THE ROLE OF THE INTERNATIONAL CRIMINAL COURT IN ENHANCING CRIMINAL JUSTICE IN UGANDA

BY

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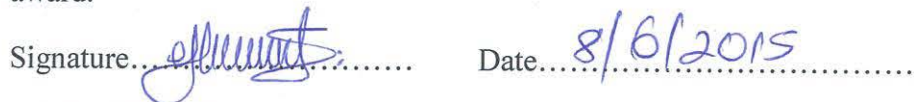
DECLARATION

I, ALUM HILDER declare that this dissertation is my own original work and that it has not been presented and will not be presented to any other university for a similar or any other degree award.



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ALUM HILDER

APPROVAL

I certify that I have supervised and read this study and that in my opinion, it conforms to acceptable standards of scholarly presentation and is fully adequate in scope and quality as a research report in partial fulfillment for the award of a Bachelor of Laws degree of Kampala International University,"

Sign ………………………………….. Date………………………………

MADAM. KUHIRWA ROSSETTE

Supervisor

DEDICATION

I dedicate this work to the Lord Almighty and my mother, Mrs Keren for the efforts and support. I am entirely grateful for the faith you have always had in me.

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The completion of this work has been a long and fruitful task. In this regard, I thank the Lord Almighty for the grace and for the ability to do this research.

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LIST OF ABBREVIATIONS

ICC : International Criminal Court

UN : United Nations AU : African Union

US : United States

UNSC : United Nations Security Council

OTP : Office of the Prosecutor

ICJ : International Court of Justice

CPPCG : Convention on the Prevention and Punishment of the Crime of Genocide

ICCPR : International Convention on Civil and Political Rights

ICSECR : International Convention on Socio-economic and Cultural Rights

RPE : Rules of Procedure and Evidence

CONVENTIONS AND OTHER INTERNATIONAL INSTRUMENTS

1. 1948 Convention on the Prevention and Punishment of the Crime of Genocide
2. 1976 International Convention on Civil and Political Rights
3. 1966 International Convention on Socio-economic and Cultural Rights
4. 1948 Universal Declaration of Human Rights.
5. 1984 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
6. 2002 Rome Statute of the International Criminal Court

LIST OF CASES

International Criminal Court.

The Prosecutor V Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen , Case No. ICC-02/04-01/05,

Ad hoc tribunals: ICTY and SCSL.

Prosecutor v Morris Kallon Case No. SCSL-2004-15-AR72 (E),

Prosecutor v. Dusko Sikirica, Damir Dosen, Dragan, Case No. IT-95-8-S.

Prosecutor v. Drazen Erdemović, Case No. IT-96-22-A, (Oct. 7, 1997) separate and dissenting opinion of Judge Cassese.

Prosecutor v. Jelisić, Case No. IT-95-10-T.

Prosecutor v. Tadic, Case No. IT-94-1-T, (15 July 1999) Judgment.

Prosecutor v. Dusko Tadic, Appeals Chamber of the ICTY, (2 Oct. 1995).

Prosecutor v. Plavsić, Case No. IT-00-39&40/1-S, (27 Feb. 2003) (sentencing judgment).

Prosecutor v. Momir Nikolić, Case No. IT-02-60/1-S, (2 Dec. 2003) (Sentencing Judgment).

Prosecutor v. Anto Furundzija, ICTY, Case No. IT-95-17/1-T, (10 Dec. 1998).Judgment of the Trial Chamber.

Permanent Court of International Justice and the International Court of Justice.

Germany v. Poland (Factory at Chorzów), 1928 P.C.I.J. Ser. A, no. 17 at 29, Judgment of 13th September 1928.

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment of 27 June 1986, ICJ Reports 1986, pp. 113-114.

National jurisdictions.

Arvind Patel v Uganda, Supreme Court of Uganda Criminal Appeal No. 36 of 2002; [2003] UGSC 35 (27 October 2003).

Azanian Peoples Organisation (AZAPO) and Others v. President of the Republic of South Africa, Constitutional Court of South Africa, Case 1796 of 25 July 1996. D. Bouterse and the December killings in Suriname LJN: AB1471,

Hoge Raad December moorden Bouterse, 00749/01 CW 2323 date: 18-09-2001.

Penn v. City of Montgomery Alabama 381 F.3d 1059 (2004).

R v Coward (1979) 70 Cr. App. R. 70;

R v Goodyear [2005] EWCA Crim 888, [2005] 1 WLR 2532.

R v Grice (1977) 66 Cr. App. R. 167;

R v Hazeltine [1967] Q.B 857

R v Smith [1990] 1 W.L.R. 1311;

R. v Cain [1976] Crim. L.R. 464;

R. v Turner [1970] 2 Q.B. 321; (1970) 54 Cr. App. R. 352;

R. v Winterford (1978) 68 Cr. App. Rep. 291;

Soon Yeon Kong Kim and Another v Attorney General of Uganda Constitutional Reference No. 6 of 2007 (unreported).

Town of Newton v. Rumery 480 U.S. 386 (1987).

Uganda v Matovu [1973] H.C.B. 193.

CHAPTER ONE

1.0 INTRODUCTION

1.1 Background

The need for an international criminal court was brought about by the fact that international law did not have sufficient instruments to punish those who committed grave international crimes. Violations of Enhancing criminal justice at the international level could go unpunished due to the lack of legal framework. As a result, punishment for these international crimes was left to national courts. The problem with the national courts was that they acted as agents of the perpetrators. They were therefore unwilling or unable to bring the perpetrators of international crimes to justice. For instance, in the former Yugoslavia and Rwanda, the governments themselves were involved in the commission of the crimes and the national courts protected them. It was therefore necessary to enforce international justice since national courts were not helping. International crimes are serious breaches of international law; thus international courts are the most appropriate judicial system to adjudge them as they are best suited to know and apply international law.[1] In this regard, Prof. William A. Schabas[2] argues that national courts are often incapable of being impartial when it comes to dealing with international crimes, such that, even the most developed nations in the West do not have penal codes which provide for the prosecution of international crimes[3].

The 'road to Rome' was a long and contentious one. The Court has roots in the early 19th Century. However, the story can traced further back in 1872 when Gustav Moynier, one of the founders of the International Committee of the Red Cross, proposed a permanent court in response to the crimes committed in the Franco-Prussian war. The Hague Convention IV, which was adopted in 1907, was the first instrument to refer to liability for breaches of international law. However, the Convention only established state obligations and hence did not refer to personal liability. The Hague Conventions, as treaties, were only meant to impose duties upon

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[1] Francois- Xavier Bangamwabo, 'International Criminal Justice and the Protection of Human Rights in Africa'

[2] William A. Schabas is Professor of Human Rights Law at the National University of Ireland, Galway and Director of the Irish Centre for Human Rights.

[3] William A. Schabas, An Introduction to the International Criminal Court (2nd ed., 2004) Cambridge University Press

states and were not intended to create criminal liability on individuals[4]. The absence of any sanctions for their violations confirms this. Another development of international criminal law came after World War I when enemy soldiers were tried by all warring nations for breach of the laws of war. The Treaty of Versailles authorized the creation of a tribunal to try Kaiser Wilhelm II. The Treaty read in part: "The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for supreme offence against international morality and the sanctity of treaties. A special tribunal will be constituted to try the accused, thereby assuring him the guarantees to the right to defence." This development was significant even though no actual trial ever took place because it demonstrated that even a head of state is not immune from prosecution by other states.

The breaking out and persistence of the conflict has been mainly attributed to: the socio-economic division between Northern and Southern Uganda as a result of the British colonial administration's division of labour, which effectively created a political elite in the South and an ethnic military identity in the North; the militarisation of politics in which the use of force has been a political means, as well as the exclusion of Acholi in all domains of political power; and finally the regionalisation of the conflict, especially the influence of the Government of Sudan in the last decade of the conflict which resulted in expansion of the conflict to surrounding countries.

Questions are raised as to whether criminal proceedings should be dismissed or suspended in light of the possibility of negotiated settlements to end atrocities; as to whether peace and justice are mutually exclusive imperatives, or whether they are both intrinsic to one another in a common quest for reconciliation. While there is local support for restorative justice which promotes the socio-economic recovery of victims of mass human rights violations and perpetrators by advancing such measures as truth telling, traditional justice, amnesty and re-integration, and those in support are critical of retributive justice as encouraging vengefulness and being an obstacle to reconciliation, there is considerable support on the other hand for retributive justice which instead promotes the holding accountable the perpetrators of gross human rights violations, thus focusing on prosecutions and those in favour are critical of restorative justice as an encouragement of impunity. It is important for the re-establishment of

[4] Supra n. 3, p 2,

lasting peace in the region that a satisfactory balance between retributive and restorative justice is struck in the ongoing debate on accountability and peace. Any transitional justice approach to the atrocities committed during the conflict is faced, quite inevitably, with a number of conflicting priorities. One of these, to which most of this thesis is devoted, is the interrelationship between amnesty on the one hand and domestic and international criminal trials before the War Crimes Division and ICC respectively, on the other. Although the discussion has hitherto been mainly around the peace and justice dichotomy, the underlying issues are essentially about the relationship between retributive justice and reconciliation. It is against this background that the thesis seeks to explore the potential of plea bargaining as one of the tools that could be applied toward achievement of the much desired critical balance, as a tool that may ensure that reconciliation and peace is not attained at the ICC]". Similar statements were reportedly made by the then Information Minister and government spokesperson, Mr. Nsaba Buturo, on the same day.

As the conflict wore on, Uganda took active participation in the then ongoing negotiations that resulted in the creation of the International Criminal Court. Uganda signed the resultant Rome Statute of the International Criminal Court on 17th March 1999 and ratified it on 14th June 2002. Following ratification of the Rome Statute and being unable, though willing, to prosecute the persons most responsible for the atrocity crimes committed in course of the armed conflict with the LRA, Uganda made the first state party referral to the International Criminal Court when it referred to it the situation concerning Northern Uganda in December 2003. In 2005, the International Criminal Court issued warrants of arrest in respect of five of the topmost leaders of the rebel movement. None of the warrants though have been executed to-date. In the meantime, the government of Uganda initiated a series of peace talks with the LRA. In June 2007 an Agreement on Accountability and Reconciliation was signed between government and the LRA in Juba, South Sudan[5]. The agreement provided in part for prosecutions and other formal accountability mechanisms and procedures in respect of persons alleged to have committed

[5] Anne Kirstine Iversen, Transitional Justice in Northern Uganda, A report on the pursuit of justice in ongoing conflict, International Development Studies, (2009). Available at http://rudar.ruc.dk/bitstream/1800/4808/1/THESIS%20final%2029.10.09.pdf (accessed on 06.04.2015).

serious crimes or human rights violations in the course of the armed conflict. An agreement on cessation of hostilities was signed between the LRA and the government during 2008. Unfortunately, the talks broke down before the signing of the final peace agreement largely argely because the top leadership of the LRA demanded for withdrawal of the ICC warrants of arrest as a pre-condition for their signatures. The LRA leader Joseph Kony, through his proxies attending the negotiations, wanted assurances that the International Criminal Court arrest warrants against him and other LRA senior officials would not be executed. The Government of Uganda assured him that once he signed the agreement, it would ask the ICC to defer the LRA case to the jurisdiction of Ugandan authorities. This assurance was unsatisfactory to the LRA and the talks eventually broke down. The LRA has since then been militarily weakened and forced to operate outside Uganda (mainly in the Democratic Republic of Congo and the Central African Republic) and normalcy is returning to the northern part of the country that was previously engulfed by the civil war. Despite the breakdown of the peace talks, the process left a legacy of structures and notions of accountability and peace that have engaged academic, political, social and public debate since then. In terms of structures, for example, the government had in June 2008, in partial implementation of the Agreement on Accountability and Reconciliation, set up a special division of the High Court, the "War Crimes Division", specifically mandated to deal with war crimes committed during the armed conflict. Under the same agreement, the government had undertaken to incorporate, with the necessary modifications, traditional justice mechanisms as "a central part of the framework for accountability and reconciliation.

1.2 Statement of the Problem

The International Criminal Court is a permanent international court established to investigate, prosecute and try individuals accused of committing the most serious crimes of concern to the international community as a whole, namely the crime of genocide, crimes against humanity, war crimes and the crime of aggression. Since the ICC first came into existence in 2002, it has become an integral part of the international political relations and human rights systems. However, the creation of the Court is just the beginning of the journey towards the enforcement of Enhancing criminal justice. In some areas in the northern Uganda, the court has failed to reach the ground level to access witnesses regarding the war criminals; criminals are tried in their foreign countries, without getting clear information from the ground. We need to evaluate how the court has fared in terms of fulfilling it role of protecting human rights. The question the study

addresses, therefore, is, "has the court succeeded in enforcing international Enhancing criminal justice?" Has the court met its objectives and mandate?

1.3 Purpose of the study

This research examines the relationship between the International Criminal Court and enhancing criminal justice with regard to the role that the Court plays in enforcing international Enhancing criminal justice. It discusses the interplay between international Enhancing criminal justice and global justice and the how the Court comes in and ensures there is global justice in matters human rights. The main objective of this research is to discuss the role that the International Criminal Court plays in enforcing international Enhancing criminal justice.

1.4. Objective of the study

To examine the role of the international criminal court in enhancing criminal justice in Uganda.

1.4.1 Specific objectives

i. To examine the legal framework that the ICC uses to achieve its role of enforcing enhancing criminal justice i.e. the Rome Statute
ii. To examine the relationship between international Enhancing criminal justice and global justice,
iii. The challenges and achievements of the Court in enforcing international Enhancing criminal justice.

1.6 Research questions

i. What is the legal framework that the ICC uses to achieve its role of enforcing international Enhancing criminal justice i.e. the Rome Statute?

ii. What is the relationship between international Enhancing criminal justice and global justice?
iii. What are the justifications for an international criminal court and the creation of the ICC?
iv. What are challenges and achievements of the Court in enforcing international Enhancing criminal justice

1.6 Scope

The study dealt with the role that the ICC plays in the enforcement of international Enhancing criminal justice. It also dealt with the extent to which the Court can be said to have performed this role, and what factors that has hindered the Court from performing this role. The study dealt with the role that the ICC plays in the enforcement of international humanitarian law or international law in general.

1.7 Significance of the study

This dissertation is a contribution to the ongoing debate at the international and local level concerning accountability for international crime in transition to peace with regard to post-conflict northern Uganda. The focus of that debate has hitherto mainly been on the choice between peace and justice; between retributive and restorative justice; and the feasibility of amnesties for international crime. This study brings a different dimension to the debate by exploring the possibility of pursuing retributive justice in a manner that fosters peace and reconciliation at the same time. Plea bargaining presents a unique tool that guarantees accountability for crime while permitting a degree of truth finding, victim participation, reparations and closure necessary for restorative justice. It is a tool that may blend retributive justice with restorative justice such that there need not be a choice of one or the other in the management of the post-conflict situation.

1.8 Literature Review

The studyis based on a number of books and articles. I will use the book An Introduction to the International Criminal Court, by William Schabas. In this book Schabas reviews the history of international criminal prosecution, the drafting of the Rome Statute of the International Criminal Court and the principles of its operation including the scope of its jurisdiction and the procedural regime.

The author traces the events that led to the formation of the ICC, from pre- Nuremberg and Tokyo Tribunals to the end of the cold war and the formation of the ICTY and ICTR. The author argues in this book that the final draft of the Rome Statute is not without its shortcomings, but it could be the most significant institutional innovation since the founding of the United Nations. This argument highlights the significance of the ICC in terms of enforcing international

Enhancing criminal justice. The success of the Court, Schabas observes, parallels the growth of international human rights movement. This book is invaluable to the study because it addresses in detail certain issues that will come up in my research. Such issues may include the history of the ICC, the creation of the Court, drafting of the ICC Statute, crimes prosecuted by the Court, jurisdiction of the Court and many others. In the studyI will also use the article 'The Role of the Intern ational Criminal Court (ICC) in Reducing Massive Human Rights Violations Such as Enforced Disappearances in Africa: Towards Developing Transitional Justice Strategies' by Jeremy Sarkin. In this article it is argued that 'while the Court cannot be the panacea for human rights ills of the world, it can set Standards'.[6]The article refers to the principle of complementarily which basically provides that cases are only admissible to the ICC when the state is genuinely unable or unwilling to prosecute the case.[7] The author further argues that the degree of the role that the Court plays, or could play, is mostly dependent on the role that others such as the state play. The ICC can only play a supporting role. State support and cooperation is vital for the ICC to be effective, because it is at the state level that majority of cases can be prosecuted.

Sarkin recommends that governments around the world need to take all measures possible to address cases of human rights violations regardless of when they happened, who the victims were, or who the perpetrators are. States should therefore bring those responsible of such violations to justice by 'fighting impunity wherever it exists'.[8] According to this article, independence of the Court is very important. The author notes that some people believe that the ICC has been used by states for political ends. The author suggests that the ICC should be careful in the way it conducts its affairs to ensure that these perceptions are not perpetrated. The author in conclusion points out that the Court can play the critical role of fostering an understanding of human rights and humanitarian law. A greater awareness of what international law expects in the domestic setting through its outreach programmes. The Court could also assist in fostering human rights cultures in the countries where it operates. The Court's partnership with other

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[6] Rome Statute of the International Criminal Court, Article 17 (1) (a).
[7] Supra n. 12, p8
[8] 11James O'Brien, 'The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia.' (1993) 87

institutions at the international, regional, sub - regional, and domestic levels (e.g. the AU, civil societies etc...) can help it to be seen as a more legitimate institution Jeremy Sarkin, 'The Role of the International Criminal Court (ICC) in Reducing Massive Human Rights Violations Such as Enforced Disappearances in Africa: Towards Developing Transitional Justice Strategies,'

The study will also use the article The International Criminal Court Finding Justice for Victims, Ending Impunity for Perpetrators' by Melanie Gow. The author notes that despite the entry-into-force of the Statute in July 2002, debate and contention around the institution have not gone away. In fact, opposition to the Court from some quarters, with the US Government being perhaps the most vocal, has intensified.
This paper addresses some of these concerns though it cannot possibly attempt to cover all the new and sometimes onerous accusations made and suggests ways forward. That the Statute of the ICC could be improved is true; that governments can play a constructive role within the established system to make it so is also true. For too long, perpetrators of crimes against humanity have brutalized, raped and maimed with impunity.

