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THE ROLE OF THE INTERNATIONAL CRIMINAL COURT IN THE FIGHT AGAINST IMPUNITY

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ABSTRACT

International Humanitarian Law (IHL) is that branch of Public International Law which regulates the conduct of war and seeks to mitigate the hardship occasioned by the outbreak of hostilities. The law limits the choice of the means and methods of warfare and also protect persons and objects that are not part of armed conflict. The International Criminal Court (ICC) was established in July 2002 as a permanent court to prosecute those who violate IHL. This article evaluated the history, establishment, structure and operation of ICC so as to distill the challenges facing the court. The consequence that flowed from this appraisal is that the ICC is faced with intricate problems and can do better if these hindrances are adequately addressed by the international community. Concrete recommendations have been made as a way of getting around these problems.

Keywords: International Crimes, Role of ICC, Impunity

1. INTRODUCTION

Individuals who committed human and humanitarian rights violations were, until fairly recently, not held accountable for their crimes via an international forum. Apart from the Nuremberg and Tokyo trials 1945-48, individuals, whether government officials, high-ranking military officers, or ordinary civilian officials, were never brought to justice at an international level for crimes; and very rarely by their own national courts. From 1948 – 1994, attempts were made through various international conventions to encourage the establishment of an International Court[1]. For instance, in 1948, the vast majority of states adopted the

[1] In 1945, after the end of World War II, the international community embarked on a new approach to justice. Following the Nazi Holocaust, the Allied nations confronted an incredible moral and legal challenge: with Germany in shambles, who would hold Nazi perpetrators accountable for the unimaginable crimes they committed? To answer this challenge, France, Great Britain, Russia, and the United

Convention on the Prevention and Punishment of the Crime of Genocide[2]. Article VI of the Convention stipulates that genocide constitutes an international crime and those responsible shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction. Sadly, no international forum was afterwards established for trial of perpetrators of such crime. In 1951, and again in 1953, the General Assembly assigned to the International Law Commission (ILC) the task of preparing a draft statute for the possible setting up of an international court, but even these efforts largely resulted in stagnation over the ensuing 40 years[3].

It was not until the horrific violations of humanitarian law perpetrated in the Former Yugoslavia and Rwanda in the early 1990s that the international community decided, once more, to put on trial those persons responsible for committing such atrocities. Accordingly, in 1993, the International Criminal Tribunal for The Former Yugoslavia(ICTY) and shortly after, a similar tribunal for Rwanda (ICTR), were set up to hold accountable those individuals accused of committing breaches of international humanitarian law[4]. However, the success of these tribunals prompted the establishment of a permanent International Criminal Court which this paper sets out to studying its historical development, structure and challenges in its role to fighting against impunity. Therefore, a conclusion is made by proffering suggestion needed for smooth operation of the Court.

2. HISTORICAL DEVELOPMENT OF INTERNATIONAL CRIMINAL COURT (ICC)

The idea of a permanent International Criminal Court (ICC) really gathered momentum after 1989 when at the request of the United Nations (UN) General Assembly the International Law Commission (ILC) was once again invited to prepare a draft statute for setting up of such court[5]. Eventually in 1994 a draft statute was submitted to the General Assembly for consideration.

States joined together to establish the first ever international criminal trials—the International Military Tribunal at Nuremberg. The Nuremberg Tribunals set a precedent for other temporary international courts that were established after genocides in Yugoslavia (1993) and Rwanda (1994). The prevalence of temporary international tribunals coupled with continued violence around the world raised the question: Could it be possible to create a more permanent international criminal court? Could such a court serve as a deterrent for the worst atrocities? What crimes would come under the jurisdiction of an international criminal court? Under what conditions would this international court be able to supersede the authority of national courts? To address these questions, representatives from over 160 countries gathered in Rome from June to July of 1998 at a meeting called the Rome Conference. Coming from diverse cultures with differing views on justice, reaching agreement about the structure of an international criminal court required careful negotiation and compromise. Despite these challenges, the document drafted at this conference, the Rome Statute, was ultimately approved by 120 countries. The Rome Statute went into effect on July 1st 2002, thus beginning the process of establishing the International Criminal Court.

[2] The Genocide Convention

[3] Claire de Than and Edwin Shorts, *International Criminal Law and Human Rights*, (London: Sweet and Maxwell, 2003) p. 316.

[4] Ibid. See also Security Council Resolution 227 as far as the establishment of the ICTY is concerned.

[5] The UN efforts to make an international court dates back to the 1950s immediately after the end of the war. The International Law Commission asked a *rapporteur* to draft a statute for an international criminal court in March 1950. The first official document on an international criminal court would be the 1951 Draft Statute for an International Criminal Court, which merely stated the structure of an international criminal court, for this reason the principles of individual responsibility were not mentioned. The Revised Draft Statute for an International Criminal Court was issued in 1953, which also did not refer to issues of individual responsibility. Focusing on the system of enforcement and jurisdiction, the 1994 draft of the International Criminal Court was promulgated but did not refer to individual responsibility issues.

Subsequently, the Preparatory Committee on the Establishment of the ICC was created in late 1995 to examine the draft statute and met in session on six occasions[6] from 1996 – 1998 to debate the whole issue, culminating in the UN Diplomatic Conference held on the July 17, 1998 in Rome. This Conference was attended by 160 States as well as human rights representatives from 14 specialized agencies, 17 inter-governmental and 124 non-governmental organizations[7]. At its conclusion the Rome Statute of the International Criminal Court was adopted overwhelmingly in a non-recorded vote by 120 states, with seven against[8] and with 21 abstentions[9]. However, negotiations during the Diplomatic Conference witnessed desertion and intensed arguments with many states vehemently voicing their concerns. For instance, India and Mexico protested against the non-inclusion of the prohibition of nuclear weapons as a war crime. The United States (US) refused to support the Statute. Apart from recommending various amendments, which were overwhelmingly rejected by other participating members, the US felt that if the Statute stands, it was possible that individuals, especially from its armed forces abroad could be prosecuted for various criminal acts committed, even in State that had not ratified the Statute. They felt that there was an inherent danger that unfriendly states might either through revenge or malice, instigate prosecutions against American citizens[10].

