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International Criminal Tribunals and National Security

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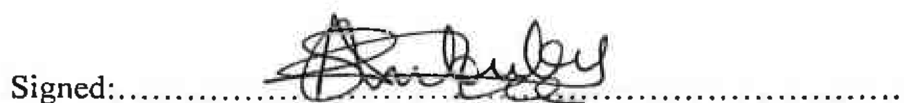
Declaration

I, **Agnes Nafula Shikuku**, declare that this is my original work and that it has not been submitted for a degree in any other university.



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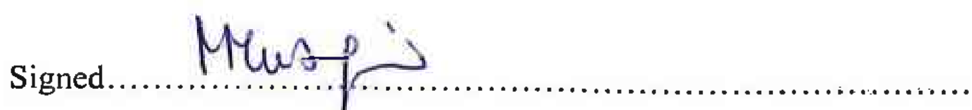

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PROF. MAKUMI MWAGIRU

Date........17/11/12..

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Abbreviations

CAR -Central African Republic
CCL -Control Council Law
DRC -Democratic Republic of Congo
ICC -International Criminal Court
ICL -International Criminal Law
ICT -International Criminal Tribunal
ICTR -International Criminal Tribunal for Rwanda
ICTY -International Criminal Tribunal for former Yugoslavia
IHL -International Humanitarian law
ILC -International Law Commission
IMT -International Military Tribunal
IMTFE -International Military Tribunal for Far East
KLA -Kosovo Liberation Army
LRA -Lords' Resistance Army
NATO -North Atlantic Trade Organization
RPF -Rwanda Patriotic Front
SCSL -Special Court for Sierra Leone
TRC -Truth and Reconciliation Commission
UN -United Nations
UNAMID -United Nations and African Mission in Darfur
UNSC -United Nations Security Council

List of Statutes

1. Rome Statute of the international Criminal Court,1st July 2002
2. Statute of the International Criminal Tribunal for the former Yugoslavia, adopted on 25th May 1993 by Resolution 827 of UN Security Council.
3. Statute of the international Criminal Tribunal for Rwanda, adopted on 8th November, 1994 by Resolution 955 of 1994
4. Special Court Agreement, 2002 (Ratification) Act, No. 9 of 2002 (Supplement to the Sierra Leone Gazette Vol. CXXXIII No. 22, 25th April, 2002
5. United Nations Charter, signed on 26th June 1945 in San Francisco
6. The Truth and Reconciliation Act 2000, http://www.sierraleone.org/Laws/2000

List of Cases

Prosecutor v Charles Taylor, Case No. SCSL-03-01-PT, Prosecutor's Second Amended Indictment, May 29 2007.

Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment (Sept. 2, 1998).

Prosecutor v. Barayagwiza, Case No. ICTR-97-19-AR72, Decision, 6-8 (Nov. 3, 1999).

Prosecutor v. Kambanda, Case no. ICTR 97-23-S, Judgment and Sentence, 39-40 (Sept. 4, 1998).

Prosecutor v. Nahimana, Case No. ICTR-99-52-T, Judgement and Sentence (Dec. 3, 2003.

Prosecutor v. Samuel Hinga Norman, Allieu Kondewa, and Moinina Fofana, CaseNo. SCSL-04-14-PT,

Abstract

This study examines the question of whether or not International Criminal Tribunals (ICTs) in executing their mandate especially in post conflict situations interfere and/or compromise the national security or even the national security strategies of states. It analyses the rationale of establishing ICTs and their role in ensuring justice and accountability within states where international crimes have allegedly been committed, the role and conceptualization of national security and the relationship between ICTs and national security. The conceptual framework adopted in this study is that of state sovereignty which emphasizes non interference with the internal affairs of a state. The study while using this concept argues that states in exercise of their sovereignty cede some of it by entering into international treaties.

In examining the rationale of ICTs, issues and philosophy relating to ICTs are discussed. The development of international criminal law (ICL) and International Humanitarian Law (IHL) is analyzed including the need to punish individuals who hold the highest responsibility in the commission of international crimes. In addition, the merits and justification that informed the establishment of UN based *ad hoc* courts and the treaty based ICC including the differences between them and the laws applicable by different ICTs are also addressed.

The concept of national security is examined from both the traditional perspective that emphasizes physical security of the state and the contemporary one that addresses the individual.

In examining the relationship between ICTs and national security, various issues that include tension between the interests of justice and political interests are discussed. The study adopted both primary and secondary sources of data. At the end of the study, the analysis proves the hypothesis that the functioning of ICTs does not interfere with the national security agendas of states but is in fact complementary.

Chapter One

Introduction to the Study

1.0 Introduction

The establishment of International Criminal Tribunals (ICTs) dates back to the Nuremberg tribunal. In these trials, it was observed that the moral responsibility of an individual cannot be superseded by the laws of the state. The tribunal decided that; "crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced".[1] The last two decades have witnessed an unprecedented proliferation of ICTs empowered to punish individuals for violations of international crimes.[2] One of the primary justifications for ICTs prosecutions of individuals who commit humanitarian atrocities is that such prosecutions will promote reconciliation and deter future actors from committing such atrocities.[3] In addition, the role of ICTs is to ensure justice and accountability.

The *ad hoc* International Criminal Tribunals for the former Yugoslavia and for Rwanda ("ICTY" and "ICTR," respectively), the permanent International Criminal Court based at the Hague, and hybrid "internationalized" tribunals such as the Special Court for Sierra Leone are some of the international community's attempt to address the worst of the international crimes. States have been the main actors in the establishment of ICTs. ICTY and ICTR were established under chapter VII of the UN charter while the ICC was established through a treaty.

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[1] Casese, A *International Criminal Law* '(Oxford University Press, 2003) p. 23.
[2] Ibid
[3] Scheffer D., 'War Crimes and Crimes Against Humanity', *European journal of international law,* Vol 11, No. 319, (1999) p328

While state sovereignty must be respected in international law,[4] developments in human rights and humanitarian law recognize other norms that compete with it for primacy.[5] The development of international criminal law has posed a great challenge to sovereignty. The law prohibits certain offences that include genocide, crimes against humanity and war crimes which are regarded so outrageous that they offend not only the domestic legal system but also the international legal system. A person who commits these offences becomes an enemy of the whole world and must be punished. It is this bid to punish individuals who hold the highest responsibility in the commission of these crimes under international law that has seen states establish ICTs.

On the other hand, national security is the concern of all states who would want to secure their national interests by protecting state sovereignty and territorial integrity. They would also want to deal with their internal affairs without direct interference from outside and maintain peace and stability inside the state. This notwithstanding, states are also party to conventions which they are under an obligation to adhere to. Whereas the primary concern of states is national security, this has to be viewed in the context of the state's international obligations. States are the main parties to the international agreements under whose auspices some ICTs are formed.

States that experience grave atrocities realize the need to pursue justice in a form that ensures continuity of the national agenda and processes without compromising the future on the account of the past. ICTs have intervened in several states to investigate and prosecute those who are suspected to hold the highest responsibility in the commission of international crimes. In most of

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[4] Article 2(1) of the UN Charter provides that the organization is based on the principle of the sovereign equality of all its members.

[5] Bassiouni, M,C., 'International Crimes: *Jus Cogens* and Obligations *Erga Omnes*', *Law and Contemporary Problems*, Vol. 59, No. 63, 1996 pp 3- 49.

these states, arguments of national security issues have come to the fore with states claiming that this action will interfere with the national security agenda.

1.1 Statement of the Research Problem

ICTs were established to prosecute those responsible for atrocities of genocide, war crimes and crimes against humanity. This was to ensure that justice is brought to the victims and would be perpetrators deterred from committing such crimes in future. The ICTs which include the ICTY, ICTR, Special Court in Sierra Leone, Lebanon, Cambodia and East Timor finally gave impetus to the creation of the ICC. The main objective was that the investigations and trials of those who hold the highest responsibility including powerful leaders would help strengthen the rule of law and send a strong signal that such crimes will not be tolerated in a human rights respecting society.

On the other hand, the general concern of every state is to pursue national interests and ensure peace and stability in a way that pursuit of justice does not interfere with the national agenda. The problem however is that the intervention by ICTs and the operational environment of these institutions have raised critical questions regarding the national security of states. There is also suspicion by states that the ICTs will compromise national security and interfere with structures and cooperation between them. This is a big problem which is not useful for the development of international law or for the sovereignty of states. The central question is whether the various ICTs in executing their mandate especially in post conflict situations interfere with or compromise national security or even the national security strategies of states. This study examines the role of ICTs in ensuring justice and accountability within states where international crimes have allegedly been committed and the resultant national security concerns in the exercise of this role.

1.2 Objectives of the Study

1. To examine the rationale of international criminal tribunals.
2. To examine the concept and role of national security.
3. To establish the relationship between ICTs and national security.

1.3 Literature Review

This section will review the literature addressing the national security question in the context of international criminal tribunals. The establishment of *ad hoc* international criminal tribunals for former Yugoslavia and Rwanda, the coming into force of the permanent international criminal court (ICC) and recent attempts to prosecute former dictators and tyrants for gross violations of human rights, and the growing salience of international humanitarian law have led to the growth of literature on what is popularly known as international criminal justice.

1.3.1 ICTS and National Security

Morris and Scharf examine the facts leading to the creation of the ICTY and give the historical background of the conflict that eventually led to the establishment of the tribunal. They address the legal basis for the creation of the ICTY, issues of territorial and temporal jurisdiction of the tribunal, cooperation and judicial assistance. This will be relevant to the study in examining the rationale for the establishment of ICTs and the effect they have on national security.[6]

Bassiouni examines international crimes and international criminal investigations and prosecutions from Versailles to Rwanda. He examines the legal, moral and ethical implications of international military tribunals sitting in Nuremberg and Tokyo after the 2nd world war, in what he calls the "Nuremberg legacy" He also examines the legal basis under which crimes such

[6] Morris, V & Scharf, M *An Insiders Guide to the International Criminal Tribunal for Former Yugoslavia: A Documentary , History and Analysis*, (Volume I, New York: Transnational Publishers, 1995)p.18.

as genocide, crimes against humanity and war crimes are considered *jus cogens*.[7] He further analyses the establishment and jurisdiction of the ICTY and ICTR. They discuss the relationships between the two tribunals and the national courts and examine some of the trials that have been undertaken by the two courts. His contribution is more relevant in contributing to the rationale for ICTs in the development of international humanitarian law than on the subject under study.

Snyder and Vinjamuri criticize what they characterize as the prosecutorial drive of Human Rights Watch, Amnesty International, and other advocates of global justice. Their case is summarized by the premise "justice does not lead, it follows."[8] Snyder and Vinjamuri, are further skeptical about the virtues of the 'new international idealism', contend that an over-reliance on *post-hoc* justice risks causing more atrocities than it prevents, pays insufficient attention to political realities, ignores the fact that potential victims are best served if they are not allowed to become victims in the first place, and cannot and will not succeed unless implemented in a more pragmatic way, that privileges the logic of consequences over that of appropriateness, and understands the need for political bargaining. There is a more sophisticated version of Krasner's argument that, as the title of one of his articles reads, "after wartime atrocities, politics can do more than the courts".[9] This will be relevant in enabling the appreciation of the role of ICTs and whether the prosecution of those who are alleged to have committed the crimes will serve to ensure peace and stability which is one of the key objectives in the national security strategies of countries.

Griffin gives a brief history of the Nuremberg and Tokyo international tribunals and modern ICTs such as ICTY and ICTR. He analyses the successes and failures of the tribunals in

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[7] Bassioni, C *International Criminal Law*" (2nd Ed, Volume III, New York, Transnational Publishers, 1999)p.45.

[8] Snyder J. and Vinjamuri L. 'Trials and Errors: Principle and Pragmatism in Strategies of International Justice', *ICJ expert paper*, 2006 , 1-17.

[9] Krasner S. 'After Wartime Atrocities Politics Can Do more than the Courts'. *Journal of International and Comparative Law, Vol. 14 ILSA* ,2001pp 145-366.

the light of historical and political factors into the predictive framework for the enforcement of international criminal law and the effectiveness of the ICC.[10] This is relevant especially when the study examines how the political factors have impacted on national security.

Kritz's agonized with the discourse of whether justice through trials would contribute to preservation of national security or prevent peace. [11] This was the period when the international criminal tribunals were established after the conflicts in the former Republic of Yugoslavia (ICTY) and Rwanda (ICTR). One of the issues that this study will examine is whether the justice being sought at the ICC will interfere with national security back at home.

Hampson a study of the effectiveness of peace agreements, emphasizes that international tribunals and commissions bring the element of impartiality necessary to restore faith in the judicial process and the rule of law.[12] Some scholars argue that the main flaw of ICTs lies precisely in the fact that it resists politics as part of its decision-making process. For example, while discussing the ICTR, Moghalu complains that the court has tried too hard to avoid the 'victor's justice' label, giving too much leeway to defendants and causing unproductive tension with the Rwandan government by attempting to prosecute members of the Rwandan Patriotic Front. He goes further to argue that the tribunal would be better served if it embraced political reality and accepted that "we live in an imperfect world"[13].

Morris and Scharf in their second volume on the ICTR analyse the history, establishment and workings of the tribunals. They address various issues which include questions as to whether the creation of the ICTR was the best option available for responding to the 1994 Rwanda

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[10] Griffin, J.B 'A Predictive Framework for the Effectiveness and International Criminal Tribunals' *Vanderbilt Journal of Transnational Law, Vol.34,* (2001)pp 20-54.
[11] Kritz, N. J *Transitional Justice: How Emerging Democracies Reckon with Former Regimes Vols. I-III* (Washington DC: United States Institute of Peace Press, 1995) p12.
[12] Osler F. and Malone D. *From Reaction to Conflict Prevention: Opportunities for the UN in the New Millennium* (Boulder, CO: Lynne Reinner, 2001)p 15.
[13] Moghalu, K. C. 'The Evolving Architecture of International Law: Image and Realities of War Crimes Justice: External Perceptions of ICTR' *Fletcher F. World Affair, Vol. 16* (2002) pp 35-115.

genocide, the achievements of the tribunal and the problems encountered. They also address the general development of international law since the Nuremberg trial.[14]

Schabas analyses the processes and negotiations that gave rise to the signing of the Rome statute. [15] The states that negotiated the statute had come to terms with the idea of loosing absolute sovereignty over crimes committed by their nationals or in their territories. Various states had problems with the legal principles on which the statute would be crafted, and the extent to which the ICC's jurisdiction would be accommodated without undue erosion of the jurisdiction of the national courts of the states. At the end of the day, the statute was a product of various compromises by states that had to let go some of their political policies, politico-economics, religious views and the roles they play in the international power arena. Schabas also delves into an analysis of the statute and the crimes created and punishable by the ICC.[16]

Wible observes that the practice of universal jurisdiction over international crimes may turn out to be ambivalent when a defendant stands trial in a foreign country, far away, and hence there appears to disconnect with justice. [17] The victims in the home country may question why they should meddle into the affairs of another country. Universal jurisdiction as a concept has also been seen to bring about a sense of borderless system of international law since often, as courts of the north sit in judgment of leaders from the south, hence a replay of the asymmetrical power play in the international arena. Yet again there is a possibility that universal jurisdiction may be misused by having prosecutions applied as a political tool.

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[14] Morris, V & Scharf M *'The International Criminal Tribunal for Rwanda'* (New York: Transnational Publishers, 1998) p 45.
[15] Schabas, W. A., *'An Introduction to the International Criminal Court'*, (United Kingdom, Cambridge, University Press, 2001).p.54.
[16] Ibid.
[17] Wible, B., 'De-jeopardizing Justice: Domestic Prosecutions for International Crimes and the Need for Transnational convergence,',*Denver Journal of International Law and Policy, Vol. 31. No. 2,* (2001) pp 201-270.

Prosecuting individuals before ICTs is beset by unique challenges. While Harhoff concedes that prosecution of individuals directly under international law is one of the most important legal innovations of the international legal system, during the 20th century. However, this practice developed from the emergence of minimum standards of civilization and also the development of international human rights, both of which protect the rights of the individuals in any state.[18] One major problem associated with this was reluctance of states to yield to the perceived threats to their sovereignty in acknowledging the powers of an international court to prosecute their own nationals under a criminal legal system beyond their own control. Other challenges include the substantial delays in the prosecution and protection of witnesses that give evidence in the investigation.[19] In Rwanda, former Yugoslavia and other judicial proceedings, the tribunals guaranteed that the victim-witnesses would remain anonymous. Unfortunately, the identities of some of the witnesses were revealed. As a result they received threats to their lives and their families and subsequently had to flee their areas or even countries of origin.[20] This will be relevant to the study as the issue of witnesses and threats to their families occasion a lot of security concerns.

Hazan triangulates the two themes of pursuit of justice for international crimes and forgiveness or amnesty as a way to achieving justice and particularly, stability in the states where the serious crimes are said to have been committed.[21] Wiliamson examines at the balance between criminal prosecution and non-prosecution before the ICC and other international

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[18] Harhoff. F, 'Legal and Practical Problems in the International Prosecution of Individuals,' *Nordic Journal of International Law, Vol. 690* (2000),pp53-61.

[19] Ibid.

[20] Ibid.

