the International Criminal Court

The Constitutive Act of the African Union 2000 states African leaders agreed to promote and protect human and peoples' rights and reinforce democratic institutions and human rights culture, and ensure good governance and the rule of law. In order for it to do so, it had to develop a security regime with a mandate closely linked to its responsibility to protect framework. As

part of one of the mechanisms that international relations encompasses to study conflict and cooperation, AU as an international institution is a very important actor. The AU's relationship with the ICC is admittedly far from perfect. The AU has purposefully urged its members not to cooperate with the ICC's regarding the arrest warrant of President Al Bashir, in Sudan. Since the issuance of his arrest warrant in 2009, Bashir has managed to travel to Egypt, Ethiopia, Libya, Qatar, Saudi Arabia, Zimbabwe and China of which none are state parties to the Statute. His first trip to a state party was to Chad in July 2010, then in Kenya in August 2010 where the authorities declined to arrest him amid a broader attempt to improve historically strained bilateral relations between the two states. In May 2011, he traveled to Djibouti also a state party and still was not arrested.

For years now the AU together with Organization of the Islamic Conference has been requesting the United Nations Security Council to defer the investigation and prosecution for twelve months in accordance with article 16 of the Rome Statute against President Omar al-Bashir but all in vain. To add insult to their injury another sitting president Mr. Kenyatta together with his deputy were indicted by the court for their alleged role in the 2007 post-election violence in Kenya. This prompted the African Union to put its full support behind these leaders . Even with this accusations the AU is wrong to lash out at the court because there is no doubt that atrocities are being committed in Africa. The AU seems to be relying on the impunity provisions accorded to the heads of states under Article 98 of the Rome Statute to justify its refusal to cooperate with the ICC. Its cooperation is highly sensitive in ensuring the apprehension and surrender of the perpetrators of crimes that fall within the Court's jurisdiction. Africa should not see itself as a target of neo-colonial victimization, but at the vanguard of a new era of international justice.136 Due to the global power relations, Africa is the beneficiary of multilateral approaches to peace

and justice. More than any other continent, Africa needs the support of the ICC the most to gradually establish its own workable and coherent human rights regime/architecture instead of relying on Europe and the U.S. or the UN umbrella. As the former U.N. Secretary-General Kofi Annan, puts it, “In all of these cases, it is the culture of impunity, not African countries, which are the target. This is exactly the role of the I.C.C. It is a court of last resort”. Yes regional blocs are very important in helping the continent’s interests and agenda at home and abroad but AU should put in mind that they have a responsibility to avoid marginalization on the international stage and to prevent impunity for political considerations. For those who are insisting that the target is in Africa should by now have seen that their accusations are baseless. If the perpetrators are not followed ten who will be responsible for the millions of African who are displaced, the thousand who are killed, the hundreds of thousands of African children transformed into killers and rapists, thousands of Africans raped.

3.4 Politics of Power

It is true to say that political power certainly shields perpetrators. The idea is of the “power triangle” which helps the leaders to move ahead. This triangle consists of three components, which is communication, recognition and influence of which the five permanent members of the UNSC control or possess. However it’s wrong to assume that only the western world has been wilding this shield on the courts face. Africa too had the chance on the floor when they ignored the arrest warrant for Bashir. As an international mechanism, the ICC must always accommodate itself to the political powers due to the domination of power inequalities in a political world.

This has been experienced at both the global and local level. Its main focus on Africa has been seen as a power tool for the western nations to intervene without being accountable. An argument put forward by African governments is that, the ICC is practicing selective justice

while avoiding diplomatically , economically, financially and politically strong countries like the United States, United Kingdom, Russia, and China because they can threaten its existence. For the court to function effectively, especially within an increasing politicized global environment, it must secure the cooperation and compliance of national governments, including those in Africa. Israel is another example that is concerned about the politics of power in the court. It unsigned the Rome Statute on the grounds that "political pressure on the court could lead it to reinterpret international law. It shares the US sentiments that the prosecutors in the court have too much power and the geographical appointment of judges as disadvantage to its own.

Because of its relative lack of checks and balances to prevent it from being misused, the ICC represents a dangerous temptation for those with political axes to grind. This is a lesson currently being learned by Israel. Despite the fact that Israel is not a party to the Rome Statute, the ICC prosecutor is reportedly exploring ways to prosecute Israeli commanders for alleged war crimes committed during the recent actions in Gaza. These outcries are exactly the same as those made by Africans. Question is if others are concerned why not Africa? In June 2009, the then lead Prosecutor Luis Moreno Ocampo called for a US-led "coalitions of the willing" to enforce arrest warrants. As Ambassador Rapp stated, the US may cooperate, but only on its own terms. This means that the repercussions could be deadly for peace and justice if the ICC decides to rely on the military capacity of the US completely of which has its own economic and political interests in Africa as seen in the Libyan and Egypt cases in the name of capturing war criminals and enforcing international justice. In line with this, the court should realize that the price it will pay for this Faustian bargain will be trivial compared to the very dangerous consequences this alliance could have for peace in Africa. This alliance, deeply threatens the credibility of the ICC

because of its double standards nature. When confronted, the court tends to respond by declaring that global justice is evolutionary, and that we shouldn't expect it to be perfect.

Africa itself has in recent years contributed its full share of disturbances to the disordered state of the world from the colonial war to the recent civil strife. From this it's clear that Africa is prone to instability which has managed to attract wider international repercussions, one of them being the US scrutiny as mentioned earlier. And until effective governmental institutions take a firmer root and clean their houses, the turmoil will continue hence hindering the progress of peace and justice in Africa. Given these prospects the US too needs to define the extent to which its interests and responsibilities run in other states affairs.