A minimum of 60 ratifications were required before the court could formally become fully operational[11]. The pace for ratification became rapid in recent years and the required quotas were finally reached up in July 2004. The period for signing the Statute ended in December 31, 2000. The ICC is separated from the International Court of Justice at The Hague which deals with disputes between nations[12]. It is meant to build on the four *ad hoc* tribunals that have prosecuted heinous crimes since 1945[13].

The initial impetus for the establishment of ICC came from within the UN, and although it is legally a separate entity established by a separate treaty between States, and not the Security Council acting under the UN Charter, the UN has a clearly defined role towards the Court. Its relationship with the UN is governed by an agreement between the Court and the UN, which mainly provides for Security Council referrals under the ICC Statute and for UN assistance in payment for any prosecutions made under such referral[14].

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[6] Ibid.

[7] Ferenez B. , "Know the Truth about the International Criminal Court" *htt/www.derechos.org/nizkor*(accessed on 3rd February 2011)

[8] Including US, China and India

[9] Including Turkey, Singapore, Sri Lanka and Mexico

[10] Claire de Than and Edwin Short, Note 3, p. 317. On July 17, 1998, the Rome Statute, the founding document of the International Criminal Court, was overwhelmingly approved by the countries attending the Rome Conference. One hundred twenty voted in favor of the document. While representatives from the United States made many important contributions to the Rome Statute, the United States was ultimately one of only seven nations who voted against it. President Bill Clinton signed the treaty in the last days of his presidency in 2000. However, it was never submitted to the Senate for ratification. The fact that the United States is not a member of the ICC has sparked strong opinions on both sides of the issue. In a speech in November, 2003, John Bolton, an under-secretary of State who was later appointed Ambassador to the United Nations by President George W. Bush, expresses concerns that while the United States agreed with goals of the court, he believed that the court itself was flawed. While Bolton supported temporary international courts, he feared that membership in the ICC threatens United States sovereignty and could put American citizens and leaders in danger. Relevant information available at www.state.gov/(accessed on 2nd March, 2012)

[11] As recommended by the International Law Commission

[12] N. A. Inegbedion, "The Evolution of International Criminal Jurisdiction – The International Criminal Court in View", *Benin Journal of Public Law*, Vol. 2, No. 1. (2004) p. 20

[13] Ibid.

[14] See Art 2 of the Statute which provides for the relationship with the UN thus: The Court shall be brought into relationship with the UN through an agreement to be approved by the Assembly of States

In addition to the Statute of the ICC, on 17 July 1998 the Diplomatic Conference also adopted a Final Act, providing for the establishment of a Preparatory Commission. The Commission was assigned a variety of tasks, the most important one which was the drafting of the Rules of Procedure and Evidence, which are to spell out the procedures of the Court, and Elements of Crimes, intended to elaborate upon the definitions of offences in Articles 6, 7 and 8 of the Statute[15]. The Commission operated until the statute came into force, at which point the Assembly of State Parties was convened. The Assembly elected the judges and prosecutor and also endorsed the work of the Preparatory Commission[16].

It should be noted that the ICC is the first international criminal court to be established by, and with the co-operation of, the world community unlike previous and existing international tribunals, for example, the Nuremberg and Tokyo War Crimes Tribunals (created by the major Allied Powers) or the ICTY and ICTR (set up under different resolutions of the Security Council). Some other differences abound between ICC and other international tribunals.[17]

3. ESTABLISHMENT AND STRUCTURE OF ICC

On 17 July, 1998, after years of relentless efforts and five weeks of intense and sometimes arduous negotiations, the Statute of the International Criminal Court was finally adopted[18]. After the necessary ratifications by State Parties, on April 11, 2002, the court became established and operational in July of that same year. The official seat of the ICC is The Hague, Netherlands, but its Statute permits it to hold its proceedings anywhere[19]. Thus it does not follow the municipal rules of scene of crime determining place or prosecution and consequently, jurisdiction. On the Court's legal status, Article 4 provides that the Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes. This power may be

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parties to this Statute and thereafter concluded by the President of the Court on its behalf". See also *http/www/answers.com/topic International – criminal – court* accessed on 11th March 2005.

[15] William A. Schabers, "Criminal Responsibility for Violations of Human rights, in Human Rights, International Protection, Monitoring and Enforcement, Jamusz Symonides ed., (Aldershot: Ashgate Publishing Ltd., 2003) p. 293.

[16] Ibid.

[17] For instance, unlike the international tribunals for former Yugoslavia and Rwanda which were set up for the specific purpose of human rights atrocities of those states and will eventually be disbanded at some time in the future, that is, they remain merely ad hoc tribunals; the International Criminal Court is a permanent institution. *See* Philippe Saunds and Pierre Klein, *Bowett's Law of International Institutions* (London: Sweet and Maxwell, 2001) p. 385; it is for the prosecution of individuals only; unlike the existing International Court of Justice which is for the hearing of complaints by states against other states; it is for the prosecution of grave humanitarian and human rights crimes globally; it is not geographically confined, as is the Yugoslavia Tribunal; the ICC is complementary to national criminal jurisdictions so, it is the responsibility of States Parties to bring those individuals to justice through their own national courts; the ICC is concerned with internal armed conflict crimes as well as crimes committed in international armed conflict. Indeed, no nexus to armed conflict will be necessary, if other conditions are met; the ICC only possess jurisdiction over crimes committed after is establishment unlike the Yugoslav and Rwandan Tribunals, which have powers to prosecute individuals for crimes prior to their being set up. Besides, the Statute of the ICC is much more detailed than either the ICTY or the ICTY and incorporates "elements of crimes" provisions which will be used by the court as interpretational aids. In addition, state parties are obligated to incorporate relevant Articles of the ICC into their own national laws.

