

**STRUCTURAL IMPRACTICALITIES OF THE ICC AFFECTING PROSECUTION OF
SITTING HEADS OF STATE: A CASE STUDY OF KENYA AND SUDAN**

ODUOR JOSEPH MCDONALD

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SUPERVISOR: MR. TIRIMBA MACHOGU

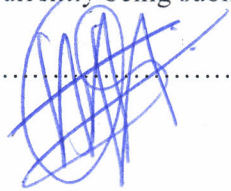
2015

**SCHOOL OF LAW
UNIVERSITY OF NAIROBI
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DECLARATION

I, JOSEPH MCDONALD, do hereby declare that this is my original work and the same has not been submitted and is not currently being submitted for a degree in any other University.

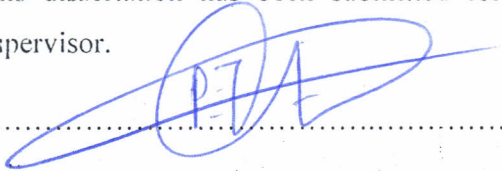
.....
JOSEPH MCDONALD



DATE:

This dissertation has been submitted for examination with my approval as the University Supervisor.

.....
Mr. TIRIMBA MACHOGU



LECTURER

DATE:

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DEDICATION

I dedicate this dissertation to all the victims of post elections violence in Kenya and the people who died as a result and other people who continue suffer gross atrocities in Africa may they get justice that they desperately deserve.

ABSTRACT

“...The International Criminal Court as ‘giant without arms and legs’ who ‘needs artificial limbs to walk and work...’”¹

In 1998, a groundbreaking idea turned into reality, and 50 years of debate ended as the first International Criminal Court (ICC) was established as a result of the Rome Statute. This judicial body took shape and created the foundation of a permanent court to prosecute persons that committed war crimes, crimes against humanity and genocide. The idea of an international criminal court came about from many factions. At the end of World War II the Allied Powers responded swiftly after the discovery of crimes committed by the Axis Powers. They therefore created the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and the Charter of the International Military Tribunal (IMT).

The IMT contained the first definition of crimes against humanity, which would later be included in the Rome Statute and fall under the jurisdiction of the ICC. Specifically in Article 6(c) the definition was as follows: “Crimes against humanity: murder, extermination, enslavement, deportation, and other inhumane acts committed against civilian populations, before or during the war; persecution on political, racial or religious grounds in execution of or in connection within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.”

Shortly after, a similar document was drafted in response to the crimes committed by the Far East Axis powers, namely Japan, labeled the International Military Tribunal for the Far East. These two tribunals laid the groundwork for the prosecution and convictions of soldiers and commanders that committed crimes in World War II. The importance of these tribunals comes in its direct definition of crimes against humanity and war crimes, and the initial recognition for the need of a global criminal system.

Finally in 1998, a Conference was called in Rome to discuss the possibility of a permanent International Criminal Court. Many struggles and oppositions needed to be overcome in order

¹Antonio Cassese. ‘When May Senior State Officials be Tried for International Crimes? Some Comments on Congo v. Belgium Case.’(2002) 859 European Journal of International Law13,853.

adopt the Rome Statute and create the ICC. Despite all of these differentiating opinions and opposing views several compromises were made, and in the end the treaty passed with a lopsided vote of 120 to 7, with 21 countries abstaining. The most remarkable thing about the Rome Statute and the creation of the ICC was the fact that the treaty required sixty of the signees to ratify it before it would be entered into agreement, and the ICC could be created as an international entity of criminal law.

Many speculated that it would be a decade before this judicial body could be created, but a mere four years later, the 60th state ratified, and the ICC was created. It opened its doors in July of 2002, and by the following March eighteen judges were nominated and the first international prosecutor, Luis Moreno Campo, was elected. The ICC is currently working on seven open cases in Sudan, Uganda, the Democratic Republic of Congo, the Central African Republic, Kenya, the Republic of Côte d'Ivoire and Libya, with many more situations being monitored for possible further indictments. It took many years of law evolution, and a series of horrendous events to justify establishment of an international criminal court, however, based on the support it received, not only at the Rome Conference, but also the continued ratification by nations, it is evident that the need for the court is considered important by many nations.

At the time of its creation, observers were hopeful that rule of law could help constrain humanity's worst impulses, a sentiment that, today, may seem foolhardy. Yet, where else would victims turn? Ruthless tyrants and their henchmen have killed, raped, and tortured innocents, and few, if any, international institutions have been able to stop them or provide justice after the fact.

The ICC has very real and sometimes infuriating limitations. Convictions are too few, cases are too long, and the backlog is too high; frustrations inside and outside the court grow. But so does the demand for the ICC's help. Whether it be in Syria, Palestine, North Korea, Sri Lanka, or in reaction to U.S. and British activities abroad, the ICC's problems have not kept governments and people from urging it to get involved in more and more places. Thus, the promise of the ICC remains intact, despite the challenges it faces.

This paper looks at the conceptual theories in customary international law and how they have sneaked into the international criminal justice system despite the fact that the Rome Statutes was

set up for the sole purpose of accelerating justice for the victims by legally avoiding the rules of customary practice such as absolute immunity or functional immunity.

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- 3) Kenya ICC-01/09,"' (ICC - CPI) < http://www.iccpi.int/en_menus/icc/situations > accessed on 25th July 2015.
- 4) Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General 3 (25.1.2005), available at the ICC homepage, <http://www.icc-cpi.int>
- 5) S/RES/827 (1993). The Statute governing the ICTY was attached as an addendum to Resolution 827, and is available at <http://www.un.org/icty/basic/statut/statute.htm> (last visited Nov. 7, 2000)
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- 11) UN Convention on Jurisdictional Immunities Adopted by the UN General Assembly in Resolution 59/38 of 16 December 2004.

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2. Barcelona Traction, Light and Power Co Ltd case (Belgium v Spain) (1970) ICJ Reps 32 (“Barcelona Traction case”).
3. Certain Questions of Mutual Judicial Assistance in Criminal Matters (Djibouti v France)(Merits) [2008] ICJ Rep 177
4. Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), International Court of Justice (ICJ), 14 February 2002,
5. Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), 2002 I.C.J. 121 (Feb. 14), available at <http://www.unhcr.org/refworld/docid/3c6cd39b4.html>.
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LIST OF ACRONYMS

AC- Appeal Cases

AU-African Union

AJIL- American Journal of International Law

All E.R. - All England Reports

ASIL- American Society of International Law

BYIL British Yearbook of International Law

C.T.S. - Consolidated Treaty Series

CUP -Cambridge University Press

CIPEV- Commission of Inquiry into Post Election Violence

ECHR- European Court of Human Rights

EHRR- European Human Rights Reports

EJIL- European Journal of International Law

ETS- European Treaty Series

EWCA- England and Wales Court of Appeal

HLC- House of Lords Cases

HRW -Human Rights Watch

ICC- International Criminal Court

ICJ- International Court of Justice

ICLQ -International and Comparative Law Quarterly

ICTJ- International Centre for Transitional Justice

ICTR- International Criminal Tribunal for Rwanda

ICTY- International Criminal Tribunal for the Former Yugoslavia

ILC-International Law Commission

ILM- International Legal Materials ILR International Law Reports

JICJ -Journal of International Criminal Justice

OUP -Oxford University Press

PCIJ- Permanent Court of International Justice QB Queen's Bench Division Law Reports

RdC - Recueil des Cours

SCSL- Special Court for Sierra Leone

SIA- State Immunity Act

STL -Special Tribunal for Lebanon

UN- United Nations

UNCJI-United Nations Convention on Jurisdictional Immunities

UNGA- United Nations General Assembly

UNRIAA -United Nations Report of International Arbitral Awards

UNTS- United Nations Treaty Series

UKHL- United Kingdom House of Lords

US -United States

USSR- Union of Soviet Socialist Republics

VCLT- Vienna Convention on the Law of Treaties

YILC- Yearbook of the International Law Commission

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CHAPTER 1. INTRODUCTION

1.1 Background

In 2002, the International Criminal Court (ICC) came into being. At the time, observers were hopeful that rule of law could help constrain humanity's worst impulses, a sentiment that, today, may seem foolhardy. Yet, where else would victims turn? Ruthless tyrants and their henchmen have killed, raped, and tortured innocents, and few, if any, international institutions have been able to stop them or provide justice after the fact.

The ICC has very real and sometimes infuriating limitations. Convictions are too few, cases are too long, and the backlog is too high; frustrations inside and outside the court grow. But so does the demand for the ICC's help. Whether it be in Syria, Palestine, North Korea, Sri Lanka, or in reaction to U.S. and British activities abroad, the ICC's problems have not kept governments and people from urging it to get involved in more and more places. Thus, the promise of the ICC remains intact, despite the challenges it faces.

On December 3, 2014, ICC judges ordered that the case against Kenyan President Uhuru Kenyatta, who is accused of crimes against humanity for planning and funding violence in the wake of Kenya's 2007 elections, should proceed within one week or be dismissed. Two days later, the prosecutor of the ICC, Fatou Bensouda, having already conceded that Kenya's non-cooperation with her investigation left the case unready for trial, withdrew the charges. She reserved the right to file them again in the future.

Her decision was highly anticipated. Leading up to the withdrawal of the charges, the media-savvy Kenyan government and its interlocutors had painted the ICC as a neocolonial tool of the West used to target disfavored African leaders. As evidence, they pointed to the absence of any non-African cases on the court's current docket. Further, they argued, criminal trials anywhere, whether in Kenya or The Hague, disrupt Kenya's attempts to move on from its recent bloody past and build a stable, peaceful future.

Compelling as this narrative may seem to some, the truth is much simpler: With 122 members heavily concentrated in Latin America and Africa, and with Africans in many key leadership posts, the ICC reflects the world it represents. Kenyan officials' condemnation of the ICC was a

cynical way to maintain power. If the activities of senior Kenyan governmental officials who were private citizens during the 2007 post-election violence and are alleged to have been involved in mass atrocities were never aired in a courtroom, those officials would avoid not only conviction but also reputational damage. Their grip on power in Kenya, as a result, would remain secure.

Needless to say the situation is the same for Sudanese president Omar Al-Bashir whose arrest warrant has been pending for many years now. And the same before in the case of Augusto Pinochet. The question that many scholars and pundits are now asking themselves is; can the ICC be able to effectively prosecute sitting heads of state?

The late Antonio Cassese rightfully stated "...The International Criminal Court as 'giant without arms and legs' who 'needs artificial limbs to walk and work....'"²

The cases mentioned above illustrate two of the prominent approaches to balancing the competing principles of accountability of state officials for serious international crimes vs. sovereign inviolability of foreign states. To allow these agents to go scot-free only because they acted in an official capacity, would mean to bow to and indeed strengthen traditional concerns of the international community (chiefly, respect for state sovereignty), which in the current international community should instead be reconciled with new values, such as respect for human dignity and human rights.³

On 17 July 1998, 120 States adopted a statute in Rome - known as the Rome Statute of the International Criminal Court (hereinafter "the Rome Statute") establishing the International Criminal Court.⁴ It entered into force in 1st July, 2002. For the first time in the history of humankind. States decided to accept the jurisdiction of a permanent International Criminal Court for the prosecution of the perpetrators of the most serious crimes committed in their

²Antonio Cassese. 'When May Senior State Officials be Tried for International Crimes? Some Comments on Congo v. Belgium Case.' (2002) 859 European Journal of International Law 13,853.

³ Antonio Cassese. 'When May Senior State Officials be Tried for International Crimes? Some Comments on Congo v. Belgium Case.' (2002) 859 European Journal of International Law 13,853.

⁴Open Document, 'Rome Statute of the International Criminal Court' 17 July 1998' (ICRC 29 August 30, 2015) <<https://www.irc.org/ihl/INTRO/585?OpenDocument>> Accessed 29 August 2015.

territories or by their nationals, The International Criminal Court was however not to be a substitute for national courts.⁵

Unfortunately, the ICC does not have an enforcement mechanism and relies entirely on the cooperation of states. This is provided for under Article 86 of the Rome Statute. The structure of the court as it is now, as has been demonstrated in previous cases⁶, makes it difficult to prosecute sitting heads of state. This is attributable to the fact that the structure of the court in terms of effective prosecution is hinged on state cooperation: the same states that these heads control.

In as much as Article 27 of the Rome Statute provides that immunities, whether under international or national law, including that of heads of state, shall not apply before the ICC, the concept of immunity has been a long standing practice in customary international law that cannot easily be erased.

Article 86 of the Rome Statute provides for state cooperation and this is an appreciation of the fact that without it, the court will not be successful as was and still is the case of Omar Al-Bashir⁷. It is prudent to appreciate that some if not all of the individuals involved in the process either directly or indirectly, have governmental authority or military command.⁸ They are in offices that would make it hard for them to cooperate with the court when the subject is an incumbent.

According to the Rome Statute, it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes. The Court can only intervene where a State is unable or genuinely unwilling, to carry out the investigation and prosecute the perpetrators.⁹ The primary mission of the International Criminal Court is to help put an end to impunity for the

⁵ H. Olásolo, *The Triggering Procedure of the International Criminal Court* (MartinusNijhoff Publishers Leiden, 2005), 39.

⁶ The Cases against President Bashir and President Kenyatta.

⁷ Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, (*Request to the Republic of the Sudan for the Arrest and Surrender of Omar Al Bashir*) Available at <http://www.icc-cpi.int/iccdocs/doc/doc1995566.pdf>

(The request was to that Sudan, in accordance with its duties as a member of the UN, surrender President Al Bashir pursuant to UN Security Council resolution 1593.

⁸ International Law Commission, *Report on the International Law Commission on the Work of its 48th Session*, in 1996 Yearbook of the International Law Commission, Vol. II, UN Doc. A/CN.4/SER.A/1996/Add. 1 (Part 2) (1996).

⁹ Rome Statute of the International Criminal Court (opened for ratification July 17, 1998, 2187 U.N.T.S. 90) <http://www.un.org/law/icc/statute/status.htm> (Accessed August 28, 2015) ;The Rome Statute hereinafter 'Rome', Article 1: "An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions..."

perpetrators of the most serious crimes of concern to the international community as a whole, and thus to contribute to the prevention of such crimes.¹⁰

The ICC prosecutes individuals, not groups or States.¹¹ Any individual who is alleged to have committed crimes within the jurisdiction of the ICC may be brought before the ICC. In fact, the Office of the Prosecutor's prosecutorial policy is to focus on those who, having regard to the evidence gathered, bear the greatest responsibility for the crimes, and does not take into account any official position that may be held by the alleged perpetrators.¹²

This study seeks to show that the immunity of heads of state is more of a creature of the ineffective structures of the international criminal court and not the customary international law on immunity of sitting heads of state. The fact that the court depends on state cooperation because it lacks machinery of its own ultimately makes it a giant without legs.

1.2 Statement of problem

The main objective envisaged while setting up the ICC and the reason it received over-whelming support from 112 countries mostly from Africa and Latin America was the fact that ICC was sold as a court of last resort where victims could finally get justice especially where the crimes are committed by people in position of power.

This study seeks to show that the immunity of Heads of State is more of a creature of the ineffective structures of the International Criminal Court and not the Customary International Law on Immunity of sitting Heads of State. The fact that the court depends on state cooperation because it lacks machinery of its own, ultimately makes it a giant without legs.

¹⁰ Registry International Criminal Court Public Information and Documentation Section, Understanding the International Criminal Court <<http://www.icc-cpi.int/iccdocs/pids/publications/uicceng.pdf>> accessed 10th August, 2015.

¹¹Dapo Akande (ed), *The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits*, in *The International Criminal Court* 225, 247 (Olympia Bekou & Robert Cryer 2004) (He observes that the ICC has jurisdiction over state officials).

¹²Ibid. No one is exempt from prosecution because of his or her current functions or because of the position he or she held at the time the crimes concerned were committed. Acting as a Head of State or Government, minister or parliamentarian does not exempt anyone from criminal responsibility before the ICC. In some circumstances, a person in a position of authority may even be held responsible for crimes committed by those acting under his or her command or orders. Likewise, amnesty cannot be used as a defense before the ICC. As such, it cannot bar the Court from exercising its jurisdiction.

1.3 Scope of Study

The ICC has conducted trials for leaders such as Liberia's Charles Taylor, former Yugoslavia's Slobodan Milosevic and Radovan Karadzic, and Cambodia's Nuon Chea, who were all tried for their participation in atrocities. Around the end 2011 the ICC probably had the first final judgments, in the case of Thomas Lubanga, with the cases of Germain Katanga and Chui and the case of Jean Pierre Bemba to follow soon afterwards.

Demands for justice have slowly become a regular part of diplomatic and popular discourse whenever atrocities occurred. Hence this study only looks at the case of Kenya's president and that of Sudan's president.

Structurally the study will put a lens on the office of the prosecutor and not the other plays e.g Judges and the state parties. From a legal perspective the study will narrow down on the Article 27 of the Rome Statute on irrelevance of office of the accused and comparison with rules of customary international law and Article 86 of the Rome Statutes which deals with cooperation of party states.

1.4 Justification of the study

The main reason behind the formation of the International Criminal Court, was to try people guilty of committing the most serious crimes of concern to the international community and to guarantee a lasting respect for and the enforcement of international justice for the victims. The ICC has the jurisdiction to prosecute everyone subject to the jurisdiction of the court without any exception. This means, even those who traditionally have been protected by immunity, can and will be prosecuted. However, this does not seem to be the case. Due to its structural shortcomings, the Court has not been able to effectively ensure that sitting heads of state are duly prosecuted and that victims get justice. If the challenges of the court can be highlighted and various options to achieve justice explored then it can be a win-win situation for both the court and the victims.

1.5 Research Objectives

The main objectives of the study are as follows

- i. To highlight the positions on immunity of sitting heads of state and their implications within the criminal justice system.
- ii. To show how the structure of the ICC prevents the effective prosecution of sitting heads of state and the gravity of state cooperation in the entire process.
- iii. To highlight the key success, failures and structural challenges of the ICC.
- iv. To offer recommendations for various options the court may explore to at least achieve justice for the victims.

1.6 Research Question

The study seek to answer the following

- a) Is the prosecution of heads of state a worthwhile endeavor given the structural inhibition of the Court? Or are there structural limitation in the first place?
- b) Are there other alternatives to seek justice to the victims?

1.7 Hypothesis

The structure of the ICC, which derives its mandate from the Rome Statute, is contributing to the ineffective prosecution of sitting heads of states. This factor renders the incumbents, who are accused of crimes falling within the jurisdiction of the court, immune to the process ultimately occasioning an injustice to the victims.

1.8 Conceptual Framework

In as much as state immunity is a practise that has been in international customary law for a very long time, we argue that the reason this is the case to date is because the structure of the ICC has made it appear as though prosecution of sitting heads of state is impossible. Their structural shortcomings have rendered the sitting heads of state immune to the international criminal justice system, irrespective of crimes committed. Thus, it is necessary to breakdown this concept of

immunity that has become, albeit indirectly, an impediment to prosecution of incumbents and explain the various categories that are there, to whom they apply to and how it applies.

The concept of Head of state immunity in international law is an ideology from the past, when there was no distinction between the personal sovereign and the state.¹³ State immunity is a rule of customary international law, and has evolved through the gradual accumulation of state practice in the form of domestic court decisions and domestic legislation.¹⁴

Historically, immunity can be traced from the time when monarchical governments reigned and sovereignty was personal.¹⁵ Immunity vested in the personal sovereign, who ascribed himself personal absoluteness, was justified on the ground that, the King was divine thus superior to all citizens and form of authority.¹⁶ The lack of distinction between the entities of the personal sovereign and that of the state, led to the absoluteness of the personal sovereign and ultimately the notion of absolute immunity for states and Heads of states.¹⁷ The earliest known judicial expression of this theory is the *Schooner Exchange* case.¹⁸

State immunity is a fundamental right of a state by virtue of the principle of sovereign equality of states¹⁹ anchored in the maxim, "*par in parem non habet imperium*" (*an equal has no power over an equal*).²⁰ This argument was also propounded by the ICJ in the *Jurisdictional Immunities of the State Case (Germany v Italy: Greece intervening)*.²¹ According to the Court, the rule of State immunity occupies an important place in international law and international relations: *It derives from the principle of sovereign equality of States, which, as Article 2, paragraph 1, of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order.* However, the Treaties of Westphalia 1648, managed to bring out the

¹³Sir Ian Sinclair, *The Law of Sovereign Immunity: Recent Developments*. (Hague Recueil des Cours 113 1980-II)198

¹⁴Damrosch, Lori Fisler, *Changing the International Law of Sovereign Immunity Through National Decisions* (2011) 44 *Vanderbilt JTL* 1185 at 1189.

