THE ICC AND THE CHALLENGES IT FACES IN THE ADMINISTRATION OF INTERNATIONAL JUSTICE
A CASE OF SUDAN

BY

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MARCH, 2016

DECLARATION

I Namirembe Jamirah, declare that this work and study is my own original work. It has neither been published for any other degree to any other university before.

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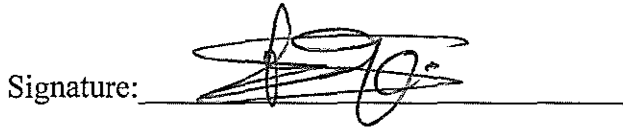
Date: 18th/03/2016.

APPROVAL

I acknowledge that the work presented by Namirembe Jamirah has been under my supervision as a university supervisor and is ready for submission to the school of law of Kampala international university

Signature: 

Date: 18/03/2011

DEDICATION

This work is dedicated to my family most especially my Mother Mrs. Nakaato Hajarah Kyazze, my sisters Kyazze Mariam and Kyazze Sarah and to my brothers Kyazze Salat, Kyazze Luyima Auza and Kyazze Shakah Lumuli and to the family of Mr. and Mrs. Mutesasira Abdul Luuti especially Mutesasira Nahia Mariam. Thanks for the love for we have made it together and you are God sent.

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ABBREVIATIONS

ICC	International Criminal Court
UN	United Nations
HRW	Human Rights Watch
UNSC	United Nations Security Council
ICTR	International Crimal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDP	Internally Displaced Persons
IHL	International Humanitarian Law
LDU	Local Defence Unit
LRA	Lord's Resistance Army
NGO	Non Governmental Organizations
OPCD	Office of Public Council for the Defence
RUF	Revolutionary United Front
SAF	Sudanese Armed Forces
SCSL	Special Court for Sierra Leone
SLM/A	Sudanese Liberation Movement/Army
TRC	Truth and Reconciliation Commission
UPC	Union of Congolese Patriots
UPDF	Uganda People's Defence Forces
ARLPI	Acholi Religious Leaders Peace Initiative
FPLC	Forces Patriotiques Pour La Liberation Du Congo

LIST OF CASES

Military and Para military activities in and against Nicaragua (Nicaragua V USA), merits judgement ICJ Reports 1986, 114

Prosecutor V Akayesu ICTR – 96 – 4 – T

Procesutor V Kambanda ICTR – 9ober 1995)7 – 23 – S

Prosecutor V Tadic ICTY No. IT – 94 – 1 – AR72 (2 Oct

TABLE OF NATIONAL LEGISLATION

The Amnesty Act, Cap 294 Laws of Uganda 2000

The Penal Code Act, Cap 120 Laws of Uganda 2000

TABLE OF LEGISLATIONS FROM OTHER JURISDICTIONS

Truth and Reconciliation Commission Act 2000, (Sierra Leone)

The statute of the special court of Sierra Leone

TABLE OF INTERNATIONAL TREATIES AND OTHER ARRANGEMENTS

Additional protocol of 1977 to the Geneva Conventions 1969

Rome Statute of the International Criminal Court, 1998

The Geneva Convention 1969

The treaty of Versailles 1919

The UN Charter, 1945

The Vienna Convention on the law of Treat 1969

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ABSTRACT

With the establishment of the International Criminal Court (ICC) in 2002, the call for International Criminal Justice has intensified. There has been prosecution of individuals who are suspected of committing genocide, crimes against humanity and war crimes. The referral of cases from Sudan to the ICC have tested its credibility. The most prominent case involves Omar Al Bashir the current president of Sudan. This case has led most African leaders to general consensus of rejecting the jurisdiction of the ICC. Such and many other challenges are an indication that the ICC is facing a lot of challenges in fulfilling its work of administering International Criminal Justice. The challenges it faces can be compared to the international tribunal that it preceded. These include the International Tribunal for Yugoslavia and Tribunal for Rwanda. This dissertation aims at establishing the major challenges facing the administration of international criminal justice and to suggest possible ways to resolve these challenges. The referral to the ICC of Omar Al Bashir the current president of Sudan has been seen as the main point of reference of this Research.

CHAPTER ONE
GENERAL INTRODUCTION

1.0 Introduction

Article 2(4) of the United Nations (UN) Charter prohibits use of force; "in the conduct of warfare, it is pertinent that war should be limited to the otherwise justifiable motives of waging it. Therefore during war civilians and non combatants should not be the target, unnecessary and extensive destruction of property should also be avoided".[1]

Provisions under International humanitarian-law (IHL) regulate the conduct of warfare and provide for the liability of commanders and superiors who disregard that law under Article 35 and 86-7 of additional Protocol 18 (1977); suffice it to say, there is yet to be a situation where those laws have been observed. Criminal liability has been imposed on perpetrators as the case in Nurernberg, Yugoslavia, Rwanda, Sierra Leone and presently the International Criminal Court jurisdiction which is the subject of the present discussion.

The establishment of the Tribunals that preceded by the international criminal court was a means to emphasize that international criminal justice prevails over impunity. Customary law also recognized individual criminal responsibility both in international and non international armed conflicts[2]. This resolve led and foresaw the establishment of the International Criminal Court (ICC).

Article I of the Rome Statute of the International Criminal Court (1998); states that the ICC is a permanent institution with powers to exercise its jurisdiction over persons for the most serious crimes of international concern as provided in the Rome statute and is a complementary to national criminal jurisdiction.