In July 2002, the treaty to establish a permanent International Criminal Court (ICC) able to try those charged with committing crimes against humanity, war crimes and genocide, finally entered into force. Perhaps, at last, the victims of these crimes will find justice and the international community will be able to send a clear message that the Idi Amins of today will not be shielded. The author further observes that Governments, UN agencies and others must take decisive action to protect children from such crimes, and to bring perpetrators to justice. Too much time has passed and too many victims have suffered.

While the ICC will not instantly provide an end to atrocities, the Court can serve as a channel for global standards of decency and respect for human rights as part of a wider strategy that promotes respect for the rule of law and addresses poverty, discrimination and inequality. The article identifies key strengths and some weaknesses of the existing ICC Statute, especially in terms of the ways in which they will affect children (though under the Statute, alleged perpetrators who were below the age of 18 when the alleged crime was committed cannot be tried before the Court), as well as proposing some core recommendations for action. The

realization of the ICC has not been an easy process and it continues to be the focus of competing tensions and agendas. Indeed the Rome Statute itself is the product of such tensions — tensions that have produced weaknesses and inadequacies within the Statute and that may well threaten the effective functioning of the Court. These flaws are compounded by the political realities of the day, which see some nations such as the United States seeking to circumvent the Court even before it has come to fruition

1.9 Methodology

This chapter presents the various aspects, methods, procedures and processes involved in the planning and execution of the study. These included the preparatory stage, sample selection and data collection.

1.9.1 Preparatory stage

Preparatory work for the study was carried out in May 2015. It involved the creating of a guideline structure for the research in form of a research proposal with the purpose with the purpose of facilitating the subsequent planning and execution of the study.

1.9.2 Sample selection

Sampling will be undertaken to ensure representativeness of the whole population. In this process, a proportion of the criminals, prison wardens, counsel and magistrate were selected. Then, using the findings from the selected group, generalization was drawn. Sampling was also done to lessen costs and to permit a higher degree of accuracy.

The main method that used in data collection was personal interviewing supplemented with the questioner approach as a good complement. The questions were drawn up which included both pre-coded and open ended questions. Questions like: Why has the right of an accused person been difficult to observe and protect in the criminal justice system? Why do courts follow procedures which undermine the criminal justice in Uganda?

Personal interviewing were preferred to all other alternative methods of data collection because of the nature of the study. This through personal interviewing, the researcher gave explanations and elaboration in case the question was misunderstood. The exercise began with a thorough

explanation by the researcher with respect to the purpose, content and context of the study to ensure clear perception of the study on the part of the respondents.

1.9.3 Data Processing and analysis

Data processing in any study is of importance to convert large quantities of data into condensed form so as to facilitate easy interpretation to the readers. The task of data processing involves Editing and Coding.

1.9.4 Editing

Editing was done after each field study and data was read through thoroughly for purpose of improving its quality. The exercise involved cross-checking each interview and schedule for spelling and correcting errors and omissions to ensure completeness, accuracy and uniformity. Completeness was done to ensure that each question have an answer. Regarding accuracy, effort was made to look at all answers given to the different questions in order to check for inconsistencies.

1.9 Limitations of the Study

This being one of the areas on which research that has been undertaken is minimal coupled with the fact that there has been no reported court case concerning litigation on a trial system, there is virtually no case law on the subject; which would have otherwise enhanced the research. Furthermore, it was not easy to get access into some of the prisons which are geographically accessible due to the long bureaucratic process in obtaining permission from the appropriate authorities.

1.10 Chapterization

The dissertation is divided into five chapters.

Chapter one; The general introduction and it covers the background to the research, the statement of the problem, objectives and significance of the study, research questions, the literature review, scope of the study and the methodology used.

Chapter two; Examines procedural issues of the ICC, jurisdiction and admissibility.

Chapter three; examine the crimes within the jurisdiction of the international criminal court and their relationship with international enhancing criminal justice

Chapter four; examines the challenges facing the international criminal court in enforcing enhancing criminal justice

Chapter five; summary, conclusions and recommendations of the study findings

CHAPTER TWO

2.0 PROCEDURAL ISSUES OF THE ICC: JURISDICTION AND ADMISSIBILITY

2.1 Introduction

The Rome Statute distinguishes between jurisdiction and admissibility. On the one hand, jurisdiction refers to the legal parameters of the Court's operations in terms of subject matter. On the other hand admissibility comes into play at a later stage. It seeks to establish whether matters over which the Court has proper jurisdiction should be adjudicated before it. The question of jurisdiction deals with the Court's consideration of a 'situation' in which a crime has been committed, in that by the time issues of admissibility is being examined, the Prosecution will necessarily have progressed to the identification of a 'case'.[9]

2.2Transitional Justice

According to Ruti Teitel, transitional justice is the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes.[10] This is a rather narrow definition that restricts the concept to periods after a "repressive" or autocratic regime. However, a more expansive definition includes all those judicial and non-judicial activities that are often used when countries move not only from autocratic rule to democracy but also from armed conflict to peace. To Alexander L Boraine, transitional justice is simply a convenient way of describing the search for a just society in the wake of undemocratic, often oppressive and violent systems by offering a deeper, richer and broader vision of justice which seeks to confront perpetrators, A broader definition is offered in Volume III of the "Encyclopedia of Genocide and Crimes against Humanity" (2004), at page 1046 where transitional justice is defined as "a field of activity and inquiry focused on how societies address legacies of past human rights abuses, mass atrocities, or other forms of severe social trauma, including genocide and civil war, in order to build a more democratic, just and peaceful future.

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[9] Ruth B. Philips, 'The International Criminal Court Statute: Jurisdiction and Admissibility' (1999) 10 Criminal Law Forum 61 at 77

[10] Ruti Teitel: Transitional Justice Genealogy, 16 Harvard; Human Rights J Spring 2003, p.1.

President of The International Center for Transitional Justice (ICTJ), with headquarters in New York, USA, which was founded in 2001 as a non-profit organisation dedicated to pursuing accountability for mass atrocity and human rights abuse through transitional justice mechanisms, focusing on seven key elements: prosecutions, truth-seeking, institutional reform, gender justice, reparations peace and justice, and memorials address the needs of victims and assist in the start of a process of reconciliation and transformation. In short therefore, transitional justice refers to judicial and non-judicial mechanisms adopted, within a specified period after an autocratic regime or armed conflict, to address past large-scale human rights violations for which the existing judicial and non-judicial justice systems are ill-suited to address. Courts in newly constituted or reemerging civilian regimes must contend with a legacy of a lack of independence, ties to the old regime, mistrust, fear and corruption, or the inexperience of newly appointed personnel[11]. As they do so, temporary mechanisms are adopted for seeking the truth, pursuing accountability, and providing reparations so that nations and their people can move forward towards sustainable peace and reconciliation. Those mechanisms ordinarily include; truth Commissions, amnesty, reparations, lustration, prosecutions and institutional reforms. The Agreement on Accountability and Reconciliation is a reflection of transition from armed conflict to peace as the government and the LRA reached a negotiated accord on how to confront perpetrators of large-scale human rights violations that occurred during the war, address the needs of victims and assist in the start of a process of reconciliation and transformation. It contains proposed formal judicial and non-judicial mechanisms[12] for dealing with issues which the existing judicial and non-judicial justice systems may or may not be entirely well suited to address on their own.

2.2.1 Truth Commissions.

These are officially sanctioned, temporary, non-judicial bodies created to establish the truth about large-scale violations, including the responsibility of individuals and institutions and the root causes of the violations.[13]

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[11] José Zalaquett, Confronting Human Rights Violations Committed by Former Governments: Applicable Principles and Political Constraints, HAMLINE L. REV. 623, 628 (1990).

[12] Clause 2.1 9 (Commitment to Accountability and Reconciliation), provides; "The parties shall promote national legal arrangements, consisting of formal institutions and measures for ensuring justice and reconciliation with respect to conflict."

[13] Marty Logan, Spokesperson, Office of the High Commissioner for Human Rights (OHCHR), Nepal, available at http://nepal.ohchr.org/en/resources/publications/TJ%20brochure_E.pdf (visited on 14.05.2011).

According to Marty Logan, they assist in understanding, acknowledging, and addressing the suffering of victims; pave the way for prosecutions; and support the processes of reconciliation.[14]
Truth commissions have been established in more than thirty countries during the past few decades[15]. Countries where they have been established include East Timor, Liberia, Morocco, Peru, Sierra Leone and South Africa. Truth commissions serve a dual propose; being bodies where individual testimonies are heard, they on one hand indicate to the individual victims that individual reconciliation is the objective but on the other hand, in their role of that tracking the overall general pattern of human rights abuse as they investigate the social and political factors leading to abuse, their focus and outcome is more that of national reconciliation.[16]

They are established to investigate human rights abuses that occurred within a specific time period, usually committed by military, government or other state institutions. Being non- judicial bodies, which do not have the authority of the courts and cannot punish, on basis of their findings they can only give recommendations for broad reforms of state institutions and suggest reparations for the victims whose implementation is entirely dependent upon the existing political will. Truth commissions have been acclaimed for providing opportunities for the creation of a historical record of human rights abuses, giving complete local ownership of the process, giving the victims an opportunity to be heard and ultimately leading to or assisting in reconciliation of the post-conflict society,.[17]
They have on the other hand been criticised in specific cases for having a restricted or too expansive a mandate, encouraging impunity by granting blanket amnesties from prosecution to perpetrators in return for giving testimonies and that their recommendations can be ignored and often are[18]. Despite having experienced such a turbulent history involving autocratic regimes and armed conflict during which there have been spates of gross and large-scale violations and abuse

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[14] Ibid

[15] Nancy Amoury Combs , Guilty Pleas in International Criminal Law: Constructing a Restorative Justice Approach (2007), at P.21.

[16] Eirin Mobekk, Transitional Justice in Post-Conflict Societies: Approaches to Reconciliation
, Article in After Intervention: Public Security Management in Post-Conflict Societies
(2005) P. 261; Editors: Anja H. Ebnöther and Philipp Fluri, ; Bureau for Security Policy at the Austrian Ministry of Defence; National Defence Academy, Vienna; and Geneva Centre for the Democratic Control of Armed Forces (DCAF), Geneva, Switzerland.

[17] Ibid at P. 267.

[18] Ibid at P. 268 – 270

of rights committed by government, the military and other state institutions, and though there have been various states of transition from one regime to another and from armed conflict to peace, Uganda has never resorted to the truth commission model of transitional justice. Instead, she has twice set up a commission of inquiry into such violations. Although similar to Truth Commissions, Commissions of inquiry have a narrower mandate, usually limited to a specific incident, time period or category of violations.

They are focused on establishing the responsibility of individuals, rather than the broader causes of a conflict, and have a shorter life-span Under the Commissions of Inquiry Act,[19] a minister may appoint a commission to inquire into the conduct of any officer in the public service of Uganda, the conduct of any chief, the conduct or management of any department of the public service or of any public or local institution, or into any matter in which an inquiry would be for the public welfare.[20] In the absence of a direction to the contrary, the inquiry is to be held in public, although the commissioners are entitled to exclude any particular person for the preservation of order, for the due conduct of the inquiry or for any other reason.[21] Such a commission is required in due course, to report to the Minister, in writing, the result of the inquiry; and also, when required, furnish to the Minister a full statement of the proceedings of the commission and of the reasons leading to the conclusions arrived at or reported.[22]
The first commission of inquiry into human rights violations and abuse was appointed in June 1974 by the then President, Idi Amin Dada in his capacity as Minister of Defence,[23] following the military coup that ousted the first post-independence government of Uganda led by Milton Obote. The Commission was set up to inquire into the "alleged disappearance" of people from Uganda since the Military take-over on 25th January, 1971, giving due consideration in the process to "the local and national events of the military take -over as well as the events, pertaining and auxiliary to the defence of Uganda when the nation was invaded on the 7th day of September, 1972." The Commission' s inquiry however was not to extend to any person

[19] Chapter 166 of the Laws of Uganda.
[20] Ibid Section 1 (1).
[21] Ibid Section 1 (3).
[22] Ibid Section 6.
[23] Legal Notice No. 2 of 1974; Commission of Inquiry into the Disappearances of People in Uganda since 25th January, 1971. Available at http://www.usip.org/files/resources/collections/truth_commissions/Uganda74-Report/Uganda74-Charter.pdf (visited on 14.05.2011).

expelled from Uganda under any authority conferred by law or who had suffered a sentence of death imposed upon him under due process of law, nor to "persons of Asian origin or extraction who though claiming to be citizens of Uganda either remaining outside Uganda or at anytime ran away from Uganda for any reason whatsoever."

Approximately three hundred cases of reported disappearances were presented to the Commission. The Commission in turn referred forty cases of suspected perpetrators to the Director of Public Prosecutions for possible charges and twenty-six more cases were referred to prosecution authorities for further investigation. In its report, the Commission concluded that the Public Safety Unit and the State Research Bureau (special security bodies set up by Idi Amin), bore the main responsibility for the "disappearances." It also criticized army officers for abuse of powers, as well as the activities of the military police and intelligence. It therefore made specific recommendations for reform of the police and security agencies as well as training for law enforcement personnel about civilian rights.[24] However, its report was not released into the public domain and its recommendations were not implemented. Instead, Idi Amin"s government became more abusive after submission of the report. All the Commissioners were targeted by the government with retaliatory acts; the expatriate Commissioner lost his job as a judge, another was sentenced to death on trumped up charges and the third escaped into exile.[25]

The second and most recent commission of inquiry of a similar type was constituted by the Minster of Justice / Attorney General in May 1986,[26] following the 26th January 1986 seizure of power by the National Resistance Army (NRA) led by Mr. Yoweri Museveni. The Commission was mandated to "inquire into all aspects of violation of human rights, breaches of the rule of law and excessive abuses of power committed against persons in Uganda by the regimes in government, their servants, agents or agencies whatsoever called during the period from the 9th of October, 1962 to the 25th day of January, 1986." In effect, the Commission was to investigate the atrocities committed under the governments of Milton Obote and Idi Amin from 1962-1986. The Commission was constrained by logistical problems and considering the large

[24] Ibid

[25] Joana R. Quinn, Dealing with a Legacy of Mass Atrocity: Truth Commissions in Uganda and Chile (2001). Available at http://politicalscience.uwo.ca/faculty/quinn/dealingNQHR.pdf (visited on 13.05.2011).

[26] Joana R. Quinn, Dealing with a Legacy of Mass Atrocity: Truth Commissions in Uganda and Chile (2001). Available at http://politicalscience.uwo.ca/faculty/quinn/dealingNQHR.pdf (visited on 13.05.2011).

scale of the exercise, it only managed to submit its report to the Minister in October 1994, having taken approximately eight years to complete its task. The Commission found evidence of widespread arbitrary arrests, detention and imprisonments and recommended the repeal of laws allowing detention without trial and transferred twenty seven case files to prosecution authorities.[27]

This report too was not widely distributed into the public domain and copies remain stored in warehouses.[28] The first commission of inquiry was not appointed during a period of transition from autocratic rule to democracy and neither was there a transition from armed conflict to peace. It conducted an inquiry into the misdeeds of the security agencies of an incumbent repressive regime. With regard to the second commission, it was appointed as the country moved from a five year armed conflict towards peace. It is therefore the second commission which, considering the context in which it was set up, to an extent operated as a tool of transitional justice. However, it too was oriented toward making recommendations to prevent the reoccurrence of such abuses rather than the promotion of reconciliation and transformation.

The first commission had a narrower subject matter mandate restricted to "alleged disappearances" of people. The second commission of inquiry had a much broader subject matter and temporal mandate covering "all aspects of violation of human rights, including arbitrary arrest, detention, torture, and killings. The first commission conducted an inquiry into the wrongdoings a repressive incumbent regime while the second commission extended the inquiry into excesses committed during repressive predecessor regimes and the armed conflict leading to the January 1986 violent change of government. Despite the differences, both commissions were designed to "establish the truth," identify who the perpetrators and what the causes were and make recommendations to prevent the reoccurrence of such abuses. Unlike Truth Commissions, the two commissions of inquiry were not tasked to address the needs of victims and assist in the

[27] The Report of the Commission of Inquiry into Violations of Human Rights: Findings, Conclusions and Recommendations, Kampala, October 1994, p591, p625-626 and app. 9

[28] Kritz, Neil J. (1996): Coming to terms with atrocities: A review of accountability mechanisms for mass violations of human rights , Law and Contemporary Politics, vol. 59, no. 4, autumn 1996, p. 127-152 at P. 142

start of a process of reconciliation and transformation. The current Constitution of Uganda as promulgated in 1995 provides for a permanent Human Rights Commission[29].

Its mandate includes, among others, the investigation, at its own initiative or on a complaint made by any person or group of persons against the violation of any human right, recommending to Parliament effective measures to promote human rights, including provision of compensation to victims of violations of human rights or their families,[30]and reviewing cases of persons detained under emergency laws[31]. The Commission is a quasi judicial body which when conducting adversarial proceedings is guided by rules of court applicable to civil or criminal proceedings in the High Court[32]. Although the Commission has the power to issue summons or other orders requiring the attendance of any person, to question any person in respect of any subject matter under investigation before the commission and to require any person to disclose any information within his or her knowledge relevant to any of its investigations,[33] it is not designed to establish the truth about large-scale violations and their root causes in the way truth commissions do but rather to establish the responsibility of individuals and institutions for such violations. Its mandate would require modification for it to play a role in transitional justice.

The Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord"s Resistance Army / Movement, without specifying a preferred model, provides for the promotion of truth-telling processes and mechanisms as appropriate for achieving reconciliation[34]. The agreement specifically imposes a duty on the government to introduce amendments to the Uganda Human Rights Commission Act in order to bring it in conformity with the principles of the agreement[35] One of the principles reflected in the

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[29] Article 51 of the Constitution of the Republic of Uganda, 1995.
[30] Ibid Article 52 and section 7 of the Uganda Human Rights Commission Act, Chapter 24 of the Laws of Uganda.
[31] Ibid Article 48 (1).
[32] Section 20 of the Uganda Human Rights Commission Act states; "Any rules of court applicable to civil or criminal proceedings in the High Court may be applied by the commission for the purposes of the exercise of its powers under article 53 of the Constitution or any other of its functions subject to such modifications as may be made by the Chief Justice by statutory instrument in consultation with the commission."
[33] Article 53 of the Constitution of the Republic of Uganda, 1995.

