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Administration of International Criminal Justice in the 21st Century: Prospects and Challenges

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Abstract
In war or armed conflict, human beings exhibit their worst form of behaviour and become so reduced to the level of animals in their thinking when dealing with the enemy, either as combatants or even citizens of the enemy state. In prosecuting such wars, no consideration was given to those who were not involved in war like women, children, prisoners of war, civilians and hors de combat. War was prosecuted with impunity and warlords and persons involved in such dastardly acts often went unpunished.However, in Rome on July 17, 1998, 120 nations voted to create a permanent International Criminal Court (ICC) to try war crimes, crimes against humanity and genocide. Only seven nations opposed the measure, including Iraq, China, Israel and the United States. With this arrangement, there is the prospect of putting an end to impunity in war.
This article examines the history, prospects and challenges of the ICC and proffers suggestion on how the ICC might be more visible in State activities.
Keywords: Armed conflicts, war crimes, crimes against humanity, genocide, impunity, hor de combat, impunity

1. Introduction

The world has witnessed so many disasters some of which are natural while a greater number of them are man-made caused by wars both internally and internationally. Apart from the wars being of great concern to the international community in terms of the alarming number of casualties on all sides of the warring parties, of greater concern however, to international humanitarian law is the manner of prosecuting these wars.

Most of these wars were fought with impunity without regards to principles of International Humanitarian Law. Women systematically raped as war tactic, famished prisoners in concentration camps, besieged city dwellers regularly shelled and sniped at, an entire town's male population rounded up and massacred under cover of the night, hundreds of thousands of "neighbours" hacked and clubbed to death…those scenes haunted TV rooms around the world at the end of the 20th century.[1] The Rwandan genocide is still fresh in our memories; the on going war in Sudan is another. The conflict in Uganda persisted for several years during which time civilians in Northern Uganda were been subjected to attacks. According to different reports given to the Office of the Prosecutor (OTP) the situation has resulted in a pattern of serious human rights abuses against civilians in the region, including torture and mutilation, recruitment of child soldiers, child sexual abuse, rape forcible displacement, looting and destruction of civilian property.[2] According to the report over 85% of the Lord's resistance army (LRA) forces are made of children, used as soldiers, porters, labourers and sexual slaves, in the case of girls. As part of initiation into the rebel movement, abducted children are forced to commit inhuman acts including ritual killing and mutilation. Children are reported to have frequently been beaten and forced to carry heavy loads over long distances, loot and burn houses, beat and kill civilians and fellow abductees, and abduct other children.[3]

The situation in Darfur, Sudan, is still of the moment. Since Sudan gained independence in 1956, it has experienced peace for just 11 years. For the remaining years, it has been wars, pain and famine without end.[4] The genesis of the Sudanese conflict is a mixture of a lot of elements not just about political but ethnic issues and the need for survival in that region. Religious issue is also another major factor where the Islamic penal code was made the law of the land and thus was affecting the Christian minority in the Sudan.[5]

Control of Sierra-Leone's diamond industry was a primary cause of the war. Although endowed with abundant natural resources, Sierra-Leone was ranked as the poorest country in the world by 1998. With the breakdown of all state structures, wide corridors of Sierra Leonean society were opened to the trafficking of arms and ammunition. Recreational drugs also eroded national and regional security as well as facilitated crime within the country, precipitating illegal trade with both Liberia and Guinea. Besides the internal trouble in Sierra

[1] Amos Tincani (Head of the EC delegation to Barbados and the Eastern Caribbean), Nation (Barbados) November 15, 2004.
[2] M. Leeladhara Bhandary, *International criminal court: Development in prosecution*, 45 INDIAN JOURNAL OF INTERNATIONAL LAW (2005), at 259.
[3] *Id.*
[4] Femi Makinde, *The Crisis in Sudan*, THE PUNCH NEWSPAPER, Mon., August 23, 2004, at 68.
[5] Sudan: A Historical Perspective.

Leone, the brutal civil war going on in neighbouring Liberia played an important role for the actual outbreak of fighting.

The war in Liberia also cannot be so soon forgotten and other internal strives all over Africa and in the world at large. These wars have had devastating consequences in terms of loss of millions of lives; state collapse, societal fragmentation and disruption of economic activities. These are consequences of state impunity and atrocious acts that shocked the conscience of the international community.[1]

The aim of international criminal justice is to bring dictators and other tyrants around the world to book by a single court and to punish the principal actors who might be responsible for any act of crime against humanity, war crime or genocide or for acts of prosecuting the war against the principles of international humanitarian law.

International Criminal Justice system however is all encompassing and it involves the collection of institutions through which an offender passes until the accusations have been disposed of or the assessed punishment concluded. The system typically has three components; law enforcement (police, sheriff, marshals), the judicial process (judges, prosecutors, defence lawyers), and corrections (prison officials, probation, and parole officers).[2] For our purpose however, we will discuss the judicial process focusing mainly on the International Criminal Court, the journey so far, prospects and challenges. The establishment of the international criminal court is in many respects a deeply innovative one, even a revolutionary step, which must be seen in its proper context: the emerging vision of the international community[3] to attain international justice. We believe that a successful prosecution will essentially involve all other arms of International Criminal Justice System.

2. Evolution of International Criminal Tribunals

The history and the origin of the International Criminal Court has been a long and complicated one, save for some not too significant international prosecutions after world War I, like the Leiziger prosecutions for German War Crimes in the First World War and the Tribunal that never was, Wilheim 11 of Hohenzollern, formerly the German Law Kaiser, the real and most recognised history of international Criminal Court began after World War II.[4]

The Nuremberg and Tokyo tribunals marked the beginning of international criminal trials. The Nuremberg and Tokyo tribunals marked the beginning of international criminal trials. The Nuremberg and Tokyo tribunals were ad hoc bodies established by Victorious Allied Powers of France, United Kingdom, United States of America and the USSR after the Second World War to try war criminals of the defeated nations.[5] These ad hoc tribunals were set up as international tribunals not only to try war crimes, but also crimes against humanity committed under the Nazi regime. The Nuremberg Tribunal held its first session on 20 November 1945 and pronounced judgment on 30 September and 11 October 1946. The Tokyo Tribunal was set up to try war crimes for the Far East and was in operation from 1946 to 1948.

In 1948, following the Nuremberg and Tokyo Tribunal, the United Nations General Assembly recognised the need for a permanent international court to deal with atrocities of the kind committed during the World War II. At the request of the General Assembly, the International Law Commission drafted two statutes by the early 1950 but these were shelved as the cold war made the establishment of an international criminal court politically unrealistic.[6]

Benjamin B. Ferencz, an investigator of Nazi War Crimes after World War II and the chief prosecutor for the United States army at the Einsatzgruppen Trial, one of the twelve military trials held by the US authorities at Nuremberg, later became a vocal advocate of the establishment of an international rule of law and of an international criminal court. In his first book published in 1975, entitled Defining International Aggression – The Search for World Peace, he argued for the establishment of such an international court.[7]

The idea was revived in 1989 when A.N.R. Robinson, a Prime Minister of Trinidad and Tobago, proposed the creation of a permanent international court to deal with the illegal drug trade,[8] and so work began

