

**NEAR EAST UNIVERSITY**  
**GRADUATE SCHOOL OF SOCIAL SCIENCES**  
**MASTER OF LAWS IN INTERNATIONAL LAW PROGRAMME**  
**(LL.M)**

**MASTER THESIS**

**THE IMPACT OF STATE COOPERATION ON THE JURISDICTIONAL  
EFFECTIVENESS OF THE INTERNATIONAL CRIMINAL COURT**

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**NICOSIA**

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**IN ACCORDANCE WITH THE REGULATIONS OF THE GRADUATE  
SCHOOL OF SOCIAL SCIENCES**

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## **ABSTRACT**

The study is an examination of the impact of State cooperation on the effectiveness of the ICC. Such has been based on ideas that some States and non-State Parties have a strong influenced the ability of the ICC to perform its duties by reluctantly complying with its cooperation requirements. An inductive approach that involves the usage and analysis of empirical literature and other secondary sources was used to establish the human rights protection role of the ICC. Results from the study showed that the ICC has to some extent managed to effectively perform its mandates as stipulated by the Rome Statute though challenges have been observed to be emanating from imposed pressure, expectations, and belief of targeting Africa and set targets.

**Key terms:** International Criminal Court, State Cooperation, Effectiveness

## ÖZ

Bu çalışma, Devlet işbirliğinin UCM'nin etkinliği üzerindeki etkisinin incelenmesidir. Bu, bazı Devletlerin ve devlet olmayan Tarafların, UCM'nin kendi işbirliği gereksinimlerine gönülsüz bir biçimde uyarak görevlerini yerine getirme kabiliyetini etkilediğine dair fikirlere dayanmaktaydı. UCM'nin insan hakları koruma rolünü oluşturmak için ampirik literatürün ve diğer ikincil kaynakların kullanımı ve analizini içeren bir endüktif yaklaşım kullanılmıştır. Çalışmadan elde edilen sonuçlar UCM'nin, Roma Statüsü tarafından öngörülen görev sürelerini bir dereceye kadar etkili bir şekilde yerine getirmeyi başardığını ortaya koymuş, ancak zorluklar, dayatılan baskı, beklentiler ve Afrika'yı hedef alma ve hedef belirleme inancından kaynaklandığı gözlemlenmiştir.

**Anahtar Kelimeler:** Uluslararası Ceza Mahkemesi, Devlet İşbirliği, Etkililik

## **DEDICATION**

This study is dedicated to my supporting and caring mother and father whose unwavering support has contributed immensely in my academic life.

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## TABLE OF CONTENTS

<b>ABSTRACT</b> .....	<b>i</b>
<b>ÖZ</b> .....	<b>ii</b>
<b>DEDICATION</b> .....	<b>iii</b>
<b>ACKNOWLEDGEMENTS</b> .....	<b>iv</b>
<b>TABLE OF CONTENTS</b> .....	<b>v</b>
<b>ABBREVIATIONS</b> .....	<b>viii</b>
<b>CHAPTER ONE</b> .....	<b>1</b>
<b>INTRODUCTION</b> .....	<b>1</b>
1.1 Historical background .....	1
1.2 Problem of the study .....	3
1.3 Objectives of the study .....	5
1.4 Research questions .....	5
1.5 Significance of the study .....	6
1.6 Methodology .....	6
<b>CHAPTER TWO</b> .....	<b>7</b>
<b>OVERVIEW OF THE ICC AND ITS TERMS OF REFERENCE</b> .....	<b>7</b>
2.1 Historical context of the ICC .....	7
2.1.1 Structure of the ICC .....	8
2.1.2 Process of the ICC .....	9
2.1.3 Investigation of cases .....	10
2.1.4 Legal status and powers of the court .....	10
2.1.5 Applicability, Jurisdiction and admissibility law .....	11
2.2 Objectives and roles of the ICC .....	13
2.2.1 Promote justice .....	13
2.2.2 Stop impunity .....	13
2.2.3 Deal with shortcomings of Ad Hoc Tribunals .....	14
2.2.4 Deal with the inability and unwillingness of the National Courts to prosecute offenders .....	14
2.2.5 Enforce the international criminal law .....	14
2.2.6 Stop conflicts and potential war criminals .....	14
2.2.7 Jurisdiction over international crimes .....	15
2.3 Factors undermining the effective functioning of the ICC .....	15

2.3.1 Inadequate police force .....	15
2.3.2 Lack of financial resources .....	15
2.3.3 Incapacity to acquire sufficient evidence.....	16
2.3.4 Misconception about the ICC .....	16
2.3.5 Conflict promotion.....	17
2.3.6 Inadequate staff.....	17
2.3.7 Political tool misconceptions .....	18
2.3.8 Long court proceedings.....	18
2.4 Overview of the relationship between human rights and the ICC .....	18
2.5 Amendments to the Rome Statute.....	20
2.6 Accomplishments of the ICC in enforcing the Rome Statute's stipulations .....	21
2.7 Criticisms against the ICC in addressing international crimes .....	21
2.8 Conclusion .....	23
<b>CHAPTER THREE .....</b>	<b>25</b>
<b>STATE COOPERATION WITHIN THE CONTEXT OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT.....</b>	<b>25</b>
3.1 Introduction.....	25
3.2 Extradition legalities on cooperation among States.....	28
3.3 Ad hoc Tribunals and State cooperation .....	29
3.4 The Rome Statute and State cooperation .....	30
3.5 Cooperation efforts by African States with the ICC .....	32
3.6 Conclusions.....	33
<b>CHAPTER FOUR.....</b>	<b>35</b>
<b>EVALUATION OF THE JURISDICTIONAL ROLES OF THE ICC.....</b>	<b>35</b>
4.1 Introduction.....	35
4.2 Imposed pressure on the performance of the ICC .....	35
4.3 Expectations.....	38
4.4 Results.....	38
4.5 The belief of targeting Africa .....	38
4.6 Ability to accomplish set standards .....	39
4.7 Set targets against available resources .....	39
4.8 Peace motives.....	40
4.9 Ability to make arrests .....	40
4.10 Ability to enforce reparations .....	44

4.11 Ability to prevent future violations.....	45
4.12 Conclusions.....	47
<b>CHAPTER FIVE .....</b>	<b>49</b>
<b>CONCLUSIONS, RECOMMENDATIONS AND SUGGESTIONS FOR FUTURE RESEARCH .....</b>	<b>49</b>
5.1 Introduction.....	49
5.2 Recommendations.....	50
5.3 Conclusions.....	51
5.4 Suggestions for future studies .....	52
<b>REFERENCES.....</b>	<b>53</b>
Articles.....	53
Books .....	59
Cases .....	61
Treaties.....	62
Institutes.....	63
Resolutions.....	64
Websites.....	65

## **ABBREVIATIONS**

**ACHR** - American Convention on Human Rights

**AU** – African Union

**DRC** - Democratic Republic of Congo

**ECHR** - Convention for the Protection of Human Rights and Fundamental Freedoms

**ICC** - International Criminal Court

**ICCPR** - International Covenant on Civil and Political Rights

**ICL** – International Criminal Law

**ICTR** - International Criminal Tribunal for Rwanda

**ICTY** - International Criminal Tribunal for the former Yugoslavia.

**IHL** - International Humanitarian Law

**IHRS** – International Human Rights Standards

**ILC** - International Law Commission

**NGO** - Non-Governmental Organization

**OPCD** - Office of Public Counsel for the Defence.

**OSCE** - Organization for Security and Co-operation in Europe.

**UDHR** - Universal Declaration of Human Rights

**UN** – United Nations

**UNCPPCG** - United Nations Convention on the Prevention and Punishment of the Crime of Genocide

**UNHRRC** - United Nations Human Rights Council

**UNSC** – United Nations Security Council

## CHAPTER ONE

### INTRODUCTION

#### 1.1 Historical background

The formation of the International Criminal Court (ICC) was welcomed with so much optimism that it would address the ravaging effects of atrocities. This follows a series of widespread inhumane international criminal acts around the world though they are considered to be very prevalent in Africa. Notable examples include holding hostages, intentional killing; inhuman treatment or torture and unlawful confinements<sup>1</sup>.

Meanwhile, international proceedings left the world economy puzzled, wondering and demanding international laws that oversee international human rights problems. This follows a series of offenders who managed to escape the wrath of the ICC<sup>2</sup>. This has aggravated concerns by State and non-State Parties over the effectiveness of the jurisdictional roles of the ICC to bring offenders to justice and curb future violations. The increasingly high number of international crimes under the jurisdiction of the ICC has to a large extent remained without being addressed with a lot of offenders roaming free either in their States or being harboured in other States<sup>3</sup>. Not only has the number of offenders remained high but also the idea that the number of effective trials held by the Court since its inception has remained very low. Such has been pointed towards the lack of jurisdictional effectiveness and yet other studies have shown that lack of cooperation among State and non-State Parties plays a crucial role in strengthening the effectiveness of the jurisdictional mandate of the ICC.

Ideas have also shown that the jurisdictional effectiveness of the Court depends on numerous things that range from an international police, adequate jurisdiction or authority and cooperation being the notable element<sup>4</sup>. Cooperation between the ICC is important so as to

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<sup>1</sup> Mahnouch H. Arsanjani, 'The Rome Statute of the International Criminal Court' (1999) 93(1). The American Journal of International Law 22.

<sup>2</sup> Hans-Peter Kaul, 'Construction Site for more Justice: The International Criminal Court After Two years' (2005) 99(2) The American Journal of International Law 370.

<sup>3</sup> Rita Elizabeth Mutyaba, 'The International Criminal Court - its Impact and the Challenges it Faces in Fulfilling its Mandate' (2014) 2(1) Journal 216-224.

<sup>4</sup> Rome Statute of the International Criminal Court UN Doc A/CONF. 183/9; 37 ILM 1002 (1998): 2187 UNTS 90, available at <http://www.un.org/law/icc/statute/rome.htm> [Accessed 23 December 2016].

make it feasible to arrest offenders, bringing them to justice and undertake investigations before a sentence can be granted. Alternatively, observations also point to the idea that the Court oversees international matters and has limited jurisdiction over State matters and hence needs support from States and non-State Parties in order for it to execute its mandate effectively<sup>5</sup>.

Though prescriptions have been made under the Rome Statute Article that non-State Parties assist the Court with required cooperation, little has been done by non-State Parties to reinforce cooperation requirements of the Court<sup>6</sup>. Questions can be poised as to what can be undertaken in order to have non-State Parties comply with the Court and in the midst of non-cooperation what strategies can the Court employ to enforce cooperation. This is also being compounded by the idea that even State Parties have also greatly failed to comply cooperation efforts made by the Court as stipulated in the Rome Statute, Part IX, which stipulates that members who have ratified the Rome Statute be liable to cooperate with the Court in any way possible<sup>7</sup>. Examples of States which failed to cooperate with the Court despite being members include Libya and Sudan<sup>8</sup>.

Though reasons affecting the effectiveness of the Court are being pointed towards the lack of cooperation, there are other issues that have been surrounded with the operations of the Court. For instance, a lot of international crimes have occurred in non-African States and yet a lot of cases that are being handled by the ICC are African<sup>9</sup>. As many scholars such as Kress (2004) and Hans (2005), posit that there are circumstances which have been surrounding the operational capabilities of the Court. Studies have however shown that the Court has been used by other State Parties as a political tool to achieve their anterior motives<sup>10</sup>. Under this background, the study therefore seeks to outline circumstances that are affecting the jurisdictional effectiveness of the Court in addressing criminal activities that are under its jurisdiction.

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<sup>5</sup> Arsanjani, Supra 1, p.26.

<sup>6</sup> Starke JG and Shearer IA, *Starke's international law* - I. A. Shearer - paperback - 11th ed (11th edn, LexisNexis UK 1994) p.127.

<sup>7</sup> A. Ciampi, The Obligation to Cooperate, in *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos*, edited by H.A.M. Von Hebel, J.G. Lammers and J. Schukking (1998) (OUP), 1607 -1638, at 1607-8.

<sup>8</sup> Ciampi, Ibid, p.42.

<sup>9</sup> <[http://Instituteon Security Studies \(ISS\) \(2010\). Briefing Paper on Recent Setbacks in Africa Regarding the International Criminal Court 2. Available at, http://www.issafrica.org/anicy/uploads/Recent\\_Setbacks\\_RE\\_the\\_ICC.pdf](http://Instituteon Security Studies (ISS) (2010). Briefing Paper on Recent Setbacks in Africa Regarding the International Criminal Court 2. Available at, http://www.issafrica.org/anicy/uploads/Recent_Setbacks_RE_the_ICC.pdf)> accessed 12 December 2016.

<sup>10</sup> The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa. Report of the Secretary-General', (1998) 5(4) *International Peacekeeping* 156–168.

On the other hand, a huge amount of money has been spent by the international community and yet the results that have been attained by the ICC are considered to be insignificant. The number of successful outcomes achieved by the ICC is very low as the major case point to the Lubanga trial which was the first successful trial executed by the ICC since its inception<sup>11</sup>. What therefore puzzles State Parties is that with the huge expenditure bill and an ongoing violation of the Rome Statute which are increasing in number and magnitude, what is therefore the role of the ICC in executing its jurisdictional mandate especially when the legal authority of the ICC is limited and its scope is ineffective when applied to certain States<sup>12</sup>.

## **1.2 Problem of the study**

The ICC is often regarded as having a critical influence on overseeing that international criminal law protection measures stipulated under the Rome Statute are enforced and upheld to around the world<sup>13</sup>. Failure to uphold the proposed regulations by either an individual, group or nations is considered violation of the Rome Statute<sup>14</sup>. In such a case, the ICC's role is also to bring perpetrators to justice through the help of States and non-State Parties as outlined in Article 59 of the Rome Statute section 1 and 2 which states that States are obliged to effect arrests on suspect following an issuance of a request by the Court and that apprehended suspect be brought to justice immediately<sup>15</sup>. Criticisms have been levelled against the ability of the ICC to deliver expected results<sup>16</sup>. That is, assessments have been made concerning the ability of the ICC to execute its mandate to institute guidelines of the Rome Statute and most insights are still advocating that a lot of disparity still exist especially in the area of cooperation<sup>17</sup>. This implies that contentions are high that the ICC has not been effectively executing its roles and evidenced by insights drawn from Macleod & Charania (2015). Such insights have shown that the Court is ineffective when cooperation is not rendered by both States and non-State Parties and yet the Rome Statute prescribes that such cooperation assistance be granted to the Court

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<sup>11</sup> Danner AM, 'Enhancing the legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court' (2003) 97(3) *The American Journal of International Law* 510.

<sup>12</sup> Draner, *Ibid.*, p.39.

<sup>13</sup> A. Nissel, 'Review: The Competing Jurisdictions of International Courts and Tribunals' (2005) 3(2) *Journal of International Criminal Justice* 525–530.

<sup>14</sup> Alexander Orakhelashvili, 'State Immunity and Hierarchy of Norms: Why the House of Lords Got it Wrong', (2008) 18 *EJIL* 955, p.956-957.

<sup>15</sup> Orakhelashvili, *Ibid.*, p.956.

<sup>16</sup> Ved P Nanda, 'The Establishment of a Permanent International Criminal Court: Challenges ahead' (1998) 20(2) *Human Rights Quarterly* 413–428.

<sup>17</sup> Patricia Hobbs, 'The Right to a Fair Trial and Judicial Economy at the International Criminal Court' (2016) 5(1) *International Human Rights Law Review* 86–118.

when needed<sup>18</sup>. To make matters worse, State Parties have to some extent refused to comply with cooperation efforts of the Court. This therefore poses serious concerns over the Court in effectively performing its mandate especially considering that it has a limited jurisdiction and does not have an international police. In addition, it is contended that the ICC is effective in executing its roles to those States that are members to the ICC<sup>19</sup>. Hence, non-member States are sometimes considered to be ruled out of assistance. This is considered to be compounded by ideas that the Office of the Prosecutor may rule out appeals for the ICC's intervention.

