THE ROLE OF ICC IN MAINTAINING JUSTICE: ISSUES, CHALLENGES AND THE WAY FORWARD

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DECLARATION

I, Julius Onyoni Opini, do hereby declare that this thesis is my original work and has not been submitted to any other university or institution for any award. I hereby now submit the same for the award of Master of Laws Degree of the University of Nairobi.

Signed…….. **Date……..**

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This paper has been submitted for examination for the award of Master of Laws Degree for which the candidate was registered with approval of the University Supervisor.

Signed……. **Date……**

DR. IWONNA RUMMEL BULSKA

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LIST OF ABBREVIATIONS

APRD	Army for the Restoration of Democracy
AU	African Union
BIA	Bilateral Immunity Agreements
CAR	Central African Republic
COW	Coalition of the Willing
CPA	Comprehensive Peace Agreement
DRC	Democratic Republic of Congo
ECCC	The Extra- ordinary Chambers in the Courts of Cambodia
EU	European Union
ICC	International Criminal Court
ICL	International Criminal Law
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for former Yugoslavia
IDPs	Internally Displaced Persons
IHL	International Humanitarian Law
ILC	International Law Commission
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East (Tokyo Trials)
KNDR	Kenya National Dialogue and Reconciliation
LRA	Lord Resistance Army (Uganda)
MLC	Movement de Liberation du Congo
NATO	North Atlantic Treaty Organization

OTP	Office of the Prosecutor of ICC
PTC	Pre Trial Chamber
SADC	South African Development Community
SC	Security Council
SCSL	The special Court for Sierra Leone
STL	The special Tribunal for Lebanon
TFV	Trust Fund for Victims
TWAIL	Third World Approaches to International Law
UFDR	The Union of Democratic forces for Unity
UN	United Nations
UNSC	United Nations Security Council
US	United States
VCLT	Vienna Convention on the Law of Treaties

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ABSTRACT

The establishment of a permanent international criminal court in 2002, whose main role is to try perpetrators of international crimes, was seen as an innovative step towards the realization of justice. The International Criminal Court (ICC) was meant to end impunity through prosecution of perpetrators of atrocities. ICC unlike the earlier tribunals preceding it adopted both the retributive and restorative approach to justice. In adopting restorative approach, ICC introduced victims' participation in its proceedings and reparation to victims. As at the end of year 2016, ICC has been able to carry out ten investigations, ten preliminary investigations, five ongoing trialsandfinalized five cases. Despite the aforesaid successes, ICC faces several challenges both inherent in the Rome Statute and external. The Court has limited jurisdiction in material crimes, time, admissibility and complementarities. It has no jurisdiction over non-State Parties unless they voluntarily acknowledge its jurisdiction or the United Nation Security Council (UNSC) refers the state's situationto the Court. It has to relay on States' cooperation to conduct investigations and enforce its decisions but in many instances this has been wanting.Non-State cooperation appears to be the major challenge which has hindered its mandate. Interpretation of the right to victims' participation and reparation are also problematic as they are not clearly defined in the Rome Statute and as such are left to the discretion of the trial Chamber. Since its establishment, ICC has only handled one reparation case in the Lubanga case which also took long to decide.

Ironically, the world is experiencing more internal conflicts and wars since the establishment of the ICC. The Syrian war is on such situation which the United Nations (UN) has recognized as war crimes and crimesagainst humanity but due to the jurisdictional limitations, the ICC may not be able to act. Similarly, the Court may not be able toinvestigate a number of situations even

when international crimes are apparent due to jurisdictional challenges. This calls for alternative measure to supplementthe efforts of the ICC in maintaining justice. Due to the inherent challenges facing the ICC and the complementarity principle, national states are encouraged to establish credible national criminal processes to prosecute international crimes occurring within their jurisdictions and provide reparation to victims. However, national prosecutions face their own challenges such inadequate infrastructure, capacity, lack of political will and non-cooperation from state actors. In order to address these challenges ICC has been requested to provide assistance and capacity building at national levels and also to strengthen its relationship with national States. This study analyses the role of the ICC in maintaining global justice. It identifies the key challenges facing ICC in its objective of maintaining universal justiceand suggests possible solutions to those challenges.

CHAPTER ONE

1.0 INTRODUCTION

1.1 Background to the study.

The setting up of the International Criminal Court (ICC) in July 2002 was hailed as one of the fundamental revolutions in the history of international criminal justice with its main role being, 'putting an end to impunity of the perpetrators of the most serious crimes of concern to the international community'.[1] The establishment of the ICC had been intensively deliberated upon after the First Word War (WWI) and before the Second World War (WWII). However, in 1989 the clamor for the establishment of ICC gained momentum when 'Trinidad and Tobago called upon the United Nations General Assembly to establish an international court to support international efforts to prevent drug trafficking'[2]. The world had before that experienced the horror of three genocides that shocked the conscience of humanity. The conflict in the former Yugoslavia and the Rwandan genocide left millions of people dead.[3] The Holocaust genocide in Germany had earlier killed more than six million Jews leading to public outcry and demand for justice.[4] The world could no longer watch helplessly as victims were being senselessly massacred. Justice for victims of atrocities was the main driving force in the founding of the ICC.

[1] Preamble, Rome Statute
[2] M CherifBassiouni, 'Observations Concerning The1997-98 Preparatory Committee's Work' (1197) 25, Denv J Int'l L &Pol'y397.
[3] Gerald E O'Conner, 'The Pursuit of Justice and Accountability: Why the United States Should Support the Establishment of the International' (1999) 27 (4), Hofstra Law Review 928.
[4] Ibid.

The establishment of the ICC revived hope that justice would prevail in the world irrespective of one's status in society as the Court sought to prosecute perpetrators of international crimes irrespective of their status in society. The Rome Statute gives the Court jurisdiction over genocide, war crimes, crimes against humanity and aggression. The Court enjoys complimentary jurisdiction[5] and is therefore a court of last resort. The Court only exercises its jurisdiction if a deserving case has not been prosecuted by a national court which has primary jurisdiction to prosecute. Such case must either be referred to the Prosecutor by a State Party, or by the United Nations Security Council under Chapter VII of the UN Charter or the Prosecutor initiates investigations *propio motu* as authorized by the Court's Pre-Trial Chamber.[6]

More than 15 years since its establishment, the ICC has only been able to carry out ten investigations,[7] ten preliminary investigations,[8] five ongoing trials[9] and five closed cases.[10] Out of the ten cases under investigations eight involve African countries namely; Central African Republic, Cote' d'lvore, Democratic Republic of Congo, Kenya, Libya, Mali, Sudan and Uganda. Other African countries, namely;-Gabon, Guinea, Nigeria and Burundi are also under preliminary investigations. The Kenyan cases were however concluded without any conviction, the Court terming them as a mistrial. According to Apiko and Aggad, this has painted the ICC as anti-African court whose aim is to exercise western imperialism thereby hindering African cooperation with the ICC.[11]

[5] Antonio Cassese, Guido Acquaviva and Mary Fan, *International Criminal Law: Cases & Commentary* (Oxford University Press 2011)
[6] Article 17, Rome Statute.
[7] ICC, 'Situations under Investigations' <https://www.icc-cpi.int/pages/situations.aspx#> accessed 19 January 2017.
[8] ICC, 'Ongoing Preliminary Investigations' <https://www.icc-cpi.int/pages/preliminary-examinations.aspx> accessed 19 January 2017.
[9] <https://www.icc-cpi.int/Pages/trial.aspx> accessed 19 January 2017.
[10] <https://www.icc-cpi.int/Pages/closed.aspx> accessed 19 January 2017.
[11] Philomena Apiko and FatenAggad, 'The International Criminal Court, Africa and African Union: Which Way Forward?' (Discussion Paper No. 201 of 2016, European Centre for Development and Policy Management).

Despite the notable progress made by ICC, the Court has been criticized for doing so little in achieving universal justice hence there is urgent need to reflect on the Court's performance and appraise its role and ability to deliver justice. One of the major shortcomings of the Court emanates from the Rome Statute which limits its jurisdiction in several respects as will be analyzed in this study.The ICC's jurisdiction is limited in various ways as hereunder.

First, its jurisdiction is limited to specific crimes, namely; crimes against humanity, war crimes, genocide and aggression.[12] Whereas it has exercised jurisdiction over three categories of the above crimes, so far ICC has no jurisdiction over the crime of aggression. Whereas the Rome Statute recognizes that the Court has jurisdiction over the crime of aggression, the condition attached to that jurisdiction is that such jurisdiction can only be exercised after the 1st day of January 2017 when at least two thirds of the Member States activate the jurisdiction and at least thirty (30) Member States ratify or accept the amendments regarding the crime of aggression.[13] However, as at March 2017, the Assembly of State Parties had not activated the said jurisdiction.

Secondly, ICC can only exercise jurisdiction on crimes that occurred after its establishment on 1 July 2002. The Court cannot exercise jurisdiction over crimes that were committed before its establishment however deserving a case may be. This leaves victims of atrocities committed before 1 July 2002 at the discretion of national judicial systems to investigate and prosecute such atrocities.

Thirdly, ICC faces the challenge of exercising jurisdiction over non-State Parties. Article 12(3) of the Rome Statute allows non- Member States to voluntarily submit to the jurisdiction of the ICC in relation to a crime committed in their territory and therefore in the absence of such

[12]Akua Kuenyehia, 'The International Criminal Court: Challenges and Prospects (Annual Lecture on Human Rights and Global Justice, Center For International Law And Justice March 21 2011).
[13] RS Clark, *The International Criminal Court and the Crime of Aggression* (Ashgate 2009).

voluntary submission, ICC cannot exercise its jurisdiction except as provided under Chapter VII of the UN Charter. So far ICC has exercised jurisdiction over non- State Parties upon the UNSC referral in only two situations, namely Libya and Sudan. The Court has been hindered from exercising its mandate in curbing crimes against humanity and war crimes in Syria since Syria is not a Member State and has not voluntarily submitted to the jurisdiction of the Court. The UNSC referral which is the only avenue through which ICC could have invoked jurisdiction has not been fruitful due to the veto by Russia and China.[14]

Fourthly, ICC's jurisdiction is limited by the principle of admissibility. Whereas the ICC may have jurisdiction over international crimes, it may not exercise it where there is no admissibility.[15] Admissibility is one of the preliminary issues the Court has to determine at pre-trial stage before any trial can proceed before the Court.

Fifthly, the complementarity principle which requires ICC to be a Court of last resort limits its jurisdiction. The ICC cannot investigate or prosecute a case unless it is demonstrated that the case is not being investigated and prosecuted by a national court where the crime occurred or unless it is proved that the initiated investigations and prosecution are a cover up to protect the suspect.

Apart from limited jurisdiction, ICC also faces the challenge of carrying out investigations and enforcing its decisions. In order for ICC to play its role in maintaining international justice, peace and protection of human rights, the Rome Statute under Part 9, requires the Member States to fully cooperate with the Court's investigations and prosecutions. Oosterveld argues that State cooperation is a key element and tantamount to the mandate of the ICC because the ICC has no

[14]Marta Bitosorli, *The Syrian Situation: International Humanitarian Law Violations and Call for Justice* (ALMASARD 2015),
[15]Article 17, Rome Statute.

police force, military or territory of its own.[16] It has to rely on the cooperation of States to investigate, arrest, collect evidence and protect key witnesses and sentence individuals who commit international crimes. The Rome Statute[17] requires State Parties in accordance with the Statute to fully cooperate with the Court in its investigation and prosecution of crimes within its jurisdiction. The responsibility of State Parties to cooperate with the ICC is two-fold; firstly is the general commitment to cooperate through investigation, arrests and surrenders of suspects[18] and secondly, is the obligation to ensure that cooperation provisions under the Statute are domesticated under their national laws.[19] ICC has also expounded some rights previously unheard of in criminal justice system such as the rights of victims' participation in the proceedings, reparations and has also created awareness on its functions and influenced domestic legislation.

Many countries especially African countries have in the recent past threatened to withdraw from the jurisdiction of ICC over allegations of bias. The threat by African countries to withdraw from the ICC warrants an assessment of the Court's role and future strategy if it has to remain relevant. The Court has been accused of being biased against Africa and this was heavily witnessed during the trial of the Kenyan cases. So far Kenya, South Africa, Burundi, Gambia, Namibia, and Uganda spearheaded by the AU have called for a collective withdrawal from the ICC. This is a clear indication of how international justice can be compromised on the grounds of political expedience. For instance in Turkey, during the WWI, the officials of Ottoman-Turkish government were never prosecuted and brought to justice after the Armenian genocide. According to Dadrian due to the change in political expedience the Turkish allies decided not to

[16]Valerie Oosterveld, Mike Perry and John McManus, 'The Cooperation of States with the International Criminal Court' (2001) 25 (3), Fordham International Law Journal 767.
[17]Article 86, Rome Statute 2002.
[18]Article 87, Rome Statute 2002.
[19] Article 88, Rome Statute 2002

prosecute the suspects and justice was not attained for the millions of lives lost during the genocide.[20] It is believed that the impunity granted to the Germany and Turkish war criminals after the WWI, is what instigated Hitler to believe that they would not be prosecuted even after the Holocaust genocide.

The ICC in its quest to achieve universal justice adopts a retributive approach through prosecution of suspects and restorative approach through reparation and victims' participation in the proceedings. Unlike earlier tribunals which did not recognize reparation and victims' participation in proceedings, ICC has been celebrated for taking this innovative approach by ensuring the victims access justice and are restored to the position they were before the atrocities occurred.[21] Reparation for harm suffered by victims is alien to international criminal justice system. The establishment of ad hoc tribunals such as the International Criminal Tribunal for former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) in 1990's did little to change the place and role of victims in the international criminal justice system.[22] ICTY and ICTR only included victim protection measures, with no provisions for victims either to be part of proceedings or to claim reparations.[23] Critics of ICTY claim that victims testifying before the Tribunal far away from their homes and places where the crimes were committed were traumatized by the experience.[24]

[20]Vahakn N.Dadrian, 'The Historical and Legal Interconnections Between the Armenian Genocide and the Jewish Holocaust: From Impunity to Retributive Justice' (1998) 23, YALE J INT'L L 503

[21]Claire de Than and Edwin Shorts (eds), *International Criminal Law and Human Rights* (Sweet and Maxwell 2003) 13

[22] Godfrey Mukhaya Musila, 'Restorative Justice in International Criminal Law: The Rights of Victims in the International Criminal Court' (Doctor of Philosophy Dissertation, University of Witwatersrand 2009).

[23] Luke Moffet, 'Realizing Justice for Victims Before the International Criminal Court' International Crime Data Base Brief 6, 2014

[24]Carsten Stahn, Héctor Olásolo and Kate Gibson, 'Participation of Victims in Pre-Trial Proceedings of the ICC' (2006) 4, Journal of International Criminal Justice 219.

Despite the notable adoption of reparation and victims' participation, ICC has faced various challenges in ensuring that victims enjoy justice. Moffet argues that even though the ICC provides for the recognition, protection, participation and reparation of victims to enhance victim's justice, it remains merely symbolic.[25] Another challenge is that the process of participation of victims at the International Court is cumbersome and involves a lot of procedures which have negative influences on the length of the case and the accused person's rights.[26] Since its establishment, ICC has only been able to make one decision on reparation in the Lubanga Case and that decision came after a long wait. In October 2016, the Trial Chamber II in the *Lubanga Case* approved and gave the Trust Fund for Victims the go ahead to implement the reparation plan.[27] In the *Kenyan Situation*, the ICC declined to hear the application for Kenyan victims requesting the Court to order the government of Kenya or the Trust Fund for Victims for reparation.[28] The Court argued that it had no jurisdiction since the cases had been closed without any conviction and therefore no one could be held responsible.