[18] Adopted by the UN Diplomatic Conference for Plenipotentiaries on the Establishment of an International Criminal Court on July 17, 1998

[19] See art 3 (3), ICC Statute

exercised on the territory of any State Party[20] or and, by special agreement, on the territory of any other State.

The composition of the Court is made up of 18 judges; elected by secret ballot by the Assembly of states Parties. After the first election, judges shall serve for a period of nine years and not be eligible for re-election[21]. No two judges may be nationals of the same state[22]. The Court consists of various Chambers namely, the Pre-Trial Chamber, the Trial Chamber and Appeals Chamber. The various officials concerned in the operation of the Court include the President, the Prosecutor and Registrar. The President and First and Second Vice-Presidents are elected by an absolute majority of the judges, and serve for a term of three years and are eligible for re-election once[23]. The court has a Prosecutor usually elected by an absolute majority of the Assembly of State Parties and serves for a term of nine years and not be eligible for re-election[24]. In accordance with Art 42(2), Luis Moreno Ocampo was elected by an absolute majority by the Assembly of State Parties (ASP) as the Prosecutor of the Court. The court is composed of four organs, namely: The Presidency; The Appeals Division, a Trial Division and a Pre-Trial Division; The Office of the Prosecutor; and the Registry[25].

The President, together with the First and Second Vice-President, constitute the Presidency, which is responsible for the proper administration of the Court with the exception of the office of Prosecutor[26]. In discharging its responsibility under the Statute, the Presidency coordinates with the concurrence of the Prosecutor on all matters of mutual concern[27]. The First Vice-President acts in place of the president in the event that the President is unavailable or disqualified. The Second Vice-President acts in place of the President in event that both the President and the First Vice President are unavailable or disqualified[28].

For a person to be qualified for election as a judge, he or she must be of high moral character, impartial and with integrity. In addition, the person should possess the qualifications required in their respective states for appointment to the highest judicial offices. Besides, such a candidate must have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or competent in relevant areas of international law such as international humanitarian law and the law of human rights, and should have extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court[29]. Nominations of candidate for election to the Court as judge may be made by any State Party to the Statute. Such nominations shall be accompanied by a statement in the necessary detail specifying how the candidate fulfils the requirements[30].

As soon as possible after the election of the judges, the Court is expected to organize itself into the divisions earlier specified and as contained in Article 34. The Appeals Division shall be composed of the President and four other judges, the Trial Divisions of not less than six judges and the Pre-Trial Division of not less than six judges[31]. In assigning judges as stated above, the Court shall be guided by the nature of the functions to be performed by each division and the qualifications and experience of the judges elected to the Court, in such way

[20] Defined as a signatory to the Statute
[21] See Art 36 (9) (a) – (c), ICC Statute
[22] Art, 36 (7), ICC Statute
[23] Art 38 (1), ICC Statute
[24] Art, 42 (2), ICC Statute
[25] Art 34, ICC Statute.
[26] Art 38 (3), ICC Statute
[27] Art 38 (4), ICC Statute
[28] Art 38(2), ICC Statute
[29] Art 36(3), ICC Statute
[30] Art 36(4), ICC Statute.
[31] Art 39, ICC Statute.

that each division shall contain an appropriate combination of expertise in criminal law and procedure and in international law. The Trial and Pre – Trial Division shall be composed predominantly of judges with criminal trial experience.

The Appeals Chamber is composed of all the judges of the Appeals and sits as such while the functions of the Trial Chamber are carried out by three judges of the Trial Division. The function of the Pre-Trial Chamber is carried out by three judges of the Pre-Trial Division. However, a single judge of that division may preside over a matter in accordance with the Rules of Procedure and Evidences. The office of the Prosecutor acts independently. It is responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court and examines them, conduct investigations and prosecutions before the Court. The office is headed by the Prosecutor, who has full authority over the management and administration of the office, including the staff, facilities and other resources thereof. The Prosecutor is assisted by one or more Deputy Prosecutors, who shall be entitled to carry out any of the acts required of the Prosecutor. The Prosecutor and his deputies shall be of different nationalities and serve on a full-time basis. To be appointed a prosecutor or deputy prosecutor, the candidate must be of high moral character, be highly competent and have extensive practical experience in the prosecution or trial of criminal cases. In addition, they shall have excellent knowledge of and be fluent in at least one of the working languages of the court[32].

The non-judicial aspects of the administration and servicing of the Court is by Registry. This organ is headed by the Registrar, who is a principal administrative officer of the court. The Registrar exercises his functions[33] under the authority of the President of the Court. The Registrar is elected by an absolute majority through secret ballot by the judges. But in doing this, account is taken of any recommendation by the Assembly of State Parties. The Registrar holds office for a term of five years[34] and is eligible for re-election once and serves on a full –time basis.

The Assembly of States Parties has the powers and responsibility to remove from office a judge, the Prosecutor or a Deputy Prosecutor if found to have committed serious misconduct or a serious breach of his or her duties under the Statute, or is unable to exercise the functions required by the Statute. The removal which must be by secret ballot should be done in accordance to lay down conditions.[35]

Decisions of the Pre-trial and the Trial chamber may be appealed to the Appeals Chamber. Appeals may be brought by the Prosecutor or the defendant and, in some cases, by others involved in the proceedings, for instance a state party investigating the same case or representatives of the victim. The Appeals Chamber may affirm, amend or reverse the original decision, order a new trial or send the case back on remand to the trial chamber[36].

