NEAR EAST UNIVERSITY
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THE INFLUENCE OF THE INTERNATIONAL CRIMINAL COURT ON AFRICA

SAMUEL OKPE OKPE

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ACCEPTANCE/APPROVAL

We as the jury members certify the *'The Influence of the International Criminal Court on Africa'* prepared by Samuel Okpe Okpe defended on 26/12/2018 has been found satisfactory for the award of degree of Master

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DECLARATION

I Samuel Okpe Okpe hereby declare that this dissertation Entitled *''The Influence Of The International Criminal Court In Africa'* has been prepared myself under the guidance and supervision of *'Assoc. Prof. Dr. Timucin Koprulu'* in partial fulfillment of the Near East University, Graduate School of Social Sciences regulations and does not to the best of my knowledge breach and Law of Copyrights and has been tested for plagiarism and a copy of the result can be found in the Thesis.

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This thesis is dedicated to scholars and dreamers across the globe who are advocating for a world of Equity and Justice.

ACKNOWLEDGMENT

My immense gratitude goes out to everyone with whose effort the completion of this thesis was made possible.

ABSTRACT

THE INFLUENCE OF THE INTERNATIONAL CRIMINAL COURT ON AFRICA

The position of the International Criminal Court in Africa has over the years been an issue of contention. The African leaders through the African Union has posed some problems with the International Criminal Court regarding the principle of impunity and self-sovereignty which they (African Union) claim is been stolen from them by the International Criminal Court. This academic thesis seeks to add to the existing literature on the political status of the ICC and its influence on the African continent.

Throughout the course of history, wars and conflicts have occurred, people or state institutions have been accused of committing international crimes during these conflicts or wars thus the need for the formation of international tribunals to prosecute these accused individuals. This thesis however, will start by outlining the important international tribunals and international commission that have been set up over the course of history to deal with international crimes, this thesis tends to outline the formation, functions and composition of the various significant international tribunals over the world before explaining in detail the ICC and its contribution to Africa coupled with the criticisms faced by the ICC in the African Continent.

Keywords - International Criminal Court, African Union, International Crimes, Courts, Tribunal and Immunity.

ÖZ

THE INFLUENCE OF THE INTERNATIONAL CRIMINAL COURT ON AFRICA

Afrika'daki Uluslararası Ceza Mahkemesi'nin konumu yıllar boyunca bir tartisma konusu olmuştur. Afrika Birliği aracılığıyla, Afrika liderleri, Uluslararası Ceza Mahkemesi ile Uluslararası Ceza Mahkemesi tarafından kendilerinden (Afrika Birligi) çalındığını iddia ettikleri cezasızlık ve kendi kendine egemenlik ilkeleri konusunda bazı sorunlar ortaya çıkarmıştır. Bu akademik tez, ICC'nin siyasi statüsü ve Afrika Kıtası üzerindeki etkisi hakkında mevcut literatüre eklemeye çalışmaktadır.

Tarih boyunca savaşlar ve çatışmalar yaşanmış, insanlar ya da devlet kurumları, bu çatışmalar ya da savaşlar sırasında uluslararası suçlar işlemekle suçlanmışlardır. Bu nedenle, bu suçlanan kişileri yargılamak için uluslararası mahkemelerin oluşturulmasına ihtiyaç duyulmaktadır. Bununla birlikte, bu tez, uluslararası suçları ele almak için tarih boyunca kurulan önemli uluslararası mahkemelerin ve uluslararası komisyonun ana hatlarını çizerek başlayacaktır. Bu makale, dünyadaki çeşitli önemli uluslararası mahkemelerin oluşumunu, işlevlerini ve bilesimini özetlemeye eğilimlidir. ICC ve Afrika'ya katkısının ayrıntılı olarak açıklanmasından once, ICC'nin Afrika Kıtası'nda karşılaştığı eleştirilerle birleştirilmistir.

Anahtar Kelimeler: Uluslararası Ceza Mahkemesi, Afrika Birligi, uluslararası suçları, Muhakeme, Mahkeme, cezasızlık.

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ABBREVIATIONS

1. ACHPR - African Court on Human and Peoples' Rights
2. ACJ - African Court of Justice
3. ACJHR- African Court of Justice and Human Right
4. ACJHPR- African Court of Justice and Human and Peoples' Rights
5. ASEAN- Association of South East Asian Nations
6. ASP - Assembly of States Parties
7. AU- African Union
8. ECCC- Extraordinary Chambers in the Courts of Cambodia
9. ECtHR- European Court of Human Rights
10. EU- European Union
11. ICC- International Criminal Court
12. ICJ- International Court Justice
13. ICTR- International Criminal Tribunal for Rwanda
14. ICTY- International Criminal Tribunal for former Yugoslavia
15. IMT- International Military Tribunal
16. IMTFE- International Military Tribunal for the Far East
17. LRA – Lord Resistance Army
18. OAU- Organization of African Unity
19. PSC- Peace and Security Council
20. SCSL- Special Court for Sierra Leone
21. STL- Special Tribunal for Lebanon
22. UN- United Nations
23. UNGA- United Nations General Assembly
24. UNSC – United Nations Security Council
25. WW- World War

INTRODUCTION

International criminal law is a recent branch of international law. It is a legal discipline that comprises of several components which come together to achieve a particular goal. These goals could be to fight against international criminality, promote accountability and also to establish international criminal justice. From the above mentioned goals, we can thus define this kind of law as the set of international rules defining "**international crimes**" and these rules have the power to control the principles and also regulate the procedures concerned with investigating, prosecuting and punishing the offenders of these crimes.

The roots of international criminal law are important in understanding the legality of the international tribunal decisions. This branch of law is an integral part of public international law, thus, general sources of international law are applied here. International criminal law is further classified into substantive and procedural law. Substantive law deals with actions that can be said to be considered as international crimes, the subjective and mental element of the crime and also the conditions under which punishments are meted to people accused of committing international crimes, whereas, Procedural law deals mainly with the different stages and processes involved in an international trial. It is also very important to note that this branch of law is a mixture of national criminal law and international law, this is shown in the direct enforcement and the indirect enforcement elements in the roots of international criminal law.

International law supports international criminal law with the *ratione materiae* (jurisdiction regarding the kind of case and the kind of settlement applied) and also *ratione personae* (by reason of his person; courts authority to bring a person into its adjucating process). The legality and power of the decisions of international courts and tribunals based on international criminal law is explained under the "article 38 of the statute of the international court of Justice". This article states that;

1. "*The court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:*

a. *International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;*

b. *International custom, as evidence of a general practice accepted as law;*
c. *the general principles of law recognized by civilized nations;*
d. *Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.*

2) This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto" [1]

The ICC was created as a permanent court bestowed with the legal power to prosecute individuals (irrespective of political authority) for internationally related offences. The African Nations greeted the Rome Statute (Statute establishing the ICC) with so much enthusiasm and hope but these relationship however turned sour when the ICC started biting deep into the various African c ountries accused of committing crimes. The world started to witness a swift change of relationship between the two organizations (ICC and AU).

The Amitav Acharya Norm model was equally used to explain the various stages of tension between the two organs (ICC and AU) and as further explained, these tensions were caused mainly because the ICC opened cases in most places where human rights abuses were ongoing and majority of these places happened to be in Africa. Some African Countries such as Gambia, Burundi, Sudan and Kenya became strong opposition to the International Criminal Court while others were strong supporters encouraging other African Countries to stick with the ICC at least until Africa can solve its own judicial problems by creating strong courts that are capable of prosecuting crimes against humanity, genocide and other international crimes.

A step towards the creation of African Regional Courts to promote international justice and try international crimes has not been very successful due to some financial reasons and also non-cooperation by the parties of the AU. Thus, the importance of the International Criminal court cannot be over emphasized because if there were to be no international criminal court, worst crimes committed by African Leaders will go unpunished.

[1] ICJ Statute, 26th June, 1945 (Art. 38)

CHAPTER 1

THE ROAD LEADING TO THE FORMATION OF THE INTERNATIONAL CRIMINAL COURT

Spanning several historical years, the world witnessed various events and happenings that warranted the coordination of a specialized institution that will fairly administer judgement and also punish the guilty party. This chapter concerns itself with the various tribunals, commission and ad hoc courts that were formed before the creation the International Criminal Court.

1.1 HAGENBACH TRIALS

One major motive of international law is to battle impunity hence providing justice for international crimes through the creation of tribunals, the first record of such creation was in "1474 for Peter Von Hagenbach of Breisach on the upper Rhine"[2]. Peter Von Hagenbach was a knight from the historical Northeastern region of France called Alsace. He was a Germanic Military and Civil commander under the reign of Charles the Bold. Hagenbach was in control of a village called Breisach where civilians were killed and brutalized, thus he was to face trials for religious crimes and also crimes of other inhumane acts. His argument in his defense was that he was following superior orders, however, he was executed. Many scholars of international criminal law sees the Hagenbach trial as the first tribunal regarding international crimes.

[2] Duhaime, L. (2013, August 4). The Peter Von Hagenbach Trial. The First International Criminal Tribunal., http://www.duhaime.org/LawMuseum/LawArticle-1563/1474-The-Peter-Von-Hagenbach-Trial-The-First-International-Criminal-Tribunal.aspx, accessed (January 27, 2018)

Michael Scharf and William Schabas chose to define the Hagen Bach Tribunal as the first instant or history of international war crimes trials[3]. Hagenbach together with his troops faced a panel composed of twenty eight (28) judges which were set up by the allied states of the Roman Empire. The Roman Empire consisted of the Kingdom of Bohemia, Milan, Switzerland, Austria and the Netherlands, Hagenbach was charged with abuse and murder of civilians and also charged with looting. He was found guilty of the charges brought against him thus he lost his knighthood and equally lost his life.[4]

From the early 20th century following the end of the WWI down to the early 1990s, ad hoc international commissions as well as ad hoc international criminal tribunals were created by the international community. In addition to the above mentioned, three internationally authorized national prosecution organs were equally formed. The term ad hoc is used because all these processes were linked to organizations or institutions or the tribunals were formed for a reason.

The 1919 peace conference created by the WWI victors in Paris brought about the creation of the first international investigative commission. The allied and associated powers discussed on German's surrender based on a new peace Treaty, prosecution of Germany's Kaiser Wilhelm II, prosecution of Turkish officials for actions that were seen as inhumane acts and also the prosecution of German war criminals. The Peace Treaty formed from this peace conference is known as the Versailles peace treaty which created an international criminal tribunal and the major aim of the tribunal was to prosecute Kaiser Wilhelm II. The Tribunal was formed from article 227 of the treaty. This article goes thus;

> "*The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties;*
> *A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defense. It will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan;*
> *In its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the*

[3] Michael, S. P. (2002). Slobodan Milosevic On Trial. In S. Williams, *A Companion* (p. 32).

[4] Gregory, G. (2012). The Trial of Peter Von Hagenbach. In *Reconciling History, Historiography and International Criminal Law.* University of North Dakota, School of Law.

> *validity of international morality. It will be its duty to fix the punishment which it considers should be imposed;*
> *The Allied and Associated Powers will address a request to the Government of the Netherlands for the surrender to them of the ex- Emperor in order that he may be put on trial*"[5]

The Versailles peace treaty also led to the formation of the Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties. This commission organized reports and submitted war criminal suspects for prosecution by the international criminal tribunal. Furthermore, it charged individuals and officers based on the *Martens clause* which is in the 1907 Hague Convention preamble. The Martens clause states that;

> "*Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience*"[6]

The tribunal was however not very effective based on political reasons.

1.2 LEIPZIG TRIALS

The Leipzig trials of May 23rd 1921 was aimed at using article 227 and article 228 of the international criminal tribunal by Germany to punish accused offenders at the Supreme Court sitting at Leipzig. The Leipzig trials just like the international criminal tribunal was not very effective as in this period, the leaders of the allied nations were looking forward to a lasting peace in Europe than pursuing Justice. The failure of these tribunals led to increasing international crimes witnessed in the WW II.

1.3 UNITED NATIONS WAR CRIMES COMMISSION

The crimes committed at WW II called for prosecution on an international scale which was organized by the allied powers. In the year 1942, the victors of the WWII signed an

[5] Versailles Peace Treaty, 1919 (Art. 227)
[6] *Hague Convention Respecting the laws and Customs of War on Land.* (1907).

agreement at the St. James Palace for the formation of the war crimes commission. Just like the other tribunals after WW I, the United Nations War Crimes Commission was dependent on political consideration thus leading to its collapse. It is however important to note that the declaration signed at the Palace of St. James is the precedent of the international Military tribunal at Nuremberg.

The composition of this War Crimes Commission were representatives from 17 nations. The representatives submitted little or no report to the commission for deliberation, the commission did not receive the support it was supposed to receive for it to function properly and thus its significance greatly reduced.

1.4 THE INTERNATIONAL MILITARY TRIBUNAL AT NUREMBERG

This tribunal was created through the London Agreement of 1945 which was reached by the United Kingdom, United States, Soviet Union and France which will sit at Nuremberg to punish the Nazi offenders. The United Kingdom feared these tribunal proceedings will provide the accused an avenue for self-justification whereas the Soviet Union sat in judgement over Germany and punished Germany for crimes which the Soviet Union committed. Example; the murder of 15,000 Polish prisoners.[7]

Article 6 of the Nuremberg Charter are for the following crimes;

a. Crime against Peace; Abetting, Assisting, waging war or even participating in acts that could lead to war;
b. War Crimes: Disregard or breach of the rule of war, brutality towards prisoners of war;
c. Crimes against Humanity: deportation, enslavement and even intentional persecution based on racial or religious grounds.

The Nuremberg tribunal equally mentions in Article 7 to punish leaders if found guilty of committing international crimes. Article 16 of the Nuremberg Charter was aimed at providing certain rights and duties to the defendants to enable for equitable justice. Very

[7] Zawodny, J. K. (1962). *Death in the forest: The story of the Katyn Forest Massacre.* Notre Damme: Notre Damme University.

importantly, the Nuremberg Charter in Article 27 allows the death penalty and also Article 26 allows for trials in absentia. The International Military Tribunal lasted from 14th November 1945 to 1st October 1946. Article 8 removed the defense of obedience to orders from higher authorities or superior orders thus making the principle of responsibility applicable to all individuals which was in contrast to the famously held belief of what was provided by majority of military laws at the beginning of WWII. Art. 8 was however not strictly followed during the judgments of the IMT as there were certain exceptions. For example, the IMT allowed the defense of a lower ranking individual or officer in cases where there is absence of an alternative moral choice for a refusal to carry out the order by the superior.

