

UNIVERSITY OF NAIROBI

INSTITUTE OF DIPLOMACY AND INTERNATIONAL STUDIES

A CRITICAL ANALYSIS OF THE INTERNATIONAL CRIMINAL COURT AND AFRICA

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Declaration

I, **IRENE WANJIRU MAINA** Declare that this Research Project is my original work and has not been submitted for the award of a degree in any other university

Signed: _____

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This Project has been submitted for examination with my approval as a University Supervisor

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Dedication

This Project is dedicated to God for giving me the grace to finish and Evangelist Teresiah Wairimu the greatest mum in the world for teaching me so many lessons of life particularly not to give up and to my Family for cheering me always being there for me and encouraging me to be the best I can.

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Abstract

This study seeks to examine the International criminal Court as an international legal regime, The study appreciates that international Crimes are so serious that no perpetrator should be allowed to go scot free and that for the international court to succeed it needs cooperation from all states whether they are member states or not to put an end to impunity and the fact that conflicts spill over.

The objective of the study is to examine the basis of having the International Criminal Court, the criminal cases from different states before the ICC and how Kenyan cases ended up at the ICC, despite being given ample opportunities to put up a special tribunal to try the perpetrators of the Post Election Violence. The study will use the theory of realism which states, that states are driven by their own interests and that international law is not law because the international system has no Government and no institutions of Government on which law depends on, no legislature to make law, no executive to enforce, no judiciary to resolve disputes and develop the law. The methodology of the study entails both primary and secondary data sources. The primary sources are content analysis of the court decisions issued by the ICC and other courts concerning international crimes.

The study finds that the International Criminal Court has a role to play, in ending impunity since most states are not willing to prosecute perpetrators of these crimes, that the ICC is the only hope of victims of these heinous crimes, states are not willing to cooperate with the ICC and are not willing to prosecute international crimes under the Rome Statute. However it notes that there are some issues that need to be addressed by the ICC and the United Nations Security Council and the United Nations General assembly, so that all matters are given the same considerations or determined on a case to case basis. The study further demonstrates that there is need to address the root causes of the conflict.

Acronyms/Abbreviations

AU	African Union
CIPEV	Commission of Inquiry on Post Election Violence
DRC	Democratic Republic of Congo
ECCC	Extraordinary Chambers of the Cambodia
ICC	International Criminal Court
ICTY	International Criminal Tribunal of Yugoslavia
IMT	International Military Tribunal
KNDR	Kenya National Dialogue and Reconciliation
MLC	Movement for Liberation of Congo
OAU	Organisation of African Unity
ODM	Orange Democratic Movement
PNU	Party of National Unity
SADC	Southern African Development Community
SC	Security Council
SCSR	Special Court of the Sierra Leone
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
US	United States
USSR	United Soviet Socialist Republic

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CHAPTER ONE

INTRODUCTION AND THE BACKGROUND OF THE STUDY

1.0 INTRODUCTION

Africa is the continent that has been most afflicted by conflicts. Since 1960 countries such as Rwanda, Somalia, Angola, Sudan, Sierra Leone, Liberia, Democratic Republic of Congo, Chad, Mali, Central African Republic and Ivory Coast are among those countries that have suffered the effects of serious armed conflict. In most of these countries such as Rwanda, Sierra Leone the United Nations constituted temporary courts but after the Rwandan genocide in 1994 it was felt that there was need for a permanent court to be established to deal with the crime of genocide, crimes against humanity and war crimes.

The international criminal court was established as a response of the human family to gross human rights violations of such magnitude and barbarity as to shock human conscience and to warrant the response of the international community as a whole. The ICC symbolises the principle of individual criminal liability for those responsible for the most serious human rights violations and was established as a permanent institution to ensure the punishment of such individuals and was established as a permanent institution to ensure the punishment of such individuals. Besides the moral condemnation of these crimes at the international level and the knock on the deterrent effect the ICC is meant to ensure that states uphold the rule of law at national and international level.

When the ICC was established it brought such hope to the people in the African continent and from the stand point of the rule of law and justice, the ICC was seen as one of the greatest achievements of the twentieth century. It was said to be a gift of hope to future generations and a giant step towards universal human rights and the rule of law. It was predicted that the ICC will save millions of humans from suffering unspeakably horrible and inhuman deaths in the coming decade and since

this is the continent that has many lords of impunity, it was hoped that they would be dealt with and impunity be brought to an end but to date the court has not brought an end to impunity nor has it brought solace to the victims of human rights violations around the globe as the perpetrators of this heinous crimes have put up a fight against this court and have ensured that they have the support of the African Union and the African Union has been calling for the deferral of cases where heads of states and Government have been indicted such as President Albashir, President Uhuru Kenyatta and Deputy President William Ruto and have even gone further by asking that article 27 of the Rome statute be amended, so that it can exempt incumbent heads of states from prosecutions during their term in office and have on several occasions asked states who are members of the African union not to cooperate with the ICC and as a result of this, in a country such as Sudan the crimes which president Albashir was indicted for are still being committed in that region and impunity has prevailed. It seems rather than focusing on the victims of these heinous crimes African states are now focused on ensuring that the perpetrators of these crimes are not brought to book.

1.1 STATEMENT OF THE RESEARCH PROBLEM

The Rome Statute which established the International Criminal Court was the result of concerted international efforts, to combat impunity for what was considered in the Rome Statute preamble crimes that deeply shock the conscience of humanity. Since its inception most of the indictments and arrest warrants issued relate to people in the African continent ever since a warrant of arrest against President Omar Al Bashir was issued by the ICC, leaders in the African continent started asking why the overwhelming focus on the African Continent?

Due to this perceived selectivity of the International Criminal Court most leaders in the African continent have stated that the ICC is discriminatory because it goes after crimes committed in Africa while ignoring crimes by hegemony in Iraq, Afghanistan and Pakistan and crimes against

humanity committed by Syria, Israel. This situation has prompted the question why the international gaze falls in some places and on some people and not on others. The African Union urged the member states to disregard the arrest warrants issued against President Al Bashir of Sudan and has dismissed the International Criminal Court as a new form of imperialism created by the west and put in place only for the least developed and developing countries in Africa.

In response to this the ICC has stated that its focus on Africa is because no other continent has paid dearly for the absence of legitimate institutions of law and accountability, resulting in the culture of impunity. In addition that the cases are referrals from the African countries and the leaders in those countries requested the intervention of ICC.

This situation was further complicated when Uhuru Kenyatta became the President of Kenya and charges against him had been confirmed and the African Union called on the member states not to cooperate with the ICC, called for deferral of his case and pursuant to a decision taken by the African Union Assembly. The African Union Commission appointed consultants to work on drafting an amended protocol of the African Court to provide for the expansion of the African Court to deal with specific criminal matters such as international crimes of genocide, war crimes and crimes against humanity.

In addition since the confirmation of charges of the Kenyan suspects, all efforts have been made to ensure that they do not stand for trial and this has been with the overwhelming support of the African Union. There have been proposals for amendment of the Rome Statute in order for accused persons not to be present in court and that incumbent heads of states do not face trial at the International Criminal Court. This clearly shows that African states are not willing to cooperate with the ICC and will do anything to ensure that perpetrators of these heinous crimes are not brought to book as whatever decisions they make, do not take into consideration the victims of the heinous crimes. The paper will focus on whether ICC is targeting Africa and should the focus be

African states be on ensuring that the perpetrators of these heinous crimes are not brought to book or should the focus be on justice for the victims of international crimes?

1.2 OBJECTIVES OF THE RESEARCH

- a. Examine the establishment of the ICC.
- b. Examine if the ICC has been able to bring impunity to an end.
- c. Critically analyse the Kenyan cases at the ICC.

1.3 LITERATURE REVIEW

This section presents and discusses the theme of the study, demonstrates various scholarly works on the subject, identifies the gaps in the existing literature, shows where the study enters the debate and its justification.

1.3.1 RATIFICATION OF THE ROME STATUTE BY THE AFRICAN STATES

Africa's early support for the ICC is clear since the Rome statute entered into force on the 1st July 2002, it was signed by 139 states and ratified by 113 and of those 113 state parties a significant proportion were African. The involvement of African states in the creation of the ICC and its participation was seen as a court created in part by Africans and ultimately for the benefit of the African victims of serious crimes.¹ Prior to the Rome statute being passed the Southern African Development Community in its support for ICC in the UN General Assembly in 1993, agreed on a set of principles that were later sent to their respective ministers of justice and Attorney generals for endorsement which were seen as a wish list which African states in particular SADC for the ICC that Africans hoped for. The principles were the ICC should have automatic jurisdiction over genocide, crimes against humanity, and war crimes, the court to have an independent prosecutor with power to initiate proceedings proprio motu, full cooperation by all the member states at all

¹ Frencz.B., "Make Law Not War", *The World Today*, Vol.54, No.6(1997)pp152-153

stages of the proceedings and adequate financial resources be provided for the ICC and states be prohibited from making reservations to the statute as in the case of United states of America². The principals were issued to the various Ministers of Justice and Attorney Generals', issued a common statement that became a primary basis for SADC negotiations at Rome. These principals appeared in the Dakar declaration on the ICC as well as other declarations and on the 27th February 1998 the council of ministers of the Organisation of African Unity now the AU took note of the Dakar declaration and called on all the OAU member states to support the creation of the ICC. This resolution was adopted by OAU summit heads of states and Government in Burkina Farso in June 1998, in light of the above the ICC was created to a large extent by Africans with extensive and deep involvement of African nations.³

In addition when the US wanted states to enter into bilateral agreements not to send US citizens for trial at the ICC.⁴ Some African countries such as Kenya, Lesotho, South-Africa, Mali, Namibia, and Tanzania refused to sign the agreements as they were contrary to the principles of international law, they were inconsistent with the Rome statute as well as with obligations arising from international treaties. These states were threatened that their failure to sign would result in suspension of aid but they stood on their ground as they were committed to the humanitarian objective of the ICC and the countries international obligation.

In view of the above the ICC creation was shaped and supported by African nations and played a pivotal role at the Rome conference at which the courts statute was drafted and adopted. African nations supported the court by ratifying the Rome statute and Senegal was the first state in the world to ratify and to date almost half of the African states is a party to it. The continent expressed

² Dakar Declaration for the Establishment of the International Criminal Court in 1998

³ Mochochoko .P., "the International Criminal court", in Ankumah.E. and Kwakwa.E.,(eds),*African Perspectives on International Criminal Justice*(SouthAfrica:ABC Press,2005)pp248-249

⁴David .S., "International Criminal Law", *The International lawyer: International Legal Developments in Review*,Vol.35.NO.2,(2000)pp641

steadfast commitment to the ICC and did so by a keen understanding of and recognition of international treaty obligations which flow from ratification from the Rome statute.⁵

The strong stand in support of the ICC that characterised the African continent is less evident today this was soon after the ICC issued an arrest warrant against President Omar Al Bashir. Malawian president Bingu wa Mutharika raised concerns about threats to state sovereignty in the context of the AL Bashir's case to subject a head of state to a warrant of arrest is undermining African solidarity and African peace and security that we fought for so many years. There is a general concern in Africa that the issuance of a warrant of arrest for Albashir a duly elected president is in violation of the principles of sovereignty guaranteed under the United Nations, which is now an outdated argument as far as there are human rights violations are concern.⁶

1.3.2 THE INTERNATIONAL CRIMINAL COURT AND AFRICA

There is the suggestion that the ICC is being used by the hegemony, the ICC is targeting or discriminating against Africa, the security council has ignored African calls for peace to be respected over justice, the ICC has made itself guilty of double standard since it has issued a warrant of arrest to persons in respect to Sudan and not so in Gaza and that the court has deigned to proceed against a sitting head of state of a country that is not a party to the Rome statute.

This was expressed by the former chairperson of AU Jean Ping who noted that rather than pursuing justice around the world in cases such as Colombia, Sri Lanka, Iraq, Afganistan and Syria the court was focusing only on Africa, since the only people who had been indicted were Africans and this

⁵ Mochochoko.P."Africa and the International Criminal Court "in E.Ankurumah and E.Kwakwa(eds)*African Perspectives on international Criminal justice*(South Africa: Institute of Security Studies,2005)p203

⁶Plessis.M.,*The International Criminal Court That Africa Wants*,(SouthAfrica:Institute of Security Studies,2010)pp13-15

was undermining rather than assisting Africans solve their problems and that it seemed that Africa has become a laboratory to test new international law⁷.

The same view is held by Mahmoud Mamdani that the ICC is part of a new International Humanitarian order, in which big powers act as enforcers of justice internationally. The ICC is a component of this new order an order which draws history of modern western colonialism and the ICC shares an aim of mutual cooperation with the worlds only superpower its name notwithstanding the ICC is rapidly turning into a western court to try African crimes against humanity. It has targeted governments that are US adversaries and ignored actions the US does not oppose like those of Uganda and Rwanda in eastern Congo effectively conferring impunity on them.⁸ President Paul Kagame has also claimed that the ICC is a new form of imperialism that seeks to undermine people from poor African countries and other powerless countries in terms of economic development and politics the danger with these arguments is that they are supported by dictators and their henchmen who do not want to be held accountable or held responsible, in addition this facts are not substantiated by true facts and this arguments may end up damaging the institution for the following reasons.

The ICC at its inception was seen as a tool for justice in a continent where impunity is emblematic and is also a call to responsibility for persons guilty of the most serious crimes it has been said by the chief Prosecutor at Nuremberg stated that letting major war criminals live undisturbed to write their memoires in peace would be mocking the dead and make cynics of the living.⁹ Since there was little hope of preventing genocide, or reassuring those who live in fear of its occurrence, if people who have committed this most heinous of crimes are left at large and not held to account. It is was found vital that they build and maintain robust judicial systems both national and international so

⁷ Plessis.M.Paper , “Implications of the AU decision to give the African Court Jurisdiction Over International Crimes”, paper no.235,(SouthAfrica:Institute of Security Studies, June 2012)p4

⁸ Mamdani.M.,*Saviours and Survivors: Darfur Politics and the War on Terror*,(Capetown:HSRCPress,2009)pp10-15

⁹ Jackson.R.,*The Nuremberg case, as Presented by Robert Jackson*, (Newyork:Knopf Publishers, 1947)p8

that over time people will see that there is no impunity for such crimes. The ICC and national criminal law systems working to complement it are the means by which we cure this defect in the international legal system. Punishing individuals whether leaders or foot soldiers is a way in which individual accountability for massive human rights violations is internalised, as part of the fabric of our international society and a way to put to a stop impunity.¹⁰

The suggestion that the ICC is the creation of the hegemons is further from the truth, having looked at the history of its creation and furthermore their staff is drawn from around the world. Under the principle of complementarity the ICC cannot handle any matter before it is established that a state with jurisdiction is unwilling to investigate or prosecute crimes.¹¹ The ICC is currently handling 8 situations the case of Uganda, Democratic Republic of Congo, Central African Republic and Mali which are state referrals, Sudan and Libya which was referred by the United Nations Security council and the prosecutor was granted authorisation by the pre-trial chamber to open an investigation in the Kenyan situation after the Kenyan government failed to investigate this situation.¹² The case of Cote de' Voire which is not a party to the Rome statute but lodged a declaration under the Rome Statute, which allows a non-state party to lodge a declaration with the registrar of the court accepting the ICC's jurisdiction for specific crimes .

The office of the prosecutor has adopted an open and transparent approach in its work. By informing those who provided information concerning a possible prosecution, where there is no reasonable basis to continue in compliance with the Rome Statute. The prosecutor has issued detailed and public statements explaining his decision not to investigate crimes committed in Iraq and Venezuela and has issued comments on why situations fall outside his jurisdiction. Some of the allegations contained were committed before 1st July 2002 meaning that the prosecutor has no

¹⁰ Robert.J.,*New Deal Lawyer, Supreme Court Justice and Nuremberg Prosecutor*,(Newyork:Calkins Creek,2008)p56

¹¹ Bekou.O., "A Case of Review of Article 88 of the ICC Statute: Strengthening a Forgotten Provision", *New Criminal Law Review: An International and Interdisciplinary Journal*, Vol 12, No.3(2009)pp468-483

¹² Wanyeki.L., "The International Criminal cases in Kenya Origin and Impact", paper no.237 (SouthAfrica:Institute of Security Studies, August 2012) pp10-11

jurisdiction over this matters he only has jurisdiction over conflicts that occurred after the Rome statute came into force.¹³ Other complaints fall outside his jurisdiction because they were complaints on environmental damage, drug trafficking, judicial corruption, tax evasion, and human rights violations which do not fall within the jurisdiction of ICC.

In the case of US with regard to crimes of aggression committed in Iraq is that the US is not a state party to the Rome statute and the ICC could not act on the crime of aggression until it was properly defined. In the case of Israel is not a party to the Rome statute and Palestine authority is not yet a state so it is not also a party to the Rome statute. In short the ICC can only act on complaints of state parties to the Rome statute unless the matters are referred by that state or by the Security Council.¹⁴

ICC's work in Africa is undermining rather than assisting African efforts to solve the continents problems. This complaint has been vocalised by the AU in the Darfur situation has been considered to be too serious and complex to be resolved without recourse to a harmonised approach to justice and peace. Neither should be pursued at the expense of the other.¹⁵ This has also been expressed in the case of Joseph Kony that peace should be pursued rather than justice because he said he will not sign the peace agreements, until the warrant of arrest on him is lifted and this is seen by the religious leaders, civil society in Uganda to undermine the peace process.¹⁶ The problem is it is not guaranteed that once the warrant of arrest is lifted he will stop the atrocities or he will even sign the peace agreements. The situation in Darfur was referred to ICC by the UNSC and with the support of African countries who recognised the gravity of the crimes that were committed. In resolution 1564 the Security Council charged the secretary general with the responsibility to establish a commission of inquiry to investigate human rights violations in Darfur to determine whether or not

¹³ Article 11 of the International Criminal Court act 2002

¹⁴ Plessis.M.,(ed),*African Guide to International Criminal Justice*,(SouthAfrica:Institute of Security Studies, 2008)p123-125

¹⁵ FIDH Position Paper recommendations to the 12th Assembly of the states parties to the statute of the International Criminal Court, the Hague ,20th -28th November 2013p5

¹⁶ Nhema.A. and Zeleza.P.(eds),*The Resolution of African Conflicts*,(Oxford: Ohio University Press)pp64-66

acts of genocide had occurred. The commission was composed of respected African and Arab members and in 2005 February under the leadership of Antonio Cassese presented the report to the Security Council recommending that due to the grave crimes committed in Darfur, the Security Council should refer the matter to the ICC.

They further found that as far as mechanisms for ensuring accountability are concerned the Sudanese courts are unable and unwilling to prosecute and try the alleged offenders. Since ICC is expected to exercise its jurisdiction only if a state is unwilling or unable to investigate and prosecute international crimes as national courts should be the first to act under the principle of complementarity.¹⁷ In this situation the prosecutor made it clear that he that he will respect any independent and impartial proceedings that meet the standards of the Rome Statute but to date Sudan has provided no evidence that any of its domestic proceedings are worthy of such respect.¹⁸

Thirdly the concern about the Security Council applying double standards, the security councils powers of referral and deferral under the Rome statute creates an environment in which it is more likely that action will be taken against an accused from weaker states, than those of powerful states or those protected of powerful states therefore the perception is that by referring the Darfur situation to the ICC but not acting in relation to Israel the council is guilty of double standards. There is concern that international criminal justice threatens states sovereignty This applies to ICC which even though is a treaty body is subject to chapter VII referral and deferral powers of the security council and even though the Rome Statute has jurisdictional limitations therefore making it impossible to make investigations in Iraq and Gaza this limitation is less pronounced in the face of Security Council's power to defer situations to the ICC. Controversy was heightened because Sudan is not a state party to the ICC, yet non-state parties voted and that two weeks after the Rome Statute became operative and before the court had opened its doors the article on deferral, was

¹⁷ International Criminal Court 2002 preamble, paragraph 10, article 17

¹⁸ A report of the International Commission of Inquiry on Darfur, Geneva, January 25, 2005 p13

invoked by the US a non-state party to the Rome statute to protect peacekeepers from prosecution and of which a resolution 1422 was adopted by the security council at its 4572 meeting and the resolution was provoked by the power of us to veto renewal of the UN mission in Bosnia and Herzegovina.¹⁹ *States that if a case arises involving current or former officials or personnel from contributing state not a party to the Rome statute over acts or omissions relating to a UN established or authorised operation shall for a twelve month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case unless the security council decides otherwise.* The resolution was cited as discrimination between peacekeeping forces from sending states that are parties to the Rome Statute and those that are not. The purpose of this was to allow the Security Council, under its primary responsibility for the maintenance of peace and security to set aside the demands of justice, at time when it considered the demands of peace to be overriding. If the suspension of legal proceedings against a leader will allow a peace treaty to be concluded precedence should be given to peace and the suspension of the proceedings would be temporary.²⁰

When the article was invoked by the AU Peace and Security Council in the Darfur situation, to defer the matter but it was not acted on and in the AU assembly in Libya on 3rd July 2009 the heads of state made a resolution not to cooperate with the ICC with the arrest and surrender of President Al Bashir of the Sudan and expressed regret that the request to defer the proceedings against Al Bashir, had neither been heard nor acted upon and it reiterated its earlier request to the UN. AU meeting in November 2009 recommended that article be amended to allow the UN general assembly to take a decision, where the Security Council has failed to take a decision within a specified time frame because the Security Council was more representative of the world community than the council

¹⁹ Stahn.C., "The ambiguities of Security Council Resolution 1422," *European Journal of International Law*, Vol 14(2003) p85

²⁰ Cryer.R.,Friman.H.,Robinson.D,Wilmhurst.E,*An Introduction to International Criminal Law and Procedure*,(Cambridge: Cambridge University Press,2007) p138

1.3.3 IMMUNITY OF HEADS OF STATES

Another debate has been on the indictment of President Al Bashir, who is a sitting head of state in light that heads of state have immunity. The Rome Statute *makes it clear that immunity is inapplicable to any person, before the ICC makes specific reference to heads of state and government.*²¹ The traditional doctrine of personal immunity for sitting heads of state do not apply in the ICC, though a state is not obligated to hand over an individual if doing so will be inconsistent with its obligations under international law, with respect to the state or diplomatic immunity of a person of a third state unless the court can first obtain the cooperation of that third state for the waiver of the immunity.²² Immunity under the Rome Statute, applies to officials before the ICC and the handing over of someone will be inconsistent with obligations under international law, is interpreted to apply to states that are not parties to the Rome Statute and to states that have not waived their immunity requiring ICC to seek a waiver in respect to such an official.

In view of the foregoing the Rome Statute which provides that, the head of state ,head of government, a member of parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under the Rome statute but the position of immunities in national courts is less obvious in the Pinochet case Republic vs. Bow St.Magistrate,exparte Pinochet Ugande, the house of lords found that heads of states are immune from criminal liability unless that immunity is waived irrespective of the crime alleged but in this case Pinochet the house of lords held that the international criminal law prohibition of crimes against humanity rendered ineffective the immunity that was traditionally accorded under customary international law for former state officials and heads of states.²³

The Kenyan government proposed reform to the article on immunities for heads of state, exempt incumbent heads of state from prosecution, at the 12th assembly of the states to the statute of the

²¹ Statute of the International Criminal Court article 27(1)

²² Ibid article 98(1)

²³ In Re Pinochet (1999)UKHL 1;(2000)1AC 119,15 January 1999

International Criminal Court at the Hague but could not be discussed as the proposal had not been presented to the assembly 90 days in advance²⁴ but the said proposal contradicts international and regional law treaties, jurisprudence and practice that do not admit immunities for heads of state at international criminal tribunals²⁵

1.3.4 ANALYSIS OF THE LITERATURE REVIEW

The claim and debate that the ICC is a western court unfairly focused on Africa has no basis at all as it is not based on a proper understanding of the ICC but the debate that it is a court for all people Africans included as they were part of its creation is correct. As most of the matters before it are self referrals by states or been referred by the Security Council and when the prosecutor has been granted leave to investigate a matter he/she has to go before the trial chamber to for the court to determine, if there is sufficient evidence to confirm charges. If the ICC has no jurisdiction in a case no matter how much evidence it has the matter will be thrown out of court and jurisdiction is conferred on the ICC in three ways by state referrals, If a matter is referred to by the UN Security Council, if a non state party submits itself to the jurisdiction of the court or if the trial chamber allows the prosecutor to investigate a matter like in the Kenyan case²⁶.