According to the Rome Statute; the establishment of the ICC is seen as a way to achieve justice for all, to end impunity; to help end conflicts, to remedy the deficiencies of ad hoc tribunals, to

[1] Geneva Conventions 1949 and the additional protocals 1977

[2] Prosecutor V Tadic, Decision on the Defence Motion for interlocutory Appeal on Jurisdictions, ICTY No. IT-94-1-AR72 (2 October 1995), Para 66 - 78

take over when national criminal justice institutions are un willing or unable to act and to deter future war criminals.[3]

The Rome Statute which established the ICC was adopted on 17 July, 1998 (Pace W.R, 2008). It came into force upon signing and ratification by 60 States which was realised in 2002. This means it can only deal with crimes that take place after 1 July 2002[4]. It is a also a rule that it can only deal with crimes that take place in a country that has accepted the authority of the court, or crimes that are perpetrated by a citizen of such a country.[5]

The ICC also does exercise jurisdiction in situations where the case is referred to the prosecutor by a state party or by the Security Council acting under chapter VII of the Charter of the UN, and where the prosecutor has initiated investigations.[6]

Crimes of a serious nature under the ICC which are otherwise defined as grave breaches in the Statute include; genocide, war crimes, crimes against humanity and the crime of aggression[7].
The reference of cases to the ICC from some African States has led to the issuance of arrest warrants. Those who have committed grave breaches of laws of international humanitarian law are bearing individual criminal responsibility.[8]

Individuals indicted to the ICC among others include; Joseph Kony and his comrades; Okot Odhiambo, Dominic Ongwen, Vicent Otti and Raska Lukwiya (who were killed). Joseph Kony is a rebel leader from Uganda. Omar Al Hassn Bashir is the President of the Republic of Sudan who was issued with arrest warrants. MP William Ruto, journalist Joshua Arap Sang, the Head of the Civil Service of Kenya Francis Muthaura, and the Deputy Prime Minister Uhuru Kenyatta faced charges of crimes against humanity brought by the ICC at The Hague. They are charged with crimes against humanity that took place in the weeks following the 2007-2008 elections in

[3] Rome Statute of the International Criminal Court, Overview, United Nations 1998 - 1999
[4] Understanding the International Criminal Court. P. 6 produced by public information and Documentation. Section of the ICC. See also Article 11 of the Rome Statute.
[5] Article 12 of the Rome Statute of the International Criminal Court (1998)
[6] Article 13
[7] Article 5 of the Rome Statute 1998.
[8] See The Geneva Conventions. The Core of International Humanitarian Law, available at http: www.icrc.org Web Eng'siteengO.nsChtrnlall/genevaconventions accessed on 10th October 2015.

Kenya. The charges included acts of murder, use of excessive force, and forcible relocation of populations. More than 1,200 people were killed during this time in Kenya, and an additional 600,000 people were forced to flee their homes. Many have not been able to return yet.[9]

In respect to the provisions of international criminal law and international humanitarian law, above mentioned superiors are all suspects because of their direct and indirect participation in the perpetration of the grave breaches above.

In its endeavor to bring peace and put an end to impunity in the world, the ICC operation in Africa is facing jurisdictional challenges which are undermining its credibility. Subsequently, this research endeavors to expose them and provide a way forward for effective observance of the complementary principle.

1.1 Background to the study

After the Second World War with the defeat of Hitler and his allies, the victors came up with the Nuremberg and the Tokyo Tribunals to prosecute the major Nazi and Japanese war criminals. (Seharf, 1998)

The concept of 'never again" was developed. Fifty years ago, the United Nations began work on the project to establish a Permanent International Court.

This was during the December, 9, 1948, when the UN General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide. It called for criminals to he tried "by such internationally penal tribunals as may have jurisdiction." Separately, members asked the International Law commission (ILC) to study the possibility of establishing an International Criminal Court.[10]

The international community in the period of the cold war neglected violators of peace and kept watching dictators commit atrocities in such places as Cambodia, Argentina, East Tirnor,

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[9]Cases. Seehttp://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situations%20index?lanen-GB.htnil. Accessed 10th/10/2015

[10] See History of the Establishment of the International Criminal Court, Mission for the Establishment of Human Rights in Iran (MEHR IRAN), coalition for the international criminal court. Available at http:mehr.org History.htm. accessed on 25 October 2015.

Uganda, Iraq and El Salvador, Radovan Karadzic and Ratko Miadic were encouraged by the world's failure to bring Pol Pot, Idi Amin, and Saddam Hussein to justice for their international crimes. When no arrest warrants were made for those leaders, they acted without fear in committing international crimes.

After the cold war, a tribunal was set up at The Hague to prosecute those responsible for atrocities in the former Yugoslavia. Shortly in April in 1994; a systematic genocide was carried out in Rwanda where about 800,000 members of the Tutsi minority tribe were massacred; this was followed with the tribunal which took responsibility for the commission of war crimes, crimes against humanity set up in Arusha Tanzania. The purpose of the tribunal was to prosecute those who took responsibility in commission of war crimes, crimes against humanity and genocide.

With the creation of the Yugoslavia and Rwanda Tribunals, there was hope that ad hoc tribunals would be set up for crimes against humanity elsewhere in the world. The tribunals, however, were faced with several challenges; the process of reaching agreement on Tribunal's Statute, electing judges; selecting a prosecutor and staff, negotiating headquarters agreements and judicial assistance pacts; and appropriating funds turned out to be too time consuming and exhausting for the members of the Security Council. It became apparent that Rwanda would be the last ad hoc tribunal.