[21] Hazan, P., 'Measuring the Impact of Punishment and Forgiveness: A Framework for Evaluating Transitional Justice', *International Review of the Red Cross (IRRC), Vol. 88 No.861*, (2006) pp 15-66.

tribunals.[22] The demands and processes of accountability cannot only jeopardize the chances to achieve a peace agreement, but also destabilize the process of reconstruction and the chances for sustainable peace.[23] History shows that the situation in the former Yugoslavia worsened with the 1999 Kosovo conflict. One of the issues that arose with the ICTY was that how peace could be achieved through negotiations when the newly established international institutions was laying the ground for the prosecution of those local leaders the international community was negotiating peace with. There was a gap between the international community's aspiration for justice and how this application was perceived by those most affected in the region.[24] In Sierra Leone, it was felt that the functioning of the special court of sierra leone caused security concerns among witnesses especially those likely to testify against key personalities. It was better for security reasons that Taylor was not tried in the region.[25] Although the ICC is a criminal court, the fact that it operates in a political environment means that it is not entirely immune from political considerations. All ICTs though legal institutions have been created through political processes. In the case of Uganda, it is argued that the issuing of warrants gave rise to controversy among some people including those of northern Uganda, who argued that the ICC prosecution would be detrimental to ongoing attempts to end conflict peacefully which included use of amnesties by the amnesty commission.

National security can be examined through different approaches and perspectives. The two traditional approaches to security are those based on the concept of power, that is, the realist

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[22] Williamson, J.A., 'An Overview of International Criminal Jurisdiction Operating in Africa', *Review of the Red Cross, (IRRC)*, Vol.88 No. 861, 2006) pp 81- 111.

[23] Chandra, L.S., Olga, M. O.,& Herman, J *'War Conflict and Human Rights: Theory and Practice'* (Routledge Publishers, 2010,)p 28.

[24] Stower & Weinstein quoted in Kerr, Rachel. 'Peace through Justice: The International Criminal Tribunal for former Yugoslavia', *South East Europe and black sea studies, vol. 7, no.3* ,(2007) pp. 301-37.9

[25] Human Rights Watch *'Trying Charles Taylor in the Hague: Making Justice Accessible to those most Affected'* June, 2006 p. 7.

approach and peace which is the idealist or liberal approach.[26] Those who favour the approach of power derive their thinking from the realist school represented by scholars like Morgenthau and Carr.[27] Those who favour the peace approach are idealists who argue that war was a major threat to national security and that peace is a consequence of security.

Waltz and Mearsheimer are the main proponents of realist theory. They argue that the anarchic structure of the international system puts states in a struggle for survival.[28] According to Waltz, international systems, unlike domestic ones, are "decentralized and anarchic" and believes that international politics is "politics in the absence of government."[29] Waltz contends that a state constantly worries that it will become dependent on another through cooperative endeavors.[30] He also criticizes international institutions because he does not believe non-state actors such as international organizations are influential enough to make a difference.[31] Realists believe that international organizations like ICTs are controlled by nation states that have their own political agendas. This means that transnational organizations would not be able to speak and act in a non-partisan manner. Almost in the same vein, Mearsheimer argues that, "great powers recognize that the best way to ensure their security is to achieve hegemony."[32] He posits that an anarchic world necessitates a state to pursue power maximization vis-à-vis other states.

The challenge for realism is justifying the use of single nations to deal with issues that are transnational such as war crimes. This study argues that the realist contention that states have no duty to follow international rules and always act to further their national self-interest is not

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[26] Mongenthau, H.,*Politics Among Nations, (* New York, Knopf 5th ed, 1973) p 12.
[27] Carr, E, H, "*The twentieth year crisis*" (London Macmillan, 2nd Ed 1986) p 34.
[28] Sean M. Lynn-Jones, "International Relations Theory" *Royal Institute of International Affairs 1944 Vol. 78, No. 2 (April* 2002) pp 365-386 .
[29] Kenneth Waltz, *Theory of International Politics* (Reading, MA: Addison-Wesley Publishing Company, 1979)p 88.
[30] Ibid
[31] Ibid
[32] Mearsheimer, J.J, *The Tragedy of Great Power Politics* , (New York, W.W. Norton & Company, 2001) P 35

necessarily correct. Nowhere do the realists, however, claim that cooperation among states is impossible. The point they emphasize is that international cooperation is difficult to achieve and sustain. This study asserts that the emergence of a new norm in international society can cause states to redefine their behavior and even act against their material interests.[33] Liberal institutionalists generally prefer to cling to the naïve belief that institutions promote cooperation by making information available to all parties and reducing the risk of intrigues.[34]

Buzan classified five sectors comprising national security which include military, political, economic, environmental and societal. He further defined the referent objects and actors in each security sector including the threats they are vulnerable to. Buzan agrees that security is essentially a contested concept where different analysts have come up with different definitions to demonstrate the enormous breath of approaches that underlie the range of work on definition of security.[35] He defines security as pursuit of freedom from threat. On the other hand, Mbote defines security as the freedom from danger, fear or anxiety.[36] Buzan and Mbote's definitions give room for other non-military issues to be considered as security concerns. According to Buzan, military security generally concerns the two-level interplay of the armed offensive and defensive capabilities of states, and states' perceptions of each other's intentions. Political security concerns the organizational stability of states, systems of government and the ideologies that give them legitimacy. Such legitimacy can be subject of internal state actors and external actors like states in an international grouping. Economic security concerns such as access to resources, finance and markets, internal or external, necessary to sustain acceptable

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[33] Checkel, J. T. 'The Constructivist Turn in International Relations Theory' *World Politics, 1998, Vol.50(2) pp 282-350.*

[34] Grieco, Joseph M. 'Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism', *International Organization Vol. 42, No. 3.* 1988, pp 485-507.

[35] Buzan, B. *Peoples, States and Fear; An Agenda for International Security Studies in the Post Cold War Era,* (2nd Ed 1991, P Hertfordshire: Harverster Wheatsheaf) pp. 16-17

[36] Mbote, P.K., 'Gender,Conflict and Regional Security', in Mwagiru M., (ed.), *African Regional Security in the Age of Globalisation,* (Nairobi: Heinrich Boll Foundation, 2004) pp 83-104.

levels of welfare and state power. Societal security is about the sustainability of culture, religious, national identity and custom. Environmental security concerns the local and planetary biosphere as the essential support system on which all other human enterprises depend. Buzan further argues that these five sectors do not operate in isolation from each other. Each defines a focal point within the security question, and a way of ordering priorities, but all are linked together strongly.[37] This concept of a wider definition of national security espoused by Buzan would be relevant to this study as the researcher would adopt a broader other than the traditional definition of security.

Other proponents with a wider definition of security include Mwagiru and Ghirmazon who point out that security, as understood now, encompasses a variety of concerns such as poverty, environmental, social, economic, and gender concerns. In its contemporary context, security refers to the totality of the human experience and it is this on which security can be nested.[38] The totality of human experience can be understood to be anything that has to do with the well being of people, whether individually or as communities. This definition of security argues against the traditional state-centric approach and emphasizes human security. Buzan, Weaver and de Wilde observe the emerging debate on "wide" versus "narrow" security studies and note the widening of the security agenda argument as based on the acknowledgement of the existence of other non-military sources of threats to humanity.[39]

Wolfers argues that national security if used without specification leaves room for more confusion. His point is that though security can be characterized as threats to life or property, its

[37] Ibid p 12
[38] Mwagiru, M., and Ghirmazon, A., 'Foreward', in Mwagiru M., ed., *African Regional Security in the Age of Globalisation, Nairobi*: (Heinrich Boll Foundation, 2004) p xv.
[39] Buzan, B., Weaver, O., and Wilde, J. *Security: A New Framework for Analysis* (London: Lynne Rienner Publishers 1998) pp 2 - 3

meaning in terms of the means by which this aim is achieved, depends on the specification made about the concept.[40]

Mwagiru defines security as the pursuit of freedom from threat and the ability of states and societies to maintain an independent and functional integrity against forces of change which are seen as hostile. He further argues that security involves perceived and actual external and internal vulnerabilities. He adds that a myriad problems and threats to human security in the Region attract a broader meaning of security to include threats to human security.[41] This interpretation of security will be relevant to this study which examines the issue of human security and the need for states to formulate national security strategies that will protect the citizens against crimes against humanity, war crimes and genocide.

Scholars like Bellany define security from the traditional state-centric and militaristic perspective as relative freedom from war that should occur.[42] Evident in this definition is the emphasis on military power to protect the state. A similar definition is given by Lippmann who states that a nation is secure to the extent that it is not in danger of having to sacrifice core values if it wishes to avoid war, and is able, if challenged, to maintain them by victory in such a war.[43]

From this review, it is clear that most of the academic literature has eschewed normative justifications for ICTs and focused on improving the institutional design of ICTs to ensure its effectiveness. A lot of materials have been written on ICC, ICTY, and ICTR on one hand, and national security on the other. However, there exists a gap on the nexus between ICTs and national security particularly the challenges posed by the ICTs' process on national security which this study will address.

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[40] Wolfers Arnold, *Discord and Collaboration*, (University Press 1962) p 149.
[41] Mwagiru, M. *Human Security: Setting the Agenda for the Horn of Africa.* (Nairobi, African Peace forum, 2008) p 65.
[42] Bellany, I., Towards a Theory of International Security, *Political Studies, Vol. 29, No. 1, 1981, p.87-102.*
[43] Lippmann, W., *US Foreign Policy: Shield of the Republic,* (Boston: Little, Brown, 1943) p 51

1.4 Justification of the Study

Developments in international criminal law, including the establishment of ICTY, ICTR and ICC, and the reliance by states on the principle of universal jurisdiction, have been motivated by the desire to avoid impunity for international crimes and ensure justice and accountability. The role of the ICTs in the execution of their mandate has however raised national security concerns in the States under investigation. This study therefore examines the impact that the functioning of the ICTs have on the national security of states. The study has further been driven by a desire not only to delve into complex and theoretical issues of ICTs and national security but also to provoke, stimulate and instigate academic discourse and public debate into the efficacy and implications of ICTs on national security .

1.5 Conceptual Framework

This study proceeds on the concept of state sovereignty. State sovereignty is a concept that provides for states to exercise complete and total authority over matters that are within their territorial boundaries. It allows states to manage their internal affairs free from outside interference by other states or any other source. National security is grounded on state sovereignty. However, although the concept is well grounded in international law, developments in human rights have eroded it to the extent that states are ceding part of their sovereignty in recognition of international norms. By becoming parties to treaties, states cede some sovereignty although this action in itself does not threaten national security. Questions have however arisen as to whether when states ratify treaties or agree to be bound by international norms, the standing of sovereignty is affected. It is an accepted principle that states are still sovereign but they choose to be bound by international norms.

Rules of *jus cogens* generally require or forbid the state to do particular acts or respect certain rights. These are peremptory norms and include serious criminal offences which the state

must enforce against individuals. Included in lists of such norms are prohibitions on waging aggressive war, war crimes, crimes against humanity and genocide. Hence a state cannot plead national security to evade being bound by these norms.

The concept of state sovereignty has diminished with time and is contrary to the realists belief that it is the duty of a state to uphold its sovereignty at all costs and not cede such authority to another state, international organs/institutions and/or regional bodies. In practice when states join international regimes, they already have ceded some sovereignty and cannot claim the sanctity of state sovereignty. The decisions of governments to participate in those organizations or other international law initiatives are based on international agreements like the establishment of the international criminal court.[44] This is because states recognize that international crimes are so heinous that anybody who commits them is an enemy of the whole world. The ICTY and ICTR are creations of the UN and ICC is an institution which interacts with states within the cooperation and the complementary frameworks. It is therefore pertinent that as states conduct national security agenda, they pay attention to the fact that they are in a global environment and cannot plead state sovereignty with the advent of ICTs that have mandate to execute at an international level. It is clear that tension between national security and ICTs is superficial and may not be used to subvert national security.

The concept of state sovereignty will be pertinent in the analysis of this study since some states have always opposed the functioning of ICTs on the basis of state sovereignty and national security. From this, it is clear that state sovereignty though still a respected norm in international law, is not sacrosanct.

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[44] Musilla G M *'Between Rhetoric and Action: The Politics, Processes and Practice of the ICC's work in the DRC'*, (Institute for Security Studies, 2009) p 15

1.6 Hypotheses

In this study, the researcher proceeds on the following hypothesis:

i) The role of ICTs and safeguarding of national security are complementary.

ii) The role of ICTs in post conflict situations interferes with the national security of States.

1.7 Research Methodology

This study will use both primary and secondary sources of data. The secondary data will include in-depth study and analysis of documents on ICTs and national security and the interface between the two. This will include studying the relevant international agreements/ instruments that established these courts, UN Security Council resolutions, court cases, books, articles, journals, conference papers and information sourced from the internet. In addition, the researcher will also review research conducted by international organizations, scholars, government, non-governmental organizations and other institutions.

On primary data, the researcher will use purposive sampling where interviews will be carried out with selected people to establish their experience and perceptions of the ICTs' process especially as it relates to national security. This will provide the researcher with more insight on issues of ICTs and National Security. The sample units will consist of legal practitioners, officers from government ministries/departments particularly office of the president and state law office.

Various means to be used in gathering the primary data include consultations and interviews conducted with the key informants and stakeholders. The primary data will assist in information clarification from secondary data and fill the gaps. The data collection will be conducted using structured questionnaires to the key informants and other stakeholders that are involved in matters of national security and international criminal international tribunals. Closed and open

ended questions will be administered to respondents. Those to be targeted for interviews are mainly within Nairobi. After collection of the primary data, the researcher will edit and clean up to ensure reliability and validity. The researcher will then correlate the primary data with the secondary data. The information will be interpreted and utilized in accordance with the objectives and hypothesis advanced.

1.8 Chapter Outline

This thesis will be divided into Five (5) chapters.

Chapter One is on the introduction to the study.

Chapter Two examines the rationale and role of ICTs.

Chapter Three examines the concept of national security.

Chapter Four analyses the relationship between ICTs and national security.

Chapter Five will contain the conclusions.

Chapter Two

The Rationale of International Criminal Tribunals

2.0 Introduction

This chapter discusses the rationale of ICTs and examines their issues and philosophy. It discusses the development of international criminal law (ICL) and the need to punish individuals who hold the highest responsibility in the commission of international crimes. It further examines the relationship between international humanitarian law (IHL) and international human rights (IHR) and the need to punish those who commit serious violations of these. The shift of jurisdiction from national to universal and from states being subjects of international law to individuals is also examined. It further discuses the background to the establishment of ICTs starting with the Nuremberg and Tokyo tribunals, the cold war period, the development of ICL and the establishment of the *ad hoc* tribunals. It also examines the merits and justification that informed the establishment of UN based courts and the treaty based ICC including the differences between them and the laws applicable by different ICTs.

2.1 The development of international criminal law

International criminal law is a body of international rules designed both to proscribe international crimes and to impose on states the obligation to prosecute and punish at least some of those crimes.[1] It regulates international proceedings for prosecuting and trying persons accused of such crimes. It is substantive law indicating what acts amount to international crimes or procedural indicating actions by prosecuting authorities and stages of international trials. The development of international criminal law is closely linked to the establishment of international criminal courts. In classical international law, states, not individuals, were the exclusive subjects.

[1] Casese, A. *International criminal law* (Oxford University Press, 2003) p15.

Individuals were objects of international law and their protection was left to the jurisdiction of the states. Hence their possible violations of international rules were prosecuted and punished by the competent authorities of the state where the acts had been performed under the doctrine of territorial jurisdiction.[2] Such prosecution and punishment only occurred if the state authorities were entitled to do so under national legislation and provided they were willing to proceed. If they did not, the victim state was authorized to internationally require the offending state to either punish the perpetrators or pay compensation.[3] However, states came together and recognized international crimes. The creation of criminal norms in international law first required the recognition of the individual as a subject of international law. Second, it was necessary to overcome states' defensive attitude towards outside interference, which was rooted in the concept of sovereignty.

The Versailles Peace treaty of June 1919 made first attempts to establish individual criminal responsibility under international law and to set up international criminal courts[4]. This was followed by the Charter of the International Military Tribunal at Nuremberg (IMT Charter)[5] which provided for the creation of an international military tribunal "for the trial of war criminals whose offenses have no particular geographical location." These major war criminals were to be tried on the basis of the IMT-Charter for crimes against peace; war crimes and crimes against humanity. It was also clear that the domestic legality of a crime does not prevent its prosecution under international law. The IMT Charter can be considered the origin of international criminal law. The charter's main statement was that crimes against peace, war crimes and crimes against humanity entail individual responsibility under international law. In these trials, it was held that

[2] Ibid 37
[3] Ibid
[4] Art. 227-230

[5] Article 1 of the London Agreement of 8 August 1945

Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced. This was closely followed by the Charter of the International Military Tribunal for the Far East (IMTEFE) in 1946.[6] With this law, the Allied Control Council for Germany accepted and improved on the model of the Nuremberg war crimes trial. The law was intended to ensure that the subsequent trials in the four occupied zones would have a uniform legal basis. Numerous national trials took place, including the twelve so-called Nuremberg subsequent trials (1946-1949).[7]

2.2 Activities during the cold war

Until the early 1990s, efforts to codify or develop international criminal law or create an international criminal court were unsuccessful. The cold war period failed to bring justice to those responsible for atrocities in Cambodia, Argentina, East Timor, Uganda, Iraq and Salvador. Once the cold war began, the sharp ideological differences between super powers made the cosmopolitan ideals underlying such trials less relevant. Concerned that war crime prosecution would become one more arena for political conflicts, neither USA nor USSR pursued them. However, the lull ended with the end of the cold war and the first significant international tribunals were established by the UN in the 1990s.[8]

During the cold war period, international criminal law was codified in international treaties. The horrendous acts of war that were committed under Nazi Germany pricked the collective conscience of the world's nations. Soon after that, with the formation of the United Nations, states adopted the Universal Declaration of Human Rights in 1948. It was recognized

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[6] IMTFE-Control Council Law No. 10 of 20 December 1945 (CCL No. 10).
[7] Schabas, W.A. *An Introduction to the International Criminal Court* (New York, Cambridge University Press, 2004) p 32.
[8] Sriram, C. L., Ortega, O.M. & Herman, J. *War, Conflict and Human Rights: Theory and Practice* (Routledge, London and New York, 2010) p 215.

that the inherent dignity, equality and inalienability of rights of human beings family would be the foundation of freedom, justice and peace in the world. Disregard and blatant contempt for human rights, outraged the conscience of mankind and became the concern of the whole world as opposed to matters confined to individual sovereign states. Other treaties included the Genocide Convention of 9 December 1948, the Geneva Conventions of 12 August 1949 and the Additional Protocols that codified IHL. The adoption in 1948 of the Convention on Genocide and the 1949 Geneva Conventions marked a great advance on the extension of substantive law to include grave breaches of Geneva Conventions, and procedural law that created systems for repressing violations by states. The relevant provisions represented a momentous departure from customary law , for the conventions also laid down the principle of universality of jurisdiction where a contracting state could try a person held in its custody and accused of 'grave breaches' regardless of their nationality, victims' nationality and location of the offence. These were closely followed by the Convention against Torture in 1984 and the string of treaties against Terrorism.[9] In addition, there are those crimes that states had universal jurisdiction to deal with, like piracy. This was in recognition that some conduct violates not only the domestic legal order of a state, but also the international legal order that led to some crimes being designated as international crimes.

