

**THE ROLE OF THE INTERNATIONAL CRIMINAL COURT IN
PROMOTING PEACE AND JUSTICE**

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(R50/68805/2011)

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**A RESEARCH PROJECT SUBMITTED IN PARTIAL
FULFILLMENT OF THE REQUIREMENT FOR THE AWARD OF
DEGREE OF MASTER OF ARTS IN INTERNATIONAL STUDIES,
INSTITUTE OF DIPLOMACY AND INTERNATIONAL STUDIES
(IDIS), UNIVERSITY OF NAIROBI**

OCTOBER 2014

Declaration`

I **Opiyo Marilyn Awuor**, hereby declare that this research project is my original work and has not been presented for the award of a degree in any other university.

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Dedication

This thesis is dedicated to my parents, Dr. Peter and Juliana Opiyo for their endless love, support and encouragement. Thank you both for giving me strength to reach for the stars and chase my dreams. Many thanks to my sisters, brothers and cousins as well. They believed in this thesis and helped make it a success.

Acknowledgement

A lot of gratitude to my supervisor, Mr. Martin Nguru for his invaluable input, patience and guidance which served to make this work possible. Lastly I wish to thank all my friends and colleagues who dedicated their time and shared their experiences and expertise with me.

Abstract

The International Criminal Court aims to promote not only justice but also peace by impacting on the prevention of atrocious crimes since the prosecutions have been seen as a major threat to perpetrators. Its historical background will be reviewed with a touch on the Rome Statute so as to understand why it was established and much emphasis will be put on the cases that the court is currently handling. This thesis therefore, will argue that the court's principal interest of promoting international justice and peace to meet the expectations of the international community has hit its mark as it's well equipped to address the complexity of the two schools in specific countries to fight impunity. This has been seen by its commitment to fully reinforce the principles of universal jurisdiction and complementarity by encompassing international law which oversees monitors and effectively holds regime leaders accountable.

LIST OF ABBREVIATIONS

| | |
|-------------|--|
| DRC | Democratic Republic of Congo |
| CAR | Central African Republic |
| ICC | International Criminal Court |
| CPA | Comprehensive Peace Agreement |
| UN | United Nations |
| AU | African Union |
| LRA | Lord Resistance Army |
| US | United States |
| IDPs | Internally Displaced Persons |
| SC | Security Council |
| RUF | Revolutionary United Front |
| MLC | Movement de Liberation du Congo |
| UFDR | The Union of Democratic forces for Unity |
| APRD | Army for the Restoration of Democracy |
| UNSC | United Nations Security Council |
| EU | European Union |
| ICTY | International Criminal Tribunal for former Yugoslavia |
| ICTR | International Criminal Tribunal for Rwanda |
| SCSL | The special Court for Sierra Leone |
| ECCC | The Extra- ordinary Chambers in the Courts of Cambodia |
| STL | The special Tribunal for Lebanon |
| BIA | Bilateral Immunity Agreements |
| ILC | International Law Commission |
| COW | Coalition of the Willing |
| OTP | Office of the Prosecutor |
| NGOs | Non- Governmental Organizations |
| ICL | International Criminal Law |
| SADC | South African Development Community |

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Chapter One

INTRODUCTION TO THE STUDY

Introduction

Peace as defined by Henry Ford¹ is not the absence of war but the presence of justice. Another definition of peace is that it is a process which takes time and tends to be fragile thus it requires careful cultivation. On the other hand, communities presumably expect that peace mechanisms will allow the achievement of justice. Without prosecuting those responsible for human rights violations and atrocities, peace is often seen as somehow incomplete. Justice on the other hand as defined by Collins Cobuild² is the fairness in the way people are treated. It's a term used to portray a number of ideas, including fairness, equality, and lawfulness.

The International Criminal Court consists of the Presidency, Chambers of the Judges, Office of the Prosecutor where investigations, prosecutions and referrals are made and the registry for non-judicial aspects of the administration of the Court. It has field offices in the Democratic Republic of Congo (DRC), Uganda, the Central African Republic (CAR), Ivory Coast and Kenya. As of June 2013, the Rome Statute had 122 State Parties. Of these states, 34 are from Africa, Tunisia being the last candidate to join June in 2011.³ When State Parties ratified the Rome Statute, it was like they gave the ICC the power of attorney hence they are required to oblige with the Prosecutors of ICC and its organs but at the same time protect the victims and witnesses from harm's way. This is to say that although the role of the ICC complements the state parties national justice system, the primary responsibility lays with the states authorities in providing justice and reparation to victims.

It is a global court enshrined with a global mandate but its current activities seem to focus on African countries because of the numerous violent conflicts occurring in the continent. Historically, the Court has been strongly backed up by the African society because of their simultaneous needs for sustainable peace and accountability for dubious behaviors within the states and it would not be what it is today without the backing of Africa. The Court is liable to

¹ The Peace Ship: Henry Ford's Pacifist Adventure in the First World War

² Collins Cobuild English dictionary p 918

³ <http://www.haguejusticeportal.net/>

begin investigations only when a situation is referred by a state party government, the United Nations Security Council or the Prosecutor in his/her own initiative (*proprio motu*). Currently the Court is investigating and prosecuting individuals accused to be involved in the heinous crimes against humanity which took place during the numerous devastating armed conflicts in Africa: namely Darfur in Sudan, Northern Uganda, the Democratic Republic of Congo (DRC), Libya, Central African Republic (CAR), Cote d'Ivoire, Mali and Kenya.⁴ Amongst these prosecutions, four are self - referrals; Uganda, Mali, DRC and CAR. Sudan and Libya (non- state parties), were referred by the United Nations Security Council while Kenya and Cote d'Ivoire(also a non- state party) were as a result of *proprio motu*. In reference to the listed cases, the Court was forced to come to terms with the basic challenges which concur in pursuing peace and justice simultaneously because peace and justice are correlated and can coexist together in that justice can deter abuses and help make peace sustainable by addressing grievances non-violently.

1.1 Background to the study

The establishment of the Court is a gift of hope to future generations, and a giant step forward in the march towards universal human rights and the rule of law.⁵ In 2002, a treaty which led to the foundation of the ICC was negotiated at a global conference in Rome as an independent judicial body that would put impunity under a tight leash for the gravest international crimes: namely genocide, war crimes, crimes against humanity and crimes of aggression. Its main focus is on individuals who have committed crimes of mass atrocities rather than states as commonly believed. The court is meant to be a last resort for victims and survivors who cannot find justice in their own country and as a deterrent to leaders who have little or no fear from domestic prosecution due to obstructionism. The statute provides that the “official capacity as a Head of State or Government...shall in no case exempt a person from criminal responsibility”.⁶ This means that any form of presidential immunity is null and void. Examples of heads of states that have been pursued by international tribunals include Kenyatta, Bashir, Taylor, Libya's Muammar Qaddafi, and the former Yugoslavia's Slobodan Milošević.

⁴The ICC Prosecutor also opened an investigation in the Central African Republic on 22 May 2007. See, Office of the Prosecutor, “Background note on the opening by the Prosecutor of an investigation in CAR”, Media Release by the Office of the Prosecutor, The Hague: ICC, 22 May 2007.

⁵Kofi Annan, Secretary-General of the United Nations Campidoglio, Rome 18 July 1998

⁶ Statute of the International Criminal Court Article 27

Presently, the court has 122 state parties who have ratified the treaty. Out of the 122 states, 34 are from Africa, 18 from Asian –Pacific states, 18 from Eastern Europe, 27 from Latin American and Caribbean States and 25 are from the Western European and other states.⁷

1.2 Statement of the study problem

The ICC has brought about progressive sustainable development of transitional justice, transnational justice and international criminal accountability. Their effort has created a clearer and stronger belief in favor of accountability and against impunity respecting the heinous abuses. The Rome Statute offers a solution, a new instrument of peace for creating global governance without a global government but with international laws and courts. Intervention by the court can help end conflicts; hold those responsible thus encouraging national proceedings.

The role of the ICC in promoting peace and justice has been controversial from the time of its inception. Negotiations towards peace deals have been going on in spite of the ICC insisting on prosecuting the indictees making those who lobbied for it uncomfortable. Moreover a general concern has been raised that the investigations are only pin pointing Africans and that they could hold back the prospects for peace and whether its interests of justice were duly genuine, a phrase frequently repeated in the ICC's Statute. A lot has been expected in the cultivation of peace in pursuit of justice as there has been a sharp relief in the African Continent of recent because of the bombardment of strife situations. The question therefore is what role do international institutions like the ICC play in promoting peace and justice? And is peace secure enough for justice to run its course?

1.3 Objectives of the study

The main objective is to examine the factors that have determined where, whom and what the ICC has decided to investigate and prosecute.

⁷ Eleventh session of the Assembly of State Parties.

Other Objectives

- To examine how the ICC can work effectively within its jurisdiction to achieve its purpose.
- To examine the role and impact of the ICC beyond its own investigations and prosecutions.
- To find out the politics of the ICC's interventions in Africa and the prosecutorial strategies

1.4 Justification of the research

1.4.1 Academic Justifications

The Court having been in the justice system for more than a decade has managed to define its role and strategies in the global system. A lot has been discussed on the court's value in pursuing justice and peace. The theme used is peace with justice not peace vs. justice. Peace has been greatly covered by authors in relation to the traditional criminal prosecutions as the sole means of Amnesties and the International Criminal Court in achieving justice. The academic sources covering Argentina, Cambodia, Uruguay, Chile, El Salvador, Guatemala, Haiti, South Africa, Algeria and Sierra Leone mention amnesties as a means of securing peace⁸ in favor of justice. My research therefore will show how the Court can provide sustainable peace and justice simultaneously without one outdoing the other.

1.4.2 Policy Justifications

This research will be instructive to governments, non- governmental organizations, peace mediators, human rights advocates and academics and as they develop policies to address the court's legacy in state parties. It will also be a reminder that the consultation of individuals prompts a deeper understanding of the ICC which is essential to building its reputation.

⁸ An amnesty is generally considered to be an official action which protects an individual from civil and/or criminal liability for past acts

1.5 Literature review

1.5.1 Introduction

In today's transitional justice literature, a core theme that concerns itself with the relationship between peace and justice is widely debated as the Court has vastly featured in these debates. According to the supporters of the ICC, justice helps in the individualization of guilt, curb the victim's thirst for revenge and foster peace building and reconciliation⁹. State parties and non-state parties facing prosecutions from the court and how it has helped in the promotion of international justice and peace since it opened its door in 2002 will be discussed.

M. Cherif Bassiouni, states that the ICC combines humanistic values and policy considerations essential for the attainment of the goals of justice, redress and prevention as well as the need for the *restoration of world order and world peace*.¹⁰ The International Criminal Court (ICC) aims to promote not only justice, but also peace by having a major impact on the prevention of crimes. While this thesis concentrates on the role of the ICC to international justice and peace, the cooperation of the states to help end impunity like the signing of the 2001 Bonn Agreement that was used to set up a new government in Afghanistan, the Sun City and related agreements that formally ended the DRC conflict in 2003 and Sudan's 2005 Comprehensive Peace Agreement (CPA) plus the Darfur Peace Agreement in 2006 were a major boost.

When we consider the various active investigations at the Court, the Democratic Republic of Congo, the Central African Republic, Uganda and Mali were self-referrals. In situations like that of Kenya and Ivory Coast, investigations were opened by the Prosecutor with the support of African governments. For example the Prosecutor was presented with evidence gathered on the crimes on the event of the 2007/2008 post-election violence by an international commission

⁹N.J. Kritz, 'Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights', 59 *Law and Contemporary Problems* (1996) 127-152; P. Akhavan, 'Justice in The Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal', 20 *Human Rights Quarterly* (1998) 737-816; A. Cassese, 'On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law', 9 *European Journal of International Law* (1998) 2-17; K.C. Moghalu, 'Reconciling Fractured Societies: An African Perspective on the Role of Judicial Prosecutions', in R. Thakur and P. Malcontent (eds), *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States* (Tokyo: United Nations University Press, 2004) 197-223.

¹⁰M. Cherif Bassiouni, "The Universal Model: The International Criminal Court" in M. Cherif Bassiouni, ed., *Post-Conflict Justice* (Ardsley, NY: Transnational Publishers, 2002), 813-825, at 819. (Emphasis added) One of the most eminent experts of international criminal justice, M. Cherif Bassiouni was the Chairman of the Drafting Committee of the 1998 Diplomatic Conference on the Establishment of an International Criminal Court. He was nominated for the Nobel Peace Prize for his contribution to the creation of the ICC in 1999.

established by its government. In addition in 2003, the Ivorian government supported Cote d'Ivoire under the leadership of President Laurent Gbagbo to voluntarily accept the jurisdiction of the court. Libya and Sudan were referred by the UN Security Council with both referrals receiving support from African states sitting on the Council at the time. This shows that the ICC opened investigations where it was needed and not where it selected¹¹.

Ian Khama the President of Botswana angry with the AU decision to oppose the arrest warrant issued for the late Libyan leader Muammar Gaddafi and other African leaders stated that:

This decision is a serious setback in the battle against impunity in Africa and undermines efforts to confront war crimes and crimes against humanity which are committed by some leaders on the continent...Such a move also places Africa on the wrong side of history. It is a betrayal of the innocent and helpless victims of such crimes. I specifically note with regret that at the summit held in Malabo, Equatorial Guinea, in June 2011, the African Union formally decided not to co-operate with the ICC over the indictments and arrest warrants against some leaders. We need to have the political will and the moral courage to hold accountable, without fear or favor, anyone in authority including a sitting head of state when he or she is suspected of having committed crimes against innocent people¹².

1.5.1 Tracing the Role of the current International Criminal Court

1.5.1.2 Darfur

In the year 2003, a militia group by the name 'Janjaweed' backed by the Sudanese government started a murderous campaign against the African tribes in the Darfur region which left thousands of people dead, and at least 1.5 million people displaced from their homes. Up till March 2005, the world had remained largely inactive to the horrors erupting in Darfur when the UN Security Council, in an unprecedented move, referred the case of Darfur to the ICC. In April 2005, the UN submitted a list of 51 Sudanese suspects to the ICC revealing high ranking officials to be the perpetrators of the conflict. The prosecution in March 2009 issued three arrest warrants for the leaders of the Sudanese government and the Janjaweed militia which included that of President Omar al-Bashir, a sitting president on charges of war crimes against humanity. This is

¹¹ Stephen A. Lamony senior adviser at the Coalition for the International Criminal Court

¹² <http://www.issafrika.org/iss-today/one-african-president-speaks-truth-to-power-on-the-icc>

where the genesis of the wrangles between the International Criminal Court and Africa started. The President was charged with individual criminal responsibility for committing war crimes, crimes against humanity and the crime of genocide in the Darfur region of South Sudan.¹³ This move challenged the notion of presidential immunity which had been seen as an impenetrable wall in the political fraternity.¹⁴ The heads therefore slowly started realizing that their shields were no longer protecting their chests from the ICC spear of justice.

Jean Ping, the AU Chairperson, is quoted to have stated that: *The AU's position is that we support the fight against impunity; we cannot let crime perpetrators go unpunished. But we say that peace and justice should not collide, that the need for justice should not override the need for peace.*¹⁵

The government of Sudan has bluntly denied the accusations and vowed never to surrender any citizen to The Hague citing jurisdiction as its scape goat and has proceeded with the local justice initiatives which are perceived to be "show trials" that do little to hold perpetrators accountable for the atrocities in Darfur. This therefore leads to the question by observers and Heads of States in the region to whether the ICC can succeed in the establishment of peace through justice in Sudan. In light of this, the Arab League and the African league asked the Security Council to suspend the prosecutions in favor of the ongoing efforts for peace in the Sudan region which bore fruitless efforts forcing the African Union, the League of Arab States and members of the Islamic Conference to announce their stand in July 2009 that they would not cooperate with the ICC in arresting Al-Bashir. To add insult to injury, Al-Bashir received an invitation from Venezuela and was promised a visit by South African President Jacob Zuma. (*Daily Nation*)

¹³<http://www.iccpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050109/icc02050109?lan=en-GB>

¹⁴See "Obasanjo backs Bashir on Darfur war charges" (28th June 2010) The East African Newspaper, available at <http://allafrica.com/stories/201006280042.html> (last accessed on 15th July 2012) The former President of the Republic of Nigeria and African Union Chairperson argued that a sitting President cannot be directly responsible for atrocities committed by rogue soldiers in a state of civil war and it would therefore be unfair for the world to ask Al-Bashir to disown the Janjaweed after it helped save Sudan from disintegration

¹⁵ See "World Reaction-Bashir Arrest" (4th March 2009) BBC, available at: <http://news.bbc.co.uk/2/hi/africa/7923797.stm> (last accessed on 4th June 2012) See also an opinion by Mubarak M. Musa, the Deputy Head of Mission-Consulate General Uganda, "International Criminal Court has lost its impartiality" in the Daily Monitor Newspaper (22nd June 2010) in which he argued that the ICC's selectivity against the Sudanese Government during the quest for peace and efforts of national reconciliation in Africa.

The AU's support of Sudan was clearly seen in Bashir's visit to Chad on July 22, 2010. Shamelessly violating his international warrant of arrest, he travelled to Chad which is an ICC member state. This prompted an outraged outcry by the Human rights activists which called on Chad to live up to its obligations as a member state of the ICC and detain Al-Bashir. These cries apparently hit rock bottom stating that Chad was more loyal to the African Union which had passed a resolution encouraging members not turn in al-Bashir than they were to the ICC. This eventually led to a series of reactions where al-Bashir was denied entry into Uganda, Malawi, Zambia and Liberia where he was to attend the 19th AU summit but thought better of it because the new President, Joyce Banda had threatened to hand him over if he dared stepped into her territory. President Banda's act brought about a string of negative effects which affected Liberia like the relocation of the 19th AU summit from Malawi to Addis Ababa.¹⁶

Governments like that of France, Germany, Canada, and Denmark, the United Kingdom and the European Union tried to make Sudan cooperate though Russia and China expressed opposition. This is because China is a big investor in Sudan and it supported the AU decision because it feared the repercussions of a change in regime which would eventually affect its natural resources deals with the Bashir government as the peace process in the country would be derailed. The AU and the Arab League on the other hand believed that the arrest will destabilize the situation in Sudan even further which apparently doesn't hold water at all. Yes both the nature and the timing of Ocampo's indictment re-energized the broader debate over the pursuit of peace versus that of justice in situations of ongoing conflict. As the Darfur scholar Alex de Waal puts it "Will this be a historic victory for human rights ... or will it be a tragedy, a clash between the needs for justice and for peace, which will send Sudan into a vortex of turmoil and bloodshed?".¹⁷

¹⁶ Ethiopia to host African Union Summit after Omar Al-Bashir Malawi Row" Found at www.bbc.co.uk/news/world-africa-18407396 (last accessed on 10th July 2012)

¹⁷De Waal, Alex. "Sudan and the International Criminal Court: a guide to the controversy." Open Democracy News Analysis. 14 July 2008

1.5.1.3. Libya

The slayed Libyan leader was indicted on 27th June 2011 on two counts of crimes against humanity during the uprising revolution against his government. It was alleged that he had planned a “policy of violent oppression of popular uprisings” in the early weeks of the NATO-led war against him. He is alleged to have formulated a plan whereby Libyan state security forces under his authority were to be ordered to use any means necessary to suppress any form of public protests against his government. Al Gaddafi was killed on 20th October 2011 and the Court terminated proceedings against him on 22nd November 2011.

Saif al-Islam the son of the former President of Libya Muammar Gadhafi who was arrested by a militia group in 2011 as he tried to escape to Niger following the ousting and subsequent demise of his father is being sought by the ICC for charges of corruption and war crimes resulting from his alleged role in suppressing the 2011 uprising. After his capture he was to be taken to the Court but apparently a former rebel group who have refused to hand him over to the central government as they believe the government to be weak and wouldn't be able to protect him from the intelligence agencies from the west who are witch hunting him are holding him hostage in a prison cell in the town of Zintan. He was to be tried in Tripoli's Criminal Court together with 36 others.¹⁸

1.5.1.4 Democratic Republic of Congo

While the 2003 Sun City Agreement ended the fighting in most of the DRC, Thomas Lubanga was transferred to The Hague in 2007 to face charges for crimes he had committed in the neighboring Ituri district. Lubanga was being prosecuted for crimes consisting of “conscripting and enlisting children under the age of fifteen” and forcing them “to participate actively in hostilities in Ituri, from September 2002 to 13 August 2003”.¹⁹ The conflict in Congo is one of the bloodiest since World War II where an approximate of 5.4 million people lost their lives since August 1998 and yet Lubanga was being convicted for enlisting child soldiers (which is also a grave crime don't get me wrong on this) but not over cases of war crimes which included

¹⁸www.the-guardian.com/.../Libya-must-immediately-surrender-saif-al-islam-al-gaddafi-to-the-ICC

¹⁹ Warrant of arrest No. ICC-01/04-01/06 issued on 10 February 2006 : <http://www.icc-cpi.int/iccdocs/doc/doc236258.PDF>

wholesale massacres of thousands of people at a time.²⁰ With this, the role of the Court becomes a bit confusing.