On the other hand, it can be drawn that the number of perpetrators who have been brought to justice under by the ICC for gross human rights violations is very low as compared to the amount of financial resources that have been injected into the institution<sup>20</sup>. Questions can be raised if the existence of the ICC is an imaginary institution that cannot effect Rome Statute standards.<sup>21</sup> Furthermore, war crimes and armed struggles under the jurisdiction of the Court are considered to be widespread and around the world and more individuals and governments are grossly violating statutory laws of the Rome Statute<sup>22</sup>. Examples can be pointed to incidents in Syria where a lot of children are considered to have been killed during air strikes and undirected bombings<sup>23</sup>. This further puts doubts on the ability of the ICC to enforce statutory measures of the Rome Statute to deal with genocides, war crimes and gross human rights violations.

However, a considerable evidence also shows that the ICC does play a huge role in enforcing the Rome Statute principles and guidelines though its achievements may be immeasurable.<sup>24</sup> This implies that there are violations such as genocides that stopped from manifesting since the

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<sup>18</sup> Brierly JLL, *The Law of Nations: An Introduction to the International Law of Peace* (6th edn, Oxford Univ Pr on Demand 1963), p.88.

<sup>19</sup> Dapo Akande, 'International Law Immunities and the International Criminal Court', (2004) 98 AJIL 407, p.417-418.

<sup>20</sup> Robert Cryer, 'Sudan, Resolution 1593, and International Criminal Justice', (2006) 19 Leiden Journal of International Law 195, p.200-202.

<sup>21</sup> Danner AM, 'Enhancing the legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court' (2003) 97(3) The American Journal of International Law 516.

<sup>22</sup> Bruce Broomhall, 'Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International Law', (2000-2001) 35 New England Law Review 399.

<sup>23</sup> Janis MW, *An Introduction to International Law* (3rd edn, Aspen Publishers Inc., U.S. 1999) p.123.

<sup>24</sup> Svaček Ondřej, 'The International Criminal Court and Human Rights: Achievements and Challenges. In Towards a Universal Justice? Putting International Courts and Jurisdictions into Perspective' (2016) Brill 206-221.



Rwanda Genocide and cannot transpire as a result of the existence of the ICC<sup>25</sup>. This is because perpetrators will be fearing that they can be subjected to stiff punishment from the ICC.

As evidenced from these ideas, it can be noted that the effectiveness of the ICC in enforcing Rome Statute lies greatly on cooperation efforts by States and non-State Parties. This study therefore seeks to establish how cooperation affects the jurisdictional effectiveness of the ICC in executing its mandate as stipulated by the Rome Statute.

### **1.3 Objectives of the study**

The study dwells on analysing the impact of state cooperation on the jurisdictional effectiveness of the International Criminal Court. Other secondary objectives of the study are to;

- 1) To examine steps that can be undertaken by the Court in order to have both State and non-State Parties comply with the Court and strategies the Court can employ to enforce cooperation in the midst of non-cooperation.
- 2) To examine the nature of ratifications or amendments that have been made to the Rome Statute and how they affect the effectiveness of the Court in containing criminal offenses under the jurisdiction of the Court.
- 3) To determine obstacles that are impeding the ICC in executing its Rome Statute's mandate to curb genocides, war crimes and crimes of aggression that are under its jurisdiction?

### **1.4 Research questions**

1. How effective is the Rome Statute in enforcing cooperation from State and non-State Parties?
2. What probable measures can be undertaken by the Court in the event of incidences of non-cooperation by State and non-State Parties?
3. What can be done to improve cooperation with the Court by State and non-State Parties?

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<sup>25</sup> Christopher Greenwood, „The Administration of Occupied Territory in International Law“, in Emma Playfair, (ed.), International Law and the Administration of Occupied Territories, (Oxford: Clarendon Press, 1992), 241, p.243.

### **1.5 Significance of the study**

Foremost, it can be noted that a lot of incidences international criminal offences under the jurisdiction of the Court are spiralling out of control and most states especially in Africa and Middle East which have had significant challenges in addressing them. This therefore requires that the jurisdictional effectiveness of the ICC be strengthened in enforcing statutory obligations stipulated by the Rome Statute. Thus by identifying obstacles and loopholes in the ability of the ICC to execute its mandate, solutions can be adopted which can further improve its effectiveness leading to better and effective international law standards. Moreover, cooperation can also be strengthened between member States and non-member States leading to improvements not only in curbing international crimes outlined by the Rome Statute but also in promoting world peace.

### **1.6 Methodology**

This study is based on an inductive approach that involves the usage and analysing of empirical literature and other secondary sources to establish the human rights protection roles of the ICC<sup>26</sup>. Such an approach will involve the identification of patterns or trends in the functions of the ICC and cooperation elements with States and non-States Parties and developing ideas that can offer explanations about such patterns. Moreover, this approach enables one to learn lessons on how the ICC has been operating and identify irregularities and resemblances so as to reach sound conclusions<sup>27</sup>. Thus deductions are made based on the collected ideas and recommendations are made thereof.

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<sup>26</sup> V Goel, 'Differential Envolvement of Left Prefrontal Cortex in Inductive and Deductive Reasoning' (2004) 93(3) Cognition B109–B121.

<sup>27</sup> Evan Heit, 'Properties of Inductive Reasoning' (2000) 7(4) Psychonomic Bulletin & Review 569–592.

## **CHAPTER TWO**

### **OVERVIEW OF THE ICC AND ITS TERMS OF REFERENCE**

#### **2.1 Historical context of the ICC**

The ICC came into existence in 1998 following the establishment of the Rome Statute in July 1998 in Netherlands, Hague but however commenced operations in 2002. The ICC is contended to have been birthed out of the plea by the International Tribunal of Far East Tokyo and the International Military Tribunal at Nuremberg which sought to deal with Japanese and Nazi war offenders. Such war perpetrators are established to have compounded the war between Germany and Japan and hence the need to bring them to trial<sup>28</sup>. This resultantly led to the establishment of what was known as the United Nations Convention on the Prevention and Punishment of the Crime of Genocide (UNCPPCG)<sup>29</sup>. The prime aim of the UNCPPCG was to address genocides concerns but more room was left for it to explore potentials of establishing an international judicial system which caters for the international community. The UNCPPCG was governed by the International Law Commission (ILC) which comprised of 34 members<sup>30</sup>.

During the 1950s obstacles were encountered during the Cold War era and the ILC lost focus of the establishment of an international judiciary court as nations were engrained with power motives over other States. The UN General Assembly however ignited steam in 1998 after the end of the Cold War advocating the need for the ILC to commence international judiciary establishment goals<sup>31</sup>. The establishment of the international judiciary was to encompass drug trafficking. This received major support following the creation of 3<sup>rd</sup> and 4<sup>th</sup> tribunals (the International Criminal Tribunal for Rwanda and International Criminal Tribunal for Yugoslavia) by the UNSC. These organizations faced severe funding needs at had respective

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<sup>28</sup> D. Kirby, 'Book review: Finland in the Second World War: Between Germany and Russia' (2004) 11(2) War in History 235–236.

<sup>29</sup> Great Britain Staff, Convention on the Prevention and Punishment of the Crime of Genocide, Paris, 9 December 1948 (H.M.S.O. 1970)

<sup>30</sup> Matthew Lippman, 'A Road Map to the 1948 Convention on the Prevention and Punishment of the Crime Genocide' (2002) 4(2) Journal of Genocide Research 177–195.

<sup>31</sup> Steven K. Holloway and Rodney Tomlinson, 'The New World order and the General Assembly: Bloc Realignment at the UN in the post-Cold War World' (1995) 28(02) Canadian Journal of Political Science 227.

figures of 40 million and 70 million as their budgets towards their causes<sup>32</sup>. These huge financial demands reinforced the need to establish an international court.

Ultimately drafts were made concerning the operations and conducts of the ICC in 1994 by the ILC and were passed to the UN General Assembly for approval. This was followed by ad hoc committee meetings and the holding of preparations that will see the final drafting of the ICC Statute. This was confronted with four major issues and this include the duties of the UNSC, scope of the Prosecutor, acceptance of the Court's jurisdiction and factors under which jurisdiction was to be exercised<sup>33</sup>. Controversy arose as many were not in consensus with the level of power held by the court and notably the United States of America.

Though the Court was considered to be a separate entity with the UNSC, the UNSC was contended to be in a strong position of delaying cases. The voting outcome was and is determined by the willingness of permanent members to vote. That is if they do not cast their votes, the outcome is not affected even though they might be in favour of the proposed resolutions. This is however considered to be a possible delaying strategy that any permanent members can adopt.

With the above concerns in considerations, the Rome Statute was established in 1998 and it gave insights on how the ICC was going to be governed. The ICC however commenced operations in July 2002 and this was because of delaying that were encountered in the ratification process. Observations were also made that the scope under which the ICC can exercise its jurisdiction and the nature of cases that it can subject to trial is limited<sup>34</sup>. In addition, the ICC's financial needs are postulated to be high and during the beginning of its tenure, a whooping total of €53 million euros was needed to sustain its operations in 2004 but the figure spiralled to €103 million euros in 2011<sup>35</sup>.

### **2.1.1 Structure of the ICC**

The entire ICC is composed of 18 judges of which 3 judges make up the Presidency and are required to serve 3 year terms. The Presidency will assume a structure that is made up of the

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<sup>32</sup> Bohlander, 'Practice and procedure of the international criminal tribunal for the former Yugoslavia, with selected materials from the international criminal tribunal for Rwanda, John E. Ackerman and Eugene O'Sullivan' (2001) 1(1) *International Criminal Law Review* 173–176

<sup>33</sup> Danner AM, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court' (2003) 97(3) *The American Journal of International Law* 510.

<sup>34</sup> Catherine S. Elliott and Frances Quinn, *Criminal Law* (6th edn, Trans-Atlantic Publications 2007) p.84.

<sup>35</sup> H. McCoubrey and Hilaire McCoubrey, *International Humanitarian Law: Modern Developments in the Limitation of Warfare* (2nd edn, Dartmouth Publishing Co 1998) p.113.

First Vice-President and Second Vice-President and are all responsible for overseeing the ICC's activities<sup>36</sup>. The entire ICC structure is composed of the Registry, Office of the Prosecutor, Judicial Divisions and the Presidency.

### **2.1.2 Process of the ICC**

The filing of cases to the ICC is undertaken in three basic ways. Foremost, State Parties of the Rome Statute about an offense or violation of human rights. The UNSC can also file petitions to have investigations carried out against any State that forms membership of the UN. Under this process, observations can be made that even non-members of the ICC are still liable for investigation. This is because they are part and parcel of the UN and are bound by UN resolutions<sup>37</sup>. The last way is the Office of the Prosecutor can freely choose to undertake an investigation of State over what it may deem as human rights infringement but the prosecutor is required to seek authorization from Pre-Trial Chamber before proceeding with the investigation.

After the investigation has commenced, the Pre-Trial Chamber takes over and during this stage Prosecutors are allowed to decide if an investigation should proceed or not. However, when petitions were filed by the UNSC or a State the Pre-Trial Chamber is the one that may talk the Prosecutor into reconsidering to proceed with a trial or not<sup>38</sup>. It must be noted that the decision not to proceed is made on the account that the trial might not result in justice. Reviews are allowed to be made and they are made by the Pre-Trial Chamber.

When investigations have yielded fruitful results, the proceedings are moved to the Pre-Trial Chamber which will summons the accused to appear in court but a warranty of arrest can also be issued in this case. The rights to appear in the court is involuntary but cases are evident that two individuals were arrested by foreign authorities whilst three were detained by their respective governments and where transferred to Hague for trial<sup>39</sup>.

The process ultimately may reach to the Trial Chamber in which the Prosecutor is required to submit considerable evidenced that will result in the accused being held guilty. The accused

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<sup>36</sup> C J Streutker and others, 'Interstitial Cells of Cajal in Health and Disease. Part I: Normal ICC Structure and Function with Associated Motility Disorders' (2007) 50(2) Histopathology 176–189.

<sup>37</sup> Rita Elizabeth Mutyaba, 'The International Criminal Court - its Impact and the Challenges it Faces in Fulfilling its Mandate' (2014) 2(1) Journal 216-224.

<sup>38</sup> Philippe Kirsch and John T. Holmes, 'the Rome Conference on an International Criminal Court: The Negotiating Process' (1999) 93(1) the American Journal of International Law 2.

<sup>39</sup> Ibid, p.86.

also entitled to a defence lawyer and rights to a free trial<sup>40</sup>. Once a decision is made, the accused can also appeal to the decision but the Trial Chamber decides if the accused should be acquitted or convicted. The sentencing is usually in the form of reparations and sentencing<sup>41</sup>.

### **2.1.3 Investigation of cases**

Since the inception of the ICC, 30 suspects have been under investigation in a total of 17 cases. The number of successful or full investigation is considered to be low and stands at 7<sup>42</sup>. The details of the 30 cases are as follows;

- 1 conviction;
- 1 pending for charges to be discussed;
- 2 await final decision;
- 2 died before being brought to court;
- 3 are currently in trial;
- 4 confirmed charges against accused;
- 4 await trial;
- 13 are at large.

Examinations are considered to be under way for Korea, Honduras, Guinea, Georgia, Afghanistan, Colombia and Nigeria<sup>43</sup>. According to Clark (2008) the duration of these investigations is assumed to have spanned five years from 2005-2010. Positive results were observed in Guinea which cooperated well by holding an internal trial of the accused<sup>44</sup>. Many nations such as Russia are also contended to be cooperating positively with the requirements of the ICC. Clark (2008) further contends that efforts have been fertile to have investigations carried out in Afghanistan.

### **2.1.4 Legal status and powers of the court**

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<sup>40</sup> Leila Nadya Sadat, 'Avoiding the Creation of a Gender Ghetto in International Criminal Law' (2011) 11(3) *International Criminal Law Review* 655–662.

<sup>41</sup> M. Deflem, 'Paust, Jordan J. International Law as Law of the United States. Durham, NC: Carolina Academic Press, 1996. Pp. Xi, 491. \$45' (1998) 9(4) *European Journal of International Law* 765–767.

<sup>42</sup> Güler Aras, David Crowther, and Professor Güler Aras, *Governance and Social Responsibility: International Perspectives* (Palgrave Macmillan 2011) p.26.

<sup>43</sup> Phil Clark, 'Ethnicity, Leadership and Conflict Mediation in Eastern Democratic Republic of Congo: The case of the Barza Inter-Communaire' (2008) 2(1) *Journal of Eastern African Studies* 1–17.

<sup>44</sup> J. De Hemptinne, 'ICC Pre-Trial Chamber Allows Victims to Participate in the Investigation Phase of Proceedings' (2006) 4(2) *Journal of International Criminal Justice* 342–350.

Article 4 of the ICC Statute confers the ICC with international legal mandates and such mandates come with power enabling it to execute its functions. Article 2 also allows the ICC to enforce measures or bring to trial any offending State, individual or group in line with the requirements of the Rome Statute<sup>45</sup>.

### **2.1.5 Applicability, Jurisdiction and admissibility law**

Just like any other institute, the ICC also has the jurisdiction to apply laws admissibly. Article 5 of the ICC also stipulates that the jurisdiction of the ICC is limited to those crimes that are considered to be perplexing the international community<sup>46</sup>. Thus Article 5 confers the ICC with the jurisdiction to deal with the following crimes;

#### **a) War crimes**

Article 5 outlines that the ICC has authority with regards to war atrocities in particular when perpetrated as part of a large-scale assignment of such crimes, or system or as part of a strategy. Such war crimes pertain to<sup>47</sup>;

- 1) Intentional killing;
- 2) Inhuman treatment or torture
- 3) Inflicting stern body and health injuries wilfully;
- 4) Unjustifiable destruction of property which is undertaken unlawfully;
- 5) Illegal use of prisoners of war;
- 6) Depriving prisoners of war of their basic rights;
- 7) Unlawful confinements, transfers of deportations;
- 8) Holding hostages;
- 9) Other violations stipulated in international law armed conflict.