During this period, there were also activities under of the United Nations that included confirmation of the Nuremberg Principles by the U.N. General Assembly.[10] The International Law Commission (ILC) drafts for an international criminal code and the statute of an international criminal court, in particular ILC Draft Code of Crimes Against the Peace and Security of Mankind (1954, 1991, 1996) were also confirmed..

[9] Casese, A *International criminal law* (Oxford University Press, 2002) p 41.
[10] General Assembly Resolution 95 dated 11th December, 1946

States also had jurisdiction over certain offences recognized by states as of universal concern, even where none of the usual bases of jurisdiction exist. It is against this background that states established international criminal tribunals. Prior to this, it was left to domestic criminal courts of states to investigate and prosecute international crimes based on the principle of universal jurisdiction.[11] The creation of ICTs saw the shift of a sovereign state as the only subject of international law to individuals being subjects of international law.[12]

2.3 International Human Rights (IHR) and International Humanitarian Law (IHL)

IHL and IHR are legal instruments that may be used to responding to serious human rights violations during war or political violence. While these two sets of rights and obligations share superficial similarities, their sources, purposes, applicability and content differ. IHR recognizes rights for individuals and obligations for states and applies whether there is an armed conflict or not. IHL establishes rights for individuals and obligations for states and individuals and applies where armed conflict exists.[13]

Obligations under both IHL and IHR are contained in treaties and customary law. By signing the IHR treaty, states assume responsibility to respect, protect and promote human rights of individuals under their jurisdiction. In contrast, customary law binds all states regardless of whether they have signed any international document on human rights. IHL and IHR have distinct purposes and histories, even though violations of IHL are often charged along with violations of human rights. While the purpose of IHR is to articulate human rights, with an emphasis on individual rights, the purpose of IHL is to regulate conflict rather than protect

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[11] Plessis, M.D., *African Guide to International Criminal Justice* (Institute for Security Studies, 2008) p 17.
[12] Shaw, M.N. *International Law,* (Cambridge University Press, 6th ed, 2008) p195.
[13] Sriram, C. L., Ortega, O.M. & Herman, J.*War, Conflict and Human Rights: Theory and Practice* opcit p 48.

rights. IHL is governed by the four Geneva Conventions and the two Additional Protocols of 1977 that call for individual criminal responsibility.[14]

2.4 Background to the Establishment of International Criminal Tribunals

The establishment of ICTs dates back to post-World War II Nuremberg and Tokyo tribunals which were established to prosecute Nazi and Japanese leaders for crimes against peace, war crimes, and crimes against humanity. The Nuremberg trials were a series of military tribunals, held by the victorious allied forces of World War II, most notable for the prosecution of prominent members of the political, military, and economic leadership of the defeated Nazi Germany. The first and best known of these trials was the trial of the major war criminals before the International Military Tribunal (IMT), which tried twenty four of the most important captured leaders of Nazi Germany, though several key architects of the war (such as Adolf Hitler, Heinrich Himmler, and Joseph Goebbels) had committed suicide before the trials began.[15] The Nuremberg tribunals were criticized as a tribunal established by the victors to try the vanquished. There were feelings that it catered for the interests and justice of the victors while victims of the atrocities were not recognized either in the process of the tribunal or in its outcome.

The International Military Tribunal for the Far East (IMTFE), also known as the Tokyo War Crimes Tribunal was convened on April 29, 1946, to try the leaders of the Empire of Japan for three types of crimes: "Class A" crimes were reserved for those who participated in a joint conspiracy to start and wage war, and were brought against those in the highest decision-making bodies. "Class B" crimes were reserved for those who committed "conventional" atrocities or crimes against humanity. "Class C" crimes were reserved for those in "the planning, ordering,

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[14] Shaw, M.N. *International Law* opcit pp1168-1199.
[15] Davidson, E., *The Trial of the Germans: An Account of the Twenty-Two Defendants Before the International Military Tribunal at Nuremberg*, (University of Missouri Press, 1997) pp 30-31.

authorization, or failure to prevent such transgressions at higher levels in the command structure." The Tokyo trial lasted two and a half years, from May 1946 to November 1948. Other war criminals were tried in the respective victim countries. War crime trials were held at ten different locations in China.[16]

The Nuremberg trials initiated a movement for the establishment of a permanent international criminal court, eventually leading over fifty years later to adoption of the Statute of the International Criminal Court.[17] The UN was energized by the work of these tribunals to adopt, on 9th December 1948, a resolution mandating the International Law Commission to begin work on the draft statute of an international criminal court.[18] These trials formed precedence for individual criminal responsibility and establishment of other *ad hoc* international tribunals, such as the International Criminal Tribunals for the former Yugoslavia and for Rwanda.[19] ICTs are also a constant reminder that international law exists and that there is a willingness to enforce it. Yacobian argues that deterrence is one of the three possible justifications given for creation of international penal theory.[20] Prosecutions naturally lie with national jurisdiction. However, national jurisdictions have been unwilling to perform this duty or if they do, it is not to the satisfaction of the international community. It has also been observed that national jurisdictions have generally been ineffective in prosecuting most serious crimes against humanity and war crimes.

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[16] Dower, John W. *Embracing Defeat: Japan in the Wake of World War II.*(New York: New Press, 1999) p19.
[17] Clapham, A. Issues of Complexity, Complicity and Complementarity: From the Nuremberg Trials to the Dawn of the International Criminal. in Philippe Sands. *From Nuremberg to the Hague: The Future of International Criminal Justice.*(Cambridge University Press 2003) p19.
[18] Schabas, W. A., *An introduction to the International Criminal Court* (United Kingdom, Cambridge, University Press, 2001) p51.
[19] Ibid.
[20] Yacobian G.S. Sanctioning Alternatives in International criminal Law: Recommendations for ICTY and ICTR *World Affairs, Vol. 161, 1998 pp 48-55.*

2.5 Justification and Rationale of ICTs

The UN established mechanisms and instruments in an attempt to deter or punish individuals who hold the highest responsibility for commission of genocide, war crimes and crimes against humanity.[21] ICTs were different in the application of international law. While some like the ICC apply international law, including statute of the ICC, International humanitarian law, and general principles of law, others apply a mixture of international humanitarian law (IHL) and domestic law, for example the Special Court for Sierra Leone (SCSL). The extraordinary chambers of Cambodia apply IHL, customs and international conventions. In determining the rationale of ICTs, the discussion will revolve around four ICTs; ICTY, ICTR, SCSL and ICC. While ICTY and ICTR are *ad hoc* tribunals that were created by the UN Security Council under chapter VII of the UN charter to ensure international peace and security, the Special Court of Sierra Leone was as a result of the agreement between the government and the UN while the ICC is a treaty based court. The three international crimes that are of central importance to modern international criminal law are genocide, crimes against humanity and war crimes which attract individual criminal responsibility under international law. The crimes are defined in each statute establishing the various ICTs.

Different ICTs had different mandates and jurisdictions. The ICTY was established as an intervention to an ongoing conflict in the former Yugoslavia.[22] The conflicts were complex and ethnically based involving multiple belligerent parties and dissolution of the state. The conflicts involved mass atrocities partly attributable to the state. Three main conflict parties (Serbs, Bosnians and Croats) were involved. Although all of these wars are in many aspects

[21] Bass, J., *Stay the Hand of Vengeance* (Princeton: Princeton University Press, 2001) p33.
[22] Chandra Lekha Sriram Olga Martin – Ortega and Johanna Herman, *War Conflict and Human Rights: Theory and Practice* (2010, Routledge Publishers) p 67.

interconnected, one can differentiate between the Croatia (1991-1995), the war in Bosnia (1992-1995) and the war in Kosovo (1999).[23]

ICTY was established through Resolution 827 in May 1993 under Chapter VII of the UN Charter as a measure to maintain international peace and security. It was the first international criminal tribunal to enforce the existing body of international humanitarian law. It was an ad hoc tribunal solely established to deal with certain offences committed in the territory of the Former Yugoslavia since 1991. The tribunal presents one of the most important mechanisms for transitional justice in the Former Yugoslavian countries. Its mandate was to bring to justice all persons responsible for serious violations of international humanitarian law in the territory of the Former Yugoslavia[24]. The tribunal had the potential for creating and institutionalizing justice norms in the international society. In considering the establishment of ICTY, the Security Council had to make a difficult choice between upholding the inviolability of state sovereignty or risk undermining sovereignty by creating an international tribunal to pursue justice. The former Yugoslavia's sovereign right to exercise territorial jurisdiction was compromised in favor of an international mechanism for enforcing justice principles.

The ICTY's purpose was fourfold; firstly, to bring to justice persons allegedly responsible for serious violations of international humanitarian law, secondly, to render justice to the victims, thirdly, to deter further crimes and lastly to contribute to the restoration of peace by holding accountable persons responsible for serious violations of international humanitarian law. The ICTY had power to prosecute persons responsible for serious violations of international humanitarian law that were defined as: Grave breaches to the Geneva Convention of 1949 (Article 2), violations of the laws or customs of war (Article 3), Genocide (Article 4) and crimes

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[23] Ibid.

[24] Slaughter, A.M., 'Judicial Globalization', *Virginia Journal of International Law Vol. No. 40* (2000) pp 1100-1213.

against humanity (Article 5). The tribunal had primacy over national courts meaning it was supranational.[25]

Establishment of ICTY constituted an important precedent for multilateral action by states in international society to enforce principles of justice. The creation of ICTY through the Security Council meant that it was binding to all member states and they all needed to cooperate to ensure that the ICTY could function even if this obliges them to amend certain provisions of domestic laws. Its establishment constituted an important development and precedent in international politics and law and gave renewed impetus to the establishment of the ICC as a permanent justice enforcement mechanism.

All countries of the former-Yugoslavia were duty-bound to cooperate with the ICTY and required to collect and keep evidence, arrest and detain war crime suspects. After the declaration of its "completion phase" by the UN Security Council more than 10 years after its establishment, a number of big trials will remain unresolved[26]. This assumption is strengthened by the mass belief that few preconditions for war crime prosecution and trials are in place in the countries of former Yugoslavia to enable closing of these cases which will certainly "foster a culture of impunity"[27].

In terms of jurisprudence, the first case of the ICTY was against Dusan Tadic who was indicted in February 1995. He was finally sentenced to a total of 20 years in prison. This initial indictment reflects the inability of the tribunal to prosecute very high ranking and well known officials-a characteristic feature of the first cases of the ICTY. The tribunal was also faced with financial problems since funding was through the UN budget. Although established in 1993 it

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[25] Article 9 of the ICTY Statute.
[26] Sikkink, K. and Keck, M.,*Activists Across Borders: Advocacy Networks in International Politics* (New York, Cornell University Press, 1998) p 67.
[27] Katzenstein, S. 'Hybrid Tribunals: Searching for Justice in East Timor', *Harvard Human Rights Journal 16* , Spring 2003 pp 245-278.

was not ready to fully function as a court until 1999. The trial of former President Slobodan Miloševič received massive coverage throughout Kosovo and his death without a verdict was a disappointment to many[28].

The ICTY focused on cases of human rights abuse against civilians with its first trials indicting lower-level perpetrators. This enabled the tribunal to operate during the ongoing conflict and to be seen as proceedings within its mandate. The strategy was that trying lower level perpetrators will eventually lead to enough evidence to indict the higher level perpetrators. Further resolutions 1503 and 1534 indicated that the ICTY was to finish its work by 2010 and that to achieve this; the tribunal was to concentrate on the prosecution of those who bear the highest responsibility and refer lower ranking individuals to the national courts.

The establishment of ICTR in 1994 was a post conflict mechanism to ensure justice and accountability after ethnic cleansing began in Rwanda following the death of Rwandan President Juvenal Habyarimana, a Hutu.[29] The international community stood at bay while the Rwandese butchered one another and in a span of one hundred days, nearly a million lives were lost. [30] The site of these horrendous pictures brought the international community back to its sense.[31] However, by this time, the Rwandan Patriotic Front (RPF) had already taken over Rwanda and the killings had subsided. Formation of the ICTR was the last action the international community took to cover for their inaction.

[28] Akhavan, P., Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities, *American Journal of Internationa Law 95 no. 1*, 2001, pp 7-31.
[29] Peskin, Victor, Beyond Victor's Justice? The Challenge of Protecting the winners at the ICTY, ICTR, *Journal of Human Rights, Volume 4, no. 2,* April-June, 2005 pp19-57.
[30] Jose E. Alvarez, Crimes of States/Crimes of Hate: Lessons from Rwanda', *Yale Journal of International Law. Vol. 16,* 1999, pp 35-89.
[31] Moghalu, K.C.,'The Evolving Architecture of International Law: Image and Realities of War Crimes Justice: External Perceptions of the International Criminal Tribunal for Rwanda', *Fletcher F. World Affair, 2002, no. 16 pp 167-189.*

The Security Council resolution 955 of 1994 paved way for the establishment of an ad hoc international criminal tribunal whose purpose was to prosecute persons responsible for serious violations of international humanitarian law that include genocide, crimes against humanity and others committed in the territory of Rwanda between 1st January 1994 and 31st December 1994.[32] The decision to locate the seat of the Tribunal in Arusha was made by the Security Council in February 1995, based on the Secretary-General's recommendation through Resolution 977 of February 22, 1995. The Tanzania government willingly offered to accommodate the tribunal at the Arusha International Conference Centre (AICC). The tribunal had jurisdiction over genocide, crimes against humanity and war crimes which are defined as violations of Common Article Three and Additional Protocol II of the Geneva Conventions. The achievements of the tribunal were vital to the proper workings of the Rwandese government. This is because it has played a major part in trying to reconcile the Rwandese by bringing forward the alleged perpetrators of the genocide and prosecuting them. The tribunal held its first trial in 1997 following the arrival of the first accused to Arusha in May 1996.

ICTR had limited temporal jurisdiction which differed from ICTY that had no concrete date. The ICTR was also to deal with the prosecution of Rwandan citizens responsible for genocide and violations of international law committed in the territory of neighboring states during the same period[33]. The jurisdiction of the tribunal had primacy over national jurisdiction. The purpose of the tribunal was to contribute to the process of national reconciliation in Rwanda, maintenance of peace in the Region and ensure such violations are halted and effectively redressed. Shinoda notes that ICTR was the first international tribunal established for the

[32] Article 1-5 of The Statute of the International Criminal Tribunal for Rwanda (ICTR), 1994.
[33] Article 7 of ICTR Statute.

purpose of national reconciliation.[34] Further goals of the ICTR concern the whole of Africa. Its alleged relevance for peace and justice on the continent is supposed to be reached by avoiding a repetition of genocide in Africa, evolving political and legal accountability especially in Africa and creating and fostering awareness on international justice and humanitarian law in particular in Africa.

ICTR played a very important role of ensuring those responsible for genocide are held accountable. As of June 2006, the ICTR had handed down twenty two judgments involving twenty eight accused persons. Twenty-five of them were convicted and three acquitted. Since its establishment, the judgments delivered so far involve, "one Prime Minister, eight ministers, one Parliamentarian, three Prefects, six burgomasters, eight military officers", and several others holding leadership positions during the genocide of 1994. Some of the renowned cases include Akayesu,[35] and Kambanda.[36]

The tribunal has implemented a process of interpreting and giving content to substantive and evidentiary international criminal law. The tribunal has engendered jurisprudence, the scope and legacy of which was unimaginable at the time of creation. ICTY soon followed by ICTR indicted a head of government setting the precedent that leaders are not immune from prosecution. The tribunals have also been acknowledged for developing jurisprudence in terms of gender crimes. It is now clear in international humanitarian law that rape is a crime against humanity and can also be part of genocide, torture and war crimes.