Article 5 of the ICC Statute provides for the jurisdiction of the Court and stipulates that the jurisdiction of the Court shall be limited to most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with the Statute creating it with respect to the following crimes, namely: the crime of genocide; Crimes against

[32] Art 42 by Art 50(1) the official languages of the Court are; Arabic, Chinese, English, French, Russian and Spanish. But by Article 50 (2), the working language of the Court is English and French.

[33] One cardinal function that the Registrar performs is the setting up of a victim and witnesses unit within the Registry. This unit provides, in consultation with the office of the Prosecutor, protective measures and security arrangements, counseling and other appropriate assistance for witnesses and victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit includes staff with expertise in trauma. See Article 43(6) of ICC Statute

[34] Art. 43 (5), ICC Statute

[35] In the case of a judge by a two-third majority of the state parties upon a recommendation adopted by a two-third majority of the other judges; in the case of the prosecutor, by an absolute majority of the States parties; and in the case of a Deputy prosecutor, by an absolute majority of the States parties upon the recommendation of the prosecutor.

[36] Art. 82 (1) (3), ICC Statute.

humanity; War crimes; the crime of aggression. The Court's jurisdiction extends over all the states, where the crimes are alleged to be committed, who are party to the treaty constituting the creation of the Court. In other words, we can say that the Court may exercise its jurisdiction at the instigation of the Prosecutor or a state party.[37] Article 12 of the Statute addresses the jurisdiction of the court over persons. The Court has jurisdiction over persons accused of a crime under the Statute if one of the two conditions is satisfied. Either the state on which territory the crime was committed is a party to the Statute or has agreed to the jurisdiction of the court, or the State of nationality of the accused is a party to the statute or has agreed to the jurisdiction of the court. Exceptionally, the general rule on personal jurisdiction does not apply in cases which have been referred to the Prosecutor by the Security Council, acting under Chapter VII of the UN Charter[38]. In this situation, a case can be brought against any person, regardless of his or her nationality or the place in which the alleged crimes was committed[39].

By virtue of the principle of complementarities, the jurisdiction of the International Criminal Court is intended to come to play only when a state is genuinely unable or unwilling to prosecute alleged war criminals over which it has jurisdiction. It means that the International Criminal Court is not meant to supersede national jurisdiction of states parties to the Statute. It has to exercise its jurisdiction only when the States concerned are genuinely or unwillingly unable to carry out the investigation or prosecution[40]. This principle is adopted in view of the sovereignty of the state parties to the Statute, so that countries do not feel that their own jurisdiction is superseded unnecessarily. Further, based on the principle of 'complementarity', State parties must also bring their substantive criminal law into line, enacting the offences of genocide, crimes against humanity and war crimes as defined in the Statute and ensuring that their courts can exercise universal jurisdiction over these crimes[41].

The jurisdiction of the Court can be ousted on a matter that is being investigated or prosecuted by a State which has jurisdiction over it, unless that state is unwilling or unable genuinely to carry out the investigation or prosecution.[42] Also, if the person concerned has already been tried for conduct which is the subject of the complaint, a trial by ICC is not permitted[43]. It means therefore that, primarily State parties are not only encouraged, but are seen as preferable, to prosecute the accused in their own courts. The jurisdiction of the Court is not restricted to the actual perpetrators of crimes but extends to those persons responsible for ordering, soliciting, attempting, aiding and abetting, inducing the commission or attempted commission of a crime, or otherwise assisting in its commission or attempted commission by a group with a common purpose or inciting others to commit genocide[44]. Persons under the age of 18 are not subject to the jurisdiction of the Court. No prosecutions may be brought

[37] Provided one of the following states is bound by the Statute: The State on whose territory the crime was committed; or the State of which the person accused of the crime is a national. However, a state that is not a party to the Statute may make a declaration to the effect that it accepts Courts jurisdiction (article 52 ICC Statute). A State party may refer a situation to the Prosecutor in accordance with Article 14. Similarly, the UN Security Council may, under Chapter VII, refer a situation to the prosecutor for investigation. Or the Prosecutor may initiate an investigation *proprio motu* on the basis of information received of crimes within the jurisdiction of the Court in accordance with Article 15.

[38] Phillipe Sande and Pierce Klein, *Bowett's Law of International Institutions* (London: Sweet and Maxwell, 2001) p. 388.

[39] Ibid.

[40] Ibid.

[41] Williams A. Schabas*, Criminal Responsibility Violations of Human Rights, in Human Rights; International Protection Monitoring and Enforcement.* Janusz Symonides ed., (Aldershot: Ashgate Publishing Ltd., 2003) p. 293.

[42] Article 17 (1) (a) – (c) of ICC Statute.

[43] Article 20 (3), ICC Statute.

[44] Article 25, ICC Statute. This provision is somewhat similar to Section 7 of the Criminal Code of Nigerian relating to parties to offence.

against such persons[45]. Nowadays, it is not uncommon for 'child soldiers' to attain a high ranking position of responsibility and command in an armed force, especially where internal armed conflicts are concerned. To automatically exempt such persons for their inhumane actions in such circumstances may well turn out to be detrimental in future prosecutions coming before the International Criminal Court.

The office of the Prosecutor is an important organ of the ICC. The Prosecutor may initiate investigations *propio motu* on the basis of information or crimes within the jurisdiction of the Court. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedures and Evidence applicable in the Court. If the Pre-Trial Chamber, upon examination of the request and the supporting evidence considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case[46]. However, the refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation[47].The rights of any individual being investigated is guaranteed.[48]

It is the responsibility of the Pre-Trial Chamber to issue the arrest warrant, but only after it has been satisfied by the Prosecutor that there are reasonable grounds to believe that the crime comes within the jurisdiction of the Court; and that the arrest appears necessary to ensure the suspects attendance at trial, or to prevent obstruction to the investigation or the Courts proceedings, or to prevent the accused from committing further crimes[49]. If the Prosecutor fails to satisfy the Pre-Trial Chamber of the above detention criteria, then the suspect must be released with or without conditions[50]. There is appeal in accordance with the Rules of Procedure and Evidence by the Prosecutor or the convicted person on the ground of disproportion between the crime and the sentence. Sentences are regulated by the Statute.[51]

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[45] Article 26, ICC Statute.