[1] Daniel Ehighalua, *Africa and the ICC: Which Way Forward*? THE GUARDIAN, Tuesday, March 2, 2010. Ehighalua is a lawyer and Secretary of the Nigerian Coalition on the International Criminal Court.
[2] BRYAN A. GARNER(ED.), BLACK'S LAW DICTIONARY (7th Edition).
[3] Antonio Cassese, *A Big Step Forward for International Justice*, *in* THE INTERNATIONAL CRIMINAL COURT: AN END TO IMPUNITY, available at <http://www.crimes of war.org/icc_magazine/icc.cassese.html>, (accessed on March 30, 2010).
[4] THE PEACE PALACE LIBRARY CENTENNIAL EXHIBITION (2004).
[5] Osita Nnamani Ogbu, *The International Criminal Court and Crimes against Humanity*, 4 IGBINEDION UNIVERSITY LAW JOURNAL (2006), at 118.
[6] Gary T. Dempsey, Reasonable Doubt: The Case against the Proposed International, 16 July 1998, retrieved from Criminal Court – Wikipedia, the free Encyclopaedias: available at <http://en.wikipedia.org/wiki/international_criminal_court>, (accessed 03 March 2010).
[7] BENJAMIN B. FERENCZ, DEFINING INTERNATIONAL AGGRESSION: SEARCH FOR WORLD PEACE (1975), at 2.
[8] International Criminal Court, 20 June 2006, Election of Mr. Arthur N.R. Robinson to the Board of Directors of the Victims

on the draft statute. However, the intervening cold war years effectively forestalled any major progress in the direction of establishing the tribunal.[1] Thus, though Nuremberg and Tokyo trials constituted a serious assault on impunity, they never brought it to an end. There was rather an upsurge of crimes against humanity. Common to Nuremberg and Tokyo were the following: there was no code of conduct for the lawyers involved; there were no specific rule of evidence[2] and the prosecutors were directly appointed by the victorious powers, whose political goals were hardly obscure. Professor Evan J. Wallach in a review of the post war tribunal procedures, determine that while the defendants were usually treated fairly, the malleability of the rules left open the possibility of abuse, which did occur.[3] Both the Nuremberg and Tokyo Trials advanced the international rule of law[4] and commonly referred to as the archetypes of modern international criminal law.

There appeared to be little hope for an ICC between 1989 and 1992, but Security Council Resolution 780[5] establishing a Commission of Experts to investigate international humanitarian law violations in the former Yugoslavia, changed all this.[6] The breakdown of the bipolar world and the increased expectations of peace with the end of the cold war sparked a strong international response to the humanitarian crisis in the Balkans, and allowed the major powers to find common ground.[7] The creation of the ad hoc tribunals for the former Yugoslavia (ICTY)[8] and Rwanda (ICTR)[9] followed the commission's work and garnered worldwide recognition and credibility that gave support to the process for establishing the ICC.

2.1. International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for the Rwanda (ICTR)

2.1.1 ICTY

The international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991, more commonly referred to as the International Criminal Tribunal for the former Yugoslavia or ICTY, is a body of the United Nations established to prosecute serious crimes committed during the wars in the former Yugoslavia and to try their perpetrators. The tribunal is an ad hoc court which is located in The Hague, the Netherlands.

The ICTY was established to respond to the violations that had taken place in the territory of the former Yugoslavia since 1991. The widespread violations of international human rights law within the territory of the former Yugoslavia, the genocide and other systematic and various violations of international humanitarian law that had been committed led to the formations of the tribunal.[10]

The specific jurisdiction of the ICTY includes the following: grave breaches of the 1949 Geneva Convention, violations of the laws or customs of war, genocide, and crime against humanity. Though it can only try individuals, not organization or government.[11] One of the five goals of the ICTY was explicitly "to deter future violations of international criminal law".

The ICTY has achieved great feat since the very first hearing (referral request in the Tadic case) on 8 November, 1994. There has been 161 indicted individuals, and it has also completed proceedings with regard to 100 of them; five have been acquitted, 48 sentenced (seven are awaiting transfer, 24 have been transferred, 16

Trust Fund, *id.,* at 2.

[1] Akinseye – George, *The International Criminal Court: An Introduction to the Rome Statute*, *in* JUSTICE IN THE JUDICIAL PROCESS: ESSAYS IN HONOUR OF JUSTICE EUGENE UBAEZONU (C.C. Nweze ed., 2002), at 491, cited by Ogbu, *supra* note 10.

[2] Laura Barnett, The International Criminal Court: History and Role, revised 4 November 2008, available at <http://www2.parl.gc.ca/content/LOP/>, (accessed 31 March 2010).
The London Charter for the Nuremberg stated that the tribunal would not be bound by technical rules of evidence with amazing candour, President Webb of Tokyo Tribunal states in respect of judicial decisions on the admissibility of evidence: "The decision of the Court will vary with the constitution from day to day." For a detailed review of the rules of procedure and evidence, or lack thereof, see Evan J. Wallach, *The Procedural and Evidentiary Rules of the Post-World War II War Crimes Trials: Did they provide an outline for international legal procedure?*, 37 COLUMBIA JOURNAL OF TRANSNATIONAL LAW (1999), at 851.

[3] Wallach *id*., at 868.

[4] For example, the elimination of the "defence to superior orders" and the accountability of Heads of State: See M. CHERIF BASSIOUNI, THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY (1998), at 9.

[5] Security Council Resolution 780, U.N.SCOR, 47th session, U.N. Doc. S/RES/780 (1992)

[6] BASSIOUNI, *supra* note 17, at 18.

[7] James O'Brien, *The International Tribunal for Violations of International Humanitarian Law in the former Yugoslavia*, 87 AMERICAN JOURNAL OF INTERNATIONAL LAW (1993), at 639-640.

[8] The International Criminal Tribunal for the former Yugoslavia was created pursuant to Security Council Resolution 827, UNSCOR, 48th Session 3175th Meeting, U.N. Doc. S/RES/827 (1993), the "ICTY Statute"

[9] The International Criminal Tribunal for the Rwanda was created pursuant to Security Council Resolution 955, U.N.SCOR, 49th Session, U.N. Doc.S/RES/995, (1994), "the ICTR Statute"

[10] See http://en.wikipedia.org/wiki/international_criminal_tribunal_for_the former-Yugoslavia, (accessed March 31, 2010).

[11] *Id.*

have served their terms, and one died while serving his sentence), 11 have had their cases transferred to local courts. Another 36 cases have been terminated (either because indictments were withdrawn or because the accused died, before or after transfer to the tribunal).[1] Despite the achievements, criticisms still trail its path. For example, two key indictees have not been arrested; critics questioned whether the Tribunal exacerbates tension rather than promote reconciliation; tribunals high cost (currently $303 million for two years);[2] complaints about length of trial; such as that of Slobodan Milosevic; claims that the court has no legal authority because it was established by the UN Security council instead of the UN General Assembly, therefore it had not been created on a broad international basis.

2.1.2 ICTR

Like its counterpart, ICTY, recognising that serious violations of humanitarian law were committed in Rwanda, and acting under chapter VII of the United Nations Charter, the Security Council created the ICTR by Resolution 955 of 8 November, 1994. The purpose of this measure is to contribute to the process of national reconciliation in Rwanda and to the maintenance of peace in the region. The ICTR was established for the prosecution of persons responsible for genocide and other serious violations of International Humanitarian law committed in the territory of Rwanda between 1 January 1994 and 31 December 1994. It may also deal with the prosecution of Rwandan citizens responsible for genocide and other such violations of international law committed in the territory of neighbouring states during the same period.[3]

In 1995, the tribunal became located in Arusha, Tanzania.[4] Also in 1998 the operation of the Tribunal was expanded.[5] Through several resolutions, the Security Council called on the Tribunal to complete its investigations by the end of 2004, complete all trial activities by the end of 2008, and complete all work in 2012.[6]

Specifically, the tribunal has jurisdiction over genocide, crimes against humanity and war crimes, which are defined as violations of common Article Three and Additional Protocol 11 of the Geneva Convention (dealing with war crimes committed during internal conflicts). So far, the tribunal has finished 50 trials and convicted 29 persons. Another 11 trials are in progress. 14 individuals are awaiting trial in detention; but the prosecutor intends to transfer 5 to national jurisdiction for trial. 13 others are still at large, while some are suspected to be dead.[7]