African states have been unwilling to prosecute perpetrators of international crimes and that is why these matters are before the ICC. In addition the prosecutor has given reasons for not investigating some situations, as the crimes happened before the Rome Statute came into force others are of the crime of aggression which the ICC has no jurisdiction over till 2008 and others are not crimes under the Rome Statute.

African states cannot say that the ICC is a western court because were involved and consulted when the court was being formed and the African Union called on all the member states to support the

²⁴ FIDH position paper recommendations to the 12th Assembly of states parties to the statute of the International Criminal Court, the Hague, 20-28th November 2013 p5

²⁵ Article 7 of the charter of the International Military Tribunal(Nuremberg), Article 7 of the statute of the International Criminal Tribunal for the Former Yugoslavia and Article 6 of the International Criminal Tribunal for Rwanda

²⁶ Article of the statute of the International Criminal Court

creation of the court. Therefore the debate that the ICC is a western court is not sound. None of the states that have objected to the ICC actions have initiated national prosecutions an example is Kenya and Sudan but in any event even though this states were to initiate national prosecutions, there would be no justice as it is impossible to prosecute a head of state in his own country. There is need for ICC to address the concerns raised by the AU especially on the issue of the deferment of Al Bashir's case they should act on it and reject or allow the deferment like it did in the case of US, rather than just keep quiet. We still need the ICC because it is the only hope for victims though this is a temporal solution because its effect is that it will deter perpetrators we need to look at the main cause of this conflict in our continent.

There is also some truth in the debate that ICC only focuses on one side it could be on the rebel side or is used to oust leaders by the hegemons so that they can impose leaders who will cater for their interests, as in the Kenyan situation where they said they would impose bans if certain leaders were not elected and ensured that the ones they did not have were before the ICC. All the people that were supposed to be indicted were not, such as Anyang Nyong'o who called for the mass action with the blessing of the former Prime minister which caused the violence, as they bore the greatest responsibility in the post-election violence in Kenya.²⁷

ICC should realise it is bound to fail if it does not get cooperation which it heavily relies on from the states, due to non-cooperation of states it led to the dropping of charges of Ambassador Muthaura so they need to get into dialogue with these states and more so AU which intends to confer the African Court of Justice and Human rights jurisdiction to deal with international crimes of genocide, war crimes and crimes against humanity.

²⁷ Glasius.M. "Global Justice Meets Local Civil Society: The International Criminal Courts Investigation in Central African Republic," *Global Political Journal*, Vol.33, No.4 (2008)pp152-153

For the debate that the ICC only focuses on situations in Africa to end. The prosecutor of the ICC should be encouraged to open investigations in other continents other than Africa, as the world wants and needs a court that is committed to pursuing cases across the globe. African states are entitled to insist that ICC be cautious while interfering in conflict situations and undermining peace processes. Until the Rome statute is amended it is upon the state parties to utilise the Rome Statute by claiming that investigations and prosecutions are not in the interests of justice and further they should convince the Security Council that the deferral is in the interests of justice and further by insisting that it has the ability and willing to prosecute the offenders that are guilty of war crimes, genocide and crimes against humanity.

Concerns on the role of the Security Council should be attended to because no man can be a judge in its own course, we do not expect it to vote for the referral of a matter to the ICC when it touches on them and even though it is not voting it is likely to influence other states who have the veto power because it is in the SC. The power to defer or refer a matter should be vested in the UNGA. In view of the foregoing the debate that the ICC only focuses on Africa fails.

1.4 JUSTIFICATION

This study is important as it will clear the misconceptions against the International Criminal Court such as, the ICC only focuses on the African Continent, as opposed to other continents and now that the incumbent President of Kenya Uhuru Kenyatta is being tried at the Hague and a fight has been put up to ensure that rules of evidence are amended so that he is not always present in court when the trial is proceeding and the call by Kenya to amend article on immunity of a head of state , so that an incumbent head of state is not prosecuted at the ICC. This study is further important as it will examine and contribute to how these amendments of rules of procedure at the ICC are infringing on the rights of victims and if it will fuel impunity since most of these crimes are perpetrated by heads of state and government.

This study will further examine and contribute to enforcement mechanisms that need to be put in place to ensure that states cooperate, because relying on state cooperation alone is bound to fail as most of the African countries have vowed not to cooperate with the ICC. The study will further examine and contribute to how states that have ratified the Rome Statute but are dualist and have not passed domestic legislation. How their nationals can be subjected to the Rome Statute in cases of genocide, crimes against humanity and war crimes.

1.5 THEORETICAL FRAMEWORK

The theory of realism that states and other international actors are driven to act by the basic instinct of survival and the maintenance of their sovereignty but not on some constructs to be adhered to in good faith.²⁸ World politics are driven by competitive self interest and believe that war is a solution. Most of this individuals who are at the Hague are driven by self-interest they want to hold on to power, jobs they give to their friends and relatives, they ensure that all institutions have collapsed by ensuring that corruption thrives and since the people have nothing more to lose they revolt leading to a conflict because this people and the state only understand the language of violence and when there is a conflict they believe in using force through the military, to force people to submit to them even when they are oppressing them not realising that conflicts are brought about by needs that are not met in.

The United States has done everything possible to ensure its interests are taken care of by making sure that none of its citizens is prosecuted by ICC, by entering in bilateral agreements with about 60 states, they also preserve their interest because they are in the Security Council and for states that have not ratified the Rome Statute, the only way the ICC could have jurisdiction over them is if it a referral by the Security Council and even though the Rome Statute is clear when it comes to matters concerning voting, that a state cannot vote in a matter which it is the subject of discussion. They are

²⁸ Sandole.J. and Merwe.H.(eds) *Conflict Resolution Theory and Practise integration and practice*,(UK:Manchester UniversityPress,1993)pp3-5

able to influence other members of the Security Council not to support any indictment which relates to their nationals.

The refusal to ratify the Rome Statute was for purposes of preserving their self interests, yet we know they are the ones who fund some of this wars, an example is in Democratic Republic of Congo, Liberia, Sierra Leone almost all of the weapons used in Africa are not manufactured in Africa they are supplied by them and will want the status quo to remain so that they get the gold and blood diamonds and anybody who tries to interfere with their interests they find their way to the ICC, so that they can get out of there way and in other parts of the world like in the African continent they want to impose their preferred leaders, who will take care of their interests and they ensure that the opponents are before the ICC so that they frustrate their ambitions of being the heads of states in those countries that they have interest in.

The perpetrators of the crimes in the Rome Statutes are usually the heads of states or leaders who have influence on people. When they are committing these atrocities they never remember that they are a sovereign state that has a duty to protect its people but as soon as they are indicted or warrant of arrest are issued, they want to hid behind sovereignty to preserve their own intrests. They also argue that neither justice nor peace should be pursued at the cost of the other but with the universalization of human rights this argument no longer holds water.

In this school of thought it is also argued that international law is not law because the international system has no government and no institutions of government on which law depends, no legislature to make law ,no executive to enforce it, no judiciary to resolve disputes and develop the law.²⁹ The perpetrators of these heinous crimes that cause a lot of heart ache are happy and very comfortable with the way the international court is not able to enforce any orders that it issues but relies on state

²⁹ Henkins.L., *International Law :Politics and Values*, (Netherlands :Kluwer Academic Publishers Group, 1995)PP 3-4

cooperation, yet at the back of their minds they know international law is made through unanimous agreements between the nations.

Since most of the states are dualists most of the African countries have ensured that they have not put in place domestic legislation, so that they do not prosecute the perpetrators of crimes in the Rome Statute and those that have domestic legislation such as Kenya, it would still be impossible to prosecute the perpetrators as they are the ones who are in power or are politically correct.

Lastly it is quite clear from the resolutions that the African Union makes that they are only after their self interests. They want the African Court to have jurisdiction to try international crimes because they know that trials of heads of states and governments will never see the light of day as the judges that are appointed to the African Court are recommended by the heads of states and government and it is very hard to try someone who has appointed you. The refusal to cooperate by the African states with the ICC also shows that they only think of themselves.

In addition the call for deferral of the cases of President Uhuru Kenyatta and President Albashir and amendment of rules of procedure to their benefit clearly show that they are driven by their own interest because if they were not driven by their own interests, they would have just proceeded with the trials as the ICC has clearly demonstrated in cases that it has handled, that it only convicts when there is evidence against a person and when there is no evidence it acquits.

1.6 HYPOTHESES

1. The ICC has a role to play in ending impunity especially in the African continent.
2. The ICC is the major institution that provides justice for victims of international crimes under the Rome Statute.
3. Investigations on ICC are hampered by reliance on state party cooperation and states are not willing to prosecute matters.

1.7 RESEARCH METHODOLOGY

The research will use both primary and secondary data. The researcher will use the case study method which according to Kothari is a form of qualitative analysis wherein careful and complete observation of an individual or a situation or an institution is done efforts are made, to study each and every aspect of the concerned unit in minute details and then from the case data generalizations and inferences are drawn.³⁰

The researcher has adopted a case study approach in order to conduct an intensive study of the units of investigation, in order to deepen the understanding of the relationship between international and domestic law in the prosecution of crimes under the Rome statute.

The tool used to collect data in the case study method will be a documentation review of published primary data of judicial records kept at the Mombasa, Nairobi, Eldoret, Kitale and Nakuru law courts criminal registry in relation to all cases that Kenya has prosecuted and were related to the 2007/2008 post election violence, cases prosecuted under the Kenya international crimes act 2008³¹ which is the domesticated legislation with regard to international crimes. Since the researcher is an advocate of the high court of Kenya it will not be difficult to gain access to the court records.

The researcher will also interview judges in the Nairobi/Mombasa high court criminal division, who are well versed with matters in international crimes at the International Criminal Court. Who have handled matters where accused persons have been charged under the International Crimes Act.

The researcher will also use questionnaires some of which will be open –ended and closed ended which she will self-administer, to personnel in the Institute of security studies who are very knowledgeable on issues on the ICC and have researchers who dedicate their time and resources to ICC matters and in addition will give the questionnaires to various participants from various

³⁰ Kothari.C.,Research Methodology Methods and Techniques,2nd Revised Edition,(New Delhi, New Age International(P) Limited Publishers,1982)p113

³¹ Statute for prosecution of International Crimes in Kenya

African countries, in various workshops organised by the Institute of Security Studies who are usually persons in the security sector and well versed with matters of the ICC, by virtue of attending the ongoing trials at the ICC and participating in the Assembly of states that have ratified the Rome Statute

Other secondary data will be obtained from analysis and review of books, journals, published academic work, publications from key institutions working in the peace and security sector as well as reports of government commissions and taskforces on politics and electoral violence in Kenya.

The data will be analyzed using content analysis. Content analysis is a technique for making inferences by objectively and systematically identifying specified characteristics of responses and objectively and systematically identifying characteristics of responses and objectively identifying and using the same approach to relate trends. The results will be presented under identified themes.

1.8 CHAPTER OUTLINE

This study consists of five chapters. In this chapter which is chapter one, it is a general introduction to this study it outlines the research problem, objectives, literature review, justification and theoretical framework upon which the research is anchored and the methodology applied in the study. Chapter two examines the ICC as an international legal regime. Chapter three looks at the criminal cases at the ICC. Chapter four critically examines why the Kenyan cases ended up at the ICC. Chapter five is the final chapter and contains conclusions and recommendations

CHAPTER TWO

THE INTERNATIONAL CRIMINAL COURT AS AN INTERNATIONAL LEGAL REGIME

2.0 Introduction

International legal regimes are defined as implicit or explicit principles or norms, rules and decision making procedures around which actors expectations converge in a given area of international law.³² International regimes are put in place to ensure that states are governed by particular rules or norms and failure by a state to abide by such norms or rules, states put in place a way of sanctioning such states.³³ International law is the term given to the rules which govern relations between states. Despite the absence of any superior authority to enforce such rules, international law is considered by states as binding upon them, and it is this fact which gives these rules the status of law. Law consist of a series of rules regulating behaviour and reflecting to some extent the ideas and preoccupation of the society within which it functions.³⁴

This chapter will focus on the establishment of the International Criminal Court as a legal regime, the basis of having a legal regime such as the ICC, why they come about sources of law for the ICC, the jurisdiction of the ICC and the difference between permanent and adhoc tribunals.

2.1 Basis of the International Criminal Court

Anytime there is a threat to peace and security states come together in order to resolve the threat to peace and security, as there is always the danger of any conflict spilling over and more often than not there is the gross violation of human rights. Some of the ways that some of those situations are taken care of in international criminal law, is by establishment of institutions such as the international criminal tribunals or the ICC which have rules that are established to try perpetrators

³² Krasner.S,*Structural causes and Regime Consequences :Regimes as intervening variables, in Krasner ,International Regimes,*(Newyork:Columbia University Press,1990)pp1-21

³³ Deitelhoff.N., “The Discursive Process of Legalization: Charting Islands of Persuasion in the ICC Case, ” *International Organisation Journal*,Vol 63,(Winter 2009),p33

³⁴ Malcom.S.,*Internatinal Law ,Fourth ed* (Cambridge: Cambridge University Press,1997)P1

of crimes against humanity ,war crimes and genocide. In the past the institutions that were established to deal with international crimes were tribunals such as the International Military Tribunal Nuremberg, International Criminal Tribunal of the former Yugoslavia, International Criminal Tribunal of Rwanda, Special Court of the Sierra Leone and Extraordinary Chambers in the Courts in Cambodia which are adhoc tribunals with limited temporal and geographical jurisdiction established under chapter VII of the UN Charter, which states that the Security Council shall determine the existence of any threat to the peace,breach of the peace or act of aggression and shall make recommendations or decide what measures shall be taken in accordance with article 41 and 42 to maintain or restore international peace and security.

Before the ICC was established to prosecute crimes under the Rome statute such as Crimes against Humanity, War Crimes and Genocide, there was no permanent International Criminal Court we only had the International Court of Justice which resolved disputes among states but had no criminal jurisdiction.³⁵ As a result of the many atrocities that happened after the Second World War, the international community felt that there was need to bring to book the perpetrators of these heinous crimes so that they would never again recur.

In the wake of humanitarian atrocities soon after the 2nd world war in 1945 the Great Britain, the United States of America, the United Soviet Socialist Republic and the provisional Government of France signed an agreement for the prosecution and punishment of major war criminals. In 1945 the first international prosecution of international crimes took place after World War II. The International Military Tribunal in Nuremberg was established by the allied power that is Britain, France, US and Russia to try major war criminals, of the European Axis for violations of the laws of war, crimes against peace and crimes against humanity.³⁶ The Nuremberg trials had a profound

³⁵ The Statute of the International Court of Justice(1945),Articles 34 and 36

³⁶ The Statute of the International Military Tribunal(1945)article 1

effect on the development of International Criminal Law, as this is where the principle of individual responsibility in international crimes and defences based on state sovereignty were rejected.³⁷

The Nuremberg trials were followed in 1946 by the International Military Tribunal in Tokyo set up for the just and prompt trial and punishment of the major war criminals in the Far East.³⁸In 1948 the UN General Assembly adopted a resolution reciting that in the course of development of the international criminal law, there will be an increasing need of an international judicial organ for the trial of certain crimes under international law.³⁹There was the adoption of 1948 Genocide Convention, and the 1949 four Geneva Conventions which placed the responsibility on states, to ensure that crimes against humanity, genocide and war crimes do not go unpunished.⁴⁰In 1989, the United Nations General Assembly adopted a resolution that instructed, the International Law Commission to study the feasibility of the creation of a permanent ICC.⁴¹Four years later the General Assembly called on the commission to commence the process of drafting a statute for the court.

Following the ethnic cleansing in Yugoslavia and the Genocide in Rwanda, war crimes in Sierra Leone, Cambodia and Lebanon the UN Security Council decided to create adhoc tribunals, to prosecute international crimes committed in the former Yugoslavia and Rwanda. The International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda,⁴²The Special court of the Sierra Leone, the extra Ordinary Courts of Cambodia and the Special Tribunal for Lebanon.

³⁷ Ward. A., *Breaking the Sovereignty Barrier :The United States and the International Criminal Court*, (Princeton: Princeton University Press2001)p20

³⁸ Statute of the International Military Tribunal for the Far East Charter (1946)

³⁹ United Nations Doc.A/760,Dec,5,1948

⁴⁰ Resolution 260(iii)of the United Nations General Assembly on 9th December 1948

⁴¹ Jonathan .I., 'Progress in International Criminal Law ?',1999 and Morris.M., "The United States and the International Criminal Court: High Crimes and Misconceptions: The ICC and Non-Party States," (Cambridge: Cambridge University Press,2000)p40

⁴² Chapter VII of the United Nations Charter.

The need for a permanent court became more profound because genocide, war crimes and crimes against humanity had become the order of the day and there was need to deter future humanitarian atrocities. The emerging consensus in the human rights circles is that international criminal tribunals are necessary, to address what former prosecutor Louise Arbour of the ICTY has called the entrenched culture of impunity where the enforcement of humanitarian law is the exception and not the rule.⁴³ More importantly, the member states that created these new tribunals have not minced words about what they expect these entities to achieve. For instance the SC resolution that established the ICTY boldly proclaimed that the purpose of the tribunal was to put an end to international atrocities and to take effective measures to bring to justice the persons who are responsible for them.⁴⁴

In 1994 the proposition by Gustave Moynier one of the founders of the International Committee of the Red Cross, called for the establishment of an international tribunal to punish violations of the Geneva Convention of 1864.⁴⁵ In 1994, the International Law Commission completed a draft on what would become the Rome Statute. The following year that is in the year 1995 the preparatory committee was established, to further review the substantive issues regarding the creation of a court based on the International Law Commission report and Statute. The aim was to prepare a convention for the ICC that had the prospects of being widely accepted globally and this led the United Nations General Assembly to convene the UN Diplomatic Conference of Plenipotentiaries, on the Establishment of a Permanent International Criminal Court. In Rome from the 15th to 17th July 1998 to negotiate and agree on the final text of a treaty establishing a permanent International Criminal Court. As a result of these marathon efforts on the 17th July 1998, 120 states adopted the

⁴³ Louise.A., "The Prosecution of International Crimes: Prospects and Pitfalls," *Washington Law Journal*, Vol 13, 23 May (1999) p6

⁴⁴ Security Council Resolution 827, May 25, 1993 available at <http://www.un.org/Docs/scres/1993>

⁴⁵ Moynier.G. "Creation of an International Tribunal for punishment of violations under the Geneva Convention," (1872) Vol 11 p122

Rome Statute which is the legislation used in the prosecution of international crimes in the International Criminal Court.⁴⁶

2.2 The International Criminal Court

The ICC is a permanent international court established to investigate, prosecute and try individuals accused of committing the most serious crimes of concern to the international community as a whole, namely the crime of genocide, crimes against humanity, war crimes and the crime of aggression.⁴⁷ It was established because some of the most heinous crimes were committed during conflicts which marked the twentieth century. The primary mission of the ICC was to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole and thus contribute to the prevention of such crimes. When the Convention on the Prevention and Punishment of the Crime of Genocide was adopted, the United Nations General Assembly recognised the need for a permanent international court to deal with, the kinds of atrocities that had been perpetrated. The idea of a system of international Criminal Justice re-emerged after the end of the cold war. However, while negotiations on the ICC statute were underway at the United Nations, the world was witnessing the commission of heinous crimes in the former territory of the former Yugoslavia and in Rwanda. In response to these atrocities the United Nations Security Council established ad hoc tribunals, for each of these situations and these events undoubtedly had a significant impact on the decisions to convene the conference which established the ICC in Rome in 1998.⁴⁸

The ICC is governed by a statute known as the Rome Statute which sets out the crimes falling within the jurisdiction of the ICC, the rules of procedure and the mechanisms for states to cooperate with the ICC. The countries that have accepted these rules are known as state parties and are

⁴⁶ King, J. and Theofrastous, 'From Nuremberg to Rome: A Step Backward for U.S. Foreign Policy,' and Barrett and Mathew, A., 'Ratify or Reject: Examining the United States Opposition of the International Criminal Court,' (New York: Columbia University Press 1999) p23

⁴⁷ The Statute of the Rome

⁴⁸ Ku, J., Nzalibe, J., "The ICC we Want," *Washington University Law Review Journal*, Volume 84, issue 4, (2006) p779

represented in the assembly of state parties. The assembly of state parties which meets once a year, sets the general policies for the administration of the court and reviews activities of the working groups established by the states and any other issues relevant to the ICC, discuss new projects and adopt the ICC's annual budget. Over 120 countries have ratified the Rome Statute and the seat of the court is in the Hague in the Netherlands. The Rome statute provides that the court may seat elsewhere, whenever the judges consider it desirable but the court can set up offices in areas where it is conducting investigations.

The ICC has jurisdiction only with respect to crimes committed after the entry into force of the Rome Statute which is 1st July 2002.⁴⁹ If a state becomes a party to this statute after its entry into force, the court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this statute for that state, a state becomes a party to this statute when it accepts the jurisdiction of the court with respect to the crime of genocide, crimes against humanity, war crimes and the crime of aggression. A situation in which one or more of such crimes appears to have been committed is referred to the prosecutor by a state party in accordance with article 14, A situation in which one or more of such crimes appears to have been committed is referred to the prosecutor by the security council acting under chapter VII of the charter of the UN or the prosecutor has initiated an investigation in respect of such crime in accordance with article 15. However as a matter of customary international law, every state has jurisdiction to prosecute international crimes under the universal jurisdiction.⁵⁰

It is important to note the ICC does not replace national courts but complements them and is the court of the last resort it only prosecutes if a state has failed or is unwilling to prosecute perpetrators of war crimes, genocide and crimes against humanity. The ICC prosecutes individuals not states and the office of the prosecutor's prosecutorial policy, is to focus on those who having regard to the

⁴⁹ Leila .N. and Carden.L. , "The new International Criminal Court :An Uneasy Revolution," *Georgetown Law Journal* Vol 88(2000)P381

⁵⁰ The Statute of the Rome

evidence gathered bear the greatest responsibility for the crimes and does not take into account any official position that may be held by the alleged perpetrators.⁵¹

In the Rome statute the crimes are defined as follows Genocide means act like killing or causing serious bodily or mental harm to members to members of a group, committed with intent to destroy that national, ethnical, racial or religious group has long been recognised as a crime of international criminal law. The definition of genocide in article 6 follows verbatim the definition of the Genocide Convention Article II, which is regarded as constituting both international treaty and custom law. The same definition was used in both the International Criminal Tribunal of Yugoslavia and International Criminal Tribunal of Rwanda statutes and its meaning further detailed in the case of Prosecutor vs. Akayesu.⁵²

Crimes against Humanity are recognised crimes under International Law, there is no generally accepted definition of such crimes in either treaty or customary law. When the crime had been regulated earlier in the International Military Tribunal in Tokyo, International Military Tribunal in Nuremberg, International Criminal Tribunal of Yugoslavia and International Criminal Tribunal of Rwanda Charters, the definitions have been brief and differed from each other. The Definition in Article 7 adopted in Rome adopted from all of them and is broader than its predecessors but the Rome Statute imposes high thresholds for crimes to be considered crimes against humanity that stretch further than existing international standards.⁵³

According to the Rome Statute the crime must be part of a widespread or systematic attack directed against a civilian population with knowledge of the attack.⁵⁴ This means that the prosecutor must not only show that the crime was committed by the defendant but he or she personally knew the

⁵¹ An article on understanding the International Criminal Court by Herman Von Hebel, the Registrar of the International Criminal Court. pp3-5

⁵² Sarooshi, Danesh, "The Statute of the International Criminal Court," *International and Comparative Law Quarterly*, Vol 48(1999)P387

⁵³ Shannon.K., Supple, "Global Responsibility and the United States :The Constitutionality of the International Criminal Court," *Hastings Constitutional Law Quarterly Journal*, Vol27(1999)P215

⁵⁴ Statute of the International Criminal Court Article 7

larger context of his or her actions. Additionally the attack must entail a course of conduct involving multiple commissions of acts against any civilian population pursuant to or in furtherance of a state or organizational policy to commit such attack.⁵⁵

Crimes against humanity are murder, extermination, enslavement, torture and the crime of apartheid. The Rome negotiations led to a couple of innovations that were added to the statute, for example rape ,sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence.

War crimes Article 8 of the Rome Statute more or less restates existing laws and customs regarding war crimes found in the Geneva Convention and the Hague convention Article 8 states that the court shall have jurisdiction in respect of war crimes, in particular when they have been committed as part of a plan or policy or as part of a large scale commission of such crimes. War crimes means for example wilful killing, torture or inhumane treatment including biological experiments and extensive unjustified destruction and appropriation of property.