The IMT indicted 24 persons and from this number, 22 persons were prosecuted. Three of the defendants were however acquitted while 12 received death sentence by hanging. Furthermore, 3 received life sentences and the remaining numbers were to serve prison terms ranging from 10-20 years.[8] The defendants at the IMT were all German nationals, however, the Russians were not arraigned for war crimes prosecution, and thus, the IMT was seen as one-sided.

1.5 THE FAR EASTERN COMMISSION AND THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST AT TOKYO.

The Far East Tokyo trial was a military trial that was held in 1946. This military trial was assembled to try the ruling class of the Japanese empire for heinous offences regarding abetting of a war. The Soviet Union requested for the construction of the Commission and this was accepted in Moscow. The commission gave the Soviet Union little autonomy over Japan. The United States was in control over this commission. The Commission comprised of 11 member states with the WWII victors exercising veto powers over it. General Douglas McArthur who was the supreme military officer of the allied powers

[8] IMT. (1945). *International Military Tribunal at Nuremberg*, United States Holocaust Memorial Museum: https://www.ushmm.org/wlc/en/article.php?ModuleId=10007069 , (accessed February 24, 2018)

started to arrest top class officials of the Japanese Empire for inciting people into staging a war, after this arrest was completed, General McArthur promulgated an order that led to the creation of an International Military Tribunal for the Far East Tokyo on 19 January, 1946.[9] Similarly, the Tribunal's Charter was approved on the same day. It is however worthy to note that the Far Eastern Commission was not a probing body but rather a political one in which the affairs of the Japan was being coordinated and also to coordinate the policies of the Allied powers in the Far East.

The Commission was saddled with the responsibility of carrying out debates, adjucating war crime trials and prosecuting accused persons for war crimes and it was equally responsible for the release of the acquitted. The United States and Soviet Union crumbled the Far Eastern Commission due to the introduction of political aims. Before its collapse, Tokyo trials were fashioned in similar way as the Nuremberg trial. The Major allies aimed to punish Japanese leaders same way as they did at Nuremberg. The trials were held on the 3rd of May 1946 at the war ministry office in Tokyo.[10] The Tokyo trials continued for about 3 years charging the defendants for war crimes, crimes against Peace and Crimes against Humanity just as in the Nuremberg tribunal. About twenty eight Japanese Military and political leaders faced the Tokyo trials, seven received death sentences, about sixteen were given life imprisonment sentences, two died while the trials were ongoing and the other two were asked to spend time in jail.[11]

1.6 COMPARING THE NUREMBERG AND TOKYO TRIBUNALS

The Nuremberg as well as Tokyo Tribunals both provided the avenue for the prosecution of international crimes. The jurisdiction of the Tokyo Tribunal are outlined in Article 5 (c) of the Charter which explains crimes against humanity as persecution on political and racial basis. This article states that;

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[9] Ryan B. J, (Great World Trials), Tokyo War Crimes Trial :1946-1948. (1997) p. 274.

[10] Richard M.H, (The Tokyo War Crimes Trial) Victors' Justice. (1971). p. 5.

[11] IMTFE. (1946). *International Courts, IMT Tokyo*, from International Crimes Database: http://www.internationalcrimesdatabase.org/Courts/International , (accessed February 28, 2018)

"*Crimes against Humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or* ***persecutions on political or racial grounds*** *in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any or' the foregoing crimes are responsible for all 'acts performed by any person in execution of such plan*".[12]

Whereas, Article 6 (c) of Nuremberg Charter includes persecution based on religious grounds as crime against humanity. This goes thus;

"*CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war;* ***or persecutions on political, racial or religious grounds*** *in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated*"[13].

Religious grounds were also added to the charter of the IMT due to the holocaust. In respect to the provision of the above stated articles, the Nuremberg Charter provided that any inhumane act committed against any individual population shall be prosecuted whereas in the charter of the far east Tokyo trials, the phrase 'against any civilian population' was removed, thus, extending the class of persons beyond civilians only. This implied that for the Tokyo trials, expansive killing of military officers during battle against the rules of war is punishable.

Both tribunals were not permanent institutions but rather ad hoc courts. As defined above, ad hoc courts are courts created for a purpose usually after the incident. In addition to the flaw already mentioned concerning the Soviet representatives persecuting Germany for the crime it (Soviet Union) committed in Poland, the Nuremberg Tribunal is also flawed for not prosecuting the states responsible for the Dresden Bombing which ended the lives of so many Germans neither did the Tokyo Tribunal punish the United States for the bombing in Hiroshima and Nagasaki which ended the lives of so many Japanese and also created environmental degradation felt till this day. Nevertheless, these trials especially the Nuremberg trial are seen as an important development to international criminal law.

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[12] IMTFE (1946)
[13] IMT (1945), Art 6 (c)

The Nuremberg principles greatly influenced international criminal law. These principles were introduced in the Resolution 95(1) of the United Nations General Assembly. These principles are;

i. Crimes committed are done by persons, thus they are responsible for their acts;

ii. Criminal liability under international law is in existence even though national laws states otherwise;

iii. These principles explains that, whoever violates international criminal law shall not be granted immunity. The Head of state or any top government official is not exempted from being tried if international law is violated;

iv. Everybody is responsible for his/her action. The claim of the defendant to be acting under an order from a superior does not matter as long as there was a moral choice;

v. There is a right to fair trial for everyone charged with a crime under international law;

vi. This talks about the crimes that are punishable as international criminal offenses (offenses under international law);

a. Crimes against peace: planning and preparation to carry out actions that are against Peace and tranquility;
b. War Crimes: brutalization of civilians, prisoners of war, breach of the law or customs of war, deliberate destruction of towns and villages;
c. Crimes against Humanity: Persecution based on Religious, political and racial grounds, extermination and even enslavement;

vii. This Nuremberg principle outlines that it is a punishable offence under international law in the involvement of a crime that will distort peace.

1. 7 COMMISSION OF EXPERTS FOR YUGOSLAVIA

Following resolution 780 of the UNSC, a commission of experts was established to inquire and gather valuable proof of dereliction of international humanitarian law and also

violation of the Geneva Convention in the former Yugoslavia. This expert's commission was also controlled based on the ever continuing politics in the Security Council and the functions of this commission were stated in Paragraph 2 of resolution 780 of the UNSC which outlines the duties of the commission of experts.[14]

From the above paragraph of resolution 780 UNSC, it can be gathered that the work of the Commission of Experts was to investigate and report to the UN Secretary General. The commission of Expert's work resulted to over 65,000 pages of documents as well as video tapes and other analysis. The findings of the commission of Experts was later handed over to the International Criminal Tribunal for former Yugoslavia.

1.8 INTERNATIONAL CRIMINAL TRIBUNAL FOR FORMER YUGOSLAVIA

Yugoslavia was a country located in the South Eastern Part of Europe. It was created after World War I in 1919 as the Kingdom of Slovenes, Serbs and Croats. It was however renamed to "Socialist Federal Republic of Yugoslavia" in 1963 with Josip Tito as its president until his death in 1980. The Formation of the Socialist Federal Republic of Yugoslavia were the Socialist Republics of Macedonia, Montenegro, Bosnia and Herzegovina, Serbia, Slovenia, Vojvodina and Kosovo were equally parts of Yugoslavia, the Socialist Republic of Yugoslavia collapsed shortly after because of Economic and political crisis which led to increased Nationalism and also the war of Yugoslavia.

The wars in Yugoslavia saw a great breach of international humanitarian law. There was widespread violence, war crimes and other inhumane acts were recorded. Considering the reports from the experts' commission, the UNSC (which is an important organ of the United Nations accountable for keeping peace by all means possible) requested the establishment of an international tribunal for Yugoslavia to be opened in February 1993. The UNSC passed the resolution 808 which formally created the "**International Criminal Tribunal for the former Yugoslavia**".[15]

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[14] UNSC. (1992, october 6). *Res 780,* http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/780 , (accessed February 28, 2018)

[15] ICTY. (1993). *Statute* http://www.icty.org/x/file/Legal%20Library/Statute/statute_808_1993_en.pdf , (accessed February 8, 2018)

Acting accordingly to the orders of the Security Council, the UN Secretary General established the ad hoc international tribunal and the resolution 827 was passed by the Security Council in May 1993 establishing the tribunal under chapter VII of the UN Charter. The elected judges named the Tribunal the International Criminal Tribunal for the Former Yugoslavia. The new tribunal was to prosecute "**war crimes, crimes against humanity and genocide that was committed in the Former Yugoslavia from 1991**". The Geneva Conventions of 1949 were very essential to the international tribunal as it was the basis on which the trials were held. The functions and duties of the ICTY is outlined in its statute called the ICTY Statute.

Article 1 of the ICTY statute granted the ICTY authority to try and prosecute individuals for serious human rights violations carried out in the former Yugoslavia from 1991[16]. It is worthy to understand the superior position of the tribunal over the National courts. Article 2 mentions the various crimes that individuals can be prosecuted for according to the Geneva Convention of 1949. These breaches includes; taking civilians as hostage, willful killing, illegal deportation, torture or inhumane treatment, while Article 3 mentions the crimes that occurred from the violation internationally accept customs in regards to warfare. These includes; plunder of property, regardless of their public or private status and also the use of harmful chemical substance or the attack on undefended towns and villages. Article 4 condemns genocide and mentions the authority of the tribunal to prosecute those found guilty of these crimes. Article 5 mentions inhumane crimes which includes rape, extermination, torture, enslavement, murder, deportation, imprisonment, various forms of persecutions as well as other inhumane acts. In addition, the tribunal shall exercise jurisdiction over natural persons as outlined in article 6 of the ICTY statute and also on all other subject matters listed in Articles 2, 3, 4 and 5.

1.9 INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA.

Rwanda is a country located in the Eastern part of Africa. The Hutu, Tutsi and the Twa all subgroup sharing the same culture and language called the Banyarwanda are inhabitants of this country. Following the era of colonization, Rwanda was under the Belgium rule. The Belgium colonial system favored the Tutsi clan when compared to the other sub-groups. This favoritism and discrimination by the Belgian forces led to Hutus and Tutsis inter-clash and in

[16] ICTY Statute (1993)

1959, the Rwandan revolution occurred. Hutu activist started killing the Tutsis, this forced the Tutsis to flee into neighboring Uganda.

A Hutu military officer Juvenal Habyarimana successfully carried out a coup and became president of Rwanda shortly after independence. As a result of this development, a Rwandan Patriotic front formed majorly by the displaced Tutsis from the Rwandan revolution swung into operation and this group was terrorizing the Hutu led government. On 6th of April 1994, the Presidential plane of President Juvenal was shot down and shortly after, the Hutus blamed the Rwandan Patriotic front which comprises mainly of Tutsis of carrying out the attack while the Tutsis accused the Hutu military officers for carrying out this attack to provoke an anti-Tutsi revolution.

Shortly after the attack, the Rwandan genocide began which saw the death of about a million people (majority Tutsis) in 3 months. Sanity returned to the country when the Tutsi led Rwandan Patriotic front took control of the country and also following the creation of the International Criminal Tribunal for Rwanda (ICTR).

In July 1994, the UNSC established another Commission of experts but this time for Rwanda. Acting accordingly to the Security Council resolution 935 of July 1994, a commission of experts were requested to make reports and present to the Secretary General. According to the reports of the Rwandan Commission of experts, the UNSC employing the provisions in article VII of the UN charter decided to establish another international tribunal in like fashion as the ICTY. The ICTR had its own Statute which was adopted by the UNSC Resolution 955. This states that;

"*Decides hereby, having received the request of the Government of Rwanda (S/1994/1115), to establish an international tribunal for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighboring States, between 1 January 1994 and 31 December 1994 and to this end to adopt the Statute of the International Criminal Tribunal for Rwanda annexed hereto*".[17]

[17] ICTR. (1994). *Statute of the International Criminal Tribunal for Rwanda,* International Criminal Law Society: http://www.icls.de/dokumente/ictr_statute.pdf , (accessed March 9, 2018)

Judging from the provision in Resolution 955 of the UNSC, the ICTR can prosecute based on issues regarding inhumane crimes and genocide just like the ICTY and war crimes tribunals mentioned earlier. The definition of crimes against humanity for Rwanda equally includes discrimination. The Rwandan tribunal had temporary jurisdiction from 1/01/1994 to 1/12/1994.[18] Because Rwanda was more of a Civil war case, breaches to the laws and customs of war or the "Geneva Convention of 1949" regarding international crisis were disregarded. The International Criminal Tribunal of Rwanda equally had primacy over the National court just like the ICTY.

1.10 LEGALITY OF THE INTERNATIONAL TRIBUNAL FOR YUGOSLAVIA AND RWANDA

The ICTY and ICTR were both ad hoc tribunals formed by the UNSC to punish criminals of genocide, crimes against humanity, war-crimes and other breaches to international human right laws. The tribunals were however challenged of its illegitimacy when the defendants argued that in article 41 of the United Nations charter, the UNSC had no right to establish ad hoc tribunals as a measure of enforcement[19]. The tribunals however argued that according to chapter VII of the UN charter, the Security Council has explicit right to enforce whatever measure it sees fit to restore peace and end the threats to peace.

The legality of the Rwandan tribunal was challenged at the Kayanbashi case while the legality of the Yugoslavia tribunal was challenged at the Tadic case. Joseph Kayanbashi at the Rwanda tribunals challenged the jurisdiction of the ICTR, making claims to 5 points.

i. The sovereignty of Rwanda was violated because the ICTR lacked a foundation treaty by the General Assembly.
ii. Chapter VII of the UN charter limits the UNSC from creating an ad hoc tribunal.