This was because the Congo national justice system was floored by corruption weakened by lack of sufficient resources and was too limited to achieve its goal. The government then decided to establish a strategy to address war crimes based on the principle of complementarity where the DRC would give the Court the upmost priority to prosecute the *crème de la crème* of the leaders in the armed groups who bore the greatest responsibility for crimes committed under the ICC jurisdiction whereas the Congolese justice system would deal with lower ranked perpetrators who were accused of the less complex crimes. This commitment pushed the legal framework for the military justice to give military tribunals jurisdiction over crimes under the Rome Statute.²¹ The then ICC prosecutor, Luis Moreno Ocampo announced in June 2004 the formal opening of the DRC investigations which seemed to have reinforced the idea of a perfect division of work between the Congolese justice system and an international court. In July 2012, Thomas Lubanga was sentenced to 14 years in prison for recruiting and using child soldiers.²²

In August 2006, the ICC issued another an arrest warrant, but this time for Bosco Ntaganda the former *chef d'état-major general ad joint* who oversaw the military operations of Thomas Lubanga's militia the UPC, for the same crimes as his former boss, conscription of children of less than fifteen years old.²³ In February 2009, the government of Congo refused to hand him over because his freedom was concurrent to the domestic peace of the people. As Emmanuel-Janvier Luzolo, Congo's Justice Minister, stated "*in the judicial practice of any state, there are moments when the demands of peace override the traditional needs of justice*". The ICC in order to promote peace in DRC bowed down to their demands even though it had the power to influence this arrest. This act showed how the ICC focus is on the long term interests of promoting peace to the state rather than short term interest of justice. The Court is not in the

²⁰ Think African Press

²¹ Military tribunals in Congo have effectively prosecuted authors of Rome Statute crimes. For a comprehensive study of these prosecutions, see Avocats Sans Frontières, *Etude de jurisprudence : l'application du statut de Rome de la Cour pénale internationale par les juridictions de la République Démocratique du Congo*, March 2009. However, the way military courts exercised their jurisdiction on international crimes was marred with abusive practices which justified recent attempts at amending the military penal code and the military code of criminal procedure. For a comprehensive critical analysis of the Congolese military justice, see Marcel Wetsh'okonda Koso, *Democratic Republic of Congo : Military justice and human rights—An urgent need to complete reforms*, (a report by AfriMAP and OSISA), OSISA, June 2009.

²² Amnesty International

²³ Case N° ICC-01/04-02/06

habit of making such deals but for this case the deal with the perpetrator was necessary to prevent further conflict and suffering of the people.

On May 23, 2014 the ICC sentenced another ex- Congolese militia leader Germain Katanga to 12 years in prison for aiding and abetting war crimes. In March 2014, he was found guilty of planning an ambush on the village of Bogoro in the gold rich Ituri province and procuring weapons such as guns and machetes that were used to kill more than 200 people making him the second person to be convicted by the court. However, he was acquitted of the direct involvement to the conflict as the presiding judge Bruno Cotte said that the six years Katanga had spent in custody would be taken into account.²⁴

At the end of the Ituri conflict, peace deals were signed and Katanga was given a position in the Congolese army. While in this position, Katanga helped with the demobilization of child soldiers which was an advantage on his side as the court became more lenient with his sentencing because he had shown some form of willingness to change at the time. Sadly, the same military he was serving was the cause of his downfall a year later when he was imprisoned for deviant behavior and was still getting used to the prison's food when the ICC issued his warrant of arrest. This was a plus in the Courts role in pursuing justice.

1.5.1.5 Uganda

The Ugandan government (Yoweri Museveni) which is a party to the ICC referred Joseph Kony, the head of the Lord Resistance Army (LRA) in the year 2003.²⁵ LRA is a rebel group which has been in the bushes for approximately two decades in the Northern part of Uganda. Kony's warrant of arrest was unsealed in October 2005 together with that of his commanders Vincent Otti, Okot Odhiambo, Dominic Ongwen, and Raska Lukwiya. The movement is 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.²⁶ This

²⁴ The AFP new agency.

²⁵ ICC Office of the Prosecutor Press Release, "President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC," January 29, 2004. According to an Office of the Prosecutor official, referrals by the governments of Uganda and DRC followed moves by the Office of the Prosecutor to open investigations under its discretionary power (CRS interview, September 3, 2008); see also Payam Akhavan, "The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court," *The American Journal of International Law*, 99, 2 (April 2005), pp. 405-406.

²⁶ ICC Press Release, "Warrant of Arrest Unsealed Against Five LRA Commanders," October 14, 2005. Kony is wanted for 12 counts of crimes against humanity, including murder, enslavement, sexual enslavement, rape, and "inhumane acts," and 21 counts of war crimes, including murder, cruel treatment of civilians, directing an attack against a civilian population, pillaging, inducing

operation is being manned by the United States through the country's military operations and is said to be vigorously looking for these culprits in Southern Sudan and Congo DRC.

A sustainable peace process took place in Juba Southern Sudan between the LRA and the Ugandan government. These peace talks offered the best chance to date for ending the conflict leading to improved security in northern Uganda making some of the internally displaced persons(IDPs) to return. The LRA rebels on the other hand cried foul that the ICC is trying to prosecute their leadership which would eventually undermine the fragile peace talks and erase their incentive to negotiate. Contrary to this, years later the exact opposite has happened. A landmark cessation of hostilities agreement was managed to remove most of the LRA combatants from Uganda allowing hundreds of thousands of civilians to begin the process of resettlement and redevelopment. This eventually opened up the lines of communication making the ICC's investigations a positive impact in encouraging and enforcing peace and justice. By focusing their attention to the international community, the ICC put the rebels at a corner because previously there was weak external support for the peace initiative. According to the African report about 150 Americans have been deployed recently by the US government to hunt Kony down.²⁷

1.5.1.6 Kenya

As a result of the botched 2007 Kenyan general elections which degenerated into violence which claimed over 1000 lives and displaced over 500,000 people, the ICC was forced to get involved in the Kenyan politics .President Uhuru Kenyatta and his deputy William Ruto were indicted by the ICC for perpetrating crimes in the 2007 general elections. This intervention helped Kenya transition from the violence of 2007 to the peaceful elections of 2013. Stephen Rapp, a US ambassador for war crimes issues stated that: the fact that these indictments have been out there has had an effect in terms of the peacefulness of this past election.²⁸ Whichever way the Prosecution goes, the ICC should be given credit for the new Kenyan government which has a responsibility to maintain peace and security, as well as care for its victims. The Security Council (SC) under chapter VII of the UN Charter has powers to tackle threats to international

rape, and the forced enlistment of children; the other LRA commanders are accused of crimes against humanity and war crimes, ranging from four to 32 counts.

²⁷ Daily Monitor 3 April 2014

²⁸ Daily Nation April5, 2013

peace, under Article 16 of the Rome Statute to defer a case for 12 months(This period is open and can be extended if a state applies again) inadmissibility (Article 17), interpreting the principle of complementarity such that the existence of negotiated AJM renders the case inadmissible, *ne bis in idem* (Article 20), treating the AJM as a prior prosecution blocking subsequent ICC proceedings and prosecutorial discretion (Article 53), allowing the Prosecutor to decline to prosecute in the interests of justice.²⁹

1.5.1.7 Liberia

In August 2003, the signing of the peace agreement ended 14 years of civil war in Liberia. The then President Charles Taylor finally resigned and took refuge in exile. The ended conflict had claimed more than 200,000 lives and had displaced more than 2 million. In December 2000, Charles Taylor was named in a report from the UN panel as being one of the principal organizers and sponsors of the Revolutionary United Front (RUF) rebels associated with the blood diamond trade which was between Liberia and Sierra Leone thus fueling the violence in Sierra Leone.³⁰ The Special court of Sierra Leone was mandated into bringing to justice “those who bear the greatest responsibility for war crimes, crimes against humanity, and other serious violations of international humanitarian law.”³¹ The unsealing of Taylors indictment in June 2003 was a sign of relief regarding the pursuit of justice in a fragile peace negotiations. Nigerian President Olusegun Obasanjo for his support of justice pledged to hand over Taylor only at the request of an elected Liberian government which at the time seemed impossible. Within three years, however, the newly-elected president of Liberia, Ellen Johnson- Sir leaf, under heavy pressure from the United States, formally requested the extradition of Charles Taylor to the Special Court in Freetown to finally face the charges laid out in Crane’s 2003 indictment.

²⁹Rome Statute, *supra* note 2; *see also* Dugard, *supra* note 9, at 701-02; Carsten Stahn, *Complementarity, Amnesties and Alternative Forms of Justice*, 3 J. INT’L CRIM. JUST. 695, 708 (2005) (also discussing amnesties or pardons under Article 12 and 21) [hereinafter, Stahn, *Complementarity*].

³⁰Williams, Gabriel I.H. “The Sierra Leone Special Court and Charles Taylor’s Possible Indictment.”*The Perspective*. Atlanta GA. 11 November 2002

³¹ Bringing Justice: The Special Court for Sierra Leone.” Human Rights Watch. NY. 07 September 2004. <http://www.hrw.org/en/node/11983/section/3>).

1.5.1.8 Central African Republic (CAR)

The Central African Republic has experienced four coups d'états and many more failed attempts³²making it an unstable state. The recent coup is that of Francois Bozize in 2003 when he seized power from Ange-Felix Patasse. As fate would have it, his regime was also faced by a series of military coup attempts prompting the involvement of the UN force. He was re- elected in 1999 and in the year 2001 Kolingba the ex- president tried to oust him from power(sadly the coup failed) forcing Patasse to seek help from Jean-Pierre Bemba a leader of the Ugandan-backed rebel group, the Movement de Liberation du Congo (MLC)³³ which had been functional in the DRC.

Bozize was the culprit for this action according to Patasse's accusations. This prompted him to flee to Chad of which he returned after a year, this time fully equipped for his mission. Again Patasse ran to Jean-Pierre Bemba for help. In the process of fighting the rebels in the capital Bangui while pushing them back to the North, civilians were greatly affected. In 2003, Bozize finally managed to seize power and was elected in 2005. Soon after the elections, violence broke out again in the northwest part displacing more than 100,000 civilians.³⁴ In 2006, a second rebellion broke out in the northeast part of the country led by a former associate of Patasse, Damane Zakaria chief of The Union of Democratic Forces for Unity (UFDR). This time round Sudan was blamed for the attacks.³⁵ Civilians were gravely affected by this violence as hundreds of them died, some were executed and there was presence of child soldiers.³⁶ In June 2008, the country's turmoil was put to rest when UFDR and APRD signed a peace agreement with the government to disarm and demobilize their soldiers.

During 2002 and 2003 violence, the local human rights organizations together with the International Federation for Human Rights based upon themselves to investigate the crimes committed in the capital.³⁷ They sent their findings to the ICC suggesting the situation to be

³² Berman, EG et al peace keeping in Africa

³³ Kolingba was president of CAR between 1981 and 1993. He seized power from Dacko through a coup and lost it to Patasse in the 1993 presidential elections

³⁴ Peter Bouckaert, Olivier Bercault and Human Rights Watch, *State of Anarchy: Rebellion and Abuses Against Civilians*. New York, NY: Human Rights Watch, 2007. UN OCHA Central African Republic Fact Sheet, June 2007.

³⁵ CAR Rebels Seize Town Near Chad, BBC NEWS, sec. 2009, 30 October 2006 (accessed October 23, 2009).

³⁶ Bouckaert, Bercault and Human Rights Watch, *State of Anarchy: Rebellion and Abuses Against Civilians*.

³⁷ Marlies Glasius, *We ourselves, we are part of the Functioning: The ICC, Victims, and Civil Society in the Central African Republic*, *African Affairs*, 108 (430) 2008: 49-67. International Federation for Human Rights. *War Crimes in the Central*

investigated and in December 2008; the CAR government official referred the situation to the court to be investigated. In May 2008, the ICC Pre-Trial Chamber issued the first arrest warrant against Jean-Pierre Bemba³⁸ who was immediately arrested after his warrant was unsealed while he was en route to Belgium and transferred to The Hague. In the year 2009 his charges were confirmed as he had committed the two crimes against humanity (rape and murder) and three war crimes (rape, murder, and pillage), as a military leader.

1.5.1.9 Other cases

The various accusations that the Court has its focus on Africa are baseless and cannot hold water. The mere fact that it hasn't received referrals from Iraq, Syria (which was vetoed by Russia and China) Colombia, Afghanistan, Chad (where a field office has been established), Georgia, Gaza amongst others doesn't mean it's biased. This blame should be shifted to the Security Council and relevant state parties but not the Court. Though investigations have not officially commenced, the ICC prosecutor is monitoring the situations in these countries. For example on Thursday 22, May 2014, Russia and China vetoed a UNSC resolution that would have asked the ICC to investigate war crimes in Syria. Samantha Power, the U.S ambassador to the United Nations stated that: *because of this decision by the Russian Federation to back the Syrian regime no matter what it does the Syrian people will not see justice today. They will see crime but not punishment*³⁹. The resolution which was also backed by scores of co-sponsors and NGOs could have offered Syrian people an end to impunity and would have been a vital element of a sustainable peace.

1.5.1.10 Peace versus Justice Dilemma

The aim of the court is not only to establish international justice but also peace. The two may contradict one another as the court establishes justice, the cause for peace is left to linger. It's stated that any attempt at peace building that ignores the form of justice is doomed and this is why the court was created.⁴⁰ Peace can exist without justice⁴¹ as experienced in the cases of

African Republic: 'When the Elephants Fight, the Grass Suffers'. Paris: IFHR; 2003.

³⁸ International Criminal Court, Prosecutor opens investigation in the Central African Republic (The Hague: ICC Press Release, 2007)

³⁹ Associated Press September 5, 2013

⁴⁰ Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences 2008.

⁴¹ D Curtis, 'The contested politics of peacebuilding in Africa', in D Curtis & G Dzinesa (eds), *Peacebuilding, Power and Politics in Africa*, Athens, Ohio: Ohio University Press, 2012, pp 1–28; and B Holland, 'Vattel on morally non-discriminatory peace', in D Tabachnick & T Koivukoski, *The Question of Peace in Political Philosophy*, Ontario: Wilfrid Laurier University Press, forthcoming 2014.

Mozambique and Namibia where there was reconciliation without trials.⁴² Some may argue that peace should be first then justice⁴³ while justice may possess a danger for peace.

The Courts pursuit of justice may sometimes seem a bit overboard in reference to political considerations. An example is the Liberian case where the debate of 'peace versus justice' was used to show political insensitivity in the timing of its indictment of former Liberian president Charles Taylor in 2003. It came when the country was in the middle of a very sensitive peace talk. The refusal of the Ghanaian authority to arrest and hand over President Taylor when he had attended the peace talks led to the resurgence of violence⁴⁴ in Liberia and additional deaths. If caution had be practiced and the local political demands adhered by, these destruction might have been avoided.

Looking at the Kenyan case, the context is the reverse. The presidential candidates (Kenyatta and Ruto) were well aware of their charges before contesting the March 2013 general elections. The ICC has shown flexibility by adjourning Ruto's trial so he could deal with the Westgate terror attack⁴⁵. This contrast with the claim that the ICC is insensitive to domestic political affairs as it has also helped the country to move from extreme violence to a relatively peaceful situation. The negotiators at the peace forum in northern Uganda laid claims that the issuance of the warrant of arrest for Joseph Kony the LRA rebel leader could jeopardize peace in the country.⁴⁶ As fate would have it they were disapproved when it facilitated the peace process. This was also the case with the indictment of Slobodan Milosevic for crimes committed in Kosovo. It was feared that the International Criminal Tribunal for the former Yugoslavia would impede the negotiation

⁴² L Vinjamuri & J Snyder, 'Advocacy and scholarship in the study of international war crime tribunals and transitional justice', Annual Review of Political Science, 7, 2004, pp 352–356; MR Amstutz, The Healing of Nations: The Promise and Limits of Political Forgiveness, Oxford: Rowman and Littlefield, 2005; H Cobban, 'International courts', Foreign Policy, 153, 2006, pp 22–28; R Dowden, 'ICC in the dock', Prospect Magazine, 134, 2007, at http://www.prospectmagazine.co.uk/article_details.php?id=9269; and International Crisis Group, The Role of International Justice in Preventing and Resolving Deadly Conflict

⁴³ L Hovil & JR Quinn, 'Peace first, justice later: traditional justice in northern Uganda', Refugee Law Project Working Paper, 17, Kampala, 2005, at www.refugeelawproject.org/resources/papers/workingpapers/RLP.WP17.pdf.

⁴⁴ <http://www.theguardian.com/commentisfree/2009/mar/06/sudan-war-crimes1>

⁴⁵ <http://allafrica.com/stories/201309280202.htm>

⁴⁶ Uganda: Acholi leaders in The Hague to meet ICC over LRA probe," *IRINnews*, March 16, 2005, <http://www.globalsecurity.org/military/library/news/2005/03/mil-050316-irin03.htm> (accessed May 11, 2009); "Uganda: ICC indictments to affect northern peace efforts, says mediator," *IRINnews*, October 10, 2005, <http://www.irinnews.org/report.aspx?reportid=56654> (accessed May 11, 2009); Richard Dowden, "ICC in the Dock," commentary, *Prospect Magazine*, May 2007, http://www.prospectmagazine.co.uk/article_details.php?id=9269 (accessed May 12, 2009).

processes to end the conflict with NATO but days later a peace agreement was signed.⁴⁷ In this context it can be said that justice complements peace.

1.6 Theoretical Framework

The theories relevant to my area of study include:

1.6.1 Political Realism/realpolitik/settlement:

This is a win –lose approach sometimes also called settlement because of its temporary nature. This is because the people or parties at the lose end are still aggrieved therefore laying and waiting for an opportunity to pounce and change their situation. For example the use of the legal means like litigations where the prosecutor was to rule in favor of the perpetrator by removing of the bargaining chip of amnesty from the negotiating table which is an incentive for peace settlements, will encourage the perpetrator to remain in power in order to shield him/herself from prosecution. Some analysts observe that in such cases, *“it is difficult to tell victims of these conflicts that the Prosecution of a small number of people should take precedence over a peace deal that may end the appalling conditions they endure and the daily risks they face”*.⁴⁸

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

1.6.2 Political idealism/idealpolitik: This is a win –win approach where a resolution is arrived at in favor of both parties. Burton argues that in this kind of situation, the solution arrived at must take into account that the gains of one party must be seen as losses to the other party. This comes about when a mutual solution is arrived at by both parties and they must be willing to

⁴⁷ Human Rights Watch, *Selling Justice Short*, pp. 18-19.

⁴⁸ Nick Grono and Adam O’Brien, “Justice in Conflict? The ICC and Peace Processes,” in *Courting Conflict?*

live with it in the long term. This win- win solution comes about through negotiations or mediations where the two parties find a common ground for a lasting solution.

1.6.3 Transformation: This is a complete metamorphosis or a total change to the society. It can be achieved through negative peace adhering to positive peace. This is a situation where the society looks peaceful from the surface but it's truly not peaceful underneath by the level of tension it excludes. For peace to be attained the tension must be rid of to get justice in the society.

Another change under this theory is that of positive peace. This is seen where a society is in harmony with each other. This change is usually from violence to peace. As Galtung states, the society can be transformed through legal means by creating laws that provide equality, gives justice and distribute resources to everybody and through education where specific targets are made on peace for survival.

The Theory that bests describes my topic is that of idealism where a resolution is arrived at. In this case peace and justice are both achieved by the ICC by promoting negotiations between the rebel parties and the government like in the LRA case or through mediation to share power in order to sustain peace through justice like in the Kenyan case.