The ICC differs from other adhoc tribunals in that it is a permanent autonomous court that is supposed to try any perpetrators of crimes against humanity, war crimes and genocide after 1st July 2002 and handles many situations in different states, whereas adhoc tribunals such as the International Criminal Tribunal for former Yugoslavia, International Criminal Tribunal for Rwanda, International Military Tribunal for Nuremburg, Special Court of the Sierra Leone and Extraordinary Chambers of the Cambodia dealt with specific situations and had a limited temporal mandate and jurisdiction which was restricted by the fact that they are established under the Security Council powers under chapter VII of the UN charter, as a means of assisting with the restoration and maintenance of international peace. In a specific jurisdiction for International Military Tribunal Nuremburg, was established for the prosecution and punishment of the major

⁵⁵ Ibid article 7:2a

war criminals of the European axis in the world war II.⁵⁶International Criminal Tribunal of Yugoslavia the jurisdiction was temporary and geographically limited to war crimes and human rights violations that constitute international crimes committed in any part of the former Yugoslavia after 1st January 1991. International Criminal Tribunal of Rwanda had the task of investigating crimes committed in Rwanda in 1994 and bring the prime suspects to justice. Special Court of the Sierra Leone it was established as a result of an agreement between the UN and the Government of Sierra Leone its task was to punish the principle figures responsible for core international crimes committed after 30th November 1996 and the Extraordinary Chambers of the Cambodia for the prosecution of crimes committed during the period of Democratic Kampuchea ,were established on the basis of a government agreement of 2003. These extraordinary chambers were charged with bringing to trial those senior leaders of Democratic Kampuchea responsible for the core international crimes committed between May 1975 and January 1979.⁵⁷

Once the tribunals have completed their mandate they cease to exist and sometimes even before they complete their mandate and it is felt that a state has institutions that can be trusted to ensure that there is justice, the cases are taken back to the national courts e.g. the Security Council decided that the International Criminal Tribunal of Yugoslavia should finish its proceedings in the trial chambers in 2008 and all activities in 2010 and had recommended to transfer unfinished cases to competent national jurisdictions.⁵⁸ As for the International Criminal Court it is usually the last resort as states are given opportunities to try suspects, that have committed crimes under the Rome Statute and once a situation is handled by the ICC it is very difficult to have the matter go back to the national courts, unlike in the tribunals as they were established because the international community did not have faith in the institutions of that state, in some states there were no

⁵⁶ Daniel.C. “The Proposed International Criminal Court ,International Centre for Criminal Law Reform and Criminal Justice Policy,” *International Law journal*, Vancouver, B.C, Canada, Vol 53(1996)p6

⁵⁷ An article by the GOETHE institute 2006 “From Nuremberg to the Hague the Road to the International Criminal Court(2006)pp2-6

⁵⁸ UN Docs.S/RES/1503(2003) and S/RES/1534(2004)

institutions and at the time there were not many conflicts and human rights violations as there are in this century.

In addition the adhoc tribunals lacked contemporary models to learn from. They had to look back to Nuremburg, which took place almost half a century earlier. Consequently the creation and development of the adhoc tribunals were to some extent a process of trial and error. In contrast, the drafters of the Rome Statute possessed the opportunity, to observe the functioning of the adhoc tribunals hence the ICC had the advantage of being able to identify pitfalls and gain ideas and the international community is now more prepared to deal with the ICC.⁵⁹

2.3 Sources of International Law in the International Criminal Court

International criminal law is a subset of public international law and like all international law and its development, application and enforcement finds its origins in International conventions and treaties, customary international law, judicial decisions and academic writings.⁶⁰ In the prosecutions of international crimes in the ICC there is need for specific laws, in order to ensure that there is coordination and states know how they are supposed to respond when international crimes occur, as the Rome statute was enacted because millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity, that international crimes threaten the peace, security and well being of the world and that the most serious crimes of concern must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.⁶¹ Measures can only be taken at the national level and the international levels if there are laws that are in place because they spell out the do's and dont's.

⁵⁹ Johnson., "Ten Years Later: Reflections on the Drafting "*Journal of International Criminal Justice* ",Vol 2,(2004) p369

⁶⁰ Statute of the International Court of Justice, article 38(1)

⁶¹ Statute of the International Criminal Court "the Rome Statute Preamble"

2.4 International Conventions/Treaties

There are a large number of conventions that have been ratified that relate to international crimes but the global adherence to these conventions has been low and state practice for prosecution of international crimes is difficult as most of the states, have not domesticated these conventions as most states are dualist states. Sometimes the definition of terms is not so clear or a convention deals with only one type of crime such as the genocide convention 1948 and there are other crimes that are considered to be international crimes and these conventions rely heavily on cooperation of states as there is no means of enforcing these conventions but it is appreciated that it is better for every nation to secure, the protection of the law by complying with it than ignoring it. States do comply with international law because states generally do feel impelled to conform to the standards which are widely accepted and which are inculcated into their public opinion and leadership because they would wish to avoid condemnation by and isolation from other states.⁶² What has been left out in one convention leads to the enactment of another convention or leads to the ratification of a convention that takes into account, all that had not been taken care of in a particular convention and that is why the Rome Statute ensured that it outlined all international crimes and was very specific with matters of the jurisdiction of the court and the definition of the crimes under it.

With regard to international crimes there are a number of conventions, we have the Hague Convention 1907 for the pacific settlement of international disputes, the genocide convention 1948, the Geneva conventions 1949 and the Rome Statute of the International Criminal Court. In the Geneva conventions and protocols that protect the civilians and victims of war against war crimes require states, to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, search for persons alleged to have committed, or to have ordered to be committed such grave breaches, and shall bring such persons, regardless of their

⁶² Schwebel.S., "Proceedings of the 101st Annual meeting, " *American Society of International Law Journal*, Vol 68-107(1974-2013)p181-183

nationality, before its own courts. It may also hand over such persons over for trial, to another contracting party concerned provided it has made out a prima facie case.⁶³

Even though the conventions clearly outlined the responsibility for states to search for, detain and try domestically or extradite those accused of war crimes those conventions had never been used in the prosecution of international crimes, until when the International Criminal Tribunal of Yugoslavia and the International Criminal Tribunal of Rwanda were established.⁶⁴

In the Genocide Convention 1948 it obligates state parties to prevent and punish genocide. The convention declares that genocide whether committed in time of peace or in time of war is a crime under international law for which individuals can be tried for. The genocide conventions specifically calls for the creation of an international Criminal Court and Specifically states that persons committing genocide shall be punished whether they are constitutionally responsible rulers, public officials or private individuals.⁶⁵ The contracting parties undertake to enact in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present convention. Persons tried by a competent tribunal of the state, in the territory of which the act is committed or by such international penal tribunal as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction.⁶⁶

The first person to be convicted under the Genocide Convention of 1949 was Jean-Paul Akayesu by the International Criminal Tribunal of Rwanda in 1998 but to date no sitting head of state has been punished or even been criminally prosecuted by another state for international crimes despite their being laws in place,⁶⁷ as state sovereignty has been over emphasized over individual criminal liability and the overriding influence of power politics, on the system of international legal order

⁶³ The Geneva Convention Relative to the Treatment of Prisoners of War, 1949, at Article. 129 and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War.

⁶⁴ Charney.J. "Progress in International Criminal Law?," *The American Journal of International Law* Vol 45,(1999)p93

⁶⁵ The Genocide Convention Article VII

⁶⁶ Ibid

⁶⁷ Penrose, Margret.M., "it is good to be king: Prosecuting heads of states and former heads of state under International Law," *Columbia Journal of Transnational Law* Vol 39(2000)P193

that can be regarded as one of the essential reasons for the non-applicability of the system of international criminal law to certain states.⁶⁸

It is clear that in the Geneva conventions, Genocide Convention ,the Hague convention on pacific settlement of disputes and the Rome statute, that the obligation to exercise universal jurisdiction over individuals have existed and accepted by states in international Law for decades. Therefore the crimes that are in the Rome Statute already existed in international law and states have an obligation to bring perpetrators to justice. The Rome Statute is the clearest exposition under international law of the three most serious crimes of concern to the world.

2.5 Customary International Law

Customary international law like conventional international law (treaties),is a source of international law.⁶⁹Whereas treaties only bind those states that are party to them, customary international law is binding on all states. A customary International Law exist if two conditions are met, it must reflect an established and accepted state practice. This refers to the actual behaviour of states in relation to a particular practice assessed against the following duration, consistency, repetition and generality of the particular practice, states accept to be bound by the rule or law in question.⁷⁰

Basic human rights obligations for example form part of international customary law. What is to be noted is the effect of customary international law, is totally different from that of conventional international law. For example a rule of customary law is binding on all nations, other than a state that has become a persistent objector on the other hand, non parties to a treaty are not bound by a treaty.

⁶⁸ Malekian,Farhad.A.,*The Monopolization of International Criminal Law in the United Nations, A Jurisprudential Approach 2nd ed*(Cambridge: Cambridge University Press,1995)P50

⁶⁹ Brownlie.S.,*Principles of public international law*,(Columbia:Lynee Rienner Publishers,2008) pp4-11

⁷⁰ Monageng.S.,*Positive Reinforcement :Advocating for International Criminal Justice in Africa*,(SouthAfrica:Nicework,2013) P6

Article 38(1) (b) of the Statute of the International Court of Justice, provides that the court shall apply “international custom, as evidence of a general practice accepted by law.”The question that arises is how a rule of customary international law, can be established for the purpose of creating binding legal obligations among states. The International Court of Justice in the North Sea Continental Shelf Cases, stated that the evidence required in the establishment of the custom is as follows.⁷¹

Not only must the acts concerned amount to a settled practice but must also be such or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of subjective element, is implicit in the very notion of “*opinion juris sive necessitatis*”.The states concerned must therefore feel that they are conforming to what amounts to a legal obligation.

For international customary law to be created there is need for evidence of acts showing a settled practice among states and the belief that a state has obligation to be bound by a customary law. It follows therefore that in examining the evidence in proof of a customary law, a court is bound to assess the existence of one objective element consisting of the general practice, and one subjective element, namely that there is a belief among states as to the legally binding nature of this practice⁷².

Widespread repetition of similar acts over time by states is relevant in determining state practice. Equally relevant are acts of states which must occur out of a sense of obligation. There must be some degree of generality and consistency over practice of states. In regard to international crimes it is generally accepted by states that, perpetrators of genocide, war crimes and crimes against humanity must be prosecuted as these crimes are heinous in nature and are threats to peace.

That every state has the responsibility of prosecuting perpetrators of these heinous crimes and if a state does not want to prosecute, they should extradite the person so that they can be brought to

⁷¹ (1969)ICJ Reports 44para77

⁷² Brownlie.I.,*Principles of Public International Law*(Oxford: Oxford University Press,2009)P29

book.⁷³ That is why many Rwandans who were perpetrators of the genocide and were in other jurisdictions, were prosecuted by other states because of the obligation under customary law, requiring that a state prosecutes any perpetrator within their jurisdiction and the conferment of universal jurisdiction on all states for international crimes, this was for purposes of ensuring that there is no safe havens for perpetrators of international crimes.

The wish in Rome when the Rome statute was been passed was not to create new criminal law but, through restatement of crimes prohibited in international treaties and customary law clarify the obligations under ICC jurisdiction.⁷⁴ Majority of states participating in the Rome negotiations agreed that the criminal law of the Rome essentially restated the existing law. The permanent members of the Security Council had already acknowledged a substantive part of these as constituting customary international law, when establishing the International Criminal Tribunal of Yugoslavia and International Criminal Tribunal of Rwanda.⁷⁵

There is a significant overlap between many of the treaty based and customary crimes and many crimes that may have started out as crimes under treaty law, such as genocide under the genocide convention are now considered part of the corpus of customary international law.⁷⁶

2.6 Judicial Decisions

Judicial decisions are also a source of international law, as some of the judgements set precedents and settle contentious issues once and for all. These judicial decisions in international criminal law include decisions of tribunals such as International Criminal Tribunal of Yugoslavia, International Criminal Tribunal of Rwanda., Special Court of the Sierra Leone and International Criminal Court. Judicial pronouncements of international criminal tribunals provide content to obligations and

⁷³ Nakhjavan.S.,*International Crimes*(South Africa: institute of Security Studies)P57

⁷⁴ Mahnoush.H. and Arsanjani,"The Rome Statute of the International Criminal Court "*The American Journal of International Law*, Vol 22(1999)P93

⁷⁵ Gennady.M.,Danilenko, "The Statute of the International Criminal Court and Third States, "*Michigan Journal of International Law*, Vol21(2001)P445

⁷⁶ (1986)ICJ Law Reports Nicaragua vs. United States of America, P14

develop and inform the criminal law norms and principles that are found in treaties and those that have been elevated to customary international law norms. There are several decisions that have settled the law on universal jurisdiction in international crimes, immunity of former and incumbent heads of state in international crime, rape as a crime against humanity and if one can alledge that they were exercising their freedom of expression if it leads to the commission of international crimes.

In the case of Adolf Eichmann it settled the issue of domestic courts exercising universal jurisdiction over international crimes. As Eichmann used to be a member of the Austrian Nazi party and was later accused of among others being responsible for killings, extermination, slavery and deportation of the Jewish population. He was abducted from Argentina by Israeli secret police and taken to be tried in Israel. He was tried under the genocide convention of 1948 on the grounds that the atrocities were not domestic crimes alone but crimes against the law of nations. The court held that the crimes he had committed offended the whole of mankind and shocked the conscience of nations are grave offences against the law of nations itself. That every state has a duty to prosecute perpetrators of these crimes and that the jurisdiction to try crimes under international law is universal.⁷⁷

In the Pinochet case the House of Lords held that the international criminal law prohibition of crimes against humanity rendered ineffective the immunity that was traditionally accorded under customary law, for former heads of states officials and heads of states. This decision by the house of lords is used to date to whenever perpetrators of international crimes raise the issue of immunity on the basis on being former heads of state or current as the issue has now been settled and most of

⁷⁷ Attorney General of the Government of Israel vs. Eichmann (1961)36 ILR 18,50(1968)

the conventions in international law expressly state that you cannot be granted immunity on the basis of being a former head of state or incumbent head of state.⁷⁸

In the judgement of Prosecutor vs. Akayesu was the first in which an international criminal tribunal interpreted the definition of genocide as set out in the Genocide Convention. The Akayesu judgement was also innovative in its affirmation of rape as an International crime and as a result of this rape was included as a crime against humanity in the Rome statute.⁷⁹

The case of Ferdinand Nahimana it was the first post Nuremberg case, to examine the role of the media in the context of mass crimes and the line between freedom of expression and incitement to international crimes.⁸⁰ It is clear that judicial decisions play a crucial role in the development of international law as they clearly bring clarity to contentious issues.

Conclusion

Regimes are important as they bring order to the international system. The establishment of the International Criminal Court was necessary in order that it could address the entrenched culture of impunity and necessary for bringing justice to the victims of international crimes. Definitions of what are international crimes are found in international treaties and conventions the most important being the statute of the International Criminal Court which expounded the meaning. There is the continuous development, amendment of rules and laws in order to deal with situations that had not been premeditated. International tribunals set the stage for the ICC which learnt from their mistakes.

⁷⁸ R vs. Bartle and the commissioner of police for the metropolis and Others(Appellants)exparte Pinochet(Respondent)

⁷⁹ UN Document.S/25704 at 36,annex(1993)annex(1993)and S/25704/Add.1(1993),adopted by the Security Council on 25th May 1993,U.N.Doc.S/RES/827(1993)

⁸⁰ <http://69.94.11.53/English/factsheet/detainee.htm>

CHAPTER THREE

CASES IN THE INTERNATIONAL CRIMINAL COURT

3.0 Introduction

This chapter will focus on the cases before the International Criminal Court, why they are before the ICC, the issues and relevance of each case. The cases have been arranged according to when they were referred to the International Criminal Court. Whether it was by way of self referral, by the Security Council or as a result of investigations initiated by the prosecutor.

The historic signing of the Rome Statute in July 1998 was a defining moment for the international criminal justice. For almost fifty years, since the end of the First World War, efforts have been made to establish a permanent international criminal court. Events in the former Yugoslavia and Rwanda shocked the world out of its complacency and the idea of prosecuting those who committed international crimes gained broad based support in global public opinion and among governments. The time, effort and resources expended on the creation of adhoc tribunal proved to be the catalyst, for a permanent institution with universal recognition that would not suffer the same challenges as its predecessors.

In July 2002, the world's first permanent court international court became a living reality fulfilling the dream embodied by the historic signing of the Rome Statute in 1998, with the vision of a permanent international institution with the power to exercise jurisdiction over persons for the most serious crimes of international concern. The International Criminal Court at its inception experienced several challenges such as guaranteeing adequate resources for the defence counsel under its legal aid system, balancing the rights of the victims and defendants before the court, interpreting the courts legal text on key issues such as witness protection, disclosure, victims'

participation and closely examining issues arising from the stay of proceedings in the case of Thomas Lubanga.

As a result of this during the first five years, the court was extensively engaged with interpreting its legal texts and significant judicial time was spent defining issues such as the scope of the victims' rights and the modalities of their participation, the guarantee of fair trial rights and equality of arms, protection of witnesses. Judicial consensus was not always achieved as there were divergent approaches to the same issues by different chambers which created uncertainty for the parties and participants and led to interlocutory requests for review by the appeals chambers but what is clear now is that it has moved from these teething problems and has made considerable advances over its counterparts at the adhoc tribunal and on some issues the court has relied on the best practice from the tribunals and judges and counsel who have been able to benefit from rich and diverse jurisprudential history.

The court commenced its first trial which was the case of Prosecutor vs. Thomas Lubanga on 26th January 2009 and issued its first arrest warrant for a sitting head of state. To date there have been eight situations that have been brought before the International Criminal Court. Four state parties to the Rome Statute Uganda, Democratic Republic of Congo, Central African Republic and Mali have referred situations occurring in their territories to the court. In addition, the Security Council has referred the situation of Darfur in Sudan and the situation in Libya both non-states parties. On 31 March 2010, the pre-trial chamber granted the prosecution authorisation to open an investigation proprio motu in the situation of Kenya and on 3rd October 2011 the prosecutor granted the prosecutor's request for authorisation to open investigations proprio motu into the situation in Cote d' Ivoire.⁸¹

⁸¹Knottmends.A, "The Security Council and the ICC:The Unsolved Puzzle", *Netherlands International Law Review*,Journal,Vol61,issue 2,(August 2014)p195

In all these cases what they have in common is that the suspects have been charged with international crimes, but they all have their relevance and have different issues. In the case of Libya and Kenya it has sparked debate on the issue of deferral of cases for heads of states, immunity of heads of states and the political will by states to prosecute perpetrators of these heinous crimes. From these cases it will be illustrated and it will be clear that political will is in short supply.

In the case of the Democratic Republic of Congo the issues that arise are, has the International Criminal Court been able to bring impunity to an end because despite the referrals by the state the conflict continues to date and does the International Court settle or resolve conflicts. In addition who ensures that an accused turns up for trial once they have been released on bail as these were the first cases where accused persons sought to be granted bail. For Sudan, Libya, Cote d'Ivoire, Mali, Uganda, Kenya and Central African Republic the unwillingness and inability of states to try perpetrators of the heinous crimes, due to lack of political will like Kenya and Sudan, other states do not have capacity as they are not able to protect their witnesses, they are therefore forced to refer their cases to the International Criminal Court, some states have institutions that are weak and not accountable like in Kenya where it was felt that there was no tribunal that could be impartial enough to try suspects of the post election violence and Sudan .

In the case of Libya is relevant as it shows that where matters have been taken before the International Criminal Court and it is established that national prosecutions can be done in that country, they are referred back to the national jurisdiction. In all the cases before the ICC the issue of cooperation arises as the International Criminal Court does not have enforcement mechanisms, it relies on state cooperation. All the suspects that are before the International Criminal Court are as a result, of cooperation of the states with the International Criminal Court. The case of Sudan and Uganda has always brought up the issue of whether justice should be pursued at the expense of peace, as when an arrest warrant against President Al-Bashir was issued it led to more human rights atrocities being committed and even expulsion of organisations that were giving humanitarian aid.

The Ugandan case Joseph Kony who is still at large has often said that he will not sign any peace agreements, unless the arrest warrants against him are withdrawn by the International Criminal Court. When the arrest warrants were issued against President Albashir the allegation that ICC was targeting Africa was levelled against it, therefore the issue here is the allegation levelled against ICC true. The Kenyan case has further sparked the debate on whether the rules of procedure and evidence should be amended, to benefit the suspects at the International Criminal Court, at the expense of the victims of the crimes.

In states where there have been referrals from the Security Council such as Libya, Sudan and where the prosecutor has sought leave of court to investigate situations such as the cases of Cote d' Ivoire, and Kenya, the issue on the responsibility to protect has arisen as states have a responsibility to protect people under their jurisdiction from genocide, war crimes and crimes against humanity and if a states proves unwilling or unable to discharge that duty responsibility shifts to the international community. In these cases the matters were referred by the Security Council and the prosecutor allowed to conduct investigations in Kenya and Cote d' Ivoire because these states were not willing to prosecute the perpetrators and gross human rights violations were taking place in their territories necessitating the intervention of the international community. In cases where both the government side and the rebel side are said to be violating human rights like in Mali, Democratic Republic of Congo and Uganda. The issues that have arisen are, if both parties are not charged it is seen as if it is a ploy to eliminate one side, so that they do not get opposition from the other. The issue of whether taking matters before the International Criminal Court resolves or settles a conflict arises in all the cases before the ICC because the causes of conflict are very different and can hardly be resolved by the courts.

3.1 The Case of the Democratic Republic of Congo at the International Criminal Court

Five cases in the DRC have been brought before the relevant trial chambers. The prosecutor vs. Thomas Lubanga, The Prosecutor vs. Bosco Ntaganda, The Prosecutor vs Germain Katanga, The Prosecutor vs Mathieu Ngudjolo Chui, The Prosecutor vs. Callixte Mbarushimana and The Prosecutor vs. Syvestre Mudacumura.⁸²The case against Thomas Lubanga arose from investigations conducted by the office of the prosecutor in the Democratic Republic of Congo, after the matter was referred to the court by the DRC government in March 2004, after investigations were complete, the ICC issued a warrant of arrest against him in February 2006, he was alleged to be one of the founding members and leader of the “*union of Congolese Patriots*” (UPC) in Ituri and its military wing which took power in Ituri in September 2002, after being created on the 15th September 2000. The Union of Congolese Patriots’ was an organised armed group which was involved in an internal armed conflict against “*Armee Populaire Congolaise*”(APC) and other Lendu militia including the “*Force de Resistance Patriotique en Ituri*” (FRPI), between September 2002 and 13th August 2003 and within this period the armed wing of UPC/FPLC was responsible for the widespread recruitment of young people, including children under 15 years both forcibly and voluntarily and they were sent to the headquarters of UPC/FPLC in Bunia which were its military training camps and other camps in Tchomia, Kasenyi and Bogoro where they took part in fighting. At the time the arrest warrant was issued by the ICC, he was in custody of the Congolese as he had been charged in their courts. Soon after the arrest warrant was issued by the ICC in February 2006 he was transferred to the ICC and his trial commenced on 26th January 2009 which was a historic moment as it was the ICC’s first trial and the first time victims could actively participate in international criminal proceedings.⁸³ He was charged as a co-perpetrator under articles 8(2)(e)(vii) and 8(2)(b)(xxvi) of the Rome Statute with the war crimes of enlisting and

⁸² [http://www.icc-cpi.int/en_menus/icc/situations and cases/pages/situation](http://www.icc-cpi.int/en_menus/icc/situations_and_cases/pages/situation)

⁸³ An article by the International Bar Association on the first challenges: An Examination of Recent Landmark Developments at the International Criminal Court, June (2009)p20

conscripting children under the age of 15 years into the *Forces Patriotique du Congo(FPLC)*,the military arm of the political party *Union des Patriotiques Congolais* and using them to participate actively in hostilities during the Ituri conflict.⁸⁴ The trial was delayed for three years due to administrative issues related to the allocation of resources under the courts legal aid scheme ,disclosure related challenges ,withdrawal of the lead counsel Mr. Jean Flamme for health reasons and when another counsel came on record she required time to familiarise herself with the case and compose a team. When the trial commenced the issues of how witnesses should prepare for trial was settled as the practise before was that a witness was prepared by the party calling him or her, this was forbidden and in its place the judges in this case implemented a system of witness familiarisation which is to be carried out by a neutral entity which is the victims and witnesses unit. The process was designed to create an atmosphere where witnesses are willing to testify without fear ,discomfort or insecurity as such a process includes an opportunity for the witness to read through their statement prior to testimony, a contact meeting with the party calling the witness and other parties/participants a psychosocial assessment and familiarisation with the court room layout. In this trial there was also a number of protective measures that were used such as withholding information about witnesses, expunging the name, and other identifying details from the public record, use of pseudonyms and conducting parts of the proceedings on camera.