Whereas ICC faces various challenges in achieving universal justice, there is still hope in the potential of the Court. Stromseth argues that international criminal courts and tribunals must focus on post-conflict justice in order to reinforce'public confidence in fair justice'.[29] Another argument which has gained momentum is that of strengthening of national capacity to prosecute international crimes as the national courts enjoy original jurisdiction. In instances where

[25] Luke Moffet, 'Justice Victims Before the International Criminal Court (Reprint edition, Routledge 2015).
[26] Luke Moffet, 'Realizing Justice for Victims Before the International Criminal Court' International Crime Data Base Brief 6, 2014
[27] T*he Prosecutor v. Thomas Lubanga Dyilo* Situation in the Democratic Republic of the Congo ICC-01/04-01/06-3198
[28]*The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* Situation: Situation in the Republic of Kenya ICC-01/09-01/11-2038, 01 July 2016 | Trial Chamber V(a) | Decision
[29] Jane E Stromseth, 'Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of law in Post Conflict Societies?' (2009) 1, Hague Journal on Rule of Law 87.

countries lack the capacity, ICC and international organizations should come in and provide assistance.[30]

Despite the challenges ICC faces, as an international Court of criminal justice it must focus on its key objectives of ensuring that justice prevails. This can be done through prompt prosecution of suspects, protecting the rights of the accused persons, ensuring transparency, and maintaining peace through deterrence and embracing impartiality in its investigations.

This study critically analyses the role of ICC in maintaining international justice for both the victims and accused persons. It identifies and discusses in detail the challenges facing ICC in enhancing justice. The study also discusses the duties of national states in reinforcing the role of ICC. This study advances the position that both national jurisdiction and ICC can work mutually together for achievement of universal justice.

1.2 Problem statement

The International Criminal Court having been in the justice system for more than a decade has defined its role and strategies in the global system. ICC as a court of last resort is the last hope for those who cannot find justice in their own countries. The Court's establishment was meant to deter perpetrators of crimes against humanity by expeditiously trying the perpetrators while at the same time restoring the victims. Whereas notable progress has been made since the Court's inception, the Court faces several challenges that undermine its credibility. These challenges include limited jurisdiction, lack of States' cooperation, inadequate reparation to the victims and lack of clear procedures for victims' participation among others. ICC relies on Member States to

[30]Lawaal Olawale, *The International Criminal Court and the National Judicial System in African States: Analysis of the Failsafe Judicial System* (Lagos University 2013).

enforce its decisions, collect evidence, conduct investigations, protect witnesses and arrest suspects.

Despite the challenges ICC is facing, it has a fundamental role in maintaining universal justice. Even at the present time the world still continues to face human rights violations and crimes against humanity. The War in Syria, South Sudan, and Israel-Palestine conflict amongst others are clear indications that atrocities still continue to occur despite the presence of the ICC. This calls for urgent need to address the challenges the ICC is facing and promote alternative avenues of achieving justice through strengthening the capacity of Member States to conduct credible prosecutions and thereby reduce over-reliance on the ICC.

General concerns have been raised that ICC investigations are only focusing Africans and that raises questions on the Court's credibility to deliver justice. This is informed by the fact that as at the year 2011 the Court had opened investigations into seven situations in Africa including the Kenyan cases[31] whereas there exist other situations outside Africa such as in the Middle East and Asia which warrant ICC's investigating but the Court has not acted. Questions have also been raised by Kenyans and the African Union States about the referral of Kenyan cases to the Court because it was felt that the ICC moved too fast to take over the cases and did not give Kenya sufficient time to investigate and prosecute the suspects. Is it a case of selective justice or double standards as alluded to by African leaders?

The fact that ICC lacks universal jurisdiction and exercises jurisdiction only in three situations, i.e. if the accused is a national of a State Party, or if the alleged crime took place on the territory

[31] *Jump up to: [ab] "Kenya election violence: ICC names suspects". BBC News. 15 December 2010. Retrieved 2011-04-30*

of a State Party, or if a situation is referred to the Court by the United Nations Security Council limits its efficacy.

The concept of co-operation by States not party to Rome Statute is also not practical. There are practical limitations in compelling co-operation even where a State is a Party but where the State is reluctant to co-operate. The case of the President of Sudan Omar Bashir is one such example of lack of co-operation from both State Parties and non-State Parties.The threatened mass withdrawal of African countries and Russia from the ICC has a negative impact on its legitimacy. This and many other challenges are perceived to render ICC ineffective in ensuring equal justices to all individuals and end impunity perpetrated by tyrannical leaders.

It is against this background that this study becomes imperative so as to interrogate the contribution and efficacy of ICC as a tool of international justice.This study will address the role of the International Criminal Court (ICC) in achieving and maintaining universal justice, the challenges the Court is facing and how those challenges can be mitigated or addressed to realize the full potential of the Court.

1.3 Justification of Study

Whereas the ICC is meant to maintain universal justice through ending impunity and trying perpetrators of serious international crimes, it faces various challenges which if not addressed will undermine its work and possibly render it irrelevant. Non-cooperation and the withdrawal of State Parties from the ICC pose as the greatest threat to its future existence. This study is justified on the ground that, it is written at a time when ICC is facing resistance and its credibility in maintaining justice is being interrogated. This study therefore offers an avenue for trying to address those challenges. It doesn't matter whether ICC indicts suspects, all that the

people who went through atrocities want to see is that justice has been done. The victims want to see the perpetrators who are responsible for their suffering punished and victims compensated. This research will provide literature and guidance to all stakeholders interested in understanding the role of ICC in its quest to maintain justice at both the national and international level. This research will therefore show how amidst the challenges the Court can provide sustainable universal justice. The findings from this study will contribute towards a better understanding of the manner in which ICC operates and its contributions in achieving world peace, its influence on domestic courts and ensuring justice for victims of serious crimes globally. This research will be instructive to governments, non- governmental organizations, peace mediators, human rights advocates and academicians among other interest groups as they develop policies to address the Court's legacy in the global arena.

1.4 Research Objectives

The main objective of this study is to critically analyze the mandate of ICC in maintaining universal justice, determine the challenges it faces and provide the way forward.

The specific objectives include the following:

1. To identify mandate of ICC and analyze the mechanisms that ICC has put in place to ensure that justice prevails.

2. To critically analyze the challenges ICC is facing in exerting its mandate and how those challenges hinder it from achieving universal justice.

3. To determine how the relationship between ICC and national jurisdictions can be reinforced to enhance justice at both the national level and international level.

4. To analyze mechanisms ICC can employ to overcome the challenges facing the Court and provide the way forward.

1.5 Research Questions

This study shall be guided by the following key questions:

1. How can ICC work effectively within its jurisdiction to achieve universal justice?
2. What is the role and impact of the ICC in investigations and prosecutions of crimes under the Rome Statute with specific reference to retributive and restorative justice?
3. Does international politics affect the ICC's interventions in investigating and prosecuting international crimes?
4. What are the challenges ICC is facing in its pursuit for international justice and how can those challenges be addressed?

1.6 Research Hypothesis

The hypothesis that underpins this study shall be:

1. Non-Cooperation from Member States and regional bodies such as AU is the greatest challenge ICC is facing in its pursuit for universal justice.
2. Inadequacies in the Rome Statute are among the greatest hindrances to ICC's success and remain the main cause of the Court's perceived failures.
3. ICC enjoys limited jurisdiction and this can be addressed through enhancing national State's prosecution of international crimes by providing assistance and capacity building.

4. The problems the ICC is facing can be solved by making amendments to the Rome Statute and the Rules of Procedure of the Court.
5. Change of attitude and genuine support to the Court by the United Nations and all countries of the world especially the permanent members of the Security Council will inevitably guarantee the Court success in its mandate.

1.7 Theoretical Framework

1.7.1 Thetheory of justice

The theory justice underpins this study. The greatest proponent of the theory of justice was John Rawls in his book, *Theory of Justice*[32]. According to Rawl, justice cannot be measured by utilitarianism but the extent to which everyone in society was treated equally irrespective of social status. Utilitarian theory has its ground in the writings of Jeremy Bentham (1748-1832) who argued that 'every act of law should be judged as to its goodness or badness, solely based on its consequences in terms of human happiness'.[33] Rawls identifies society as the basic structure of society and the primary subject of justice.[34] Critics of Rawls' theory of justice as the basic structure argue that society is not static but it is 'produced through history and by complex webs of interaction among individuals and institutions'.[35]

Justice in itself is intuitively understandable and there is no distinction made between justice in the legal sense, moral sense, ethical sense and sociological sense.[36] Its application is relative and varies from one society to another, with each society attaching different meaning to it. Early

[32] John Ralws, *Theory of Justice* (Harvard University Press 1999).
[33] JW Harris, *Legal Philosophies* (2nd edn, Butterworth 1997)
[34] Wayne Morris, *Jurisprudence: From the Greeks to Post-Modernism* (Cavendish Publishing Limited 1997) 193.
[35] 'Theory of Justice' https://www.enotes.com/topics/theory-justice accessed 9 February 2017.
[36] Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory* (3rd edn, Oxford University Press 2012).

thinkers like Plato and Aristotle acknowledged that 'the concept of justice is imprecise, and it consists of treating equals equally and un-equals unequally in proportion to their inequality'.[37] Plato stressed that a society is based upon justice and every society should educate its people on the benefits of justice.[38] According to Aristotle corrective justice is the 'justice of the courts whichis applied in the redress of crimes or civil wrongs and it requires that people be treated equally'.[39]

Retributive justice, as the fundamental concept inherent to all criminal prosecutions, was accepted as a crucial objective for the ICC, ICTY and ICTR in order to uphold due process rights and the rule of law.[40] To retributivism theorists, punishment should be given in response to its being deserved, the penalty should be appropriate to the wrong action and the consequences of punishment are irrelevant.[41] If the guilt are punished then justice is attained. However, as developement of international criminal law heightened, the deficiency of retributive justice was realised as victims did not play a significant role other than victims.

Restorative justice emphasizes on repairing the harm caused or revealed by criminal behavior. In most cases victims of crimes, would see justice done if it is restorative rather than retributive.The ICC in maintaining universal justice should ensure that victims who endured the atrocities see that justice is done not only by punishing the perpetrators but also bring healing at individual and communal level.[42] This form of restorative justice brings together all the parties affected by an incident of wrongdoing to collectively decide how to deal with the aftermath of the incident and

[37] Ibid.
[38] Wayne Morrison, *Jurisprudence: from the Greeks to Post-Modernism* (Cavendish Publishing Limited 1997).
[39] Ibid.
[40] Anja Wiersing,'Lubanga and its Implications for Victims Seeking Reparations at the International Criminal Court' [2012] Amsterdam Law Forum, Summer Issue 21.
[41] Susan Easton and Christine Piper, *Sentencing and Punishment: The Quest for Justice* (3rdedn, Oxford University Press 2012).
[42] Tom M. Antkowiak, 'An Emerging Mandate for International Courts: Victim-Centered Remedies and Restorative Justice' (2011) 47 Stanford Journal of International Law 279.

its implications for the future.[43] It prioritizes the need to affirm the moral worth and dignity of all parties involved, victims, perpetrators, and society as a whole.[44]

The theory of justice is therefore relevant in this study. It is through this study that different situations will be measured, whichever theory ICC has adopted. Victims are not only interested in retributive justice where the perpetrators are punished, but they want to see that justice has been achieved where there is reparation or their rights to participate in the proceedings are respected. The world's perception of ICC in its role in maintaining justice is not the same across various societies. For example, AU has been adamant that it is unjust and a form of Western imperialism because almost all of the cases at the ICC are from Africa.

1.7.2 Political idealism

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

In this theory, peace and justice are both achieved by the ICC by promoting negotiations between the rebel parties and the government like in the LRA case in Uganda or through mediation to share power in order to sustain peace through justice like in the Kenyan situation after the 2007/2008 post-election violence peace deal.

[43] Carrie Menkel Meadow, 'Restorative Justice: What Is It and Does It Work? (2007) 3, ANN. REV. LAW Soc. SCI 167.
[44] C Villa-Vicencio, 'Transitional Justice, Restoration, and Prosecution', in D Sullivan and L.Tifft (eds.), *Handbook of Restorative Justice: A Global Perspective* (Routledge 2006).

The theory of justice mentioned above shall be key in addressing the key objectives in this study.

1.8 Literature Review

The main objective of this study is to critically analyze the role of the ICC in maintaining universal justice, determine the challenges it faces and provide the way forward. In the year 2022, ICC shall be celebrating two decades of existence. The literature reviewed in this thesis shall focus on the objective of this study.

Werle,[45] in his book *Principles of International Criminal Law*, provides rich reading material for anyone interested in international criminal law and the role of the ICC. He provides a detailed historical background that led to the establishment of ICC and explains the crimes under the jurisdiction of the ICC. The author recognizes the role of ICC in maintaining peace, justice and rule of law by ending impunity. Whereas the book provides rich background information that shall inform this study, it does not analyze whether the ICC has indeed helped in maintaining justice or not. If not what are the challenges facing the Court and how can they be addressed.

Ellis and Goldstone,[46] discuss the challenges facing the achievement of justice accountability at the ICC in the 21st century. Whereas the authors did not foresee the current withdrawals of African countries from the ICC, they identify peculiar challenges which relate to the topic under study. The authors identify lack of cooperation from State Parties as a hindrance to judicial enforcement of ICC decisions hindering the pursuit of justice.

[45] Gerhard Werle, *Principles of International Criminal Law* (Oxford University Press 2014).
[46] Mark S. Ellis and Richard Goldstone, *The International Criminal Court: Challenges to Achieving Justice and Accountability in the 21st Century* (International Debate Education Association, 2008)

Schabas,[47] provides an overall discussion on the ICC from its creation, jurisdiction, crimes, trial, investigation, rights of victims, admissibility among other issues. He argues that ICC as a court of last resort only acts when domestic justice system is unwilling to try the perpetrators or is unable to do so.

Kersten,[48] questions the impact of the ICC interventions in ending wars and building peace. He argues that ICC's actions to intervene when there is still conflict has either a negative or positive effect on peace which then affects the realization of justice. He questions whether holding perpetrators of mass atrocities accountable helps or hinders the attainment of justice. The author in his discussion borrows and builds on theoretical and analytical insights from studies on conflict and peace. He provides a detailed discussion on the Court's impact on justice in conflict. His book mainly focuses on the role of ICC in ending conflict through its interventions and conflicting State Parties interests and its own institutional interest, the scope of this study is to determine ICC interventions in pursuing justice, challenges and the way forward.

Mariniello,[49] provides a recent perspective of the role of the ICC. The book published in 2015, focuses on both procedural and substantive challenges the ICC is facing. In tandem with the objective of this study, this book offers guidance and enriches this study as it provides the ICC with ways in which it can solve the said obstacles to enhance its role in maintaining justice. The author explores the impact of ICC in countries where most serious crimes have been committed. The book will be used to enrich this study.

[47]William A Schabas, *An Introduction to the International Criminal Court* (4thedn, Cambridge University Press 2011).
[48] Mark Kersten, *Justice in Conflict: The Effects of the International Criminal Court's Interventions on Ending Wars and Building Peace*
[49]Triestino Mariniello (ed), *International Criminal Court in Search of its Purpose and Identity* (Taylor and Francis 2015).

O'Conner,[50] reviews the impact of not prosecuting the Ottoman-Turkish government and Germany war crimes after the atrocities committed during the WWI on the international community. He argues that the failure to pursue justice at the expense of political affiliations was the main reason why the WWII occurred.

Ocampo,[51] in his article appreciates the role ICC plays in ending impunity and ensuring that perpetrators of international crime face the law through punishment. He applauds ICC as a model institution that promotes and enhances international criminal justice. He identifies lack of adequate cooperation between the ICC and its State Parties and enforcement of judicial decisions as the greatest challenges ICC faces as a tool of achieving universal justice. This article was published in 2008, six years after the establishment of the ICC. Currently ICC faces more complicated challenges that threaten its legality. For example the current threat of mass withdrawal of African countries from ICC is a big setback towards the Court's mandate. The author discusses the impact of the establishment of ICC on national legislation and justice and holds the view that the ICC has ignited the domestication of Rome Statute and created fears among political leaders to deter them from committing international crimes. This article shall enrich this study in many ways.