¹⁵HerschLauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, (1951) 28 *BYIL* 220, p.232

¹⁶F.H. Hinsley, *Sovereignty*, (2nd edn, Cambridge: University Press 1986)16, .38

¹⁷ Mark A. Summers, *Immunity or Impunity?: The Potential Effect of Prosecutions of State Officials for Core International Crimes in States Like the United States That Are Not Parties To The Statute of The International Criminal Court*, (2005-2006) 31 *Brooklyn Journal of International Law* 463, .466.

¹⁸Talmon, Stefan, 'Hague International Tribunals: International Court of Justice: Jus Cogens after *Germany v. Italy: Substantive and Procedural Rules Distinguished*' (2012) 25:04 *LJIL* 979

¹⁹Bankas, Ernest K, 'The State Immunity Controversy in International Law: Private Suits Against Sovereign States in Domestic Courts' (2005) *Springer* 43.

²⁰ Garner, BA (ed), *Black's Law Dictionary*, note 9. See also *Io CongresodelPartidocase* (1981) 2 *All ER* 10464.

²¹ (2012) *ICJ Reps* 99 at 123-124, para 57

distinction between the personal sovereign and the state.²² Likewise, monarchical sovereignty has been diminished by the rise of republicanism, anti-colonial nationalism and the emergence of democratic states.

Immunity on the other hand has often been viewed as being an impediment to human rights enforcement by the individual. This is especially so when the violations are conducted by heads of state. Classical positivists argue that states are the only subjects of international law and that the duties and rights enunciated in the human rights instruments devolve on states. As such, international rules are to be interpreted against the backdrop of the position of the individual in traditional international law, as incapable of acquiring direct rights in international law. Based on this classical view of international law, immunities of states and state officials are paramount.

There are two types of immunities enjoyed by heads of state:

'Immunity Ratione Personae' Also Called Absolute Immunity and 'Immunity Ratione Matiriae' also Called Restrictive Immunity

a) **'Immunity Ratione Personae' (Absolute Immunity)**

These immunities are conferred only as long as the official remains in office. They are usually described as 'personal immunity'²³. A Head of State is accorded immunity *ratione personae* not only because of the functions he performs, but also because of what he symbolizes; the sovereign state. The person and position of the Head of State, reflects the sovereign equality of the state and the immunity accorded to him or her, is in part due to the respect for the dignity of the office and of the state which that office represents²⁴. Immunity *ratione personae* are procedural in nature and it ensures the complete inviolability of the office holder through his exemption from the jurisdiction of states.²⁵ In criminal cases, while an incumbent occupies any of these offices,

²² Text of treaty available at http://avalon.law.vale.edu/17th_century/westphal.asp, (Accessed 16 June 2015)

²³ Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), International Court of Justice (ICJ), 14 February 2002, "though state officials have immunity under international law while serving in office, the immunity is not granted to them for their own benefit, but given to ensure the effective performance of their functions on behalf of their respective states."

²⁴ Akande, Dapo & Sangeeta Shah, Immunities of State Officials, International Crimes, and Foreign Domestic Courts (2010) 21.

²⁵ Antonio Cassese, *When May Senior State Officials be Tried for International Crimes?: Some Comments on the Congo and Belgium Case*, (2002) 13 EJIL 853, p.863.

he is personally immune and inviolable, and therefore, cannot be detained, arrested, or prosecuted by the authorities of a state other than his home state.²⁶

The ICJ however, failed to define the state officials that belong to this limited category of other very high-ranking state representatives. This lapse has certainly led to confusion and inconsistent practice among national courts of states.²⁷ There is ambiguity as to those falling within the class of high ranking officials of states. The UN Convention on Jurisdictional Immunities of States²⁸ only refers to the immunity *ratione personae* of Heads of States while the Commentary of the International Law Commission mentions the immunity *ratione personae* of other officials of states.²⁹

Immunity *ratione personae* applies to private acts committed either before assumption of office as well as during the subsistence of office. This is to avoid foreign states interfering with the functions of state officials under the guise of being private acts.³⁰ Since immunity *ratione personae* is effectively absolute during incumbency³¹ and given that it comes to an end at the expiration of office, a serving Head of state is exempt from the jurisdiction of the courts of states even where the commission of a crime is alleged.

There is a nexus with the study on this concept because the ICC does not recognise the official capacity of the accused person and in Article 27 it categorically states so. But in reality as the case of Uhuru Kenyatta and that of Omar Al-Bashir illustrates there is a well scripted playbook that ensures that fully implementing Article 27 of the Rome statutes is impossible and sympathy is given to rules of customary international law which gives sitting heads of states some immunity.

²⁶ Antonio Cassese, *International Criminal Law*, 3rd edition, Oxford University Press, 2013) at 318-322; Cambridge University Press, 2011) at 356

²⁷ Rothwell, Donald R, *International Law: Cases and Materials With Australian Perspectives*, Cambridge University Press, 2011, at 356.

²⁸ Article 3(2) of UN Convention on Jurisdictional Immunities Adopted by the UN General Assembly in Resolution 59/38 of 16 December 2004.

²⁹ The failure of the Convention to include other officials is due to the disagreement over exactly the officials who may enjoy this type of immunity, see Paper by Professor Gerhard Hafner at Chatham House, London on 5 October 2005, Conference on State Immunity and the New UN Convention, Transcripts and Summaries of Presentations and Discussions available at <http://www.chathamhouse.org.uk/publications/papers/view/-/id/310.p.8>, (accessed 16/05/2015)

³⁰ Mark A. Summers, Immunity or Impunity?: *The Potential Effect of Prosecutions of State Officials for Core International Crimes in States Like the United States That Are Not Parties To The Statute of The International Criminal Court*, (2005-2006) 31 Brooklyn Journal of International Law 463, p.466 No italicization apart from books

³¹ Salvatore Zappala, *Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Law?: The Ghaddafi Case Before the French Cour de Cassation*, 2001 12 EJIL 598.

The new impunity playbook is as straightforward as it is nefarious. First, win public sympathy by distorting facts to make the judicial process look unfair and biased. At the same time, feign cooperation with the court to provide cover for step two, which is to quietly yet thoroughly undermine the criminal case through witness intimidation and evidence tampering. This second step is possible because the ICC (like all other international tribunals) relies on the states in which the crimes occurred to guarantee access and on other states to use political and diplomatic pressure to get the country in question to cooperate with the ICC.

To win in the court of public opinion, the Kenyan government and its allies called into question the ICC's fairness and legitimacy by pointing out that all individuals under investigation or prosecution at the ICC are from Africa. It did not matter that the ICC was, in most cases, responding to requests by African countries to investigate atrocities committed in their country. (The U.N. Security Council referred two other African countries to the ICC without obstruction by China and Russia, themselves hardly enablers of Western imperialism.) The one outlier is Kenya, where, starting in 2009 the then-ICC prosecutor initiated formal investigations in the 2007 election violence consistent with Kenya's status as an ICC State Party. However, he did so only after a Kenyan investigative commission recommended that the ICC step in if Kenya failed to create a domestic tribunal, which it did not create.

The unfortunate reality is that the continent with the highest number of atrocity-ridden conflicts is Africa. Of greater relevance, within the ICC's jurisdiction, is the fact that a higher percentage of African countries are party to the ICC than, say, Middle Eastern countries (27 percent versus two percent). In short, the ICC's involvement in Africa is the logical fulfillment of its mandate. That is not to say that the perception of a Hague-based international court with live cases solely against Africans is not troubling. It is. Yet, to ignore millions of African victims for the sake of appearing "balanced" would truly compromise the ICC's integrity.

Further, the premise put forth by Kenya's government—that the ICC is a "tool" for the West push out disfavored regimes—is far-fetched. In fact, regime change may be the last thing Western powers would want in Kenya, given that the Kenyan government has been a reliable counter-terrorism ally undermining the case. With many states diplomatically and politically unwilling to support a court of law that was perceived to be biased, Kenya had cover to disrupt the ICC cases more dramatically. Of course, it was careful not to do so blatantly. Instead,

Kenyan authorities issued a litany of public pronouncements vowing full cooperation. At the same time, key witnesses due to testify in the Kenyatta case were bribed and intimidated, assets were not frozen in defiance of court orders, access to information was restricted, and meaningful cooperation was not forthcoming.

In the meantime, the new model of impunity has been catching on. For example, Laurent Gbagbo, the deposed president of Cote d'Ivoire who is sitting in an ICC jail awaiting trial, is running for reelection, a tactic Kenyatta used as a private citizen to gain "head of state" status, which he argued would shield him from prosecution—a legally dubious proposition, at best.

So does the concept of absolute immunity as envisaged by customary international law apply in ICC or it doesn't as envisaged under Article 27 of the Rome Statute?

b) Immunity Rationemateriae (functional immunity)

Immunity Rationemateriae or functional immunity, unlike immunity racione personae, applies to a much broader class of persons but to a much more restricted category of acts. With the emerging trend in international law seeking to entrench a culture of accountability, it has been argued that the enforcement of the rights of individuals is to prevail even where immunities are involved.³² Thus developments in the law regarding the immunities of states, that is; from absolute to restrictive, was largely contributed to by the increasing significance and recognition of the individual in international law. Though it may have only been the economic interests of individuals or at least of, the international business man.³³

Functional immunity is derived from the traditional rules of international law, in which official actions are attributable to the state rather than the individuals that perform them.³⁴ Immunity rationemateriae or functional immunity is substantive in nature, that is; it does not attach to the individual but attaches to the act in question, and so it does not come to an end when the official ceases to hold office.³⁵ This conduct-based immunity may be relied on by former officials in

³²HerschLauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, (1951) 28 BYIL 220, p.235

³³Jürgen Bröhmer, *State Immunity and the Violation of Human Rights*, (The Hague: MartinusNijhoff Publishers, 1997), p.8

³⁴Kai Ambos, *General Principles of Criminal Law in the Rome Statute*, in *The International Criminal Court* 147, 153 (Olympia Bekou&Robert Cryer eds., 2004) (concluding that the ICC's jurisdictional focus is on individuals);

³⁵ Paola Gaeta, *Official Capacity and Immunities in Antonio Cassese*; Paola Gaeta and John R.W.D. Jones (edited), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford: University Press, 2002 p.975

respect of official acts performed while in office, as well as by serving state officials. It endures as the official acts of the state and this serves to prevent the circumvention of the sovereign right of a state of freedom from interference in its internal affairs and structures.³⁶ It may also be relied on by persons or bodies that are not state officials or entities but have acted on behalf of the state.³⁷ In *Prosecutor v Blaskic*³⁸, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) shed some light on the application of this type of immunity in the international criminal justice system.

The nexus of this concept to the study is illustrated in the Kenya's case. In the Uhuru Kenyatta's case this concept was relied upon to ensure that he does not attend hearings at the ICC he had to attend to his functions as head of state.

1.1.1 Nexus of the Concept and the Study

From the above discussion it is evidently clear that the concept of immunity can not be just wished away and that it is high time the Rome Statutes took cognisance of that fact. This way structurally the office of the Prosecutor could adjust and have a better strategy to ensure justice to the victims but these adjustments can only be done by the international community. So, where does the international community go from here? For one, the ICC should recognize its own mistakes. It committed missteps on the diplomatic stage—failure to resort to the ICC Assembly of State Parties for Kenya's non-cooperation far earlier—and should have followed a better investigation and prosecution strategy from the start, especially when the Kenyan suspects were private citizens. For instance, the ICC should have had a permanent investigative field office in Kenya collecting documentary and communications evidence from the start.

Yet, to focus on these missteps would be to deflect true blame. Unless countries that are party to the ICC are willing to accept an international tribunal with its own enforcement power (that is, an ICC police force), individual states will need to take their duty to cooperate with the ICC

³⁶ Lord Millet in *R v. Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte* (No.3), 1999, 2 All E.R. 97; J. Craig Barker, *The Future of Former Head of State Immunity after Ex Parte Pinochet*, (1999) 48 ICLQ 937, p.940-941

³⁷ Simbeye, Yitiha, *International Criminal Courts, Immunity Rationemateriae of Incumbent High-ranking State Officials and the Subpoena Duces Tecum* (2013) 4:1 Open University LJ 180; Fox, Hazel & Philippa Webb, *The Law of State Immunity*, 3rd edition, note 70 at 568.

³⁸ *Prosecutor v Blaškić* (Objection to the Issue of Subpoena Duces Tecum), IT-95-14-AR 108 (1997), (1997) 110 ILR 607 at 707, para 38

more seriously. To date, most of them have stood idly by while Kenya unleashed its political attacks on the ICC. The failure to counter this assault, for example, by making regional security assistance with Kenya conditional on cooperation with the ICC, calls into question why the international community formed the ICC in the first place: establish international peace and security through a just rule of law.

The countries that are party to the ICC must begin to make tough decisions, starting this week as they, and influential observer nations such as the United States, gather in New York for the ICC Assembly of States. In many ways, this conference will forecast the future of the ICC. Vital subjects are on the agenda: the woeful underfunding of the Court and Kenyan proposals to amend the ICC's governing treaty to codify statutory immunity for heads of state.

As the assembly begins, the question to be answered is, which countries, if any, will choose to be true leaders in international criminal justice. If no one takes up the call, victims of atrocities, both living and those not yet born, will bear the consequences.

1.9 Research Methodology

The methods that will be used to gather information for this research will be both primary and secondary. The primary research will mainly involve going through the various international statutes of international crimes, local statutes, international treaties while secondary research will entail desk review methods such as library and internet searches.

1.10 Limitation of the Study

The study is limited to the structure of the ICC and not other factors affecting effective prosecution of sitting Heads of States such as politics. Another limitation is time factor which limited us to desk review research methods rather than other qualitative and quantitative methods e.g. interviews and questionnaires.

1.11 Literature Review

Prosecution of Heads of State

For a moment, consider the utopian reality of prosecuting a head of state for crimes committed against his/her citizenry. Historically, this was a farfetched truth until the world wars defeated modern 'civilization' as an ideal. Ironically prosecution perhaps remains one of resolute yet tacit gains that democracy yielded. Humanity in almost all respects remains a developing concern of time. It follows that socio-political factors such as criminal responsibility of State Presidents remains a development of Laws. This paper inter-alia hopes to establish the paradigms of such development.

In her article Penrose³⁹ delves into the ripple effect of the Pinochet⁴⁰ ruling on the arrest of sitting presidents to date. She postulates that even after the ruling, the International community is reluctant to try sitting heads of state. She then enquires into the legal foundations of this lull by the international community while looking at the effect it has on the victims. Despite the fact that the article was written in 2000, it remains relevant in assessing whether there has been any dynamic shifts in the world order of Presidential prosecutions.

Penrose recalls the international community's reluctance in prosecuting a head of state. This includes a situation where such a head of state has committed crimes listed as prosecutable by an International Court. She evokes news reports of United Nations Human Rights Representatives preferring to broader a peace agreement for Milosevic's peaceful hand over power in exchange for non-prosecution.⁴¹ Fortunately, the situation did not need such a step. Penrose begins the recent history of the ICC by quoting Article 7 on individual criminal responsibility of heads of state. Here State heads in authority or government who instigated, committed, ordered or

³⁹Mary Margaret Penrose, *It's Good to Be the King!: Prosecuting Heads of State and Former Heads of State under International Law*, 2000, CJTL, 39:193

⁴⁰R v Bow Street Metropolitan Magistrate and others, Ex Parte Pinochet Ugarte (Amnesty International and others intervening) (No 3) [2000] 1 AC 147 at 203.

⁴¹U.N. Prosecutor Rejects Immunity Deal for Milosevic, WASH.POST, Oct. 5, 2000, at A26. JirDienstbier, the U.N. Special Rapporteur on human rights in the former Yugoslavian republics, reportedly suggested that Milosevic should be granted immunity from prosecution before the ICTY in exchange for leaving power

otherwise abetted a crime shall bear responsibility for such acts.⁴² This perhaps asserted the British Home Secretary statement that ‘...those who commit human rights abuses in one country cannot assume they are safe elsewhere...’⁴³

This if read with Article III of the ICTR, the precedent to ICC statute provides that criminal responsibility shall attach where a representative of a head of State directly participates to conspire and incite the acts mentioned in Article II which reflect the Rome Statute.⁴⁴

Even so, Penrose quotes the opacity in western nations in accepting to prosecute heads of State.⁴⁵ She quotes France providing refuge to Duvalier, the Arabs hosting Idi Amin and Haile Mengistu being hosted in Zimbabwe notwithstanding the crimes as sitting states they have committed. She also questions the silence of the European Union in accepting prisoners from the ICTR. Here, the more developed states of Europe for instance France, Switzerland, Belgium and the United Kingdom with Spain being the only European State that accepted to host the ICTY and that was in 2000. Certainly, this points a queer trend to the West enforcing criminal sanctions against Africa.

Penrose then introduces the ICC which at the time had just been ratified but was yet to come into force. In her discourse, she asserts the need prosecute such heads of State such that they shall be held individually responsible for crimes. This will apply especially to heads of State as well as government.⁴⁶ This literature presents a prelude to the leading authorities in prosecution of State heads. It introduces the ICC as well to form a foundation for its structure as well as its objectives.

Penrose in her criticism of other globally recognized courts that existed prior the ICC had very little hope that the court would properly prosecute sitting presidents. 12 years later, this hope has waned and African nations together with a good quarter of the oriental sphere, have expressed a

⁴²S/RES/827 (1993). The Statute governing the ICTY was attached as an addendum to Resolution 827, and is available at <http://www.un.org/icty/basic/statut/statute.htm> (last visited Nov. 7, 2000) [hereinafter "ICTY Statute"].

⁴³Warren Hoge, *After 16 Months of House Arrest, Pinochet Quits England*, N.Y. TIMES, Mar. 3, 2000, at A6.

⁴⁴Penrose (n 37) 211

⁴⁵Ibid.

⁴⁶Rome (n 4)

non-committal stance to the court. This study is different since it looks at the current times and how the ICC has evolved institutionally to perform its core task of persecuting heads of state.

Dr Hans Corell⁴⁷ in his commentary on the International Prosecution of Heads of State for War Crimes begins by demystifying State Sovereignty. He asserts Prosecution of Heads of State must be aligned with International Law and Practice.⁴⁸ He defines the authority of prosecution of Heads of State to be from the General Assembly of almost nations on Earth.⁴⁹ The resolution postulates that all States have an obligation to protect its population from genocide, war crimes, ethnic cleaning and crimes against humanity. Alternatively, the United Nations has mandate to single out and take decisive action against such a State that deliberately or manifestly fails to protect its civilian population.⁵⁰

In prosecuting heads of State though, he points out that Heads of State/ government cannot be convicted in either senior civil or criminal proceedings.⁵¹ There are however exceptions provided in precedent both in the ICTY and the ICTR⁵² and most recently, the ICC. He addresses Article 27 where the Jurisdiction of the ICCs not limited by personal immunities or Special procedures.⁵³ This condition is notwithstanding the fact that different Statutes regulate these Laws.

There are three ways by which a proceeding may be instituted against a head of State according to Article 13 of the Rome Statute, first, a State Party may refer to the prosecutor where certain types of crime have been performed or by reference by the Security Council or finally, by the prosecutor initiating an investigation with respect to Article 15 of the Rome Statute.⁵⁴

The author however criticizes the Security Council for undermining its own authority. The Article drafted in 2009 inquires why the Security Council took such a long time to persecute Al-

⁴⁷ Hans Corell, Ambassador, Commentary: International Prosecution of Heads of State for Genocide, War Crimes, and Crimes Against Humanity, 43 J. Marshall L. Rev. xxv (2009).

⁴⁸ Ibid.

⁴⁹ G.A. Res. 60/1, 4 138, U.N. Doc.A/RES/60/1 (Oct. 24, 2005).

⁵⁰ Ibid.

⁵¹ Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), 2002 I.C.J. 121 (Feb. 14), available at <http://www.unhcr.org/refworld/docid/3c6cd39b4.html>.

⁵² Statute of the International Criminal Tribunal for the Former Yugoslavia art.7, F 2 (2009). available at <http://www.ictor.org/ENGLISH/basicdocs/statute/2007.pdf>. Accessed 28th August 2015.

11. Statute for the International Criminal Tribunal for Rwanda art. 6, T 2 (2007), available at <http://www.ictor.org/ENGLISH/basicdocs/statute/2007.pdf>. Accessed 28th August 2015.

⁵³ Rome (n 4).

⁵⁴ Penrose (n 37) 15

Bashir. The author however acknowledges that the Security Council is not supported by member States. He posits an interesting fact that while the Security Council needs funds for its operations, the overriding concern is actually the political will of member states concerned. Noting the close relationship between these two entities, the U.N as well as the ICC and the overriding responsibility for world Justice.