This case was important because it set important precedents for the conduct of similar cases before the ICC.Thomas Lubanga was convicted on 14th March 2012 on the basis that he was the president of UPC/FPLC and the evidence demonstrated that he was the Commander in Chief of the army and its political leader. He exercised overall coordinating role as regards the activities of UPC/FPLC and was involved during their operations and played a critical role in planning ,providing logistic support, including weapons,ammunition,food uniforms, military rations and other supplies. Inaddition he was involved in making decisions for recruitment and actively supported recruitment

⁸⁴ ICC,The Prosecutor vs. Thomas Lubanga Dyilo,Document containing the Charges, August 28,2006

initiatives by giving speeches to the local population and recruits and he encouraged those who were under 15 years to join the army and provide security for the populace once deployed in the field after their military training. On 10th July 2012 he was sentenced to a total period of 14 years imprisonment.

The cases against Germain Katanga and Mathieu Ngudjolo Chui were also referred to the ICC by the Government of DRC. The ICC issued arrest warrants for Katanga and Ngudjolo in July 2007 and they were transferred by the Congolese authorities to ICC custody in October 2007 and February 2008, respectively. Germain Katanga was alleged to be the commander of the *force de resistance patriotique en Ituri (FRPI)* and Mathieu Ngudjolo Chui was alleged to be the highest ranking commander of the Front des Nationalistes et Integrationnistes. They were both charged as co-perpetrators and were charged jointly with four counts of crimes against humanity and nine counts of war crimes related to murder, sexual crimes, the use of child soldiers and rape.⁸⁵ The case was centred on their indirect co-perpetration in orchestrating an attack on the village of Bogoro in the region of Ituri on 24th February 2003, as commanders of the Ngiti combatants from Walendu-Bindi and the Lendu combatants from Bedu Ezekere respectively. After the trial Mathieu Ngudjolo Chui was acquitted in December 2012 and Germain Katanga was found guilty one count of crime against humanity (murder) and four counts of war crimes (murder, attacking a civilian population, destruction of property and pillaging committed on 24th February 2003 during the attack on the village of Bogoro, in the Ituri district of the DRC. He was sentenced to 12 years imprisonment.⁸⁶

Callixte Mbarushimana was a Rwandan National and an alleged political leader in exile in the Democratic Forces for the liberation of Rwanda (FDLR) militia. The matter was referred to the ICC by the government of DRC. The ICC judges on 28th September 2010, issued a warrant of arrest against him and he was arrested in France where he was living as a political refugee. The

⁸⁵ ICC, Combined Fact sheet: Situation in the Democratic Republic of the Congo, Germaine Katanga and Mathieu Ngudjolo Chui, June 27, 2008 p6

⁸⁶ *ibid*

prosecutor's case was that Callixte commanded FDLR attacks against civilians in the Kivu, including murder, torture, rape and the destruction of property. The confirmation of the charges took place from 16th -21st September 2011. On the 16th December 2011 the pre-trial chamber decided to decline to confirm the charges against him and he was released on the 23rd December 2011.⁸⁷

The ICC issued a warrant of arrest against Bosco Ntaganda in April 2008 but he remained at large till 22nd March 2013 when he surrendered himself in the ICC'S custody. It is alleged that he was the deputy military commander in Lubanga's (*FPLC*) militia in August 2006 and later on he became a commander of a different rebel group the National Congress for the People's defence (*CNPD*) in North Kivu. Ntaganda agreed later to be integrated into the Congolese armed forces as part of a January 2009 peace deal and he was promoted to the rank of a military General. The Congolese government refused to pursue him on behalf of the ICC arguing that doing so would jeopardize peace efforts in the Kivu region.⁸⁸ At first he was accused of three counts of war crimes related to the recruitment and use of child soldiers in 2002 and 2003 when he surrendered himself the pre-trial chamber unanimously confirmed charges consisting of 13 counts of war crimes of murder and attempted murder, attacking civilians, attacking protected objects, destroying the enemies property, rape, sexual slavery, enlistment, conscription of child soldiers under the age of fifteen years and using them to participate actively in hostilities and five crimes against humanity as he continued to orchestrate extra-judicial killings and disappearances of perceived opponents even after the warrant of arrest was issued.⁸⁹ His matter is still before the court.

The issues arising in these cases from the Democratic Republic of Congo are, has the international criminal court been able to deter the perpetrators of these heinous crimes and has it brought an end to

⁸⁷ ICC, Warrant of Arrest for Callixte Mbarushimana, September 28, 2010

⁸⁸ AFP, "Peace Before Justice, Congo Ministers Tells ICC," February 12, 2009

⁸⁹ Xinhua.H., "UN Mission in DR Congo Denies Ntaganda's Role in Military Operations," Cambridge Journal, Vol 33, September (2010) p15

impunity the answer to this is no, reasons being that courts cannot end conflicts as most of these conflicts are as a result of needs that have not been met and violence is driven by issues not just perpetrators.⁹⁰ Since the Democratic Republic of Congo referred their situations to the International Criminal Court, the conflict still continues and the referrals do not seem to have any deterrent effects this only show that there are unresolved issues. It is argued instead of pursuing criminal trials which define to some extent fix identities of victims and perpetrators. A political process where all citizens yesterdays victims, perpetrators and bystanders may face one another as today's survivors.⁹¹ In as much as judicial settlement of disputes is one of the methods for peaceful settlement of disputes. It has been observed that the challenge of conflict management is not how to do away with conflicts but how to deal with them so that harmful effects do not affect our societies and ruin our relationships. Judicial settlement means that one party takes the matter to court and when this happens the other has no option but must attend court. The court hears the case and eventually gives a judgement which is binding on all parties meaning parties must do what the court orders. The problem with this method is that it is a zero sum methodology and gives a zero sum outcome as the gains of one party, translates into the lose for the other party. It leaves one party happy and the other dissatisfied. Courts in this regard only settle a conflict but do not resolve them.⁹²

Since the conflict in Democratic Republic of Congo has always been about sharing the resources in that region the conflict will never end, until all parties to the conflict agree and if not agree strike a balance on how those resources will be shared. The best method of resolving this conflict is finding a method that will be a win-win situation for all parties such as mediation for it is not forced. There will never be peace even if the state refers other matters to the International Criminal Court as the

⁹⁰ President Thambo Mbeki in the Newyork times February 6,2014 p20

⁹¹ Mamdani.M,*Analysis of the Cases at the International Criminal Court*,(Capetown:HSRC Press,2009)p20

⁹² Zartman.I.W and Saadia .T. "International Mediation," in C.Crocker,F.Hampton,and P.Aall(eds)*Leashing the Dogs of War: Conflict Management in a Divided World*,(Washington DC:USIP)pp437-454

conviction of Thomas Lubanga and Germaine Katanga has not deterred people in that region from continuing with the conflict..

The other issue is the importance of state cooperation with the International Criminal court, as the ICC relies heavily on state cooperation. The prosecution of a matter before the ICC will normally require very considerable investigations, information gathering and inter agency cooperation, often with high levels of confidentiality and information or witness protection required. As the ICC lacks institutional features necessary for a comprehensive handling of criminal matters, for ordinary policing and other functions it relies heavily on the assistance and cooperation of states.⁹³ Most suspects of international crimes will hardly ever surrender themselves to the court and will always be on the run, if no state is willing to arrest them and take them to the ICC then they will always be at large. A good example is the case of Joseph Kony and Albashir who states have refused to arrest. In addition for the suspects their interim release such as when they make applications for bail is pegged on whether a state will cooperate with the ICC, by agreeing to host them during their interim release. As in the cases of Thomas Lubanga and Callixte Mbarushimana the court stated that before a chamber can finally determine the issue of interim release of a suspect. A state able and willing to host the defendant in the event of such release must first be identified.

In the case of Callixte Mbarushimana prior to making the application for his interim release the defence counsel sent a request for cooperation to the French authorities, to ascertain whether they would agree to receive Mr.Mbarushimana into the French territory in the event he was granted interim release. The request was not responded to and the court found that it was inappropriate for counsel to request an order from the chamber to ask France to cooperate, prior to making the actual application for release. In other words the court cannot force a state to host a suspect, when released on bail as states, are only obligated to facilitating the transfer of persons to face trial at the ICC.⁹⁴As

⁹³ Romano.C. and Klefner.J,(eds)*Internationalised Criminal Courts*,(Oxford: Oxford University Press,2004)p40

⁹⁴ Ibid p41

they would need to use resources to ensure that a suspect turns up for trial as he or she must be surveilled through out and in Africa states do not have such kind of resources. The President of ICC Judge Sang-Hyun Song he has emphasised that, for the ICC to effectively deal with situations referred by the council under chapter VII, it needs to be able to count on the full and continuing cooperation of all UN members, whether they are parties to the Rome Statute or not. This includes not only cooperation in investigations and the gathering of evidence, but also in areas such as the execution of arrest warrants and tracing assets of suspects. In making any future referrals, it would be very helpful if the Security Council could underline this obligation of full cooperation, without which it is very difficult for the ICC to discharge the mandate the council has given it.

The issue of state referrals clearly shows that states are unwilling to prosecute matters in their jurisdiction because they do not have structures that can be trusted or are accountable and if the perpetrators of these heinous crimes are tried by their national court the victims will never get justice. That the referrals signify that they have faith in the ICC. One of the key features of the ICC regime is the principle of complementarity. Where it is expected that international crimes are prosecuted in national courts but so far, in the cases that are before the ICC it is only Libya that has been able to demonstrate its ability to carry out national prosecutions.

3.2 The Case of Central African Republic in the International Criminal Court

This situation was referred by the government of Central African Republic to the ICC in 2004. This was after the CAR had initiated proceedings in their national courts and were unable to carry out the necessary criminal proceedings because they were unable to collect evidence and secure the attendance of the suspects before the court and after a careful consideration of all the relevant facts the Office of the Prosecutor concluded that the cases would be admissible before the ICC.⁹⁵ The ICC issued an arrest warrant against him and it was alleged that he was a former DRC rebel leader

⁹⁵ Schabas, W., *An introduction to the International Criminal Court* (Cambridge: Cambridge University Press) pp16-17

turned politician and a successful businessman, Bemba had been the leading challenger to incumbent President Joseph Kabila in DRC's 2006 presidential elections and was elected to the Congolese legislature in January 2007. He subsequently went into exile in Europe following armed clashes with the security forces loyal to Kabila. The warrant alleged that as the commander of the movement for the liberation of Congo, one of the two main DRC rebel groups during the country's civil war (1998-2003) Bemba had overseen systematic attacks on civilians in CAR territory between October 2002 and March 2003. Bemba's MLC, based in the DRC north allegedly committed these abuses after it was invited into CAR by the then president Ange-Felix Patasse to help quell a rebellion.⁹⁶

Bemba was arrested in Belgium in May 2008 and turned over to the ICC in July 2008. In June 2009 the judges at the ICC confirmed three charges of war crimes and two charges of crimes against humanity for alleged rape, murder and pillaging. The charges hinged on the question of command responsibility as the prosecutor contended that Bemba personally managed the MLC, stayed in constant contact with the combatants and was well informed about the group's activities in CAR. His trial started on 22 November 2010 and the submission of evidence has now closed the matter pending judgement. Later on November 2013 warrants of arrest were issued for Bemba's co-perpetrators Aime Kilolo Musamba, Jean Jacques Mangenda Kabongo, Fidele Babala Wandu and Narcisse Arido. They have all appeared before the court and awaiting the decision on the confirmation of the charges.⁹⁷

In this case the issue of what hinders state prosecutions is clearly brought out, is it the unwillingness of states? or is it lack of capacity to prosecute due to institutions that are not accountable or inexistent. The first hindrance to national prosecutions in most African countries is that they are dualist states. Most countries have ratified the Rome Statute but have not domesticated

⁹⁶ ICC Pre-trial Chamber 11, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute Charges of the Prosecutor Against Jean Pierre Bemba Gombo, June 15, 2009

⁹⁷ Witte, E., "Command Responsibility and the Trial of Jean Pierre Bemba," *American Law Journal*, Vol 49 2010 p18

the Rome Statute that is they do not have domestic legislation relating to international crimes of genocide, warcrimes and crimes against humanity. Therefore if these crimes are committed it is difficult to try the suspects for international crimes and they are forced to try suspects under the existing legislation like Kenya did in the Post election violence, as the International Crimes Act of 2008 came into force on 1st January 2009 and the effect of this is that the sentences may not be as severe, as in the legislations that have domesticated the Rome Statute as they are exactly the same save for the commencement dates.⁹⁸

In as much as it is expected that when international crimes are committed that the perpetrators are prosecuted by their national courts, as the Rome Statute envisions that the International Criminal Court only prosecutes those with the highest responsibility.⁹⁹ The inability of states in conducting these trials has been brought about, by having institutions that can no longer be trusted, they could have collapsed and others are not accountable. If the institutions are viewed by the people as institutions that cannot be trusted even though the prosecutions are conducted, at the back of the victims minds, they know that there will be no justice and that is why in Africa when it comes to international crimes most people prefer that the matters go to the International Criminal Court. Sometimes it is impossible to try the perpetrators of these crimes as they are the one who are in power and even though they are not they know who is in the system as sustaining a conflict requires people with financial muscles.

Protection of witnesses which is crucial is a major challenge, in International Crimes most countries do not have resources to put up or setup a witness protection unit. As it is an expensive affair as it entails being able to meet the witnesses expenses plus his or her family. In addition if the state is not able to protect their witness in such crimes chances are that, more often than not they will be intimidated and if the trial is being conducted in the national jurisdiction most likely the witness

⁹⁸ Mwagiru.M., "From Dualism to Monist: The Structure of Revolution in Kenya's Constitutional Treaty Practice," *Journal of Language, Technology and Entrepreneurship in Africa*, Vol.3No.1 2011,p154

⁹⁹ Statute of the Rome Preamble

will refuse to testify. So the best option is for the matter to proceed before the International Criminal Court, where they have the resources to prosecute, protect witnesses and the judges are perceived to be impartial, as opposed to national courts. As some of those judges have been appointed by the perpetrators or the judicial system can easily be interfered with as the judges do not have security of tenure. Other institutions such as the police may be so corrupt that they can be easily influenced, they can tamper with the evidence and if evidence is not collected and presented to court there is no way one can be charged.

3.3 The Darfur, Sudan Case in the International Criminal Court

There are five case in the situation in Darfur, Sudan: The Prosecutor vs. Ahmad Harun and Ali Muhammad, The Prosecutor vs. Omar Hassan Ahmad Al Bashir, The Prosecutor vs. Bahar Idriss Abu Garda, The Prosecutor vs. Abdalla Banda Nourain and The Prosecutor vs. Abdel Raheem. The ICC jurisdiction in Sudan was conferred by the UNSC as Sudan is not a party to the Rome Statute. The UNSC resolution 1593, in 2005, referred the situation in Darfur. The resolution was adopted by a vote of 11 in favour, none against and four abstentions the US, China, Algeria and Brazil.¹⁰⁰ The background of this matter was that the International Commission of Inquiry on Darfur was established by former UN Secretary General Kofi Annan to investigate the situation of Darfur in September 2004. The commission reported to the UN in January 2005 that there was a reason to believe that crimes against humanity and war crimes had been committed in Darfur, Sudan and recommended that the situation be referred to the ICC.¹⁰¹ Where there was a mass slaughter and rape of women, men and children in Western Sudan. The killings began in 2003 and still continue to date, these crimes against humanity and war crimes were carried out by a group of Government armed and funded Arab militias known as Janjaweed. The Janjaweed systematically destroyed

¹⁰⁰ UN Security Council Resolution 1593(2005), March 31, 2005

¹⁰¹ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General, S/2005/60, January 25, 2006

Darfurians by burning villages, looting economic resources, polluting water source, murdering, torturing civilians and raping when this was brought to the attention of the UNSC.

On 31st March 2005 pursuant to resolution 1593, the UNSC determined that the situation in Darfur, Sudan continued to constitute a threat to international peace and security and acting under Chapter VII of the UN Charter referred the situation in Darfur since 1st July 2002 to the prosecutor of the ICC. The Prosecutor opened the first investigations in June 2005 and the Sudanese Government created its own special courts for Darfur in an apparent effort to stave off the ICC's jurisdiction however the court efforts were criticized as being insufficient and two arrest warrants were issued for two alleged perpetrators Ahmad Harun, Minister of Humanitarian Affairs and Ali Kushayb alleged leader of the government allied Janjaweed militia. In July 2008 the prosecutor announced his intention to apply for a warrant of arrest against President AlBashir for his role in allegedly using the state apparatus to facilitate the commission of war crimes, crimes against humanity and genocide of the civilian population in Darfur. On 4th March the 2009, the Pre-trial chamber issued a warrant of arrest for the President AlBashir for five counts of crimes against humanity and two counts of war crimes.

The arrest warrant was hailed by Human Rights organisations and considered it an important step against impunity. Many Governments including France, Germany, Canada, United Kingdom, Denmark and the European Union called on Sudan to cooperate but for African governments they criticized the issuing a warrant of arrest against a sitting head of state and that was the genesis of the allegation that ICC was targeting African countries.¹⁰²

President AlBashir made it clear that Sudan does not recognise the ICC and will not cooperate with the court and has rejected ICC jurisdiction over Darfur as a violation of its sovereignty and an instrument of western pressure for the regime change and has accused the court of being part of a

¹⁰² Plessis.M. *African Guide to International Criminal Justice*, (South Africa: ISS, Pretoria, 2009) pp114-115

neo-colonialist plot against a sovereign African and Muslim state.¹⁰³ President Albashir has denied that genocide or ethnic cleansing is taking place in Darfur and has accused the prosecutor of basing his investigation on testimony of rebel leaders and spies posing as humanitarian workers and as a result of this the Government of Sudan responded by expelling over a dozen international aid organisations, that it accused of collaborating with the ICC. In July 2010, when a second warrant of arrest was issued against him the Government of Sudan expelled two senior humanitarian officials from Darfur.¹⁰⁴

The Sudanese government has rallied support from many Arab and African leaders and regional organisations such as the African Union, the Arab League, the Community of Sahel-Saharan states and the Organisation of the Islamic Conference all which have criticized the ICC and called for a deferral of prosecution by the UNSC. That decision to prosecute an African head of state has sparked a backlash among African governments and the AU has resolved not to cooperate with the ICC in carrying out the arrest warrant. In October 2009, an AU panel on Darfur led by the former South African President Thabo Mbeki concluded that a special hybrid court consisting of Sudanese and international judges should try the gravest crimes committed in Darfur but did not take a position on whether such a court would seek to try cases currently at the ICC. President Albashir has travelled to numerous countries in the region since the first ICC warrant was issued in 2009, including Egypt, Ethiopia, Libya, Qatar, Saudi Arabia and Zimbabwe, none of which are parties to the ICC.

In 2010 he travelled to Chad which was his first trip to an ICC state party but was not arrested although Chad had previously publicly supported the ICC prosecution. He also travelled to Kenya where the Kenyan authorities did not arrest him yet Kenya is a party to the Rome Statute.

¹⁰³ Marlise.S. and Neil .M., "Bashir Defies Arrest Order on War Crime Charges," *New York times*, March 6, 2009 p10

¹⁰⁴ Arieff.A., *International Criminal Court Cases in Africa: Status and Policy Issues*, (New York: Columbia University Press, 2011) pp11-14

In 2010 the ICC issued summons against Mr. Abu Garda who appeared voluntarily before the court and the pre-trial chamber did not confirm his charges and was released from the custody of the ICC, Mr. Banda and Mr. Jerbo who appeared voluntarily and their charges were confirmed for trial.¹⁰⁵

This case has caused many scholars to delve into the issue of immunity for heads of state, as the Rome Statute expressly states that immunity is inapplicable to any persons, before the ICC and makes specific reference to heads of states and government. As the traditional doctrine of immunity for heads of states do not apply in the ICC.¹⁰⁶ The irrelevance of official capacity under the Rome statute is part and parcel of the courts mission that, the most serious crimes of concern to the international community do not go unpunished. The alternative risks an impunity gap at the highest levels and creating a perverse incentive for alleged perpetrators to hold onto power indefinitely or to gain power to avoid prosecution. If gross human rights were going on when the commission of Inquiry into the Darfur situation was established, it only means that if President Al Bashir would be granted immunity international crimes would still be committed. The irrelevance of official capacity to bar prosecution would thus represent a major retreat in international criminal law practice.¹⁰⁷

The issue of the International Criminal Court targeting Africa has been a persistent claim triggered by the issuance of arrest warrants against President Al Bashir, which facts of this case before the ICC do not support, as the majority of the situations before the court came about because African governments asked the ICC to become involved or the United Nations Security Council referred a situation to the court. It should be noted that the ICC has had a significant positive impact in Africa as it has brought a measure of justice to victims of crimes, the court is prosecuting. As it allows victims to participate by giving them an opportunity to have their views and concerns represented

¹⁰⁵ Nouwen, S., *The Catalysing Effect of the International Criminal Court in Sudan*, (Cambridge: Cambridge University Press, 2013) p40

¹⁰⁶ Statute of the Rome Article 27

¹⁰⁷ Human Rights Watch Memorandum for the Twelfth Session of the International Criminal Court Assembly of State Parties, November 2013, p15

before the courts. Therefore by the heads of states and the African union refusing to cooperate with the ICC it is a grave injustice to the victims of these heinous crimes.

In the Sudan case the question of whether justice should be pursued at the expense of peace has also arisen as one of the persistent criticisms against ICC, have been that by prosecuting President Albashir, the court risks prolonging violence or endangering the fragile peace processes. By removing the bargaining chip of amnesty from the negotiating table. Critics alleged that the ICC may remove the incentives for peace settlements while encouraging perpetrators to remain in power in order to shield themselves from prosecutions. It has also been observed that 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 as is the case of Uganda. Where a few people who are directly affected by the atrocities committed by Joseph Kony prefer that traditional methods of dispute resolution, than the arrest of the perpetrators by the ICC as it would exacerbate the conflict.¹⁰⁸ In the past, African heads of states could count on a comfortable exile in a friendly county but since the coming into force of the ICC, rulers who have committed international crimes and violated human rights against their own people have found their exile options substantially diminished.¹⁰⁹

When the arrest warrants were issued in complicated the implementation of the 2005 Comprehensive Peace Agreement for Southern Sudan and the peace process in Darfur, by providing an incentive to the ruling parties inner circle to cling to power. When the Government of Sudan expelled the aid agencies, threatened NGO's and Peacekeeping troops, the case of Albashir was criticised. In a report made to the congress by the Director of National Intelligence about the impact of the arrest warrant against on UN Peacekeeping operations in Darfur he said that the indictment of President Albashir, has made him less cooperative than he was and the warrant could

¹⁰⁸ Grono.N. and O'Brien .A.,*Justice in Conflict? The ICC and Peace Processes in Courting Conflict* (Newyork:Columbia University Press,2011)pp11-14

¹⁰⁹ Cheng.C., "Justice and Gaddafi 's fight to the Death, "*The Wall Street Journal* , Vol 33, April 6,2011,p5

make it harder for peace operations in Darfur.¹¹⁰The outgoing commander of African Union and United Nations Peacekeeping Mission in Darfur (UNAMID), General Martin Luther ,stated that the decision to pursue President Ablator had been a big blow to UNAMID. The UN Secretary General Ban Ki Moon, even though he has maintained a neutral position on the ICC action on Sudan but has argued that the international community must seek to balance peace and justice in dealing with the conflict in Darfur,as the expulsion of aid agencies was detrimental to relief and peacekeeping operations.

