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DEDICATION

I, dedicate this thesis to God Almighty my creator, my strong pillar, my source of inspiration. I also dedicate this work to my late loving wife **Ennie Chidzenga** who meant so much to me, may her dear soul rest in eternal peace. The thesis is further dedicated to my three daughters **Michelle, Monalissa** and **Melany** who gave me the strength to carry on in the face of adversity.

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ABSTRACT

Impunity continues unabated within the international system despite dedicated measures aimed at punishing the offenders. Since the Nuremberg Military post WWII, dedicated initiatives to guarantee international peace and security via implementing punitive measures against those who commit egregious deeds against humanity have been implemented. The Rwandan and Yugoslavian genocides, and subsequent tribunals instituted afterwards quickly come to the fore. These two tribunals set the tone that resulted in the establishment of the International Criminal Court under the Rome Statute. Since formation, the body has been accused of inherent bias against the African continent. This thesis sought to establish the veracity of that assertion through establishing cooperation between African non state parties and the Rome Statute. Documentary research formed the key thrust of this thesis. Theories of humanitarian intervention such as the fiduciary theory and views of the classical scholar, Grotius, were used and related to the objectives. Models of criminal justice that sought to understand basis of punishment were also used and an evaluation of the ICC strategy as it relates to Africa evaluated. The conclusion being that the strategy is not in sync with aspirations of the continent and as such the ICC must ensure the concerns of African states are address to guarantee cooperation. The other alternative choice existing for African states being to exit from the obligations of the Rome Statute and form a new all African Court to punish Africans for crime committed in Africa.

Keywords: *cooperation, ratified, ICC, UNSC, Africa.*

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CHAPTER ONE

GENERAL INTRODUCTION AND BACKGROUND

1.1 Introduction

State cooperation under international criminal justice forms the key against impunity for without state cooperation, the international criminal justice system will definitely not function. The refusal by South Africa not to enforce an Interpol '*UN INTERPOL Special Notice*' against the Sudanese president, Omar Al Bashir when he visited South Africa and the threats given by the United States of America to the International Criminal Court (ICC) prosecutors can be used as two examples to give weight to this narrative.¹ Prosecution of warlords such as Charles Taylor by the ICC was as a result of successful state cooperation. This is so since the leading institution that seeks to curb impunity, the ICC, depends on states, the United Nations Security Council (UNSC)², national law enforcement authorities and other international partners to have suspects arrested and surrendered to the Hague.

The United Nations Security Council has made dedicated efforts in ensuring that violators of international humanitarian law are brought to book. In achieving this, it has relied on the cooperation of states in the arrest, investigation, prosecution of accused persons subject to ICC system. This can be seen by the fact that 18 months after the adoption of the resolution establishing the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) was set up. These two tribunals, primarily the ICTR have been hailed for their efficiency in giving fair judicial trials, creating important jurisprudence and giving groundbreaking contribution towards the development and enforcement of international

¹ **UN INTERPOL Special Notice** is the closest instrument to an **international arrest warrant** in use today. **Interpol** (the International Criminal Police Organization) circulates **notices** to member countries listing persons who are wanted for extradition.

² Sudan was not an ICC signatory. The UNSC requested a referral to the ICC to have Al Bashir charged.

criminal justice. The ICTY was established under Resolution 808(1993) and the tribunal was finally established pursuant to Resolution 827(1993).³

The Security Council was unequivocal in its belief that future stability of Yugoslavia can only be definite if and only if military measures were accompanied by punishment of impunity and thus perpetrators under international law. Resolution 935 (1994), following the earlier ICTY precedence, was agreed upon on 1 July 1994 after the UNSC satisfied itself that a genocide and crimes against humanity had systematically occurred in Rwanda. The preambles of both tribunals, the UNSC was clear in that creation of such tribunals would help deter and halt future atrocities and that prosecution of offenders would help contribute towards restoration of peace and reconciliation.⁴

It is without doubt that the United Nations Security Council has played a crucial role in international criminal justice. Since the Nuremberg Military Tribunals, the establishment of the United Nations Security Council has been one achievement by the international community insofar as the development and evolution of international criminal justice is concerned. In this regard, the relationship between the UNSC and the ICC is groundbreaking and one way that has ensured that both state and non-state parties are held to account for impunity and violations of IHL.

Refusal by states to cooperate has been referred to by ICC Chief Prosecutor, Fatou Bensouda as being synonymous with justice delayed and denied. This, she opines, helps perpetuate impunity and she uses the South Sudanese example to make good her argument.⁵ Such refusal though has been necessitated by political undertones in some cases, primarily in Africa where there is an emerging school of thought that the ICC is just meant to punish Africans whilst allowing those that are perceived to be untouchable the green-light to perpetuate impunity.

³ The SC - acting under Chapter VII of the UN Charter - having determined that '... widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia ... constitute a threat to international peace and security', decided that - in the particular circumstances of the former Yugoslavia - the establishment of an ad hoc tribunal '*would contribute to the restoration and maintenance of peace*'.

⁴ *First Annual Report of the International Criminal Tribunal for the Former Yugoslavia*, 29 August 1994, U.N. Doc. A/49/342 - S/1994/1007, para.11.

⁵ <https://www.un.org/press/en/2018/sc13623.doc.htm> Accessed 25 January 2020

This Chapter main purpose is to introduce the research topic, contextual background, outlines the legal problem underpinning the research and lays out the theoretical framework of the research. The intention is to address the broader objectives of this research study and this shall be done through the usage of case study material and well analyzed case studies to give meaning to theoretical discourses that emerge.

1.2 Contextual Background of the Study

Since Nuremberg trials in 1945, the success of international criminal justice as a means of confronting war-time atrocities has critically hinged on the degree of cooperation by states in the prosecution of international crime, whether such states were parties to a relevant treaty or not.

The genesis of International Humanitarian Law (herein referred to as IHL) can be traced back to 1864 when the first Geneva Convention; the Convention for the Amelioration of the condition of the Wounded in Armies in the field was promulgated.⁶ This precedence gave birth to the foundation of the Geneva Conventions and subsequently led to the establishment of the International Red Cross Simultaneously, the Hague Conventions were adopted by states with a thrust to regulate and govern the conduct of war. As a consequence of this, it can be appreciated that the Hague Conventions are various international treaties that emerged from the Hague Peace Conferences in 1899 and 1907.

Fundamental changes to IHL were witnessed in the late nineteenth century when states began to opine that violations of the emerging law of armed conflict must engage. This development saw states putting on trial enemy personnel who had acted with impunity during an armed conflict as related to violations of laws and customs of war or of their individual soldiers. The cessation of hostilities after the World War I brought to the fore a coordinated effort at enforcing IHL with the conception of the Treaty of Versailles that sought to punish German for responsibilities of crimes committed during and

⁶ This was influenced by one of the bloodiest battles of the nineteenth century in Solferino, Henry Dunant proposed, in 1862 and published that nations should form relief societies to provide care for the wounded in wartime.

leading to the war itself.⁷ Already, the movement towards punishment of individuals can be seen emerging, with the acquiescence, instead of cooperation, of the defeated state.

1.2.1 International Humanitarian Law and International Criminal Justice

The 1949 Geneva Conventions not only contains most of the provisions of contemporary IHL, but creates a foundation for prosecution of international crimes that are essentially violations of laws of war. The development of international criminal justice was solely aimed at ensuring that violators of IHL and other international crimes are brought to account. The Rome Statute, under the principle of complementarity, gives primacy to national jurisdiction to enforce IHL.⁸ The end of the Second World War led to rapid development and evolution of international criminal law. The establishment, by the victorious Allied powers, of the International Military Tribunals at Nuremberg and the Tokyo International Criminal Tribunal can be viewed with this evolutionary perspective. For the defeated states of Japan and German, the obligation to cooperate with the tribunals was forced as this was purely victor justice. Most of their leaders, in the case of German, were either arrested (Herman Goering and others), committed suicide (Hitler, Goebbels) or were simply incapacitated to negotiate favorable terms of surrender.

Between 1945, when the IMT was set up and 1990, the Cold War tensions and rivalry prevented any solid developments of international criminal law to punish for violations of IHL. However, after the fall of the Soviet Union and collapse of the Berlin Wall (the Iron Curtain), international criminal law gathered momentum again. International criminal tribunals were therefore next established in the 1990s by the United Nations Security Council. The UNSC invoked the famous Chapter VII⁹ when The

⁷ The Treaty of Versailles (Art. 227–230) provided for the prosecution of Kaiser Wilhelm II before a special tribunal ‘for a supreme offence against international morality and the sanctity of treaties’. However, the Kaiser fled to the Netherlands and was never tried. Although the treaty also recognized the right of the Allies to establish military tribunals to try German soldiers accused of war crimes, instead a compromise was reached under which Germany tried some of those accused of crimes – the ‘Leipzig Trials’.

⁸ This means countries which have capacity are able to investigate and prosecute crimes under the Rome Statute

⁹ Article 39 The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

International Criminal Tribunal for the former Yugoslavia (hereinafter: ICTY) was convened by the Security Council resolution no. 827 (1993) whereas the International Criminal Tribunal for Rwanda (hereinafter: ICTR) by resolution no. 955 (1994) (UN SC res. 827 (1993), UN SC res. 955 (1994)). The Special Court for Sierra Leone (SCSL) was established by the United Nations at the instance of the government of Sierra Leone to deal with the international crimes committed during the country's civil war.¹⁰

In general, these tribunals are *ad hoc* in that they are created to deal with crimes committed within a particular location and within a particular time period. They were also established post ex facto. After handling volumes of materials, they are now winding down in what had been a hugely productive effort at punishing impunity. An important lesson passed down by the ad hoc tribunals was the importance of state cooperation with the Tribunals; without active cooperation, the success of the Tribunals would not have been recorded since success of these *ad hoc* tribunals is purely a function of cooperation and not otherwise hence without such cooperation, it becomes difficult to succeed.

The establishment of these tribunals vary as some are established by national domestic laws whereas some such as in Sierra Leone are established by international agreements. For East Timor and Kosovo, such mechanisms were established when the countries were still being administered by the United Nations.¹¹ What cannot be missed is the role of the state in complying with various requests, directions and requirements to ensure the success of prosecutions. All the states that hosted ad hoc or hybrid tribunals went a great distance to facilitate investigations, promote effective evidence gathering, actively cooperate during prosecutions and arrest of targeted suspects. Again, it can be noted that without invoking the whole power of concerned states to assist in this manner,

¹⁰ During Yugoslavia's disintegration in the early 1990s, war broke out among the various factions and a number of significant atrocities were committed. In 1993, the UN Security Council, by Resolution 827, set up an International Criminal Tribunal for the Former Yugoslavia. That tribunal was established to deal with serious international crimes committed since 1991 on the territory of the former Yugoslavia and is based in The Hague. In 1994, the UN Security Council, by Resolution 955, set up an International Criminal Tribunal in Arusha, Tanzania, to try crimes committed during the genocide in Rwanda in which nearly a million people died.

the outcomes of international criminal justice would have been extremely difficult to achieve.