According to the ICTR's completion strategy, in accordance with Security Council Resolution 1503, all first-instance cases were to have completed trial by the end of 2008 (this date was later extended to the end of 2009)[8] and all work is to be completed by 2010. It has recently been discussed that these goals may not be realistic and are likely to change. The Rwandan Tribunal has been the object of stinging criticism, which has come mainly from two sources: the current RPF led government of Rwanda and the Western countries, led by the United States. The Rwandan government opposed the very creation of the Tribunal in the first place, citing two main reasons. To begin with, the most severe punishment to be meted out by the Tribunal would be imprisonment and not death (for the government, those proved to have been involved in the genocide deserved the death penalty, which still exists in Rwanda). Secondly, the Rwandan government argued, it was unrealistic to limit the Tribunal's temporal jurisdiction to the period 1 January to 31 December 1994 since equally serious crimes had been committed before then and these crimes were related to the ones perpetrated in 1994. Other reasons included the likelihood that judges from countries which had been in one way or another involved in the war would show bias; and the fact that those found guilty would serve their sentences in countries offering prison facilities and not in Rwandan jails.[9] In the eyes of the Rwandan government, therefore, the tribunal will be ineffective; it will not meet the expectations of the Rwandan people; at most, it would be used to appease the conscience of the international community, which had stood by while the genocide took place and had made no effort to stop it. The government had continued to take a very hostile attitude towards the tribunal, whose personnel in Kigali have reportedly been subjected to harassment and even manhandled in the course of their works.[10]

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[1] *Id.*
[2] *Id*. See Consumer Price Index (estimate) 1800-2008, Federal Reserve Bank of Minneapolis. (Retrieved March 8, 2010).
[3] http://www.unictr.org/About ICTY/General information, (accessed March 31, 2010).
[4] United Nations Security Council Resolution 977 S-RES (1995)
[5] United Nations Security Council Resolution 1165 S-RES (1998)
[6] United Nations Security Council Resolution 1824 S-RES-1824 (2008)
[7] International criminal Tribunal for Rwanda, wikipedia, the free encyclopaedia.
[8] *Id.* available at <http://en.wikipedia.org/wiki/International_Criminal_Tribunal_for _Rwanda>, (accessed on 6 May 2010).
[9] Chris Maina Peter, *The International Criminal Tribunal for Rwanda: Bringing the Killers to Book in* INTERNATIONAL REVIEW OF THE RED CROSS (1997) No.321, at 695-704. At present six countries have indicated their willingness to provide prison facilities for persons convicted by the Rwandan Tribunal: Austria, Belgium, Denmark, Norway, Sweden and Switzerland.
[10] *Id.,* citing prosecuting genocide in Rwanda: ICTR and the National trials, Lawyers, committee for human Rights,

Western governments have been critical of the Tribunal as part of their broader criticism of the United Nations as a whole. Among other things they have alleged that it is not making any headway and that it is generally dysfunctional.[1]

3. International Criminal Court (ICC)

3.1. The Rome Conference

As the Conference to establish the ICC got underway in Rome in July 1998, three basic groupings of states emerged.[2] Led by Canada and Norway, the 'like minded group' was arguably influential[3] and advocated a potent and robust ICC. It consisted mostly of the middle powers and developing countries, which generally supported a proprio motu prosecutorial model.[4] The second group consisted of the permanent members of the UN Security Council, or the "P-5", with the exception of Britain, which had joined the like minded states just before the conference began. Not surprisingly, this group sought a more important role for the Security Council in the establishment and operation of the court. The United States in particular expressed grave concerns about the possibility of a proprio motu prosecutor and argued for the limiting of the ICC's jurisdiction to Security Council referrals. A third non-aligned group was formed in opposition to the P-5's insistence on the exclusion of nuclear weapons from the statute. This group included such states as India, Mexico and Egypt. However, this group's opposition in respect of the independence and powers of the ICC was similar to that of the P-5.

Jurisdictional issues were the most complex and most sensitive, but the proprio motu prosecutor model did receive significant, although not general, support.[5] As the conference was nearing its conclusion and no agreement was evident, the Bureau of the Committee of the whole[6] decided to prepare a final package for possible adoption. The alternative of reporting that an agreement could not be reached and scheduling another conference was not attractive. Many feared that a second conference stood no better chance of success and would likely result in either a weakened ICC or no court at all for years to come. By a final vote of 120 in favour, 21 abstaining and 7 against, the Bureau's package was adopted.

The United States voted against the statute in Rome – putting it in the company of China, Iraq, Israel, Libya, Qatar and Yemen – then signed on[7] and then "unsigned" as previously noted. The expressed concerns related to jurisdictional issues and, in particular, to what the American delegation saw as a lack of accountability in granting proprio motu power to an independent prosecutor. The foregoing processes culminated in the history and birth of the International Criminal Court.

3.2 Structure of the Court

The court is composed of four organs. These are the Presidency, the judicial Divisions, the Office of the Prosecutor and the Registry.

1. The Presidency

The Presidency is responsible for the overall administration of the court, with the exception of the Office of the Prosecutor, and for specific functions assigned to the presidency in accordance with the statute. The presidency is composed of three judges of the court, elected to the presidency by their fellow judges, for a term of three years. The President of the Court is Judge Sang Hyun Song (Republic of Korea), Judge Sanji Mmasenono Monageng (Botswana) is first Vice President, and Judge Cuno Tarfusser (Italy) is second Vice-President.[8]

2. Judicial Divisions

The Judicial Divisions consist of eighteen judges organized into the Pre-trial Division, the Trial Division and the Appeals Division. The judges of each division sit in Chambers which are responsible for conducting the proceedings of the court at different stages. Assignment of judges to divisions is made on the basis of the nature of the functions each division performs and the qualification and experience of the judge. This is done in a manner ensuring that each division benefits from an appropriate combination of expertise in criminal law and procedure and international law.[9]

Washington, D.C, July 1997, at 4.

[1] *Id.*

[2] Barnett, *supra* note 15, citing Philippe Kirsch and John T. Holmes, *Rome Conference on an International Criminal Court: The Negotiating Process*, 93 AMERICAN JOURNAL OF INTERNATIONAL LAW (1999), at 3.

[3] Michael Schmitt & Major Peter J. Richards, *Into Uncharted Waters: The International Criminal Court*, LIII NAVAL WAR COLLEGE REVIEW, No.1 (Winter, 2000), at 139.

[4] A prosecutor who has the power to initiate proceedings himself or herself.

[5] Kirsch & Holmes, *supra* note 36, in their section on Jurisdictional Issues.

[6] Members of the Bureau included representatives of Canada, Argentina, Romania, Lesotho and Japan.

[7] On the structure of the Court, see http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/ June 8 2012).

[8] *Id.*

[9] *Id.*

3. Office of the Prosecutor

The office of the prosecutor is responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the court, for examining them and for conducting investigations and prosecutions before the court. Currently, the office is headed by the prosecutor, Mrs. Faton Bensenda, who replaced Luis Moreno-Ocampo (Argentina), whose term of nine years came to an end. At the time of writing this article, a Deputy Prosecutor who is in charge of the prosecution Division of the office of the Prosecutor had not yet been announced.[1]

4. Registry

The Registry is responsible for the non-judicial aspects of the administration and servicing of the court. The Registry is headed by the Registrar who is the principal administrative officer of the court. The Registrar exercises his or her functions under the authority of the President of the Court.[2]

5. Other Offices

The court also includes a number of semi-autonomous offices such as the Office of Public Counsel for victims and the Office of Public Counsel for Defence. These offices fall under the Registry for administrative purposes but otherwise function as wholly independent offices. The Assembly of States parties is the management oversight and legislative body of the International Criminal Court. It is composed of representatives of the States that have ratified and acceded to the Rome Statute. Each State party is represented by a representative who is proposed to the Credential Committee by the Head of State of government or the Minister of Foreign Affairs. The Assembly of States parties has also established a Trust Fund for the benefit of victims of crimes within the jurisdiction of the Court and the families of these victims.[3]

The Assembly of States parties has a Bureau, consisting of a president, two vice presidents and 18 members elected by the Assembly for a three-year term, taking into consideration principles of equitable geographic distribution and adequate representation of the principal legal systems of the world.[4]

On the second session in September 2003 the Assembly of States parties decided to establish the Permanent Secretariat.[5] The Assembly of States parties decides on various items, such as the adoption of normative texts and of the budget, the election of the judges and of the prosecutor and the Deputy Prosecutor(s).