A permanent international criminal court was hailed as the solution to the problems that afflict the ad hoc approach. Ambassador Scheffer told the Senate Foreign Relations Committee on July 23; *"our experience with the establishment and operation of the International Criminal Tribunal for the former Yugoslavia and Rwanda had convinced us of the merit of creating a permanent court that could be more quickly available for investigations and prosecutions and more cost efficient in its operation"*.

On 17 July 1998; a conference of 160 countries decided to set up the International Criminal Court by an agreed document; The Rome Statute. Many of these countries were African. The countries agreed that in some countries, in times of conflict, the national courts might not be able

to deal with such crimes properly or the governments might not be willing to genuinely investigate or prosecute their own citizens; they, therefore, decided that the ICC could try cases if a country was unable or unwilling genuinely to do it itself.

The issuing of arrest warrants to Sudanese President had been opposed by African leaders and seen as an assault on African independence immunity and sovereignty of states[11]. The arrest warrants for Joseph Kony have also been seen as a blockade and a hindrance to the peace process[12]. The defense budget has been a point of complaint. This research therefore analyzes the challenges facing the ICC in implementing International Justice.

Given the fact that State Parties agreed by the statute to put an end to impunity for the perpetrators of these crimes[13]. It is confusing that the moment they seem to be uncooperative. This brings about an unresolved concern of when the ICC should intervene. This research therefore endeavours to point out these jurisdictional challenges the ICC is facing and a probable resolve to them.

1.2 Statement of the Problem.

The need for international justice facilitated the creation of the International Criminal Court; however, with the ICC now in operation, the issue under contention is the possibility that international justice can be achieved. This strong assignment is being tested with African cases before the ICC.

This study will seek to examine the implications of the involvement of the ICC in Sudan, and the plausibility of a withdrawal of the court from the resolution of the conflict in the region. The problem of this study is how to show criminal jurisdictional challenges facing the International Criminal Court in dispensing justice to Africa and giving correct legal redress where appropriate to cases brought before it.

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[11] See hap: www.unhcr.orglrefworldJdocidl49afc4b2.html accessed 15th/Oct/2015
[12] See http: www.enoughproiect.org!publications/what-do-about-joseph-kony accessed 17th/Oct/2015
[13] See Preamble of The Rome, Statute of International Criminal Court 1998.

1.3 Objectives

1.3.1 Main Objective

To examine the relevance of international criminal justice to Africa through the auspice of the ICC.

1.3.2 Specific objectives

i. To point out challenges facing the criminal jurisdiction of the court.

ii. To appreciate the role of international justice system towards conflict resolution through justice dispensation.

iii. To study the history of international justice.

iv. To draw conclusions and propose recommendations for African cases before the international criminal court.

1.4 Research Questions

i. How can international justice help African countries in conflict?

ii. Is the ICC facing jurisdictional challenges in administering justice and what challenges are they?

iii. Are there national means of achieving justice in the countries where the atrocities have been carried out?

iv. Are there any possible recommendations and possible solutions to challenges facing the ICC in Africa?

1.5 Scope of the Study

a. Subject scope

The study is about regulation of conflict in international law (IL) through administering justice to the perpetrators through international criminal law (ICL).

b. Historical Scope

The research will cover the period of the commencement of the ICC Statute up to the present (2002 to December2015).

c. Geographical scope

The research will basically deals with the Sudan before the ICC.

1.6 Chapterization

Chapter one will give the introduction, background to the study, statement of the problem, research questions, scope of the study, chapterization, significance of the study, the research methodology and literature review.

Chapter two will explain international criminal justice under which the researcher elucidates the establishment of the ICC, furthermore, the researcher takes comparison of the past international justice systems like the Nuremberg Tribunal, Tokyo Tribunal, and the international criminal tribunals for Yugoslavia and Rwanda (ICTY and ICTR).

Chapter three expounds on Sudan before the ICC and how it is being handled. The researcher thus analyses Sudan. And tends to give a brief exposure on the possible causes of these conflicts that have given rise to the alleged criminals under international investigation.

Chapter four is a study of the challenges to the criminal jurisdiction of the ICC and the implication of the intervention of the ICC in Sudan.

Chapter five gives conclusion and recommendation.

1.7 Justification for the Study

This study is important in exposing the criminal jurisdictional challenges that the international justice system faces and tries to bring out findings and recommendations which can improve the situation.

It is also important as a tool that can guide the ICC in including aspects of traditional justice of the people of Africa and judging African cases on their own facts.

This study is important at this point where the 1CCs effectiveness is being doubted by many especially in Africa.

1.8 Methodology

The researcher will use qualitative method of gathering information. This will involve analysis of the existing information in relation to solving a problem, she will investigate the why and how of decision making rather than the what, when and where. Through use of available literature, the researcher will carry out a form of an evaluation research on the performance of ICC.

The researcher will use qualitative method because of the nature of the subject under study which will involve scrutinizing existing information. Various articles, documents, commentaries and historical discourses have been herein after discussed.

The researcher will carry out a detailed library search for literature related to the ICC and critically analyze it.

Furthermore, the researcher will undertake a field study; where she will intensely interview several persons, ranging from legal experts and some government officials. Data will be collected through interviews, and recognized websites will be consulted on the internet.

In order to further exposition of the subject, the researcher will collect data from specialized and general libraries in the country, such as, Islamic University in Uganda; Makerere University main library; Iddi Basajabala Memorial Library in Kampala International University, nongovernmental organizations in Uganda, among others.