1.2.2 The Rome Statute and State Cooperation

The International Criminal Court was established in terms of the Rome Statute on 1 July 2002 with the mandate being to punish most heinous crimes ever experienced by mankind.¹² Article 1 of the statute, is clear on the purpose and nature of the Court. It states as follows:

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. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute -Rome Statute of the ICC Article 1

The ICC was created as a court of last resort to prosecute against impunity in cases and matters where national courts fail to act and it is dichotomous in mandate to the International Court of Justice whose objective is to handle disputes between states. The ICC seeks to prosecute individuals responsible for committing war crimes, genocide crimes against humanity and the crime of aggression, which is yet to be defined. Its first hearing was in 2006 when it was to decide the fate of Thomas Lubanga, who stood accused of recruiting and using child soldiers in the war in the Democratic Republic of the Congo (DRC).¹³

The missing link in the international legal system then led to the creation of the ICC, which gap existed since, as earlier on mentioned the ICJ only dealt with disputes between states meaning that without punishing the individual, egregious violations of human rights frequently went unpunished. This was observed to have been the reason behind the failure to prosecute for crimes committed in Rhodesia, Cambodia,

¹² ICC Jurisdiction and non party states, <https://www.thedailystar.net/law-our-rights/news/icc-jurisdiction-and-non-party-states-1697461> (accessed 25 January 2020)

¹³ <https://www.britannica.com/topic/International-Criminal-Court> (accessed 25 January 2020)

Mozambique, Liberia and El Salvador where horrifying numbers of unarmed civilians, included women and children were brutally murdered.

1.3 Statement of the Problem

Currently, the international criminal justice framework has no clear, acceptable and universally applicable mechanisms to ensure the cooperation of states that are not party to the Rome Statute. Further, there are no clear mechanisms on how non-party states can be pressured to cooperate in the context of various international law principles in their favour. This reality poses fundamental operational problems in the prosecution of international crimes and in the fight against impunity.

The main *ad hoc* Tribunals were fortunate in relation to cooperation because the UNSC was heavily involved; all Resolutions of the UNSC binds all member states of the United Nations Organization in terms of the UN Charter. Article 12 of the Rome Treaty allows the ICC to have jurisdiction over nationals of non-state party countries provided the crime is committed within the territory of a state party.

Further, the framework in place at the Security Council means members of the Security Council, themselves accused of violations during conflicts, can just use veto power to protect themselves. All these issues pose legal problems that question the stability or future of the whole international criminal justice system.

1.3.1 Specific Research Objectives

- ✧ To describe the significance of state cooperation in the global fight against impunity
- ✧ To critically analyse the role and place of state cooperation in international criminal justice between 1945 to the period of the *ad hoc* tribunals.
- ✧ To interrogate case studies on state cooperation under the Rome Statute for purposes of illustrating the operationalization of state cooperation under the Rome Statute
- ✧ To proffer conclusions and recommendations on how to strengthen the state cooperation framework of the ICC in the interests of international criminal justice.

1.4 Research Methodology

Interpretive studies are best addressed by qualitative methodology. The objective of this study, which seeks to analyse the level of state cooperation and enforcement of IHL by ICC on non-state parties entails that the researcher be guided by qualitative research tactics. The study seeks to draw from case law and precedence insofar as analyzing this level of cooperation is concerned.

To achieve this, the research shall benefit fundamentally from desktop research; that is, a comprehensive evaluation of written works, authoritative on the subject, such as journals, books, reviews and published articles. The relevance of these sources cannot be understated as related to their value insofar as giving both a historical and contemporary perspective is concerned. Basically, this research adopts descriptive, doctrinal and case study approaches. No interviews or fieldwork or quantitative research shall be carried out.

1.5 Significance and Justification of the study

This study is of fundamental importance to a lot of stakeholders insofar as IHL is concerned. Through this research, a lot of information will come to the fore which will help shed more light into the intricate relationship between the ICC and Africa. That will go a long way in laying bare gray areas that exist insofar as that area is concerned. Of paramount importance to the researcher being the scope of understanding of the concept of IHL will be broadened and deepened. This will enable there to be a proper contextualization of issues as related to this understanding.

Not only will the research prove beneficial to the researcher but it will add to the already existing board of knowledge. A lot of research on the subject have been done but gaps still exist. The gap that is going to emerge from this study shall add to theory whilst findings shall seek to bridge the separation between theory and practice. The findings will prove to be handy to the policymaker and beneficial to practice. Regardless, this research is being done from an African perspective meaning views contained will be organic to Africa instead of being Euro-centric which situation has led the ICC to be accused of bias.

1.6 Limitations of the Study

Just like in all studies, time is always a limiting factor. This research is going to be longitudinal in design. This is due to university requirements. This means that some developing concepts might be missed by the researcher since by the time of publication, and with the passage of time, most dynamics can and would have morphed differently. As such, time is a limiting factor.

1.7 Chapter Synopsis

This Chapter provides a contextual background of the research, introduces the research question and the statement of the problem. It further identifies the objectives of the research which are going to form the backbone of this research as the paper moves into subsequent chapters. Within this chapter, a depiction of the methodology used for this research was made whose thrust was aimed at highlighting feasibility and applicability of conducting the research in line with the requirements of the study program.

1.8 Chapter Summary

The chapter looked at the introduction and helped generate the problem statement guiding the research. The problem statement led to the objectives which shall be used by the researcher as he navigates around the issue at hand which issue centers on state cooperation within the African context and the ICC.

CHAPTER TWO

THE ROME STATUTE STATE COOPERATION FRAMEWORK

2.1 Introduction

The relationship between the ICC and supra national bodies on the African continent such as the African Union has been a stormy one. These supra national bodies are of the belief that the ICC must withdraw its mandate in Africa and leave the investigation and prosecution of grave crimes to national and regional mechanisms. This logic is derived from the principle of complementarity.¹⁴ This scheme of things places the entire discourse of the adequacy of mechanisms and tools within the Rome Statute as related to cooperation into question. From a total of 123 members who are state party to the convention, 43 African countries are signatories whilst 33 have ratified.¹⁵ The furore around the *UN INTERPOL Special Notice* arrest request from Interpol to former Sudanese president, Omar al Bashir, when he was visiting South Africa, a state party to the convention, brought the relationship between the ICC and Africa into the spotlight. Not only that, the fact that Sudan is a non-state party, gives weight to the basis behind this thesis as does the reality that most of those on trial and those convicted have been Africans.

Therefore, this chapter is going to focus on the Rome Statute State Cooperation Framework as regards Africa. This is so since the objectives of this study seek to understand the relationship between the statute and Africa as regards the issue of state cooperation. The main argument carried by the chapter focuses on controversies and debates that have emerged as a consequence between Africa and the Rome Statute

2.2 International Criminal Court and the Theory of International Punishment

Hugo Grotius, the famous Dutch scholar and diplomat posited that it is obligatory upon all members of the international community to punish violators of natural and the positive law of nations regardless of who the violations occurred against.¹⁶ Grotius based this rationale on the absence of a higher authority in the international society

¹⁴ The principle of complementarity which gives states the primary jurisdiction to try grave crimes and play an active role in the fight against impunity.

¹⁵ iccnow.org/documents/Africa_and_the_ICC.pdf (accessed on 31 January 2020)

¹⁶ Criddle, E., *Standing for Human Rights Abroad* (November 20, 2014). *Cornell Law Review*, Vol. 100, No. 2 (2015)

whilst simultaneously there existed a need to punish for impunity whilst generating deterrence in the process. This theory develops by highlighting that there basically is no need for a state to prove that it has suffered injuries specific to it alone for it to partake in enforcement action. What is needed, so goes the theory, being sound judgment by any member of the international community not liable in such shenanigans can thus take measures. Probably, this was the rationale taken by The Gambia when it decided to file a complaint against Myanmar at the International Court of Justice seeking to have Myanmar charged for genocide against the Rohingya. Gambia is a state party to the ICC whilst Myanmar is not.

The Grotian narrative justifies warfare to be waged upon a violator of the nature of law as a form of punishment. This he explains by highlighting that a sovereign can thus be obligated to wage warfare on those that “feed on human flesh”.¹⁷ Therefore, so posits Grotius, any state can mete out punishment on one that violate the rights of its citizens as an enforcement action aimed at vindicating natural justice. This theory, if viewed from within the current international order and within the African context, can be seen to be functional as was enforced by the United Nations Security Council on Libya in 2011 during the commencement of hostilities where member states felt that the Libyan leadership was extremely operating against the spirit of warfare by waging attacks indiscriminately against civilians.

Samuel Pufendorf and Emerich de Vattel stressed that punishment was allowable only within the framework of a hierarchical relationship between subject and sovereign whereas the law governing international relations rested on an entirely different premise, that is, the formal equality of sovereign states.¹⁸ This was no wonder that by the 20th century, this Grotius perspective had been abandoned as being based on arbitrary use of force against a sovereign state. The rationale for revulsion was based on the principle of *par in parem non habet imperium* that is, states could not claim authority over other states without their authority. This rationale became the guiding principle in international law.

¹⁷ *ibid*

¹⁸ Samuel Pufendorf, *The Law of Nature and of Nations*, Basil Kennet trans., 5th ed. London 1749)

Besides this, Grotius view has been rejected since it is postulated that it is inconsistent with the core aspirations of humanitarian intervention. Steven Neff in his criticism of the theory aptly put it across by saying Grotius is only concerned with the punishment of the wrongdoer and not the rescuing of the victims. Thus, he opines, Grotius is too engrossed with values of retribution and deterrence whereas the core principles and thus values of humanitarian intervention aims at securing the safety of human beings from present or imminent.

This theory helps shed an appreciation on the arbitrary use of force against states accused of impunity. For this thesis, the relationship is wide and can be augmented by numerous instances wherein the arbitrary use of force per Grotius resulted in the escalation of issues instead of resolving them, hence proving the lack of applicability of this theory. For instance, under the auspices of the doctrine of *Responsibility of Protect* (R2P), NATO, deriving mandate from UNSC resolution 12345 on Libya, bombarded Tripoli to smithereens, a deed that created a power vacuum post the macabre assassination of Gaddafi, then Libyan leader. This intervention and use of force did not thaw hostilities but instead escalated them to the current scenario where we now have two governments, both fighting for recognition and the emergence of such unfortunate reality as slavery.

2.3 Application of Theory to State Cooperation

This discussion of Grotius shows that the relationship between justice and punishment is blurred. Justice seeks to bring to the fore the issue of accountability. It hence forms part of the causal relationship between committing a crime and being punished. For punishment and justice to be attained within the realms of the Rome Statute, cooperation between and amongst nation states that are both state parties and non-state parties becomes of paramount importance. The creation of the ICC was hailed and can be seen as one of the most important events in international relations and international law.¹⁹ A lot of key factors ought to be in place if ever the ICC is to function effectively. Besides resources, financial muscle and administration capabilities, the issue of cooperation is of much significance as the former. This is so since the ICC is fundamentally different to national institutions in that it does not have a national police

¹⁹ Zhu W, 2006, On co-operation by states not party to the International Criminal Court, Volume 88 Number 861 March 2006

nor does it have an army of its own to enforce its resolution making dependency on cooperation amongst nations, both state and non-state actors, key.

This cooperation is crucial when conducting investigations, enforcing arrest warrants (*United Nations INTERPOL Special Notices*), transferring the accused and executing judgments. So scope and degree of cooperation becomes the basis under which the success of the ICC is premised on.²⁰ This cooperation is broad based and needs active participation and support of both big and small countries in all regions of the world.

In its 13th Ordinary Session held from 1-3 July 2009 in Sirte, Libya, the African Union (AU) affirmed the need for all concerned States to respect International Law and particularly the immunity of state officials when applying the Principle of Universal Jurisdiction. This proves that the Grotian perspective, for it to be applicable, ought to respect the aspirations of the sovereignty of individual states and the aspirations of the bodies to which they are members. As such, state cooperation from this realm is a function of statecraft and diplomacy whose efficacy sees punishment not as just and necessary but as being the right thing to do, provided there is the right legal framework and international basis giving merit to such. States will naturally cooperate as was the case with the landmark Rwandan Tribunal, which Tribunal has been hailed as one of the most successful landmark cases proving the efficacy of punishment within the realms of state cooperation. This tribunal, to some extent, vindicates Grotius in that it proves that punishment, done well, can achieve the ends of justice.

The following part discusses the specific provisions dealing with the international legal position on obligations of non-state parties in general.

