

THE INTERNATIONAL CRIMINAL COURT AND PURSUIT OF LEGAL JUSTICE: PROBLEMATIZING COMPLEMENTARITY

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Abstract

The study tried to analyze the challenges and limitations that the International Criminal Court has faced because of different legal, factual and other restrictions obstructing it from pursuing its aim of meeting the highest legal standards of independence, effectiveness and fairness expected by the International Community and as a result to bring about legal justice. The International Criminal Court (ICC) exercises its authority on crimes under its jurisdiction, as a means of last resort, after all the available judiciary remedies in the national jurisdiction failed. It is when national courts prove “unwilling” or “unable” to investigate or prosecute the defendant, that the ICC can require the national government to surrender the targeted perpetrator to the Court. At this juncture, the principle of complementarity which rests on two basic pillars, namely, safeguarding respect for the primary jurisdiction of states, and efficiency and effectiveness to put an end to impunity comes in to play. However, the International Community’s decision to incorporate the complementarity principle in the preamble of its final draft statute was intended to provide plausible compromise between national sovereignty and the court’s jurisdiction. The complementarity appears as a mechanism devised to maintain the balance and shape the Court’s operational dynamics. The ICC, on the other hand, teeters between values of sovereignty and internationalism. As the international criminal institution and national courts have concurrent jurisdiction over the most serious international crimes, there inevitably will be conflicts between the two jurisdictions. Consequently, the principle of complementarity, at the same time, creates a curious pair of conflicting forces and hence a dilemma for the Court itself. One perspective to these conflicting forces stresses that the ICC limits itself in exercising jurisdiction without the consent of a sovereign government that could otherwise exercise jurisdiction on its own. Accordingly, the court seeking to exercise jurisdiction in a hostile way: trying to exercise jurisdiction against states actually trying to conduct their own proceedings is seen to have proved very far from reality. If anything in the ICC’s cases, states evidence no intention of trying certain crimes even mock proceedings for the purpose of holding off ICC jurisdiction. Thus, there is a paradox between the creation of the ICC’s exercise of sovereignty and that of the nations. The study documents that ICC has had subject matter jurisdiction and admissibility regime which is restricted by the preconditions set on its exercise of temporal jurisdiction. The objectives of the Principle of Complementarity are to serve as complementary to the national criminal jurisdictions of the states in the world. The Complementarity Principle also appears as a mechanism devised to maintain the balance and shape the Court’s operational dynamics. However, this Principle has impact on the states’ sovereignty in that the ICC encroaches upon their sovereignty. Thus, the ICC has been challenged by lack of support and cooperation for effective enforcement of its decisions and legitimacy on the part of the states which emanate from the gaps and challenges of the Principle of Complementarity as well as from the Court’s political nature. These may, in turn, affect justice and rule of law at international level. It can be concluded that the ICC has jurisdiction limitations and challenges to effectively enforce its decisions and legitimacy – ‘toothless Court’. Therefore, comprehensive jurisdiction measures such as the practices of diplomatic cooperation of the states as a golden thread that underlies the Rome Statue using possible and plausible should be taken, and the Court should also be assessed in-depth based on different international criminal cases in different socio-cultural, economic and political contests from all corners of the world.

Introduction

Background of the Study

In the fight to end impunity for perpetrators of the most serious crimes and not to let the most serious crimes of international concern go unpunished, the international community collaborated for a persistent solution. Realities called for these types of perpetrators to be prosecuted at all times and in all places either by measures of the national courts of the different states or by the cooperation of an international authority, and bringing justice in the end.¹

Lack of sufficient mechanism to hold individuals accountable for the most serious international crimes and the need for protection of individuals from violation of human rights and humanitarian law necessitated an appropriate mechanism to enforce the law.² Following the International Criminal Tribunals for the former Yugoslavia and Rwanda, which the UN Security Council established in 1993 and 1994 respectively to try those accused of war crimes committed during the conflicts in those countries, a permanent international court came into picture.³ The international community has created the first permanent International Criminal Court (ICC) through the Rome Statute, which came into force on the 1st of July 2002, having attained the requisite number of ratification. The court is competent to try war crimes, crimes against humanity, genocide and the crime of aggression.⁴ This Statute governs the court's jurisdiction and condition of operation.

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1. See the Rome Statute of the International Criminal Court, 2002, Preamble.
 2. Ellis and Goldstone, (2008), The International Criminal Court: Challenges to achieving justice and accountability in the 21st century, IDEBATE press, USA, p-286.
 3. The International Committee of the Red Cross (ICRC), 2004, International Humanitarian Law: answers to your questions, ICRC, Geneva, Switzerland, p- 34.
 4. *Aggression has been included as a crime within the court's jurisdiction. However, the court is not exercising this jurisdiction since the concept is still awaiting a definition, to be agreed by state parties, and the conditions under which it may be prosecuted.* See also Outcome of recent review conference on the International Criminal Court explained, available at <http://allafrica.com/stories/201006230268.html>, Accessed: 25 December 2010.

The International Criminal Court (ICC) is not part of the United Nations system. It is rather an independent International Organization having its seat at The Hague. Its establishment is structured for it to have a secondary role or to complement the work of national jurisdictions, i.e. to act as a ‘court of last resort’.⁵ Thus, the court will have jurisdiction to try a case only when a country is “unwilling” or “unable” to carry out prosecutions: This is the arrangement the Statute refers to as the complementarity principle.⁶ This is a notion of ‘positive complementarity’ that came from the basic desire to strengthen national jurisdictions in prosecuting crimes by themselves and leaving the ICC as a backup court for trying those crimes that couldn’t be tried at the national level.⁷ The ICC can exercise its jurisdiction “if that priority is not put to good use”.⁸

Statement of the Problem

Taking into consideration the inception of the ICC to be a backbone in repressing the most serious crimes of international concern and insuring respect for human rights and international humanitarian law, we cannot be complacent as there are insurmountable challenges to its great responsibility of undertaking its mission.

It is a truism that the ICC’s jurisdiction is not founded on an authoritative act but rather on its specific acceptance by states through an agreement. This fact obliges the court to prove its

5. *ibid*

6. *ibid*; see also Article 17 of the Rome statute of the International Criminal Court, 2002.

7. *ibid*

8. Frederic Megret, Why would states want to join the ICC? A theoretical exploration based on the legal nature of Complementarity, available at <<http://ssrn.com/abstract=1308612>>, Accessed: 2 December 2010, p- 16.

authority and effectiveness to the international community. Nevertheless, in doing so, the ICC is facing limitations and challenges because of different legal, factual and political restrictions obstructing it from pursuing its aim of meeting the highest legal standards of independence, effectiveness and fairness expected by the international community.

This research thesis is mainly concerned with one of the Statute's fundamental principle - the principle of complementarity - and seeks to investigate the following major challenges related to that key principle:

1. Since the statutory language is sufficiently constricted to allow a mere understanding or explanation, it requires a clarification. Thus, it will elicit proper meanings and ascertainment of the elements related to complementarity principle, which is very susceptible to different internal or external, political or otherwise interests of states concerned.
2. How do we make ascertainments of application of complementarity on jurisdictional links of every state (whether party or non-party to the Rome statute)? What is the exact nature of the jurisdiction exercised by the court in each case?
3. Does (and will) the doctrine of complementarity actually work to accommodate national sovereignty? Under what circumstances can we expect the Chief Prosecutor to accept assertions of national jurisdiction?
4. The ICC affirms its jurisdictions only when there is a gap in state jurisdictions that may be created by lack of punitive reaction by states and when the rights of the victims have not been redressed. Since criminals should not be allowed to go unpunished in one way or another, looking at the effects of admissibility of amnesties and impunities also needs a close look.
5. The search for justice should be pursued in a way that does not impede or jeopardize efforts aimed at promoting lasting peace. However, there has been an inevitable reoccurrence of the peace versus justice debate at the ICC. What are the challenges of balancing these competing interests when the ICC faces such a dilemma? Is the ICC free to take a certain case from a state if the national jurisdiction of the state is against the

interest of justice and fairness, for reasons beyond what is stated under Article 17(2) of the Rome Statute?⁹

The ICC, by definition, is also a non-political institution run by an international judicial body and entitled to make its own decision following the rule of law. Its effectiveness depends on its credibility as a non-political institution. This thesis questions if the ICC has an implicit political role to fulfill in practice, if the Court strives to remain politically neutral and if the ICC can be successful and perceive its legitimacy if it regards itself purely as a juridical institution.

There is particularly an anxious debate around the world that the ICC is biased, because the five official investigations which have been taken on so far are based in Africa (the Central African Republic, The Democratic Republic of Congo, Sudan, Uganda, Kenya and most recently Libya) - all are located on the African continent.¹⁰ Thus, the question of how significant it is that all of the cases currently before the Court are against Africans for crimes committed in Africa, and how this affects the perception of the Court's legitimacy in the international community. In addition, whether it can be concluded that there are good reasons for doing so regardless of the persistent hypocrisy governing the international politics and international justice or not.

In relation to this, the Court is the first permanent international institution with the capability of prosecuting those individuals that committed the most heinous crimes against humanity but this does not fit with the reality at hand. As there is lack of enforcement capacity by the ICC, would the cooperation between the Court and other states pose a dramatic danger in the maintenance of the purpose and power of the International Criminal Court? Would it be trading its independence? What would it mean for justice and rule of law if the ICC comes to rely heavily on state parties and non-parties with their own exclusive political agenda?

In a nutshell, these are the major issues that have triggered the student researcher to carry out this senior thesis. These are the major challenges the Court has faced that are found intertwined with the principle of complementarity. Moreover, the enthusiasm of exploring if the alleged political

⁹ Article 17(2) of the Rome Statute incorporates shielding a person concerned from criminal responsibility for crimes under the jurisdiction of the ICC, unjustified delay in proceedings and absence of independency or impartiality to be construed as unwillingness by the state, which leads the case for an admission, by the ICC.

¹⁰ See supra note 5.

nature of the Court and its great need for cooperation in enforcement will hinder the ICC's legitimacy or its pursuit of legal justice.