[34] Clause 7.3 of the agreement.
[35] Clause 14.4 of the agreement.

agreement by the parties is that ".. a comprehensive, independent and impartial analysis of the history and manifestations of the conflict, especially the human rights violations and crimes committed during the course of the conflict, is an essential ingredient for attaining reconciliation at all levels."[36]

One way of implementing this ideal could be extending the mandate of the Commission to include the investigation and establishment of the truth about the large-scale human rights violations that occurred in the armed conflict in Northern Uganda and determining their root causes.

2.2.2 Amnesty

Amnesty is a "sovereign act of pardon and oblivion for past acts, granted by a government to all persons (or to certain persons) who have been guilty of crime or delict, generally political offences - treason, sedition, rebellion - and often conditioned upon their return to obedience and duty within a prescribed time."[37] It has also been defined as "a pardon, forgiveness, exemption or discharge from criminal prosecution or any other form of punishment by the state."[38]

Unlike pardon which is the act of the sovereign power which exempts an individual on whom it is bestowed from the punishment the law inflicts for the crime he has committed, amnesty is an act of the same authority, the object of which is to efface and to cause to be forgotten a crime. In effect, amnesty confers on the recipient immunity both from prosecution and punishment rather than immunity from punishment only. Amnesties were for a long time considered an acceptable part of transitional justice in countries seeking to address past episodes of systematic violations of human rights, most especially as a result of the wave of democratisation in Latin America during the 1980s contributing to the international tendency to accept that criminal justice could be compromised during delicate political transformations.[39]

Resort to amnesty was often justified by arguments for political balancing that more often tipped in favor of peace and assuring political stability over criminal justice in post-conflict or post-authoritarian settings. In the delicate undertaking of political transition, practical concerns

[36] Clause 2.3 of the agreement.
[37] Black's Law Dictionary, Second edition (1910) West Publishing Company, p.66.
[38] Section1, Amnesty Act, Chapter 294 Laws of Uganda.

[39] Jaime Malamud-Goti, Transitional Governments in the Breach: Why Punish State Criminals?
, 12 HUM. RTS. Q. 1, 1 – 6 (1990).

outweighed principled ones when criminal trials put at risk the complex process of transition to peace or a new order. Nevertheless, to assure accountability, these countries often formed truth commissions to conduct investigations and to provide a mechanism for truth telling for the benefit of victim-survivors and society at large.[40] Although amnesties are granted in exercise of state sovereignty, developments in international Enhancing criminal justice and international criminal law together have caused a paradigmatic shift such that amnesties are no longer assumed to be unconditionally lawful within an international legal framework[41].

Though international criminal law supports the theory of "qualified amnesties" in transitional justice schemes, prohibiting bars to prosecution for war crimes, enumerated treaty crimes, and crimes against humanity, international Enhancing criminal justice on the other hand stands for the proposition that no amnesty is lawful even in those settings of the so-called "qualified amnesties"[42]. Despite these developments in international law, Uganda maintains a blanket amnesty scheme for persons denouncing rebellion. Following seizure of power in January 1986, the NRM government of Mr. Yoweri Museveni in 1987 made legislation offering amnesty to all opposing forces who surrendered, including those directly involved in the fighting and those who supported the combatants politically or financially, and those who had worked for former regimes in the police, army, prisons and security forces but excluded those who had committed „heinous crimes" listed as genocide, murder, kidnapping and rape.[43] The Amnesty Statute of 1987 resulted into negotiations between the UPDA and Government culminating in the Gulu peace accord signed in 1988 between the Government and the UPDA that terminated rebellion by that particular group. Despite this amnesty, rebellion by other groups persisted in the northern region of the country.

In response to persistent calls for peaceful resolution of the ensuing armed conflict in the northern region of the country and as one of the mechanisms for restoring peace, Uganda' s Parliament passed the Amnesty Act[44] in January 2000 which was amended in 2002 to establish

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[40] Lisa J. Laplante, Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes. Virginia Journal of International law vol. 49:4. Available at http://www.law.wisc.edu/gls/documents/lisa_laplante_paper.pdf (visited on15.05.2011).

[41] Ibid.

[42] Ibid.

[43] Section 2 of Amnesty Statute, No. 6 of 1987, Laws of Uganda.

[44] Chapter 294 of the Laws of Uganda.

that a reporter (person seeking to be granted amnesty) may receive amnesty only once and subsequently in 2006 to extend its operation until 2008. Operation of the Act was extended for a further period of twenty four months running from 25th May 2010. Under the Act comprehensive amnesty is granted to any Ugandan wishing to abandon rebellion without risk of criminal prosecution or punishment in a national court for offenses related to the insurgency. Unlike the 1987 Amnesty statute which excluded persons who had committed „heinous crimes" listed as genocide, murder, kidnapping and rape, the Amnesty Act of 2000 gives a blanket amnesty for all crimes committed in relation to the insurgency. Amnesty is granted to any Ugandan who has at any time since the 26th day of January, 1986 engaged in or is engaging in war or armed rebellion against the government of the Republic of Uganda by; actual participation in combat, collaborating with the perpetrators of the war or armed rebellion, committing any other crime in the furtherance of war or armed rebellion, or assisting or aiding the conduct or prosecution of the war or armed rebellion.[45]

The Act creates an amnesty Commission comprising seven members who the president designates and the parliament approves, whose role is to monitor programmes of demobilisation, reintegration; and resettlement of reporters; coordinating a programme of sensitisation of the general public on the amnesty law; consider and promote appropriate reconciliation mechanisms in affected areas; promote dialogue and reconciliation within the spirit of the Act; and to perform any other function that is associated or connected with the execution of the functions stipulated in the Act.[46] The idea of amnesty had considerable local support. The Amnesty Act was indeedenacted on the understanding that "it is the expressed desire of the people of Uganda to end armed hostilities, reconcile with those who have caused suffering and rebuild their communities."[47] This blanket amnesty initially did not provoke much international response. A good number of international organisations, donor states and international non-governmental organisations supported the amnesty process through the provision of funds and expertise to the Amnesty Commission. However, following referral of the situation in northern Uganda to the International Criminal Court in the year 2003, the Ugandan amnesty process has become the

[45] Ibid, Section 2.
[46] Ibid, Section 8.
[47] Preamble to the Amnesty Act, Chapter 294 of the Laws of Uganda.

subject of heated debate both politically during the Juba peace talks and among activists and academics around the world.[48] Since its establishment, the Amnesty Commission has played a key role in ending armed rebellion in the West Nile region of Uganda. The Chairman of the Amnesty Commission, constituted under the Amnesty Act, mediated the Peace talks that took place from 16th to 22nd December 2002 at State Lodge, Arua, Uganda, which culminated in the signing of the Agreement between the Government of the Republic of Uganda and the Uganda National Recue Front II.[49]

This initiative effectively ended armed rebellion in the West Nile region. The Commission has also been instrumental in resettling persons in Northern Uganda who have denounced rebellion and granted amnesty. By June 2005, more than 15,300 combatants and abductees belonging to various rebel factions had received amnesty. Over 11,851 had received resettlement packages to enable them re-integrate in civilian life[50]. The Commission"s resettlement activities have since 2009 been incorporated under the Peace, Recovery and Development Plan of Uganda, a Comprehensive Development Framework by the government of Uganda that was launched in October 2007. The plan is not only a response to immediate post-conflict-specific issues, but is also to eliminate the great discrepancies in the development of the Northern and the Southern part of the country[51].

The Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army / Movement imposes a duty on the government to introduce amendments to the Amnesty Act in order to bring it in conformity with the principles of the agreement[52]. For example, the Act in its current form does not require full disclosure of all material facts by a reporter which prima facie is not in conformity with the principle of

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48 Louise Mallinder, (2009), Uganda at a crossroads: narrowing the amnesty?
Working paper no. 1: From Beyond Legalism: Amnesties, Transition and Conflict Transformation, Institute of Criminology and Criminal Justice, Queen"s University Belfast.

49 The agreement can be accessed at http://www.beyondjuba.org/peace_agreements.php (visited 20.05.2011).

50 Finnegan, L., and Flew, C., (2008), Disarmament, Demobilisation and Reintegration in Uganda: Mini Case Study, Saferworld and University of Bradford Centre for International Cooperation and Security. Available at http://www.saferworld.org.uk/DDR%20Mini%20Case%20Study%20Uganda.pdf (visited 20.05.2011).

51 Information posted on the Peace Recovery and Development Plan for Northern Uganda (PRDP) website at http://www.prdp.org.ug/index.php (visited on 20.05.2011)

52 Clause 14.4 of the agreement.

accountability espoused by the agreement. Traditional justice on the other hand, unlike amnesty, offers an alternative mode of accountability. The fact that many perpetrators, for practical reasons will not be investigated, much less prosecuted, should not mean that they should escape any form of accountability by simply being granted unconditional amnesty.

2.3.3 Lustration.

Lustration is a transitional justice mechanism that seeks to hold accountable persons who have in the past worked for or collaborated with the authoritarian secret political police.[53] In a broader sense, it is a vetting exercise which usually entails a formal process for the identification and the removal of individuals responsible for abuses, especially from police, prison services, the army and the judiciary."[54] The idea behind it is the prevention of human rights abuses through condemnation and punishment of dangerous, corrupt, abusive, incompetent or culpable remnants of the previous system, through their exclusion from public institutions in order to prevent the recurrence of human rights abuses and build fair and efficient public institutions under a new system. It aims at the restoration of credibility to a government by purging from the public sector perpetrators of crimes committed under an earlier repressive regime. The practice of lustration ordinarily revolves around, first, the screening of candidates for public office; second, the barring of candidates from public office; and third, the removal of holders of public office. The practice has attained recognition as one of the cornerstones of administrative justice and has begun to feature prominently in transitional justice pursuits.

Policies geared toward the purification of state institutions have played an important, albeit controversial, role, in the transitions from authoritarian communist rule in Central and Eastern Europe in countries like the Czech Republic, Hungary, Poland and Slovakia. For Example the Polish lustration law adopted in April 1997 imposes a duty on people born before May 11, 1972 who hold or are candidates for the office of President of the Republic, members of the Parliament, senators, judges, procurators, advocates and people holding key positions in the public Polish Television, public Polish Radio, the Polish Press Agency and the Polish Information Agency, to make a statement regarding their work or collaboration with secret

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[53] Monika Nalepa, Lustration and the Survival of Parliamentary Parties, Taiwan Journal of Democracy, Volume 5, No. 2: 45-68, at p.66.

[54] UN Doc. S/2004/616, (Aug. 2004). The rule of law and transitional justice in conflict and post-conflict societies, Report of the Secretary-General, p. 17

services between 1944 and 1990. Lustration statements consist of parts A and B. Part A is a declaration that a person did or did not work or collaborate with organs of state security. Part B (not made public) includes details of work or collaboration in the case of a positive statement.

Names of all who return positive declaration are published in the government gazette, but without details of the type of collaboration. None of the successive regimes of Uganda has had a deliberate official general policy of prevention of human rights abuses through screening, barring candidates for or removal of holders of public office, especially from the police, prison services, the army and the judiciary, on account of having been responsible for abuses committed by predecessor repressive regimes. There has not been any legislation made of the type adopted in central and Eastern Europe for that purpose. On the contrary, most persons who would have been held responsible for such abuses have been killed during the political upheavals, escaped into exile or kept a low profile out of the public glare. Occasionally a few of them have been arrested and prosecuted and some have been retained in public offices by the successor regimes for political expedience. Nevertheless, with every tumultuous change of government, there has ensued a de-facto ethno-regional based change of political fortunes that is not dissimilar to a purge.

2.2.4 Traditional Justice.

This is a reference to indigenous and informal practices of dispute settlement and reconciliation. The Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord' s Resistance Army / Movement explicitly states that; *„Traditional justice mechanisms, such as Culo Kwor, Mato Oput, Kayo Cuk, Ailuc and Tonu ci Koka and others as practiced in the communities affected by the conflict, shall be promoted, with necessary modifications, as a central part of the framework for accountability and reconciliation."*[55]

2.3 Jurisdiction

2.3.1 Subject Matter Jurisdiction

Subject Matter Jurisdiction refers to the crimes which the Court may prosecute: genocide, crimes against humanity, war crimes and the crime of aggression. Currently the ICC will have

[55] Clause 3.1.

jurisdiction over four categories of international crimes which are the considered as "the most serious crimes as a whole."[56] Here is a brief description of these crimes. a detailed analysis will be made in the next chapter.

2.3.1. Crimes against Humanity

According to Article 7 of the Rome Statute, crimes against humanity refer to the listed 11 acts which are: (a) murder; (b) extermination; (c) enslavement; (d) deportation or forcible transfer of population; (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) torture; (g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) enforced disappearance of persons; (j) the crime of apartheid; (k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.[57]Article further provides that the listed 11 crimes must be committed as part of a widespread or systematic attack against any civilian population, with knowledge of the attack. This provision delicately limits the scope of acts that can be prosecuted.

2.3.1.3 War Crimes

War crimes are listed under Article 8. War crimes, considered a violation of established protections of the laws of war. According to the Statute, "war crimes" means: grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention; other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law; and in the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, and include acts committed against persons taking no active part in the

[56] Supra n. 13, para. 4

[57] Ibid , Art. 6

hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness and wounds.

2.3.1.4 The Crime of Aggression

When the Rome Statute was adopted, the crime of aggression was included under the crimes within the jurisdiction of the ICC, but it was not defined. This was because the delegation at the Rome Conference could not reach agreement on the definition of the 'crime' of aggression or on the manner in which the International Criminal Court was to adjudicate this crime.[58]Article 5 (2) (now deleted) of the Statute indicated that the Court shall exercise jurisdiction with respect to the 'crime' of aggression under three conditions [59] First, a provision must be adopted that defines this crime and sets out the conditions under which the Court may exercise its jurisdiction.[60] Second, this provision must be adopted through an amendment to the Statute at the first review conference, which took place in 2010. Third, this provision must be consistent with the relevant provisions of the UN Charter. It was proposed that the Rome Statute be amended with regard t o the 'crime' of aggression. Consequently, Article 5 (2) was deleted and a new Article 8 bis was inserted. Article 8 bis now provides that the 'crime' of aggression 'means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.' It further goes on to explain in Sub- Article 2 that '"act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations[61].

Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression: (a) The invasion or attack by the armed forces of a State of the territory of another

[58] H. von Hebel and D. Robinson, 'Crimes Within the Jurisdiction of the Court', in R. Lee (ed.), The International Criminal Court: The Making of The Rome Statute, The Hague: Kluwer Law Intenational,(1999), p.85.

[59] Prosecutor v. Tadic (Case NO. IT-94-1-AR72), Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.

[60] Ibid.

[61] Supra n. 13, Art. 8 bis.

State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof; (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State; (c) The blockade of the ports or coasts of a State by the armed forces of another State; (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State; (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement; (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State; (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein

2.3.2 Temporal Jurisdiction

The Court lacks jurisdiction over crimes before the Rome Statute entered into force.[62]The jurisdiction of the ICC is non-retroactive. The ICC Statute entered into force on 1st July, 2002. Therefore the earliest date from which the Court can have jurisdiction over crimes under the Statute is 1st July, 2002, or from the date of coming into force of the Statute for any particular state party. Therefore if a state party becomes a party to the Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute.[63] However, for a state which accedes or ratifies after 1st May 2002, the entry into force of the Statute shall be the first day of the month after the 60th day following the deposit by the state of its instrument of ratification of ratification, acceptance, approval or accession.[64]States which are not state parties can make a declaration under Article 12(3) of the Statute, accepting the jurisdiction of the ICC for particular crimes.

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[62] Ibid , Art. 11(1).

[63] Ibid, Art. 11 (2).

[64] Ibid , Art. 126 (2).

The jurisdiction of the ICC would then be from the date of declaration.[65]Therefore the Court may exercise jurisdiction from the date of declaration for non-party states.[66]The Statute has been criticized for its inability to reach into the past and prosecute atrocities prior to its coming into force. But it has been argued in defense of the Statute that the failure to prosecute retroactively does not wipe the slate clean and grant a form of immunity to previous offenders. Those responsible for atrocities committed prior to the entry into force of the Rome Statute would be punished by national courts. The Statute has been criticized for its inability to reach into the past and prosecute atrocities prior to its coming into force. But it has been argued in defense of the Statute that the failure to prosecute retroactively does not wipe the slate clean and grant a form of immunity to previous offenders. Those responsible for atrocities committed prior to the entry into force of the Rome Statute would be punished by national courts[67].Where the state of nationality or the territorial state are unable or unwilling to act, an increasing number of states now provide for universal jurisdiction over such offences[68].

2.3.3 Territorial Jurisdiction.

The Rome Statute provides under Article 12 that the Court shall have jurisdiction if "the conduct in question occurs" in the "territory of a" state party to the Rome Statute. The Court, according to this principle, has jurisdiction over crimes committed on the territory of state parties, regardless of the nationality of the perpetrator. The Court can also exercise jurisdiction over crimes committed in the territory of states that accept ad hoc jurisdiction. The United Nations Security Council can also assign jurisdiction over a particular territory to the ICC. The concept of territory, according to the Statute, not only extends to land territory of the state but also to crimes committed on board vessels or aircraft registered in the state party.[69]

Logically, territorial jurisdiction should be inclusive of the state's air space, its territorial waters as well as exclusive economic zone. However, the Statute of the ICC has not clearly identified the actual scope of these parameters. They still remain grey areas. Solutions to these problems

[65] Ibid
, Art. 11(2).
[66] Ibid , Art. 12 (3).
[67] Supra n. 3, p. 70.
[68] Naomi Roht-Arriaza, (ed.), Impunity and Human Rights in International Law and Practice (1995) p.94.
[69] Supra n. 13. Art. 12 (2) (a).

will be sought in the practice of national judicial systems, although judicial systems vary from state to state, making it hard to establish generally accepted rules[70]. Issues on the scope of territory will most likely lead to disputes and cause problems for the Court. The judges of the ICC will be hard pressed to determine where borders lie.[71] This is because sometimes it is not clear who has title in a certain territory. A good example of how border issues can be problematic is the Israeli-Palestinian conflict. If, for instance, the Palestinian Authority was to declare independence and accede to the Rome Statute, the ICC would have jurisdiction over the territory of an independent Palestine. However, such a territory would be subject to dispute by the Israelis. Similarly, a declaration by Israel under Article 12(3) accepting jurisdiction of the ICC would mean that the ICC would have jurisdiction over a contested territory. Since the ICC is the first international criminal court, its territorial jurisdiction is quite dissimilar from that of ICTY and ICTR. These two ad hoc tribunals have limited jurisdiction: ICTY has jurisdiction only on the territory of the former Yugoslavia; and ICTR has jurisdiction on the territory of Rwanda as well as the territory in which Rwandan citizens committed international crimes.