3.5 Justice versus Peace in Africa

All state parties to the statute under the international law bounding them to the treaty are required to fully cooperate with the proceedings of the court. Note that all individuals indicted by the court must be arrested, evidence provided, witnesses protected and enforce the Court's decisions, including sentences. These requirements are duly to be followed no matter the diplomatic headaches and protocols involved even if the culprit happens to be the head of state like in the case of Omar al-Bashir of Sudan and Kenyatta of Kenya. States must work with the ICC and with one another through bilateral and multilateral forums and processes to address these violations in order to leash the impunity gap which is wider in Africa. Also States Parties must leave the pretense of pitting justice against peace because Justice and peace must be seen to complement each other as opposed to against each other. This is why the AU's argument on Sudan that the arrest of al-Bashir will hinder peace efforts is absurd and doesn't hold water. In my view i can say that the struggle for peace is dependent on the political context in which the proceedings or accusations take place. The two, peace and justice can work in partnership or

cooperation with one another under certain circumstances, and in opposition at others. For example in the Ugandan case, justice and peace may have initially been positively linked, as the threat of ICC prosecution helped drive the LRA to the negotiating table.

Another thing worth noting is that the courts presence further complicates the means of getting a dictator to leave power peacefully. Let's refer to the case of the president of Haiti, Jean-Claude Duvalier who was peacefully convinced to leave power in exchange for a peaceful exile by American negotiators of the Reagan Administration. This is totally in contrast with the expectations of today's era. For example the Syria's dictator Bashar al-Assad. Do you think he can be manipulated easily with negotiations over his departure? Negotiators have little to offer him except future prosecutions and prison. I totally agree that the likes of Duvalier and Assad plus other dictators should not be excused of their actions where they may enjoy their ill-gotten gains but pay for their crimes. The downfall for forcing them to pay may mean more violence, deaths, and extended strife. Peace and justice may go together in some cases, but be at odds in others. Look at the case of Libya; it has been under turmoil since the removal and death of their dictator, Muammar Gaddafi. In South Africa though, the case was a bit different. The democratically elected government chose a "truth and reconciliation" process over stiff justice which they saw was fit for them.

3.6 African Leadership

African leaders through their representative bodies like the African Union and the East African Legislative Assembly need to view the Court as a helper rather than a competitor of justice that aids them fight against impunity on their continent. In light of this, it is important for them to understand that the court has its own mandate which it duly exercises against perpetrators for committing international crimes and therefore States still have the opportunity to try other

suspects who are “less responsible” so as not to create opposition. In support of this, the AU needs to support the ICC in the operation of its mandate by allowing it to open an African Liaison Office that will smoothen its work on the African continent and also keep the lines of communication between the Court and the African Union open. African leaders need also to closely monitor the work of institutions like the African Court of Justice and Human Rights and the East African Court of Justice to make sure that their effectiveness against the fight of impunity on the continent is at par. Highly qualified and experienced judges need to be appointed in such institutions so as to ensure that they can efficiently exercise the mandate of the Court and also improve the human rights record of the continent. The needs of the victims of the grave international crimes need to be prioritized at both the national and regional level by the elected leaders. They should therefore focus on establishing structures that can not only genuinely prosecute perpetrators of international crimes but also respect the rights of victims to truth and reparations for the harm that they have suffered. In a nutshell, prosecutorial measures should be pursued alongside other transitional justice mechanisms that can make the justice process more comprehensive.

3.7 African Civil Society and the ICC

In this globalizing world, the quest for peace and justice requires complex strategies. The need to address the structural causes of conflict, many of which may be inherent in the global system must be put in place. To do so, requires cooperation between civil society actors at the local, national, regional and global levels and with governments, intergovernmental organizations and, in some cases, businesses. African Civil Society’s view with regard to the role of the ICC on the continent is heterogeneous. African civil society has played a key role for the court to become a reality and continue holding an important position in promoting the ICC. Around 130

undersigned African civil society organizations with representatives in 34 African countries affirmed its support for the court. They believe that the withdrawal from the ICC would send the wrong signal about Africa's commitment to protect and promote human rights and reject impunity as reflected in article 4 of the AUs Constitutive Act. It will also be in breach of the international law for the civilians if perpetrators are not punished for their crimes.

They say that the African leaders should put victims of war crimes interests ahead of those leaders facing charges at The Hague. According to the several theories brought forward some belief that the ICC is a necessary tool in fighting impunity that has created havoc on the lives of African citizens. Critics on the other hand believe that the ICC is not some form of treatment that will cure Africans of their diseases ridding them from their criminal ailments. The society promises to work with the court to ensure consistency in the application of international justice. It believes in working to expand rather than contract the membership of the court is a step to widen the accessibility to justice and sending the message that nobody is above the law.

3.8 Immunity

Immunity refers to the state of being protected from something. This subject of immunity is very diverse and confusing. Van Schaack and Syle have observed that, immunity has been enjoyed for centuries by state officials, and under both the international and national law may claim it while still in office for the crimes committed. The Rome Statute of the International Criminal Court, 1998 (Rome Statute) has used the term 'official capacity' in article 27 to describe 'immunity' or 'special procedural rules' attaching to the state officials under national and international law.

This rule of immunity of state officials has however been dynamic over the years. What seemed impossible in the past like the prosecution of a state official in their home bound national courts for international crimes is now possible under contemporary international law but only after the expiry of their office term. Another example is that of the Ethiopian authorities who prosecuted and sentenced former state official, Mengistu Haile-Mariam, for genocide and crimes against humanity in absentia. Though the authority was doing right under the international law, it lacked legitimacy under international human rights law in the quest for justice.

3.9 The scope of immunity of state officials

In reference to International law, two aspects of immunity for state officials have been put in place: functional immunity and personal immunity. State officials serving at the time are said to be within the jurisdiction of international tribunals depending on the terms of the statutes' tribunals.158According to Shaw, he observes that in the domestic court compared to the international tribunals, the procedure is more complex because of the 'status of head of state before domestic courts' and that 'international law has traditionally made a distinction between official and private acts of a head of state'. Hence functional immunity exists only when an official is in office and expires when the term ends. It may also be invoked not only by serving state officials but also by former state officials in respect of their official acts while they were in office. This type of immunity does not apply when a person is charged with international crimes either because such acts can never be official. If state officials want to be shielded under the umbrella of immunity from arrest and prosecution like in the cases of South Sudan and Kenya, then immunity would allow states to choose whether or not their agents would be responsible under international law.