#### **b) Genocides**

"Genocide" means any of the subsequent acts perpetrated with purpose of destroying partly or wholly a religious, racial, ethnical or national group and these can be<sup>48</sup>:

- 1) Executing certain group members;

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<sup>45</sup> Antonio Cassese, *International Criminal Law*, Oxford, Oxford University Press, 2003, pp. 472', (2004) 14(1) the Italian Yearbook of International Law Online 497–501.

<sup>46</sup> H. H. Jescheck, 'The General Principles of International Criminal Law set out in Nuremberg, as Mirrored in the ICC Statute' (2004) 2(1) Journal of International Criminal Justice 38–55.

<sup>47</sup> Jescheck, *Ibid*, p.42.

<sup>48</sup> Jennifer Trahan, 'The Rome Statute's Amendment on the Crime of Aggression: Negotiations at the Kampala Review Conference' (2011) 11(1) International Criminal Law Review 49–104.

- 2) Inflicting harm (mental or bodily) to certain group members;
- 3) Intentionally manipulating life conditions of a group so as to foster its destruction;
- 4) Imposing strategies to curb birth of certain groups;
- 5) Illegal possession of children of one group by another group.

### **c) Crime of aggression**

In line with this Statute, crime of aggression will be defined as the devising, initiation or killing of a person who holds a political or military over a particular State or acts of hostility which by their nature, significance and magnitude constitute violation of the UN Charter<sup>49</sup>. This Article also establishes that acts of aggression occurs when one State employs military force coercion against the political freedom, territorial integrity or territorial uprightness of another State. Notable examples of crimes of aggression listed by Article 8 of the Roman Statute are<sup>50</sup>;

- 1) Military invasions of a State of by any other State;
- 2) Military bombarding of a State of by any other State;
- 3) Military blockades of coasts or ports by any other State;
- 4) Military attacks on air fleets, marine and on the land of one State by any other State;
- 5) When a States grants another State to use its region to perform hostile activities on another State;
- 6) Using mercenaries or armed groups to execute armed attacks on another State.

### **d) Against humanity**

"Crime against humanity" refers to total awareness of the latter deeds that are perpetrated as part of a well-organized or comprehensive assault against any civilian population, with knowledge of the attack<sup>51</sup>:

- 1) Stiff deprivation of physical liberty which violates the stipulations of international law;
- 2) Extermination;
- 3) forcibly transferring or deporting a population;
- 4) Enslavement;
- 5) Murder;
- 6) Apartheid;

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<sup>49</sup> Resolution RC/Res.6 of 11 June 2010.

<sup>50</sup> Dawson Grant. M. 'Defining Substantive Crimes within the Subject Matter Jurisdiction of the International Criminal Court: What is the Crime of Aggression'. (1999) NYL Sch. J. Int'l & Comp. L., 19, 413.

<sup>51</sup> Cassese, Supra 45, p. 498.



- 7) Strange disappearances of people;
- 8) Targeted persecutions against a certain group or race;
- 9) Sexual offenses such as rape, forced prostitution and any other sexual rights violations;
- 10) Torture;
- 11) Other inhuman acts

## **2.2 Objectives and roles of the ICC**

The roles of the ICC are simultaneously related to their objectives and thus the aim of the ICC can be said to;

### **2.2.1 Promote justice**

Most victims of international crimes have fallen victims to international or national offenses and this is considering a breach to human rights<sup>52</sup>. Children and women have been at the end which suffered significantly from perpetrations. Though prosecutions have been targeting atrocities and major war crimes that have been committed, a huge disparity exists when crimes committed by government official and other State officials are neglected. Moreover, the application of jurisdiction to trial the offenders often results in ineffectiveness and justice is not always served especially on the side of the victims<sup>53</sup>. The role of the ICC is further justified by the magnitude of atrocities that have been committed since World War I in which a reportedly high number of victims has been recorded<sup>54</sup>.

### **2.2.2 Stop impunity**

The focus of the ICC can also be said to combat impunities that have been committed by heads of States who were not been prosecuted for their offenses. A notable example can be related to the Cambodian cases in which it was incapable of prosecuting Pol Pot for the death of at least one million individuals<sup>55</sup>. The Pol Pot was meet with mixed sentiments as most nations such as China were willing to object the accusations while nations such as USA had no jurisdiction to trial him. Hence, as a result he was never brought into any court to face charges held against him. The occurrence of these proceedings was before the establishment of the ICC and had the

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<sup>52</sup> 'DR Congo - Congo: Crimes Against Humanity?', (2015) 52(7) Africa Research Bulletin: Political, Social and Cultural Series 20630C–20631C.

<sup>53</sup> Thomas C Wright, *Impunity, Human Rights, and Democracy: Chile and Argentina, 1990-2005* (University of Texas Press 2014) p.81.

<sup>54</sup> Burrus M. Carnahan and M. Cherif Bassiouni, 'International Criminal Law:' (1988) 82(4) the American Journal of International Law 899.

<sup>55</sup> History Place (1996). 2 000 000 Deaths of Cambodians.

ICC been established, Pol Pot could have faced the wrath of the law. This implies that the ICC seeks to ensure that offenders like Pol Pot are brought to justice and victims receive reparations.

### **2.2.3 Deal with shortcomings of Ad Hoc Tribunals**

The 1<sup>st</sup> Tribunals, that is, the Tokyo and Nuremberg Tribunals had a lot of shortcomings. Foremost, their mandate is considered to be limited to specific crimes and places<sup>56</sup>. This implies that perpetrators of offenses such as atrocities, drug trafficking and sexual violations could easily escape the wrath of the law. Moreover, if the perpetrators were not from Germany or Tokyo, it means that they were not going to be trialled. This was also exacerbated by the fact that the prosecuting process required huge sums of money to finance them.

### **2.2.4 Deal with the inability and unwillingness of the National Courts to prosecute offenders**

This idea is based on assertions that certain nations are incapable of prosecuting offenders such as those that hold positions of influence which can either be political or military. This is aggravated by the fact things like corruption, threats and intimidation might be high in those countries. As a result, national courts might be rendered incapable of prosecuting them. Alternatively, when the offender is not a citizen of the State in which the offense was committed, the responsible State might be reluctant to prosecute the offender<sup>57</sup>. The ICC thus comes in with an international authority to bridge in that gap and bring the offenders to trial.

### **2.2.5 Enforce the international criminal law**

The number of casualties that has been registered since the World War II has surpassed the 170 million mark<sup>58</sup>. The absence of an international court meant that offenders could easily go away with an offense. Alternatively, offenders were considered to be immune from prosecution but the existence of the ICC means that all offenders can be brought to justice irrespective of their positions and country of residence.

### **2.2.6 Stop conflicts and potential war criminals**

The results of the ICC which are evidenced by the sentencing of offenders is often envisage to halt conflicts. This is because the nature of punishment and reparations considered by the ICC

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<sup>56</sup> Thomas J. Fararo, *Rational Choice Theory: Advocacy and Critique* (James S. Coleman and Thomas J. Farraro eds, Sage Publications 1992) p.11.

<sup>57</sup> Mutyaba, *Supra* 37, p.219.

<sup>58</sup> Manley O. Hudson, 'Advisory Opinions of National and International Courts. I. National courts' (1924) 37(8) *Harvard Law Review* 970.

are considered to be strong enough to deter future offenses<sup>59</sup>. However, other ideas still point to the notion that conflict is an unavoidable event which is bound to happen at any time and cost<sup>60</sup>. Hence, the ability of the ICC to halt is considered to be ineffective. As such, efforts to negotiate peace can also limit the ability of the ICC to stop conflict and this can be as result of the idea that negotiations might made to release offenders. For instance, the Sudanese Peace Agreement was made with a lot of compromises and some offenders were pardoned so to strike an agreement<sup>61</sup>.

### **2.2.7 Jurisdiction over international crimes**

Prior to the setting up of the ICC, there was no international courts with the mandate to enforce international law. The International Court was the only court that was capable of executing such a mandate but was restricted to disagreements between States. Other courts such as the Inter-American Court and the European Court of Human Rights were respectively restricted to a limited magnitude of human rights violations and European Convention of Human Right violations<sup>62</sup>.

## **2.3 Factors undermining the effective functioning of the ICC**

There are numerous factors that are being outlined as impediments to the ability of the ICC to effectively institute measures that can warranty effective execution of its mandate as stipulated by the Rome Statue. These impediments are herein discussed as follows;

### **2.3.1 Inadequate police force**

The ICC faces challenges of lack of authority and a police force that can arrest offenders and often depends on State Parties to make arrests. The cooperation of States is made in line with the requirements of Article 86 which requires that all States parties offer the ICC with all the cooperation that it deserves. Contrasting results are still being witnessed as some State parties have failed to cooperate with the ICC and examples include Mali and Kenya<sup>63</sup>.

### **2.3.2 Lack of financial resources**

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<sup>59</sup> Philippe Le Billon, 'the Political Ecology of War: Natural Resources and Armed Conflicts' (2001) 20(5) Political Geography 561–584.

<sup>60</sup> Phil Clark, 'Ethnicity, Leadership and Conflict Mediation in Eastern Democratic Republic of Congo: The Case of the Barza Inter-Communaire' (2008) 2(1) Journal of Eastern African Studies 1–17.

<sup>61</sup> Ibid, p.14.

<sup>62</sup> C. Kress, 'Universal Jurisdiction over International Crimes and the Institut de Droit International' (2006) 4(3) Journal of International Criminal Justice 561–585.

<sup>63</sup> International Criminal Court, Supra Note 9.

One of the core element that is threatening the functions or roles of the ICC is that of financial needs. The ICC has been contended to be chunking a huge financial bill and an estimated US\$900 million is assumed to have been spent towards the ICC<sup>64</sup>. Such costs are weighed against the number of cases that have been effectively handled by the ICC. Mutyaba (2013) outlines that 8 situations and 18 cases are currently being addressed by the ICC. On therefore places questions on the benefits of such activities against the costs that are being incurred by the international community.

On the other hand, arguments can be levelled that the number of cases processed is as a result of inadequate staff of which more money is required to recruit them<sup>65</sup>. Thus a balance needs to be stroked or measures need to be put in place to ensure that more effective results are reaped from the operation of the ICC.

### **2.3.3 Incapacity to acquire sufficient evidence**

The ability of the ICC to execute effective judgment hinges on the availability of sufficient evidenced provided or acquired. However, such evidence is not always readily available and the ICC or State Parties are sometimes incapable of acquiring it. This is because it is either too risky to acquire it, there are numerous technical impediments and logistical problems. This has been the case with nations such as Darfur, Central African Republic and Democratic Republic of Congo<sup>66</sup>. A huge sum of money is also required to visit those places and carry out the required tasks. Moreover, cases can be noted when the Court was restricted access to undertake the necessary investigations and this can be evidenced by the Cote D'ivoire which denied the Court not only of the right to gather more concrete evidence but to proceed with prosecution of offenders who had committed international criminal offenses that were under the Court's jurisdiction.

### **2.3.4 Misconception about the ICC**

The ICC also faces allegations that it is biased especially towards African States. This is because a huge number of cases that are handled by the ICC are African cases. Example include Ivory Coast, Libya, Kenya, Sudan, Central African Republic, Democratic Republic of Congo,

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<sup>64</sup> Jon Silverman, Ten Years, 900 M: Does the ICC Cost too much? BBC NEWS (March 12, 2012), <http://www.bbc.co.uk/news/magazine-17351946>.

<sup>65</sup> Mayerfeld, J. (2003). Who Shall Be Judge? The United States, the International Criminal Court, and the Global Enforcement of Human Rights. *Human Rights Quarterly*, 25(1), 93-129.

<sup>66</sup> Hans-Peter Kaul, 'Construction Site for More Justice: The International Criminal Court after Two Years' (2005) 99(2) *The American Journal of International Law* 370.

Uganda etc.<sup>67</sup>. Thus misconceptions have risen that the ICC targets Africa. The accusations were further heightened by the arrest of AL-Bashir of Sudan<sup>68</sup>. Moreover, a huge number of African cases that were as a result of referrals by the UNSC and State parties. Their view is that the legal system in Africa is incapable of administering justice to the victims<sup>69</sup>. This is usually true in most African States such as Sudan and Libyan in which dictatorship is assumed to be very high and a biased rule of law under such circumstances the Court has to intervene<sup>70</sup>.

### **2.3.5 Conflict promotion**

There are also criticisms that are being made that the ICC is being utilized to promote conflicts instead of reducing them. For example, Libya denying the Court the right to Saif Al Islam Gadhafi to face trial following issuing of a warrant of arrest while Sudan denied the legitimacy of the Court citing among other issues that it can fuel conflict<sup>71</sup>. This can be based on the idea that amnesty might be needed to warranty peace agreements but the ICC can proceed with the trial which compromises efforts to bring peace<sup>72</sup>. Moreover, offenders are sometimes reluctant to surrender themselves because of the fear of facing their punishments or indictments. This can be supported by what transpired in Darfur in which the indictment of Joseph Kony was strongly presumed to agitate further conflicts. On the other hand, rebels might also advocate their allegations be terminated if a peace deal is to be brokered. Hence, the prosecutor in this case is forced to drop the investigations as prescribed by Article 53 (1) (c).

### **2.3.6 Inadequate staff**

The incapacity of the ICC to handle a backlog of cases that still need to be addressed can be pointed to the problem of it being understaffed. The Human Rights Watch considers that even during the establishment phase of the ICC, it commenced operations with three members who constituted part and parcel of the Office of Public Counsel for the Defence (OPCD)<sup>73</sup>. Additional staff were recruited but at the expense that huge sums of money were paid to hire

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<sup>67</sup> Mutyaba, Supra 57, p.223.

<sup>68</sup> *The Routledge Handbook of New Security Studies*, (2010) 48(03) Choice Reviews Online 48–1725–48–1725.

<sup>69</sup> Paul Rogers, 'The United Nations and the promotion of peace\*' (2002) 18(2) *Medicine, Conflict and Survival* 110–119.

<sup>70</sup> T Publ and Others, *The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa: Report of the Secretary-General to the United Nations Security Council* (United Nations 1998)

<sup>71</sup> Article 13 Rome Statute; Chapter VII of the UN Charter.

<sup>72</sup> *The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa. Report of the Secretary-General*, (1998) 5(4) *International Peacekeeping* 156–168.

<sup>73</sup> Géraldine Danhoui, 'European Convention on Human Rights, Loukis G. Loucaides, Leiden / Boston, Martinus Nijhoff Publishers, 2007, 274P' (2007) 15(1) *African Yearbook of International Law Online / Annuaire Africain De droit International Online* 303–310.

them. It can thus be noted that credibility issues of the ICC hinge on the availability of funds which also determines the number of staff.

### **2.3.7 Political tool misconceptions**

The ICC is surrounded by negative perceptions and it is often argued that the UNSC is using the ICC as a political tool to attain its objectives. This stems from assertions that the UNSC has an influence over referrals. Cases of Libya and Sudan are considered to have been made because the UNSC was not pleased by these nations but the Syrian cases was not referred to the ICC yet the magnitude of offenses was so high<sup>74</sup>. War crimes in Syria were considered to be in serious violation of human rights and under the ICC's jurisdiction.