Those who support this claim state that, the ICCs approach to the Sudan has been flawed because it failed to acknowledge the political implications of the ruling, as the ruling targeted only the ruling elite of the Sudanese government and that is the way it is supposed to be because the ICC only prosecutes those with the highest responsibility, due to budgetary constraints and also so that states can take up prosecutions in their national jurisdictions. The problem with this is that these same elite perceive these indictments not as legal edicts but as tools to coercive diplomacy in the international arena. It is very difficult to enforce the law in an ongoing conflict and trade offs are necessary between short term deterrence and long term prevention strategies and that is where the ICC, should weigh if it needs to pursue justice instead of peace as the Rome Statute allows for deferment of a case if it is a threat to international peace.¹¹¹

Though the warrant of arrest can secure peace in Darfur, as the threat of prosecution may sometimes put pressure on the perpetrators to stop the conflict. Sometimes peace deals that sacrifice justice often fail to produce peace in the long run, as there those who feel that it is better for the perpetrators to be prosecuted as the type of justice they want is retributive and their those who feel

¹¹⁰ Transcript of the Senate Committee on Armed Services Hearing on “Current and Future Worldwide Threats to the National Security of the United States, March 2009,p12

¹¹¹ Bubna.M., “The ICC’s Role in Sudan: Peace Versus Justice, “*Institute for Defence Studies and Analysis Journal* ,Vol 23, April 2009,p9

it is better for peace to be pursued other than justice by seeking traditional ways of settlement of the conflict as opposed to going to court.¹¹²

Since the ICC is focused on the prevention and punishment of the most serious crimes, the ICC cannot involve itself in negotiations of peace, but rather to ensure that justice is done, in the present and in the future. One of the ICC's principle purposes is to serve as a deterrent for those at risk of committing the gravest crimes by bringing an end to impunity. Thus to defer on justice in the service of peace would be to undermine both the court and the deterrent effect it is designed to have. As long as justice is treated as synonymous with prosecutions alone and peace building is reduced to the process of negotiating peace agreements, then peace and justice will remain at logger heads. An alternative approach to transitional justice recognises the potential for a peace and justice continuum, in which diverse accountability mechanisms can contribute to peace building. In the long run peace and justice means different things to different people.¹¹³

Any attempt to defer president Albashir's case is seen as a grave injustice to the victims of the heinous crimes and even as the debate on justice versus peace rages on. There have been calls not to defer the said case as there is no guarantee that it will end the misery of the victims of these crimes. As when African Union argued that failing to defer the said case would prevent peace negotiations regarding the situation in Darfur. Since then Sudan refused to cooperate with the ICC and mass crimes are still being committed in that region and impunity prevails to date.

3.4 The Ugandan Case at the International Criminal Court

The Government of Uganda referred its situation concerning the Lord Resistance Army to the ICC. LRA is a rebel group that has fought for over two decades in Northern Uganda. The ICC in October 2005 issued the first warrants of arrest since its inception for the LRA leader Joseph

¹¹² Hayner .P., "Seeking Justice as War Crimes Rage on," *The Chicago Journal* , Vol 43,july 16,2008,p6

¹¹³ Simpson.G, "One Among Many: The ICC as a tool of justice during transition," in Waddell.N. and Clark .P.(eds),*Courting Conflict?Justice,Peace and the ICC in Africa*,(Newyork:Newyork Printing Press,2008)p75

Kony, Commanders Vincent Otti, Okot Odhiambo, Dominic Ongwen and Raska Lukwiya. The LRA was accused of establishing a pattern of brutalization of civilians including murder, forced abduction, sexual enslavement and mutilation amounting to crimes against humanity and war crimes none of the suspects have been arrested to date. Vincent Otti and Raska Lukwiya have reportedly been killed since the warrants were issued and the search of the others is still ongoing and it is believed that they are in the neighbouring countries.¹¹⁴

Although the LRA atrocities have been widely documented, ICC actions in Uganda have been met with some domestic and international opposition due to debates over what would constitute justice for the war torn communities of Northern Uganda and whether the ICC has helped or hindered the pursuit of peace agreement. It has been observed that the arrest warrants were crucial in bringing the LRA to the negotiation table in 2006 for peace talks brokered by the Government of South. In August 2006, rebel and Government representatives signed a cessation of hostilities agreement, in February 2008, the Government and LRA reached several further agreements, including a permanent cease fire. However, the LRA has demanded that ICC arrest warrants be annulled as a prerequisite of a final agreement and the threats of the ICC prosecution are considered by many to be a stumbling block to achieving an elusive peace deal and that is why it has been said that peace should be pursued rather than justice.¹¹⁵

The Ugandan Government has offered a combination of amnesty and domestic prosecutions for lower and mid-ranking LRA fighters, and is reportedly willing to prosecute LRA leaders in domestic courts if the rebels accept a peace agreement. In March 2010, the Ugandan

Parliament passed legislation known as International Criminal Bill, which creates provisions in domestic laws for the punishment of genocide, crimes against humanity and war crimes. Ugandan attempts to prosecute the LRA leaders domestically could entail challenging the LRA cases

¹¹⁴ Dagne.T., "Uganda, Current Conditions and the Crisis in North Uganda," *Oxford law journal* Vol 23, (2006)p9

¹¹⁵ Tim.A., *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (London: Zed books, 2006)p40

admissibility before the ICC under the principle of complementarity, however only the ICC's pre-trial chamber has the authority to make a decision on admissibility and only the prosecutor can move to drop the case.¹¹⁶

The debate on justice versus peace is often invoked whenever the Ugandan case at the Hague is mentioned. In many conflicts there is tension between establishing justice and creating peace. As neither of these words equates to the other. The leaders of the Lords Resistance Army have often cited the International Criminal Court arrest warrants, as a key obstacle in signing a permanent peace deal. Joseph Kony has stated openly that until the warrants are lifted, he and his men will not leave the bush.¹¹⁷

It has been argued that it is folly to try and attain court justice before ending hostilities but for those against this notion, argue that justice should be pursued because the ICC warrants influenced the LRA's decision to come to the negotiating table and the issuing of the warrants of arrest coincided with one of the longest periods of peace and stability in the Northern Uganda, for over two decades, as the LRA decided negotiation would be preferable to any trial. Questions are also raised about the if the intentions of the rebels in LRA are genuine.

The people in the north would prefer restorative justice. That is rooted in their culture and they would argue that the ICC have no grounding with what is going on in the region, if it thinks the answer is to pull out a whole lot of rebels.¹¹⁸ These sentiments are echoed by some of the victims of international crimes in Uganda. They state that real justice is not punishment. Real justice is not killing someone because someone has killed your child because you now become a killer, just like him or her. It is therefore argued that it is the failure to see this by the ICC that they have become

¹¹⁶ Holmes.J.,*The Principle of Complementarity ,in Lee.R.,The International Criminal Court: The Making of the Rome Statute issues,negotiations,results*(Kluwer law international:Hague1999)p33

¹¹⁷ CAFOD,Christian Aid, Conciliation Resources, Quakers and World Vision, Memorandum Submitted to the UK Parliament's International Development Committee inquiry on the Prospects for Sustainable Peace in Uganda, July 2007,p20

¹¹⁸ Volqvartz.J., "ICC Under Fire Over Uganda Probe, "*Journal of the Global Policy Forum*,Vol 45,23 February 2005,p23

more of a hindrance than of help for the people of Acholi land, who are the victims of the atrocities. It would appear there exists a gulf between the wishes of the LRA's victims on the ground and their international advocates at the ICC.

President Museveni was quoted in March 2008, stating that if the rebels returned to Uganda in the agreements entered, that instead of using the formal western type of justice they would use the traditional type. Under the system someone who has committed a mistake asks for forgiveness and pays some compensation. They would ask the ICC to withdraw the complaint. In addition the Acholi leaders travelled to the Hague to urge the Office of the Prosecutor, to drop the investigation for fear that it would drive Kony deeper into the bush along with their children and doom any peace deal.

The presumption that the Acholi wholeheartedly favour traditional restorative justice rather than retributive is not correct, as victim communities do not articulate homogeneous views and are themselves fractured and fragmented along the societies from which they come as the majority of the people in Northern Uganda do want to see the leaders of LRA punished, as opposed to being granted amnesty in traditional ceremonies.¹¹⁹ Not all Ugandan victims are Acholi and other northern tribes have different traditions some favour prosecutions, over their own tribal practices. Not all Acholi support traditional methods, some victims do not want to reconcile with the offenders and prefer prosecution and incarceration or even summary execution

All in all it is difficult to decide whether to pursue justice or peace at first because different people prefer different things, others prefer retributive justice as opposed to restorative justice. There is no guarantee that once an individual has been indicted and warrants of arrest are lifted so that peace may be pursued that the suspects of the heinous crimes stop committing international crimes. If the court decides that peace should be pursued it should be on a case to case bases and should not be a

¹¹⁹ Allen.T., "Joseph Kony and the Lord's Resistance Army: Peace VS. Justice?," Prosecuting Presidents: The Challenges of International Indictments of African Leaders, Joint RUSI-CFPA Conference 27 March 2009, p125

blanket provision for all situations where they alledge that peace should be pursued instead of justice

3.5 The Case of the Republic of Kenya in the International Criminal Court

The prosecutor's request to open an investigation in Kenya was approved by the ICC judges in March 2010. It was the first instance in which ICC judges authorized an investigation based on the recommendation from the prosecutor as opposed to a state referral or UNSC directive. The investigation was related to post election violence in Kenya in 2007-2008 in which over 1000 individuals were killed, hundreds of thousands displaced and a range of other abuses including sexual violence allegedly committed. The prosecutor contended that high ranking officials planned and instigated large scale abuses a view that was supported by independent investigations into the violence.

On December 15, 2010, the prosecutor presented two cases against a total of six individuals, for crimes against humanity. The prosecutor applied for summons as opposed to arrest warrants stating that summons would be sufficient to ensure the suspects appearance before the court.¹²⁰ Judges issued the summons in March 2011 and in April the six suspects appeared voluntarily before the court where each denied the accusations against them.

The suspects named in the first case were William Ruto at the time member of parliament and Minister of Education, Henry Kosgey the Minister for Industrialization at the time the crimes were committed and Joshua Arap Sang a radio journalist. They were each accused of three counts of crimes against humanity, related to murder, forcible population transfers and persecution. Those named in the second case were Ambassador Francis Muthaura head of the Public Service and secretary to the cabinet and chairman of the National Security Advisory Committee, Uhuru Kenyatta Deputy Prime Minister and Minister of finance and Mohammed Hussein Ali former

¹²⁰ ICC Office of the Prosecutor ,Factsheet: Situation in the Republic of Kenya ,December 15,2010 p4

commissioner of police of the Kenyan police. They were each accused of five counts of crimes against humanity related to murder, forcible population transfers, rape, persecution and other inhumane acts.¹²¹

The suspects in the first case were associated with the leader of opposition at the time that is Raila Odinga, while those in the second case are associated with the former president of Kenya Mwai Kibaki. This cases sparked a backlash within the Kenya's political class despite earlier support for the ICC involvement and in December 2010, parliamentarians passed legislation urging Kenya to withdraw from the court, being ignorant of the fact that a withdrawal would not preclude ICC over crimes committed during the period when Kenya was a state party or any crimes under the Rome Statute that would be committed in the future as a matter can be referred to the ICC by the UNSC if a state is not a party to the statute.¹²²

Confirmation of charges against William Ruto, Joshua Arap Sang, Uhuru Muigai Kenyatta, Francis Muthaura, Mohammed Ali and Henry Kosgey took place between 21st September 2011 to 5th October 2011 and the pre-trial chamber declined to confirm charges against Mohammed Ali and Henry Kosgey. The pre-trial chamber confirmed charges against William Ruto, Joshua Arap Sang, Uhuru Muigai Kenyatta and Francis Muthaura. On 18th March 2013 the charges against ambassador Francis Muthaura were withdrawn. The trial of William Ruto is ongoing but the trial of Uhuru Muigai Kenyatta the incumbent president of Kenya has never taken off, as the prosecutor informed the court that she does not have sufficient evidence to prosecute him since two key witnesses withdrew from testifying.¹²³

The Kenyan case further sparked the debate of deferral of cases of heads of states and immunity for heads of states. The call for none cooperation by the African Union and the amendment of rules of

¹²¹ ICC ,”Situation in the Republic of Kenya ,”accessed on July 20,2011p3

¹²² The Statute of the Rome Article

¹²³ Fatou Bensouda during the trial of President Uhuru Kenyatta August 2014

procedure. The call by the African Union not to cooperate with the ICC is seen as a call to protect heads of states from prosecutions and heads of states thinking about themselves other than the victims of the heinous crimes. International law must be seen not only as a tool for prosecuting authors of heinous crimes, but also as a crucial mechanism that can provide victims of such crimes with an option and a possibility of enforcing their rights to truth justice and reparations. It is through this approach that one can truly speak of international criminal law as being victim centred.

Kenya wants article 27(1) amended which states expressly that “*the official capacity as a head of state or government, member of government or parliament, elected representative or a government official shall in no case exempt a person from criminal responsibility.*” Article 27(2) “*immunities or special procedure rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the court from exercising jurisdiction over such a person.*”¹²⁴ Kenya proposes that the articles be amended by including article 27(3) which reads “*notwithstanding paragraph 1 and 2 above, serving heads of states, their deputies and anybody acting or is entitled to act as such may be exempted from prosecution during the current term of office. Such an exemption may be renewed by the court under the same conditions.*” The Attorney General of the Republic of Kenya has argued that, article 27(1) (2) as it is goes against basic tenets of international law pertaining to privileges and immunities of government officials

Any attempts to defer the Kenyan cases and grant immunity to President Uhuru Kenyatta have been objected to, as the Rome Statute states that the Security Council can request the court to stop the investigations or prosecutions for 12 months if there is a threat to peace and security. In the Kenyan case there is no such threat. In addition that the victims of these cases have a right to justice as they have found none in Kenya. Victims of these international crimes should not be denied justice just because their tormentors hold high political positions. Immunity for government leaders before the ICC is contrary to the basic principle that no one should be above the law. Human rights abuses by

¹²⁴ Statute of the Rome 2002

governments and armed groups remain one of the biggest challenges confronting people in Africa and allowing the amendments will take us many steps backward. As heads of states and government can violate human rights. In could cause them to cling onto power, till they die to avoid prosecution.

It has also been proposed that Article 63 which states that “*the accused shall be present during trial except in exceptional circumstances*” and they want it amended to read that an accused person may be excused from continuous presence in court, after the chamber satisfies itself that exceptional circumstances exist. The proposal to have the rules of evidence amended so that the accused persons can participate in court proceedings via video link and be absent during proceedings are issues that need wide consultations of which the views of the victims should be taken into account considering the pain that these crimes cause the victims. These amendments should not be rushed to solve a certain political issue. As absence of accused persons during the trial sends the message that they are not remorseful or will not have a deterrent effect and could further spark conflict as the victims may feel that their grievances have not been addressed. Although these amendments are designed to address the Kenyan case, they will have a long term effect on the court and other cases. Therefore any discussions on amendments to the ICC legal framework should respect the integrity and the object and purpose of the Rome Statute. A tailored response to address the concerns of the ICC should not be adopted without proper consultations from all stakeholders.¹²⁵

3.6 The Case of the Cote D’Ivoire in the International Criminal Court

Cote d’Ivoire, was not a party to the Rome statute at the time it accepted the jurisdiction of the ICC on 18th April 2003. On 15th February 2013 , Cote d’Ivoire ratified the Rome statute and on 3rd October the pre trial chamber granted the prosecutor’s request for authorisation to open investigations proprio motu into the situation of Cote d’ Ivoire with respect to alledged crimes

¹²⁵ FIDH Position Paper Recommendations to the 12th Assembly of the States Parties to the Statute of the International Criminal Court. The Hague, 20-28 November 2013, p7

within jurisdiction of the court, committed since 28th November 2010, as well as with crimes that may be committed in the future in the context of this situation and on 22nd February 2012, the pre-trial chamber decided to expand its authorisation for the investigation in Cote d'Ivoire to include crimes within the jurisdiction of the court allegedly committed between 19th September 2002 and 28th November 2010.

After the investigations by the prosecutor were complete the allegations against Laurent Gbagbo were that since November 2010, at least 3000 people were killed and over 100 raped and it was believed that the crimes were committed by forces from both sides of the conflict those loyal to President Laurent Gbagbo as well as his rival President Alassane Ouattara, the pre-trial chamber issued a warrant of arrest against Laurent Gbagbo for four counts of crimes against humanity, murder, rape and other inhumane acts and in the alternative attempted murder and persecution. The charges against him were confirmed on 12th June 2014 and he was committed for trial before the trial chamber.¹²⁶

The issue that has been brought out in this case is that, even though a state has not ratified the Rome Statute, it can submit itself under the jurisdiction of the International Criminal Court. As the ICC does not only get its jurisdiction from a state ratifying the Rome Statute, when the Prosecutor is granted leave to initiate an investigation by the Security Council or when a matter is referred to the court by the UNSC. Therefore if international crimes are being committed in a state and it is not a party to the Rome Statute they can refer the matter to the ICC, not being a party to the Rome Statute does not mean that a state cannot refer a matter to the court, as we are live to the fact that most institutions in Africa are not credible and African countries do not have the capacity to conduct international crimes. States should not wait for the prosecutor to initiate investigations as when the prosecutor does it means a state is unwilling to prosecute or be referred by the

¹²⁶ Decision Assigning the Situation in the Republic of Cote d'Ivoire to pre-trial chamber 11, 22 May 2011 p5

Security Council as it will work against them when making applications in the court like the Kenyan case.

All perpetrators of international crimes the government, rebel or opposition should all be brought to book. Prosecutions should not only focus on one side, if the crimes were committed by both sides as when this is done it looks like politics is in play and allegations start being levelled against the ICC.

3.7 The Libyan Case at the International Criminal Court

On 26th February 2011, the United Nations Security Council, decided unanimously to refer the situation in Libya since 15th February 2011 to the ICC prosecutor. On 3rd March 2011, the ICC prosecutor announced his decision to open an investigation in the situation in Libya. On June 27th 2011, the ICC judges issued warrants of arrest for the Libyan leader Muammar al Qadhafi, his son Sayfal Islam Qadhafi and intelligence chief Abdullah al Senussi having found reasonable grounds to believe that they are responsible for crimes against humanity, including murder and persecution allegedly committed across Libya from 15 to 28th February 2011, through the state apparatus and security forces. The prosecutor alleged that Gadhafi conceived and implemented through persons of his inner circle such as Sayfal Islam Gadhafi and Abdullah al Senussi a plan to suppress any challenge to his absolute authority, through killings and other acts of persecution executed by Libyan security forces. They implemented a state policy of widespread and systematic attacks against a civilian population in particular demonstrators and alledged dissents.¹²⁷

In the international circles it was alleged that the warrants that were issued against Gaddafi would make it less likely for Gaddafi to relinquish power, while others argued that they would deter

¹²⁷ ICC,Pre-Trial Chamber 1,Office of the Prosecutor ,Situation in the Libyan Arab Jamahiriya :Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi,Saif Al –Islam Gaddafi and Abdullah al Senussi,May 16,2011p1-5

further abuses.¹²⁸ On 22 November 2011 the pre trial chamber formally terminated the case against Muammar Gaddafi due to his death. On 31st May 2013 the court rejected Libya's challenge to the admissibility of the case against Sayfal Islam Qadhafi and later on the pre-trial chamber declared that the case against him was admissible and the one against Abdullah al Senussi was inadmissible before the ICC, on the basis that it was currently subject to domestic proceedings conducted by the Libyan competent authorities and that Libya is willing and genuinely able to carry out such investigations.¹²⁹

The issues brought out by this case are the willingness of the court to have international crimes prosecuted in national courts of any state that is before the International Criminal Court as long as it has been established that there are credible institutions to conduct trials. As initially Libya had challenged the admissibility of the case of Gaddafi, as it was said that investigations were going on since the day he was captured. It was contended that the investigations ,covered the same incidents and conduct as those contained in the ICC warrant of arrest and was infact broader in terms of time and subject matter and it was indicated that even though Libya's legislation does not provide for international crimes, some of the crimes he had been charged with provided for a death penalty.

This application was rejected on the basis that in considering admissibility of cases before the International Criminal Court, the court takes two factors into consideration firstly, whether at the time of the proceedings in respect to admissibility, there is an ongoing investigation. Secondly, if there is prosecution of the case at the national level and whether the state is unwilling or unable to genuinely carry out such an investigation or prosecution. The only way that a state can prove that there is an investigation or prosecution is by submission of concrete tangible evidence such as forensic analysis collected, documentary evidence and interviews from witnesses and Libya had not

¹²⁸ Blanchard., "Libya: Unrest and US Policy", *Cambridge law Journal* Vol.43 P82011

¹²⁹ Cryer.R.,*International Criminal Law and Procedure*, (Cambridge: Cambridge University Press 2012)p16

done so. It was noted that even though there is no law criminalising international crimes, at the domestic level, that does not per se render the case admissible before the ICC.¹³⁰

In essence even though a matter is before the International Criminal Court and it is proved by way of tangible and concrete evidence, that there are ongoing investigations or prosecution of the same offences at the national level, it can be ordered that the case is inadmissible before the ICC and the matter be prosecuted at the national level. If a state proves that it is genuinely willing to prosecute the case, the matter can also go back to the national jurisdiction as prove that there are investigations only is not sufficient, as there may not be the willingness to prosecute. A state does not have to have legislation at the domestic level criminalising international law but can have other legislation whose sentence is punitive.

Even though the application challenging the case of Gaddafi was rejected because he had not proved the above. The case of Abdullah al Senussi was found to be inadmissible before the ICC as it was being prosecuted by the competent authorities of the Libyan government and for ICC to make these findings they established that Libya has credible institutions. Therefore for the debate that ICC is targeting Africa to cease African States must demonstrate that they are willing to prosecute international crimes, in their counties by ensuring when international crimes are committed, investigations are carried out and on completion there is the willingness to prosecute these matters and the institutions they have can be trusted as opposed to the current culture, where no investigations are carried out and if they are carried out they are half hearted investigations and there is no will to prosecute.

3.8 The Case Mali in the International Criminal Court

On the 18th July 2012, Fatou Bensouda released a press statement confirming receipt of a referral of the situation of Mali by the Government's Interior Minister of Justice. In terms of the 13th July 2012

¹³⁰ The Decision of the Pre Trial Chamber on the Admissibility of the Case against Mr.Gaddafi,pp2-7

referral letter, the Government of Mali alleges that gross human rights violations and war crimes have been committed in the country, especially in the Northern region. The alleged crimes include summary executions of soldiers, rape of women and young girls, killing of civilians, the recruitment of child soldiers, torture pillaging, enforced disappearances and the destruction of property. This was after, several insurgent groups began fighting the Malian Government for independence or greater autonomy for North Mali an area known as Azawad. The *National Movement for the Liberation of Azawad (MNLA)*, an organisation fighting to make Azawad an independent homeland for the Tuareg people had taken control of the region by April 2012. The prosecutor indicated that she would conduct preliminary investigations into the alleged crimes in accordance with the Rome Statute of the ICC. Mali was the fifth country to request the ICC to investigate crimes in its territory, which came at a time when the ICC was under fire for not opening investigations in other parts of the world.¹³¹ After conducting preliminary examination of the situation, including the assessment of admissibility of potential cases the Office of the Prosecutor determined that there was a reasonable basis to proceed with an investigation.

The referral by Mali came at a time when ICC was under fire for not opening investigations in other parts of the world. For ICC to ensure that it rebuilds its legitimacy in Africa it must open investigations into situations outside the continent. Though the self referrals signify support for the ICC, they also come with their own challenges, as it is said that self referrals by governments are meant to cripple government adversaries, rather than end impunity for international crimes. The self referral by Mali is seen as an attempt by the interim government which is weak and in search of support and legitimacy both locally and abroad, to put down the rebellion in the north, and eliminate opposition from those who might seek to destabilise a new government and this should not be the case.

¹³¹ Maunganzize.O., *Implications of Another African Case as Mali Self Refers to the ICC* (South Africa: ISS, 2012) P2

Conclusion

Twelve years after the coming into force of the Rome Statute the ICC has made some notable achievements, which is the prosecution of persons with the greatest responsibility in international crimes just as was envisioned. The completion of two cases that is the Thomas Lubanga and Germain Katanga and the warrant of arrest against Albashir has gone a long way in the development of jurisprudence on issues of immunity for heads of states, witness protection, deferral of matter before the court and disclosure of evidence, in addition where the court did not find sufficient evidence to confirm the charges and where it had confirmed the charges and found that there was no sufficient evidence to support a conviction, the court acquitted the accused this goes a long way in ensuring that people have faith in that institution and that the purpose of the ICC is not just to convict perpetrators but give a fair hearing to them.