Personal immunity is more for the senior state officials while they are still in office. This form of immunity has been heavily supported by the state as well as judicial practices which imply that international crimes are under it as seen in the cases of Muammar Qaddafi and Robert Mugabe where the domestic court was involved.

3.10 Immunity of state officials in Africa

Presently, there is no regional framework outlawing state officials in Africa from receiving immunity and no regional treaty permitting immunity to the prosecution of international crimes in Africa. However the international court does not recognize presidential immunity. This said, it should be noted that the Constitutive Act of the African Union (AU) contains key principles which are reflected in article 4 that rejects impunity (and by analogy, immunity of state officials) for international crimes in Africa. It should be noted that there is also a principle that allows the AU to have the right to intervene in a member state (case at hand Kenya) in pursuant to a decision of the Assembly of Heads of State and Government of the Union in respect of grave circumstances such as war crimes, genocide and crimes against humanity. However nothing has been said on whether an African state official can be prosecuted for international crimes, therefore leaving the ICC room to prosecute by international law the grave atrocities of genocide, war crimes and crimes against humanity where a state official may not claim immunity from prosecution for such crimes in Africa. States like Rwanda have enacted laws like Law 33 Repressing the Crime of Genocide, Crimes against Humanity and War Crimes. Though it's not a party to the Rome Statute, Section 18 outlaws the immunity of state officials for these international crimes.

3.11 Prosecuting Serving Heads of State

The indictment of the several serving heads of state has been a bold move and a big achievement of the ICC. Originally it was seen as an obstacle to the peace processes but time has revealed that the indictments were the best means to curb the atrocities. The issuance of arrest warrants against Omar Hassan Ahmad Al-Bashir, President of Sudan, Muammar Mohammed Abu Minyar Gaddafi the then President of Libya and Uhuru Kenyatta the President of Kenya, the first ever such action against serving heads of state caught them off guard . Some dismissed these actions as mere threats with no realistic way of effectuating their objective; because after all, President Al-Bashir is visiting states that are parties to the Rome Statute and President Uhuru Kenyatta was recently invited by President Obama to the US- Africa summit.

3.12 Challenges and Opportunities

The slow wheels of justice at the ICC have been a frustration to victims due to resistance to and obstruction of its work. For example, the non- cooperation factor from various countries and the AU. These countries forget that the court is there to help them fight impunity and foster a culture for the respect of the rule of law. The Statute does not consider the stipulations of peace agreements which may include the granting of amnesties and other forms of suspension of prosecutions and investigations into possible ICC crimes.

3.13 Conclusion

Restoring the Courts trust amongst the Africans will be a hard nut to crack but supporters are optimistic that with the appointment of Fatou Bensouda the Present Chief Prosecutor, an opportunity to amend the relationship might present itself. Regardless of how this is to be achieved, each country must develop the capacity to effectively investigate and prosecute international crime committed within its borders. Where necessary the AU might assist in cases

where perpetrators have sought asylum to avoid being prosecuted. It needs to play its part in the fight against impunity in Africa and the world and actively follow up situations in other jurisdictions where crimes have been committed while maintaining an impartial political role to uphold its credibility among African state leaders and the victims in the communities.

CHAPTER FOUR

ANALYSIS OF THE ROLE OF THE INTERNATIONAL CRIMINAL COURT IN ADMINISTRATION OF JUSTICE IN AFRICA

4.1 Introduction

This chapter aimed to link the objectives of the study with the theoretical framework in presenting the research findings and discussing them as obtained from the respondents. The results are presented according to the objectives of the study which reflect the research hypotheses that set out to answer. In addition, this chapter presents the characteristic of the study subjects displayed by the qualitative findings.

4.2 The International Criminal Court

The ICC is an independent permanent Court based in The Hague, Netherlands that prosecutes individuals accused of the most heinous political crimes like genocide, crimes against humanity, war crimes and crimes of aggression (committed by one state in another state).[55] The court is based on a treaty, the Rome Statute which almost 122 countries have signed and ratified as of 1 May 2013. It is viewed as a Court of last resort and it will not act if a case is investigated or prosecuted by a national judicial system unless the national proceedings are biased by shielding the accused from criminal responsibility. It should be noted that the Court is a independent institution and not affiliated to the United Nations as most assume though it maintains a cooperative relationship with the U.N.[56] Thus in simpler terms: the ICC is often "trapped" in-between the demands of legalism and the need to consider policy. As opposed to sacrificing one for the other. ICC depends on how well the Court manages to navigate these contravening

[55] 168International Criminal Court, 'Resolution RC/Res.6—Aggression amendment', 11 June 2010, at http://www.icc cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf. This amendment will need 30 ratifications in order to be implemented

[56] Haguejusticeportal.net.

commitments and demands. Indeed, the very survival of the Court may ultimately depend on whether it is able to strike the right balance between these conflicting demands.

The jurisdiction and functioning of the ICC is governed by the Rome Statute. Building on this and its relationship to the UN's special tribunals, the ICC supports global accountability both political and military leaders. Since its inception in 2002, it has managed to indict and prosecute perpetrators for their impunity acts though it has had to face some challenge from uncooperative states. For example the United States being a heavy weight in the political arena has refused to be a friend of the court due to its concerns over possible charges against American troops and diplomats. The Court has also been criticized by international observer and African leaders for placing undue focus on the African continent while neglecting human rights violations in western countries. To date, formal investigations have only been in Africa.[57]

4.3 Support for the International Criminal Court

One of the objectives was to examine the role and impact of the ICC beyond its own investigations and prosecutions and from the response on the general perceptions of the role of the International Criminal Court, it is evident that majority of the population are well conversant with the court. This being the case, it's safe to assume that the courts impact has been positive despite the numerous outcries heard of its agenda. These findings confirm the assertion that the court is indeed impacting its support which can be seen by the increasing number of States that are ratifying the Rome Statute, increased court's prosecutions and investigations globally including preliminary investigations in several parts of the world. Currently there are 122 States that have ratified the Rome Statute. 34 are African States, 18 are Asia Pacific States,

[57] The international Criminal Court – Global Policy Forum.