Corell in conclusion amalgamates the different political ideals that come with prosecuting a head of State. He postulates two opposing interests quoting the Kenyan example where the ICC was requested to inquire into the post-election violence of 2007-2008 under the CIPEV report. Cooperation to the ICC was not readily granted by the Kenyan State and the Security Council remained a casual observer. Correll states that this reluctance could be attributed to the consequences that would follow such a prosecution.⁵⁵ The author settles the ultimatum by stating that, in the heat of conflict, the victims may be interested in peace more than Justice. Alternatively, leaving out the crime would constitute a fine breeding ground for the continuation of further Conflicts in future.

Corell's analysis is different from this study. He looks at cooperation from a universal standpoint as a method of ending conflict. This study on the other hand looks at cooperation from a State's perspective. In his discourse he also highlights the relationship between the ICC and the Security Council while this study highlights the inter-relations between the various organs within the ICC and how this affects its core mandate of prosecuting heads of states.

The only way forward in his view is for the intervention of the international community partnering with the civil society as well as the business community within that country to turn the tables. His conclusion provides a practical yet somewhat idealist approach on how to gain the participation of States in convicting a sitting head, It is practical because it avoids war, achieves stability in the troubled state swiftly and involves grassroots players. On the other hand it remains idealist since it ignores the intricacies of international relations and forgets the slothfulness of the U.N.

⁵⁵ Ibid.

Blommestijn and Ryngaert⁵⁶ in their article, Exploring obligations for States to act upon the ICC's Arrest Warrant for Omar Al-Bashir savor the customary exceptions as to why ICC has the mandate to arrest a sitting president. They analyze Article 27 of the Rome statute⁵⁷ which provides for an exception against the personal immunity of a sitting president. This is pursuant to the Arrest Warrant case.⁵⁸ In the case, ICTR ICTY and ICC were listed as exceptions when to the personal immunity rule of sitting presidents. The example of Charles Taylor is given where the court denied the personal immunity rule by stating that the sovereign equality of states does not prevent a Head of State from being persecuted.

Blommestijn and Ryngaert further argue that the principle was developed as a way of ensuring state functions remain un-impeded rather than for the perpetuation of unlawful crimes by a sitting head of state. To this extent, they enforce the mandate of the ICC by quoting Damgaard⁵⁹ who states that the ICC can arrest a sitting president based on the fact that its jurisdiction extends both *rationemateriae* and *ratione personae*; it has extensive independence as an international tribunal by virtue of the members who are state parties to the Rome statute and that the Court extends beyond the jurisdiction of a single state.

Their paper aids in answering whether the ICC is an impartial body and whether its mandate extends beyond the limits of its state parties who may favor Sitting heads of state in their governments.

Joanne Foakes⁶⁰ on the other hand postulates that International Courts as well as domestic courts do not have the do not have the potential of prosecuting high level crimes. Foakes further states that the exact limits of the limitations to State immunity are not clear. In a nutshell, she asserts

⁵⁶ Von Michiel Blommestijn, and Cedric Ryngaert, 'Exploring the Obligations for States to Act upon the ICC's Arrest Warrant for Omar Al-Bashir: A Legal Conflict between the Duty to Arrest and the Customary Status of Head of State Immunity' (2010) 6 ZIS hereinafter Blommestijn and Ryngaert.

⁵⁷ Rome (n 4).

⁵⁸ Case Concerning the Arrest Warrant of 11.4.2000 (Democratic Republic of Congo v. Belgium), ICJ Reports 2002, 2.,58 (hereafter "Arrest Warrant case").

⁵⁹ C. Damgaard, *Individual Criminal Responsibility for Core International Crimes: Selected Pertinent Issues* (Springer, 2008), at 264.

⁶⁰ Joanne Foakes, *Immunity for International Crimes? Developments in the Law on Prosecuting of Heads of State in Foreign Courts* (2011)

ILP. <http://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/bp1111_foakes.pdf> (Accessed 28th August 28, 2015)

that the answer is with the International Law Commission, which is yet to resolve the issue conclusively.

Since the Pinochet Judgment, Foakes reports that the number of attempts to prosecute State leaders have increased.⁶¹ She states that this has been a global phenomenon affecting the U.S.⁶² Soviet union⁶³ and Spain⁶⁴. The paper examines the extent to which prosecutions against Heads of States can occur. To do this she covers the two broad facets of functional immunity as well as personal immunity. She continues to State that where personal immunity is accorded, it is in a representative capacity. She states that there is no internationally predetermined procedure for domestic courts to determine liability. She also tackles the issue of who constitutes a head of State. In *U.S. v Noriega*⁶⁵, the defendant had claimed immunity as a head of State but this was denied. The court held that the issue was performance of International crimes as a person with such control of government resources. However, the courts also stated that a head of State shall be determined by the government of the State by the claimant would be coming from. This however sets out a problem where such a leader has been ousted.

Foakes provides the critical eye necessary in approaching the study. She diverges the focus from the traditional academic players, to propose more dynamic solutions such as the ILC to solve the Presidential prosecution question. This provides a broad spectrum of recommendations but not the individual interplay between the various institutions of the ICC as is the objective of this study.

Victims and Their Quest For Justice At The ICC

At the heart of any criminal procedure in any self-respecting court system is the fact of the right to representation.⁶⁶ The integral nature of this facet is so absolute, that it is tied to bringing

⁶¹Ibid.

⁶²Reuters Stephanie Nebehav :Bush's Swiss Visit off After Complaints on Torture, February 5 2011 <<http://www.reuters.com/article/2011/02/05/us-bush-torture-idUSTRE7141CU20110205>> (Accessed 28th August 28, 2015)

⁶³Foakes(n 58) 12

⁶⁴Ibid.

⁶⁵United States v. Noriega, 121 ILR 591.

⁶⁶ See *Victims and Witnesses*, INT'L CRIM. CT., http://www.icc-cpi.int/en_menus/icc/0structure%20of%20the%20court/victims/Pages/victims%20and%20witnesses.aspx (Accessed 10th August. 2015). Websites

justice to the victim.⁶⁷ Justice is seen as a retributive measure where the ills alleged to be perpetrated by the accused are retaliated in a legally equal measure. The punishment is hoped to appease the victims by seeing the perpetrator suffer.⁶⁸ In this sense therefore, representation forms a tacit but primal facet in answering the question whether the ICC process and structure speaks to Justice. In essence the role of the prosecution in representing the views of the victims is priceless.

In their Article, 'The Gap between Juridified and Abstract Victimhood'⁶⁹ Kendall and Nouwenre define the word representation in search of contextualizing justice. They assert that 'representation' in the Court process goes beyond the prosecution or the defence 'making present again' the facts as they were before the court.⁷⁰ They propound that representation is the making available facts before the court which at that moment on time are absent. Kendall and Nouwen by this fact distinguish the ICC from other ad hoc tribunals such as the ICTY and ICTR where victims as compared to alleged perpetrators were largely neglected therefore alleviating the idea of Justice.⁷¹ They postulate that the Rome Statute as severally supported by academia and Civil society really appreciates victims for victims and values their evidence as such.⁷² In fact, prima facie, the conclusion can be drawn therefore that the margin of error that otherwise existed in favor of alleged perpetrators by non-representation of victims has been narrowed.

Kendal and Nouwen also traverse the discourse of whether the ICC process can survive without State cooperation albeit, in an abstract sense. In their work, they refer to Pierre Bourdieu's Oracle Effect. Here all the parties- the Prosecution, the victims as well as the Bench act on a delegated authority of a much larger audience. They postulate that the prosecutor speaks on a usurped authority of the victims, the defence witnesses on the borrowed authority of the accused and the bench adjudicates on behalf of all members of the Rome Statute. They quickly point out

⁶⁷Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Appeals Chamber Doc. No. 1497, 79 (Sept. 25, 2009), <http://www.iccpi.int/iccdocs/doc/doc746819.pdf>. (Accessed 10th August 2015).

⁶⁸ See FP King and A La Rosa 'Penalties under the ICC Statute' in F Lattanzi and W Schabas (eds) *Essays on the Rome Statute of the International Criminal Court* (1999) 311, 316-319, 329.

⁶⁹ Sara Kendall and Sarah Nouwen, 'Representational practices At the international Criminal court: The gap between Juridified and Abstract victimhood' (2014) 76:235 *Law and Contemporary Problems*, 236. Hereinafter Kendall and Nouwen.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Leila N. Sadat, *On the Shores of Lake Victoria: Africa and the Review Conference for the International Criminal Court* 16-17 (Washington Univ. in St. Louis, Legal Studies Research Paper No.10-06-04, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1626323 [Accessed 10th August 2015].

though, that the relationship is mutually constitutive such that these powers are circular; not only representative but also represented. In a deductive sense therefore, the determination of the case needs a state party's cooperation in the trying of its nationals. If this does not happen, the court as an oracle of nations within the statute will continuously demand cooperation from the unwilling state. The cost of such non-cooperation being justice to the victims of the perpetuated crimes.

Finally, in their effort to determine the discriminatory nature of the ICC in the selection of witnesses who testify before the court, Kedal and Nouwen advance both practical and factual concerns. Inter alia, witnesses may chose not to trust in the process and therefore decide to withdraw notwithstanding their registration⁷³. Another system of victim elimination is by the judges when a suspect is eliminated from the list due to a low evidentiary standard. This was shown in *Prosecutor v Kenyatta*⁷⁴ where the court refused to recognize Hussein Ali as a suspect and therefore dropped his case. Other reasons for selective application of International Criminal Law include geographical mapping⁷⁵ such as in Congo where the prosecutor opened cases in particular areas locking out victims in other areas where crimes had also been committed.

The two scholars provide a concrete literature review on the theme of justice. They provide a clear view on the nexus between ICC structures and the Justice to the victims. They also explain how justice is directly affected by the contributions of the victims and the systems of the court. It however sidesteps the current discourse because it is not focused on the Kenyan situation.

Korir⁷⁶ on the other hand squarely deals with the question of state cooperation within the Kenyan context. The Article is published in 2010 and therefore gives proper insight to what transpired

⁷³ Isaiah Lucheli, *Ninety Three Post Election Violence Victims Withdraw From International Criminal Court Proceedings*, STANDARD DIGITAL (June 7, 2013), https://www.standardmedia.co.ke/?articleID=2000085360&story_title=93-pev-victims-withdraw-from-icc-proceedings (Kenya). [Accessed 10th August 2015].

⁷⁴ *Prosecutor v. Kenyatta (Kenya II)*, Case No. ICC-01/09-02/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, Pre-Trial Chamber II Doc. No. 382-Red (Jan. 23, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1314543.pdf> [Accessed 10th August 2015].

⁷⁵ See further *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, Appeals Chamber Doc. No. 1432, 40–66 (July 11, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc529076.pdf>

⁷⁶ Abraham KorirSing'oei, *The ICC As Arbiter In Kenya's Post Electoral Violence (2010)*19(6) Minnesota Journal of Int'l Law Online

when the 'ICC Fever'⁷⁷ was at a Pitch. His study is mostly centered on the CIPEV⁷⁸ report constituted by Justice Philip Waki and the reactions of the country as well as the continent. He propounds that the ICC prosecutor chose to proceed *Propriomotu*⁷⁹ due to the Government of Kenya's inability to prosecute the crimes committed by itself.⁸⁰

The framers of the Rome Statute intended that the ICC be a final option where Crimes have been committed on a Member State's soil.⁸¹ After the flawed elections, one Party denied bringing their grievance before the courts of Kenya stating that corruption and decay penetrated the judiciary. That it would be an exercise in futility to submit their grievances there. Alternatively, a petition on the floor of Parliament through a members bill was met with similar disinterest with only 8 of the 224 members of Parliament being present. The bill required 30 votes to pass. The Bill would establish a local tribunal to deal with the post-election chaos of 2007/08. Korir states that this was implicit unwillingness by the State to take up prosecution. At that moment in time, public opinion supported international intervention.⁸²

Korir postulates that this dalliance between the state and the ICC did not last as most of the actors mentioned within the CIPEV and later identified as suspects by the prosecutor were within government⁸³. It is this affliction that made the Kenya and the ICC queer bedfellows with the former amassing support from the African Union.⁸⁴ The A.U on its part took a non-cooperative stance toward the ICC.⁸⁵ Korir argues that the neo-colonial card which the A.U still holds does not hold water against its member states cooperating. This is because the Rome Statute was

⁷⁷ Daily Nation 2009

⁷⁸ Commission Of Inquiry Into Post-Election Violence [CIPEV], Report Of the Commission Of Inquiry Into Post-Election Violence Vii (2008) [Hereinafter CIPEV/WAKI Report], available at http://www.communication.go.ke/documents/CIPEV_FINAL_REPORT.pdf. [Accessed 10th August 2015].

⁷⁹ On its own motion

⁸⁰ Daily Nation (n 75) Agreed Minutes of Meeting of 3 July 2009 Between Prosecutor and Delegation of the Kenyan Government (July 3, 2009), available at <http://www.iccepi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Comm+and+Ref/Kenya/> (follow "Agreed Minutes of Meeting of 3 July 2009" hyperlink) [11th August 2015].

⁸¹ Preambular Clauses of the Rome Statute, Rome Statute of the International Criminal Court, art. 15(1), *opened for ratification* July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

⁸² John Ngirachu & Njeri Rugenep, *Kenya MPs Snub Debate on Local Tribunal Bill*, DAILY NATION, Nov. 11, 2009, available at <http://www.nation.co.ke/News/politics/-/1064/685208/-/xt2vytz/-/>. [Accessed 11th August 2015].

⁸³ Korir (n 12).

⁸⁴ Ibid; *AU Votes Against Cooperating with ICC Arrest Warrant for Bashir*, FRANCE24.COM, July 3, 2009, <http://www.france24.com/en/20090703-african-union-votes-end-cooperation-over-bashir-indictment-sudan-icc-darfur>.

⁸⁵ Korir (n 12).

welcomed in Africa as a remedy to accountability against wars that have plagued the continent. As a matter of fact, he points, 33 out of 54 of the African states had ratified the Statute by 2010 without duress or coercion from their colonial masters.⁸⁶

As a conclusion, Korir brings out the dwindling chances of justice to victims of 2007/08 Kenyan Post election violence, purely based on the non-cooperation by the government⁸⁷. He cautions the optimism of victims by selling out a poor record in ICC's performance in post-colonial Africa, where the A.U has taken a non-cooperation policy toward the Court. Interestingly, Korir's article, though vaguely outdated, focuses on some of the issues that this paper discusses; state cooperation as well as justice for the victims. However, unlike his article, this paper shows that it is the structure of the ICC that is at the root of most of the problems facing the Court and not solely cooperation as Korir argues. The paper brings out the fact that the court's inability to effectively perform its functions, including ensuring cooperation by states, stems from its structural shortcomings.

Generally the exit point of this study and most of the studies before is that most were written before the trials of Kenya's president and that the difficulty of prosecuting a sitting head of state had not been felt to the same magnitude. Hence most of the papers don't highlight the structural or otherwise the fallacy of Article 27, 13 and 86 of the Rome Statute. This paper differs because it appreciates that in practice there is discrimination and sitting heads of states still have functionally immunity. And the fact that ICC still depends on state parties to do the arrests and cooperation in case of a sitting head of state in cases where there is non-cooperation then the sitting head of state has "absolute immunity". This paper further highlights the success and failures of the ICC and appreciates the challenges. It goes further by trying to offer alternatives and other viable options for the court albeit little but can go a long way to ensure justice for the victims.

⁸⁶ Ibid.

⁸⁷ Ibid.

1.12 Chapter Breakdown

This study will comprise five chapters as per the breakdown below:

Chapter 1: Introduction

This chapter provides an overview of the study and deals with Introduction, Background, Statement of the problem, Hypothesis, Research questions, Objectives of the study, Theoretical framework, Literature review and Methodology of the study.

Chapter 2: What is the position of immunity in International Criminal Law

This chapter analyses the concept of absolute and functional immunity in as applied in customary international law and how they vary in application within the International Criminal Law as envisaged under Article 13 and 27 of the Rome Statutes.

The chapter also analyses this position against the main objective of setting up the Rome Statute i.e to ensure justice for the victims, hence this chapter also brings to light the role of justice to victims in the whole ICC process, because in many discourse the victims are usually forgotten.

Chapter 3: Structural gaps of the ICC affecting the prosecution of heads of states: A case study of Kenya and Sudan

This chapter analyses the structural gaps especially within the wording of the Rome Statute and the office of the Prosecutor.

The chapter uses the case study of Kenya and that of Sudan's president. The chapter also sheds into light the role played by party states e.g in the arrest of suspects, the case of South Africa's failure arrest Omar Al-Bashir is used as a case point and what is the legal position for failure of a party state to arrest a suspect?

Chapter 4: International Criminal Court-Successes and Failures

This chapter provides an analysis of the successes and failures the court has had and the focus especially of the failures is to try and appreciate the same link them to the fundamental structure of the court.

Chapter 5: Conclusion and recommendations

This chapter brings together the salient findings of the study and make recommendations that can offer justice to the victims amid the murky politics of the ICC.

CHAPTER 2. WHAT IS THE POSITION OF IMMUNITY OF HEADS OF STATE IN INTERNATIONAL LAW?

International criminal law and international human rights law are intertwined. Thus, the commission of each of the core international crimes (genocide, war crimes, crimes against humanity, torture, and the crime of aggression) almost always implicates violations of the human rights of individuals and groups. Consequently, where high-ranking state officials commit these crimes, internationally protected human rights are invariably abused...⁸⁸

In this chapter, arguments/ theories behind immunity of heads of states in international law and whether it can be waived in cases of gross violations of Human Rights shall be discussed. The study will follow the evolution of the principle of immunity of sitting heads of state and how the debate on whether or not their immunity can be waived came up in the wake of development and universal recognition of Human Rights. Additionally, the chapter will review the history behind the formation of the International Criminal Court and the Rome Statute, its role in international criminal law and how it relates to states. The role of the victims in their quest for justice shall also be addressed so as to espouse why their participation is paramount.

2.1 Concept of Immunity under Customary International Law

According to the Court, the rule of State immunity occupies an important place in international law and international relations: It derives from the principle of sovereign equality of States, which, as Article 2, paragraph 1, of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order. However, the Treaties of Westphalia 1648, managed to bring out the distinction between the personal sovereign and the state.⁸⁹ Likewise, monarchical sovereignty has been diminished by the rise of republicanism, anti-colonial nationalism and the emergence of democratic states.

⁸⁸ McGregor, Lorna, 'State Immunity and Human Rights: Is There a Future after Germany v. Italy?' (2013) 11:1 JICJ 125 at 125-127; Forcese, Craig, "De-immunizing Torture: Reconciling Human Rights and State Immunity" (2007) 52 McGill LJ 127.

⁸⁹ Treaties of Westphalia, 'Text of the Treaties' (Yale Law, 17th Century Literature) available at http://avalon.law.yale.edu/17th_century/westphal.asp, (Accessed 16/06/2015).

The ICJ in the Arrest Warrant Case⁹⁰ essentially cemented the principle of immunity of heads of state to the international criminal processes. Here, the ICJ held that serving heads of state, heads of government and foreign ministers enjoy a broad personal immunity from the jurisdiction of foreign domestic courts, including immunity from prosecution for international crimes. The court made it clear that such immunity subsists even where it is alleged that an international crime has been committed.⁹¹ It should be noted that many of the national courts that dismissed the foregoing cases against heads of state and heads of government on grounds of state immunity actually did so in the footsteps of this ICJ decision that is, on the grounds that immunity *ratione personae* absolutely bars foreign criminal proceedings.⁹²

The concept of sovereignty in international law is the foundation and framework of the international system; sovereignty essentially founds all international law concepts, principles and regimes. The reality today is that despite the fact that international law waives immunity for heinous crimes committed by heads of state; foreign state immunity with respect to acts committed in the exercise of official powers seems to remain the rule, even when these acts are committed in violation of a norm which has the character of *jus cogens*.⁹³

In the ICJ Jurisdictional Immunities Case⁹⁴, for example, Italy argued, *inter alia*, that the massacres carried out by German armed forces in Greece amounted to breaches of international humanitarian law and, therefore, violations of *jus cogens*. For Italy, these violations displaced the applicability of any rule of immunity for Germany before Italian and other foreign courts. However, the ICJ rejected this argument, holding that even if the acts of the German armed forces involved violations of *jus cogens* rules, the applicability of the customary international

⁹⁰Krajewski, Markus and Christopher Singer, 'Should Judges be Front-Runners? The ICJ, State Immunity and the Protection of Fundamental Human Rights' (2012) 16 Max Planck UNYB 22.