1.9 Literature Review

The matter at hand is a recent development and therefore there are no substantial publications on it. The available academic discourses written regarding this topic are mainly articles that have not clarified an adequate solution. The researcher tends to analyze some of the available literature on the subject but will subsequently offer what she deems to be the appropriate solution.

Baines and Bradbury in their article; "Peace in Northern Uganda, But whose Justice", note that much as the indictment of Joseph Kony and other LRA colleagues was seen as a progress in international justice; he sees traditional justice and reconciliation as a local necessity which is

however despised by international actors and global experts who find local methods of justice as "infantile", and "lacking credibility." In support of his argument, the researcher will tend to explore more on how traditional justice system can be utilized to complement the international justice system.

Mugwanya[14] presenting an overview of the establishment and accomplishment of the JCTR highlighted the key challenges facing the tribunal. They include; identifying and locating those "most responsible" and bringing to justice many of which have fled to other countries; identifying witnesses many of which are displaced, deceased or unwilling to testify; and engaging with the question as to whether the ICTR is contributing to peace building in Rwanda.

Mugwanya was of the view that the ICTR had a deterrent effect, by providing a measure of accountability and strengthening the rule of law. With the above challenges, much as the ICC was introduced to perform better than the tribunals, the challenges faced by the tribunals are the very challenges that the ICC is likely to face. The researcher will justify how these challenges also affect the ICC.

Pajibo,[15] while acknowledging the importance of the Special Court for Sierra Leone (SCSL), also reflected on the work of Sierra Leone's Truth and Reconciliation Commission (SLTRC) which operates alongside the SCSL, lie however highlighted that the SLTRC cannot grant amnesties for international crimes. This is relevant to the study because the researcher intends to recommend that the truth and reconciliation committees should be encouraged as one if she recommendations.

Kapiamba[16] commenting on the activities of the ICC in the Democratic Republic of Congo (DRC) says that individuals are concerned about the ICC decision to release Thomas Lubanga. Those who cooperated with the ICC's investigation in the case are particularly worried and a

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[14] International Justice in Africa: Prospects and Challenges, Report of Workshop Proceedings. Available at http:www.refugeerigthS.org/PubliCatiofls!2008/WOrk5hOP. Accessed on 22nd/October/2015

[15] Ibid

[16] Ibid

number have fled DRC, fearing retaliation by Lubanga or his supporters. The researcher views it as a challenge where the intended action of the ICC will aggravate impunity.

According to Kapiamba,[17] tile primary challenge to effective international justice in DRC is a multi-dimensional impunity gap.

Chris Dolan[18] presenting on the ICC involvement in Uganda argues that it imposes a foreign conception of justice and has led to a false polarization of the interests of justice and peace. Dolan argues for recognition of the distinction between negative and positive peace, with positive peace characterized by sustainability and ownership if not correctly pursued, international justice could, he argued; undermine the latter.

Dolan recommends that a correct approach to the pursuit of justice involves a negotiated conception of justice characterized by local ownership; which likely involves compromising on the international community's retributive version of justice.

Dolan acknowledged that further to the agreements reached during the accountability and reconciliation phase of the Juba peace process; it is now time for the ICC prosecutor to step back and allow domestic institutions to work. Much as the researcher highly agrees with Dolan but she finds that Dolan does not endeavour to give a detailed explanation of how this should be carried out which the researcher tends to expose in the article, 'International Criminal Court Heading Towards Universality; Chief Judge Philippe Kirsch said

'In Rome, States created a new system of justice where the worst criminals would not be allowed in the sharing of power any longer [and] where the use of massive violence against civilians would neither be rewarded nor forgotten. The Rome system was built upon the lessons learned from the last century when the international community failed to protect entire populations, the lack of arrest can affect the credibility and long-term deterrent impact of the court.[19]

[17]Ibid

[18]Ibid

[19]IniemationaiCriminal Court Heading Towards Universality, says Chief Judge. UN News, November 30, 2007. http:www.globalpolicy.org/intljustice/icc/2007/05iccdock.htm Accessed on 18. October 2015

What the Chief Judge misses out in his statement is how practically effective the worst criminals will be handled. The case of Africa has shown that it is easier said than done as shall be elucidated in this research.

Dowden[20] in his article 'ICC in the Dock', criticises the implementation of international justice in Africa; he looks at the ICTR and the judges and the court that were stationed in Tanzania and they went on embezzlement spree and a traumatized Rwanda was the last thing on their minds. In 13 years at a cost over $1 billion; the Tribunal has only achieved 28 convictions. Though the aforementioned factor may not be very legal; the researcher tends to verify that given the bureaucracy of international justice; a similar trend in the ICC is not far from reality given the Lubanga case.

Dowden further clarifies the fact that in recent times; almost all of Africa's nastiest wars have ended in local deals, victors have shown a reluctance to punish whereas losers have not been excluded but given places in government binding them into the system to prevent future rebellion.

Dowden recommends that if the ICC is going to step into Africa's complex wars; it must understand the local contexts and think through the effect of its actions. Local input and outcomes based on peace and reconciliation must be as close to the heart of the ICC's mission as justice. The researcher will use Dowden's argument to answer the question: whether international justice is the best for Africa.

Gibney[21] commends that the ICC certainly can play an important role in the protection of human rights, but it is essential to recognize the limitations that the court has been placed under. He says the problem is that the court was promoted as providing salvation (of sorts) but then given no police force, slight Security Council support, and an ineffective and seemingly megalomaniacal prosecutor.

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[20] R. Dowden, ICC in the Dock, Prospect Magazine, May 2007. http:www.globalpolicv.org intijustice icc 2007 O5iccdock.htm Accessed on 18. october 2015.