ICTR however operated alongside the Gacaca courts that were operating domestically in Rwanda although it was supranational these courts. The Gacaca courts were part of a system

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[34] Shinoda, H . 'Peace Building by the Rule of law: An Examination of Intervention in the form of International Tribunals , *International Journal of peace studies, vol.7,*2002 pp 41-58.
[35] *Prosecutor vs Akayesu* –case ICTR 96-4-T judgement 2nd September 1998.
[36] *Prosecutor vs. Kambanda* case ICTR -97-23-S Judgement and sentence 4th September 1998.

of community justice inspired by traditional cultural communal law enforcement procedures. They were a method of transitional justice designed to promote healing and ensure moving on from crisis.[37]

The Special court of Sierra Leone was formed against a background of a civil war that had lasted over a decade. Among the atrocities committed were systematic and widespread acts of amputations, rape and arson, and particularly the RUF forced large number of children into its fighting force. However, governments' Civilians Defense Forces (CDF) committed atrocities albeit on a smaller scale. The international community recognized the need for some instrument of justice or an establishment of an institution to address the atrocities committed in the country. By resolution 1315 of August 2000, the UN Security Council established the SCSL on the basis of an agreement between the UN and government of Sierra Leone[38]. The basis for establishment of the SCSL is in its statute and the agreement concluded between the UN and the government of Sierra Leone .

Unlike ICTY and the ICTR which were purely international tribunals established under Chapter VII of the UN charter, the SCSL is a hybrid criminal court though it has characteristics to classify it as the international criminal tribunal. It is composed of international and national judges, lawyers and other appointed staff. It applies international law and domestic law.[39]

SCSL had power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and sierra Leonean law committed in the territory of Sierra Leone since 30th November 1996.[40] The court has inherent jurisdiction over persons who

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[37] Harrell, P. E., *Rwanda's Gamble: Gacaca and a new model of Transitional Justice* (New York. Writers Advantage Press, 2003) p43.
[38] (UNSC Res 1315(2000) of 14th August 2000(UN Doc S/RES/1315).
[39] Art 14(1) and 2 statute of the SCSL

[40] Art 1(1)) of the statute SCSL.

commit war crimes and crimes against humanity particularly those persons who bear greatest responsibility for international crimes committed in Sierra Leone. The court commenced its operations on 1st July 2002 and first indictments were approved by the court on 7th march 2003.

The prosecution was to include leaders who in committing such crimes threatened the establishment of and implementation of the peace process in sierra Leone. The SCSL had primacy over national courts and could only impose imprisonment but not death penalty. The purpose and aim of the SCSL was to establish a credible system of justice and accountability, end impunity, contribute to national reconciliation and help restore and maintain peace.

2.6 Permanent Mechanism to international crimes

The adoption of the Rome statute on 17th July 1998 and its coming into force in 2002 was a historic moment in the fight against impunity and international justice in general.[41] It seemed like in establishing the permanent International Criminal Court, the international community had finally bequeathed itself and future generations one of the most important institutions hitherto missing in the international arrangement. The statute was the result of a concerted international effort to combat impunity for what are considered to be the most egregious international crimes that in words of the preamble to the statute, 'deeply shock the conscience of humanity'.

The adoption of the Rome statute marked the culmination of effort by the international law commission to find a permanent mechanism that would address international crimes.[42] Tribunal fatigue that involved the process of reaching agreements on the tribunal statute, electing judges, selecting a prosecutor and staff, negotiating headquarters agreements and judicial assistance pacts and appropriating funds turned out to be too time consuming and exhausting for

[41] Musila, G , *Between Rhetoric and Action; The Politics, Processes and Practice of the ICC's work in DRC'* (Institute of Security Studies, 2009) p1.
[42] International Law Commission Report, 1994.

members of the Security Council. A permanent international criminal court was hailed as a solution to the problems that afflict the ad hoc approach .The ICC would build on the positive achievements of enforcing international human rights norms and establishing new case law.

2.6.1 Difference between the ICC and other ad hoc international tribunals

The ICC was different from the other international criminal tribunals in many respects. Firstly, The ICC was a Permanent court while the others were ad hoc with temporal jurisdiction. Unlike the ICTY and the ICTR, the ICC was established as a treaty based court independent from the UN. ICTY and ICTR were however creations of the UN which created them as different organs. Although the ICC was not a creation of the UN, it could however use the UN to facilitate cooperation among member states. Another difference is that the ad hoc tribunals were established after the offences were committed, had limited jurisdiction in time/space and had no uniform interpretation of the law while ICC exist before crimes against juris gentium are committed, have uniform or standard interpretation of international criminal law. In addition, while the ad hoc tribunals were supranational the national courts, the ICC was complementary in the exercise of its functions. The ICT's are similar in one aspect in that they all require cooperation of states since they do not have own police forces and implementation mechanism for international law.

2.6.2 Sovereignty issues in the creation of the ICC

The concept of state sovereign is one of the main issues that delayed the creation of a permanent criminal court. The difficulty encountered in the process of adoption of the statute was attributed to the concern that the jurisdiction of the court could infringe upon states' sovereignty. This explains why states had to negotiate the treaty and ratify the statute by freely

exercising their sovereign powers.[43] A number of states offered support for a permanent international criminal court but emphasized that this could only be established through negotiations. This necessitated a multilaterally negotiated agreement among states. A close analysis of the Rome Statute in particular those concerning the acceptance of ICC's competence, the jurisdictional links and the trigger mechanism appear to be very respectful of the principle of state sovereignty as the basic element of international relations. The provision of the complementary character of the ICC jurisdiction implies that the primary responsibility in repressing serious crimes of international concern lies with national courts. The ICC only comes to the fore and takes the place of national jurisdiction not at the beginning but rather when states fail to manage correctly their sovereignty allowing serious crimes to go unpunished. This is reflected in the provision of the ICC only intervening in situations where states are either unable or unwilling to prosecute individuals responsible for commission of these crimes within the jurisdiction of the state. The ICC is more of a fulfillment of the promise at the Nuremberg Trials.

2.6.3 ICC's mandate

The court has mandate to try individuals who hold the highest responsibility in the commission of serious crimes of concern to the international community, that is, genocide, crimes against humanity, war crimes and aggression.[44] The statute defines each of these crimes except for aggression which the court will exercise jurisdiction only after such a time when state parties agree on a definition of the crime and set out conditions under which it may be prosecuted[45]. The court also has power to provide redress to victims and survivors of these crimes and it is intended that the mere presence of the ICC has a deterrent effect on the future

[43] Benvenuti, P. Complementarity of the International Criminal Court to National Jurisdictions, in Lattanza F & Schabas (eds), W. *Essays on the statute of the international criminal court,* Vol.1, Fonte di Sotto, 1 ,1999, p39.
[44] Rome statute of the international criminal court, 2002, Article 5.
[45] Ibid

commission of human rights atrocities[46]. The court has also the potential to advance the rule of law internationally by impelling national systems to investigate and prosecute those indicted thus strengthening the ability of national jurisdictions to bring justice to perpetrators of these heinous crimes. However, a number of states including the United States, China, Russia, Israel, Sudan and India are not members to the treaty. The US played an important role during the Rome negotiations and originally did sign the statute but then on May 6, 2002, famously 'unsigned' the treaty[47]. This also led the US into signing agreements under Article 98 to prevent state parties from surrendering American subjects to the ICC.

The ICC has jurisdiction in cases where the accused is a national of a state party, the alleged crime took place on the territory of a state party, or a situation is referred to the court by the United Nations Security Council[48]. The court has a complementary role and is designed to complement existing national judicial systems. This is contrary to ICTY and ICTR that had supranational jurisdiction. This means that the ICC can only exercise its jurisdiction when national courts are unwilling or unable to investigate or prosecute such crimes. Primary responsibility to exercise jurisdiction over suspected criminals is therefore left to individual states.[49] The official seat of the ICC is in the Hague, Netherlands, but its proceedings may take place anywhere[50].

A compromise was reached, allowing the court to exercise its jurisdiction only under certain limited circumstances, namely; Where the person accused of committing a crime is a

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[46]Brandon, B. and Plessis, D. M.,. *The Prosecution of International Crimes; A Practical Guide to Prosecuting ICC Crimes in Commonwealth States,* (London; Commonwealth secretariat, 2005) p 35.

[47] Chandra L. S., Olga Martin – Ortega, O.M., & Herman, J., *War Conflict and Human Rights: Theory and Practice , opcit* p69.

[48] Murphy F. J. *The United States and the Rule of Law in International Affairs London,* (Cambridge University Press, 2004) p119.

[49] Plessis M. D., *African Guide to International Criminal Justice,* opcit p16

[50] Rome Statute of the International Criminal court (1998). Adopted at Rome on 17 July, UN Doc.A/CONF.183/9 (1998)

national of a state party; or Where the alleged crime was committed on the territory of a state party; or Where a situation is referred to the court by the UN Security Council[51]. The court's jurisdiction does not apply retroactively and can only try crimes committed on or after 1st July 2002 (the date on which the Rome Statute entered into force). Where a state becomes party to the Rome Statute after that date, the court can exercise jurisdiction automatically with respect to crimes committed after the statute enters into force for that state.[52]

According to the Rome Statute, all state parties have a general obligation to cooperate fully with the court in its investigation and prosecution of the crimes.[53] If a state party fails to comply with the request to cooperate with the court contrary to the provisions of the statute, the court may refer the matter back to the assembly of states or the Security Council depending on who originally referred the matter to court.[54] Forms of cooperation include and are not limited to arresting and surrendering suspects, identification and whereabouts of persons and object, taking of evidence, execution of searches and seizures and protection of witnesses and victims. A state party can deny a request for assistance if it concerns the production of any documents or disclosure of evidence that relates to national security.[55]

The ICC has so far only dealt with cases involving those alleged to bear the greatest responsibility for the commission of crimes within its jurisdiction through the three trigger mechanism. First, a state party refers the case to the ICC, secondly the United Nations Security Council refers the case or lastly, the Prosecutor by his own initiative, that is, *proprio motu* basis. The countries that have cases include; Libya which is not a state party and where the case has

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[51] Nyamuya M. J., *War crimes and Real Politics: International Justice from World War I to the 21st century* (London, Lynne Rienner, 2004) p44.
[52] Schabas A. W., *An Introduction to the International Criminal Court'*. (New York; Cambridge University Press, 2004) p51.
[53] Article 86 of the Rome Statute of the international criminal court
[54] Ibid, Article 87(7)
[55] Ibid, 93(4)

been referred by U.N. Security Council through Resolution 1970, Kenya, a state party, where a case has been referred by the prosecutor on *proprio motu* basis, Sudan, a non-state party but case referred by the UN security council through resolution 1593 of 2005, Uganda, a state party and whose government has referred the case to the ICC and lastly, the Central African Republic, a state party whose government has referred the case.

2.7 International criminal tribunals and international security

The UN Security Council under chapter VII of the UN charter could adopt binding decisions to restore international peace and security.[56] The adoption of chapter VII enforcement action constitutes an exception to the principle stated in article 2(7) of the charter, according to which the UN is not authorized 'to intervene in matters which are essentially within the domestic jurisdiction of any state'.[57] With the cessation of the cold war, the Security Council was able to extend its activities under chapter VII to most of the internal armed conflicts that occasioned commission of international crimes and devastating human security concerns. In 1991 through resolution 713, the UN Security Council determined the situation in the former Yugoslavia as constituting a threat to peace. This was followed by similar resolutions in situations concerning various states that include Rwanda where the genocide was considered to constitute a threat to peace and security; Sierra Leone civil war, the civil war in Democratic Republic of Congo and the Libyan case among others.

These conflicts ravaged the world, especially the African continent and occasioned egregious violation of human rights to large populations of people. Although all states have signed, ratified and are parties not only to the UN charter but to human rights instruments, some states have shown that their commitment to these guarantees have remained largely theoretical

[56] Chapter VII of the UN Charter.
[57] Article 2(7) of the UN Charter.

and in some cases, these continue to be violated. In such circumstances, the Security Council comes in once they interpret the situation as being a violation to international peace and security not only to ensure peace but also to ensure justice by bringing those responsible for the commission of any international crime before international criminal tribunals for trial. This explains why the UN Security Council through resolutions established the ad hoc tribunals and also refers situations under the ICC. Although prosecutions lie with national jurisdictions, they have been unwilling to perform these duties or they do so but not to the satisfaction of the international community especially when it comes to the prosecution of international crimes which necessitates intervention by the Security Council.

Chapter Three

The Concept of National Security

3.0 Introduction

This chapter examines the concept of national security. It begins by examining the definition of national security concept which is highly contested. The chapter analyses different approaches to national security from both the traditional/narrow perspective to contemporary/broad perspective. It discusses traditional security which is more concerned with physical security of the state, regime and leaders including the use of military means to protect it. It also addresses the contemporary context with the new paradigm of human security where the individual is the main referent object. The chapter therefore examines security of the state and security of the individual. National security is also conceptualized as emanating from within and without by analyzing it from the national, regional and global level.

Further, the chapter discusses the adoption of national security strategies using the elements of power that include; military, economic and diplomatic. It finally concludes by arguing that human security should be the key concept in national security strategies by states. It observes that most states respond to ICTs through national security strategies and foreign policies.

3.1 Definition and Conceptualization of National Security

There is no single universally accepted definition of "National Security". Security in itself is a contested concept. However, while the concept of national security and national interests remain contested concepts, there are some basic issues which have no contestation. Walter Lippmann gave one of the early definitions in 1943 in terms of a nation and war: "A nation has security when it does not have to sacrifice its legitimate interests to avoid war, and is

able, if challenged, to maintain them by war."[1] A later definition by Harold Lasswell, a political scientist, in 1950, looks at national security from almost the same aspect, that of external coercion: "The distinctive meaning of national security means freedom from foreign dictation".[2] Arnold Wolfers, while recognizing the need to segregate the subjectivity of the conceptual idea from the objectivity, talks of threats to *acquired values* "An ambiguous symbol meaning different things to different people. National security objectively means the absence of threats to acquired values and subjectively, the absence of fear that such values will be attacked. Golfers argue that national security if used without specification leaves room for more confusion. His point is that though security can be characterized as threats to life or property, the meaning of security in terms of the means by which this aim is achieved, depends on the specification made about the concept.[3]

The 1996 definition propagated by the National Defense College of India resembles the accretion of the elements of national power: "National security is an appropriate and aggressive blend of political resilience and maturity, human resources, economic structure and capacity, technological competence, industrial base and availability of natural resources and finally the military might." From this perspective, national security then, is the ability to preserve the nation's physical integrity and territory; to maintain its economic relations with the rest of the world on reasonable terms; to preserve its nature, institution, and governance from disruption from outside; and to control its borders." Charles Maier defines national security through the lens of national power. He observes that: "National security is best described as a capacity to control those domestic and foreign conditions that the public opinion of a given community believes

[1] Lipmann, W. *US foreign Policy: Shield of the Republic* (Boston little,Brown,1943) p51.
[2] Ayoob, M. 'Security in the third world: The worm about to turn?' *Royal institute of international affairs, vol.60, No.1 ,Blackwell Publishing, winter*, 1983-1984, pp 41-51.
[3] Wolfers Arnold, *Discord and collaboration: Essays on International Politics* , (Baltimore, John Hopkins,University Press, 1965)pp 149-150.

necessary to enjoy its own self-determination or autonomy, prosperity and wellbeing."[4] Mbote defines security as the freedom from danger, fear or anxiety.[5]

The United States Armed Forces defines national security of the United States as a collective term encompassing both national defense and foreign relations of the United States. Specifically, the condition provided by; a military or defense advantage over any foreign nation or group of nations; a favorable foreign relations position and a defense posture capable of successfully resisting hostile or destructive action from within or without, overt or covert.[6]

National security is considered to be the ability of a nation to project and protect its national values and interests from internal and external threats for its continued integrity, survival and the wellbeing of the citizens.[7]

The origin of modern concept of national security as a philosophy of maintaining a stable nation state can be traced to the peace of Westphalia where the concept of a sovereign state, ruled by a sovereign became a basis of a new international order of nation states. Thomas Hobbes in 1651 in his leviathan works stated that' Citizens yield to a powerful sovereign who in turn promises an end to a civil and religious war and to bring forth a lasting peace and give him the right to Conduct policy including to wage war or negotiate for peace. Immanuel Kant in what was later to be idealism, in 1795 'Perpetual Peace' proposed a system where nation states dominating national interests were replaced by an enlightened world order, a community of mankind where nation states subsumed the national interests under the rule of the international law because of rational insight, common good and moral commitment. Here, national security

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[4] Cindy H. *Transnational Nomads: How Somalia's Cope with Refugee Life in Dadaab Camps in Kenya'*(London, Oxford University Press 2007) p23.
[5] Mbote, P.K., Gender,Conflict and Regional Security, in Mwagiru M., (ed.), *African Regional Security in the Age of Globalisation,* (Nairobi: Heinrich Boll Foundation, 2004) pp 83-4.
[6] Buzan, B. *Peoples, States and Fear; An agenda for international security studies in the Post cold war Era*, (2nd Ed 1991, P Hertfordshire: Harverster Wheatsheaf) pp. 16-17
[7] Hart, G. *The fourth power: A grand strategy for united states in the 21st Century* (New York: Oxford University Press, 2004) p 115.

was achieved by this voluntary accusation by the leadership to a higher order than a nation state via international security.

As an academic concept, national security can be seen as a recent phenomenon which was first introduced in the United States after World War II, and has to some degree replaced other concepts that describe the struggle of states to overcome various external and internal threats. The concept of national security became an official guiding principle of foreign policy in the United States when the National Security Act of 1947 was signed on July 26, 1947 by America's President Harry S. Truman. The Act did not define national security which was conceivably advantageous as its ambiguity made it a powerful phrase to invoke whenever issues threatened by other interests of the state, such as domestic concerns, came up for discussion and decision. The realization that national security encompasses more than just military security was present, though understated, from the beginning itself. This is reflected in the fact that the Act established the National Security Council to advise the President on the integration of domestic, military and foreign policies relating to national security."[8]

3.2 Approaches to National Security

National security can be examined through different approaches and perspectives. The traditional approach which is state-centric and the broadened approach. The realist school of thought represented by scholars like Morgenthau and Carr favor the state centric approach and links security to the concept of power.[9] The two opposing approaches together with other alternative approaches conceptualize security differently; wideners and traditionalists. While traditionalists define security by equating it with military issues and the use of force, wideners accept it as more than military power and addresses societal concerns.