1.7 Hypotheses

- The ICC supports investigations and trials in the national courts of countries where it is active.
- The ICC is an apparatus of international justice that is largely founded upon the assumptions that it produces beneficial effects by enhancing accountability.
- The ICC be a global catalyst for national prosecutions

1.8 Methodology

The methodology to be adapted in this study will be analytical and qualitative. Structured open-ended questionnaires will be prepared to be used in interviews to encourage the free flow and sharing of information. The assessment of their knowledge on the role of the court in promoting peace and justice will be done. As a reflection of the different views different countries have on the ICC, the Ugandan, Democratic Republic of Congo, and South Sudan nationalities had to be

interviewed in Nairobi Kenya. The analytical approach will be based within the context of ICC documents and cases dealing with the international and domestic law such as treaties, the constitutive Act of the African Union, Constitutions, the UN Charter and other similar documents in order to gauge its actual impact on its success in bringing peace, justice, and accountability. A focus on library research will also be applied. This will be inform of reading literature written by scholars such as articles, journals, books and assessing internet information.

1.8.1 Primary source of information

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

1.8.2 Secondary source of information

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

1.9 Scope and limitations of the study.

The research will mostly focus on the countries that are prone to conflict (read Africa) and have ratified the Rome Statute. It's important to note that the methodological limitations of using analyzed sources may produce gaps which might generally not be true for other studies done to analyze the role of the ICC. Because of the time constraints, my research will mostly rely on secondary source of information which can be accessed easily at the moment.

1.10 Chapter outline

Chapter one will be on the historical background, literature and the theoretical framework of the study.

Chapter two will be on the concept of the Rome Statute, functions of international law: jurisdiction and complementarity, the politics of the international criminal justice, veto power and the support of NGOs to the ICC.

Chapter three will cover the ICC's focus on Africa, Africa's view of the International Criminal Court and the Rome Statute, relationship of the African Union with the ICC and immunity.

Chapter four will discuss the analysis of the role of International Criminal Court in promoting peace and justice.

Chapter five will be on the summary, Conclusions and Recommendations.

CHAPTER TWO

INTERNATIONAL LAW AND THE ROME STATUTE

2.0 Introduction

International law is a body of rules laid out in agreements between states. These rules are like guidelines bound to make states behave in appropriate ways.⁴⁹ It is an essential tool for abolishing war which is now a necessity. The Rome statute, a bilateral treaty falls under the international convention of treaties. It also falls under the *Jus Cogens* rule which has a binding principle law on genocide, war against humanity, piracy, slavery and war crimes. The first time international law was applied to an individual rather than a state was at the Nuremburg trials of Nazi war criminals in 1945 and 1946. This had the aim to prevent future abuses and help form the basis for the global human rights regime which formed the foundation for the future international trials. This response to fight atrocities also led to the Universal Declaration of Human Rights, a document that holds only symbolic and moral (not legal) weight. As the cold war came to an end, more violent conflicts seemed to spring up internally. Calls for justice were made as the global political environment was now more receptive.

*“While ending the cold war did not lead to an era of peace and tranquility, however, it did have the desirable effect of reducing incentives to cover up atrocities and keep mass murders in power for strategic purposes,” and activism and media attention encouraged a “return to the precedent of Nuremburg and the notion of international criminal prosecution”.*⁵⁰

Apparently the ICC’s work should be consistent with the international law principles. Cases should be chosen strategically using the jurisdictional threshold of gravity of the crime. The international law helps in the governing of power of international regime leaders. This dissuades them from misusing or abusing their positions. For example the ideology of being above the law no longer applies to sitting presidents. When we look at the cases of Al Bashir, Mr. Kenyatta and the late Muammar Gaddafi, they are of the opinion that, there is no room for immunity for any

⁴⁹ Allen, Trial Justice, 4-5.

⁵⁰ Katherine Ann Snitzer, Peace Though Justice?: Evaluating the International Criminal Court April 2012

perpetrator. Some researchers believe that international law influences politics⁵¹ by monitoring elections to gather information related to violence. An example is the DRC case in 2011.⁵² It also promotes active cooperation among states by prescribing a set of rules within which countries are to conduct their external relations.

2.1 Mission of the International Criminal Court

The Rome Statute of the International Criminal Court entered into force on 1 July 2002, with the satisfaction of Article 126 of the Statute.⁵³ Its preamble recognizes a relationship between the aims of justice and maintaining peace and security affirming that grave crimes must not go unpunished. The countries which have signed and ratified the Statute are called state parties and are represented by the Assembly of state parties which meets at least once a year to set the general policies for the administration of the Court and review its activities. The court's survival depends on the funding provided by states mostly from the EU region, cooperation of states in leading investigations with the court and enforcing arrest warrants.

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

⁵¹BA Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics*, Cambridge: Cambridge University Press, 2009; and K Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics*, New York: Norton, 2011

⁵²International Criminal Court monitoring pre-election violence in DR Congo', Congo Planet, 11 November 2011, at <http://www.congoplanet.com/news/1904/international-criminal-court-monitoring-election-violence-in-dr-congo.jsp>.

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

Accusations of selectivity, targeting of the African continent and lack of credibility has been rained upon the Court contrary to the support it provides to the universal criminal justice without biasness. In spite of all these pitfalls facing it, the court still has the capability to contribute to procuring international justice and peace which depends on its platform of indicting perpetrators and the lobby of state members.

The International Criminal Court (ICC) was established to: achieve justice for all, put an end to impunity, help end conflicts and mend the loopholes of the ad hoc tribunals so as to take over the responsibility when national judicial systems refuse and are unable to act, and to deter future war criminals.⁵⁴ These reasons are discussed in depth as follows.

2.1.1 Ensure Justice for All

Most of the victims' population composes of majorly women and children who experience the wrath of human rights violations/ abuses when international or state conflicts occur. The court's presence therefore, makes sure that the victims get justice for the heinous crimes committed against them in their society. This mostly occurs when the perpetrators are high ranking government officials who might corrupt the national judicial system to work in their favor. This situation was exemplified in the prosecutions that took place after World War I when the German military personnel alleged to have committed war crimes were either acquitted or sentenced to modest terms of punishment after being put on trial by their domestic courts.⁵⁵ This therefore opened the flood gates for mass crimes which have continued to occur since World War I hence increasing the number of victims affected. It has been estimated that at least 170 million individuals have been victims of crimes of humanity, war crimes and genocide.⁵⁶ The prosecution of the perpetrators who have committed heinous crimes against these victims by the ICC is therefore an important step in the healing process for these victims.

⁵⁴ See Sara Anoushirvani, *The Future of the International Criminal Court: The Long Road to Legitimacy Begins with the Trial of Thomas Lubanga Dyilo*, 22 PACE INT'L L. REV. 213, 214 (2010). See also United Nations, Rome Statute of the International Criminal Court, available at <http://untreaty.un.org/cod/icc/general/overview.htm>.

⁵⁵ Meron, *supra* note 6, at 558.

⁵⁶ M. Cherif Bassiouni, *International Criminal Law: International Enforcement*, 639 (2008).

2.1.2 End Impunity

Senior officials or heads of states throughout history have evaded the justice system after committing international crimes. The ICC prevents such dubious behaviors and future atrocities by ending impunity through the prosecution of these leaders. Therefore; it helps in the implementation of the responsibility to protect which was put forward by the UN General Assembly in 2005.⁵⁷ For instance Laurent Gbagbo in the Ivory Coast and Robert Mugabe in Zimbabwe are weary of the court because they are culprits for violence in their states respectively.⁵⁸ Leaders like Paul Kagame of Rwanda and Bashar – al Assad of Syria might also be in this line up for future prosecutions. Pol Pot a Cambodian communist revolutionary who led the Communist Party of Kampuchea (CPK), otherwise known as the Khmer Rouge (1963 until 1997) was responsible for the murder of more than a million Cambodians in the mid-1970s⁵⁹ and was unable to be prosecuted by the Cambodian government who turned him to the United Nations (U.N.) to be put on trial. Sadly this didn't bear fruits because China had vowed to veto this resolution, should they proceed with the prosecution. Other examples are Idi Amin Dada who came to be known as the “butcher of Uganda” for his brutal rule in the 1970s, Mobutu Sese Seko of DRC and Adolf Hitler of Germany.

2.1.3 Limitations of the Ad Hoc Tribunals

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

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

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

⁵⁹The History Place, Genocide in the 20th Century, Pol Pot in Cambodia 1975- 1979, 2,000,000 deaths, available at <http://www.historyplace.com/worldhistory/genocide/pol-pot.htm>. See also: KIERNAN BEN, THE POL POT REGIME: RACE, POWER AND GENOCIDE IN CAMBODIA UNDER THE KHMER ROUGE, 1975-79 (1996).

2.1.4 National Courts Unwilling and Unable to Prosecute Perpetrators

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

2.1.5 Ensure Enforcement of International Criminal Law by Deterring Potential War Criminals

Since the Second World War, there have been approximately 250 conflicts which have culminated with about 70 million casualties.⁶⁰ In the past era, the absence of an International Criminal Court meant that the perpetrators would commit impunity and get a gate pass because they would not be held accountable for their actions. Those who occupied seniority positions or posts of influence likewise were also immune to prosecutions because their domestic courts were less willing to prosecute them because of their positions thus acting as a benchmark to acquaint them of their crimes. However, with the establishment of the Court, such individuals would be held accountable for their actions regardless of their position in the government. It is hoped that the indictments and trials at the international criminal court would eventually lead potential perpetrators to think twice about committing international crimes.

⁶⁰Scharf, Michael P., "Foreword: The Role of Justice in Building Peace" (2003). Faculty Publications. Paper 225. http://scholarlycommons.law.case.edu/faculty_publications/225

2.1.6. No Other International Courts that have Jurisdiction over International Crimes

Before the establishment of the Court, the International Court of Justice was the only permanent international Court. However, this Court only dealt with disputes between States⁶¹ which focused mainly on civil or political issues. It did not have jurisdiction to prosecute perpetrators of international crimes. The European Court of Human Rights only adjudicates over State Parties that violate the European Convention of Human Rights.⁶² Moreover, its jurisdiction is limited to the human rights violations that occur in Europe and also does not have criminal jurisdiction. Though the Inter-American Court has limited jurisdiction,⁶³ it only adjudicates to specific human rights violations that occur in States that are members of the Organization of American States. It too does not have criminal jurisdiction. Similarly, the African Court of Human Rights' jurisdiction is restricted only to human rights violations that occur in States that are members of the Africa Union⁶⁴. It was therefore imperative to create an international criminal court that would have the jurisdiction to try international crimes regardless of the location where these crimes occur.

2.1.7 Help End Conflicts

It was projected that the establishment of the International Criminal Court would help end conflicts. On its own initiative the court is focusing on the actions of the regime leaders in Kenya and Ivory Coast. Once they have been brought to justice, it is hoped that this will diminish the urge and ultimately end conflict.⁶⁵ However, there are concerns that the Court might actually hinder this process. It has been argued, it is unavoidable at times to enter into peace deals with

⁶¹ International Court of Justice, Statute of the International Court of Justice, Art. 34 and 36, *available at* <http://www.icj-cij.org/documents/?p1=4&p2=2&p3>

⁶² The European Union established the European Convention on Human Rights which is enforced by the European Court of Human Rights,

⁶³ Statute of the Inter-American Court on Human Rights, O.A.S. Res. 448 (IX-0/79), O.A.S. Off. Rec. OEA/Ser.P/IX.0.2/80, Vol. 1 at 98, Annual Report of the Inter-American Court on Human Rights, OEA/Ser.L/V.III.3 doc. 13 corr. 1 at 16 (1980), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 133 (1992). *See* Art. 1. The Inter-American Court of Human Rights is an autonomous judicial institution whose purpose is the application and interpretation of the American Convention on Human Rights. The Court exercises its functions in accordance with the provisions of the aforementioned Convention and the present Statute.

⁶⁴ African Court of Human Rights, *available at* <http://www.african-court.org/en/index.php/about-the-court/jurisdiction>. Under Article 3 of the Protocol, the Court has jurisdiction to deal with all cases and disputes submitted to it regarding the interpretation and application of the Charter, the Protocol and any other relevant human rights instrument ratified by the concerned States. *Id.*

⁶⁵ United Nations, Rome Statute of the International Criminal Court, *available at* <http://untreaty.un.org/cod/icc/general/overview.htm>.

perpetrators to prevent further crimes from being committed.⁶⁶ This explains why the amnesties are given to perpetrators in order to negotiate peace deals. In fact when the Court issued an arrest warrant against the Lord's Resistance Army commander Joseph Kony in Northern Uganda, critics were vocal about the impending results the warrant of arrest would have on the peace negotiating process.⁶⁷ However, the opposite of their expectations happened, the LRA was brought to the negotiating table with the Ugandan government which was a first step to ending the conflict.⁶⁸ Of course, the credit cannot be entirely attributed to the Court, there were other underlying factors at play for example the signing of the Sudan's Comprehensive Peace Agreement which made it difficult for the LRA to sustain the conflict.⁶⁹ Nonetheless the Court also played a role by issuing arrest warrants which added pressure on the LRA leadership to consider negotiating a peace agreement with the government.

2.2. The impact of the International Criminal Court

The impact of the Court can be seen in the increasing number of States that are ratifying the Rome Statute, increased Court's prosecutions and investigations including preliminary investigations in several parts of the world. In 1998, when the ICC treaty was adopted, seven countries: US, China, Libya, Iraq, Israel, Qatar and Yemen voted against it but today a majority of states have ratified the treaty.⁷⁰

2.2.1 International Recognition of the Court

The situation seems to be changing as a good number of states have accepted the legitimacy of the court which shows its great influence in the provision of peace and international justice. Following the 2011 spring revolution in the Middle East and North Africa, Tunisia decided to join the statute and both Qatar and Egypt are in the consideration stage. The Palestine leaders are also very aware of the court's potential to promote justice and peace given the fact that it became a state. Currently there are 122 States that have ratified the Rome Statute. 34 are African States, 18 are Asia Pacific States, 18 are from Eastern Europe, 27 are from Latin American and

⁶⁶Nicholas Waddell & Phil Clark, *Courting Conflict? Justice, Peace and The ICC in Africa*, 16-17, available at <http://www.lse.ac.uk/internationalDevelopment/research/crisisStates/download/others/ICC%20in%20Africa.pdf>.

⁶⁷see Nick Grono and Adam O'Brien, *International Crisis Group, Justice in Conflict? THE INTERNATIONAL CRIMINAL COURT AND PEACE PROCESSES IN AFRICA* (2007).

⁶⁸ Humanitarian news and analysis

⁶⁹ John Prendergast and Adam O'Brien, *A Diplomatic Surge for Northern Uganda* (2007)

⁷⁰ United Nations, 'Rome Statute of the International Criminal Court', at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en, accessed 25 March 2013.

Caribbean States and 25 are from Western European and other States⁷¹. Out of the five UNSC permanent members; The U.S, Russia, France, Britain and China, only France and Britain have ratified the statute⁷² though they all support the court's work. For instance they reinforced the Sudan and Libyan cases in 2005 and 2011 respectively.⁷³ Russia with its vetoing habits against referrals to the court, managed to file a complaint against Georgia.⁷⁴ The United States for example was all in for the Court's foundation initially but later felt increasingly antagonistic towards it and refused to ratify the Statute. Its absence as a hegemonic state is a major blow to its legitimacy though it did so to protect itself. The antagonism was seen in the policies adopted by the United States to undermine the Court's effectiveness. It went forward to sign The Bilateral Immunity Agreements (BIA) with other State Parties which granted the U.S. immunity from prosecutions. Those States that refused to sign the agreement were punished⁷⁵ by cuts made in the US military aid and additional economic support funds. However it has progressively increased its cooperation over the years. In 2013, president Barack Obama signed a bill which would reward informants possessing information which could lead to the arrest/conviction in any country, or the transfer to or conviction by an international criminal tribunal of any foreign national accused of committing international crimes as defined under the statute of such tribunal.⁷⁶

When Bosco Ntaganda surrendered to the U.S. Embassy in Rwanda, the embassy assisted with his transfer to The Hague to stand trial for war crimes and crimes of humanity committed in the

⁷¹ The Hague Justice Portal.

⁷² American Non-Governmental Organizations Coalition for the International Criminal Court

⁷³ C Heyder, 'The UN Security Council's referral of the crimes in Darfur to the International Criminal Court in light of US opposition to the Court', *Berkeley Journal of International Law*, 24(2), 2006, pp 650–671; and J Ralph, *Defending the Society of States: Why America Opposes the International Criminal Court and its Vision of World Society*, Oxford: Oxford University Press, 2007

⁷⁴ Jurist Document, 'Russia to File Complaint against Georgia with International Criminal Court', University of Pittsburgh, 19 August 2008, at <http://jurist.law.pitt.edu/paperchase/2008/08/russia-to-file-complaintagainst.php>.

⁷⁵ Mathew C. Weed, *International Criminal Court and the Rome Statute: 2010 review conference*, congressional research service 5 (2001), available at <http://www.fas.org/sgp/crs/row/r41682.pdf>

⁷⁶ There is, however, one condition for giving the award: information provided has to be 'in the national interests of the United States'. The rewards programme for criminals wanted by international criminal courts became part of the rewards programme created in 1984. Its initial aim was to reward people who provided actionable information that would prevent international terrorist attacks or help convict individuals involved in terrorist attacks. See United States Congress, 'S. 2318 (112th): Department of State Rewards Program Update and Technical Corrections Act of 2012', 112th Congress, 2011–2013, Text as of Jan 02, 2013 (Passed Congress/Enrolled Bill), at <http://www.govtrack.us/congress/bills/112/s2318/text/enr>; and White House, 'Statement by the President on enhanced State Department rewards program', 15 January 2013, at <http://www.whitehouse.gov/the-press-office/2013/01/15/statement-president-enhancedstate-department-rewards-program>.

Democratic Republic of Congo.⁷⁷ Recently, the US sent troops to Uganda to help capture Joseph Kony who is alleged to have committed war crimes and crimes against humanity in northern Uganda.⁷⁸ An additional five million dollars was put up as bounty on whoever had information regarding his whereabouts.

2.2.2 Investigations and Prosecutions of Alleged Perpetrators

Since its establishment, the Court has opened investigations in eight countries. These include: the Democratic Republic of the Congo (DRC) 2004, Sudan (2005), Uganda (2004), Libya (2011), Kenya (2010), Central African Republic (2007), the Ivory Coast (2007) and Mali.⁷⁹ The Court has also conducting preliminary investigations in Iraq, Honduras, Afghanistan (2007), South Korea (2010) and assessing whether genuine national investigations are being carried out in Nigeria, Guinea, Georgia, Sri Lanka and Colombia.⁸⁰ With regard to the current situations before the Court, two investigations were started by the Prosecutor *proprio motu*.⁸¹ Switzerland, the UN High Commissioner for Human Rights, Navi Pillay and a member of the Commission of Enquiry in Syria, Carla del Ponte, expressed interest for the court to investigate crimes committed by the Syrian president Bashar al Assad since 2011.⁸² In addition, in regards to the individuals being prosecuted, out of the 28 people who have been charged, 15 have appeared before the Court whereas the arrest warrants of 11 individuals are still outstanding.⁸³ The indictment of some individuals has resulted in States cooperating with Court in apprehending these criminals. For example Belgium played an active role in the arrest and transfer of former Central African Republic Vice President, Jean- Pierre Bemba.⁸⁴ However, some of the indicted individuals have

⁷⁷ Marlise Simons, The U.S. Grows More Helpful to International Criminal Court, a Body It First Scorned, THE N.Y. TIMES (April 2, 2013), <http://www.nytimes.com/2013/04/03/world/europe/us-assists-international-criminal-court-but-still-has-no-intention-of-joining-it.html?>

⁷⁸ The Washington Post March 23, 2014

⁷⁹ Situations and Cases, International Criminal Court., <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/> (last visited July 13, 2013)

⁸⁰ Office of the Prosecutor, International Criminal Court., http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/Pages/office%20of%20the%20prosecutor.aspx/ (last visited July 13, 2013).

⁸¹ Situations and Cases note 31

⁸² UN rights officials urge Syria war crimes charges', New York Times, 19 February 2013, at <http://www.nytimes.com/2013/02/19/world/middleeast/un-rights-panel-says-violence-in-syria-is-mounting.html?>

⁸³ Prosecutions, International Criminal Court., http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/prosecutions/Pages/prosecutions.aspx.

It should be noted that the warrants issued against Muamar Gadaffi and Raska Lukwiya were terminated after their deaths.