2.3.1 Obligations of non-state parties to cooperate under International Law

For non-state parties, there is neither harm nor benefit (*pacta tertiis nec nocent nec prosunt*) to be bound by a treaty they are not state party to.²¹ The *pacta sunt servanda* is a principle in international law that seek to compel members of the community to be bound to fulfill commitments they undertake to a treaty, be it bilateral or multilateral, post ratification and once it gets into force.²² This principle, to affirm its importance

²⁰ https://www.icrc.org/en/doc/assets/files/other/irrc_ (Accessed 25 February 2020)

²¹ Ibid.,

²² www.judicialmonitor.org/archive_0908/generalprinciples.html (accessed on 25 February 2020)

within the broader context of international relations, was incorporated in the Covenant of the League of Nations and subsequently the Charter of the United Nations though it has been noted that the principle was not explicitly stated in both documents by name. The Vienna Convention on Law of Treaties made clear and direct reference to this important principle.

This principle moves in sync with aspirations of Article 86 of the Rome Statute. This article explicitly makes it clear that cooperation with the statute is obligatory upon state parties and thus are expected to cooperate fully with the court in its investigation and prosecution of crimes that occurred within their jurisdiction. Article 87 of the Rome Statute further states the obligations expected of states by this convention. Cooperation is the key factor for consideration which this article impresses upon.²³

Article 87(7) of the Rome Statute provides that

"Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council." - The Rome Statute

The issue of cooperation as highlighted earlier on is at the heart of the effective operation of the Rome Statute. The United Nations Security Council acts as the referee and ultimate arbiter as related to cooperation. To achieve this, the UNSC works with organizations such as Interpol. At Interpol, there is what is known as the *United Nations INTERPOL Special Notice*. This notice is not issued to present political figures since when the UN entered into an agreement with Interpol, the terms were that those leaders who qualify to be arrested as regards to war crimes and other deeds of impunity be arrested and that they would be arrested under Interpol-UN Special Notice. This notice is given to political figures accused of crimes against humanity. The challenges with *Red Notice* being that section 3 of the Interpol Constitution prohibits it from being

²³ Rome Statute of the ICC.

operational because most of the crimes will be political. No wonder Interpol recuses itself when political issues are concerned.

UN-INTERPOL Special Notice is given when UNSC sits and decides and issues it and it also carries a power of enforcement since most countries of the international community are members of the UN and also that the key five countries which are permanent members of the UNSC enforces compliance making it imperative that countries are bound. This notice is one type of a notice used to arrest and prosecute for impunity. Interpol assists the UN in tracking the accused with the objective being to ensure they face justice. Interpol, it must be observed, got different kinds of notices from blue, green, black, red but those who commit egregious crimes against humanity are arrested under Interpol-UN Special Notice. This is a unique type of a notice which is done to deal with the issue of section 3 of the constitution of Interpol

2.4 The problem of non-party states in international law

The issue of cooperation as highlighted earlier on is at the heart of the effective operation of the Rome Statute. The United Nations Security Council acts as the referee and ultimate arbiter as related to the issue of cooperation for non states and state parties. The Interpol *Red Notice* alert given to former Sudanese president, Omar al Bashir was thus violated by a state party to the treaty, South Africa. This can be viewed within the realms of the principle of *pacta sunt servanda* where South Africa, as a state that ratified the Rome Statute, was supposed to honor its obligations by arresting and surrendering the accused to the ICC.

Al Bashir was able to embark on numerous state visits to both states that had ratified and those not during the time the arrest warrant was served on him. He visited Kenya, Chad, Djibouti and in all these instances, the prosecutor would write to the Security Council informing them about these developments. All these notifications were done in line with the provisions of article 87(7) of the Rome Statute. Malawi was also reported for its failure to nab Bashir when he visited that country.

2.4.1 The Case of the Prosecutor vs Uhuru Kenyatta

The accused was Kenyan president, Uhuru Muigai Kenyatta on five counts of crimes against humanity. These charges were emanating from 2007-2008 post electoral violence in Kenya that left over a thousand dead and numerous others injured. These

charges were subsequently withdrawn by the prosecutor on 5 December 2014.²⁴ President Kenyatta stood accused of being criminally liable and as an indirect co-perpetrator in accordance with article 25(3)(a) of the Rome Statute. These charges were laid out as murder per article 7(1)(a), deportation or forcible transfer of population (article 7(1)(d)), rape (article 7(1)(g), persecution (article 7(1)(h); and other inhumane acts (article 7(1)(k)).

The charges against the Kenyan president were withdrawn after the prosecutor filed a notice to withdraw the charges. The Trial Chamber V (B) terminated the proceedings. This charge was necessitated after the Pre-Trial Chamber II believed that substantial evidence existed that Mr Uhuru Muigai Kenyatta was responsible for the common implementation of systematic and coordinated violence through the provision of institutional support of behalf of his PNU coalition.

The dispute between Kenya and the ICC escalated to a point that Kenya ended up refusing to cooperate with the ICC prosecutor, choosing instead not to send suspects to the court to face trial. This move ended up forcing the African Union to evaluate whether or not it is still feasible to have member states remain as signatories and state parties to the Rome Statute. This rationale emanates from the logic that generally; the ICC is cherry-picking Africans only for prosecution whilst ignoring other people from other regions of the world who even commit serious egregious crimes against humanity. This stance resulted in many of the African state parties to the convention hinting that if the ICC does not remove bias and is not reformed, they will pull out of the treaty. Raising the argument of the importance of its independence, the ICC resisted allegations of lack of transparency raised against it.

2.5 Analysis Of The Cooperation Framework For Both State Parties And Non State Parties.

The effectiveness of the operation of the ICC rests solely on the aspect of cooperation to it by states. This cooperation applies to both state and non state parties to the ICC

²⁴ The prosecutor vs Uhuru Muigai Kenyatta, the confirmation of charges hearing took place from 21 September to 5 October 2011. Charges withdrawn due to insufficient evidence. Case also involved charges against Francis Kirimi Muthaura and Mohammed Hussein Ali. Judges declined to confirm charges against Mohammed Hussein Ali on 23 January 2012.

convention. It hence can be observed that beyond the general principle of the law of treaties according to which treaties are binding only on state parties, when viewed in the light of other general principles of international law, cooperation with the ICC is no longer voluntary in nature but is now obligatory in the sense of customary international law.²⁵ The ICC is fundamentally different to national courts in that its enforcement capabilities are restricted due to the absence of its own stand alone police force. This lack of a stand alone police or military, despite its global reach, restricts its effectiveness in prosecuting those indicted for trial. This then mean that the ICC has to solely rely on the cooperation of states as regards investigation, evidence gathering, making arrests, transferring the accused and executing judgments.²⁶

The multidimensional aspect of state cooperation required by the ICC means that both big and small countries must be willing to cooperate with it. It must be emphasized that treaties are binding to state parties and this shows that for non state parties, there neither is harm nor benefit in them (*pacta tertiis nec nocent nec prosunt*). This hence means that in accordance with the general principles of the law of treaties as enshrined by the Vienna Convention on Law of Treaties, the obligation of non state parties to cooperate differs from that of state parties.²⁷ Within the Rome Statute, the provisions on the need to cooperate are differ for both state and non state parties. Taking Article 86 for instance as a point of analysis, the issues of state cooperation and judicial assistance are clearly spelt out. ²⁸

Article 87(5) of the same Rome Statute stipulates on cooperation by non-state parties. It states that the Court “may invite any State not party to this Statute to provide assistance under this Part on the basis of an *ad hoc* arrangement, an agreement with such State or any other appropriate basis.” The fact that only state parties are obligated to cooperate compels the Rome Statute to make different provisions for state and non

²⁵ Wenqi (2008), International Criminal Justice, Vol 2

²⁶ *ibid*

²⁷ *ibid*

²⁸ In accordance with this provision, State Parties shall, in accordance with the provisions of this statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the court.

state parties on the issue to do with cooperation. In clearer terms, as regards state parties, the ICC is *entitled* to present *co-operation requests* and they are obligated to *fully co-operate* with the ICC as regards investigations and prosecution of crimes. When it comes to non-state parties, the ICC can go only as far as *invite* these states to *provide assistance* on the basis of an *ad hoc* arrangement.²⁹ This shows that cooperation for non state parties can be said to be of a *voluntary nature*.

The relationship between the UNSC and the ICC often makes non state parties to comply and cooperate with the ICC. The UNSC derives this authority from the UN Charter and can also be looked at from the perspective that Article 1 of the Rome Statute highlights the role of the ICC as being *complimentary to national criminal jurisdictions*. This therefore mean that all it takes for the ICC to exercise its jurisdiction is having state parties and the UNSC refer situations to the ICC where specific crimes have been committed.³⁰ Article 25 of the UN Charter is unambiguous in its affirmations of the authority of the UNSC. It clearly states that all decisions made by the UNSC are binding upon member states. This means in instances referred to the ICC by the UNSC, the UNSC can ask all member states of the UN to cooperate within the realm of maintaining international peace and stability.³¹

The case of the Darfur region can be used to show the influential role of the UNSC in the ICC and related co-operation with the court. In this legendary case, the International Commission of Inquiry forwarded a report to the UNSG on 25 January 2005 where a recommendation was made to the SC to refer the case to the ICC for investigation and prosecution. This was on the basis and understanding that there was absence of will from the Sudanese government to try the accused or capacity thereof of the legal system to have perpetrators assume accountability for their egregious deeds.³² Upon receiving and reviewing the report, and acting under Chapter VII of the UN Charter,

²⁹ *ibid*

³⁰ *Ibid.*, article 13

³¹ “Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General”, 25 January 2005

³² *Ibid.*,

the UNSC adopted resolution 1593 on 1 March 2005 which it decide to refer the situation in Darfur since 1 July 2002 to the ICC Prosecutor.³³

This adoption represented the first instance in which the SC invoked the ICC's investigative mechanisms in line with Article 13(b) of the statute. An important aspect of this move being Sudan, the concerned state, was not party to the ICC. Naturally, Sudan vehemently expressed opposition to the resolution though it is bound by the provisions of the UN Charter to obey the SC resolution and cooperate with the Court.³⁴ The principle of *complementary jurisdiction* within the Rome Statute allows any concerned state to challenge the jurisdiction of the Rome Statute.

2.5.1 Prospects of co-operation by States not Party to the ICC

The biggest asset for the ICC remains the hope that all states will co-operate fully and without any condition meaning states are expected to give assistance to the ICC. This is just mere hope which hope is often at odds with the aspirations of nation states for of paramount importance to states is the sovereignty aspect and security. The issue of sovereignty is generally agreed to be the reason as to why most states have not ratified the Rome Statute. The Office of the Prosecutor is seized with these investigations. This office derives success from co-operation. The office is located in the Netherlands meaning it is far away from most accused African states such as Uganda, DRC and Sudan amongst others. This makes it overly depended upon the local police forces of mentioned regions to have success with prosecution. The issue of sovereignty makes states give less cooperation to what the Courts otherwise wishes to have.

Since cooperation and is the backbone of success for any case, and borrowing from experience with the International Criminal Tribunal for the former Yugoslavia (ICTY), it shall prove to be difficult for the ICC to have cooperation with states. This is particularly clear if it is to be noticed that for states to cooperate with the ICC, they must pass national legislation enabling its legal provisions to be in sync with the Rome

³³ Security Council Resolution 1593 of 31 March 2002, para 2

³⁴ [Beijing Evening News, 1 April 2005, p. 8.](#) Who Believes Propaganda? Media Effects during the Anti-Japanese Protests in Beijing

Statute. Both the International Criminal Tribunal for Rwanda and Yugoslavia, though different in formation, have got one crucial similarity in that none of the two had a police or armed force to enforce them. Cooperation hence became their only bane for success.