Objectives of the Study

Considering the above predicaments, this study generally tried to analyze the limitations and challenges the International Criminal Court has faced because of different legal, factual and other restrictions obstructing it from pursuing its aim of meeting the highest legal standards of independence, effectiveness and fairness expected by the International Community and, as a result, to bring legal justice. Specifically, the study also intended to:

- Assess the jurisdiction and admissibility regime of the International Criminal Court;
- Expose the principle of complementarity and its objectives in the Rome Statute of the International Criminal Court;
- Analyze the existing theoretical and factual challenges and gaps encountered concerning the principle of complementarity;
- Investigate the alleged political nature of the Court and its implication on justice and rule of law;
- Explore the challenges faced by the court in state cooperation due to the lack of effective enforcement mechanisms and its maintenance of purpose and power of the International Criminal Court; and
- Identify possible measures undertaken to address those problems.

Significance of the Study

As this study is relevant, urgent, and timely as well as has great importance in addressing the major challenges and gaps concerning the International Criminal Court's prosecution and enforcement; it contributes to legal policy makers at different levels, to knowledge reservoir of the field of law, and legal and related issues practitioners at international level. Those long-standing challenges are frequently concerning complementarity principle in the Rome Statute, which is the heart of the ICC system. In addition, as a judicial organ, its persistence not to tip away from justice and rule of law due to some political considerations is very important and needs to be given attention. Compared to other issues regarding the Court, these have been the focus of international attention for the last two decades. Since the facts on the ground are so ripe and available, the student researcher's attempt to conduct a research on this subject matter will

be practically feasible to come up with a helpful perspective if not a solution. Accordingly, the benefits to be accrued from this study are the following: basic understanding of the International Criminal Court; to have the necessary know how of how the ICC manages cases to entertain within its jurisdiction; to appreciate how the court maintains its power and purpose and to come across other problems attached to this matter; to provide helpful recommendations for the challenges faced by the ICC in the pursuit of rule of law and legal justice; to assist as a reference material for academic purposes, interested parties and other target beneficiaries; and to serve as a springboard for other researchers who would like to get involved on the same issue in depth or by taking cases at different levels.

Delimitations and Limitations of the Study

Scope of the Study

The scope of this study confines to the limitations and challenges the International Criminal Court has faced because of different legal, factual, political and other restrictions obstructing it from pursuing its aim of meeting the highest standards of independence, effectiveness and fairness expected by the International Community and as a result to bring legal justice. In the study, its coverage is confined by giving more emphasis on the existing problems intertwined to the principle of complementarity. In addition, it explored if the alleged political nature of the court and its great need for cooperation in enforcement to maintain effective implementation would hinder the ICC's legitimacy or its pursuit of legal justice.

Limitations of the Study

In the first place, a researcher has to work out potential risks and challenges s/he will face in actual undertakings of the study. However, there are some unforeseen circumstances which may not be unmanageable due to one reason or another. These instances then become limitations. These limitations are identified as potential weaknesses of the study. After the student researcher had thought about data analysis, the nature of self-report to be produced, the research instruments used in terms of their threats to internal validity that may have been impossible to avoid or minimize, and the sample size considered in the light of the nature well as the objectives of the survey, it acknowledged its major limitations which would affect the findings of the study on few of the issues under investigation.

These limitations include shortage of enough time to conduct extensive and intensive literature reviews, research funds for locating and making avail relevant and latest materials on the issues being investigated, and some other related matters. In addition, shortage of classical and latest theoretical and empirical literature, especially domestic resources on the research issues contributed their share to influence the validity of few of the findings. In the same vein, the limited access to relevant pieces of information and poor cooperation on the part of different institutions to provide necessary assistance in getting access to resources available in their territories might restrict the amount of secondary data which could have been incorporated in different section of the study report.

Research Methodology

The primary research method for this study was doctrinal or “Desk chair” method of legal research. It is a method of research where the researcher depends on official documents, case files, legal documents and other secondary data sources without going out for field survey, interviewing and employing questionnaires as research instrument. Through this method, the researcher heavily relied on various published and unpublished foreign literature and when available domestic literature and case files which dealt with the International Criminal Court. In the study, the student researcher obtained and engaged in documentary analyses of different books, articles, relevant laws, and different instruments from the United Nations and other organizations. In addition, Online visits of relevant and potential web sites were visited to download such documents for addressing the research questions and objectives.

Organization of the Paper

This paper is organized into four parts in which each is concerned with achieving a specific purpose. The first part presents the research proposal itself. It deals with the background of the study, statement of the problem, objectives, significance, delimitations and limitations of the study as well as its methods. Part Two is devoted to the general over view of the International Criminal Court. It brief highlights the historical background of the International Criminal Court and its unique features. The next part dwells upon addressing the challenges, gaps and limitations intertwined to the principle of complementarity thereby investigating the rationale of the principle of complementarity in the Rome Statute of the International Criminal court. In addition, relevant cases on these issues are presented. The fourth part tries to inquire the alleged political role of the International Court and State’s cooperation with it to maintain effective enforcement over international criminal laws and their effect on the legitimacy of the Court. It thus brings

together those threads of arguments and counter-arguments together in order to draw conclusions and to forward pertinent recommendations.

General Overview of the Court

Historical Background of the Court

Until very recently, the international law lacked sufficient mechanisms to ensure that perpetrators of the most serious international crimes are held to be accountable in order to protect individuals from violations of human rights and humanitarian law. In the words of Steven C. Roach, “the establishment of the International Criminal Court followed a long history of failed attempts to institutionalize the principle of international criminal responsibility”.¹¹ The roots of this long struggle can be traced to The Hague Conventions and later to the League of Nations, whose failure to contain national aggression would ultimately lead to the establishment of the United Nations.¹²

The most essential aspect of the evolution of the International Criminal Law is the link between state sovereignty and accountability.¹³ State sovereignty has provided one of the most enduring obstacles for advancing international law as these crimes primarily depended on domestic jurisdiction. History reveals that, when such crimes were committed, national justice systems were not as such effective because of widespread human rights abuses and systemic violence. Moreover, there was the involvement of agents of the state in the commission of the crime. This, in return, led to protection of perpetrators with impunity.¹⁴

The fact that national jurisdictions have often proven themselves to be incapable of being balanced and impartial in such situations¹⁵ and the need to challenge impunities by states made

¹¹ Steven C. Roach, 2006, Politicizing the International Criminal Court: The Convergence of Politics, Ethics, and Law, Rowman & Littlefield Publishers, UK, p- 19.

¹² *ibid*

¹³ *Supra* note 2, p- 289.

¹⁴ *ibid*, p. 286.

¹⁵ William A. Schabas, 2007, An introduction to the International Criminal Court, Third Edition, Cambridge University press, UK, p. 1.

the enforcement of international justice when national systems are unwilling or unable to act a necessity.¹⁶

The need for an international criminal law and a global criminal court to apply it began attracting the attention of the international community soon after the First World War and as result of it. It all started with the international tribunals at the Nuremberg and Tokyo and, subsequently, in the former Yugoslavia and in Rwanda. The progress made in the achievement of these goals, particularly that of the establishment of an International Criminal Court, since this time may be stretched as follows.

The Hague Conventions

The concept of international prosecution for humanitarian abuses slowly began to emerge with the developments of the law of the armed conflict in the mid-19th century. In the 1872, a draft statute to establish the International Criminal Court to prosecute breaches of the Geneva Convention of 1864 and other humanitarian norms in respect to the Franco-Prussian War was proposed by one of the founders of the International Committee of the Red Cross movement. However, the idea was not given attention as it was considered too radical for that time.¹⁷

The Hague Conventions for the peaceful settlement of international disputes (1899) and (1907), in the peace conference along with the Geneva Conventions were the first formal statements of the laws of war and war crimes at the embryonic stage of international law. The major efforts in these conferences were to create a binding international court to settle international disputes that were considered necessary to proscribe war crimes and to protect civilians during the times of war.¹⁸

In 1920, the Commission of Jurists, which met at The Hague to prepare a draft of the statute of the Permanent Court of International Justice, adopted a proposal recommending the creation of a separate high court of international justice to try crimes constituting breach of international public order. However, the Council of the League of Nations did not receive it and no resolution was made.¹⁹

¹⁶ Supra note 2, p- 286.

¹⁷ Supra note 15, p- 2.

¹⁸ id, p- 3.

¹⁹ ibid, p- 33.

Again, the issue was raised in 1937 for a ‘Treaty for the Establishment of an International Criminal Court’ in Geneva under the auspices of the League of Nations. However, no actions were taken to its realization due to insufficient number of ratifying states. In addition this, many unsuccessful efforts to create an International Criminal Court was rendered by the League of Nations.²⁰ Nevertheless, actual prosecutions for violations of the Hague Conventions have not emerged until after the Second World War.²¹

The Nuremberg and Tokyo Trials

The War Trials that took place at Nuremberg and Tokyo by the International Military Tribunals that were set up by the victorious Allied Powers of the Second World War to try Axis war criminals revealed heinous atrocities that shocked the world and thus widened the horizons of international criminal law. It led to the recognition of a new category of crimes: “crimes against humanity”. And thereby it reminded the significance of such courts in permanent settings and gave a forwarding motion to advance the movement for a permanent international criminal court .The United Nations took the lead in this movement.²²

In the Moscow Declaration of November 1943, the victorious nations decided to prosecute the Nazis for war crimes. The UN commission for the investigation of war crimes was established to prepare a “Draft convention for the establishment of a United Nations war crimes court”. The agreement for the prosecution and punishment of major war criminals of the European Axis, and establishing the Charter of the International Military Tribunal (IMT), which was annexed to the agreement, was formally adopted on 8 August 1945 by the four major powers, namely, the United Kingdom, France, the United States and the Soviet Union. The Tribunal’s jurisdiction was limited to crimes against peace, war crimes and crimes of humanity. After this groundwork, at Nuremberg in October 1945, indictments were served to some Nazi leaders.²³ These Nazi war criminals were charged with ‘genocide’ and ‘crimes against the humanity’ for the atrocities committed against the Jewish people of Europe. After this major incident, the General Assembly of the United Nations began to put some effort to push the law further along these areas.²⁴

²⁰ See supra note 15, p.5.

²¹ *ibid*, p. 2.

²² Supra note 19, p. 34.

²³ Supra note 15, p. 5-6.

²⁴ *Id*, p. 7.