18 are from Eastern Europe, 27 are from Latin American and Caribbean States and 25 are from Western European and other States.[58] The increasing number of states and those wish to have temporal jurisdiction of the court shows its great impact for peace and justice.

4.4 International Crimes

There is no favorable definition of 'international crimes' in international law.[59]Crimes that constitute the jus cogens[60] violations of international law, like war crimes, crimes against humanity, genocide, and torture are the international crimes. For instance, ICC investigations focused on alleged crimes against humanity committed in the context of post-election violence in Kenya in 2007/2008, in six of the eight Kenyan Provinces: Nairobi, North Rift Valley, Central Rift Valley, South Rift Valley, Nyanza Province and Western Province. In granting the Prosecutor's request to open an investigation, the ICC Pre-Trial Chamber noted the gravity and scale of the violence. The Prosecutor contended that over 1,000 people were killed, there were over 900 acts of documented rape and sexual violence, approximately 350,000 people were displaced, and over 3,500 were seriously injured. The Chamber noted from the Prosecutor's submission elements of brutality, for example burning victims alive, attacking places sheltering IDPs, beheadings, and using machetes to hack people to death, and that perpetrators, among other acts, allegedly terrorized communities by installing checkpoints where they would select

[58] Haguejusticeportal.net

[59] 172PQ Wright 'The law of the Nuremberg trial' (1947) 41 American Journal of International Law 38 56 (a crime against international law is 'an act committed with intent to violate a fundamental interest protected by international law or with knowledge that the act will probably violate such an interest, and which may not be adequately punished by the exercise of the normal criminal jurisdiction of any state') with Dinstein (n 6 above) 221 (while international crimes typically are grave offences that 'harm fundamental interests of the whole international community', an offence becomes an international crime only when defined as such by positive international law).

[60] 173Jus cogens is formally defined by the Vienna Convention on the Law of Treaties as a body of 'peremptory norm[s] of general international law … from which no derogation is permitted' (art 53 Vienna Convention on the Law of Treaties, 23 May 1969). Jus cogens crimes impose duties on all states notwithstanding their ratification of relevant treaty laws.

their victims based on ethnicity, and hack them to death, commonly committed gang rape, genital mutilation and forced circumcision, and often forced family members to watch."

It can be noted that most committed crimes under the Rome Statute is crime against humanity. Crimes against humanity can be defined certain acts that are deliberately committed as part of a widespread or systematic attack directed **against** any civilian population or an identifiable part of a population. And all this is committed deliberately with certain intention and the best way to contain this is by enforcing international law under international crimes through ICC.

4. 5 Success and Failures of the International Criminal Court

4.5.1 Success of ICC.

The ICC since its inception 2003 as an institution, like the Tribunal courts before it, have to take into account small successes, especially when dealing with doctrine and law that the court achieves in order to evolve its uses and expand its powers through increased efficiency and reduced state opposition. In order for the court to fully realize its potential, it must show the world that it can be a successful permanent institution in international law with clear standards and goals, as well successful indictments, prosecutions and convictions of heinous war criminals in different parts of the world.

Among the initial success of the ICC is definitely laying a foundation for what could be an extremely efficient and successful judicial entity. The fact that the Rome Statute passed with such a lopsided victory, despite all of the objections from different sides regarding the semantics of the document, was a major victory in itself. Then, the rapidness of the ratification of the treaty, just four short years after the monumental signing, showed that the need to establish a world criminal court was present. Since the inception of the court, one hundred and twenty two

have joined the court. The support for the ICC is definitely growing although with f recent rebellion especially from Africa nations as they view the ICC as targeting Africa inappropriately

When the outline for an international criminal court was established, it quickly became evident that in order for the court not to only appease the reluctant states, but maximize its usefulness on the international stage, the court had to be complimentary. This role of a complimentary institution maintains the domestic jurisdiction of the individual states to prosecute their own criminals if they find the evidence to prosecute as well as possess a functioning judicial body to properly convene a fair and just trial. By limiting the role of the ICC to complimentary, the Rome Statute and the states that are party to the treaty created a last resort institution that will only be utilized if the country is unable or unwilling to prosecute their war criminals. This entails many factors that must each be examined before an indictment or even an investigation is launched by the ICC. Another success of the ICC is the clearly defined roles that the different organs operating within the confines of the Rome Statute have and how they are utilized to the advantage of the court and the international stage, especially the unique role of judges and the use of the appeals process.

First, the court's decision making process is common law, which means that judges, and not a jury, decide the fate of the accused based on legal precedence and knowledge of the law. Although this is contrary to the United States legal system, it definitely has its benefits. The common law practice definitely ensures that the rights of the individual, as well as the palpability of the court are handled by professionals. This is very important with an international forum because of the vast differences between hundreds of judicial systems. A civil law court at the international level is simply not practical. By granting the fate of indictees to the judges, a system of checks and balances has also been included in the Rome Statute and is therefore

utilized by the court. The appeals system for the ICC creates an atmosphere of fairness and justice that protects all individuals, from the defendants to the victims, of their alleged crimes.

In the ICC an appeal can not only be granted for guilty verdict, but also an acquittal. This additional appeal gives the prosecutor a second chance to submit additional evidence that may change the determination of the judgment. In creating a system in which the court can interpret international criminal law, it has correctly identified the issue that needs to be addressed in order for the court to blossom and reach its full potential. It will need to create a system in which precedence can be established and therefore common law is correctly carried out.

To date, the ICC has opened investigations into ten situations: (1) the Democratic Republic of the Congo; (2) Uganda; (3) the Central African Republic I; (4) Darfur, Sudan; (5) the Kenya; (6) Libya; the (7) Côte d'Ivoire; the (8) Mali; (9) the Central African Republic II; and (10) Georgia.[2] The ICC has publicly indicted 39 people. The ICC has issued arrest warrants for 31 individuals and summonses to eight others. Seven persons are in detention. Proceedings against 22 are ongoing: nine are at large as fugitives, four are under arrest but not in the Court's custody, one is in the pre-trial phase, seven are at trial, and one is appealing his conviction. Proceedings against 17 have been completed: three have been convicted, one has been acquitted, six have had the charges against them dismissed, two have had the charges against them withdrawn, one has had his case declared inadmissible, and four have died before trial.