2.3.4 Personal Jurisdiction.

Personal jurisdiction of the ICC involves persons that the Court will have jurisdiction over. Article 12(2) (b) of the Statute provides that the Court will have jurisdiction over nationals of a state party who are accused of a crime under the Rome Statute. The Court will also exercise jurisdiction over nationals of non-party states that accept its jurisdiction by declaration under Article 12(3). The Court can also exercise jurisdiction over nationals of non-party states following a decision by the United Nations Security Council.

The Statute provides that the Court has no jurisdiction over a person under the age of 18 at the time of the commission of the crime. International law does not bar criminal liability for international crimes committed by persons below age of 18, because juveniles maybe prosecuted
In addition to the power of referral, UN Security Council also has the power to establish ad hoc tribunal to further international criminal justice, in addition to the work done by the ICC.

[70] ibid , p. 78.
[71] ibid , p. 79.

Such individuals may be prosecuted in national justice systems but cannot be tried before the International Criminal Court. The Statute of the ICC also provides that the ICC may also exercise jurisdiction even over nationals of non-party states: states that have not consented to jurisdiction. Article 12 specifically makes provision that the Court will exercise jurisdiction to prosecute nationals of any state when crimes within the Court's subject matter are committed on the territory of a state that is party to the Rome Statute, or that consents to ICC jurisdiction on that case. This provision has generated a heated controversy and opposition especially from the United States. The crimes of genocide, war crimes and crimes against humanity are committed often with the collusion of governments. The governments are unlikely to consent to ICC jurisdiction over crimes that the governments supported. The Rome Statute seeks to provide a solution to this human rights and humanitarian law issue. It seeks to achieve this by providing that, in some cases, the Court will have jurisdiction even without the consent of the defendant's state of nationality, even if that state is not party to the Statute[72].

In my opinion, it's a practical and logical provision in that it prevents rogue regimes from going scot free. The pressing need for justice in cases of genocide, war crimes and crimes against humanity is too serious to be ignored. The victims of these crimes want justice to be done and their human rights protected.

2.4 Admissibility

Under the Rome Statute of the International Criminal Court, the Prosecutor does not have unfettered authority to start an investigation in every case that the Court has proper jurisdiction.

Article 13 of the Statute provides three instances when the Court may exercise jurisdiction: (i) where "a situation" is referred by a state party to the Rome Statute; (ii) where "a situation" is refereed by the Security Council; or (iii) where the ICC Prosecutor has initiated an investigation in respect of such a crime in accordance with Article 15.[73]

[72] Madeline Morris, The Jurisdiction of The International Criminal Court over Nationals of Non-party States (1999) p.363

[73] Article 15 of the Rome Statute states that the Prosecutor may initiate investigations
proprio motu,
after analyzing the seriousness of the information received, and if satisfied that there is 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.

2.4.1 The Principle of Complementarily

The Principle of complementarity usually comes up when discussing admissibility issues. Paragraph 10 of the Preamble of the Rome Statute states that 'the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions'
This means that the Court must rule a case inadmissible when it is being handled by a national court the principle of complementarity is different from that of 'primacy associated with ad hoc tribunals.

According to the 'primacy' principle, ad hoc tribunals can assume jurisdiction as of right, without the need to show failure of the national justice system.[74]It has been argued that the term complementarity' maybe somewhat of a 'misnomer' Complementarity would seem to suggest a good relationship between national and international justice, but in essence, the two systems work in opposition to each other. Article 17(1) provides that a case is inadmissible when it is being investigated or prosecuted by a state that has jurisdiction over it. A case will in addition be inadmissible when the case has already been investigated and state has decided not to prosecute it. The threshold for determining unwillingness or inability is quite high. The Statute states that to determine unwillingness in a particular case, the Court shall have "regard to the principles of due process recognized by international law.

Article 17(2) lists down 3 considerations the Court shall make in order to determine unwillingness. These considerations are: (a) whether the process was aimed at shielding the person concerned from criminal liability for crimes within the jurisdiction of the ICC as listed under Article 5; (b) whether there has been an unjustified delay in the proceedings which is inconsistent to intent to bring the person concerned to justice; and (c) whether the proceedings were not or are not conducted with independence or impartiality. Article 17(3) provides that in order to determine inability in a particular case, the Court shall consider whether the state is unable to obtain the accused or the necessary evidence and testimony" or otherwise unable to carry out its proceedings, due to a "total or substantial collapse" or unavailability of its national

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Bartram S .Brown, 'Primacy or Complementarity: Reconciling the Jurisdiction of National Courts d International Criminal Tribunals', (1998) 23 Yale Journal of International Law
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judicial systems. These provisions regarding the high threshold for unwillingness and inability underscore the fact that the ICC is not intended to replace national justice systems. Rather the ICC is an alternative that fills the gap left by national courts' incapacity to perform their primary tasks. This empty void created with the absence of an international criminal court, would result in perpetrators of human rights and humanitarian law violations to go scot free. There would be no way for bringing such persons to justice. Before the creation of the ICC, there was no substitute legal process and hence no recourse to justice for the victims. It is argued that the principle of complementarity is in fact strength of the Statute. Giving national courts primary jurisdiction may encourage a more effective national procedures and implementation. If a state lacks legislation that deals with international crimes, the ICC would assume jurisdiction since it would be unable genuinely to prosecute perpetrators of these crimes. In such as situation, the ICC's assumption of jurisdiction would be derived from the fact that the state was "unable genuinely" to deal with the case. Such states would be advised to make their domestic legislation acquiescent with the Statute of the ICC.

This would in turn ensure that national courts are capable to deal with breaches of international humanitarian and Enhancing criminal justice. The Statute of the ICC encourages states to exercise jurisdiction over ICC crimes. International cooperation must be enhanced so that crimes are prosecuted at the national level by putting in place legislative measures. Despite this provision, however, there is no obligation for states to prosecute article 5 crimes. The obligation to prosecute such crimes as well as other international crimes can be found in other treaties. For instance, article 5 of the Genocide Convention requires states to put in place effective framework to prosecute perpetrators of genocide. The principle of complementarity as provided under the Rome Statute does not divest states the right to prosecute article 5 crimes. In fact states are encouraged to do so. However, in the event that the state fails to do so, then the Court will take over the matter. The Statute also prohibits double jeopardy. When a case has already been tried by a domestic justice system, the complementarity article in the Statute prohibits a person who has been tried by a national judicial system to be immune from prosecution as set in important human rights treaties such as the International Covenant on Civil and Political Rights.

.4.2 State Sovereignty vis-à-vis Fight against Impunity

:ven though states have a right under international law to prosecute persons accused of the most erious crimes of concern to the international community, oftentimes those responsible go scot ssume jurisdiction since it would be unable genuinely to prosecute perpetrators of these crimes. n such as situation, the ICC's assumption of jurisdiction would be derived from the fact that the tate was "unable genuinely" to deal with the case. Such states would be advised to make their lomestic legislation acquiescent with the Statute of the ICC. This would in turn ensure that ıational courts are capable to deal with breaches of international humanitarian and Enhancing :riminal justice. The Statute of the ICC encourages states to exercise jurisdiction over ICC :rimes. International cooperation must be enhanced so that crimes are prosecuted at the national evel by putting in place legislative measures. Despite this provision, however, there is no)bligation for states to prosecute article 5 crimes. The obligation to prosecute such crimes as well ıs other international crimes can be found in other treaties.

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2.4.4 The Principle of Universality

There are certain crimes that are so serious that they attract concern from the entire international community. The principle of universal jurisdiction requires that certain crimes can be prosecuted by any state which has custody of the person responsible for such crimes. [76] Every state has a

[75] M. David, 'Grotius Repudiated: The American Objections To The International Criminal Court And The Commitment To International Law' (1999) 20 Michigan Journal of International Law
337- 345

[76] Rod Jensen, 'Complementing Complementarity: The Principle of Complementarity in the Rome Statute of the International Criminal Court' p. 4.

right and a right in prosecuting these persons. It doesn't matter where the crimes were allegedly committed, the nationality of the alleged perpetrators and the nationality of the victims. A state can prosecute crimes on the premise of universality even without the consent of other states including the states of nationality of the perpetrators, states within whose territory the crimes took place as well as the states of nationality of the victims. Universal jurisdiction therefore bestows upon states the right to domestically prosecute perpetrators of ICC crimes under international law.

2.4.5 Plea bargaining.

A plea bargain is "a negotiated agreement between a prosecutor and a criminal defendant whereby the defendant pleads guilty to a lesser offence or to one of multiple charges in exchange for some concession by the prosecutor usually, a more lenient sentence or a dismissal of the charges."[77] It is therefore an agreement that the accused will plead guilty to the crime in exchange for which, the prosecution may agree to: withdraw some of the charges, reduce the charge to a lesser offence, and / or ask the court for a lighter sentence. Through mutual negotiations an understanding between the prosecution and the accused is reached before trial for the latter to plead guilty in exchange for or in expectation of receiving some lenient consideration or concessions by the prosecution. The principal justification for plea bargains is the notion of judicial economy in that plea bargains avoid the time and expense of a trial, freeing up the courts to hear other cases.

The court system is saved the burden of conducting a trial on every crime charged. In that way it is a tool of efficiency in criminal procedure because it reduces enforcement costs. For this practical reason, plea bargaining is practiced in many national jurisdictions, varying only in extent. According to Jenier I. Turner (2009), there are mainly three patterns of plea bargain traditions at the national level; those that allow plea bargaining in all cases such as the United States; those that allow plea bargaining only for minor crimes such as Germany and Bulgaria;

Blacks Law Dictionary, Seventh edition. Bryan A. Gamer Editor), West Publishing Company, (August 1999) Page 1173.

and those that do not formally allow plea bargaining under any circumstances, such as Japan, but employ practices that are functionally similar to plea bargaining.

In the international criminal courts, plea bargaining is allowed in all cases. The large-scale nature of international crimes dictates that they often cannot all be processed through the ordinary criminal justice system. The practice of international criminal prosecution of large-scale crimes in the ad-hoc international criminal tribunals and lately the International Criminal Court reveals that invariably effective prosecution strategies focus on the planners and organisers of crimes, rather than those of lower rank or responsibility, thereby generating an "impunity gap" in respect of the middle-ranking and lower echelons of responsibility. Despite the large-scale nature of the violations committed in the armed conflict in Northern Uganda, the negotiators of the Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord' s Resistance Army / Movement did not explicitly provide for a prosecution policy that targets only those who planned, organised or carried out widespread or systematic serious crimes against the civilian population during the armed conflict, but rather those who "... are alleged to bear particular responsibility for the most serious crimes, especially crimes amounting to international crimes..."[78] It is a gravity or seriousness of crime rather than level or degree of responsibility approach. The role or level of participation of the alleged perpetrator in such conduct is only a factor to be taken into account in the choice of forum.[79]

Whereas amnesty was justified at the time, given the fragile security situation and the government' s desire to weaken the LRA by encouraging defections, with the LRA now at its weakest, and with the pending ICC proceedings together with the commencement of domestic prosecutions, the momentum appears to have swung in favour of prosecutions. It then becomes necessary to review the efficacy of the entire amnesty regime within this changed environment.

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[78] Nancy Amoury Combs, (2007). Guilty Pleas in International Criminal Law: Constructing a Restorative Justice Approach, Stanford University Press.

[79] Clause 4.3 of the agreement

CHAPTER THREE

3.0 CRIMES WITHIN THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT AND THEIR RELATIONSHIP WITH INTERNATIONAL ENHANCING CRIMINAL JUSTICE

3.1 Introduction

The International Criminal Court has jurisdiction over four categories of crimes: genocide, crimes against humanity, war crimes and aggression. The Statute of the ICC describes these crimes as 'the most serious crimes of concern to the international community as a whole'.[80]The Statute also describes them as 'unimaginable atrocities that deeply shock the conscience of humanity'.[81]

Article 1 provides that the Court was established in order to be 'permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern' All of the definitions of crimes within the jurisdiction of the Court have some form of built-in threshold that will help to focus these decisions and limit the discretion of the Prosecutor.

3.2 GENOCIDE

3.2.1 Introduction

Genocide occupies a prominent place within the system of the ICC Statute. The "crime of crimes" is the first to be defined in the Rome Statute. It was envisaged in Article 6, which is similar to Article II of the Convention against Genocide, and it reflects the fact that genocide is an international crime. The destruction of, and the attempt to destroy entire peoples of certain cultural, religious, racial or national grouping is an ancient phenomenon in the history of mankind[82]. The UN General Assembly adopted the Convention for the Prevention and Repression of the Crime of Genocide on 9 December 1948 ('the Genocide Convention' or 'the Convention.') The Convention became the substantive rules which may be considered customary

[80] Supra n 13, preamble; Art. 5.
[81] Ibid , preamble.
[82] Paola Gaeta, 'Genocide', in William A. Schabas and Nadia Bernaz (eds.),
Routledge Handbook of International Criminal Law
(2011) p. 109.

international law. Regarding this, the ICJ stated that 'the principles underlying the Convention are principles that are recognized by civilized nations as binding on states, even without any conventional obligation.'[83]

Genocide is viewed as one of the worst crimes, if not the worst crime, a government can commit against its citizens or subjects. A government in this regard includes any ruling authority be it a guerilla group, a quasi state, a terrorist organization and so on. The classic case of genocide is the Holocaust where five or six million Jews were murdered by Hitler's Germany in an attempt to destroy Jews as a group during World War II. The world witnessed subsequent genocides following the Holocaust. This led to a push by the international community to make genocide an international crime through the United Nations. As a result in 1946 genocide was declared an international crime by the United Nations General Assembly[84]. In 1948 states adopted the Convention on the Prevention and Punishment of the Crime of Genocide.

3.2.3 Genocide in the Rome Statute

The major characteristic that distinguishes genocide from war crimes, crimes against humanity and other serious crimes is that the accused person must possess the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group." The ICTY and ICTR have called this requirement genocide's special intent or dolus specialis. Furthermore, the International Law Commission recognized genocide's dolus specialis as the "distinguishing characteristic of this particular crime under international law." Evidence of this intent may be drawn from the facts, the circumstances of the case or a pattern of purposeful action. But "[w]here an inference needs to be drawn, it has to be the only reasonable inference available on the evidence.[85]

The intention of the perpetrator of genocide must be to "destroy" the group. However, an ICTY trial chamber observed that customary international law limits the scope of genocide to only those actions whose intent is the "physical or biological destruction of all or part of the group"[86] therefore a perpetrator who seeks to destroy a group culturally or sociologically will not

[83] Reservation to the Convention on Genocide, 1951 ICJ Rep 23.

[84] General Assembly Res. 96 (1)

[85] Prosecutor v. Broanin, case no. IT-99-36-T, Judgment, September 1, 2004, paragraph 970; Prosecutor v. Krstic, case no. IT-98-33-A, Judgment, April 19, 2004, paragraph 41.

[86] Prosecutor v. Krstic, case no. IT-98-33-A, Judgment, August 2, 2001, paragraphs 576, 580.

fall within the definition of genocide. According to Schabas, destruction of the group was grouped into three categories during the debates surrounding the adoption of the Genocide Convention:

Physical, biological and cultural. He observes that "cultural genocide" was the "most troublesome" of the three, because it could be interpreted to include "the suppression of national languages and similar measures," and as such the drafters of the Convention felt that such issues are better left to human rights "declarations on the rights of minorities and consequently they decided to exclude cultural genocide from the scope of the definition[87].

The definition of genocide contains an exhaustive list of what a genocide perpetrator must seek to destroy: he must seek to destroy "a national, ethnical, racial, or religious group. From this definition, it is clear that a group has to exist for genocide to occur. But how do we determine the existence and identity of a group? According to the ICTY and ICTR, a subjective approach has to be taken in order to determine the existence and identity of a group: if the perpetrator or the victim considers the group to exist, this will indicate the crime of genocide. Destruction of a group in part also amounts to the crime of genocide. The ICTY and ICTR tribunals have interpreted this requirement in the definition of genocide to mean a significant or substantial part of the group. The ICTR observed "that 'in part' requires a considerable number of individuals."[88] According to the ICTY and ICTR, however, a perpetrator must seek to destroy a "substantial" part, although not necessarily "a very important part".[89]

3.3 CRIMES AGAINST HUMANITY

3.3.1 Introduction

The concept of 'crimes against humanity' emerged in response to the massive government orchestrated atrocities of the first half of the twentieth century.

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[87] Supra n.3, p. 38.

[88] Prosecutor v. Kayishema et al., case no. ICTR-95-10-T, Judgment and Sentence, May 21, 1999, paragraph 97.

[89] Prosecutor v. Jelisic , case no. IT-95-10-T, Judgment , October 19, 1999,
Prosecutor v. Bagilishema, case no. ICTR-95-1A-T, Judgment, June 7, 2001, paragraphs 56-59.

[90]In the twentieth century, the War crimes have been punished since the beginning of criminal law.

The Hague Conventions of 1899 and 1907 and the First and Second Geneva Conventions (1864 and 1906) comprised some of the first formal codifications of the laws of war and war crimes. They have been refined and interpreted over time. The term war crime has not been an easy term to define. This is because its usage has evolved constantly. The first attempt to define the term was in the Instructions for the Government of Armies of the United States in the Field also called the "Lieber Code" after its author, Francis Lieber. The Lieber Code was issued by US President Abraham Lincoln in 1863 to be distributed among military personnel. Just to show an example, the Lieber Code held that it was a serious "breach of the law of war to force the subjects of the enemy into service for the victorious government" it also prohibited "wanton violence committed against persons in the invaded country." War crimes are defined by various instruments including the Rome Statute of the International Criminal Court, the Geneva Conventions, the precedents set by the Nuremberg Tribunals, the Laws and Customs of War, the ICTY and the ICTR. War crimes are "serious violations of customary or treaty rules belonging to the corpus of international humanitarian law.