[46] Article 15 (4), ICC Statute

[47] Article 15 (5), ICC Statute

[48] These rights are contained in Article 55 and include not being compelled to incriminate oneself; or being exposed to coercion, duress or threats, to torture or any other form of cruel, inhuman or degrading treatment or punishment, or being subjected to arbitrary arrest or detention. Further, prior to questioning, the individual concerned must be informed of the grounds for such a questioning; and s/he has a right to remain silent, and the right to legal advice unless he has waived that right.

[49] Article 58 (1), ICC Statute

[50] Article 60 (2), ICC Statute

[51] There are ranges of different punishments and penalties that the Court may impose on a convicted individual. These include a term of imprisonment not exceeding 30 years or imprisonment for life, if warranted, according to the seriousness of the crime. Since there is no tariff provisions it appears the Court exercise a broad discretion when imposing sentences. In addition to sentencing, the Court may be imposing a fine and /or forfeiture of proceeds, property and assets accumulated from the crime itself; see Article 77 (1) of ICC Statute. Moreover, the Court may award compensation to victims who have suffered loss, damage or injury; Article 75 of ICC Statute. Not surprisingly, the death penalty is omitted from the International Criminal Court's sentencing provisions. During the negotiation stage of the Statute it was argued that potential Member State which possess the death penalty may fine its exclusion unacceptable as undermining their own national laws and as a consequence be reluctant to ratify the Statute. As a satisfactory compromise Article 80 was introduced. The Article states that the Statute will not affect the application by states of penalties prescribed by their national law, nor the law of states which do not provide for penalties prescribed. Therefore, States are expressly left to their own national devises when sentencing and imposing penalties; once again reaffirming the complementarities qualities of the Statute.

Fundamental to the effective workings of the court is the co-operation and collaboration not only between states but also between the Court and the state or states concerned. Consequently, member states are obligated to co-operate fully with request made by the court. If the State refuses, the court may inform the Assembly of State Parties or, where the Security Council referred the matter to the court, the Security Council[52]. The court may call upon State Parties as well as non-state parties to arrest and surrender an individual suspected of committing crimes under Article 5 of the Statute[53]. State parties must comply with any such requests[54]. The court may also seek co-operation in respect of investigations or prosecution. For instance, the Court may ask a State to furnish it with various types of documents and evidence relating to investigation.[55]

A sentence of imprisonment shall be served in a State designated by the court from a list of States, which have indicated to the Court their willingness to accept persons. If no State is designated by the Court, then the host state will undertake to imprison the accused for the sentence. State parties shall give effect to fines or forfeitures order by the Court, without prejudice to the rights of *bona fide* third parties, and in accordance with the procedure of their national law[56]. The Court can also review its sentence. For instance, where the prisoner has served two thirds of the sentence, or 25 years in the case of life imprisonment, the Court shall review the sentence to determine whether it should be reduced. The Court may reduce the sentence in some circumstances.[57]

4. CHALLENGES TO THE OPERATION OF ICC

There have been significant achievements both inside and outside the courtroom – including investigations in seven countries and preliminary examinations in eight more. Moreover 120 States are now Parties to the court, including 33 from Africa alone. The 50-year prison sentence given former Liberian President Charles Taylor recently for his role in atrocities committed in Sierra Leone in the 1990s is another pillar in the edifice of international law and a sharp reminder to dictators that they can no longer act with impunity[58].One of the early, yet often overlooked, achievements of the Rome Statute is its

[52] Article 87 (7), ICC Statute

[53] Article 89, ICC Statute

[54] Article 58 (1) and 59, ICC Statute

[55] For instance, expert and witness statements, exhumation and examination of grave sites, the service of documents and the tracing and freezing of assets. See generally Article 93 (1) of ICC Statute.

[56] Article 109 (1), ICC Statute

[57] If the person was willing to co-operate with the court in its investigations and prosecutions; voluntarily assisted the Court through enforcement of the judgments and orders, e.g. locating assets subject to orders of fines, forfeiture or reparations for the benefit of victims; or other factors which justify a reduction of sentence. See Article 110(4) of ICC Statute.

[58] Taylor is the first head of state to be convicted by an international court since the Nuremberg trials after the Second World War. The Special Court for Sierra Leone handed down its sentence on Wednesday following a four-year trial after which Taylor was found guilty last month of "aiding and abetting, as well as planning, some of the most heinous crimes in human history." The prosecution argued that Taylor armed and supplied rebels in neighbouring Sierra Leone in the 1990s not for ideological or political reasons, but simply for greed for the so-called "blood diamonds" with which the rebels paid him. The trial heard from 115 witnesses many of whom recounted public executions, amputations of civilians' limbs, the displaying of decapitated heads, public rapes of women and girls, and people being burned alive in their homes. About 50,000 people are believed to have been killed in the war in Sierra Leone. Taylor's lawyers say they will appeal the sentence and the prosecution, which asked for Taylor to be given 80 years in prison, says it will be asking for a stiffer penalty. Taylor's prosecution and conviction sends a powerful message to dictatorial and brutal leaders who for too often have appeared immune from accountability for their actions. It adds to the stature of the International Criminal Court (ICC), which was established in 2002 and whose mandate has been ratified by 121 countries. The doctrine of accountability has recently been affirmed by the prosecution before the

contribution to the codification of international criminal law, through both the definitions within the Statute itself and the carefully crafted and detailed Elements of Crimes. The definitions in the Rome Statute are thus disseminated into the domestic criminal law of the countries that have joined. As the creation of the International Criminal Court is a potential step towards a more just society; giving real substance to the concept of ending impunity for the worst crimes against mankind, building on the firm foundations laid so far is imperative.