According to article 112(7), each State party has one vote and every effort has to be made to reach decisions by consensus both in the Assembly and the Bureau. If consensus cannot be reached, decisions are taken by vote.[6]

4. Jurisdiction

4.1 *Crimes within the Jurisdiction of the Court*

Article 5 of the Rome Statute grants the court jurisdiction over four groups of crimes, which it refers to as the "most serious crimes of concern to the international community as a whole": the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. The statute defines each of these crimes except for aggression. It provides that the court will not exercise its jurisdiction over the crime of aggression until such time as the State parties agree on a definition of the crime and set out the conditions under which it may be prosecuted.[7]

Many States wanted to add terrorism and drug trafficking to the list of crimes covered by the Rome Statute; however, the States were unable to agree on the definition for terrorism and it was decided not to include drug trafficking as this might overwhelm the court's limited resources. India lobbied to have the use of nuclear weapons and other weapons of mass destruction included as war crimes but this move was also defeated. India has expressed concern that "the Statute of the ICC lays down, by clear implication that the use of weapons of mass destruction is not a war crime. This is an extraordinary message to send to the international community.[8]

Some commentators have argued that the Rome Statute defines crimes too broadly or too vaguely. For example, China has argued that the definition of 'war crimes' goes beyond that accepted under customary international law.[9]

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[1] *http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/*
[2] *Id.*
[3] Assembly of States Parties, available at <http://www.icc-cpi.int/menus/ASP/Assembly>, (accessed April 7 2010).
[4] *Id.*
[5] (ICC-ASP/2/L.5).
[6] See *supra* note 41.
[7] Article 5 of the Rome Statute.
[8] Dilip Lahiri, 17 July 1998: Explanation of Vote on the adoption of the Statute of the International Criminal Court, Embassy of India, Washington, D.C., available at <http://en.wikipedia.org/wiki/international-criminal-court>, (accessed on March 03, 2010).
[9] Amnesty International, International Criminal Court: Concerns at the Fifty Session of the Assembly of States Parties in International Criminal Court, available at http://en.wikipedia.org, *id.*

4.2. Territorial Jurisdiction

During the negotiations that led to the Rome Statute, a large number of States argued that the court should be allowed to exercise universal jurisdiction. However, this proposal was defeated due in large part to opposition from the United States.[1] A compromise was reached, allowing the court to exercise jurisdiction only under the following limited circumstances:

(a) Where the person accused of committing a crime is a national of a State party (or where the person's state has accepted the jurisdiction of the court);
(b) Where the alleged crime was committed on the territory of a State party (or where the State in whose territory the crime was committed has accepted the jurisdiction of the court); or
(c) Where a situation is referred by the U.N. Security Council.

4.3. Temporal Jurisdiction

The court's jurisdiction does not apply retroactively – it can prosecute crimes committed on or after 1 July 2002 (the date on which the Rome Statute entered into force). Where a state becomes party to the Rome Statute after that date, the court can exercise jurisdiction automatically with respect to crimes committed after the statute enters into force for that State.[2]

4.4 Complementarity

The ICC is intended as a court of last resort, investigating and prosecuting only where national courts have failed. Article 17 of the Statute provides that a case is inadmissible if:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.
(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or mobility of the State genuinely to prosecute.
(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the court is not permitted under article 20, paragraph 3.
(d) The case is not of sufficient gravity to justify further action by the Court[3].

Article 20, paragraph 3, specifies that, if a person has already been tried by another court, the ICC cannot try them again for the same conduct unless the proceedings in the other court:

"(a) were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the court; or
(b) otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice."[4]

5. Activities of ICC Today

The court has received complaints about alleged crimes in at least 140 countries[5] but, as of March 2011, the prosecutor had opened investigations into just seven situations: Uganda, the Democratic Republic of the Congo, the Central African Republic, Darfur, Kenya, Libya and Cote d'lvoire.

5.1 Uganda

In December 2003, the government of Uganda, a State party, referred to the Prosecutor the situation concerning the Lord's Resistance Army in Northern Uganda.[6] On 8 July 2005, the Court issued its first arrest warrants for the Lord's Resistance Army leader Joseph Kony, his deputy Vincent Otti, and LRA Commanders Raska Lukwiya, Okot Odiambo, and Dominic Ongwen.[7] Lukwiya was killed in battle on 12 August 2006,[1] and Otti

[1] Elizabeth Wilushurst, *jurisdiction of the court in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE (Roy S. Lee ed., 1999), at 136
[2] Article 11 of the Rome Statute.
[3] Article 17 of the Rome Statute.
[4] Article 20 of the Rome Statute.
[5] International Criminal Court, 9 June 2012. Update on Communications received by the Office of the Prosecutor of the ICC
[6] International Criminal Court, 29 January 2004: President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC, available at http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2004/president%20of%20uganda%20refers%20situation%20concerning%20the%20lord_s%20resistance%20army%20_lra_%20to%20the%20icc?lan=en-GB
[7] International Criminal Court, 14 October 2005: Warrant of Arrest unsealed against five LRA Commanders, available at http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200204/related%20cases/icc%200204%200105/pr

was killed in 2007, apparently by Kony.[2] The LRA's leaders have repeatedly demanded immunity from ICC prosecution in return for an end to the insurgency.[3] The government of Uganda says it is considering establishing a national criminal tribunal that meets international standards, thereby allowing the ICC warrants to be set aside.[4]

5.2 Democratic Republic of the Congo

In March 2004, the government of the Democratic Republic of the Congo, a State party, referred to the prosecutor "the situation of crimes within the jurisdiction of the court allegedly committed anywhere in the territory of the DRC since the entry into force of the Rome Statute, on 1 July 2002."[5]

On 17 March 2006, Thomas Lubanga, former leader of the Union of Congolese Patriots Militia in Ituri, became the first person to be arrested under a warrant issued by the Court, for allegedly "conscripting and enlisting children under the age of fifteen years and using them to participate actively in hostilities".[6] His trial was due to begin on 23 June 2008,[7] but it was halted on 13 June when the court ruled that the prosecutor's refusal to disclose potentially exculpatory material had breached Lubanga's right to a fair trial.[8]

The prosecutor had obtained the evidence from the United Nations and other sources on condition of confidentiality, but the judges ruled that the prosecutor had incorrectly applied the relevant provision of the Rome Statute and, as a consequence, "the trial process has been ruptured to such a degree that it is now impossible to piece together the constituent elements of a fair trial".[9] The court lifted this suspension on 18 November 2008[10] and Lubanga's trial began on 26 January 2009. On 14 March 2012, Lubanga was found guilty of conscripting and enlisting children under the age of 15 and using them to participate actively in hostilities from 1 September 2002 to 13 August 2003 in the Ituri region.[11]

Two more suspects, Germain Katanga and Matthiew Ngudjolo Chui, have also been surrendered to the court by the Congolese authorities.[12] Both men are charged with six counts of war crimes and three counts of crimes against humanity, relating to an attack on the village of Bogoro on 24 February 2003, in which at least 200 civilians were killed, survivors were imprisoned in a room filled with corpses, and women and girls were sexually enslaved.[13] The charges against both men include murder, sexual slavery and using children under the

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ess%20releases/warrant%20of%20arrest%20unsealed%20against%20five%20lra%20commanders

[1] International Criminal Court, 11 July 2007: Decision to Terminate the Proceedings against Raska Lukwiya, available at http://www.icc-cpi.int/iccdocs/doc/doc297945.PDF

[2] Uganda's LRA confirm Otti dead, BBC NEWS, 23 January 2008.

[3] Human Rights Watch: Ugandan rebels must face justice, even if not before international court, ASSOCIATED PRESS, 30 May 2007.

[4] Uganda's Mato Oput ritual forgiveness for brutal 20-year war, AGENCE FRANCE PRESSE, 23 January 2008.