⁹¹Certain Questions of Mutual Judicial Assistance in Criminal Matters (Djibouti v France)(Merits) [2008] ICJ Rep 177. The ICJ subsequently reaffirmed its judgment (as regards heads of state) in Certain Questions of Mutual Judicial Assistance in Criminal Matters.

⁹²Foakes, Joanne, 'Immunity for International Crimes?: Developments in the Law on Prosecuting Heads of State in Foreign Courts' (2011) Chatham House Briefing Paper, November 2011, IL BP 2011/02 1 at 4.

⁹³ Arrest Warrant of 11 April, 2000 (Democratic Republic of Congo v Belgium) (2002) ICJ Reps 3 ("ICJ Arrest Warrant Case"); *Jurisdictional Immunities of the State Case* (Germany v Italy: Greece intervening) (2012) ICJ Reps 99 ("ICJ Jurisdictional Immunities Case").

⁹⁴ Murphy, Sean D, 'Immunity Ratione Personae of Foreign Government Officials and Other Topics: The Sixty-Fifth Session of the International Law Commission', GWU Law School Public Law Research Paper No. 2013-125.

law on state immunity was not affected.⁹⁵The ICJ may be right in this case, in view of its limited ability; the fact that it does not create customary international law, but finds it in state practices.⁹⁶

So in as much as Immunity has often been viewed as being an impediment to human rights enforcement by the individual especially when the violations are conducted by heads of state, Classical positivists argue that states are the only subjects of international law and that the duties and rights enunciated in the human rights instruments devolve on states. As such, international rules are to be interpreted against the backdrop of the position of the individual in traditional international law, as incapable of acquiring direct rights in international law. Based on this classical view of international law, immunities of states and state officials are paramount.

2.2 Hierarchy of Laws in International: The Power Play Between Immunity of Heads of State and Jus Cogens?

The concept of jus cogens is reflected in the Law of Treaties as an internationally accepted norm which cannot be derogated from and which can only be modified by a subsequent norm of the same character.⁹⁷ Sir Gerald Fitzmaurice describes jus cogens as, "... absolute obligations which operate in an imperative manner in virtually all circumstances. The obligation is, for each state, an absolute obligation of law not dependent on its observance by others..."⁹⁸ However, the class of norms that fall within jus cogens is not without controversy.

The concept of jus cogens has long been accepted as applying to the use of force, the law of state responsibility, the principle of non-discrimination based on racial grounds, the principle of self-determination, grave violations of human rights amounting to international crimes, namely slave trade, genocide, crimes against humanity and torture.⁹⁹

⁹⁵ibid at 142, para 97.

⁹⁶Rome (n 4)art 38(1)(b).

⁹⁷1155 U.N.T.S. 331, Article 53. See also the Article 53 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations 1986, (1986) 25 I.L.M. 543.

⁹⁸FITZMAURICE, GERALD G. "The General Principles of International Law Considered from the Standpoint of the Rule of Law.", (1957-II) 92 RdC, p.125

⁹⁹Gennady M. Danilenko 'International Jus Cogens: Issues of Law Making', (1991) 2 EJIL 42; Prosecutor v. Furundzija, Case No. IT-95-17/I-T, (1999) 38 I.L.M. 317; Antonio Cassese, *Human Rights in a Changing World*, (Polity Press, 1990)79;

Jus cogens are a peremptory norm. The Vienna Convention on the Law of Treaties¹⁰⁰ defines a “peremptory norm” as follows: a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.¹⁰¹

Among these peremptory norms¹⁰² are the international prohibitions on the commission of some heinous international crimes. These crimes are prohibited both under customary international law and international treaties. Certain human rights have attained jus cogens status thus have attendant obligation erga omnes and therefore prevail over other rules of international law, whether customary or treaty because by virtue of their peremptory nature they are higher norms.¹⁰³ Therefore, legal obligations arising from the jus cogens nature of a norm and the erga omnes nature of these legal obligations must include the non-recognition of immunities of states and Heads of states.

Jus cogens rule is widely accepted as having a superior status to other international law rules that have not attained a jus cogens quality. In the event of a conflict, it takes supremacy over these other rules as described here. First, when a rule of jus cogens is shown to be in conflict with a rule of ordinary international law relative to some specific case or state of affairs, the former shall prevail. Second, when a rule of jus cogens is shown to be in conflict with a treaty or a single treaty provision, the treaty or the single provision – if severable from the remainder of the treaty – shall be considered void. Third and more significantly, when a rule of jus cogens is shown to be in conflict with a rule of ordinary customary international law, the customary rule shall be considered void.¹⁰⁴

¹⁰⁰1969,1155 UNTS 339, art 53. United Nations, *Vienna Convention on the Law of Treaties*, (Adopted 23 May 1969, entered into force Jan. 27, 1980) United Nations, Treaty Series, vol. 1155, p. 331, available at: <http://www.refworld.org/docid/3ae6b3a10.html> [accessed 30 August 2015]. Art 33 hereinafter Vienna.

¹⁰¹ Costello, Daniel G, ‘Political Constructivism and Reasoning about Peremptory Norms of International Law’ (2011) 4:1 WUJR 1 at 2; Criddle, Evan J & Evan Fox-Dent, ‘A Fiduciary Theory of Jus Cogens’ (2009) 34:2 YJIL 331 at 331-33.

¹⁰² Barcelona Traction, Light and Power Co Ltd case; (Belgium v Spain) (1970) ICJ Reps 32 (“Barcelona Traction case”).

¹⁰³ Bassiouni, p.11-13, p.17. On Obligation Erga Omne; Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law*, (Oxford: Clarendon Press, 1989) 192

¹⁰⁴ Thirlway, Hugh, *The Sources of International Law* (Oxford University Press, 2014) 155;

Of special note is the fact that the rule of state immunity in international law has not attained jus cogens status. In fact, it is universally accepted that the state immunity rule is inferior to jus cogens rules in the hierarchy of international law norms.¹⁰⁵ According to the normative hierarchy theory, international law norms are of different hierarchies, depending on how fundamental their nature may be.⁹⁶ Thus, when a higher international legal norm (jus cogens) conflicts with a lower norm, the higher norm prevails.¹⁰⁶

On this ground, it would logically follow that where there is a conflict between the state immunity rule and the jus cogens constituted by the prohibition on any of the foregoing international crimes, the state immunity rule should give way. It could, therefore, be argued in this regard that, at least, the courts of various states should apply the theory that a violation of jus cogens norm constitutes an implicit waiver of state immunity.¹⁰⁷

2.3 Birth of ICC

The International Criminal Court (ICC) is the first permanent international court designed to prosecute the most heinous offenders of human rights. Unlike the International Court of Justice, the ICC is a criminal court with the power to try individuals for committing grave atrocities. The main goals of the ICC include putting an end to impunity for the worst crimes that impact the international community, bringing justice to victims and perpetrators, and deterring future acts of violence.¹⁰⁸ The court is an independent entity and is not an organ of the United Nations, although it retains an important relationship with the UN Security Council.¹⁰⁹

ON 17th July 1998 The Rome Statute of the International Criminal Court (Rome Statute) was signed.¹¹⁰ It had taken the General Assembly 50 years to create an international criminal court.

¹⁰⁵Orakhelashvili, Alexander, *Peremptory Norms in International Law* (Oxford University Press, 2008) 320; Caplan, Lee M, "State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory" *The American Journal of International Law* Vol. 97, No. 4 (Oct., 2003), pp. 741-781

¹⁰⁶ Shelton, Dinah, 'Normative Hierarchy in International Law' (2006) 100:2 *AJIL* 291; Linder falk, Ulf, 'Normative Conflicts and the Fuzziness of the International Jus Cogens Regime' (2009) 69 *ZaoRV* 961

¹⁰⁷ Johnson, Thora A, 'A Violation of Jus Cogens Norms as an Implicit Waiver of Immunity under the Federal Sovereign Immunities Act' (1995) 19:4 *Maryland JIL* 260.

¹⁰⁸CC - CPI, "ICC - About the Court," ICC - CPI, 2010, http://www.icc-cpi.int/en_menus/icc/ . accessed 20th August 2015

¹⁰⁹ICC-CPI, "*Understanding the ICC*" (ICC Outreach, 2013), 3-7. *ibid.*

¹¹⁰Rome Statute of the International Criminal Court art 1, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (asserting that "an International Criminal Court ... is hereby established" and " the jurisdiction and functioning of the Court shall be governed by the provisions of this Statute").

The reasons why it took long to form this court are both political and legal.¹¹¹ First prosecution and enforcement of law are guarded by sovereign prerogatives. Secondly, the subject-matter involves individual responsibility concerning serious crimes, and therefore it concerns people belonging to the government or the military who directly or indirectly may be involved in making or executing decisions that can be brought to the Court.¹¹²

The ICC was established through the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome Conference).

This was in contrast to how the ad hoc tribunals for Yugoslavia and Rwanda were created (ICTY¹¹³ and ICTR¹¹⁴). These Tribunals were created under UN Charter chapter VII as enforcement measures to deal with specific situations after crimes had been committed in those territories.

The ICC is set up by a multilateral treaty and not as the ad hoc tribunals through a Security Council resolution. It is a permanent court that has jurisdiction over crimes listed under article 5 of the Rome statute. This treaty entered into force in 2002, and it began its first investigation, the situation in northern Uganda, in 2003.¹¹⁵ Thereafter, investigations began in six other nations in Africa: Democratic Republic of Congo, Central African Republic, Kenya, Libya, and Cote d'Ivoire. The ICC was different from its predecessors because it was not established to deal with a particular case of violations of international law. It was set up to have a universal jurisdiction. Its preamble asserts, "The most serious crimes of concern to the international community as a

¹¹¹ Insert the necessary footnote or otherwise delete.

¹¹² Lee, Roy S, 'The Rome Conference and its Contributions to International Law' in *The International Criminal Court: the Making of the Rome statute: Issues, Negotiations and Results* Volume (Year) Journal page(By quoting 1-41, then you mean that all pages must be read.

¹¹³ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of the International Humanitarian Law Committed in the Territory of Former Yugoslavia Since 1991, established by the Security Council acting under Chapter VII of the United Nations Charter, 25 May 1993, Security Council Resolution 827 (1993), United Nations Security Council Official Records, Forty-eighth Session, 3217th Meeting S/RES/827 (1993), [ICTY Statute].

¹¹⁴ Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of the International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, between 1 January 1994 and 31 December 1994, established by the Security Council acting under Chapter VII of the United Nations Charter, 8 November 1994, Security Council Resolution 955 (1994), United Nations Security Council Official Records, Forty-ninth Session, 3253rd Meeting, S/RES/955 (1994), [ICTR Statute].

¹¹⁵ Alex K. Kriksciun, 'Uganda's Response to International Criminal Court Arrest Warrants: A Misguided Approach?' 16 (2007) *Tulane J Intl & Comp L* 213, 214 .

whole must not go unpunished” and resolves “to guarantee lasting respect for and the enforcement of international justice”.¹¹⁶

Thus, the Court states as its mission to create not only a permanent precedent, but also an institution enforce it. According to the Rome Statute “international community as a whole” has a duty to act in the interests of justice: obligation erga omnes

Situations can be brought to the ICC in three different ways. First, any country that is a State Party to the Rome statute can refer a Situation; the UN Security Council can refer a Situation to the ICC as was done in the case of Libya. Third, the Office of the Prosecutor can begin an investigation under Proprio motu powers as was the case in Kenya.¹¹⁷ Proprio motu refers to ‘one’s own initiative.’ It is the independent judgment of the Prosecutor to decide which crimes to investigate. Article 15 of the Rome Statute states that the Pre-Trial Chamber must approve the investigation, but the Prosecutor has little oversight aside from this. The first Situation that was brought to the Court by the Prosecutor’s own power was the Situation in Kenya. The conditions leading to the charges are described later in this paper.

The statute lays out the structure and jurisdiction of the Court. The body of the Court itself is made up of four ‘organs’: the Presidency; the Appeals, Trial, and Pre-trial Divisions; the Office of the Prosecutor; and the Registry.¹¹⁸ There is also an Assembly of States Parties, which is responsible for funding and overseeing the Court, as well as enforcing the Court’s decisions and currently has 119 member states.¹¹⁹

2.4 The Principle of Complementarity: State Relation with the Court

The principle states that the Court will only intervene when the state within whose jurisdiction the crime occurred is unable or unwilling to investigate and prosecute the crime.¹²⁰ In addition, unless called upon by the UN Security Council, the Court may only try cases that would

¹¹⁶ Rome(n 2), Preamble

¹¹⁷ William Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press, 2007), 160.

¹¹⁸ Ibid. Article 34.

¹¹⁹ Crimes of aggression are also included, but these have yet to be defined and enter into force.

¹²⁰ The Rome Statute, Article 1: “An International Criminal Court (“the Court”) is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions...”

¹²⁰ Registry International Criminal Court, Public Information and Documentation Section, *Understanding The International Criminal Court*, <<http://www.ice-cpi.int/iccdocs/pids/publications/uicceng.pdf>> accessed 10th August, 2015.

normally be under the jurisdiction of states that are members of the Court. Thus, states must voluntarily agree to the Court's authority in order for it to have any jurisdiction over cases there. As the Rome Statute lays out, "The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State."¹²¹

This setup ensures that the Court will, for the most part, respect the sovereignty of nation states and the right of states to accept or reject its jurisdiction.¹²² The framers of the Statute also restricted the Court's jurisdiction to a limited scope of crimes, endeavouring to "remain within the realm of customary international law"¹²³ as much as possible. The Rome Statute however does not provide the Court with any mechanism for ensuring the execution of its warrants and it must, therefore, rely on national authorities to carry out its decisions.

2.5 Victims and Their Quest For Justice

International justice institutions have been heavily criticized for their detached approach to the societies they assist and in particular for marginalizing or excluding victims. The ICC's mandate includes novel provisions for victim involvement.¹²⁴ Victims and affected communities have often been peripheral or entirely excluded from justice processes in response to mass violence. International criminal courts and tribunals since Nuremberg have set out to 'end impunity' with the principal aim of retribution; punishing those responsible and deterring further crimes. In these contexts, victims have been called as witnesses to give evidence but rarely have they had the opportunity to tell their stories or received public acknowledgement of the crimes committed against them.

Experience shows that if during judicial processes, victims are treated with dignity and afforded a meaningful role; it becomes an important part of victims' healing.¹²⁵ However, the

¹²¹Ibid Article 4.

¹²²A UN Security Council referral can go around this provision, as in the case of Sudan.

¹²³Arsanjani, "The Rome Statute of the International Criminal Court," *The American Journal of International Law*, Vol.93, No.1 (Jan., 1999), pp. 22-43 Published by: American Society of International Law : <http://www.jstor.org/stable/2997954> [Accessed: 28/05/2015]

¹²⁴Jorda C & de Hemptinne J, *The Status and Role of the Victim, in The Rome Statute of the International Criminal Court: a commentary*, 1387, 1388 (Antonio Cassese et al. eds., 2002) (stating that the Rome Statute "appears to mark a new step forward ... victims are accorded the double status denied to them by the provisions setting up the ad hoc Tribunals. First they are able to take part in the criminal process.... Secondly, they are entitled to seek form the Court reparations").

¹²⁵Ibid

implementation of these provisions and their implications on other areas of the Court's operations has been controversial.¹²⁶

Rome Statute provides in Art. 68(3) for the possibility of victims participating in all phases of the proceedings. Unlike its predecessors the Rome Statute affords victims of crimes explicit rights to make representations¹²⁷, submit observations¹²⁸ and have their views and concerns presented and considered.¹²⁹ The concept of "victim" has been and still is a much contested one in international law so that the position the ICC takes on this matter will be important.¹³⁰ In the Rome Statute there is no definition of the term "victim", but there is a definition in the RPE, Rule 85, Section III. Section III provides a special division with the headline "victims and witnesses". There, the term "victim" has been defined as follows: "For the purpose of the Statute and the Rules of Procedure and Evidence: (a) "Victims" means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court; (b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes."

Why is Victim Participation before The ICC Important?

2.5.1 Giving a voice to victims

The idea of "giving a voice to victims" has been mentioned relatively frequently¹³¹ and has been the only purpose of victim participation mentioned by the ICC itself.¹³²

There are different possibilities as to how to interpret this term. On the one hand it could mean to grant victims a right to a say in the way that they may express legal opinions or suggestions, maybe also through a legal representative. On the other hand the term "voice" could be

¹²⁶Ibid

¹²⁷Art.15(3).

¹²⁸Art.19(3).

¹²⁹Art.68(3).

¹³⁰ Silvia A. Fernández de Gurmendi, 'Definition of Victims and General Principle' in Roy Lee (ed) *The International Criminal Court: Elements Of Crimes and Rules of Procedure and Evidence* 427, 429 (Publisher 2001)

¹³¹ McDonald, A. *The Role of Victims and Witnesses in International Criminal Trials*. (Publisher 2002); Treaty Enforcement and International Cooperation in Criminal Matters with special reference to the Chemical Weapons Convention. R. Yepes-Enriques and L. Tabassi. *The Hague*, T.M.C. Asser Press: 257-276. At page 259.

¹³² 237 See PTC I, Situation in the Democratic Republic of the Congo, Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 of 17 January 2006, Case No. ICC-01/04, paras.50, 51 Please clarify on the nature of these publications; Journals or Books, edited books or reports or conference papers.

understood in a much more literal sense as giving victims the possibility to appear in person and tell their stories. "Giving a voice to victims" shall therefore be examined as the first possible aim of victim participation.

As mentioned above given that the Prosecutor's actions will most probably be governed by the desire to procure a successful conviction, it is possible that victims' interests and the interests of the Prosecutor will not coincide.¹³³ For this reason it has been argued that an independent voice of the victims consists in the right to have the prosecutor's right to punitive justice balanced with the right of victims to restorative justice.¹³⁴ Similarly others have suggested that the rationale behind provisions on victim participation is also often to make the victim or his or her representative a watchdog over the fairness of the proceedings with respect to the victim's personal interest¹³⁵ of proceedings, by ensuring a view other than the Prosecutor's is presented to the Chamber.¹³⁶

It seems that the ICC favours a similar interpretation as one Chamber has said that in its opinion, the Statute granted victims an independent voice and role in proceedings before the Court and that it should be possible to exercise this independence, in particular, vis-à-vis the Prosecutor of the International Criminal Court so that victims can present their interests.¹³⁷ Similarly in the victim information booklet it is said that by presenting their own views and concerns to the judges, victims are given a voice in the proceedings that is independent of the Prosecutor. This would help the judges to obtain a clear picture of what happened to them or how they suffered, which they might decide to take into account at certain stages in the proceedings thus eventually leading to an impact on the way proceedings were conducted and in the outcomes.¹³⁸

¹³³Mekjian, G. J. and M. C. Varughese' Hearing the victim's voice: analysis of victims' advocate participation in the trial proceeding of the International Criminal Court '17(2005)Pace International Law Review 33.

¹³⁴Ibid.

¹³⁵Donat-Cattin, D. Art. 68(How do you mean?) "Protection of victims and witnesses and their participation in the proceedings". Volume (1999) Journal Commentary on the Rome Statute of the International Criminal Court.

¹³⁶Musila G, Rethinking International Criminal Justice: Restorative justice and the rights of victims at the International Criminal Court, (Berlin, Lap Lambert Academic Publishing 2011), 153.

¹³⁷PTC I, *Situation in the Democratic Republic of the Congo*, Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 of 17 January 2006, Case No. ICC-01/04, para. 51. Define Nature of Publication.

¹³⁸Victims Before The International Criminal Court A Guide For The Participation Of Victims In The Proceedings of The Court pg 12 available at <http://www.icc-cpi.int/NR/rdonlyres/C029F900-C529-46DB-9080-60D92B25F9D2/282477/160910VPRSBookletEnglish3.pdf> accessed 20th July 2015.