[8] Paris R. *Human Security: Paradigm Shift or Hot Air?* (International Security. Fall 2001) p52.
[9] Carr, E, H, *The twentieth year crisis*, (London Macmillan, 2nd Ed 1946) p 34.

Traditionally, national security was perceived in military terms but the concept has been broadened. Buzan, Weaver and de Wilde observe the emerging debate on "wide" versus "narrow" security studies and note the widening of the security agenda argument as based on the acknowledgement of the existence of other non-military sources of threats to humanity. Other proponents with a wider definition of security include Mwagiru and Ghirmazon who point out that security, as understood now, encompasses a variety of concerns such as poverty, environmental, social, economic, and gender concerns. In its contemporary context, security refers to the totality of the human experience, and it is this totality of experience on which security can be nested.[10] The totality of human experience can be understood to be anything that has to do with the wellbeing of people, whether individually or as communities. Mwagiru further defines security as the pursuit of freedom from threat and the ability of states and societies to maintain an independent and functional integrity against forces of change which are seen as hostile. He argues that security involves perceived and actual external and internal vulnerabilities. He adds that a myriad problems and threats to human security in the Region attracts a broader meaning of security to include threats to human security.[11]

Barry Buzan adopts a broader understanding of security and agrees that security is essentially a contested concept where different analysts have come up with different definitions to demonstrate the enormous breath of approaches that underlie the range of work on definition of security.[12] He looks at security from all angles, that is, from micro to macro addressing the social aspects and how people or society construct and securitize threats. He examines security

[10] Mwagiru, M., and Ghirmazon, A., 'Foreward', in Mwagiru M., ed., *African Regional Security in the Age of Globalisation*, (Nairobi: Heinrich Boll Foundation, 2004), p xv.
[11] Mwagiru, M. *Human Security: Setting an the Agenda for the Horn of Africa.* (African peace forum , Nairobi, 2008) p65.
[12] Buzan, B. *"Peoples, States and Fear; An agenda for international security studies in the Post cold war Era'*, opcit, p 19.

based on three levels and five sectors. The three levels are individuals, states and international systems. The five sectors are military, political, economic, environmental and societal. He further gave sufficient definitions as to who the referent objects and actors are in each security sector, and to which threats they are vulnerable.

3.2.1 Security of the State

The traditional understanding of national security went only as far as physical security of the state was concerned from external threats and most recently internal threats. Traditional concept of security therefore raised concerns as to whether it was security of the state, regime or leaders. State security was perceived from the realist point of view.

Realists tend to view international relations in terms of 'balance of power' among sovereign states. These states pursue their individual national interests in an anarchic international system[13]. These interests frequently run up against each other causing lack of peace and hence state of insecurity. This leads to power politics and the struggle for survival in a dangerous and irredeemably anarchic world. The political element of warfare as an instrument of state policy has been most famously summarized by Clausewitz who argued that: "war is not merely a political act, but also a real political instrument, a continuation of political commerce, a carrying out of the same by other means". [14]

Realists believe that sovereignty involves the territorial inviolability of the state from external interference in a manner consistent with the depiction of sovereignty in the treaty of Westphalia and the monopoly on the legitimate use of violence by the state. This conception of sovereignty is clearly related to broader realists' claims of the centrality of the state as the main actor in international relations and the reliance on self help as a means of preserving this

[13] Lawson S. *International Relations: Short Introduction* (Cambridge, Polity Press, 2003) p 35.
[14] Bellany, I., 'Towards a Theory of International Security', *Political Studies*, Vol. 29, No. 1, 1981, pp 75-102.

sovereignty. Realists further argue that the best means through which security may be achieved for the state and for its citizens is through the sovereign power of the state.

The concept of state security is therefore tied to the general scenario described above, especially with respect to the condition of anarchy and its negative consequences. The sovereign state becomes the ultimate guarantor of people's security. The state is thus the primary source of protection for individuals and sub-state groups.[15] This leads directly to the notion that it is the duty of the state to provide this protection, not only from external threats but from within as well. And should the sovereign power and its agents themselves become the major source of threat to people's security, and then the people are entitled to withdraw their support from the sovereign and defend themselves[16]. Realists believe it is incumbent for state to have a national security strategy in place that shall ensure security for its citizens.

States claiming sovereignty will inevitably develop offensive military capabilities to defend themselves and extend their power. As such, they are potentially dangerous to each other. Uncertainty, leading to a lack of trust is inherent in the international system. States can never be sure of the intentions of their neighbors and therefore they must always be on guard. States will want to maintain their independence and sovereignty and as a result, survival will be the most basic driving force influencing their behavior. Although states are rational, there will always be room for miscalculation and in the world of imperfect information; potential antagonists will always have an incentive to misrepresent their own capabilities to keep their opponents guessing.

Military security is traditionally therefore, the earliest recognized form of national security and it mainly deals with the physical security of the state. Military security implies the capability of a State to defend itself, and/or deter military aggression. Alternatively, military

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[15] Ullman, R.H., Redefining Security, *International Security*, Vol. 8, No. 3, 1993, pp16-67.
[16] Walt, S.M., 'The Renaissance of Security Studies', *International Studies Quarterly, Vol. 35, Issue No. 2, 1991, pp 211 – 39.*

security implies the capability of a State to enforce its policy choices by use of military force. Military security generally concerns the two-level interplay of the armed offensive and defensive capabilities of states, and states' perceptions of each other's intentions. A state is the main referent object though not the only one. The securitizing agent is the government or the states' representatives who must protect the state from internal and external threats.

Political security concerns the organizational stability of the state, the system of government and the ideologies that give the state legitimacy. Such legitimacy can be subject of internal state actors and external actors like other member states in an international grouping. The main threat is against state sovereignty and the stability of the state.

Economic security concerns issues such as access to resources, finance and markets, internal or external, necessary to sustain acceptable levels of welfare and state power. Historically, conquest of nations have made conquerors rich through plunder, access to new resources and enlarged trade through controlling of the conquered nations' economy. In today's complex system of international trade, characterized by multi-national agreements, mutual inter-dependence and availability of natural resources enables states to have the freedom to follow choice of policies to develop a nation's economy in the manner desired which forms the essence of economic security.

3.2.2 Security of the Individual

Modern conception of national security has embraced the notion of societal security, that is, human security. This includes security of the citizens and extends to health, food, education among others. The basic argument is that if national security does not involve societal security, then it will not be delivering full security for the state[17]. Societal security is closely connected to political security but different. It focuses on organizational stability of the states and the

[17] Buzan, B, *People, states and fears'* opcit, p.35

sustainability of culture, religion, national identity and custom. It is about collectives and communities that are defined through common identity. The societal threats against a national identity are most common in weaker states where there can be several identities[18]. In stronger states, the state itself can be a threat against smaller identities and communities where culture, religion and traditions are affected by the states' law and rules. It also concerns human security which emphasizes the protection of individuals.

Critical theory rejects the emphasis placed on the state and takes in a broad array of factors as far as security is concerned. They view sovereignty as constituting an obstacle to the realization of security. Ken Booth rejects the belief that the state is and should be the key guardians of people's security.[19] Maintenance of internal and external sovereignty obfuscates the possibility for the victims of insecurity to be empowered, and for non-state actors concerned with emancipation to affect security practices.

As critical theory is closely related to Marxism or socialist political viewpoints, a key focus for critique is global capitalism in that it generates relentless competition for materials and resources, it is global capitalism and not anarchy that must be held responsible for much conflict and violence, whether it takes place within or between states. Nevertheless, certain strands of critical theory are however, very much concerned with each other, but in terms of how they treat their own inhabitants. Given that it is not widely acknowledged that people are much more likely to suffer at the hands of their own governments than from any external threat, critical theorists argue that attention needs to be shifted from the security of the state as such, to the security of groups and individuals within it[20].

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[18] Ibid

[19] Ken Booth, *Security and Self: Reflections of a Fallen Realist', in Critical Security Studies,* opcit, *p106.*

[20] Jackson R.& Seronsen G., *Introduction to International Relations: Theories and Approaches* (New York, Oxford University Press, 2003) p 33.

Critical theorists are of the view that any security agenda worth its name must be primarily concerned with the quest for human emancipation.[21] This entails adopting a methodology that is addressed not merely to problem-solving with the aim of simply ameliorating the worst excesses, but to a more thorough transformation of that order to achieve the greatest possible measure of security through human equality. The focus on emancipation renders critical theory a progressive, modernist political project with roots in enlightenment philosophy[22].

3.2.2.1 Human Security

The emerging paradigm of human security challenges the traditional notion of security by putting a human being in place of the state as a proper referent object for security.[23] According to Tow and Trood, the idea of human security encompasses a range of concerns that take the concept of security into almost any area of human life. The origin of the idea can be traced to the 1960s and was reflected in the new security literature that began to emerge in the 1980s and 1990s. It has been given much of its recent attention currently by the United Nations "Human Development Report of 1994" which provided a major statement on the new security concept. The report argued that traditional definitions had been far too narrow, with the concept being largely confined to "security of territory from external aggression, or as the protection of national interests in foreign policy or as global security from the threat of nuclear holocaust". Forgotten in all these were the more basic concerns of ordinary people who needed security in their daily lives[24]. Human security was defined generally in terms of safety from chronic threats

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[21] Goldstein J. , *International Relations* (San Francisco, Longman, 2003) p56.
[22] Clemens W. , *Dynamics of International Relations* (Lanham, Rowman and Littlefield Publishers, 1998) p37.
[23] Nkabahona, A. 'Improving Human Security in the Horn of Africa through the Observance of Human Rights' in Mwagiru, M (ed), *'Human security: Setting the Agenda for the Horn of Africa'* (African Peace Forum, 1st ed. 2008) p27.
[24] Ibid .

such as hunger, disease and repression as well as 'protection from sudden and hurtful discretions in the patterns of daily life whether in homes, in jobs or in communities[25].

A more specific list of seven security concerns was thus provided. These include: freedom from poverty; food security- access to basic sustenance; healthy security – access to health care and protection from disease; environmental security – protection against pollution and depletion; personal security – including domestic violence; community security – referring to the integrity and survival of traditional cultures and minorities; and political security – the protection of civil and political rights[26].

According to Anuradha M. Chenoy[27] Human Security is the necessary response to the unending spiral of armed conflicts that continue to engulf the contemporary world. The concept of human security emphasizes that every aspect of human rights and needs is necessary for security. This is borne out by the fact that conflicts occur when these rights are denied and needs are regressed. Human security is a people-centered approach that addresses human rights, capabilities and aspirations and questions the logic of traditional security approaches that focus on the state to rely on military methods.[28] Human security seeks to complement state security by broadening and democratizing security since issues like identity politics, or the neglect of social justice can become the central themes of national security, just as many inter-ethnic rivalries or sectarian conflicts have become.

The concept of human security has changed the security concept from territorial security to people's security, from militarism to human development. With this new understanding of

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[25] Walter C. Clemens, *Dynamics of international relations,* opcit, p19.
[26] Ibid
[27] Chenoy, A. (2004) A Plea for Endangering of Human Security, *Journal of International Studies, Vol. 42, No.2 of 2005, pp 168-69*
[28] Ibid

security, threats to human security can be economic, food, health, environment, personal, community and political.[29] These threats could be either internal or external.

Human security broadens security concerns to include the non-traditional aspects of security. Traditionally, states had a monopoly over security and in many cases, this concern is mixed with regime security. States are concerned primarily with preserving their territory and sovereignty and furthering their perceived national interests. If the territorial status quo is intact, they consider themselves secured[30]. Axworthy says that; human security views people's security as a critical part of the state's concern without diluting its interests[31]. He "sends this point home" by saying that "most recent conflicts (especially in Asia and Africa) rise from issues in civil society and it is the people who are affected by it." The people-centered approach thus is a radical departure from the traditional security conceptualization.

Human security concept emphasizes the protection of the individual. Hence, protecting individuals and groups make the world a more secure place since the security machinery would be more focused on quantifiable threats that endanger the basic survival of human beings rather than perceived threats to the state. Threats to human security receive adequate global attention.

The link between human security and human rights is captured in Article 3 of the Universal Declaration of Human Rights (1948) which states that everyone has the right to life, liberty and security of the person. This article refers to human security in the structure of human rights. Tension sometimes exists between the preservation of the state (by maintaining self-determination and sovereignty) and the rights and freedoms of individuals. Although national security measures are imposed to protect society as a whole, many such measures will restrict the

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[29] Nkabahona, A. 'Improving Human Security in the Horn of Africa through the Observance of Human Rights' in Mwagiru, M (ed), *Human security: Setting the Agenda for the Horn of Africa* opcit p27.
[30] Doyle T. and McEachern , *Environment and Politics* (New York, Routledge, 1998) p115.
[31] Connelly, James and Smith, Graham, *Politics and the environment: from theory to practice.* (London: Routledge 2003) p69

rights and freedoms of individuals in society. The concern is that where the exercise of national security laws and powers is not subject to good governance, the rule of law, and strict checks and balances, there is a risk that national security may simply serve as a pretext for suppressing unfavorable political and social views. In the United States, the politically controversial USA Patriot Act and other government action has brought some of these issues to the citizen's attention, raising two main questions; to what extent, for the sake of national security, should individual rights and freedoms be restricted and can the restriction of civil rights for the sake of national security be justified. Suppressing democratic freedoms as an expedient to achieving national security will only weaken security further by radicalizing and isolating certain populations, which in turn will contribute to these populations' perceived grievances and thereby increase the impetus to violence.[32]

It is an accepted principle in international law that state sovereignty implies state responsibility and the primary responsibility for the protection and security of its people lies with the state itself. Where there are egregious violations of human rights or where a population is suffering serious harm as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.[33] States bind themselves to international norms and in the driving of the national security agenda states should always consider its international commitments.

[32] Megan, Y.A.,Giglio,J. & Paxson, M , *National security and human rights,* (Woodrow Wilson international centre for scholars, Kennan Institute, 2006) p16.
[33] Report of the International Commission on Intervention and State Sovereignty: '*The responsibility to protect*' Dec. 2001.

3.3 National Security Strategy

In order to address security in the contemporary context, States come up with grand strategies or national security strategies. A grand strategy is a process of determining what interests the state has, what priorities to place on various interests and what national instruments of power are available, appropriate and acceptable for achieving individual interests and the aggregate of those interests[34]. The process is inevitably political because it involves public policy choices about the relative interests that are at stake, their intensity and the risks each involve[35]. The process is always contentious especially in separating interests that are vital from those that are low level such as major interests. States begin by defining their national securities, which is drawn from their national vision and values that enables states to come up with their objectives. A national security strategy is therefore both a vision and a blue print about how a state intends to protect national interests and survive in the volatile world[36]. It is important to conceptualize whose security is at stake.

The state is the central actor when it comes to ensuring national security and should conceptualize security from the broadened approach with emphasis on human security. This is because non-military and societal security issues are of greater practical concern to national security making the traditional security discourse more defunct for the third world under contemporary conditions. This is not to suggest that traditional threats should not be considered on their own, but rather the critical approach (which attempts to highlight past inadequacies of

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[34] Drew, D & Snow, D. M. *Making the Twenty First Century Strategy: An Introduction to Modern Security Processes and Problems,* (Air University Press, 2006) p 5

[35] Ibid.

[36] Mwagiru, M , Coordination of National Security Strategy: Perspectives on Grand Strategy Formulation in Kenya, *NDC Occasional papers on security No. 1, Institute of Diplomacy and International Studies, University of Nairobi, 2008, p2.*

the traditional security discourse) serves a central conceptual and empirical focus "to aid in understanding the future role of the Third World in the international system[37].

States have therefore to come up with national security strategies and foreign policies that will ensure the driving of the national security agenda both in the internal and external environment. The making and implementation of strategy at the national level is largely an exercise in risk management and risk reduction. Risk, at that level, is the difference between the threats posed to a nations' security by adversaries and the capabilities of a state to counter or negate those threats.[38] Assessing risk and resolving it has two primary dimensions. The first is the assessment of risk itself: what conditions represent threats to national security, and how serious are those threats relative to one another and to a states' safety? The answers to these questions are not mechanical and obvious but are the result of subjective human assessments based on different political and philosophical judgments about the world and a states' place in it. The other dimension is the adequacy of resources to counter the threats that are identified. In circumstances of plenty, where there are adequate resources like manpower, material and perceived will to counter all threats, this is not a problem. In the real world, each of these dimensions presents a real set of issues, which must be acknowledged up front.[39] Strategists' first task is to define the national security objectives that form the foundation of the strategy process. If the objectives are ill defined, inconsistent, or unsupported by some degree of national consensus, then the strategists' function becomes exceedingly difficult.