Murithi,[52] discusses the relationship between the ICC and African Union. The African Union as a region body has a large number of members as State Parties to the Rome Statute. However, since the ICC issued an arrest warrant against Sudan's president and trial of the *Kenyan* cases trying a sitting president, the Africa-ICC relationship became more precarious. Murithi reminds AU of its

[50] O'Conner (n).
[51] Luis Moreno Ocampo, 'The International Criminal Court: Seeking Global Justice' (2008) 40, Case Western Reserve Journal of International Law 215.
[52] Tim Murithi, 'The African Union and the International Criminal Court: An Embattled Relationship? (Institute for Justice and Reconciliation, Policy Brief Paper No.8 2013).

shared goal with ICC to end impunity and calls for cooperation between the two institutions. In this article, the author foresees an avenue where this relationship can be repaired by bridging their differences and working actively to address impunity and foster justice in Africa. The AU non-cooperation policy against the ICC will only deepen impunity and injustice. Murithi, also argues that ICC should understand that as a court of last resort, it can only have criminal jurisdiction where the State is unable to prosecute. The author argues that ICC should strengthen the institutional and judicial capacity of State parties to investigate and try perpetrators of genocide, war crimes, crimes against humanity and aggression at national level. This article is very current and shall be key to enriching this study although the author does not look into the detail the justice entails.

Wanyeki,[53]analyses the impact of the ICC on the Kenyans justice perceptions. The author contextualizes the Kenyan cases providing a historical background that led to commission of international crimes in Kenya and what triggered the ICC investigations. Since ICC's establishment, the *Kenyan Cases,* with Kenya and other African countries threatening to withdraw from the ICC, have threatened the legality of ICC. The author argues that despite the fact that a special tribunal was recommended to ensure that those on the Justice Waki list go through criminal proceedings, this did not materialize as politics took center stage and domestic justice failed and the government of Kenya preferred the intervention of the ICC. Wanyeki, questions whether the ICC proceedings in Kenya influenced justice, complementarity and deterrence. This article was written during the investigations of the Kenyan cases when expectations of justice were very high. However, at the time of writing this study all the cases

[53]MuthoniWanyeki, 'The International Criminal Court's Cases in Kenya: Origin and Impact' (Institute of Security Studies No.37 2012).

against the six suspects had been terminated thereby raising the question as to whether ICC was able to meet justice expectations for Kenyans which is what this study seeks to unravel.

Stromseth,[54] questions whether international criminal courts and tribunals influence public confidence and perception of justice in countries that survived the atrocities. The author argues that there is need to relook at this cross road and determine the domestic impact of international criminal courts on justice on the ground. International criminal justice must focus on the people who endure the atrocities by ensuring that the perpetrators are brought to justice through criminal proceedings. He mainly focuses on the post-conflict justice and is of the view that this can be done through strengthening justice and rule of law on the ground. This literature is relevant to the study because the study shall inquire into which mechanisms the ICC has put in place to strengthen justice at both the domestic level and international level.

1.9 Research and Methodology

The research methodology employed in this study is exclusively desk review which is basically secondary data. The methodology involved the analysis of relevant literature, articles, case law and legislation. The decisions from the ICC and other international tribunals are analyzed to provide interpretation of the topic under study. The data considered also include reading, and analysis of policy papers and publications of different institutions on the concept of victim's rights and access to justice in ICL. The study also considered reports made by official bodies established at international level such as Office of ICC Prosecutor as well as other relevant materials of various government departments, agencies and other credible organizations that have conducted inquiry into situations similar to this study.

[54] Jane E Stromseth, 'Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of law in Post Conflict Societies?' (2009) 1, Hague Journal on Rule of Law 87.

The other secondary data used include relevant books, articles, journals, conference papers and information from the Internet on the subject.

1.10 Chapter Description

This research comprises of five key chapters. The first chapter introduces the topic under study. It sets out the background and agenda of the study, the research questions, problem statement, objectives, the methodology employed, hypothesis, and justification of the study, the theories relevant to the study and literature review.

The second chapter provides a conceptual understanding of the role of the ICC in maintaining universal justice. It sets out the historical development of the Court and jurisdiction over crimes covered under the Rome Statute. It discusses in detail both retributive and restorative justice and how ICC has adopted the same.

The third chapter provides for challenges and issues if not interrogated will undermine the role of the ICC. The issues discussed in this section include ICC's limited jurisdiction, non-cooperation, and victims'reparation and participation at the ICC, perceived bias against Africa, and lack of support from UNSC and permanent members of the UNSC among other challenges. The objective of this study is to analyze the key challenges ICC is facing in its mandate of achieving universal justice.

The fourth chapter considers the impact of the ICC at national level in order to identify the mechanisms that these countries have put in place to promote justice for victims of atrocities and ensure that those culpable of international crimes face justice. This chapter is based on the argument that nationals enjoy original jurisdiction over prosecution of crimes.

The fifth chapter provides conclusion and findings of the study and provides the way forward. The key recommendations shall be based on the way ICC can address the key issues it faces in maintaining justice.

CHAPTER TWO

2.0 THE INTERNATIONAL CRIMINAL COURT: HISTORY, DEVELOPMENT AND ITS ROLE IN MAINTAINING UNIVERSAL JUSTICE

2.1 Introduction

This chapter discusses in detail the historical developments that led to the establishment of the ICC and examines its role in maintaining universal justice. It discusses both the retributive and the restorative approach to justice adopted by ICC and compares the same with the approach by earlier international tribunals. The objective of this chapter is to give a theoretical understanding of the role of the ICC in maintaining universal justice.

2.2 Historical Development of the International Criminal Court

The idea of establishing an international criminal court was first conceived in the early fifteenth century but gained momentum in the late nineteenth century after the Second World War.[55] This dates back to the 1870s when Gustav Moynier made the first proposal for the formation of an international permanent court in response to the Franco-Prussian war.[56] It was however not until after the First World War (WWI) that the idea of establishing an international criminal court was revisited during the negotiation of the Treaty of Versailles. The negotiators of the Treaty envisaged the establishment of international adhoc tribunal to try the Germany and Kaiser perpetrators of war crimes during the WW1[57]. The Treaty of Versailles[58] provided for the establishment of a tribunal to try Kaiser Wilhem II. Although the trial never happened, it was

[55] Antony Cassese, *International Law* (2nd edn, Oxford University Press 2005).
[56] J Holmes Armstead, 'The International Criminal Court: History, Development and Status' (1998) 38 (3), Santa Clara Law Review
[57] Ibid.
[58] Article 227, The Treaty of Versailles.

however a departure from the traditional state sovereignty concept that a head of state cannot be prosecuted and the new concept of individual criminal responsibility was embraced.

After the WWI, a fifteen member commission was set up to look into the cause and responsiblity for the war, violations of the laws of war and what tribunal would be appropriate for conducting trials.[59] A treaty to establish an international criminal court was negotiated in 1937 but it never materialized due to lack of support from States. In 1945, the Allies signed an agreement in London which for the first time established a tribunal, the Nuremberg International Military Tribunal (IMTN).[60] The Nuremberg tribunal was established to try senior leaders of the Nazi regime ensuring that they faced trial for their role in the atrocities of the War.[61] In 1946 the Tokyo International Military Tribunal for the Far East (Tokyo IMT) was set up by a proclamation of General Douglas MacArthur.[62] These were the first international tribunals set up to try war criminals and impose individual liability for atrocities committed.

The peculiar characteristics of early tribunals were that they mainly adopted a retributive approach to justice. The Allied Powers in prosecuting the perpetrators of international crimes were of the view that the threat imposed by expansionist Nazi Germany and Imperial Japan must attract international condemnation and retribution.[63] In dispensing justice they focused on only on retributive justice.[64] They did not address the post-conflict justice which mainly ensures that victims who endured the atrocities were put in the same position as they were before the

[59]Malcom Davies, Hazel Croall and Jane Tyrer, *Criminal Justice: An Introduction to the Criminal Justice System in England and Wales*(3rdedn, Pearson Longman 2005).ibid
[60] See the 1945 London Agreement for IMT.
[61]Andrew Cayley, Fiona McKay, Steven Powles and Amal Alamuddin,'Milestones in International Criminal Justice: Victims Rights and Complementarity' (International Law Meeting Summary, 28 February 2012).
[62] Neil Boister and Robert Cyrer, *The Tokyo International Military Tribunal* (Oxford University Press 2008).
[63] MC Bassiouni, *Introduction to International Criminal Law* (Transnational Publishers 2003)
[64] Mary Will, 'A Balancing Act: The Introduction of Restorative Justice in The International Criminal Court's Case of *The Prosecutor v Thomas Lubanga Dyilo'* (2008) 17 (1), Journal of Transnational Law and Policy 85.

atrocities occurred through reparation. Central to the theory of retributive justice is that people should receive what they deserve. It aims at reinforcing rules that have been broken through punishment.

Wesley argues that punishment in retributive justice,[65] 'removes the undeserved benefit by imposing a penalty that in some sense balances the harm inflicted by the offender'.[66] The retributive principle can be applied in different ways. First it asserts that the offender deserves punishment for his offence; secondly, penalties should not be applied to anyone who is guilty of an offence; and thirdly, the severity of a penalty should not exceed the limit related to the offence even if that would help reduce crimes.[67] In this scenario retributive justice's main objective is to restore both the victim and the offender at their relative position by ensuring that the offender is punished. Critics of retributive justice argue that sometimes it is confused with vengeance.[68] Punishment provoked by anger due to injustice may escalate if vengeance and not retributive justice is the yardstick applied.[69]

In 1948, the Convention on the Prevention of and punishment of the Crime of Genocide was adopted by the United Nations General Assembly (UNGA).[70] It was the first Convention to recognize genocide as an international crime.[71] It was after the adoption of the Convention that UNGA invited International Law Commission (ILC) to look into the possibility of establishing an international judicial organ to try those charged with genocide. In response, the ILC in 1950s drafted international criminal codes, however, the establishment of an international criminal

[65] Wesley Cragg, *The Practice of Punishment: Towards a Theory of Restorative Justice* (Routledge, 1992)`
[66] Jason Keane, 'Sentencing: The Criminal Justice System' (Library Council of New South Wales 2005).
[67] Nigel Walker and Nicola Padfield, *Sentencing: Theory, Law and Practice* (2nd edn, Butterworth 1996).
[68] Richard A Posner, 'Retribution and Related Concepts of Punishment' (1980) 9 The Journal of Legal Studies 71
[69] Susan Easton and Christine Piper, *Sentencing and Punishment: The Quest for Justice* (3rd edn, Oxford University Press 2012).
[70] UNGA, *Convention on the Prevention of and punishment of the Crime of Genocide* 9 Treaty Series vol 78 277 December 1948, Adopted 9 December 1948, entered into force 12th January 1951.
[71] Ibid.

court was put to a halt following the Cold War and UNGA postponed its consideration in addressing the question.[72]

The question of establishing an international criminal court was then revisited in 1989 when Trinidad and Tobago,[73] made a request to UNGA for establishment of an international court to try drug trafficking charges in an effort to fight drug trafficking.[74] It was at this point that UNGA requested ILC to commence drafting a statute for establishing of an international court.[75] However in the 1990s and before 1994, the world experienced the worst atrocities in Rwanda and Former Yugoslavia. This resulted in the creation of international tribunals namely: the International Criminal Tribunal for Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). ICTY was authorized to prosecute grave breaches of the 1949 Geneva Convention, violations of the laws of customs of war, genocide and crimes against humanity when these crimes occurred on the territory of the former Yugoslavia after January 1, 1991.[76]

Both ICTY and ICTR were based on retributive approach to justice like the earlier tribunals. It has been argued that a system based on retributive justice that rests principally on prosecution of perpetrators has got its own limitations.[77] First, the international prosecution alone cannot address crimes entailing gross human rights violations. Another limitation of retributive justice is

[72] Susan Easton and Christine Piper, *Sentencing and Punishment: The Quest for Justice* (3rdedn, Oxford University Press 2012).
[73]UN General Assembly, Letter dated 21 Aug 1989 from the Permanent Representative of Trinidad and Tobago to the UN Secretary-General, UN Doc A/44/195 (1989) and UN General Assembly, UN Doc A/44/49 (1989).
[74]Claudia Tofan and R van der Wolf, *The Long and Unwinding Road to Rome* (Wolf Legal Publishers 2011).
[75]UN General Assembly, Legal Committee, UN Doc A/C.6/44/SR.38-41 (1989).
[76]Will (n).
[77]Anja Wiersing,'Lubanga and its Implications for Victims Seeking Reparations at the International Criminal Court' [2012] Amsterdam Law Forum, Summer Issue 21.

that ICL focuses on prosecuting high ranking officials with the greatest responsibility.[78] The selectivity of perpetrators is a hindrance to delivery of justice to victims of crimes. Retributive justice system which was based solely on the guilt of high ranking perpetrators did not take into consideration the interests of victims.

The mass commission of crimes against humanity, war crimes, and genocide committed in Former Yugoslavia and Rwanda and the works of both ICTR and ICTY led to global support of a permanent court with international jurisdiction. In 1994 ILC submitted a draft to UNGA for the establishment of the ICC.[79] Following the Draft Statute by the ILC, UNGA established an *Ad hoc Committee on the Establishment of an International Criminal Court (Adhoc Committee)* to look and consider substantive issues.[80] *The Preparatory Committee on the Establishment of International Criminal Court (Preparatory Committee)* was created to enable States and various stakeholders prepare a legal text based on the ILC draft Statue and report by the Adhoc Committee.[81] On July 17 1998, UNGA convened the *Rome Conference on the Establishment of International Criminal Court (The Rome Conference)* opening the Rome Statute for signature and ratification. Out of the 160 countries participating in the Rome Conference, 120 voted in favor for the establishment of ICC. The Rome Statute entered into force in 2002 and ICC was established in 2002 based at The Hague in Netherlands.

[78]Article 1, Rome Statute. The ICC shall exercise its jurisdiction over persons for the most serious crimes of international concern.

[79]UN General Assembly, Report of the ILC of its 46th Session, UN Doc A/49/10 (1994).

[80]William A Schabbas, *An Introduction to the International Criminal Court* (2nd edn Cambridge University Press 2004).

[81]UNGA, *Establishment of International Criminal Court* UN Doc A/50/639 (18th Decemeber 1995).

2.3 The Role of ICC in Maintaining Universal Justice

The establishment of the ICC marked an important change in the international criminal justice system. It generated hope of a world in which justice would prevail irrespective of one's status in society as it sought to prosecute perpetrators of international crimes and restore victims. In its preamble the Rome Statute resolves to 'guarantee lasting respect for the enforcement of international justice'. The Former UN Secretary General Koffi Annan in an address to Mexican Congress in 2002 stated that:

> "Our hope is that, by punishing the guilty, the ICC will bring some comfort to their surviving victims and to the communities that have been targeted. More important, we hope it will deter future war criminals, and bring nearer the day when no ruler, no State, no junta and no army anywhere will be able to abuse human rights with impunity."[82]

The assumption is that victims of genocide, war crimes, and crimes against humanity need justice and prosecuting perpetrators of such crimes will deter their commission and bring about peace. This was a driving force in the establishment of the ICC after the atrocities that had occurred during the WWI and WWII. The desire to have a permanent court to foster international criminal justice was meant to address the inadequacies of the earlier tribunals. More than 15 years later, questions arise as to whether ICC has discharged its mandate in attaining international justice. ICC was established not just to end impunity or deter commission of international crimes, but also to address the shortcomings of earlier tribunals. The preceding tribunals such as ICTR and ICTY enjoyed limited jurisdiction. These tribunals were specifically

[82]KoffiAnnan,'Parliamentarians Must Ensure that Consensus of Poor, Vulnerable Kept at Forefront' <http://www.un.org/ffd/pressrel/19b.htm> accessed 20 February 2017.

set up to deal with atrocities committed within a specified time period and specified areas.[83] The earlier tribunals mainly focused on retributive approach to justice; that is ensuring that the perpetrators of international crimes were accountable. It is only the ICTY under Article 24(3) of its Statute that recognized the restitution of property and proceeds acquired during a criminal conduct as a form of restorative justice.

In guaranteeing respect for and enforcement of international justice, ICC employs both retributive and restorative justice. Restorative justice emphasizes on repairing the harm caused or revealed by criminal behavior.[84] Retributive justice conceived as just response to a wrong is therefore conceived of as a restoration of the relationship to one in which all parties enjoy equality of relationship.[85] However, this may not work in some circumstances especially where at the end of trial the suspects are acquitted. While the earlier tribunals focused on retributive justice with little attention on restorative justice, ICC balances the two.