As mentioned, state cooperation with the ICC requires adoption of national legislation. This means that states must enact laws giving life to course of judicial proceedings against an accused person. The practice of ad hoc Tribunals is not governed by the *extradite or prosecute* principle.³⁵ It is beyond any reasonable doubt, therefore, that the effective operationalization of the Rome Statute in Africa and beyond is premised upon state cooperation. Without this cooperation, the aspirations of the Rome Statute will be difficult to realize. It means therefore that, after having made reference to the aspect of cooperation, a brief analogy of what it entails becomes crucial.

As a matter of perspective, for effective execution of various ICC functions, cooperation ought to holistically capture all aspects that are aimed at bringing those most responsible for core international crimes to justice.³⁶ The ICC does not have an enforcement mechanism of its own as already indicated and this therefore makes it depended on cooperation from members of the international community. This is clearly encapsulated in part IX of the Rome Statute where various ways in which states can cooperate with the ICC are laid out.³⁷ Without such cooperation, therefore, the international criminal justice system will not work.

The issue of *voluntary cooperation* occurs when the Court calls upon state parties to respect their Rome Statute obligations with forms of such cooperation so as to have a properly functioning and effective institution that affirms the rights of all and sundry, witnesses and victims alike. From this elevation, a number of cooperation agreements have emerged between the Court and African states as shall be explained later. As at September 2017, 10 such agreements were in existence with a further two *ad hoc*

³⁵ Article 9 of the Statute of the International Criminal Tribunal for the former Yugoslavia on Concurrent jurisdiction provides that the International Tribunal and national courts shall have concurrent jurisdiction but the International Tribunal shall have primacy over national courts

³⁶ ASP 2017: State cooperation crucial for an effective ICC

³⁷ Ibid.,

enforcement of sentence agreements with the DRC as regards Thomas Lubanga and Germain Katanga.³⁸

2.5.2 Cooperation in relation to investigation and evidence gathering

At the heart of the success of the implementation of the Rome Statute lies the aspect of investigation and evidence gathering. Investigations compels the ICC Prosecutor to have a solid case against those who commit acts of impunity. This needs impartiality and also since the ICC depends on state cooperation, requires commitments of parties involved, be they state or non-state parties as was the case with the Bosco Ntaganda case where the US, a non state party, was actively involved in the arrest and detention of the warlord. This is where a differences emerge between the ICC and the ICTY.

It was stipulated, in Article 29 of the ICTY that all states shall have to comply timeously with any request for assistance issued by the trial chamber of the ICTY. This covered issues to do with the identification and location of suspects and places forming part of the investigation. This dovetails with Article 86 of the Rome Statute that seeks to ensure compliance by requiring *full cooperation*. This specific provision clearly shows that states are obligated to do everything possible as regards cooperation within the aspirations of this statute. The context becomes clear if we observe that the ICTY was established by the UNSC as its organ as regards to the prevailing situation at that moment.

The experience extracted from the *ad hoc* ICTY highlights the fact that though most states have signed cooperation agreements with the ICC, few states have certain provisions giving weight to such, including on the African continent. This then leads to a lot of issues as regards legal consequences of non-cooperation by non states coming to the fore. This can be viewed within the scope of Article 87, primarily paragraphs 5 and 7 as related to non-cooperation between states and the ICC.³⁹ A good example of a situation regarding cooperation not party to the ICC occurs when such a state initially agree to cooperate but with the escalation and deepening of investigation, the non state party may shift goalposts and choose instead not to cooperate as earlier on

³⁸ Ibid.,

³⁹ Article 112.2(f) of the Rome Statute

agreed. For clarity purposes and if the state concerned has reached an agreement with the ICC, it is bound via international obligations to cooperate with the Court.⁴⁰

Regarding the situation above, the non state in question, if it decides to later on choose not to be bound via *ad hoc* cooperation with the ICC, Article 87(5) of the Rome Statute provides that *the Court may inform the Assembly of States Parties or where the Security Council referred the matter to the Court, the Security Council*. The SC has the authority to deal with this state in accordance with the UN Charter. It must be noted, in retrospect, that the ICC is not an organ of the UN and neither is it bound by the UN charter.⁴¹

2.6 Overview

This section highlighted that treaties are binding to states that ratified and are state party to them. The other observation being these treaties do not bind or neither do they create obligations for non-state parties. The section managed to prove the existence of exemptions to this logic. This is so since it emerged that principles of international law are clear as to what constitute the authority of the UN Security Council within the realms of the UN Charter. For the ICC, non-state parties can be answerable via a referral by the Security Council and the provisions of Article 1 common to the Geneva Conventions of 1949. This then makes it clear that cooperation is no longer voluntary but obligatory within the brackets of customary international law.

The Rome Statute in Article 87 provides for the ICC to invite non state parties to reach an agreement on the basis of *ad hoc cooperation*. The fact that ICC was established for the purposes of ensuring criminals are punished must always be sacrosanct regardless of whether the state is a state party or not. This objective, despite receiving support from all regions of the world, is being compromised by absence of resources and capacity. It is evident that cooperation is a dual aspect that involves both sides to the justice equation. Cote d'Ivoire was not state party to the ICC when it submitted a request in sync with provisions of Article 12 of the Rome Statute. This then shows that non state parties have got specific practical issues that are unique to each particular case.

⁴⁰ Wenqi (2008)

⁴¹ Ibid.,

Cooperation of member states is one vehicle through which the ICC can achieve its mandate. Without this, the Rome Statute will be synonymous in function with the post WWI League of Nations which historians and intellects perceived then and now to have been a toothless barking bulldog. Thus, the thrust of the ICC lies on playing the enforcement and compliance roles with specific international law norms whose thrust is to prevent, detect and prevent mass violence.⁴² Post WWII, the adoption of Convention on the Prevention and Punishment of the Crime of Genocide, the four Geneva Conventions and the Nuremberg Principles which gave precedence to the ICC came into force.⁴³

The ICC achieves its objectives through negotiating with states and regional bodies as was the case with the Congolese government when the court negotiated for the arrest of Thomas Lubanga.⁴⁴⁴⁵ However, this has not always been successful. The ICC sought and failed to try Gaddafi. The arrest warrant of his spy chief, Abdullah al Senusi who has an arrest warrant placed on him by the ICC on 16 May 2011 has not been successful with the Libyan authorities demanding that he face local courts so as to be exposed to the possibility of receiving the death sentence.

The ICC was a response to the absence of enforcement mechanisms as regards to the above mentioned convention. Violations of international humanitarian law continued with impunity and hence, post the Rwandan Genocide of 1994, on 17 July 1998, multilateral treaty known as the Rome Statute was conceived under the auspices of the United Nations. To achieve its mandate, the ICC works to ensure egregious crimes are punished and also that international law is respected. The critical objective of the ICC is to act as a court of last resort in prosecuting against the crimes of genocide, humanity and war crimes in instances where national institutions have failed due to one reason or the other.⁴⁶ As related to the African states of Uganda, the Democratic Republic of the

⁴²<https://unchronicle.un.org/article/role-international-criminal-court-ending-impunity-and-establishing-rule-law> (Accessed 11 February 2020)

⁴³ Ibid

⁴⁴ <https://internationalcriminalcourtnashie.weebly.com/aims-and-objectives.html> (accessed 12 February 2020)

⁴⁶ Ibid.,

Congo and Central African Republic, referrals to the ICC were made by these states. The cases of non-members, Libya and Sudan is different in that referrals were made by the United Nations Security Council whilst the Prosecutor, *proprio motu*, was responsible for the Kenyan and Ivorian situations. This was done with the authorization of the Pre-Trial Chamber.

The ICC was created to complement national courts. This means that the court will not institute investigations if a country is already investigating the crime or if prosecution has been successful. In instances where states shows unwillingness to prosecute due to one reason or the other, the court can institute proceedings.⁴⁷ As have already been stressed repeatedly, this function is compromised by lack of cooperation with the case of the United States of America coming to the fore. So, the ways of achieving its objective starts and fail with matters to do with cooperation. With cooperation, the mandate of the ICC can be easily achieved whilst without it, it is thus difficult for it to come to fruition.

The case of the Sudan then can be used to exemplify this reality. The issuance of the *Red Notice* by Interpol was ignored by South Africa, a member state that proceeded to threaten to withdraw from the Rome Statute and thus being bound by its obligation. Until recently, Al Bashir remained in Sudan with a most recent decision by the Transitional Authority ruling Sudan recommending that he be transferred to face charges at the ICC. This lack of cooperation has been widespread and rampant across the African continent with political and administrative reasons being highlighted as key in these situations.

2.7 Conclusion.

This chapter looked at theories of international justice, the restorative model and came up with a framework that helped identify the gap to be filled. From a review of the literature in line with objectives, it is evident that cooperation between the ICC and Africa is hindered by a lot of factors. These factors can be addressed but again the issue of morality ought to be addressed. The paper is now going to have a review of the ICC and its case studies in Africa

⁴⁷ <https://www.hrw.org/legacy/background/africa/icc0904/2.htm> (accessed 11 February 2020)

CHAPTER THREE

THE POLITICS OF STATE COOPERATION WITH INTERNATIONAL COURTS

3.1 Introduction

This Chapter investigates the politics of the ICC state cooperation regime with specific reference to the African continent. This thrust is necessary because the ICC has been regarded as a global political player, apart from being a global justice institution. Further, since it works with states and their political systems, the ICC cannot avoid the politics of those states. The major argument carried in this Chapter is that the ICC state cooperation regime is fraught with political interests and political considerations, and these considerations determine the success of the state cooperation system. Without a good political relationship between African governments and the ICC, state cooperation is affected and justice processes are adversely affected.

This chapter will use case study approach, whilst arguing that politics and justice are connected, and that state cooperation is both a justice issue as it is a politics issue. Consequently, this chapter develops from that by first highlighting the relationship between the ICC and Africa, on the basis of selected case studies. These case studies relate to developments that have happened on the African continent as regards to the interaction between the continent and the institution.

3.2 African contribution to the ICC

The ICC has the majority of its membership in Africa, and it is not a surprise that its relationship with Africa was bound to be interesting. It is not debatable as to the efforts taken by Africa insofar as accounting for impunity is concerned. The fact that an African country, Senegal was the first country to ratify the convention and that the block has most member states as state parties to the convention clearly proves that efforts are in place to ensure that justice is availed to all injured parties and those who commit egregious crimes are taken to account. What though has been the thorny issues between the ICC and Africa has been the issue of targeting.

Africa believes that the ICC is an instrument targeting only weak African states whilst ignoring big countries, which countries have been observed to be at the forefront of the most atrocious episodes of human rights violations. The intimidation of the ICC

prosecutor by the United States of America when she sought to have US servicemen indicted for trial vindicates this elevation of thinking.

The arguments being made are to the effect that, despite early cooperation with the ICC, inherent bias and selective application of justice is forcing most African states to consider their cooperation relationship with the ICC.⁴⁸ The myriad of assumptions, suspicions and lack of trust between Africa and the ICC are based on issues to do with transparency, governance and commitment.⁴⁹ The events of October 2016 showed a low point in the relationship between the ICC and Africa. Burundi indicated its willingness to withdraw self from the Rome Statute and not to be outdone, South Africa decided to outdo Burundi by seeking to exit a little earlier than Burundi.⁵⁰

3.2.1 The impact of politics to state cooperation in Africa

The major issues to do with the role of the ICC and conflict resolution on the African continent has not been given preponderant attention it deserves. Further to that, concerns raised by African states that raised the intention to withdraw from the Rome Statute have not been addressed. Though South Africa and Gambia later on recanted their stance, Burundi still intends to withdraw from the statute. African states embraced the ICC. The countries joined the Rome Statute in large numbers and referred situations to its prosecutor for investigations. be seen to be faith and confidence based and part of the process of state cooperation between African States and the ICC. The first country to be signatory was African, Senegal and it did this on February 2 1999. Other African states followed en masse. The desire to be members of an international punishing body was driven by the omissions of the Rwandan Genocide of April 1994 where the international community stood akimbo as tribes waged despicable deeds of savagery against each other.