### **2.3.8 Long court proceedings**

Foremost, proceedings by the ICC are considered to be very tedious commencing from the Pre-trial stage up to the trial stage. Mutyaba (2014) contends that one of the key factors that causes delays is that there is enough room for offenders to appeal to judgements made. Thus during that time, judges have to take time revealing the appeal and if possible look at the evidence that has been submitted together with the appeal. This also adds to the number of cases which are awaiting trial and people often considered this as lack of credibility<sup>75</sup>. In most cases, the ICC has to grant the offender the right to appeal failure to do so is considered as an infringement to the rights of the offender<sup>76</sup>.

## **2.4 Overview of the relationship between human rights and the ICC**

It is worthy to note that there is a relationship between human rights and the International Criminal Court. Foremost, contentions can be made that the ICC is not a human rights court on severe judgment, however it has prominent importance and worldwide influence on most basic human rights and conditions<sup>77</sup>. The relationship between the ICC and human rights dates back to the post World War II era which formed a major foundation for international justice and international human rights law in which atrocities were committed in Germany by the Nazi<sup>78</sup>. Such developments are believed to have spiralled the need for an international justice system

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<sup>74</sup> International Criminal Court, Supra Note 63.

<sup>75</sup> Mar Jimeno-Bulnes, 'European Judicial Cooperation in Criminal Matters' (2003) 9(5) European Law Journal 614–630.

<sup>76</sup> Mutyaba, Supra 67, p.224.

<sup>77</sup> Kaul D Hur. H. C. H-P, 'Human Rights and the International Criminal Court' [2011] 'The Protection of Human Rights through the International Criminal Court as a Contribution to Constitutionalization and Nation – Building' 1–14.

<sup>78</sup> Ibid, p.13.

that addresses international human rights concerns. Furthermore, events that compounded the Second World War such as war crimes, crimes against humanity and crime of aggression in 1939 led to the establishment of a new international order which was subsequently followed by the Universal Declaration of Human Rights (UDHR) in 1948<sup>79</sup>. The convening of States to establish the UNDR was a major development in the need to formulate a platform for what will constitute fundamental freedom and rights individuals around the world would be in need of irrespective of social origin, religion, sex, colour etc.

Meanwhile, the UDHR placed emphasis on promoting not only basic human rights such as freedom from slavery and torture but also cultural, economic and social rights such as right to education and security, political and civil rights<sup>80</sup>. This provided a platform for the development of other international human rights aspects that include International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights<sup>81</sup>. The international bill of human rights is thus made up of these three important elements.

The need to promote global human rights still faces numerous challenges and most individuals in different parts of the world do not enjoy these basic rights that are stipulated by the UDHR<sup>82</sup>. This is because the rate at which basic human rights that include freedom from inhumane treatment, torture and the right to liberty and life are being violated at a grossly alarming rate. It is worthy to note that their occurrence is characterised by armed conflicts and war and posing huge threats on human rights and freedom<sup>83</sup>. The duties of the ICC were thus developed and centred on addressing among others these concerns. This is backed by Article 3 of 3 of the Geneva Convention which strives to address things such as unlawful execution, infringements of personal dignity, torture, cruel treatment, murder against any protected individual<sup>84</sup>. Such rights are part of the 15 crimes against humanity that are addressed by the Rome Statute<sup>85</sup>.

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<sup>79</sup> Rowland J.V. Cole, "Africa's Relationship with the International Criminal Court: More Political than Legal." *Melbourne Journal of International Law* 14, (2013).

<sup>80</sup> Jennifer Fallagant, "The Prosecution of Sudanese President Al Bashir: Why an SC deferral would harm the legitimacy of the ICC." *Wisconsin International Law Journal* 27 (2010): 727-756.

<sup>81</sup> Hurd, Ian. *International Organizations: Politics, Law*, Practice New York: Cambridge University Press, 2011, p.88.

<sup>82</sup> Sriram, Chandra Lekha and Steven Brown, "Kenya in the Shadow of the ICC: Complementarity, Gravity and Impact." *International Criminal Law Review* (2012): 219-244.

<sup>83</sup> Meernik, James. "Justice, Power and Peace: Conflicting Interests and the Apprehension of ICC Suspects." *International Criminal Law Review* 13 (2013): 169-190.

<sup>84</sup> James, Ibid, p.173.

<sup>85</sup> Michael E. Kurth, "The Lubanga Case of the International Criminal Court: A Critical Analysis of the Trial Chamber's Findings on Issues of Active Use, Age and gravity." (2013): *Goettingen Journal of International Law*: (431-453).

## 2.5 Amendments to the Rome Statute

The amendment process to the Rome Statute is undertaken by member States and this entails that non-member States are not allowed to participate in the amendment process<sup>86</sup>. The amendment process also requires that at least two thirds of majority votes be gained for an amendment to be made and this is done in line with the requirements of Articles 121 and 122 of the Rome Statute<sup>87</sup>. Amendments to the Rome Statute can be made to Article 5. 6. 7 and 8 and the amendments become binding to the member States a year after the amendments. Three amendments<sup>88</sup> have been made so far since the inception of the ICC and these amendments were made in respect of;

- 1) Article 8
- 2) Crime of aggression
- 3) Article 124

The first amendments restricted the use of weapons that are banned for use in international conflicts to be utilized in non-international conflicts<sup>89</sup>. Emphasis behind such an amendments was meant to restrict the level or magnitude of destruction especially endangerment to life which can lead to the destruction of non-combatants or non-military objectives. Restriction were imposed on the use of expanding bullets, analogous materials, poisonous gases and asphyxiating materials. Thus when applied in relation to violations of the Rome Statute, it can be noted that this amendment sought to limit the prevalent and magnitude of destruction on human life and objects that are necessary to the sustaining of human rights. Hence, by amending this, efforts are to ensure that the lives of innocent people are preserved and uncompromised access to certain needs is not infringed and risky.

The second amendment on crime of aggression was meant to confer much authority and power to the ICC in investigating and prosecuting any perpetrators for crimes committed<sup>90</sup>. Its main efforts were to reduce incidences of blockade, bombing and invading by any State on another State<sup>91</sup>. This can be said to be a milestone for the ICC is enforcing the Rome Statute measures

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<sup>86</sup> David Křivánek, "Prospects For Ratification And Implementation Of The Rome Statute By The Czech Republic." *International Criminal Law Review* (2008): 161-184.

<sup>87</sup> G. Sluiter, 'Implementation of the ICC Statute in the Dutch Legal order' (2004) 2(1) *Journal of International Criminal Justice* 158–178.

<sup>88</sup> Resolution RC/Res.5.

<sup>89</sup> Beth Van Schaack, 'The Aggression Amendments: Points of Consensus and Dissension' (2011) 105 *Proceedings of the Annual Meeting (American Society of International Law)* 154.

<sup>90</sup> Rome Statute Resolution RC/Res.6.

<sup>91</sup> Tladi D, "The African Union and the International Criminal Court: The Battle for the Soul of International Law" 34 *South African Yearbook of International Law* (2009), 57 -69, 57-58.



as perpetrators can be brought to justice. With a binding restriction, perpetrators can be dissuaded from committing offenses and makes it easy for the ICC to hold liable any offending State. Such an amendment made it easy for the ICC to enforce peace keeping initiatives which result in the protection of human rights. The last amendment pertained to Article 124 which was regarded as provisional and efforts were made in 2015 that it abolished from use from the ICC<sup>92</sup>.

## **2.6 Accomplishments of the ICC in enforcing the Rome Statute's stipulations**

The issue of accomplishments made by the ICC is subject to a lot of criticism but however the most notable achievement which everyone can point to is the Lubanga case. Human rights violations by Lubanga were considered to be too gross as he was further accused of enlisting minors into hostility activities<sup>93</sup>. The ICC was applauded for recognizing Lubanga's human rights though it led to further delay in executing judgment. In the judgement, a Victims Trust Fund was established and would led to payments being made to the victims<sup>94</sup>. The payment is however considered to have not been effected up to now and the amount of funds to be paid as for the repercussions is considered to be unknown. Other accomplishments by the ICC can be pointed to incidences that could have transpired but failed to do so as a result of the existence of the ICC. This could be as a result of fear of prosecution as evidenced from the Lubanga case in which 14 years are to be saved and the other 8 were suspended.

## **2.7 Criticisms against the ICC in addressing international crimes**

Despite the achievements that have been made by the ICC, the ICC still continues to come under fire from various parties. The ICC has been severely criticised for lack of credibility in its operations and approach of international crimes. One of the most notable criticism surrounds the issue of credibility. The number of accomplishments by the ICC are highly questionable as far as the issue of credibility is concerned. In this aspects, the ICC is contended to have under delivered since its inception in July 1998<sup>95</sup>. This follows the amount of resources spent towards ensuring that the ICC effectively executes its mandate. This can be reinforced by arguments that billions of dollars have been spent towards the ICC and yet the results have been insignificant. For instance, a major accomplishment by the ICC since its inception is the

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<sup>92</sup> Ibid, p.58.

<sup>93</sup> Burrus M. Carnahan and M. Cherif Bassiouni, 'Lnternational criminal Law:' (1988) 82(4) The American Journal of International Law 899.

<sup>94</sup> M. Ellen O'Connell and M. Niyazmatov, 'What is Aggression? Comparing the Jus ad Bellum and the ICC Statute' (2012) 10(1) Journal of International Criminal Justice 189–207.

<sup>95</sup> W. C. Wanless, 'Corporate liability for international crimes under Canada's crimes against humanity and war crimes act' (2009) 7(1) Journal of International Criminal Justice 201–221.

Thomas Lubanga trial which was finally concluded in 2012 after 10 years of trial<sup>96</sup>. In this case, Lubanga was convicted of criminal acts of conscripting children in acts of hostilities.

Available accounts however show that ICC has been relatively endeavouring to improve its ability to deliver expected results. It was observed that after the Lubanga verdict, hue strides have been made by the ICC in bringing perpetrators of inhuman international criminal offences to justice. Recordable results can be evidenced by the Ngudjolo Chui who was acquitted of war crimes and human rights violations<sup>97</sup>. Another instance was Germain Katanga trial in which he was facing war crimes and human rights violations. Germain Katanga was sentenced to prison for 12 years in prison in 2014. The problem of credibility has been blamed on the lack of participation by member states and most States that are not affiliated with the ICC are still reluctant to do so. The second reason behind the lack of credibility is also be blamed on the failure to institute fair trials and that a high number of fugitives have not yet been trialled<sup>98</sup>.

The ICC is also being criticized for lack of legitimacy and investigations and prosecutions by the ICC are considered to be solely based on Africans<sup>99</sup>. This therefore implies that other non-African fugitives are not being investigated and prosecuted. In addition, the selection process of cases is considered to be lengthy and prone to biasedness. In this case, cases have to be brought to attention by request from Judges, the United Nations Security Council (UNSC) or by the ICC itself. This will follow as a series of investigation by Office of the Prosecutor before final approval for a case. The major stumbling block is that though most cases are African related, their investigation is not carried out in Africa. The selection process has resulted in many cases being adjourned for lack of sufficient evidence (ICC, n.d).

Furthermore, the membership composition of the ICC is questionable. The ICC is composed of two permanent members of the UNSC and is still referring cases to the ICC. The UNSC can also reject claims or petitions for a case irrespective of the fact that violations of the Rome Statute are taking place. Thus it is suggested that the effective investigation, prosecution and protection of human rights by the ICC requires that States be members of the ICC.

The ICC is being attacked on the lack of ability to enforce the required standards or courses of action. This follows the idea that to every violation of the Rome Statute, there are always

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<sup>96</sup> The Prosecutor v. Thomas Lubanga Dylilo.

<sup>97</sup> The Prosecutor v. Mathieu Ngudjolo Chui ICC-01/04-02/12.

<sup>98</sup> Fernandez S, 'Presidency Statements' (International criminal court) <<https://www.icc-cpi.int/about/presidency/Pages/statements.aspx>> accessed 10 January 2017.

<sup>99</sup> *The Routledge Handbook of New Security studies*, (2010) 48(03) Choice Reviews Online 48–1725–48–1725.

scapegoats and examples are being pointed out towards the ravaging damaged that has been caused by ISIL or ISIS<sup>100</sup>.

Arguments can also be placed that these criticisms are as a result of the fact that expectations that are being raised against the ICC are considered to be too high and unattainable<sup>101</sup>. This therefore implies that the ICC might be effective in executing its roles to enforce stipulations of the Rome Statute but the criteria which is being used to determine such ability is wrong. Hence, criticisms must be levelled on realistic and attainable standards. Such expectations are contended to be mainly in line with the following aspects;

- I. The Post Conflict Justice asserts that expectations from the Court are in terms of restorative justice through criminal process<sup>102</sup>.
- II. Increasing victim participation in the Court's proceedings<sup>103</sup>.
- III. Bringing more perpetrators to justice including those that are being harboured in other States where the Court was unable to apprehend them<sup>104</sup>.

However, the fact that States concurred to the Rome Conference in 1998 entails that achievements have been made and some cannot be measured physically. This can be pointed that to the idea that since the inception of the ICC most individuals have been deterred from committing gross and inhumane international criminal violations. With regards to this, a defence can be made that the ICC has done a lot and most of its achievements can be unmeasurable.

## 2.8 Conclusion

It can be concluded that positive results have been attained since the inception of the ICC and this has seen some States positively cooperating with the requirements of the ICC. However, a relatively high number of States have failed to cooperate with the ICC and this can be attributed to the lack of a police force and authority by the ICC.

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<sup>100</sup> R. J. Graving, 'The ICC International Court of Arbitration: Meeting the Challenges?' (2000) 15(2) ICSID Review 417–453.

<sup>101</sup> Matthew Gillett, 'the Anatomy of an International Crime: Aggression at the International Criminal Court' (2003) 4(2) International Law Journal.

<sup>102</sup> Sergey Vasilev 'Post Conflict Justice 'the Victims' Court and the Promise of Restorative Justice' (2016). Accessed from <http://postconflictjustice.com/the-victims-court-and-the-promise-of-restorative-justice/> on 23 December 2016.

<sup>103</sup> Knut Doermann and others, *Elements of War Crimes Under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge University Press 2003) p.103.

<sup>104</sup> Bellelli, Roberto, *'International Criminal Justice: Law and Practice from the Rome Statute to Its Review,* (2010) Ashgate Publishing, and Farnham p.77.

Efforts by the ICC are being hampered by a lot of factors and these factors include the lack of funding to carry out the desired investigations and thereby obtain the required evidence. Most States parties that are being investigated by the ICC are in Africa and hence travel arrangements and other logistics have to be made. In retrospect, these nations are sometimes confined in a war environment which makes it too risky for officials to carry out the required activities. Conclusions can also be made that the ICC is surrounded by a lot of misconceptions as most States Parties consider it to be biased towards Africa and that it is being used as a political tool by the UNSC. Thus as long as these misconceptions exist, the ICC will face severe problems from collaboration from some State Parties. In addition, the ICC is being criticized on the basis that it holds too much power and hence resistance can be seen to be manifesting especially from offenders who find it as a hiding spot.

Moreover, the roles of the ICC are assumed to have promoted conflict at the expense of peace as offenders are sometimes in a strong position to bargain with the ICC for certain peace deals to be made. This therefore compromises the effectiveness of the ICC to perform its duties.

If the ICC is to effectively address international criminal law problems, then the issue of credibility has to be addressed as well. Credibility problems are arising from issues such as delay, voting process, scapegoats and the referral of cases which have been observed to be highly concentrated in Africa. Such can be accomplished by ensuring that the Court's guidelines are applied universally irrespective of political or economic affiliation and that all referrals especially those made by the UNSC and non-State Parties are subject to detailed investigation before commencing prosecution as stipulated in the Rome Statute.