To deter the commission of serious international crimes, the ICC aims at achieving retributive justice by bringing perpetrators to account and punishing them through sentencing. In its Preamble, the Rome Statute affirms that 'that the most serious crimes of concern to the international community as a whole must ***not go unpunished*** and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation'.[86] Defining justice in a retributive approach simply means that people should be treated in the same way they treat others through punishment.

[83] Sarah Anoushirvani, 'The Future of the International Criminal Court: The Long Road to Legitimacy Begins with the Trial of Thomas LubangaDyilo' (2010)22 PACE INT'L L REV 213.
[84] L Kurki 'Restorative and Community Justice in the United States' (2000) 27 Crime and Justice 235.
[85] Margaret-Anne Gansner, 'Challenges to Victim Involvement at the International Criminal Court: Shedding Light On The Competing Purposes Of Justice' (Masters Thesis, Dalhousie University 2011).
[86] Preamble, Rome Statute (Emphasis added).

Since its establishment in 2002, the ICC has been able to carry out ten investigations,[87] ten preliminary investigations,[88] five ongoing trials[89]and five closed cases.[90] However, until 2016, ICC had only made four convictions: Lubanga Dyilo in 2012; Germain Katanga in 2014; Ahmad al-Faqi al-Mahdi in 2016 and Bemba in 2016. In 2012, ICC convicted Thomas Lubanga Dyilo, the first ever conviction since the establishment of the Court.[91] On 14th March 2012, the Trial Chamber unanimously found Lubanga guilty and a co-perpetrator of the 'war crimes of conscripting and enlisting children under the age of 15 using them to participate actively in hostilities from 1 September 2002 to 13 August 2003'.[92] Katanga was found guilty in March 2014 of one count of crimes against humanity and four counts of war crimes in DRC and sentenced to 12 years imprisonment. Ahmad al-Faqi al-Mahdi pleaded guilty to war crimes of attacking historic and religious buildings in Timbuktu and was sentenced to nine years imprisonment.[93] Bemba was found guilty of war crimes and crimes against humanity and sentenced to 18 years imprisonment.[94]

These convictions achieved a retributive approach to justice ensuring that those accused of international crimes do not go unpunished. However, retributive justice at ICC has had its own limitations. The question is, what happens when there is no conviction? This is the situation that

[87] ICC, 'Situations under Investigations' <https://www.icc-cpi.int/pages/situations.aspx#> accessed 19 January 2017.
[88] ICC, 'Ongoing Preliminary Investigations' <https://www.icc-cpi.int/pages/preliminary-examinations.aspx> accessed 19 January 2017.
[89]<https://www.icc-cpi.int/Pages/trial.aspx> accessed 19 January 2017.
[90]<https://www.icc-cpi.int/Pages/closed.aspx> accessed 19 January 2017.
[91]Triestiono Mariniello, 'Prosecutor vsThomas Kubanga Dyilo: The First Judgment of the International Criminal Court's Trial Chamber' [2012] International Journal for Human Rights law Review 137.
[92]*Prosecutor* v *Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, ICC- 01/04-01/06-2842, TC, 14 March 2012 https://www.icc-cpi.int/CourtRecords/CR2012_03942.PDF accessed 21 February 2017.
[93]*Prosecutor vsAhmad al-Faqi al-Mahdi* Case No. ICC-01/12-01/15 ICC
[94]Prosecutor v*Jean-Pierre Bemba Gombo* https://www.icc-cpi.int/CourtRecords/CR2016_04476.PDF accessed 21 February 2017

prevailed before the establishment of the ICC which the Rome Statue sought to answer by introducing restorative justice to the victims.

Uganda was the first country to refer a situation to the ICC in 2004 alleging the commission of war crimes and crimes against humanity in Northern Uganda between Lord Resistance Arm and national authorities in Uganda since 1st July 2002.[95] However, since its referral, there has been no trial to punish the perpetrators of the crimes and ensure that retributive justice is realized. This has been caused by the failure of the Ugandan government to arrest the accused persons who remain at large. It was not until 2015 when one of LRA leaders, Dominic Ongwen, surrendered himself to ICC.[96] However ICC intervention was met with hostility and opposition from victims thus hindering the pursuit for retributive justice.[97]

Lack of cooperation from African States to arrest Sudan's president Omar El Bashir suspected to be an indirect co-perpetrator of genocide, war crimes and crimes against humanity in Darfur, raises questions on the role of ICC in maintaining justice.[98] Since ICC issued an arrest warrant against Omar, he still remains at large, yet the situation in Darfur continues to worsen.

[95]Loiuse parrot, 'The Role of International Criminal Court in Uganda: Ensuring that the Pursuit of Justice Does not Come at the Price of Peace' (2006) 11, Australian Journal of Peace Studies 9.
[96] Adam Branch, 'Dominic Ongwen on Trial: The ICC African Dilemma' (2017) International Journal of Transition Justice 1.
[97] John R Bolton, 'The Risks and Weaknesses of the International Criminal Court From America's Perspective' (2001) 64, Journal of law and Contemporary Problems 167.
[98] Gwen P Barnes, 'The International Criminal Court's Ineffective Enforcement Mechanisms: The Indictment of President Omar Al Bashir' (2011) 34 (6), Fordham International Law Journal 1584.

As regards the Kenyan ICC cases, despite the fact that international crimes were committed during the 2007-2008 post-election violence, none of the six accused persons was convicted thereby hindering the retributive approach to justice.[99]

Realizing the weakness of retributive justice and the challenges facing ICC in its investigations and trials, the Rome Statute recognizes restorative justice. The ICC integrates restorative justice through reparations and victims' participation in the proceedings. Article 75 of the Rome Statute provides for reparation of victims of atrocities in the form of restitution, compensation and rehabilitation. While retributive justice at the ICC focuses on justly punishing the perpetrators of international crimes, restorative justice focuses on bringing the offender back to society and restoring the victims to the position they were before the commission of the crime. Some commenters argue that ICC's mandate in both retributive and restorative justice is blurred.[100] Beitzel and Castle argue that:

> "…restorative justice by involving the local community to address the needs of victims and the responsibilities of the offender and the community (1) is better able to respond comprehensively to the justice requirements, (2) is compatible with peace building in war-torn societies, and (3) dissolves the dichotomy often presumed between justice and peace."[101]

Retributive justice ensures that justice prevails when guilt is determined through legal proceedings and punishment meted out for the offence committed. While crimes are a violation

[99] Natalie M Block, 'The ICC and Situation in Kenya: Impact and Analysis of the Kenyatta and Ruto/Sang Cases' (Masters Thesis, University of Washington 2014).
[100] Terry Beitzel and Tammy Castle,'Achieving Justice Through the International Criminal Court in Northern Uganda: Is Indigenous/Restorative Justice a Better Approach?' (2013) 23(1), International Criminal Justice Review 45.
[101] Ibid.

of state law, crime also harms the community and victims. Restorative justice practices are intended to heal at the individual and communal level.[102] It brings together all the parties affected by an incident of wrongdoing to collectively decide how to deal with the aftermath of the incident and its implications for the future.[103] Restorative practices prioritize the need to affirm the moral worth and dignity of all parties involved, victims, perpetrators, and society as a whole.[104] Restorative justice presents the best approach in obtaining victims justice at the ICC. In 2002 ICC established the Trust Fund for Victims under Article 79 of the Statute to ensure adequate reparations through restitution, rehabilitation and compensation. According to Braithwaite, restorative justice is:

> ...a process where all stakeholders affected by an injustice have an opportunity to discuss how they have been affected by the injustice and to decide what should be done to repair the harm. With crime, restorative justice is about the idea that because crime hurts, justice should heal. It follows that conversations with those who have been hurt and with those who have afflicted the harm must be central to the process.

The concept of restorative justice introduced by the ICC is an important milestone in bringing healing to the victims and accomplishing an important aspect of justice that is alien to the world. It is however yet to be seen how well the ICC practices this important aspect of justice.

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[102] Tom M. Antkowiak, 'An Emerging Mandate for International Courts: Victim-Centered Remedies and Restorative Justice' (2011) 47 Stanford Journal of International Law 279.
[103] Carrie Menkel Meadow, 'Restorative Justice: What Is It and Does It Work? (2007) 3, ANN. REV. LAW Soc. SCI 167.
[104] C Villa-Vicencio, 'Transitional Justice, Restoration, and Prosecution, in D Sullivan and L.Tifft (eds.), *Handbook of Restorative Justice: A Global Perspective* (Routledge 2006).

2.4 Conclusion

The idea of establishing an international criminal court was first conceived in the early fifteenth century but gained momentum in the late nineteenth century after the Second World War. A lot of discussions were held by states with a view of getting a solution of ending impunity to the grave atrocities and violation of human rights witnessed all over the world. After several false starts, eventually the Rome Conference of 1998 brokered a deal after the approval of the Rome Statute by majority of states paving way to the establishment of the International Criminal Court in 2002.

The establishment of ICC rejuvenated hope that both victims of war and perpetrators of international crimes would meet international justice. ICC as an international criminal court adopts a retributive approach to justice to ensure that the rule of law prevails and perpetrators of crimes are punished. However the failure of retributive approach to justice to address the interests of victims, led to the adoption of restorative justice through victim reparation and victims' participation in ICC proceedings. ICC has however not fully utilized the provision of restorative justice as the provisions for the same are not express in the Rome Statute. Interpretation of the right to victims' participation and reparation has therefore been problematic as they are not clearly defined in the Rome Statute and as such are left to the discretion of the trial Chamber. Since its establishment, ICC has only handled one reparation case in the Lubanga case which also took long to decide. The Court declined to grant an application for reparation by victims in the Kenyan cases arguing that since there was no conviction, the court could not hold anyone accountable.

CHAPTER THREE

3.0 CHALLENGES FACING ICC IN ITS ROLE IN MAINTAINING JUSTICE

3.1 Introduction

Justice for victims of international crimes has always been advanced as the main reason of establishing the ICC. It is hoped that this will be achieved by punishing those responsible for atrocities deemed to be of international nature. In the second chapter of this study, it is clear that ICC pursues both retributive justice through prosecutions and restorative justice by ensuring victim participation and reparation.[105] Whichever approach the ICC takes, whether retributive or restorative, its mandate to pursue justice stems from the founding Rome Statute. This chapter analyses some of the issues and challenges the ICC is facing in its mandate to pursue justice. The focus here is mainly on two areas namely; retributive justice and restorative justice.

3.2 Challenges ICC is facing

The challenges ICC is facing in pursuing international justice through prosecution of international crimes are clearer now than ever anticipated.[106] Fair play for victims at the ICC has since the establishment of Court been seen to be delivered through prosecution of perpetrators and ensuring that they are accountable. The power to prosecute perpetrators of atrocities emanates from the Rome Statute. The Court can only prosecute that which it has power over, and provide specific remedies to the victims as specified in the Statute. It is apparent that ICC was established to ensure that there is an end to impunity, promote rule of law, democracy and

[105] See Chapter two.
[106] Richard H Steinberg (ed), *Contemporary Issues Facing the International Criminal Court* (Nijhoff Publishers 2016).

international criminal justice. However more than fifteen years later after its establishment, this is yet to be fully realized. This calls for the need to reflect on the challenges the ICC is facing which may have hindered it from fully realizing its purpose. Some of the notable challenges are discussed below.

3.3 Limited Jurisdiction

If ICC has to enhance universal justice it must at the same instance enjoy universal jurisdiction, which apparently is not the case. The ICC jurisdiction is limited in different ways.

First, ICC's powers to prosecute are limited to specific crimes[107]. ICC's jurisdiction is limited to only three types of international crimes, namely; genocide, crimes against humanity and war crimes. Whereas the jurisdiction over genocide, crimes against humanity and war crimes commenced immediately the ICC became operational, this did not apply to the crime of aggression. The Statute had not defined what constituted crime of aggression neither had it set out jurisdictional conditions.[108] It was not until 2010, during the Review Conference of the crime of aggression in Kampala, Uganda that the crime of aggression was defined as:

> "The planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations[109]."

[107] AkuaKuenyehia, 'The International Criminal Court: Challenges and Prospects (Annual Lecture on Human Rights and Global Justice, Center For International Law And Justice; March 21 2011).
[108] ICC, *Handbook on Ratification and Implementation of the Kampala Amendments to the Rome Statute (*Liechtenstein Institute on Self-Determination 2012) <http://crimeofaggression.info/documents/1/handbook.pdf> accessed 2 March 2017.
[109] Article 8 bis Rome Statute.

Whereas the Rome Statute recognizes that ICC has control over the crime of aggression, the condition attached is that such jurisdiction can only be exercised after 1 January 2017 when at least two thirds of State Parties activate the jurisdiction and thirty State Parties ratify or accept the amendments.[110] By June 2016, thirty two States had ratified the amendment with Chile and Netherlands being the last two to do so.[111] However, the Assembly of State Parties has not yet activated the ICC jurisdiction on aggression. So as it stands by March 2017, ICC still has no jurisdiction over the crime of aggression.

The definition of a crime against humanity in the Rome statute is limited. According to the Rome Statute, a crime against humanity which is defined in Article 7.1 must be "part of a widespread or systematic attack directed against any civilian population". This means that an individual crime on its own, or even a number of such crimes, would not fall under the Rome Statute unless they were as a result of a State policy or an organizational policy. This makes it difficult to successfully prosecute at the ICC some serious crimes committed or perpetrated by those in authority as crimes against humanity.

The limitation of crimes which the ICC can exercise jurisdiction over is a hindrance to the achievement of universal justice as other serious international crimes such as piracy and terrorism are left to national courts to deal with. Some countries may lack investigative and institutional framework to deal with such crimes.

Secondly, ICC can only exercise jurisdiction on crimes that occurred after 1 July 2002. This implies that for crimes that occurred before the Court entered into force cannot be pursued by the

[110] RS Clark, *The International Criminal Court and the Crime of Aggression* (Ashgate 2009).
[111] 'Kampala Amendments' http://www.pgaction.org/programmes/ilhr/icc-kampala.html accessed 2 March 2017.

Court however deserving they may be. There are many such cases which have never been prosecuted by the national courts and the victims have never gotten justice.

Thirdly, ICC faces the challenge of exercising jurisdiction over non-State Parties. The ICC has jurisdiction over international crimes under the Statute when those crimes are committed in the territory of a State Party or it's national.[112] The role of the ICC is limited in scenarios where the State in which the crimes have occurred is not a Member State to the ICC.[113] Article 12(3) of the Rome Statute allows non-State Parties to voluntarily submit to the jurisdiction of the ICC in relation to a particular crime. However, in relation to the crime of aggression, non-State Parties are exclusively excluded from the Court's jurisdiction when the crime is committed on its territory or by its nationals.

Since its establishment no non-State Party has voluntarily submitted to ICC jurisdiction in the face of grave violations of international crimes. ICC has only exercised its jurisdiction over non-State Parties through the UNSC referral of situations in Sudan and Libya. The Court has jurisdiction over non-State Party only where the United National Security Council while exercising its mandated in maintaining international peace and security refers a situation to the ICC. In 2005, in adopting Resolution 1593, the UNSC, acting under Chapter VII of the UN Charter referred the Darfur situation in Sudan to the prosecutor.[114] UNSC requested all Member States to fully cooperate with the ICC to ensure the rule of law and justice prevails in Sudan. It is however still debatable, whether UNSC referral of Sudan to ICC was meant to attain justice. The US abstained on the Sudan referral vote on the ground that it did not agree with the resolution to the extent that ICC should exercise jurisdiction against non-State Parties, but rather opted not to

[112] Article 12, Rome Statute.

[113]

[114] UNSC, Resolution 1593 (2005) (Adopted by the Security Council at its 5158th meeting, on 31 March 2005).

oppose the resolution because the US strongly supported justice for the victims of Darfur and those who had committed the atrocities.[115] The US had supported the establishment of an African tribunal to try those who had committed genocide crimes in Darfur as a means of ensuring justice.