They can occur in both international and non-international armed conflict. After WWI the Allies developed a concept to try enemy leaders criminally for the violations of international law committed during the war. The Treaty of Versailles stipulated the arrest and prosecution of German officials accused as war criminals for crimes committed in 1912. The Leipzig trial was significant because it was the first attempt to develop a comprehensive system.

3.4.3 The Nuremberg Charter

War crimes were later codified in the Nuremberg Charter. The Charter defined war crime thus: Violations of the Laws and customs of war] shall include, but not limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of

[90] Margaret M. de Guzman, 'Crimes Against Humanity' in William A. Schabas and Nadia Bernaz (eds.), Routledge Handbook of International Criminal Law
2011), p. 121

hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

3.4.3 The Geneva Conventions of 1949

The Geneva Conventions are four treaties adopted and expounded from 1849 to 1949 that contain the laws of conduct within armed conflict. They are widely ratified. In instances without ratification the Geneva Conventions serve as customary international humanitarian law. Breaches of these Conventions amount to war crimes.

3.4.4 War Crimes under the Rome Statute of the International Criminal Court

Under the definition of war crimes, the Court will also have jurisdiction over the most serious violations of the laws and customs applicable in international armed conflict within the established framework of international law. These violations are defined extensively in Article 8, subparagraph (b) of the Rome Statue In the case of armed conflict not of an international character, the Court's jurisdiction will cover breeches of Article 3 common to the four Geneva Conventions of 12 August 1949. The rules prohibiting war crimes are contained in Article 8 of the Statute. This Article provides for the prosecution of four categories of offences: grave breaches of the Geneva Convention of 1949[91]; other serious violations of the laws and customs of international armed conflict[92]violations of Article 3 common to the four Geneva Conventions of 12 August 1949[93]; and other serious violations of the laws and customs applicable in armed conflict not of an international character.

With respect to international armed conflict, the war crimes listed in the Rome Statute include intentionally directing attacks against the civilian population; intentionally directing attacks against civilian objects; intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations; pillage,; use of poison or poisonous weapons; and the conscripting or enlisting of children under the age of 15 years. Those crimes applicable in non-

[91] Supra n 13, Art. 8 (2) (a).
[92] Ibid, Art. 8 (2) (b).
[93] Ibid,Art. 8 (2) (c).

international armed conflict in the Rome Statute are violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; outrages upon personal dignity; ordering the displacement of civilian population; and the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court.

3.5 The Crime of Aggression

3.5.1 Introduction

The Covenant of the League of Nations established after the First World War required that all members to mutually respect and preserve the territorial integrity and political independence of one another against 'external aggression'.[94] However, the Covenant had its own limitations. For instance, if the League's Council failed to come to a unanimous decision regarding a dispute armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof; (b) bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State; (c) the blockade of the ports or coasts of a State by the armed forces of another State; (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State; (e) the use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement; (f) the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State; (g) the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein Article 15 bis sets out the manner in which the Court would exercise its jurisdiction over the 'crime' of aggression. Paragraph (1) of this provision indicates the three existing trigger mechanisms under Article 13 of the Statute that would apply to aggression, which are: a referral by a state party, a Security Council Referral, and a

[94] Covenant of the League of Nations, 11 Martens Nouveau Recueil (1922), Art. 11.

proprio motu investigation by the Prosecutor.[95]

According to Paragraph (2) of this provision, in the event that the Prosecutor has concluded that there is reasonable basis to proceed with an investigation on the crime of aggression, he or she must first ascertain whether the Security Council has determined the existence of an 'act' of aggression in the state concerned[96]. If the Security Council has indeed made such a determination, the Prosecutor may proceed with an investigation into the 'crime' of aggression.

3.6 ICC Crimes and their Relationship with International enhancing criminal justice

In July, 2002, the ICC came into being in order to prosecute war crimes, crimes, crimes against humanity, genocide and the crime of aggression committed after July 1, 2002. The Court tries citizens of State Parties who are accused of committing within the jurisdiction of the ICC, as well as those who commit crimes in the terror of member states. Under the Rome Statute of the ICC, the Court has jurisdiction to try crimes committed in international armed conflict as well as in non-international armed conflict.

The role of the ICC is not to exercise its responsibility by replacing national legal systems. Rather it functions as a tribunal of "last resort". Hence, in accordance with the basic principle of complimentarity established by the Rome Statute, national tribunals retain the primary competence for judging cases of genocide and international crimes. In other words, the ICC is not the first mechanism but is merely complementary to the national tribunals in the matter of trying these crimes. The Court can exercise its competence in one of the following hypothetical situations:

A State Party may submit a situation in which it seems that crimes have been committed by a national of a State Party or on the territory of a State Party.

The United Nations Security Council may submit a situation, regardless of the nationality of the perpetrator of the crimes or of the place in which they have been committed.

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[95] Supra n 13, Art. 13.

[96] Ibid, Art. 15 bis, para 2

The state prosecutor may initiate on his or her behalf or ex officio an investigation concerning crimes committed on the territory of a State Party or by a national of a State Party. He or she can start such an investigation on the basis of information received from a reliable source. The Rome Statute of the ICC protects human rights. Art. 8(2)(a)(i) as well as Art. 8(2)(b)(vi) prohibit the attack or killing of ordinary civilians who are not in any way involved in hostilities. Crimes listed under Art. 8(2)(b) have a close connection to the protection of individual human rights. For instance the crime of mutilation, of medical or scientific experiments[97] and of outrages upon personal dignity[98] are there to protect the inherent human right of the individual.

3.6.1 The Expansion of the Scope of Crimes

With regard to crimes against humanity, certain acts that were recognized under the Nuremberg Charter have been retained and even expanded. For instance the words "forcible transfer of population" have been added the act of deportation." The inclusion of war crimes relating to non-international armed conflict was a milestone of the Rome Statute and is a significant achievement in matters of humanitarian and Enhancing criminal justice. Luigi Condorelli observes in this regard:

There can be no doubt that the Rome Statute represents a major step in the evolution of international humanitarian law, especially with regards to the norms applicable in case of internal armed conflict. The rules it proclaims are fundamentally innovative if compared to those contained in conventional instruments in force (such as the Geneva Conventions of 1949 and the protocols of 1977). First of all the Statute articulates in a written form a Hague Law of internal armed conflicts that was almost unknown in previous legal instruments. Secondly, it identifies the cases in which the violation of humanitarian principles applicable in case of internal armed conflicts is to be qualified as war crimes.[99]

Article 8 of the Rome Statute is one of the longest provisions in the Statute, and is all the more striking when compared with the 'relatively laconic provisions of the Nuremberg Charter and the Geneva Conventions.[100] To some extent it represents a progressive development over these

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[97] Supra n.13, Art. 8(2)(b) (x)
[98] Ibid , Art. 8(2)(b) (xxi)

[99] L. Condorelli, 'War Crimes and Internal Conflicts in the Statute of the ICC' in M. Politi and G. Nesi (eds.), The Rome Statute of the International Criminal Court: A Challenge to Impunity,
2001), p.116.
[100] Supra n. 3, p. 54.

previous circumstances, because it expressly covers non-international armed conflicts. Furthermore, some war crimes are defined in considerable detail, focusing attention on their forms and variations.

3.6.2 The Recognition of Sexual Violence Crimes in the ICC Statute

Gender and sexual violence crimes were generally considered trivial by international humanitarian law treaties. They were usually omitted from such treaties. This was due to countless reasons such as "sexist belief that rape is a natural part of every war'.[101]

Another reason for the exclusion of gender and sexual crimes from international humanitarian law treaties was because they were considered secondary to other crimes in terms of importance. As a result, rape and other forms of sexual violence during wartime have been historically under-investigated and under-prosecuted[102].

The Rome Statute of the International Criminal Court goes a long way in addressing the issue of gender violence. Gender crimes were not recognized under the Nuremberg Charter. Acts of 'rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity' have been included[103]. The Statute recognizes a broad range of sexual and gender violence crimes of the most serious nature. The ICC Prosecutor has a duty to investigate crimes of sexual and gender violence[104]. Furthermore, Art. 8 of the Rome Statute, in its definition of war crimes over which the Court has jurisdiction, includes the following gender-specific crimes: "rape, sexual slavery, enforced prostitution, enforced sterilization or any other form of sexual violence". Art. 7 which deals with crimes against humanity incorporates the crimes of "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity." These provisions mentioned above are an expansion on previous lists and reject the classification of sexual violence as being secondary to other crimes[105]. When States are selecting judges, they

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[101] B. Bedont, 'Gender -Specific Provisions in the Statute of the ICC' in F. Lattanzi and W. Schabas (eds.) Essays on the Rome Statute of the International Criminal Court , Naples: Editorials Scientifica, (1999).
[102] Supra n. 113.
[103] Supra n 13. Art. 7 (1) (g).
[104] Ibid, Art. 54(1)(b)
[105] Supra n.113.

must consider the need for gender balance as well as the need for judges to have expertise in the field of violence against women and children[106]. This shows the commitment of the Rome Statute to the enforcement of Enhancing criminal justice.

3.6.3 The Right to Due Process for the Accused during Trials

The Rome Statute guarantees the right to due process that is detailed and comprehensive trial procedures that are designed to ensure a fair trial of individuals. Ensuring that the rights of individuals are respected is essential for the international acceptance of a Court. These provisions for due process are stipulated in Articles 67 to 76 as well as the Rules of Procedure and Evidence. The accused is entitled to a public hearing that is conducted in a fair and impartial manner[107].

These rights are to be enjoyed without discrimination. According to Art. 67, the accused has the right to be informed about the charge(s) brought against him in a language that he understands well. The accused person has the right to be tried without undue delay[108] and should be given adequate time and facilities for the preparation of his defence and to communicate freely with counsel of the accused's choosing[109]

The accused enjoys the right to a competent translator where the Court's proceedings or its documents are presented in a language the accused does not understand to ensure fairness in proceedings.[110] Article 67(2) gives the accused the right to disclosure of evidence by the Prosecutor, which is in his possession or control, which shows the innocence of the accused. Furthermore, Art. 67(1)(d) guarantees the accused right to be present during trials, to conduct the defence in person or through counsel of his choosing. Where the interests of justice so require, the accused has a right to legal assistance assigned by the Court if he cannot afford it.

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06 Supra n.13, Art. 36.

07 Supra n.13, Art. 67(1)

08 Ibid, Art. 67(1)(c)

09 Ibid , Art. 67(1)(b)

10 Ibid, Art. 67(1)(f)

3.6.4 The Right to Protection for Victims and Witnesses

Article 68 of the Rome Statute deals provides for the protection of victims and witnesses. Art. 68(1) provides that the Court shall take measures to ensure victims and witnesses are protected.

3.6 5 CC Crimes and their Relationship with International enhancing criminal justice

In July, 2002, the ICC came into being in order to prosecute war crimes, crimes, crimes against humanity, genocide and the crime of aggression committed after July 1, 2002. The Court tries citizens of State Parties who are accused of committing within the jurisdiction of the ICC, as well as those who commit crimes in the terror of member states. Under the Rome Statute of the ICC, the Court has jurisdiction to try crimes committed in international armed conflict as well as in non-international armed conflict.

The role of the ICC is not to exercise its responsibility by replacing national legal systems. Rather it functions as a tribunal of "last resort". Hence, in accordance with the basic principle of complimentarity established by the Rome Statute, national tribunals retain the primary competence for judging cases of genocide and international crimes. In other words, the ICC is not the first mechanism but is merely complementary to the national tribunals in the matter of trying these crimes. The Court can exercise its competence in one of the following hypothetical situations:

A State Party may submit a situation in which it seems that crimes have been committed by a national of a State Party or on the territory of a State Party.

The Court has a duty to ensure the physical and psychological well-being as well as safety of victims and witnesses. The Court shall consider factors such as age, gender, health and nature of the crime in when protecting victims and witnesses especially when dealing with the sensitive matters involving crimes of sexual nature and violence against children. Art. 68(1) makes an exception to the right to public hearing provided under Art. 67. It allows the Court to conduct proceedings in camera or the presentation of evidence in electronic or other special means. These measures are especially meant to be implemented in the case of a victim of sexual violence or violence against children. The Court shall consider all circumstances in this regard and listen to

the views of the victim or witness.[111] Victims and witnesses have the right to be heard and advise the Prosecutor when making security arrangements or any other assistance accorded to the victim or witness.[112]

Art. 68(3) provides that victims have a right to be heard where their personal interests are affected. This shall be done in a manner which is consistent with rights of the accused to ensure a fair and impartial trial. Furthermore, Art. 68(4) provide that the Prosecutor may be advised by the Victims and Witnesses Unit. This advice is in regard to issues such as security arrangements, counseling and other legal assistance. A State may make an application to ensure that necessary measures are taken to protect its "servants or agents" and for the "protection of confidential and sensitive information"[113] The Rome Statute provides for the reparation of victims. Art. 75 thereof provide that the Court shall establish principles with regard to reparations to, or in respect of victims. The forms of victim reparations under Art. 75 are restitution, compensation and rehabilitation. The Court is given discretion under Art. 75(2) to make an order against a convicted person with regard to reparation to victims. The award for reparation may be made by the Court out of the Trust Fund established under Art. 79. All these provisions are designed to protect the interests of victims and witnesses. The Rome Statute therefore upholds and enforces Enhancing criminal justice. Art. 36 require that candidates to be judges should have established competence in the field of criminal law and procedure, or in "relevant areas of international law and international humanitarian law and the law of human rights..." Experts in these aforementioned legal fields are the best to interpret and enforce international criminal justice as well as international humanitarian and Enhancing criminal justice.

3.6.5 The Limitations of the Rome Statute in enforcing enhancing criminal justice

The Statute, however stellar and exemplary in its broad provisions regarding protection of human rights, it has its limitations. For example, from a human rights perspective, the Genocide Convention as well as the Article 6 of the Rome Statute has left out certain groups from the definition of genocide. It is not only "a national, ethnical, racial, or religious group" that can be

[111] Supra n.13, Art. 68(2)

[112] Ibid, Art. 68(4)
[113] Ibid, Art. 68(6)

the target of genocide. Political groups can also be victims of genocide. Critics of the Geneva Convention point to the narrow definition of the groups that are protected under the treaty, particularly the lack of protection for political groups for what has been termed politicide (politicide is included as genocide under some municipal jurisdictions).[114]

The controversial exclusion of political groups from the definition of genocide was due to the fact that the drafters of the Geneva Convention felt that political groups "are too vaguely defined, as well as temporary and unstable and they further held "that international law should not seek to regulate reparation to victims. The award for reparation may be made by the Court out of the Trust Fund established under Art. 79. All these provisions are designed to protect the interests of victims and witnesses. The Rome Statute therefore upholds and enforces enhancing criminal justice. Art. 36 require that candidates to be judges should have established competence in the field of criminal law and procedure, or in "relevant areas of international law and international humanitarian law and the law of human rights..." Experts in these aforementioned legal fields are the best to interpret and enforce international criminal justice as well as international humanitarian and Enhancing criminal justice[115].

Although Art. 8 has been lauded for its achievements in the field of humanitarian law, it has also its limitations. For instance, there is concern with regard to the distinction between international and non-international armed conflict. In order to determine whether war crime provisions are applicable in a given situation, each situation must first be assessed and characterized as either international or non-international. According to Professor Antonio Cassesse, One may entertain some misgivings concerning the distinction between the regulation of international armed conflict, on the one side, and internal conflict on the other. In so far as Art. 8 separates the law applicable in the former category of armed conflict from that applicable to the latter category, it is somewhat retrograde, as the current trend has been to abolish the distinction and to have simply one corpus of law applicable to all armed conflicts. It can be confusing- and unjust- to have one law for international armed conflict and another for international armed conflict[116].

[114] Naomi Klein, The Shock Doctrine: The Rise of Disaster Capitalism (2007) p. 101.
[115] Genocide,' Wikipedia, the Free Encyclopedia, available at http://www.en.wikipedia.org/wiki/Genocide retrieved 29 March, 2014.
[116] Supra n. 81, p. 96.

However, proposals to include new acts of crimes against humanity, including economic embargo, terrorism and mass starvation, did not rally sufficient support[117].

This shows the limitation that exists within the framework of the Rome Statute in terms the scope of crimes under its jurisdiction. Crimes against humanity have evolved over the years and new ones have emerged. This limits the Statute's scope in terms of its role in enforcing human rights as well as humanitarian law.

The success of the Court depends, first, of all on the focusing of efforts to achieve the universal ratification of the Rome Statute to ensure that it attains the truly global application that was envisaged by its founders. This is crucial for deterrence from committing international crimes, creating a real expectation that genocide and other serious international crimes, whenever and wherever they are committed, will not go unpunished. Secondly, as the Court is becoming more operational, it is increasingly clear that the cooperation of states and of international organizations is extremely important, especially with regard to the detention of suspects, the protection of witnesses, and the execution of sentences. Although the states parties will be mainly required to fulfill the Court's requests, all states and organizations can help it in its work. Thirdly, diplomatic and public support will remain indispensable. All the statements of support for the Court – from states, from non-governmental organizations, from academia and from international and regional organizations – help promote cooperation with the Court and compliance with its judicial rulings. The more difficult the circumstances, the more decisive this support will be. All these are deterrent measures that prevent conflicts and punish impunity for those who commit these heinous crimes.

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[17] Supra n. 3, p. 46.

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3.7 Legal basis of the amnesty.

Considered from the domestic perspective, the Amnesty Act is a democratic solution to what the government perceived at the time to be a domestic problem. There are no qualms regarding the domestic legislative mandate and process leading to its enactment. It is the product of a legitimate exercise of state sovereignty. The governments control of the national system of criminal law is an integral feature of Uganda's national sovereignty, and therefore using its own discretion on whether to investigate, prosecute and punish offenders of the worst of crimes is a mere exercise of that sovereignty. However, when considered from a normative point of view, all persons are entitled to equal protection of the law 138 which includes protection against unlawful invasions of their right to life, [118] their right to respect for and protection of dignity[119] and their right not to be subjected to torture of any kind.[120]

[118] Ibid Article 22.
[119] Ibid Article 24.
[120] Ibid Article 44 (a).