The belief in being signatories to the Rome Statute was premised on the logic that deterrence to impunity will be created whilst in the event that such crimes erupt, offenders would be punished. To this end, 33 members ratified the treaty whilst 13

⁴⁸ <https://www.oxfordscholarship.com/view/10.1093/oso/9780198810568.001.0001/oso-9780198810568> (Accessed 10 February 2020)

⁴⁹ <https://justiceinconflict.org/2017/05/09/how-three-words-could-change-the-icc-africa-relationship/> (Accessed 10 February 2020)

⁵⁰ *ibid*

additional members signed though are yet to take the final step.⁵¹ At present, most of ICC's current dockets comes from Africa from such countries as Central Africa Republic, the Democratic Republic of Congo (DRC), Ivory Coast and Uganda. The ICC prosecutor was invited by these countries to investigate crimes committed within their territories. Professor Jalloh is of the view that by taking this route, these countries indirectly exposed themselves since when doing investigations, the ICC does not look at one side but investigates both the militia and government forces on whoever engages in conduct that violates the Rome Statute.

A case study approach is now being made to give context and perspective as to the relationship between the ICC and Africa.

3.2.2 The case of ICC Prosecutor vs Bosco Ntaganda

The case of Bosco Ntaganda illustrates the gradual movement of African states from cooperating with the ICC. Human Rights Watch documented atrocities committed by Ntaganda for over a decade. He has been sought by the ICC since 2006 but was living freely in DRC moving into and out of the DRC to Rwanda. He was a former rebel leader of Rwanda-backed rebel group, the National Congress for the Defense of the People which, along with his fighters, was integrated into the Congolese Army in 2009. Ntaganda led a mutiny and became the leader of a new rebel group, the M23.⁵² His outfit participated in summary executions, rapes and forced recruitment of children to fight as child soldiers. Following infighting between M23 factions in 2013, Ntaganda crossed freely into Rwanda from the DRC, turned himself in to the United States embassy in Kigali and was flown to the Hague where he was sentenced to 30 years imprisonment.

This case shows that the importance of an independent and impartial court to adjudicate international crimes is a necessary yardstick for state cooperation. Critical issues on the African continent can be those to do with government sympathy and how that impacts upon cooperation. A government might not be sympathetic to the ICC today but its replacement be willing to cooperate with the Rome Statute as is the case in this instance.

⁵¹ The Relationship between Africa and the ICC. Human Rights Forum 5 April 2019

⁵² Human Rights Watch-Bosco Ntaganda

Bosco Ntanganda was arrested with cooperation from the US, a non signatory to the Rome Statute.

3.2.3 Charles Ghankay Taylor

At the time of his indictment in 2003, Taylor was the president of Liberia. The ICC approved and sealed a 17-count indictment on March 7 2003. This indictment was unsealed on June 4 2003 when Taylor was attending a Peace Conference in Ghana. Taylor stepped down as president of Liberia on 11 August 2003 under international pressure and as LURD and MODEL rebel fighters were advancing on Monrovia.⁵³ He went into exile in Nigeria. On December 4 2003, Interpol issued a “Red Notice” based on a Sierra Leone Special Court Arrest warrant. Taylor challenged the legitimacy of the court’s jurisdiction on the basis of sovereign immunity and extra-territoriality. This challenge was dismissed on May 4 2004 by the Appeals Chamber which felt that he was subject to the jurisdiction of the court.

A UN Security Council Resolution 1688 was issued and cleared the way for Taylor to be tried at the Hague. He was transferred to the Hague on June 20 2006. On 26 April 2012 the Trial Chamber found Charles Taylor guilty of all 11 counts on the modes of liability of planning of crimes and for aiding and abetting of crimes committed by rebel forces in Sierra Leone. He was given a single sentence of 50 years in prison. The Appeals Chamber upheld Charles Taylor’s conviction and 50-year sentence.

Nigeria stood accused of not cooperating with the Special Court through shielding Charles Taylor from facing trial. Skeptics assumed then that the move was a stark violation of international law and defeats the objectives of justice. It must be remembered that the Special Court did not have UN Chapter VII authority to compel cooperation. That absence was nullified by the fact that the SC under resolution 1478 clearly requested states cooperation with the Sierra Leone Special Court. The basis of accusation of Nigerian governments reluctance to surrender Taylor then emanated from Human Rights who were of the view that Taylor, while in exile in Nigeria, continued

⁵³ The Special Court for Sierra Leone

to pose a regional risk to West Africa for he allegedly retained contact with his militias.⁵⁴

The Economic Community for West Africa (ECOWAS), AU and South Africa were understood to have played a prominent role in negotiations that led to Taylor relinquishing power and subsequently obtaining Nigerian asylum. This arrangement then stood ambiguous as it was said to be unclear as to the duration of the asylum as regards to justice.⁵⁵ Then Nigerian president had given assurances that Taylor would avail himself for trial and hence the procrastination was viewed as a travesty to justice. This case exemplifies roadblocks inherently available within the context of cooperation. Diplomacy is a critical aspect of this and it eventually took serious behind the scenes movements to have Taylor tried at the Hague.

3.2.4 Laurent Gbagbo

Gbagbo, then Ivorian president, stood accused of crimes against humanity in the aftermath of Ivory Coast 2010 Presidential Elections. His troubles emanated from his refusal to cede power to then challenger Alassane Ouattara which situation led to systematic violence and the death of over 3 000 people. The prosecutor alleges that he attempted to stay in power by using the state's defense and security forces and political militias to target Ouattara supporters. He was charged as an indirect co-perpetrator for murder, rape, sexual violence and persecution among other acts, which acts amounts to crimes against humanity.

It must be observed that the UN Security Council has the power to refer to the ICC a situation in a country that has not joined the court as was the case in Sudan and Libya for instance. The arrest warrant of former Sudanese President Omar Hassan al-Bashir comes from such a referral.⁵⁶ Up until the prosecution of Gbagbo, ICC trials had mostly been about former rebel commanders. While it was not the first time a head of state to be charged by the ICC, Gbagbo was the first leader to make it to trial. The fact that Ouattara's supporters, themselves also accused of human rights violations, were

⁵⁴ Human Rights Watch interview with official of the National Transitional Government of Liberia, Monrovia, March 10, 2004

⁵⁵ Interview with Special Court Staff, Freetown 3 March 2004

⁵⁶ The Washington Post, February 3 2016: Who is Laurent Gbagbo and why is he on trial at the ICC?

not prosecuted for their offenses brought considerable damage to the integrity and lack of partiality of the ICC.

This case shows that state cooperation can be a function of changing political interests by politicians. Gbagbo ratified the Rome Statute with the objective of using it against his political nemesis. The fact that he ended up himself being tried by the same court and not his political enemies shows the need to have an all inclusive regulatory framework within the Rome Statute that ensures that the Statute is not abused by politicians, who in themselves come and go yet egregious crimes remain unaccounted for.

3.3 African states changing attitudes to the ICC

The International Criminal Court is not a substitute for national courts. According to the Rome Statute, it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes. For Africa, there is general mistrust as regards the agenda of the ICC. African leader feel, rightly so, that the body is targeting Africans whilst ignoring worse off war criminals. The threat by the US government to sanction the ICC prosecutor for daring to try American troops for war crimes they partook in can be used as an example. The Omar al Bashir South African fiasco forced an attitude change by Africa to the ICC. Working in common purpose with the Interpol, the ICC, through the influence of certain states, most of whom are not even state parties to the Rome Statute, tried to arm-twist South Africa into violating its diplomatic protocols. This became the turning point of the relations between the ICC and Africa.

This change in attitude affected cooperation. African calls to have an African institution that would be solely responsible for trying Africans grew louder. Calls for the reform of the ICC grew louder by the day. This strained relationship between the ICC and Africa traces roots to the United Nations Diplomatic Conference of Plenipotentiaries in Rome. 49 countries including SADC and the then OAU were involved in the drafting processes of what later on became known as the Rome Statute.⁵⁷ The expectations of these states were not met by the drafting of the Rome Statute. It must be recalled that twenty-five African countries had adopted the Dakar Declaration of 6 February 1998

⁵⁷ Equatorial Guinea, Gambia, Seychelles, Somalia, Saharawi Arab Democratic Republic and Southern Sudan were not present.

calling for the establishment of the ICC.⁵⁸ This was recognized by the Council of Ministers of the OAU on February 27 1998. On the other hand, the SADC position in relation to consensus on the ICC was adopted between 11-14 September 1997.

The most important issue emanating from these two non-binding agreements being that they were emphasized in official communications during the United Nations Diplomatic Conference in Rome. They, henceforth, represented the shared vision of the majority of African states. They both addressed the issue of ICC and its institutional status. The two documents were in favor of an international institution that would be separate in scope to the United Nations whilst proving, concurrently, to be independent, permanent, impartial, just and effective.⁵⁹ They both were of the view that the actions of the ICC ought to be firm and not easily malleable to political considerations.

African states in attendance also were of the view that the Court was going to be complementary to national criminal justice systems. The Dakar Declaration had a further exception, highlighting that complementarity also existed between ICC and regional tribunals. This clearly shows that some African states were of the view that the new body was going to create regional tribunals solely to deal with African criminal matters first before any external international judicial action. SADC was clear in that it anticipated the new organization to have jurisdiction over the crime of aggression as well as companies and corporations.⁶⁰

The SADC narrative was premised on the logic that these companies and legal persons stood accused and were suspected of being behind serious rights abuses on the continent through plundering of resources and funding anarchy and arms dealing with violent extremist non state actors. By the end of the Rome Statute negotiations, these expectations were not met. This issue of diplomatic failure rested on the independence of the new body as regards its relationship with the controversial UNSC. The feeling

⁵⁸ Dakar Declaration for the Establishment of the International Criminal Court

⁵⁹ Dakar Declaration

⁶⁰ J Chella, *The Complicity of Multinational Corporations in International Crimes: An examination of Principles* (PhD Thesis, Bond University 2012)

was that dependence of a judicial institution on a political body compromised its independence.⁶¹

The delivery of the arrest warrant on Sudanese President al Bashir in 2009 escalated hostilities between the ICC and Africa. It is evidently clear that the ICC lacked requisite political advice which situation just but escalated the hostility between the ICC and Africa. The AU began rallying Africa to have a consolidated African Common Position as regards interactions and relations with the ICC. It is evidently clear that African states and the AU disagree with the strategy pursued by the Prosecutor. The allegation of case selection, which cases are specific to Africa has cemented the allegations of bias raised against the ICC by Africa.

The Kenyan situation exposed the Prosecutor, Fatou Bensouda who stood accused by the AU resulting in the AU questioning the wisdom of continued targeting of African heads of state. The targeting of President Kenyatta and his deputy William Ruto resulted in Bensouda standing accused of pursuing some geo-political agenda. The ICC also stands accused by the AU of avoiding the complementarity principle.

The organs of the ICC are supposed to bring fairness and accountability as they seek to regulate against impunity have been accused of lack of the later. This is supposedly perpetuated by the reason that each state party had a reason as to why they joined the convention. Political targeting, as was the case with the Ivory Coast issue being one of the factors.⁶² As such, confidence with the institutions and its organs have plummeted. This lack of confidence in the institutions of the ICC thereby compromises state cooperation from African states as the rationale that the court seeks to target African states exclusively sinks in. This shows that the court may never be capable of building trust and resolving its African problem. As noted by Nyabola , the only way out of the ICC quagmire is the establishment of the African Criminal Court, exclusively meant for Africans.