Whereas ICC had indicted President Omar Al-Bashir for crimes under its jurisdiction committed in Sudan, and issued an arrest warrant against him, Bashir has however not been arrested and State Parties have refused to fully cooperate with ICC to arrest him. Although the ICC prosecutor has assured that justice in Darfur may be delayed but not forgotten, the failure by the UNSC to support ICC investigation in Darfur is a clear hindrance to the pursuit of justice in Darfur.[116]

UNSC referrals of Sudan and Libya to the ICC were in principle meant to end impunity and ensure justice to the victims of the atrocities. However, whether justice has been achieved through the UNSC referrals of non-State Parties is still debatable. Critics argue that such referrals have hindered the quest for peace in the said countries.

Fourthly, ICC jurisdiction is limited by the principle of admissibility. Whereas the ICC may have jurisdiction over international crimes, it may not exercise it where there is no admissibility. The Rome Statute[117] provides situations where ICC may lack admissibility. First, where the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution, the ICC should not intervene. Secondly, the case has been investigated by a State which has jurisdiction over it and

[115]Corrina Heyder, 'The U.N Security Council's Referral of the Crimes in Darfur to the International Criminal Court in Light of US Opposition to the Court: Implications for the International Criminal Court's Functions and Status' (2006) 24, Berkley Journal of International law 650.

[116]Daniel Sullivan, 'Justice in Darfur Delayed but Far from Forgotten' http://endgenocide.org/justice-in-darfur-delayed-but-far-from-forgotten/ accessed 2 March 2017.

[117]Article 17, The Rome Statute.

the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute. Thirdly, the person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3. Finally, the case is not of sufficient gravity to justify further action by the Court.

In the case of Prosecutor Vs Thomas Lubanga Dyilo *(Lubanga Case*)[118] the Court held that two issues must be evaluated when determining admissibility: first, whether there are national investigations and prosecutions pertaining to the case at hand that might pre-empt ICC jurisdiction, and second, whether the gravity threshold for the ICC is met. This decision is important in that it clarifies the criteria used to determine which cases are sufficiently grave and the "type" of perpetrators who will be targeted by the ICC. Before initiating investigation the Prosecutor must determine the admissibility. Lack of admissibility implies that ICC has no jurisdiction over the case.

Fifthly, the principle of complementarity is a limitation to its jurisdiction. In cases where grave atrocities under the jurisdiction of the ICC have occurred, ICC may lack control where the State has the capacity to prosecute the perpetrators. The principle of complimentary at ICC vests original jurisdiction to national states and the ICC remains a Court of last resort.[119] In its Preamble, the Rome Statute emphasizes that ICC shall be complimentary to national jurisdictions. The principle of complementarity emanated from the principle of sovereign state. The principle of complementarity was a political trade-off made during the negotiations leading up to the adoption of the Rome Statute. This trade-off was necessary to receive the required

[118]*Prosecutor v. Thomas LubangaDyilo*, International Criminal Court (ICC), Case No. ICC-01/04-01/06, Warrant of Arrest, February 10, 2006

[119] Linda E Carter, 'The Principle of Complementarity and the International Criminal Court: The Role of *Ne Bis in Idem'* (2010) 8, Santa Clara Journal of International Law 165.

amount of ratifications for the Statute to enter into force.[120] The reason for including such a principle was to persuade States into giving the Court jurisdiction over certain crimes, while maintaining state sovereignty.[121]

The State Parties have the primary responsibility for prosecution of international crimes. The Court was never intended to impose judicial dominance over working domestic legal systems adhering to the international rule of law, as the ICC does not have the authority to initiate proceedings when domestic proceedings are in accordance with the Rome Statute.[122] The principle of complementarity is on the one hand, founded on the respect for the sovereignty of the State, and on the other hand, a method of making international criminal prosecution more effective.[123] Complementarity is practiced by the ICC in two forms, a passive form and a positive form.[124] The passive form is the traditional form, in which the Court remains passive until the State fails to investigate and prosecute. The positive form of complementarity, adopted and developed by the Prosecutor,[125] is not only passive and reactive, but actively guides and encourages the national States to establish a working framework of legislation, thereby enabling the national States to prosecute international crimes domestically in accordance with the standards of the ICC.

3.4 Perceived bias against African states

Is it coincidental that all of the cases currently before the ICC are from Africa or does it mean that atrocities are being committed only in Africa? Those are pertinent questions being asked by

[120] Godfrey MukhayaMusila, 'Restorative Justice in International Criminal Law: The Rights of Victims in the International Criminal Court' (Doctor Of Philosophy Dissertation, University of Witwatersrand 2009).
[121] Robert Cryer, H. Friman, D. Robinson & E. Wilmshurst, *An Introduction to International Criminal Law and Procedure*, (Cambridge University Press 2010) 24.
[122] Antony Cassese, *International Law* (2nd edn, Oxford University Press 2005).
[123] Cryer (n) 127.
[124] The legal basis for positive complementarity can be found in Art. 93 (10) of the Rome Statute.
[125] Ibid.

critics of the Court. Out of the ten cases under investigations eight involve African countries namely; Central African Republic, Cote' d'lvore, Democratic Republic of Congo, Kenya, Libya, Mali, Sudan and Uganda. In addition Gabon, Guinea, Nigeria and Burundi are also under preliminary investigations. The two situations which have been successfully referred to the Court by the UNSC under chapter VII of the UN Charter namely; Libya and Sudan are also from Africa. There are other deserving situations outside Africa such as Syria, Afghanistan, Burma, Honduras and Palestine but the Court has not acted in those situations.

In 2005 the Court issued warrants of arrest against President Omar Bashir of Sudan a sitting present. This angered many African States who vowed not to cooperate with the ICC to enforce the summons. The subsequent trial of President Uhuru Kenyatta of Kenya and his deputy, William Ruto further strained the AU – ICC relationship. The AU has openly declared its intention of withdrawing support to the Court and has urged its Members to do the samearguing that the Court is unfairly targeting the African continent. The ICC is being perceived as an anti-African court whose aim is to exercise western imperialism.[126]

The referral of the Kenyan Cases to the ICC and subsequent trial of a sitting president generated a lot of discontent against the Court among African leaders. The Court has been attacked consistently as a Western institution that is unnecessarily intruding in Kenya's sovereign space. The African leaders perceive the Court as a neo-colonial tool, and an affront to Kenya's sovereignty and a demonstration of injustice. Majority of the African leaders under the AU hold the view that the Court is unfairly targeting Africans because of their race. President Kagame and Museveni as well as other AU leaders have dismissed the Court as an imperialist court.

[126] Philomena Apiko and FatenAggad, 'The International Criminal Court, Africa and African Union: Which Way Forward?' (Discussion Paper No. 201 of 2016, European Centre for Development and Policy Management).

Due to Kenya's influence in African politics, an Extraordinary Session of the Assembly of the AU was convened in October 2013 before President Kenyatta and his Deputy resumed their ICC trials. The AU resolved not to cooperate withthe ICC and urged the Kenyan leaders not to attend the ICC trial. The AU also resolved 'to undertake consultations with UNSC, concerning AU-ICC relationships, including the deferral of the Kenyan and Sudanese cases.[127] The AU Assembly argued that 'no serving AU head of state should appear before any international Court to safeguard stability and integrity of Member States, and therefore, the trials of Kenyan leaders could undermine the country's sovereignty, stability, and peace'. In early 2014 the AU expressed 'its deep disappointment that the deferral of Kenyan cases to the UNSC was unsuccessful' and decided that 'African ASP members reserved the right to make further decisions to safeguard peace, security and stability, as well as the dignity, sovereignty and integrity of the continent'. The effects of such policy positions werenoticeable in president Omar al-Bashir's visits to Kenya, Malawi, South Sudan, Nigeria, and South Africa, and the lack of political will to enforce his ICC arrest warrant by those countries he visited. The AU also reacted to the situation by recalling the idea of extending the African Court of Justice and Human Rights' jurisdiction to try international crimes.

Although the AU called for non-cooperation, President Kenyatta and his Deputy Ruto continued to attend ICC trials but due to the heat generated the AU, the ICC exempted them from attending all Court sessions.Kenya initially pushed for immunity and managed to successfully lobby the ASP to amend the rulesof procedure for that concession. Despite Kenya's efforts to comply with the obligations of the Rome Statute, the OTP consistently complained about lack of statecooperation in turning over crucial evidence, and witness intimidation and interference in

[127]Geoffrey Lugano 'Changing Faces' on Acceptance of International Criminal Intervention in Kenya.AU 2013.

cases.Consequently, the OTP terminated Kenyatta's case, citingthe reasonsof non-cooperation by Kenyan authorities for not building a strong case. Similar concerns were raised in the second case (involving the Deputy President), thus prompting the OTP to request the Court to use recanted evidence which was partof the amendments to the rules of evidence and procedure.[128] The ICC judges finally passed a verdict of 'no case to answer' motion on Sang and Ruto's case deeming the case a mistrial and cited political interference and witness tampering as the reason for the failure of the case. Notwithstanding the fact that the Kenyan cases were all finally terminated in favor of the suspects, the cases left a big tent in the credibility of the Court which cannot be rectified in near future. The Kenyan cases almost led to the collapse of the ICC as the African continent is the biggest stakeholder of the Court and threatened mass walkout would have left the Court with no work in future.

3.5 Victims Participation and Reparation in Attaining Victims' Justice at the ICC

The ICC unlike the earlier international tribunals introduced the concept of victims' participation and reparation as a form of restorative justice. This was seen as a major step towards enhancing victims' justice at the Court. The supporters of restorative justice argue that victims can make a meaningful contribution towards the truth finding process and can add to the evidence led by the prosecution.[129] The issue of victims' participation at the ICC has been addressed in a number of cases raising challenges.[130]

[128]Amendments of Rule 68 of Rome Statute Rules of Evidence and Procedure.
[129]Christine Van den Wyngaert, 'Victims Before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge' (2012) 44 CASE W RES J INT'L L 476.
[130][130]*Prosecutor v BoscoNtaganda (Ntaganda Case),* 'Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings', ICC-01/04-02/06-211, 15 January 2014; *Prosecutor v. Thomas LubangaDyilo (Lubanga Case)*, 'Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007', ICC-01/04-556,19

This mandate of the ICC to foster restorative justice to victims of international crimes has faced challenges that were never anticipated. Moffet argues that even though the ICC provides for the recognition, protection, participation and reparation of victims to enhance victims' justice, it remains merely symbolic.[131] He attributes this to the criminal nature and structural limitations of ICC. He goes ahead to provide that victims are integral in the work of the ICC as they reinforce its mandate to end impunity through transparency and accountability.[132] However, the limit and capacity of the ICC to prosecute certain selected crimes is a hindrance to attaining justice for victims. Moffet provides that instead of focusing on what ICC can achieve to ensure justice for victims and the challenges facing the institution, there is need to move from rhetoric expectations and enhance domestic justice through cooperation with national State and regional bodies such as the African Court of Justice and Human Rights (ACJHR).

Haslam on the other hand argues that the scope of victims' participation at the ICC is not codified within the Statute leaving each chamber with unfettered discretion to decide the manner and modalities.[133] In the *Case of Prosecutor vs Katanga and Chui*, Judge Steiner held that Article 68 (3) of the Rome Statute does not pre-establish a set of procedural rights (i.e. modalities of participations) that those granted the procedural status of victim at the pre-trial stage of a case may exercise.[134] Victims' participation at the ICC is permitted at every appropriate stage of the proceedings where victims' personal interests are affected and where

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December 2008,; *Prosecutor v. Jean-Pierre Bemba Gombo (Bemba Case)*, 'The Fourth Decision on Victims' Participation', ICC-01/05-01/08-320, Pre-Trial Chamber II 12 December 2008.

[131] Luke Moffet, 'Justice Victims Before the International Criminal Court (Reprint edition, Routledge 2015).

[132]Luke Moffet, Elaborating Justice for Victims at the International Criminal Court*'* (2015) 13, Journal of International Criminal Justice 281.

[133] Emily Haslam, 'Victim Participation at the International Criminal Court: A Triumph of Hope over Experience?' in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (Hart Publishing: 2004) 315.

[134]*The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui,* 'Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case', ICC-01/04-01/07-474, para 45(iv) (Pre-Trial Chamber I, 13 May 2008).

victim participation is appropriate and not prejudicial to a fair trial.[135] However, it is entirely upon the discretion of the relevant chamber to determine the stages which victims can participate but balance the same with the accused's rights and fair trial. It is also not mandatory.

Another challenge is that the process of victim participation at the ICC is cumbersome and involves a lot of procedures which have a negative impact on the length of the case and the rights of accused person.[136] These delays are occasioned by the individualized approach adopted under Article 68 of the Rome Statute yet atrocities committed involve a large number of victims.[137] In the case of *Prosecutor v Bosco Ntaganda*[138] Pena argues that some of the problems were as a result of the length of the application form which was initially seventeen pages long and was shortened to seven page form.[139] The Court is devising new mechanisms to lessen the length of victims' application at the ICC by adopting collective application. In the *Gbagbo* case, Pre-Trial Chamber I permitted victims to apply collectively by giving consent to a third person to make a single joint application and to serve as the group's contact point with VPRS.[140] However collective application of victims in the *Kenyan Situation* was objected to on the ground that it could jeopardize the rights of victims.[141]Moving away from the procedures adopted in the

[135]Article 68, Rome Statute.
[136] Luke Moffet, 'Realizing Justice for Victims Before the International Criminal Court' International Crime Data Base Brief 6, 2014
[137] Ibid.
[138]*Prosecutor v Bosco Ntaganda,* 'Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings', ICC-01/04-02/06-211, 15 January 2014.

[139] Mariana Pena, 'Victim Participation Decision in the Ntaganda Case: How Does the System Compare to Previous Experiences? (International Justice Monitor Commentary 17 February 2015.
[140] ICC-02/11-01/11-86, Pre-Trial Chamber I, April 5, 2012.
[141]Victims Rights Working Group , Interview with Judge Elizabeth Odio Benito, former Judge of the International Criminal Court from 11 March 2003 to 31 August 2012 in the *Lubanga Case.*

Kenyan Cases, the Pre-Trial Chamber in the *Ntaganda case* has introduced a simplified one-page application form and ordered that applications be transmitted to the chamber and other parties.[142]

Reparation was recognized as a means of restoring victims to the position they were before atrocities occurred as a means of furthering restorative justice. It confers a responsibility to the Court to afford justice to the victims who have suffered harm occasioned by those convicted by the Court. Article 75 of the Rome Statute recognizes that the Court may on its own initiative or through victims' application order an award of reparation to be paid by the accused person or the Victims Trust Fund. In October 2016, in the *Lubanga Case*, the Trial Chamber II approved and gave Trust Fund for Victims the go ahead to implement the reparation plan.[143] However, this decision came after a long wait. Lubanga's trial begun in 2006 and he was convicted in 2012. The need for ICC to encourage domestic reparation remains paramount. Even though victims in *Lubanga Case* celebrate the decision of the ICC for reparation, the process took such a long time and they had to wait for a long time for justice to prevail.