⁸⁴ Surrender of Jean Bemba to the International Criminal Court., Press Release, ICC-CPI-20080703-PR 335, available at http://www.icccpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200105/related%20cases/icc%20105%200108/press%20releases/Pages/surrender%20of%20jean_pierre%20bemba%20to%20the%20international%20criminal%20court.aspx.

continued to elude the Court and have defiantly travelled to States that have ratified the Rome Statute. For example Chad having ratified the statute, was the first country to welcome Bashir on its territory in July 2010, 2011 and 2013 consecutively. Kenya joined the circus in August 2010, followed by Djibouti in May 2010 and Malawi in October 2011.⁸⁵ The reluctance of State Parties to apprehend indicted persons shows that the cooperation with the Court is still weak although States are obliged to cooperate with the Court under Article 87 as it can only deliver justice and peace if it has the support of the court.

The Ukraine government has sworn to send its president Viktor Yanukovich to the court to be charged with crimes against humanity. Though Ukraine is not a member state of the ICC because it only signed but failed to ratify the Statute after the Constitutional Court found that the Statute was unconstitutional but it was ready to volunteer its jurisdiction to the court between November 30, 2013 to February 22, 2014 when peaceful protests were to be held.

2.2.3 Recognition of Victims' Participation

Principle three of Chicago's principles on Post – Conflict Justice requires states to acknowledge victims to ensure their access to justice while developing solutions.⁸⁶ This states that victims should be included to participate in the Court's proceedings. Under Article 68, the victims' views may be presented at various stages of the proceedings determined to be appropriate by the Court though this is uncommon in other international tribunals.⁸⁷ At the criminal tribunals at Nuremberg, Tokyo, the ICTY, ICTR, the victims were not part of the criminal process. Their role was limited to serving as witnesses in the trials. The inclusion of victims in the Court proceedings is important because the victims are the people on the ground that experienced the atrocious crimes and by involving them in the proceedings, they feel empowered and realize that they too have a stake in the court proceedings. The Court has also been innovative in creating a trust fund which has the dual mandate of implementing court-ordered reparations as well as

⁸⁵ The ICC informed the UN Security Council of the lack of cooperation between Chad and the Court. See 33 International Criminal Court, 'Pre-Trial Chamber II: Situation in Darfur, Sudan', 26 March 2013, at [http:// www.icc-cpi.int/iccdocs/doc/doc1573530.pdf](http://www.icc-cpi.int/iccdocs/doc/doc1573530.pdf)

⁸⁶ The Chicago Principle on Post- Conflict Justice, M. Cherif Bassiouni, Daniel Rothenberg: International Human Rights Law Institute 2008

⁸⁷ American Non –Governmental Organization for the International Criminal Court , victims' participation at the ICC: purpose , early developments and lessons, available at http://www.amicc.org/docs/Victims_Participation.pdf. See also Article 68.

providing assistance to victims and their families irrespective of judicial decisions.⁸⁸ Over 80,000 beneficiaries have received assistance from the Trust Fund.⁸⁹

To participate in the proceedings, victims have to get certification from Court by filing an application before it. They will need to show a personal interest in the proceeding before the appropriate Chamber.⁹⁰ Once the Chamber appoints a legal representative for them,⁹¹ they can participate in the proceedings. For example, they are allowed to make general representations, to take part in reparation claims, claims on jurisdiction, investigations, indictments, interim release hearings, confirmation hearings, hearings on admissibility and relevance of evidence, sentence hearings and finally to access the record of the case at the Registry.⁹² As of November 2012, the ICC has received more than 12,000 applications for participation in the proceedings and ⁹³majority of these applications have been accepted.⁹⁴ For the ICC to have a lasting impact on peace and justice, the victims' thirst needs to be quenched.

2. 3 Jurisdiction of the ICC

Jurisdiction refers to the power of a state to affect persons, property and circumstances within its territory. The principle of universality which gives the ICC the jurisdiction irrespective of nationality, locality or offence of a state sets the extent and the limits while putting in mind the rules of international criminal law. The ICCs jurisdiction is limited to crimes of genocide, crimes against humanity, war crimes, and the crime of aggression.⁹⁵ It may be invoked in three major ways pursuant to the Rome Statute: A case can be referred to the ICC prosecutor to investigate like in the case of the LRA in Uganda where president Museveni referred Kony to the ICC, the Democratic Republic Congo, the Central African Republic and Mali.⁹⁶ Secondly the United Nations Security Council (UNSC) acting in terms of Chapter VII of the UN Charter may refer

⁸⁸ Trust Fund for Victims, International Criminal Court, <http://www.trustfundforvictims.org/>.(last visited July 13, 2013).

⁸⁹ Trust Fund for Victims, TFV Chair Meets Foreign Ministers of DRC and Uganda at TICAD-V, available at <http://www.trustfundforvictims.org/news>.

⁹⁰ Victims Participation at the ICC , International Criminal Court., http://www.icc.cpi.int/en_menus/icc/structure%20of%20the%20court/victims/participation/Pages/booklet.aspx.

⁹¹ Article 68(3) of the Rome Statute

⁹² Article 43 of the Rome Statute

⁹³ Sang-Hyun Song, The Role of the International Criminal Court in Ending Impunity and Establishing the Rule of Law, U.N. CHRONICLE (Dec. 31, 2012),

<http://www.un.org/wcm/content/site/chronicle/home/archive/issues2012/deliveringjustice/theroleoftheinternationalcriminalcourt>.

⁹⁴ Article 43(2) of the Rome statute

⁹⁵ Article 5 of the Statute

⁹⁶ Article 13 (a) of the Statute

alleged crimes to the ICC Prosecutor⁹⁷ like in the case of Darfur in Sudan and the situation in Libya of which both non-States Parties and lastly the Prosecutor can initiate investigations *proprio motu* under Article 15 of the Statute on the basis of alleged crimes.⁹⁸ The first and the last situations can only be exercised when the state or the nationality of the accused individual to be investigated by the ICC is a party to the Rome Statute.⁹⁹ Sadly nations like China, Egypt, India, Indonesia, Iran, Pakistan, Russia, and the United States are not parties to the statute but they can temporarily accept jurisdiction of the ICC if they so wish.¹⁰⁰

Once the establishment of jurisdiction has been attained, the Court then follows the other protocols required by the international criminal law in terms of protecting the accused persons. It's important to note that the ICC only has jurisdiction and is permitted to prosecute crimes committed after the Statute entered into force.¹⁰¹ For the SC to be involved under Chapter VII¹⁰², the situation must be a threat to international peace or a breach of that peace, or an act of aggression. In addition, the Court can only secure jurisdiction over individuals who are indirectly responsible such as the military commanders/superiors and not entities like armed/criminal groups, States and companies. The major focus of the court is on those who have had a leading role in committing international crimes no matter their rank or status. Some of the worst crimes perpetrated since the year 2002 have been committed in states that are not parties to the Court; hence they fall out of the court's jurisdiction. Examples of these states include Sri Lanka, Myanmar and Iraq.

⁹⁷ Article 13 (b) of the Statute

⁹⁸ Article 13 (c) of the Statute

⁹⁹ Article 12 (2)(a) of the Statute

¹⁰⁰ Article 12 (3) of the Statute

¹⁰¹ Article 11 (1) of the Statute

¹⁰² Articles 39 to 51 of the United Nations Charter

2.4 Complementarity in the Rome Statute

The court also operates on the principle of complementarity which requires every state to exercise its criminal jurisdiction over perpetrators.¹⁰³ The provision of this principle in the Statute originated in the 1994 International Law Commission (ILC) Draft Statute¹⁰⁴ where it is stated in paragraph 10 of the preamble that:

“..The International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions”; and the preamble and Article 1 of the Rome Statute provides *“An International Criminal Court is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute”*.¹⁰⁵

A misunderstanding of this principle only occurs when both courts; the international and the local are entitled to prosecute the same crimes thus deciding which court should take the lead becomes a problem. This is where the principle of complementarity is applied to help provide a road map. This principle asserts that the jurisdiction of a case can only happen when a case has not been investigated or prosecuted by the other court. In this case the international court can only prosecute if the national court hasn't had the upper hand.¹⁰⁶ It should be noted that the primary responsibility of prosecution, remains with the domestic jurisdiction over the individuals responsible for international crimes.¹⁰⁷ Since the ICC and national courts have concurrent jurisdiction over the most serious crimes in violation of international criminal law and humanitarian law, this principle helps remove any obstacle that can bring conflict between the two jurisdictions.

¹⁰³ Arts 1 and 17 Rome Statute; M Benzing ‘The complementarity regime of the International Criminal Court: International criminal justice between states sovereignty and the fight against impunity’ (2003) 7 Max Planck Yearbook of United Nations Law 591,592.

¹⁰⁴ The Draft Statute for an International Criminal Court was adopted by the ILC at its forty-sixth session in 1994, and was submitted to the General Assembly as a part of the ILC's Report covering the work of that session (1994 ILC Draft).

¹⁰⁵ Rome Statute (n 1), Preamble, para. 10 and art. 1

¹⁰⁶ Taylor G. Stout, Reporter, International Judicial Monitor; an international law resource for Judiciaries, justice sector professionals, and the rule of law community around the world

¹⁰⁷ Linda E. Carter, The principle of complementarity and the International Criminal Court: The Role of Ne Bis in Idem,,8 SANTA CLARA J. International Law 165(2010)

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

that, a nation is “unwilling” when: (i) national authorities are shielding the accused from criminal responsibility; or (ii) national authorities have unduly delayed the proceedings, manifesting an intent to not bring the accused to justice; or (iii) the national proceedings are not conducted independently or impartially, manifesting an intent to circumvent justice. In addition, a nation is “unable” to prosecute when, primarily as a result of the collapse of its judicial system, it is not in a position to: (i) detain the accused or have him surrendered by the authorities holding him in custody; or (ii) collect the necessary evidence; or (iii) carry out criminal proceedings. The principle of complementarity applies regardless of the manner in which ICC proceedings are initiated, whether by a state party, the U.N. Security Council, or the ICC Prosecutor.¹⁰⁸

Complementarity ensures that the states incorporate the Court’s laws into their domestic/national law. For instance, the enhancement of international cooperation and Article 93(10), allowing States to make requests to the ICC for assistance in matters such as: identification of persons, collecting evidence, and victim protection, suggests that the Rome system is interdependent and mutually reinforcing.¹⁰⁹

2.4.1 Complementary and jurisdiction over senior State officials

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

“This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of

¹⁰⁸ Article 17 of the Rome Statute

¹⁰⁹ Office of the Prosecutor, *Report on Prosecutorial Strategy* (2006) at 5, available at http://www.iccpi.int/library/organs/otp/OTP_Prosecutorial-Strategy-20060914_English.pdf.

a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence". Further Article 27(2) of the Rome Statute states that "*immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person*".¹¹⁰

2.5 The Politics of International Criminal justice

International criminal justice has for so long been rebuked by advocates who are shy to acknowledge the presence of politics in their legal environment. Most states use the ICC for their political motives which go against the principles of international criminal justice. Power politics impact on the functioning of the court. The big five are capable of carrying out an ICC arrest warrant and also delay investigations or prosecutions through the UNSC subject to the conditions in article 16 of the statute. For example the UNSC used the court as a diplomatic tool to target the Darfur crisis as opposed to using alternative means which would have been fatal to their relations. State leaders also use the Court as a political instrument to act against rebels in order to reinforce their regime and authority which will lead to an unjust international legal system as the court will only focus on one side.¹¹¹ Examples are the cases of Joseph Kabila in the DRC 2004, Yoweri Museveni in Uganda 2004, Francois Bozize in CAR 2005 and the Mali government in 2012.

Courtenay Griffiths QC who was the lead counsel in the ex-President Charles Taylor of Liberia in the Special Court for Sierra Leone states that '*Right, as the world goes, is only in question between equals in power, while the strong do what they can and the weak suffer what they must*'. He's trying to say that certain personalities from certain countries will never find themselves indicted by the tribunal. Example is the case of President Kim Jong of North Korea who was found to have committed crimes against humanities is still pending. As observed the "coalition

¹¹⁰Appeal Judgment, ICC-01/09/11-1066, para.61

¹¹¹ WW Burke-White, 'Complementarity in practice: the International Criminal Court as part of a system of multi-level global governance in the Democratic Republic of Congo', *Leiden Journal of International Law*, 18, 2005, pp 557–590; and P Clark, 'Law, politics and pragmatism: the ICC and case selection in the Democratic Republic of Congo and Uganda', in N Waddell & P Clark (eds), *Courting Conflict: Justice, Peace, and the ICC in Africa*, London: Royal African Society, 2008, pp 37–45.

of the willing” (COW) which is led by the US is usually needed to enforce the ICC arrest warrants. For example the warrant of arrest of President al – Bashir was seen as both politically and legally to be legit by the US. It has continued to impose its presence in Africa through military means like the creation of AFRICOM in 2007 which was believed to be a means of access to the Africa’s oil and mineral resources challenging China’s commercial influence in the region which seems to be backfiring since most leaders in the present regime seem to be favoring China over the West for developmental issues. Kenya being the first on the list signed an agreement with China for the railway gauge. Its invasion of Iraq and Libya could attest to the fact that they see themselves as the superior power hiding behind the cocoon of ‘humanitarian’ intervention to protect civilians. These invasion allegations were poorly received by the Office of The Prosecutor(OTP) whose response was that the chain of events happened on the said territories of which Iraq was not a state party(remember Sudan and Libya are not state parties too) and had not lodged a declaration of acceptance of jurisdiction under article 12(3).

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

The number of potential victims of crimes within the jurisdiction of the Court in this situation – 4 to 12 victims of willful killing and a limited number of victims of inhuman treatment – was of a different order than the number of victims found in other situations under investigation or analysis by the Office. It is worth bearing in mind that the OTP is currently investigating three situations involving long-running conflicts in Northern Uganda, the Democratic Republic of Congo and Darfur. Each of the three situations under investigation involves thousands of willful killings as well as intentional and large-scale sexual violence and abductions. Collectively, they have resulted in the displacement of more than 5 million people. Other situations under analysis also feature hundreds or thousands of such crimes.¹¹²

Being a permanent member of the security council and is amongst those who hold the veto power, the US is untouchable in all respects whatsoever and it greatly supported resolution 1970

¹¹² See prosecutor’s decision on Iraq, page 9, available at http://www.icc-cpi.int/organs/otp/otp_com.html.

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

“The Impact of Timing of International Criminal Indictments on Peace Processes and Humanitarian Action”, they noted that *“although the ICC was established as an impartial arbiter of international justice, both the timing and nature of its indictments issued to date suggest that the intervention of the ICC in situations of ongoing conflict is influenced by broader external factors”*¹¹³.

2.6 Veto power and the Court

Article 27 of the UN Charter states that:

- 1. Each member of the Security Council shall have one vote.*
- 2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.*
- 3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting*¹¹⁴.

When the United Nations Charter was established five countries: China, France, Russia, the United Kingdom and the United States were given important roles in the maintenance of international peace and security. A special status therefore was granted to them for being the Permanent Members at the SC in form of ‘veto power’. Should any of these members have an

¹¹³ Jacqueline Geis and Alex Mundt “The Impact of Timing of International Criminal Indictments on Peace Processes and Humanitarian Action

¹¹⁴ Article 27 United Nations Charter

opinion of a negative vote in the 15-member Security Council, the resolution or decision would not pass. And if a member doesn't fully agree with the decision and doesn't wish to cast a veto, it may choose to abstain from the vote. Since its inception, all the five permanent members have been able to exercise the right of veto at one time or another.

In the recent developments referring to the Syrian crisis, Russia and China managed to veto the UN Security Council resolution to block the International Criminal Court from investigating possible war crimes in Syria, prompting angry responses from the proposed supporters who said the two countries should be ashamed of themselves.¹¹⁵ This will be the fourth time these countries have used their veto power as permanent council members to deflect action against the government of President Bashar Assad. In such a case the Court can't be blamed if the Syrian people don't get the prospects of peace and justice that they seemingly deserve. These veto countries should be held responsible for whatever outcome befalls the Syrian people. The court is very ready to do its part but the roadblock seems to be stagnant.

This resolution would have referred the Syrian crisis, to the world's permanent war crimes tribunal for investigation of possible war crimes and crimes against humanity, without specifically targeting either the government or the opposition. China's reasoning was that a referral to the ICC won't lead to an early resumption of peace talks. The U.S. Ambassador Samantha Power had this to say "*Sadly, because of the decision by the Russian Federation to back the Syrian regime no matter what it does the Syrian people will not see justice today. They will see crime, but not punishment*".¹¹⁶

Syria not being a state party to the Rome Statute that established the International Criminal Court only had the Security Council for referral. The U.S., Britain and France vowed to keep pursuing justice despite this unfortunate defeat.

Another example is that of Kim Jong the Korean President. He's been blamed for systematic torture, rape deliberate starvation and other human rights abuses. These atrocities have been documented in the United Nations report and a pursuant of his arrest seems next to impossible by an international tribunal. This is because his prosecution will likely be vetoed by China, North

¹¹⁵ The guardian May 22, 2014

¹¹⁶ The guardian note 64

Korea's closest political ally and trade partner. A recommendation that the UN refer the report to the ICC threatens to put Beijing in an awkward diplomatic position and as one of the five permanent members of the council; China vowed to exercise its rights of veto power.

2.7 Support of Non- Governmental Organizations to the International Criminal Court

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

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

2.9 Conclusion

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

CHAPTER THREE

3.0 INTERNATIONAL CRIMINAL COURT FOCUS ON AFRICA

3.1 Introduction

Advocates of International Criminal Law (ICL) propose that the establishment of international criminal courts would restrain government officials and warlords from committing grave crimes against humanity hence achieve justice and facilitate the peace making processes in countries torn by crisis. The court's role impends on helping African states combat impunity in order to foster a culture for the respect of the rule of law. It relies on the fact that the executive and judicial arms of the state system will obey and apply the law equally on everyone powerful or not in international affairs. It also plays the role of a "gentle civilizer" of state power in weak states that are unable, or unwilling, to bring perpetrators to account but it prefers not to. This is because its intent is not to replace the domestic legal processes but complement them accordingly. The work of the ICC in Africa hence prompts a lot of questions like the political implications of its work and what impact if any has it had on the resolution of peace and justice to end impunity? Is the Court's pursuit of retributive and punitive justice an obstacle to peace making and reconciliation efforts, or should it adopt a more nuanced approach?¹¹⁷ Could the ICC's intervention fire up already deadly conflicts? Has the ICC suffered politically because of charges by some that it has "selectively" targeted poor, African, or "third world" states?¹¹⁸ What, practically, can African states do to respond to these questions and challenges?

3.2 Assembly of State Parties of the International Criminal Court

To answer some of the above questions, the President of Botswana, Lt-Gen Seretse Khama Ian Khama in the last session of the ICC's Assembly of States Parties stated that, "*the reality is that atrocious human rights abuses and other serious crimes that merit the ICC's attention have and continue to be committed in Africa*".¹¹⁹ Do you think that he is right? Of course he is, because its creation and engagement marks a new era of providing justice in Africa. To back up this

¹¹⁷ Issaka K. Souare, "The International Criminal Court and African Countries: the Case of Uganda", Review of African Political Economy, vol. 36, no. 121, 2009, pp. 369-388, <http://www.roape.org/121/05.html>, accessed 23 September 2010

¹¹⁸ Miriam Manak, "Proving Ground for International Criminal Court?" Inter Press News Service, <http://ipsnews.net/africa/nota.asp?idnews=43620>, accessed 23 September 2010; Stephanie Hanson, "Africa and the International Criminal Court," Council on Foreign Relations, http://www.cfr.org/publication/12048/africa_and_the_international_criminal_court.html, accessed 23 September 2010.

¹¹⁹ www.policy.org.za/topic/ian-khama

statement, Nicholas Waddell and Phil Clark in their seminal work *Courting Conflicts? - Justice, Peace and the ICC in Africa* added that *the fact that the ICC has focused so overwhelmingly on African situations prompts questions about why the gaze of international criminal justice falls in some places and on some people and not on others. The Court's focus on Africa has stirred African sensitivities about sovereignty and self-determination - not least because of the continent's history of colonization and a pattern of decisions made for Africa by outsiders.*¹²⁰ In addition Alexander Murdoch Mackay a Scottish Presbyterian missionary to Uganda in 1889 stated that, *in former years, the universal aim was to steal Africans from Africa. Today the determination of Europe is to steal Africa from the Africans. A hundred and twenty-three years later, Europe appears to still be trying to steal both Africa and the Africans. They are now using their new creation, the International Criminal Court (ICC), to steal Africans from Africa to put on show-trials in Western Europe.*¹²¹

Africa has been prone to a number of civil wars and other forms of violent conflicts, of which some have led to war crimes, crimes against humanity and genocide. Since 1960, it has been marred by major civil wars and it is civilians who suffer the most in these armed conflicts.¹²² Sadly this shows that the continent and the international community weren't moved by the Rwandan genocide as it continues to host atrocities. In addition it continues to fight a host of challenges ranging from unconstitutional change of governments to gross violations of human rights, with millions of Africans becoming internally displaced people (IDPs) in their own countries and others are refugees. Getting rid of this cancerous tumor of repeated cycles of violence has been one of the top priorities of the African Union and the international community.