[5] International Criminal Court, 19 April 2004: Prosecutor receives referral of the situation in the Democratic Republic of Congo, available at http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2004/prosecutor%20receives%20referral%20of%20the%20situation%20in%20the%20democratic%20republic%20of%20congo?lan=en-GB

[6] International Criminal Court, 17 March 2006: First arrest for the International Criminal Court, available at http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2006/first%20arrest%20for%20the%20international%20criminal%20court

[7] International Criminal Court, 13 March 2008: The trial in the case of Thomas Lubanga Dyilo will commence on 23 June 2008, available at http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20(2008)/the%20trial%20in%20the%20case%20of%20thomas%20lubanga%20dyilo%20will%20commence%20on%2023%20june%202008?lan=en-GB.

[8] International Criminal Court, 13 June 2008: Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, available at http://www.icc-cpi.int/iccdocs/doc/doc578371.pdf.

[9] International Criminal Court, 16 June 2008. Trial Chamber 1 ordered the release of Thomas Lubanga Dyilo – Implementation of the decision is pending, available at http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20(2008)/trial%20chamber%20i%20ordered%20the%20release%20of%20thomas%20lubanga%20dyilo%20_%20implementation%20of%20the%20decision%20is%20pend

[10] ICC's long-delayed first trial to start January, AGENCE FRANCE-PRESSE, 18 November 2008

[11] See http://www.icc-cpi.int/NR/exeres/A70A5D27-18B4-4294-816F-BE68155242E0.htm

[12] International Criminal Court, 18 October 2007. Second arrest: Germain Katanga transferred into custody of the ICC, available at http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200107/press%20releases/second%20arrest_%20germain%20katanga%20transferred%20into%20the%20custody%20of%20the%20icc?lan=en-GB

[13] International Criminal Court, 7 February 2008: Third detainee for the International Criminal Court: Mathieu Ngudjolo

age of fifteen to participate actively in hostilities.[1]

5.3 Central African Republic

In December, 2004, the government of Central African Republic, a State party, referred to the prosecutor, "the situation of crime within the jurisdiction of the court committed anywhere on the territory of the Central African Republic since July 1, 2002, the date of entry into force of the Rome Statute.[2] On 22 May 2007, the prosecutor announced his decision to open an investigation,[3] focusing on allegations of killing and rape in 2002 and 2003, a period of intense fighting between government and rebel forces.[4]

On May 23 2008, the court issued an arrest warrant for Jean-Pierre Bemba, a former Vice President of the Democratic Republic of Congo, charging him with war crimes and crimes against humanity, committed when he interfered in the events in the Central African Republic in 2002 and 2003.[5] He was arrested near Brussels the following day.[6] On 3 July, 2008 he was surrendered to the ICC.[7]

5.4 Darfur, Sudan

On 31 March 2005, The United Nations Security Council passed Resolution 1593, referring "the situation prevailing in Darfur since 1 July 2002" to the prosecutor.[8] In February 2007 the prosecutor announced that two men – Sudanese Humanitarian Affairs Minister, Ahmad Muhammad Harun and Janjaweed Militia leader Ali Kushayb had been identified as key suspects, accused of war crimes and crimes against humanity.[9] On 2 May 2007, the court issued arrest warrants for the two men.[10] However, Sudan says the court has no jurisdiction over this matter,[11] and has refused to hand over the suspects.[12] On 14 July 2008, the prosecutor accused Sudanese President Omar al Bashir of genocide, crimes against humanity and war crimes.[13] The court issued an arrest warrant for Al-Bashir on 4 March 2009 for war crimes and crimes against humanity, but ruled that there was insufficient evidence to prosecute him for genocide.[14] Al-Bashir was the first sitting head of state indicted by the ICC.[15] Bashir denies all the charges, describing them as "not worth the ink they are written in."[16] In July 2009,

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Chui, available at http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200107/press%20releases/third%20detainee%20for%20the%20international%20criminal%20court_%20mathieu%20ngudjolo%20chui?lan=en-GB

[1] International Criminal Court, 2 July 2007: Warrant of Arrest for Germain Katanga, available at http://www.icc-cpi.int/iccdocs/doc/doc349648.PDF .

[2] International Criminal Court, 6 July 2007: Warrant of arrest for Mathieu Ngudjolo Chui, Available at http://www.icc-cpi.int/iccdocs/doc/doc453054.PDF

[3] International Criminal Court, 15 December 2006: Prosecution's Report Pursuant to Pre-Trial Chamber III's 30 November 2006 Decision Requesting Information on the status of the Preliminary Examination of the situation in the Central African Republic, available at http://www.icc-cpi.int/iccdocs/doc/doc320182.PDF

[4] International Criminal Court, 22 May 2007: Prosecutor opens investigation in the Central African Republic, available at http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2007/prosecutor%20opens%20investigation%20in%20the%20central%20african%20republic?lan=en-GB

[5] International Criminal Court, 22 May 2007: Background situation in the Central African Republic, available at http://www.icc-cpi.int/NR/rdonlyres/B64950CF-8370-4438-AD7C-0905079D747A/144037/ICCOTPBN20070522220_A_EN.pdf

[6] Nora Boustany, *Court Examines Alleged Abuses in Central African Republic*, THE WASHINGTON POST, 23 May 2007, at 416.

[7] International Criminal Court, 24 May 2008: Jean-Pierre Bemba Gombo arrested for crimes allegedly committed in the Central African Republic, available at http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200105/related%20cases/icc%200105%200108/press%20releases/jean_pierre%20bemba%20gombo%20arrested%20for%20crimes%20allegedly%20committed%20in%20the%20central%20african%20republic?lan=en-GB

[8] United Nations Security Council, 31 March 2006: Security Council Refers Situation in Darfur, Sudan, available at http://www.un.org/News/Press/docs/2005/sc8351.doc.htm

[9] Sonja Pace, International Court Names Top Suspects in Darfur War Crimes, VOICE OF AMERICA, 27 February 2007

[10] Alexanda Hudson, ICC judges issue arrest warrants for Darfur Suspects, REUTERS, 2 May 2007

[11] International Criminal Court, 14 July 2008: ICC prosecutor presents case against Sudanese President, Hassen Al-Bashir, for genocide, crimes against humanity and war crimes in Darfur, available at http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205/press%20releases/a

[12] Warrant issued for Sudan's Bashir, BBC NEWS, 4 March 2009.

[13] SUDAN: The case against Bashir.

[14] http://www.dw-world.de/dw/article/0,445-1345,00.html

[15] http://news.bbc.co.uk/2/hi/africa/8133925.stm

[16] http://www.icc-cpi.int/menus/icc/situations+and+cases/cases

the member-states of the African Union agreed not to cooperate with the ICC in arresting Bashir.[1] Nevertheless, several African Union members who are also States parties of the ICC, including South Africa and Uganda, let it be known that Al-Bashir might be arrested if he entered their territory. However, in defiance of the ICC indictments, Al-Bashir has travelled to countries like Kenya and Chad which are states parties to the ICC without being arrested since the warrant was issued.[2] On February 3, 2010, the Appeals Chamber of the ICC reversed the Pre-Trial Chamber's rejection of the genocide charge, ruling that the PTC had applied a stringent standard of proof. On 12 July 2010, after a lengthy appeal by the prosecution, the court held that there was indeed sufficient evidence for charges of genocide to be brought and issued a second warrant containing three separate counts.[3]
On February 8, 2010, the court ruled that there was insufficient evidence to proceed to trial on charges against Idriss Abu Garda, a Darfuri rebel commander.