However, frustration exists at the pace of justice, since almost ten years after the ICC's founding document, the Rome Statute, entered into force, the world still awaits a judgment from the ICC's first trial of Congolese businessman, Thomas Lubanga. Its performance so far has belied the most extreme claims on either side: by design, the ICC is hardly positioned to pose a risk to rich countries, but it is also unable to take on significant cases without support from those same states. Unlike their national counterparts, they are not backed by a system of coercive enforcement, and thus are at the mercy of outside assistance-primarily of states-for the implementation of their requests and decisions. However, outside assistance will not easily be forthcoming if the state, or another potential support provider, happens to be implicated in the crimes being processed, or has some other compelling reason to refuse cooperation.

The limited reach of the jurisdiction and admissibility regime of ICC is another major limitation to its operation. This is a combination of, on the one hand, a quite conservative and state sovereignty-oriented system of jurisdiction based on the principle of territoriality and the active personality principle,[59] combined with, on the other hand, an admissibility regime based on complementarity. The principle of complementarity, as provided for in article 17 of the ICC Statute, is the decisive basis of the entire ICC system.[60] Complementarity entails that

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Yugoslav War Crimes Tribunal of Slobodan Milosevic, who died before his trial was complete, Radovan Karadzic and Ratko Mladic. The ICC is now conducting trials against former Ivory Coast President Laurent Gbagbo and Jean-Pierre Bemba, the former vice-president of the Democratic Republic of the Congo. In 2005 the ICC issued an arrest warrant for warlord Charles Kony, accused of enlisting child soldiers in Uganda and Congo. The warrant for Kony and one issued for the President of Sudan, Omar al-Bashir, for alleged genocide, crimes against humanity and war crimes in Darfur, illustrate that the ICC is still a work in progress. The court has no police force of its own and is dependent on supporting states to hand over the accused for trial. Kony remains at large despite concerted efforts by troops on the ground to capture him and a worldwide social media campaign. Sudan's Bashir, who has firm support among many Arab nations, is still able to travel widely outside his own country without fear of detention. Several major nations, including the United States and Russia, have signed the treaty creating the court, but have not ratified the treaty. Others, such as China and India, have not endorsed the court at all. The ICC has also been accused of being slow, expensive and apparently sometimes politically motivated in its proceedings. Certainly the court's panel of three judges from Ireland, Samoa and Uganda in Taylor's trial gave him what many would consider excessive opportunities to make his case. He spent 81 days – seven months – speaking in his own defence. The court allowed him to tell his life story, make profoundly political statements and to verbally wander all over the map without ever being cut off or brought into line. There is, however, likely to be an immediate negative reaction to the Taylor verdict and sentence, even if the long-term result is positive. It is likely to make men like al-Bashir and Zimbabwe's Robert Mugabe, against whom there is compelling evidence of crimes against humanity, even more determined to hang on to power for fear of what may happen to them if they lose control. For details see, Jonathan Manthorpe, ''Liberia's Charlse Taylor: 50-year Prison Sentence, a Sharp Reminder to Dictators'' *Vancouver Sun* May 30, 2012. Available at *www.standardmedia.co.* Accessed 30th May, 2012.

[59] Rome Statute, Art. 12(2). *See* Hans-Peter Kaul, *Preconditions to the Exercise of Jurisdiction*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 583 (Antonio Cassese, Paolo Gaeta & John R.W.D. Jones eds., 2002); Michael P. Scharf, *The ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 L. & CONTEMP. PROBS. 67, 110 (2001).

[60] For an overview of the basic features of the complementarity principle, see John T. Holmes, *Complementarity: National Courts versus the ICC*, *in* THE ROME STATUTE OF THE INTERNATIONALCRIMINAL COURT: A COMMENTARY 607–16 (Antonio Cassese, Paolo Gaeta & John R.W.D. Joneseds., 2002).

judicial proceedings before the ICC are only permissible if and when states which normally would have jurisdiction are either unwilling or genuinely unable to exercise their jurisdiction. The Rome Statute recognizes the primacy of national prosecutions. It thus reaffirms state sovereignty and especially the sovereign and primary right of states to exercise criminal jurisdiction. In sum, the founders of the ICC have created a new system of international criminal jurisdiction consisting of two levels which complement each other. The first level is constituted by states and their national criminal law systems. As confirmed by the principle of complementarity as the decisive basis of the Statute, states continue to have the primary duty to exercise their criminal jurisdiction over those responsible for international crimes.[61]The second level is constituted by the International Criminal Court.

According to the principle of complementarity, the Court can only act as a last resort in cases in which national criminal law systems are unwilling or genuinely unable to carry out the investigation or prosecution. The complex system apparently needs more time to be fully accepted and adhered to by all concerned in order to develop its full potential. At the same time, the principle of complementarity creates a curious pair of conflicting forces and hence a dilemma for the Court itself. If states generally discharge their primary duty to prosecute crimes, the Court will not be given anything to do and will have no cases. On the other hand, the Court needs exemplary and successfully handled cases because the international community and the states parties have the legitimate desire to see concrete evidence that the ICC is a meaningful and useful institution.

A cardinal challenge is the fact that the Court is one hundred percent dependent on effective criminal cooperation and support of states parties. As the Court generally has no executive powers and no police force of its own, it is totally dependent on full, effective and timely cooperation from states parties.[62] As foreseen and planned by its founders, the Court is characterized by the structural weakness that it does not have the competencies and means to enforce its own decisions. As already shown with regard to the principle of complementarity, also in this respect it was the wish of the Court's creators that states' sovereignty should prevail.