The role of the ICC in Africa has generated much comment and mixed reaction among a broad spectrum of Africans.¹²³ Its relationship with Africa has been seen as biased, double standard and politicized. This conclusion has been reached at because most current cases before the Court are

¹²⁰ Nicholas Waddell and Phil Clark, *Courting Conflicts? - Justice, Peace and the ICC in Africa*

¹²¹ Ufdc.ufl.edu/UF00080855/00071

¹²² This article is based on a presentation by Jakkie Cilliers, the executive director of the Institute for Security Studies, to the annual conference of the Committee for International Affairs, entitled 'A responsibility to protect? Sovereignty vs. intervention', held at the Royal Irish Academy, Dublin, 21 November 2008. Sabelo Gumede is a senior researcher and Thembanani Mbadlanyana a junior researcher in the ISS, Pretoria office.

¹²³ MJ Adriko 'The obligations of state parties under the Rome Statute' Workshop organised by Uganda Coalition on the International Criminal Court, Entebbe 5-6 September 2008, http://www.apilu.org/Presentation_made_by_Adrilo_Moses_on_the_domestication_of_the_Rome_Statute_in_Africa.pdf (accessed 16 March 2010).

from Africa and so are the indictees. Though this argument of unfairness focus on Africa has been largely dismissed by scholars and critics alike, its mythology is still employed by supporters of the Court and the Office of the Prosecutor (OTP).¹²⁴ The question that lingers in our minds therefore is, is this simply an unintended side effect in the pursuit of global justice or is it a reflection of racism in an international institution?

One underlying issue has been that of Article 16 of the Rome Statute where the deferral power is to be granted by the suspension of proceedings if a request is put up by the United Nations Security Council (UNSC) in favor of peace demands. This Article has been invoked several times. For example in July 2002, the US (a non-State Party) invoked this Article amidst heavy protest to acquire blanket immunity for all its citizens in peacekeeping missions around the world.¹²⁵ Contrary to this, every request from the Africa States Parties made to the UNSC asking for use of its ‘deferral power’ under Article 16 of the Rome Statute to request the ICC to suspend proceedings has been denied.¹²⁶ On May 22 2014, Russia and China being permanent members of the UNSC used their veto powers to kill a resolution that would have referred Syria’s conflict to the court. This is despite clear and vivid evidence of war crimes on a large scale in the region. No sooner had the dust in the Syria situation settled than Germain Katanga a Congolese warlord, was sentenced to 12 years in prison for aiding and abetting war crimes.¹²⁷ Some describe the ICC as the International Criminal Court for Africans, as it seems to harbor deep vines in Africa for it portrays a bad picture that only Africans commit war crimes and genocides.

This situation raises a lot of eyebrows but I still insist ICC hunts Africa to save it from its own jaws. Currently Africa has two toothless bodies that are still infants in handling such grave matters. These are The Africa Court on Human and Peoples Rights and The African Commission on Human and Peoples Rights. This prompts the question of when the A.U will be able to fathom Africa’s needs. This gives the court no choice but to step up and take the role by default. Looking at the scenario, you can’t blame it, can you? So I think the African governments need to stop using the court as a scapegoat for their own faults to build peace and provide justice to victims. The Court exists to make citizens safe and secure, not to appease governments.

¹²⁴ See for example Luis Moreno Ocampo, ‘Working with Africa: the view from the Prosecutor’s office’ at the ISS Symposium on ‘The ICC that Africa wants’ Cape Winelands, 9 November 2009.

¹²⁵ Security Council Resolution 1422, UN Doc S/RES/1422, 12 July 2002

¹²⁶ UN SC 5947th meeting, S/PV.5947, 31 July, 2008

¹²⁷ www.icc-int/en.../icc/.../pr1008.aspx

It should be noted that, Africa was greatly involved in the establishment of the court and the adoption of the Rome Statute.¹²⁸ African states were very active then and they still remain the most heavily represented region in the Court's membership in terms of state party ratification of the Statute.¹²⁹ Presently, 54 states in Africa have signed and ratified the Treaty. In terms of regional representation SADC seems to have the most member who are state parties to the ICC. Only Swaziland has yet to even sign the ICC Treaty, while Angola, Mozambique, Seychelles and Zimbabwe have signed, but have not yet ratified.¹³⁰ There is no question as to the level of commitment the ICC is involved in Africa as an equal partner in the pursuit of international justice. In addition, Africa is well represented in the ICC itself. Five of the current Courts judges are African: Fatoumata Dembele Diarra from Mali, Akua Kuenyehia from Ghana, Daniel David Ntanda Nsereko from Uganda, Joyce Aluoch (Kenya), and Sanji Mmasenono Monogeng (Botswana). The high level profiled Africans at the court include Prosecutor Fatou Bensouda from Gambia, Judge Fatoumata Dembele Diarra from Mali, First Vice President Akua Kuenyehia from Ghana, and Deputy Registrar Didier Preira from Senegal.

Looking at the history of the Court, it's clear that it didn't come in an ideological vacuum. Its aim was to create peace, promote reconciliation and justice with the Responsibility to Protect. Most of the African countries under review are somehow similar in nature as the arm of their central government has been considerably bound to specific areas which affect their performance; states like Kenya, Uganda, and Sudan are amongst the top 20 states rated "critical" in the 2010 Failed States Index.¹³¹ These were later translated to fragile states to lessen the negativity effect. ICC is just filling a gap in the international legal system because there was a need for a permanent International institution with power to try individuals for the most heinous crimes. Its first case just happened to be African and it was a referral brought by Uganda, then the Democratic Republic of Congo/DRC/ in March 2004 followed suit, then Mali, Ivory Coast, and the Central African Republic. When we look at these cases, it means that the countries gave

¹²⁸ J Dugard 'Africa and international criminal law: Progress or marginalization?'(2000) 94 *American Society of International Law Proceedings* 229 230.

¹²⁹ Coalition for the International Criminal Court

¹³⁰ Official website of the ICC at <<http://www.iccpi.int>>.

¹³¹ 'The 2010 Failed States Index,' *Foreign Policy*, July/August 2010, http://www.foreignpolicy.com/articles/2010/06/21/the_failed_states_index_2010, accessed 23 September 2010.

ICC permission to intervene in their affairs hence these accusations of biasness are far from the truth. In the case of Sudan and Libya, the UN Security Council asked that the ICC to become involved. It's only in the Kenyan case where the ICC acted entirely on its own. In addition, the Prosecutor has also initiated preliminary examinations in Guinea, and Nigeria, along with several countries outside of Africa, such as Afghanistan, Colombia, Georgia, Honduras, and the Republic of Korea.

In relation to the African continent, it's true to say that most armed conflicts occur in these states as seen historically and the justice systems are weak if not biased. Though this conclusion has been disputed by examples of many other countries where atrocities have been and continue to be committed like in Burma, Venezuela, Colombia, Iraq, Syria, Afghanistan and even Egypt where crimes against humanity have been committed, I can state that the jurisdictional arm of the court can't prosecute these states because they have not ratified the statute, and in cases like Iraq, Afghanistan and Israel where the United States is held responsible, it has protected its citizens and military personnel by signing a pact – a non-surrender agreement, Article 98 Agreement with over 100 countries. For the cases of Syria, Sri Lanka, North Korea, Uzbekistan, Israel and Palestine which are non-members, the Veto votes from the permanent members has hindered their quest for justice by denying them jurisdiction through the Security Council.

When we look at justice, we tend to look at the perpetrators and not the victims. What if African perpetrators are being singled out more than others? They are the ones committing the crimes. Perhaps if they were mindful then the selective justice will not be there. The thing is the victims of the crimes who are overlooked are the ones who have the right to complain, not the defendants in the dock. Nonetheless, its focus on Africa serves as a perpetual notice to criminals, tyrants and would-be tyrants that there is a watch dog or a big brother in The Hague who is thirsty for their blood witch hunt or not. An African and Historian expert, Stephen Ellis of Leiden University stated that the indictment of a head of state is a political act and it poses some fundamental questions about the ICC. He continues by asking if it's an independent court or a political institution, or maybe both. This critic of biased political tendencies was further fuelled by the presences of the court in the Middle East and North Africa which were a referral by the UNSC, the most political tool of all. While these were happening the Libyan and Sudanese cases were

still pending at the court and the Palestinian Authority membership was still being withheld, a decision which hit the last nail on its reputation as a neutral arbiter of justice.

3.3 African Union and the International Criminal Court

According to the preamble of the Constitutive Act of the African Union 2000, African leaders agreed to promote and protect human and peoples' rights and reinforce democratic institutions and human rights culture, and ensure good governance and the rule of law. In order for it to do so, it had to develop a security regime with a mandate closely linked to its responsibility to protect framework.¹³² As part of one of the mechanisms that international relations encompasses to study conflict and cooperation, AU as an international institution is a very important actor. The AU's relationship with the ICC is admittedly far from perfect. The AU has purposefully urged its members not to cooperate with the ICC's regarding the arrest warrant of President Al Bashir, in Sudan.¹³³ Since the issuance of his arrest warrant in 2009, Bashir has managed to travel to Egypt, Ethiopia, Libya, Qatar, Saudi Arabia, Zimbabwe and China of which none are state parties to the Statute. His first trip to a state party was to Chad in July 2010, then in Kenya in August 2010 where the authorities declined to arrest him amid a broader attempt to improve historically strained bilateral relations between the two states. In May 2011, he traveled to Djibouti also a state party and still was not arrested.

For years now the AU together with Organization of the Islamic Conference has been requesting the United Nations Security Council to defer the investigation and prosecution for twelve months in accordance with article 16 of the Rome Statute against President Omar al-Bashir but all in vain.¹³⁴ To add insult to their injury another sitting president Mr. Kenyatta together with his deputy were indicted by the court for their alleged role in the 2007 post-election violence in Kenya. This prompted the African Union to put its full support behind these leaders. Even with this accusations the AU is wrong to lash out at the court because there is no doubt that atrocities are being committed in Africa. The AU seems to be relying on the impunity provisions accorded

¹³² K. Powell, 'The African Union's Emerging Peace and Security Regime Opportunities and Challenges for Delivering on the Responsibility to Protect', 2005 Monograph No. 119, available at www.nsi-ins.ca/english/research/progress/19.asp

¹³³ Assembly/AU/Dec.296(XV) ¶ 5, July 27, 2010, available at <http://www.dirco.gov.za/diaspora/docs/audecision/summitJul2010Decisions.pdf>

¹³⁴ Gosnell C 'The request for an arrest warrant in Al Bashir' (2008) 6 *Journal of International Criminal Justice* 841-851 and A Ciampi 'The proceedings against president Al Bashir and the prospects of their suspension under article 16 ICC Statute' (2008) 6 *Journal of International Criminal Justice* 885-897.

to heads of states under Article 98 of the Rome Statute to justify its refusal to cooperate with the ICC.¹³⁵ Its cooperation is highly sensitive in ensuring the apprehension and surrender of the perpetrators of crimes that fall within the Court's jurisdiction. Africa should not see itself as a target of neo-colonial victimization, but at the vanguard of a new era of international justice.¹³⁶ Due to the global power relations, Africa is the beneficiary of multilateral approaches to peace and justice. More than any other continent, Africa needs the support of the ICC the most to gradually establish its own workable and coherent human rights regime/architecture instead of relying on Europe and the U.S. or the UN umbrella. As the former U.N. Secretary-General Kofi Annan, puts it, "In all of these cases, it is the culture of impunity, not African countries, which are the target. This is exactly the role of the I.C.C. It is a court of last resort".¹³⁷ Yes regional blocs are very important in helping the continent's interests and agenda at home and abroad but AU should put in mind that they have a responsibility to avoid marginalization on the international stage and to prevent impunity for political considerations. For those who are insisting that the target is in Africa should by now have seen that their accusations are baseless. If the perpetrators are not followed ten who will be responsible for the millions of African who are displaced, the thousand who are killed, the hundreds of thousands of African children transformed into killers and rapists, thousands of Africans raped. Should the Court ignore these victims in favor of the perpetrators? The point is, the court is working for the victims who happen to be Africans.

3.4 Politics of Power

It is true to say that political power certainly shields perpetrators. The idea is of the "power triangle" which helps the leaders to move ahead. This triangle consists of three components, which is communication, recognition and influence of which the five permanent members of the UNSC control or possess. However it's wrong to assume that only the western world has been wilding this shield on the courts face. Africa too had the chance on the floor when they ignored

¹³⁵Article 98 provides, "(1) The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity. (2) The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender

¹³⁶ [www.theguardian.com/.../2012/may/28/...](http://www.theguardian.com/.../2012/may/28/)

¹³⁷ Kofi A. Annan, "Justice Vs. Impunity," *International Herald Tribune*, May 30, 2010

the arrest warrant for Bashir. This said, as an international mechanism, the ICC must always accommodate itself to the political powers due to the domination of power inequalities in a political world. This corresponds to the argument made by the realist author EH Carr, according to whom law ‘cannot be understood independently of the political foundation on which it rests and of the political interests which it serves’.¹³⁸

This has been experienced at both the global and local level. Its main focus on Africa has been seen as a power tool for the western nations to intervene without being accountable. An argument put forward by African governments is that, the ICC is practicing “selective justice” while avoiding diplomatically, economically, financially and politically strong countries like the United States, United Kingdom, Russia, and China because they can threaten its existence. For example the ICC has been seen to accommodate itself to the US power because it realized that alienating itself from the US could easily spell disaster. The result of this cooperation has seen the court licking the US boots by prosecuting US enemies in Africa and ignoring crimes committed by US allies. They seem to forget that, for the court to function effectively, especially within an increasing politicized global environment, it must secure the cooperation and compliance of national governments, including those in Africa. Israel is another example of a country that is concerned about the politics of power in the court. It “unsigned” the Rome Statute on the grounds that “political pressure on the court could lead it to reinterpret international law. It shares the US sentiments that the prosecutors in the court have too much power and the geographical appointment of judges as disadvantage to its own”¹³⁹.

Because of its relative lack of checks and balances to prevent it from being misused, the ICC represents a dangerous temptation for those with political axes to grind. This is a lesson currently being learned by Israel. Despite the fact that Israel is not a party to the Rome Statute, the ICC prosecutor is reportedly exploring ways to prosecute Israeli commanders for alleged war crimes committed during the recent actions in Gaza. Similarly, China and India seemed to have joined the bandwagon as they have refused to cede to the Rome Statute and by expressing concern over

¹³⁸ EH Carr, *The Twenty Years' Crisis, 1919–1939*, New York: Perennial, 2001, p 166. More generally, realist authors argue that institutions are unlikely to act independently from states. However, other academics underline the possible autonomy of action for international institutions

¹³⁹ www.policyreview.eu/opposing-palestine-membership-of-the-international-criminal-court

the powers of the prosecutor and the court's jurisdiction. These outcries are exactly the same as those made by Africans. Question is if others are concerned why not Africa? In June 2009, the then lead Prosecutor Luis Moreno Ocampo called for a US-led "coalitions of the willing" to enforce arrest warrants. As Ambassador Rapp stated, the US may cooperate, but only on its own terms.¹⁴⁰ This means that the repercussions could be deadly for peace and justice if the ICC decides to rely on the military capacity of the US completely of which has its own economic and political interests in Africa as seen in the Libyan and Egypt cases in the name of capturing war criminals and enforcing international justice. In line with this, the court should realize that the price it will pay for this Faustian bargain will be trivial compared to the very dangerous consequences this alliance could have for peace in Africa. This alliance, deeply threatens the credibility of the ICC because of its double standards nature. When confronted, the court tends to respond by declaring that global justice is evolutionary, and that we shouldn't expect it to be perfect.

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

3.5 Justice versus Peace in Africa

All state parties to the statute under the international law bounding them to the treaty are required to fully cooperate with the proceedings of the court.¹⁴¹ Note that all individuals indicted by the court must be arrested, evidence provided, witnesses protected and enforce the Court's decisions, including sentences. These requirements are duly to be followed no matter the diplomatic headaches and protocols involved even if the culprit happens to be the head of state like in the case of Omar al-Bashir of Sudan and Kenyatta of Kenya. States must work with the ICC and with one another through bilateral and multilateral forums and processes to address these

¹⁴⁰ m.state.gov/md200880.htm

¹⁴¹ Article 86 of the Rome Statute

violations in order to leash the impunity gap which is wider in Africa. Also States Parties must leave the pretense of pitting justice against peace because Justice and peace must be seen to complement each other as opposed to against each other. This is why the AU's argument on Sudan that the arrest of al-Bashir will hinder peace efforts is absurd and doesn't hold water. In my view i can say that the struggle for peace is dependent on the political context in which the proceedings or accusations take place. The two, peace and justice can work in partnership or cooperation with one another under certain circumstances, and in opposition at others. For example in the Ugandan case, justice and peace may have initially been positively linked, as the threat of ICC prosecution helped drive the LRA to the negotiating table.¹⁴²

Another thing worth noting is that the courts presence further complicates the means of getting a dictator to leave power peacefully. Let's refer to the case of the president of Haiti, Jean-Claude Duvalier who was peacefully convinced to leave power in exchange for a peaceful exile by American negotiators of the Reagan Administration.¹⁴³ This is totally in contrast with the expectations of today's era. For example the Syria's dictator Bashar al-Assad. Do you think he can be manipulated easily with negotiations over his departure? Negotiators have little to offer him except future prosecutions and prison. I totally agree that the likes of Duvalier and Assad plus other dictators should not be excused of their actions where they may enjoy their ill-gotten gains but pay for their crimes. The downfall for forcing them to pay may mean more violence, deaths, and extended strife. Peace and justice may go together in some cases, but be at odds in others. Look at the case of Libya; it has been under turmoil since the removal and death of their dictator, Muammar Gaddafi. In South Africa though, the case was a bit different. The democratically elected government chose a "truth and reconciliation" process over stiff justice which they saw was fit for them.

3.6 African Leadership

African leaders through their representative bodies like the African Union and the East African Legislative Assembly need to view the Court as a helper rather than a competitor of justice that aids them fight against impunity on their continent. I expect the regime leaders to make public displays of their concerns about the repercussions of the refusal to comply in order to signal

¹⁴² <http://www.usip.org/publications/ugandalords-resistance-army-peace-negotiations>

¹⁴³ <http://countrystudies.us/haiti/18.htm>.

others that indeed that grave consequences like the military force or imposition of costly sanctions lay awake waiting for them. In this light therefore, it is important for them to understand that the court has its own mandate which it duly exercises against perpetrators for committing international crimes and therefore States still have the opportunity to try other suspects who are “less responsible” so as not to create opposition.¹⁴⁴ In support of this, the AU needs to support the ICC in the operation of its mandate by allowing it to open an African Liaison Office that will smoothen its work on the African continent and also keep the lines of communication between the Court and the African Union open. African leaders need also to closely monitor the work of institutions like the African Court of Justice and Human Rights and the East African Court of Justice to make sure that their effectiveness against the fight of impunity on the continent is at par. Highly qualified and experienced judges need to be appointed in such institutions so as to ensure that they can efficiently exercise the mandate of the Court and also improve the human rights record of the continent.¹⁴⁵ The needs of the victims of the grave international crimes need to be prioritized at both the national and regional level by the elected leaders.¹⁴⁶ They should therefore focus on establishing structures that can not only genuinely prosecute perpetrators of international crimes but also respect the rights of victims to truth and reparations for the harm that they have suffered. In a nutshell, prosecutorial measures should be pursued alongside other transitional justice mechanisms that can make the justice process more comprehensive.