2.5.2 Retribution

One of the underlying purposes of victim participation could also be to give victims the opportunity to satisfy any potential desires for retribution. It has been said that one of the main goals for the participation of victims in the trial is to seek a conviction.¹³⁹ Whether this really is the case, remains to be seen. But if retribution is and remains one of the main purposes of punishment, it may be assumed that victim participation is also aimed at satisfying any possible desire for retribution. This would not, of course, signify that the victim will have a direct impact on sentencing, being an “objective” matter on which personal opinions will have no bearing. The legal expression of retribution in the form of the sentence will remain in the hands of the Court and the Prosecution while the victim will only have the possibility to state his or her opinions. Retribution and vengeance are not to be confused even if they may share a common structure. Retribution is impersonal, personal vengeance has no place in the courtroom.¹⁴⁰

2.5.3 Norm Stabilization/Restoration of the Rule of Law

Norm stabilization or the restoration of the rule of law has been singled out as one of the purposes that could become more important in international criminal law than other purposes. Victim participation is considered one of the essential tools for bringing the Court and its proceedings closer to the persons who have suffered atrocities.¹⁴¹ Victim participation has also been seen as a means of improving the public’s identification with the plight of victims, to help tame or channel the anger and frustration felt by victims and others who no longer trust in the states’ willingness or ability to combat crime.¹⁴²

2.5.4 Reconciliation

There are indications that collective reconciliation will be made part of the punishment purposes of the ICC, even if the ICC cannot achieve reconciliation on its own but can only promote

¹³⁹Zappalà, S. *Human Rights in International Criminal Proceedings*. (Oxford University Press 2003) 225.

¹⁴⁰Crocker, D. A. *Retribution and Reconciliation*. (Maryland, Institute for Philosophy and Public Policy 1999.).

¹⁴¹Bitti, G and H. Friman (2001). *Participation of Victims in the Proceedings. The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence*. R. S. Lee, Ardsley, (New York, Transnational Publishers: 456-474. At page 467)

¹⁴²Aldana-Pindell, R. (2004). *An Emerging Universality of the Justiciable Victims' Rights to the Criminal Process to Curtail Impunity for State-Sponsored Crimes*. *Human Rights Quarterly* 26: 605-686. At page 613.

it.¹⁴³ Accordingly, one aim of victim participation could be to promote reconciliation. Indeed, during the negotiations of the Rome Statute, delegations stressed the contribution of victims' participation to the process of reconciliation. Through victim participation the offender should be made more aware that he or she has not only committed a serious breach of public norms, but that he or she has also inflicted harm and suffering on another human being.¹⁴⁴ Others also see victim participation as a necessary component in successfully promoting a reconciliation process.¹⁴⁵

2.5.5 Truth

As mentioned above, it will not be possible for the ICC to avoid contributing to the shaping of history even if its truth-finding function is confined to a "legal truth" and to the facts pertaining to specific accused persons. It may be assumed that victim participation contributes greatly to this process and that it is designed to do so. It has indeed been argued that victim participation is essential if the truth is to be discovered and punishment is to be just. Information on the impact of the offence on the victim provided by victims themselves could for example help in assessing the seriousness of the offence.¹⁴⁶ It will also ensure that the Court, and the international community at large, is made fully aware of the suffering endured by the victims.¹⁴⁷

But do victims contribute in a different way or more to the finding of truth in their capacity as victims than witnesses?¹⁴⁸

In conclusion it can be said that victims do indeed impact on the finding of truth. However, as shown above, as long as victims do not testify as witnesses at the same time, their impact is

¹⁴³ H. von Hebel, J. G. Lammers and J. Schukking, Reflections on the International Criminal Court, Essays in Honour of Adrian Boos The Hague, TMS Asser Press: 77-89. At pages 75, 88.

¹⁴⁴ Timm, B. (2001). *The Legal Position of Victims in the Rule of Procedure and Evidence, International and National Prosecution of Crimes under International Law*. H. Fischer, C. Kreß and S. R. Lüder. Berlin, Berlin Verlag: 289-307. At page 293.

¹⁴⁵ Stehle, S. (2006). *Das Strafverfahrensinnmaterielle Wiedergutmachung*. Frankfurt am Main. At page 40.

¹⁴⁶ Donat-Cattin, D. (1999). Art.68 Protection of victims and witnesses and their participation in the proceedings, Commentary on the Rome Statute of the International Criminal Court, Observers'Notes Article by Article. O. Triffterer. Baden-Baden, Nomos Verlagsgesellschaft. At page 873.

¹⁴⁷ Stahn, C, H. Olasolo, et al. (Participation of Victims in Pre-Trial Proceedings of the ICC.(Journal of International Criminal Justice 4(1) 2006) 219-238. At page 221.

¹⁴⁸ D. McGoldrick, P. Rowe and E. Donnelly. *Victim Participation at the International Criminal Court: A Triumph of Hope over Experience? The Permanent International Criminal Court. Legal and Policy Issues* Oxford and Portland Oregon, Hart Publishing: 315-334. At page 327

rather limited and should not be overestimated. Still, contributing to the truth can be seen as one of the aims of victim participation even if its impact is limited. This would appear to limit the number of statements and the maybe following ordering of the production of further evidence.

2.5.6 Rehabilitation of the victim

Another goal of victim participation could be the “rehabilitation” of the victim. This can be understood in the sense of an individual healing or regaining his or her dignity for instance through the Court’s acknowledgment of the victim’s suffering.¹⁴⁹ It is said that for survivors of torture and organised violence, receiving some form of acknowledgement of what they have endured is particularly important therapeutically. Acknowledgement is said to generally aid the healing process and can be the key to achieving a sense of closure.¹⁵⁰ Victim participation is therefore arguably essential if one wants to avoid secondary victimization and victim alienation.¹⁵¹ The participation process is said to have a healing effect because victims can feel part of the process that directly affects their interests. Victims to take back control of their lives and to ensure that their voices are heard, respected, and understood.¹⁵²

Participatory rights are said to bolster the dignity of victims by giving them a voice in proceedings, giving them a feeling of self-determination. The debasement and dehumanization that the perpetrator has inflicted on the victims is thus symbolically reversed. Participation has even been termed to be non-material reparations.¹⁵³

2.5.7 Confrontation

Confronting the perpetrator with the suffering of the victims could be another purpose of victim participation. It is important that the perpetrator is also made aware of facts that are beyond the objective elements of crime he or she committed but which have a significant impact on the victim, such as emotions, or injuries with sometimes lifelong after-effects.

¹⁴⁹ Berlin Verlag, Jorda, C. and J. de Hemptienne (2002). *The Status and Role of the Victim. The Rome Statute of the International Criminal Court, A Commentary.* A. Cassese, P. Gaeta and J. R. W. D. Jones. Oxford, Oxford University Press. 2: 1387-1419. At Page 194.

¹⁵⁰ Werle, G. *Principles of International Criminal Law.* The Hague, TMC Asser Press. (2005). At Page 31

¹⁵¹ Heikkilä, M. *International Criminal Tribunals And Victims Of Crimes.* (Turku, Institute for Human Rights, Abo Akademi University) . (2004). At page 142.

¹⁵² Danieli, Y. "Victims: Essential Voices at the Court." *Bulletin of the victims right working group*(2004). 1: 6.

¹⁵³ Stehle, S. *Das Strafverfahren als immaterielle Wiedergutmachung.* Frankfurt am Main. . (2006). At pages 45, 331.

However, it seems that just as with the 'rehabilitation of the victim,' confrontation could be an important factor in achieving reconciliation or other goals and will therefore probably take place. However, it should not be seen as an explicit aim of victim participation, as it is indeed conceivable that the perpetrator will not necessarily be confronted with individuals but rather with their legal representative.

2.6 Conclusion

While state immunity or state immunity is a desirable within the context customary international law, it was purposely avoided through Article 27 of the Rome Statute to ensure effective prosecution of perpetrators of atrocities especially where such perpetrators hold high offices. The paper has successfully argued that this objective has not been achieved. Using the case Uhuru Kenyatta and the fact that the Office of the Prosecutor relies on state parties for co-operation there is a virtual or in practice the sitting heads of state in fact have immunity.

CHAPTER 3. STRUCTURAL GAPS OF THE ICC AFFECTING THE PROSECUTION OF HEADS OF STATE: A CASE STUDY OF KENYA AND SUDAN

When the Office of the Prosecutor (OTP) of the ICC withdrew the case against President Kenyatta, a number of questions were raised regarding whether or not prosecution of heads of states is a worthwhile endeavor. This situation was exacerbated further by the challenges the ICC faced and still is facing in relation to the refusal of states to arrest and surrender President Bashir of Sudan years after the first warrant of arrest was issued against him¹⁵⁴. It because of such things that Judge Antonio Cassese once referred to the International Criminal Court as '*giant without arms and legs*' who '*needs artificial limbs to walk and work*'.¹⁵⁵ Is this a statement of fact or a misrepresentation of what the International Criminal Court is? This chapter seeks to analyze the cases before the ICC involving sitting heads of state with an aim of proving whether or not the above statement is true.

The political sensitivity in prosecuting sitting heads of states goes without saying. First, because heads of states, being politicians, have very strong supporters (and detractors) in their respective countries and secondly is that the prosecution of a head of state raises issues of state sovereignty and immunity of heads of state which are the very under pinning of international law and international relations.¹⁵⁶

One other factor that has been a thorn in the flesh for the Court is the fact that the heads of state that have so far been prosecuted are all African ergo worsening the relationship between Africa and the ICC.¹⁵⁷

The African Union during the 13th AU Heads of States Summit held in Sirte, Libya called for all African States Parties to the Rome Statute to desist from cooperating with the Court or arresting

¹⁵⁴ International Criminal Court, Summary of the Decision of Pre-Trial Chamber I on the Prosecution's Application for a Warrant of Arrest for Omar Hassan Ahmad Al Bashir, available at <http://rav.haguejusticeportal.net/Docs/ICC/Bashir%20Warrant%20Summary.pdf> (Accessed 28th August 28, 2015)

¹⁵⁵ A Cassese, '*On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law*' 9 EJIL (1998) 1, at 13

¹⁵⁶ Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), International Court of Justice (ICJ), 14 February 2002, "*though state officials have immunity under international law while serving in office, the immunity is not granted to them for their own benefit, but given to ensure the effective performance of their functions on behalf of their respective states.*"

¹⁵⁷ "AU Member States shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El Bashir of The Sudan." Decision during the 13th AU Heads of States Summit of Parties to the Rome Statute, held in Sirte, Libya.

the President of Sudan.¹⁵⁸ During 17th A.U Heads of State and Government Summit in Malabo, Equatorial Guinea on 15 July 2011, the A.U condemned the issuance of arrest warrants by the ICC for Muammar Mohammed Abu Minyar Gaddafi and two other high-level Libyan officials. Participating states at the summit also criticized the UNSC for not requesting the ICC to defer investigations and prosecutions in the situation in Darfur, Sudan under Article 16 of the Rome Statute. Such a request by the UNSC had the effect of suspending the ICC arrest warrant against Sudanese President Omar Al-Bashir.¹⁵⁹

Aside from these political issues, a very practical challenge relating to prosecution of heads of state is ensuring cooperation of states. As is well known, the ICC does not have an enforcement mechanism and relies entirely on the cooperation of states. This is provided for under article 86 of the Rome Statute. As has been demonstrated by the case against Presidents Bashir and Kenyatta, the prosecution of sitting heads of state complicates states parties' obligation to cooperate.¹⁶⁰ To begin with, President Bashir's case gave rise to seemingly conflicting obligations which have been the subject of debate among scholars since the first warrant was issued against him in 2009.¹⁶¹

The crux of it is that article 27 of the Rome Statute provides that immunities, whether under international or national law, including that of heads of state, shall not apply before the ICC.¹⁶² However, article 98¹⁶³ provides that the ICC shall not request a state to cooperate if such cooperation would make the state breach the immunities of a third state.

Thus the question is whether the prosecution of a sitting head of state, in light of the above, is a worthwhile enterprise? And even if conviction can be ensured, which often does not happen, the consequences of such prosecution, such as, the reluctance of states to cooperate with the ICC when a sitting head of state is involved; the likely loss of more lives and suffering upon conviction, seem to outweigh the benefits of a possible conviction.

¹⁵⁸ Ibid

¹⁵⁹ ICC Press Release, African Union Maintains Contradictory Stance on Justice, (July 18, 2011)

¹⁶⁰ Tladi D, "The African Union and the International Criminal Court: The battle for the soul of international law" 34 *South African Yearbook of International Law* (2009), 57-69, 57-58

¹⁶¹ P. Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?', *Journal of International Criminal Justice*, Vol. 7, 2009, pp. 315-332.

¹⁶² Rome Statute of the International Criminal Court (17 July 1998) 2187 UNTS 90, art 27 [Rome Statute]" Article 27 of the Rome Statute

¹⁶³ Ibid, Article 98

3.1 A Case Study of Kenya

Justice Cascade” refers to the work of Kathryn Sikkink who theorizes that key turning points in the development of international criminal law (ICL) have created a safer world where violators who previously held any level of power can potentially be tried¹⁶⁴. Is this the case for Kenya?

Kenya’s case represents a critical turning point in the history of international justice. The situation is a critical turning point because it is the first time in which the cases were initiated by the ICC prosecutor¹⁶⁵.

In 2009, the ICC opened an investigation regarding post-election violence in Kenya in 2007-2008. The ICC cases were initiated by the Prosecutor Ocampo under the Court’s Proprio motu powers.¹⁶⁶The situation was not referred by the UN Security Council or by the Republic of Kenya. The Kenyan national judiciary had six years to progress towards prosecutions but had failed to do so. Thus, the ICC relying on the principle of complementarity in its investigation and subsequent prosecutions of citizens of the Republic of Kenya took up the matter¹⁶⁷.

The Office of the Prosecutor identified six elites who were accused of organizing the violence. These elites were the “Ocampo Six.”¹⁶⁸The Pre-Trial Chamber confirmed charges against three of the accused in January 2012.¹⁶⁹

In one case, Uhuru Muigai Kenyatta is accused of being an indirect, co-perpetrator of crimes against humanity including rape, murder, deportation, persecution and other inhumane acts.¹⁷⁰The circumstances however changed when Uhuru Kenyatta was elected president of Kenya in the 2013 elections. The subject matter was now a sitting head of state courtesy of the Jubilee Alliance Party which was created as a pact between Ruto and Kenyatta in an effort to

¹⁶⁴ Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (New York: W. W. Norton & Co., 2011).

¹⁶⁵ William Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press, 2007)160.

¹⁶⁶Ibid.

¹⁶⁷Ibid,134.

¹⁶⁸ “Ocampo Six” were Uhuru Kenyatta, Francis Muthaura and Mohammed Hussein Ali who were opposed to members of the political party Orange Democratic Movement (ODM) and William Ruto, Joshua Arap Sang and Henry Kosgey who were ODM members.

¹⁶⁹ Originally Henry Kosgey, a fourth, did have his charges confirmed by the Pre-Trial Chamber, but his case was dropped shortly afterwards.

¹⁷⁰ Kenya ICC-01/09,” (ICC - CPI) < http://www.iccpi.int/en_menus/icc/situations > accessed e.g., , accessed on 25th July 2015.

show their innocence and an attempt to get their cases dropped by the ICC¹⁷¹. The effort of the ICC to provide justice was the mechanism that directly created this alliance, although the ICC did not cause the Kenyatta Administration to be elected, despite popular beliefs.¹⁷²

Thereafter, the Kenyan National Assembly voted to withdraw from the Rome Statute in September 2013. In order for the Republic of Kenya to legally withdraw from the ICC, the Kenyan Government must submit a written statement to the UN Secretary General¹⁷³. This has not yet occurred and the ICC still has temporal jurisdiction over crimes committed in Kenya between 2002 and one year after the date of the withdrawal¹⁷⁴.

The location of the trials also raised accusations from many who claim that justice is difficult to bring to the people of Kenya if the trials are held in Europe. The current ruling on the presence of the accused is that Kenyatta does not always have to be physically present but Ruto must be present during most of his trial and will be excused on a case by case basis.¹⁷⁵

The Kenyatta Administration has continued to push for the ICC to postpone¹⁷⁶ or drop the cases against sitting heads of state for a variety of reasons. The original arguments claimed that due to instability in the country (such as the terrorist attack at Westgate Mall) and the requirements of being the head of government, the cases should be postponed.¹⁷⁷

The African Union requested that the UN Security Council defer the cases for 1 year based upon insecurity in Kenya.¹⁷⁸ The trial of Uhuru Kenyatta has in fact been postponed four times now¹⁷⁹. Originally set in July 2013, the defense and prosecution both needed more time to prepare a case

¹⁷¹Simon Allison, 'Kenyan Election Alliance between Bitter Enemies united by ICC Charges' (the guardian) <<http://www.theguardian.com/world/2012/dec/04/kenya-election-alliance-rival>> accessed 11th January 2015

¹⁷²Simon Allison, 'Kenyan Election Alliance between Bitter Enemies united by ICC' (Daily Maverick) <<http://www.dailymaverick.co.za/article/2012-12-04->> accessed 11th January 2015.

¹⁷³Andrew Cannon, "Kenyan MPs Approve Motion to Withdraw from the International Criminal Court | Lexology," accessed June 15, 2014, <http://www.lexology.com/library/detail.aspx?g=b0192db0-c4e1-4315-8cf3-494785213739>.

¹⁷⁴Ibid.

¹⁷⁵Judgment 1669852, "Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber V(A) of 18 June 2013 Entitled 'Decision on Mr. Ruto's Request For Excusal from Continuous Presence at Trial,' ICC - CPI, July 31, 2013, http://www.iccpi.int/en_menus/icc/situations.

¹⁷⁶Murithi Mutiga, 'UN Security Council Rejects Kenya's ICC Deferral Bid', Africa Review, March 19, 2011. Both the ICC and the UNSC have rejected Kenya's and the African Union's request for a deferral.

¹⁷⁷Daniel Howden, 'Terror in Westgate mall: the full story of the attacks that devastated Kenya' (the guardian) <<http://www.theguardian.com/world/2012/dec/04/kenya-election-alliance-rival>> accessed 11th January 2015.

¹⁷⁸"Africa Backs ICC Kenya Case Delay," (BBC News, February 1, 2011), <http://www.bbc.com/news/world-africa-12332563>.

¹⁷⁹Ibid.

and so it was pushed back to October, then November, then February 5th 2014 and is now scheduled for October 7th, 2014.¹⁸⁰ The trials were not postponed for reasons such as citing the power of the accused as this could have sent a powerful negative message. For instance, if a defendant can avoid trial by working to settle an unstable country, then they have an incentive to destabilize that said country, and of course to entrench themselves in power. In reality, the Republic of Kenya never attempted to hold any trials surrounding the prosecution of offenders in the post-election violence of 2007-2008. There are no current, public plans to begin trials. In other countries, show trials have been held after periods of intense violence to humiliate one leader or political party while attempting to promote a sense of unity among the remaining population.¹⁸¹ These trials are not fair or just since the judge has often already decided the defendant is guilty. The lack of action by the Kenyan government, especially within the judicial system highlights the unwillingness of the government to prosecute.

Outside of the political and judicial arenas, the ICC has had direct impacts on individuals, especially victims, witnesses and those seeking reparations. There were 628 victims who filed for recognition as victims from the Court at the start of the Ruto/Sang trial and they are represented by Wilfred Nderitu.¹⁸² Nderitu is allowed to examine witnesses and protect the rights of his clients. He recently ensured that testimony by a witness was not altered by clarifying translation problems.¹⁸³ Yet in 2013, 93 victims requested to withdraw from the trial, which many speculated was due to security concerns.¹⁸⁴

The victims (from various ethnic groups) jointly wrote a letter to the Victims and Witnesses Office explaining their withdrawal.¹⁸⁵ The group claimed that they did not support the prosecution of the newly elected President or his Deputy President. They requested that their names be removed from the list because they did not want to claim for compensation from

¹⁸⁰ Ibid .

¹⁸¹ Ibid .

¹⁸² ICC Press Release, "Ruto and Sang Trial Opens at the International Criminal Court," ICC - CPI, September 10, 2013, http://www.icc-cpi.int/en_menus/icc/press

¹⁸³ Tom Maliti, "Defense Lawyer Says Ruto Did Not Attend Two Rallies; Witness Insists Ruto Was Present," *International Justice Monitor*, February 26, 2014, <http://www.ijmonitor.org/2014/02/>

¹⁸⁴ "Standard Digital News, : More Witnesses and Victims Withdraw from Ruto's ICC Case, accessed March 2, 2014, <http://www.standardmedia.co.ke/ktn/> .

¹⁸⁵ Bernard Momanyi, "Kenyan Victims Withdraw From ICC Proceedings - Institute for War and Peace Reporting - P213," Institute for War and Peace Reporting, June 7, 2013, <http://iwpr.net/report-news/kenyan-victims-withdraw-icc-proceedings>

people we don't have any complaint against.¹⁸⁶ The letter also stated that the victims did not feel that the Prosecutor had their best interests at heart.¹⁸⁷ While there is speculation as to whether the claims in the letter came of their own free accord or were influenced, 17% of the victims left the judicial proceedings before the Ruto/Sang trial began. The withdrawal could signal many things.