Further conclusions can be made that the scope under which the ICC can exercise its jurisdiction and the nature of cases that it can subject to trial is limited. The ICC cannot try cases for crimes committed before a State signed on to the Statute.

Lastly, there is need to ensure that results that are delivered by the ICC are high and effective if State parties are to have confidence in the ability of the ICC to perform its duties. This is because little has been attained in terms of results against a huge costs bill that has been incurred. The ability to lower costs incurred by the ICC is being hampered by concerns that the ICC is understaffed and hence it is the main reason behind the problem of delays. This can be achieved by ensuring that the number of offenders who have committed offenses stipulated under the Court's jurisdiction are brought to justice and all pending cases that have been outstanding are dealt with.

## CHAPTER THREE

### STATE COOPERATION WITHIN THE CONTEXT OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

#### 3.1 Introduction

State cooperation is an essential element of the ICC in executing its mandate and when such cooperation is compromised, the ICC may encounter challenges in performing its mandate. Part IX of the Rome Statute therefore provides an outline of matters that govern judicial assistance and international cooperation of the ICC<sup>105</sup>. With regards to this matter, efforts to deal with international criminal issues therefore revolve around judicial assistance that is rendered by the ICC and the extent to which State parties effectively comply with the stipulations of the ICC. One major feature of the ICC that has been contended to offer drawbacks on the role of the ICC in addressing international criminal matters is that it tends to lack military power<sup>106</sup>. This implies that the ICC does not possess an effective mandate to arrest suspects and to acquire evidenced on criminal cases. As a result, the ICC places huge reliance on state criminal justice systems<sup>107</sup>. In addition, it can be noted that the extent to which such cooperation is offered also hinge on underlying circumstance through which ad hoc tribunals that form the basis through which the ICC was established<sup>108</sup>. This chapter will therefore provide insights of how cooperation under tribunals as well as the ICC has affected the ability to contain international criminal offences.

The notion of cooperation dates back to guidelines proposed by the UNSC which obliged member States to confine and implement decisions suggested by the UNSC in line with Chapter

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<sup>105</sup> T Hannks, 'The realities of international criminal justice' (2013) 13(1) International Criminal Law Review 1–5.

<sup>106</sup> Steven D. Roper and Lilian A. Barria, 'State Co-operation and International Criminal Court Bargaining Influence in the Arrest and the Surrender of Suspects' (2008) 21(02) Leiden Journal of International Law.

<sup>107</sup> Ibid, p.44

<sup>108</sup> Statute of the International Tribunal for the former Yugoslavia (1993) Security Council Resolution 827 (1993) on Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, (1993) ILM 1192; as amended by Security Council Resolution 1166 of 13 May 1998, available at <http://www.un.org/icty/> [Accessed 23 December 2016].

VII of the UNSC which *ad hoc* Tribunals were formed<sup>109</sup>. Care must however be taken to note that rules that govern cooperation under the Rome Statute are diverse and that the Rome Statute is restricted to International law regulations that govern treaties<sup>110</sup>. For instance, under the Rome Statute, Part IX, the right to enforce cooperation and render the Court with assistance is mainly imposed on member States and non-member States therefore have little obligations to comply with it and exceptions are made when cases are referred to by the UNSC<sup>111</sup>. Hence, this has imposed difficulties in international criminal law (ICL) in as far as practitioners are concerned as well as to the application of (ICL). The International Court of Justice postulates that reference of international law is drawn in line with its Article 38 (1) from;

- I. As an international custom,
- II. International conventions that are honoured by States,
- III. With regards to Article 59,
- IV. Standard values as portrayed by civilised nations,

Despite, depicting sources from which the ICL, major challenges are still being observed when it comes to the applicability of the ICL and such is in line with non-State Parties<sup>112</sup>. The problem is whether non-State Parties should be enforced to comply or cooperate with the Court as obligated by *customary international law* requiring States to arrest, charge and punish perpetrators of genocide, crimes against humanity and war crimes that are stipulated or are in the jurisdiction of the ICC<sup>113</sup>. Such obstacles occur when perpetrators are not members of the Court (citizens of non-State Parties).

When the issue of cooperation is related to State Parties limitations can still be observed and these relate to,

- I. Determining the yard stick which they can utilise to prosecute offenders of criminal offenses that are in the jurisdiction of the Court,
- II. The Court is the one which determines the unwillingness or inability of State Parties to prosecute offenders of international crimes and,

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<sup>109</sup> United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, available at: <http://www.unhcr.org/refworld/docid/3ae6b3930.html> [Accessed 23 December 2016].

<sup>110</sup> William A Schabas, *An Introduction to the International Criminal Court* (4th edn, Cambridge University Press 2011) p.33.

<sup>111</sup> Mahnouch H. Arsanjani, 'The Rome statute of the International Criminal Court' (1999) 93(1) *The American Journal of International Law* '22.

<sup>112</sup> Calvo-Guller K. N, *the Trial Proceedings of the International Criminal Court* (2006) (Martinus Nijhoff) p.113.

<sup>113</sup> *Ibid*, p.123.

### III. Determining the effectiveness of cooperation between the Court and State Parties.

Part IX further outlines conditions how perpetrators of criminal offenses stipulated by the Court are to be apprehended and surrendered to the Court and are based on previous experiences of *ad hoc Tribunals*<sup>114</sup>. One of the essential elements that determines the effective functioning of the Court is to ensure that State Parties are comfortable with arrest and surrender procedures so as to safeguard human rights of the accused. Therefore greater care must be undertaken in determining how human rights infringements during arrest and surrender of the accused person can influence trial proceedings. Furthermore, such can be done to determine if such can result in acquitting of a trial or mitigation of punishment to be imposed on a person whose offenses are considered to be grave or gross violations. Examples can be drawn from *Prosecutor v. Thomas Lubanga Dyilo* case about *Article 76 of the Statute on Decision on Sentence Pursuant* violations in the accused right to a fair trial and irregularities in following disclosure of evidence requirements are strongly believed to have interfered with the Court's judgement<sup>115</sup>. Considerations must be placed on the impact that is posed on amnesty of offenders on the cooperation between the Court and the State Parties. Detailed information on insights on how to approach these matters as well as procedures and lessons can be drawn from Special Tribunals and ad hoc Tribunals such as the Extraordinary Chambers of the Courts of Cambodia (ECCC) and the Special Court for Sierra Leone (SCSL).

It is therefore apparent that the ICC relies on cooperation of States so that it can be able to apprehend offenders who have committed offenses that are outlined in the Rome Statute's and are in the jurisdiction of the ICC<sup>116</sup>. The need for cooperation is not only limited to arresting perpetrators but also but also on transferring accused persons to the Court and initiating investigations in the concerned State in the event that the accused refuses to comply or having witnesses to appear before the Court<sup>117</sup>. Thus, when the Court lacks an appropriate or effective way of enforcement, the effectiveness of the Court and its survival are greatly compromised. Questions therefore still remain as to what other available ways of enforcement are available

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<sup>114</sup> William Schabas, 'The United Nations war crimes commission's proposal for an international criminal court' (2014) 25(1-2) Criminal Law Forum 171–189.

<sup>115</sup> Decision on Sentence Pursuant to Article 76", *The Prosecutor v. Thomas Lubanga Dyilo*, Case No.: ICC-01/04-01/06, Trial Chamber, 10 July 2012, paras. 88-91.

<sup>116</sup> As evidenced from the "Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997", *The Prosecutor v. Tihomir Blaskić*, Case No.: IT-95-14-AR108 bis, Appeals Chamber, 29 October 1997, para. 26.

<sup>117</sup> B Swart, General Problems. In *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos*, edited by H.A.M. Von Hebel, J.G. Lammers and J. Schukking, 1589.

to the disposal of the Court in the midst of these obstacles especially considering its lack of jurisdiction and an international police.

### **3.2 Extradition legalities on cooperation among States**

When it comes to addressing criminal issues, the aspect of cooperation among States is often as a result of complementary legal aid by States which is assumed to be out respect for other States<sup>118</sup>. On the other hand, it remains a common trait that Courts have a jurisdictional limit over criminal issues where in most cases territorial jurisdiction is often exercised over criminal matters<sup>119</sup>. This therefore implies that a significant level of jurisdiction is often observed over criminal matters committed within a State and external or international jurisdiction that can be executed by States to capture offenders who are citizens of a concerned State but have violated legalities in another State (horizontal cooperation)<sup>120</sup>. The main issue of concern is that when an individual has committed an offense in another State he or she must be trialled and must not go unpunished all because on the basis of territorial jurisdiction.

The law of extradition therefore plays an important role in fostering horizontal cooperation among State Parties and this is based on two essential necessities which are;

- I. Double criminality rule: Which highlights that a criminal offense the offender is being accused of must be recognised as a law by both the requested and requesting State.
- II. Restriction of a transfer of an accused to face a death penalty for an offense committed as evidenced by cases under which the South African government was refused to extradite an offender to face a death sentence<sup>121</sup>.

The issue of extradition therefore poses serious concerns over cooperation ties between States especially when legal irregularities between the requested and requesting State are existing over criminal elements committed and deciding the punishment to be levelled on the offender.

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<sup>118</sup> A Beck, 'Criminal law: Conviction of Lesser Offense as Acquittal of Graver Offense: Former Jeopardy: Remanding Cause for Sentence' (1907) 5(3) Michigan Law Review 206.

<sup>119</sup> A State's Jurisdiction refers to the Competence of the State to Govern Persons and Property by its Criminal and Civil Law.

<sup>120</sup> Watson GR "The Passive Personality Principle" 28 Texas International Law Journal (1993) and Hathaway OA, "Between Power and Principle: An integrated Theory of International Law" 71 University of Chicago Law Review (2005).

<sup>121</sup> Mohamed and Another v. President of the Republic of South Africa and Others 2001 (3) SA 893 (CC).



### 3.3 Ad hoc Tribunals and State cooperation

One of the most effective way States can demonstrate their level of commitment and cooperation to the Court is through prosecuting members for genocides be it crimes against humanity in their national boundaries. This was reinforced by steps taken to implement requirements of the Geneva Convention of 1949 that address grave breaches and human rights violations tasking that international tribunals to handle war crimes<sup>122</sup>. A notable example can be drawn from Rwanda tribunal that was established by the UNSC to deal with genocides that transpired in Rwanda<sup>123</sup>. During such a time, States relied on customary international law and the Geneva Convention of 1949 to impose punishment on offenders for violating the international humanitarian law<sup>124</sup>. The ICTR and ICTY required Rwanda and Yugoslavia to have perpetrators of gross human rights violations within their States to be indicted to the ICTR and ICTY to face trial, in most cases accused persons were residing outside Rwanda<sup>125</sup>.

The critical element behind cooperation of State members of these tribunals is that they relied on established statutory guidelines<sup>126</sup>. However, cooperation by non-State Parties was as a result of conformity to Article 25 of the UNSC Resolution. Problems with this method of cooperation were initially observed when Rwanda decided to independently conduct genocides trials yet the ICTR remained contended to trial offenders that were under its jurisdiction though incidences are there whereby cases were handled to Rwanda<sup>127</sup>. Another notable problem with this system of cooperation is that suspects would take advantage of the unwillingness of States to acknowledge to presence of suspects within their borders, and reference can be made to the *Felicien Kabuga case* which remained unresolved for financing genocides. The belief was that *Felicien Kabuga* was being harboured in Kenya<sup>128</sup>.

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<sup>122</sup> United Nations Security Council Resolution 808 (1993) of 22 February 1993 available at [http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_808\\_1993\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_808_1993_en.pdf) [Accessed on 23 December 2016].

<sup>123</sup> United Nations Security Council Resolution 955 (1994) of 8 November 1994 available at <http://www.unict.org/Portals/0/English/Legal/Resolutions/English/955e.pdf> [Accessed 23 December 2016].

<sup>124</sup> P Lumumba, 'The Rome statute and Omar Al Bashir's Indictment by the International Criminal Court' (2010) 39(2) Africa Insight

<sup>125</sup> FK Matanga, 'The challenges facing the international criminal court in prosecuting cases of genocide, crimes against humanity and war crimes' (2010) 39(2) Africa Insight.

<sup>126</sup> Matthew Lippman, 'A road map to the 1948 Convention on the Prevention and Punishment of the Crime Genocide' (2002) 4(2) Journal of Genocide Research 177–195.

<sup>127</sup> Rebecca M.M. Wallace *International Law* 5th (2009) p.20.

<sup>128</sup> Kristine Plouffe-Malette, 'Book review: Prosecuting genocide, crimes against humanity and war crimes in Canadian courts, written by Fannie Lafontaine' (2014) 14(6) International Criminal Law Review 1205–1208.

### 3.4 The Rome Statute and State cooperation

Article 86 of the Rome Statute stipulates that all States are to fully comply with the requirements of the Court in matters pertaining to investigating and prosecuting offenders for criminal offenses that are within the scope of the Court<sup>129</sup>. Differences can be noted when compared to a treaty which only applies to member States that have ratified it<sup>130</sup>. On the other hand, it also implies that States which form part and parcel of the Rome Statute will be governed by it. Agreement and allegiance to the Rome Statute is often acknowledged through ratification in which by consent the State Party agrees to conform to the stipulated guidelines<sup>131</sup>. The Rome Statute is not universally applicable and by 2012 it had a membership of 121 States<sup>132</sup>. However, the same applies to a treaty and members may not deviate from the requirements of the treaty in the fear that they will lose or cease to enjoy the benefits thereof. The Rome Statute on trademark, confirmation, agreement, endorsement or accession posits that the ‘*The statute is subjected to confirmation, agreement or endorsement by signatory States. The method of acceptance, agreement or endorsement by a State*’<sup>133</sup>.

Request by the Court are kindly open so as to improve the effectiveness of the Court and are in line with Article 87 of the Rome Statute but there exist certain circumstances under which the Court may engage regional organizations and International Criminal Police Organization to enforce cooperation from States<sup>134</sup>. The UNSC may be tasked to intervene in cases where States reluctantly comply with the Court. This can be traced to the Darfur situation in which the UNSC was engaged in accordance to the UNSC Resolution 1593 of 2005<sup>135</sup>.

In the midst of this, the Court can adopt measures that it feels would enhance the well-being, psychological, physical or safety of the witnesses as well as protecting information<sup>136</sup>. Scholars do however critique the Rome Statute’s formulation for failing to take into consideration the protection of witnesses in international criminal justice<sup>137</sup>. It is can be however difficult for States to refuse to comply with cooperation requirements of the Court which in most cases

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<sup>129</sup> Henckaerts J. and Doswald-Beck L., *Customary International Humanitarian Law*, Volume I: Rules, (2005) (Cambridge University Press), xvi

<sup>130</sup> <<http://InternationalCriminalCourt.TheStatesParties.to.theRomeStatute.Web.10November2012.http://www.icc-cpi.int/Menus/ASP/states+parties/>. Retrieved June 9, 2016> accessed 12 December 2016.

<sup>131</sup> J. I. Ross, ‘Book Review: Crimes against Humanity: The Struggle for Global Justice’ (2001) 11(1) *International Criminal Justice Review* 130–133.

<sup>132</sup> Article 87 Rome Statute.

<sup>133</sup> Article 87 (1) (b) Rome Statute.

<sup>134</sup> Article 2 Rome Statute.

<sup>135</sup> Article 87 (2) (b) Rome Statute.

<sup>136</sup> Article 87 (3) (b) Rome Statute.

<sup>137</sup> Rebecca M.M. Wallace *International Law* 5th (2009) 20.

emphasises the need by States to comply in order to ensure the effective functioning of the Court<sup>138</sup>. In addition, requests made by the Court are assumed to be effective when they are specific in relation to the area in which the offense has been committed and State of the offender which was not done in the Darfur which required that the Sudanese President Bashir be surrendered<sup>139</sup>. In order to deal with this issue Parties can engage in ad hoc agreements as was done by Cote D'Ivoire before being recognized as a member<sup>140</sup>. It is after making ad hoc arrangements that Cote D'Ivoire was recognized as a Party and was able to make referrals to the Court. Such a process can be employed by the Court as a way of getting those States that are reluctant to fully pledge their membership to the Court but are willing to deal with international crimes.