Overall the major successes of the court have been almost exclusively on paper and not in the actual purpose of prosecuting and sentencing of criminals. Although The legal precedence, general international acceptance and the adaptability of the court form a foundation and pathway for overall success. The success of the court has not yet been completely realized, but the

framework is in place and is constantly adapting to the changing world that should ensure the success of the court in the future.

4.5.2 Failures of ICC

Despite sufficient groundwork for the ICC laid out through the Rome Statute and amended to include aggression at Kampala in 2010, the ICC in many nation's eyes has been a failure. Despite the doors opening and becoming fully functional in 2003, just recently, September 2009, the ICC opened its first case, prosecuting Congolese warlord Thomas Lubanga Dyilo. For nine years the court has sat dormant due to several different reasons. When the ICC first opened its doors, it immediately began investigating various situations, especially in Africa for the crimes it was established to enforce. The first elected chief prosecutor, Luis Moreno-Ocampo, an Argentine lawyer who gained fame through exposing Argentine corruption in the Trial of the Juntas, was inaugurated in 2003 and opened cases in regions such as Uganda and the Democratic Republic of Congo. Since that time Ocampo has been widely criticized for his continuous failures and this disappointment has led to reluctance of the states.

Thomas Lubanga Dyilo trial has been completed and the accused has been found guilty of all charges as of March 14, 2012, this event stands on the doorstep of Moreno-Ocampo's departure from the role of Chief Prosecutor. When the ICC was established through the Rome Statute it became evident that the role of the chief prosecutor would be essential to the court's success, and in many ways the successes of the court would mirror the successes of the prosecutor.

This analysis has become accurate, only to the negativity of the court. Moreno-Ocampo's failures are directly linked to the failures of the ICC in its attempt to become a viable force in the stage of international criminal law. Some believe that Moreno-Ocampo's attitude and

management style are not conducive to the teamwork required in order to increase the fluidity with which the court is run. Due to the lack of success, the funds wasted and the fact that only one trial has been completed, and that taking over three years with sentencing yet to come, some of the failures of the ICC must fall on the chief prosecutor's shoulders.

Furthermore, when his term comes due in mid-2012, a continued legacy of the Moreno-Ocampo regime will take over duties as the new Chief Prosecutor, Fatou Bensouda, Ocampo's current Chief Deputy, and an extension of his tenure. Although Ms. Bensouda has been in the Ocampo corner for ten years, she is from Gambia, which may diffuse some of the bias discussed below that so scarred the Ocampo regime. Hopefully, Ms. Bensouda can enlist the help of his subordinates instead of isolating them, and ensure that states follow the jurisdictional guidelines of the court. This brings about another flaw or failure of the ICC.

Other recent failure of the ICC is investigation process, kind of evidence brought before the court. For instance all Kenyan either were dismissed or withdrawn for lack of sufficient evidence or withdrawn due to the same. The latest case to be dismissed due to political interference and witness's intimidation was Kenya deputy president William Ruto and Journalist Joshua Arap sang.

The ICC depends on the cooperation of the states that have ratified it to turn over suspects, and help in the information gathering process to speed up and actually complete fair and efficient trials. Unfortunately for the ICC, this is not always the case. Specifically, many instances have occurred since the inception of the court where the prosecutor has the evidence, the indictment has been issued, but no trial ensues simply because the indicted is not turned over to the ICC for trial. Therefore the suspect remains at large as an international criminal. This is especially the

case with Omar Al-Bashir of the Sudan. Due to the lack of cooperation, heads of states indicted, as well as powerful military leaders continue to purge local populations without having to answer to their crimes. Despite ratification of the Rome Statute, the perception of state cooperation and the actuality of it can be vastly different.

This lackadaisical approach by party states continues to frustrate the court and its process. Something must be done to ensure that criminals indicted by the court appear at the court.

The final major flaw of the ICC definitely stems from the lack of participation by three permanent members of the UN Security council. As of this text, China has not signed the Rome Statute, and neither the United States nor Russia has ratified it. In fact, as of the Bush Administration actions of 2002, the United States actually unsigned it.

In nutshell, despite a strong foundation laid out at the Rome Conference, the ICC has had few tangible successes since its inception. Some of this can be attributed to the inception of the court, but much can be realized specifically from the three major flaws, the ineptness of the prosecutor's office, the unwillingness of states party to the treaty to cooperate with the wishes of the court, and the lack of support from permanent members of the UN Security Council which holds veto powers over the cases of the ICC. Due to hindrances such as these, the court has struggled to carve out its niche in the world of international criminal law.

4.6 Role of the International Criminal Court in Promotion of Peace and Justice in Countries

The International Criminal Court supports accountability, peace and justice at all times though the terms 'peace' and 'justice' are not defined in the ICC Preamble. Peace and justice should be promoted as mutually reinforcing imperatives and the perception that they are at odds should be

put to rest. The question for the court is never whether to pursue accountability and justice, but rather when and how. The nature and timing of such measures should be framed first of all in the context of international law taking into account the national context and the views of the victims. These views include dialogue with the victims to promote better understanding of the transitional justice. The inclusion of victims in the Court proceedings is important because the victims are the people on the ground that experienced the atrocious crime and by involving them in the proceedings; they feel empowered and realize that they too have a stake in the court proceedings.

The Court should also be innovative in creating a trust fund which has the dual mandate of implementing court-ordered reparations as well as providing assistance to victims and their families irrespective of judicial decisions.[61] This will enable the court to independent by recruiting its own staff such as national representatives. Further on protection of witnesses will be grunted thus promotion of justice and peace.