3.4 Overview

African condemnation of the ICC was clear and straightforward with even at one point Ugandan president Yuweri Museveni characterizing the body as useless. Burundi had

⁶¹ P. M. Dupuy and Y Kerbrat, *Droit International Public* (11th edn., Paris: Dalloz, 2012)

⁶² *Ibid.*,

its parliament voting to leave the institution whilst Gambia followed suit after calling the court *International Caucasian Court*. A bill to withdraw was tabled in Kenyan parliament whilst Namibia is reconsidering membership under the rationale that the ICC is not as useful as it was supposed to be to Namibia since Namibian institutions themselves are now strong and enhanced. The AU as an organization hinted on a mass withdrawal after Kenya had initiated this proposal. This massive lack of faith and trust in the ICC by Africa is undermining its credibility and eventually render it useless.

Africa has the option to use their numbers to reform the court but the the UNSC-ICC nexus will always be a stumbling block. Calls by Africa to have the UN and its Security Council reformed have thus far fallen on deaf ears and chances are highly likely that the call for the reformation of the ICC will also be affected by the later. The accusation of bias by Africa got substance. This is confirmed by the fact that 9 out of the 10 situations being investigated by the ICC are from Africa. The election of a Gambian as a prosecutor have done nothing to change anything.

The allegations by Africa are surely premised on substance for the ICC have thus far managed to prove beyond any reasonable doubt that it does not have the clout to investigate western countries. The threats of sanctions by non state party, USA just helps support this reality. There seem to be enough evidence suggesting that the lack of objectivity by the ICC emanates from global inequality than from the capacity of the ICC itself. The UNSC is extremely powerful yet fundamentally imbalanced instead of distribution of power. Africa, a continent of 1 billion people, representing around 15 percent of the population of the world is not represented yet the UK with a mere 83 million citizens is a permanent member. Europe has three members sitting on the SC whilst Africa, a continent of 54 countries, got non.

3.5 Conclusion

This chapter touched on crucial issues to do with the issue of cooperation between the African continent and the ICC. Of paramount importance being the relationship between superpower states and the Rome Statute, treatment between these bigger powers and smaller powers and also the usage of case studies to put to the fore the matters under discussion in line with the objectives of the study. It is important to notice that morality is key in all this and there has to be a way to ensure fairness so as to guarantee that the aspirations of morality are held. As such, the discussion is going to

lead to the next chapter that shall focus exclusively on the strategy used by the ICC, its doctrine and thus be able to highlight inconsistencies, if they are there, that compromises cooperation between African states and the ICC.

CHAPTER FOUR

THE ROME STATUTE STATE COOPERATION SYSTEM

4.1 Introduction

The objectives of this study are aimed at establishing *if the Rome Statute framework has adequate mechanisms to ensure international criminal justice against states that are not party to the Statute*. A review of the literature, through the application of relevant theories managed to establish a gap that sought to understand the feasibility, per cost benefit, of having members of the international community not being states party to the Rome Statute, on the basis of *morality*. So to have a proper appreciation and perspective of the issues at hand, an appreciation of the ICC via its doctrine will be embarked upon within this chapter. To achieve this, the chapter shall begin with an appreciation of what constitutes a strategy before going at length to test the efficacy of the ICC strategy as it relates to state cooperation the African states.

4.2 Strategy Explained

A strategy is the alignment of ends (aims and objectives), ways (concepts) and means (resources), informed by risks to attain goals.⁶³ The three concepts are related and can be depicted by a three legged chair that needs all three legs to be balanced to ensure that it does not fall over. Because of the dynamic nature of the international system, it is always not possible to achieve this balance. For strategists, it is incumbent upon them that they test the efficacy of their strategy by looking at feasibility, accessibility, suitability and risk. Issues to do with morality and ethics play a crucial role as regards the applicability of a strategy. A strategy that fails any of these tests is unsound and not worth pursuing. This means, to the strategists, there thus is a need to adjust the means, ways and ends to ensure that the strategy is applicable. Beyond the realm of strategy, are tactics and operations aimed at achieving the grand objective.⁶⁴

⁶³ US War Academy, 2017

⁶⁴ file:///C:/Users/DELL/Desktop/AY17_Theory_of_War_and_Strategy.pdf (accessed 10 February 2020)

After having had an appreciation of what constitutes a strategy, the discussion is now going to zero in on the ICC stance as it relates to its strategy of engaging Africa. To achieve this, the means, ways and ends shall be looked at, one after the other.

4.2.1 The Means: State Cooperation Regime

The ICC has made tremendous efforts at creating structures and systems that can be used in the fight against impunity. The ICC is composed of four organs namely the Presidency, the Judicial Divisions, the Prosecutor and the Registry. The Assembly of State Parties serves as the Court's management, oversight and the legislative body of the Court. It is not an organ of the Court. Its objectives is to establish the budget, elects judges and prosecutors, amends law and procedure and conducts other activities consistent with the Rome Statute.⁶⁵ There is a Trust Fund for Victims that is separate from the court and was created by the Assembly of States Parties.⁶⁶ The obligations of this is to provide assistance to victims of crimes identified by the Rome Statute whilst assisting in the implementation of court ordered reparations.⁶⁷ The objective of this Trust Fund, so it was hoped upon conception, being to promote the restoration of justice, build societal reconciliation, and establishing sustainable peace by attempting to address the direct harms of atrocity crimes.⁶⁸

It seems this objective has been marginally successful whilst it has been broadly controversial. In regions that have been beneficiaries of such financial assistance such as in Rwanda, there still are lingering thoughts of justice denied. The same goes for Sudan, where until recently, former Sudanese president accused of crimes against humanity and indicted by the ICC remains yet to face justice over his alleged atrocities. The Presidency of the ICC, which itself is composed of the president and first and second vice presidency elected on a three year renewable term has the responsibility of constituting and assigning cases to the Chambers, conducting judicial reviews and concluding court wide cooperation agreements with states.⁶⁹ This organ has been at the center of disputes with African states for it is from it that cases are referred for

⁶⁵ <https://www.aba-icc.org/about-the-icc/structure-of-the-icc/> (accessed 10 February 2020)

⁶⁶ as specified in Article 79 of the Rome Statute

⁶⁷ Ibid.,

⁶⁸ ibid

⁶⁹ Ibid.,

consideration. A worrying trend that only African states fall victim have seen and resulted in a number of African states threatening to pull out of the ICC system or even choosing not to be state parties.

Nyabola (2012) is of the view that the ICC has an African problem in that member states of the African Union subscribed “disproportionately” to the Rome Statute citing the issues of hidden agendas as the reason. He uses the case of former Ivorian president Gbagbo whom he says ratified the Rome Statute in the hopes that the court would go after rebels in his country but instead it ended up going after him. He proceeds to develop his argument by stating that there is a high likelihood that a member state to be prosecuted is likely to be from Africa. The author further notes that the cases, from Africa, brought to the ICC, are not new cases but instances where international community failed to act in timely fashion.⁷⁰ He makes his arguments in view of cases to which warrants have been issued by the ICC.

The organs of the ICC mentioned above which are supposed to bring fairness and accountability as they seek to regulate against impunity have been accused of lack of the later. This is supposedly perpetuated by the reason that each state party had a reason as to why they joined the convention. Political targeting, as was the case with the Ivory Coast issue being one of the factors.⁷¹ As such, confidence with the institutions and its organs have plummeted. This lack of confidence in the institutions of the ICC thereby compromises state cooperation from African states as the rationale that the court seeks to target African states exclusively sinks in. This shows that the court may never be capable of building trust and resolving its African problem. As noted by Nyabola (2012), the only way out of the ICC quagmire is the establishment of the African Criminal Court, exclusively meant for Africans.

4.2.2 State Cooperation Mechanisms

Cooperation of member states is one vehicle through which the ICC can achieve its mandate. Without this, the Rome Statute will be synonymous in function with the post WWI League of Nations which historians and intellects perceived then and now to have been a toothless barking bulldog. Thus, the thrust of the ICC lies on playing the

⁷⁰ Global Policy Forum: Does the ICC have an African Problem? Nyabola 2012

⁷¹ Ibid.,

enforcement and compliance roles with specific international law norms whose thrust is to prevent, detect and prevent mass violence.⁷² Post WWII, the adoption of Convention on the Prevention and Punishment of the Crime of Genocide, the four Geneva Conventions and the Nuremberg Principles which gave precedence to the ICC came into force.⁷³

The ICC achieves its objectives through negotiating with states and regional bodies as was the case with the Congolese government when the court negotiated for the arrest of Thomas Lubanga.⁷⁴⁷⁵ However, this has not always been successful. The ICC sought and failed to try Gaddafi. The arrest warrant of his spy chief, Abdullah al Senusi who has an arrest warrant placed on him by the ICC on 16 May 2011 has not been successful with the Libyan authorities demanding that he face local courts so as to be exposed to the possibility of receiving the death sentence.

The ICC was a response to the absence of enforcement mechanisms as regards to the above mentioned convention. Violations of international humanitarian law continued with impunity and hence, post the Rwandan Genocide of 1994, on 17 July 1998, multilateral treaty known as the Rome Statute was conceived under the auspices of the United Nations. To achieve its mandate, the ICC works to ensure egregious crimes are punished and also that international law is respected. The critical objective of the ICC is to act as a court of last resort in prosecuting against the crimes of genocide, humanity and war crimes in instances where national institutions have failed due to one reason or the other.⁷⁶ As related to the African states of Uganda, the Democratic Republic of the Congo and Central African Republic, referrals to the ICC were made by these states. The cases of non-members, Libya and Sudan is different in that referrals were made by the United Nations Security Council whilst the Prosecutor, *proprio motu*, was

⁷² <https://unchronicle.un.org/article/role-international-criminal-court-ending-impunity-and-establishing-rule-law> (Accessed 11 February 2020)

⁷³ Ibid.,

⁷⁴ <https://internationalcriminalcourtnashie.weebly.com/aims-and-objectives.html> (accessed 12 February 2020)

⁷⁶ Ibid.,

responsible for the Kenyan and Ivorian situations. This was done with the authorization of the Pre-Trial Chamber.

The ICC was created to complement national courts. This means that the court will not institute investigations if a country is already investigating the crime or if prosecution has been successful. In instances where states shows unwillingness to prosecute due to one reason or the other, the court can institute proceedings.⁷⁷ As have already been stressed repeatedly, this function is compromised by lack of cooperation with the case of the United States of America coming to the fore. So, the ways of achieving its objective starts and fail with matters to do with cooperation. With cooperation, the mandate of the ICC can be easily achieved whilst without it, it is thus difficult for it to come to fruition.

The case of the Sudan then can be used to exemplify this reality. The issuance of the *Red Notice* by Interpol was ignored by South Africa, a member state that proceeded to threaten to withdraw from the Rome Statute and thus being bound by its obligation. Until recently, Al Bashir remained in Sudan with a most recent decision by the Transitional Authority ruling Sudan recommending that he be transferred to face charges at the ICC. This lack of cooperation has been widespread and rampant across the African continent with political and administrative reasons being highlighted as key in these situations.