[18] *ICTR Statute (1994)*
[19] The Prosecutor Vs. Joseph Kayanbashi, ICTR-96-15-T (International Criminal Tribunal for Rwanda, Trial Chamber 2 July 3, 1997). Accessed from World courts: ICTR, the Prosecutor Vs. Joseph Kayanbashi, Par. 9 p. 4, 1997

iii. The supremacy of the tribunal over local courts is against the "principle of *jus de non evocando" (*the right to enjoy jurisdiction from competent court)

iv. The tribunal has no jurisdiction over any individual under international law;

v. The tribunal is bound to be partial and also dependent.

These claims are very similar to the claims made against the ICTY by Dusko Tadic, thus the prosecutor at the ICTR constantly made reference to the Tadic' case to answer the question of jurisdiction. The ICTR prosecutor in response to the first question of jurisdiction explained that the sovereignty of Rwanda was not violated as Rwanda made the invitation for an international tribunal, the prosecutor further went on to say that, as mentioned in the ICTY trials, the member states of the UN are obliged to execute all the resolution/decision of the UNSC under Art. 25 of the UN charter.[20] The prosecutor further explained that considering a matter of urgency in setting up a tribunal in Rwanda, a treaty would have been an ineffective means, hence a quick decision for the creation of an ad hoc tribunal by the UNSC.[21]

Regarding the second question raised by the defense counsel that the UNSC had no authority under the provisions of Chapter VII of the charter to open an ad hoc tribunal, the prosecutor noted that the means of maintaining peace mentioned in chapters VI and VII of the UN charter was not exhaustive, thus, the UNSC is granted the full authority to explore whatever means therein to protect international peace in areas where the UNSC has certified to be endangering international peace. In regards to the question of Primacy by the tribunal, the prosecutor noted that the Art. 8 of the ICTR statute, the tribunal can request the national court at any time to defer any proceedings to the competence of the tribunal. This is a principle of "*non bis in idem* (Latin for not twice in the same thing, which means; no legal action can be instituted twice for the cause of a particular legal action") which is outlined in Art. 9 of the ICTR statute. The primacy element of the tribunal is completely extracted based on the statute in which the tribunal was created according to chapter VII of the UN charter, thus, conferring upon the tribunal, the legal authority and power to give commands and requests that are irrevocable and must be met by the states, and in most cases, bending the will of the state.

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[20] United Nations. (1945). *Art. 5 UN Charter.*

[21] The Prosecutor Vs. Joseph Kayanbashi, ICTR-96-15-T (International Criminal Tribunal for Rwanda, Trial Chamber 2 July 3, 1997). Accessed from World courts: ICTR, the Prosecutor Vs. Joseph Kayanbashi, Par. 9 p. 4, 1997

The prosecutor answered the question whether the tribunal has any jurisdiction under international law over any individual by making reference to the Nuremberg Tribunals. The ICTR prosecutor explained that according to the Nuremberg trials, criminals/individuals under international law are accountable for the crimes committed. Furthermore, the prosecutor explained that the UNSC by setting up the ICTR and ICTY have extended the legal responsibility of individuals to also International Humanitarian law, thus the ICTR holds legal jurisdiction.

The prosecutor in order to answer the last question on the impartiality of the tribunal mentioned that, the ICTR has its legal independence because it possess a personal statute, its area of jurisdiction and equally its system of action. The ICTY just like the ICTR was faced by similar question of impartiality. At the ICTY during the Tadic case, the prosecutor made reference to the "1954 Effects of Awards of Compensation made by the United Nations Administrative Tribunal" by the ICJ that; political organs of the UN could create an independent and purely judicial institution, thus the UNSC could create such judicial body according to chapter VII of the charter.[22]

The ICTY and ICTR signified a major shift against impunity as individuals irrespective of their positions and power were held accountable for crimes committed.

1 .11 HYBRID, MIXED OR INTERNATIONALIZED COURTS

Following the creation of the Tribunals, the UNSC decided not to establish another ad hoc tribunal but instead it relied on the Secretariat to create a form of hybrid court which would have a mixture of national and international laws, legitimacy and similar mechanism as the ad hoc tribunals and also a mixed staff system in which international prosecutors works hand in hand with the national colleagues and these courts are found in the states where the violation occurred unlike the ICTR that was located in Arusha, Tanzania.

After the ad hoc international criminal tribunals, a third generational criminal law body known as hybrid or internationalized courts were established. The Hybrid courts were set up to

[22] Prosecutor Vs. Dusko Tadic, IT-94-1-a (International Tribunal For the Former Yugoslavia July 15, 1999)

prosecute local and international crimes comprising of local and international judges. Examples of such courts are;

i. Extraordinary chambers in the Courts of Cambodia: In 1975, Khmer Rouge gained control of the country, however, this group of communist were overthrown in 1979, following this event, the nation Cambodia was faced with a war which saw the death of over 3 million people[23]. The collapse of the Khmer Rouge regime was equally followed by a civil war which came to an end in 1998. Following these events, the government of Cambodia requested the UN to establish a trial that will prosecute top members of the Khmer Rouge regime. Because Cambodian legal system was not in a good form, the ECCC was created through the support of the Cambodian government and the UN in 2003[24], the court is however independent from both its founding parties. The aim of the ECCC is to try heinous atrocities committed during the Khmer Rouge regime.

ii. The Special Tribunal for Lebanon (STL): this is another hybrid court with an international character but applying the national criminal law of Lebanon to prosecute individuals responsible for the attack on Rafic Hariri who was the former Lebanese Prime Minister[25]. Former Prime Minister Hariri was assassinated in February 2005 and this event has brought huge political implications on Lebanon even until this day. The STL was inaugurated on the 1st March 2009 and has been hearing cases since then. Its headquarters is in the Netherlands, but it also possesses a field office in Lebanon.

iii. Special Court for Sierra Leone (SCSL): Following the end of the civil war in the country in 2002, the Sierra Leonean Government requested the UN in 2000 to set up a judicial trial that will prosecute civilians as well as UN peace keepers for serious crimes during the civil war. The SCSL is seen as the first international hybrid tribunal

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[23] *About ECCC*. (2003). Extraordinary Chambers in the Court of Cambodia: https://www.eccc.gov.kh/en/about-eccc , (Accessed March 3, 2018)

[24] *Promotion of ECCC legacy*. (2015, September 28). Office of the High Commissioner, United Nations Human Rights: http://cambodia.ohchr.org/en/rule-of-law/promotion-eccc-legacy , (Accessed March 3, 2018)

[25] *About the Special Tribunal for Lebanon*. (2009). Special tribunal for Lebanon: https://www.stl-tsl.org/en/about-the-stl , (Accessed March 3, 2018)

with the authority to try those accused of serious crimes against humanity from the date of the failed Abidjan Peace Accord[26]. This international tribunal sits at Sierra Leone and shortly after its inauguration, indictments were made. The former Liberian President Charles Taylor was also indicted. A total of nine persons have been convicted and sentenced to serve jail terms, while others died during trials.

iv. Other hybrid tribunals includes; "Special Panels and Serious Crime Unit in East Timor", "Regulation 64 Panels in the Courts of Kosovo" and very recently, the "Extraordinary African Chambers signed between the African Union and Senegal in 2012".

[26] Bangura, Y. (1999). *Reflections on the 1996 SIerra Leone Peace Accord.* United Nations Research Institute on Social Development.

CHAPTER 2

WHAT IS THE INTERNATIONAL CRIMINAL COURT

Just as in every other international organization, there are different organs, founding/binding charter and also history. In this chapter, we shall be examining the International Criminal Court in details; its foundation statute, composition and also mode of operation.

2.1 INTERNATIONAL CRIMINAL COURT

Following the difficulties in establishing ad hoc tribunals and commissions, a permanent international court had to be created, hence the ICC was created to "**prosecute offenders and decide on cases regarding crimes against humanity, war crimes and also international crimes of genocide**". The international law commission drafted the statute of the ICC. Following orders from the UN General Assembly, the International Law Commission in 1947 created the draft code of crimes but this was not adopted until 1996 due to some misunderstanding to what 'aggression' meant.[27]

The most important treaty that established the ICC is the "**Rome statute**" that was signed in Rome on the 17th July, 1998. This Statute was established at a conference for diplomacy but it became effective on the 1st July 2002 and the ICC started functioning on this date. The statute confirmed four (4) international crimes; "**crimes against humanity, genocide, war crime and crime of aggression**".

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[27] Slany, W. (Ed.). (1972). *Foreign Relations of the United States, 1947, council of Foreign Ministers; Germany and Austria, Volume II*, https://history.state.gov/historicaldocuments/frus1947v02 , (Accessed March 9, 2018)

During the cold war era, two very important names are remembered for their contribution in setting up the ICC, these names are;

i. Benjamin B. Ferencz
ii. Robert Kurt Woetzel

Benjamin Ferencz is an American advocate but was born in Hungary on the 3rd of November, 1920. After serving as an investigator of the Nazi war crimes, Benjamin Ferencz was later appointed in the Einzatsgruppen trial (9th of the 12 trials of the Nazi war crimes organized by the United States in Nuremberg) as the chief prosecutor on behalf of the United States Army. Following his experience from the post WW II era, Benjamin Ferencz became one of the leading advocate for the establishment of an International Criminal Court and in 1975 he published his first book which was titled "Defining International Aggression: the search for world peace". The author at the beginning of the book started with a very important citation by Hugo Grotius in his book the law of War and Peace. This citation was advocating for punishment to be exerted on wrong doers for crimes committed .It goes thus;

> "If we our strength should all together join,
> Viewing each other's welfare as our own.
> If we should each exact full punishment
> From evil doers for the wrong they do,
> The shameless violence of wicked men
> Against the innocent would not prevail;
> Guarded on every hand and forced to pay
> The penalties which their misdeed deserve,
> They soon will cease to be or few become" (Ferencz, 1974).

In the book, Benjamin Ferencz argued in support of the establishment of a world criminal court.

Robert Kurt Woetzel (12/05/1930 -09/06/1991) was born in Shanghai to German parents. He later migrated to the United States and there he received a Law degree from Bonn University and got a Ph.D. from Oxford University. He was a Professor of International law and taught at several universities and was engaged in so many projects which are regarded as a major contribution to the creation of an international criminal court.

The International Criminal Law Commission was founded by Prof. Robert in 1965 and in this commission he served in the position of Secretary General. The Commission's main function was to organize legal programs, conventions and seminars to highlight proposed developments that could be introduced in International Law. In 1970, Prof Robert co-edited 'Towards a feasible International Criminal Court' along with Prof. Julius Stone. The aim of this book was to further outline how an institutionalized international Criminal Court can be developed and managed. Shortly after, Prof. Robert founded the "Foundation for the Establishment of an International Court". This foundation was effective until his death in 1991. The functions of the foundation were the same as the Law Commission. The foundation conducted seminars in which legal issues were discussed and all the discussions were aimed towards the establishment of an International Criminal Court. This foundation was equally working for the UN all as a means to support the establishment of an International Criminal Court.

In 1989, Prof. Robert, Prof. Benjamin and Arthur Napoleon Raymond Robinson who was the former Prime Minister of Trinidad and Tobago all drafted a proposal in favor of the creation of an International Criminal Court. This Proposal was proffered to the UN General Assembly by Prime Minister Arthur Napoleon who vehemently stated that in other to fight the illicit drug trade that was on a rampage in Trinidad and Tobago, an International Criminal Court would be needed. The Proposal from Prime Minister Arthur led the international law commission into drafting a new permanent international criminal Court.

The International Law Commission in 1995 presented a Final draft article of the proposed International Criminal Court to the UN General Assembly. Upon the recommendation of the commission, subsequent meetings were held for the realization of the court statute. In June 1998, the General Assembly met in Rome to finalize the proposed treaty of the International Court, this treaty was to become the international court statute. The Rome statute was adopted on the 17 July, 1998 and the statute entered into force on 1 July, 2002 following the ratification of its 60th member according to article 126 paragraph 1 of the statute. This states that

"*This Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations"*[28] .

The ICC as of December 2018 has 138 signatories in which about 123 are parties (ratified and adopted the Rome Statute). Countries such as the United States, Israel, Russia and few others has indicated that they will not be ratifying the Rome Statute. Burundi which was a state party since 13 January 1999, ratified in September 2004 and adopted in December 2004 notified on 27 October 2016 that it was withdrawing from the Rome Statute and this withdrawal became effective from the 27 October 2017.[29] Another example is the Gambia and South Africa, both countries announced their withdrawal on 10 November, 2016 and 19th October 2016 respectively however, the withdrawal was rescinded (canceled) on 10 February, 2017 by Gambia and 7 March, 2017 by South Africa.[30] The only country awaiting effective withdrawal is the Philippines. The Philippines signed the statute on 28 December, 2000 and ratified on 30 August, 2011 and the Rome Statute was put into force on 1 November, 2011, this however changed on 17 March, 2018 when President Duterte announced the withdrawal of the country from the Rome Statute, this withdrawal is expected to be effective on the 17 March, 2019.[31]

Article 127 paragraph 1 of the Statute analysis the conditions under which withdrawal from the ICC can be conducted. This states that;

"*A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date*".[32]

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[28] *Rome Statute of the International Criminal Court, Art. 126.* (1998, July 1). Retrieved from International criminal Court: https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

[29] *Burundi*. International Criminal Court: https://www.icc-cpi.int/burundi , (Accessed March 6, 2018)

[30] AFP. (2017, March 8). *South Africa Revokes Decision to Leave ICC*. Daily Nation: https://www.nation.co.ke/news/africa/South-Africa-ICC-Hague/1066-3841804-format-xhtml-fob105z/index.html , (Accessed March 12, 2018)

[31] Calayag, K. A. (2018). *Duterte's Claim on the ICC is grossly incorrect.* Sunstar Philippines: http://www.sunstar.com.ph/article/424763/ , (March 6, 2018)

[32] ICC Rome Statute (1998), Art. 127

The African continent has the most members in the ICC with over 33 member states and of all the state party, an African country (Senegal) became the first to sign the Rome treaty.[33]

2.2 CHARACTERISTICS OF THE ICC

2.2.1 COMPOSITION OF THE COURT

Similar to all functional organizations and institutions, there is a need to setup various organs or departments that are each responsible for a particular line of duty. According to Article 34 of the Rome Statute, the ICC comprises of the following;

i. Presidency: The presidency is headed by the president who is the most senior judge selected by the judges in the judicial divisions. The Presidency under the Rome Statute comprises of the President, the First Vice- President and also the Second Vice- President. The function of the presidency as outlined under Article 38 of the Statute is the proper administration of the court but this however does not interfere with the office of the prosecutor.

ii. Judicial divisions: A total of 18 judges makes up the judicial divisions and these divisions are divided into three (3); "**appeals division, trial division and pre-trial division**". Judges are placed in these various divisions according to their experience and field of work.[34]

iii. Office of the prosecutor: Article 42 of the Statute emphasizes that the office of the prosecutor in the discharge of its duties shall be independent from the court. The prosecutor oversees this office and is also responsible for making investigations, examination and also prosecutions relating to the cases brought before the judicial divisions.

iv. Registry: the registrar is the head of the registry which controls all the administrative functions of the ICC. The court's non-judicial activities are

[33] ICC. (n.d.). *African States*. International Criminal Court: https://asp.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/african%20states.aspx , (Accessed March 6, 2018)

[34] ICC Rome Statute (1998), Art. 34

under the control of the registry. These includes; security and support to victims and lawyers, language interpretation and record keeping.