The first step for every state is to determine the national security objectives. This is based on national interests for whom policies are defined in a bid to achieve the interests based on the

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[37]Ibid.
[38] Drew, D. & Snow D, M., *Making Twenty-first century strategy: An introduction to modern national security processes and problems* 'opcit, p6
[39]Ibid

national vision to ensure its survival both in the internal and external environment. Nuechterlein categorizes national interests into four levels based on their intensity. The first level refers to survival interests which exist when the physical existence of a country is in jeopardy due to attack or threat of attack. Clearly, protecting its existence is the most basic interest the state has. If a state cannot survive, no other interest matters.[40] Secondly, vital interests' concerns circumstances where serious harm to the nation would result unless strong measures, including the use of force, are employed to protect the interests. Major interests are situations where a country's political, economic, or social well-being may be adversely affected but where the use of armed force is deemed excessive to avoid adverse outcomes. Peripheral interests are situations where some national interest is involved but where the country as a whole is not particularly affected by any given outcome or the impact is negligible.[41] It is important for states through policy makers and analysts to identify proper national interests since improper identification of national interests would lead to instability especially when wrong issues are identified as constituting national interests of a state. Citizen participation is also key. Since no state has finite resources, prioritization is key in determining which interests are a threat to national survival and therefore should be securitized to ensure proper allocation of resources. These securitized interests should be separated from non-political that can be addressed by non-state actors and politicized that government departments/ministries can handle.

Different perceptions of the international environment lead to different strategies of how best to achieve national ends. This is due to the fact that the international system is anarchic and states must to some extent rely on their own ability to realize national interests. States should

[40]Neuchterlein, D. *United States National Interests in a Changing World* (The University Press of Kentucky, 1973) pp6-7

[41] Drew, D.M, Snow, D.M: *Making Twenty-First-Century Strategy: An Introduction to Modern National Security Processes and Problems,* opcit, pp 33-36.

therefore posses an appropriate mix of the ways to either convince or coerce other states to act in accordance with its interests in different circumstances. The available instruments of power that a state has include military, economic and diplomatic or political. Military instrument is where a country's armed forces can be employed or used as a threat to achieve national ends. Economic is the application of the state's material resources while Diplomatic refers to the ways the international political position and diplomatic skills of the state can be brought to bear in pursuit of national interests.

The ability to mediate successfully and produce unique and mutually acceptable issues without application of military or economic power is the essence of the diplomatic instrument. Once a state has carried out an evaluation of strengths, weaknesses, opportunities and threats; it then applies the appropriate instruments of power to achieve the desired ends (Objectives). Accordingly, in order to possess national security, a nation needs to possess all the instruments of national power though the capabilities are different.

National security threats are both internal and external and involve not only conventional foes such as nation-states but also non state actors such as terrorist organizations and multi-national organizations. The threats are analyzed at national, regional and global level. Other threats include political instability, food insecurity, organized crime, natural disasters and events causing severe environmental damage.[42] Towards this end, states take many measures to ensure national security. This include use of diplomacy to rally allies and isolate threats; marshalling of economic power to facilitate or compel cooperation; maintaining effective armed forces; implementing civil defense and emergency preparedness measures including anti-terrorism legislation; ensuring the resilience and redundancy of critical infrastructure; using

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[42] Michael C. 'Words, Images, Enemies: Securitization and International Politics'. *International Studies Quarterly. Issue No. 47.* 2003 pp167-182.

intelligence services to detect and defeat or avoid threats and espionage, and to protect classified information; Using counterintelligence services or secret police to protect the nation from internal threats.[43]

In the formulation of national security strategy, states should conceptualize it in a broadened way to include societal security which deals with human security and the 'Human Being' as the main referent object. It also becomes apparent that security threats are both from internal and external. The most important question is; Whose security is at stake in the formulation of the grand strategy. Regimes can be responsible for the insecurity of their own citizens while citizens too may be responsible for insecurity of the regimes. This tendency causes insecurity dilemma. The notion of insecurity dilemma poses the serious challenge of whose security is to be preserved in a national security strategy. In principle, distinct securities may be at issue simultaneously; the security of the individual citizen, security of the regime and security of the state. For a society composed of communal groups, with distinctive ethnic and religious identifications, their perceived securities may also be at stake making the interplay and competition among the various players even more complex and irresolvable.

At a political level, there has been a growing recognition that systems of government and ideologies have a powerful influence not only on domestic stability but on international security. This has led to recognition by states in the contemporary world that their own security is interdependent with the security of other states. States have therefore developed a pattern of institutionalized cooperation between states that have opened up unprecedented opportunities to achieve greater international security in the years ahead.[44] States in their national security strategies identify what areas they need to cooperate and how they will do it. In most cases, they

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[43] UNHCR, *The State of the World's Refugees: Human Development in the New Millennium* ,Geneva, 2006.
[44] Ibid.

do this by entering into treaties to ensure international peace and security and create an international order that promotes peace, security and opportunity through stronger cooperation. States also use foreign policy as part of the instruments of power. National interests are well articulated in the foreign policies that attempt to influence other actors in the external environment and get support on certain issues. Security here will depend upon diplomats who can act in every corner of the world from grand capitals, dangerous outposts, development experts that can strengthen governance and support human dignity and intelligence and law enforcement that can unravel plots, strengthen justice systems and work seamlessly with other countries.[45] In the strengthening of the justice system, States put in place national mechanisms that look at interests of justice.

The executive branch of government has the major responsibility for the formulation of foreign and national security policies. At the helm is the president assisted by relevant executive branch agencies. These policies are based on national security strategies. From the contemporary understanding of national security, various sectors ought to be involved in the formulation and implementation. States have therefore to put in place best modes and structures for coordination because without coordination, implementation of a national security strategy becomes ineffective. Coordination also assists in the allocation of resources of national security strategy formulation and implementation to priority areas.

It is also pertinent that as states conduct national security agenda, they pay attention to the fact that they are in a global environment and cannot plead state sovereignty with the advent of ICTs that have mandate to execute at an international level.

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[45] National Security Strategy for United States of America, 2009

Chapter Four

The Relationship between International Criminal Tribunals and National Security

4. 0 Introduction

The previous chapters examined the rationale for international criminal tribunals and role and conceptualization of national security. This chapter examines the relationship between the international criminal tribunals and national security. In examining this relationship, it discusses the perceived tension between the interests of justice and political interests. It also addresses the relationship between international criminal tribunals and the national mechanisms and looks at the issues of transitional justice. It analyses the national security concerns of states while dealing with ICT's. This is because the national security role and the ICT's role have different priorities. Whereas ICT's were established with the primary justification to prosecute individuals who commit international crimes and therefore are set to ensure justice and accountability, states have their national security strategies/agenda's which they would want to pursue to ensure that their national interests that include state sovereignty and territorial integrity are protected. It also examines state's cooperation with ICTs and amongst themselves based on their national security strategies and foreign policies. The issue of States' obligations to international treaties which states have in the exercise of their sovereign rights agreed to be bound is also examined. This relationship is discussed under the following issues;

4.1 National Security at ICTs' intervention

ICTs have always intervened in post conflict situations or where conflicts are ongoing. In most of these situations, international crimes that include genocide, war crimes and crimes against humanity have been committed while in other circumstances, the concerned states have

in their national security policies given a narrow (traditional) interpretation of national security and ignored the societal security perspective. Consequently, this has led to devastating human security situation. In some of these cases, the effects of the conflicts are not only felt nationally but also internationally raising concerns about international peace and security. In such cases, the international community has responded through establishment of ICTs to ensure justice and accountability while the concerned states try to put in place national mechanism to stabilize the situation. In the case of ICTY, the end of the cold war resulted in Yugoslavia falling apart and the onset of yet another violent conflict. The conflict was characterized by government sponsored ethnic cleansing policies that lasted for long.[1] Serbian leader Slobodan Milosevic encouraged nationalism through his vision of the 'great Serbian project' aimed at creating an ethnically homogeneous Serbian state. He began by calling Serbian domination of the country. This ultra nationalism sparked separatism and ultimately the violent breakup of the state along ethnic lines. In 1991, Milosevic attacked Slovenia and Croatia after they had declared their independence and were keen on protecting state sovereignty and inviolability. In 1992, Milosevic attacked Bosnia with devastating 'ethnic cleansing' of Bosnian Muslims and Croats[2]. The conflict was largely based on ethnicity and religion with political leaders using identity and historical grievances to stalk violence. This means that there were egregious violations of human rights. In addition, the human security situation was devastating and the political elite was more focused on the security of the state, regime and leadership than the individual.

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[1] Birdsall, A. 'The International Criminal Tribunal for the former Yugoslavia – Towards a More Just Order?' *Peace Conflict & Development, Vol 8, January 2006 pp1-24.*

[2] Morris & Scharf, *An Insider's Guide to the International Criminal Tribunal for the former Yugoslavia: A Documentary History and Analysis,* (Irvington-on-Hudson, New York: Transnational Publishers, 1995)p 22.

In Rwanda, genocide was carried out by the Hutu political regime, the highest level of government that had for a long time carried out politics of exclusion[3]. The Rwandan conflict was not a spontaneous outburst of savagery. The media organized the extermination of the Tutsi and Hutu moderates through the systematic incitement of the public, targeting a largely illiterate population with no access to other sources of information.[4] The Hutu Interahamwe and other volunteer militia systematically infiltrated every town and village in Rwanda and compiled accurate lists of those slated for extermination[5]. Fighting only stopped when the Tutsi led Revolutionary Patriotic Front (RPF) gained control of the whole country and installed a government. The new government as a matter of national security policy petitioned the Security Council to establish a tribunal to prosecute the perpetrators[6].

The impact of civil war on an already-poor country was devastating. Sierra Leone's economy, infrastructure, education and health systems were left in ruins.[7] But the human cost was perhaps the greatest raising concerns of human security. Pre-existing social and economic inequalities proved initial fertile recruiting conditions for the main protagonists of the conflict. As the war progressed, regional divisions were exploited and the violence quickly developed into a Corrosive ethnic dimension[8]. This left the country shattered and lasting peace seemed a distant prospect. Successive agreements were signed at Abidjan in 1996, Conakry in 1997 and Lomé in 1999 in an effort to halt the conflict. The United Nations Mission in Sierra Leone (UNAMSIL) was established in 1999 to keep the peace and assist in rebuilding the country, but it took a further three years before the violence finally stopped. In post-conflict Sierra Leone, two

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[3] Plessis, M. D., *African Guide to International Criminal Justice.(* Institute for Security Studies, 2008) p35.
[4] Ibid.
[5] Chandra, Olga & Ortega, *War, Conflict & human rights*, (Routledge, New York, 2010) p171
[6] Shraga, D. & Zacklin, 'The International Criminal Tribunal for Rwanda' *European Journal of international law*, Vol.7, 1996, pp 501-518.
[7] Chandra, & Ortega, *War, Conflict & human rights'* opcit, pp 85-87.
[8] Ibid

transitional justice mechanisms ran in parallel, at least for a part of their respective operations. The Truth and Reconciliation Commission ("TRC") functioned exclusively within Sierra Leone between 2002 and 2004 and the Special Court for Sierra Leone which began its operations in mid-2002, with the first indictments appearing in 2003.

Like all other societies recovering from conflict situations, Sierra Leone was faced with a number of competing national priorities: to seek accountability for human rights violations; to promote reconciliation in communities previously divided by conflict; to support demobilization, disarmament and reintegration of former combatants; to press for reparations for the victims of the conflict; and to strengthen national institutions among others. The capacity of particular post conflict transitional justice mechanism to assist in any of these aims was significantly influenced by the prevailing circumstances. The TRC found despite the vast resources, the same had been mismanaged by successive governments and had not benefited the people of Sierra Leone. There was also a regional angle in Sierra Leone national security. Over the past several decades, West Africa as a region had been plagued with instability and conflict including Sierra Leone's immediate neighbors. This was the case with Liberia which got involved in Sierra Leonean conflict and the involvement of former Liberian President Charles Taylor that became the subject of the Special Court's trial at the Hague.

In Sudan, violence exploded in Western Darfur, where janjaweed militias with links to government carried out campaigns of intimidation and terror against the civilian population. The systematic nature of the attacks led to their characterization as crimes against humanity, and possibly genocide. In January 2005, the Commission reported that it had compiled a confidential list of potential war crimes suspects and "strongly recommended" that the Security Council

refers the situation to the ICC.[9] Following the Council's referral, the Office of the Prosecutor initiated its own investigations in June 2005 and after submissions before the ICC secured a warrant of arrest against Omar Al Bashir, a sitting head of state.[10]

The ICC intervention in Kenya followed an investigation into the post-election violence that took place in 2007/2008, in which an estimated of over 1,000 individuals were killed, hundreds of thousands displaced, and a range of other abuses, including sexual violence, allegedly committed.[11] Although the immediate trigger of the violence was disputed presidential results, Kenya had long standing structural conflicts[12]. In the Kenyan case, the prosecutor was quick to open investigations on *proprio motu* basis.

Ugandan case was one of Africa's longest running conflicts where LRA attacks in the mid 1990's forced approximately three-quarters of the Acholi population to flee their homes in Gulu and Kitgum/Pader districts in northern Uganda. The conflict caused an estimated over a million internally displaced persons, a clear indication of lack of human security in this region. The ICC unsealed arrest warrants issued by the Court in respect of LRA leader Joseph Kony and commanders Vincent Otti, Okot Odhiambo, Dominic Ongwen, and Raska Lukwiya in October 2005,. The LRA was accused of establishing "a pattern of brutalization of civilians," including murder, forced abduction, sexual enslavement, and mutilation, amounting to crimes against humanity and war crimes.[13] None of the suspects was arrested. Ugandan military operations, supported by the United States, to kill or capture senior LRA leaders in Congo, South Sudan, and Central African Republic were initiated.

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[9]Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, S/2005/60, January 25, 2005.
[10] United Nation Security Council Resolution No. 1593, 2005.
[11] Chandra, Olga & Herman, *War, Conflicts & Human Rights* opcit p17.
[12] Mwagiru, M. *Mediation of Violent Electoral Conflict in Kenya. Water's Edge*, (Institute of Diplomacy and international studies, Nairobi, Kenya, 2008) p3.
[13] Tim Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army,* (London: Zed Books, 2006) p57.

The DRC government referred the situation of crimes within the jurisdiction of the Court allegedly committed anywhere in the territory of the DRC to the Office of the Prosecutor in April 2004. Despite the end of a five-year civil war in 2003 and the holding of national elections in 2006, DRC continues to suffer from armed conflict, particularly in the volatile eastern regions bordering Rwanda, Uganda, and Burundi.[14] This has led to devastating human security concerns. The ICC has issued four arrest warrants in its first DRC investigations, which focuses on the Eastern Congolese District of Ituri, where an inter-ethnic war erupted in June 2003 with reported involvement of neighboring governments. The second investigation focused on sexual crimes and other abuses committed in the eastern provinces of North and South Kivu.[15]

It is therefore apparent that ICTs intervened during or after conflicts. Most states had put in place national security strategies that narrowly interpreted security and ignored the individual as the main referent object. At the same time, the human security situation was devastating.

4.2 Legal and political context

The functioning of ICTs is not only an international criminal justice system but also a political process.[16] The primary mandate to prosecute perpetrators of international crimes lies with the state and ICTs only come in where states have failed to do so or where they have done so to the dissatisfaction of the international community. In considering the establishment of ICTY, the security council had to make a difficult choice between upholding the inviolability of state sovereignty or it could risk undermining sovereignty by creating an international tribunal to pursue justice[17]. The Security Council decided on the latter after defining the situation as a

[14] Musila, G.M. *Between Rhetoric and Action' The Politics, Processes and Practice of the ICC's work in the DRC,* (Institute of Security Studies,2009) p8.
[15] Ibid.
[16] Ibid.
[17] Maogoto, J. N. *War Crimes and Realpolitik: International Justice from World War I to the 21st Century.* (Boulder: Lynne Rienner, 2004) pp 143-144.

breach to international peace and security as envisaged under chapter VII of the UN charter. The judicial intervention was based on already existing international laws that incorporate already agreed upon norms of human rights. Being a Security Council resolution, it was binding on all member states that were required to offer cooperation.

There were however various reactions from within the former Yugoslavian countries. The perception concerning the establishment was very different among the various stakeholders. Serbian political elite rejected the establishment and asserted that war crimes should be handled by national courts and under national laws. On the other hand, the Croats thought that the ICTY aimed at undermining the legitimacy of Croatia's war of independence and thus the foundation of the young state[18]. This led to systematic propaganda against ICTY by media under the control of regimes of Milosevic in Serbia and Franjo Tudjman in Croatia. As a result, the majority of both Serbs and Croats thought that the ICTY was biased and controlled by Washington against individual struggles.[19] It is only Bosnia's who were largely supporting the tribunal hoping for justice for crimes and atrocities committed during the conflict.[20] Overall, except for Bosnia, Yugoslavia argued that the international tribunal was based on political motivations rather than international legal practice and that the proposed statute of the international tribunal is inconsistent and replete with legal lacunae to the extent that it makes it unacceptable to any state cherishing its sovereignty and dignity. However, regarding the international community, most

[18] Basic, S., *Bosnian society on the Path to Justice, Truth and Reconciliation'* (Berghof centre for constructive conflict management, 2006) p371.

[19] Hodzic, R. *Bosnia and Herzegovina: Legitimacy in Transition*. Expert paper written for international conference on building a future on peace and justice, 2007, p 3.

[20] Birdsall: *The International Criminal Tribunal for the former Yugoslavia – Towards a More Just Order?* Opcit pp 10-11.

states expressed their support for the ICTY and the need to act in the face of alleged violations of human rights[21].