After the collapse of the Kenyan Cases at the ICC, the next natural question to be tackled was reparation to the victims of atrocities committed during the 2007 - 2008 post-election violence. The ICC declined to hear the application for Kenyan victims requesting the Court to order the government of Kenya or the Trust Fund for Victims for reparation.[144] The Court argued that it had no jurisdiction since the cases had been closed without any conviction. The Kenyan cases open the avenue for re-evaluating how victims of atrocities where no conviction has occurred can have justice. The Court adopted a restrictive approach and argued that even though this was

[142]*Ntaganda Case*, 'Decision on Victims' Participation in Trial Proceedings' Icc-01/04-02/06 6 February 2015.
[143] T*he Prosecutor v. Thomas Lubanga Dyilo* Situation in the Democratic Republic of the Congo ICC-01/04-01/06-3198
[144]*The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* Situation: Situation in the Republic of Kenya ICC-01/09-01/11-2038, 01 July 2016 | Trial Chamber V(a) | Decision

dissatisfactory to the victims, 'the criminal court can only address compensation or harm suffered as a result of crimes if such crimes have been found to have taken place and the person standing trial for his or her participation in those crimes is found guilty'.[145]

3.6 Enforcement and Compliance to ICC Decisions (cooperation)

In order for ICC to enforce its decision aimed at enhancing international criminal justice it requires cooperation from both Member States and non-Member States. Recognizing the key role that the ICC plays in maintaining peace and protection of human rights, the Rome Statute under Part 9, requires both the Member States and Non-Member States to cooperate fully with the Court in its investigations and prosecutions. Oosterveld and others argue that, State cooperation is a key element and tantamount to the mandate of the ICC because the ICC has no police force, military or territory of its own.[146] It has to rely on the cooperation of States to investigate, arrest, collect evidence, protection of key witness and sentence individuals who commit international crimes. Article 86 of the Rome Statute requires State Parties in accordance with the Statute to fully cooperate with the Court in its investigation and prosecution of crimes within its jurisdiction. The duty to cooperate with the ICC is two-fold: the general commitment to cooperate through investigation, arrests, surrenders;[147] and the obligation to ensure that cooperation provisions under the Statute are domesticated under their national laws.[148]

State cooperation though provided for in the Rome Statute has been a complex issue as it has been proved that States are not willing to cooperate with the Court due to various considerations. It has therefore been that cooperation should be forced on States. Judge Antonio Cassese has

[145]Ibid.
[146]Valerie Oosterveld, Mike Perry and John McManus, 'The Cooperation of States with the International Criminal Court' (2001) 25 (3), Fordham International Law Journal 767.
[147]Article 87, Rome Statute 2002.
[148]Article 88, Rome Statute 2002.

stated that "the provisions on state cooperation with the Court should be clarified and strengthened so as to leave no loopholes available to those States which are unwilling to allow the Court to exercise criminal jurisdiction over persons under their control."[149]

However State cooperation with the ICC has remained the biggest blow to the mandate of the Court. It was anticipated that as the ICC continued to carry out its mandate of ending impunity, its legitimacy would be enhanced and non-Member States would become members and appreciate the benefits of having an international permanent criminal court.[150] However, this has not been the case and the last five years have witnessed several intentions of State withdrawal from the Court. Russia withdrew its signature from the ICC Statute in November 2016, joining Israel, Sudan and US as countries that signed the Statute but never ratified the same.[151] Russia argued that ICC had failed to promote justice and rather had become a court of enhancing western imperialism.[152] ICC had on November 2014 issued its findings that the annexation of Crimea to Russia had resulted into an international armed conflict under its jurisdiction.[153]

So far Kenya, South Africa, Burundi, Gambia, Namibia, and Uganda have called for a collective withdrawal from the ICC following a long process of negotiations spearheaded by the AU. On 12th October 2016, Burundian Parliament voted for its withdrawal. In an instrument of withdrawal to the ICC, South Africa argued that its obligation under the Rome Statute to cooperate with the Court in arresting and surrendering a head of State conflicts with its

[149] A.Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections', EJIL 1999, P1
[150] Kuenyehia
[151]
[152] Rebecca Hersher, 'Russia Withdraws Support for International Criminal Court' http://www.npr.org/sections/thetwo-way/2016/11/16/502296321/russia-withdraws-support-for-international-criminal-court accessed 2 March 2017.
[153] Paul Roderick Gregory, 'International Criminal Court: Russia's Invasion of Ukraine is a 'Crime' not Civil War' https://www.forbes.com/sites/paulroderickgregory/2016/11/20/international-criminal-court-russias-invasion-of-ukraine-is-a-crime-not-a-civil-war/#62065ea57ddb accessed 2 March 2017.

obligations under customary international law leading to its withdrawal.[154] South Africa went ahead to state that it is still committed to protect human rights and fight against impunity as evidenced by apartheid struggle. The withdrawal notice stated in part as follows:-

> "There are perceptions of inequality and unfairness in the practice of the ICC that do not only emanate from the Court's relationship with the Security Council, but also by the perceived focus of the ICC on African States, notwithstanding clear evidence of violations by others."[155]

The wave of withdrawal from the ICC by African States is saddening as it has a negative impact on the protection of human rights, justice, rule of law and fight against impunity. Whereas ICC is a court of last resort, the African human rights system is still weak. Africa still experiences intrastate and interstate armed conflicts that have led to serious human rights violations. It is a home of international human rights violations and atrocities. Weak judicial system, lack of political will to try such atrocities, corruption, poor governance mechanisms and injustice make perpetrators who are usually close to leadership unaccountable for their deeds. In a region where armed conflicts are rampant leading to human rights violations, the need to revisit the African-ICC relationship is paramount for the protection of fundamental freedom and human rights.

The threat for mass withdrawal is a major threat to the legitimacy of the ICC and its pursuit for justice. As Member States withdraw from the ICC, the Court shall automatically lack jurisdiction over the said States unless the UNSC refers the matter to the Court. However, this might not be the case as currently the ICC does not enjoy much support from the UNSC.

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[154] 'South Africa Withdrawal from the ICC' http://www.dirco.gov.za/milan_italy/newsandevents/rome_statute.pdf accessed 18 January 2017.

[155] Available at https://www.justsecurity.org/wp-content/uploads/2016/10/South-Africa-Instrument-of-Withdrawal-International-Criminal-Court.jpg accessed 18 January 2017.

3.7 Lack of adequate support from Permanent Members of UNSC

One of the major setbacks of the ICC is lack of participation by three Permanent Members of the UN Security Council namely China, USA and Russia as they are not State Parties to Rome Statute. China has not signed the Rome Statute, neither has the United States nor Russia ratified it. The absence of United States of America seen as a super power State is a major blow to the Court's legitimacy. The United States has adopted policies which seem to undermine the Court's effectiveness. The USA has signed the Bilateral Immunity Agreements (BIA) with other States which grant the US nationals immunity from prosecutions. States that refused to sign the agreement were "punished"[156] through cuts made in the US military aid and additional economic support funds. This lack of participation of the US and other powerful States in ICC certainly hinders the ability to enforce the orders and laws instituted by the Court. The U.S. non-active participation in the ICC affairs especially hinders any palpable advancement of the Court.

While the US deploys many troops overseas each year, full participation of the US and the other Permanent Members of the Security Council is essential to the survival and effectiveness of the Court. If any of the three Veto power States considers an indictment contradictory to the agenda of their nation, they can veto the indictment and allow the crimes and the perpetrator to go on unpunished. The US has not only failed to sign or be a Party to the Rome Statute, but has also established a confrontational approach to the Statute especially under the Bush presidency. The US signed over fifty Bilateral Immunity Agreements thereby undermining the justice and integrity of the Court. Though the US appeared to be more supportive to the Court during the Obama regime it has however not gone as far as signing the Rome Statute, or giving its full backing to the Court.

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

On the other hand Russia recently threatened to completely deny the Court any support over the Crimea investigations. China has been one of the Permanent Members frequently exercising its veto power over UNSC resolution against the mandate of the Court. The overall lack of Security Council support still exists and urgently needs to be resolved in order for the ICC to reach its full potential.[157]

3.8 The Politics of International Criminal justice

International criminal justice has been considered as a weakling by human rights advocates who argue that the most powerful States use the ICC for their political motives which go against the principles of international criminal justice. Power politics impact negatively on the functioning of the Court.

The big five are capable of carrying out an ICC arrest warrant and also delay investigations or prosecutions through the UNSC subject to the conditions in article 16 of the Rome Statute. For example the UNSC used the ICC as a diplomatic tool to target the Darfur crisis as opposed to using alternative means which would have been fatal to their relations.

Some State leaders use the Court as a political instrument to act against rebels in order to reinforce their regime and authority which often leads to an unjust international legal system as the Court tends only focus on one side.[158]

[157]Donovan Donald *03.23.12 "International Criminal Court: Successes and Failures"*

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

The USA's invasion of Iraq and Libya could attest to the fact that USA regards herself as the superior power hiding behind the cocoon of 'humanitarian' intervention to protect civilians. The US invasion allegations were poorly received by the Office of The Prosecutor (OTP) whose response was that the chain of events happened on the said territories of which Iraq was not a State Party (remember Sudan and Libya are not State Parties too but OTP was quick to intervene) and had not lodged a declaration of acceptance of jurisdiction under article 12(3). The OTP further added that the coalition force had no intention to destroy as defined in the genocide norms and that they didn't meet the criteria set out in article 8(1).

The USA being a Permanent Member of the Security Council is amongst the countries which hold the veto power. In that respect the US is untouchable in all respects. The US supported resolution 1970 which referred the situation in Libya to the Court even though Libya is not a State Party. The indictment and bombing of the ex -Libyan leader, Muammar Al Gaddafi during the NATO war raised questions because the Libya situation resembled that of Syria, Yemen and Bahrain where similar acts of war crimes and crimes against humanity had been committed yet there was no intervention by the UNSC in those countries.

In the case of Syria, the people of Syria wished the ICC could help them get justice even though it's not a State Party to the Rome Statute but the request to refer the Syrian case to the ICC was vetoed by Russia while China abstained.

According to Jacqueline Geis and Alex Mundt in their book: *"The Impact of Timing of International Criminal Indictments on Peace Processes and Humanitarian Action*", they noted that *"although the ICC was established as an impartial arbiter of international justice, both the timing and nature of its indictments issued to date suggest that the intervention of the ICC in situations of ongoing conflict is influenced by broader external factors*"[159].

The decisions made by the Security Council are based on political consideration in as much as other factors may be considered. It is therefore hypocritical for UNSC countries who are not State Parties to vote for the indictment of citizens of other countries suspected to have committed international crimes while shielding their own citizens who have equally committed atrocities elsewhere (for instance the invasion of Iraq by the USA and allied forces) and are left scot-free.

The political games of the UN and the lack of support from powerhouses like the U.S., Russia and China render the ICC ineffective as a non-partisan arbiter in trying serious crimes. Without genuine political goodwill from both the State and non-state Parties ICC cannot succeed.

3.9 Veto power and the Court

Article 27 of the UN Charter gives veto power to the five Permanent Members of the Security Council. Clause 3 of Article 27 states that "*Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting*[160]".

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

[160]Article 27 United Nations Charter

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

In the Syrian crisis, Russia and China vetoed the UN Security Council resolution to block the International Criminal Court from investigating possible war crimes in Syria. This prompted angry reaction from human rights activists and supporters of referral of the Syrian situation to the UNSC who said the two countries should be ashamed of themselves.[161] This was the fourth time the two countries used their veto power as Permanent Council Members to deflect action against the government of President Bashar Assad.

As a result of the veto power exercised by China and Russia the UNSC resolution to refer the Syrian situation to the ICC failed and therefore the Court can do nothing since Syria is not a State Party and can only intervene through the UNSC resolution conferring power to the Court which did not happen.The two countries which vetoed the decision should be held responsible for whatever outcome befalls the Syrian people. The Court is very ready to do its part but the roadblock occasioned by the veto has stalled the process.

[161]The guardian May 22, 2014

The Syrian crisis would have been referred to the ICC for investigation of possible war crimes and crimes against humanity, without specifically targeting either the government or the opposition had the decision sailed through. China's reasoning in opposing the referral was that a referral to the ICC won't lead to an early resumption of peace talks.

The US was upset with the veto decision but could do nothing about it. Syria not being a State Party to the Rome Statute only had the Security Council for referral. The U.S.A, Britain and France vowed to keep pursing justice despite this unfortunate defeat.

Another example of the threat of veto power is that of Kim Jong the Korean President. He has been blamed for systematic torture, rape, deliberate starvation and other human rights abuses. These atrocities have been documented in the United Nations report. However his prosecution will most likely be vetoed by China, North Korea's closest political ally and trade partner. A recommendation that the UNGA refers the report to the ICC threatens to put China in an awkward diplomatic position as one of the five Permanent Members of the Security Council as China has vowed to exercise its right of veto power**.**

3.10 Weaknesses of the Rome Statute in investigative and prosecution processes

Some of the failures of the Court stem from the inadequacies inherent in the Rome Statute. The Rules of procedure on collection of evidence and conduct of pre-trial proceedings are also a hindrance to the Court's success. For instance the pre-trial proceedings leading to admissibility of cases take long. A lot of time and resources are spent at the pre-trial stage before a case can be confirmed for hearing yet the same issues raised at the pre-trial can be determined during the hearing.

The investigative processes and evidence gathering methods are also weak and are partially to blame for some of the failures of the Court. The Office of the prosecutor tends to heavily rely on investigations carried out by other agencies and sometimes evidence gathered from such investigations may not be credible enough to sustain a conviction. The recent amendment of the rules of procedure to allow the Prosecutor to use recanted evidence has not helped much as the rule was instantly opposed during the trial of Ruto and Sang case (the Kenyan case).

3.11 Conclusion

The key challenges ICC is facing emanate from the Rome Statute itself. The major challenge is its jurisdiction which is limited by various issues such the crime committed, the time, admissibility and complementarity. The second challenge emanates from its efforts to enhance restorative justice through victims' participation and reparation. Lack of State cooperation, political will and lack of support from key players in the UNSC to enforce its decisions including the veto power have limited the efficacy of the Court. The perceived biasness against Africa coupled with the threat of mass withdrawal by African States from the ICC is also a big blow to the mandate of the ICC as Africa forms the biggest regional block of the Rome Statute.

CHAPTER FOUR

4.0 JUSTICE BEYOND ICC: MAINTANING JUSTICE AT THE NATIONAL LEVEL

4.1 Introduction

In chapter three the challenges facing ICC have been discussed in detail. The challenges include limited jurisdiction in material crimes, admissibility, complementarity and perceived biasness of the Court against African States. The second challenge is the enforcement of its decisions and investigations where ICC exclusively relies on State cooperation. Other challenges include; the issue of restorative justice through reparation and victims' participation, lack of adequate support from Permanent Members of UNSC, international politics, Veto power of the UNSC and the inherent weaknesses of the Rome Statute. In order to deal with these challenges and promote justice, this chapter analyses the role of national Courts in enhancing justice where serious crimes have occurred and the responsibilities of the International Criminal Court is limited. Critically this chapter provides an alternative to the ICC so that international justice for victims and perpetrators are achieved in instances where ICC lacks jurisdiction.

4.2 International Crimes and Justice at the National Level

Due to the limitation facing ICC in maintaining universal justice, the need to build national justice system has been recognized as the most important and perhaps the best alternative to the ICC's role in achieving universal justice.[162] Kaye[163] postulates that international courts face various challenges in administering criminal justice. Some of those challenges can be addressed

[162]Linda E Carter, Mark Steven Ellis and Charles C Jalloh, *The International Criminal Court in an Effective Global Justice System* (Edward Elgar Publishing 2016).
[163] Kaye David; Justice Beyond the Hague: Supporting the Prosecution of International Crimes at National Courts' (US Council for Foreign Affairs Special Report No 61, 2011).

by reinforcing national criminal jurisdiction with a view of building their capacity to try majority of the perpetrators of international crimes. In instances where the national systems lack the capacity to promote justice after atrocities, the desire for ICC and other international organizations to provide assistance through capacity building has been recognized as fundamental.[164] International courts are usually away from the scene of crimes. For instance ICC has its permanent office at Hague, very far from the scene of crimes especially in Africa. International courts and tribunals must focus on interfacing effectively with national jurisdictions through coordination with national judicial system and appreciation of other traditional conflict resolutions mechanisms.[165]

Faced with a myriad of challenges such as limited jurisdiction, non-cooperation from Member States and inadequate victim participation and reparation necessitates alternative methods to reinforce the work of the ICC. The mandate of the ICC in fostering justice must not be undermined because it is vital for the existence of humanity. The fact that there is a high occurrence of serious crimes which are likely to continue occurring cannot be wished away. In most cases as the atrocities occur ICC lacks jurisdiction oversome of thesituations and in some cases where it has jurisdiction it has faced resistance and non-cooperation from Member States. The threat of mass withdrawals from the ICC witnessed in the recent times is a clear indication that ICC has a lot of work to do in entrenching its legitimacy and this calls for ICC to play an alternative role of providing support to national systems. For instance South Africa which has been one of the greatest supporters of ICC has refused to arrest President Al Bashir of Sudan and later many African states have made their respective applications to the ICC for withdrawal.

[164]Ibid
[165]Ibid.