Article 88 of the Rome Statute therefore advocates that States to the Court, lay procedures and systems that can facilitate cooperation as outlined by the Rome Statute<sup>141</sup>. Thus, States have a mandate to institute regulations and laws that can enhance their abilities to comply with cooperation requirements of the Court. Efforts have also been made to have the Rome Statute as part of domestic legal frameworks within States though challenges have been witnessed in have it domesticated<sup>142</sup>. A significant number of member States of the Rome Statute are African countries and more than 16 countries have made efforts to have the Rome Statute domesticated in their States<sup>143</sup>. On the other hand, amendments in statutory laws within States can be made to compliment cooperation efforts of the Court. What is therefore needed is to have a certain guideline that can be followed by States in having to domesticate the Rome Statute. This is important as it enhances the ability of States to fully cooperate with the Court. In addition, Article 88 also empowers the Court to request cooperation from both State Parties and non-State Parties to cooperate and have suspects apprehended and surrendered to the Court with its requirements but non-State members may choose not to comply. This supports the notion of State sovereignty even though requirements are there that States comply with the requirements of the Court<sup>144</sup>.

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<sup>138</sup> <<http://InternationalCriminalCourt.org>. The States Parties to the Rome Statute. Web. 10 November 2012. <http://www.icc-cpi.int/Menus/ASP/states+parties/>. Retrieved June 9, 2016> accessed 12 December 2016.

<sup>139</sup> Article 87 (3) (b) Rome Statute.

<sup>140</sup> Article 87 (4) (b) Rome Statute.

<sup>141</sup> Article 87 (5) (b) Rome Statute.

<sup>142</sup> Article 87 (6) (b) Rome Statute.

<sup>143</sup> Amnesty International: The ICC Summary of Draft and Enacted Complementing Legislation as at April 2006" Available at [http://www.iccnw.org/documents/AI\\_Implementation\\_factsheet06Nov14.pdf](http://www.iccnw.org/documents/AI_Implementation_factsheet06Nov14.pdf) [Accessed 23 December 2016].

<sup>144</sup> South African Journal of Criminal Justice (3) 2003 368-392, 373.

Deductions can therefore be made that the formulation of the Rome Statute was mainly to deal with crime of aggression, genocides, crimes against humanity and war crimes. Due to the nature of these crimes, perpetrators of these crimes must therefore not be allowed to escape the full wrath of the law even when statutory requirements of the Rome Statute do not apply.

### **3.5 Cooperation efforts by African States with the ICC**

It can be noted that the jurisdiction of the Court is over individuals and lacks the power to institute decisions over other territories<sup>145</sup>. It is because of this major reason that the Court relies significantly on cooperation of States<sup>146</sup>. Arguments can therefore be made that the most effective way through which the Court can function is through referrals by State Parties as outlined by Article 14 and by 2013, four referrals had been made to the Court<sup>147</sup>. Even in the midst of referrals, cooperation aspects have been lacking and this can be evidenced by the DRC scenario which failed to surrender five suspects to the Court<sup>148</sup>. Evidence can also be drawn from the Libya and Sudan which are non-State Parties to the Court but have greatly failed to comply with the Court. This comes in the wake by Libya denying the Court the right to *Saif Al Islam Gadhafi* to face trial following issuing of a warrant of arrest while Sudan denied the legitimacy of the Court<sup>149</sup>. Despite these uncooperative acts, both Libya and Sudan were bound by Article IV of the UN Charter<sup>150</sup>. Such cases have been followed by the engagement of the UNSC to deal with legal and jurisdictional matters of internal crimes. This has however led to critics over the legal and political aspirations of the UNSC after it referred the Darfur situation to the Court<sup>151</sup>.

Cooperation between African States and the Court has been primarily surrounded by the role played by the African Union (AU) and in most cases the AU is considered to have strongly embarked on decisions that support non-cooperation with the Court<sup>152</sup>. This tends to place concerns over institutional and normative facts about international law. Institutional aspects focus on institutions that are tasked with the responsibility of ensuring the upholding legal

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<sup>145</sup> Article 25 (1) of the Rome Statute.

<sup>146</sup> Article 58 of the Rome Statute.

<sup>147</sup> ICC Press Release, Prosecutor Receives Referral of the Situation in the Democratic Republic of Congo (Apr 19, 2004).

<sup>148</sup> Mwesiga Baregu, 'The clones of 'Mr Kurtz': Violence, War and Plunder in the DRC' (2002) 7(2) African Journal of Political Science.

<sup>149</sup> Article 13 Rome Statute; Chapter VII of the UN Charter.

<sup>150</sup> Article 13 (b) Rome Statute; Chapter VII of the UN Charter.

<sup>151</sup> Article 98 of the Rome Statute of the ICC Para 10, Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), Doc. Assembly/AU/13(XIII)

<sup>152</sup> Tladi D, "The African Union and the International Criminal Court: The Battle for the Soul of International law" 34 South African Yearbook of International Law (2009), 57 -69, 57-58.

frameworks on both regional and international capacities<sup>153</sup>. Though the objectives of the AU and the Court are to some extent similar, the AU has a different perspective about the Court. Tladi contends that the roles of the Court are often regarded as an imposition of Western and European values upon African States by the AU for the sake of universality<sup>154</sup>. Thus, reasons by the AU to base its non-cooperation stance are centered on integrity, sovereignty and dignity. However, the African judicial systems is regarded as incapable of dealing with criminal offenses committed by Africans on fellow Africans<sup>155</sup>. The Court is thus a mechanism that can be used to positively influence and reinforce African judicial systems in dealing with genocides, war crimes and grave crimes. Recommendations are therefore that the African continent must allow the Court to help it in addressing criminal matters that are within the jurisdiction of the Court by cooperating with arrest, surrender and investigation procedures of the Court.

### **3.6 Conclusions**

Conclusions can therefore be made that State cooperation is an essential element of the ICC in executing its mandate and failure to acquire that cooperation can affect the effective functioning of the Court. As a result, efforts to deal with international criminal issues therefore revolve around judicial assistance that is rendered by States to the ICC.

Conclusions can be made that rules that govern cooperation under the Rome State are diverse and that the Rome Statute is restricted to International law regulations that govern treaties. With regards to this, the major problem is whether non-State Parties should be enforced to comply or cooperate with the Court as obligated by customary international law requiring States to arrest, charge and punish perpetrators of genocide, crimes against humanity and war crimes that are stipulated or are in the jurisdiction of the ICC.

On the other hand, it can be concluded that other major issues that are affecting cooperation of States to the Court are mainly related to determining the yard stick which they can utilise to prosecute offenders of criminal offenses that are in the jurisdiction of the Court, and secondly the Court is the one which determines the unwillingness or inability of State Parties to prosecute

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<sup>153</sup> T Barrow, 'AFRICA - ICC: AU special summit' (2013) 50(10) Africa Research Bulletin: Political, Social and Cultural Series 19901A–19902B.

<sup>154</sup> AU Summit Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court 9(ICC), Assembly/AU/Dec 245(XIII), July 2009, para. 12.

<sup>155</sup> Stanley P. Cauvain, 'ICC expert summit on food security, 29-30 June 2009' (2009) 1(3) Quality Assurance and Safety of Crops & Foods 202–203.

offenders of international crimes and determining the effectiveness of cooperation between the Court and State Parties can be a daunting task.

It can also be concluded that the need for cooperation is not only limited to arresting perpetrators but also but also on transferring accused persons to the Court and initiating investigations in the concerned State in the event that the accused refuses to comply or having witnesses to appear before the Court. It is worthy to note in conclusion that States' agreement and allegiance to the Rome Statute is often acknowledged through ratification in which by consent the State Party agrees to conform to the stipulated guidelines and that the Rome Statute is not universally applicable.

Based on deductions made, conclusions can be made that requests made by the Court are effective when they are specific in relation to the area in which the offense has been committed and State of the offender. Thus States have a mandate to institute regulations and laws that can enhance their abilities to comply with cooperation requirements of the Court.

Lastly, conclusions can be made that cooperation between African States and the Court is surrounded by the role played by the AU and the AU has strongly embarked on decisions that support non-cooperation with the Court. This is compounded by the idea that the objectives of the AU and the Court are to some extent similar, the AU has a different perspective about the Court.

## **CHAPTER FOUR**

### **EVALUATION OF THE JURISDICTIONAL ROLES OF THE ICC**

#### **4.1 Introduction**

This chapter presents an evaluation of the jurisdictional roles of the ICC and such is based on ideas that have been given in the preceding chapters. Hence, it identifies gaps and areas that need to be addressed so as to address challenges, perceptions as well as strengths that can influence the effective functioning of the ICC. This areas therefore relate to imposed pressure on the performance of the ICC, expectations, results, and the belief of targeting Africa, ability to accomplish set standards, set targets against available resources, peace motives and ability to make arrests, enforce reparations, and prevent future violations. These are herein discussed as follows;

#### **4.2 Imposed pressure on the performance of the ICC**

There are indicators that can be utilized to assess the effectiveness of the ICC and the notable indicator that can be utilized is its performance<sup>156</sup>. That is, its ability to achieve stipulated targets and hence the goals of the ICC are the ones that can be used to determine its effectiveness<sup>157</sup>. Such goals are outlined as follows;

- I. Transparency and fairness;
- II. Effective management and leadership;
- III. Offer effective security
- IV. Allowing full access to the court<sup>158</sup>.

Foremost, it can be said that the operations of the ICC can be considered to have been relatively transparent and to a greater extent fair<sup>159</sup>. This is because it has made huge attempt to address

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<sup>156</sup> Evenson, E., Director and Liz \_Evenson, I.J.P. *The International Criminal Court at Risk* (2015). Available at: <https://www.hrw.org/news/2015/05/06/international-criminal-court-risk> (Accessed: 10 November 2016).

<sup>157</sup> Elizabeth C. Minogue, "Increasing the Effectiveness of the Security Council's Chapter VII Authority in the current situations Before the International Criminal Court." *Vanderbilt Law Review*, (2008): 647- 680.

<sup>158</sup> <[http://InternationalCriminal Court. The States Parties to the Rome Statute. Web](http://InternationalCriminalCourt.TheStatesPartiestotheRomeStatute.Web). 10 November 2012. <http://www.icc-cpi.int/Menus/ASP/states+parties/>. Retrieved June 9, 2016> accessed 12 December 2016.

<sup>159</sup> Rastan R, 'The jurisdictional Scope of situations before the International Criminal Court' (2012) 23(1-3) *Criminal Law Forum* 1–34.

international criminal law violations that are in its jurisdiction. With this in mind, it can thus be said that the ICC does possess effective management and leadership. Moreover, it does allow full access to the Court though other States have been reluctant to join the Court as observed by the high number of non-State Parties<sup>160</sup>.

The most problem that is associated with these objectives is that they are not quantifiable and this puts a stumbling block on efforts to effectively determine the ICC's effectiveness<sup>161</sup>. Effectiveness in terms of performance can easily be measured when the objectives are quantifiable and can easily be broken into smaller measurable tasks and this is not feasible when it comes to the ICC<sup>162</sup>. This is because data is not easily available to measure its given tasks.

Arguments revealed by the ICC showed that some of the goals that were placed on it are actually outside its jurisdiction and hence it implies that their attainment is difficult<sup>163</sup>. This usually occurs when a task is given to the ICC and yet it has no jurisdiction, power or necessary resources to execute that job<sup>164</sup>.

On the other hand, some indicators that are being used to measure the performance of the ICC are considered to be external and this is also because it has no control over such things<sup>165</sup>. For instance, the ICC considers that available agreements, cooperation by States, the number of arrests, referrals by States are outside its control and yet these issues have some important repercussions on its performance<sup>166</sup>.

Performance measures can thus become biased when such factors are not accounted for. Possible causes can highlight that people are not usually informed of these factors or issues that are affecting the ICC and hence their judgement is often mistaken<sup>167</sup>.

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<sup>160</sup> Goy B, 'Individual Criminal Responsibility before the International Criminal Court' (2012) 12(1) International Criminal Law Review 1–70.

<sup>161</sup> <<http://www.beyondintractability.org/bi-essay/democratisation> (2003)> accessed 12 December 2016.

<sup>162</sup> Scaliotti, 'Defences before the International Criminal Court: Substantive grounds for excluding Criminal Responsibility – part 2' (2002) 2(1) International Criminal Law Review 1–46.

<sup>163</sup> K M Fierke, *Critical Approaches to International Security* (Polity Press 2007) p.36.

<sup>164</sup> Madeline Morris, 'The Democratic Dilemma of the International Criminal Court' (2002) 5(2) Buffalo Criminal Law Review 591–600.

<sup>165</sup> Ibid, p.598.

<sup>166</sup> Claire Finkelstein, 'Excuses and Dispositions in Criminal Law' (2002) 6(1) Buffalo Criminal Law Review 317–359.

<sup>167</sup> Philip Pettit, 'Is Criminal Justice Politically Feasible?' (2002) 5(2) Buffalo Criminal Law Review 427–450.



Moreover, pressure has been severely put on the ICC to achieve certain levels of performance and yet some of the required assignments or issues have to be severely investigated so that a proper judgement can be given<sup>168</sup>. Some of the issues can however be said to be tools of propaganda by one State against the other and usually such members would want the ICC to execute judgement in its favour<sup>169</sup>. Failure to do so, the State accuses the ICC of incompetence. This is common with referrals.

Despite this, the most basic and essential performance indicator that can be used to assess the role of the ICC in protecting human rights is attained results<sup>170</sup>. From the observations made, it can be noted that much has not been given out by the ICC. This follows the number of arrests since its inception and the notable achievement was the Lubanga case<sup>171</sup>.

When measured using against the amount of resources that are being injected into it against the results obtained it can be said that the ICC's performance is not that up to par<sup>172</sup>. This is because huge amounts of million dollars of international tax payers is injected to finance its operations. Despite this effort, a number of perpetrators are still walking out freely without arrests being made

Moreover, performance measures can be made in line with the amount of reparations paid to reflect the damage suffered by the victim. However, the ICC has not been able to come up with what amount will actually yield satisfactory reparation to the victims. This happens again with the Lubanga cases in which the amount of reparation was not determined and up to now it is uncertain how much the victims received and as it stands a huge number of cases still await trial and some of the victims have not yet received their reparations<sup>173</sup>.

Overall, the ICC has attained much though some of the targets are imposed on it and are out of jurisdiction or control and this is being driven by the fact that much of the factors that affect

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<sup>168</sup> R. A. Duff, 'Virtue, vice, and criminal liability: Do we want an Aristotelian Criminal Law?' (2002) 6(1) Buffalo Criminal Law Review 147–184.

<sup>169</sup> James Leslie L. Brierly, *The law of nations: An Introduction to the International Law of Peace* (6th edn, Oxford Univ Pr on Demand 1963) p.117.

<sup>170</sup> Bernd Schünemann, 'Principles of Criminal Legislation in Postmodern Society: The Case of Environmental Law' (1997) 1(1) Buffalo Criminal Law Review 175–194.

<sup>171</sup> Elaine M. Chiu, 'The challenge of motive in the criminal law' (2005) 8(2) Buffalo Criminal Law Review 653–729.

<sup>172</sup> Schünemann, *Ibid.*, p.89.