3.7 African Civil Society and the ICC

Kofi Annan the former UN Secretary General in 1999 stated that: *I think it is clear that there is a new diplomacy , where NGOs , peoples from across nations, international organizations, the Red Cross , and governments come together to pursue an objective. When we do- and we are determined , as has been proven in the land mines issues and the international criminal court- there is nothing we can take on that we cannot succeed in and this partnership... is a powerful partnership for the future.*¹⁴⁷

¹⁴⁴ Margaret M. deGuzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, 33 *Michigan Journal of International Law* 265-320 (2012). Available at: <http://repository.law.umich.edu/mjil/vol33/iss2/2>

¹⁴⁵ <http://ciccglobaljustice.wordpress.com/2014/04/29/wanted-highly-qualified-candidates-to-become-icc-judges/>

¹⁴⁶ <http://www.africaportal.org/dspace/articles/african-union-and-international-criminal-court-embattled-relationship>.

¹⁴⁷ <https://www.globalpolicy.org/ngos/docs99/gpfrep.htm>

In this globalizing world, the quest for peace and justice requires complex strategies. The need to address the structural causes of conflict, many of which may be inherent in the global system must be put in place. To do so, requires cooperation between civil society actors at the local, national, regional and global levels and with governments, intergovernmental organizations and, in some cases, businesses. African Civil Society's view with regard to the role of the ICC on the continent is heterogeneous. African civil society has played a key role for the court to become a reality and continue holding an important position in promoting the ICC. Around 130 undersigned African civil society organizations with representatives in 34 African countries affirmed its support for the court.¹⁴⁸ They believe that the withdrawal from the ICC would send the wrong signal about Africa's commitment to protect and promote human rights and reject impunity as reflected in article 4 of the AUs Constitutive Act. It will also be in breach of the international law for the civilians if perpetrators are not punished for their crimes.

They say that the African leaders should put victims of war crimes interests ahead of those leaders facing charges at The Hague. According to the several theories brought forward some believe that the ICC is a necessary tool in fighting impunity that has created havoc on the lives of African citizens. Critics on the other hand believe that the ICC is not some form of treatment that will cure Africans of their diseases ridding them from their criminal ailments. The society promises to work with the court to ensure consistency in the application of international justice. It believes in working to expand rather than contract the membership of the court is a step to widen the accessibility to justice and sending the message that nobody is above the law. As Ibrahim Tommy a member of the Centre for Accountability and the Rule of Law, in Sierra Leone puts it, *Instead of just focusing on the leaders, as has so often been the case, we need to bring the public along through extensive public education and advocacy efforts.*¹⁴⁹ Georges Kapiamba, Congolese Association for Access to Justice, DRC adds that *Priorities of African civil society for the next two years should be public awareness of the activities of the ICC and of the role of political leaders on strengthening domestic justice to fight impunity at the local level. The ICC will not take care of all cases. We need to strengthen legislative advocacy. Political actors and*

¹⁴⁸<http://www.issafrica.org/uploads/African-civil-society-letter-to-AU-on-ICC-withdrawal-Oct-2013.pdf>.

¹⁴⁹<http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2013/05/Positive-Reinforcement-Advocating-for-International-Criminal-Justice-in-Africa-SALC.pdf>.

society should be educated on the benefits of the domestication of the ICC Statute.¹⁵⁰ Richard Shilamba, Children Education Society, Tanzania adds that *Effective awareness raising, advocacy and support initiatives to the general public and relevant stakeholders are fundamental to ensure meaningful realization of international criminal justice in Tanzania.*¹⁵¹

3.8 Immunity

According to the Oxford *Advanced Learner's Dictionary*, immunity is defined as 'the state of being protected from something'.¹⁵² This subject of immunity is very diverse and confusing.¹⁵³ Upon reading several articles on immunities, I came across different terms such as 'sovereign immunity', 'foreign sovereign immunity', 'foreign state immunity', 'state immunity', 'state sovereign immunity', 'diplomatic and consular immunity', 'impunity', 'amnesty', 'immunity of international organizations', 'jurisdictional immunity', 'inviolability', 'immunity from procedural enforcement', 'immunity from execution' and 'immunity from prosecution'.¹⁵⁴ Van Schaack and Syle have observed that, immunity has been enjoyed for centuries by state officials, and under both the international and national law may claim it while still in office for the crimes committed.¹⁵⁵ The Rome Statute of the International Criminal Court, 1998 (Rome Statute) has used the term 'official capacity' in article 27 to describe 'immunity' or 'special procedural rules' attaching to the state officials under national and international law.

This rule of immunity of state officials has however been dynamic over the years. What seemed impossible in the past like the prosecution of a state official in their home bound national courts for international crimes is now possible under contemporary international law but only after the expiry of their office term. This trend was observed in Malawi and Zambia where the former

¹⁵⁰ <http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2013/05/The-Role-of-Civil-Society.pdf>

¹⁵¹ http://www.iccnw.org/documents/CHESOPressReleaseICC14Nov2009_en.pdf.

¹⁵² *Oxford Advanced Learner's Dictionary* (2005) 776

¹⁵³ G Robertson *Crimes against humanity: The struggle for global justice* (2002) 403-426; SK Kapoor *International law and human rights* (2007) 216-223; MN Shaw *International law* (2003) 621-692; J Dugard (2005) 238-265; I Detter *International legal order* (1994) 456-463; H Leuterpacht 'The problem of jurisdictional immunities of foreign states' (1951) 28 *British Yearbook of International Law* 265; R Higgins 'Certain unresolved aspects of the law of state immunity' (1982) 29 *Netherlands International Law Review* 265; H Fox 'State immunity and the international crime of torture' (2006) 2 *European Human Rights Law Reports* 142; L McGregor 'State immunity and *jus cogens*' (2006) 55 *International and Comparative Law Quarterly* 437-445; A Orakhelashvili *Peremptory norms in international law* (2006) 320.

¹⁵⁴ I Sinclair 'The law of sovereign immunity: Recent developments' (1980) II *Hague Recueil des Cours* 113, 167

¹⁵⁵ B van Schaack and RC Syle *International criminal law and its enforcement: Cases and materials* (2007) 865-874.

presidents were put on trial, but for domestic crimes.¹⁵⁶ Another example is that of the Ethiopian authorities who prosecuted and sentenced former state official, Mengistu Haile-Mariam, for genocide and crimes against humanity *in absentia*.¹⁵⁷ Though the authority was doing right under the international law, it lacked legitimacy under international human rights law in the quest for justice.

3.9 The scope of immunity of state officials

In reference to International law, two aspects of immunity for state officials have been put in place: functional immunity (immunity *ratione materiae*) and personal immunity (immunity *ratione personae*). Immunity *ratione personae* presents itself strongly in international courts or tribunals. State officials serving at the time are said to be within the jurisdiction of international tribunals depending on the terms of the statutes' tribunals.¹⁵⁸ According to Shaw, he observes that in the domestic court compared to the international tribunals, the procedure is more complex because of the 'status of head of state before domestic courts' and that 'international law has traditionally made a distinction between official and private acts of a head of state'.¹⁵⁹ Hence functional immunity exists only when an official is in office and expires when the term ends. It may also be invoked not only by serving state officials but also by former state officials in respect of their official acts while they were in office. This type of immunity does not apply when a person is charged with international crimes either because such acts can never be 'official' or because they violate norms of *jus cogens*.¹⁶⁰ If state officials want to be shielded under the umbrella of immunity from arrest and prosecution like in the cases of South Sudan and Kenya, then immunity would allow states to choose whether or not their agents would be responsible under international law.¹⁶¹

Personal immunity is more for the senior state officials while they are still in office. This form of immunity has been heavily supported by the state as well as judicial practices which imply

¹⁵⁶ On prosecution of former presidents of Malawi and Zambia, see, PM Wald(2009) Tyrants on trial: keeping order in the courtroom

¹⁵⁷ upetd.up.ac.za/thesis/available/etd-01252012-112603/.../05chapter5.pdf

¹⁵⁸ Shaw M N *International law* (2003) 655-656.

¹⁵⁹ See note 42

¹⁶⁰ Jorgensen NHB *The responsibility of states for international crimes* (2000) 85-92.

¹⁶¹ Broomhall B *International justice and the International Criminal Court: Between sovereignty and the rule of law* (2003) 128-129 (citing J Brohmer *State immunity and the violation of human rights* (1997) 26-32).

that international crimes are under it as seen in the cases of Muammar Qaddafi¹⁶² and Robert Mugabe¹⁶³ where the domestic court was involved.

3.10 Immunity of state officials in Africa

Presently, there is no regional framework outlawing state officials in Africa from receiving immunity and no regional treaty permitting immunity to the prosecution of international crimes in Africa. However the international court does not recognize presidential immunity. This said, it should be noted that the Constitutive Act of the African Union (AU) contains key principles which are reflected in article 4 that rejects impunity (and by analogy, immunity of state officials) for international crimes in Africa. It should be noted that there is also a principle that allows the AU to have the right to intervene in a member state (case at hand Kenya) in pursuant to a decision of the Assembly of Heads of State and Government of the Union in respect of grave circumstances such as war crimes, genocide and crimes against humanity.¹⁶⁴ However nothing has been said on whether an African state official can be prosecuted for international crimes, therefore leaving the ICC room to prosecute by international law the grave atrocities of genocide, war crimes and crimes against humanity where a state official may not claim immunity from prosecution for such crimes in Africa. States like Rwanda have enacted laws like Law 33 Repressing the Crime of Genocide, Crimes against Humanity and War Crimes. Though it's not a party to the Rome Statute, Section 18 outlaws the immunity of state officials for these international crimes. In the republic of Zimbabwe, law 111 Sec 30 of the Constitution provides for Presidential immunity, the amended Art 46 of the Constitution of the United Republic of Tanzania, Art 98 Constitution of the Republic of Uganda, 1995; sec 34(1)-(5) Constitution of the Fourth Republic of Ghana (Promulgation) Law, 1992; secs 28(1), 34*bis* and 35(1)-(3) Constitution of the Kingdom of Swaziland; art 61 Constitution of Liberia; art 48(4) Constitution of the Republic of Sierra Leone, 1991 and Kenya, the International Crimes Act, 2008 outlawing

¹⁶² French *Cour de Cassation* 13 March 2001 Judgment 1414 (2001) 105 *Revue Generale de Droit International Public* 437

¹⁶³ See *Tachiona v Mugabe* 169 F Supp 2d 259, 309 (SDNY 2001); see generally the opposition submission in the 'Brief for the United States, in Tachiona, on her own behalf and on behalf of her late Husband Tapfuma Chiminya Tachiona *et al*' *Petitioners v United States of America On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit* In the Supreme Court of the United States 05-879, April 2006. In n 9: 'The assertion of head-of-state immunity on behalf of Foreign Minister Mudenge is consistent with international practice [citing also *Case Concerning the Arrest Warrant of 11 April 2000*], paras 20-21, 22'

¹⁶⁴ Art 4(h) Constitutive Act of the AU.

the immunity of state officials in section 27.¹⁶⁵ However, the same Kenyan constitution now protects the President from any criminal court proceedings, and also states once a person is elected President any criminal proceedings against him that were ongoing shall cease (or be suspended). This shows that the framers of Kenyan constitution were confused because they envisioned Kenya electing someone with criminal record against them.

3.11 Prosecuting Serving Heads of State

The indictment of the several serving heads of state has been a bold move and a big achievement of the ICC. Originally it was seen as an obstacle to the peace processes but time has revealed that the indictments were the best means to curb the atrocities. The issuance of arrest warrants against Omar Hassan Ahmad Al-Bashir, President of Sudan, Muammar Mohammed Abu Minyar Gaddafi the then President of Libya and Uhuru Kenyatta the President of Kenya, the first ever such action against serving heads of state caught them off guard.¹⁶⁶ Some dismissed these actions as mere threats with no realistic way of effectuating their objective; because after all, President Al-Bashir is visiting states that are parties to the Rome Statute and President Uhuru Kenyatta was recently invited by President Obama to the US- Africa summit.¹⁶⁷

3.12 Challenges and Opportunities

The slow wheels of justice at the ICC have been a frustration to victims due to resistance to and obstruction of its work. For example, the non-cooperation factor from various countries and the AU. These countries forget that the court is there to help them fight impunity and foster a culture for the respect of the rule of law. The Statute does not consider the stipulations of peace agreements which may include the granting of amnesties and other forms of suspension of prosecutions and investigations into possible ICC crimes. This might be misinterpreted by the court as a form of unwillingness to prosecute the perpetrators by the state but what the court doesn't understand is, sometimes this is necessary in order to facilitate the peaceful transition from one regime to another. An example of such a situation is in regards to the case of South

¹⁶⁵ Sec 27 International Crimes Act, 2008; A Okuta 'National Legislation for Prosecution of International Crimes in Kenya' (2009) *Journal of International Criminal Justice* 1063-1076, 1073.

¹⁶⁶ Prosecutor v. Omar Hassan Ahmad al Bashir, Case No. ICC-02/05-01/09, Warrant of Arrest (Mar. 4, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf>; *Situation in Libya*, INT'L CRIM. CT, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx

¹⁶⁷ *Amnesty Urges Nigeria to Arrest Sudanese President*, CNN (Oct. 26, 2009), <http://www.cnn.com/2009/WORLD/africa/10/26/nigeria.amnesty/index.html>; *Sudan's President Bashir Defies Arrest Warrant in Chad*, BBC NEWS (July 21, 2010), <http://www.bbc.co.uk/news/world-africa-10718399>.

Africa where the Truth and Reconciliation Commission granted amnesty to some human rights violators and murderers in exchange for their testimony before the Commission. If the ICC was to interfere with this form of agreement, there would be dire consequences. This is one of the cases where the Court would have to choose between Justice and peace.

3.13 Conclusion

Restoring the Courts trust amongst the Africans will be a hard nut to crack but supporters are optimistic that with the appointment of Fatou Bensouda the Present Chief Prosecutor, an opportunity to amend the relationship might present itself. Regardless of how this is to be achieved, each country must develop the capacity to effectively investigate and prosecute international crime committed within its borders. Where necessary the AU might assist in cases where perpetrators have sought asylum to avoid being prosecuted. It needs to play its part in the fight against impunity in Africa and the world and actively follow up situations in other jurisdictions where crimes have been committed while maintaining an impartial political role to uphold its credibility among African state leaders and the victims in the communities.

CHAPTER FOUR

ANALYSIS OF THE ROLE OF THE INTERNATIONAL CRIMINAL COURT IN PROMOTING PEACE AND JUSTICE

4.1 Introduction

This chapter aims to link the objectives of the study with the theoretical framework in presenting the research findings and discussing them as obtained from the respondents. The results are presented according to the objectives of the study which reflect the research hypotheses that i set out to answer. In addition, this chapter presents the characteristic of the study subjects displayed by the qualitative findings. Qualitative data is presented based on the thematic areas of analysis. This section also demonstrates the role of the court in the promotion of justice and peace.

I conducted the interviews in two cities and three towns: Nairobi, Nakuru, Kisumu, Eldoret and Homabay. These towns were chosen because they were mostly affected by the 2007/2008 Post Election Violence in Kenya thus their view on the court's role was diversified. The aim of the study was to capture the attitudes of respondents about international crimes, peace, justice, the focus of the Court in Africa, immunity of heads of state and their perception of the court. I used an open ended questionnaire to conduct the interviews with a sample size of 40 (20 years of age and above) respondents.

4.2 General Information

From the response I got, under gender, the female category was at 30% while the male response was at 70%. This showed that women were not as interested as the male in the discussion of the Court. Some would brush you off saying they had no idea or weren't in the least interested in politics.

Table 4.1: Percentage of the gender response

| Gender | Frequency | Percentage |
|---------------|------------------|-------------------|
| Female | 12 | 30 |
| Male | 28 | 70 |

Source: Author 2014

4.2.1 Age of the respondents

According to the age brackets, the 41 – 50 years category were most responsive at 40% followed by the 20- 30 years at 25% then 31-40 years at 20% and finally 51 years and above at 15%. This is because the 41-50 percent age category had more information on the topic and understood the essence of my research.

Table 4.2: Age percentage of respondents

| Age(Years) | Frequency | Percentage |
|-------------------|------------------|-------------------|
| 20-30 | 10 | 25 |
| 31-40 | 8 | 20 |
| 41-50 | 16 | 40 |
| 51 and above | 6 | 15 |

Source: Author 2014

4.2.2. Education level of respondents

Most respondents were under the degree category at 65% compared to the master's level which was at 25% and PhD at 7% while others which touched on tertiary training and pre secondary school was at 3%. This showed that graduates were more supportive of the idea compared to post graduates.

Table 4.3: Level of Education

| Level of Education | Frequency | Percentage |
|---------------------------|------------------|-------------------|
| Degree | 26 | 65 |
| Masters | 10 | 25 |
| PhD | 3 | 7 |
| Other | 1 | 3 |

Source: Author 2014.

4.3 The International Criminal Court

The ICC is an independent permanent Court based in The Hague, Netherlands that prosecutes individuals accused of the most heinous political crimes like genocide, crimes against humanity, war crimes and crimes of aggression (committed by one state in another state).¹⁶⁸ The court is based on a treaty, the Rome Statute which almost 122 countries have signed and ratified as of 1 May 2013. It is viewed as a Court of last resort and it will not act if a case is investigated or prosecuted by a national judicial system unless the national proceedings are biased by shielding the accused from criminal responsibility. It should be noted that the Court is an independent institution and not affiliated to the United Nations as most assume though it maintains a cooperative relationship with the U.N.¹⁶⁹

The jurisdiction and functioning of the ICC are governed by the Rome Statute. Building on this and its relationship to the UN's special tribunals, the ICC supports global accountability for all including political and military leaders. Since its inception in 2002, it has managed to indict and prosecute several perpetrators for their impunity acts though it has had to face some challenges from uncooperative states. For example the United States being a heavy weight in the political arena has refused to be a friend of the court due to its concerns over possible charges against American troops and diplomats. The Court has also been criticized by international observers and African leaders for placing undue focus on the African continent while neglecting human rights violations in western countries. To date, formal investigations have only been in Africa.¹⁷⁰

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

¹⁶⁹ Haguejusticeportal.net

¹⁷⁰ The international Criminal Court – Global Policy Forum

Table 4.4: General perceptions of the International Criminal Court

| Perception | Frequency | Percentage |
|--------------------|------------------|-------------------|
| Fair | 4 | 10 |
| Good | 9 | 22.5 |
| Excellent | 24 | 60 |
| Do not know | 3 | 7.5 |

Source: The Author 2014

From the Above table of response, it was clear that most respondents (60%) understood what the ICC was all about. Awareness was high in the male category (70%) as most of them seemed to be fully engrossed into the political arena and low in the female category at 30% (refer to Table 4.1). (22.5%) had good knowledge of the court and its proceedings and 7.5% had no idea of what it was. This shows that majority of the people are aware of the existence of the International Criminal Court processes. A follow-up question on its support revealed that many respondents (80%) believed in the ICC as it had helped curb the political conflict situations globally. (20 %) of the respondents who were against the support of the Court felt that the Court was impeding on the quest for justice and peace processes because impunity is still around us.

Table 4.5: Support for the International Criminal Court

| Support | Frequency | Percentage |
|----------------|------------------|-------------------|
| Positive | 32 | 80 |
| Negative | 8 | 20 |

Source: Author 2014

One of the objectives was to examine the role and impact of the ICC beyond its own investigations and prosecutions and from the response on the general perceptions of the role of

the International Criminal Court, it is evident that majority of the population are well conversant with the court. This being the case, it's safe to assume that the courts impact has been positive despite the numerous outcries heard of its agenda. These findings confirm the assertion that the court is indeed impacting its support which can be seen by the increasing number of States that are ratifying the Rome Statute, increased court's prosecutions and investigations globally and universal including preliminary investigations in several parts of the world. Currently there are 122 States that have ratified the Rome Statute. 34 are African States, 18 are Asia Pacific States, 18 are from Eastern Europe, 27 are from Latin American and Caribbean States and 25 are from Western European and other States.¹⁷¹ The increasing number of states and those wish to have temporal jurisdiction of the court shows its great impact for peace and justice.