6. Prospects of the ICC

6.1. Peace and Justice

One of the primary objectives of the United Nations is to secure universal respect for human rights and fundamental freedoms of individuals throughout the world. In this connection, few topics are of greater importance than the fight against impunity and the struggle for peace and justice and human rights in conflict situations in today's world. The establishment of a permanent International Criminal Court (ICC) is seen as a decisive step forward. The International community met in Rome, Italy, from 15 June to 17 July 1998 to finalise a draft to establish the ICC.[4]

6.2 To end impunity

"A person stands a better chance of being tried and judged for killing one human being than for killing 100,000".[5]

The judgment of the Nuremberg tribunal stated that "crimes against international law are committed by men not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced…" thereby establishing the principle of individual criminal accountability for all who commit such acts as a cornerstone of international criminal law. According to the Draft Code of crimes against the peace and security of mankind, completed in 1996 by the International Law Commission at the request of the General Assembly, this principle applies equally and without exception to any individual throughout the governmental hierarchy as military chain of command. And the Convention on the Prevention and Punishment of the Crime of Genocide adopted by the United Nations in 1948 recognises that the crime of genocide may be committed by constitutionally responsible rulers, public officials or private individuals.[6]

6.3 To help end all conflicts

In situations such as those involving ethnic conflict, violence begets further violence; one slaughter is the parent of the next. The guarantee that at least some perpetrators of war crimes or genocide may be brought to justice acts as a deterrent and enhances the possibility of bringing a conflict to an end. The ad hoc international criminal tribunals for Yugoslavia and Rwanda and now, the International Criminal Court were created with the hope of hastening the end of the violence and preventing its recurrence.[7] As stated by Benjamin B. Ferencz, "There can be no peace without justice, no justice without law and no meaningful law without a court to decide what is just and lawful under any given circumstances."[8]

6.4. To deter future war criminals

Hans Corell, the former United Nations under Secretary-General for Legal Affairs[9], stated:

> "From now on, all potential warlords must know that, depending on how a conflict develops, there might be an established international tribunal before

[1] International Criminal Court, 18 October 2007. Report on the activities of the Court.
[2] Bashir visited Kenya on 27 August, 2010 to witness the promulgation of Kenya's new Constitution. He also visited Chad to attend a meeting of the community of Sahel-Saharan states (Censad) which ran from 21-23 July 2010 of which Sudan is a member state.
[3] http://www.icc-cpi.int/iccdocs/doc/doc907140.pdf
[4] The Rome Statute of the International Criminal Court, available at <http://untreaty.un.org/cod/geneva/overview.htm>, (accessed 14 April 2010).
[5] Jose Ayala Lasso, former United Nations High Commissioner for Human Rights in a speech delivered at the UN Headquarters on July 17, 2003.
[6] *Id.*
[7] *Id.*
[8] Benjamin B. Ferencz was a Nuremberg Prosecutor.
[9] Hans Corell was under-Secretary of the UN 1994-2004.

> which those will be brought who violate the laws of war and humanitarian law… Everyone must now be presumed to know the contents of the most basic provisions of international criminal law; the defence that the suspects were not aware of the law will not be permissible."

Most perpetrators of war crimes and crimes against humanity throughout history have gone unpunished. In spite of the military tribunals following the Second World War and the recent ad hoc international criminal tribunals for the former Yugoslavia and for Rwanda, the same holds true for the twentieth century. That being said, it is reasonable to conclude that most perpetrators of such atrocities have believed that their crimes would go unpunished. Effective deterrence is a primary objective of those who worked to establish the International Criminal Court. Once it is clear that the international community will no longer tolerate such monstrous acts without assigning responsibility and meting out appropriate punishment … to heads of state and commanding officers as well as to the lowliest soldiers in the field or militia recruits. It is hoped that those who would incite genocide; embark on a campaign of ethnic cleansing, murder, rape and brutalise civilians caught in an armed conflict; or use children for barbarous medical experiments will no longer find willing helpers.[1]

6.5 To achieve justice for all

An International Criminal Court has been called the missing link in the international legal system. The International Court of Justice at The Hague handles only cases between States, not individuals. Without an international criminal court for dealing with individual responsibility as an enforcement mechanism, acts of genocide and egregious violations of human rights often go unpunished.

6.6. To take over when national criminal justice institutions are unwilling or unable to act

Nations agree that criminals should normally be brought to justice by national institutions. But in times of conflict, whether internal or international, such national institutions are often either unwilling or unable to act, usually for one of two reasons. Governments often lack the political will to prosecute their own citizens, or even high-level officials, as was the case in the former Yugoslavia, or national institutions may have collapsed, as in the case of Rwanda.[2]

7. Challenges of the ICC

7.1. The Attitude of the US towards the ICC

The attitude adopted by the United States towards the Court will certainly have some influence, even unofficially on whether the Court begins to investigate a case or not. The United States of America (US) signed the ICC Statute on 31 December 2000. However, in letter to the United Nations Secretary-General dated 6 May 2002, the US stated its intention not to ratify the ICC Statute. Therefore, having made clear its intention not to become a party to the Statute, the US has no international obligation to refrain from acts that would defeat the object and purpose of the ICC Statute. Since then the US has entered into bilateral agreements with various States granting protection to US nationals from ICC jurisdiction. If the US's non-support of the ICC extends to actively opposing the Court then there is cause for concern.[3] However, the position of the US to the ICC has changed slowly since the court came into being.[4]

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[1] Rome Statute of the International Criminal Court.

[2] *Id.*

[3] Sivuyile S. Maqungo, Trial and Error: Challenges facing the ICC (Commentary), available at http://www.iss.co.za/pubs/ASR/12No4/SMaqungo, (accessed on 18 May 2010) (The author herein is a Principal State Law Adviser at the S.A. Department of Foreign Affairs and was part of the South African Delegation to the Rome Conference on the establishment of the ICC). See also L.O. Taiwo, *International Criminal Court, The United States and The Fight Against Impunity*, Vol. II, ISIL YEARBOOK OF INTERNATIONAL HUMANITARIAN AND REFUGEE LAW (2007), at 107-132.

[4] HOYT & COALITION FOR THE INTERNATIONAL CRIMINAL COURT, USA AND THE ICC (2008); Arieff, Margesson, Browne, & Antonia Chayes, *How American Treaty Behaviour Threatens National Security*, 33 INTERNATIONAL SECURITY (2008). The US government has always been a staunch opponent of the ICC, particularly since President Bush formally renounced any US obligations under the Rome Statute in May 2002. As a result of this opposition, the President signed the American Service members' Protection Act (ASPA) into Law in August 2002. This law restricts any US agency, court or government cooperation with the ICC, except when the ICC deals with US enemies; makes us support peacekeeping missions in large part contingent on the guaranteed impunity of US personnel; and grants the president permission to free US citizens and allies from ICC custody by "any means necessary," thus earning the legislation the nickname of "the Hague Invasion Act". This led to several bilateral agreements entered into between America and Nations around the world in accordance with Article 98 of the Rome Statute. States that signed this agreement had to promise not to surrender Americans in their territory to the jurisdiction of the ICC. Several other economic threats and lack of military and technical assistance were issued. The US has however relaxed these measures and has since amended the ASPA.

7.2 Witness protection and enforcement of sentences

The International Criminal Court does not have prison facilities of its own and has relied on the co-operation of States Parties to the ICC Statute for the acceptance of prisoners. The ICC also relies on their cooperation for the relocation and protection of witnesses. The readiness of states to open their prisons to prisoners sentenced by the ICC and their willingness to provide sanctuary to witnesses will be crucial to the success of the Court.[1]

7.3 The number of ratifications

The attitude of the US towards the Court may have impacted negatively on the pace of ratification. As soon as the US started pressuring States to sign bilateral agreements granting protection of US nationals from the ICC, the pace of ratification also slowed. The misconception of the jurisdiction of the ICC is also slowing ratification. For example, there are those who publicize suggestions that the ICC may investigate and prosecute leaders such as President Robert Mugabe of Zimbabwe for crimes against humanity. The truth is that the ICC's jurisdiction is only activated when the crime under its jurisdiction has been committed in the territory of a State Party or by a national of a State Party, and it has no retroactive effect. Since Zimbabwe is not a State Party of the ICC Statute the ICC has no jurisdiction over what has occurred in Zimbabwe. If, or when, Zimbabwe becomes a State Party to the ICC Statute, its jurisdiction will be limited to events subsequent to ratification. The situation in Zimbabwe may however, be referred to the ICC by the UN Security Council to confer jurisdiction on it as in the case of Sudan.[2] It is necessary for the ICC – if it is to be truly universal – that more states ratify its statute. As of October 2010, there were 114 states from all regions of the world that had ratified the ICC statute.[3]

However, much more ratification is required to achieve universal acceptance. Suggestions by journalists that the ICC will investigate leaders for their past conduct before their State of nationality ratified the ICC Statute only causes reluctance by such leaders to support the ICC. Those suggestions are not true. It is therefore necessary that states, and in particular the leaders of states, know that the ICC will not investigate past conduct of individual leaders. If Zimbabwe, or any other State, becomes a State Party to the ICC today, the ICC will not investigate any crime against humanity, or any of the other crimes, committed before that state became a party to the ICC Statute.[4]

7.4 Financing the International Criminal Court

The ICC is expected to be very big in its size and structure. It has already employed several hundreds of staff and its staff and principal officers are well-paid. According to Article 49 of the ICC statute, the judges, the prosecutor, the deputy prosecutors, the registrar and the deputy registrar shall receive such salaries, allowances and expenses as may be decided upon by the assembly of state parties.