The self referrals by Democratic Republic of Congo, Mali, Central African Republic and Uganda signal the welcome and continued support for the ICC as it shows that these Governments would like to see an end to the commission of international crimes, within the states that have referred their situations and if states do not want their citizens to be prosecuted in the ICC then they must be willing to prosecute perpetrators of this heinous crimes and ensure that people have faith in their institutions. In whatever decisions that are made at the ICC or the assembly of state parties to the Rome statute, should have the rights of the victims at heart.

CHAPTER FOUR

KENYA AND THE ICC

4.0 Introduction

Since the reintroduction of multi-party politics in 1991, Kenya has experienced violence with ethnic ramifications before, during and after elections. The violence takes different forms such as disruption of campaign rallies, eviction of citizens from their homes, verbal threats, intimidation, destruction of property and it is preceded by ethnic hatespeech. In 2007 Kenya witnessed electoral conflict during the electoral season of the 2007 Civic, Parliamentary and Presidential elections. In 2007 the electoral conflict became violent once the Presidential elections were announced. In earlier seasons such as 1992 and 1997, electoral violence happened before the voting but died off once the election results were announced. Prior to the announcement of the Presidential results the election season was physically violence free, the physical violence only became manifested once the actual voting was over.

The violence was blamed on an electoral structure in which one party could overwhelmingly secure the majority seats in the Civic and Parliamentary elections and yet lose out on the Presidential elections. In addition to media houses that were partisan and announced results that favoured the Presidential candidate of their choice. The conflict in Kenya was not a peculiar conflict but had features that are displayed in all other conflicts in the world. The conflict both in its non-violent and violent stages had features that are readily identifiable in all conflicts, it had parties to it both visible and invisible. It had issues and interests that led to its metamorphosis from a structural to a violent conflict and the issues involved were complex and many.¹³²

This chapter will focus on how the Kenyan cases ended up at the International Criminal Court and a thorough analysis of article 16 for deferral of the Kenyan case.

¹³² Makau.M, *Kenyas Quest for Democracy*, (Colombia: Colombia Publishers, 2008) p331

4.1 Background of the Conflict in Kenya and the ICC Cases

In December 2002 the Kenya African National Union (KANU) that had governed Kenya since its independence in 1963, was defeated at the polls by the National Rainbow Coalition (NARC) which included Mwai Kibaki's National Alliance Party and Raila Odinga's Liberal Democratic Party. The two combined in 2002 to remove Daniel Moi from power. Over 62 percent of the Kenyans who participated in the polls voted for NARC's presidential candidate Mwai Kibaki, giving the party a clear mandate to achieve key pillars of its electoral platform, including the stalled process of the constitutional process reform, ending impunity for grand corruption and past human rights violations.¹³³ A new constitution was promised within 100 days of NARC coming into power. The new president appointed a special advisor on ethics and governance, John Githongo a former Executive Director of the Kenyan Chapter of Transparency International. It did not take long for the optimism to fade.

Apparently a memorandum of understanding was signed by the coalition partners but later ignored once Kibaki became the President. Although the president was not bound to the MOU, the political ramifications of his action were mammoth and between 2003 and 2007 his Government was under fire. The Presidents section of the NARC party walked out of the Bomas process over demands by LDP central to the constitution change process namely reducing Presidential powers, restoring separation of powers, checks balances and devolution. The President's section of the party also broke its memorandum of understanding with its partner LDP through which it had committed to reducing Presidential powers by introducing the position of Prime Minister. The Attorney General Amos Wako oversaw further amendments to the draft constitution produced by the bomas process and the National Alliance Party section of the NARC presented the Wako draft to the country in a referendum in 2005, despite protests of its Liberal Democratic Party Coalition member for having

¹³³ Wanyeki.L, The International Criminal Court's cases in Kenya :Origin and Impact, Institute of Security Studies paper no 237 ,August 2012 p1

failed to honour the National Alliance Party-Liberal Democratic Party Memorandum of Understanding on powersharing. The Wako draft was resoundingly rejected during a subsequent national referendum with 58 % of the Kenya's voting against it. This 2005 referendum polarised the country along ethnic lines a situation that replayed in the 2007 presidential elections.¹³⁴ Thus by the time the 2007 general elections were approaching, the only positive aspect of NARC administration was Kenya's restored economic growth trajectory, which had reached 7% in December 2007.¹³⁵

In 2007 Raila Odinga established the Orange Democratic Party to contest for the Presidency in the general elections. His former partner in NARC also formed Party of National Unity (PNU) and both parties touted themselves as political parties with national following as the campaigns continued. PNU came to be perceived as representing the economic and political interests of one ethnic group that is the Kikuyu and the Orange Democratic Party as representing everybody else. It was clear throughout 2007 that the battle for the presidency would be tightly waged and opinion polls routinely gave Raila Odinga the lead.¹³⁶ The campaigns became increasingly characterised by ethnic prejudice and stereotyping in the radio stations, on bulk short message services and discussion groups.

There was a lot of distrust between the supporters of PNU and ODM and this was further aggravated by the Presidents backtracking on one of the reforms reached through the Inter-Parties Parliamentary Group agreements of 1997, that required all political parties be consulted during the appointment of commissioners to the electoral commission of Kenya and in 2007 when the terms of some commissioners in the electoral commission ended in

¹³⁴ Ibid p2

¹³⁵ Ibid p2

¹³⁶ Opinion polls conducted by synovate and Gallup both local and International opinion polling companies p

2007, the President made appointments without other political parties and the commissioners' that were appointed were perceived to favour PNU and this exabated the political temperature.¹³⁷

No violence preceded the 2007 general elections except in Kuresoi where it was reported that there were crude weapons being shipped into the Rift Valley but when it was investigated it was found to have resulted from local rivalries, rather than as had been the case in 1992 and 1997 of ethnic cleansing of non indigenou communities in the Rift valley by indigenou communities to create ethnically homogenous voting blocks.¹³⁸ It is against this backdrop that Kenyans went to the polls on 27th December 2007, having been urged by all aspirants to vote for three piece suit either ODM or PNU at all the three levels of Government namely Civic,Parliamentary and Presidential.

Initial results came in quickly and seemed to indicate that ODM was in the lead but by the second day of counting and tallying the returns slowed to a trickle and then stopped all together particularly from those constituencies believed to be PNU strongholds. Party representatives in the national tallying centre began to complain about discrepancies between polling station tallies and over all constituencies tallies, noting alterations to the latter that did not correspond to the totals of the former. As ODM advantage began to dwindle tempers among ODM and PNU leadership and supporters frayed further and on the fourth day there was a lot of tension on the commissioners as both parties wanted the results to be announced yet the tallying had not yet been completed. The Kenya Police Forces and the Paramilitary General Service Unit (GSU) moved to the tallying centre. All broadcasters and media except the ostensibly public but still government controlled Kenya Broadcasting Corporation were ordered to leave. The Chair of the Electoral Commission of Kenya then appeared to announce Kibaki as the presidential winner. Less than half an hour later, as night was falling, the Chief Justice presided over a prepared but small swearing in ceremony at State

¹³⁷ Kimani.N.,Ethnic Diversity in Eastern Africa Opportunities and Challenges,(Nairobi :Twaweza Communications LTD 2010)p8

¹³⁸ Report From the Elections Monitoring and Response Centre(EMRC),KHRC,Nairobi,November 2007,p10

House. All public demonstrations were banned and all the broadcasters were ordered to halt live broadcasting by the President, ostensibly to calm the situation with that the country erupted.¹³⁹

The announcement of the Presidential results on 30th December 2007, sparked off violence in Nairobi, Kisumu, Mombasa, Eldoret, Kericho, Taveta, Wundanyi, Kilifi, Narok, Busia, Bungoma, Kakamega, Kuresoi and Molo. Within the first three days 164 people were killed. Within three weeks of the violence conflict five hundred people had died. By the third week, over six hundred people had been killed and 250,000 were internally displaced in the post election violence. By the end of the first month of the conflict over eight hundred people had been killed and another 350,000 internally displaced. ODM rejected the announcement of the Presidential results and refused to go to court to challenge the outcome claiming that the judiciary had already been prepared by the executive branch of the government, to dismiss any electoral petition by ODM. Even before the elections there was lack of trust in the judiciary as the judiciary had over the years not been perceived as a true arbiter in electoral grievances. The party instead called its supported to protest at the Nairobi's Uhuru Park.¹⁴⁰

It should be noted that in Kenya all the conflicts that have been there in Kenya during or before elections are as a result of people dividing themselves along ethnic groups and perceiving that some ethnic communities are more privileged than others. Conflicts that are said to be ethnic find their beginnings with the arousing of racial, national, ethnic and religious hatred since the ideologies propagated or statements made by some individuals who do not necessarily have to be politicians stir up ethnic hatred.

¹³⁹Report by Otieno.J., "Countdown to Deception:30hours that Destroyed Kenya" Poll Groups lift the Lid on Tallying mess, Saturday Nation, 19th January, 2008, p16

¹⁴⁰ Mwangi.M., The Waters Edge: Mediation of Violent Electoral Conflict in Kenya, (Nairobi :IDIS 2008)p3

Since the advent of multiparty politics it became clear that the only way that one can win elections is by having the most votes, so politicians divide people along ethnic lines especially in times of election for their own benefit. Whenever there is an election it is a major contest between two ethnic groups, the other forty ethnic groups just support the two who are the Kikuyu and Luo. Every ethnic community that supports either desperately want their preferred presidential candidate, to win because it is thought that if a presidential candidate from your community wins there is a high likelihood of benefitting from jobs, land and other privileges.

The adoption of multiparty democracy in Kenya heightened ethnic consciousness, through elite mobilization, multiparty elections eventually precipitated ethnic conflict. Interestingly in the 1950's and 1960's Kenyans united to fight for independence. They had a common enemy the white rulers. In the same way they united to fight for the second liberation restoration of democracy. They were fighting the dictatorial regime sustained by Kenya African National Union meaning that unity of purpose can be forged even among multi-ethnic states like Kenya.

Studies have shown that ethnicity is hardly even a cause of conflict but a way in which people in conflict label their grievances, such as weak institutions, corruption, historical injustices, economic and social inequalities and they use ethnicity to target their perceived enemies. If the institutions are not weak, there is no corruption, historical injustices, economic and social inequalities even though politicians would try to incite different ethnic groups against each other, nobody would listen to them because everyone would be satisfied with whoever is the president no matter which ethnic group they come from as long as he or she takes care of their interests.¹⁴¹

Africa has been known as a hopeless continent due to ethnic tensions and in Kenya it was said that the killings in Kenya during the post-election violence had tapped into an atavistic vein of tribal

¹⁴¹ Rothchild.D.,*Managing Ethnic Conflict in Africa: Pressures and Incentives for cooperation*,(Washington DC:Brooklings Institution Press,1997)p4

¹⁴¹ Berge.P.,*Race and Racism Comparative Perspective*,(Newyork:Wiley and Sons,1978)pp403-404

tensions that always lay beneath the surface but until then had not produced widespread mayhem. Negative ethnicity is nurtured through language, stereotyping and deliberate exclusion of members of a society has been said to be the root cause of Africa's political problems. Contrary to this claims the problem of conflicting ethnic claims is universal one a resurgence of which we have seen particularly after the collapse of world communism in 1989 in support of this we have cases from Yugoslavia, problems facing the Russian diaspora in the former soviet states.¹⁴²

Conversations about ethnicity must of necessity explore political and economic needs of citizens. This is because ethnicity by itself is not a problem it is the way it is used for political and economic survival and concealment of exploitative practices as well as its tendency to exclude.

Western economists seeking to explain the cause of Africa's dismal performance compared to other regions and they have claimed it is due to ethnic diversity which leads to poor performance that ethno linguistic diversity as the driving factor behind the region's economic regress. Collier states that ethnic fractionalization renders countries prone to civil war, democratic governance tends to minimise its occurrence while ethnic domination does the opposite. African civil wars are not about ethnic grievance they are prompted by greed for lootable resources in states such as Liberia.¹⁴³ Elizabeth Colson remarks that in Africa tribes and ethnic communities as we know them today are creations reflecting the influences of the colonial era, when large-scale political and economic organisation set the scene for the mobilization of ethnic groups based upon linguistic and cultural similarities which had formally been irrelevant in effecting alliances.¹⁴⁴

¹⁴² Collier.P., "Implications of Ethnic Diversity", *Economic Policy*, Vol.16,no.32(2001)p129

¹⁴² Colson.E.,(ed),*Essays on the problem of tribe*,(Seattle: Washington University Press,1968)pp201-202

Some scholars uphold the view that ethnic conflicts are a colonial creation by employing divide and rule. This method was used to pit ethnicities against each other. They favoured some communities and isolating the others this created enmity and suspicion among African people but this view is refuted by those who hold that African societies are characterized by deep ethnic cleavages that are ancient and permanent and to argue that ethnic conflict in Africa was a creation of the colonial regime would suggest that prior to colonisation of Africa indigenous communities lived in harmony, yet it is evident that ethnic violence in the form of civil strife of various magnitude predated the colonial state in Africa. The persistence of ethnic violence in Africa should not be exclusively be blamed on external factors. Internal factors should be examined critically to establish the extent to which they contribute to ethnic conflicts in many African states.¹⁴⁵

Ethnicity cannot be a root cause of conflict in Kenya as thought, as some of the most ethnically diverse states such as Indonesia, Malaysia and Pakistan though not without internal conflict and political repression have suffered little interethnic violence, while countries with very slight differences in language or culture such as Somalia and Rwanda have had the bloodiest conflicts. Concentrating on ethnicity as the primary cause of conflict underestimates the complexity of African societies and deviates policy makers from the real causes of conflict. Ethnicity is used as a tool for political mass mobilization. Ethnicity could only be a symptom the cause of conflict would be poverty, exclusion and biased distributive systems that breed glaring inequality in the distribution of key resources like income and land.¹⁴⁶

In light of this it is time that we start focusing on how to harness our ethnic diversity, for the good of our country other than fight each other when there are only two tribes in Kenya the rich and the

¹⁴⁵ Midgal J., Atul.K., Vivienne.S.(eds)*State Power and Social Forces: Domination and Transformation in the Third World*,(Cambridge: Cambridge University Press)p108

¹⁴⁶ Horowitz.D.,*Ethnic Groups in Conflict*,(London: University of California Press,1985)pp166-175

poor. Ethnic solidarity within the context of limited resources is rational and cannot be wished away as people tend to congregate around those with whom they have some form of affinity, be it linguistic or cultural giving them the feeling of security and belonging. When communities feel excluded from centres of power and when resource allocation is not addressed deliberately and aggressively through strategic reforms conflicts are likely to occur and ethnic belonging solidified. Land has been at the centre of most local tensions, when ethnic solidarity is activated in a context of political and economic needs it can be quickly strengthened and made volatile but with accountability, transparency in governance more equitable, distribution of resources, cross-ethnic learning's and exchanges,urbanisation,improved economic opportunities for the youth and responsible leadership, intermarriages and globalization.

Everywhere in the world where the ruling class have encouraged inclusiveness or diffused power by applying positive principles of proportionality and reciprocity in central government policies, elite recruitment, public resources allocation and group right protection. They have managed to reduce the intensity of state ethnic conflicts.¹⁴⁷

In as much as in Kenya it is perceived that the cause of conflict before and after elections is ethnicity the real cause of conflict is economic inequalities, social inequalities, historical injustices such as land grabbing, corruption and weak institutions that the citizens of Kenya cannot entrust with their grievances. There is need for the government to look at these issues once and for all so that no community or ethnic group will feel discriminated against.

4.2 Efforts to Reinstate Order and Seek Justice

The ODM protested publicly within the region and internationally and it was clear that both parties had issues and different interests that needed to be mediated since they could not solve the issues

¹⁴⁷ Moynihan.D.,*Pandemonium: Ethnicity and International Politics*,(Oxford: Oxford University Press,1993)p13

they had, for ODM they believed that the Presidential elections were stolen and that the president was illegally in office that his rule had no legal or moral basis and they wanted to use mass action to galvanise the anger of their supporters. PNU believed on the other hand that President Kibaki was declared the winner by a constitutional organisation and that mass action was not legal and stated that the law had laid down the rules and regulations for regulating electoral contests. The East African Community Observer Mission in its report raised issues about the way in which the tallying of votes for Presidential elections was conducted. The delay in the announcement of the results, plus shortcomings that resulted in the gross mismanagement of the tallying process and the declaration of the Presidential results. This critically undermined the credibility of the final stage of the electoral process. In addition the media shaped the events that unfolded soon after the Presidential announcement by interpreting the results before they were announced and after in a manner that suited the fortunes of the political parties they supported. Increasingly reinventing both tradition and history.¹⁴⁸

In the face of the violence various individuals and groups in the country offered various types of conflict management activities. Being Kenyans and hence coming from the conflict they were clearly endogenous third parties one such group was the concerned Citizens for Peace spearheaded by the Ambassador Kiplagat, General Opande and General Sumbeiywo and this initiative by Ambassador Kiplagat was dismissed by ODM. The international community began to exert pressure on the parties to reach an outcome that would leave their interests in Kenya intact. On the basis of internationalisation of the conflict.¹⁴⁹ Many exogenous parties made suggestions not only on the methods that should be used to settle or resolve the conflict but also about parties they considered to be the most suitable mediators for the conflict.

¹⁴⁸ Hobsbawm.E.,Ranger.T.(eds),*The Invention of Tradition*(Cambridge: Cambridge University Press,1992)p20

¹⁴⁹ Mwangi.M.,*Conflict:Theory,Processes and Institutions of Management*,(Nairobi :Centre for Conflict Research: 2006)p62-63

Earlier on there were calls by the international community for third parties to be allowed to reconcile the Kenyan parties. There were three notable calls in this respect. The first was by the United Nations Secretary General Ban Ki-Moon for the Kenyan Leaders and political parties to resolve their difference peacefully through dialogue and by making use of the existing legal mechanisms and procedures. The second was by the African Union which appealed for calm and asked the leaders to embrace dialogue and consultation to deal with the problems and indicated its ability to assist its availability to assist in the process. The third was by the gripped parts of the country. In Kenya the degree of intervention did not reach the high coercion level of military invasion, although some Kenyan parties had called for it and the US assistant Secretary of State speaking in Addis Ababa had come very close to suggesting that limited military action could be an option to the west response to the conflict. In Kenya by and large western intervention was restricted to the diplomatic for example speeches and support for one party, economic threatening to cut aid off and social using immigration laws to target individuals.¹⁵⁰

The AU intervened by use of the good offices of its chairman John Kufuor. President Kufuor spent three days in Kenya his good offices ,were required to facilitate negotiations between the two parties but at the end of it all the parties had not agreed and each group blamed the other for something this led to a deadlock. The PNU side wanted the ODM to recognise Kibaki as being legitimately elected, to accept that there was a Government in place and bring an end to the violence and consider the possible creation of the position of a non executive Prime Minister. On the other hand the ODM demands were that President Kibaki should accept that he is illegitimately in office, that ODM had won the elections, that there should be tallying of the Presidential votes and a re run of the Presidential elections featuring only Kibaki and Raila and a Coalition Government with ODM getting an executive Prime Ministers position.¹⁵¹At the end of it all

¹⁵⁰ Berman.B., “Unhappy Valley: Conflict in Kenya and African State Violence and Ethnicity “,*Cambridge Journal*, Vol33,issue 4,November 2008,pp716-719

¹⁵¹ Kibaki and Raila blame each other in deadlock on polls impasse talks,Daily Nation,11January,2008,p3

President John Kufuor announced that a mediation would be carried out by the former Secretary General Kofi Annan as head of the team of Eminent persons and he summed up his achievement as being that, parties had agreed that there should be an end to the violence, that there should be dialogue, parties agreed to work together with a panel of Eminent African Personalities and all outstanding issues would be addressed. His role was simply to engage the parties in the pre-negotiation stages while third parties would continue with the negotiation.¹⁵²

The team of Eminent African Personalities included Graca Machel, ex-president of Tanzania Benjamin Mkapa. The PNU team had Martha Karua, Professor Sam Ongeru and Mutua Kilonzo. On the ODM side it comprised of Musalia Mudavadi, William Ruto and Sally Kosgei. The AU-panel and its eight member negotiating team developed a four item agenda, the first was ending the violence and restore fundamental rights and liberties, On agenda two it was immediate measures to address the humanitarian crisis, promote reconciliation healing and restoration, Agenda 3 was reaching a political settlement as the crisis revolved around the issues of power and functioning of state institutions. Agenda four was long term issues including constitutional, legal, policy and institutional reforms, transitional justice, equality and youth employment. An agreement was quickly reached on items one and two and four. Three took more time because it was a political settlement but eventually as a result of ever increasing domestic regional and international pressure and the skilled mediation by the AU panel PNU succumbed and a grand coalition was established with President Kibaki retaining his position but being obliged to consult with the new Prime Minister who was Raila Odinga. A cabinet both comprising of ODM and PNU representatives was established. When the agreement was signed in public in the presence of the AU panel and the

¹⁵² Chris.D., Contemporary Political Issues and Updates (Cambridge: Cambridge University Press 2013) p2

neighbouring Jakaya Kikwete this time the country erupted in cheers and for Kenyans that was their New Year as they were not able to celebrate the New Year due to the violence.¹⁵³

Although the violence and political standoff was over questions on how to deal with the consequences of the violence and how to prevent its recurrence then surfaced. The Kenya National Dialogue and Reconciliation under agenda one on ending violence aimed to establish a commission of inquiry into the post election violence (CIPEV). In Kenya Commissions of inquiry are common and were or are often ineffective. Consequently this one was not only to be led by regional and international personalities that were acceptable to both principles and their parties but was also to be answerable to the AU panel. Justice Philip Waki a Judge of the Court of Appeal was appointed to head it together with a Congolese Human rights expert, An Australian Security Service Expert and the Executive Director of the International Commission of Jurists the Kenyan Chapter.

The CIPEV was sworn in on 3rd June 2008, with the mandate to investigate the facts and circumstances related to the violence following the 2007 Presidential elections between December 28th 2007 and February 2008 and worked under a tight timeline of three month with the possibility of extension for one month. It had open and closed hearings across the country these hearings were used to hear from survivors and on 15th October 2008, the CIPEV released its report and made the following findings:¹⁵⁴ That Post Election Violence was unprecedented in all but two provinces in Kenya, state agencies failed to anticipate or contain the violence, PEV was attributed to the institutionalisation of violence after 1991, personalisation of power around the president, weakened and de-legitimised institutions, the violence was partly planned and partly spontaneous. Where attacks were planned the report pointed to Politician's and business leaders as the orchestrators and went to present evidence of this, there were systematic attacks on Kenyans along ethnic lines with guilt by association being the theme as the violence was deliberately directed towards particular

¹⁵³ Lone.L, Powersharing in Comparative Perspective: The Dynamics of a Unity Government, *the Journal of Modern African Studies*, Vol 48, issue, 02, May 2010, pp203-229

¹⁵⁴ A report by the commission of inquiry on post Election violence in Kenya, October 2008, p9

communities perceived to be of certain political persuasion and institutions responsible for upholding the rule of law virtually collapsed and failed to act on intelligence and other warnings and it recommended that the establishment of a special tribunal for Kenya with a threefold mandate to investigate, prosecute and adjudicate crimes related to the PEV.

The special tribunal would apply the principles of the international crimes bill as well as Kenyan law, parties to the national accord must agree on the establishment of the special tribunal which must be enacted within 60 days and if this local option fails, the names of the individuals linked to the violence will be referred to the ICC where a special prosecutor will take up the investigation and possible prosecution of those implicated in the violence.¹⁵⁵

In view of the foregoing solving a conflict is a delicate balancing act, because if you were to choose that you want the conflict settled that is by use of power, as opposed to resolving the conflict which rejects power as the dominant framework of managing social relations it would lead to a win lose situation, so the likelihood of the conflict recurring is very high and all parties to the conflict have different interest, some may not want the conflict resolved but others settled.¹⁵⁶

In Kenya had the international community decided to use military intervention, even though the violence would have subsided it would still have recurred because the main problem was that we had weak institutions and that is why Raila Odinga refused to go to court as he knew that there would be no justice and even if he had gone to court whatever decision would have been made, most likely, would have been that the elections were not rigged because the judges at that time had been appointed by him. He would have had to live with the decision and that would not have addressed the cause of conflict because the only issues were not that he had lost elections but others

¹⁵⁵ Ibid 10

¹⁵⁶ Groom. A., "Paradigms in Conflict: The Strategists ,the Conflict Researcher," in Burton.J and Dukes.F.(eds)*Conflict Readings in Management*(London:Macmillian Publishers,1990)pp71-98

such as unemployment of youths, no reforms in the institutions and these clearly made the people feel oppressed and could not imagine they would have to endure the oppression for five more years.