When those rights are violated those aggrieved by such violation have the right to obtain redress in the ordinary courts of law and those guilty of perpetrating such violations are answerable before such courts, both civilly and criminally. An amnesty to the wrongdoer effectively obliterates such rights. The Constitutional basis of the Amnesty Act would have been open to challenge on that account, had the amnesty relived the perpetrators of civil liability, which it does not.[121] The perpetrators are only relived from the possibility of criminal prosecution and punishment. Even though the law permits private prosecutions, such a possibility does not constitute a "right" the deprivation of which would render the Amnesty Act unconstitutional. Although enactment of the Amnesty Act was for domestic purposes, the armed conflict in Northern Uganda is not an entirely domestic problem. The conflict itself took on an international dimension, without escalating into an international armed conflict though, firstly when the LRA

Article 21 (1) of the Constitution of the Republic of Uganda, 1995 states; "*All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.*"[122]

Section 2 (2) of the Amnesty Act provides that a person granted amnesty "shall not be prosecuted or subjected to any form of punishment for the participation in the war or rebellion for any crime committed in the cause of the war or armed rebellion.

The legality of domestic amnesties for perpetrators of serious crimes under international law is in a state of transition and considerable uncertainty. Apart from the state sovereignty justification, reliance has been placed on Article 6 (5) of Additional Protocol II to the Geneva Conventions, which states that authorities "shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict," to justify broad domestic amnesties in international law. Such justification was relied upon by the South African Constitutional Court in Azapo v. President of the Republic of South Africa[123]

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[22] 1995 constitution of the republic of Uganda

[23] http://www.saflii.org/za/cases/ZACC/1996/16.html para 30 - 32 (accessed on 02.05.2015).

In that case, the applicants applied to South Africa's Constitutional Court for an order declaring s.20 (7) of the Promotion of National Unity and Reconciliation Act unconstitutional. That section permitted the newly established Committee on Amnesty to grant amnesty for any act or omission. However, the applicant had to tender a full disclosure of all relevant facts, and attest that the relevant conduct was associated with a political objective. As a result of the grant of amnesty, the perpetrator would be relieved from criminal and civil liability. The Court argued that by virtue of that provision, there was no obligation on the part of a contracting state to ensure the prosecution of those who might have performed acts of violence or other acts which would ordinarily be characterised as serious invasions of human rights. In armed conflicts that are not of an international character, "erstwhile adversaries ..... inhabit the same sovereign territory. They have to live with each other and work with each other and the state concerned is best equipped to determine what measures may be most conducive for the facilitation of such reconciliation and reconstruction,.... If they are treated too harshly - or if the net of punishment is cast too widely - there may be a backlash that plays into their hands." it reasoned.

Reliance on Article 6 (5) of Additional Protocol II to the Geneva Conventions as a justification for domestic grant of the "broadest possible amnesty" at the end of hostilities in non-international armed conflicts is not without criticism. The South African Constitutional Court's reasoning has been specifically criticized as being flawed because it adopted an overly broad definition of jus cogens, applied Additional Protocol II to all other jus cogens norms and did not consider whether amnesty for offenses that were in fact jus cogens (such as torture and genocide) was permissible.

Similarly, the International Committee of the Red Cross (ICRC) has interpreted Article 6 (5) of Additional Protocol II to the Geneva Conventions as essentially providing for "combatant immunity", which ensures that a combatant cannot be punished for the mere fact of taking part in hostilities, "including killing enemy combatants", as long as he respected international humanitarian law[124].

[24] Letter of the ICRC Legal Division to the ICTY Prosecutor of 24 November 1995 and to the Department of Law at the University of California of 15 April 1997.

It is a sort of release at the end of hostilities, for those detained or punished for the mere fact of having participated in hostilities. It does not aim at an amnesty for those who violated international humanitarian law. The provision is inapplicable to amnesties that extinguish penal responsibility for persons who have violated international law. Support for the ICRC interpretation can be found Article 31 (1) of the Vienna Convention on the Law of Treaties, which directs States Parties to interpret treaties in good faith in accordance with the ordinary meaning to be given to the terms of the treaty, in their context and in the light of its object and purpose. Additional Protocol II having been designed, among other purposes, to ensure greater protection for the victims of non-international armed conflicts by developing and supplementing Article 3 common to the Geneva Conventions, an interpretation of Article 6 (5) of Protocol II that allows amnesties which prevent prosecution for the most egregious human rights abuses during armed conflict would be inconsistent with the primary objective of the Protocol. On the other hand, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Enhancing criminal justice and Serious Violations of International Humanitarian Law, which were adopted by the General Assembly in 2005[125] affirm a general duty of States to "provide effective remedies to victims, including reparation,"

For that reason "Amnesties and other measures of clemency shall be without effect with respect to the victims" right to reparation..."[126] While it is true that punishment is not the only means of ensuring reparation, in practice, by dint of dispensation of justice, victims are likely to be more prepared to be reconciled with their erstwhile tormentors because they know that the latter have now paid for their crimes,[127]and in any event, the practical realities of Uganda are such that without punishment it would be difficult to ensure other forms of reparation. Uganda ratified the Geneva Conventions on 18th May 1964[128]and acceded to Additional Protocol II to the Geneva Conventions on 13th March 1991.[129] It is bound to interpret its treaty obligations in good faith in accordance with the ordinary meaning to be given to the terms of both treaties, in their context

[125] General Assembly resolution 60/147, annex.
[126] Ibid Principle 24 (b)
[127] Jo M. Pasqualucci, (1994),The Whole Truth and Nothing but the Truth: Truth Commissions, Impunity and the Inter-American Human Rights System, Boston University International Law Journal, Vol. 12, 1994, p. 353.
[128] http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P (accessed on 02.06.2011).
[129] http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=475&ps=P (accessed on 02.06.2011).

and in the light of their object and purpose. Whereas Article 6 (5) of Additional Protocol II to the Geneva Conventions permits granting of the "broadest possible amnesty" in relation to the armed conflict in northern Uganda, the amnesty ought to be limited to "combatant immunity" ensuring only that combatants of the LRA cannot be punished for the mere fact of taking part in hostilities, including killing UPDF combatants, as long as they respected international humanitarian law. Amnesty cannot be used to extinguish penal responsibility for persons who have violated international humanitarian law. For that reason, the Amnesty Act should not be used to prevent prosecution for the most egregious human rights abuses that occurred during the armed conflict since such use would be inconsistent with the primary objective of the Protocol.

3.8 Characteristics of the amnesty.

3.8.1 The amnesty, by type. Amnesties can take a variety of forms including blanket amnesties, self-amnesties, and conditional amnesties. Self-amnesties are granted through amnesty laws usually made by authoritarian governments shortly before leaving office in anticipation of future lawsuits or prosecutions, absolving officials of that government of liability for any crimes committed by them while in power. Such amnesties were issued in Argentina and Chile in the 1970s and 1980s. As the authoritarian regimes declined in both states, their members became concerned that they would be held accountable for human rights abuses that had occurred during their reign. In an effort to prevent prosecution for these crimes, the governments passed amnesty laws granting themselves amnesty. Conditional amnesties on the other hand are ordinarily granted following a determination by a quasi-judicial body, such as a truth commission, applying legislative criteria. [130]Such amnesties are granted on an individualized basis and after certain conditions have been fulfilled. In the case of South Africa, for example, amnesty was granted in respect of acts, omissions and offences associated with political objectives committed in the course of the conflicts of the past, and it was granted to persons who made full disclosure of all the relevant facts relating to acts associated with a political objective.[131]The South African Constitutional Court accordingly.

[130] Naomi Roht-Arriaza, Amnesty and the International Criminal Court, inInternational Crimes, Peace, and Human Rights: The Role of the International Criminal Court, (Dinah Shelton ed., 2000); 1027-28, n.343.

[131] Section 20 (2) and (3) of the Promotion of National Unity and Reconciliation Act, 34 of 1995.

They further argued that obligations deriving out of an international treaty could not be altered by a later treaty (the Agreement between the United Nations and Sierra Leone setting up the Special Court for Sierra Leone) without the consent of the parties to the Lomé Agreement. They argued therefore that the government of Sierra Leone had acted contrary to its prior and international obligations when it signed the Agreement with the United Nations. More specifically, they argued that the Lomé Agreement obliged the government of Sierra Leone to ensure that "no official or judicial action" would be taken against any members of the RUF and other participants in the conflict. This would include acceding to an extradition request or an agreement to establish an international court; as such measures would clearly amount to "judicial or official" actions. The preliminary motion was decided by the Appeals Chamber without a prior decision of a Trial Chamber, since the Rules of Procedure and Evidence of the SCSL provided for a referral of preliminary motions to the Appeals Chamber when an issue of jurisdiction is concerned.

The Appeals Chamber observed that "*one consequence of the nature of grave international crimes against humanity is that States can, under international law, exercise universal jurisdiction over such crimes. Where jurisdiction is universal, a State cannot deprive another State of its jurisdiction to prosecute the offender by the grant of amnesty.*"[132]

Similarly before the ICTY, it was decided that considering that torture is prohibited by a peremptory norm of international law, at the inter-state level, it serves to internationally de-legitimise any legislative, administrative or judicial act authorising torture. On account of the jus cogens value of the prohibition against torture, treaties or customary rules providing for torture are null and void ab initio and therefore a State taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law would violate the general principle and would not be accorded international legal recognition. [133] From both decisions, it would seem that one of the consequences of the jus cogens character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the one hand to prohibit

[132] Case No. SCSL-2004-15-AR72 (E), para. 155.
[133] Case No. IT-95-17/1-T, Prosecutor v. Anto Furundzija, Judgment of the Trial Chamber, ICTY, 10th December 1998

torture to such an extent as to restrict the normally unfettered treaty- making power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad.[134]

As shall be seen in the next section dealing with the duty to prosecute, the explicit duty to institute criminal proceedings against alleged torturers precludes adherents to the Convention Against Torture from enacting, or at least applying, an amnesty law that forecloses prosecution of torturers.

According to Yasmin Naqvi (2003), emergent State practice and the decisions of national and international courts reveal that an acceptable amnesty would require the following cumulative criteria: (1) the amnesty is prescribed and limited to achieving certain objectives, in particular, the objectives of securing peace and initiating or furthering reconciliation; (2) the amnesty is accompanied by other accountability measures such as truth commissions, investigatory bodies, or lustration; (3) the amnesty is not self-proclaimed, i.e., it is the result of negotiation between the outgoing and incoming regimes or of a peace deal brokered by international parties, such as the United Nations; and (4) the amnesty only applies to lower ranking members of armed forces or groups or those considered "least responsible" for the perpetration of international crimes. Attempts to exonerate persons accused of war crimes which do not fit into the above criteria, or which otherwise fail to conform to the fundamental principles of international law, should not in principle be accorded recognition by domestic or international courts.[135]
On basis of all the foregoing, only conditional amnesties will attract any real support under international humanitarian law and international criminal. International customary law currently recognises the importance of restorative justice objectives such as reconciliation and through the mechanism of principled and limited amnesties it accommodates that objective in the transitional justice process[136].

[34] Ibid para 156.
[35] CALIF. L. REV. 449 (1990);
[36] Ibid, p. 587 -588.

For that reason, limited amnesties within internationally accepted parameters can be considered consistent with the fundamental principles of international law[137]. Any application, in good faith, of amnesty processes as a policy instrument within those parameters is unlikely to come into conflict with international law but states cannot lawfully use amnesty processes that exhibit a flagrant disregard for their treaty-based and customary human rights obligations. However, even where the amnesty is contrary to international law, this does not mean that the amnesty itself is a violation of the law because neither treaty-based nor customary international law contains any such provision yet.

3.6 Prosecutions.

Uganda made the first state party referral to the International Criminal Court in December 2003, which proceeded in 2005 to issue warrants of arrest in respect of five of the topmost leaders of the LRA, none of which warrants have been executed to-date. On the other hand, domestic trial of the first suspect is due to start in the not too distant future at the War Crimes Division of the High Court.[138] The implication is that for the over two decades during which the armed conflict has raged, not a single LRA perpetrator of the numerous atrocities committed has hitherto been tried. This dismal record behoves an examination of the existence or otherwise of an obligation to prosecute perpetrators of international crime.

3.6.1 The duty to prosecute on the basis of treaty obligations.

Some widely ratified treaties impose a direct, positive or explicit duty upon states parties to prosecute, or else extradite perpetrators of gross human rights violations. Such a duty exists in respect of grave breaches of the Geneva Conventions[139] and violations of the Genocide Some interpreters of the International Covenant on Civil and Political Rights contend that it too requires state parties to "investigate serious violations of physical integrity, in particular, torture,

[137] Ibid, p 616.
[138] The daily Monitor Newspaper of Tuesday 24th May, 2011.

[139] Article 129 of the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949; Article 146 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949. This Convention.

extra-legal executions, and forced disappearances, and to bring to justice those who are responsible.

Not all violations of international humanitarian law in those conventions require a state to prosecute or extradite individuals who have been accused of committing such violations. The duty to prosecute or extradite arises only in the very specific circumstances laid out by the conventions, one of which, for example, is that grave breaches under the Geneva Conventions should have occurred during an international armed conflict. However, when these situations arise, a state's failure to prosecute can amount to an international breach. The alternative formulation is the imposition of state responsibility to provide a legal remedy to the victims of such violations which obligation inherently imposes a duty to prosecute. For instance, both the Convention on the Prevention of the Crime of Genocide and the Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment establish state responsibility to provide a legal remedy to the victims of violations.

The Genocide Convention explicitly outlines the duty of states to enact domestic legislation to punish perpetrators of genocide, and their responsibility to provide effective penalties for those found guilty. Likewise the Convention against torture compels states to ensure that all acts of torture are offenses under their laws, and requires state parties to either prosecute or extradite alleged torturers.

Article 6 (5) of Additional Protocol II to the Geneva Conventions permits granting of the "broadest possible amnesty" which fact supports the argument that there is no corresponding obligation to prosecute for violations of international humanitarian law committed in the course of non-international armed conflicts. However under the Rome Statute, which is applicable to international as well as non-international armed conflicts, as from July 2002, the nature of the crime, rather than the context in which it is perpetrated, became the defining criterion qualifying States" obligations. Article 8 (2) (c) and (e) of the Rome Statute confirms that there is individual Criminal responsibility for war crimes committed in non-international armed conflicts, implying a duty to prosecute those offenders, irrespective of the nature of armed conflict.

Under Article 8 (1) of the Rome Statute, the Court has "jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes." The emphasis placed on prosecuting mainly perpetrators of war crimes committed on a large scale and in an organised manner would seem to indicate that no amnesty could be valid for those persons. The Statute was made such that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation, so as to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.

On that ground, being a state party, Uganda is obliged by the principle of Pacta sunt servanda, to observe and perform in good faith, its obligations under the Rome statute, to prosecute or surrender perpetrators of war crimes committed on a large scale in the armed conflict that has ravaged the northern region.

3.6.2 The duty to prosecute on the basis of customary international law

Under customary international law, recognition of certain crimes as jus cogens entails a duty to prosecute or extradite and "places upon states the obligatio erga comnes not to grant impunity to the violators of such crimes."[140]

Recognition of a crime as jus cogens creates a corresponding duty, and not merely an optional right to prosecute, for "otherwise jus cogens would not constitute a peremptory norm of international law".[141] Whereas the clearly accepted and recognised jus cogens norms include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity, and torture,[142] it is now increasingly accepted that war crimes may be included in this category.[143]

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140 M. Cherif Bassiouni, (1996) International Crimes: Jus Cogens and Obligatio Erga Omnes 59 L. & CONT. PROB. 63; Michael P. Scarf, The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes, 59 L. & CONT. PROB. 41; p. 65

141 Cherif Bassiouni, (1996) International Crimes, Jus Cogens and Obligatio Erga Omnes 59 Law & Contemp. Probs. 63; p.266.

142 Yearbook of the ILC 1966, Vol. II. p. 248.

143 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment of 27 June 1986, ICJ Reports 1986, pp. 113-114, para. 218.

For that reason, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Enhancing criminal justice and Serious Violations of International Humanitarian Law, which were adopted by the General Assembly in 2005,[144] and are considered to reflect existing obligations under international human rights and humanitarian law, require that in cases of gross violations of international Enhancing criminal justice and serious violations of international humanitarian law constituting crimes under international law, such as war crimes, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him.[145] This position is in conformity with an emerging state practice supporting an obligation to prosecute the most serious violations of international law. [146] This state practice has generated an anti-amnesty norm, which has the effect of transforming the status and function of the domestic amnesty for international crimes as a kind of international signal, drawing the attention of the international community, which, whether via states, or transnational courts, or non-governmental organisations, or cooperation amongst all three, asserts its own rights to make the acts amnestied into matters of international interest and possible legal action.[147]

Article 8 (1) of the Rome Statute, while not requiring unlimited prosecution, may be satisfied by targeted prosecutions limited to the most serious crimes and the most responsible perpetrators, failure of which might trigger the jurisdiction of the ICC.

3.6.3 Practical implications of the obligation to prosecute.

In December 2005, The African Commission on Human and Peoples" Rights passed a resolution urging Member States of the African Union that had not yet done so to ratify the Rome Statute and to adopt a national action plan for the effective implementation of the Rome

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[144] General Assembly resolution 60/147, annex.
[145] Ibid para. 4.

[146] Andreas O"Shea, (2002), Amnesty for Crime in International Law and Practice
, p. 50, Springer (2002).
[147] Rhys David Evans (2007) Amnesties, pardons, and complementarity: does the International Criminal Court have the tools to end impunity? Available at
www.nottingham.ac.uk/shared/shared_hrlcpub/HRLC_Commentary_2005/EVANS.pdf. (Accessed on 05.06.2011).