<sup>173</sup> Arthur W. Blaser, 'stay the Hand of Vengeance: The Politics of War Crimes Tribunals. By Gary Jonathan Bass. Princeton, NJ: Princeton University Press, 2000. 402p. \$29.95' (2002) 96(01) American Political Science Review 255–256.

its performance are external<sup>174</sup>. Such factors have not been given enough attention by those who argue that it has not achieved much. Again, the issue of achieved results still remains an issue to the ICC and the ICC needs to ensure that it achieves more in terms of its objectives<sup>175</sup>. Such objectives are greatly advocated to be expressed at least in measurable elements which will make it easy to measure performance of its management and leaders. What is also making it difficult to measure the performance of the ICC is that there are no quantifiable measures that can be used to measure performance. Most of its basic and core objectives cannot be expressed in quantifiable terms<sup>176</sup>.

#### **4.3 Expectations**

Expectations that are levelled on the ICC are diverse and numerous and when this is compared against the capacity of the ICC<sup>177</sup>, when can actually argue if the ICC is not undertaking too much responsibilities.

#### **4.4 Results**

This issues of results has been a formidable issue against the ICC and when related to the number of arrest made and cases trialled, the ICC can be said to have not done enough. But some efforts on the other hand, are being characterised by a lot of factors which are acting as hindrances<sup>178</sup>. One can argue that cooperation, outside determinants and finance have an important bearing on the ability of the ICC.

#### **4.5 The belief of targeting Africa**

When weighed against the number of African cases brought to the attention of the ICC against those of non-African states, arguments can actually be levelled against the ICC<sup>179</sup>. It is worth mentioning also that the number of African cases brought to the attention of the ICC can be as a result of the prevalent of gross internal criminal law violations in such a continent and hence

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<sup>174</sup> Gary Jonathan Bass, *Stay the hand of vengeance: The Politics of War Crimes Tribunals* (3rd edn, Princeton University Press 2000) p.204.

<sup>175</sup> Brierly JLL, *The Law of Nations: An Introduction to the International Law of Peace* (6th edn, Oxford Univ Pr on Demand 1963) p.107.

<sup>176</sup> Douglas Husak, 'Comparative Fault in Criminal Law: Conceptual and normative Perplexities' (2005) 8(2) *Buffalo Criminal Law Review* 523–540.

<sup>177</sup> Evenson, E., Director and liz \_evenson, I.J.P. (2015) *The International Criminal Court at Risk*. Available at: <https://www.hrw.org/news/2015/05/06/international-criminal-court-risk> (Accessed: 10 November 2016).

<sup>178</sup> Janis MW, *An Introduction to International Law* (3rd edn, Aspen Publishers Inc., U.S. 1999) p.68.

<sup>179</sup> M Simmons, 'Defence counsel ethics, the ICC code of conduct and establishing a bar association for ICC list counsel' (2016) 16(6) *International Criminal Law Review* 1048–1116.

the reason for the high number. But on the other hand, considerations also need to be place against human rights violations that are occurring or have occurred in non-African states.

#### **4.6 Ability to accomplish set standards**

Standards set by the ICC are sometimes difficult to attain and examples can be pointed to its aim to arrest and prosecute offenders<sup>180</sup>. This has proved to be difficult as considerations have been put on the number of arrests that have been made since the inception of the ICC. The number of cases that have been trialled under the ICC is also an issue of major concern. Some cases still await trial and others have not been given a sentence or judgement<sup>181</sup>. Irrespective of all these ideas, the expectations of the public itself can also make it a daunting task for the ICC to attain certain aims. What the public expects the ICC to achieve is sometimes outside its jurisdiction and in most cases the ICC may lack resources to execute them<sup>182</sup>. Hence, the ICC may ultimately be believed to have failed or underperformed. In such cases, the ICC can be said to be performing its Rome Statute stipulated roles but issue of expectations is the major hindrances that is negatively affecting its image.

#### **4.7 Set targets against available resources**

It is also essentials to notice that targets that are set require the necessary resources in order to execute them. Inadequate resources can make it difficult from the ICC to achieve stipulated goals. In most cases, resources that have been given to the ICC have not been sufficient enough to carry out planned missions<sup>183</sup>. This is because there are a lot of costs involved that emanate from carrying out investigations, making contact with witnesses or even safeguarding the acquired evidence<sup>184</sup>. On the contrary, the amount of financial injections that have been made into the ICC are considered to be huge and have surpassed a billion dollar mark. When this figure is weighed against what the ICC has achieved or expected to achieve, to can be noted that not much have been attained<sup>185</sup>. It can be concluded in this aspect that the ICC has

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<sup>180</sup> Jian Bi and Carla Kuesten, 'Intraclass correlation coefficient (ICC): A framework for monitoring and assessing performance of trained sensory panels and panelists' (2012) 27(5) Journal of Sensory Studies 352–364.

<sup>181</sup> Mark Kestern, 'Big fish or little fish — who should the International Criminal Court Target?' (31 August 2016) <<https://justicehub.org/article/big-fish-or-little-fish-who-should-international-criminal-court-target>> accessed 10 November 2016.

<sup>182</sup> Arthur W. Blaser, 'Stay the hand of vengeance: The politics of war crimes tribunals. By Gary Jonathan Bass. Princeton, NJ: Princeton university press 2000. 402p. \$29.95' (2002) 96(01) American Political Science Review 255–256.

<sup>183</sup> Evenson, E., Director and Liz \_Evenson, I.J.P, The International Criminal Court at Risk (2015) Available at: <https://www.hrw.org/news/2015/05/06/international-criminal-court-risk> Accessed 10 November 2016.

<sup>184</sup> P. D. Bliese and R. R. Halverson, 'Group size, group process effects and ICC Values' (1996) 1996(1) Academy of Management Proceedings 333–337

<sup>185</sup> Benedetto Conforti and Carlo Focarelli, *The law and practice of the United Nations (legal aspects of international organization)* (4th edn, Martinus Nijhoff Publishers 2010) p.113.

consumed a lot of international resources but the number of effective trials is very low though the ICC still advocates that its budget is still insufficient.

#### **4.8 Peace motives**

Peace motives can also contradict with the ability of the ICC to make arrests or even bring the offenders to justice<sup>186</sup>. This is because violators may possess backing of rebel groups who may demand that the offender be realised if certain peace agreements are to be brokered. In most cases, the ICC might be in huge desire to have the offender trialled and reparations made to victims but when such a case ensues, the ICC has no choice but to give in. a lot of cases have compromised the ability of the ICC to make such arrests and these have not been considered as well<sup>187</sup>. When this is put into consideration, one can make deductions that the ICC has to a greater extent made huge strides to effectively perform its duties but a lot factors are still undermining its capabilities.

#### **4.9 Ability to make arrests**

Improving the delivery of justice faces many hurdles, but the arrest of its suspects is a particular weak spot that affects the court in a profound way. As an act of compliance with international criminal law, arrest pits execution of a court's judicial order against the prerogatives of a sovereignty-minded, albeit legally obligated, state.

Efforts to bring offenders to face trials at the ICC have ended up being a considerable test for the ICC which has been operational for more than ten years<sup>188</sup>. The lack of a police force has placed the ICC in a critical position where it has to strongly rely on the dedication and cooperative ability of States who are also facing a series of economic and diplomatic challenges. This has to a greater extent made it difficult to make arrests.

More importantly, the drive to serve justice for severe criminal acts through the ICC has led to the development of in making arrests through the Special Court for Sierra Leone and the International Criminal Tribunal for the Former Yugoslavia. All these tribunals made effective custodies of 9 and 161 indictees respectively with no record of failure<sup>189</sup>. Precious wellsprings

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<sup>186</sup> Mark Kestern, 'Big fish or little fish — who should the International Criminal Court Target?' (31 August 2016) <<https://justicehub.org/article/big-fish-or-little-fish-who-should-international-criminal-court-target>> accessed 10 November 2016.

<sup>187</sup> Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Legime* (Cambridge University Press 2005) p.62.

<sup>188</sup> M. Deflem, 'Paust, Jordan J. International Law as Law of the United States. Durham, NC: Carolina Academic press, 1996. Pp. Xi, 491. \$45' (1998) 9(4) European Journal of International Law 765–767.

<sup>189</sup> P. D. Bliese and R. R. Halverson, 'Group size and measures of group-level properties: An examination of Eta-Squared and ICC values' (1998) 24(2) Journal of Management 157–172.

of lessons were thus drawn by both member States and the ICC from these tribunals about what can be achieved despite the overwhelming obstructions. These lessons should be mined and connected on the grounds that as a perpetual court with conceivably overall jurisdiction, the difficulties confronting ICC arrests are subjectively more unpredictable than those which the tribunals surmounted<sup>190</sup>. The effort made to effect arrests and encouragements made by the ICC can prove to be hard to sustain as different States around the world have different situations of different magnitudes. More is however required from member and non-member States if the ICC is going to continue to make effective arrests.

What complicates the issue of arrests is that cases of arrests are different and apprehension strategies are not always simple for the ICC. With the limited number of years of experience, cases of arrests made by the ICC can be categorised into the following aspects<sup>191</sup>;

- I. Cases like Lubanaga case in which repatriation of the offender who is already in the custody of a State where the affirmed violations happened are made to the ICC.
- II. Jean-Pierre Bemba Gombo case where an arrest is made by State officials for criminal acts performed in another State and the offender is surrendered to the ICC to face trials.
- III. Cases like the Joseph Kony case where a State is incapable of apprehending a suspect but arrests are made through military actions involving armed forces.
- IV. Omar al-Bashir of Sudan instances where the State is already implicated in acts of misconducts but denies to bring into custody of a suspect whose presence is well known.

The latter cases are tedious and often take time to make and in most cases have a lot of effects as the ICC tries to effect arrests.

Political justice has tantamount to become what most analysts have contended to be political justice. When considerations are put, it can be observed that activities of the ICC are to a greater extent influenced by political justice. Arguments can be placed that in the foreseeable future, much still needs to be done if the role of ICC is to be seen as truly an international justice role. This is in the wake of the odds that have been against the ICC in which it severely lacked

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<sup>190</sup> Institute on Security Studies (ISS), 'Briefing Paper on Recent Setbacks in Africa Regarding the International Criminal Court 2 (2010). Available at, [http://www.issafrica.org/anij/uploads/Recent\\_Setbacks](http://www.issafrica.org/anij/uploads/Recent_Setbacks).

<sup>191</sup> Mark Kestern, 'Big fish or little fish — who should the International Criminal Court Target?' (31 August 2016) <<https://justicehub.org/article/big-fish-or-little-fish-who-should-international-criminal-court-target>> accessed 10 November 2016.

resources, police backing, and geographical jurisdiction<sup>192</sup>. This has however come at a time when the ICC possessed back up from its allies and the ICC can be urged to promote such relationships which can either increase membership of the ICC. Participation by major national powerhouses will also greatly enhance the capabilities of the ICC.

Warrants of arrests made by the ICC must be made after review of the decision to make them public or not. Sealed warrants are usually more encouraged as opposed to public warrants which can evoke political conflicts<sup>193</sup>. The major advantage with sealed warrants is that it makes it feasible to effect arrests on offenders who at the time might be in the jurisdiction of a member State. Indictment of the offender in this case does not halt further acts of human rights violations

Duties therefore lies in the OTP to make valuable decisions about the time at which they can effect arrests because if not properly done, the offender might flee or decide to end his life. Several cases like the Bosnian case in which they tried to hide evidence from the ICC following realizations that it has commenced investigations of mass killings<sup>194</sup>. This led to the Bosnians to exhume therians. Some crime scenes were even planted with explosives such as IED and this has been common with what transpired in Yugoslavia<sup>195</sup>. Furthermore, the bespoke solution must be applied in those cases where the application of one arrest or indictment procedure does not apply.

An analysis can be made that the ICC is still heavily dependent on the member States and non-member States to make arrests. The ICC requires that the offender be arrested and transferred to Hague for trial. Without such a role, it can be noted that the ability of the ICC to make arrests is ineffective. This can be evidenced by facts which have shown that 14 warrant of issued have not yet manifested into court trials<sup>196</sup>. There is therefore a need to promote the role that must be played by the Assembly of States Parties to promote and boost such cooperation. However,

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<sup>192</sup> International Committee of the Red Cross (ICRC), 'To Serve and to Protect Human Rights and Humanitarian Law for Police and Security forces. Geneva, Switzerland' (2014).

<sup>193</sup> <<http://InternationalCommissionofJuristsKenyaSectionOmarAlBashirsVisitsKenyaandChad>> available at <http://www.icj-kenya.org/index.php/more-news/324-omar-al-bashirs-vists-to-kenya-and-chad> accessed 12 December 2016.

<sup>194</sup> United Nations Security Council Resolution 808, *Supra* note 122.

<sup>195</sup> D. K. Arya, 'Ceas de Rover, to Serve and to Protect: Human rights and Humanitarian Law for Police and Security Forces, International Committee of the Red Cross, Geneva, 1998, 455 pages' (1998) 38(325) *International Review of the Red Cross* 743–745.

<sup>196</sup> Cornelius Nestler, 'Constitutional Principles, Criminal Law Principles and German Drug law' (1998) 1(2) *Buffalo Criminal Law Review* 661–690.

amendments were made in 2014 towards changing arrest strategies and these were through the Arrest Strategy Roadmap of the ICC in New York.

The issue of arrest is also surrounding by criticisms as far as the issue of custody is concerned. This is because most States that have joined the ICC are considered to have weak governance structures<sup>197</sup> which makes it difficult to apprehend suspects and it is the wake of political or logistical problems. Much hostilities have also been witnessed in cases where Security Council referrals have provoked hostile acts by the affected State and examples include Libya and Sudan<sup>198</sup>. This can be necessitated by the idea that the issue of referrals can sometimes impose certain guidelines which might contradict with the affected State's desires. As a result, acts of opposition or refusal to cooperate will be witnessed as States try to align the ICC's requirements in line with domestic affairs. This implies that efforts to bring into custody of an offender are always different and this kind of scenario can be best dealt with by applying bespoke solutions. Cooperation between States and the ICC is of utmost importance in making arrests but it strongly lacks and this sometimes undermines the ability of the ICC to improve its performance as far as the issue of making arrests is concerned.

The global group must make a strong and purposeful dedication to the objective of ending this continuing exemption. The present situation undermines the ICC itself furthermore the worldwide responsibility for guaranteeing responsibility for the most exceedingly terrible global violations. Inability to capture offenders encourages them and possible future culprits, and powers the observation that they can stay past the scope of the Court and culprits can keep on committing criminal acts without punishment. This was highlighted in the ICC's 2013 Report on Cooperation. Further observations also reveal that there are costs identified with eliminating threats and providing security and contacting witnesses as well as protecting proof<sup>199</sup>. Moreover, such expenses will perpetually recur until the cases are exhibited to the Judges.

In the meantime, achieving this objective is essential for purposes of international justice and for targets that are autonomous of the authenticity and viability of the ICC. A large portion of

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<sup>197</sup> J. Von Bernstorff, 'The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the turn to Rights in International Law' (2008) 19(5) *European Journal of International Law* 903–924.

<sup>198</sup> Bernstorff, *Ibid*, p.913.

<sup>199</sup> Minoru Hatanaka, 'ICC and ICC open space; the trend of media art in recent years' (2012) 66(4) *The Journal of The Institute of Image Information and Television Engineers* 299–303.

the ICC's defendants are connected with the perpetration of serious international atrocities against non-combatants in unstable areas that include challenged districts of Southern Sudan, Darfur State, Central African Republic and Democratic Republic of Congo<sup>200</sup>. The international community has put extensive fortune so as to promote stability in these regions but this is being undermined by ICC escapees, who are wellsprings of industrious unsteadiness. Restricting fugitives a place of refuge and effectively handing them to the ICC, in this way aids to avoid abominations notwithstanding following through on the guarantee of responsibility for terrible violations officially perpetrated. But promoting more arrests of offenders will help to improve international justice

Tribunals and the ICC can be said to have been formulated on foundations that seriously lack the ability to enforce the required measures and do not possess the required systematic backing of laws<sup>201</sup>. Despite the requirements made by the Rome Statute to make arrests but it has a strongly failed to make them. Moreover, as long as international cooperation is still lacking, it can be so difficult for the ICC to make arrests.