The unabated war in Syria is a practical example of the challenges facing the ICC in fostering justice even when atrocities committed are clear. The war in Syria continues to be the most complicated war that has seen the loss of lives, destruction of property and displacement of people over a considerable length of time without sufficient international community interventions. Notwithstanding the atrocities committed, ICC with its limited jurisdictionhas no power to investigate the rampant crimes against humanity committed in Syria.[166] The war in Syria was sparked in March 2011 when the government reacted violently against peaceful demonstrators. Despite the fact that the world and UN have categorized the Syrian conflict as crimes against humanity, the Court is yet to invoke jurisdiction as the UNSC has not succeeded to refer the situation to the Court. ICC enjoys territorial jurisdiction only over Member States an in the case of non-Member State the Court can only invoke jurisdiction upon UNSC referral or where the Non-Member State recognizes ICC jurisdiction through a declaration voluntarily submitting to the jurisdiction of the Court.

The possibility of ICC prosecuting perpetrators of international crimes in Syria are limited to the extent that Syria is not a Member of the International Criminal Court and the only avenue ICC can invoke jurisdiction is through the UNSC referral.[167] The efforts of UNSC to refer the Syrian situation to the ICC have also faced repulsion from Members of the UNSC. In particular Russia and China vetoed against the referral due to political considerations.[168] Even though ICC prosecutor Fatou Bensouda has argued that the Court could invoke jurisdiction over perpetrators who are nationals of the Member States of ICC, the prosecutor is not in a position to warrant the

[166] Mark Kersten, 'Calls for Prosecuting War Crimes in Syria are Growing: Is International Justice Possible?' https://www.washingtonpost.com/news/monkey-cage/wp/2016/10/14/calls-for-prosecuting-war-crimes-in-syria-are-growing-is-international-justice-possible/?utm_term=.b54028dbaa87 accessed 6 March 2017.
[167] Kirsten Ainley, 'The Responsibility to Protect and the International Criminal Court: Countervailing Crisis'(2015) 91, Journal of International Affairs 37.
[168] Amanda Kramer, 'Deconstructing the Security Council's Failure to Refer the Conflict in Syria to International Criminal Court'

Courts intervention.[169] The Situation in Syria is a clear indication of challenges facing the ICC in enhancing justice for victims and bringing perpetrators of crimes to justice.

In Burundi, violence erupted when President Pierre Nkurunziza declared that he will run for a third term leading to loss of lives and property. When the ICC indicated that it would initiate investigation into the matter, Burundi threatened to withdraw from ICC.[170] This undermines justice for the victims of atrocities committed in Burundi. In Kenya, the failure of the ICC to convict any of the accused persons before ICC left a lot of questions unanswered on whether justice would ever prevail for the victims. ICC dropped the Kenyan cases due to lack of cooperation from the Kenyan government and witness interference.[171] The only avenue left for Kenyan victims to seek justice was through reparation either by the ICC or Kenyan Courts but this also failed to materialize when the Kenyan victims made an application before the Court for reparation and the Court rejected the application on grounds that it lacked jurisdiction over the matter as none of the suspects indicted had been convicted.

In Sudan, although the UN referred the case to the ICC which later issued a warrant arrest against President Al Bashir, he has not been arrestedas at the end of the year 2016. This implies that the victims of Darfur are still waiting for justice to through the prosecution of Al Bashir which is a very remote possibility in the near future. African nations hostility towards the ICC begun in 2009 when Omar Al-Bashir was issued with an arrest warrant, which created discontent among African States.[172] In response the African Union, made a decision urging its members

[169] Marta Bitosorli, *The Syrian Situation: International Humanitarian Law Violations and Call for Justice* (ALMASARD 2015),

[170] John Aglionby, 'Burundi Becomes First Nation to Quit International Criminal Court' https://www.ft.com/content/ce408588-95bf-11e6-a1dc-bdf38d484582 accessed 6 march 2017.

[171] KPTJ, 'All Bark no Bite?: State Cooperation and International Criminal Court' (KPTJ 2014).

[172] Gwen P Barnes, 'The International Criminal Court's Ineffective Enforcement Mechanisms: The Indictment of President Omar Al Bashir' (2011) 34 (6), Fordham International Law Journal 1584.

through a communiqué that "the AU Member States shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El Bashir of The Sudan"[173] and requested Member States of the AU not to cooperate with the ICC.[174] Since then, the AU-ICC relationship has remained precarious with the AU arguing that sitting presidents enjoy immunity under international customary law.[175] The competing obligations under the AU and ICC, which on one hand the AU requires non-cooperation from African States with the ICC and on the other hand their obligation with the Court under the Rome Statute, puts the Member States in a dilemma.[176]

It is clear from these scenarios that despite ICC's mandate over international crimes as stipulated in the Rome Statute, it may not be able to enhance justice due to jurisdictional limitations imposed on it by the Rome Statute itself. The issue of non-State cooperation and other external factors such as lack of political will hinder the Court from fulfilling its mandate of ending impunity. Unlike earlier tribunals such as ICTY and ICTR which had primacy over national courts, the ICC has no primacy jurisdiction over national courts. The Court can only invoke jurisdiction where a Court is not willing to prosecute or lacks the capacity to prosecute over crimes under the Courts jurisdiction. Seils,[177] a human rights activist, in his book argues that because ICC jurisdiction is limited to that of national courts, enhancing national judicial system to enhance justice over international crimes is essential.

[173] ibid.
[174] African Union, Assembly/AU/Dec.245 (XIII) Rev.1),
[175] Elise Keppler, 'Managing Setbacks for the International Criminal Court in Africa' 2011, Journal of African Law 1.
[176] Phoebe Oyugi, 'Cooperation Disputes between African States Parties to the Rome Statute and the International Criminal Court: Is there an End Anywhere?" (2014) 2, Speculum Juris 121.
[177] Paul Seils, *Handbook on Complementarity: An Introduction to the Role of the National Courts and the ICC in Prosecuting International Crimes* (International Centre for Transnational Justice, ICTJ

Given the limitations of the ICC, the need to build justice at the national and regional level remains paramount.[178] Kaye[179] argues that due to limitations apparent at the ICC, there is need for the Court to strengthen national justice system. There are several benefits that have been associated with establishing and strengthening national judicial systems to try perpetrators of international crimes and provide restorative justice to victims.The World Bankin its report advocates for national justice level system to try perpetrators of atrocities to enhance legitimate institutions of governance.[180] It enhances awareness on the role of the ICC amongst the population by educating the people on the international crimes. Teitel argues that reconciliation is fostered by promoting transitional justice.[181] Expertise at the national level on international criminal justice system is enhanced and jurisprudence is developed as countries learn from ICC, international tribunals and lessons from other countries. Olowale argues that the prosecution of some serious crimes in Africa by the national judicial system is hindered by lack of political will hencethe main reason why ICC remains the best alternative.[182] However, in order to address this challenge he proposes that ICC should support national judicial systems in Africa if it has to enhance justice for the victims and perpetrators of the crimes.

Perpetrators of international crimes at national level are likely to evade ICC prosecution because ICC focuses on senior officials with the highest responsibility.[183] In order to fill the impunity gap, in such circumstances the role of national jurisdiction in prosecuting the majority of

[178] M CherifBassiouni, 'Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal' (2005) 38 (1), Cornell International Law Journal 1.
[179] Ibid
[180]World Bank, *World Bank Development Report* (World Bank 2011) http://siteresources.worldbank.org/INTWDRS/Resources/WDR2011_Full_Text.pdf accessed 10 March 2017.
[181]RutiTeitel, *Transitional Justice* (Oxford University Press 2000).
[182] Ibid.
[183]Bassiouni

perpetrators whom the ICC may not prosecute is paramount.[184] In recognizing the need for post-conflict justice, Iraq established the Iraq Special Tribunal to try crimes against humanity in 2003.[185] After the post-election violence that led to massive loss of lives in Kenya, six Kenyans were indicted to the ICC to face trial. However, a majority of the perpetrators were to be prosecuted by the national judicial system.

Lack of cooperation from State Parties is a big challenge that must be addressed by the ICC. The duty to cooperate with the ICC is two-fold: the general commitment to cooperate through investigation, arrests, surrenders;[186] and the obligation to ensure that cooperation provisions under the Statute are domesticated under their national laws.[187]

The principle of complementarity promotes efficiency as ICC cannot deal with all crimes committed at national level. So far since the establishment of ICC various countries have established national judicial system to try perpetrators of serious crimes.[188] These countries include Kenya, Germany, Bosnia, Uganda, Sierra Leone and Cambodia amongst others. Despite the challenges facing the ICC the Court has triggered national investigations, strengthening of institutional framework and capacity building in variouscountries such as Kenya, Bosniaand Germany amongst others to try serious crimes against humanity.

[184] Trust Africa, *Domestic Prosecution of International Crimes: Lessons for Kenya* (KPTJ 2015).
[185] Douglas J Sylvester, 'The Lessons of Nuremberg and the Trial of Sadaam Hussein' in John T Perry (ed), *Evil, Law and the State Perspectives on State Powers and Violence* (New York 2006).
[186]Article 87, Rome Statute 2002.
[187]Article 88, Rome Statute 2002.
[188]LawaalOlawale, *The International Criminal Court and the National Judicial System in African States: Analysis of the Failsafe Judicial System* (Lagos University 2013).

There are three ways in which countries can enhance justice for victims of atrocities at national level. First is to establish credible national judicial processes. Second is to establish special judicial chambers. Third, is to establish prosecutorial posts to specialize in atrocities[189].

Kenya enacted the International Crimes Act in 2008 (Act No. 16 of 2008) which took effect on January 1 2009. The Act was enacted to deal with international crimes and to enable the country co-operate with ICC. The Judiciary established the International and Organized Crimes Division of the High Court which has jurisdiction over international crimes under the Rome Statute and the Kenyan International Crimes Act.

The Ugandan International Crimes Division was established following the war in Northern Uganda and so far it has tried one case. The Special Court of Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, the War Crimes Chamber of Bosnia-Herzegovina are some of the national processes put in place to try international crimes[190].

National process also faces political challenges that may affect their legitimacy.[191] Kaye summarizes the challenges as:

> "Many governments lack the resources required for all the facets of legitimate justice: fair and humane policing, investigations, and witness protection programs; independent judges of character and probity; prosecutors making choices widely seen as lawful and just; defense counsel capable of serving their clients' best interests; outreach and education and the broad public buy-in that comes with them; and strong governmental support."

[189] ibid.
[190] ibid.
[191] Kaye

In order to enhance justice, reconciliation and peace, countries which have faced atrocities have made use of the traditional justice system to make up for the ICC limitations. For example in Rwanda following the genocide more than 120,000 people were arrested to face prosecution.[192] Rwanda blended both the restorative justice based on local traditional conflict mechanisms with the modern punitive/retributive justice mechanism. Rwanda adopted three mechanisms: the ICTR, national courts and the Gacaca Courts.[193] The Gacaca Courts were established at the community level by the Rwandan government to foster reconciliation and justice at the grassroots level. The Gacaca Courts closed officially on 4thMay 2012 but have left a mixed legacy.[194]Brehem, Uggen and Gasanabo argue that while the Gacaca Courts enhanced reconciliation as communities were granted the opportunity to share information, with time the said courts were highly politicized.[195] Bornkamm on the other hand argues that the Gacaca Courts' jurisdiction was limited to only cases of genocide against Tutsis and secondly the judges had limited knowledge on international crimes. This brings out the inadequacies of national processes in regard to prosecution of international crimes by the national judicial system. This obligates the ICC and international community to help build capacity at the national level.[196]

4.3 Kenya as case study on steps taken to complement ICC

Since the time Kenya was locked in post-election violence of 2007 / 2008 and the referral of the Kenyan cases to the ICC, the country has steps to ensure that perpetrators of serious crimes are

[192]'Outreach Program on the Rwanda Genocide and the United Nation' http://www.un.org/en/preventgenocide/rwanda/about/bgjustice.shtml accessed 11 March 2017.
[193]Ibid.
[194] Paul ChristophBornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation* (oxford University Press 2012).
[195]HollieBrehem, Christopher Uggen and and Jean Gasanabo, 'Genocide, Justice and Rwanda's Gacaca Courts' (2014) 30(3), Journal of Contemporary Criminal Justice 333.
[196] Bert Ingeleare, *Inside Rwanda Gacaca Courts: Seeking Justice After Genocide* (1stedn, University of Wisconsin Press 2016).

tried locally. This part of the study will analyze some of the specific measures which Kenya has put in place to compliment the ICC efforts.

4.3.1 Enactment ofInternational Crimes Act in 2008

After the 2007 / 2008 post-election violence, Kenya enacted the International Crimes Act in 2008 (Act No. 16 of 2008) but the Act took effect on January 1 2009. The Act was enacted mainly to deal with and punish convicted suspects of international crimes and to enable the country cooperate with ICC with regard to the cases which had been referred to the Court. The Judiciary established the International and Organized Crimes Division of the High Court which has jurisdiction over international crimes under the Rome Statute and the Kenyan International Crimes Act. The Act is based on the Rome Statute and provides for the crimes covered by the Statute. The Act confers jurisdiction on the High Court of Kenya over crimes against humanity, war crimes and genocide. The Constitution of Kenya 2010 gives immunity to the Head-of-State with the exceptions of cases brought before the ICC. This issue of immunity to a sitting head of state is still a controversial one.

The Act does not operate retrospectively meaning that only crimes which occurred after the enactment of the Act can be tried under the Act. Offences which occurred before the Act can be tried in the ordinary courts in the normal way under the existing penal code for crimes prescribed under the Penal Code. Most cases emanating from the post-election violence have however not been investigated and prosecuted properly and as a result there have not many convictions as was expected. There is agitation especially from civil society activists that Act should be amended to do away with immunity so that all persons, irrespective of their rank or official capacity, are

criminally liable for offences covered by the Act and are therefore subject to the jurisdiction of the Court.

4.3.2 The Witness Protection Act

After the commencement investigations by the ICC, amendments were made to the Witness Protection Act to create an independent and autonomous Witness Protection Unit. The Unit which is headed by a Director is operational and is tasked with protecting witnesses especially in sensitive cases.

However, the recent posting of information about protected witnesses on the popular website Twitter has dealt a blow to the credibility of the Protection Unit. The posting sparked concern about the risk of divulging confidential information through social media which posed risk to the protected witnesses who were identified through the leaked information. A user had published the names of protected witnesses who were due to testify in the Kenyan cases against suspects accused of orchestrating the post-election violence of 2007 to 2008 in Kenya.

4.3.3 The Privileges and Immunities Act CAP 179 of the Laws of Kenya

The Act which was amended in 2010 seeks to consolidate the law on diplomatic and consular relations by giving effect to certain international conventions.

Legal notice No 170 granted immunities and privileges to the International Criminal Court and all its employees under the fourth schedule of the Act. The schedule covers organizations, their employees and families hence domesticating the Agreement on the Privileges and Immunities of the International Criminal Court. The amendment was aimed at providing diplomatic immunity

to the employees of ICC from prosecution in any court in Kenya on acts related to their official duties unless they waive the immunity.

4.3.4 The Power of Mercy Act (No 21 2011)

Article 133 of the Kenyan constitution states that: "*On petition of any person, the president may exercise a power of mercy in accordance with the advice of the Advisory Committee…*" and "*may grant a free or conditional pardon to a person convicted of an offence***."**[197]

The Power of Mercy Act sets out the composition, functions and powers of the Advisory Committee of the Power of Mercy, the duration of the Power of Mercy and other miscellaneous provisions.

The Act provides that "any person"[198] can petition the President for mercy. The Act does not contain any restrictions except in respect of persons who are on probation or serving a suspended sentence.Under section 21 of the Act, a person who has been sentenced to death or life and has served at least five years can apply for mercy. The Acts mandates the Committee to determine whether there is a need to contact the victim, in which case reasonable efforts shall be made to notify the victim. This begs the question whether a person tried under the ICA 2008 would be eligible for a pardon. The Act promotes restorative justice by seeking to forgive the perpetrator and at the same time reconcile the perpetrator with the victim.