Statute at the national level[148]. Furthermore, the Rome Statute requires States Parties to ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under Statute

Accordingly and in order to guarantee the primacy of Uganda' s Courts in the exercise of jurisdiction to prosecute for international crime, Parliament passed The International Criminal Court Act, 2010.[149]

The Act, which came into force on 25th June 2010, has a wide scope; it creates offences that are the "equivalent" of the crimes of genocide, crimes against humanity and war crimes set out in the Rome Statute;[150]and establishes the mechanisms and procedures through which Uganda may comply with requests for cooperation and assistance from the ICC in such matters as investigations, arrests, surrender of suspects and the enforcement of sentences for convicts.[151] Uganda now has effective primacy for the prosecution of the international crimes of A successful institutional reform should follow a clear understanding of the systemic and structural problems that led to the conflict.

Reform can then be achieved through such measures as; the elimination of abusive and corrupt officials from public service; promotion of integrity and legitimacy through structural reforms that promote accountability, independence, and responsiveness; creating oversight mechanisms that ensure accountability to civilian governance; reforming or creating new legal frameworks, such as adopting constitutional amendments to guarantee the protection and promotion of human rights training programs for public officials and employees such as judges, lawyers and police officers, on applicable human rights and international humanitarian law standards, as well as the restructuring of the court system. Following situations of armed conflict, disarmament, demobilisation, and reintegration of the disbanded armed actors into civil society is essential. The Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord"s Resistance Army / Movement does not reflect any specific position on

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148 Para 2 of the Resolution on Ending Impunity in Africa and on the Domestication and Implementation of the Rome Statute of the International Criminal Court , taken at the meeting of its 38th Ordinary Session held in Banjul, The Gambia from 21st November to 5th December 2005.

149 Act 11 of 2010, Laws of Uganda.

150 Ibid Sections 7, 8 and 9.

151 Ibid Sections 20

post-conflict institutional reform. It however contains general statements of acknowledgment of the need for a degree of institutional reform such as; "...accountability mechanisms shall be implemented through the adapted legal framework in Uganda;"[152]

"The parties also recognise that modifications may be required within the national legal system to ensure a more effective and integrated justice and accountability response;"[153] Insofar as practicable, accountability and reconciliation process shall be promoted through existing national institutions and mechanisms, with necessary modifications."[154] The kind of institutional reform envisaged under the agreement therefore is limited to the adaptation of existing institutions to the needs of the transitional justice processes rather than structural reforms for the promotion of accountability, independence, and responsiveness of such institutions.

3.9 Conclusion.

Even though customary international law prohibiting amnesties for international crimes has not crystallised yet, it is clearly heading towards that direction. State practice and the decisions of national and international courts generally consider exemptions from criminal responsibility for the core crimes falling within the realm of international humanitarian, human rights and criminal law by amnesties incompatible with their jus cogens nature. Amnesties are only permitted in exceptional cases, namely where they are conditional and accompanied by alternative forms of justice. An amnesty that prevents prosecution of an offence that is subject to human rights and humanitarian law treaties explicitly requiring States parties to ensure punishment of specific offences either by instituting criminal proceedings against suspected perpetrators in their own courts or by sending the suspects to another appropriate jurisdiction for prosecution would violate the treaty concerned and will not be given international recognition. For that reason an amnesty that encompasses serious violations of the laws of war governing non-international armed conflict would be of doubtful validity. One of the declared objectives of the Amnesty Act, 2000 is securing peace and initiating or furthering reconciliation. It however is not conditioned on or directly supported by other contemporaneous accountability measures such as a truth

[152] Clause 4.4 of the agreement
[153] Ibid Clause 5.1.
[154] Ibid Clause 5.4.

commission. Although it is not self- proclaimed, but the result of a domestic and democratic legislative process, it is not restricted to lower ranking members of the LRA or those considered "least responsible" for the perpetration of international crimes, but extends unconditionally to include even those most responsible for war crimes. Therefore applying the criteria suggested by Yasmin Naqvi, the Act is of doubtful validity under customary international law for encompassing serious violations of the laws of war governing non-international armed conflict.

CHAPTER FOUR

4.0 CHALLENGES FACING THE INTERNATIONAL CRIMINAL COURT IN ENFORCING ENHANCING CRIMINAL JUSTICE

4.1 Introduction

Until the end of World War II, international law was concerned with relations between sovereign states. The manner in which governments treated or mistreated their own citizens of other states was not the concern of international law.[155] Indeed, no court had the jurisdiction necessary to consider such complaints. However, this changed as a direct consequence to the Holocaust, the Nuremberg trials, and the establishment of the United Nations.[156] This change was due to a number of reasons. First, the crimes committed by the Nazi regime shocked the world and nations and their leaders recognized that when human rights violations reach such levels of horror, it becomes the business of the international community to intervene on behalf of the victims. Second, the victorious nations' decision to prosecute the Nazis through the Nuremberg trials led to the recognition of a new category of crimes called 'crimes against humanity.[157]

For the first time, certain crimes were considered 'so egregious that a failure to prosecute would itself be a moral and legal affront.'[158] Many scholars envision the ICC at the helm of global efforts to develop and enforce human rights and humanitarian law.[159] They have high hopes for the tribunal and expect it to advance international justice swiftly, impartially, and effectively.[160]
The ICC is expected to develop international criminal law by building upon the jurisprudence of the Nuremberg and Tokyo tribunals, the International Criminal Tribunal for the former

[155] Mark S. Ellis, and Richard J. Goldstone (eds.), The International Criminal Court: Challenges to Achieving Justice and Accountability in the 21 st Century (2008) p. 1.

[156] Ibid.
[157] Ibid.
[158] Ibid
[159] E.g., Benjamin Ferencz, An International Criminal Court: A Step Toward World Peace (1980); M. Cherif Bassiouni, ' The Time Has Come for an International Criminal Court ,' (1991) 1 Indiana International & Comparative Law Review 12.
[160] Jenia Iontcheva 'Nationalizing International Criminal Law: The International Criminal Court as a Roving Mixed Court,' (2004) 52 Chicago Public Law and Theory Working Paper 5.
138Jelena Pejic, 'Creating a Permanent International Court: The Obstacles to Independence and Effectiveness,' (1998) 29 Columbia Human Rights Law Review 291, 294.

Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR). The Court is to "clarify existing ambiguities in the law" and to set the "highest international standards" of due process.

There is hope that the ICC will clarify and advance international criminal, humanitarian as well as Enhancing criminal justice and will thus contribute to the globalization of criminal justice.

The former UN Secretary General Kofi Annan stated: 'In the prospect of an international criminal court lies the promise of universal justice. That is the simple and soaring hope of this vision.[161]

It is doubtful, however, that the ICC will have 'the political capital to meet the expectations' of its most 'ardent supporters.'[162] The establishment of the Court represents a major triumph of concerted international efforts to combat impunity.[163] This chapter focuses on the principal challenges faced by the Court in its endeavor to fulfill its role of fighting impunity.

4.2 Challenges Relating to Prosecution and Investigation

The Court has already initiated a number of investigations in the Northern Uganda. It is also analyzing several situations including Columbia, Georgia and Afghanistan. While many challenges facing the ICC are common to all international courts and tribunals, unique complications have arisen in the context of inter alia: (a) investigating situations of ongoing conflict; (b) the distance between the court and the situations under investigation; (c) operating in diverse cultural contexts; (d) unprecedented legal challenges; and (e) cooperation.[164]

4.2.1 Protection of Victims and Witnesses

In highly volatile and insecure circumstances in the case of an ongoing conflict, the Office of the Prosecutor (OTP) faces challenges such as approaching possible witnesses without exposing them; identifying safe sites for interviews; securing discreet transportation for investigators and

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[161] Press Release, Statement of Secretary-General Kofi Annan before the International Bar Association in New York (June 12, 1997), U.N. Doc. SG/SM/6257 (1997), available at http://www.un.org/News/Press/docs/1997/19970612.sgsm6257.html.

[162] Supra n. 120, p.4.

[163] Fatou Bensouda, 'Challenges Related to Investigation and Prosecution at the International Criminal Court', in Roberto Belleli (ed.), International Criminal Justice: Law and Practice from the Rome Statute to Its Review (2010), p.131

[164] Supra n.141, p. 123.

witnesses; and even providing for the contingency of moving witnesses to safe locations without attracting attention.[165] For instance, the issue of witness protection concerns prevented the OTP from conducting investigations in Darfur at the scene of the alleged crimes. In relation to this, the then Prosecutor Luis Moreno Ocampo told the Council on Foreign Relations in New York in October 2008 that 'since July 2005, my Office has carried out an investigation under difficult circumstances. I have a duty to protect the persons called as witnesses and I cannot protect those living in the Sudan.

Thus we had to investigate Darfur without visiting Darfur.'[166] This shows that, even though such investigations are not impossible, they have to follow difficult paths. Witness protection problems may also come about during trials. For example, in the Thomas Lubanga trial, 19 prosecution witnesses were 'subject to procedural measures of protection- they testified with their image and voices distorted.'[167] To achieve effective witness protection, state cooperation is vital. The Court has concluded certain witness relocation framework agreements with ten states (as of 2008).[168] However, this number is not enough in order to protect victims and witnesses effectively.

4.2.2 Dealing with Ongoing Crimes

It has happened that, while investigations are on-going regarding past crimes, the individuals under investigation commit new crimes. This creates a necessity to deal with such crimes as well.[169]

For instance, there were reports that indicated that on 17 September 2008 the Lord Resistance Army (the LRA) attacked Congolese villages in DRC's Dungu Territory. These attacks followed a similar method with school children abductions, looting and killing of civilians, including local chiefs. In light of this renewed attacks, the Prosecutor called for renewed efforts to arrest LRA leader Joseph Kony and his top commanders. These challenges can be addressed by for instance

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[165] Ibid, p. 134

[166] Prosecutor's keynote address at the Council for Foreign Relations Symposium, New York, 17 October 2008, p. 3. available at http://www.icc-cpi.int/nr/exeres/3386f5cb-45dc-b66f-17e762f77b1f.htm (visited 11 April 2014)

[167] Supra n. 141, p. 135.

[168] Ibid.

[169] Ibid.

focusing on those who bear the greatest responsibility. In this regard, the OTP has adopted a Rome- Statute-based policy of focusing its efforts on the most serious crimes and those who bear the greatest responsibility for these crimes:

as a general rule, the Office of the Prosecutor should focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or organization allegedly responsible for those crimes.[170]

This approach enables the Prosecutor to have the maximum impact with the limited resources available.[171] This is because it is impractical to prosecute each and every individual at the international level who has committed a crime under the Statute. The OTP will prosecute only the individuals with the greatest responsibility, while the rest will be dealt with by national courts.[172]

4.3.3 Distance between the Court and Situations under Investigation

The Court's distance from the communities affected by international crimes is also likely to impair its political acceptability within those communities. The Court sits at The Hague, Netherlands. The distance between the geographical locations of the Court from situations which the Court is concerned poses significant challenges. Evidence from other human rights regimes suggests that if the Court attempts to impose its mandates in a heavy top-down fashion and is not attuned to local political processes and preferences, it may provoke resistance and even a counter-reaction to international norms and practices[173] prosecutions to take place, the Court 'must make careful attempts to bridge' these geographical constraints[174]. The history of the ad hoc tribunals reveals that the remoteness of international tribunals damages their legitimacy and effectiveness with local populations. For instance in the former Yugoslavia, the ICTY has been perceived as a distant and often biased tribunal with little relevance to the reconciliation process

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[170] Paper on some policy issues before the Office of the Prosecutor, September 2003, para. 2.1, p. 7 , available at http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905-_Policy_Paper.pdf (visited 11April 2014).

[171] Supra n. 141, p.136.

[172] Ibid.

[173] Supran. 137, p. 28

[174] Supra n. 141, p. 138.

in the countries of the region.[175] The International Criminal Tribunal for Rwanda has also been critiqued for its remoteness from the place where the crimes that it judges took place.[176] Hearing about the ICTR from sparse radio broadcasts, most Rwandans view the ICTR as an "inherently foreign" institution that has "forfeited any impact on Rwandan society."[177]

4.3 The Challenge of State Cooperation with the ICC

State cooperation is an important part of the success of international courts and tribunals. Cooperation is necessary for the service and the execution of arrest warrants, as it is impossible to secure the presence of an accused without the cooperation of relevant states.[178]

The Statute of the ICC establishes a comprehensive regime too ensure that 'the most serious crimes of concern to the international community as a whole' do not go unpunished and that 'their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.'[179] However, the Court lacks effective mechanism to enforce its decisions and hence it relies upon the cooperation of state parties, non-States parties, international organisations and NGOs to implement many of its decisions.[180] The Rome Statute sets out the legal framework for the provision of assistance by States Parties and other entities, including the arrest and surrender of individuals and other forms of cooperation.[181]

The ICC has no police force, inter alia, to execute warrants of arrests issued by it.[182] This shows clearly that the achievement and success of the Court largely depends on the cooperation of states. It is inconceivable that the prosecutor of the court would enter a sovereign state without

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[175] Ivana Nizich, International Tribunals and Their Ability to Provide Adequate Justice: Lessons from the YugoslavTribunal' (2001) 7 ILSA Journal of International Comparative Law 353, 355.

[176] Kingsley Chiedu Moghalu, 'Image and Reality of War Crimes Justice: External Perceptions of the International Criminal Tribunal for Rwanda ' (2002) 26 Fletcher Forum of World Affairs 21, 29.

[177] International Crisis Group, International Criminal Tribunal for Rwanda: Justice Delayed (2001) p. 21.

[178] Supra n. 141, p. 140.

[179] Supra n.13, preamble, para. 4

[180] Supra n. 141, p. 140.

[181] Ibid.

[182] Hans- Peter Kaul, ' The International Criminal Court: Current Challenges and Perspectives' (2007) 6 Washington University Global Studies Law Review 575, 578.

approval from said country to conduct his investigations.[183] In this regard, Dagmar Stroh, speaking for the ICRY and ICTR said that cooperation of states remains an "indispensable requirement for efficient proceedings."[184] Achieving the arrest and surrender of individuals remains a critical challenge to the Court. While the Court assumes responsibility for the legal aspects of arrest and surrender, it does not have a mandate to execute arrest warrants.[185]

In fact, it's the duty of states to ensure that suspects against whom arrest warrants have been issued are subsequently arrested and surrendered to the Court. The Court is unable to fulfill its mandate without the assistance of states. The Court has received effective cooperation in the arrest and surrender of Thomas Lubanga Dyilo and Jean-Pierre Bemba. Thomas Lubanga was detained within the DRC under national proceedings. His arrest was achieved through cooperation with the territorial state, several State Parties, the Security Council and international organizations. The arrest and surrender of Jean-Pierre Bemba also involved complex cooperation issues.[186]

On 23May 2008, Pre-Trial Chamber III issued a sealed warrant of arrest for Jean- Pierre Bemba, along with a request for provisional arrest to the Kingdom of Belgium. The following day, Bemba was arrested by the Belgian authorities. He was later surrendered and transferred to the Court. The obligations to cooperate with the Court are listed in certain provisions in the Rome Statute. Article 86 provides in part: '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.' In light of the binding nature of the aforesaid provision, state parties are obliged to assist the ICC with any support that it has sought. Cooperation with the ICC includes provisional arrest, and the identification of the whereabouts of the suspects.[187]

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[183] Moses Retselisitsoe Phooko, 'How Effective the International Criminal Court has been: Evaluating the Work and Progress of the International Criminal Court' (2011) 182
Notre Dame Journal of International, Comparative, & Human Rights Law 194.

[184] Dagmar Stroh, 'State Cooperation with the International Criminal Tribunals for the Former Yugoslavia and for Rwanda' (2001) 6 Max Plank Institute for Comparative Public Law
249, 249.

[185] Supra n. 141, p.140.

[186] Supra n. 141, p.140.

[187] Mark S. Ellis, 'The International Criminal Court and its implication for Domestic Law and National Capacity Building' in Mark S. Ellis and Richard J. Goldstone (eds.),

It is rather sad, in this regard, that the African Union (AU) has urged its members, who are also parties to the Rome Statute, not to cooperate with the Court in executing warrants of arrest and surrendering of President Omar Al Bashir.[188]

4.3.2 The AU and the ICC

Is the AU's refusal to cooperate with the Court Justified?

The ICC's involvement in the Africa has elicited mixed reactions. It has been said that the ICC is 'a tool of imperialists pursuing its own brand of justice at the cost of enflaming war and disregarding the interests of victims.'[189] This suggests a presumption that the ICC is a foreign court that was created with the intention of prosecuting only Africa.[190] This is the rationale the AU has used in publicly urging its members not to cooperate with the ICC's regarding the arrest of President Al Bashir of Sudan. Moses Retselisitsoe Phooko argues that since it's clear that atrocities are being committed in Africa, the attacks thus should 'not be on the ICC's involvement in Africa, but rather to encourage it to expand its scope of focus beyond Africa and to other regions where atrocities are also committed.'[191] He articulates this point by arguing that:

International case law has confirmed that genocide and crimes against humanity are violations of jus cogens norms – "overriding norms" that prevail over any other norms. These norms also entail erga omnes duties of states that are obligations not only owed to victims but to all states and the international community as well. Accordingly, all states have a clear obligation that is owed to the international community to prohibit atrocities including arresting President Al Bashir and surrendering him to the ICC.[192]

The International Criminal Court: Challenges to Achieving Justice and Accountability in the 21 ST Century (2008) p. 195.

[188] BBC News Africa, African Union in Rift with Court , July 3, 2009, available at http://news.bbc.co.uk/2/hi/8133925.stm. Retrieved 12 April 2014.

[189] Samar Al-Balushi & Adam Branch, Africa : Africom and the ICC – Enforcing International Justice in Continent ?, allafrica.com, May 27, 2010, available at http://allafrica.com/stories/201005271324.html. Retrieved 12 April 2014

[190] Supra n. 161, p. 197.

[191] Ibid.

[192] Supra n. 161, p. 197

The AU contended that as much AU members that are obliged under the UN Charter to adhere to the United Nations resolutions, they are also bound to comply with the decisions of the AU arising from Article 23 (2) of the Constitutive Act of the African Union which imposes sanctions on member states who fail to comply with the decisions and policies of the AU.

This argument is also mistaken because it fails to acknowledge that when there is a conflict of between the UN Charter and other international agreements, the obligations flowing from the UN Charter prevail. As was found by the International Court of Justice (ICJ) in Libyan Arab Jamahiriya v. United States of America that 'members of the United Nations are obliged to accept and carry out the decisions of the Security Council . . . the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention.