4.2.3 Ends

The objectives of this court, mentioned numerous number of times earlier on, are to prosecute individuals for egregious crimes against humanity. The broader objectives include serving as a court of last resort, for perpetrators of crimes of genocide, humanity, war crimes whilst assisting national judiciaries within this endeavor. The court is also seized with ensuring peace and stability and also deterring potential perpetrators.⁷⁸ The court is limited to dealing with crimes that occurred after 1 July 2002 thereby denying justice to those who were victims of impunity in prior era. The ICC can only prosecute for crimes committed in countries it has jurisdiction over by way of

⁷⁷ <https://www.hrw.org/legacy/background/africa/icc0904/2.htm> (accessed 11 February 2020)

⁷⁸ <https://internationalcriminalcourtnashie.weebly.com/aims-and-objectives.html> (accessed 12 February 2020)

ratification with special referral by the UNSC as was the case with Sudan being the exception.⁷⁹

The fact that the ICC depends on cooperation of state parties and that it lacks its own police force to investigate and arrest perpetrators makes it functionally moribund. This situation was made visible by the Al Bashir scenario where both South Africa and Sudanese authorities were reluctant to act upon an Interpol *Red Notice* to have him extradited to face trial at the Hague. The fact that only ratified countries are able to select and vote for judges brings to the fore the issue of meritocracy and effectiveness of the ICC. The fact that big powers like China, US and Indonesia amongst others are not state party to the Rome Statute compromises the achievement of its broader objective of maintaining international peace and security through punishing impunity.⁸⁰

The mentioned factors have thus shown that the ICC has thus far being inept as related to its objectives. Allegations of targeting Africa are not without basis if the decision by the US is to be put into context, which feels that its soldiers can be victims of “frivolous political persecution” if it becomes a state party. Calls for reform has fallen on deaf ears and concerns by African states are not being heeded. State failure in North Africa brought about by the Arab Spring means that a lot of atrocities are now being committed by non-state actors such as Al-Qaeda in the Islamic Maghreb (AQIM), Boko Haram and Al Shebaab. These terror entities are not accountable to anyone but themselves and embark upon the most egregious crimes against humanity. Al Shebaab has shown repeated affinity at targeting Kenyan civilians whilst the infamous 2014 Chibok Girls kidnapping by the Nigerian insurgent group, Boko Haram shows the inability of the ICC

In short and wholly, the strategy in place at the moment being used by the ICC has failed to live up to its expected reality. Crimes against humanity are ongoing with reckless abandon, cooperation from African states is dwindling with African states suggesting instead for the need to create a splinter entity to prosecute Africans only so as to ensure fairness and membership to the Rome Statute is actually dwindling instead of expanding. This is a clear realization of the lack of applicability of the current

⁷⁹ <https://theowp.org/the-international-criminal-court-effective-or-not/> (accessed 13 February 2020)

⁸⁰ Ibid.,

strategy being used by the ICC as it seeks to achieve its objectives. The biggest issue of cooperation by African states, which forms the basis of this paper, remains scarce and there is little to no hope that such cooperation will be achieved anytime soon.

4.2.4 The ICC and African Politics

As highlighted prior, the application of the doctrine is accused of selective bias against Africa. Countries from the global south have repeatedly raised their disquiet over how skewed power distribution is against African countries. Chatham House (2013) posits that there is a clear relationship between the high number of atrocities committed on the African continent and the number of referrals to the ICC. The paper posits that those who raise such damaging allegations are the elites in Africa themselves who are responsible for most egregious crimes committed against African citizens. However, another school of thought is of the view that indeed, there are perception issues against Africa which issues compromise the integrity of the ICC as related to how the ICC doctrine is applied. Powerful states act with obvious impunity and the revelations by the US that the ICC is a failed institution that must not prosecute Americans give context and weight to this analogy.

Consecutive ICC prosecutors, primarily Luis Moreno Ocampo stood accused of selective application of the Rome Statute as he deliberately chose not to communicate with African interlocutors via having discussions with the African Union.⁸¹ This resulted in the former AU Chairperson, Jean Ping stating clearly that the AU is not against the ICC but the application of its doctrine and its inherent bias against Africa. Africa did not receive well the arrest warrant issued by Belgium against then DRC's Foreign Minister, Abdoulaye Yerodia Ndombasi signaling the hostilities between the ICC and Africa.⁸² The issue of the repeated usage of the concept of universal jurisdiction by European states against Africa infuriated the AU in 2008 resulting in the body adopting a resolution denouncing Western governments and courts for abuse of the doctrine.

African states have had issues with the doctrine of universal jurisdiction and how it is applied. This has seen the AU trying desperately to coordinate African response to the

⁸¹ John Dugard, "Palestine and the International Criminal Court: Institutional Failure or Bias?", *Journal of International Criminal Justice*, 11(3), 2013: 563-70

⁸² The case was brought to the ICJ on 11 April 2000

ICC shenanigans. There is an assumption that the AU is trying to undermine the authority of the ICC by creating its own institution whose thrust is specifically aimed at dealing with Africans. The AU, when the ICC issued the arrest warrant on the former Sudanese president, Omar al Bashir, felt that the way the ICC doctrine was being administered on Africa and in this case, Sudan, was retrogressive towards AU's efforts to achieve lasting peace in the Sudan. The issue of the application of diplomatic immunity enjoyed by a sitting president dominated this furore.⁸³

The drive to have an African substitute to the ICC is gathering momentum due to issues to do with inherent bias of the entity against Africa. To this end, in 2009, the AU Commission launched a process that is aimed at amending the Statute of the African Court of Justice and Human Rights protocols in an effort to broaden the scope and mandate of the body to include issues to do with international and trans-national crimes. The product of this saw the inclusion of issues to do with criminal jurisdiction, war crimes, crimes against humanity, terrorism, piracy and corruption.

However, it has to be observed that the drive to establish a dedicated body to deal with egregious crimes in Africa is not solely driven by the existence of the discourse between Africa and the ICC but that the process started long before the 2009 issuance of the arrest warrant against then Sudanese President Omar Al Bashir. Efforts to prosecute for the crime of apartheid through the establishment of the International Convention on the Suppression and Punishment of the Crime of Apartheid was mooted in the early 1970's by Africa though it did not see the light of the day. Added to that, in 1980 when the draft African Charter on Human and People's Rights was being debated upon, Guinea suggested the establishment of a court dedicated to the prosecution of human rights violations and related international crimes.

All these initiatives, it has to be noted, resonate on the aspect of the abuse of the concept of universal jurisdiction by some European Courts who have a greater affinity to target high level African leaders and politicians. This observation was noted by the Assembly of Heads of State of the AU and the Pan African Parliament.⁸⁴ The import from this

⁸³ Article 27 of the Rome Statute provides that official capacity as a head of state or government or a member of a government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute.

⁸⁴ The Johannesburg Declaration of the Pan-African Parliament, 15 May 2008

realization was the establishment of the Ad Hoc AU-EU Expert Group on the Principle of Universal Jurisdiction in January 2009. The most crucial recommendation behind this initiative being the examination of the efficacy of the possibility to empower the African court with jurisdiction over genocide, war crimes and crimes against humanity.

The other important realization behind this thrust being the need to effect Article 25(5) of the African Charter on Democracy, Elections and Governance whose main objective is aimed at having the AU formulate a novel crime of ‘unconstitutional change of government.’⁸⁵ Definitely, it can be postulated that there are other African leaders who are inspired to have the ICC and its doctrine shelved. These leaders definitely root for the establishment of an Afro-centric body dedicated to dealing with Africans without interferences from the global north. Their desire is definitely premised upon assumed and real subjective bias against Africa which bias they speculate emanates from regional and ethnic bias against Africa.

Anecdotal evidence affirmed by the May 2013 decision by the AU Assembly clearly highlights that the AU is convinced, beyond any reasonable doubt, that the ICC is an instrument of repression used by the global north against Africa. The rationale is to the effect that the ICC takes a condescending and skewed view against Africa whilst turning a blind eye against atrocities committed by superpowers such as the USA. The recent threats by the US to punish the ICC prosecutor and her team if ever they dared investigate and arrest any American and the subsequent inaction by the ICC post those remarks gives traction to the African argument

The effort to paint the ICC as an instrument of neocolonialism is debatable but not far off the mark. Africa gave broad based support to the Rome Statute under the belief that the statute was going to be effective in regulating against impunity in an impartial matter but the manner in which the ICC doctrine has been applied has raised more issues as opposed to solving less. As such, the assumption that the AU will allow the ICC to open a liaison office in Addis Ababa is a mirage that definitely will never see the light of the if ever current relations and ways of interaction continue to proceed the way they have been this far. This then goes to prove the rationale that, due to doctrinal issues, the

⁸⁵ African Charter on Democracy, Elections and Governance, adopted January 2007

relationship between the ICC and Africa is uncertain and will remain so for the nearest foreseeable future.

4.3 Conclusion

This chapter discussed the issues to do with the ICC and the strategy it is implementing to ensure it achieves its objectives and mandate. It is clearly evident that besides having the structures and systems in place to achieve its objectives, the ICC strategy is not consistent with its aspirations. Its lack of its own investigating arm has proven to be the biggest drawback whilst lack of cooperation by the superpowers is threatening to turn the entity into another version of the failed League of Nations. The discussion now moves another gear as it seeks to conclude and present findings in the next chapter.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.0 Introduction

This chapter gives the conclusions and recommendations of the study. The problem statement was aimed at establishing whether *the Rome Statute framework have adequate mechanisms to ensure international criminal justice against states that are not party to the Statute*

5.1 Summary of Major Arguments

The purpose of this section is to take a pragmatic evaluation of the main arguments raised through each chapter that formed this thesis. Chapter I managed to highlight that the ICC appears to create obligations and duties to non-state parties that have not signed or ratified the Rome Statute. To make matters even more dire, this legal position is enforced via political processes of the UNSC.

For Chapter Two, the major thrust was on the theoretical foundations underpinning the study. The chapter looked at Grotius Theory of International Punishment, analyzing theoretical underpinnings as regards the issue of crime and punishment at the international level. The major issues from this chapter being that cooperation between the ICC and Africa is hindered by a lot of factors. This then proceeded to show that the aspect of morality plays a crucial role insofar as issues to do with state cooperation with the Rome Statute is concerned.

Chapter Three was concerned with the application of the Rome Statute on Africa by the ICC. This section developed from Chapter I and borrowed from the objectives via the usage of case study material to address the aspirations of the research objectives of this thesis. This chapter touched on crucial issues to do with the issue of cooperation between the African continent and the ICC. Of paramount importance being the relationship between superpower states and the Rome Statute, treatment between these bigger powers and smaller powers and also the usage of case studies to put to the fore the matters under discussion in line with the objectives of the study.

The major argument raised in this Chapter is that the state cooperation regime of the ICC is fraught with problems, and such problems leaves the door open for politics to enter.

Chapter Four developed the narrative further by looking at some features of the ICC state cooperation regime, and their inherent problems in achieving desired objectives. It emerged that the AU is determined to at least have a counter institution that deals with issues to do with Africa due to the constant abuse of the concept of universal jurisdiction by the EU. The application of the law by the ICC against Africa is skewed as a result of politics. However, it also emerged that the call to have a homegrown African institution did not start with the indictment of the former Sudanese President, Omar Al Bashir but has been a legacy issue since the times of the apartheid era. This Chapter shall seek to make a summary of the findings and give conclusions of the study. It shall further proffer conclusions and recommendations within that endeavour.

5.2 Summary of Major Findings and Conclusions

This section discusses the major legal arguments that emerged from this study. To achieve that, the section shall thrive to make a coherent analysis of the law as regards the objectives of the study. The relationship between Africa and the ICC as regards the issue of cooperation is broken. There is no functional discourse as the relationship is based on distrust. So findings can be used to advocate for a withdrawal from the ICC by African states and formation of a new body that is accountable to Africans and that understands and appreciates African issues.

Alternatively, findings can be used to lobby the ICC to improve the relationship with African states by looking at its structures and systems whilst also changing its doctrine to ensure engagement is not compromised by mistrust. The fact that Africa embraced the noble cause to have an international body that can prosecute against impunity shows that there is a desire and dedication to have such conduct regulated. Bad faith is hence affecting that noble agenda. The ICC must self-introspect and listen to concerns emanating from Africa so as to ensure that allegations of bias do not affect the ICC.

5.2.1 Cooperation between Africa and the ICC is a mirage

In terms of cooperation, the court is having a challenge with African states. As highlighted on the evaluation of its strategy, the end state is aimed at ensuring that there is peace and stability and that those who commit egregious crimes are punished. This, for it to succeed, as it emerged within the thesis, depends on state cooperation. African states are just no longer willing to cooperate with the court due to allegations of bias. The conflict between Articles 27 and 98(1) makes it difficult for the ICC to execute its

mandate robustly and has been cited by the African Union as a window where the importance of immunity to prosecute government officials can be found. So it shows that the framework itself does not inspire cooperation from African states no wonder it is waning.