[21] M. Gibney, Human rights and Human Welfare, Round table online journal, Monday, May 4,2009. http:/ www.hrhw.org 2009/0 5/international-criminal-court.html Accessed on 18. October 2015.

The researcher compares this issue with the recent warrant of arrests for Sudanese President Bashir and Joseph Kony of the LRA whose arrests cannot be effected; this imposes an enormous challenge that justice cannot be realized with such a system in place.

Max[22] writing on 'Africa and The International Criminal Court' explains severe limitations placed on the ICC's jurisdictional scheme, both temporally in terms of competence only from I July 2002 as well by the preconditions to the exercise of jurisdiction in the form of territoriality and nationality as the court's jurisdiction being limited to offences that occur on a state's party's territory or which are committed by a state party's national.

Max further explains that the court's powers may out rightly be constrained out of deference to the grant of an internationally acceptable amnesty or pardon; and while the court may in terms of its own statute ignore the official status of a criminal who might otherwise have been afforded immunity under customary international law for the crimes he or she has committed.

Max further submits that the immunity arguably remains in place where the prosecution is attempted before a national court under the complementary scheme of the Rome Statute. He however gives an exposition of challenges facing the ICC but does not give any possible remedies which are advanced in this research.

The Human Rights Report indicates that one of the problems the ICC is facing is the choice of cases: usually, there are various atrocities committed and there is always failure to choose which one to include on the charge sheet. For instance in the case of Lubanga, sufficient evidence was available for crimes against conscription and use of child soldiers, this left out other atrocities, such as murder, rape, destruction of property that were committed in the process.

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[22] Max du Plescis, Africa and the International Criminal Court. Available at http:/!www.csvr.org.zaJwits/confpaps/dupleissis.htm. Accessed on 25th October 2015.

The researcher views this as one of the challenges that the ICC is facing and therefore suggests that an adequate remedy is needed. She suggests that need to use experts such that justice is not denied to the victims of war crimes.

1.9.1 Research constraints

The researcher however has encountered financial challenges considering her status as a student. The research was also done in haste with less than two month to look for and gather information. This however she hopes to improve on if given enough time and adequate funds.

CHAPTER TWO
INTERNATIONAL CRIMINAL JUSTICE

2.0 Introduction

This chapter defines international criminal justice and gives a brief analysis of international tribunals where they have been administered.

Justice Nahamya defines international criminal justice as a generic term for the procedure by which criminal conduct is investigated; arrests are made, evidence gathered, charges brought, defences raised; trials conducted; sentences rendered and punishments carried out by international courts. (Nahamya, 2009)

Examples of international courts include; the Nuremberg and Tokyo tribunals set up by the allied victors after the Second World War, the international criminal tribunal; for former Yugoslavia (ICTY) and in Africa the international criminal tribunal for Rwanda (ICTR) and the special court for Sierra Leone (SCSL), and the international criminal court (ICC).

These Courts have been set up to try those who commit international crimes. International crimes include offences which conventional or customary law either authorize or require states to criminalize, prosecute and or punish. (Orenthicher, 1991)

Malcom regards this as universal jurisdiction where by each states has jurisdiction to try crimes regarded as particularly offensive to the international community as a whole. Traditionally, there were two crimes; piracy and war crimes that could be tried under universal jurisdiction. (Malcom, 1989).

In addition to this universal jurisdiction, international criminal jurisprudence may exercise priority over domestic legal structures, thereby compelling a nation state to commit itself to the process of mandatory criminal prosecution although under its domestic judicial system; criminal prosecution may be subject to the courts' discretion. (Nwodo, 1999).

The essence of international law has always been its ultimate concern for the human being. (Grotius, 1604). The modern world has placed its hopes in internationalism and therein no doubt

its future lies. In an international environment, man's rights now can only be on what is universal, on ideas capable of bringing together men of all races. (Pictet, 1988).

The Nuremberg tribunal pointed out that; 'international law imposes duties and liabilities upon individuals; as well as upon states'. (Shaw, 2001). This was because crimes against international law are committed by men not by abstract entities; and only by punishing individuals who commit such crimes can the provisions of international law be enforced. (Shaw, 2001).

Accordingly, Stigmatizing delinquent leaders through indictment as well as apprehension and prosecution, however undermines their influence. (Weston, and D'Amato, 1980). Even if war time leaders still enjoy popular support among an indoctrinated public at home, exclusion from the international sphere can significantly impede their long-term exercise of power.

Following in the next section, is a brief look at the various tribunals that have been set up to administer international criminal justice.

2.1 The Nuremberg Tribunal 1945

This tribunal was set up to try individuals under the Nazi government who perpetrated crimes of genocide and crimes against humanity. (Weston, and D'Amato, 1980).

Article 6 of the Charter of the International Military Tribunal of 1945 referred to crimes against peace, violations of the law and customs of war; and crimes against humanity as offences within the jurisdiction of the Tribunal for which there was to be individual responsibility. The above article can be regarded as part of international law. (Shaw, 2001).

The Allied powers asserted jurisdiction over the Nazi on a principle of universality; *"hostis humani generi"* literally meaning ("enemy of all mankind"); which posited that certain acts constituted a universal violation of the integrity of all "civilized" nations and were subject to prosecution by any nation, regardless of immediate connection to the act itself. (Shabacker, 199).