In Bosnia-Herzegovina, the work of the ICTY dramatically changed the civic landscape and permitted the ascendancy of more moderate political forces backing multiethnic coexistence and nonviolent democratic process[22]. In Yugoslavia, the ICTY helped to delegitimize Milosevic's leadership. However, this was following bargains that favored the Western community and donor aid that was advanced to Serbia. The delegitimization was revealed by his attacks on the Tribunal prior to his overthrow, as well as the later calls for his prosecution by the Serb and Montenegrin public[23]. Although the ICTY indictment did not stem the deportation and abuse of ethnic Albanians during the NATO campaign in Kosovo, it at least marginally discouraged anti-Serb vengeance by the Kosovo Liberation Army (KLA).

Unlike the government of the former Yugoslavia, the Rwandan government strongly urged the Security Council to establish a tribunal and offered full support[24]. This was attributed to the fact that the government consisted of the Tutsi's and moderate Hutu's that had been targets of the genocide.

In Sierra Leone, the Lomé Peace Agreement was a result of internationally brokered diplomacy, bringing together the Sierra Leonean government and the RUF. The agreement gave immunity from legal process for atrocities committed during the conflict and also offered amnesty. The Lomé Peace Agreement failed to stop the conflict and in violation of the terms of the ceasefire the violence recommenced. The Commission was to function in a "spirit of national

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[21] Bodley, A. 'Weakening the Principle of Sovereignty in International Law: The International Criminal Tribunal for the former Yugoslavia', *New York University Journal of Law and Politics, Vol. 31,* 1999, p. 431.

[22] Akhavan, P., 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities, American Journal of International Law'. Vol 95 No. 7, 2001 pp7-19.

[23] Ibid.

[24] Shraga, D & Zacklin, R 'The International Criminal Tribunal for Rwanda' *European Journal of International law*, Vol. 7, 1996, pp 501-18.

reconciliation," and to address human rights violations from the beginning of the conflict in 1991.[25]

At the time the SCSL was established, the conflict in Sierra Leone was settled and the country was about to begin the lengthy process of structural and cultural peace building. Another positive thing is that the government controlled the whole country and was able to help the SCSL with its tasks in particular the arrest of suspected perpetrators who were within Sierra Leone. However, many people in Sierra Leone supported the TRC process as opposed to the SCSL. The fact that the court would prosecute members of CDF in which many saw rather war heroes than criminals provoked rejection of the court.[26] In particular, a charge against Hinga Norman was highly controversial[27]. The Sierra Leonean elites feared that the court may disrupt the efforts for peace and the TRC was seen as a more appropriate way to address the difficult past.[28] This aspect was also alluded to by Murungi during the interview.[29] However, the SCSL ruled that the agreement was not a treaty and so could not prevent individuals who committed crimes under the jurisdiction of the court from being prosecuted. Large parts of the military saw the court as an instrument of the US policy. This was because the US was the largest donor for the court fund and the chief prosecutor was a US citizen.

The ICC was initially embraced with enthusiasm by a wide range of people, NGOs, and governments when it came into being on 1 July 2002. Many of those who initially welcomed it

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[25] Article 26 of the Lome Agreement.
[26] Boister, N. 'Failing to Get to the Heart of the Matter in Sierra Leone', *Journal of international criminal justice, Vol. 2* (2004) p. 1100-1117.
[27] *Prosecutor v. Samuel Hinga Norman, Allieu Kondewa, and Moinina Fofana,* CaseNo. SCSL-04-14-PT, Decision on the Preliminary Defence Motion on the lack of Personal Jurisdiction Filed on Behalf of the Accused Fofana, March 3, 2004.

[28] Schabas, W., 'The Relationship Between Truth Commissions and International Courts: the Case of Sierra Leone', *Human Rights Quarterly* , Vol. 25, 2003, pp 1035-1066

[29]Interview with Murungi, B , International criminal lawyer and legal representative of the victims of Gender violations at the SCSL, on 26th August, 2012

were African countries and immediately there were three self referrals from Uganda, DRC and CAR. Despite an auspicious start, however, the ICC on several occasions run into considerable controversy occasionally being accused by African states for selective justice. Prof. Kindiki argues that one cannot discuss ICC without considering the regional or African dimension.[30]

The government of Uganda was among the first to sign the Rome Statute, ratifying it in June 2002 and referring "the situation concerning the Lord's Resistance Army (LRA), a rebel group to the ICC in 2003.[31] The government through its national security policy wanted to respond to this situation using an international institution that it had bound itself. It was therefore in the national interest of the Uganda government to ensure security for the people of northern Uganda. This, it chose through holding peace talks and referring the situation to the ICC.

In the Kenyan situation, unlike other instances where arrest warrants are issued, the prosecutor obtained summonses which he considered would be sufficient to ensure the suspects' appearance before the Court.[32] The prosecutions targeted the upper echelons of political power with potential implications for the country's stability, inter-ethnic relations, and country's next elections. In Sudan, President Bashir believed that outside involvement amounted to breach of the principles of state sovereignty and the ICC was regarded by Sudan as a tool of the Americans. The Sudan government created special courts for Darfur in an apparent effort to escape the ICC's jurisdiction. However, the special courts' efforts were widely criticized as insufficient.[33]

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[30] Interview with Prof. Kithure Kindiki, Public international lawyer and one of the defense counsels of Kenyan suspects before the ICC. On 20th Of September, 2012

[31] Payam Akhavan, *The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court*, ,opcit pp405-406.

[32] ICC Office of the Prosecutor, *Factsheet: Situation in the Republic of Kenya,* December 15, 2010.

[33] Human Rights Watch, *Lack of Conviction: The Special Criminal Court on the Events in Darfur*, June 2006;

Oduor argues that although Africa complains about selective justice, most of the cases before the ICC are self referrals and even those that are not, the states have failed to prosecute based on the complementary principle. She is also of the opinion that as to whether it interferes with national security depends on how national security has been defined and what is at stake in various states since there are a lot of politics when it comes to the functioning of ICTs.[34]

It is therefore clear that ICTs process is a political process and ICTs do not operate oblivious of political consideration since they operate in a political environment. The prosecutor however needs to initiate investigations based on a legal criteria set out in the statutes.

4.3 Tensions between Justice and political interests

In most cases where ICTs intervened, there were issues of perceived tension between interests of justice and political interests based on the argument that trying some suspects would injure the process of reconciliation in the respective states. In the case of ICTY, Yugoslavia argued that it already subscribed to and had incorporated international justice principles into its national laws and it was therefore not justifiable to infringe its sovereign right to exercise jurisdiction over the alleged perpetrators.[35] Unlike the other ICT's that were established in the post conflict situations, the ICTY was established at the helm of ongoing fighting and violence between the conflict parties. This meant that the capacities of the political, legal and societal structures were very limited[36]. This must have informed the initial strategy of the ICTY not to target investigations of the most high ranking and well known perpetrators such as Milosevic. However, the action undermined opportunities to win early support, particularly in Bosnia. Although there were initial fears of security concerns, the ICTY did not have an impact on

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[34] Interview with Oduor, D. , Deputy Public Prosecutor, Kenya. On 20th August, 2012.

[35] Barria, L.A. & Roper S.D. 'How Effective are International Criminal Tribunals: An Analysis of the ICTY and ICTR.' *The international Journal of Human Rights*, Vol. 9, No.3, 2005, pp349-368.

[36] Birdsall, *The International Criminal Tribunal for the former Yugoslavia – Towards a More Just Order?* Opcit p12.

reconciliation process. In Croatia, cooperation with the ICTY facilitated steps towards international integration, discrediting extremist elements and encouraging liberal political forces to consider the initiation of complementary war crimes prosecutions before national courts.[37]

In the Rwandan case, although the tribunal was established upon the request of the Rwanda government, the attitude of the government changed when details about the tribunals' framework became public. The government objected to the provisions on jurisdiction, competency and location.[38] The government did not want the jurisdiction to go back to 1990 and preferred end of July 1994 rather than December as they did not want to extend temporal jurisdiction to retribution of crimes that occurred against the Hutu[39]. The original cooperation was to ensure that the reality of the 1994 genocide becomes internationally known. But as the work of the ICTR continued, the risk of powerful people being indicted increased; the government obstructed the process and failed to cooperate as fully as it had originally done. This is a clear demonstration of tension between interests of justice and political interests. In fact, ICTR has been criticized for not prosecuting members of the RPF army due to the incumbent government.[40]

There was tension between interests of justice and political interests in Sierra Leone. One of the greatest fears was that the TRC and SCSL in discharging their functions will interfere with each other's mandate. Schabas however stated that the differences were minor and the mission could be accomplished if average Sierra Leonean understood that there are two institutions, both

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[37] Ibid p15.
[38] Shraga, D & Zacklin, *The International Criminal Tribunal for Rwanda*, opcit pp501-518.
[39] Magnareila, P.J. *Justice in Rwanda's Genocide, its courts and the UN* (Aldershot: Ashgate Publishing Ltd 2000) p22.
[40] Zorbas, E, 'Reconciliation in post-genocide Rwanda', *African Journal for legal studies, Vol. 1 Terrace: Africa Law institute* ,2004, pp32-34.

working towards accountability for the atrocity and victimization that they had suffered.[41] There *were no indications* that violence between former victims and perpetrators may *break out so the* court never threatened to destabilize the peace process[42]. The SCSL was established under less hostile local political and security conditions. The losing party to the conflict was attempting to appease a suddenly more aggressive and well capacitated enemy[43].

According to an interview by Murungi, the political elite preferred the TRC process because it offered amnesty.[44] The court on the other hand did not consider the amnesty and ruled that the agreement was not a treaty and hence could not remove the liability of individuals to be prosecuted by an international tribunal under the doctrine of universal jurisdiction. When President Ellen Johnson Sirleaf took over in Liberia, she was not keen on the criminal prosecution of Charles Taylor due to the repercussions from his supporters.[45] Indeed, the prospect of further regional instability was the reason given by the Special Court for securing the transfer and trial of Charles Taylor in The Hague rather than in Freetown. His trial was held and concluded at The Hague for security reasons.[46]

In Uganda, when the arrest warrants were issued, there was no viable peace process underway as negotiations between the Government and LRA under the auspices of Betty Bigombe had faltered. However, in early 2006, a new peace initiative under the auspices of Riek Machar, Vice President of South Sudan, commenced and resulted in the signing of a Cessation of

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[41] Schabas, W 'The Relationship Between Truth Commision and International Courts: The Case of Sierra Leone', *Human Rights Quarterly , Vol. 25, 2003, pp 176-199.*
[42] Howarth, Kathryn , 'The Special Court for Sierra Leone – Fair Trials and Justice for the Accused and Victims', *International Criminal Law Review Vol. 8,* 2008, pp 399-422.

[43] Mahony,C. *The Justice sector Afterthought: Witness Protection in Africa.*(Institute of Security Studies, 2001) p 164.
[44] Interview from Murungi, B, International lawyer and legal representative of victims of gender violations at SCSL, opcit.
[45] Cruvillier, T, 'Why try Taylor in the Hague', *International justice tribune* ,vol.44 , 2006, 77-147
[46] Ibid.

Hostilities Agreement between the Government of Uganda and the LRA in August 2006.[47] During the two years of negotiations, violence in Northern Uganda abated and many internally displaced were able to return to their homes. Some commentators claim that the arrest warrants were a factor in bringing the LRA to the negotiating table.[48] However, there are various debates that followed the referral of the Ugandan case. The key debate was the appropriateness of the ICC to be involved in the continuing hostilities in the northern Uganda, especially given the potential impact on the prospect of peace. It was felt that emphasis should be placed on the urgent need for a peaceful resolution to the conflict in order to ensure that criminal prosecutions do not undermine other initiatives to achieve peace.[49] On one hand, it can be argued that the government of Uganda wanted first, to ensure political stability and peace using the ICC by ensuring that members of the LRA who caused human atrocities in northern Uganda are brought to justice. On the other hand however, it is also believed that given the situation of civil war ravaging the country, the government of Uganda hoped that joining the ICC would help it prosecute the rebels[50]. This is because the atrocities were committed by all sides including Uganda Peoples Defense Forces (UPDF) leading to a logical conclusion that Uganda's referral to ICC amounted to washing its own hands of an insoluble internal problems. However, the Prosecutor has similarly initiated investigations of actions by the Ugandan military in northern Uganda[51].

In Sudan, the action by the ICC created considerable controversy over whether the arrest warrants stand in the way of peace. ICC Prosecutor Luis Moreno-Ocampo's request for an arrest

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[47] Mahony, C. *The Justice Sector Afterthought: Witness Protection in Africa*, opcit pp 139-140
[48] United Nations 2009 *Consultative Conference of International Criminal Justice* (New York, United National Headquarters).
[49] Parrot, L. 'The role of ICC in Uganda', *Australian Journal of Peace studies*, *Vol. 1, 2006 401-472*.
[50] Novogrodsky, N. 'Challenging impunity', *American journal of international law*, vol. 27, 2005, pp 15-58.
[51] Ibid.

warrant against Sudan's President al-Bashir triggered a backlash by numerous actors, including the African Union (AU) and the Organization of the Islamic Conference, who asked the United Nations (UN) Security Council to defer the ICC's work in Darfur for 12 months[52]. It was argued that ICC prosecutor should not press for charges against senior officials in the government of Sudan, at the time when deployment of UNAMID (the AU/UN peacekeeping mission in Sudan) in Darfur were at a critical point[53]. It was felt that at this sensitive time, to lay charges against senior government officials, and to criminalize the entire government, will derail attempts to pull Sudan from the brink.[54] They argued that justice should wait until after those culpable are no longer in positions of authority, since seeking to prosecute while al-Bashir is still in control risks retaliation, including against those who work for humanitarian agencies. This argument was also advanced by Prof. Kindiki who believes that the mandate of ICTs can interfere with national security where the indicted persons are in position of authority like Sudan.[55] However, he also argues that indictment of key personalities by the ICTY worked well and did not affect the securities of those countries.

The process of handing over suspects to the ICTs has been contentious. It is obvious that indicting a sitting Head of State may cause uncertainty and grave insecurity among sections of the population in a country[56]. This was the fear in the Sudan experience. The Al Bashir regime is likely to commit more atrocities since ICC is perceived as being in cohort with the enemies to the regime.

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[52] Gosnell, C. 'The for an arrest warrant in Al Bashir', *Journal of International Criminal Justice, Vol.6, (2006) pp 841-85.1*

[53] OTJR collected essays, *Debating International Justice in Africa,* (Centre for socio-legal studies, University of Oxford, 2010) p35.

[54] 'Communique of 142nd meeting of the Peace and Security Council, African Union, 2008.

[55] Interview with Professor Kindiki, Opcit citing.

[56] Ibid.

An earlier effort by Kenya's government and the African Union (AU) to push for a deferral of ICC prosecutions by the UN Security Council in the interest of peace and security was unsuccessful.[57] Kenyan government legal filings to ICC judges challenging the admissibility of the case were similarly unsuccessful.

The DRC referral of the situation to the court is premised on the supposed role the court could play in the stabilization of the country by promoting the rule of law and democracy after many years of armed conflict.[58]

The tension between interests of justice and political interests is also apparent from some of the cases before the ICC. A warrant of arrest was also issued against Bosco Ntaganda, the alleged former deputy military commander in Lubanga's FPLC militia who remains at large. His nationality was disputed as the ICC arrest warrant states that he is "believed to be a Rwandan national," but other sources state that he is an ethnic Tutsi from DRC's North Kivu province.[59] At the time the warrant was unsealed, Ntaganda was a commander in a different rebel group, the National Congress for the People's Defense (CNDP), in North Kivu. Ntaganda later agreed to be integrated into the Congolese armed forces as part of a January 2009 peace deal, and he was reportedly promoted to the rank of military general. The Congolese government has since refused to pursue Ntaganda on behalf of the ICC, arguing that to do so would jeopardize peace efforts in the Kivu region. In the case of Thomas Lubanga Dyilo, the alleged founder and leader of the Union of Congolese Patriots (UPC, after its French acronym) in Ituri and its military wing, the Patriotic Forces for the Liberation of Congo (FPLC) the ICC issued a warrant in 2006. At the time, Lubanga was in Congolese custody and had been charged in the domestic justice system.

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[57] Mahony, C. *The Justice Sector Afterthought: Witness Protection in Africa*, opcit, pp132-133.
[58] Musilla, G.M. '*Between Rhetoric and Action' The Politics, Processes and Practice of the ICC's work in the DRC' opcit p* 35.
[59] Ibid.

After a determination of admissibility by the ICC, Lubanga was transferred to ICC where he was charged with three counts of war crimes related to the recruitment and use of child soldiers. Despite his conviction and sentencing, Prof. Kindiki argues that the same has not acted as a deterrent and conflicts are ongoing.

According to Mteshi, national security should be broadly interpreted with the human security paradigm in mind. He is of the opinion that the role of ICTs affect national security of states especially where the persons indicted are key actors in national security agenda or where the indicted persons are high profile politicians that command large section of followers and supporters like in the Kenyan case. He believes that the ICC is not oblivious of the security situation and this may in his personal opinion informed the hearing of Kenyan cases being pushed until after the elections in order to avoid unnecessary tensions. He thinks that the best mechanism would have been truth and reconciliation[60].