Perhaps the victims felt pressured, threatened, or were paid to drop the cases, perhaps the victims truly felt like the ICC was not listening to their needs, or that they are simply more loyal to their leaders than to foreign entities. It is also important to point out that the witnesses to the trials risk their safety and that of their family, their jobs and financial security if they choose to testify for the ICC. Many witnesses have dropped out because of security concerns or have been removed by the Prosecutor for questions of the truth of testimony after recanting statements.¹⁸⁸ The Kenyatta Trial has not started yet, and the exact original number of witnesses has not been reported, but in the last year alone 7 were removed and there are now 27 witnesses left.¹⁸⁹ The witnesses who are no longer testifying are the key witnesses in both cases which ensured that the cases would be confirmed by the ICC Pre-Trial Chamber¹⁹⁰. The impact of the removal of these witnesses is unknown was grave because it resulted in the case against Kenyatta being dropped.

The Kenya National Dialogue and Reconciliation Monitoring Project (KNDR) found that as early as April 2010, witnesses and potential witnesses were being intimidated into silence. "Deaths, threats, and intimidation of potential witnesses have forced many witnesses into hiding locally or abroad. The absence of a functional witness protection program has made it difficult for some of the witnesses to remain in the country (sic)."¹⁹¹

3.2 A Case Study of Sudan.

In its decision of 4 March 2009, the Pre-Trial Chamber (PTC) of the International Criminal Court (ICC) authorized the issuance of an arrest warrant for the Sudanese President, Omar Al-

¹⁸⁶Ibid

¹⁸⁷ Ibid

¹⁸⁸ Tom Maliti, "Prosecutor Withdraws Seven Witnesses in Kenyatta Case in Past Year," (International Justice Monitor, January 16, 2014), <http://www.ijmonitor.org/2014/01/>

¹⁸⁹ Ibid

¹⁹⁰ Ibid

¹⁹¹ South Consulting, "The Kenya National Dialogue and Reconciliation (KNDR) Monitoring Project Status of Implementation," (KNDR, April 2010), <http://www.dialoguekenya.org/Monitoring/>.

Bashir.¹⁹² Subsequently, the PTC directed the Registry to transfer a request for the arrest and surrender of Al-Bashir to the majority of the State community. The juridical process underpinning the case of Al-Bashir was set in motion by the Security Council in September 2004, when it called for the establishment of an international commission to conduct an investigation into the crimes committed in the Sudanese region of Darfur.¹⁹³ This was based on the report that was subsequently published, which established that “the Government of the Sudan and the Janjaweed are responsible for serious violations of international human rights and humanitarian law amounting to crimes under international law”¹⁹⁴. The Security Council, by means of Resolution 1593 (2005),¹⁹⁵ referred the situation in Darfur, from 1 January 2002 onwards, to the ICC.

This referral, which the Council issued while acting under Chapter VII of the Charter of the United Nations (UN), was the first time in the Court’s history that the Council exercised its power to trigger the jurisdiction of the ICC. This unprecedented judicial measure, through which an incumbent Head of State of a non-State Party was charged before the ICC, has prompted a series of legal questions on the principle of immunity¹⁹⁶ that lie at the heart of the development of international criminal law. It is the interplay and the tension between these three legal regimes, namely the ICC as a treaty-based Court, the Security Council as an authoritative political body, and customary international law as the underlying general legal framework, which makes the specific case of Al-Bashir one of such a compelling nature.

The prosecutor’s investigation into the Darfur situation, which has led to the warrant for the arrest of Al-Bashir, presents an unprecedented scenario, it being the first time that the Security

¹⁹² Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, I I (March 4, 2009), <http://www.icecpi.int/icedocs/doc/doc639096.pdf> (reporting that on March 31, 2005, the UN Security Council referred the matter in Darfur to the Prosecutor of the ICC). 98. See id. 13 (stating that the prosecutor

¹⁹³ The creation of the International Commission of Inquiry on Darfur was done in pursuance of UN SC Res. 1564, 18.9.2004.

¹⁹⁴ International Commission of Inquiry on Darfur, Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General 3 (25.1.2005), available at the ICC homepage, <http://www.icc-cpi.int> (hereafter “Commission of Inquiry Report”).

¹⁹⁵ UN SC Res. 1593, 31.3.2005.

¹⁹⁶ P. Gaeta, ‘Does President Al Bashir Enjoy Immunity from Arrest?’, *Journal of International Criminal Justice*, Vol. 7, 2009, pp. 315-332.

Council has exercised its powers to refer a situation to the Court.¹⁹⁷ This particular triggering procedure is one of the three possible ways in which the Prosecutor can start an investigation¹⁹⁸, 45 and, aside from the possibility for an ad hoc agreement under Art. 12 (3), is the sole mechanism for bringing a situation within a non-State Party before the Court. However, unlike the two other trigger procedures, the legal implications that stem from this *modus operandi*, and in particular the Prosecutor's decision to investigate a situation in a non-State Party¹⁹⁹, are not elaborated upon in the Statute anywhere outside of Art.13²⁰⁰, nor do the *travaux préparatoires* shed much light on the issue.

It remains contentious to what extent the referral of the situation in Darfur – which places Sudan within the jurisdictional ambit of the Court – alters the status that Sudan holds in relation to the ICC. Does the resolution, either by virtue of its text or as an inherent implication to a referral, completely strip Sudan of its impervious non-State Party standing, thereby rendering Sudan fully bound to the Rome Statute as a whole? Most notably, with regard to the discussion on immunity, to what extent does the referral by the Security Council renders Art. 27's dismissal of immunity applicable to Sudan, it has not ratified the Rome Statute? It is this latter question that not only lies at the heart of the analysis of the case against Al-Bashir, but that, more generally, will play a role in qualifying the reach that contemporary international criminal justice has vis-à-vis Heads of State.

To analyze the possibility of the ICC to apply Art. 27 to the State of Sudan, and, subsequently, prosecute Al-Bashir before the Court, it would be useful to first and foremost understand the duty various groups of states have to the ICC.

3.2.1 Duty of State Parties to the ICC In The Matter Relating to Omar Al- Bashir

States Parties by virtue of their ratification of the Statute, have a legal obligation to fully adhere to the regime of international cooperation and judicial assistance, as is set out under Part 9 of the

¹⁹⁷ The Council's authority to do so stems from Art. 13 (b), which sets out the possibility for the Prosecutor, following a Council referral, to exercise his jurisdiction over the situation in question.

¹⁹⁸ The other two mechanisms for triggering the Courts jurisdiction being via a State Party referral to the Prosecutor (Art. 13 [a] ICC-St.) or by the Prosecutor's use of its powers to initiate an investigation *proprio motu* (Art. 13 [c] ICC-St.).

¹⁹⁹ Akande, 2009; A. Derbal, 'The ICC's Involvement in the Situation in Darfur: Not a Threat to Peace', (University of Notre Dame, Center for Civil and Human Rights), Working Paper No. 1 Winter 2008.

²⁰⁰ (Rome n 4)Art. 13(b) of the Rome Statute.

Statute.²⁰¹93 This includes Art. 86, which, as an overarching interpretative guideline, imposes the pivotal duty to, fully cooperate with the ICC “in its investigation and prosecution of crimes within the jurisdiction of the Court.” In Art. 89 (1), this sweeping obligation is furthermore reaffirmed with regard to a request for arrest and surrender of a suspect to the Court. As a result the ICC requested that member states arrest and surrender President Al Bashir if presented with the opportunity to do so.²⁰² State Parties have arguably incurred an unmitigated treaty obligation to apprehend and transfer Al-Bashir to the ICC. *Pancta sun servanda*.

Despite their duties under the Statute, States Parties – as affirmed by Art. 98 (1) and as indicated above – remain fully bound by the rules of customary international law, which require them to respect international immunities of foreign officials. If Al-Bashir were to make a visit to or travel through the territory of a State Party, this State would thus be inconveniently faced with two conflicting legal obligations. This was seen in two different scenarios; one in Kenya and Chad:

The ICC issued the second indictment directly before President Al Bashir's visit to Chad, but Chad did not rescind its invitation to the Sudanese President and he arrived on July 21, 2010.²⁰³ The ICC, the European Union, Human Rights Watch, and Amnesty International, however, were concerned with the events and called on Chad to arrest President Al Bashir, but Chad refused.²⁰⁴

Then, on August 28, 2010, President Al Bashir traveled to Kenya, also a member of the ICC.²⁰⁵ 163 The Government of Kenya invited President Al Bashir to attend a signing ceremony

²⁰¹ This also includes those States that have entered into an ad hoc agreement with the Court, pursuant to Art. 12 (3) ICC-St.

²⁰² The Rome Statute for the Arrest and Surrender of Omar Al Bashir, at 3-4 (Mar. 6, 2009), available at <http://212.159.242.180/iccdocs/doc/doc642283.pdf> (asking that all member states participate in the arrest and prosecution of President Al Bashir)

²⁰³ Prosecutor v. Omar Al Bashir, Case No. ICC02/05-01/09, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, (July 12, 2010), <http://www.iccpi.int/iccdocs/doc/doc907140.pdf> (indicting President Al Bashir for genocide on July 12, 2010); see also Hamilton, *supra* note 1 and accompanying text (reporting that President Al Bashir arrived in Chad on July 21, 2010).

²⁰⁴ Jody Clarke, Chad Urged to Arrest Sudan's President, (Irish Times, July 23, 2010), at 9 (discussing that, upon President Al Bashir's arrival to N'Djamena, the capital of Chad, Idriss Ddby was there to greet him); see also Visiting Sudanese Leader Hails Reconciliation with Chad, (BBC Monitoring Africa, July 22, 2010).

²⁰⁵ Julian Borger, Court Censures Commonwealth Chief as Rift Deepens over War Crimes Suspects: Sharma 'Questions Duty' of States to Hand Over to ICC: Row Began over Kenya Refusal to Arrest Bashir, (THE GUARDIAN, London, Oct. 28, 2010), at 22

to honor Kenya's new constitution.²⁰⁶ Once again, the defiant president was permitted to leave a free man.²⁰⁷165 The Kenyan Government claimed that it could not arrest President Al Bashir because it would have been detrimental to the Sudanese peace process. Subsequently, a State could decide to nevertheless act upon the arrest warrant and justify this action on the same reasoning that was applied by the PTC as was the case of Malawi that threatened to arrest Al Bashir if he stepped into the country.

As has been argued, however, this would amount to a direct violation of the customary international law rules on immunity and, consequently, to a breach of international law. A State Party cannot rely on its duty of arrest to legitimately override the personal immunity that Al-Bashir is entitled to.²⁰⁸ If a State were to do so, the Republic of Sudan could, as a result, start proceedings against the arresting State before an international judicial body such as the ICJ.²⁰⁹ On top of this, Al-Bashir would be able to make a claim of unlawful arrest before the Court.²¹⁰

Alternatively, States Parties could decide to err on the side of caution, and instead of acting on the Court's request for arrest and surrender challenge their alleged obligation to arrest on the basis that the request of the PTC was *ultra vires* (see previous part). It is submitted that a State Party could do this by consulting 'with the Court without delay in order to resolve the matter' in accordance with Art. 97 of the Rome Statute. The ICC's legal texts provide little clarification as to whether it is one of the ICC Chambers or the national authorities that eventually hold the authority to make the final decision on whether or not immunity from arrest is applicable and thus whether or not the requested State has an obligation to arrest.

²⁰⁶Jody Clarke, Kenya's Historic Day Overshadowed by Presence of Sudanese Leader Bashir, (Irish Republic. TIMES, Aug. 28, 2010,) at 9 (declaring that the ceremony celebrating Kenya's new constitution was overshadowed by the presence of Sudanese president Omar al-Bashir).

²⁰⁷ Ibid

²⁰⁸²⁰⁸ Julian Borger, Court Censures Commonwealth Chief as Rift Deepens over War Crimes Suspects: Sharma 'Questions Duty' of States to Hand Over to ICC: Row Began over Kenya Refusal to Arrest Bashir, (THE GUARDIAN, London, Oct. 28, 2010), at 22.

²⁰⁹ Cronin-Furman/Taub, *Opinio Juris*, 18.3.2009, available at <http://opiniojuris.org>. last accessed on 19th of August 2015.

²¹⁰ Radosavljevic, LLR 29 (2008), 269-285. For an analysis of the possibility to argue unlawful arrest under the Statute.

As Akande has shown, there is much obscurity surrounding this issue, both in the ICC's legal provisions and in the views adopted by States Parties in domestic legislation.²¹¹ In order to solve the conundrum as to who can take the decision, it could be argued that Art. 119 of the Statute should be controlling here; this article states that "any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court." Thus, it might be the Court itself that would have the final say in deciding whether or not its initial request for cooperation can be considered legitimate in light of the Statute.²¹²

3.2.1.1 The Legal Position of Omar Al-Bashir Visiting South Africa and Failure of South Africa Arresting him

The South African government displayed an indefensible derogation of its international and domestic legal obligations when it failed to arrest Sudanese President Omar al-Bashir during the African Union summit in Johannesburg and ignored a High Court order prohibiting his departure. The move has rightly sparked an outcry.

The International Criminal Court (ICC) issued warrants of arrest for Al-Bashir in 2009 and 2010 following his indictment for crimes against humanity and genocide committed in Darfur, Sudan, between 2003 and 2005.

How did South Africa's obligations arise and why is the government's failure to meet them so disheartening?

South Africa's obligations

Two factors form the basis of South Africa's obligation to arrest Al-Bashir. The first is the country's accession to the Rome Statute of the ICC on November 27, 2000. This made it a state party to the court.

²¹¹Akande, *AJIL* 98 (2004), 407: "Despite the fact that the Court must, in the first place, make a decision under Article 98, there remains the issue whether that decision is binding on the requested state. The national statutes that deal with the immunity of foreign officials when a request for arrest has been made by the ICC reveal that states have taken differing views on the identity of the body entitled to decide the issue."

²¹²Crawford, *In the Matter of the Statute of the International Criminal Court and in the Matter of Bilateral Agreements sought by the United States under Article 98(2) of the Statute*, 2003, 58, available at <http://www.iccnw.org/documents/SandsCrawfordBIA14June03.pdf>.

In terms of Article 86 of the statute, state parties are duty bound to “co-operate fully with the court in its investigation and prosecution of crimes within the jurisdiction of the court”. To facilitate the ICC’s prosecution, the government was obliged to arrest al-Bashir as soon as he landed in South Africa.

The second is that in 2002, the South African parliament passed the Implementation of the Rome Statute of the International Criminal Court Act 27. This law domesticated the ICC Statute in line with the country’s constitution. The constitution states that “[a]n international agreement binds the Republic only after it has been approved by resolution” in both houses of parliament.

Section 8 of the act states that the director-general of the Department of Justice and Constitutional Development must, on receipt of a warrant of arrest, forward it to a magistrate to have it endorsed and executed in any part of South Africa.

The government’s failure to forward the warrants of arrest for endorsement and execution was a violation of both the 2002 law and the constitution, which regarded the law as binding on the republic.

The government’s failure to arrest Al-Bashir flies in the face of the South African Constitutional Court’s reiteration in 2014 that South Africa has a duty to abide by its international obligations. The court ruled that the observance of this duty is of particular importance international obligations. This required the state to ensure that those accused of committing serious international crimes are brought to justice. The constitutional court ruling was unanimous. Judge Majiedt said:

“Our country’s international and domestic law commitments must be honoured. We cannot be seen to be tolerant of impunity ... We must take up our rightful place in the community of nations with its concomitant obligations. We dare not be a safe haven for those who commit crimes against humanity.”

Obligations not taken seriously

The legal challenge in South Africa was preceded by a statement issued by the ICC on June 13. Judge Cuno Tarfusser of the ICC Pre-Trial Chamber held that there was:

“... no ambiguity or uncertainty with respect to the obligation of the Republic of South Africa to immediately arrest and surrender Omar al-Bashir to the court.”

A day later the Southern African Litigation Centre brought an urgent application to the North Gauteng High Court to compel the government to arrest Al-Bashir.

The court ordered that the Sudanese president be prohibited from leaving the country pending the application’s conclusion. Nevertheless, on June 15, Al-Bashir left South Africa for Sudan.

Notwithstanding the clarity of its obligations and the efforts by the ICC prosecutor and the Southern African Litigation Centre to have Al-Bashir arrested, the South African government’s reaction was lethargic at best and defiant at worst.

The only rational explanation of its failure to arrest Al-Bashir is that it does not take its obligations seriously. This suggests it has joined ranks with other African governments that have vowed not to co-operate with the ICC. This is disheartening.

The arrest of Al-Bashir would have been a huge opportunity for the promotion of international criminal justice and the rule of law in Sudan. Instead, the South African government has chosen to adhere to the view in the African Union that the ICC should be discredited. This is argued on the basis that the court has pursued selective justice because it has so far targeted only African perpetrators in its pursuit of international criminal justice.

There is substance in this claim. But this is not a justifiable basis on which to renege on international obligations. The South African government’s decision is one of political expediency, preferring to be cajoled by the political rhetoric surrounding the fledgling ICC rather than abide by international law.

3.2.2 Duty of Non-States Parties

This category of States consists of all non-States Parties, excluding Sudan and any country that has entered into an ad hoc agreement with the Court. Because such States have not given their consent to the enforcement of the Statute, they hold no legal obligations to cooperate with the Court on account of the Statute. Treaties are binding in principle only on state parties. For non-party states, there is neither harm nor benefit in them (*pactatae tuis nec nocent nec*

prosunt). Therefore, according to the general principle of the law of treaties as embodied in the Vienna Convention on the Law of Treaties, the obligation of non-party states to cooperate differs from that of state parties.²¹³

Nonetheless, despite their legal dissociation from the Court, in the case of a Security Council referral to the ICC, as was the case for the situation of Sudan, it is possible for non-States parties to incur obligations vis-à-vis the Court by virtue of the Council's resolution. In clause two of the operative part of Resolution 1593²¹⁴, the Council indeed addresses the obligations that are incumbent on those States that are not parties to the conflict. Considering that the situation in Darfur represents an internal State conflict,²¹⁵ this section pertains to all UN members outside of Sudan, including both States Parties and non-States Parties to the ICC. Regarding these countries, the Council makes the key assertion that it "urges" them to cooperate fully with the Court.

3.2.3 What Are The Possibilities Of The Arrest And Surrender Of Al-Bashir?

At this point we can safely conclude that the prospect of Al-Bashir's arrest by third States is severely restricted as a result of his entitlement to immunity within inter-state relations, as a Head of State of a non-State Party to the Statute. Sudan is the only State that can, and is even required to, legally enforce the arrest warrant, or allow others to do so by means of an immunity waiver²¹⁶. It is well known, and hardly surprising of course, that Sudan is reluctant to fulfill these international obligations. But it remains no less true that those States that may be willing to arrest Al-Bashir are legally prohibited from doing so; they are not allowed to "help themselves" and remedy Sudan's failure to waive Al-Bashir's immunity.

However this does not mean that the international court is completely useless and has no hope of ever effectively prosecuting a sitting head of state. This was made evident in the trial and

²¹³ United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: <http://www.refworld.org/docid/3ae6b3a10.html> accessed 24 August 2015.

²¹⁴ UN Security Council, Security Council Resolution 1593 (2005) on Violations of International Humanitarian Law and Human Rights Law in Darfur, Sudan, 31 March 2005, S/RES/1593 (2005), available at: <http://www.refworld.org/docid/42bc16434.html> [accessed 24 August 2015]

²¹⁵ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General 3 (25.I.2005), available at the ICC homepage, <http://www.icc-cpi.int>

²¹⁶ Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Request to the Republic of the Sudan for the Arrest and Surrender of Omar Al Bashir, at 4 (Mar. 5, 2009), <http://212.159.242.180/iccdocs/doc/doc639772.pdf> (requesting that Sudan, in accordance with its duties as a member of the UN, surrender President Al Bashir pursuant to UN Security Council resolution 1593).

prosecution of the former president of Liberia, Charles Ghanaky Taylor. On May 31, 2004, the Appeals Chamber of the Special Court for Sierra Leone, a UN-backed hybrid criminal tribunal sitting in Freetown, Sierra Leone, ruled unanimously²¹⁷ that Charles Taylor does not enjoy any immunity from prosecution by the Court though he was the serving Head of State of Liberia at the time criminal proceedings were initiated.

3.3 Conclusion

This paper has illustrated the structural gaps that exists in the office of prosecutor and the role played by party states in adhering to the Rome statutes.

So, where does the international community go from here? For one, the ICC should recognize its own mistakes. It committed missteps on the diplomatic stage—failure to resort to the ICC Assembly of State Parties for Kenya’s non-cooperation far earlier—and should have followed a better investigation and prosecution strategy from the start, especially when the Kenyan suspects were private citizens. For instance, the ICC should have had a permanent investigative field office in Kenya collecting documentary and communications evidence from the start.