During a period of years preceding 8 May 1945 in Germany, all the defendants had committed crimes against humanity, that is, murder, extermination, enslavement deportation, and other inhumane acts against civilian populations; as well as persecutions on political; racial, and religious grounds. This was in all the three countries and territories occupied by the German

armed forces since 1 September 1939; and in Austria, Czechoslovakia, Italy and on the High Seas. (D'Amato, 1947)

All the defendants had formulated and executed a common conspiracy which involved, among other things; the systematic persecution, incarceration and extermination of all who were suspected of being hostile to the Nazi party and all who were suspected of being opposed to the common plan of exterminating the Jews. (D'Amato,1947).

The said crimes against humanity constituted violations of international conventions of internal penal laws and of the general principles of criminal law as derived from the criminal law of all civilized nations. (D'Amato,1947).

In resolution 95(1) of the General Assembly of which was unanimously approved the principles of the United Nations in 1946, the principles of international law recognized by the charter of the Nuremberg Tribunal and the judgment of the Tribunal were expressly confirmed.
In 1968, the General Assembly adopted a convention on the Non-Applicability of Statutory Limitations to war crimes and crimes against humanity. This reinforced the general conviction that war crimes and crimes against humanity, form a distinct category under international law, susceptible to universal jurisdiction. While the Four Geneva 'Red cross' conventions of 1949 also contain provisions for universal jurisdiction over grave breaches, the list was further extended to Additional protocol into the 1949 Geneva Conventions. (Shaw, 2001).

Even though the trial of the victims by the allied powers was meant to be a punishment for Hitler and his officials the Nuremberg trials were therefore a significant step in the formation and administration of international criminal justice. The researcher however finds the differences between the Nuremberg and the ICC jurisdiction different:
Whereas the Nuremberg jurisdiction was seen as victory for administration of justice, the ICC jurisdiction basically arose from cooperation between the host nations to arrest the perpetrators as was the case with Kony and Lubanga.

2.2 The International Criminal Tribunal for Yugoslavia (ICTY)

The Security Council adopted resolution 808 (1993) on 22 February 1993 and this resolution provided that 'an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of former Yugoslavia since 1991. (Shaw, 2009).

The Secretary General of the United Nations (UN) produced a report incorporating a draft statute and commentary which was adopted by the Security Council in resolution 827 (1993) acting under chapter VII of the UN Charter. This allows the council to take decisions binding upon all member states of the UN. (Shaw, 2009).

The Tribunal consists of two trial chambers and an Appeals Chamber, together with the prosecution and a registry servicing both the chambers and the prosecutor.

Articles 2 to 5 of the Statute lay down the crimes with regard to which the Tribunal can exercise jurisdiction. These encompass grave breaches of the Geneva Conventions of 1949 (article 2); violations of the laws or customs of war (including use of weapons calculated to cause unnecessary suffering, wanton destruction of cities, towns and villages; and the plunder of public or private property under article 3; genocide under article 4 and crimes against humanity including murder, extermination, deportation and torture relating to the civilian population under article 5.

Article 6 of the ICTY Statute provides that the tribunal has jurisdiction over natural persons, while article 7 establishes that persons who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of crimes listed in article 2 to 5 shall be individually responsible for the crime. (Shaw, 2001).

Article 6 also provides that the official position of any accused person is not to relieve a person of criminal responsibility nor mitigate punishment while the fact that a subordinate committed the crime and the superior failed to take the necessary and reasonable measures to prevent the acts or to punish the perpetrators there of.

Furthermore, the article stipulates that an accused person who acts pursuant to an order of a government or of a superior will not relieve him of criminal responsibility although this may constitute a mitigating factor if the tribunal determined.

The Appeal Chamber of the Tribunal in the Tadic case (Prosecutor V Tadic ICTY No. IT-94-1-AR72 (2 October 1995) confirmed that customary international law had imposed criminal responsibility for serious violations of humanitarian law governing internal as well as international armed conflicts.

2.3 The International Criminal Tribunal for Rwanda (ICTR).

Following the massacres in Rwanda, an independent and ad hoc commission of experts administered by the Secretary General of the UN and the Security Council along with the Special Rapporteur of the Commission on Human Rights, made the recommendation for the establishment of an ICTR.

Just like the other tribunals, the ICTR was established to prosecute serious violations of international humanitarian law, to sustain law and order, and thereby to contribute to the restoration and maintenance of peace and national reconciliation in Rwanda. (Caroll, 2000)

Derived from its chapter VI powers; the United Nations Security Council created the ICTR as an "international tribunal," specifically bracketing or suspending the jurisdiction over the criminal prosecutions exercised by the national courts of Rwanda. (Caroll, 2000)

In cases involving issues of humanitarian law, the ICTR enjoys "concurrent jurisdiction" with the national courts of Rwanda even though the it maintains jurisdictional primacy over the national courts and can request that the national courts defer jurisdictional authority in any case.[23]

The Rwandan government expressed concerns over the scope of the ICTR's temporal jurisdiction, the administrative and judicial location of the tribunal, and the nature of the

[23] See ICTR Article 8.

prescribed penalties.[24] During the discussion concerning the creation of the ICTR, the Rwandan government fortuitously held one of the nonpermanent positions on the Security Council.[25]

In the debates, the Rwandan delegation argued that limiting the temporal jurisdiction of the tribunal to the period beginning 1 January, 1994 to 31 December, 1994 undermined the ability of the process to designate adequately the perpetrators of the genocide.[26]

The ICTR has apprehended most of the significant leaders implicated in the 1994 genocide against the Tutsi minority such as Theorieste Bagosora, a Defence Ministry Official and major architect of the Tutsi extermination plan as well as Jean Kambanda; prime minister of the 1994 Rwandese Interim government who pleaded guilty to conspiracy to commit genocide.[27]

Jason however, concludes by criticizing the mode of legal practice exercised by the UN in addressing specific regional and national problems as sustained on its own normative ideology and fails to generate a contextually dependant framework or system sensitive to the needs of the subject people(s).[28] This is supported by the fact that in Rwanda, the local courts referred to as the Gacaca have been commended for bringing reconciliation other than the retributive international criminal system.