The ICC is an independent judicial body (not to be mistaken with the International court of Justice), before ratifying the Rome Statute, states are expected to conform their national laws in line with the statute of the ICC and also assist the court by any means necessary.

2.2.2 JURISDICTION AND ADMISIBILITY

Before a case can be prosecuted by the international criminal court, three jurisdictional elements as well as three admissible elements must be met. The jurisdictional elements are;

1. Relating to subject-matter (*Ratione materiae*): This element answers the question of what actions are considered as crimes and can also be prosecuted. Individuals can only be prosecuted for actions that are outlined as crimes under the Rome Statute. The actions that are considered as crimes according to the court are in Art. 5 of the Rome statute which goes thus;

   > a. "*The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression;*
   >
   > *b. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations*"[35].

2. Territorial or Personal Jurisdiction: For any prosecution to be carried out by the court, the individual(s) concerned must have either carried out the criminal action in location

[35] ICC Rome Statute (1998), Art. 5

(territory) that is deemed to be under the jurisdiction of the ICC (member state territory) or is/are citizens of a member state of the ICC Statute. Similarly, the UNSC can equally refer cases of countries that are not a party to the ICC statute for prosecution. Individuals guilty of criminal offences are also prosecuted regardless of their locations or the location of the crimes that they have committed as long as the persons are citizens of member states that are party to the Rome statute or a citizens of countries bounded by the statute. Regarding territorial jurisdiction, the UNSC can refer to the court cases of any individual that falls out of the above mentioned categories for prosecution. Personal Jurisdiction can be called *ratione personae*.

3. Temporal jurisdiction: The ICC's jurisdiction covers for cases that happened after the adoption of its statute. This implies that individuals are punished for offences after 1 July, 2002 (date the Rome Statute was enforced), however, on certain issues, the court can punish individuals from member states for old crimes that happened before the member state joined the Rome Status. For example, if an offence is committed on 5 July, 2002 by an individual in a state which approved the Statute on 5 July, 2003, such crimes are out of the ICC's temporal jurisdiction as it happened before the member state enforced the Rome Statute but such crimes could be prosecuted by the ICC, but this only happens in certain cases. Temporal jurisdiction outlines the "**time period**" in which the ICC exercises its jurisdiction. It is called *ratione temporis*.

The admissibility criteria for the International Criminal Court is outlined in article 17 paragraph 1 of the Rome Statute. According to this article, in the instance whereby a state is prosecuting a case, the ICC cannot interfere except in events where the state is unable to undertake prosecution. Similarly, if an individual has gone through trials for an accused crime, the ICC cannot initiate trials for the same accused crime on that individual. The ICC equally considers the volume of the case before initiating proceedings, thus, cases that are of less gravity to Justify continued court involvement are declared inadmissible.[36]

From the above criteria, we can then deduce the three elements that are considered for case admissibility;

[36] ICC Rome Statute (1998), Art. 17

a. Interest of Justice: all prosecution are done based on the interest of Justice. If a particular case to be prosecuted is deemed by the prosecutor to be against the interest of justice particular due to certain important reasons, the case becomes inadmissible.
b. Gravity: Prosecution for any case shall be initiated provided that the crimes committed are of reasonable gravity for further action by the ICC.
c. Complementarity: in an event where the states are unwilling to prosecute an individual for crimes committed (maybe due to the power of the individual), the court can stand in place of the state to initiate proceedings for such individuals. This implies that, the international criminal court cannot initiate court proceedings for cases that are currently ongoing initiations in the National courts for individuals accused of committing criminal offense

2.2.3 TRIAL

The International Criminal Court conducts trials using the common and civil law judicial system. Art. 65 of the ICC statute explains that, a trial is done with the accused in attendance and also the accused must be fully aware of the rights he/she possesses. The presumption of innocence which is awarded to the accused is outlined in Art. 66. Article 67 explicitly explains the rights of the accused, however, paragraph 1 of this article is most important. This states that;

"*In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality;*

(a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;

(b) To have adequate time and facilities for the preparation of the defense and to communicate freely with counsel of the accused's choosing in confidence;

(c) To be tried without undue delay;

(d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defense in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal

assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defenses and to present other evidence admissible under this Statute;

(f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks;

(g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;

(h) To make an unsworn oral or written statement in his or her defense; and

(i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal"[37].

Trials are done in the judicial divisions of the court and are mostly done in public, the public system of trials of the ICC is a debated issue. Another debated issue is the high number of African Nations that have been tried by the court.

[37] ICC Rome Statute (1998) Art. 67 Paragraph 1.

CHAPTER 3

INTERNATIONAL CRIMINAL COURT AND AFRICA

One major criticism of the ICC is in its relationship with Africa.[38] As stated earlier, the African continent is the continent with the most members states in the ICC and also the first ratifying member state of the Rome Statute was Senegal another African State, this indicated the support accorded to the International Criminal Court by African Nations.

In recent times however, the ICC has been given names such as international criminal court of Africa, international Caucasian court (by Gambian officials) or even African Criminal Court, this is because out of 11 of the situations opened by the ICC, 10 are from African countries thus the court is viewed as a tool by the western power for recolonization and imperialism aimed at only initiating prosecution from developing states and overlooking the crimes committed by developed states[39]. Important cases studies involving some African nations shall equally be discussed in details.

The International Criminal Court in the rebuttal of these criticisms stated that all of its opened cases were in conformity with the admissibility criteria outlined in the court's Rome Statute. Majority of the cases from Africa were submitted to the ICC by the respective Government of these states while few of the other cases were however referred by the UNSC.

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[38] Allison, S. (2016, October 27). African Revolt Threatens International Criminal Court's Legitimacy. *Daily Maverick*, https://www.theguardian.com/law/2016/oct/27/african-revolt-international-criminal-court-gambia , (Accessed March 13, 2018)

[39] Muchayi, W. (2013, September 24). *Africa and the International Criminal Court: A drag net that catches only small fish?* Nehanda radio: http://nehandaradio.com/2013/09/24/africa-and-the-international-criminal-court-a-drag-net-that-catches-only-small-fish/ , (Accessed March 7, 2018)

The referral by the UNSC is seen as a breach of sovereignty rights and as these referral are all of African countries, this according to majority of the African countries is a form of imperialism by Western powers.

3 .1 CRITICISM OF THE INTERNATIONAL CRIMINAL COURT BY AFRICAN NATIONS

When the Rome Statute was initiated in 1998, the African Nations greeted this development with so much excitement. Two very important factors were seen as the reason for this excitement. The first one was the recent Rwandan Crisis where the country was torn apart by genocide, secondly because of the jurisdiction of the ICC. African Nations found refuge in the Rome Statute against stronger nations with emphasis placed on Crimes of Aggression by the ICC. These two reasons encouraged majority of African Nations (about 34 African countries) to join the Rome Statute. However, as time evolved, the bond between the ICC and some African Nations greatly deteriorated and even spreading to the African Union. The following reasons account for this negative outcome;

3.1.1 ANTI-IMPUNITY NORM

Impunity in its simplest form is defined as the exemption to be punished for an action, this directly translates the definition of anti-impunity to be the punishment for an action or the support for an individual to face the consequences of his/her actions. The ICC is not the first step or institution that advocated for this norm, the Nuremberg tribunals, Tokyo Trials, as well as the 1990s ICTY and ICTR as well as other hybrid courts organized by international bodies all advocated for anti-impunity norm. This Norm requires that, regardless of status or position, all individuals will face justice.

Art. 25 of the Rome Statute explicitly analyses the anti-impunity norm. Article 25 is called the Individual Criminal Responsibility. It holds accountable any individual accused of an offence under the Jurisdiction of the ICC based on the Rome Statute. It states that;

> 1. "*The Court shall have jurisdiction over natural persons pursuant to this Statute;*
> *2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute;*

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission; 18 Rome Statute of the International Criminal Court;

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either;

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime;

(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;

(f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose;

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law"[40].

Article 25 of the Rome Statute grants permission to the ICC to try cases of all responsible individuals regardless of their power or influence. David Bosco in his book "Rough Justice" calls the anti-impunity norm a "remarkable transfer of authority from sovereign states to an international institution"[41]. This explains why so many powerful states refused to sign the Statute

[40] ICC Rome Statute (1998), Art. 25

[41] Bosco, D. (2014). *Rough Justice: The International Criminal Court in the World of Power Politics.* Oxford : Oxford Press.

as they fear for their sovereignty. African Nations have the same debate, they fear the anti-impunity norm is in contrast with their state sovereignty.

The State sovereignty norm is a fundamental norm for state sustainability as it is also in Article 1 and also Art. 2 of the UN Charter. As argued by the African Union, the Notion of State Sovereignty births sovereign immunity which includes diplomatic immunity and Head of State immunity.[42] The Sovereign immunity norm attached to states is a very fundamental aspect of self-independence thus the ICJ declares this to be a "*Jus Cogens* (overriding principle of International law) norm". While the diplomatic immunity is codified by the Vienna Convention and the Head of State immunity is not, both immunities are declared by the ICJ to apply to all states, so the African nations are claiming that the issuing of arrest warrant and the indictment of serving African leaders by the ICC is a direct violation of the Sovereign immunity norms.

3.1.2 WESTERN IMPERIALISM

The ICC is also criticized to be a tool in the hands of Western powers to promote imperialism.[43] Critics (African Union) sees this court as a colonialist tool for Western powers to exercise control on weaker nations especially African Nations.

William Schabas has made comments about the International Criminal Court stating that "*Why prosecute post-election violence in Kenya or recruitment of child soldiers in the DRC, but not murder and torture of prisoners in Iraq or illegal settlements in the West Bank?*"[44] Richard Falk equally talks about the bias system of the ICC. He outlines that the court encourages the anti-impunity rights of the great powers and acts otherwise for weaker state.

Robert Mugabe, who was the Chair of the African Union in 2015 and was also the former president of Zimbabwe argues that leaders such as Tony Blair who was the former British Prime Minster and Former United States President George Bush are not held accountable by the

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[42] Wittgenstein, L. (1953). *Philosophical Investigations* (Vol. II). Oxford: Basil Blackwell.
[43] Allison, S. (2016, October 27). African Revolt Threatens International Criminal Court's Legitimacy. *Daily Maverick*. Retrieved March 13, 2018, from https://www.theguardian.com/law/2016/oct/27/african-revolt-international-criminal-court-gambia
[44] Dersso, S. (2013, June 11). *The International Criminal Court's Africa Problem*. Aljazeera: https://www.aljazeera.com/indepth/opinion/2013/06/201369851918549.html , (Accessed March 9, 2018)

International Criminal Court even though there are ample evidence to show the havoc both parties created in Iraq, thus Africa should set up another version of the ICC to try these people.[45]

Another very important example to show Western imperialism was the Comoros and Israel Case. In May 2013, Comoros an African Country in accordance to Art. 14 of the Rome Statute referred the 2010 Israeli attack on the Turkish Mavi Mamara ship that was bound for Gaza with humanitarian aid. The act of Israel was condemned by leaders worldwide but the prosecutor of the ICC stated that after preliminary examination of the case, the International Criminal Court will not initiate any proceedings from the case as there will be no adequate gravity to justify the court's action on the case. Another way in which the ICC is criticized on anti-imperialism ground is the right given to the UNSC to refer cases to the court.

Art. 13(b) of the Rome Statute enables the UNSC to refer cases to the ICC for prosecution. This article states that;

"*A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations*"[46].

Chapter VII of the UN Charter is called "actions in respect to threat of Peace, Breaches of Peace and acts of aggression". Under Art. 13(b) of the Rome Statute, the UNSC is expected to refer to the ICC all cases under its (ICC) jurisdiction and that are not prosecuted by national courts. This however is not the case as the UNSC is divided along power sharing line and every potential case that should be referred to the ICC is vetoed by a member(s) of the Security Council.

In the exercise of this right, the UNSC has referred only two non-signatory states to the ICC and these two states equally happen to be African Nations they are; Libya in 2011 and Sudan in 2005.[47] Recent attempt to refer the Syrian issue to the prosecutor of the ICC has failed

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[45] Mugabe, R. (2015, June 19). *Africa must Set up own ICC to try Europeans*. News24: https://www.news24.com/Africa/News/Africa-must-set-up-own-ICC-to-try-Europeans-says-Mugabe-20150619 , (Accessed March 9, 2018)

[46] ICC Rome Statute (1998), Art. 13 (b)

[47] Aregawi, B. (2017, July 21). *The Politicization of the International Criminal Court by the Security Council Referrals*. Accord: http://www.accord.org.za/conflict-trends/politicisation-international-criminal-court-united-nations-security-council-referrals/ , (Accessed March 13,2018)

woefully due to conflict of interest between the great powers in the UNSC.[48] The inability to refer to the ICC Myanmar and also Israel further proves the political nature of the UNSC.

For Myanmar (Burma), there is an increased level of Human Right violation, child trafficking, sexual violence and other form of racial and religious inspired hatred meted out on the Rohingya Muslims especially. The Rohingya Muslims have been refused citizenship rights by the government of Myanmar and they are equally marginalized economically. Calls made by the UN General Assembly against the Burmese military regime were not adhered to and even when the UNSC started deliberating on the crisis, a referral could not be made due to a veto from China supported by Russia. Importantly, the Burma case was deliberated upon by the UNSC four years before the Libyan issue exacerbated, yet, the Libyan case was easily referred to the ICC whereas Burma has not been referred to the ICC.