Another challenge on the factual side is the enormous difficulty of carrying out investigations and collecting evidence regarding mass crimes committed in regions which are thousands of kilometers away from the Court. This creates difficult access; which makes investigations unstable and unsafe[63]. Carrying out investigations in Uganda, the Democratic Republic of the Congo, the Central African Republic[64] or with regard to Darfur entails logistical and technical difficulties, unprecedented problems which no other prosecutor or court is faced with. Another grim reality is the notorious scarcity of financial and other resources available for investigations and other work of the Court.

Obviously, there are also other challenges. For example, it seems realistic to assume that politics and states' interest will continue, in the future, to be important obstacles to the

[61] 10. Hans-Peter Kaul, *The International Criminal Court: Key Features and Current Challenges*, *in* THE NUREMBERG TRIALS—INTERNATIONAL CRIMINAL LAW SINCE 1945 245, 246 (Herbert R. Reginbogin & Christoph J.M. Safferling eds., 2006).

[62] 11. Jakob Katz Cogan, *International Criminal Courts and Fair Trials—Difficulties and Prospects*, 27 YALE J. INT'L L. 111, 119 (2002); Hans-Peter Kaul, *Der Internationale Strafgerichtshof—Stand und Perspektiven*, *in* VOM RECHT DER MACHT ZUR MACHT DES RECHTS 93, 95 (Frank Neubacher & Anne Klein eds., 2006).

[63] This point was emphasized by Chief Prosecutor Moreno-Ocampo in his address to the fourth Assembly of States Parties to the Rome Statute in The Hague. Luis Moreno-Ocampo, Prosecutor of theInt'l Criminal Court statement to the Fourth Assembly of States Parties to the Rome Statute (Nov. 28, 2005)

[64] The Proseutor announced the opening of investigations in the Central African Republic on 22May 2007.

effectiveness of the ICC.[65] In the apparently eternal struggle between brute force and the rule of law, further disappointments and setbacks seem possible.

5. CONCLUSION

First, the ICC must continue to consolidate its ongoing development into an efficient and professional international organization and, at the same time, into a functioning and credible international court. It also remains essential that the ICC continues to show; through the way it conducts all its activities, that it is a purely judicial, objective, neutral and non-political institution. Second, the Prosecutor and his office as the driving force of the ICC bear a special responsibility. The Office of the Prosecutor is the engine; professional and effective investigations are the fuel for the entire Court. In more legal terms: the ICC Statute and its Rules of Procedure and Evidence set up the legal framework for the work of the Office of the Prosecutor. The Prosecutor and his Office are called upon to use this legal framework for, firstly, the sustained build-up of an organization which is as efficacious as possible, and secondly, the continued development of professional and efficient working methods, with clear goals and priorities, in particular with regard to investigations. The efficiency of the work of the Office of the Prosecutor is essential for the Court as a whole. Without professional and efficient working methods, without an Office of the Prosecutor which carries out its duties in an optimal manner, the ICC cannot function.[66]

Third, it is obvious that the Court cannot be successful without active and steadfast support from states parties, not only in word but also, more importantly, in concrete deed. States parties must draw appropriate conclusions from the well-known fact that the Court has no executive powers, no police, no armed forces or other executive mechanisms. Consequently, states parties and the Court must in a foreseeable future develop a new system of best practices of effective criminal cooperation:[67] direct, flexible, without unnecessary bureaucracy, with a fast flow of information and supportive measures. This system must fully take into account that the ICC can be only as strong as the states parties make it. This concerns in particular the unresolved question about serving arrest warrants and transferring suspected criminals to The Hague. It is obvious that the states parties and all forces that support the ICC cannot let down the Court in respect of arrests. One must hope that this is clear to all concerned. In the former Yugoslavia, NATO and coalition forces have made most arrests for the International Criminal Tribunal for the Former Yugoslavia. With regard to Rwanda, most arrests have been made by neighboring states. Likewise, states parties and U.N. Security Council members who, in a regrettably weak resolution,[68] referred the Darfur crises[69] to the

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[65] *See* M. Cherif Bassiouni, *The International Criminal Court: Quo Vadis?*, 4 J. INT'L CRIM. JUST. 421 (2006); Kai Ambos, *Prosecuting International Crimes at the National and International Level: Between Justice and Realpolitik*, *in* INTERNATIONAL PROSECUTION OF HUMAN RIGHTS CRIMES (Wolfgang Kaleck, Michael Ratner, Tobias Singelstein & Peter Weiss eds., 2007).

[66] *See* Antonio Cassese*,''* Is the ICC Still Having Teething Problems?*'', 4 J. INT'L CRIM. JUST*. (2006) p.434

[67] Hans-Peter Kaul,'' Construction Site for More Justice: The International Criminal Court after Two Years'', *99 AM. J. INT'L L.* (2005) p.370

[68] Security Council Resolution 1593, U.N. Doc. S/RES/508 (Mar. 31, 2005). *See* Andreas Zimmermann, *Two Steps Forward, One Step Backwards? Security Council Resolution 1593 (2005) and the Council's Power to Refer Situations to the International Criminal Court*, *in* VÖLKERRECHT ALS WERTORDNUNG—FESTSCHRIFT FOR CHRISTIAN TOMUSCHAT 681 (Pierre-Marie Dupuy, Bardo Fassbender, Malcolm B. Shaw & Karl Peter Sommermann eds., 2006).

[69] Ethnic groups living in Darfur, a territory in the southwest region of Sudan, have competed for essential resources (e.g., land and water) for centuries. These primarily agrarian tribes felt marginalized by the central government in Khartoum, especially since the military coup in 1989. This coup, led by Sudanese president Omar al-Bashir, favored Sudanese Arabs over Sudanese Africans and has ignored

Court must now find ways and means of supporting the ICC with regard to the decisive question of arrests and transfers to The Hague.[70] Currently, there are five arrest warrants confirmed by Pre-Trial Chamber II with regard to suspects from Uganda.[71] It remains unclear whether and when these arrest warrants will be executed. This is not good.