#### **4.10 Ability to enforce reparations**

The notion that human beings are entitled, as a matter of right, to an effective remedy for human rights violations has a turbulent and incomplete history in the international arena. The idea itself dates back to the Universal Declaration of Human Rights of 1948, which declared that victims should have an effective remedy for violations of fundamental rights<sup>202</sup>. The form of that remedy has remained a source of disagreement, especially with regards to whether states and state actors are subject to criminal jurisdiction for human rights violations, and to the form of victim participation in criminal proceedings.

Though the ICC enforces reparations on the offenders to recompose the victims, it is apparent that some reparations have not yet been made up to date. Notable examples can be drawn from the Lubanga Case in which it is certain as to what amount the victims were going to receive and up to now no reparation has been paid<sup>203</sup>.

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<sup>200</sup> Jimeno-Bulnes M, 'European Judicial Cooperation in Criminal Matters' (2003) 9(5) European Law Journal 614–630.

<sup>201</sup> Leander, 'The International Criminal Court: Origins, Jurisdiction and the 'African Bias'' (South African History Online, 3 December 2015) <<http://www.sahistory.org.za/article/international-criminal-court-origins-jurisdiction-and-african-bias>> accessed 10 January 2017.

<sup>202</sup> F Timothy, 'A comparative study on the exclusions in ICC(1982) and ICC(2009)' (2010) 6(2) The Journal of International Trade & Commerce 227–246.

<sup>203</sup> Henckaerts J. and Doswald-Beck L., *Customary International Humanitarian Law*, Volume I: Rules, (2005) (Cambridge University Press), XVI., p.81.



In most cases, though reparations can be a good idea, it remains a daunting task as to what figure should be set for general offenses as the ICC may seek to ensure that the reparation made must be equitable to the offender. However, others may argue that the reparation must be commensurate with the level of crimes committed while others may contend that they must be high enough to deter future crimes.

In light of this, it is still prevalent that international criminal violations are still occurring and reparations can be said to have not done an effective job to deter future violations as far as the number of rising offenses is still increasing.

#### **4.11 Ability to prevent future violations**

The potency of the ICC to deal with violations hinges on stipulations that have been established by the ICC or other international regulations and its ability to put them into manifestation. Alternatively, as much freedom to manoeuvre is granted to the prosecutor, flexibility is gained especially when considering the fact that the prosecutor might be lacking financial capability to make arrests. This however has a major disadvantage that if it is over exercised it can negatively affect the integrity and credibility of the ICC as well as values it seeks to uphold<sup>204</sup>. This implies that the future credibility of the ICC can be enhanced by promoting accountability and the ICC ought to keep away from all contemplations of discouragement that can improve efforts to combat crimes by buttressing a strong, reliable, dependable, and standardizing an environment in which genuine violations are not endured. The idea of the ICC of discouraging criminal acts as part of the counteractive action of international violations would be a misinformed objective for a few reasons<sup>205</sup>.

- I. Foremost, most plainly, particular and general discouragement efforts are experimentally impalpable in the global criminal domain where they cannot be demonstrated or negated in a significant and strategic way which is past guesses. Prevention, in this manner can't, and ought not, serve as an apparent goal to be accomplished by the Court.
- II. Secondly, discouragement of future crimes appears to postulate that culprits of the most evident violations can be stopped by threatening to punish them. There is great motivation to speculate that this is not the actuality of the situation. Numerous culprits are mentally

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<sup>204</sup> Deflem M, 'Paust, Jordan J. International Law as Law of the United States. Durham, NC: Carolina Academic press, 1996. Pp. Xi, 491. \$45' (1998) 9(4) European Journal of International Law 765–767.

<sup>205</sup> T Margarret, 'Index to international criminal justice review' (2005) 15(2) International Criminal Justice Review 239–241.

and socially undeterrable. This is not synonymous with the idea that criminal justice, all in all, and the work of the Court specifically have no prevention effect just that particular and common prevention establishes an unsound reason.

- III. Third, a discouragement point of view is ethically imperfect since it receives a rationalistic way to deal with criminal acts that certainly flags to potential offenders that their demonstrations, however horrifying, may some way or another be exculpated through future discipline<sup>206</sup>. That is, violations committed will attract in the most pessimistic scenario, a predefined sticker price of a jail sentence. This causes offenders to continue with their acts of perpetrations even though they will be fully aware of the negative consequences.
- IV. Fourth, particular and general prevention can't lay solely on the shoulders of a solitary foundation, particularly not a legal one. Counteractive action ought to be seen in a much more extensive, systemic and long haul way, requesting more from non-legal organizations.

In circumstances, for example, in Libya and where international warrants of arrests have been issued to State officials during circumstances in which they were perpetrating offences, the objective of the ICC, in that capacity, must not truly be taken to be deterring criminal offences in the feeling of a particular prevention approach<sup>207</sup>. Or maybe, the main objective of the ICC ought to remain the offering of justice and responsibility for the sake of halting the exemption of culprits of global violations, as a commitment to the buttressing of a solid, predictable, trustworthy, and authentic regulating environment in which genuine wrongdoings are not endured. This will thus prompt to genuine international criminal law violation prevention.

A lot of suggestions can be made in light of this aspect but the OTP must establish prevention strategies that match its long term objectives<sup>208</sup>. The ability of the ICC can be enhanced by complementary and hard-nosed diplomacy. This stems from insights which have shown that the decision by the ICC to stay apolitical tends to hinder its ability to enforce tough measures that can improve cooperation, effect more arrests and persuade more State members to take the required steps in addressing human rights concerns.

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<sup>206</sup> F. James, 'What sort of global justice is 'international criminal justice'?' (2015) 13(1) *Journal of International Criminal Justice* 77–96

<sup>207</sup> Leander, 'The International Criminal Court: Origins, Jurisdiction and the 'African Bias'' (South African History Online, 3 December 2015) <<http://www.sahistory.org.za/article/international-criminal-court-origins-jurisdiction-and-african-bias>> accessed 10 January 2017.

<sup>208</sup> Henckaerts J. and Doswald-Beck L., *Customary International Humanitarian Law*, Volume I: Rules, (2005) (Cambridge University Press), XVI, p.212.

Though the Rome Statute clearly demarcates that it is the duty of the ICC to stop violations, it has become apparent that deterrence strategies are dependent on its failure and deterrence ability<sup>209</sup>. This is because when arrests have been made, offenders will be incapable of making further offenses and when there is a high likelihood that the level of punishment will be so stern, offenders are dissuaded from committing criminal acts. This ICC however encounters several difficulties in these aspects and these are often structural hindrances. Such will include too much reliance of State governance to make arrests and lack of a military or police force that can make the necessary arrests. Furthermore, the judicial capacity of the ICC is considered to be limited and vast number of offenders might be difficult to prosecute.

On the contrary, it is the ICC is deemed to possess the necessary resources that can be used to address such problems and thereby improving deterring future violations<sup>210</sup>. What is therefore required is that the ICC adopts measures that can allow domestic courts to carry out investigations and bring perpetrators to justice. This is also in line with the Rome Statute which outlines that the ICC engages its services in the event that a State has failed to bring justice after an offense has been committed. States however will try to avoid international intervention as they seek to maintain their sovereignty and other associated costs that may emanate thereof.

#### **4.12 Conclusions**

Conclusions can therefore be made that the ICC has to some extent managed to effectively perform its roles. This is because it has made significant efforts to bring to justice perpetrators of gross and inhuman offences and has made huge strides to promote peace. In addition, reparation measures imposed by the ICC on violations stipulated under its jurisdiction have also been to a greater extent being able to deter future violations. On the other hand, when financial considerations are made, conclusions can be made that the huge amount of financial support that has been rendered to the ICC has not been able to commensurate efforts to bring more perpetrators to justice. This is evidenced by the number of arrests made and the number of cases that are awaiting trial. On the other hand, conclusions can be made that expectations are so high about the performance of the ICC and in most cases such expectations are beyond the reach of the ICC. Moreover, the ICC has been operating with limited staff and has been

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<sup>209</sup> Ibid, p.214.

<sup>210</sup> <<http://InternationalCriminal Court. The States Parties to the Rome Statute. Web. 10 November 2012. http://www.icc-cpi.int/Menus/ASP/states+parties/>. Retrieved June 9, 2016> accessed 12 December 2016.

encountering obstacles in instituting its guidelines and making arrests because of lack of corporation by made states and lack of jurisdiction to effect arrests. With this in mind, it can therefore be ultimately concluded the ability of the ICC to effectively execute its mandate and perform its roles hinges on the ability to rid-off obstacles that are currently facing the ICC such as financial support, limited jurisdiction, lack of international policy and lack of corporation by member States. Hence, they ICC has to a greater extent playing a significant role ineffectively performing its duties.

## **CHAPTER FIVE**

### **CONCLUSIONS, RECOMMENDATIONS AND SUGGESTIONS FOR FUTURE RESEARCH**

#### **5.1 Introduction**

This study has addressed the subject of the impact of state cooperation on the effectiveness of the ICC and this follows a series of concerns over the sky rocketing number of concerns addressed towards and against the ICC. This study thus weighed the objectives, roles, past and prevailing Rome Statute violations concerns, factors affecting the ICC against its attained results. It was revealed from the study that there are a lot of factors that are affecting the ability of the ICC to render its deities effectively. Among such factors is, inadequate police force, lack of financial resources, incapacity to acquire sufficient evidence misconception about the ICC, conflict promotion allegations, inadequate staff, political tool misconceptions and long court proceedings.

Huge strides were to amend the Rome Statute so as to improve the ability of the Court to execute its mandate and attain more effective results. Criticisms are however still being placed on the ICC as one can argue that it has not achieved much in terms of results. Notable results are being pointed to the Lubanaga case and the number of perpetrators walking free is considered to be high.

What is rendering criticisms against the ICC is being attributed to financial support, expectations, a lot of external factors and factors that are undermine its operations. Thus, an accurate assessment of the role of the ICC requires that these issues be put into consideration.

On the other hand, the issue of cooperation remains a major element that is hampering the effectiveness of the ICC as its jurisdiction is limited and does not have an international police. The issue of cooperation is being further worsened by the idea that non-State may choose not to comply with the directive of the Court and in most cases, some State Parties to the Rome Statute even refused to comply with cooperation requirements of the Court. Cooperation between African States and the Court can be said to be affected by the AU which has had different perceptions about the Court in relation to integrity, sovereignty and dignity matters.

Recommendations will be made in line with these established results so as to proffer out an effective way that can be used to assess and improve the performance of the ICC. The next section thus deals with recommendations on addressing issues that are affecting the ICC and ways that can be used to deal with such issues and possibly lead to an improvement in performance.

## **5.2 Recommendations**

Foremost, there is need to disseminate information around the world about the ICC including its objectives, jurisdiction and factors undermine its operations. A lot of issues surrounding the ICC are as a result of the idea that people are not well informed about the ICC. This can be placed on allegation such as bias and political propaganda. Thus, by giving out information one can actually have a detailed view of the ICC and in return have actual perception of it. This will also help in enhancing cooperation by both members and non-members.

There is also a need to continually inject funds into the ICC. This follows concerns that the ICC is understaffed. Most of the delays that the ICC is being accused of are as a result of lack of staff members. Such members are needed in demonstration and judge departments so that the numbers of allegations can be investigated and pending cases can be addressed in time. Both victims will also be given a proper judgement in time.

Cooperation by both members and non-member States is needed to ensure that the ICC fully carries out its investigations. Such cooperation will help in addressing challenges in acquiring evidence and even help to make arrests of the offenders.

Investigations must be thorough and should be carried out everywhere irrespective of the status of the State. This follows allegations that the ICC is targeting Africa and yet most violations are occurring in non-African states.

There is also a need to ensure that sentence given by the ICC to offenders and the amount of reparations paid by the offender are high. This will go a long way in eradicating future international criminal offences that are in the jurisdiction of the Court.

Members States are also greatly encouraged to put in place measures and policies that can promote legal support and protection in their domestic nations. Such measures can include a free play of human rights defenders and freedom of the public to assess activities and performance of the state and access to the required resources. This can help to strengthen local justice systems and makes it easy to apprehend and bring into custody those that have

committed offenses that are in the jurisdiction of the Court thereby making it easy for the Court to bring to justice offenders.

In the event of a loggerhead, peace initiatives must be promoted by the ICC and this comes in the wake that negotiations by rebel groups might require offenders to be released. If such a cases can lead to possible peace, then the ICC is greatly advocated to promote such cases and even lobby parties involved in a conflict to consider such measures so as to promote mutual interests that can lead to improvement in peace and security.

### **5.3 Conclusions**

Conclusions can be made that the Rome Statute is to a large extent effective in enforcing cooperation from State and non-State Parties. However, to some extent the Rome Statute is not effective in enforcing cooperation from State and non-State Parties because there are cases whereby both State and non-State Parties have failed to comply with cooperation requirements stipulated under the Rome Statute. Probable measures that can be undertaken by the Court in the event of incidences of non-cooperation by State and non-State Parties have been established to be having a third party international body such as the UNSC to intervene in such matters. In most cases, it can be concluded that in order to improve cooperation with the Court by State and non-State Parties, there is need to increase the jurisdictional effectiveness and authority of the Court.

Conclusions can therefore be made that state cooperation does greatly influence the jurisdictional effectiveness of the International Criminal Court. This has based been on the idea that some States and non-States Parties have declined to cooperate with the Court provisions that have been made in the Rome Statute requesting that they comply with cooperation requirements of the Court. In line with this notion, conclusions can also be made that the need to obtain non-State cooperation is posing a huge challenge for the Court. This is based on the idea that the Court only enforces an obligation on member States that have ratified the Statute.

On the other hand, the effectiveness of the Court can also be concluded on steps or procedures the Court adopts after parties have declined to cooperate with the Court. The basic procedure the Court has been utilizing is engaging other third parties such as the UNSC. However, such a move is surrounded by criticisms as other States argue that the UNSC might employ a political stance against those States it does not favour.

Amendments to the Rome Statute have been in two notable forms and this first one involved the use of weapons that are banned for use in international conflicts to be utilized in non-international conflicts. This has managed to restrict the level or magnitude of destruction especially endangerment to life which can lead to the destruction of non-combatants or non-military objectives. Secondly, the amendment on crime of aggression was meant to confer much authority and power to the ICC in investigating and prosecuting any perpetrators for crimes committed. This has had an impact of reducing incidences of blockade, bombing and invading by any State on another State.

Conclusions can also be made that there is lack of cooperation between African States and the Court and such is being necessitated by the role that is being played by the AU which is embarking on decisions that support non-cooperation with the Court. The defence by the AU to reluctantly comply with the Court is justified on the basis of on integrity, sovereignty and dignity. However, the African judicial systems is regarded as incapable of dealing with criminal offenses committed by Africans on fellow African

In overall, the Court can be said to have achieved much in terms of results since its inception and the effectiveness of the Court to achieve more has been determined by things such as imposed pressure, expectations, belief of targeting Africa and set targets. Despite such issues, the ICC has managed to curb future violations to a relatively high degree.

#### **5.4 Suggestions for future studies**

The study provides an insight on the impact of State cooperation on the jurisdictional effectiveness of the ICC. Such has been conducted on both perspectives of both States and non-State Parties to the ICC. Future studies can address such concerns specifically to either State parties or non-State Parties. Further suggestions can be made that future studies should also attempt to examine major issues that are effectively affecting cooperation between African States and the Court. Since more cases that have been brought to the attention of the Court are African related.



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