4.4 Democratic Republic of Congo (DRC) as another case study of ICC complementarity

The DRC has ratified the Rome Statute and the provisions of the Statute are directly applicable in Congo's national courts. Civil courts do not however have jurisdiction over international

[197]The Constitution of Kenya, 2010
[198]Section 19 of the Power of Mercy Act

crimes (as those prosecutions are reserved for military courts). There is also domestic legislation criminalizing genocide, war crimes and crimes against humanity. Article 28 of the 2006 Constitution excludes a defence of "following orders".

Due to prolonged civil war inDRC there are increased rape and sexual assault cases in the eastern part of the country. The mobile Gender Courts were established to deal with cases of rape and sexual assault as there are no courts in the remote areas of the country. The combination ofconflict-related rapes and the culture of impunity led to an increase of rapes committed by both the military andcivilians. The Mobile courts have been used in the DRC judicial system as a way to reach remote communities that have no formal courtrooms and are located far from the urban Centres. Over the past few years, mobile courts have been established in a number of regions (including Bandundu, Katanga, Maniema, North Kivu, South Kivu, Ituri, Kasai Occidental and Equateur) with the support of the government and inter-governmental organizations.[199]

The mobile courts exist within the structure of the DRC justice system and are staffed solely by Congolese officials. The courts have discretion to hear other serious crimes, but their priority is to address sexual offences.The mobile courts have both civil and criminal jurisdiction over military and civilian matters. However, the courts' priority and focus is on conflict-related sexual violence, although they can also consider "women's issues more generally, including issues to do with family law, property rights, and inheritance laws". The courts are flexible and can also handle other serious crimes such as murder and theft.

The mobiles courts have demonstrated that positive complementarity can be implemented in states and that with the right political will, international crimes can be tried in domestic settings

[199]Helping to Combat Impunity for Sexual Crimes in DRC: An Evaluation of the Mobile Gender Justice Courts (2012) OSISA, 14. available at http://www.osisa.org/sites/default/files/open_learning-drc-web.pdf.

without significant upheaval of the judicial system and without massive financial input. This is very important because the ICC simply does not have the capacity to prosecute all perpetrators of international crimes hence these courts provide the DRC with the opportunity to prosecute perpetrators that ICC cannot reach such as lower-ranking soldiers.

The success of the mobile courts model in DRC and the application of international law by the courts is a demonstration that there is a lot of potential in all countries touse similar models as "complementarity" mechanisms to ICC. This will create a greater impact in achieving universal justice than relying only on the ICC.

4.5 Conclusion

National courts enjoy original prosecution powers unlike ICC which has complimentary jurisdiction. Since ICC has limited jurisdiction, it should provide assistance to national judicial systems to enhance justice through capacity building. Lack of political will to prosecute perpetrators of international crimes at the national level is the biggest challenge facing national judicial processes. However, some countries have made commendable progress towards incorporating international criminal law best practices in their judicial systems and national legislations. The efficient working of national judicial systems is the best alternative to the ICC and ICC should therefore help to build capacity at the national level. Universal justice can only be achieved through complimentary efforts of both national judicial processes and the ICC given that ICC's jurisdiction is limited in many ways. The examples of Kenya and DRC demonstrate that domestic judicial systems can be successful in complimenting ICC. Each country must therefore develop the capacity to effectively investigate and prosecute international crimes committed within her borders.Domestic legal systems are better able to deal with critical issues,

such as peace and reconciliation, safeguarding the rights and meeting the needs of victims of crime; and making adequate and effective use of traditional mechanisms for conflict resolution.[200]

[200] John MukumMbaku, International Justice: The International Criminal Court and Africa

CHAPTER FIVE

5.0 CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

This chapter provides a summary and conclusion of the topic under study. It also sets out a summary of the key challenges facing ICC in its pursuit for international justice and proposes measures to address those challenges.

5.2 Chapter Summary

The first chapter introduces the topic under study. It sets out the background and agenda of the study, the research questions, problem statement, research objectives, the methodology employed, hypothesis, and justification of the study. It also reviews the relevant literature and analyses the key theories explaining the topic under study.

The second chapter provides a theoretical and conceptual understanding of the role of the ICC in maintaining justice. It discusses the approach adopted by the early tribunals in administering justice over international crimes. It recognizes that earlier tribunals adopted a retributive approach to justice. It discusses the role of ICC in maintaining justice and how it adopts both the retributive and restorative approach to justice.

The third chapter as core chapter of discussion critically analyzes the challenges facing ICC in its pursuit for justice through prosecution, victims' participation and reparations as a form of restorative justice. The issues under consideration in this chapter include ICC's limited jurisdiction, the perceived bias of the Court against Africa, non-cooperation of States, victims'

participation at the ICC and victims' reparation, lack of support from permanent UNSC members states and the veto power of UNSC among others. The objective of this study is brought out in this chapter through the analysis of the key challenges facing ICC in its role of ensuring justice.

The fourth chapter addresses the impact of the ICC at national level in order to identify the mechanisms that countries have put in place to promote justice for victims of atrocities and ensure that those culpable of international crimes face justice. This chapter is based on the argument that nationals enjoy original jurisdiction over prosecution of crimes and should therefore play a greater and first role of prosecuting suspects of crime.

The fifth chapter provides the conclusion and findings of the study and provides the way forward. The key recommendations are at assisting ICC to address the key challenges identified which hinder it from effectively playing its role in maintaining international justice.

5.3 General Conclusions

The establishment of ICC was seen as an innovative approach towards realizing justice through the prosecution of perpetrators of international crimes and ensuring that victims get justice. The ICC has since its establishment been able to deal with international crimes in a number of situations but it is argued that the Court has not realized its full potential. Whereas the creation of the Court is seen as an achievement in defense of human rights and promotion of peace and justice the expectations are still large and the shortcomings are glaring. Its long tremendous journey has contributed to a paradigm shift in global relations especially in international criminal law where emphasis in on individuals rather than States.

Unlike earlier tribunals, ICC adopts both a retributive and restorative approach to justice. It enhances retributive justice through prosecution by ensuring that those who commit crimes are

held accountable. This promotes human rights, rule of law, democracy and justice. ICC also recognizes restorative justice through victims' participation at the ICC proceedings and reparation with the aim of restoring victims to nearly if not the same position they were before crimes were committed against them.

ICC's jurisdiction is limited to specific international crimes specified in the Rome Statute. Although ICC has jurisdiction over the crime of aggression, this jurisdiction is yet to be exercised as it has not been activated by ASP. It is however expected that by December 2017, the same shall have been activated.

Justice for victims of atrocities committed before July 2002 cannot be achieved through the ICC because it does not have jurisdiction on crimes committed before its establishment. There is therefore need for countries that experienced atrocities before the establishment of the ICC to put in place national mechanisms to deal with those atrocities.

ICC can only invoke jurisdiction in specific situations namely; where the case has been referred to the Prosecutor either by a State Party, or the United Nations Security Council under Chapter VII of the UN Charter or the Prosecutor initiates investigations *propio motu* as authorized by the Pre-Trial Chamber of the Court, or where a non-State Party voluntarily submits to the jurisdiction of the Court. Where the Court does not have admissibility it cannot prosecute such crimes. Admissibility is the first necessary step of proceedings before the Court and is dealt with at the pre-trial stage. For the ICC to exercise jurisdiction over a situation before it, various factors must be proved to establish that the case is admissible before it.

ICC is a court of last resort in accordance with the principle of complementarity. National States will exercise original jurisdiction over the crimes committed in their respective territories and

ICC will only come in when a State is unable or unwilling to prosecute such crimes. ICC can also exercise its jurisdiction through the UNSC referral. So far UNSC has only referred two cases namely; Libya and Sudan. UNSC being a political organ has in some circumstances failed to refer deserving cases to ICC due to political alignments. For example the Syrian referral was vetoed against by China and Russia.

ICC has jurisdiction only over the State Parties and nationals of Member States. ICC has limited jurisdiction over non-Member States and can only invoke jurisdiction where a non-Member State voluntarily acknowledges ICC's jurisdiction or through UNSC referral. So far this has hindered the ICC from initiating investigations in non-Member State countries even where the atrocities are apparent and need the Court' s intervention.

ICC relies exclusively on State cooperation for investigations and enforcement of its orders. It has no police force and therefore enforcement of its decisions depend entirely on cooperation with Member States. Unfortunately State cooperation with the ICC has been poor. For instance African countries have failed to enforce arrest warrants against President Bashir of Sudan. The Africa-ICC relationship and cooperation is an area that must be addressed with haste if the Court has to maintain its credibility as various countries have threatened to withdraw from the Court with South Africa already having withdrawn. The withdrawal of Member States from the ICC not only affects the legitimacy of the Court but also undermines international justice.

States cooperation with international courts is a delicate and fragile topic considering that ICC lacks enforcement mechanisms. This requires a "permanent policing force directly under the

umbrella of the ICC." While this idea may have merits, the reality of States willingly granting the Court an international police force is unlikely.[201]

Whereas ICC is the first Court to recognize the right of victims' participation at the International Court proceedings and provision of reparation to the victims, this form of restorative justice faces its own challenges. The right to victims' participation is limited in scope and leaves the judges with the discretion to interpret it leading to various interpretations. Since its establishment the ICC has only been able to handle one reparation case in the Lubanga case. The victims of Darfur civil war in Sudan are yet to be given any reparations because Bashir has not been tried. Similarly, after the closure of the Kenyan cases, the victims' reparation application was rejected on the ground that ICC had not convicted any of the accused persons and therefore it lacked the jurisdiction to deal with the application. The two situations bring forth the challenges ICC faces in giving victims reparation.

As a result of the limitations imposed on the ICC by its constituting statute, the need to establish credible functional national processes becomes paramount. ICC has had a great impact on national jurisdictions. So far various countries such as Kenya, Uganda, Bosnia, Germany and US have put in place national processes to investigate and prosecute international crimes at national level. There are at least three ways in which countries can enhance justice for victims of atrocities at national level. First is to establish credible national judicial processes. Secondly is to establish special judicial chambers to deal with international crimes. Thirdly, is to establish prosecutorial posts to specialize in prosecution of atrocities. Where the countries have no capacity to prosecute international crimes the ICC should provide assistance in building capacity.

[201] www.internationalpolicydigest.org

Overall, despite a strong foundation laid out at the Rome Conference, the ICC has had few successes since its commencement. The Court's "little" success can be attributed to the youthfulness of the Court, but much can be realized if the various challenges identified in this study are addressed. The Court has struggled to carve out its niche in the world of international criminal law but all is not lost. The Court still has an opportunity to prove to the world that it can live true to its objective and end impunity.

Although ICC intervention sends a strong message that impunity shall not be tolerated, national states are close to the scenes of crimes and should therefore play a greater role in bringing suspects to account. It is therefore easy for national courts to prosecute and collect evidence as opposed to ICC intervention. However, lack of political will, corruption and the reluctance to prosecute those involved in atrocities poses the biggest challenge to national prosecution of international crimes.The ICC presents a historic opportunity for the international community to take a stand against large scale violations of human rights. Even if the ICC achieves its full potential, it realistically cannot be able to address all situations in which national courts are unwilling or unable to prosecute all perpetrators.

Among other factors, there are temporal and other jurisdictional limitations on what cases the ICC can handle. Countries are therefore encouraged to employ other mechanisms that will ensure justice to the victims as well as fair proceedings to suspects such as Truth and Reconciliation Commissions.

5.4 Key Recommendations

Based on the above conclusions this study recommends the following measures to be considered to address the challenges facing the ICC and improve on its little successes;-

The ICC plays a paramount role in maintaining international justice and peace. ICC must work tirelessly to justify its legitimacy. The Court must remain and be seen to be impartial in its dealings in all situations requiring its intervention. Currently all of the cases being prosecuted by the Court are all from Africa and this give an impression that the Court is biased against African States. The Court needs to broaden its spectrum as regards to inter-continental examination. The charge of bias against Africa may appear unfounded due to the turmoil in Africa which is no secret, but this perception must be addressed urgently to restore trust and credibility of the Court as an impartial court. The election of an African as the second Chief Prosecutor of the Court may have addressed some initial concerns of bias but still a lot more needs to be done. The Court must been seen to be impartial fishing out suspects of crimes and the indictment of criminals from other parts of the world, for example, Syria, Afghanistan, Burma, Honduras or Palestine, must be a priority to shake the label of being a lackey to the West.

The ICC is facing a lot of criticisms from all quarters for various reasons but this does not mean that it should be wound up. The Court must remain patient and consistence in dealing with serious crimes regardless of who has committed the crime or where the crime has been committed. The baby steps the ICC has taken so far will translate to future successes if the court remains focused and impartial.

There is need to encourage and strengthen State cooperation with the ICC. The ICC cannot succeed in its mission without the full support and cooperation of the State Parties. At the moment cooperation from State Parties especially from African countries is at its lowest ebb. For the ICC to become more efficient and successful, some basic rules to be obeyed by all States must be set by none other than the Assembly of State Parties to ensure the full support of the State Parties to the Rome Statute. The ICC constantly finds itself in a precarious situation,

juggling between the rules established as a responsibility of the Court and the constant interference of States, both the Member States and non-Member States. The Court can only enforce that which it has power to enforce and this is limited to what the Rome Statute stipulates.

The concept of State cooperation must be reiterated and upheld especially in the apprehension of ICC fugitives like President Bashir of Sudan. The consequences of disobedience Article 98 of the Treaty, and therefore breaking international law, should be clearly spelt out and be met with hard decisions such as economic sanctions or aid reduction from other nations. The consequences which States that harbor or fail to apprehend fugitives within the confines of their borders must face should be spelt out and enforced ruthlessly. Such consequences should possibly include; international ridicule, trade sanctions and aid reduction among other measures.

The ICC lacks an enforcement mechanism and has to rely on State Parties Cooperation which has been declining in the recent past. The Assembly of State Parties should consider workable methods of enforcing the article on cooperation and even amend the Rome Statute to take a firmer stance on State cooperation in the entire international criminal justice process starting with conduct of investigations, apprehension of indicted suspects, availing and protecting witnesses and imprisonment of convicts. The amendments should consider possible imposition of economic sanctions, loss of foreign aid as possible consequences for failure to adhere to the Rome Statute obligations.

The possible amendments should also take into account other procedural hardships which the Court faces such as the lengthy pre-trial proceedings and streamline Court proceedings in such a manner that time is not wasted at the pre- trial proceedings. The amendments should also strengthen the Office of the Prosecutor and improve investigative processes. The State Parties

should consider progressive amendment which promote the cause of justice rather than retrogressive amendments.

There is need to strengthen national judicial systems to prosecute international crimes at national level. ICC has limited jurisdiction in the sense that it is a Court of last resort. The Court also prosecutes only those with the highest responsibility leaving a large number of perpetrators at large. So far some countries have put in place national mechanisms to enhance justice but they face challenges such as weak investigative systems, corruption and lack of political will. Traditional justice and conflict resolution mechanisms at the community level should be encouraged to foster reconciliation and prevent reoccurrence of international crimes.

The domestication of international criminal justice can serve not only to secure accountability for the most heinous crimes, but can also spur systematic legal reforms, helping strengthen domestic legal systems and shore up the credibility of local institutions.

There is need to strengthen the relationship between UNSC and ICC as well as AU and ICC. Currently the relationship between the said institutions is not as healthy could be expected given that UNSC referral is the only avenue through which the ICC can invoke jurisdiction over international crimes committed in the territory of non-Member States. There is also need to improve the waning AU – ICC relationship and foster cooperation from African countries and avert mass withdrawals. The continent of Africa is a major stakeholder in ICC and it would be a tragedy if African States were to pull out of the Court given that Africa has made substantial investment in the Court. The ICC should reassure Africa that it is not being unfairly targeted and such re-assurance should be demonstrated by actual steps to indict suspect of atrocities from other continents.

There is need for increased awareness on the role of ICC so that it can be appreciated. The current wave that ICC is anti-African is a clear indication that the role of the ICC is not well understood by many as well as when the Court invokes jurisdiction. This calls for serious civic education and publicity on the mandate and working of ICC.

In order to enhance restorative justice, both the ICC and national states should put in place reparation mechanisms. Victims of atrocities are usually the most affected and therefore the need to recognize and compensate the victims should be a priority of both the ICC and national processes.

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