Akhavan suggests that the ICTY and the ICTR have significantly contributed to peace building in post war societies; as well as to introducing criminal accountability into the culture of international relations. Both institutions have helped to marginalize nationalist political leaders and other forces allied to ethnic war and genocide; to discourage vengeance by victim groups; and to transform criminal justice into an important element of the contemporary international agenda.

[24] J. B. Fink, Deontological Retributivism and The Legal Practice Of International Jurisprudence: The Case Of The International Criminal Tribunal For Rwanda. Journal of African law, Cambridge University Press, vol. 49 No.22005, p. 121.
[25] Ibid.
[26] Ibid.
[27] See Prosecutor v Kambanda, Judgment and Sentence, No. ICTR-97-23-S (Sept 4, 1998). Also see P. Akhavan, op cit iwte 50 at 8.
[28] Ibid.

2.4 The Special Court for Sierra Leone (SCSL)

This arose as a result of a decade of war led by an indigenous rebel group. Although there is a general agreement that crimes in Sierra Leone did not amount to genocide, they did constitute serious violations of the laws and customs of war and crimes against humanity. During the war, more than two million people were forced to leave their homes, collecting in crowded internally displaced person camps around Freetown or in dangerous refugee camps along the volatile Guinean and Liberian boarders[29]

Sexual and gender-based violence was the most reported form of human rights abuse in Sierra Leone. There was also wide spread killing of at least 100,000 people and wide spread use of child soldiers in the rebel groups of about 7,000children, intentional amputation of hands and the feet or arms and legs. The RUF and the AFRC committed most of these crimes.[30]

The rebels and the government entered a peace agreement (Lome) which granted an amnesty for crimes committed by all parties and referred to the establishment of a Truth and Reconciliation Commission (TRC). Despite the UN Special Representative of the Secretary-General present at the signing, he was not a party to the agreement. He later appended a handwritten reservation to the amnesty stating that the UN would not recognize amnesty for international crimes of genocide, crimes against humanity, war crimes and other serious violations of international law.

The TRC was mandated among others to address impunity, to respond to the needs of the victims, to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered.[31] The TRC however, was not a success story leading to the establishment of the Special Court.

The government of Sierra Leone requested the UN Security Council to establish the SCSL to bring and maintain peace and security in Sierra Leone and in the West African sub-region.[32] Unlike the International Tribunal for Yugoslavia and Rwanda, the Special Court was not

[29] Ibid.

[30] See UNICEF, "peace process falters for child soldiers of Sierra Leone," July 2003, available at www.unicef.org/media1media_12200.html. also see T. Periello, ibid.

[31] See Truth and Reconciliation Commission Act 2000, s.6 (1)

[32] See 9. August 2000 letter from the Permanent Representative of Sierra Leone to the UN addressed to the President of the Security Council. U.N. Doc. S/2000/786 (annexed 10 August).

established according to the council's chapter VI authority; but by an international agreement whose negotiations was requested by the Security Council.[33]

The Report of the Secretary General states that the Security Council by its Resolution 1315 (2000) of 14 August 2000 requested the Secretary General to negotiate an agreement with the Sierra Leonean government to create an independent Special Court to prosecute persons who bear the greatest responsibility for the commission of crimes against humanity, war crimes and other serious violations of International humanitarian law, as well as crimes committed under relevant Sierra Leonean law committed within the territory of Sierra Leone.[34]

The inclusion of domestic crimes in the Statute was attributed to various factors; in part it is an attempt to legitimize and revitalize the existing legal system, which many see as complex and inaccessible.[35] It has also been attributed to gaps in international criminal law regarding arson and crimes against girls and an attempt to ground the court in the specific circumstances of the Sierra Leone conflict.[36]

The SCSL is a hybrid court and in theory the prosecutor was to be international and the Deputy to be Sierra Leonean. Until recently; however, the Deputy prosecutor was not in fact Sierra Leonean.

On the bench, they have two trial chambers, each with a Sierra Leonean and international judges. A similar setup was established in the Appeal Chambers. The bench is to uphold the strictest of standards and be impartial, fair and unbiased. No direct connection or interaction exists between the SCSL and the Sierra Leonean Courts.

[33] See Berth K. Dougherty's Interview with David Scheffer, U.S Amabassador for War Crimes (1997- 2001), Washington D.C May 15, 2003, "Right-sizing international criminal justice: the hybrid experiment at the special court for Sierra Leone", International affairs 80, 2. 2004 at 3 18-9. Cited in Tom Perriello, op cit note 80.

[34] See Nahamya, op cit note 41.

[35] D. J Macaluso, "Absolute and Free Pardon: the Effect of the Amnesty Provision in the Lome Peace Agreement on the Jurisdiction of the Special Court for Sierra Leone," Brook. J, Int'l L 347, 2001-2002, at 362.

[36] Jbid see also Article 5 of the Statute of the Special Court of Sierra Leone.

The security endorsed this request upon an understanding that the amnesty provisions of the Lome Agreement would not apply to international crimes.

There is discontent expressed in regard to this court; some fear that the special court is prosecuting too few perpetrators, the "greatest responsibility" standard will allow too many key actors to remain at large and of particular concern in the army.