The International Criminal Court is facing a time of transition. The ICC's leadership that charted the course of the court's first decade has ended its mandate. This year, 2012, a new prosecutor has assumed office, fundamentally changing the face of the ICC. The ASP and its Secretariat can perform three central functions to catalyze greater and more coordinated international support for complementarity, as follows:

a) ASP members are uniquely placed to spearhead efforts to encourage other actors to support complementarity efforts, including development agencies, multilateral development banks, embassies on the ground, national governments, and civil society. The new ASP President is particularly well positioned to engage the leadership of various institutions to impress upon them the importance of complementarity in general, and to enlist their support in finding solutions for complementarity needs in specific states.

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the basic needs of many of the people living in Darfur. This conflict reached a new level, however, when rebels representing the three main African ethnic groups in the region (Fur, Massalit, and Zaghawa) attacked a government air force base in 2003. Khartoum responded to the rebels' attack by not only targeting members of the rebel groups but also by attacking Darfuris belonging to the tribes associated with the rebels (Fur, Massalit, and Zaghawa). International observers, journalists, and human rights organizations report that the Janjaweed and Sudan's own army are responsible for horrific war crimes: the rap-ing of women is widespread; innocent civilians, especially men, have been killed en masse; children have been kidnapped; wells have been poisoned and villages have been burned. (To learn more about the genocide in Darfur, see the Darfur and Southern Sudan page on the Enough Project's website: *www.enoughproject.org*.)

[70] Lydia Polgreen and Marlise Simons, *The Pursuit of Justice vs. the Pursuit of Peace*, NY Times A7 (July 11,2008). The indictment had been issued in response to a referral from the UN Security Council under Security Council Res No 1593, UN Doc S/RES/1593 (2005). Prior to its request for an arrest warrant for Bashir, the Office of the Prosecutor indicted two other individuals in connection with its Resolution 1593 investigation. On February 27, 2007 the prosecutor initiated a case against Ahmad Harun and Ali Kushayb for crimes against humanity and war crimes. The Pre-Trial Chamber issued arrest warrants for both these individuals on April 27, 2007. The warrants are yet to be executed by the government of Sudan although as of this writing, Kushayb has been arrested under Sudanese domestic law.] Ahmad Harun maintains his post as Minister of State for Humanitarian Affairs. Office of the Prosecutor, International Criminal Court, *Pre-Trial Chamber 1: Public Summary of Prosecutor's Application under Article 58* (July 14, 2008), available online at <http://www.icc-cpi.int/library/cases/ICC-02-05-152-ENG.pdf> (visited Feb 20th , 2012).

[71] Warrants of Arrest for Dominic Ongwen, Okot Odhiambo, Raska Lukwiya, Vincent Otti, ICC-02/04-01/0554–57. For the latest developments see *supra* note 4. *See* Kasaija Phillip Apuuli, *The ICC Arrest Warrants for the Lord's Resistance Army Leaders and Peace Prospects for Northern Uganda*, 4 J. INT'L CRIM. JUST. (2006) p.107. See Office of the Prosecutor, International Criminal Court, *Pre-Trial Chamber II: Warrant of Arrest for Joseph Kony Issued On 8 July 2005 As Amended On 27 September 2005*, (Sept 27, 2005), available online at <http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-53_English.pdf> (visited March 10th , 2012); Office of the Prosecutor, ICC, *Pre-Trial Chamber II: Warrant of Arrest for Raska Lukwiya* (July 8, 2005), available online at <http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-55_English.pdf> (visited March 10th, 2012); Office of the Prosecutor, ICC, *Pre-Trial Chamber II: Warrant of Arrest for Okot Odhiambo* (July 8, 2005), available online at <http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-56_English.pdf> (visited March 10th, 2012); Office of the Prosecutor, ICC, *Pre-Trial Chamber II: Warrant of Arrest for Dominic Ongwen* (July 8, 2005), available online at http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-57_English.pdf (visited March 10th, 2012). Lukwiya and Otti have subsequently died. Trial Watch, *Vincent Otti*, available online at <http://www.trial-ch.org/en/trial-watch/profile/db/facts/vincent_otti_395.html> (visited March 10th, 2012); Trial Watch, *Raska Lukwiya*, available online at <http://www.trial-ch.org/en/trialwatch/profile/db/facts/%20raska_lukwiya_396.html> (visited March 10th, 2012).

b) The ASP can use its convening power to foster regular discussions among the actors needed to address complementarity effectively: states, civil society and the global legal community. In particular, it can help bridge the gap in communication between the international justice and international development communities. For example, development agencies could be invited to participate in ASP sessions and side events.

c) The ASP is also well poised to improve the sharing of information among different actors engaged in complementarity on an ongoing basis. The creation of an ASP extranet on complementarity by the body's Secretariat is a welcome development. If followed by active promotion, it could potentially be a powerful tool. The SASP could, for example, engage with governments and in-country donor coordination mechanisms in all ICC situation countries, and countries under preliminary analysis, to ensure that they are aware of the extranet as a forum to post their needs. Similarly, the SASP can ensure that States Parties and relevant civil society organizations have identified focal points for posting information on activities and resources. The Bureau's Working Groups can and should convene meetings to discuss specific needs identified by States Parties. These might range from calls for assistance on domesticating Rome Statute crimes, to trainings on international criminal law for prosecutors or defense counsel, to prison management needs critical to shore up the back end of the judicial chain. ASP delegates should be encouraged to discuss these needs and take them back to their governments to identify possible roles for their countries in finding a solution. They can also use their awareness of these needs to inform their governments' participation in other relevant forums: whether at the General Assembly, in rule of law donor forums, or relevant regional meetings. The ICC is playing its part to show that even those at the highest levels of power cannot escape justice when implicated in grave crimes. But from the foregoing, it is obvious that the ICC is entangled with challenges and limitations. It is hoped that the suggested recommendations if implemented will help to reposition the ICC.