In December 1946, a resolution was adopted by the General Assembly calling for the preparation of codification of international law on offences against the peace and security of mankind or an international criminal code. This was followed by the convention on the Prevention and Punishment of the Crime of Genocide in 1948, known as the Genocide Convention.²⁵ Meanwhile, the UN General Assembly following the adoption of the Geneva Conventions of 1949, invited the International Law Commission to study the possibility and desirability of establishing an international judicial organ for the trial of crimes under international law specifically genocide. The International Law Commission affirmed that it was possible and desirable but did not recommend that this organ be a chamber of the International court of Justice.²⁶

Deriving its mandate from Article VI of the Genocide Convention, the draft code of crimes and the Nuremberg Principles in 1950, the International Law Commission prepared the draft statute of an International Criminal Court and actually submitted a proposal in 1954.²⁷ Then, the General Assembly suspended the attempt, seemingly pending the sensitive task of defining the crime of aggression and an international code of crimes. By then, political tensions associated with the era of the Cold War had made progress on the war crimes agenda virtually impossible for a certain period.²⁸

In 1981, the General Assembly motivated in part by an effort to combat drug trafficking, Trinidad and Tobago asked the International Law Commission to revive on its draft code of crimes. And a substantially revised version of the 1954 draft code was provisionally adopted by the Commission in 1991, and then sent to member states for their reaction. In the year 1994, the International Law Commission submitted the final version of its draft statute for an ICC to the General Assembly. In 1996, it adopted the final draft of its ‘code of crimes against the peace and security of mankind’. The two played a decisive role in the preparation of the Rome Statute of the ICC.²⁹

²⁵ *id.*, p. 8.

²⁶ *Supra* note 19, p. 34.

²⁷ *Supra* note 15, pp. 8-9.

²⁸ *id.*, p. 9.

²⁹ *id.*, pp. 9-10.

The *ad hoc* Tribunals

While the draft statute of an ICC was being considered in the International Legal court (ILC), events compelled the creation of a court on an *ad hoc* basis in order to address the atrocities being committed in the former Yugoslavia and Rwanda. Accordingly, the General Assembly set up *ad hoc* tribunals for former Yugoslavia and Rwanda.³⁰ In May 1993, the Security Council established International Criminal Tribunal for former Yugoslavia (ICTY), followed by International Criminal Tribunal for Rwanda (ICTR) in November 1994.³¹ The Yugoslav and Rwandan tribunals have communalities, sharing not only virtually identical statutes but also some of their institution.³²

These tribunals were highly important as they further highlighted the need for an establishment of a permanent international criminal court.³³ It also eliminated the notion of the Victor's justice that characterized the political elements of the judicial authority of the Nuremberg and Tokyo military tribunals.³⁴ As a result, it became a useful basis for the formulation of the Rome Statute. Nevertheless, in due course, it became clear that creating new tribunals could not continue because these tribunals faced several limitations in their operation.³⁵

The participation of only a few states in their creation is one of the reasons for their restrictions. While the Nuremberg and Tokyo tribunals were set up by the victorious Allied powers after World War II, the Security Council created the Yugoslavia and Rwanda tribunals.³⁶ On each occasion, their creation was conditional on the political will of the International Community.³⁷ In addition to that, *ad hoc* tribunals are limited to specific geographical jurisdiction, i.e. confined within the frontiers of the former Yugoslavia, Rwanda and its neighboring countries, and they are set to respond primarily to events in the past. Finally, their establishment required extensive deal of money and time.³⁸

³⁰ *id.*, p. 11.

³¹ Benjamin N. Schiff, 2008, Building The International Criminal Court, Cambridge University press, USA, p. 9.

³² *Supra* note 2, p. 286.

³³ *ibid*

³⁴ *Supra* note 11.

³⁵ *Supra* note 33, p. 7.

³⁶ *Supra* note 2, p. 286.

³⁷ *Supra* note 33, p. 7.

³⁸ *Supra* note 2, p. 286.

Immediately after the end of World War II, a permanent international tribunal became critical to overcome the limitations of the *ad hoc* tribunals.³⁹

Although by the mid 1990s attentions had shifted from the *ad hoc* tribunals to the establishment of the permanent court, the creation of temporary institutions was not ruled out after the Rome Statute was adopted. For example, in 2002 the Secretary General established a special court for Sierra Leone to deal with atrocities committed in Sierra Leone during the 1990s because the ICC was not in a position to assume responsibility for prosecutions concerning crimes committed prior to its entry into force in 2002.⁴⁰

Drafting of the Rome Statute

After years of serious attempts to evolve a body of international criminal law and provisions for the establishment of an international criminal court in several conventions and so many negotiations, finally a five weeks Diplomatic was held by the International Law Commission with the aim of finalizing and adopting a treaty for the establishment of the court in Rome in June 1998. More than 160 states participated in the Conference. As a result, the final provisions of the Rome Statute for the establishment of the International Criminal Court were adopted on July 17, 1998 by an overwhelming majority of the attending states of the UN Diplomatic Conference of the Plenipotentiaries - specially convened for this purpose at Rome. The Statute required sixty ratifications or accessions for entry into force. The Statute entered into force on July 1, 2002 after the attainment of the requisite number of ratification under Article 126 of the Statute.⁴¹

As of October 2010, 114 states have joined the court, including all of Europe and South America, and roughly half the countries of Africa.⁴² Some states, including China, Yemen, Iraq, the United States and Israel voted against the treaty and are critical of the Court. Forty states have signed but not ratified the Rome Statute. Three of these states – Israel, Sudan and the

³⁹ *ibid*

⁴⁰ *Supra* note 15, p. 14.

⁴¹ *Supra* note 19, p. 36.

⁴² On 19 May 2011, the Government of Grenada deposited its instrument of accession of the Rome Statute of the International Criminal Court to the UN. This will bring the total number of states parties to the Rome Statute to 115.

United States - have “unsigned” the Statute, indicating they no longer intend to become states parties and, as such, have no legal obligations arising from their signature of the Statute.⁴³

The International Criminal Court: Features

The ICC has a number of unique characteristics. This will not only make it a stronger institution but also strengthen international jurisprudence and exemplifies for innovative approaches at the domestic level.⁴⁴ Looking at the Court’s special features also helps us differentiate it from other international courts and regional international courts like the International Court of Justice (ICJ) and the European Court of Human Rights (ECHR).

The ICC is the first and the only specialized permanent International Criminal Court with the intention of fighting impunity for perpetrators of the most heinous crimes of international concern by prosecuting perpetrators of genocide, crimes against humanity, and war crimes. It seeks to “deter depredations against citizens in violent conflicts and to contribute to justice, peace political transition and reconstruction.”⁴⁵ The Statute of the Court is a lengthy document. It is divided into nine parts and has a total number of 128 Articles.⁴⁶ The Court is based in The Hague, Netherlands, although its proceedings may take place anywhere.⁴⁷

The Court seeks to incorporate lessons from the past *ad hoc* tribunals in order to improve the effectiveness and efficiency of international criminal trials. As Benjamin N. Schiff noted:

*The Court is built upon a range of national legal systems and incorporates structural elements common to other International Organizations. Its structure, rules and operations reflect experiences of the ad hoc International Criminal Tribunals for Yugoslavia and Rwanda But differ significantly from them. The ICC’s objectives include the prosecution of transgressors and rehabilitation of victims, its mechanisms combines traditions of Civil Law with Common Law precepts . . .*⁴⁸

⁴³Building the International Criminal Court, available at < www.bsos.umd.edu/~schiff0209.htm >, Accessed: 20 June 2011

⁴⁴Overview of the international criminal court ant its unique characteristics, Available at <www.hrschool.org/~178/>, Accessed: 20 April 2011.

⁴⁵ Supra note 33, p. 1.

⁴⁶ Supra note 19, p. 31.

⁴⁷ Article 3 of the Rome Statute of the International Criminal Court.

⁴⁸ Supra note 33, p. 2.

Challenges and Limitations facing ICC in Relation to the Principle of “Complementarity”

Jurisdiction of the ICC

Subject matter Jurisdiction

The Preamble and Article 5 of the Rome Statute limits the subject matter jurisdiction of the Court to 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. Except for the crime of aggression, whose content is subject to further negotiations,⁴⁹ the Statute defines each of these crimes at some length. The court will not exercise its jurisdiction on such crime 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 as indicated under Article 5(2) of the Statute. These definitions adopted provide a good consolidation of principles found in earlier conventions and customary international law on the subjects. The crime of aggression is apparently a field in which customary rules have not yet sufficiently developed.⁵⁰

Preconditions to the exercise of Jurisdiction

Underneath the idea of an international criminal court was the intention to exercise universal jurisdiction. Proposals to this effect were produced at the Rome Conference. However, it was ultimately rejected, due in large part to opposition from the United States and because it was felt that universal jurisdiction would discourage too many states from ratifying the Statute.⁵¹ As a result, the Court does not have universal jurisdiction. The Court exercises jurisdiction only under the following limited circumstances:

⁴⁹ In June 2010, the ICC’s first review conference in Kampala, Uganda expanded the definition of “crimes of aggression” and the ICC’s jurisdiction over them. The resolution deleted the provision that requested for the future definition of the crime, Article 5(2), and called upon all state parties to ratify or accept the amendment in accordance with Article 121(5) of the Rome Statute. But it seems that the ICC will not prosecute for this crime until at least 2017. Professor Leonard in an interview about his book entitled, “The onset of Global Governance” affirmed the fact that crime of aggression not being part of the Rome Statute is not necessarily a bad thing at this point. This is because since this crime does not have an accepted definition as most of the other crimes do, it may be the most easily politicized of all and there may be overuse of that crime. Therefore, allowing it to be incorporated in the statute would be extremely problematic and hinder the legitimacy of the Court rather than help it. He further pointed out that the ICC would be best served if it stays with the longstanding definitions of the three core crimes it already governs, and then eventually come to a definition of the crime of aggression only when the court becomes a more accepted institution in the international community. (See [Outcome of recent review conference on the International Criminal Court explained](http://allafrica.com/stories/201006230268.html), Available at <http://allafrica.com/stories/201006230268.html>, Accessed : 25 December 2010).

⁵⁰ See supra note 19 at p. 38; See also Articles 5- 9 of the Rome Statute.

⁵¹ Kenneth Roth, [Foreign Affairs - The case for Universal jurisdiction](http://www.faculty.maxwell.syr.edu/hpschmitz/p...), Available at <http://www.faculty.maxwell.syr.edu/hpschmitz/p...>, Accessed: 1 June 2011.