4.7 Accountability for Crimes

The world today is far much different than it was 12 years ago. Victims of atrocious crimes now have the leverage of pursuing and receiving justice by having the perpetrators brought to account to answer for their crimes. This has been seen through the indictment, arrest and prosecution of Thomas Lubanga, founder and former commander-in-chief of the Patriotic Force for the Liberation of Congo (Forces Patriotiques pour la Libération du Congo, FPLC) and founder of the Congolese Patriotic Union who was sentenced to 14 years by the ICC. By this it plays an important role to deter leaders of same character from committing international crimes in violation of the international law. In addition by their bold move of issuing arrest warrants for

[61] Trust Fund for Victims, INT'L CRIM. CT., http://www.trustfundforvictims.org/.(last visited July 13, 2013).

sitting heads of state like the Sudanese President Omar Al Bashir, the ICC is sending a clear and firm message that regardless of your rank, you will be held accountable for your acts.

In a nutshell, impunity is no longer an option for those who would take power or maintain it by violence and committing international law and Human Rights violations.

4.8 The Focus on Africa Dilemma

Africa as a continent has been having issues with the International Criminal Court making their relationship to plummet further; the two entities are great enemies. This sourness prompted the African Union to give approval to African states not to cooperate with the Court under any circumstances which was in contrast with its own Constitutive Act stated in article 4, to combat impunity and fight for international criminal justice. Africans see the court as a biased instrument sent by the western world to destroy them. Rather, they are not the primary targets but primary users as they are force behind the establishment of the court, and the only voluntary actors in prosecuting perpetrators. For example the self- referrals cases of mass violations of international law committed the Democratic Republic of Congo, Uganda and the Central African Republic territories. In line with this the Prosecutor Fatou Bensouda has been urged to open preliminary investigations in Mali to determine whether war crimes and crimes against humanity have been committed there since the onset of its crisis. War crimes have been reported namely the Massacre of Malian loyalist soldiers in Aguel-hoc, the conscription of child soldiers, and violence, such as murders, kidnappings and rape against civilians, have been committed by different armed groups occupying the country's northern part.[62] This shows that Africa has a more proactive role in the support of the court to promote peace and justice hence the stability in the continent. According to Mahmood Mamdani, he sees the ICC as part of a new international humanitarian order…on

[62] http://www.npwj.org/ICC/Africa-not-target-a-driving-force-International-Criminal Court.html#sthash.lJZbjSz5.dpuf

big powers as enforcers of justice internationally... that draws on the history of modern Western colonialism. .where state sovereignty obtains in large parts of the world but is suspended in... Africa and the Middle East.[63]

The question that is critical is which must be answered, why Africa is rebelling against ICC? To answer this question first of all most of the African leaders want 'African solutions to African problems' of which they are sure they are going to walk presumably because they have their counters parts who would bail them out of situations if need be. But the case of the court is different in that it is steadily reducing impunity serving as a watch dog to great violations of human rights which the leaders fear will sooner rather than later influence the domestic institutions to comply with their responsibility under international humanitarian and human-rights law to investigate and prosecute international crimes.[64] In addition the ICC's main focus is on the countries that suffer most from instability, war and impunity. African leaders should change their focus or direction and put their energy in making the Court better and stronger because it's not out to destroy them since it doesn't seek competition or undermine their criminal processes. As Nelson Mandela, puts it: *I dream of an Africa which is in peace with itself .One Africa should be the dream of all African leaders but there can be neither peace nor unity in Africa if there is no justice. Fight for the ICC not against it. Show that Africa is a continent of hope and not a dark planet of despair.*[65]

Haile Selassie, the first Chairman of the Organization of African Unity now African Union, stated in 1963 that:

[63] Mamdani's Thesis is set out in an article in The Nation, available at: http://www.thenation.com/ doc/20080929/mamdani (3 July 2009).
[64] Gareth Evans, Five thoughts for policy makers: International Coalition for the Responsibility to Protect.
[65] Peacechild.org/nelson-mandela-i-dream-of-an-africa—which-is-in-peace-with-itself/

Until the philosophy which holds one race superior and another inferior is finally and permanently discredited and abandoned; until there are no longer first – class and second class citizens of any nation; until the color of a man's skin is of no more significance than the color of his eyes; until the basic rights are equally guaranteed to all without regard to race; until bigotry and prejudice and malicious and inhuman self-interest have been replaced by understanding and tolerance and good- will, the African continent will not know peace.[66]

The ICC is a beacon of hope that assures Africa that it will come to know peace, because those who threaten peace by their heinous acts will be held accountable before the bar of justice. The African continent should be made a platform for the re- birth of the ICC and not a burial place, a platform where the Court is transformed from the sword of injustice to the shield of peace and justice. Regime leaders should not challenge their indictments. This has been seen from verbal protestations to immunity claims of which I wouldn't have expected from a leader. From my perspective, the public display of their concerns signals a lot rather than conceal them. They tend to approach the situation as a political battle rather than a legal one. Nearly all those indicted by the ICC have contested their indictments in some manner. Examples include Slobodan Milosevic, Radovan Karadzic, Ratko Mladic at the ICTY, and the major figures at the ICTR, Charles Taylor at the Special Court for Sierra Leone, Uhuru Kenyatta and William Ruto at The Hague, Omar Al Bashir amongst others. From the Joseph Kony's leadership of the Lord's Resistance Army in Uganda though in this case can be referred double standard of African leaders whereby they differ with ICC when it directly affect them but if is contrary they support it, President Museveni has been leading a campaign against the ICC but is in favor of it when dealing with this very case, Lubanga's connection with crimes committed in the Congo or the

[66] Debate.umv.edu/dreadlibrary/cardillo.html

leader of the Janjaweed militia in The Sudan of which Omar Al Bashir was alleged to be a member of which none has surrendered to the court.