Yet, to focus on these missteps would be to deflect true blame. Unless countries that are party to the ICC are willing to accept an international tribunal with its own enforcement power (that is, an ICC police force), individual states will need to take their duty to cooperate with the ICC more seriously. To date, most of them have stood idly by while Kenya unleashed its political attacks on the ICC. The failure to counter this assault, for example, by making regional security assistance with Kenya conditional on cooperation with the ICC, calls into question why the international community formed the ICC in the first place: establish international peace and security through a just rule of law.

The countries that are party to the ICC must begin to make tough decisions, starting this week as they, and influential observer nations such as the United States, gather in New York for the ICC Assembly of States. In many ways, this conference will forecast the future of the ICC. Vitally important subjects are on the agenda: the woeful underfunding of the Court and Kenyan proposals to amend the ICC’s governing treaty to codify statutory immunity for heads of state.

²¹⁷Prosecutor v Charles Ghankay Taylor, Case Number SCSL-2003-01-I, Decision on Immunity from Jurisdiction, 31 May 2004. The motion was heard in the Appeals Chamber by Justices Emmanuel Ayoola, George Gelaga King, and Renate Winter. The Decision is available at <<http://www.sc-sl.org/SCSL-03-01-I-059.pdf>>

As the assembly begins, the question to be answered is, which countries, if any, will choose to be true leaders in international criminal justice. If no one takes up the call, victims of atrocities, both living and those not yet born, will bear the consequences.

CHAPTER 4. HIGHLIGHTING THE SUCCESS, FAILURES AND CHALLENGES FACED BY ICC

In 1998, a groundbreaking idea turned into reality, and 50 years of debate ended as the first International Criminal Court (ICC) was established as a result of the Rome Statute. This judicial body took shape and created the foundation of a permanent court to prosecute persons that committed war crimes, crimes against humanity and genocide. The idea of an international criminal court came about from many factions. At the end of World War II the Allied Powers responded swiftly after the discovery of crimes committed by the Axis Powers. They therefore created the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and the Charter of the International Military Tribunal (IMT).

The IMT contained the first definition of crimes against humanity, which would later be included in the Rome Statute and fall under the jurisdiction of the ICC. Specifically in Article 6(c) the definition was as follows: “Crimes against humanity: murder, extermination, enslavement, deportation, and other inhumane acts committed against civilian populations, before or during the war; persecution on political, racial or religious grounds in execution of or in connection within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.”

Shortly after, a similar document was drafted in response to the crimes committed by the Far East Axis powers, namely Japan, labeled the International Military Tribunal for the Far East. These two tribunals laid the groundwork for the prosecution and convictions of soldiers and commanders that committed crimes in World War II. The importance of these tribunals comes in its direct definition of crimes against humanity and war crimes, and the initial recognition for the need of a global criminal system.

The first ever international trials were held shortly after the establishment of these Tribunals. The victorious Allies insisted on the punishment of crimes committed by individuals during the war by both the German and Japanese powers. These courts prosecuted fifty defendants, and several thousand more were prosecuted through occupational tribunals established for less-senior defendants. As the heinous crimes committed by the Axis power’s senior and low level officials

became exposed to the world, it was evident that justification for a permanent international criminal court had been established.

Shortly thereafter, two major events happened that would shape the rules and ideologies for international criminal law forever. The first of these events was the 1948 Genocide Convention and then the four 1949 Red Cross Geneva Conventions. The Genocide convention, officially labeled The Convention on the Prevention and Punishment of the Crime of Genocide, laid the groundwork for what has been labeled the 'most heinous international crime'.

Genocide as defined by the United States Holocaust Memorial Museum is, "[G]enocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group." This convention was formed from the discovery of Adolf Hitler and Nazi Germany's plan to eradicate the Jewish population in Europe.

The convention is extremely important as it established genocide as a war crime for the first time. This crime later became adopted into the Rome Statute of 1998 as one of the three original crimes that would fall under the jurisdiction of the ICC. The Geneva Conventions that followed continued the trend of establishing laws to prevent crimes during times of war. The four Geneva conventions and the additional Protocols added later built upon the previously recognized idea of International Humanitarian Law (IHL), which, when combined with genocide, formed the three crimes that fall under the direct jurisdiction established in the Rome Statute of 1998 and therefore are prosecutable in the ICC. The Fiji Red Cross Society makes the point, "The Geneva Conventions and their Additional Protocols are part of international humanitarian law—a whole system of legal safeguards that cover the way wars may be fought and the protection of individuals."

The four conventions covered several different topics as follows: the 1st Convention discussed rules for wounded soldiers on the battlefield; the 2nd Convention covered the wounded and shipwrecked at sea, the 3rd laid rules for prisoners of war (POWs), and the fourth protected

civilians under enemy control. Thus *Ius in Bello*, literally translated as “Oath upon to Wage War” or more accurately, the rules with which war is to be fought, were created. These two conferences also created the first idea of International Humanitarian Law for which the ICC currently upholds.

Despite these laws being established and ratified as a treaty (currently 140 nations are party to the Genocide Convention, and 194 nations have agreed to the Geneva Conventions), there remained no court that could uphold these laws or prosecute the perpetrators that committed these abhorrent crimes against fellow soldiers and civilians. However, in 1993 and 1994, two ad hoc courts were created for specific regions in which it became evident that the rules of the previously stated conventions had been knowingly broken repeatedly by many people involved in these internal conflicts.

In 1993 the International Criminal Tribunal for the former Yugoslavia (ICTY) was created in light of the vicious crimes committed against the civilian population throughout the former Yugoslavia. The ICTY was a unique creation as it marked the first time a court had been established to prosecute individuals who committed heinous crimes against their fellow man in a regional setting. This creation also ended a fifty year system of having the laws and treaties in place to govern the rules during warfare, but no real system to prosecute individuals who broke these laws.

Shortly after the creation of the ICTY, another ad hoc court was being established in the wake of the horrific events that occurred in the African nation of Rwanda in 1994. The shock that embodied the world after the discovery of such a systematic genocide was overwhelming, and the UN Security Council moved quickly to bring the leadership and perpetrators to justice. In November of 1994, through Security Council Resolution 955 the temporary ad hoc court became a reality. The court mirrored many of the same rules established through the ICTY, but the prosecution focused specifically on Rwandans that committed the act of genocide during the terrible and short-lived civil war. These two courts laid the foundation that would later become the Rome Statute and the establishment of the ICC. Some other ad hoc tribunals have been created by the Security Council to deal with local issues, such as Sierra Leone, Cambodia and the Special Tribunal for Lebanon (STL).

Finally in 1998, a Conference was called in Rome to discuss the possibility of a permanent International Criminal Court. Many struggles and oppositions needed to be overcome in order to adopt the Rome Statute and create the ICC. Despite all of these differentiating opinions and opposing views several compromises were made, and in the end the treaty passed with a lopsided vote of 120 to 7, with 21 countries abstaining. The most remarkable thing about the Rome Statute and the creation of the ICC was the fact that the treaty required sixty of the signees to ratify it before it would be entered into agreement, and the ICC could be created as an international entity of criminal law.

Many speculated that it would be a decade before this judicial body could be created, but a mere four years later, the 60th state ratified, and the ICC was created. It opened its doors in July of 2002, and by the following March eighteen judges were nominated and the first international prosecutor, Luis Moreno Campo, was elected. The ICC is currently working on seven open cases in Sudan, Uganda, the Democratic Republic of Congo, the Central African Republic, Kenya, the Republic of Côte d'Ivoire and Libya, with many more situations being monitored for possible further indictments. It took many years of law evolution, and a series of horrendous events to justify establishment of an international criminal court, however, based on the support it received, not only at the Rome Conference, but also the continued ratification by nations, it is evident that the need for the court is considered important by many nations.

4.1 The Successes of the ICC

The ICC is a fairly young institution, having only been open and active since 2003. Therefore the institution, like the Tribunal courts before it, have to take into account small successes, especially when dealing with doctrine and law that the court achieves in order to evolve its uses and expand its powers through increased efficiency and reduced state opposition. In order for the court to fully realize its potential, it must show the world that it can be a successful permanent institution in international law with clear standards and goals, as well successful indictments, prosecutions and convictions of heinous war criminals in different parts of the world.

The initial successes of the ICC came quickly and have compounded over time, definitely laying a foundation for what could be an extremely efficient and successful judicial entity. The fact that the Rome Statute passed with such a lopsided victory, despite all of the objections from different

sides regarding the semantics of the document, was a major victory in itself. Then, the rapidness of the ratification of the treaty, just four short years after the monumental signing, showed that the need to establish a world criminal court was present. Since the inception of the court, fifty seven additional nations have joined the court, with more coming all the time. The support for the ICC is definitely growing, especially among the smaller nations of the world, as they view the ICC as a support system to their own domestic judicial institution.

When the outline for an international criminal court was established, it quickly became evident that in order for the court to not only appease the reluctant states, but maximize its usefulness on the international stage, the court had to be complimentary. This role of a complimentary institution maintains the domestic jurisdiction of the individual states to prosecute their own criminals if they find the evidence to prosecute as well as possess a functioning judicial body to properly convene a fair and just trial. By limiting the role of the ICC to complimentary, the Rome Statute and the states that are party to the treaty created a last resort institution that will only be utilized if the country is unable or unwilling to prosecute their war criminals. This entails many factors that must each be examined before an indictment or even an investigation is launched by the ICC.

First, is the country's judicial system intact? Many war crimes are committed during times of civil war, or in the recent case of Libya, the civil war often leads to regime change. If a new court is not established, and the state is therefore unable to launch an investigation or hold a court proceeding, then the ICC can step in as a support unit and take over the case. Also, if circumstances arise that invoke a sense of bias for or against a criminal who is being prosecuted, such as the case of President Al-Bashir of Sudan for the crimes committed in Darfur in which his country will never consider indicting him, then the ICC can step in and takeover the case, as they have done.

In order to determine if the state is unwilling the court needs to examine if the proceedings are impartial, if the criminal is being shielded by government lackeys or whether there is an unjustifiable delay in the proceedings. The role of a complimentary court counts as a success because it limits the authority the court possesses, and it enables the states themselves to take the initiative in prosecuting their own criminals.

By limiting the power of the court, the Rome Statute correctly prevented the court from growing into an unrestricted power. Another success of the ICC is the clearly defined roles that the different organs operating within the confines of the Rome Statute have and how they are utilized to the advantage of the court and the international stage, especially the unique role of judges and the use of the appeals process.

First, the court's decision making process is common law, which means that judges, and not a jury, decide the fate of the accused based on legal precedence and knowledge of the law. Although this is contrary to the United States legal system, it definitely has its benefits. The common law practice definitely ensures that the rights of the individual, as well as the palpability of the court are handled by professionals. This is very important with an international forum because of the vast differences between hundreds of judicial systems. A civil law court at the international level is simply not practical. By granting the fate of indictees to the judges, a system of checks and balances has also been included in the Rome Statute and is therefore utilized by the court. The appeals system for the ICC creates an atmosphere of fairness and justice that protects all individuals, from the defendants to the victims, of their alleged crimes.

In the ICC an appeal can not only be granted for guilty verdict, but also an acquittal. This additional appeal gives the prosecutor a second chance to submit additional evidence that may change the determination of the judgment. In creating a system in which the court can interpret international criminal law, it has correctly identified the issue that needs to be addressed in order for the court to blossom and reach its full potential. It will need to create a system in which precedence can be established and therefore common law is correctly carried out.

In 2010, a major breakthrough for the court came into existence which has been viewed not only as a display of the flexibility of the states party to the Rome Statute, but a necessary addition to the constantly changing international community. The Conference in 2010 in Kampala, Uganda took direction from the UN Security Council a step further and inducted a definition of aggression based on SC Resolution 3314, and added it to genocide, war crimes and crimes against humanity as a list of possible crimes that fall under the umbrella of the ICC. Although Kampala has not been entered into effect as a treaty yet, it cannot take effect until January 1, 2017, this amendment to the Rome Statute showed the flexibility of the court and its states members to adjust to a constantly changing world. Adding aggression to the list of war crimes

ensured that despite the solid foundation from the Rome Statute, the ICC was able to add new amendments that would further extend its jurisdiction and ensure international peace.

Another example of this adaptability occurred in 2009 when a Review Conference convened and stated that an amendment should be considered to include terrorism to the list of crimes falling under the ICC's jurisdiction. This document called Annex E, laid out a fairly acceptable definition of terrorism, which has been one of the major stepping stones in the process of including it in international criminal law, and went as far as to almost recommend that the Rome Statute should include terrorism as another crime added to the list for ICC jurisdiction. Although the steps have not yet been taken to establish an amendment for a new inclusion, the groundwork has been laid, and therefore the idea of including terrorism has been mulled over. This is just another example of the constant flexibility and adaptability of the ICC and the Rome Statute, which is absolutely essential to the success and survival of the court.

Overall the major successes of the court have been almost exclusively on paper and not in the actual prosecuting or sentencing of criminals, which will be discussed in the next section, the legal precedence, general international acceptance and the adaptability of the court form a foundation and pathway for overall success. The success of the court has not yet been completely realized, but the framework is in place and is constantly adapting to the changing world that should ensure the success of the court in the future.

4.2 Failures of the ICC

Despite sufficient groundwork for the ICC laid out through the Rome Statute and amended to include aggression at Kampala in 2010, the ICC in many nation's eyes has been a failure. Despite the doors opening and becoming fully functional in 2003, just recently, September 2009, the ICC opened its first case, prosecuting Congolese warlord Thomas Lubanga Dyilo. For nine years the court has sat dormant due to several different reasons. When the ICC first opened its doors, it immediately began investigating various situations, especially in Africa for the crimes it was established to enforce. The first elected chief prosecutor, Luis Moreno-Ocampo, an Argentine lawyer who gained fame through exposing Argentine corruption in the Trial of the Juntas, was inaugurated in 2003 and opened cases in regions such as Uganda and the Democratic

Republic of Congo. Since that time Ocampo has been widely criticized for his continuous failures and this disappointment has led to reluctance of the states.

Although recently, the trial of Thomas Lubanga Dyilo has been completed and the accused has been found guilty of all charges as of March 14, 2012, this event stands on the doorstep of Moreno-Ocampo's departure from the role of Chief Prosecutor. When the ICC was established through the Rome Statute it became evident that the role of the chief prosecutor would be essential to the court's success, and in many ways the successes of the court would mirror the successes of the prosecutor.

This analysis has become accurate, only to the negativity of the court. Moreno-Ocampo's failures are directly linked to the failures of the ICC in its attempt to become a viable force in the stage of international criminal law. Some believe that Moreno-Ocampo's attitude and management style are not conducive to the teamwork required in order to increase the fluidity with which the court is run. Due to the lack of success, the funds wasted and the fact that only one trial has been completed, and that taking over three years with sentencing yet to come, some of the failures of the ICC must fall on the chief prosecutor's shoulders.

Furthermore, when his term comes due in mid-2012, a continued legacy of the Moreno-Ocampo regime will take over duties as the new Chief Prosecutor, Fatou Bensouda, Ocampo's current Chief Deputy, and an extension of his tenure. Although Ms. Bensouda has been in the Ocampo corner for ten years, she is from Gambia, which may diffuse some of the bias discussed below that so scarred the Ocampo regime. Hopefully, Ms. Bensouda can enlist the help of his subordinates instead of isolating them, and ensure that states follow the jurisdictional guidelines of the court. This brings about another flaw or failure of the ICC.

The ICC depends on the cooperation of the states that have ratified it to turn over suspects, and help in the information gathering process to speed up and actually complete fair and efficient trials. Unfortunately for the ICC, this is not always the case. Specifically, many instances have occurred since the inception of the court where the prosecutor has the evidence, the indictment has been issued, but no trial ensues simply because the indicted is not turned over to the ICC for trial. Therefore the suspect remains at large as an international criminal. This is especially the case with Omar Al-Bashir of the Sudan. Due to the lack of cooperation, heads of states indicted,

as well as powerful military leaders continue to purge local populations without having to answer to their crimes. Despite ratification of the Rome Statute, the perception of state cooperation and the actuality of it can be vastly different.

This lackadaisical approach by party states continues to frustrate the court and its process. Something must be done to ensure that criminals indicted by the court appear at the court.

The final major flaw of the ICC definitely stems from the lack of participation by three permanent members of the UN Security Council. As of this text, China has not signed the Rome Statute, and neither the United States nor Russia has ratified it. In fact, as of the Bush Administration actions of 2002, the United States actually unsigned it. This lack of participation certainly hinders the ability to enforce the laws instituted by the court. The lack of U.S. participation especially hinders any palpable advancement of the court. Why does the U.S. not support the court?

While the U.S. does deploy many troops overseas each year, full participation from the U.S. and the other permanent members of the Security Council is essential to the survival and effectiveness of the court. Granted veto power for permanent member status, if any of these three powers considers an indictment contradictory to the agenda of their nation, they can veto the indictment and allow the crimes and the perpetrator to go on unpunished.

Not only is the U.S. not signing or party to the Rome Statute, they had established a confrontational approach to the Statute under the Bush presidency. The U.S. has over fifty treaties of such, and is therefore undermining the justice and integrity of the court. Now however, the new administration, under President Barack Obama has begun to show some semblance of cooperation to the court and its functions. Although this is a step in the direction of support, the U.S. has not gone as far as signing the Rome Statute, or giving its full-fledged backing. Therefore, the overall lack of Security Council support which still exists, even from the teetering U.S., will need to be resolved in order for the ICC to reach its full potential.

Overall, despite a strong foundation laid out at the Rome Conference, the ICC has had few tangible successes since its inception. Some of this can be attributed to the youth of the court, but much can be realized specifically from the three major flaws previously discussed, the ineptness of the prosecutor's office, the unwillingness of states party to the treaty to cooperate with the

wishes of the court, and the lack of support from permanent members of the UN Security Council which holds veto powers over the cases of the ICC. Due to hindrances such as these, the court has struggled to carve out its niche in the world of international criminal law.

4.3 Challenges of the ICC in Kenya and Sudan Cases

The OTP has also faced challenges in its cases against current Kenyan heads of state. After a vigorously contested election in 2007, Kenya descended into violent chaos. An estimated 1,100 people lost their lives and as many as 650,000 were forced to flee their homes. The AU team that mediated an end to the conflict pressured Kenyan officials to prosecute post-election violence in a special tribunal. After they failed to do so, former United Nations Secretary-General Kofi Annan convinced Kenyan President Mwai Kibaki to share his confidential list of suspected perpetrators with the ICC. In 2011, the ICC summoned six Kenyans to The Hague, including political rivals William Ruto and Uhuru Muigai Kenyatta. Immediately after their summons, Ruto and Kenyatta formed a coalition that won control of the Kenyan government, securing domestic support that shielded them from the ICC's reach.

Both Kenyatta and Ruto have launched a concerted effort to undermine the ICC in Africa. Among other things, they have sent diplomats around the continent in an effort to convince ICC members to withdraw from the Court. They even tested African leaders' appetite for withdrawing from the Court en masse during an extraordinary October 2013 meeting of the AU. And as a result of the AU's lack of cooperation, Bensouda was recently forced to withdraw her case against Kenyatta amid accusations that the Kenyan government had tampered with witnesses and failed to share vital evidence with the prosecutor's office. Ruto still faces charges in The Hague, but Besnouda faces similar challenges with that case.

Kenyatta—and potentially Ruto—managed to skirt prosecution as a result of key domestic and international support. The 2013 elections that brought both to power were praiseworthy for being more fair and peaceful than Kenya's 2007 election, and both leaders have presided over a boom in the Kenyan economy. The duo have received Western support in their fight against al Shabab, a terrorist group that has recently begun to target Kenya. If the ICC is to try both Kenyatta and Ruto successfully, they will need substantive support from domestic and international groups. At the moment, however, such support is lacking.

4.4 Conclusion

This paper has successfully highlighted the various successes that ICC has had and more importantly linked the failures to the structural impracticalities e.g the dependence of the OTP on state parties which is unforthcoming when dealing with sitting heads of state and this will form the basis of offering viable solutions.

But this is not to trigger despair, history has shown otherwise, much like the ICTY in its first few years, the ICC faces a situation in which many indicted heads of state have enough domestic and international support to shield them from prosecution. Nonetheless, political tides can and do change. As demonstrated by the Milosevic, Karadzic, and Mladic cases, indictments and international arrest warrants do not usually disappear. Instead, they create the basis for today's supporters to become tomorrow's jailers, particularly if suspected war criminals threaten vital international support and reform efforts. The ICC must look to the ICTY as a blueprint, gathering concrete and consistent support from international actors who can effectively pressure parties on the ground to cooperate. While Bashir and others might currently have enough support to undermine the ICC's efforts to prosecute them, time will ultimately tell if they can sustain it, succeeding where so many other top leaders—who were once also thought untouchable—failed.