Being permanent in nature and set to replace the *ad hoc* tribunals and special court, the ICC requires very huge funding from the international community.

The salaries of the staff and principal officers will be huge dent on the finance of the court. Former registrar of the ICTR, Agwu Ukiwe Okali pointed out in a speech before the United Nations preparatory committee on the establishment of an International Criminal Court that the ICC should have employment terms and conditions that will attract the best qualified candidates which would address issues like pension and travel entitlements, installation and education allowances, and disability and survivors' benefits.[5] It is to be expected that the remuneration of the principal officers of the court will not be far from what Okali recommended.

The jurisdiction of the ICC covers international crimes. It is certain that the cost of investigation, prosecution and detention will be enormous.

Article 115 of the ICC statute contains a provision on the source of the court's funding. It will constitute no problems if the funds will be made readily and sufficiently available through the source mentioned (including state parties and the United Nations). However, of all the countries that have ratified the ICC statute, a great number are impoverished countries whose financial contributions to the court cannot be guaranteed. Moreover, the United States which would have been in a great position to contribute a huge part of the court's funding is not a state party. This appears to be a tough challenge.

7.5. Jurisdiction problems

The ICC is far from being the all-powerful global criminal enforcement giant as there are crimes that are not covered by the jurisdiction of the court. Even where the court clearly has jurisdiction over an international crime, it may still be extremely difficult for the court to make headways in both the investigative and prosecutorial

[1] Moqungo, *supra* note 100.
[2] *Supra note 79*
[3] *http://www.icc-cpi.int/Menus/ASP/states+parties/*
[4] *Supra* note 101.
[5] Speech delivered on April 1998 at the UN Headquarters in New York.

aspects of its work. A major reason for this is that governments commit a vast majority of the world's worst crimes against their own citizens and the ICC may be powerless to intervene. Also, citizens of countries that have not ratified the statute of the ICC cannot be prosecuted for crimes they commit within their own territory unless the United Nations Security Council votes to refer the situation to the ICC.

Inevitably, state parties to the ICC Statute are countries that have expressed their commitment to honour and observe the rules of law. It would be glib to describe the ICC as a court of and for the virtuous but there is yet, an element of truth in that description.

The early cases of the court will most likely come from countries whose governments are sympathetic to the ideas of international law but do not have full control over their own territory (such as the Democratic Republic of Congo). In this case, the government may have joined the ICC as part of a broader effort to restore the domestic rule of law, almost as a declaration of values that they hope will come to be associated with their administration.

In any case, the Court is practically powerless to apprehend suspects on its own. The power to apprehend suspects is dependent on the support of national governments to hand over suspects in their custody, to arrest the suspects through the use of the police and armed forces.

7.6. Evidential problems

The ICC, in its investigation and prosecution will definitely have to possess evidence linking the accused to the crimes committed, and prove beyond reasonable doubt with the evidence that the accused is in fact guilty. The Nuremberg and Tokyo military tribunals profited from the meticulous documentation of Nazi and Japanese war criminal records of their own horrendous activities; including order to kill, ironically, these records became very useful to secure the conviction of the war criminal.

It is a disturbing likelihood that there could be a dearth of strong and direct evidence to successfully prosecute and convict persons facing charges of international crimes in recent and modern day conflicts. Certain offences that were easily proved as a result of incriminating documentary evidence at the Nuremberg and Tokyo trials may be extremely difficulty to prove at the ICC. Most likely nowadays, official document and materials would have vanished before any investigation of crimes can take place. It would appear that the unwanted prospects of long term in jail will always be an impetus for the destruction of keeping beyond reach of all such documents and materials indicting the commission of crimes.

7.7 The politically motivated Prosecutor

Clearly, what many ICC opponents fear most is a prosecutor who initiates proceedings proprio motu for purely political reasons.[1] John R. Bolton, former American Permanent Representative to the UN, has suggested that the United States should be mainly concerned "for the president, the cabinet officers who comprise the national Security Council, and other senior civilian and military leaders responsible for our defence and foreign policy. They are the real potential targets of the politically unaccountable prosecutor".[2] However, safeguards have been built into the Rome Treaty precisely to guard against politically motivated prosecutions. Several factors notably, a process of vigorous internal indictment review, such as that in place at the ICTY; the requirement of confirmation by a judge; and the inevitable acquittal that would result from an unfounded prosecution-likely prevent abuse of power by a politically driven prosecutor.[3]

In fact, the ICC's goal is to alleviate the adverse effect of political pressures in the realm of international justice.

7.8 Soldiers Confused by the Laws of War

Another concern that finds expression in the debate is that the ICC endangers soldiers because its existence will prevent them from acting when they should, for fear of potential prosecution. Those who express this opinion contend that if the prosecutor initiates proceedings without supervision by any national government, cases could be pursued without understanding the dilemmas that are faced by soldiers in armed conflict. In response to this assertion, Adam Roberts suggests that many senior UK officers take a positive view of the laws of war. This is not an isolated perspective. In the 1991 Gulf War and in the 1999 Kosovo conflict, Western forces found that the Law actually assists in the professional and effective conduct of military operations.[4]

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[1] Barnett, *supra* note 15, citing Brian A. Hoyt, Rethinking the US Policy on the International Criminal Court, 48 JOINT FORCE QUARTERLY (2008), at 33.
[2] *Id.,* citing John Bolton, "Is a UN International Criminal Court in the US interest?", (Hearing before the sub-committee on International Operation of the Senate Committee on Foreign Relations (ICC hearing), 105th Congress, 23 July 1998), at 48.
[3] *Id.,* citing Louis Arbour, *The need for an Independent and Effective Prosecutor in the Permanent International Criminal Court*, 17 WINDSOR YEARBOOK ON ACCESS TO JUSTICE (1999), at 212.
[4] *Id.* citing Adam Roberts

In addition, Article 8 of the Rome Statute limits the prosecution of soldiers for isolated incidents, regardless of whether they might be considered criminal acts. ICC jurisdiction is meant to apply to, in particular, war crimes that are committed as part of a plan or policy or part of a large-scale commission of such crimes.

7.9 Barrier to Peace and Reconciliation

Many commentators have expressed concern that the ICC may stand as an obstacle to reconciliation and the resolution of conflicts.[1] In the past, many countries, including South Africa, Chile, and to some extent, Great Britain in relation to Northern Ireland, have granted amnesties in order to end conflicts. The fear is that as ICC becomes involved in ongoing or recent conflicts, wars will be fought longer, peace processes will be disrupted and leaders will be reluctant to relinquish power if facing indictment. Ultimately, the argument is that removing the possibility for amnesty removes incentives for settlement, and may even encourage leaders to remain in power.