4.9 Immunity of state officials from the International Criminal Court

Schabas[67] and Van Schaack and Slye[68] believe that immunity is a defense under international criminal law. It's therefore a defense to international criminal responsibility for state officials accused of international crimes. Immunity can also be a barrier to individual accountability183 serving as a ground to run from criminal responsibility rendering any action from the court as being inadmissible to the individual as it would have been invoked.[69]

Historically, state officials were not answerable for their actions in criminal responsibility because the states then had a merger between 'sovereign' and 'sovereignty.[70] A divine ruler could not be put on trial because the ruling was always in their favor.[71] The question we ask ourselves then is if at present the state officials enjoy the same benefits as the medieval rulers? The answer to this question is no as today tribunals and international courts have been established to control biasness in the system. All the states have the provision to prosecute and punish perpetrators of international crimes in accordance to the customary international law. In general international courts are of the view that even if state officials were to be accorded immunity by national or international law; it would not be of much benefit if the crimes are of international nature. The International Court of Justice (ICJ)[72] the International Criminal Court

[67] W. A Schabas An introduction to the International Criminal Court (2007) 231.
[68] B .van Schaack and RC Slye International criminal law and its enforcement: Cases and materials (2007) 865-874.
[69] D.P Stewart 'Immunity and accountability: More continuity than change?'(2005) 99 American Society International Law Proceedings 227 228
[70] MC Bassiouni *Crimes against humanity in international criminal law* (1999) 505-508 (stating that this is particularly true with respect to monarchies as evidenced by Louis XIV's statement: '*L'etat c'est moi'* (meaning that 'the state is me', - my own translation).
[71] The Dissenting Opinion of Judge Jean Yves De Cara in the Case Concerning Certain Criminal Proceedings in France (Republic of the Congo v France) Provisional Measures Order of 17 June 2003, ICJ Reports (2003) 102, 122.
[72] *Arrest Warrant* case (n 21 above) para 61.

(ICC) [73] the International Criminal Tribunal for the former Yugoslavia (ICTY)189 and the International Criminal Tribunal for Rwanda (ICTR)[74] have the opinion that the official position of individuals should not be a defense from prosecution nor a mitigating factor in their punishment. Since the Nuremberg and Tokyo trials[75] this has been the stated position.

Further the Appeals Chamber of the Special Court for Sierra Leone (SCSL) which held the case against Charles Taylor was clear that the official position of a person incumbent or not, does not bar them from prosecution before international courts. The decision made by SCSL to reject immunity shows that even if the request for immunity relates to a non- party state of the International Criminal Court it will not be accepted. In this support the Extra-ordinary Chambers in the Courts of Cambodia (ECCC)[76] and the Iraqi Supreme Criminal Tribunal[77] echoes the SCSL opinion.

On matters touching on the African continent, the AU's Constitutive Act under article 4 rejects impunity.[78] Immunity for sitting heads of states who have committed atrocities should be rejected before the African Court for Justice and Human Rights. On August 25th and 26th 2014, The African Union (AU) Office of the Legal Counsel convened a meeting in Nairobi with

[73] *Prosecutor v Al Bashir* Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Al Bashir
(Case ICC-02/05-01/09) Public Reducted Version, Pre-Trial Chamber I, 4 March 2009 15, paras 41-43.
[74] *Prosecutor v Kambanda* (Case ICTR 97-23-S) Judgment and Sentence, 4 September 1998.
[75] 191Nuremberg Judgment *International Military Tribunal*, 1946, reprinted in (1947) 41 *American Journal of International Law*
172, 221.
[76] 192Arts 2 and 29 Law on the Establishment of Extra-ordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes
committed during the Period of Democratic Kampuchea, 27 October 2004, as revised on 23 November 2004, (NS/RKM/1004/
006); Criminal Case File 002/14-08-2006, Investigation 002/19-2007-ECCC/OCIJ (Khieu Samphan) *Provisional Detention*
Order 19 November 2007; Criminal Case File
[77] Prosecutor v Saddam Hussein Al-Majid et al, Defendants' Preliminary Submission Challenging the Legality of the Special Court 21 December 2005, 1-24 paras 1-121.
[78] ICJ Kenyas Expert Opinion Paper on the Jurisprudence Emerging from the 2007 Election Petitions presented by George Kegoro, Executive Director, The Kenya Section of the International Commission of Jurists

government officials of AU member countries in East Africa to promote ratification of AU treaties. One of their discussions touched on the provision of immunity for sitting leaders and other senior officials. Though Article 46A is of the amendments states that "No charges shall be commenced or continued…against any serving African Union Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure in office[79]" provides immunity for sitting leaders the statutes of international and hybrid international national war crimes tribunals reject exemptions on the basis of official capacity. The provision of immunity to sitting officials will take people back to the medieval times and risks giving leaders the gate pass to committing crimes.[80]

It also bases a foundation for the perpetrators to cling to power to void facing what awaits them. African countries like Benin, Burkina Faso, Democratic Republic of Congo, Kenya, and South Africa have ruled out immunity for sitting officials for serious crimes under their national laws, so why the bickering. In reference to table 4.12, therefore it can be concluded that state officials have a duty, like any other private individuals, to cooperate and assist international courts.

Conclusion

ICC is an independent permanent court which is the last result on matters affecting humanity, Although the court had overwhelming support from the word go of recent it has faced serious rebellion from Africa continent on the ground that the court is biased whereby most of the African countries threaten to massively withdraw under the umbrella of African Union. Generally the court deals with international crimes that are under the Rome Statute. The court from its inception has prosecuted and detained a number of cases although has faced some

[79] Article 46A of the African Union Constitution
[80] Timothy Mtambo executive director at Malawi's Centre for Human Rights and Rehabilitation

challenges while handling the matters. The court has seen its success and failures at the same time although failures supersede success. African is the main focus here since most of the cases prosecuted and investigated hail from the continent reason the court is facing a lot of resistance from it. From the analysis it can be concluded that those responsible for violations of human rights and international humanitarian law should be brought to justice. Though the respondents were for the national court for sovereignty reasons, their support for the court was good when the issue of immunity from prosecutions was mentioned.

CHAPTER FIVE

5.0 Conclusion and Recommendations

5.1 Conclusions

The creation of the International Criminal Court should be seen as an achievement in defense of human dignity and promotion of peace and justice. Its long tremendous journey has contributed to the paradigm shift in global relations and international law where particular focus is made on individuals and not states. The most intriguing thing about the response to trials about the atrocities committed has been related to the proximity of idealism and cynicism surrounding the entire project. To this end, this study has explored the ICC's ability in delivering justice and peace. While exploring the reasons why the court was established; to achieve justice for all, end impunity, help end conflicts, and remedy the deficiencies of ad hoc tribunals to take over when national jurisdictions are unwilling and unable to act and to deter future war criminals, it can be noted that the court has been very effective in its role. Emphasis has also been put on its impact to the international community which has been tentatively positive. This study also maintains that tensions may arise between the two concepts of peace and justice but this does not necessarily mean that the ICC represents a threat to peace.