*Where the person accused of committing a crime is a national of a state party (or where a person's state has accepted the jurisdiction of the court); Where the alleged crime was committed on the territory of a state party (or where the state on whose territory the crime was committed has accepted the jurisdiction of the court); or Where a situation is referred to the court by the UN Security Council.*⁵²

Territory of the crime and nationality of the perpetrator are the most firmly established bases of criminal jurisdiction. Therefore, the court follows the fundamental principles of application of jurisdiction - the principle of territoriality and nationality- respectively; which are recognized under international criminal law. The personal and territorial jurisdiction of the court would only be found when states become parties to the statute. In other words, a state's acceptance of jurisdiction is required as a precondition to exercise jurisdiction according to Article 12 since its primary source of legality emanates from the consent of states.⁵³ Personal jurisdiction of the court is also limited on the age of the suspect at the time of the alleged commission of a crime, which should be above 18. Minors are not within the jurisdiction of the international criminal court whatever aggravated crime they commit within the jurisdiction of the court.⁵⁴

The third precondition implies that the court may also exercise its jurisdiction on a non- party state's territory and national. This is where the state declares acceptance to such jurisdiction with respect of the crime in question by a declaration lodged with the registrar of the court⁵⁵ or where the specific situation is referred to the court by the Security Council acting under Chapter VII of the Charter of the United Nations.⁵⁶ Hence, the court's jurisdiction regime recognizes the special role of the UN Security Council in maintaining peace and security. It may avail itself of the ICC to manage its responsibilities by referring situations of aggravated concern in any part of the world to the court so that it no longer has to create *ad hoc* tribunals as it did for the former Yugoslavia and Rwanda.⁵⁷ In doing so, it gives the ICC a competence which is independent of a state's acceptance of the Statute and the presence of preconditions. The Security Council used this power when it referred the situation in Darfur, Sudan, to the court while this state not being a

⁵² Supra note 2, p- 32; See also Article 12 of the Rome Statute.

⁵³ Supra note 53; See also Article 19(2)c of the Rome Statute.

⁵⁴ *ibid* at Article 26.

⁵⁵ Supra note 19, p- 40-41; see also Article 12(3) of the Rome Statute.

⁵⁶ *id*

⁵⁷ Supra note 2, p. 288.

party to the Rome Statute⁵⁸ But it should be noted that this is an exceptional setup of the court's jurisdiction.

Temporal Jurisdiction

According to Article 11 of the Rome Statute, the Court can only prosecute crimes committed on or after the date the Rome Statute entered into force in 1 July 2002: its jurisdiction does not apply retroactively. In case of states that become members after the Statute entered into force, the court will only exercise its jurisdiction on crimes committed after the day that the state ratified the statute which is the entry into force of the statute for that state. However, these states could make declaration in order for the court to exercise jurisdiction in respect to crimes committed before their ratification of the statute and after the statute entered into force.⁵⁹

Another point worth mentioning at this junction is that the court applies the principle of individual responsibility. The ICC doesn't stand to determine that the State's behavior amounts to an internationally wrongful act like the case of the International Court of Justice. The Rome Statute by stipulating that "the court shall be a permanent institution and shall have the power to exercise its jurisdiction over *persons* for the most serious crimes of international concern", establishes individual criminal responsibility on natural persons who commits a crime within the jurisdiction of the court.⁶⁰ The court is concerned about the mere existence of factual requirements whether: heinous crimes were committed and there was no appropriate reaction by states.⁶¹

This principle applies equally to all persons without any distinction with the exception of minors. Official capacity (as a Head of State or Government, a member of a government or parliament, an elected representative or a government official) and immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, does not bar the court from exercising its jurisdiction over such a person nor in itself constitute a ground for reduction of sentence. This can be demonstrated by the Court's most inductees like the sitting head of State of Sudan, President Omar Al- Beshir.⁶²

⁵⁸ id

⁵⁹ id, p. 32.

⁶⁰ id, p. 64; See also Article 1 and 25 of the Rome Statute.

⁶¹ id

⁶² Dr. S.K Kapoor, 2002, International Law and Human Rights, Ajanta offset Printers, India, p. 370.

Article 13 of the Statute empowers the court to exercise jurisdiction with respect to crimes conferred to it under Article 5 where:

- I. A Situation is referred to the prosecutor by a state party;*
- II. A situation is referred to the prosecutor by the United Nations Security Council acting under Chapter VII of the Charter of the United Nations; or*
- III. The Prosecutor has initiated an investigation proprio motu—acting on its own motion or initiative.*⁶³

So far, three states parties to the Rome Statute - Uganda, the Democratic Republic of the Congo and the Central African Republic have referred situations occurring on their territories to the court. On top, the Security Council according to chapter VII of the UN Charter⁶⁴ has referred the situation in Darfur, Sudan. The prosecution also opened investigation on its own motion in the situation of Kenya and recently in Libya.⁶⁵

The Office of the Prosecutor(OTP) in making its preliminary examination in order to determine whether there is a ground to proceed with an investigation requires cooperation from national and international authorities to provide his office with the information, evidence, and practical support needed to carry out his mandate.⁶⁶ He may seek information from states, organs of the United Nations, intergovernmental or non- governmental organizations or other reliable sources.⁶⁷

In addition to this, in making his determination the Prosecutor must consider whether or not the crime is within the jurisdiction of the court, admissibility test requiring consideration of gravity and of whether national proceedings are being genuinely carried out with respect to the case; and also the interests of justice⁶⁸.

Be that as it may, a fundamental point that has to be understood about the ICC is that even where the court has jurisdiction, there is a challenge that it may not necessarily act. We will discuss this topic in the coming section in a detailed fashion. But at this junction, it's important to note that

⁶³ Article 13 of the Rome Statute.

⁶⁴ Chapter VII of the UN, grant the UNSC the power to deal with situations that pose threats to international peace and security.

⁶⁵ *Situations and Cases*, Available at < www.icc-cpi.int/>, Accessed: 1 June 2011; Chapter VII of the UN grant the UNSC the power to deal with situations that pose threats to international peace and security.

⁶⁶ Press release, the Prosecutor of the ICC opens investigation in Darfur, Available at www.icc-cpi.int/, Accessed: 1 June 2011.

⁶⁷ *ibid*

⁶⁸ *id*

what the Statute refers to as the principle of “complementarity” provides that certain cases may be inadmissible even though the court has jurisdiction i.e. if it has been or is being investigated or prosecuted by a state with jurisdiction.⁶⁹ Therefore, powers of the ICC with respect to the crimes referred to in Article 5 of the Statute is still within the limits of the principle of complementarity which is the most decisive functioning power of the ICC.⁷⁰

Complementarity of the International Criminal Court

History has told it that the international community established an international permanent criminal court within the context of tension between ending impunity and national sovereignty. It was set up in the shadow of the end of the Cold War - complementary to the national criminal jurisdictions.⁷¹

The Statute recognizes that the Court is “complementary” to national criminal jurisdiction.⁷² Paragraph 6 and of the Preamble and Article 1 spots that primarily every state has the duty to exercise its criminal jurisdiction over those responsible for international crimes over which the Court has jurisdiction under Article 5 of the statute.⁷³ The Court exercises its authority on crimes under its jurisdiction, as a means of last resort, after all the available judiciary remedies in the national jurisdiction failed. It’s when national courts prove “unwilling” or “unable” to investigate or prosecute the defendant, that the ICC can require the national government to surrender the targeted perpetrator to the ICC.⁷⁴ Thus, the principle of complementarity rests on two basic pillars: safeguarding respect for the primary jurisdiction of states; and efficiency and effectiveness to put an end to impunity.⁷⁵

Emphasizing the primary responsibility of states - under conventional and customary international law - to investigate and prosecute international crimes, the Statute specifically provides that a case is inadmissible before the ICC where the case is being investigated or prosecuted by a state which has jurisdiction over it. Accordingly, Article 17 of the Statute provides that the Court can only intervene when:

⁶⁹ Supra note 2, p. 32.

⁷⁰ id, p. 60.

⁷¹ id, p. 294.

⁷² See Preamble of the Rome Statute of the International Criminal Court.

⁷³ Supra note 19, p. 39.

⁷⁴ Supra note 2, p. 289.

⁷⁵ Too much of a good thing? : ICC implementation and the uses of complementarity, Available at <<http://ssrn.com/abstract=1537213>>, Accessed: 25 December, 2010, p. 3.

- a) *The case is being investigated or prosecuted by a state which has jurisdiction over it, but this 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, but such decision resulted from the unwillingness or inability of the state genuinely to prosecute;*
- c) *The person concerned has already been tried for the conduct which is the subject of the complaint; however, the trial is done for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the court or if it's not conducted independently or impartially and–or was inconsistent with an intent to bring the person concerned to justice. (Article 20, Paragraph 3); or*
- d) *The case is not of insufficient gravity to justify further action by the court.*⁷⁶

Hence, the exception under the principle of complementarity where the Court may act is when the state is “unwilling” or “unable” to genuinely to carry out the investigation or prosecution. However, unjustified delays in proceedings as well as proceedings which are merely intended to shield persons from criminal responsibility will not render a case inadmissible before the ICC since it's designed to complement existing national judicial systems at their failure.⁷⁷ It should, in addition be noted that, even upon referral by the Security Council, the fundamental feature of ICC remains complementary to national criminal jurisdictions.⁷⁸

The principle of complementarity creates an incentive to states by calling upon them to *Prima facie* investigate and prosecute the core crimes of the ICC Statute, which have been committed within their national jurisdiction.⁷⁹ This reminds states of their duty to strengthen their legislative capacity to exercise criminal jurisdiction over those responsible for heinous crimes and enhance their international cooperation to confront the persistent problem of impunity.⁸⁰ This is, in other words, known as “positive complementarity” approach.⁸¹ As M. Cherif Bassiouni noted:

The ICC was never intended to be a supra-national legal institution nor would it have been accepted as such by most states. It was conceived as a treaty-based international legal institution of last resort that would preserve the primacy of national legal systems

⁷⁶ See supra note 19, p-39; see also Article 17 of The Rome Statute.

⁷⁷ Supra note 19, p. 39.

⁷⁸ Supra note 2, p. 61.

⁷⁹ Supra note 11, p. 42.

⁸⁰ Supra note 19, p. 39.

⁸¹ Nidal Nabil Jurdi, 2010, Some lessons on complementarity for the International Criminal Court Review Conference, Available at <papers.ssrn.com/so13/papers.cfm>, Accessed: 25 December 2010, p. 6.