4.4 International Crimes

There is no favorable definition of 'international crimes' in international law.¹⁷² Crimes that constitute the *jus cogens*¹⁷³ violations of international law, like war crimes, crimes against humanity, genocide, and torture¹⁷⁴ are the international crimes. A minority of respondents rated

¹⁷¹Haguejusticeportal.net

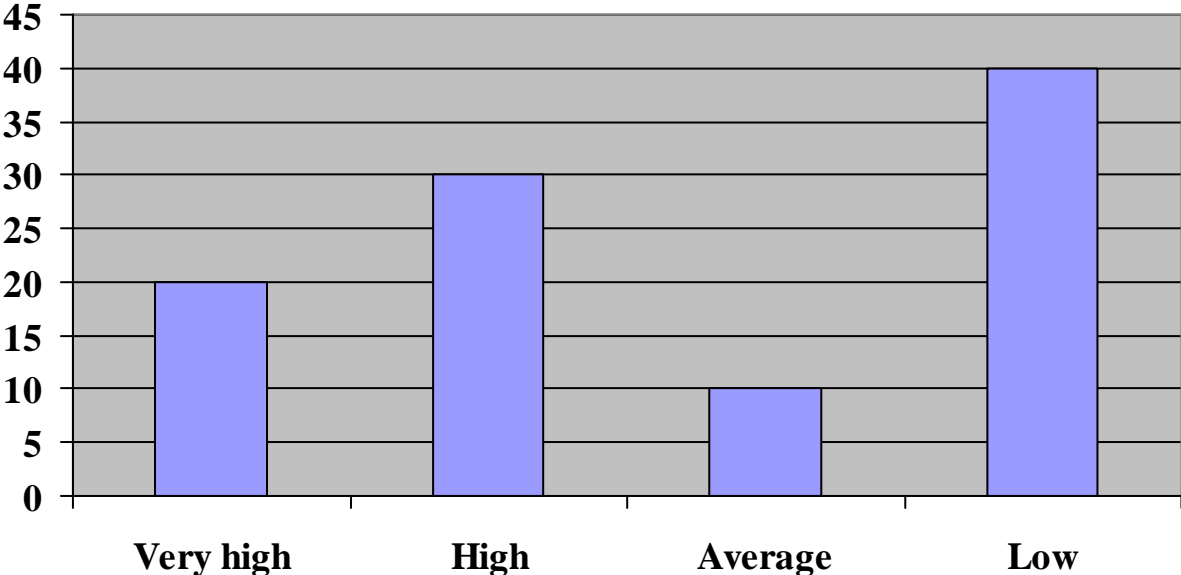
¹⁷²PQ Wright 'The law of the Nuremberg trial' (1947) 41 *American Journal of International Law* 38 56 (a crime against international law is 'an act committed with intent to violate a fundamental interest protected by international law or with knowledge that the act will probably violate such an interest,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

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

¹⁷⁴There is a division of opinion on how a given international crime achieves the status of *jus cogens*. As one author notes, 'there is no scholarly consensus on the methods by which to ascertain the existence of a *jus cogens* norm, nor to assess its significance or determine its content'; see MC Bassiouni 'International crimes: *jus cogens* and *obligation erga omnes*' (1996) 59 *Law & Contemporary Problems* 67. However, there is some consensus as to specific crimes which are *jus cogens*: aggression, genocide, crimes against humanity, war crimes, piracy, slavery and slave-related practices, and torture. Sufficient legal basis exists to reach the conclusion that all these crimes are part of *jus cogens*. The ICJ, for example, states that '[*jus cogens*] obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law; others are conferred by international instruments of a universal or quasi-universal character'. See *Barcelona Traction Light and Power Co Ltd (Belgium v Spain)* 1970 ICJ 32. The Nuremberg and Tokyo Charters included the crime of aggression while modern international criminal law – as embodied in the Statutes of the ICTY, ICTR, ICC and other international and internationalised tribunals and developed in their jurisprudence – tends to focus exclusively on the three core categories of crimes: crimes against humanity, genocide and war crimes. Aggression also labelled 'crimes against peace' is included in the Rome Statute of the ICC and the International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind. See art 16 Draft Code of Crimes Against Peace and Security of Mankind *Report of the International Law Commission on the Work of Its Forty-eighth Session* UN Doc A/51/10 (1996); art 5(2) Rome Statute of the International Criminal Court, 17 July 1998, entered into force 1 July 2002, UN Doc A/CONF 183/9 (providing that the ICC 'shall exercise jurisdiction over the crime of aggression once a provision adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with this crime').

as very high was able to identify international crime at (20%), the high percentage was (30%), average were (10%) and the low (40%). This indicated that most people are not self-aware of the international crimes. Murder and genocide was mostly mentioned by half of respondents (50%) when asked to give examples of international crimes. This was because most respondents were very much aware of the Rwandan genocide and the 2007 Post-Election Violence in Kenya where mass killings took place hence the use of the term murder by most respondents.

Figure 4.1: Awareness of International Crimes



Source: Author 2014

4.5 Success of the International Criminal Court

The support for the Court continues to grow. It has continued to capture nations’ imaginations about what should be done to fight impunity at all levels. Victims and criminals alike are given equal chances to justify themselves.

Table 4.6: Interviewees Responses on the Success of the Court

| Response | Frequency | Percentage |
|-----------------|------------------|-------------------|
| Yes | 25 | 62.5 |
| No | 15 | 37.5 |

Source: Author 2014

The response as per table 4.6 shows a good feedback on the Courts success at (62.5%) saying Yes. The reasons they gave is that perpetrators have now been put on a tight leash forcing them to be in the system of checks and balances. Charles Taylor was mentioned to have participated in the blood diamond trade. Names of tyrants like Robert Mugabe of Zimbabwe, Sadam Hussein, Gadhafi of Libya were mentioned mostly by male respondents. They believed that the removal of regime leaders, who had committed war crimes or murder as they put it, did not deserve to be in power. Although Mugabe has been in power for the longest period his time to face the court was inevitable. The other remaining (37.5%) said No. That the court was not a success as impunity was still at large and the indicted leaders like Al Bashir are still walking freely and flying like birds to various ICC party states who are supposed to be exemplary. He should have been arrested on sight and prosecuted by now, not to mention the numerous postponements by the lead Prosecutor Fatou Bensouda on the ongoing Kenyan cases at The Hague for lack of sufficient evidence to proceed with the trial accusing the Kenyan government of failing to supply the information she had requested. The victims on the other hand are busy being bribed to fabricate accusations left, right and center.

4.6 Respondents' Attitudes to Peace

To better understand the respondents' opinions towards peace, they were first asked to define the concept. Peace was seen as the absence of war or violence by most respondents (40%). This was elaborated that when there is violence, the level of security diminishes bringing in the aspect of fear. Almost (25%) of the respondents defined it as not being displaced into the IDPs camps while (15%) and (20%) of the respondents associated peace with justice or had little idea respectively. A majority of respondents (84%) believed peace could be achieved in Kenya and

other war torn countries like South Sudan, Democratic Republic of Congo and the Central African Republic. When asked who they thought should take action to bring about peace in a country, respondents identified the government at 60 percent because they mostly valued their sovereignty. The ICC followed with a percentage of 30, regime leaders (5%) and the police (5%). This shows that most respondents generally believed in their governments though the courts role in promoting peace should not be underestimated as it is the top most priority.

Table 4.7: Definition of Peace

| Definition | Frequency | Percentage |
|-------------------------------|------------------|-------------------|
| Absence of war/violence | 16 | 40 |
| Displacement into IDPs | 10 | 25 |
| Associated peace with justice | 6 | 15 |
| No idea | 8 | 20 |

Source Author 2014

Table 4.8: Body responsible for promoting peace in a country

| BODY RESPONSIBLE | FREQUENCY | PERCENTAGE |
|-------------------------|------------------|-------------------|
| Government | 24 | 60 |
| The ICC | 12 | 30 |
| Regime leaders | 2 | 5 |
| Police | 2 | 5 |

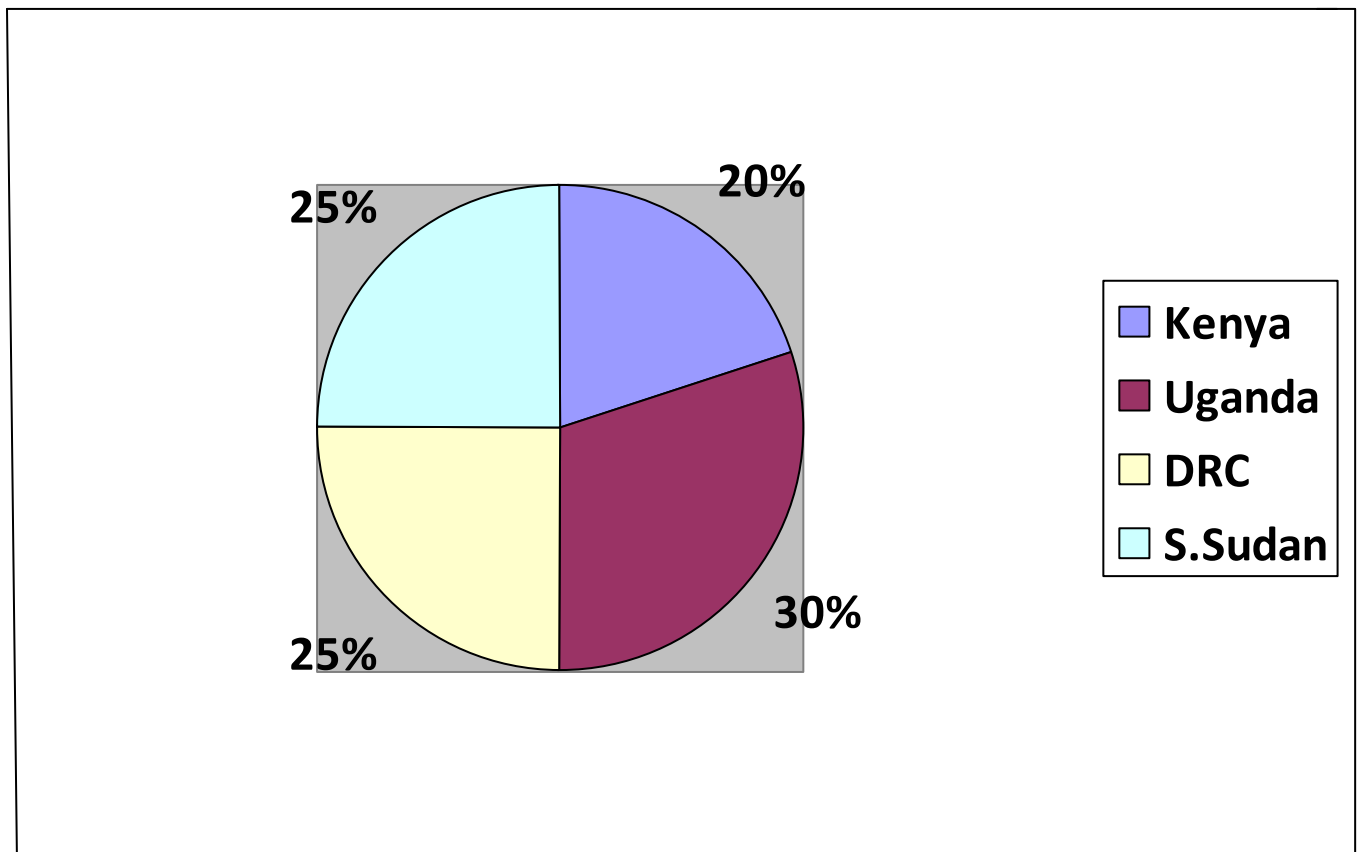
4.7 Role of the International Criminal Court in Promotion of Peace and Justice in Countries

The International Criminal Court supports accountability, peace and justice at all times though the terms ‘peace’ and ‘justice’ are not defined in the ICC Preamble. Peace and justice should be promoted as mutually reinforcing imperatives and the perception that they are at odds should be put to rest. The question for the court is never whether to pursue accountability and justice, but rather when and how. The nature and timing of such measures should be framed first of all in the context of international law taking into account the national context and the views of the victims. These views include dialogue with the victims to promote better understanding of the transitional justice. The inclusion of victims in the Court proceedings is important because the victims are the people on the ground that experienced the atrocious crime and by involving them in the proceedings; they feel empowered and realize that they too have a stake in the court proceedings. The Court was also been innovative in creating a trust fund which has the dual mandate of implementing court-ordered reparations as well as providing assistance to victims and their families irrespective of judicial decisions.¹⁷⁵

In Kenya, the reaction to the ICC justice process is different from that of peace. Justice in Kenya is at (30%). Basing on the current situation cases at the Court, they seem to have no hope for justice. Cases are being postponed, the country is not very cooperative with the court and the chief prosecutor seems to have run out of options. Basing on the number of expatriates living in Kenya, the Ugandans were at (20%) meaning that they believe in justice from the court. Since the referral of the LRA Commander Joseph Kony to the court, he has twice agreed to sit down to support peace processes and the United States has send troops into Uganda to comb him out of his hiding place. The DRC respondents formed (25%) meaning that their morale on justice is a bit low followed by South Sudan at (25%) where they doubt whether President Al Bashir will ever be arrested to bring back their hope in justice. His indictment brought out a mixed reaction internationally. It was seen as a political move by the court rather than a criminal charge. These political sentiments undermine the court’s process and its outcome.

¹⁷⁵ *Trust Fund for Victims*, INT’L CRIM. CT., <http://www.trustfundforvictims.org/> (last visited July 13, 2013).

Chart 4.1 Illustrates Impact of the International Criminal Court on Countries



Source Author 2014

4.8 Accountability for Crimes

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

clear and firm message that regardless of your rank, you will be held accountable for your acts. In a nutshell, impunity is no longer an option for those who would take power or maintain it by violence and committing international law and Human Rights violations.

Table 4.9: Illustrates the Accountability for Crimes by Perpetrators

| PERCEPTION | FREQUENCY | PERCENTAGE |
|--------------------------|------------------|-------------------|
| Strongly Agree | 12 | 30 |
| Agree | 8 | 20 |
| Strongly disagree | 10 | 25 |
| Disagree | 10 | 25 |

Source Author 2014

Majority of the respondents about (30%) strongly agreed that those responsible for the violence should be held accountable. (20%) agreed, (25%) strongly disagreed and (25%) disagreed. Respondents identified crimes against humanity, war crimes and genocide as the principal crimes committed by these perpetrators. Respondents provided a long list of individuals or groups that should be held accountable, including current and former presidents and leaders of rebel groups. When asked why accountability was important, the respondents provided the following reasons: it was owed to the victims (59%), victims must be compensated (23%), justice must be done (10%), and those responsible must be punished (8%).

Table 4.10: Illustration of why accountability of perpetrators is important

| Accountability | Frequency | Percentage |
|-------------------------|------------------|-------------------|
| Owed to the victims | 23 | 59 |
| Compensation of victims | 10 | 23 |
| Justice | 4 | 10 |
| Punished | 3 | 8 |

Source Author 2014

When the respondents were further given options of how the perpetrators should be held accountable for their crimes, using the different justice mechanisms, namely international trials, National courts and no trials. Over half of the respondents (52%) preferred international trials outside the country while (27%) said they should be tried in the national courts, while (10%) preferred no trials at all and (9%) percent didn't know. Thus, in general, respondents clearly prefer trials conducted internationally as the avenue to hold accountable those responsible for the violence committed during the conflicts.

Table 4.11 Justice Mechanism preferred

| Justice Mechanism | Frequency | Percentage |
|--------------------------|------------------|-------------------|
| International Trials | 21 | 55 |
| National Courts | 10 | 26 |
| No trials | 4 | 10 |
| Don't know | 3 | 9 |

Source Author 2014

4.9 The Focus on Africa Dilemma

Africa as a continent has been having issues with the International Criminal Court making their relationship to plummet further. Their relationship is like that of oil and water. To hit the nail on the head rather, these two entities are great enemies. This sourness prompted the African Union to give approval to African states not to cooperate with the Court under any circumstances which

was in contrast with its own Constitutive Act stated in article 4; to combat impunity and fight for international criminal justice. Africans see the court as a biased instrument sent by the western world to destroy them. Rather, they are not the primary targets but primary users as they are force behind the establishment of the court, and the only voluntary actors in prosecuting perpetrators. For example the self-referrals cases of mass violations of international law committed the Democratic Republic of Congo, Uganda and the Central African Republic territories. In line with this the Prosecutor Fatou Bensouda has been urged to open preliminary investigations in Mali to determine whether war crimes and crimes against humanity have been committed there since the onset of its crisis. War crimes have been reported namely the massacre of Malian loyalist soldiers in Aguel-hoc, the conscription of child soldiers, and violence, such as murders, kidnappings and rape against civilians, have been committed by different armed groups occupying the country's northern part¹⁷⁶. This shows that Africa has a more proactive role in the support of the court to promote peace and justice hence the stability in the continent. According to Mahmood Mamdani, he sees the ICC as part of a new *international humanitarian order... on big powers as enforcers of justice internationally... that draws on the history of modern Western colonialism.. where state sovereignty obtains in large parts of the world but is suspended in... Africa and the Middle East.*¹⁷⁷

The question put forward to the respondents, is why Africa is resistant to the ICC? To answer this question first of all most of the African leaders want 'African solutions to African problems' of which they are sure they are going to walk presumably because they have their counters parts who would bail them out of situations if need be. But the case of the court is different in that it is steadily reducing impunity serving as a watch dog to great violations of human rights which the leaders fear will sooner rather than later influence the domestic institutions to comply with their responsibility under international humanitarian and human-rights law to investigate and prosecute international crimes¹⁷⁸. In addition the ICC's main focus is on the countries that suffer most from instability, war and impunity. African leaders should change their focus or direction and put their energy in making the Court better and stronger because it's not out to destroy them since it doesn't seek competition or undermine their criminal processes. As Nelson Mandela, the

¹⁷⁶<http://www.npwj.org/ICC/Africa-not-target-a-driving-force-International-Criminal-Court.html#sthash.IJZbjSz5.dpuf>

¹⁷⁷Mamdani's Thesis is set out in an article in The Nation, available at: <http://www.thenation.com/doc/20080929/mamdani> (3 July 2009).

¹⁷⁸Gareth Evans, Five thoughts for policy makers: International Coalition for the Responsibility to Protect

first son of Africa puts it: *I dream of an Africa which is in peace with itself. One Africa should be the dream of all African leaders but there can be neither peace nor unity in Africa if there is no justice. Fight for the ICC not against it. Show that Africa is a continent of hope and not a dark planet of despair.*¹⁷⁹

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

*Until the philosophy which holds one race superior and another inferior is finally and permanently discredited and abandoned; until there are no longer first – class and second class citizens of any nation; until the color of a man’s skin is of no more significance than the color of his eyes; until the basic rights are equally guaranteed to all without regard to race; until bigotry and prejudice and malicious and inhuman self- interest have been replaced by understanding and tolerance and good- will, the African continent will not know peace*¹⁸⁰.

The ICC is a beacon of hope that assures Africa that it will come to know peace, because those who threaten peace by their heinous acts will be held accountable before the bar of justice. The African continent should be made a platform for the re- birth of the ICC and not a burial place, a platform where the Court is transformed from the sword of injustice to the shield of peace and justice. Regime leaders should not challenge their indictments. This has been seen from verbal protestations to immunity claims of which I wouldn’t have expected from a leader. From my perspective, the public display of their concerns signals a lot rather than conceal them. They tend to approach the situation as a political battle rather than a legal one. Nearly all those indicted by the ICC have contested their indictments in some manner. Examples include Slobodan Milosevic, Radovan Karadzic, Ratko Mladic at the ICTY, and the major figures at the ICTR, Charles Taylor at the Special Court for Sierra Leone, Uhuru Kenyatta and William Ruto at The Hague, Omar Al Bashir amongst others. From the Joseph Kony’s leadership of the Lord's Resistance Army in Uganda, Lubanga’s connection with crimes committed in the Congo or the leader of the Janjaweed militia in The Sudan of which Omar Al Bashir was alleged to be a member of which none has surrendered to the court.

¹⁷⁹ Peacechild.org/nelson-mandela-i-dream-of-an-africa—which-is-in-peace-with-itself/

¹⁸⁰ Debate.umv.edu/dreadlibrary/cardillo.html

4.10 Immunity of state officials from the International Criminal Court

Schabas¹⁸¹ and Van Schaack and Slye¹⁸² believe that immunity is a defense under international criminal law. It's therefore a defense to international criminal responsibility for state officials accused of international crimes. Immunity can also be a barrier to individual accountability¹⁸³ serving as a ground to run from criminal responsibility rendering any action from the court as being inadmissible to the individual as it would have been invoked.¹⁸⁴

Historically, state officials were not answerable for their actions in criminal responsibility because the states then had a merger between 'sovereign' and 'sovereignty'.¹⁸⁵ A divine ruler could not be put on trial because the ruling was always in their favor.¹⁸⁶ The question we ask ourselves then is if at present the state officials enjoy the same benefits as the medieval rulers? The answer to this question is no as today tribunals and international courts have been established to control biasness in the system. All the states have the provision to prosecute and punish perpetrators of international crimes in accordance to the customary international law. In general international courts are of the view that even if state officials were to be accorded immunity by national or international law; it would not be of much benefit if the crimes are of international nature. The International Court of Justice (ICJ)¹⁸⁷ the International Criminal Court (ICC)¹⁸⁸ the International Criminal Tribunal for the former Yugoslavia (ICTY)¹⁸⁹ and the

¹⁸¹ W. A Schabas *An introduction to the International Criminal Court* (2007) 231.