Conversely, others suggest that amnesty is not the reason why leaders relinquish power. They argue that dictators leave only when they are weak and vulnerable and desperate to get whatever they can, not whatever they want.[2] Moreover, an indictment does not necessarily have a negative effect. For example the arrest of Augusto Pinochet in London in 1998 did not destabilise Chile. Opinion polls at the time suggested that the arrest had no influence on voting intentions, that most were certain of his guilt and, although there was a preference that justice be meted out at home, most realise that this was a practical impossibility.[3] Similarly, while it can not yet be said what effect the indictment of Milosevic had in his downfall, it arguably did not result in his clinging stubbornly to power.

The amnesty versus prosecution debate is an issue in at least two of the situations currently under investigation by the ICC prosecutor. In Darfur, the arrest warrant issued for the Sudanese President, Al-Bashir, is feared by some as a potential threat to the peace process and as endangering humanitarian and peace keeping operations on the ground.[4] However, others argue that the threat of an arrest warrant has encouraged the government to reach out to its domestic rivals during the conflict, thus enhancing prospects for peace. In Uganda, some observers hold that the ICC arrest warrants were critical in bringing Joseph Kony and others to the negotiating table. However the LRA leaders demanded that they be shielded from prosecution in exchange for their further participation in the peace process. As such, international and Ugandan opposition to the role of the ICC is mounting. Thus far, the prosecutor has refused to withdraw the warrants.

7.10 The ICC purports to exercise jurisdiction over Non- Party Nationals

The US government has expressed concern that the Rome Treaty purports to exert jurisdiction over US servicemen even if the United States has not ratified. In fact, following the principle of universal jurisdiction accepted in international law, any state has the right to prosecute the crimes defined in the Rome statute-genocide, war crimes and crimes against humanity-regardless of jurisdictional links such as nationality and territoriality.[5] The US itself has historically supported this principle since its inception in the 18th century, the US has recognised universal jurisdiction with respect to war crimes and crimes against humanity.[6] The American restatement of Law confirms this:

> A state has jurisdiction to define and describe punishment for certain offences recognised by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircrafts, genocide, war crimes and perhaps, certain acts of terrorism, even where none of the basis of jurisdiction …is present.[7]

Recent US court cases have indicated an increased reliance on the principle of universality.[8] It would seem to follow that the ICC would be competent as a state to prosecute serious international crimes.

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[1] *Id.,* citing MARK FREEMAN AND GIBRAN VAN ERT, INTERNATIONAL HUMAN RIGHTS LAW (2004), at 479

[2] *Id.,* citing Vesselin Popovski, *International Criminal Court: Necessary Steps Towards Global Justice*, 31 SECURITY DIALOGUE (2000), at 406.

[3] *Id.*

[4] Barnett *supra* note 15 citing Arieff, Margesson and Browne, *supra* note 101.

[5] *Id.* See generally Lawyers Committee for Human Rights, Exercise of ICC Jurisdiction: The Case for Universal Jurisdiction, International Criminal Court Briefing Series, Vol.1, No.8, 1998.

[6] *Id.,* citing Johan D. Van der Vyer, *Personal and Territorial Jurisdiction of the International Criminal Court*, 14 EMORY INTERNATIONAL LAW REVIEW (2000), at 43.

[7] Restatement (Third) of Foreign Relations Law of the United States, Vol. 404 (1998), available at http://www.macalester.edu/courses/intl114/docs/restatement.pdf.

[8] Barnett, *supra* note 15, citing Kenneth Randall, *Universal Jurisdiction under International Law*, TEXAS LAW REVIEW (1998), at 839. Randall lists the following examples: Tel-Oren v. Libyan Arab Republic, 726F.2D 774, 781, 788 (D.C. Cir. 1984), Cert. Denied, 470 US 1003(1985) ; Filartiga v. Pena-Irala, (Ir. 1985), Cert. Denied 475 US 1016 (1986)

7.11 Cost and Delay

As the ICC matures, critical voices are mounting with respect to the expense and delay involved in ICC proceedings.[1] By early 2008, the ICC had cost the international community over US$600 million[2] and had yet to be anywhere near its first conviction. The Lubanga case, the case that had advanced the furthest had essentially been derailed by late 2008. Even proponents of the ICC have begun to ask whether the ICC is losing credibility. On the other hand, although major prosecutions proceeded very slowly, things are not at a standstill. They are even beginning to move faster-between November 2007 and May 2008, almost 700 application process filings and decisions were made at the ICC; and status, rights, and modalities for victim participation during investigation, and at the pre-trial and trial stage, were also determined. The problem is that success at the procedural level inevitably slows progress in the actual trials, bogging down the larger issues at play.[3] The main question is whether the ICC can retain its preventive power in the face of such delays. The ICC will remain credible only as long as it can remain a powerful symbol for deterrence.

7.12 The focus on Africa

Finally, one recent concern of some significance is the ICC prosecutor's exclusive focus on sub-saharan Africa. A number of critics have expressed serious reservations about this practice, and voiced fear about bias and the perception that the ICC is yet another instrument of foreign intervention in a long history of Western/Northern interference in African affairs. Even if various geopolitical pressures have simply made it easier for the prosecutor to begin investigations in Africa rather than elsewhere, commentators contend that this sends a negative signal about how the ICC may continue to work.

Proponents of the ICC raise a number of explanations for the court's concentration on Africa. First, each of the situations under investigation has been initiated upon referral by an African government or the UN Security Council. It is difficult to claim that the prosecutor is biased against Africa in his investigation if three of the four investigations were requested by the governments of those countries themselves. The prosecutor has also noted that his investigations are more in Africa because it is in Africa that the breaches of humanitarian law are most severe. Sexual assault, forced displacement and massacre are issues that are present on a massive scale in the countries under investigation. He said that it is only natural that they should come under investigation first. National legal systems are also weak in Africa, so the complementarity principle has led to ICC jurisdiction faster than in some other states. Finally, it is important to note that although the prosecutor has initiated official investigations in Africa only thus far, he is also seriously monitoring the situation in other countries around the world, including Afghanistan, Georgia and Colombia.[4]

8. CONCLUSION

The idea of an International Criminal Court is no doubt very laudable and indeed every nation should be eager and willing to imbibe such innovation and support it. However, a cursory look at the prospects and challenges would reveal that the challenges far outweigh the prospects. Nations which have the wherewithal and economic muzzles, and who naturally were expected to support the establishment of the ICC have not done so and even threaten less economically successful nations who are dependent on them for economic lifeline. If the world will leave in a just, peaceful and sustainable environment, then all nations must rise up to ratify the ICC to wipe out impunity.

There is therefore the need for increased political support for the ICC. Professor Herta Daubler-Gmelin[5] made some important remarks on what the ICC should do to generate support. She said "outreach is one meaningful tool to generate increased support for the court in countries such as Uganda, where the peace process is ongoing. In her opinion, the OTP should also publish guidelines for the work of the prosecutor so that his decision becomes more transparent. Concerning other actors, she stated that unfortunately the ICC is hardly a priority on the agenda of many states.

[1] *Id.,* citing Arieff, Mergesson and Browne (2008); INTERNATIONAL BAR ASSOCIATION, BALANCING RIGHTS: THE INTERNATIONAL CRIMINAL COURT AT A PROCEDURAL CROSSROADS (2008).
[2] *Id*., citing Christopher M. Gosnell, *International Criminal Court: A Court Too Far*, INTERNATIONAL HERALD TRIBUNE, 28 March, 2008.
[3] *Id*., citing International Bar Association, *supra* note 119.
[4] *Id*., citing Gosnell, *supra* note 120. Also, information received from Phillipe Kirsch, President of the International Criminal Court; Cecilia Nilsson Kleffiner, Legal Advisor at the coalition for the International Criminal Court and Deborah Ruid, Programme Officer with Parliamentarians for Global Action during meetings in the Hague with Canada's Standing Senate Committee on Human Rights, 31 March 2008.
[5] Chair of the Human Rights Committee of the German Parliament in the Conference Report on the International Criminal Court at Work: Challenges and Successes in the Fight against Impunity, held in Berlin, 21-22 September 2007.

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