This single act of non- referral by the UNSC calls to mind some vital questions. Questions like; why was the Libyan crisis which was less destructive easily referred to the ICC whereas Burma a more destructive case was not referred even though the Rohingya Muslims are still selectively killed by the Burmese Government? What were the selective measures the UNSC considered to quickly refer Libya to the ICC that were not applicable to Burma? Another important argument is the Israeli-Palestinian case as mentioned by William Schabas.

Even with the availability of evidence to initiate trials against the state of Israel for the illegal settlement of West Bank, the case is yet to be referred to the court because any proceeding aimed at punishing Israel will be vetoed by the United States of America. All these selective acts of referral by the UNSC is caused by the concept of interest that these great powers exhibit in these countries thus leaving only the weaker states (mostly African countries) to suffer.

Furthermore, African states are skeptical of the fact that Russia, China and the United States of America (all members of the Security Council) are not parties to the Rome Statute thus the provisions under the Rome Statute do not apply to these countries and since they are in the

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[48] UNSC. (2014, May 22). *Referral of Syria to International Criminal Court Fails as Negatives Votes Prevents Security Council from Adopting Draft Resolution.* United Nations Organization: https://www.un.org/press/en/2014/sc11407.doc.htm ,(Accessed March 18, 2018)

United Nations Security Council, they will only work with the ICC solely for their personal gain and for political not judicial reasons.

The international criminal court which in theory is independent from the United Nations is now seen in the eyes of many as a mere tool used by the West which includes the UNSC. The Court for some of its cases is now dependent on the United Nations thus signifying a shift from its original aim in the judicial fight against impunity to a mere political body set up by strong powers to further exert control on weaker powers. The inability of the UNSC to efficiently refer all cases in regards to Chapter VII of the UN Charter is by proxy strengthening the arguments of African Nationals that are against the ICC as the non-referral or selective referral of cases only makes the court less efficient.

Relationship between the ICC and African Union is further deteriorating, the trust for the international court is waning fast in Africa.

3.2 INTERNATIONAL CRIMINAL COURT VS. AFRICA

The ICC as stated earlier was a welcome development by most countries especially countries in Africa. But owing to recent events, the table of support for the Court in Africa is beginning to shift to a more negative and skeptic spectrum. The subsequent chapters will; analyze the situation prior to when the support of the International Criminal Started to diminish amongst African Nations, the steps that were taking by the African Union. Similarly, key African States would be used as case studies and finally it will examine the defense of the International Criminal Court in respect to the negative events.

Before we consider the events it is important to highlight the realist theory perception of the international system which determines that the international system is anarchical in nature, meaning there is no world government thus States are left in the international system to engage in whatsoever activity they deem fit for their self-survival. In contrast to this however, the Constructivist theories argues that even though there is actually no defined world government, international institutions, international laws and norms are created to shape the actions of states and other players in the international system, thus the powers of the ICC and its Norms thereof are the binding principles for the member of the Rome Statute to follow.

Amitav Acharya is an important scholar in actions relating to Norms and rules. In his Norm Localization model, he explained how the pressure from the international organizations or stronger states exerted on weaker states are being controlled or managed by these weaker states. The pressure could be in form of an international norm or rule thus the weaker states quickly manage this pressure by following what they deem necessary and disobeying the other norms.[49]

Another of his (Amitav Acharya) very important work in the theories of norms which will be applied in the ICC vs. the African Union case is the one he termed 'norm subsidiarity' model. In this instance, the new norms that were promulgated by International Organizations or stronger western powers were met with huge resistance from the weaker states due to the fact that the weaker states perceived that if these norms were to be initiated in their countries, they would lose their sovereignty to the International Organization or Western Powers that are in charge of these norms. From the above phenomenon, one can deduce the norm cycle of Acharya to be one in which, the weaker states (African Nations) tend to repel (reject) the norms built by the ICC mainly because they feel it is a threat to their self-determination rights and sovereignty, and by repelling these norms, the African Nations are proposing to the International Criminal Courts valuable changes to the Rome Statute which will proffer a workable solution for all the parties.

[49] Acharya, A. (2011). Norm Subsidiarity and Regional Orders: Sovereignty, Regionalism and Rule-making in the Third World. *International Studies Quarterly*, pp. 96-102.

CHAPTER 4

JOURNEY OF THE INTERNATIONAL CRIMINAL COURT AND AFRICA

This chapter provides a detailed chronological order of the relationship between the ICC and African nations and also explains the various reasons responsible for the kind of relationship experienced between the ICC and Africa in each order.

4.1 Before Al-Bashir Period (2002-2008)

From the On-set of the ICC, democratic African Nations were fully supporting the Rome Statute despite its anti-impunity norm save for authoritarian regimes such as Eritrea and Egypt. From this period, Egypt, Eritrea and Libya were skeptical of the Anti-impunity norm in its relations to state sovereignty and immunity and they tried to lobby the African Union into dis-allowing mass membership of African Countries in this newly formed permanent International Criminal Court claiming that it was all imperialist schemes of super powers.[50]

The majority of countries however supported the International Court and in 2003, the International Criminal Court had her first case referred to the prosecutor by Uganda. This Ugandan case was a case about the war lord Joseph Kony of Uganda. Shortly after this event, the Democratic Republic of Congo referred another war-lord Jean Pierre Bemba to court. When the condition in Darfur Sudan got out of hand, the UNSC referred the country to the ICC. It is worthy to note that, the African Union in 2004 encouraged members to support, sign and even

[50] Kurt M, A. B. (2018, January). African resistance to the International Criminal Court: Halting the advance of the anti-impunity norm. *Review of International Studies, 44*(1), pp. 101-127

adopt the statute into their domestic law[51] and this Cote-d'Ivoire did by giving the International Criminal Court limited domestic Jurisdiction.

The former Liberian President Charles Taylor was in 2003 issued an arrest warrant by Interpol, Nigeria refused to cooperate with this warrant until the Liberian Government showed its support in relation to the arrest and in 2006, Charles Taylor was extradited to Sierra Leone and not to the International Criminal Court.[52] Another event that happened in similar fashion was the prosecution of former Chadian President. Senegal had refused to initiate proceedings against the former Chadian leader Hisene Habre giving reasons that it was beyond the court's jurisdiction and when requested to transfer the case to Belgium, the Senegalese court equally refused to do so citing reasons of impunity and immunity. These two events signified that African States although in acceptance of the international norms set up by the ICC were equally selective of which ones to follow in other to maintain their rights of sovereignty. This explains the Norm localization model of Acharya. The African Union in response to these events created in 2006 a committee of African eminent Jurists to determine if the sovereignty of states can be by-passed and when, where and how can the anti-impunity law of the ICC be exercised.[53]

In the same vein, the idea of Universal Jurisdiction became a debated issue especially from Rwanda where the International Criminal tribunal was held. The Rwandan Government accused the Western powers of initiating prosecution for the Tutsi led government for genocidal crimes committed in the Hutu Regime. All these events led the African union Assembly in 2008 to pass a resolution saying attempts to exercise the principle of universal jurisdiction will mean undermining the principle of universal sovereignty especially on African Nations.

Relations with the ICC and Africa could still be fairly assessed until when everything went sour following the arrest warrant for the Sudanese President Al-Bashir.

4.2 Post Al-Bashir Period (2008- 2018)

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[51] Ibid

[52] Kurt M, A. B. (2018, January). African resistance to the International Criminal Court: Halting the advance of the anti-impunity norm. *Review of International Studies, 44*(1), pp. 101-127

[53] Committee of Eminent African Jurist. (2006). *Options for Hissene Habre to face justice.* African Union. https://www.hrw.org/legacy/backgrounder/africa/chad1205/2.htm , (Accessed March 15, 2018)

Following the African Union Assembly 2008 resolution on the issue of universal jurisdiction and state sovereignty, the ICC through its former Chief Prosecutor Luis-Moreno Ocampo solicited for the arrest of President of Sudan Omar Al-Bashir for crimes that were under the jurisdiction of the Rome Statute. In protest to this arrest warrant, the Peace and Security Council of the AU requested according to the Rome Statute for the UNSC to defer the issue sighting two reasons; Firstly, using Rwanda as an example, the African Union laid claims that the arrest warrant was in contrast to State sovereignty and the African body was beginning to believe the International Criminal Court was merely against African nations. Secondly, the African Union reiterated its stance against the arrest warrant of the Sudanese President making claims to the fact that since he was a very important figure in the country and by extension an important figure in the conflict, the arrest of such a man will only exacerbate the conflict,[54] thus the AU strongly discourages the actions of the International Criminal Court.

The Sudan Crisis occurred in the Darfur region of the country in February 2003. Two important rebel groups named the Sudan Liberation Movement and the Justice and equality movement launched an attack against the Sudanese Government for an alleged oppression of the Darfur Non-Arab population. In response to these attacks, the Sudanese Government under president Al-Bashir started an operation of ethnic cleansing mostly focused on the Non-Arab population of the Darfur region. This ethnic cleansing explains the reason why President Al-Bashir is indicted by the ICC for crimes of genocide, inhumane treatment and crimes against humanity. The indictment however came after the UNSC referred the country to the ICC by passing Resolution 1593. The Resolution 1593 was passed in 2005 following the report of the International Commission of Enquiry on Darfur and the resolution required for all country be it a signatory or a non-signatory member of the Rome Statute to cooperate with the ICC.

This resolution was what the AU requested to be deferred so as to adequately manage the peace process in Darfur. At this stage however, the African Union was not directly in opposition to the ICC but this was a stage towards the outright accusation of the court in 2015. Shortly after this request was rejected by the Security Council, few African Countries came out to express

[54] Peace and Security Council. (2008). Communique of the 142nd Meeting of the Peace and Security Council; PSC/MIN/Comm(CXLII)Rev.1. Retrieved March 18, 2018

their dissatisfaction and opposition to the court. Comoros, Libya (which was skeptical of the court from on-set), Senegal (the first country to sign the Statute) and Djibouti all called on African Nations to collectively withdraw their support of the ICC claiming that it was also serving an imperialist goal against African Nations.[55] The request was however rejected by African States that adopted the Statute even though most of the states felt disappointed that the deferral request was turned down by the UNSC.

In 2009, the African Union in a bid to limit the power of the ICC on Africa called for the creation of an African Court to prosecute crimes that are under the jurisdiction of the ICC. The aim of this African Court was to reduce the power the International Criminal Court exerts on African Nations and by doing so, limit the support of African states to the court. The second move the African Union made was to defy the arrest warrant on Sudanese President Al-Bashir by requesting all African Nations to openly reject and not work with the International Criminal Court's orders, arrest warrant or universal jurisdiction action[56]. Some African Countries hearkened to this plea by the AU and refused to arrest the Sudanese President when he came for official visits, even China a member of the UNSC welcomed the Sudanese President in its territory. Only Chad resented the African Union request saying that if given the opportunity, it will arrest the president of Sudan. Other countries such as Botswana and Nigeria albeit stylishly equally rejected this request made by the African Union.

Following continued problems in Darfur, the AU Peace and Security Council created a panel called the AU High level Panel on Darfur. This panel reported to the African Union saying that, the anti-impunity norm would however be implemented in the Sudanese case but instead of trials to be held in the International Criminal court, a hybrid court of local and foreign judges should be created in Sudan to prosecute the crimes committed in Darfur.[57] This action signified that, African Nations were gradually moving to a much more anti-International Criminal Court

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[55] Sudan Tribune. (2009, June 10). African Countries back away from ICC withdrawal demands. *Sudan Tribune.* Retrieved June 10, 2009, from http://www.sudantribune.com/spip.php?article31443

[56] African Union. (2009). Decision on the Meeting of African States Parties to the Rome. *AU assembly, 13 Ordinary Session.* Sirte. https://au.int/sites/default/files/decisions/9560-assembly_en_1_3_july_2009_auc_thirteenth_ordinary_session_decisions_declarations_message_congratulations_motion_0.pdf , (Accessed March 19, 2018)

[57] Kurt M, A. B (2018)

spectrum and are now demanding for Africans to solve their African Problems. All these actions taking by the AU signified the norm localization model of Acharya.

The Assembly of State party to the Rome Statute conference that was held in November 2009 was greeted by Amendment plans proposed by some African Nations. Before this meeting, 26 International Criminal Court African members and 12 non-members convened in Ethiopia, Addis Ababa to discuss these amendment plans which are as follows;

1. Changes should be made in regards to procedural aspects: The office of the prosecutor is expected to review the guidelines of the code and conduct in the exercise of prosecutorial powers so as to ensure more accountability by members of state parties.
2. In relation to article 13 of the Rome Statute which states that;

"*The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if;*

(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;

(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or

(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15"[58].

The convention maintained that the referral power by the UNSC should remain.

3. Art. 16 of the Rome Statute: This article concerns itself with the deferral of investigation by the United Nations Security Council, this article states that;

"*No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions*"[59].

[58] ICC Rome Statute (1998), Art. 13
[59] ICC Rome Statute (1998), Art. 16

The convention maintained that this right should be amended so as to allow the UN General Assembly to equally access the same right in places where the UNSC is failing. The Addis Ababa convention maintained that this right if given to the General Assembly of the UN, it will be in tandem with the UNSC for conflict resolution.

4. Officials whose states are not signatory to the Rome Statute: In respect to immunity of state officials as outlined in Articles 27 and 98 of the Rome Statute, the Addis Ababa convention also known as the second ministerial meeting requested the ICC to specify exactly if the special immunity rights of non-member states to the Rome Statute is equally un-applicable in matters relating to universal jurisdiction.
5. Respect to Crimes of Aggression: In this regard, the Addis Ababa ministerial council outlined this to be directly concerning African States. The amendment proposal made in respect to crimes of Aggression is to allow the Assembly of State parties of the ICC, the ICJ and the UN General Assembly to equally determine if there is a crime of aggression. The ministerial meeting would be fully supportive if all these organs are involved in this process and not only the UNSC as outlined in the UN Charter.