*of the contracting parties, while offering a jurisdictional resort of convenience for the Security Council and for non-party states wishing to avail themselves of the court's capabilities*⁸²

In short, a principle that “insures that the judgments of a domestic court are not replaced by the judgments of an international court”⁸³ and they maintain their sovereignty. Nevertheless, it's a kind of disciplining device that suggests about the real world consequences with states if they don't implement their criminal jurisdiction.⁸⁴

The ICC's complementarity principle in many ways serves as the functional heart of the courts judicial structure.⁸⁵ As discussed somewhere in the above section, it's more practical to restrict the principle of complementarity to those national jurisdictions that have direct *nexus* to the criminal conduct (territorial jurisdiction) or the accused (personal jurisdiction). The rationale behind this is '*forum conveniens*'.⁸⁶ Here, national jurisdictions are convincingly presumed to be the ones in a position to collect evidence and testimony of the crime, but are unwilling or unable to act.⁸⁷ Their cooperation is obviously essential to effective prosecution. Thus, if the principle of complementarity is applied with regard to any possible basis of jurisdiction, there is a risk of thwarting the essential aim pursued by the creation of a criminal international jurisdiction.⁸⁸

The Impact of Complementarity on State Sovereignty

The International Community's decision to incorporate the complementarity principle in the preamble of its final draft statute was intended to provide plausible compromise between national sovereignty and the court's jurisdiction.⁸⁹ These are assurances that the Court would not exercise jurisdiction over crimes committed within states' territorial borders seemed necessary for they would not willingly transfer their sovereignty to the ICC otherwise.⁹⁰ Thus, while states retain their primary right to investigate and prosecute, under the principle of complementarity, ICC acts as a backup justice system to trump states' sovereignty in the event that national

⁸² Supra note 2, pp. 294-295; See also Article 12(3) and 13(b) of the Rome Statute.

⁸³ Supra note 2, pp. 86-87.

⁸⁴ Supra note 89, p. 2.

⁸⁵ Supra note 11, p. 42.

⁸⁶ Supra note 2, p. 59.

⁸⁷ *id.*, p. 67.

⁸⁸ *id.*

⁸⁹ Supra note 11, p. 42.

⁹⁰ *ibid.*

mechanisms fail to punish heinous conducts.⁹¹ Thus, the Statute reflects states' agreement over how to institutionalize international criminal justice system while still protecting national sovereignty.

Complementarity appears as a mechanism devised to maintain the balance and shape the Court's operational dynamics. Be that as it may, the ICC teeters between values of sovereignty and internationalism. As the international criminal institution and national courts have concurrent jurisdiction over the most serious international crimes, there inevitably will be conflicts between the two jurisdictions.⁹² Consequently, the principle of complementarity, at the same time, creates a curious pair of conflicting forces and, hence, a dilemma for the Court itself. While wanting states handle cases, if states generally discharge their primary duty to prosecute crimes, the Court will not be given anything to do and will have no cases. But, the Court, on the other hand, needs exemplary and successfully nation handled cases. This is because the Court wants to prove itself to the desire of International Community and the states parties to see concrete evidence that the ICC is a meaningful and useful institution.⁹³

One perspective to these conflicting forces stresses that the ICC limits itself in exercising jurisdiction without the consent of a sovereign government that could otherwise exercise jurisdiction on its own. This ideology indicates that the ICC does not violate or erode the principle of state sovereignty and there is little reason to fear that.⁹⁴ What the ICC does is to provide a mechanism where states are actually encouraged to exercise their legislative and adjudicative jurisdiction which is an important part of state sovereignty.⁹⁵ In fact, if there is to be a fear, it should be a treat that ICC will become dormant if complementarity shields states from the jurisdiction of the ICC⁹⁶

⁹¹ id

⁹² On the principle of complementarity in the Rome statute of the International Criminal Court, Available at <chinesejil.oxfordjournals.org/cont...>, Accessed: 5 June 2011.

⁹³ The International Criminal Court: current challenges and perspectives, Available at <law.wustl.edu/..kaul.pdf>, Accessed: 14 May 2011.

⁹⁴ Supra note 2, p. 88.

⁹⁵ International Criminal Law vs State Sovereignty: Another Round!?, Available at <ejil.oxfordjournals.org/..979.full>, Accessed: 5 June 2011.

⁹⁶ Supra note 2, p. 88.

As Steven C. Roach argued, complementarity principle resolves the effects arising from the political tensions between universal jurisdiction and state sovereignty.⁹⁷ In addition, Cherif Bassiouni in his book entitled “The ICC in Justice” asserts that:

*It is not a supranational body, but an international body similar to existing ones ... The ICC does no more than what each and every state can do under existing international law ... the ICC is therefore an extension of national criminal jurisdiction ... consequently the ICC does not infringe on national sovereignty.*⁹⁸

Accordingly, the Court seeking to exercise jurisdiction in a hostile way: trying to exercise jurisdiction against states actually trying to conduct their own proceedings is seen to have proved very far from reality.⁹⁹ If anything in the ICC’s cases, states evidence no intention of trying certain crimes even mock proceedings for the purpose of holding off ICC jurisdiction. Uganda and Sudan are good examples. In the Al-Bashir case, Sudanese officials affirmed that they cannot conduct investigations in Darfur due to the ongoing conflict. The ICC then started to try the case because Sudan’s judicial system made no step to investigate or prosecute the case. For what’s worth, states have even gladly affirmed that they are unwilling or unable to prosecute (Uganda).¹⁰⁰

It’s known that the court faces structural weakness as it is fully dependent on state cooperation in its execution. So, in addition to regarding to the principle of complementarity, this respect is also seen to indicate that a states’ sovereignty was meant to prevail.¹⁰¹

In this aspect, a study indicated that, paradoxically, creation of the ICC was an exercise of sovereignty. The only entity that could create a permanent International Criminal Court was states.¹⁰² In creating the Court, those States have accepted that the ICC may exercise some of their sovereign powers (the right to exercise jurisdiction) in a certain arrangement.¹⁰³ Thus, sovereignty is not always an enemy because without sovereignty there are no courts and without courts there are no prosecutions.¹⁰⁴

⁹⁷ Supra note 11, p. 41.

⁹⁸ Supra note 76.

⁹⁹ Supra note 89, p. 14.

¹⁰⁰ *ibid*

¹⁰¹ Supra note 174.

¹⁰² Supra note 76.

¹⁰³ *id*

¹⁰⁴ *id*

On the hand, it's argued that the idea behind ICC is a use of state sovereignty for international ends. State sovereignty is a powerful concept in international law. Therefore, states will hold firm to retaining control over domestic prosecutions and make it to remain as part of the sovereignty of a nation.¹⁰⁵ Unless, it's in the self-interest of the state to refer these matters to international tribunals, they will be reluctant to admit to judicial inadequacies that would transfer a case to the ICC.

States retain such attitude because there is an argument derived from national interests that states have joined an institution that is apparently very taxing in terms of sovereignty.¹⁰⁶ Sovereignty is also one of the reasons why states would not want to join the ICC.

One aspect of this is seen in the case of referral by the Security Council under Article 13(b) of the Statute and Chapter VII of the UN Charter where pre-trial procedure and notification is not necessary. In this case, this is because the principle of domestic jurisdiction is not supposed to work in favour of states.¹⁰⁷ But this does not prevent any state with jurisdiction over the situation referred by the Security Council from informing the prosecutor that it's investigating or prosecuting the case or it has already investigated or prosecuted it.¹⁰⁸ Nevertheless, the skip of the pre-trial procedure and notification of states might be taken as a loose pre-caution taken to safeguard sovereignty of states to investigate and prosecute crimes within their jurisdiction.

Studies reveal that, in order to guarantee impact of complementarity on state's ability and sovereignty, a state party should adopt legislation according to the requirement of complementarity principle envisaged in the Rome Statute so as to allow national judicial systems to have jurisdiction over the crimes prohibited by the statute.¹⁰⁹

In sum, there is an underlined recommendation that complementarity must not function as a principle that separates the national from the international jurisdiction or puts them in conflict with each other, but as a principle, that in fact requires interaction between them while keeping

¹⁰⁵ Supra note 2, p. 89.

¹⁰⁶ *ibid*

¹⁰⁷ Supra note 2, p. 66.

¹⁰⁸ *ibid*

¹⁰⁹ Supra note 173.

the court in an ‘avant-grade position’¹¹⁰; as long as a states’ legal system is prepared to pursue alleged perpetrators, the court should limit its power from prosecuting.

Therefore, it is the researcher’s heartfelt belief that it is important to closely analyze complementarity’s attitude towards the construction of sovereignty which is very ambivalent. On the one hand, complementarity is a presumption in favour of national jurisdiction and, on the other, complementarity is also a treat to a state sovereignty. Thus, the researcher here holds that, as the wording shows, the Court should only complement and not replace national jurisdictions. Here, it should be noted that it’s also necessary to avoid the risk of any state abusively invoking the principle of complementarity in its own favour, thus hindering the role of the ICC. However, this is not to disregard the fact that this is a complex system and apparently needs more time to be fully accepted and adhered to by all concerned in order to develop its full potential.

The Dichotomy between ‘Peace’ and ‘Justice’

In the exercise of the ICC’s jurisdiction, to prosecute perpetrators who bear the responsibility for the most serious crimes of international concern, the court confronted involvement of a dilemma. This is often described as the peace versus justice dilemma. For an institution whose mandate is to strengthen peace by providing an avenue for justice, the two seem to go along. But this is not the case witnessed.¹¹¹ Different interests may intersect during this process of rendering peace and justice i.e. the process of one may disrupt the other. In other words, the outcome of the peace negotiation may be affected by the proceeding in the justice system. Contradictions may arise on the question which should be the primary objective.¹¹² While some argue that “there is no peace and no reconciliation without punitive justice” others say “justice can be at any time but peace should be grabbed at a moment”.

After the Security Council’s first referral to the ICC of Bashir’s indictment, the long lived potential of serving the purpose of justice without compromising peace in prosecution of persons responsible for serious crimes was put into question.¹¹³ The issuance of the warrant has inspired

¹¹⁰ supra note 2, p-77

¹¹¹ Afua Hirsch, Peace v Justice: the ICC’s dilemma , available at www.guardian.co.uk/commentisfree/20..., accessed 4 June 2011

¹¹² Ibid

¹¹³ Awol k.Allo(2009), ‘Mayhem in Darfur: The Accountability, Peace and Immunity Debate’, Mizan Law Review, Vol.3 No.1., Addis Ababa, Ethiopia, p-84

intense debate about whether criminal proceeding against Bashir would bring even more violence and conflict to Darfur and destroy any hope of peace.