The fact that most permanent members of the Security Council have not ratified the convention itself but can choose to decide who appears at the Hague whilst they themselves, as was the case with the United States, are not willing to have their citizens tried, just goes to show the power and influence of the Security Council. The lack of mechanisms of policing, investigating and arresting makes the ICC a spectator in events it is supposed to be owning, controlling and directing. This has been the biggest drawback insofar as ensuring prosecution of international crimes, primarily on the African continent is a success. This drawback has resulted in most states either bullying it outright as was the case with the USA or in most instances in Africa, African states simply accusing it of having an inherent bias against African states.

The observations hence show that the available mechanisms and frameworks are not enough to make the ICC prosecute all states for crimes in the Rome Statute. This inability is reflected by an unending cycle of violence on the African continent despite the fact that most cases heard by the court have been emerging from Africa. The court hence lacks both specific and general deterrence capabilities. Wars are erupting frequently on the continent, peace is proving to be elusive whilst warlords like Joseph Kony are yet to be apprehended. Non state actors such as Boko Haram whose leader, Abubakar Shekau is known to personally execute and torture people are thriving on the African continent. This shows that available frameworks in place being used by the ICC are not as effective as they ought to be.

5.2.2 The Rome Statute does have adequate tools and mechanisms to guarantee cooperation

The explanation by Grotius in his theory on justice and punishment addressed this objective in detail. The submissions that there is a direct relationship between justice and punishment is the bedrock on which the ICC mandate is based upon. ICC, through the Security Council of the United Nations, has one of the most progressive mechanisms aimed at ensuring cooperation of member and non-member states in matters to do with the prosecution of offenders.

The abuse of privilege by permanent members of the Security Council has emerged as the crucial point of departure. It emerged that most of the referrals by the ICC to the SC were on matters to do with African states whilst there seems to be a deliberate lack of reciprocity as regards crimes of a similar nature committed by superpowers who happen to be members of the SC. For even worse off crimes, western leaders, primarily George Bush and Tony Blair, are walking free African leaders such as Omar Al Bashir are being hunted down. The intimidation of the ICC prosecutor by the USA when she sought to have American troops tried for crimes against humanity can be used as a case in point. This intimidation had negative ramifications as regards the efficacy of the tools and mechanisms that seek to guarantee state cooperation between the Rome Statute and Africa.

5.2.3 Tension between Article 27 and Article 98(1)

The biggest obstacle in the fight against impunity is laden within the Rome Statute itself. Conflict and tension between Article 27, which removes immunity from senior government officials and Article 98(1) which requires the Court not to issue requests for cooperation that would result in States Parties violating their obligations to provide immunities to senior officials of other States under customary international law. Some international legal scholars and organizations, including the African Union, have argued that Article 98(1) is an exemption for States Parties not to cooperate in the arrest of persons subject to an arrest warrant of the Court, when such individuals are high-ranking government officials of non-States Parties and should be accorded personal immunities. Further to this, it is manifestly evident that the role of the UNSC as regards enforcement is opaque and extremely ambiguous. That ambiguity has resulted in allegations of bias being raised by African states against the UNSC and thus the ICC for there is a genuine belief that the two institutions are not complimentary as regards efforts to regulate against impunity but instead are bent on ensuring that Africa gets punished for whatever political transgressions it has committed.

Liaison between the ICC and Africa is non-existent and that has seen the emergence of mistrust punctuating the relationship.

5.2.4 The Operationalization Of State Cooperation Under The Rome Statute

What emerged from the study is that the principle of *pacta sunt servanda* generally does not hold when it comes to the application and implementation of the Rome Statute. Member states from Africa feel duped, hard done by and unfairly treated with the way the court carries itself insofar as African issues are concerned. The findings established that there is a general consensus that the court is an instrument of neocolonialism and that African states are not seeing the utility arising from it. No wonder more African states are willing to un-sign from the treaty. The research also sought to evaluate treatment as related to cooperation with non-state parties on the African continent. There is a blurred line between being a state and a non state party for as long as you are an African state. The Security Council is quick and ready to make referrals when it comes to any African subject but slow or even unwilling to prosecute other nationals who are not from Africa.

Countries are still cooperating with the Rome Statute though. In most cases as emerged from the study, African countries are the ones that seek referral as was the case in CAR, Congo and Ivory Coast. The other thing that emerged as cooperation between the ICC and the African continent is concerned being the objectives of becoming state parties to the convention. Revenge mentality seems to have been the sole reason behind membership. The fact that political issues in Africa always end violently meant individuals in power sought to use this institution to get to their political foes. This was the case with the former Ivorian president Gbagbo. It emerged that the sole reason he had the Ivory Coast become a state party was based on the need and hope to have rebels who were against him tried by the court. However, the reverse ended up happening. In true revenge fashion, his successor, Ouattara, allowed the ICC to arrest Gbagbo and charged him for crimes against humanity, crimes to which he was later acquitted of.

The basic observation thus is cooperation seems not to be driven by the need to seek justice but by the need to settle scores and gain political revenge. It seems tribal schisms that exists in African politics are so wide and difficult to heal that it will take generations upon generations to have healing succeed. This then raises the moral question. The morality of membership is not in any way driven by the need to cooperate with the statute and ensure impunity is prosecuted for. African are cooperating with the Rome Statute just to get at their political nemesis. Its not about justice. No wonder most

African countries are no longer impressed by their membership and those that are not members are not willing to become members anytime soon.

By not becoming state parties and/or choosing not to cooperate with the ICC, Africa is lagging behind in ensuring that peace and stability, the panacea to growth and development, prevails. Leaders in position of authority are hiding behind structural reasons to evade justice. This scenario just helps breed animosity which results in unending instability on the region. The presence of terrorist organization on the continent must actually be spurring African states into seeking to have constructive dialogue with the ICC to ensure the much-needed cooperation is a resounded success, which success can then be used to take to account those mutilating people under the guise of ideological, religious and political differences.

The Rome Statute in its current form and scope is not conducive towards achieving its key aspirations of regulating against impunity. This is so due to political manipulation it suffers at the hands of big powers against small powers. This manipulation has since seen the emergence of conflict as regards common purpose between it and Africa at large. This finding was a crucial theme and emerged frequently as the research progressed and hence ought not to be ignored.

5.3 Summary of Recommendations

This section discusses recommendations from findings of the research.

5.3.1 More robust Implementation Required

To improve efficiency and applicability of state cooperation, the ICC must robustly implement a raft of legal provisions of the ICC that seek to plug the current lacunae inhibiting effective cooperation from being achieved. The first port of call being to address the tension between Article 27 and Article 98(1) as regards immunity from prosecution of sitting heads of states. The interpretation of these two provisions have solely been responsible for the lack of nexus and *ad idem* between the ICC and Africa. This lack of coherence has seen the allegations that the body is an instrument of punishing African leaders coming to the fore.

5.3.2 Establish an African Criminal Court

It is recommended that Africa must establish its own continental criminal court. There definitely exist justified logic as regards the call to have the establishment of a newly

independent institution to address the regulatory schisms currently being taken advantage of by political bigots thereby militating against the delivery of justice. This then makes the rallying call by the AU to have a wholly independent African body to prosecute Africans very plausible.

5.3.3 Amendment of the Rome Statute

State parties to the Rome Statute must consider amending it and ensuring that issues that breeds mistrust primarily between Africa and the ICC in relation to state cooperation are addressed. The context of this being aimed at ensuring that the international body is not reduced into being another League of Nations, renowned more for its bark than bite due to lack of adequacy.

5.3.4 Establish alternative state cooperation procedures for non state parties

The ICC must also consider the adoption of new procedure to ensure that the Rome Statute is effective. This has been done before. The judges of the ICC amended rule 165 of the Rules of Procedure and Evidence during their 34th plenary session in February of 2016. This statute addresses procedures related to proceedings for the offenses against the administration of justice in sync with Article 70 of the Rome Statute. This amendment allowed the respective functions of the Pre Trial and Trial Chamber to be head by one judge instead of three. The thrust behind these amendments, so it was opined by the judges, being to give impetus to the overall efficiency of proceedings by ensuring that the Court expends its resources to the most crucial crimes whilst keeping intact the fairness of Article 70 proceedings.

This amendment was adopted in sync with Article 51(3) of the Rome Statute permitting two-thirds majority of the judges to come up with provisional Rules in cases that are urgent and where such rules do not give specific provisions for a specific case before the court. This was based on the rationale consideration that the scarcity of judicial resources is piling pressure on the Court thereby making it moribund. Within the same breadth, the adoption of regulation 66 b sought to compliment Rule 165 through the establishment of modalities as regards the constitution of the Chambers. The fact that there is some precedence as to the adoption of new procedures means within the current context, the ICC can also afford to come up with procedures that seek to ensure that state cooperation is a success.

5.3.5 Remove UNSC referral system for non-state parties

The ICC can also consider abolishing, totally, the route to refer cases to the Security Council for non party states. This is so since there seem to be evidence that it will forever remain difficult to prosecute any citizen from the permanent members of the SC. However, this is occurring amidst an emerging trend that the SC is ever ready to recommend the indictment of Africans. The fact that some members of the Security Council are not state parties to the Rome Statute gives weight and enough rationale to this domain of reasoning. This arrangement can be considered and abolished forever, never to be reconsidered again for it is from such inconsistencies that state cooperation is not succeeding as other quarters are citing victimization by these superpowers.

5.3.6 Liaison Between AU and ICC

In order to improve the political relations between the AU and the ICC, a liaison office must be established by the ICC in the AU system. The efforts to create a liaison office to be located at the AU headquarters by the ICC was good but done in bad faith. There is mistrust and the appearance of acting as if the ICC want to play a supervisory role to the AU by being located within its headquarters defeats the ends and aspirations of justice. Instead it will be prudent enough to have the ICC adopting purely Afro-centric solutions, crafted by Africans and implemented by the ICC to ensure that state cooperation from an African perspective is a resounding success.

5.3.7 Design a new role for the UNSC in relation to State Cooperation

A new role for the UNSC must be designed, that is accepted and voted for all by all state parties to the ICC. The role must relate to interaction between the ICC and the UNSC, primarily as regards intercourse with Africa. The current relationship between the ICC, Africa and the UNSC is not healthy and does not, in any way, protect and guarantee regulation against impunity. However, the major risk with trying to have the SC being a passive observer in the application and implementation of the Rome Statute is the lack of enforcement which might give states the right to trample upon the rights of their citizens with impunity. The ICC does not have its own enforcement mechanism meaning it depends on the coercive capabilities of the SC to have its aspirations realized.

Without this deterrent muscle, there always is a risk that member states will embark upon some gory, egregious deeds which deeds might end up going unpunished.

The model of criminal justice used seems to show a general elevation as to the aspirations of criminal justice systems across the world. The objective is to punish and reform whilst compensating society for the injury suffered. It is hoped that this route will help achieve the ends of criminal justice, that is, healing. So to theory, the findings are going to add to the already existing body of knowledge. It is the researchers hope that the findings of this thesis shall be used by researchers and academics to enhance their intellectual appreciation of the nexus between cooperation and justice and also the importance of regulating against impunity within Africa.

5.4 Conclusion

The thesis explored the problems relating to the state cooperation regime of the ICC, especially focusing on how the regime faces difficulties against non-state parties. The central finding made is that the state cooperation regime has flaws and weaknesses, and has several entry points for politics to affect justice processes. Further, it was demonstrated, through research on African states and their responses to ICC driven processes, that the state cooperation regime need to be revised in the interests of international criminal justice.

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