In the structure of settlement, the outcome is based on the existing power relationships between the parties. Hence as soon as the power balance between them changes, the whole bargain struck must be re-evaluated. The weaker party accepts the outcome because it has no power to contest it and not because it believes that the outcome is the best possible. In the Kenyan case they chose the best way which is mediation which resolves a conflict, as it rejects power in situations of conflict. Resolution of conflict is non power based and non coercive. It aims at a post conflict relationship which is not based on power and which endures because parties find it legitimate. Resolution is based on the belief that at the bottom of each conflict, there are certain needs which are not negotiable. The non fulfilment of these needs causes the conflict in the first place.¹⁵⁷

A central proposition of resolution is that these needs are not in short supply. Thus each party can have their needs satisfied, and the satisfaction of the needs of one party does not entail the loss for the other. In resolution of conflicts it addresses the basic causes of conflict and the parties' needs. That is why in the Kenyan case during mediation before they agreed it looked at the causes of the conflict and found that there was need to reform the institutions mainly police, judiciary, electoral commission. There was need for a new constitution so that presidential powers would be reduced, as in the past when it came to appointments it was the president's job and he did not have to consult any one when he was making constitutional appointments.

Had the President Kibaki's side refused to take part in the mediation since he was the one in power and could have sought protection from the military, the violence would still have continued because the people would have felt that their grievances had not been addressed. Currently there have been various reforms that have taken place since the mediation. A new constitution was enacted and

¹⁵⁷ Burton.J.,(ed),*Conflict: Human Needs Theory*(London:Macmillian,1990)p45

there have been reforms in various institutions such as the police, where there is an independent commission taking care of grievances against the police in the past there was no channel for the people to air their grievances. There have been reforms in the judiciary and judges are now appointed by the judicial service commission, so they are not afraid of making orders against the ruling class as they have security of tenure. There are land reforms where people that did not have land are given land and titles by the government, this is especially in the coastal region. The government has ensured that part of the tenders goes to the youth and there is the youth fund which ensures that the youth can access loans to start business. The electoral commission has been reformed as when the commissioners are appointed, it is a competitive process and there is consultation with all members of parliament before their appointment. Therefore resolution of conflicts is much better, than settling a conflict because settling a conflict is just for some time but resolution is for a long time as it looks at the causes of the conflict.

4.3 The Proposed Special Tribunal

The full report of CIPEV report including the infamous envelope were submitted to the AU panel, to the President and the Prime Minister. Following acceptance of the report and findings by both the President and Prime Minister it was released to the public and formally presented to Parliament. Parliament then adopted all of its findings and recommendations without amendments. Work on drafting the statute necessary to establish the special tribunal then began, with the minister of Justice National Cohesion and Constitutional affairs taking the lead, together with the support of the Attorney General's office as the legal advisor to the Government and the law reform commission. A draft bill to establish the Special Tribunal was made public in early 2009 when stakeholders, from governance, legal and human rights began working on it in order to ensure that it

adequately reflected regional and international criminal justice standards particularly those of the Rome Statute establishing the ICC.¹⁵⁸

The special tribunal bill was first introduced in Parliament in 2009, Parliamentarians from across the ODM –PNU united to defeat it under the slogan don't be vague go to the Hague. The argument was that no Special Tribunal in Kenya could be trusted to deal independently and impartially with the legal accountability of for the post elections violence. With the defeat in parliament of the Government sponsored bill to establish the special tribunal, some parliamentarians then tried to bring forward a private members bill to establish a special tribunal as an alternative approach which was vigorously opposed by human rights and legal sectors of the civil society as it aimed at establishing a special division in the high court to try suspects.

This bill was opposed because it was believed that the investigative and prosecutorial arms of the judiciary had been compromised with the state security arms being accused of involvement in the violence and the Director of Public Prosecutions having failed to make any credible attempt even to try suspects of ordinary crimes committed during the violence such that no credible criminal justice proceedings and access to justice for victims were possible.¹⁵⁹ The lack of movement on the CIPEV recommendations caused the lead mediator to hand over the infamous envelope containing the list of names of those it had found responsible for the post election violence to the Office of The Prosecutor. The OTP had followed the violence in Kenya since its inception but it was clear that the OTP had not initially expected to become involved in matters relating to the post election violence in Kenya. Kenya having adopted the recommendations of the KNDR and later the CIPEV as it was expected that a special tribunal would eventually be established. Even at the late date the

¹⁵⁸ James.L., “The Political Economy of Reforms in Kenya: The Post Election Violence of 2007 and the New Constitution “, *Cambridge Journal*, Vol 55, Issue 1, March 2012, pp31-51

¹⁵⁹ A Report by the Human Rights Watch Turning Pebbles :Evading Accountability for Post Election Violence in Kenya, Newyork, (2011) p 13

motivating factor for the lead mediator handing over the envelope to the OTP was to encourage the national process of establishing a Special Tribunal.¹⁶⁰

After receipt of the envelope the OTP became actively engaged meeting with a bi-partisan Kenyan Government Delegation sent to the Hague in July 2009 and later with the President and Prime Minister in December 2009. The OTP declared that the Kenyan situation was under preliminary investigation and started analysing materials in its possession with a view to establishing whether or not there was sufficient evidence to go before the ICC judges Pre Trial Chamber, to request for authorisation to initiate a formal investigation. At the initial stage only three elements needed to be established, whether or not the ICC had jurisdiction over the Kenyan situation, the admissibility of the situation before the ICC and whether the Kenyan government was willing and able to deal with the situation in its own courts(the complementarity test).The Pre trial chamber was convened to hear the OTP's submission with respect to these elements in March 2010.Regarding the first element, the ICC clearly had jurisdiction as Kenya was a state party to the Rome statute which it had ratified prior to the violence. In addition the meetings the government had with the OTP as soon as the Prosecutor received the envelope confirmed as he had received clear commitments from all the relevant parts of the government the Attorney General, Minister for Justice ,National Cohesion Constitutional Affairs as well as the President and Prime Minister for each step the OTP had taken.¹⁶¹The second element the admissibility had to do with whether or not the scale and the scope of the crimes alleged would reach the thresholds required under article 7 of the Rome Statute. On the final element of complementarity, the Rome statute intends for the ICC to be a court of last resort. For the ICC to exercise jurisdiction, a state party with national jurisdiction over a particular matter must be either unable or unwilling to conduct a bona fide investigation or prosecution of the alleged crimes. It was evident that the capacity of the Kenyan criminal justice system to proceed

¹⁶⁰ Teyie.A. "Kenya: campo Witnesses Fear Leak ", *Cambridge law Review journal*, Vol 23,(2010)p4

¹⁶¹ <http://www.ICC-CPI.INT> Public Statement on the Agreement Between the ICC's OTP and the President and Prime minister under Statements by the Office of the Prosecutor, P2

with these cases may have been constrained by the widespread nature of post election violence and many ordinary crimes committed during that period.

However capacity was less of an issue than political will. An estimated 2000 persons suspected of having committed ordinary crimes who were initially held by the Kenyan Police Forces immediately after the post election violence were released within six months. This followed pressure on the government first by ODM which stated that, many of the detainees were its supporters who were being wrongly targeted.¹⁶² Then by the human rights and legal sectors of the civil society who argued that it was unconstitutional for suspects to be held in detention indefinitely. The Department of Public Prosecutions released a report on the prosecution of cases it had prosecuted since the post election violence and it was clear that it had only prosecuted a few most of which were for petty crimes committed during the post election violence and the major cases relating to the burning of the Kiambaa church, the extra judicial execution taped by the British Broadcasting Corporation in Kisumu and the murder of the state security service man. All except the latter were dismissed by the courts on the basis of shoddy investigation and half-hearted prosecutions.¹⁶³

Failure by the Kenyan government to establish a special tribunal within the time given in the CIPEV report was noted by the pre-trial chamber and the explanation given by the executive branch of the Government that failure to establish a special tribunal was attributed to parliament, which it has no control over was unconvincing and was dismissed given that almost half of the parliamentarians were also members of the Grand Coalition Government and the Government's suggestion that it intended to establish a special division in the High court was dismissed and the pre-trial chamber found that the Kenyan government will to assure legal accountability to the victims of post election violence did not exist. Another concern was the safety of victims and potential witnesses even though the Kenyan government had enacted amendments to the witness

¹⁶² Hansard parliament records comments by ODM parliamentarians in debates on those detained in respect of the post elections violence from 2008 at <http://www.Parliament.go.ke/index.php>

¹⁶³ Report by the Attorney general on the prosecution of cases related to the post election violence, May 2011, pp5-6

protection act later in 2010 which achieved little in terms of addressing legitimate concerns of the safety of such persons ,in particular those that were publicly known to have contributed to the KNHR report or participated in the CIPEV hearings for all these reasons on 31st March 2010 the pre-trial chamber authorised the OTP to commence formal investigations into the Kenyan situation.

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Following the decision the OTP proceeded with its investigation which took the form of formal and public engagements with the relevant parts of the Kenyan Government as well as informal and discrete interviews to victims, who might provide testimony as to what happened to them and potentially assist in establishing links between direct perpetrators and higher level of financiers, instigators and planners. It should be noted that since the time the OTP started the investigations to the time he concluded investigations he was engaging the Kenyan Government with a view of having the matters tried in the national courts but failed.

On the 15th December 2010, the ICC prosecutor announced his intention to bring charges against William Ruto, Major Ali Mohammed, Uhuru Kenyatta, Henry Kosgey and Ambassador Francis Muthaura having concluded his investigation. In response to this the Kenyan government embarked on shuttle diplomacy and secured the support of the AU and the then East Africa Community and attempted to secure a deferral of the ICC situation in Kenya by the UNSC. On 8th March 2011, the pre- trial chamber issued summons to appear for the six Kenyans to prepare for the confirmation of the charges hearings. The charges were confirmed for the five, save for Major General Hussein Ali. The OTP and the ICC had moved faster than anyone had expected and now the true meaning of don't be vague lets go to the Hague became glaringly evident.¹⁶⁵

Kenya's refusal to set up a special tribunal clearly shows that at that time, the institutions that were existing could not be trusted and further that they trusted the International Criminal Court

¹⁶⁴ Sarah.M.,Complementarity in the line of fire(Ohio: Ohio University Press 2013)pp17-19

¹⁶⁵ Ibid p20

more. Kenyas attempt to try to set up a special division in the high court was just a way of ensuring that the perpetrators of the heinous crimes did not stand for trial, as they had expected that the trials in the Hague, would take time before they commence but now the reality had dawned on them.

Even though they would have been able to set up the special division in the high court, the victims of the crimes would not have found justice, in light of the fact that corruption is still rife in the judiciary. How can an incumbent president of a state be tried in his own county? it is difficult and in addition if the perpetrators of these crimes are able to intimidate witnesses ,who are in the Hague how about if the trials were taking place here. The witness protection though independent gets their budget approved by the parliament. Since there are politicians been prosecuted they would have ensured that they do not give them all the money that they need for protection of witnesses, like they do to the judiciary. Going by what has happened to accused persons who are politicians, who have been charged for hate speech who have been publically heard inciting communities against each other and are acquitted at long last. There is no way that the president and vice president can be convicted even if there is sufficient evidence.

To date no investigations have been carried out concerning the post election violence in Kenya and for those offences that people reported there is no evidence to charge, as the investigations done were very shoddy and most of those crimes especially rape or defilement were committed by the military and the police are not willing to investigate. Lack of political will to try the suspects of post election violence is clearly seen and even as these matters are before the ICC there is no cooperation from the Kenyan government, as whatever evidence they have been told to give to the court they have refused, thereby frustrating the prosecutor. It is important for suspects of the heinous crimes to cooperate with the court because just because one has been charged does not mean that they are guilty and that is why it is said that one is innocent until found guilty.

4.4 The Deferred of Kenya's ICC Cases

The Kenyan Government started looking for support from the African Union, as the AU had resolved that its members would not cooperate with the ICC, when the arrest warrant of President Omar Al-Bashir was issued by the ICC, the AU resolved to make an application to the Security Council to defer the Darfur case for one year. The Kenyan Government was hoping for a similar decision from the AU with regard to the ICC cases in respect of the four accused. A resolution to that effect was inserted into the AU's January 2011 Assembly of Heads of State and Government through the Intergovernmental Authority on Development and the summit voted positively in favour of this resolution supporting Kenya's request to the SC for a deferral of the ICC process on the grounds of complementarity. The Kenyan government explained to the AU that Kenya's new constitution had demanded judicial reforms and consequently there would be a new Chief Justice, Attorney General and Director of Public Prosecutions with their respective offices being separated for the first time thereby ending the structural conflict of interest, created by having the Attorney General serve both as the legal advisor to the Kenyan government and when necessary as the chief Prosecutor.¹⁶⁶ In addition in February 2010, pursuant to a decision taken by the African Union Assembly a year earlier, the AU Commission appointed consultants to work on drafting an amendment protocol, on the statute of the African Court of Justice and Human Rights for purposes of the expansion of the African Court to deal with criminal matters so that they could have jurisdiction to try international crimes.¹⁶⁷

Later on when Uhuru Kenyatta was appointed as the Head of State and William Ruto as the Deputy President. The Kenyan Government launched an offensive to make sure that they do not stand trial at the ICC for crimes against humanity, among other strategies including non-cooperation with the investigations carried out by the Office of The Prosecutor, use of political bodies by asking for a

¹⁶⁶ Resolution by the African Union on the indictments in the African Continent Assembly/AU/Dec.245(xiii)p1

¹⁶⁷ Plessis.M., Implications of the AU Decision to give the African Court jurisdiction Over International Crimes, Paper 235, ISS, June 2012, p1

deferral of their cases for 12 months by the SC. An effort which despite its failure at the SC, they have enjoyed the support of the AU, proposing reforms to the Rome Statute to provide for immunities to Heads of States or making changes that would prevent the court from exercising its jurisdiction over the two and seeking a political agreement to modify rules of procedure and evidence of the ICC, so the accused receive special treatment, in light of their official capacity and allowing them to be absent from most parts of trial. These strategies are seen to diminish the legitimacy of the ICC proceedings and most of all block the efforts to fight impunity for the crimes against humanity committed in Kenya as the victims of these crimes have a right to justice. Many of the proposals contradict the purpose of the statute which is to prosecute the main perpetrators of international crimes, no matter the current or past position of the perpetrator.¹⁶⁸

According to the prosecutor, the investigation of the Kenyan cases faced several challenges including the fact that the Government of Kenya, failed to provide the OTP with important evidence and failed to facilitate access to critical witnesses. In the Ruto case Fatou Bensouda at the beginning of the trial informed the court that the trial is the culmination of a long and difficult investigation. As it has been fraught with cooperation challenges and obstacles relating to the security of witnesses. Many of the witnesses and victims have been scared to come forward, others have given statements but subsequently sought to withdraw from the process citing intimidation or fear of harm and worrying evidence has also emerged of attempts to bribe witnesses to withdraw or recant their evidence.¹⁶⁹

The SC on the 15th November 2013 rejected the resolution on the deferral of the Kenyan cases, as the absence of justice, was one of the of the main reasons for the recurrence of international Crimes committed on the occasion of electoral processes in the country. The Kenyan government had also proposed a reform of article 27 of the Rome Statute to exempt Heads of State from prosecution

¹⁶⁸ Letter expressing Position of the Victims in the Kenyatta case at the international Criminal Court to any Resolution by the UNSC to suspend the Prosecution of that case, 3 November, 2013, p4

¹⁶⁹ Opening Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, 10th September, 2013

during their term in office. The said could not be discussed as required by the rules of the Assembly but allowing that amendment would contradict international and regional treaties, jurisprudence and practice that do not admit immunities for Heads of State at international Criminal Tribunal.¹⁷⁰

Kenya finally proposed an amendment seeking to allow an accused person from being absent in the courtroom, which has been supported by Botswana, Jordan and Liechstein. The United Kingdom has presented proposals for amendments seeking to have the accused use video link to the proceedings.¹⁷¹

The Security Council's power to defer, and indeed its broader relationship with the ICC, had been one of the thorniest issues in the negotiations leading to adoption of the Rome Statute and subsequently after adoption. In the draft of the International Law Commission of 1994.

The article provided that “*No prosecution may be commenced under this Statute arising from a situation which is being dealt with, by the Security Council as a threat to or breach of the peace or an act of aggression.*” under Chapter VII of the Charter, unless the Security Council otherwise decides. Thus under this proposal ICC would not have been able to proceed in many matters without prior Security Council authorisation. This was particularly so, in circumstances where the issue fell within the contours of chapter VII of the UN charter. Although supported by the five permanent members of the Security Council, this suggestion by the International Law Commission was heavily criticised by other countries. As it subordinated the ICC's judicial functions to the whims and caprices of a political body. Some of the other fears were this would reduce the credibility and moral authority of the court, limit its role, undermine its independence, impartiality

¹⁷⁰ Article 7 of the Charter of the International Military Tribunal (Nuremberg), Article 7 of the Statute of the International Criminal Tribunal of the Former Yugoslavia and Article 6 of the Statute of the International Criminal Tribunal for Rwanda.

¹⁷¹ Working Group on Lessons Learnt ,Comments on the Working Paper on Rules 134 bis to 134 quarter(11November 2013 on the Rules of Procedure and Evidence,14,November,2013 and Letter from Judge Monagen to the Chair of the Study Group on Governance of 12 November 2013.

,autonomy ,introduce inappropriate political influence into the judicial equation and ultimately render the work of the ICC ineffective.¹⁷²

The compromise that was reflected in the final version of article 16 ,but one with which many countries still seemed displeased, effectively diminished the authority to the Security Council by requiring it to act to prevent a prosecution rather than act to authorise one. In other words, article 16 requires the Security Council to take preventive action through a resolution under chapter VII requesting that no investigation or prosecution be commenced for a renewable period of 12 months.

The problem of article 16 has been politicised and used to the advantage of other states and to the detriment of other states, the Security Council has refused to even consider the request for deferral by Sudan, therefore Kenya was lucky that it took its time to consider the request and rejected it and this has in return frustrated many African countries as there were many calls to consider the Sudan referral.

The perception that the Security Council is biased and has been politicised is demonstrated by, soon after the Rome Statute was entered into force. Article 16 was invoked at the behest of the United States in resolution 1422 in its 4572nd meeting on 12th July 2002, *Requests, consistent with the provisions of article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing state not a party to the Rome Statute over acts or omissions relating to a United Nations established or authorised operation, shall for twelve month period starting 1st July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise.*¹⁷³

This was included in the resolution after the United States threatened, to veto renewal of the mandate of the UN mission in Bosnia, Herzegovina and other future peacekeeping missions. The

¹⁷² Cryer.R. Frimann.H.Robinson.D. and Wimshurst.E.,*An Introduction to International Criminal Law Procedure*,(Cambridge: Cambridge University Press,2007)p138

¹⁷³ Security Council Resolution 1422,UN Docs/res/1422,12 July 2002 p1

resolution was subsequently renewed after 12 months but this time the Security Council expressed its intention to renew the resolutions under the same conditions, each 1 July for further 12 month period for as long as may be necessary and many governments regarded these controversial resolutions as problematic and objected to it, as it clearly discriminated against peacekeeping forces from sending states that are parties to the Rome Statute and those that are not. The resolutions suggested that the resolutions effectively sought to modify the terms of the Rome Statute indirectly, without amendment of the treaty. Those statements demonstrate the politicised nature of article 16 and the Security Council's invocation thereof at the behest of and under threat by a veto wielding superpower.¹⁷⁴

It has been observed that the purpose of article 16 was to allow the Security Council under its primary responsibility for the maintenance of peace and security, to set aside the demands of justice at a time when it considered the demands of peace to be overriding, if the suspension of legal proceedings against a leader will allow a peace treaty to be concluded, precedence should be given to peace. The suspension of the proceedings would be temporary. The subsequent practise of the council quoting article 16 would have surprised those drafting the statute.

A clear look at article 16 clearly shows it only allows deferrals only on a case to case basis, only for a limited period of time and only when a threat to or a breach of peace and security have been established by the council under chapter VII and does not sanction blanket immunity in relation to unknown future events. In addition it requires the existence of a threat to peace, a breach of peace or an act of aggression. Taking into account that article 16 was the product of delicate negotiations and that provision was only intended to be available to the Security Council only on a limited case by case basis. Allowing article 16 to be a blanket provision would result in the gradual weakening of the courts role, in prosecuting those who have perpetrated the most heinous crimes.

¹⁷⁴ Murpy.S., "Efforts to Obtain Immunity from International Criminal Court for US Peacekeepers", *American Journal of International Law*, Vol 96,2002,p752

The Security Council actions in the United States case are not consistent with the provisions of the Rome Statute and severely damage the courts credibility and independence. Although the provision allows the Security Council limited power of intervention in the workings of the ICC, it was not intended as a means by which the Security Council can undermine the ICC but this article should be used sparingly and only when a threat to international peace could be identified. The frustration by the African Union concerning their calls to defer cases made recommendations recommending that article 16 be amended to allow the UN General Assembly to take a decision within a specified time frame in the face of the Security Council's failure to act within six months. The problem with this amendment is that it confers power to the UN General Assembly which it does not have under its own constituent instrument the UN charter. That conferral of power would have to be done by amending the United Nations Charter and the request for deferral is made when the situation in question is a threat to peace and security and it is only the Security Council that is given competence to deal with peace and security issues.

In view of the foregoing Kenya's request for deferral was rejected because no efforts were being made to investigate or prosecute the matters contrary to their allegations. In addition in the Kenyan case there was no threat to international peace and security and further more the people wanted the perpetrators to be tried in the Hague no matter which community they came from, so as to put an end to the perennial problem of violence before and after elections and was rightly put by the Security Council when it rejected Kenya's deferral, that absence of justice was the reason for recurrence of international crimes in Kenya. All in all the Security Council should not use double standards in applying article 16 as in the case of the US, where they invoked article 16 in their favour because they threatened to veto peacekeeping missions. Article 16 should only be allowed if there truly is a threat to peace and security and in most situations that threat is not there.

Conclusion

Most of the cases that are before the ICC are as a result of failed institutions and the unwillingness of states to prosecute international crimes in their national courts, as in the case of Kenya where it was given ample opportunities to put up a special tribunal but failed to do so on the basis that no tribunal could be impartial enough to try these matters, which was the feeling of most ordinary Kenyans and surprisingly the parliamentarians when they refused to pass the bill on creation of a special tribunal which clearly shows that that we need to reform our institutions. If Kenya had shown that it was willing to prosecute the matters before the ICC it would have been given a deferral.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.0 Introduction

The previous chapters examined the International Criminal Court as an international legal regime, the basis of having the ICC as a legal regime and how the ICC come about, the difference between adhoc tribunals and the ICC, sources of law for the ICC. Cases at the ICC and the difference in the cases before the ICC and how Kenyan suspects ended up in the ICC. Thus the objectives of the study which were to examine the establishment of the ICC. Examine the cases at the ICC and critically analyse the Kenyan cases at the ICC have been accomplished.

The study has established and proved the hypothesis that the ICC has a role to play in ending impunity, especially in the African Continent as that is where most crimes against humanity, genocide and war crimes are committed are committed. All the accused persons and suspects are people who have the greatest responsibility. Having looked at the cases before the ICC most states such as the Democratic Republic of Congo, Central African Republic, Uganda and Mali these states, failed to prosecute the perpetrators of this heinous crimes on the basis that the national courts were unable either because the people did not have faith in the institutions and believed that they could only get justice at the ICC, as securing witnesses in this kind of crimes is an uphill task as the people who commit the crimes can easily kill and in any case most of them are charged with offences such as murder and are people of means and have large followings.