¹⁸² B. van Schaack and RC Slye *International criminal law and its enforcement: Cases and materials* (2007) 865-874.

¹⁸³ D.P Stewart 'Immunity and accountability: More continuity than change?' (2005) 99 *American Society International Law Proceedings* 227 228

¹⁸⁴ The Dissenting Opinion of Judge Jean Yves De Cara in the *Case Concerning Certain Criminal Proceedings in France (Republic of the Congo v France) Provisional Measures* Order of 17 June 2003, ICJ Reports (2003) 102, 122.

¹⁸⁵ MC Bassiouni *Crimes against humanity in international criminal law* (1999) 505-508 (stating that this is particularly true with respect to monarchies as evidenced by Louis XIV's statement: '*L'etat c'est moi*' (meaning that 'the state is me', - my own translation).

¹⁸⁶ G Robertson *Crimes against humanity: The struggle for global justice* (2002) 403-426; SK Kapoor *International law and human rights* (2007) 216-223; MN Shaw *International law* (2003) 621-692; J Dugard (2005) 238-265; I Detter *International legal order* (1994) 456-463; H Leuterpacht 'The problem of jurisdictional immunities of foreign states' (1951) 28 *British Yearbook of International Law* 265; R Higgins 'Certain unresolved aspects of the law of state immunity' (1982) 29 *Netherlands International Law Review* 265; H Fox 'State immunity and the international crime of torture' (2006) 2 *European Human Rights Law Reports* 142; L McGregor 'State immunity and *jus cogens*' (2006) 55 *International and Comparative Law Quarterly* 437-445; A Orakhelashvili *Peremptory norms in international law* (2006) 320

¹⁸⁷ *Arrest Warrant* case (n 21 above) para 61

¹⁸⁸ *Prosecutor v Al Bashir* Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Al Bashir (Case ICC-02/05-01/09) Public Reducted Version, Pre-Trial Chamber I, 4 March 2009 15, paras 41-43.

¹⁸⁹ *Prosecutor v Milošević* Decision on Preliminary Motions, Trial Chamber, Decision of 8 November 2001, paras 26-34; *Prosecutor v Kunarac, Kovač and Vuković* (Cases IT-96-23 -T and IT-96-23/1-T) Trial Chamber, Judgment 22 February 2001, para 494; *Prosecutor v Karadžić* (Case IT-95-5/18-PT) Decision on the Accused's Holbrooke Agreement Motion, 8 July 2009, Trial Chamber, para 5; *Prosecutor v Karadžić* Case (IT-95-5/18-PT) Appeal of the Decision Concerning Holbrooke Agreement

International Criminal Tribunal for Rwanda (ICTR)¹⁹⁰ have the opinion that the official position of individuals should not be a defense from prosecution nor a mitigating factor in their punishment. Since the Nuremberg and Tokyo trials¹⁹¹ this has been the stated position.

Further the Appeals Chamber of the Special Court for Sierra Leone (SCSL) which held the case against Charles Taylor was clear that the official position of a person incumbent or not, does not bar them from prosecution before international courts. The decision made by SCSL to reject immunity shows that even if the request for immunity relates to a non-party state of the International Criminal Court it will not be accepted. In this support the Extra-ordinary Chambers in the Courts of Cambodia (ECCC)¹⁹² and the Iraqi Supreme Criminal Tribunal¹⁹³ echoes the SCSL opinion.

Table 4.12: Impact of Immunity of State officials

| Impact | Frequency | Percentage |
|-----------------|------------------|-------------------|
| Positive | 10 | 25 |
| Negative | 30 | 75 |

Source: Author 2014

As stated in table 4.12, the immunity of state leaders is greatly opposed at (75%). Those respondents who support it were at (25%). Majority of respondents were of the view that it takes away the victim's rights for justice. On matters touching on the African continent, the AU's

Disclosure, 28 January 2009, Appeals Chamber, paras 8-12; Decision on Appellant Radovan Karadžić's Appeal Concerning Holbrooke Agreement Disclosure, Appeals Chamber, 6 April 2009, para 17.

¹⁹⁰ *Prosecutor v Kambanda* (Case ICTR 97-23-S) Judgment and Sentence, 4 September 1998.

¹⁹¹ Nuremberg Judgment *International Military Tribunal*, 1946, reprinted in (1947) 41 *American Journal of International Law* 172, 221.

¹⁹² Arts 2 and 29 Law on the Establishment of Extra-ordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes committed during the Period of Democratic Kampuchea, 27 October 2004, as revised on 23 November 2004, (NS/RKM/1004/006); Criminal Case File 002/14-08-2006, Investigation 002/19-2007-ECCC/OCIJ (Khieu Samphan) *Provisional Detention Order* 19 November 2007; Criminal Case File 002/14-08-2006, Investigation 002/19-09-2007 *Provisional Detention Order*, ECCC-OCIJ, 19 September 2007 1-5 paras 1-6; Extra-ordinary Chambers in the Courts of Cambodia, Criminal Case File 002/14-08-2006, Investigation 002/19-09-2007, ECCC-OCIJ, *Police Custody Decision* 12 November 2007 1-2; Extra-ordinary Chambers in the Courts of Cambodia, Criminal Case File 002/14-08-2006, Investigation 002/19-09-2007, ECCC-OCIJ, *Provisional Detention Order* 14 November 2007 1-5, paras 1-11.

¹⁹³ *Prosecutor v Saddam Hussein Al-Majid et al*, Defendants' Preliminary Submission Challenging the Legality of the Special Court 21 December 2005, 1-24 paras 1-121.

Constitutive Act under article 4 rejects impunity.¹⁹⁴ Immunity for sitting heads of states who have committed atrocities should be rejected before the African Court for Justice and Human Rights. On August 25th and 26th 2014, The African Union (AU) Office of the Legal Counsel convened a meeting in Nairobi with government officials of AU member countries in East Africa to promote ratification of AU treaties. One of their discussions touched on the provision of immunity for sitting leaders and other senior officials. Though Article 46A *bis* of the amendments states that “No charges shall be commenced or continued...against any serving African Union Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure in office¹⁹⁵,” provides immunity for sitting leaders the statutes of international and hybrid international national war crimes tribunals reject exemptions on the basis of official capacity. The provision of immunity to sitting officials will take people back to the medieval times and risks giving leaders the gate pass to committing crimes.¹⁹⁶

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

4.11 Conclusion

From the analysis it can be concluded that those responsible for violations of human rights and international humanitarian law should be brought to justice. Though the respondents were for the national court for sovereignty reasons, their support for the court was good when the issue of immunity from prosecutions was mentioned.

¹⁹⁴ICJ Kenyas Expert Opinion Paper on the Jurisprudence Emerging from the 2007 Election Petitions presented by George Kegoro, Executive Director, The Kenya Section of the International Commission of Jurists

¹⁹⁵ Article 46A of the African Union Constitution

¹⁹⁶ Timothy Mtambo executive director at Malawi’s Centre for Human Rights and Rehabilitation

CHAPTER FIVE

5.0 CONCLUSION AND RECOMMENDATIONS

5.1 Conclusions

The creation of the International Criminal Court should be seen as an achievement in defense of human dignity and promotion of peace and justice. Its long tremendous journey has contributed to the paradigm shift in global relations and international law where particular focus is made on individuals and not states.

The most intriguing thing about the response to trials about the atrocities committed has been related to the proximity of idealism and cynicism surrounding the entire project.¹⁹⁷ This thesis has explored the ICC's ability in delivering justice and peace. While exploring the reasons why the court was established; to achieve justice for all, end impunity, help end conflicts, and remedy the deficiencies of ad hoc tribunals to take over when national jurisdictions are unwilling and unable to act and to deter future war criminals¹⁹⁸, it can be noted that the court has been very effective in its role. Emphasis has also been put on its impact to the international community which has been tentatively positive. This thesis also argues out that tensions may arise between the two concepts of peace and justice but this does not necessarily mean that the ICC represents a threat to peace.

The Court has also recognized the importance of victim's participation in the quest for justice, As Moreno-Ocampo stated, *that we must think about an integrated approach and how to combine justice with other areas, such as rehabilitation and development, in order to produce better communities.*¹⁹⁹ As stated in Principle three of the Chicago's principles on Post – Conflict Justice which requires states to acknowledge victims and ensure their access to justice in order to develop solutions.²⁰⁰ This states that victims should be included to participate in the Court's

¹⁹⁷Minow M Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence (Boston, MA: Beacon Press, 1998), at 50.

¹⁹⁸ See Sara Anoushirvani, *The Future of the International Criminal Court: The Long Road to Legitimacy Begins with the Trial of Thomas Lubanga Dyilo*, 22 PACE INT'L L. REV. 213, 214 (2010). See also United Nations, Rome Statute of the International Criminal Court, available at <http://untreaty.un.org/cod/icc/general/overview.htm>.

¹⁹⁹ L. Moreno-Ocampo, 'Keynote Address: Integrating the Work of the ICC into Local Justice Initiatives', 21 American University International Law Review (2006) 497^503, at 501.

²⁰⁰ The Chicago Principle on Post- Conflict Justice, M. Cherif Bassiouni, Daniel Rothenberg: International Human Rights Law Institute 2008

proceedings. Under Article 68, the victims' views may be presented "at stages of the proceedings determined to be appropriate by the Court. The participation of victims is uncommon in other international tribunals."²⁰¹

The Court has been seen to exert authority in the international community by refusing to bow to pressure to suspend the pursuit of justice for the cause of peace. Justice has always been sacrificed in favor for peace in the process of ending conflicts to bring about stability in a state rather than hold the perpetrators accountable. This is one of the reasons why the court was formed to show that the pursuant of justice can greatly contribute in building sustainable peace. The court to this day has registered a number of achievements in its role that the international community can reflect on since it opened its doors in 2002. When we refer to the cases that the court has handled, a deduction can be made that there has not yet been any conflict between peace and justice with the court's involvement to prosecute. Therefore, it can be said that the existence of the warrants of arrest for the regime leaders suspected of committing war crimes, hasn't in anyway affected peace talks. For example in the DRC, its government spearheaded the peace agreement in spite of the warrant of arrest issued for Ntaganda and even went further to absorb him and his group into the army. In the Darfur case, it hasn't interfered with any peace process as the government has no interest to procure one with or without the warrant of Al Bashir. In Uganda it managed to isolate the rebel group from its base of support in Khartoum. In addition, the LRA leaders were much interested to leverage peace talks with the Ugandan government so as to revert the ICC's arrest warrants.²⁰² Further, investigations are underway *inter alia*, Democratic Republic of Congo, Uganda, Libya and Central African Republic, Ivory Coast and Mali²⁰³. The prosecution chamber is also monitoring the situations in Colombia, Georgia, Chad, Afghanistan and Nigeria.²⁰⁴

²⁰¹ American Non –Governmental Organization for the International Criminal Court , victims' participation at the ICC: purpose , early developments and lessons, available at http://www.amicc.org/docs/Victims_Participation.pdf. See also Article 68.

²⁰² Conf. Rep., *The International Criminal Court at Work: Challenges and Successes in the Fight Against Immunity*, (Sept. 21, 2007), available at http://www.dgvnrw.de/fileadmin/user_upload/Vereinsbilder/Conference_Report_31.10.07.pdf.

²⁰³ Situations and Cases, International Criminal Court., <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/> (last visited July 13, 2013)

²⁰⁴ U.N. News Centre, *International Criminal Court monitoring events in Georgia, Prosecutor says*, Aug. 20, 2008, available at <http://www.un.org/apps/news/story.asp?newsid=27759&cr=georgia&cr1>; see also adetokunbo mumuni, *nigeria: international criminal court analyses jos crisis*, sahara reporters, nov. 7, 2010, available at www.saharareporters.com

The court's intent in pursuing international justice has enhanced the national or domestic law of states through the principle of complementarity. This principle ensures that states incorporate the ICC crimes into their domestic/ national law. For instance, reference to 'enhancing international cooperation' and Article 93(10), allowing States to make requests to the ICC for assistance in matters such as: identification of persons, collecting evidence, and victim protection, suggests that the Rome system is interdependent and mutually reinforcing.²⁰⁵ For example in the Central African Republic, the Court's investigations proved to be a jump start for the authorities to commit in pursuing the criminals to account for their crimes by establishing a humanitarian law office within the army. This shows the courts effort in promoting national prosecutions.²⁰⁶

Apparently, all of the current cases before the Court are from Africa but this does not mean that atrocities are not being committed elsewhere. Before the indictment of Presidents Al Bashir and Uhuru Kenyatta, the courts target on low profiled individual such as rebels, warlords and opposition leaders²⁰⁷ but it soon changed its course and decided to go for the big fish sending a message that they meant business and no one was immune to their pursuit. Sadly the arrest warrants for some of the individuals have been pending for too long because of the lack of cooperation of the state parties to the court. The AU a regional body openly declared its intention of not supporting the court urging its members to do the same. This was in total contrast to its Constitutive Act of 2000, which in its preamble states that, African leaders agreed to promote and protect human and peoples' rights and reinforce democratic institutions and human rights culture, and ensure good governance and the rule of law. In order for it to do so, it had to develop a security regime with a mandate closely linked to its responsibility to protect framework.²⁰⁸ As part of one of the mechanisms that international relations encompasses to study conflict and cooperation, AU as an international institution is a very important actor. Since the issuance of Al Bashir's arrest warrant in 2009, he has managed to travel to Egypt, Ethiopia, Libya, Qatar, Saudi Arabia, Zimbabwe and China of which none are state parties to the Statute. His first trip to a state

²⁰⁵ Office of the Prosecutor, *Report on Prosecutorial Strategy* (2006) at 5, available at http://www.iccpi.int/library/organs/otp/OTP_Prosecutorial-Strategy-20060914_English.pdf.

²⁰⁶ Human Rights Watch, *World Report 2009*, Central African Republic chapter, http://www.hrw.org/sites/default/files/related_material/car.pdf.

²⁰⁷ See Nick Grono, *The International Criminal Court: Success or Failure?* (Jun. 9, 2008), available at <http://www.opendemocracy.net/article/the-international-criminal-court-success-orfailure>.

²⁰⁸ Powell K, 'The African Union's Emerging Peace and Security Regime Opportunities and Challenges for Delivering on the Responsibility to Protect', 2005 Monograph No. 119, available at www.nsi-ins.ca/english/research/progress/19.asp

party was to Chad in July 2010, then in Kenya in August 2010 to celebrate the signing of a new institution where the authorities declined to arrest him amid a broader attempt to improve historically strained bilateral relations between the two states.

The AU justified the actions of Chad and Kenya as follows: '*both Chad and Kenya, being neighbours of Sudan, have an abiding interest in ensuring peace and stability in Sudan and in promoting peace, justice and reconciliation which can only be achieved through continuous engagement with the elected government of Sudan.*'²⁰⁹ In May 2011, he traveled to Djibouti also a state party and still was not arrested. This shows how states are not cooperative to end the impunity act.

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

The immunity debate has risen up a number of critical issues concerning the court. According to Shaw, he observes that in the domestic court compared to the international tribunals, the procedure is more complex because of the 'status of head of state before domestic courts' and that 'international law has traditionally made a distinction between official and private acts of a head of state'.²¹¹ Hence functional immunity exists only when an official is in office and expires when the term ends. It may also be invoked not only by serving state officials but also by former state officials in respect of their official acts while they were in office. This type of immunity does not apply however when a person is charged with international crimes, either because such acts can never be 'official' or because they violate norms of *jus cogens*.²¹² This is greatly pronounced when prosecuting heads of state and particularly sitting heads of state, such as Omar

²⁰⁹ African Union Press Release N° 119/2010, 29th August 2010.

²¹⁰ Article 5 of the Statute of the ICC

²¹¹ Shaw MN *International Law* 655-656.

²¹² Jorgensen NHB *The responsibility of states for international crimes* (2000) 85-92.

Al Bashir is and Uhuru Kenyatta. The impact of actually arresting and prosecuting them essentially means their removal from power and its implications would be very profound.

5.2 Recommendations

The ICC has to maintain its independence so as to instill confidence in the international community. The big five shouldn't use it as a political tool to attain their interests. The Community should push for the ratification of the statute by the United States of America, Russia, China and possibly India in order to increase its global support. The Permanent members of the UNSC play an important role as they are very influential on Security Council resolutions that refer some of the cases to the ICC. For example, the referral of the Syrian case wouldn't have been vetoed by Russia and China if they were parties to the statute. Their absence arguably sends out a negative message to the small states that impunity can be bought with power.

In reference to the Darfur case, all states should cooperate to enforce the arrest warrants issued by the court. This will assist in eliminating safe havens for suspects and justice would have been attained. The court by reducing the wording of the Rome Statute rejecting the idea that public office brings immunity is undoubtedly a positive step to reduce impunity. It should therefore also indict the heads of states particularly in Uganda and the DRC where the leaders think that by referring cases to The Hague, they are immunizing themselves from it. This would send out a clear message that there is no one above the law.

The Security Council should be able to enact travel restrictions, economic sanctions and diplomatic sanctions on states that provide asylum for suspects, those that refuse to arrest indictees, or cooperate with the court. The active role from the Security Council may be a problem. Though the court is not a political tool, the council is.

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

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Appendixes

Appendix 1: Questionnaire on the role of the International Criminal Court in Promoting Peace and Justice.

UNIVERSITY OF NAIROBI

INSTITUTE OF DIPLOMACY AND INTERNATIONAL STUDIES

Good morning/ afternoon, my name is Opiyo Marilyn Awuor, a Master’s of Arts degree student at the University of Nairobi in International Studies; Institute of Diplomacy and International Studies. I am currently undertaking a research on the Role of the International Criminal Court in promoting peace and justice.

This study is a requirement for the partial fulfillment of a Master’s Degree. Due to your personal and professional experience in this field of study, I have selected you to provide relevant information to the study by filling the questionnaire attached herewith and revert. This is an academic exercise and all information collected from respondents will be treated with strict confidentiality.

PART I: GENERAL INFORMATION

1. Kindly answer all the questions either by ticking in the boxes or writing in the spaces provided.

1) Name

2) Occupation.....

3) Gender:

a) Female

b) Male

4) Age :

20-30 years

31-40 years

41-50 years

51 years and over

5) Education:

Degree Masters PhD Other

PART II: PERCEPTION OF THE INTERNATIONAL CRIMINAL COURT

Please tick each question corresponding to your personal opinion for each statement.

1) International Criminal Court

On average, how do you rate your understanding of the International Criminal Court?

(a) Fair (b) Good (c) Excellent (d) Do not know

2) Do you support the International Criminal Court?

(a) Yes (b) No

Reasons :

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3) How would you rate your understanding of the term International Crimes?

(a) Very High (b) High (c) Average (d) Low

4) Name examples of such crimes :

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5) Do you think the International Criminal Court has been a Success?

(a) Yes

(b) No

Briefly describe your answer:

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PART III: KNOWLEDGE ON PEACE AND JUSTICE

1) Define the concept of peace.

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2) Can peace be achieved in your country/ Region?

(a) Yes

(b) No

Please elaborate:

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3) Who do you think is responsible for peace in your Country?

(a) The government (b) The ICC (c) Regime leaders (d) Police

4) What is the Court's role in promoting peace and justice in relation to the situation in your country/region?

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5) How has Justice and peace contributed to the accountability of crimes?

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6) Which justice mechanism are you conversant with?

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PART IV: THE INTERNATIONAL CRIMINAL COURT FOCUS ON AFRICA

Please tick the each question corresponding to your personal opinion for each statement.

1) How is the African relationship with the International Criminal Court?

(a) Positive (b) Negative

Please explain:

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2) How can you describe the African leadership?

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3) How will the ICC be able to overcome the pressure and challenges exerted on it by some African states and institutions?

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4) Why do you think the African leaders are reluctant to cooperate with International Criminal Court?

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5) Is it true to say that political power tends to shield perpetrators?

a) Yes

b) No

Please explain

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6) What is the impact of immunity from prosecution of state officials to the International Criminal Court should it be provided?

(a) Positive

(b) Negative

Please elaborate:

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THANK YOU FOR TAKING YOUR TIME TO COMPLETE THE QUESTIONNAIRE