From the above proposed amendment, we can see the Acharya norm cycle taking form. The African countries although part of the Rome Statute would want to implement some changes in the Statute so as to be in conformity with the universal sovereignty norm. Despite these proposal for amendments to the Statute, the ICC in July 2010 “re-issued a second arrest warrant for Sudanese President Al-Bashir for crimes of genocide”. This second arrest warrant marked the beginning of the call for Mass withdrawal made by the African Union itself.

CHAPTER 5

ROAD TO MASS WITHDRAWAL

An AU summit was summoned immediately after the second arrest warrant was issued for the Sudanese President and in this summit, the AU assembly called on all its members to disregard the arrest warrant and also a proposal by the ICC to create an ICC-AU liaison office in Ethiopia was rejected by the AU. In the speech of the AU Commission Chairperson, the creation of the Liaison office is viewed by African nations as one of the many schemes of the ICC and its Western supporters to continue their imperialist polices in Africa, thus the proposal was rejected.[60]

In the same July 2010 African Union Summit, the former Malawian president who was also the chairman of the African Union Bingu Wa Mutharika proposed that rulers of states and heads of government of African States should not face the International Criminal Court but should rather face African courts (a theory that was greatly mocked seeing that the African Judicial system was a total failure) and by this way according to former president Mutharika, the African country can fight against impunity.

The argument of the former Malawian President was in conformity with the report submitted by the "African Union High level Panel on Darfur" in which it requested that Africans should be allowed to solve their African problems by an African Court, thus in 2013, the African Union started to work towards creating an "African Court of Justice and Human Rights" by

[60] Assembly of the African Union. (2010). Assembly of the African Union, 15th Ordinary Session. *Assembly/AU/Dec.296(XV).* Kampala. https://au.int/sites/default/files/decisions/9630-assembly_en_25_27_july_2010_bcp_assembly_of_the_african_union_fifteenth_ordinary_session.pdf , (Accessed March 25, 2018)

bringing together the "African Court of Justice and African Court of Human and Peoples Rights" that were already in existence. This development led the African Union to declare that no serving African ruler of State or President should be prosecuted by any international court.[61]

Although the Rome Statute does not create any exception for a regional court to exercise the complementarity principle of the ICC, the African Union through the formation of a newly revised African Court has successfully although stylishly created a competition for the ICC. The leaders of African Nations voted to include genocide as well as other international crimes such as crimes against humanity under the jurisdiction of the new African court the only exception was that sitting heads of states are not to be tried by the court. Which implies that, there shall be immunity for certain powerful citizens even though there is evidence of criminal offences against them. This impunity right goes directly against the anti-impunity principle of the International Criminal Court. The Acharya norm model is still very visible here as we see that local authorities and powers by themselves creates norms that are suitable for them in a bid to reject pressure from the center or from the international powers. The support for immunity for top government officials is however very problematic giving reasons that most heinous crimes are related to top government officials and seeing that these officials will not be prosecuted for these offences committed, the crimes will only linger on. In addition to this, heads of states who are guilty of offences committed will choose to remain in power because they can enjoy impunity rights, thus obstructing democracy and bringing about tyranny.

The International Criminal Court from 2013 began to face major backlash from African Leaders both in African Union Summit and also in the UN General assembly. In May, 2013, the Prime Minister of Ethiopia Hailemariam Desalegn at the African Union Headquarters Assembly for Heads of state and Governments accused the ICC of being racially biased. According to the Prime Minister, the aim of creating the International criminal court was to fight against Impunity but now it also seems as though the court was created to punish Africa in a sort

[61] African Union. (2013, October 12). *Decision on Africa's Relationship with the International Criminal Court (ICC)*.Icc now: http://www.iccnow.org/documents/Ext_Assembly_AU_Dec_Decl_12Oct2013.pdf , (Accessed March 27, 2018)

of race hunting.[62] African leaders in the UN General Assembly resonantly echoed that the court through its imperialist agenda has only brought a bad light to the African Continent making it seem as if there is no judicial system in Africa and also exporting Africa to other parts of the world in a bad image.

Following the criticism from African Nations, the African Union Assembly in January 2016 passed a resolution that will allow the withdrawal of African parties to the Rome Statute, which in other terms implies a withdrawal from the ICC. This action from the African Union was obviously not anonymous as some states in Africa such as Botswana and Nigeria were pro-ICC, whereas others were anti-ICC.

Burundi and South Africa in 2016 proposed to the United Nations that they were withdrawing their signatures from the Rome Statute. Although Burundi's proposal became effective, the South African Parliament rescinded the withdrawal proposal. Gambia followed suit for a proposal for withdrawal but this was equally rescinded following the change of government.[63]

The African Union again after a year devised another mechanism that could be said to be a challenger to the ICC. This plan was called the ICC withdrawal strategy and the most relevant section of the strategy was the paragraph 8 of the strategy which spelled out its objectives. Paragraph 8 goes thus;

> "*It is in this regard that the AU policy organs have issued a number of decisions, the most recent of which the assembly called on the open ended ministerial committee to develop a withdrawal strategy to be considered by member states and particularly African state parties to the Rome Statute, as a sovereign exercise. The intended outcome of the implementation of the various decisions of the AU policy organs is to:*

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[62] Reuters (2013, May 27). *Ethiopian Leader Accuses International Criminal Court of Racial Bias.* Reuters: https://www.reuters.com/article/us-africa-icc/ethiopian-leader-accuses-international-court-of-racial-bias-idUSBRE94Q0F620130527 , (Accessed March 28, 2018)

[63] AFP. (2017, March 8). *South Africa Revokes Decision to Leave ICC*, Daily Nation: https://www.nation.co.ke/news/africa/South-Africa-ICC-Hague/1066-3841804-format-xhtml-fob105z/index.html , (Accessed March 12, 2018)

a. *Ensure that international justice is conducted in a fair and transparent manner devoid of any perception of double standards;*
b. *Institution and Legal Administrative reforms of the ICC;*
c. *Enhance the Regionalization of International Criminal Law;*
d. *Encourage the adoption of African solutions for African problems;*
e. *Preserve the dignity, sovereignty and integrity of member states*"[64]

Acceptance of this strategy was greeted with different views by individual states of the AU. The next part of this chapter will handle the relevant cases of some African countries in respect to their relations with the International Criminal Court.

5.1 KEY SUPPORTERS OF THE ICC IN AFRICA

5.1.1 BOTSWANA

The nation Botswana is a major supporter of the ICC in the African Continent. Botswana has always sided with the ICC in the AU assembly meetings and has also encouraged other states to do so. When the African Union earlier called for non-compliance in the arrest of Sudanese President Al-Bashir, Botswana made it clear that if it has the opportunity, Al-Bashir would be arrested by the Nation and in 2010, Botswana challenged the African Union saying that the African Union has not yet acquired supranational status over African countries so the organization (African Union) should not dictate to its member parties what to do in terms of their foreign policy.[65]

The International Criminal Court achieved a giant stride in 2017 when the Batswana judiciary adopted the Rome Statute into its national laws. When the call for mass withdrawal was initiated, Botswana was one of the countries that fought against the realization of this idea. A

[64] African Union. (2017, January 12). *ICC Withdrawal Strategy.* Human Rights Watch: https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan._2017.pdf , (Accessed April 1, 2018)

[65] Philomena .A, F. A. (2016, November). The International Criminal Court, Africa and the African Union: What Way Forward? *European Centre for Development Policy Management*. http://ecdpm.org/wp-content/uploads/DP201-ICC-Africa-AU-Apiko-Aggad-November-2016.pdf , (Accessed April 3, 2018)

statement from the foreign ministry of the country reiterated the support of the Nation for the ICC. This statement further establishes the position of the Court in the region saying that "Botswana is convinced that the only permanent international tribunal is the ICC and the court is a very important factor in the aspect of International Criminal law"[66].

In addition to this, the International Criminal Court in October 2015 organized a major regional seminar in Botswana, this seminar was talking about the cooperation between the International criminal court and the states and also it intensely highlighted the linkage between regional and national building through cooperation with the ICC.

Apart from Botswana, other staunch national supporters of the ICC in Africa are;

5.1.2 COTE D' IVOIRE

This Western African Country is a great supporter of the International Court. Following the 2011 Presidential Election which led to the fall of President Laurent Gbagbo, a post-election violence erupted and this violence was believed to be caused by President Gbagbo because he refused to hand over power to the Incumbent President Alassane Outtara. This violence soon led to a 3 months Civil War in which so many lives were lost and people displaced. President Gbagbo was eventually disarmed and the new Ivorian regime cooperated with the ICC in arresting ex-President Gbagbo. The Ivorian government has equally stated in the African Union about its support for the court.

5.1.3 NIGERIA, GHANA AND MALI

These countries are equally strong supporters of the ICC and they all reiterated their support for the court especially during the withdrawal announcement and through this opposition, the general withdrawal proposal was pushed off the table.[67]

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[66] African Times. (2017, November 6). *Botswana: Khama Reiterates ICC support in Final State of Nation Address*, African Times: http://africatimes.com/2017/11/06/botswana-khama-reiterates-icc-support-in-final-state-of-nation-address , (Accessed April 3, 2018)

[67] Philomena .A, F .A (2016, November)

5.1.4 GABON

In September 2016, Gabon requested the International Criminal Court to begin proceedings for war crimes that occurred in the country since May 2016. This equally shows that Gabon is a great supporter of the ICC.

5.1.5 SEYCHELLES, CAPE VERDE AND TUNISIA

The above mentioned countries joined the Rome Statute since 2010 and are also strong supporters of the court. The former UN Secretary General Kofi Annan, has spoken against the African Nations opposing the ICC saying that the court is the most important figure for trying International Crimes and bringing justice to victims of such crimes.[68]

5.2 NON-SUPPORTERS OF THE INTERNATIONAL CRIMINAL COURT

5.2.1 BURUNDI

Burundi is a name to easily remember when mentioning states opposed to the International Criminal Court. This Eastern African country signed the Rome Statute in 1999 and in September 2004, the country ratified the Rome Statute. The country has been a base for intra state violence over the years but the 2015 political violence has the highest record in terms of havoc and destruction on the Nation.

The incumbent president of Burundi Pierre Nkurunziza assumed control of the government in 2005. He announced in 2015 that he was going to run for presidency for the third tenure which is in clear violation of the constitution that allows only two tenures for seat of presidency. Following this announcement, his oppositions protested and these protest met with government forces and his supporters leading to what later became a blood bath and a displacement of about 20,000 Burundians.[69] The Presidential election was however held in July 2015 and he was

[68] Wintour, P. (2016, November 18). African Exodus from ICC must be Stopped, says Kofi Annan. *The Guardian*. https://www.theguardian.com/world/2016/nov/18/african-exodus-international-criminal-court-kofi-annan , (Accessed April 5, 2018)

[69] Coalition for the ICC. (2015). *Burundi*. Coalition for the International Criminal Court: http://www.coalitionfortheicc.org/country/burundi , (Accessed April 4, 2018)

controversially awarded President, shortly after his swearing in, in December 2015, over 250 people were killed and more than 200,000 fled their homes.

The Office of the Prosecutor of the International Criminal Court however opened preliminary examinations of the crisis from April 2015 onwards and in a bid to reject further intrusion by the International Criminal Court, Burundi in October 2016 notified the United Nations Secretary General that it no longer intends to be a party to the Rome statute. The right to withdrawal is in article 127 of the Rome Statute which states that:

1. "A state party may by written notification addressed to the Secretary General of the United Nations, withdraw from this statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date;
2. A state shall not be discharged by reason of its withdrawal, from the obligations arising from this statute while it was a party to the statute, including any financial obligation which may have accrued. Its withdrawal shall not affect any cooperation with the court in connection with criminal investigation and proceedings in relation to which the withdrawing state had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the court prior to the date on which the withdrawal became effective"[70].

Burundi may have decided to withdraw from the ICC because top government workers were facing investigation from the International Court, so the withdrawal is often seen as a selfish one. The Government in defense to this claim however has explained that the court is a political instrument that the world powers (which majority are not members) are using to enslave other states. Similarly, according to Art.127 paragraph 2 of the Rome Statue, any criminal investigation which may have been started before the application for withdrawal shall be continued and the withdrawing state has to cooperate with the ICC, this implies that despite the withdrawal, the preliminary examination and investigation that has commenced will not be stopped, thus faulty parties will be held accountable according to the Statute. Burundi becomes the first country to leave the international criminal court.

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[70] ICC Rome Statute (1998), Art. 127

5.2.2 SOUTH AFRICA

The nation South Africa has from the onset being a major supporter of the ICC, but issues started to develop in this relationship after the arrest warrant for President Al-Bashir was issued. The South African government from the issuance of the arrest warrant had reluctantly accepted to arrest the Sudanese President "if" he visited the country but this cooperation was two faced as was shown in the African Union meeting, South Africa called for reforms to be made to the Rome Statute. When further resistance was encouraged by the African Union, South Africa was a major voice calling for the establishment of an African Court to try African cases and by so doing it discarded the International Criminal Court.

During the 2015 African Summit that was held in South Africa, Al-Bashir was in attendance and a national court seating in Gauteng demanded that Al-Bashir be arrested, this warrant was however not executed because the South African Government had stated that the Sudanese President had diplomatic immunity when attending diplomatic conferences thus he will not be arrested.[71]

This action goes directly opposite the teaching of the Rome Statute which is outrightly against impunity. South Africa was criticized by the ICC, European Union and also other states that were in support of the arrest warrant. Shortly after this event, the International Criminal Court initiated an investigation to determine whether South Africa had acted lawfully in not arresting President al-Bashir but on 21st October 2016, President Jacob Zuma submitted a petition expressing his withdrawal from the Rome Statute. This single action caused uproar in the country as opposition claimed that the presidency cannot exercise such rights without consulting the parliament thus on 7th March 2017, the South African high court ordered that the petition be revoked.[72]

President Jacob Zuma in his defense said that, the ICC does not ensure for diplomatic immunity and as such would bring about a regime change if a leader is found guilty and a regime

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[71] Khoza, A. (2017, July 6). *South Africa Should have Arrested Al-bashir -ICC*. News24: https://www.news24.com/SouthAfrica/News/south-africa-failed-to-arrest-al-bashir-icc-20170706 , (Accessed April 5, 2018)

[72] AFP (2017)

change will bring about instability and even possible reasons for a war.[73] This is why South Africa in the African Union Assembly State Parties has always supported for an amendment of the Rome Statute that can allow for Diplomatic immunity.