The Court has been seen to exert authority in the international community by refusing to bow to pressure to suspend the pursuit of justice for the cause of peace. Justice has always been sacrificed in favor for peace in the process of ending conflicts to bring about stability in a state rather than hold the perpetrators accountable. This is one of the reasons why the court was formed to show that the pursuant of justice can greatly contribute in building sustainable peace.

The court to this day has registered a number of achievements in its role that the international community can reflect on since it opened its doors in 2002. When we refer to the cases that the

court has handled, a deduction can be made that there has not yet been any conflict between peace and justice with the court's involvement to prosecute. Therefore, it can be said that the existence of the warrants of arrest for the regime leaders suspected of committing war crimes, hasn't in anyway affected peace talks. In Uganda for example it managed to isolate the rebel group from its base of support in Khartoum. In addition, the LRA leaders were much interested to leverage peace talks with the Ugandan government so as to revert the ICC's arrest warrants. Further, investigations are underway inter alia, Democratic Republic of Congo, Uganda, Libya and Central African Republic, Ivory Coast and Mali. The prosecution chamber is also monitoring the situations in Colombia, Georgia, Chad, Afghanistan and Nigeria.

The court's intent in pursuing international justice has enhanced the national or domestic law of states through the principle of complementarity. This principle ensures that states incorporate the ICC crimes into their domestic/ national law. For instance, reference to 'enhancing international cooperation' and Article 93(10), allowing States to make requests to the ICC for assistance in matters such as: identification of persons, collecting evidence, and victim protection, suggests that the Rome system is interdependent and mutually reinforcing. For example, in the Central African Republic, the Court's investigations proved to be a jump start for the authorities to commit in pursuing the criminals to account for their crimes by establishing a humanitarian law office within the army. This shows the court's effort in promoting national prosecutions.
Apparently, all of the current cases before the Court are from Africa but this does not mean that atrocities are not being committed elsewhere.

Before the indictment of Presidents Al Bashir and President Uhuru although by the time of his indictment he was deputy prime minister, the courts target on low profiled individual such as rebels, warlords and opposition leaders but it soon changed its course and decided to go for the

big fish sending a message that they meant business and no one was immune to their pursuit. Sadly the arrest warrants for some of the individuals have been pending for too long because of the lack of cooperation of the state parties to the court. The AU a regional body openly declared its intention of not supporting the court urging its members to do the same. This was in total contrast to its Constitutive Act of 2000, which in its preamble states that, African leaders agreed to promote and protect human and peoples' rights and reinforce democratic institutions and human rights culture, and ensure good governance and the rule of law. In order for it to do so, it had to develop a security regime with a mandate closely linked to its responsibility to protect framework. As part of one of the mechanisms that international relations encompasses to study conflict and cooperation, AU as an international institution is a very important actor. Since the issuance of Al Bashir's arrest warrant in 2009, he has managed to travel to Egypt, Ethiopia, Libya, Qatar, Saudi Arabia, Zimbabwe and China of which none are state parties to the Statute. His first trip to a state party was to Chad in July 2010, then in Kenya in August 2010 to celebrate the signing of a new institution where the authorities declined to arrest him amid a broader attempt to improve historically strained bilateral relations between the two states.

The Court in theory under strict conditions has universal jurisdiction over atrocities committed anywhere in the world. The principle of universality which gives the ICC the jurisdiction irrespective of nationality, locality or offence of a state sets the extent and the limits while putting in mind the rules of international criminal law. The ICCs jurisdiction is limited to crimes of genocide, crimes against humanity, war crimes, and the crime of aggression.210.

The immunity debate has risen up a number of critical issues concerning the court. According to Shaw, he observes that in the domestic court compared to the international tribunals, the procedure is more complex because of the 'status of head of state before domestic courts' and

that ‘international law has traditionally made a distinction between official and private acts of a head of state’.211 Hence functional immunity exists only when an official is in office and expires when the term ends. It may also be invoked not only by serving state officials but also by former state officials in respect of their official acts while they were in office. This type of immunity does not apply however when a person is charged with international crimes, either because such acts can never be ‘official’ or because they violate norms of jus cogens. This is greatly pronounced when prosecuting heads of state and particularly sitting heads of state, such as Omar Al Bashir is and Uhuru Kenyatta. The impact of actually arresting and prosecuting them essentially means their removal from power and its implications would be very profound.

5.2 Recommendations

The ICC has to maintain its independence so as to instill confidence in the international community. The big five shouldn’t use it as a political tool to attain their interests. The

Community should push for the ratification of the statute by the United States of America, Russia, China and possibly India in order to increase its global support. The Permanent members of the UNSC play an important role as they are very influential on Security Council resolutions that refer some of the cases to the ICC. For example, the referral of the Syrian case wouldn’t have been vetoed by Russia and China if they were parties to the statute. Their absence arguably sends out a negative message to the small states that impunity can be bought with power.

In reference to the Darfur case, all states should cooperate to enforce the arrest warrants issued by the court. This will assists in eliminating safe havens for suspects and justice would have been attained.

The court by reducing the wording of the Rome Statute rejecting the idea that public office brings immunity is undoubtedly a positive step to reduce impunity. It should therefore also indict the heads of states particularly in Uganda and the DRC where the leaders think that by referring cases to The Hague, they are immunizing themselves from it. This would send out a clear message that there is no one above the law. The Security Council should be able to enact travel restrictions, economic sanctions and diplomatic sanctions on states that provide asylum for suspects, those that refuse to arrest indictees, or cooperate with the court. The active role from the Security Council may be a problem. Though the court is not a political tool, the council is.

Though the relationship between Africa and the court is still wanting, it is very important for all the stakeholders in the justice process to look at the fight against impunity as their main objective rather than victimizing themselves at the mercy of the international community. The continent should realize that most conflicts have occurred in African and they need to be curbed to end impunity

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