Most national courts do not have witness protection units that can be trusted and therefore if these prosecutions are conducted at national level, the witnesses will hardly go to testify because they are intimidated. In addition in most of the African countries there is no separation of power you will find that the judges are appointed by the president, the judges do not have security of tenure therefore it is impossible for them to try the people who appointed them and their co-perpetrators

this was clearly seen in Sudan, after the indictment of President Bashir they set up courts to try international crimes but it was established that none of the judges was willing to try them. Therefore in these circumstances the only court that can try these perpetrators is the ICC and deal with this culture of impunity is the ICC. It has been seen that once one has been charged before the ICC it has a deterrent effect as people are afraid of committing these international crimes and are even careful about how they talk to people lest they turn against each other and they are accused of committing these heinous crimes. In view of the above the hypothesis that the ICC has a role to play in ending impunity in the African continent has been confirmed.

The study has also confirmed the hypothesis that the ICC is the major institution that provides justice for victims of international crimes under the Rome statute because,if any of the cases before the ICC were prosecuted in national courts all efforts would have been put to ensure that the cases do not go on or the accused persons are acquitted a good example was the Kenyan case where all efforts have been made to ensure that the cases do not go on at the ICC,by suggesting amendments to the Rome Statute to ensure that sitting heads of state have immunity before the ICC and for accused persons to be allowed not to attend court throughout the proceedings and deferral of the case. All these suggestions for amendment by the accused persons are self centred and do not have the interests of the accused at heart. Victims of the heinous crimes before the ICC have hope as the judges in the court are very independent and are not afraid of anyone, balance the rights of the accused persons and those of the victims, do not tilt on one side and are objective. Before any amendment is made at the ICC it has to be subjected to all the state parties most of who are of the view that the rights of the accused persons do not override those of the victims which ensures the rights of the victims are taken care of.

In the Kenyan case only petty offenders were prosecuted in the national courts and the perpetrators of the major crimes such as the Kiambaa burning of the church were acquitted and the judge noted that the investigations in this matter was shoddy and the prosecutions were half hearted. If the

prosecution of the Kenyan cases or any of the cases that were not referred to the ICC by their states were prosecuted by their national courts, all efforts would have been made to ensure they do not go on, even if it meant amending statutes so that the perpetrators do not stand trial and even though they would have gone for trial they would have been acquitted because the institutions that are in Africa have been corrupted and therefore the victims would not get justice.

The study has also confirmed the hypothesis that investigations by the ICC are hampered by reliance on state party cooperation and most states are not willing to prosecute or cooperate. A good case is the one of President Albashir where there is a warrant of arrest but when he visits state parties to the Rome Statute he has never been arrested yet these states have an obligation to arrest him. States are not willing to prosecute these matters and that is why Democratic Republic of Congo, Central African Republic, Uganda and Mali have referred the matters to the ICC and the ones that are willing to prosecute do not have democratic structures such as the Sudan. Others are referrals by the UNSC or as a result of investigations by the prosecutor, since these countries have been given an opportunity to prosecute the matters but have failed.

In Kenya despite been given ample time to set up a special tribunal to try the perpetrators of the post election violence they failed to set up the tribunal because no tribunal could be impartial enough and have failed to cooperate with the prosecutor to give information that is needed for the Kenyan cases and the resolution by AU not to cooperate with the ICC. In addition states have started advancing the argument that peace should be pursued rather than justice and that is why the states do not assist the ICC in arresting the perpetrators. In this states where this argument is being advanced, in states such as Sudan and Uganda these suspects continue to perpetrate these crimes, therefore there is no guarantee that if the suspects are not charged the conflict ends it is just a gimmick by the states for none cooperation with the ICC and not prosecute those matters.

The theory of realism which I relied on in my theoretical framework has been proved, that states are driven to act by the basic instinct of survival and the maintenance of their sovereignty. World

politics are driven by competitive self interest and believe that war is a solution. Most of this individuals who are at the Hague are driven by self-interest they want to hold on to power, or want power ,ensure that resources are shared by very few people that is themselves and their friends, they ensure that all institutions have collapsed by ensuring that corruption thrives and since the people have nothing more to lose they revolt leading to a conflict because this people only understand the language of violence and when there is a conflict they believe in using force through the military to force people to submit to them even when they are oppressing them, not realising that conflicts are brought about by needs that are not met.

The United States has done everything possible to ensure its interests are taken care of by making sure that none of its citizens is prosecuted by ICC by entering in bilateral agreements with about 60 states, they also preserve their interest because they are in the security council and for states that have not ratified the Rome Statute they only way the ICC could have jurisdiction over them is if it a referral by the security council and even though the Rome Statute is clear when it comes to matters concerning a state, that a state cannot vote in a matter which, they are the subject of discussion. They are able to influence other members of the Security Council not to support any indictment which relates to their nationals. The refusal to ratify the Rome Statute was for purposes of preserving their self interests yet we know they are the ones who fund some of this wars an example is in the Democratic Republic of Congo,Liberia,Sierra Leone almost all of the weapons used in Africa are not manufactured in Africa, they are supplied by them and will want the status quo to remain so that they get the gold and blood diamonds and anybody who tries to interfere with their interests they find their way to the ICC, so that they can get out of there way and in other parts of the world like in the African continent they want to impose their preferred leaders, who will take care of their interests and they ensure that the opponents are before the ICC, so that they frustrate their ambitions of being the heads of states in those countries that they have interest in.

The perpetrators of the crimes in the Rome Statutes are usually the heads of states or leaders who have influence on people, when they are committing these atrocities they never remember that they are a sovereign state that has a duty to protect its people but as soon as they are indicted or warrant of arrest are issued they want to hid behind sovereignty to preserve their own intrests. They also argue that neither justice nor peace should be pursued at the cost of the other but with the universalization of human rights this argument no longer holds water.

No other continent has suffered more than Africa due to the absence of legitimate institutions of law and accountability. There is a growing international will of which the African continent is an integral part of to enforce humanitarian norms and to bring to justice to those responsible for the most serious crimes of concern to the international community. The struggle to fight impunity is not a neo colonial exercise as alledged by African leaders it is one that has received support from and has been shaped by the people of the African continent. National, hybrid and international jurisdictions from the African continent have made a significant contribution to international criminal practice and jurisprudence and the continent has played a major role in the creation of the permanent ICC as African, since the Rome Statute entered into force on 1st July 2002, it was ratified by 113 state parties of which 31 were African states which to date is the largest regional grouping.

The strong stand in support of the ICC that characterised Africa's earlier position on international criminal justice is less evident today, since the indictment of President Albashir who was the first sitting head of state to be indicted and the subsequent indictment of Kenya's six top Government officials, which was further complicated by the fact that Uhuru Kenyatta ended up being the President of Kenya and William Ruto the Deputy president of Kenya and the refusal of the UNSC to defer both the Omar Albashir ,Uhuru Kenyatta and William Ruto cases despite them being head of states which is a clear indication that the African leaders want to protect themselves at the

expense of the victims of these heinous crimes, since they know that any sitting head of state can be indicted if they commit crimes against humanity.

There is an opportunity for African states to meaningfully make recommendations that might shape the future work of the ICC. In so doing, African states have an opening to call for changes and improvements to an international institution that they were integrally part of creating. It is important to recall that the process of changing and improving an international institution requires meaningful and engaged debate. It is also a process that does not happen overnight. While African states make the case for the various changes to the ICC and its method of working there remains much to be heartened about in the interim.

First until the ICC expands African nations and most certainly African victims of the horrifying crimes have a reason to celebrate rather than denounce the work of the court. As Desmond Tutu once said that justice is in the interests of the victims and the victims of these crimes are African. To imply that the prosecution is a plot by the west is demeaning to Africans understates the commitment to justice we have seen across the continent.

Africa has already demonstrated a clear commitment to the ideals and objectives of the ICC more than half of all African states have ratified the Rome statute and many have taken proactive steps to ensure effective implementation of its provisions. The opposition that was aggravated by the prosecutor's decision to indict President Albashir reflects an outdated and defensive view of sovereignty as a trump to human rights and justice which is not consistent with advances in international human rights worldwide but takes the AU's documents to face value as the preamble of the AU speaks of states being determined to promote and protect human rights, consolidate democratic institutions and culture and to ensure good governance and the rule of law.

African states keep sending mixed signals at one time they are referring matters to the ICC, such as the situation in Democratic Republic of Congo, Central African Republic, MALI and Uganda since they were unable to prosecute the perpetrators of this heinous crimes and another time they are levelling allegations against the ICC such as the ICC only focuses on situations in Africa. This referrals signal the continued support for the ICC and yet the allegations signal the lack of support for the ICC.

It is time for Africa to deal with impunity once and for all by first reforming their institutions ,such as the judiciary,electrol commission, police and civil service which are usually the cause of the conflict because people have no faith in them. There is need to have democratic structures and accountable in order to prevent a relapse into the conflict.¹⁷⁵ In the Kenyan case the cause of conflict was identified as such the personalization of presidential powers and the deliberate weakening of institutions. Where laws are passed to increase executive authority and other laws seen as being in the way of an executive presidency are often changed or even ignored. Lack of autonomy in government institutions, land disputes where land is given to a few people who are politically correct and majority are left without land, unemployment of the youth and grand corruption. There is need for the causes of conflict to be dealt with as if it is not, the conflict often recurs. Just because the ICC has indicted people with the greatest responsibility, does not mean that the conflict will not continue and we can look at the situation in DRC most of the people indicted are from that state but the conflict continues.

In addition on the issue of complementary, it is pegged on institutions that can be trusted in the case of Libya some of the cases were not confirmed because the ICC felt that the national courts could handle them and in contrast to the situation of the Sudan where the national courts said that they were ready to hear those matters but after investigations it was found out that no one in the judicial system was willing to handle those matters and as a result the matters were referred to the court by

¹⁷⁵ Jeong. H., Peace building in Post conflict Societies Strategy and Process,(US: Lynne Rienner Publishers,2005)p4

the UNSC. States must now put up institutions that can be trusted if they want to prosecute international crimes. They must also have systems that protect witnesses.

All discussions including proposals to discuss amendments to the ICC legal framework should respect the integrity and object and the purpose of the Rome Statute, as they seek to diminish the legitimacy of ICC proceedings and try to block the efforts to fight impunity for international crimes and are a betrayal to the victims as the victims have sought for justice in this state's but have found none. States must make the unequivocal commitment to the principles of the Rome Statute and to the fight against impunity. Discussions on proceedings against a sitting head of state must bear in mind and safeguard developments of international law and the provisions of the Rome Statute which do not recognise immunities for international crimes as more often than not the people that are likely to commit these crimes are heads of state.

States must firmly reject any amendment to modify the rules of procedure of evidence that may affect the credibility and legitimacy of proceedings as well as the capacity of the court to fully fulfil its mandate and no amendment should be adopted without a proper consultation process and should avoid a tailored response to address the concerns of the accused persons before the ICC and state parties should avoid adopting any rushed proposal to solve a political problem raised by an accused before the court. Any amendments must seek the views from the court, other stakeholders, including victims, victims' representatives and civil society this will address a legitimate concern and not provide a tailored response to one or more accused persons.

There is need in Africa for greater and more accurate public and official awareness of the work of the ICC and a need for enhanced political support for the work of the court and the entire international criminal justice. The fulfilment of the aims and objectives of the ICC on the African continent and particularly through the complementarily regime are dependent on the support of

African states and administrations. They need to have a collaborative relationship between these stakeholders and the ICC.

Other structures such as the African Court on Human and Peoples Rights, The African Court of Justice and other pan African institutions can play a meaningful role in cooperating with the ICC and should be encouraged to do so. An example is the work of the ACHPR in its 2005 resolution of ending impunity in Africa and on the domestication and implementation and the implementation of the Rome Statute in which the commission called on the civil society organisations in Africa, to work collaboratively to develop partnerships to further respect the rule of law internationally and strengthen the Rome Statute. There is need for these structures and organisations to raise awareness in this acute climate of myth-peddling.

It is imperative that the 31 members of the ICC are encouraged to take seriously their obligations under the Rome Statute, to ensure accountability for perpetrators and that its 53 members of the AU are called to affirm rather than cheapen the organisations commitment to eradicate impunity and ensure responsibility for perpetrators of crimes against humanity, war crimes and genocide. This is a time for African voices ,regional organisations and civil society to speak out against distortions regarding the ICC'S work in Africa.Criticism must be given but with an understanding that the courts position in Africa is one that needs strengthening and nurturing so that it can ensure that African interests are taken care of.

The AU decision to embark upon the expansion of the African court's jurisdiction is a reaction to the ICC's currently directed investigations in the continent .It must be said that would be an oddity, the African court will not have retrospective jurisdiction so it cannot solve the existing frustration that the AU feels in respect of the current ICC cases. The draft protocol specifies that the court has jurisdiction only in respect to crimes committed after the entry of the protocol and statute.¹⁷⁶ Nor

¹⁷⁶ The draft protocol on the establishment of an African Court on Peoples and Human Rights, Article 49E

would the prosecution of a case by the African court Bar the ICC from prosecuting the very same case under the principle of complementarity, as article 17 of the Rome Statute refers to states and not other courts. All things considered the draft protocol appears to have been rushed into existence and the result is a legal instrument that raises more questions than it provides answers to Africa's vast human rights needs. A positive outcome would be for the AU to setup a court that complements the work of the ICC and is comprehensively funded, legally sound and politically capacitated to fearlessly pursue justice for the worst crimes affecting the continent.

In the indictments by the ICC they should not only bring charges on one side of the political divide like the rebels only, it must also look at the government side as in the situation of Uganda where the indictments are only for the rebels, yet government forces are said to commit the same atrocities as if it does so it will be viewed as a court that assists one party gain power by removing their adversaries. In addition it must also look at other situations in other parts of the world as it is doing currently in Afghanistan, Georgia, Guinea, Colombia, Honduras, Korea and Nigeria. All in all the ICC is a court by and for Africans looking at the history of its creation.

BIBLIOGRAPY

BOOKS

- Arieff.A, *International Criminal Court Cases in Africa: Status and Policy Issues*, (Newyork: Columbia University Press2011)
- Anderson.T., *Trial Justice: The International Criminal Court and the Lord's Resistance Army*(London: Zed books,2006)
- Brownlie.S., *Principles of public international law*, (Columbia: Columbia Publishers,2008)
- Chris.D., *Contemporary Political Issues and Updates*(Cambridge: Cambridge University Press 2013)
- Cryer.R, Friman.H., Robinson.D,Wilmhurst.E,*An Introduction to International Criminal Law and Procedure*,(Cambridge: Cambridge University Press,2007)
- Henkins.L. *International Law: Politics and Values*, (Netherlands: Kluwer Academic Publishers Group, 1995)
- Holmes.J.,The Principle of Complementarity ,in Lee.R.,The International Criminal Court: The Making of the Rome Statute issues, negotiations, results (Kluwer law international: Hague1999)
- Hobsbawn.E.,Ranger.T.(eds),*The Invention of Tradition*(Cambridge: Cambridge University Press, 1992)
- Jackson.R.,*The Nuremberg case, as Presented by Robert Jackson*, (Newyork: Knopf Publishers, 1947)
- Jonathan I., 'Progress in International Criminal Law ?',1999 and Morris.M.,The United States and the International Criminal Court: High Crimes and Misconceptions: The ICC and Non-Party States,' (Cambridge: Cambridge University Press,2000)
- Jeong.H.,*Peacebuilding in Post conflict Societies Strategy and Process*,(US: Lynne Rienner Publishers,2005)
- King.J. and Theofrastous,'From Nuremberg to Rome: A Step Backward for U.S.Foreign Policy, and Barrett and Mathew .A., 'Ratify or Reject: Examining the United States' Opposition of the International Criminal Court,'(Newyork:Columbia University Press1999)
- Kothari.C.,*Research Methodology Methods and Techniques,2nd Revised Edition*,(New Delhi, New Age International(P) Limited Publishers,1982)
- Krasner.S.,*Structural causes and Regime Consequences :Regimes as intervening variables, in Krasner ,International Regimes*,(Newyork:Columbia University Press,1990)pp1-21
- Kimani.N.,Ethnic Diversity in Eastern Africa Opportunities and Challenges,(Nairobi :Twaweza Communications LTD 2010)
- Mamdani.M.,*Saviours and Survivors: Darfur Politics and the War on Terror*,(Capetown:HSRCPress,2009)
- Malcom.S.,*Internatinal Law ,Fourth ed* (Cambridge: Cambridge University Press,1997)P1
- Malekian,Farhad.A.,*The Monopolization of International Criminal Law in the United Nations, A Jurisprudential Approach 2nd Ed*(Cambridge: Cambridge University Press1995)
- Maunganize.O.,*Implications of Another African Case as Mali Self Refers to the ICC*(SouthAfrica:ISS 2012)
- Makau.M.,Kenyas *Quest for Democracy*,(Colombia:Colombia Publishers,2008)p331
- Mwagiru.M.,*The Waters Edge: Mediation of Violent Electrol Conflict in Kenya*,(Nairobi :IDIS 2008)
- M.,*Conflict:Theory,Processes and Institutions of Management*,(Nairobi :Centre for Conflict Research, 2006)
- Mochochoko .P., "the International Criminal court", in Ankumah.E. and Kwakwa.E.,(eds),*African Perspectives on International Criminal Justice*(SouthAfrica:ABC Press,2005)
- Monageng.S.,*Positive Reinforcement :Advocating for International Criminal Justice in*

- Africa*, (South Africa: Nicework 2013)
- Nakhjavan.S., *International Crimes* (South Africa: Institute of Security Studies, 2008)
- Nhema.A. and Zeleza.P.(eds), *The Resolution of African Conflicts*, (Oxford: Ohio University Press)
- Nouwen.S., *The Catalysing Effect of the International Criminal Court in Sudan*, (Cambridge: Cambridge University Press, 2013)
- Plessis.M., *The International Criminal Court That Africa Wants*, (South Africa: Institute of Security Studies, 2010)
- Plessis.M. Paper , “Implications of the AU decision to give the African Court Jurisdiction Over International Crimes”, paper no.235, (South Africa: Institute of Security Studies, June 2012)
- Plessis.M., (ed), *African Guide to International Criminal Justice*, (South Africa: Institute of Security Studies, 2008)
- Plessis.M. *African Guide to International Criminal Justice*, (South Africa: ISS, Pretoria, 2009)
- Sandole.J. and Merwe.H.(eds) *Conflict Resolution Theory and Practise integration and practice*, (UK: Manchester University Press, 1993)
- Schabas.W., *An introduction to the International Criminal Court* (Cambridge: Cambridge University Press, 2009)
- Sarah.M., *Complementarity in the line of fire* (Ohio: Ohio University Press 2013)
- Ward. A., *Breaking the Sovereignty Barrier: The United States and the International Criminal Court*, (Princeton: Princeton University Press 2001)
- Wanyeki.L., “The International Criminal cases in Kenya Origin and Impact”, paper no.237 (South Africa: Institute of Security Studies, August 2012)
- Bekou.O., “A Case of Review of Article 88 of the ICC Statute: Strengthening a Forgotten Provision”, *New Criminal Law Review: An International and Interdisciplinary Journal*, Vol 12, No.3 (2009)
- Blanchard.C., *Libya: Unrest and US Policy*, Cambridge Law Journal Vol 43 P82011.
- Charney.J. “Progress in International Criminal Law?” *The American Journal of International Law* Vol 45, (1999)
- Daniel’s. “The Proposed International Criminal Court, International Centre for Criminal Law Reform and Criminal Justice Policy,” *International Law Journal, Vancouver, B.C, Canada*, Vol 53 (1996)
- David .S., “International Criminal Law”, *The International lawyer: International Legal Developments in Review*, Vol.35.NO.2, (2000)
- Deitelhoff.N., “The Discursive Process of Legalization: Charting Islands of Persuasion in the ICC Case,” *International Organisation Journal*, Vol 63, (Winter 2009)
- Dagne.T., “Uganda, Current Conditions and the Crisis in North Uganda,” *Oxford law journal* Vol 23, (2006)
- Frencz.B., “Make Law Not War”, *The World Today*, Vol.54, No.6 (1997)
- Ku.J, Nzelibe.J., “The ICC we Want ,” *Washington University Law Review Journal*, Volume 84, issue 4, (2006)
- Glasius.M. “Global Justice Meets Local Civil Society: The International Criminal Courts Investigation in Central African Republic”, *Alternatives: Global, Political, Vol.33, No.4* (2008)
- Gennady.M., Danilenko, “The Statute of the International Criminal Court and Third States,” *Michigan Journal of International Law*, Vol 21 (2001)
- James.L., “The Political Economy of Reforms in Kenya: The Post Election Violence of 2007 and the New Constitution “, *Cambridge Journal*, Vol 55, Issue 1, March 2012
- Johnson.L., “Ten Years Later: Reflections on the Drafting “, *Journal of International Criminal Justice* , Vol 2, (2004)
- Knottmends.A, “The Security Council and the ICC: The Unsolved Puzzle”, *Netherlands International Law Review, Journal*, Vol 61, issue 2, (August 2014)

- Leila .N.,Sadat and Carden.L. , “The new International Criminal Court: An Uneasy Revolution,”*Georgetown Law Journal* Vol 88(2000)
- Shannon.K.,Supple, “Global Responsibility and the United States :The Constitutionality of the International Criminal Court, ”*Hastings Constitutional Law Quarterly Journal*,Vol27(1999)
- Stahn.C.,“The ambiguities of Security Council Resolution 1422”,*European Journal of International Law*,Vol 14(2003)
- Sarooshi,Danesh, “The Statute of the International Criminal Court ,”*International and Comparative Law Quaterly*, Vol 48(1999)
- Schwebel.S., “Proceedings of the 101st Annual meeting, “*American Society of International law Journal*,Vol 68-107(1974-2013)
- Louise.A.,”The Prosecution of International Crimes: Prospects and Pitfalls, “*Washington Law Journal*,Vol 13,23 May(1999)
- Lone.L,Powersharing in Comparative Perspective: The Dynamics of a Unity Government, *the Journal of Modern African Studies*, Vol 48,issue,02,May 2010
- Mahnoush.H. and Arsanjani,”The Rome Statute of the International Criminal Court “*The American Journal of International Law*,Vol 22(1999)
- Moynire.G.”Creation of an International Tribunal for punishment of violations under the Geneva Convention,”(1872)VOL11
- Penrose,Margret.M., “it is good to be king: Prosecuting heads of states and former heads of state under international law, “*Columbia Journal of Transnational Law* Vol39(2000)
- Plessis.M.,Implications of the AU Decision to give the African Court jurisdiction Over International Crimes,Paper 235,ISS,June 2012
- Teyie.A. “Kenya:Ocampo Witnesses Fear Leak “,*Cambridge law Review journal*,Vol23,(2010)
- Witte.E.,”Command Responsibility and the Trial of Jean Pierre Bemba,”*American Law Journal*,Vol 49 2010
- Xinhua.H., “UN Mission in DR Congo Denies Ntagandas Role in Military Operations,”*Cambridge Journal*,Vol33,September (2010)

REPORTS

- A report of the International Commission of Inquiry on Darfur,Geneva,January 25,2005.
- A report of the International Commission of Inquiry on Darfur to the United Nations Secretary General,S/2005/60,January 25,2006
- Report from the Elections Monitoring and Response Centre (EMRC), KHRC, Nairobi, November 2007,
- Report by Otieno.J.,Countdown to Deception:30hours that Destroyed Kenya”Poll Groups lift the Lid on Tallying mess,Saturday Nation,19th January,2008,
- A report by the commission of inquiry on post Election violence in Kenya,October 2008,
- A report by the Human Rights Watch Turning Pebbles :Evading Accountability for Post Election Violence in Kenya,Newyork,(2011)
- A report by the Attorney general on the prosecution of cases related to the post election violence,May 2011,

PERIODICALS

- Kibaki and Raila blame each other in deadlock on polls impasse talks,Daily Nation,11January ,2008
- Marlise.S. and Neil .M.,”Bashir Defies Arrest Order on War Crime Charges, “*New York times*, March 6,2009

CASES

Attorney General of the Government of Israel –vs-Eichmann (1961)36 ILR 18,50(1968

Re Pinochet (1999)UKHL 1;(2000)1AC 119,15 January 1999

R-vs-Bartle and the commissioner of police for the metropolis and Others(Appellants)exparte
Pinochet(Respondent

The Prosecutor vs.Thomas Lubanga Dyilo,Document containing the Charges,August 28,2006

The Prosecutor vs Germaine Katanga and Mathieu Ngudjolo Chui, June 27,2008

The Prosecutor vs Jean Pierre Bemba Gombo,June 15,2009

The Prosecutor vs Muammar Mohammed Abu Minyar Gaddafi,Saif Al –islam Gaddafi and
Abdullah al Senussi,May 16,2011