The AU has been too lenient, in my opinion to act against those who commit gross human rights violations in Africa. It has also been too slow to act. Since the AU has so far done nothing to assist the ICC with executing arrest warrants targeting President Al Bashir and other ICC suspects, it is doubtful and highly unlikely that the AU will act against them. Press Release, African Union, Division of Communication and Information, On the Decision of the Pre-Trial Chamber of the ICC informing the UN Security Council and the Assembly of the 4.4 The Challenges of Complementarily and National Capacity Building The concept of complementarity entails a procedural and substantive safeguard against a 'supranational institution curtailing the sovereign rights of nations.'[193]

However, there has been much debate concerning whether gross violations of international humanitarian law should be tried only through international tribunals or whether domestic state courts might undertake that role.[194]

The history of the second half of the Twentieth Century indicates minimal prosecution of violations of humanitarian law by states. The concept of complementarity has certain impacts on states. It will likely push states to retain control over prosecuting nationals charged with violating

[193] Supra n.165, p. 86.

[194] Ibid , p. 87

international humanitarian and Enhancing criminal justice.[195] States will place precedence on domestic jurisdictions over international jurisdiction where they are able to deal with international crimes. States will emphasize that 'primary responsibility for prosecuting international crimes' should remain 'part of the sovereignty of a state.'[196]

State sovereignty is a powerful concept in international law. Therefore, states will be in control of domestic prosecutions unless it is in the benefit of the state to refer the matter to international tribunals. It is almost inconceivable that a state that has a fully functional legal system would not at least investigate accusations of Article 5 crimes.[197]

As a result states will likely effectively pursue domestic prosecution if international crimes so as to avoid triggering the jurisdiction of the ICC and attract international attention for failure to prosecute. However, 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. Why? Well, 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. The ICC is limited in exercising jurisdiction without the consent of a sovereign government that could otherwise jurisdiction on its own. The ICC cannot hear a case when a state has made a decision to act. Thus, under the complementarity regime, the ICC will only have jurisdiction if there is a breakdown in the national system of justice or a state simply fails to act.[198] The ICC does not violate or erode the principle of complementarity.[199] In fact, it is argued that there is little reason to fear the loss of state sovereignty under the principle of complementarity of the Rome Statute.[200] On the contrary, there is very real threat that the ICC will become dormant for the very reason that

[195] Ibid, p. 89
[196] Ibid.
[197] Ibid.
[198] Lori Sinanyan, The International Criminal Court: Why the United States Should Sign the Statute (But Perhaps Wait to Ratify)' (2000)73 Southern California. Law Review
1195.
[199] Government Urged to Ratify International Criminal Court, Australian Law (April 2001), available at http://www.lawcouncil.asn.au/download.html?table=publications&oid=195945, accessed 15 April 2014.
[200] Supra n.165, p. 88.

complementarity shields state from the jurisdiction of the ICC. Even in the event a case is referred to the ICC by the U.N. Security Council for prosecution,[201] the jurisdiction of the Court will be automatically excluded if the state with jurisdiction is willing and able to start the investigation. There is a practice among a number of member states of granting blanket amnesties for perpetrators of gross violations of international humanitarian law. This practice will have to cease for the principle of complementarity to effectively work. In this regard, domestic legislation will have to a prohibition against selective amnesties since such a policy would be difficult to reconcile with the general mandate of the ICC of fighting impunity.

However, this challenge presented by the concept of complementarity can be overcome and even turned into strength. The creation of the ICC drastically increases the role of national courts in undertaking trials of international crimes. Because of the principle of complementarity, the ICC will only have jurisdiction if there is a breakdown in the national justice system or a state simply fails to act. As a consequence, the ICC's impact on domestic laws and national capacity building will be very significant and far-reaching. For the ICC to achieve national capacity building, states have a responsibility to adopt or amend the necessary domestic legislation required to fully cooperate with the ICC.[202]

This involves both substantial and procedural laws. Thus, if states want to retain control over the prosecution of nationals charged with ICC crimes, they must ensure that their national judicial systems meet international standards. The minimum requirements expected of states are to adhere to standards of due process found in international human rights instruments. States will have to be knowledgeable in internationally recognized human rights standards required in the gathering of evidence on behalf of the Court. For the purposes of determining admissibility, the ICC will most likely rely on standards approved by the U.N. General Assembly and found in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the U.N. Standard Minimum Rules for the Treatment of Prisoners, the U.N. Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment, the U.N. Guidelines on the Role of Prosecutors, the U.N Basic Principle on the Independence of the Judiciary and the U.N. Basic Principles on the Role of Lawyers.

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[201] Supra n.13, Art. 13(6).

[202] Ibid, p. 103.

CHAPTER FIVE

5.0 CONCLUSION AND RECOMMENADATIONS

5.1 Conclusion

The Statute creating the International Criminal Court entered into force on 1 July 2002, after having been ratified by 60 States. Today, 121 States from all regions of the world are Parties to this Statute. The ICC has opened investigations on several cases against persons accused of being those most responsible for crimes against humanity, war crimes committed in Uganda, Democratic Republic of Congo, Central African Republic, Kenya, Libya, Cote d'Ivoire, and genocide in Darfur, Sudan. An international criminal court has been called the missing link in the international legal system.[203]

The International Court of Justice at The Hague handles only cases between States, not individuals. Without an international criminal court for dealing with individual responsibility as an enforcement mechanism, acts of genocide and gross violations of human rights often go unpunished.[204]

The ICC was also needed in order to end impunity. The Judgment of the Nuremberg Tribunal stated that "crimes against international law are committed by men, not abstract entities, and only punishing individuals who commit such crimes can the provisions of international law be enforced." This decision established the principle of individual criminal accountability for all who commit such acts as a cornerstone of international criminal law.

The ICC has also been vital in remedying the deficiencies of ad hoc tribunals in enforcing Enhancing criminal justice. Establishment of ad hoc tribunals normally raises the question of selective justice- there has been no war crimes tribunal for the atrocities in Cambodia. The ICC, being a permanent court fills this gap because it can operate in a more consistent way. Setting up an ad hoc tribunal takes time. The delays inherent in setting up an ad hoc tribunal can have several consequences: crucial evidence can deteriorate or be destroyed; perpetrators can disappear or escape; and witnesses can relocate or be intimidated. The International Criminal

[203] United Nations, 'The International Criminal Court: An Overview'in Mark S. Ellis, and Richard J. Goldstone (eds.), The International Criminal Court: Challenges to Achieving Justice and Accountability in the 21 st Century (2008), p. 9.

[204] Ibid, at 118 Nations in 1948 recognizes that the crime of genocide may be committed by constitutionally responsible rulers, public officials or private individuals.

Court has been able to deter future war criminal and violators of international human rights and humanitarian law. Most perpetrators of international crimes throughout history have gone unpunished. In spite of the military tribunals in the wake of the Second World War and the two recent ad hoc international criminal tribunals for the former Yugoslavia and Rwanda, the same holds true for the Twentieth Century. Effective deterrence has been the primary objective of the ICC. The permanent International Criminal Court also has its challenges. It lacks enforcement capabilities to enforce its decisions. Lack of cooperation from States also poses a challenge.

5.2 Recommendations

On the above background I make recommendations to a number of players in the affairs of the ICC in enforcing Enhancing criminal justice. These stakeholders include the Court, the UN Security Council, States Parties, international organizations as well as regional organizations. These stakeholders should:

Include the crime of terrorism in the Rome Statute. In spite of the lack of consensus as to the definition of terrorism in international law, the Statute of the ICC should incorporate terrorism within its scope, due to its relation to human rights. The events of September 11, 2001 have thrown the threat posed by terrorist acts into sharp focus.[205] The Statute of the ICC provides that the Court shall have jurisdiction over persons for "the most serious crimes of international concern."[206] An amendment to include terrorism within its jurisdiction is an urgent and pressing concern. Increase universality of the scope of the Court. Although the ICC Statute has been ratified by any States, efforts to reinforce its universality must be strengthened. Influential States, such as the United States of America, Russia and China have not ratified the Statute. This limitation of its jurisdiction contributes to the misperception that the Court is not impartial, which is unfortunately further reinforced by the fact that all the current ongoing investigations are conducted on the African continent, where serious crimes have indeed been committed. Therefore, more States need to ratify the Statute in order to increase the scope of the Court's jurisdiction.

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[205] The events of 9/11 also highlighted the inefficacy and inefficiency of the existing measures against acts of random or targeted violence.

[206] Supra n.13, Art. 1.

Enhance support of States. States have an obligation to cooperate with the ICC as it does not have its own police force. The Court suffers cruelly from the insufficient cooperation of the States, which weakens its authority and efficiency. In addition to the necessary judicial and technical cooperation, States Parties should provide both political and diplomatic support. They should also refrain from meeting any person upon whom an ICC arrest warrant has been issued.

Enhance support of intergovernmental organizations. Support of the ICC must also be reflected in the priorities of intergovernmental organizations, such as the European Union and the African Union. The latter (of which a very large number of its Member States have ratified the Statute) should also work towards compliance with the Court's decisions, and strengthen complementarity in the prosecution for international crimes.

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Strengthen investigations and prosecutions of the Office of the Prosecutor. The new ICC Prosecutor, Fatou Bensouda, should conduct a critical evaluation of the implementation of, and impact of, policies and practices of the OTP. Accordingly, the policy of limiting the size of the investigation teams should be revised to recruit professional investigators.

Provide support to complementarity efforts at national level. The ICC has jurisdiction when national courts have neither the ability nor the will to genuinely investigate crimes within its jurisdiction and prosecute their perpetrators. As the ICC prosecutes only those most responsible for crimes within its jurisdiction, the implementation of this principle, and the initiation of effective prosecutions at the national level, will effectively help to overcome the "impunity gap".

Strengthen the impact of the ICC on affected communities.
The ICC, based in The Hague, is far removed from situations under investigation and is governed by a unique and very complex legal system. The Court cannot hope to have an impact if it remains little-known, or even misunderstood, especially since it is easily subject to misinformation, a sign that its potential effectiveness is taken seriously. It is therefore essential that the Court maintain and strengthen its outreach activities in the field. 8.

Provide support for the participation and effective representation of victims. The participation of victims in the Court proceedings is a major innovative component of the The UN Security Council should continue to use, in an impartial manner, its power of referral to the ICC. Rome Statute. The aim is to restore to the victims of crimes - who were ignored by the ad hoc Tribunals that only heard them as witnesses - the central position in the new system of international justice, thereby giving it true significance. This element strongly underlines the fact that it would be unthinkable for the ICC to judge mass crimes that offend the conscience of mankind without due consideration being given to the victims of the crimes.

Protect witnesses, victims and intermediaries.

The ICC conducts its investigations in ongoing conflict areas. To facilitate the progress of its proceedings, and also because of limited resources, the ICC uses many intermediaries. The involvement of intermediaries is essential given their access to local populations, their understanding of local languages and context, and the delicate security situation, which enables them to interview victims and witnesses without bringing attention to them. In order to contribute to the protection programme of the ICC, States must sign relocation agreements with the Court, which are often the only possible form of protection considering the context of conflict in the situation countries.

BIBLIOGRAPHY

BOOKS

1. Antonio Cassese , International Criminal Law (2nd ed., 2008)
2. Clare de Than and Edwin Shorts, International Criminal Law and Human Rights(2003).
3. F. Lattanzi and W. Schabas (eds.) Essays on the Rome Statute of the International Criminal Court , Naples: Editorials Scientifica (1999).
4. Ian Brownlie, Principles of Public International Law(5th edition, 1998).
5. Lyal S.Sunga , The Emerging Systems of International Criminal Law: Developments in Codification and Implementation (1997).
6. Madeline Morris, The Jurisdiction of The International Criminal Court over Nationals of Non-party States (1999).
7. Mark S. Ellis, and Richard J. Goldstone (eds.), the International Criminal Court: Challenges to Achieving Justice and Accountability in the 21st Century (2008).
8. M. Cherif Bassiouni, (ed.), International Criminal Law (2nd ed , 2003)
9. M. Cherif Bassiouni , Statute of the International Criminal Court: A Documentary History (1998) Transnational Publishers William A. Schabas, An Introduction to the International Criminal Court (2nd ed, 2004) Cambridge University Press.
10. M. Politi and G. Nesi (eds.), The Rome Statute of the International Criminal Court: A Challenge to Impunity (2001).
11. Naomi Roht-Arriaza, (ed.), Impunity and Human Rights in International Law and Practice(1995).
12. R. Lee (ed.), The International Criminal Court: The Making of The Rome Statute (1999).
13. Robert Cryer, Hakan Friman, Darryl Robinson and Elizabeth Wilmshurst, An Introduction to International Criminal Law and Procedure (2007)Cambridge University Press.
14. Ruth B. Philips, The International Criminal Court Statute: Jurisdiction and Admissibility (1999).
15. William A. Schabas and Nadia Bernaz (eds.), Routledge Handbook of International Criminal Law (2011).

JOURNAL ARTICLES

1. Bartram S .Brown, 'Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals' (1998) 23 Yale Journal of International Law.
2. Dagmar Stroh, 'State Cooperation with the International Criminal Tribunals for theFormer Yugoslavia and for Rwanda' (2001) 6 Max Plank Institute for Comparative Public Law.
3. Ivana Nizich, 'International Tribunals and Their Ability to Provide Adequate Justice: Lessons from the Yugoslav Tribunal' (2001) 7 ILSA Journal of International Comparative Law.
4. James O'Brien, 'The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia' (1993) 87 American Journal on International on International Law Jenia Iontcheva 'Nationalizing International Criminal Law: The International Criminal Court as a Roving Mixed Court' (2004) 52 Chicago Public Law and Theory Working Paper
5. Markus Benzing, 'The Complementarity Regime of the International Criminal Court: International Criminal Justice Between State Sovereignty and the Fight against Impunity' (2003) 7 Max Planck Yearbook of United Nations Law.' Military Tribunal (Nuremberg) Judgment and Sentences', 41 American Journal of International Law.
6. Mirjan Damaska'The International Criminal Court Between Aspiration and Achievement,' (2009) 14 UCLA Journal of International and Foreign Affairs.
7. Moses Retselisitsoe Phooko, 'How Effective the International Criminal Court has been: Evaluating the Work and Progress of the International Criminal Court' (2011) 182
8. Notre Dame Journal of International, Comparative, & Enhancing criminal justice
9. Raphael Lemkin, Genocide- A Modern Crime' (1945) 4 Free World.

PAPERS

1. Francois- Xavier Bangamwabo, International Criminal Justice and the Protection of Human Rights in Africa.
2. Jeremy Sarkin, 'The Role of the International Criminal Court (ICC) in Reducing Massive
3. Human Rights Violations Such as Enforced Disappearances in Africa: Towards Developing Transitional Justice Strategies.
4. Rod Jensen, 'Complementing Complimentarity: The Principle of Complimentarity in the Rome Statute of the International Criminal Court.

MEDIA SOURCES

1. BBC News Africa, African Union in Rift with Court, July 3, 2009, available at http://news.bbc.co.uk/2/hi/8133925.stm, retrieved 12 April 2014.
2. Elizabeth C. Minogue, 'Increasing the Effectiveness of the Security Council's Chapter VII Authority in the Current Situations before the International Criminal Court,' (2008) 61 Vanderbilt Law. Review. p. 674.
3. Government Urged to Ratify International Criminal Court, Australian Law (April 2001), available at http://www.lawcouncil.asn.au/download.html?table=publications&oid=195945 1859, accessed 15 April 2014.
4. Paper on some policy issues before the Office of the Prosecutor, September 2003, para. 2.1, p. 7 ,available at http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905-_Policy_Paper.pdf (visited 11April 2015).
5. Press Release, Security Council, Security Council Refers Situation in Darfur, Sudan, To Prosecutor of International Criminal Court, U.N. Press Release SC/8551 (Mar. 31, 2015) 95 available at http://www.un.org/News/Press/docs/2005/sc8351.doc.htm, retrieved 12 April 2014. Prosecutor's keynote address at the Council for Foreign Relations Symposium, New
6. York, 17 October 2008, p. 3. available at http://www.icc-cpi.int/nr/exeres/3386f5cb-45dc-b66f-17e762f77b1f.htm (visited 11 April 2015)
7. Statement by Luis Moreno Ocampo, Prosecutor of the International Criminal Court, to the U.N. Security Council pursuant to UNSCR 1593 (2005), 5 June 2008, at 2 and 4, available at http://www.icc-cpi.int/exeres/2386f5cb-b2a5-45dc-b66f-

17e762f77b1f.htm. (visited 15 April 2015). http://www.scribd.com/doc/36619566/Press-Release-AU-Bashir-Kenya-Muigwithania-com, retrieved 12 April 2015.

8. Wikipedia, the Free Encyclopedia, 'Genocide,'available at
9. http://www.en.wikipedia.org/wiki/Genocide, retrieved 29 March, 2015.
10. Wikipedia, the Free Encyclopedia, 'War Crime,' available at
11. http://www.en.m.wikipedia.org/wiki//War_crime, retrieved 31 March 2015.

WEBSITES

1. http://www.un.org
2. http://www.icc-cpi.int
3. http://www.en.m.wikipedia.org/wiki//War_crime

OTHER SOURCES:

Unpublished reports.

Anne Kirstine Iversen, Transitional Justice in Northern Uganda, A report on the pursuit of justice in ongoing conflict, International Development Studies, (2009). Report of the Commission of Inquiry into the Disappearances of People in Uganda since the 25th January 1971. (1975), Kampala, 13th June 1975. Report of the Commission of Inquiry into Violations of Human Rights: Findings, Conclusions and Recommendations, Kampala, October 1994.

Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, U.N. GAOR, 54th Sess., Agenda Item 142-43 at 23, 28, 34, 90 U.N. Doc. A/54/634 (1999). Report on Community Perspectives on the Mato Oput Process: A Research Study by the Mato Oput project , October 2009.

Transitional Justice in Northern Uganda, Eastern Uganda and some Parts of West Nile Region, (2008), Report of the Justice Law and Order Sector (JLOS) sponsored study conducted by TERL Limited Uganda Law Reform Commission Study Report on the Reform of Criminal Trial Procedures in Uganda , of June (2008).