Peace or justice, what is right is difficult, but one is affecting the other and cannot seem to go along simultaneously, in most cases of ICC. Thus, it's crystal clear to see that the indictment has split opinions. Some have applauded the ICC for taking the pursuit of justice to the highest level. But others fear it could shut off any chance of ending the Darfur conflict through negotiation by making the government more hostile. Accordingly, the writer seeks to make a critical analysis of whether the concern for justice truly jeopardizes the effort for peace in the particular context of Darfur.

International organizations (like the Arab League, African Union, Organization of the Islamic Conference, and Non- Aligned Movement), individual states, Advocates, policy makers and others have protested against the indictment and demanded for the immediate suspension of the situation. They requested the Security Council to defer the situation, using its power under Article 16 of the statute, by raising the fact that the prosecution of AL-Bashir results a threat to peace and perpetuates the suffering of civilians.¹¹⁴

Ongoing peace negotiations exist in some of the cases where ICC opened investigations. For instance, while the prosecutor indicted President Omar Al-Beshir, there were progressive peace negotiations between his government with southern Sudan and with Darfur rebels. Accordingly, when African Union demanded the Security Council for the deferral of the proceeding of ICC against Al-Bashir, the basic reason was the fear that the indictment may undermine the delicate peace process of the Southern Sudan and affect the ongoing efforts aimed at facilitating the early resolution of the conflict in Darfur. Similarly, the LRA leaders also have demanded immunity from ICC's prosecution in return for an end to the insurgency even though the government of Uganda didn't accept. These individuals are mostly crucial in the peace efforts. Al-Bashir had a prominent role in the referendum of Southern Sudan as a president of the Khartoum government. The referendum which took place in Southern Sudan from 9 January to 15 January 2011, on whether the region should remain a part of Sudan or become independent, was the centerpiece of the 2005 peace deal that ended two decades of conflict between the majority Muslim north and

¹¹⁴ Ibid; See also Article 16 of the Rome Statute, which allows the Security Council to order the suspension of ICC proceedings for up to one year, with the option to renew the suspension for an unlimited number of times.

largely Christian south which left two million people dead. Furthermore, Al-Bashir was also involved in the ongoing peace negotiation with the rebel groups in the Darfur region. On the African- European summit in December 2010, on this regard, while the African Union expressed its confidence in the leadership of Al-Bashir to bring Sudan into a new era of peace, the European Union highly objects the impunity of Al-bashir while simultaneously urging him to implement Sudan's 2005 north-south peace accord. This shows that such EU's stand on Al-Bashir is the junction of peace and justice in the action of ICC and internal peace negotiations.¹¹⁵

On the other hand, there are others who argue that the indictment will rather induce the president and alleged co-perpetrators to aggressively pursue peace than jeopardizing the progress towards peace and exacerbating the conflict.¹¹⁶ The Security Council held in this regard that "justice and accountability are critical to achieving lasting peace and security in Darfur."¹¹⁷ Consistent with this assertion, Jurist Guest Columnist Saira Mohamed of Columbia Law School appealingly says:

*Any decision by the UN Security Council to stop the ICC's proceedings against Sudanese President Omar Hassan Al-Bashir by using its power under Article 16 of the Rome Statute would render the ICC a mere bargaining chip, which not only worsen the situation in Darfur, but also would vitiate any power the fledgling Court might have to secure accountability and deter future crimes.*¹¹⁸

She asserts that justice is an integral part of peace: without accountability, atrocities continue without cost, and peace becomes more remote. She points out, before the government of Sudan waged war in Darfur; it has been burning villages and killing civilians in Southern Sudan throughout the 1990s without one condemnation by the Security Council. At that time there was no international court to try the perpetrators of those crimes. But now that the ICC can hold perpetrators of international crimes accountable, the same mistake need not be made again.¹¹⁹ Further, if leaders are convinced using Article 16 to come to the negotiating table to stop attacking its people it poses not only a danger to the people of Darfur, who will continue to

¹¹⁵ ICC Press Release, UN Secretary General visits ICC, available at www.icc-cpi.int/./press+releases/, accessed: 3 April 2011

¹¹⁶ See supra note 194

¹¹⁷ Id at p-85

¹¹⁸ Saira Mohamed, Instrumentalizing International Justice: Don't halt the Bashir case, available at <jurist.law.pitt.edu/forumy/2009/03/...>, accessed: 4 June 2011.

¹¹⁹ Ibid

suffer, but also to the ICC and to all efforts at international justice, which will be seen as nothing more than political tools and once it becomes clear that justice is merely political, its power to compel any action at all will evaporate.¹²⁰

In summarizing her argument, Saira states that “*justice is more than a tool; it’s an end in itself*”. Suspending ICC’s action when the treaty to peace triggered by the warrant results solely from the calculated action of the defendant and when there is no peace process to protect, would serve only to strengthen the climate of impunity that has reigned in Darfur, to ignore the suffering of victims and to further erode the rule of law in Sudan.¹²¹

Further on this aspect, on a ‘peace and justice’ session held during the review conference in Kampala, the president of the International Center for Transitional Justice Mr. David Tolbert stated that “ the long term benefits of pursuing justice far outweigh any short-term benefits of amnesties.”¹²²

Former UN Secretary General Koffi Annan, in suggesting the need of striking a balance between the competing interests by crafting a workable strategy that participate both the Prosecutor and the Government of Sudan captured the following terms:

*Justice, peace and democracy are not mutually exclusive objectives, but rather, mutually reinforcing imperatives. Advancing all three in fragile post-conflict settings requires strategic planning, careful integration and sensible sequencing of activities. Approaches focusing only on one or another institution, or ignoring civil society or victims, will not be effective. Our approach to the justice sector must be comprehensive in its attention to all of its interdependent institutions, sensitive to the needs of key groups and mindful of the need for complementarity between transitional justice mechanisms.*¹²³

In a nutshell, while no single approach can fully resolve this debate, it’s unquestionable that international law demands prosecution of gross violations of human rights and humanitarian law. Even if there is a competing interest at hand, prosecution should be considered to the extent practicable. If prosecution is impossible or dangerous to the integrity of the nation, a cautious

¹²⁰ Id

¹²¹ Id

¹²² Press Release, Stocktaking of International Criminal Justice: Peace and Justice, available at www.icc-cpi.int/Menu/ASP/pressrelease.., accessed: 4 June 2011.

¹²³ Supra note 194, p-87

and comprehensive step- based approach must be adopted as a minimum standard.¹²⁴ The writer is also of the same opinion. Peace and justice are complementary and can never be mutually exclusive.¹²⁵

The International Criminal Court: Effectiveness in enforcing its decisions & legitimacy

State cooperation for the effective functioning of the International Criminal Court

The court has faced, from satisfying multiple constituencies of proving its effectiveness to dealing with a lack of financial resources and enforcement mechanisms.¹²⁶ What is expected from the Court and from the wider system of international justice in the future is for the court to recognize that it has primary responsibility to demonstrate its credibility in practice through consistency of cases brought before the court and; fair, impartial and efficient proceedings consistent with due process and proper administration of justice.¹²⁷ As Benjamin N. Schiff notably explained in his book, the court's profound effects may be measured from different perspectives. He illustrated:

*If it deters criminality or leads states to tighten their domestic laws and enforce international humanitarian norms, it could be considered successful. On the other hand, it may be deemed irrelevant if potential perpetrators don't recognize it as a treat, if its efforts are thwarted by non-cooperation or lack of resources, or if victims regard it as useless in their search for justice. The court could become an unprecedented, sterling achievement or it may be a great idea whose time has not arrived.*¹²⁸

But since the Court lacks enforcement mechanism and will never be able to end impunity alone, its ultimate success will critically depend on the cooperation of states. International organizations and civil societies also provide a considerable level of assistance. The Court will require cooperation from states at all stages of the proceedings, such as investigation, making arrest and enforcing penalties.¹²⁹ Correspondingly, The Rome Statute stipulates that state parties shall fully cooperate with the court in its investigation and prosecution of crimes within the jurisdiction of the Court and to comply with requests for arrest and surrender of a suspect within their territory. It also requires that any state (even a non-party state) can give any other cooperation as may be

¹²⁴ *ibid* at p. 80.

¹²⁵ States which participated at the review conference in Kampala on a 'peace and justice' session also affirmed the same.

¹²⁶ *Supra* note 2, p. 284.

¹²⁷ *ibid*, p. 291.

¹²⁸ *Supra* note 33, p. 2.

¹²⁹ *Supra* note 2, p. 291.

necessary to facilitate the works of the prosecutor and provides for Cooperation Agreements to be agreed on an *ad hoc* basis between the Court and non-state parties.¹³⁰ In addition to the states where crimes were committed or wanted persons are located, all states in a position to provide cooperation can assist the Court.¹³¹ State parties are also expected to ensure that there are procedures available under their national law for all forms of cooperation, which are specified under the Rome Statute.¹³² The UN Secretary- General Ban Ki-moon echoed this obligation by stating that: “To succeed, the ICC must have universal support and states that have joined the court must cooperate fully with the court. That includes backing it publicly, as well as faithfully executing its orders.”¹³³

While the ICC and the UN cooperate on a regular basis, it is also developing its cooperation with regional organizations as well. The court entered into a cooperation agreement with the EU. There is also a role of cooperation by the Organization of American States (OAS). Coming to NGOs and civil societies, they are also instrumental to the Court’s work. They play a large role in urging ratification of the Statute, assisting states in developing legislation implementing the Rome Statute; they also have a critical role in broadcasting information about and building awareness of the ICC. In addition, local NGOs may possess knowledge which is directly relevant to the Court’s work in the field.¹³⁴

As the ICC lacks a centralized enforcement mechanism and it’s dependent upon state cooperation, the task of its judicial power will, therefore, depend on public perception of its fairness and efficiency of norms and the role of NGOs in promoting and upholding the ICC’s legal standards of fairness.¹³⁵ Accordingly, some countries indeed evidenced such assistance to the court.

The *Abu Garda* case is an encouraging example of cooperating with the ICC, as a number of African and European nations, including The Netherlands, Chad, Senegal, Nigeria, Mali and Gambia, worked with the prosecutor to secure Mr. Abu Garda’s presence in The Hague. Mr. Abu Garda, leader of the Sudanese Insurgency - the United Resistance Front, appeared voluntarily

¹³⁰ See part IX International Cooperation and Judicial Assistance (Articles 86-102) of the Rome Statute of the ICC; See also Article 54(3) (c) and (d) ; and Article 87(5) of the Statute.

¹³¹ Supra note 2, p. 291.