Murungi is of the view that national security should be looked at from a broad perspective. According to her, the biggest question is how a state has protected its national security. She argues that the complementary nature is to allow states to use local mechanism. She was involved in the cases before SCSL and although there were initial fears of security concerns, and tension between the court and TRC, the concerns were ironed out and the two worked well concurrently. Initially, politicians preferred the TRC because of amnesty and were entirely opposed to the court.[61] She also states that the Rome statute has provisions that cater for security concerns. This is from the fact that Security Council can refer a situation to ICC and even defer for a year in a resolution adopted under chapter VII while exercising their powers on

[60] Interview with Mr, Alexander Mteshi, Director, National intelligence Service(NIS) on 15th September.
[61] Interview with Betty Murungi, legal practitioner and international lawyer opcit

international peace and security[62]. Prosecutor can also decide not to initiate an investigation in specific cases if he is of the view that prosecution will not serve the interests of justice. This may be a situation where doing this will complicate the situation on the ground. National security information is protected to the effect that if disclosure will prejudice national security, then reasonable steps will be taken by the state in conjunction with the prosecutor and the trial chamber to resolve the matter by cooperative means.[63]

It is therefore clear that ICTs are not purely legal institutions but respond to political situations. This means that tension between justice and political interests can still prevent the court from exercising its jurisdiction in some instances. The tensions between justice and political interests are superficial

4.4 ICTs and transitional justice including national mechanism

ICTs exist in the context of transitional justice and are very important tools among others as transitional justice mechanism. This is to ensure that criminal and non-criminal mechanisms operate at the same time. In the case of Rwanda, the ICTR targeted the masterminds and this affected the perception of the common people as the other suspects who actually committed the offences went about their normal duties. The masterminds were not persons integrated in the communities where reconciliation ought to take place. This situation was however cured by the introduction of a more popular justice system based on the Gacaca customary procedure of conflict resolution. There was limited outreach concerning the tribunal especially as regards, why the tribunals were lengthy, why their numbers were limited, why only masterminds were targeted and the outcome. It is however clear those ICTs do not operate oblivious of national security concerns. It has been argued that the situating of the court at Arusha placed the victims far from

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[62] Article 16 of the Rome Statute.
[63] Article 72 of the Rome statute

justice although the Security Council decided to do so due to security reasons.[64] Besides this, the ICTR was quite successful in making the alleged mastermind of the genocide account for their deeds.[65] The relationship between the ICTR and the national trials manifests considerable complexity, even in achieving national reconciliation. The ICTR has often been faulted for its remoteness from Rwandese people. Prof. Kindiki cites the Rwandan case as one where the Gacaca courts played a major of ensuring national security and stability in the country as opposed to ICTR. He attributes this to the disconnect between international justice which is far from the victims and local perception of the rule of law, peace and stability. The ICTR however made a modest contribution to post conflict peace building. It improved the post conflict situation by impeding the resurrection of the former government and enhancing the political attraction of criminal justice as an alternative to anti-Hutu violence. Hence realizing an enabling environment that could ensure societal security. The establishment of the court was also very important as institutions in Rwanda were non-existent in the aftermath of the long year internal conflict. It has however been argued that ICTR performed poorly in protecting witnesses from what was a similarly extreme threat[66]. The ICTR's hurried creation without adequate consideration of the security environment and the safety of witnesses facilitated the intimidation and murder of many witnesses who remained unprotected. The ICTR provides a lesson in the need for careful examination of a security situation, as well as competent and well capacitated intelligence and security capability, prior to creation of a punitive mechanism.[67]

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[64] Mose, E, 'The ICTR: Experiences and Challenges', *New England Journal of International and Comparative Law*, Vol. 5, 2005 pp 19-86
[65] Van Der Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law (*Leiden: Brill Academic Publishers) p263
[66] Interview with Ondieki, A, Director, Witness Protection in Kenya,opcit
[67] Mahony C. *The Justice Sector Afterthought Witness Protection in Africa*, opcit. p164

SCSL was an important instrument in transitional justice just like the TRC. The court gained a lot of credibility after the arrest of Charles Taylor in 2006. By trying and sentencing high ranking officials, the court made it clear that human rights violations would not be tolerated especially after charging the head of state of another country. Despite initial security concerns, both the TRC and SCSL worked well concurrently.

In Kenya, there were complaints of threat to witnesses.[68] Since high ranking officials and politicians were linked to the post-election violence there were enormous chances of witness intimidation and even elimination.[69] The ICC left other low level perpetrators whom the victims still have to contend with. The truth, justice and reconciliation commission was set up for the purpose of reconciliation and national healing. The Kenyan situation is a clear indication that although the ICC intervened the government needs to fast track implementation of national policies especially concerning the four agendas that were agreed upon under the mediation of former UN Secretary General Kofi Annan. The issue of accountability for the violence remained a sensitive one in Kenyan politics. Parliament was unable to set up a local tribunal to deal with the cases[70]. Apart from the justice interests there are other interests like the national reconciliation, and the need to address political and structural conflicts. In Kenya, due to strategic interests, the violence depicted overwhelming interests by major powers which contributed to the suspects being tried by the ICC.

Ondieki, the Director of Witness Protection observes that witnesses are normally at risk and yet the issue of witness protection have not been well embraced in most countries especially Africa. She also states that since ICC only deals with those who bear the greatest responsibility, this leaves behind the small perpetrators and the victims whose cases have to be handled through

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[68] Ibid.
[69] Obtained through interview from Ondieki, A.
[70] Ibid.

local mechanisms. This, if not properly handled, mighty cause tensions between the victims and the perpetrators. She adds that in cases of witness protection, witnesses have to be resettled and this end up decentralizing families and interfering with the social fabric. However, she observes that ICTs are key mechanisms in transitional justice and that there is no peace without justice as the two works in tandem.[71] Lichuma looks at ICTs as complementary mechanism that does not prevent national mechanism from going on.[72]

It is therefore apparent that ICTs are important tools of transitional justice mechanism and they do not prevent other national mechanism from going on.

4.5 Treaty obligations and state cooperation

Cooperation by states is very critical to the functioning of ICTs. The statutes establishing ICTs obligates states to offer cooperation. ICTs cannot succeed in their work without effective and reliable cooperation and assistance from member states, in particular states where the investigations are ongoing. The Prosecutor is a stateless actor who does not have a police force and therefore relies on the cooperation of states to discharge his/her mandate. While UN resolutions are binding on all member states, the Rome statute also provides for cooperation by states. This study has shown that the cooperation by states is influenced by states' national interests and foreign policies. In the case of SCSL, Ghana and then Nigeria initially failed to cooperate and arrest Charles Taylor once his indictment had been made public in June 2003. During this period, Taylor was living in Nigeria as the Nigerian authorities had agreed to offer him asylum. However, when a new, democratically-elected government came to power in Liberia, Nigeria bowed to considerable international pressure and arrested Taylor before he had

[71] Interview from Ondieki, A., Director of witness protection in Kenya.opcit.
[72] Interview with Lichuma, Commisioner, Kenya National Human Rights Commission on 23rd September 2012

chance to escape to Cameroon.[73] In the Sudan situation, the prosecutor has had numerous challenges in the arrest of Al Bashir especially from African countries who have been unable to offer cooperation. Despite Bashir's visits to several African countries that include Egypt, Nigeria, Kenya and Djibouti none of these countries opted to arrest him mainly based on their national interests and foreign policies. In the Kenyan instance, the government has chosen not to arrest him despite Kenya's high court judgment ordering his arrest. Unfortunately, human rights violations go on unabated in Darfur and the ICC warrants seem to have had little effect.

According to the statutes establishing these courts, member states are obliged to offer cooperation. The law of treaties provides that treaties are binding on member states which imply that non-state parties have no obligations.[74] This position is contrary to what has been witnessed in cases of Sudan and Libya that have cases before the ICC without being state parties to the Rome statute. However, the two are members of the UN and the situations in the two countries have been interpreted by the Security Council as breach of international peace and security under chapter VII of UN charter necessitating the making of resolutions that are binding on member states. This is why President Al-Bashir's rejection of the jurisdiction of the ICC arguing that Sudan is not a party to the Rome Statute and that Sudan's own judiciary has sole jurisdiction over crimes in Darfur, and is thus qualified and ready to try those accused of any violations could not stand. Lichuma argues that international mechanisms were put in place as control measures to govern certain regimes and once a state becomes a party to any treaty, that state agrees to be bound by the provisions of the treaty and cannot later argue on grounds of state sovereignty or

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[73] Cruvellier, T. *Why Try Taylor in the Hague*, opcit.
[74] Vienna Convention on the law of Treaties, Done at Vienna on 23rd may 1969. Entered into force on 27th January 1980.

even allege interference.[75] Oduor states that the mandate of the ICTs has been given by member states while exercising their sovereign rights. This makes ICTs not to be isolated organs. States can therefore not claim interference when they are the ones that in the first instance gave them that mandate.

It can therefore be concluded that once a state becomes a member to an international treaty, it cedes some of its sovereignty and cannot evade international commitments whenever enforced on it.

4.6 Study linked to the objectives.

The objectives of this study were to examine the rationale of ICTs, the concept and role of national security and lastly to establish the relationship between ICTs and National security. These objectives have been fulfilled by this study. Chapter two examines the rationale of ICTs starting with the development of international criminal law, background to the establishment of ICTs and the justification for the establishment which was mainly to prosecute individuals who hold the highest responsibility in the commission of international crimes, that is, war crimes, crimes against humanity and genocide. This prosecution was to ensure enforcement of international criminal law that includes, IHL, Rome statute, international customary law and general principles of law. Such prosecutions were to ensure justice and accountability and act as a deterrent.

The role and conceptualization of national security has been examined at length in chapter three where the researcher has examined national security both from the traditional to the contemporary perspective. In doing this, the researcher has considered security of the state and that of an individual with the human security paradigm. Both the narrow and the broadened

[75] Interview with Lichuma, W., Lawyer and former commissioner of Kenya National human rights commission, Investigations department. opcit

approaches to national security have been expounded and linked to how these are articulated in the national security strategies of countries.

The relationship between national security and ICTs form the basis of the analysis of this study and the researcher has considered at length this relationship based on whether the functioning of the ICTs interfere with national security of countries, interests of major powers, tensions between the interests of justice and political interests, transitional justice and cooperation by states.

4.7 Study linked to the hypothesis

The assumption on which this study was premised was; firstly, that the role of ICTs and safeguarding of national security are complementary and secondly that the role of ICTs in post conflict situations interferes with national security of states. The hypothesis has adequately been tested and as revealed from the study especially the analysis in chapter four, the functioning of ICTs and the role of states to ensure national security are complementary. This is because ICTs are institutions that have been established by states while exercising their sovereign rights hence ceding some of their sovereignty. The perceived tensions that exist between the interest of justice and political interests are superficial and ICTs do not function oblivious of national security considerations on the ground.

Chapter Five

Conclusion

In concluding this study, it is important to highlight that the intervention of ICTs in conflict situations has been of great concern to most states. Infringement of state sovereignty has always been alluded to by states whenever ICTs intervene. This has however been in disregard to the realization that state sovereignty is not sacrosanct and that where states have become parties to international treaties, they cede some of their sovereignty and cannot turn around and claim it. States while exercising their sovereignty do come up with national security strategies and at the same time enter into international treaties. It is however pertinent for states to come up with national security strategies that reflect their international obligations.

Whether or not the national security agenda is interfered with, perpetrators of international crimes must be punished. States can therefore not allege state sovereignty to commit atrocities that shock the conscious of mankind. Whenever such crimes are committed, it is the duty of the international community to respond and ensure a stop to egregious violations of human rights. This is not only to ensure peace but also justice and accountability by punishing perpetrators. State sovereignty means state responsibility and incidences of egregious violations of human rights presupposes that a state has failed in its responsibility to protect its citizens.

ICTs have in most instances, intervene in conflict situations. In these conflicts, egregious violations of human rights are committed and the human security situation is devastating. It has also been noted that in most of these situations the understanding of national security has been narrow and the states have had in place national security policies that reflect the narrow definition of national security. Most national security strategies in place have also protected the regime or leaders and have concentrated on the physical security of the state. The 'individual' or

'human factor' has been given little attention. The neglect of wider interpretation of national security has led to lack of protection of wider security interests. In fact, it can ably be argued that if a state has good national security policies that protect societal security which includes human security and ethnic security, then most conflict situations will avoided. It is therefore important that states adopt broader interpretation of national security while coming up with their national security strategies.

All states must in their national security strategies ensure that there is no impunity. In cases where the perpetrators who hold the highest responsibility are tried by the ICTs, individual states must ensure that low level perpetrators are dealt with through national mechanism. This therefore calls for states to have adequate and independent national mechanisms that will ensure justice and accountability. Victims suffer due to distant justice occasioned by ICTs. The low level perpetrators in their day to day activities continue interacting with the victims hence the need to ensure justice at this lower level and compensation to the victims. Another important factor is the healing, reconciliation and eventual integration of the perpetrators into the community especially in countries where there have been structural conflicts. Normally, victim's perceptions about ICTs are shaped by their initial high expectation of the tribunals in a country where few other avenues of pursuing justice exist. It is therefore important for ICTs in collaboration with the civil society to manage expectations through rigorous awareness campaigns and other forms of engagement in order to maximize the understanding of the victims about the process.

Chapter VII of the UN charter allows intervention in circumstances that are interpreted to occasion breach of international peace and security. National security can no longer be analyzed oblivious of the regional and international environment. This is due to the fact that most conflicts

not only occasion egregious violations of human rights which is an issue of international concern, but have chances of becoming internationalized and hence the need to ensure international peace and security.

The African continent has been vocal on the issue of ICC accusing it of selective justice. No other continent has suffered a spiral conflicts more than Africa. The situation has been aggravated by the absence of legitimate institutions of law and accountability. However, most states in Africa tend to overlook their international commitments when it comes to the functioning of ICTs. It is clear that ICTs will only interfere if no action has been taken at the national level. Despite complaints from the Continent, there is a growing international will of which the African continent is an integral part, to enforce humanitarian norms and to bring to justice those responsible for the most serious crimes of international concern. It should be understood that the struggle to the fight against impunity is not a neo colonial exercise; it is one that has also received support from and has been shaped by the people of the Africa.

ICTs process is a political process. In the case of ICC, the politics that arose in its creation, continued even beyond. The fact that it operates in a political environment means that it is not entirely immune from political consideration. Accusations of selectivity on the part of the Security Council was therefore bound to arise. It is noteworthy that although the decision to refer a situation is a political one, the prosecutor makes a decision to initiate an investigation based on the legal criteria set out in the statute. Although the selective justice issue in Africa has been argued up to the African Union level, it is apparent that most of the cases before the ICC were referred by the states themselves. This notwithstanding, domestic arguments have arise where a situation is referred by the state depending on who gets indicted or prosecuted. In the Ugandan

case, questions lingered as to why only the leaders of the Lord's Resistance Army were indicted and none from Uganda People's Defense Forces.

National security includes protection of human rights and hence a state that claims sovereignty and advancement of national security should ensure citizens are protected from human rights violations and where such occur there should be national mechanisms to ensure justice. This is what informed the complementary principle of the Rome statute where ICC will initiate prosecution of specific crimes only when states are unable or unwilling to do so. If states formulate and implement national security strategies that ensure national security especially, human security, there will be no violations of human rights and the Security Council or the ICTs will not intervene. Similarly, if a state came up with appropriate domestic measures like national justice mechanism to deal with crimes and ensure justice, there would be no interference from the outside.

Although ICTs were established to ensure justice and accountability and act as deterrence to commission of international crimes, the continuity of conflicts and commission of these crimes clearly indicate the deterrence role has not yet been fulfilled. In the DRC case, despite the indictment and sentencing of Lubanga, conflicts have been prevalent. However, ICTs have been very instrumental in the introduction of criminal accountability into the culture of international relations. This has led to the development of jurisprudence of international law and international humanitarian law and acted as a constant reminder to the world of the existence of international criminal law. ICTs have also transformed criminal justice into an important element of the contemporary international agenda.

Major Powers determine whether ICT's will be effective or not based on their interests. This has been reflected in the functioning of ICT's. The major powers decide the mandate of the

tribunals, set their funding and coerce parties to cooperate with tribunals on the basis of national interests. These powers also hold veto powers at the UN Security Council. This is demonstrated by the referral by the Security Council of cases in Sudan and Libya and not similar action being taken in Syria due to the interests of Russia and China who are veto members. In the Rwandan case, the non cooperation of the Rwandan government with the ICC did not seem to attract a lot attention from the international community while in the case of Kenya the international community hastily intervened due to the geostrategic interests.

National interests are at the core when it comes to determination as to whether states will cooperate with ICTs or not. This is despite the fact that States' cooperation is not only a legal requirement but is also critical to the functioning of ICTs. The Prosecutor is a stateless actor who relies on the cooperation of states to discharge his/her mandate. ICTs do not have own police force and prisons and have to rely on states. There have been instances where states failed to offer cooperation like the case of Sudan in which a warrant of arrest was issued by the ICC against Al Bashir, a sitting head of state. Despite the issuance of the warrant of arrest, he visited various African countries but was never arrested due to the concerned states' national security interests and foreign policies. America on the other hand unsigned the Rome Statute establishing the ICC based on their national security interests and has henceforth adopted hands off approach to the issues of ICC.

ICC can intervene in situations where a state is not a party to the Rome statute. This has been demonstrated in the case of Libya and Sudan who are not members and where the circumstances were interpreted as breach of international peace and security. Here, the strict rules of the law of treaties did not apply and the Security Council invoked chapter VII of the UN Security Council to ensure international peace and security.

The concerns about tension between interests of justice and political interests are superficial. In some cases where such concerns have been raised like in the case of Sierra Leone, the national mechanism of a truth, justice and reconciliation commission worked harmoniously with the court. It is therefore important to note that there can be no peace without justice and individuals can no longer hide from prosecutions by alleging that their prosecution will occasion interference with the fragile peace process in a post conflict situation. ICTs will only intervene under the complementary principle, allowing national mechanism to take precedence. States therefore need to come up with national security strategies that protect societal security with emphasis on human security and ethnic security.

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