Similarly, the International Criminal Court published the result from its investigation and concluded that the South African Government faulted in its obligation to arrest Al-Bashir, the Pre-trial chamber of the ICC however refused to refer South Africa to the United Nations Security Council because the Government withdrew its appeal against the decision of the High court for the withdrawal request to be rescinded. This showed that the Government once again showed its support for the ICC but is only calling for amendment to the Rome Statute.

The South African Government equally had its grievances with the UNSC and its ability to refer to the ICC cases. It has stated that, most members (3 out of 5) of the UNSC are not parties to the Rome Statute thus it is only unwise to allow such rights to such countries that have only in turn undermined the existence of the ICC. South Africa has equally supported the creation of African Courts to try International crimes so as to avoid imperialism that is being perceived to be achieved through the International Criminal Court. Former President Jacob Zuma has equally called for mass withdrawal by African Countries from the ICC but with the formation of the new government however, South Africa is believed to become an ardent supporter of the ICC.

5.2.3 GAMBIA

The Gambia under the authoritarian rule of Former President Yahya Jameh showed minimal support in the effective working of the International Criminal Court. President Yahya who ruled the country for over 20 years with a very strong hand has been seen in multiple cases opposing the court. The former President was not the only Gambian politician who disregarded the ICC but even the Information Minister of the Country Sheriff Bojang directly translated the ICC into the International Caucasian Court[74], claiming that the court is a tool used by the West predominantly Caucasians to persecute people of color especially Africans.

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[73] Philomena .A, F .A (2016, November)

[74] *Gambia Withdraws from International Criminal Court*. (2016, October 26). Aljazeera. https://www.news24.com/SouthAfrica/News/south-africa-failed-to-arrest-al-bashir-icc-20170706 , (Accessed April 7, 2018)

When Bensouda from Gambia was appointed in 2012 as the Chief Prosecutor of the ICC, people thought it would buy the support of Africa and especially her home state but the Gambia in late October 2016, announced that it was withdrawing from court, this came as a total blow to the ICC and also a very big surprise to the international community which had earlier thought that the Gambia would be a major supporter of the court. President Yahya however became an incumbent president when he lost election to current president Adama- Barrow, the country was flung into a state of election repression because President Yahya refused the election result. Leaders from various African countries visited Gambia in a bid to proffer peace and avoid an imminent civil war, eventually he stepped down and President Adama-Barrow in February 2017 rescinded the withdrawal decision. Investigations are underway to determine if former President Yahya Jameh should face trial for some of the worst human crimes he committed while in office as president.

The Gambia and South Africa were the only countries who rescinded their withdrawal notification.

5.2.4 KENYA

Kenya is popularly known as the first country in history whose current president and Vice – President are facing trial at the ICC. After the 2007 post-election crisis in the country, the Waki Commission (commission on inquiry on post-election violence) was established in 2008 by Kofi Annan together with the panel of eminent African Personalities.

The Waki Commission was created as a result of the “Kenya National Dialogue and Reconciliation accord of February 28, 2008”. After the Waki Commission compiled its report, it submitted the record of the accused persons responsible for the election violence to Kofi Annan who then gave the names to Luis Moreno Ocampo (now former chief prosecutor of the ICC). The agreement made was Kenya would be given a one (1) year Ultimatum beginning from July 2009 to set up a tribunal that will punish perpetrators of the violence and if it fails to do so, the International Criminal Court will take up the issue.

Kenya as expected failed to establish the tribunal due to tribal politics and favoritism, thus the International Criminal Court took up the case and indicted some prominent Kenya politicians and two of these men became President and Vice-President. Both Men played very tactical with legal proceedings and were often seen in campaigns blasting the International Criminal Court that it was against Kenyan's sovereignty. The cases brought before them were eventually dropped but they were dropped without prejudice meaning that issues related to the cases could still be filed.

President Kenyatta's popular statement against the International Criminal Court is solely based on nation's sovereignty. He has criticized the court as being a western tool used to delimit nation's sovereignty and also create regime change. The Sudanese President whose arrest warrant has been issued subsequently visited Kenya in August 2010 but he was not arrested, Kenya directly disobeyed the orders of the ICC in its refusal to arrest Al-Bashir and the African Union equally supported Kenya's decision not to arrest the Sudanese president. The African Union equally wrote to the United Nations Security Council to defer the case against the Kenyan President and Vice President but when this request was rejected, the Kenyan Parliament in 2013 called for a withdrawal from the Rome Statute.

Two motions have equally being passed by the Kenyan Parliament in favor of exiting the court.[75]. In the African Union meetings, Kenya is often in support of a mass withdrawal plan for all African Nations from the International Criminal Court,

During the 2016 Independence Day celebrations (Jamhuri day), President Kenyatta openly said that "*we have sought the changes that will align the ICC to respect for national sovereignty. Those changes have not been forthcoming. We will therefore need to give serious thought to our membership"*[76]. Kenya is one of the major supporters calling for the amendment of article 27 of the Rome Statute which will grant immunity to sitting heads of state or governments. This action furthermore shows the selfish nature of majority of the African leaders. It is clear as crystal that the major reason why President Kenyatta is advocating for immunity is because he is still a

[75] PSCU. (2016, December 12). *Kenya Considering ICC Withdrawal, President Kenyatta says*. Daily Nation. https://www.nation.co.ke/business/Kenya-considering-ICC-withdrawal--President-Kenyatta-says/996-3483844-11vfmux/index.html , (Accessed April 8, 2018)

[76] Ibid

sitting head of state thus he does not want to answer for his crime. Kenya in theory supports anti-impunity by still keeping its membership but in practical, it is asking for immunity for heads of states.

5.2.5 UGANDA

From the inception of the ICC, Uganda is the first state to refer a matter for prosecution in 2003[77]. With this event, one may think that the country is an ardent crusader of the International Criminal Court but this referral was only made based on a selfish reason as it is seen that Uganda was only trying to punish the Lord Resistance Army using the ICC. When Lord Kony of the LRA said that he would stall peace process if the indictment on his head is not removed, the Ugandan Government started to accuse the International Criminal Court of being responsible for the obstacle to peace due to its indictment on Lord Kony whereas it was the Ugandan Government that referred the case to the ICC.

It should also be noted that President Museveni has been in power since 1986, thus for such a long serving president in whose history has been engaged in wars, impunity and diplomatic immunity is a must requirement.

When the African Union started to rally for mass withdrawal, Museveni was equally in support of this as he began to see the ICC as an exploiting tool in the hands of Western powers against Africans. In his own view, he termed the Interest of Peace to be above everything else even Justice, thus he queried the indictment on President al-Bashir of Sudan saying that such move by the ICC will impede peace process.

In 2009, the country nullified an invitation sent to the Al-Bashir to attend a seminar in Kampala but subsequently things changed when President Museveni in 2016 invited President al-Bashir to the fifth Presidential swearing in ceremony in Kampala, amongst the invited guests in this ceremony were foreign dignitaries and other African leaders, as it was time for the president to give his speech, he spoke on the ICC quoted as saying "*Forget about this ICC useless thing. Earlier we thought the ICC was useful, but to us, now African leaders, we see it is*

[77] Kurt. M (2018)

useless. It's a bunch of useless people"[78] after this remark, representatives from the United States, Canada and European Union walked out of the ceremony.

The president's remark is termed to be a funny one as just a year earlier, he requested the ICC to prosecute the LRA commander Dominic Ongwen. This implies that, even though Uganda will not withdraw from the Rome Statute any soon, the country is using the ICC for selfish reasons which is detrimental to justice. The country's foreign affairs minister, Okello Oryem was quoted in 2016 saying the "ICC deserves what is happening to it now"[79], this statement came after South Africa showed its intention to leave, however, the Ugandan Attorney General, William Byruhanga in 2017 expressed that even though the country has its concern with the ICC, it has not considered leaving.

5.2.6 NAMIBIA

The Nation Namibia is not a supporter of the ICC. Under President Hage Geingob, attempts made at withdrawal have been initiated in 2015 and 2016. The Cabinet of Namibia have equally accepted to a withdrawal but it is left for the parliament to deliberate on possible withdrawal methods. President Hage at a conference in London told Reuters News that, Namibia will only stay in the ICC if the United States joins.[80] The president equally stated that Africans should develop its own institutions and courts and by so doing leave the ICC.

President Hage has equally accused the International Criminal Court saying that it is not fit for purpose thus mass withdrawal by African States should be initiated. In his undelivered speech at the 2015 AU Summit in South Africa on the Kenyan issue, President Hage had written that African Nations should withdraw from the ICC since it is becoming an abomination by not

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[78] *Western Envoys in Uganda walk out of Museveni's Swearing-in*. (2016, May 12). Retrieved from BBC: http://www.bbc.com/news/world-africa-36278479

[79] Cropley, E. (2016, October 28). *ICC's Toughest Trial: Africa Vs. Infamous Caucasian Court.* Reuters: https://ca.reuters.com/article/topNews/idCAKCN12S1U3 , (Accessed April 10, 2018)

[80] Milhench, C. (2016, December 1). *Namibia will Stay in ICC- if United States Joins, says President.* Reuters: https://www.reuters.com/article/us-namibia-economy-president/namibia-will-stay-in-icc-if-united-states-joins-says-president-idUSKBN13Q5L0 , (Accessed April 12, 2018)

fulfilling its mandate.[81] The president equally requested the ICC to stay out of Kenyan domestic affairs saying that no state or institution can dictate to any nation whom to rule them. In February, 2017, the Government of Namibia said that it supported the mass withdrawal policy of the African Union and equally requested that sitting heads of states should not be prosecuted by the ICC only until after their tenure so as to promote stability.

Other non-supporters of the ICC in the African Union are **Ethiopia**, **Libya** and **Sudan**. As stated earlier, the former Ethiopian Prime Minister, Hailemariam Desalegn who was the chairman of the AU summit in 2008 stated that, African leaders do not trust the ICC and its fight against impunity seeing that it is only directed at African countries. This summit was were the idea of mass withdrawal was firstly hinted. Similarly, in 2009, the President of Benin said that "we have a feeling that this court is hunting us", thus most African countries have been skeptical about the role of the court especially in its dealings with Africa. Libya under President Gaddafi in 2003, out rightly rejected the International Criminal Court saying that it is only an instrument used by foreign powers to promote their selfish interest in Africa.

When the UNSC referred Libya to the ICC, African leaders were equally unsatisfied with this saying that Libya was not a member of the Rome Statute. Similarly, Sudan has never been a friend of the ICC. President al-Bashir has an arrest warrant on his head by the ICC and Sudan is also not a party to the Rome Statute.

In October 2015, during the UN General Assembly meeting, the foreign minister of Sudan, Ibrahim Ghandour accused the ICC saying that it is a tool to Target African Leaders. The foreign minister further faulted the relationship between the UNSC and the ICC saying that it is more of politics than justice thus reforms should be made to the Rome statute so that everyone will be treated fairly and equally.[82] Jean Ping from Gabon who was the former AU Commission chairperson in 2009 accused the former chief prosecutor of the ICC Luis Moreno Ocampo of being biased against African nations. Jean Ping attacked Ocampo saying that he (Ocampo) is

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[81] Immanuel, S. (2015, June 15). *Geingob's Undelivered Speech Blasts ICC.* The Namibian: https://www.namibian.com.na/index.php?id=138108&page=archive-read , (Accessed April 12, 2018)

[82] Reuters. (2015, October 3). *Sudan Accuses ICC of Bias against African Leaders.*The News Nigeria: http://thenewsnigeria.com.ng/2015/10/sudan-accuses-icc-of-bias-against-african-leaders , (Accessed April 14, 2018)

issuing justice with unfairness stressing the need that other parts of the World besides Africa equally needs to be prosecuted but the ICC is not doing anything in those areas.[83]

Judging from the above mentioned case studies, we can see that for most African countries, Justice is perceived to be selfish when it is against them. The ICC however challenges the African Union member countries giving reasons why it is not targeting Africans as it has been accused.

[83] Lough, R. (2011, January 30). *African Union Accuses ICC Prosecutor of Bias.* Reuters: https://www.reuters.com/article/ozatp-africa-icc-20110130-idAFJOE70T01R20110130 , (Accessed April 14, 2018)

CHAPTER 6

INTERNATIONAL CRIMINAL COURT REBUTTAL

The ICC in its defense claimed that the most important criteria employed before an investigation is put into place is the "principle of complementarity" mentioned in the Rome Statute. The Complementarity Principle makes it possible for justice to be delivered in countries or institutions that are not capable of handling such legal cases or in the event of unwillingness to administer justice. Thus, the International Criminal Court can be said to be the last hope for people in search of justice for powerful criminals that cannot be tried by national courts.

As expressed by Kofi Annan, heinous crimes will not be punished if African States withdraws from the International Criminal Court, he (Kofi Annan) later stated that, the alleged bias nature as indicated by most African Nation against the ICC is unfair and unfounded sighting an example that the only case opened by the ICC was the Kenyan case and it enjoyed the support of millions of Kenyans who wanted Justice.[84] The Kenyan case as mentioned above, if the Waki Commission was however strictly followed by the Kenyan Government, a tribunal to try post-election crimes would have been opened and the guilty parties would be punished but the Kenyan Government however failed in its one year ultimatum to open a tribunal this explains why the principle of complementarity was employed by the ICC in the Kenya Case.

Moreno Ocampo in his response to Jean Ping of Gabon explicitly denied claims that the office of the prosecutor was bias in its pursuit of Justice. Mr. Ocampo further reiterated that the

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[84] Wintour, P. (2016, November 18). African Exodus from ICC must be Stopped, says Kofi Annan. *The Guardian*. https://www.theguardian.com/world/2016/nov/18/african-exodus-international-criminal-court-kofi-annan , (Accessed April 5, 2018)

principle of complementarity was only been engaged to ensure justice for international crimes committed.[85]

Majority of the cases initiated by the International Criminal courts were opened by the national governments of such countries while few were referred by the UNSC and only Kenya was self-initiated. Joseph Kony was referred to the ICC by the Uganda. Similarly, Jean Pierre Bemba and Laurent Gbagbo were referred by the Democratic Republic of Congo and Ivorian Government respectively for indictment. The ICC never forced these governments to refer these cases, the National Governments of these states voluntarily referred these cases, so claiming that the ICC voluntarily targets African Nations is an unfounded accusation.[86] In the words of John Washburn, "*This is not a question of picking on Africa, the UNSC referred Darfur; and the other countries came forward voluntarily*"[87], Libya can also be added to the list of countries referred by the UNSC.