¹³² Article 88 of the Rome Statute of the ICC.

¹³³ International Criminal Court: call for nations to join ICC, Available at www.loc.gov>.>Law, Accessed: 20 June 2011.

¹³⁴ Supra note 2, p. 291-292.

¹³⁵ Supra note 11, p. 3.

before the ICC on charges of war crimes allegedly committed in Darfur, Sudan. Though it's not promised if the voluntary surrender of Mr. Abu Garda will set a precedent for future cases before the ICC, such cooperation is always welcome for the court.¹³⁶

To add another case, On 11 October 2010, Mr. Callixte Mbarushimana, a leader of the *Forces Democratiques pour la Liberation du Rwanda* (FDLR), was arrested in Paris, by the French authorities following an arrest warrant issued by the International Criminal Court. Callixte Mbarushimana is the first senior leader arrested by the ICC for the massive crimes committed in the Kivu provinces of the Democratic Republic of Congo. The arrest is the result of almost two years of investigations conducted by France, Germany, DRC, Rwanda and the ICC, into the activities of the FDLR. In this aspect, the ICC prosecutor Luis Moreno-Ocampo showed his gratefulness to these states and indicated that it's a clear example of "positive complementarity in action".¹³⁷

However, such cooperation is not true in all cases. Cooperation with the ICC has sometimes been problematic. In fact, most states' parties lack political will to cooperate with the ICC.¹³⁸ In this respect, Steven argues that the Court has not yet lived up to its expectations and has got "teething problems" in deterring or at an action aimed at stopping the violence caused by the targeted perpetrator.¹³⁹

The situations in Congo, Sudan and recently in Libya reveals lack of political will to cooperate with the ICC which is highly undermining the court's mandate. The Government of Congo after referring the situation to the ICC and transferring three leaders of armed group, refused to transfer another suspect, Bosco Ntaganda, despite an arrest warrant issued by the ICC in 2006. The execution of the arrest warrant is obviously impossible without cooperation of the government of Congo who at the first place referred the situation to the Court.¹⁴⁰

The Court's other short coming as a result of non-cooperation is also evidenced in the case of Sudan as discussed in the previous subjects, where the ICC prosecutor has not yet aggressively

¹³⁶ Mark Ellis, *The ICC and the Gaza conflict* .2009, Available at www.ibanet.org/Document/Default.aspx, Accessed: 28 October 2010.

¹³⁷ ICC Press Release, "New ICC Arrest: Leader of movement involved in massive rape in the DRC is apprehended in Paris", Available at www.icc-cpi.int/menus/icc/situation..., Accessed: 5 June 2011.

¹³⁸ Supra note 11. P. 3.

¹³⁹ *ibid*

¹⁴⁰ Supra note 2, p. 227.

enforced the crimes committed in Sudan.¹⁴¹ Following the decision of the Security Council not to accept its request to defer the proceeding against Al-Bashir, the AU has been pressing its members not to cooperate. Since its request has never been acted upon, the AU stated that: “The AU member states shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities for the arrest and surrender of President Omar Al-Bashir of the Sudan.”¹⁴²

Many African countries believe that detaining Al-Bashir would disrupt the effort to end conflict in Sudan, refused to cooperate with the Court. Besides, the effort to bring peace in the state countries, and mostly African countries, intend to reserve their peaceful relation in security, political and economic relations with the country-, specifically neighbours.

Thirdly, the same is seen in the case of Libya in a resolution adapted on 26 February 2011, where the United Nations Security Council decided to refer the situation in Libya to the ICC. Warrants were against Gaddafi, his son, Saif Al-Islam Gaddafi, and the country’s intelligence chief Abdullah Al-Senussi for ordering, planning and participating in illegal attacks of murder and persecution of civilians during the crackdown by Muammar Gaddafi’s regime on anti-government rebels. Because the Security Council ordered the ICC investigation on Gaddafi for crimes he committed against humanity across Libya, all UN member states would be obliged to arrest him if he ventures into their territory.¹⁴³ The European Union underlined its full support to the ICC, saying it plays a key role in the promotion of international justice and called for full cooperation of states with the ICC. The Sudanese Government has openly rejected the Court’s jurisdiction and refused to cooperate with investigations.¹⁴⁴

Having said that, whatever obstacles that the Court can resist, it’s a truism that the Court will have major difficulties in succeeding if it does not receive a proactive cooperation. Without the intermediary of national authorities in the investigation and prosecution of cases, the International Criminal Court can not operate effectively. Thus, keeping this in mind, the

¹⁴¹ *ibid*, p. 284.

¹⁴² AU Doc Assembly/AU/13(XIII), 3 July 2009, Decision on the meeting of African States parties to the Rome Statute of the International Criminal Court, Available at <reliefweb.int/node/318220/pdf>, Accessed 4 June 2011.

¹⁴³ ICC prosecutor to reveal details of Libya case, Available at <www.seattlepi.com/news/article/ICC...>, Accessed: 29 June 2011.

¹⁴⁴ ICC urges all states to cooperate on Libya case; EU supports it, Available at www.kuna.net.kw/./ArticleDetails.aspx, accessed 29 June 2011.

jurisdiction of the Court to prosecute a certain situation, states, regional organizations and civil societies should be encouraged to take an unreserved view in cooperation and support for the Court.

ICC as a Political Institution: Myth or Reality?

To ensure that the Court would be a purely judicial institution and would act in a purely judicial way, the guarantee of a fair trial and protection of the rights of the accused have paramount importance before the ICC.¹⁴⁵ By definition, ICC is a non-political institution run by an international judicial body and entitled to make its own decision based on the rule of law. The Court's credibility and effectiveness also depends on the realization of such an spire purpose it is intended to achieve. However, there is an anxious debate around the world that the ICC is a Western biased political institution. It is accused of selectively pursuing justice by focusing on investigating suspected criminals mainly from Africa.¹⁴⁶

Since the creation of the ICC, its focus has mainly been on Africa. There are currently six active investigations before the Court. The Court opened investigations in the Democratic Republic of the Congo, Sudan, Uganda, the Central African Republic, Kenya and Libya many of which countries are involved in ongoing conflicts. More recently, the ICC's prosecutor requested authorization from judges to open an investigation in Cote d'Ivoire.¹⁴⁷ This seemingly exclusive focus on Africa has led to accusations of the ICC being yet another vehicle for Western imperialism. It left the Court open to protest and criticism over its inevitable lopsidedness, by African states and their supporters.¹⁴⁸

On the Thirteenth Ordinary Session of the Assembly of the African Union held from 1 to 3 of July 2009, the African countries generally accused the ICC for focusing only on the African continent while other crises exist elsewhere in the world.¹⁴⁹ They said:

¹⁴⁵ Supra note 2, p. 285.

¹⁴⁶ African Legislators See bias in ICC's workings- Geopolitical Monitor, Available at www.geopoliticalmonitor.com/african..., Accessed 29 June 2011.

¹⁴⁷ Ghana politics: ICC issues arrest warrants against Muammar Gaddafi, Available at <www.ghanapolitics.blogspot.com>, Accessed: 29 June 2011.

¹⁴⁸ D. Greenberg, "African Union Declaration Against the ICC not what it seems", Available at <<http://www.fpif.org/articles/african> union declaration against the icc not what it seems>, Accessed: 29 June 2011.

¹⁴⁹ *ibid*

*While the ICC is keen on investigating war crimes and crimes against humanity, in Kenya, Uganda, Sudan, the court is sitting on numerous complaints against Western leaders who are accused of causing untold suffering from wars they started in the Middle East.*¹⁵⁰

Numerous African leaders have accused the ICC of being nothing more than a tool of Western imperialism, arguing that the Court is merely the newest way for the West to exploit the continent.¹⁵¹ Officials from the ICC, however, argue that the accusations lacked substance because the Constitution of the Court's judges' panel is demonstrated by judges from Africa.¹⁵² In an interview held in July 2009 between Lorrain Smith, International Bar Association (IBA) Programme Manager, and the former president of the ICC Judge Philippe Kirsch about his perceptions of the ICC's achievements and challenges, he responded that:

*There is a misconception that the Court is targeting Africa. This is demonstrably false, as clearly illustrated by the fact that of the four African situations before the Court (back then), three were referred to the Court by the states themselves, and the fourth was referred by the UNSC. And also, there are five African judges now in the court. This is a case where lack of knowledge and inaccurate information are harmful to the ICC.*¹⁵³

There can be many reasons why ICC is sticking to African states. Though it's clear and acknowledgeable that international crimes are prominently committed in Africa, it's also true that such crimes are also committed outside of Africa. The difference lies in the agenda setting and decision making privilege the West enjoys over the rest of the world that once again is rooted in the Third World's economic dependency has also projected to dependency in law. The Global North is in a better position to cover their commission of crimes. If President Al-Bashir is indicted for crimes within his country, there should be no reason not to charge the previous President of the USA George W. Bush for the crimes in Iraq and Afghanistan.