CHAPTER 5. CONCLUSION AND RECOMMENDATIONS

It is difficult to recommend a solution to the ICC's current limitation, not only because its problems are so deep and structural, but also because it emerged as the best possible compromise between the goal of justice and the reality of state interests.²¹⁸ Neither of these has changed so much that an improved and more effective structure for the institution can likely be achieved. It is also possible that with time and successful convictions, the Court's prestige and clout will make its decisions more difficult to ignore, because, although the Court is already ten years old, it is still developing and is yet to grow into a more effective role. Further developments in the cases currently before the court, as well as new ones will be important in determining the Court's future role.

If the ICC is going to be able to truly function as a 'court of last resort'²¹⁹, it needs to have the enforcement powers to do so. As things stand, it is not equipped to handle its cases, because if the state is truly unwilling or unable to prosecute, the ICC cannot carry out its mandate within that country²²⁰. However there are a few changes that the court can consider. These are:

5.1 Court Management.

Revitalizing the ICC's image starts at the Core of its internal structure, namely the Assembly of State parties (ASP) and the four organs of the Court.²²¹ Although, the organs of the Court are separate branches, they should work fairly independently (to provide checks and balances) and collaboratively to progress performance and meet high standards and obligations expected of them in the Statute.²²² Improving the internal relationships within the ICC, specifically the affairs of the ASP, the Office of the Prosecutor (OTP) and the Judges, will lead to respect and motivation creating legitimacy, and credibility from internal members, external member and non-member states.

²¹⁸Ingrid Roestenburg-Morgan, International Criminal Law in Africa, (NNVN, 15th March 2014) <www.nvvn.nl/artikel/the-international-criminal-court-in-africa/> Accessed on 10th August 2015; Hereinafter Roestenburg-Morgan.

²¹⁹ ICC website, 'ICC at a Glance' (ICC, 1 April 2015) http://www.icc-cpi.int/en_menus/icc/about%20the%20court/icc%20at%20a%20glance/Pages/icc%20at%20a%20glance.aspx Accessed 9 August 2015.

²²⁰ Human Rights Watch, 'Making Justice Count' (HRW, 4 August 2015) <<https://www.hrw.org/report/2015/08/04/making-justice-count/lessons-iccs-work-cote-divoire>> Accessed on 9th August 2015.

²²¹ Rome (n 4), Article 34 on the Organs of the Court.

²²² Milan Markovic, 'The ICC Prosecutor's Missing Code of Conduct' (2011) 47 Texas International Law Journal 201.

It is time for the Court's Registry, an organ of the ICC²²³ to be fairly more independent²²⁴ to perform more effectively. They are also encouraged to develop a special department or a lobby-committee to liaise particularly with non-member States and other important stake-holders in the interest of the overall objective of the Court in actualizing its mandate.

This committee could be an extension to the already overreaching program currently designed for the grassroots where the Court is present²²⁵. However the Committee will operate at a higher level and more relevant to induce more ratification by all and sundry.

Destructive violence that shocks humanity is usually not a single event, but a process developing over time requiring planning and resources. Thus the court could lobby for more funds even from established blue-chip companies to actualise the Court's programmes and discuss with States Parties that are less positive about their contributions to the Court. The reality is that egregious crimes could be prevented by acting and mobilising on adequate information as well as having courage and political will to act as at when due not after atrocities.

5.2 Assembly of State Parties (ASP)

The Rome Statute states that, The Assembly's duties include, but not limited to, matters of budgetary concerns, making appropriate amendments to the Statute and providing oversight management to the Organs of the Court.²²⁶ Consequently, the ASP acts as the check to balance the Actions of the Organs of the Court. However, in the first few years of the ICC, the absence of effective management from the ASP is prevalent as it failed to effectively manage and monitor the activities of the Organs, resulting in a sub-par output from the OTP; a lack of cohesion within the Divisions of qualified and knowledgeable judges and investigators.²²⁷

²²³Rome(n 4) Article 34.

²²⁴Rome(n 4)Articles 43 (2) (4).

²²⁵Roestenburg-Morgan (n 231) 4.

²²⁶ *ibid*

²²⁷Milan Markovic, 'The ICC Prosecutor's Missing Code of Conduct,' (2011) 47 Texas International Law Journal 201.

This paper recommends that the ASP to re-organise and establish a more permanent management structure. This is because, it is the only body able to hold the OTP accountable for poor performance, as well as adequately address the perception of bias against the Court.²²⁸

The Assembly must take action by mobilising States Parties that are members of the UN General Assembly and on the Security Council to open up a discussion on UN funding for referrals. It is critical that State Parties build on their collective efforts to help the Court secure the resources it needs to carry out all relevant activities and if necessary diplomatic engagement. The ASP must resolve to make the ICC a workable endeavor. The world would be better-off, with an efficient and effective ICC and effort should be made to protect the determination that led to its inauguration as a court.

5.3 Office of The Prosecutor

The OTP has been a major source of concern, a main organ of the Court, significant internal changes are essential in order to improve productivity and subsequently the legitimacy and credibility of the Court. To make an internal overhaul, the ASP needs to provide adequate oversight on the OTP (Article 112 (2) (B) Rome Statute) being the only committee with such authority²²⁹.

It is critical that the ASP exerts its authority to monitor the Independence of the OTP otherwise the Court will continue to perform sub-optimally in delivering justice. Consequently, developing high ethical standards would enhance cohesion and high performance for all prosecutors occupying the office. It would also help to ‘provide a common framework for conceptualizing the Prosecutor’s obligations under the ICC Statute’ and ‘would lower the likelihood of major ethical disagreements and promote goal congruence within the OTP similar to the Code of Conduct for counsels.’²³⁰ Additionally, it would unify the Court and enhance credibility, which are fundamental challenges of the ICC.

²²⁸Agata Porter, ‘An Independent Oversight Mechanism for the international Criminal Court’ (2008) American on-Governmental Organisations Coalition for the International Criminal Court, <<http://www.amicc.org/docs/Oversight.pdf>> Accessed on 10th August 2015 .

²²⁹ Rome (n 4).

²³⁰ICC-ASP, ‘Code of Professional Conduct for counsel,’ ICC-ASP/4/Res.1, 2 December 2005.

The Statute provides that the Prosecutor has a term of nine years and ineligible for re-election.²³¹ Debatably, the length of the term of office and the prohibition from re-election are challenging, a nine year term could be a long period for a person to be in charge of the OTP. The Prosecutor could become too comfortable in office resulting in a dysfunctional performance.

The prohibition of the Prosecutor running for a second term could also be limiting, losing focus or lack motivation to perform up to standard. Hence, amendment for a shorter term of four or five years is recommended to keep up a sustained performance level and a possibility of a re-election after the expiration of the first term. This regenerates motivation that keeps the Prosecutor inspired to fulfill the Roles expected for a potential re-election.

The success at the International Criminal Tribunal for Yugoslavia is worthy of emulation by the ASP in favor of a five year term with the potential to renew for an additional term.²³² This change would afford the ASP adequate checks on the OTP without intruding on its independence. It will motivate the Prosecutor to fulfill the Requirements outlined in the Statute and the Code for the OTP. The Prosecutor as the head of the OTP needs to be apt. The output of the OTP needs to take significant strides in producing successful trials to increase legitimacy and credibility.²³³

5.4 Enforcement of the Court's Decisions

The Court's lack of its own enforcement mechanism and the diverse geographic range of its work entail dependence on States cooperation to carry out the work.²³⁴ The Court stated in its 2009 and 2011 reports that the lack of cooperation by States impairs its efficiency, performance, and the Integrity of legal proceedings.²³⁵ In recent years the Lack of cooperation by states has emerged as a major problem for the Court²³⁶. The ICC relies on domestic judicial systems and their law enforcement mechanisms to carry out its mandates. Thus, the success of the OTP

²³¹Rome(n 4), Article 42(4).

²³²R. Balfour, Chloe Briere, Heather Grabbe 'The European Future of the Western Balkans;Thessalonki 10(2003-2013)'(2013) 12 European Union Institute of Security Studies.

<http://www.iss.europa.eu/uploads/media/Thessalonikiat10_01.pdf> Accessed on 10th August 2015.

²³³ChidiOguamanam, 'African leaders and the International Criminal Court'The Punch (Nigeria) Newspaper, 12 December 2013.

²³⁴ibid.

²³⁵ICC-ASP, *Report of the Court on cooperation*, ICC-ASP/10/40, December 21, 2011, New York; <<http://www.iccpi.Int/iccdocs/asp>> accessed 7 July 2014.

²³⁶MR Phooko, 'How Effective the International Criminal Court has Been: Evaluating the Work and Progress of the International Criminal Court' 183 (2011) Notre Dame Journal of Int'l, Comparative & Human Rights Law,186.

investigations and prosecutions depend on the willingness of the International Community to assist the Court. As a result, the behaviour and reputation of the Court is essential, as it has the ability to boost or discourage this cooperation.

The primary responsibility to prosecute using the Substantive Crimes under the Statute lies with States. It is however not subject to detailed treaty provisions on mutual legal assistance, including extradition, between states.²³⁷ Hence, prosecution of these crimes in national courts is often hindered by the lack of an international legal framework for cooperation between States.²³⁸ The lack of detailed treaty provisions regarding mutual legal assistance for the prosecution of core crimes creates a gap; efforts should be made through the ASP on how to fill this gap. Consequently, it is recommended that sanctions should be designed and attached to behavior of State Parties who refuse to cooperate and carry out roles and obligations expected of them. Being mindful of the fact that sanctions could be counterproductive at times, but it should also be noted that States are conscious of the negative perceptions derivable or accruing from such disciplinary actions.

5.5 Restorative Justice

Following an effective and fair charging strategy, is critical for the OTP to maintain credibility and proper dispensation of restorative justice. Charging relatively 'insignificant' perpetrators can contribute to perceptions that the Court is not effective and leaves victims unsatisfied. Additionally, charging only individuals who represent one party to the conflict risks undermining perceptions of the Court's impartiality. In regards to which crimes are charged, the OTP has tended to bring a select charge in the interest of time and cost cutting. The charges that the OTP has chosen have not always reflected the scope of crimes committed or represented the main types of victimisation. This has left gaps in justice served to victims, and has undermined perceptions of the Court's legitimacy in civil society and the international community.²³⁹ Furthermore, charging a section of the conflict and letting others get away sets the Stage for future conflicts and does not adequately serve justice as victims of the limited crimes

²³⁷ Dire Tladi, 'Complimentarity and Cooperation in the International Criminal Justice; Accessing Initiatives to fill the Impunity Gap' (2014)177 ISS <<https://www.issafrika.org/uploads/Paper277V2.pdf>> Accessed on 10th August 2015.

²³⁸ibid.

²³⁹ibid

charged will not be encompassing or representative of all victims and therefore limit the dispensation of restorative justice particularly through the mechanism of Trust Fund for Victims.

5.6 Outreach Strategies

For the Court to fulfill its mandate, roles and judicial activities it must be understood by a variety of audience hence, the Court's outreach programme has been created to ensure that affected communities in situations subject to investigation or proceedings can understand and follow the work of the Court through the different phases of its activities. The Outreach serves as a critical function for the ICC in developing a network of communication between the Court and the victims far away from The Hague. By spreading accurate knowledge of the judicial proceedings within situation countries, the outreach unit increases the scope of justice for victim communities, eases the investigation process, and strengthens the legitimacy of the Court.

The Court faces three main challenges in respect of effective outreach:

- low levels of awareness,
- misconceptions, and
- The²⁴⁰ process of leaving countries post-trial.

It is important that the ICC improves on its current strategies and resolve these issues in order to fulfill the Court's mandate.²⁴¹

Outreach plays an invaluable role in the work of the Court. The future of the ICC hinges on its ability to obtain global legitimacy among States and their people. Outreach serves a critical function in improving understanding and demand for international justice, especially in countries where the Rule of Law is weak.

Making the outreach unit more effective, means more communities will understand the mission of the Court and support its roles thereby shore-up legitimacy for the Court.²⁴² Moreover, it

²⁴⁰Erika Murdoch, 'The Office of the Prosecutor: Charging Strategy' Strategies' 'The International Criminal Court, Confronting Challenges on the path to justice'[2013] (Jackson School of International Studies Task Force Report.)

²⁴¹Allie Ferguson, 'From the courtroom to the field: ICC Outreach Strategies' 'The International Criminal Court, Confronting Challenges on the path to justice'[2013] Jackson School of International Studies Task Force Report.

²⁴²Thomas Franck, *The Power of Legitimacy Among Nations* (OUP 1990) 16.

establishes and fosters sensitive relationships with victims. Although, the ICC could be regarded as a punitive organisation but victims are central to the Court's mandate and success. It is obligated to provide restorative justice through trial participation, reparations, and the Trust Fund for Victims, all these would be enhanced with improved Outreach Strategies.

5.7 Short-Term and Long-Term Solutions

In order to ensure the long-term success and stability of the ICC, the failures must be addressed, and the accomplishments must be enlisted as a tool for building. Over the next decade, several adjustments must be made in order to secure a foothold in the global world.

The first thing that needs to be recognized about the ICC is the relative adolescence of the court itself. For many institutions, especially those crossing so many international boundaries, it needs to be expected that time will help evolve and shape the future of the institution. When referring specifically to the infancy of the court it helps to examine the early years of other international judicial institutions such as the ICTY and ICTR. When the ICTY and the ICTR were established in 1993 and 1994 respectively, the groundwork for these two institutions was essentially a revolutionary idea, where as a civil war and specifically crimes committed during those civil wars were being punished on an international level. Many people questioned the authority of the UN Security Council to involve itself and establish a judicial system to deal with domestic disputes. Due to these factors, as well as monetary issues, both of these courts, although established quickly, found it hard to secure their foothold on the international stage.

The ICC has faced many of the same problems early on, and with the broadness of its jurisdiction, some of the problems facing the ICC are compounded by sheer convolution of judicial interaction with so many different states. As it stands right now, one of the main goals for the ICC is to prevent itself from becoming irrelevant. Both the ICTY and ICTR struggled in the early stages, but now both are thriving and have become fully recognized functioning institutions of international judiciary law. This influence has just recently gained prominence, and in order for the ICC to mirror the successes of these tribunals, the key will be patience.

The second short term goal of the ICC, in order to maintain relevance and support, is to ensure the new figurehead, Ms. Bensouda, becomes a charismatic figurehead to be the face of the court for many years to come. Moreno-Ocampo has obviously not fulfilled the exorbitant expectations

that were placed directly on his shoulders when he ascended to the office of chief prosecutor. Despite the intentions of firm policy and pursuant of miscreants, Moreno-Ocampo's record did not withstood the enormous expectations placed on him at the time of his election. Instead he has alienated staff and produced little results, while at times being categorized as abrasive or uncooperative.

The chief prosecutor needs to be charismatic and assertive while simultaneously working in the confines of the international system. This can be a very fine line to walk. On one hand, the authority of the ICC must be upheld, but on the other it also must be understood that the court uniquely deals with many nations, and the diplomacy involved in receiving full cooperation from the parties of the Rome Statute must be a priority.

In other words, the Prosecutor Besouda has an enormous task of not only locating and indicting the correct situations and criminals, but also receiving the full cooperation of the states functioning within the treaty.

In order to become more efficient and therefore successful, some ground rules must be laid by the ICC and the parties of the Rome Statute to ensure the full support of the states. Due to recent events, especially those pertaining to Omar Al-Bashir and the Darfur conflict have exposed the ICC's weakness on the international stage in regards to persuading states to turn over criminals indicted by the court. The ICC constantly finds itself in a precarious situation, juggling the rules established as a responsibility of the court and the constant interference or agenda of all states, including those states that have ratified and also those that have not ratified the Rome Statute.

In order to ensure the support of the global environment especially the specific parties to the treaty, the next conference needs to reiterate the importance of state cooperation in the apprehension of ICC fugitives. Consequences for disobedience of the Treaty, and therefore breaking international law, such as economic sanctions or aid reduction from other party nations need to be discussed and perhaps implemented in order to ensure that criminals do not go unapprehended indefinitely. This is simply a small step to reaffirm that states which harbor or fail to apprehend fugitives within the confines of their borders must face consequences in the form of international ridicule, as well as possible trade sanctions or aid reduction.

As Demirdjian affirms, this may be difficult, “despite the binding effect of the general legal framework establishing international courts, cooperation with international courts is a delicate topic and generally speaking, it is a fragile scheme considering the lack of enforcement mechanisms.” This statement implies the need for a permanent policing force directly under the umbrella of the ICC. While this idea may have merits, the reality of states willingly granting the court an international police force is unlikely. Despite the fact that the cooperation of states is included in the Statute, not all states interpret this as such.

In order to enforce the article a conference needs to be called to reiterate and maybe even amend the Rome Statute to take a firmer stance on state cooperation in the apprehension of the indicted, with possible economic sanctions, or loss of foreign aid as possible consequences for insubordination to the treaty. This scenario seems more likely, and may produce positive results through understanding.

A last short term goal for the ICC will involve the long and arduous task of courting the United States to sign and ratify the treaty in order to receive more support and power, enabling the court to function properly. This will not be a simple process, and therefore the short term goals need to focus on simply bridging the enormous gap between the ICC and the United States. The first step in this process should be the acceptance of Annex E into the legal framework of the ICC as an amendment.

Considering the U.S.’s “war on terror” the inclusion of terrorism and terrorist acts as defined in Annex E will provide a basis with which many successful barriers may be broken between the two parties. Terrorism may be the most explosive threat to all global states, and therefore inclusion into court doctrine seems to be a natural progression. As Van Krieken states, “That, however, does not mean that one should not prepare for adding terrorism to the list of crimes for which the ICC would have jurisdiction.” The court must proceed knowing that the inclusion of terrorism under its jurisdiction will not instantly convince the U.S. to sign and ratify the treaty. It may be a small step towards creating an atmosphere of bilateral thinking opening the waves of diplomacy and communication for both parties.

Since the U.S. has gone out of its way to isolate countries through separate treaties even with those party to the Rome Statute, but recently showed some signs of bending toward the

jurisdiction of the court, the court must find a way to deter American disapproval of the jurisdiction of the court. Including Annex E as an amendment to the Rome Statute may be the first step in the long courting process of the U.S. and possibly the UN Security Council.

The face of the ICC for the long-term remains extremely convoluted. The willingness to adapt to the wishes of the majority of the permanent members of the UN Security Council remains its most compelling and arduous task. Bridging the gap between powers such as the United States and China will ultimately make or break the court in the long run. In certain circumstances the wishes of these major powers may need to be compromised and included for the court to reach its full potential. This is a fine line considering the court must also uphold its own authority and integrity. The court needs to broaden its spectrum in regards to intercontinental examination. Currently all of the cases being brought before the court are located in Africa. Now, as some Africans claim bias, the turmoil in Africa is no secret.

While this charge may be unfounded, it is definitely an issue that needs to be addressed. With the election of an African Chief Prosecutor, the court has definitely addressed those initial concerns. Furthermore, the indictment of war criminals in other parts of the world, for example, Afghanistan, Burma, Honduras or Palestine, the court must make it a priority to shake the label of being a lackey to the West.

These long-term goals, while complicated, must be addressed with concern to the evolution of the court. The goals of the ICC will absolutely need to focus on bringing criminals to justice, successfully prosecuting them, and sentencing them for the crimes committed during times of war. Ultimately without successful prosecution the ICC will continue to face international opposition, and therefore this must be their main priority. The successful prosecution of Lubanga Dyilo is a start. However, in order to continue to receive support and possibly enlist new support, the ICC must complete the task it was established to do, and that is convicting war criminals of the atrocious crimes they have committed. The other short term solutions suggested above will only increase the efficiency and success of the court, but ultimately judgment of the court will lie in the hands of its ability to function cohesively.

CONCLUSION

Throughout the history and evolution of an international criminal court from World War II on, the need has never been a debatable topic. The need, due to the inevitability of humans acting inhumane towards their fellow man, especially in conflict areas, will always be present. Overall, the ICC needs to be examined in the perspective of its context. It is an adolescent institution that must function in an international system without full global support and especially lacking in support from major global powers. This can be a very precarious situation to bridge and maintain. However, success will be the foundation of its power. The more successful and justifiable cases that are brought and handled before the ICC, the more that its niche in the international stage will be carved. When this occurs, major powers such as the U.S. and China can ill afford to ignore the criminal court.

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