In regards to the accusation that the ICC is an imperialist tool used by the West but is unable to punish Western Nations, the ICC argues that countries such as the United States of America and Israel which are accused of international crimes and appalling Human Rights record cannot be punished by the court because they fall outside the Jurisdiction of the ICC and even if a referral by the UNSC is required to punish the state of Israel, the United States being a permanent member of the UNSC will ensure to use its Veto powers similar action will be used by Russia if any of its "friends" are to be referred by the UNSC. Thus the political implication of the UNSC has equally obstructed the free flow of Justice for other countries.

The International Criminal Court will only involve itself or intervene when National courts or Governments fails to initiate prosecution for Crimes. The Cambodia government for example

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[85] Lough, R. (2011, January 30). *African Union Accuses ICC Prosecutor of Bias.* Reuters: https://www.reuters.com/article/ozatp-africa-icc-20110130-idAFJOE70T01R20110130 , (Accessed April 14, 2018)

[86] Muchayi, W. (2013, September 24). *Africa and the International Criminal Court: A drag net that catches only small fish?* Nehanda radio: http://nehandaradio.com/2013/09/24/africa-and-the-international-criminal-court-a-drag-net-that-catches-only-small-fish/ , (Accessed March 7, 2018)

[87] Hanson, S. (2008, July 24). *Africa and the International Criminal COurt.* Council on Foreign Relations: https://www.cfr.org/backgrounder/africa-and-international-criminal-court , (Accessed April 16, 2018)

established the Cambodia Tribunal which is known as the Extra-ordinary Chambers to punish guilty parties of the 1975-1979 crimes committed by the Khmer Rouge regime,[88] equally, Bangladesh and Guatemala were also capable to set up tribunals independently (without the help of the UN) to try crimes of genocide, human rights violation and other international crimes under the jurisdiction of the Rome Statute.

In such instances, the principle of Complementarity cannot be used because the national governments were capable to prosecute criminals. In regards to the Yugoslavia war, the ICTY was set up in the country without the help of the ICC to prosecute Slobodan Milosevic and other guilty individuals in contrast to countries like Zimbabwe were hundreds of its innocent citizens perished in the 2008 protest and sadly no one is held responsible for this.

By taking into account the regional courts created by different inter-governmental institutions, only states can be held accountable for crimes and not individuals thus the ICC is still a last resort to punish individuals for human rights violation. In comparison of various regional court with the African Court of human and Peoples right, these courts are far advanced than the African Court. The European court of Human Right (ECtHR) founded in 1959 is one of the oldest regional human rights court and equally one of the most effective. Thus most European citizens can report their countries to the ECtHR or most countries under the European Convention of Human Rights can be prosecuted by the court without going to the ICC.

The Inter-American Court on Human rights founded by the Organization of American States (OAS) in 1979 can initiate proceedings against the 20 states that enforced the American Convention of Human Rights and accepted its Jurisdiction over domestic matter, thus individuals from these countries are sure of receiving justice from a regional court hence no need of going to the ICC.

The ASEAN International Commission on Human Rights (AICHR) spearheaded by the Association of Southeast Asian Nations (ASEAN) is another regional commission founded in 2009 to manage human rights practices by its member states. Thus atrocities committed by states

[88] *About ECCC*. (2003). Extraordinary Chambers in the Court of Cambodia: https://www.eccc.gov.kh/en/about-eccc , (Accessed March 3, 2018)

belonging to these various regional institutions are dealt with at the regional level, this indicates why less cases from these countries are transferred to the ICC. Even though, there is an African Court dealing with Human Rights, this court has faced and is currently facing so many obstacles which will be discussed in the next chapter

CHAPTER 7

STEPS TAKING BY THE AU TOWARDS ENSURING JUSTICE

The African Union is embellished with the mandate of ensuring Justice and Human Rights in Africa. The Constitutive act of the AU in Art. 3(h) outlines one of the motives of the AU which is to;

"*Promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments*"[89].

Art. 4(h) of the constitutive act equally provides the member states of the AU authority to interfere in other countries where international crimes are occurring so as to maintain peace and in the long run restore justice. Various articles listed in the statute of the commission of the AU similarly outlines important judicial steps that can be taken by members of the African Union in order to promote justice. This chapter shall consider the various courts established by the African Union and also discuss the contribution of these courts to the African continent.

7.1 African court of Human and Peoples right (ACHPR)

This is the first judicial institution created by the African continent that ensures the "protection of the rights of humans and peoples" in the continent. The Court was formed based on "Article 1 of the protocol to the African charter on Humans and People's right" and this court

[89] African Union. (2000). *Constitutive Act of the African Union, Art 3.* African Commission on Human and Peoples' Right: http://www.achpr.org/instruments/au-constitutive-act/#3 , (Accessed April 16, 2018)

was adopted in 1998 in Ouagadougou, Burkina Faso by the then organization of African Unity which is now known as African Union.

The African Charter on Humans and Peoples Right which established the African Court of Human and People's right was adopted in January, 2004 when more than 15 countries ratified the charter. Currently this charter has 30 ratifications from the following states; "Algeria, Benin, Burkina Faso, Burundi, Cameroon, Chad, Cote d'Ivoire, Comoros, Republic of the Congo, Gabon, Gambia, Ghana, Kenya, Libya, Lesotho, Mali, Malawi, Mozambique, Mauritania, Mauritius, Nigeria, Niger, Rwanda, Sahrawi Arab Democratic Republic, South Africa, Senegal, Tanzania, Togo, Tunisia and Uganda"[90].

It is worthy to note that only 8 out of these 30 countries have given the court Jurisdiction to hear cases from NGOs and other individuals, these countries are ; "Benin, Burkina Faso, Cote d'Ivoire, Ghana, Mali, Malawi, Republic of Tunisia and Tanzania"[91]. The court that was established in 2004 passed its first judgment in the year 2009 following an application made in 2008 (this implies that from inception till 2009, no judgment was made).

The first application was a case between "*Michelot Yogogombaye* Vs *the Republic of Senegal*". To summarize, the statute establishing the "**African Court of Human and People's right** is the **Protocol to the African Charter on Human and People's Rights on the establishment of an African Court on Human and People's Rights**". It currently has ratifications from 30 member states and only 8 out of these 30 states have granted jurisdiction to the court to listen to cases from NGOs and Individuals.

7.2 Court of Justice of the African Union

This is the main judicial body of the African Union. It was adopted in July 2003 and entered into force in 2009. The court's jurisdiction is outlined in article 19 to the "protocol of the court of Justice of the African Union" which goes as follows;

[90] Philomena .A, F .A (2016, November)
[91] Ibid

"1. The court shall have jurisdiction over all the disputes and applications referred to it in accordance with the act and this protocol which relate to:

a) The interpretation and application of the act:
b) The interpretation, application or validity of Union treaties and all subsidiary legal instruments adopted within the framework of the union;
c) any question of International law;
d) all acts, decisions, regulations and directives of the organs of the Union;
e) all matters specifically provided for in any other agreements that states parties may conclude among themselves or with the Union and which confer jurisdiction on the court;
f) the existence of any fact which, if established , would constitute a breach of an obligation owed to a state party or to the Union;
g) the nature or extent of the reparation to be made for the breach of an obligation"[92].

The Court of Justice was however quickly merged with the African Court of Human and Peoples Right to form the African court of Justice and Human Rights which will become the new court of the AU. The court so far has 16 ratifications.[93]

7.3 African Court of Justice and Human Right

It was founded on 1 July 2008 and has not yet been signed into force. The African Court of Justice and Human right was founded by merging the African court of Human and Peoples Right and the Court of Justice of the AU. The court seats in Arusha, Tanzania, same place where the former court of the AU (Court of Justice of the AU) seats. Article 1 of the protocol to the Statute of the African Court of Justice and Human Right explains the formation of this court. This Article states that;

"The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted on 10 June 1998 in Ouagadougou, Burkina Faso and which entered into force on 25 January 2004, and the Protocol of the Court of Justice of the African Union, adopted on 11 July 2003 in Maputo, Mozambique, are hereby

[92] African Union. (2003). *Protocol to the Court of Justice of the African Union, Art. 19.* African Union: https://au.int/sites/default/files/treaties/7784-treaty-0026_-_protocol_of_the_court_of_justice_of_the_african_union_e.pdf , (Accessed April 16, 2018)

[93] Philomena .A, F .A (2016, November)

replaced by the present Protocol and Statute annexed as its integral part hereto, subject to the provisions of Article 5, 7 and 9 of this Protocol"[94].

Article 5 of the protocol to the Statute of the ACJHR equally stated that all cases of Human Rights that were pending at the African Court of Human and People's right as at the time of the creation of the ACJHR should be transferred to the Human Right section of the newly merged court[95]. This implies that the jurisdiction granted to the ACHPR is exactly the same as those awarded the ACJHR. The African Court of Justice and Human Rights has only 5 ratifications from its 30 member states and the court is divided into two sections; general affairs and Human Rights.[96]

7.4 Africa Court of Justice, Human and People's Right

This court is founded on the "Protocol on Amendments to the protocol on the statute of the African court of Justice and Human Right, this is known as the Malabo Protocol"[97]. The court has the jurisdiction to try international crimes committed by states or individuals. It is divided into three sections; general affairs, human rights and international crimes. The court was founded in June 2014 but has not yet entered into force. This court has only 9 members in which none has given it domestic jurisdiction because it is not yet entered into force.

From the above mentioned courts we can see that the African Union in a bid to improve its judicial system is avoiding anti-impunity. None of these courts mentioned here have the power to punish sitting heads of states or state leaders. The Africa Court of Justice, Human and People's right is the only court with the power to try international crimes but this court is not yet enforced thus if there is no ICC, African Leaders will walk freely from international crimes committed.

Similarly, another important aspect trailing the ineffectiveness of the African courts is the fact that these courts lack funding. It is estimated that about US$20 million is spent on a single

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[94] African Union. (2008, July 1). *Protocol on the Statute of the African Court of Justice and Human Right.* RefWorld: http://www.refworld.org/docid/4937f0ac2.html ,(Accessed April 16, 2018)

[95] Ibid

[96] Philomena .A, F .A (2016, November)

[97] Ibid

international criminal trial,[98] this amount is twice as much as the national budget spent by the AU. Thus, the AU does not have sufficient funds to complete international criminal trial, it is impossible to run these courts in the absence of the ICC.

It is of no doubt that the ICC is out for justice of the defenseless and not systematically picking on African Nations. Until the African Continent can boost of a reliable judicial system that can conduct trials for any individual irrespective of power or position, the ICC remains the center of last resort of victims of international Crimes.

[98] Philomena .A, F .A (2016, November)

CONCLUSION

Perpetrators of war crimes, crimes against humanity, genocide and other crimes regarding international law will go scot-free if international criminal tribunals were not introduced. What then would be the power of justice if such huge crimes were not punished? The advent of International Criminal tribunal has not only provided Justice for those affected by international crimes but has also served as a form of deterrence to others.

As our world system has no central authority, wars and conflict are almost inevitable. The belligerents in these unending conflict can intendedly or unintendedly cause inflicting pains and sorrows to not just the other conflicting parties but even to civilian objects, this is why the international community through various international organizations have created judicial organs to prosecute offenders.

Most importantly, we should consider the difference in characteristics of the different tribunals and commissions that were set up to investigate the various international crimes committed so as to enable full justice. The importance of the ICC was also mentioned since this is a permanent international court. The changes in characteristics of the various tribunal and commission reflects the immense understanding of the international society towards international crimes and also the formation of a permanent court shows how seriously the international society perceive international crimes.

With the creation of the ICC, the world became satisfied that a permanent court has been created to fight against impunity and also to deliver justice with all fairness and equality. Thus, in 2002 the former UN Secretary General Kofi Annan when the Rome Statute was adopted encouraged all African Countries to join the Court in order to fight against aggression from

foreign states and also to maintain their state sovereignty. Things took a bad turn when the ICC started to exhibit its full jurisdiction. According to Fatou Bensouda who is a Gambian National and also the chief prosecutor of the ICC, the obstacles facing the ICC from most African Countries were expected to happen as majority of the dictators are looking for cover under the disguise of immunity. If then immunity is granted to Leaders who are mostly the key actors in International crime what then is the use of the ICC?

The indictment of Al-Bashir was the turning point of the relationship between the African Continent and the ICC with most African States arguing that a serving head of state should not be prosecuted but in instances where immunity is breeding opportunity to commit more crimes then there is no justice which also implies that the ICC will only be a figure head and nothing more.

When Kenyatta and Ruto were indicted by the ICC for post-election violence, African Leaders frowned at these development as well, calling it a means to change political regimes by outside governments but majority of Kenyans who were victims of this 2008 post-election violence greeted this development with great Joy.

The recommendation by the Waki Commission to set up a tribunal to punish offenders of this post-election violence were ignored by the Kenyan Government, so if not for the ICC, victims of these violence will have no Justice and offenders will go free without facing the wrath of the law. The ICC is strictly working on a principle of complimentarily, thus, it is not purposely picking on African Nations but only investigating issues concerning states that are incapable of prosecuting criminals.

When the African Union created a strategy to enable withdrawal from the Court, the continent was thrown into a state of shock as the Judicial system of the African Union were half-functioning with very limited jurisdictional authority.

The African Union established the ACJHR which has not been entered into force and in spite of this the AU further created the ACJHPR which still is not in force, thus, if the African Continent all pulls out of the Rome Statute, what will be the fate of justice in Africa? What will Victims hold as consolation? Would it only be a Hobbesian state of Nature where it is man

against man? Until Africa can boast of a strong, formidable international court that can prosecute individuals irrespective of power or authority, the International Criminal Court is according to Kofi Annan, credible court of last resort for the most serious crimes.

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