The other reason that can be attributed to the ICC act of avoiding the north is its political economy. Of course, any institution's existence is dependent on fund for its functioning. Similarly, ICC's investigation, prosecution and adjudication are dependent on the fund of the Court which is mainly collected from state parties which have responsibility to pay assessed contributions. In addition, funds from United Nations and donations from entities, individuals

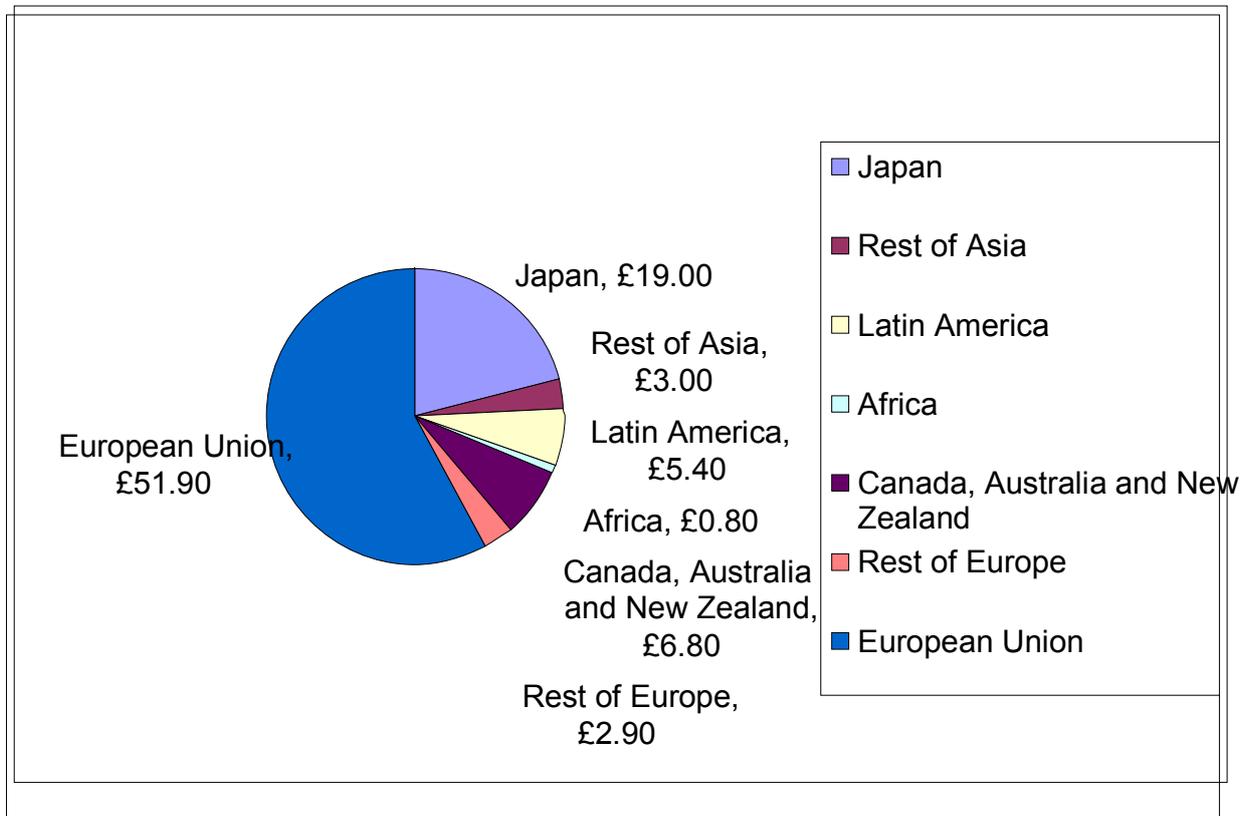
¹⁵⁰ Supra note 238.

¹⁵¹ Supra note 240.

¹⁵² Supra note 238.

¹⁵³ Supra note 228.

and any other non-member states are accepted. Each state's contribution is based on the country's capacity to pay, which reflects factors such as national income and population. As we can see on the report of the committee on Budget and Finance, the payment rate between the North and the South have a wide gap.¹⁵⁴



Source: ICC, 2008, ICC's Budget in 2008.¹⁵⁵

Figure 1--The Contribution of the ICC Budget in 2008 (Millions)

Between the years of 2007 and 2010, even some African countries have been banned from giving vote since they are late in their outstanding contributions and minimum payments required according to Article 112 of the Rome Statute. Here, what we can generally observe is that ICC's fund is almost dependent on the contributions of the northern countries. This may create an imbalance as going against the interest of the north may affect the whole existence of the Court - the ICC would not want to prosecute the one who is paying its salary.

¹⁵⁴ Report of the Committee on budget and finance on the work of its Fourteenth Session, July 2010, Available at www.icc-cpi.int, Accessed: October 28 2010.

¹⁵⁵ International Criminal court contributions 2008, Available at <en.wikipedia.org/wiki/file>, Accessed: 9 November 2010.

More critically, after the African states had concluded that they are either unwilling or unable to act quickly or forcefully enough to apprehend suspects, the court began to seek support from the country that has shown itself willing and able to wield military force across the globe: the United States.¹⁵⁶ This creates a concern that it would bring the danger of trading its independence to a state with its own exclusive political agenda. Heavily depending on a state that is not even party to the Statute may pose a dramatic danger to the maintenance of the purpose and power of the court.

Recently, the US Government has declared its interest in working more closely with the ICC - not with the intent of becoming a party to Rome Statute (the ICC treaty), but to help execute arrest warrants. Akin to this, the US Council of Foreign Relations report recommended that the Obama administration does not ratify the ICC treaty, but “consider boosting its cooperation with the court in such areas as training, funding, the sharing of intelligence and evidence and the apprehension of suspects”. And also, the US announced the creation of a new military command for the continent, AFRICOM¹⁵⁷ in 2007. As Samare and Adam asserted:

This may bring questions as of what it will mean for justice and rule of law if the ICC comes to rely heavily on the military capacity of a single state- a state with its own military agenda and interests in Africa- as its enforcement arm, in particular when the state declares itself the law it claims to enforce. The ICC appears to be trading its independence in return for access to coercive force, a bargain that will be made at the price of the court’s legitimacy, impartiality and legality. But the price paid by the ICC will be trivial compared to the very dangerous possibility that this alliance could help justify and expand US militarization in Africa, in particular in conjunction with AFRICOM (Africa Command), at a dramatic cost to peace and justice in the continent.¹⁵⁸

They argue, the appointment of AFRICOM as the ICC’s police officer in Africa, may provide cover for US military operations. And it’s hard to imagine that the ICC, in its reliance on US enforcement capacity would be able to avoid politicization and not fall into the trap of prosecuting only those the US is willing to capture, regardless of crimes committed. This is because US could exert its influence by threatening to revoke funding or support for the court or by interfering with internal workings of the court. Moreover, they appealingly summarize it

¹⁵⁶ Samare Al-Bulushi and Adam Branch, AFRICOM and the ICC: enforcing international justice in Africa?, Available at www.blackagendareport.com/, Accessed: 1 June 2011.

¹⁵⁷ AFRICOM is a unified combatant command of the United States Department of Defense that is responsible for U.S. military operations and military relations with 53 African nations.

¹⁵⁸ Supra note 248.

saying that if the ICC is seen as working hand-in-glove with US interests in Africa, its legitimacy may end up fatally damaged.¹⁵⁹

Therefore, what some people see as a solution to the ICC's lack of enforcement capacity in fact pose a dramatic danger to peace and justice in Africa and to the future of the ICC itself. Its decision to indict certain actors and not others has triggered suspicion of the Court's susceptibility to power politics. Whichever the reasons, the researcher strongly adduces that selective justice is clearly manifested in the prosecution of the International Criminal Court and such act resembles an injustice that will take away the aspiration of the court's pursuit to the opposite, i.e. 'justice'.

Conclusion and Recommendation

Conclusion

The creation of the ICC was a truly historic achievement, more than fifty years in the making, but its creation was only the beginning. The roots of this long struggle can be traced to the Hague Conventions and later to the League of Nations, whose failure ultimately lead to the establishment of the United Nations. The court was finally set up in the shadow of the end of the Cold War. The court now stands as a permanent institution capable of punishing perpetrators of the worst offences known to human kind. It can build an important impact by putting would-be violators on notice that impunity is not assured and serve as a catalyst for enacting national laws against the gravest international crimes. Consequently, the ICC's impact for domestic law and national capacity building will be significant and far- reaching.

When the ICC was established in 2002 through the Rome Statute of the International Criminal Court which govern the Court's jurisdiction and condition of operation, its creation was a great achievement. The Statute has introduced a number of striking unique characteristics. Among them, the Statute of the Court for the first time explicitly and specifically embodied the principle of complementarity. This principle guides that the Court and it is structured to have a backup role to national systems, the ICC steps in only when national courts prove unable or unwilling to do justice, and provided the case is of sufficient gravity to justify action by the Court. The Court may affirm its jurisdiction only when it identifies a gap in state jurisdictions. The gap may range from legal barriers (including amnesties, immunities, non retroactivity, statutes of limitations) to

¹⁵⁹ ibid

lack of independent judiciaries, lack of capacity, and security problems. These gaps may be the consequence of a breakdown of the institutions of a state; but it may also be caused by poor administration of justice.

The most serious aspect of the evolution of the Court is the link between state sovereignty and accountability. At the heart of the complementarity principle is the understanding that the most serious crimes of concern to the International Community must be prosecuted at the national level for reasons of *forum conveniens* and that ratifying the statute will mean joining the global movement to end impunity. It's in the best interests of the ICC that national courts create stronger national criminal justice systems that conform to international legal standards. The allegations of state sovereignty should also mean to keep the court complementary to state jurisdiction and not to replace them or put them in conflict with international jurisdiction using the complementarity principle.

Recommendation

The first phases of newly established institutions have not always resulted in the best practices. Such institutions need time and experience to find their proper path. But, before winding up, the following points are forwarded by the author to be taken into consideration in the Court's pursuit of legal justice.

- Because the Court's jurisdiction is limited to national and territories of states; parties, continued ratification of the Statute is essential to the Court having a truly global reach and strengthening its aspiration of bringing legal justice. Steps should be undertaken to facilitate and to promote the importance of ratifying the Rome Statute. Especially at a national level, acts such as appointing ICC focal points within governments would be of great help.
- To counter allegations of the Court's objectivity in determining its jurisdiction unilaterally, the International Community in the next review conference can consider establishing an independent Third Party Advisory Council to provide unbiased instructive recommendations on whether such decision is objective, impartial, and non-political.
- States should be assisted, encouraged, and even pressured to act and to end impunity before the ICC seizes jurisdiction. They are in the best position to handle the context that is specific to the place due to the social and cultural attachment and avoid the externality of the Court to the situation. The practice of international human rights mechanisms like

naming and shaming by the periodic reports of the UN Human Rights Committees, working groups, and reporters to the Human Rights Council could be helpful in this regard. Accordingly, ICC can report states that are able and willing but still refrained from acting to the International Community. This will, at least, exert pressure on non-complaint states.

- State cooperation is a golden thread that underlies the Rome Statute. Executing arrest warrants is very important in building efficiency and confidence in the Court. There should be a multilateral effort to have suspects apprehended. States should pledge at the review conference or at future sessions of the Assembly of State Parties (ASP) to adopt implementing legislation within a particular timeframe and to enter into a framework agreements with the ICC on important areas of assistance identified by the Court. ICC State parties should take steps to facilitate cooperation at a national level, such as by appointing ICC focal points within governments.
- As the issue of cooperation extends beyond the issue of technical provision of assistance diplomatic way of support which includes political support for the Court in the international, diplomatic pressure on states to cooperate is another way of support. It is important for states to share best practices on cooperation. The ICC should also work for the alternative enforcement mechanisms in addition to strengthening cooperation of party states or, otherwise, depending only on some powerful states which will ultimately lead it to be a toothless Court.

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