Some potential indictees have been shielded for political reasons; President Kabbah for instance was not indicted as a defence minister when actually government forces were also responsible for atrocities.[37]

It should be realized that even with the above tribunals in place, there was still a need to set up the ICC. The challenges faced by the international tribunals impose a general challenge in administration of international criminal justice. Hence forth the researcher looks at the basic challenge facing international justice from which the lessons perceived shall be used for the present study.

2.5 Challenging International Criminal Justice: jurisprudential aspects

In the international community there is no overall sovereign authority with the power to make and enforce international law.[38] To this the realists believe international is irrelevant.

The positivists view propounded by John Austin in the nineteenth century, is that law is a sovereign command made effective by the threat of sanction, and given that in the international system there is no sovereign authority to threaten sanction, so international law is not law as such, but rather a form of positive morality.[39]

This tradition has its origins in Hobbes state of nature, where he suggests that since there's no common power, 'there is no law', and that therefore, life is 'solitary, poor, nasty, brutish and

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[37] Ibid.

[38] See Rachel Kerr, The International Criminal Tribunal For The Former Yugoslavia, Exercise in Law, Politics and Diplomacy, Oxford University Press, p 6. available at www.oup.com accessed on November 8, 2015.

[39] See Beck, International Rules, 57. Cited in Rachel, ibid.

short'.[40] International law imposes obligations and operations and operates on the basis of voluntary compliance rather than the threat to coercion.

Natural law doctrine however, was formulated on the doctrine that law is rooted in a set of fundamental principles of right and wrong recognized by all societies, such as the right to life, liberty and property. Natural law scholars argued that the law is based on human reason it is law because it is rational that it should be so and is therefore eternally and universally valid.[41]

Hugo Grotius (1583-1642), the 'father of international law', recognized the independent role of states in formulating international law, but considered natural law to constitute the greater part of any law because outside of the sphere of the law of nature, which is also commonly called the law of nations, there is hardly any law common to all nations.[42]

Grotius drew a distinction between the law of nations, based on the mutual consent of states and the law of nature, which proceeds from humanity. The former is created by treaty and the latter by custom.

According to Higgins,[43] the difference between domestic law and international law lies in the fact that domestic law operates in a vertical legal order, while international law operates in a horizontal legal order. Law is made by sovereign states rather than by one overall sovereign. Thus, the fact that there is no overall sovereign authority does not detract from the status of international law as law.

Thus in the area of international peace and security, however, states agreed to devolve sovereignty to the Security Council to make and enforce law. The relationship between and the Security Council acting under chapter VII is therefore vertical not horizontal.[44]

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[40] See Rachel, ibid.
[41] See Beck, International Rules, 34.
[42] Hugo Grotius, De juTe BellE ac Pacis trans. Francis W.Kelsey, 1925, cited in Beck, International Rules,36.
[43] As cited in Rachel, op. cit note 94.
[44] In respect of the Tribunal, for example, the relationship between states and the tribunal is a vertical one, whereas the relationship between the relationship between the ICC and states is horizontal.

The UN Charter is a legal instrument which sets out the powers and responsibilities of the Security Council. The power and authority of the Security Council and the criteria for application of that power and authority is international law. The acquisition and actual exercise of power and authority is international politics.

The Security Council is not a law enforcement body; however, it is a peace enforcement body. Law enforcement falls within its remit only where the enforcement of law and the maintenance of international peace and security.

2.6 Conclusion

This chapter appreciates the role of International Criminal Court in setting up the various tribunals, however, it should be realized that even with the above tribunals in place, there was still a need to set up the ICC. The challenges faced by the international tribunals impose a general challenge in administration of international criminal justice.

The chapter further analyses the jurisprudential aspects challenging the International justice system. For instance the positivist thinking views international law as not law at all because it lacks sanctions, threat or coercion. Grotius defined the law of nations as based on the mutual consent of states and according to Higgins, law is made by sovereign states rather than by one overall sovereign. Thus, the fact that there is no overall sovereign authority does not detract from the status of international law as law.

The challenge in effecting international criminal justice arises from the absence of a special organ to carry out that purpose. Also, international justice relies much on the cooperation of state parties as provided for in the preamble of the Rome Statute. State cooperation cannot be easily achieved due to domestic intricacies before a state can decide to forward a case to the international court.[45]

[45] See Joseph Kony case.

The subsequent chapter is an analysis of the three African cases before the ICC, Joseph Lubanga, Joseph Kony and Omar el Bashir and the steps taken by ICC and the contracting parties in indicting.

2.7 Recommendations

The lessons for ICC deduced from the administration of international justice in the aforementioned case studies include;

The ICC should deliver justice using national, sub-regional or regional mechanism, such that for the sake of Africa, the ICC can create a strong African constituency for international justice.

The ICC should be in place to appreciate and understand the socio-economic and political contexts that have given rise to commission of such crimes. This study will help when it is time to administer justice.

Furthermore, the ICC should adopt a broad concept of justice that is relevant to victims. Sometimes, the western retributive system may not be the best at a given time.

CHAPTER THREE
CRIMINAL INDICTMENTS

3.0 Introduction

This chapter expounds on Sudan before the international criminal court (ICC) and how it is being handled. The chapter begins with analysis of the composition of the court. The researcher then discusses Sudan and analyses the circumstances under which she was indicted.

In this case the researcher appreciates the on - going proceedings and developments. The purpose of the chapter is to help to discuss the challenges faced by ICC.

3.1 The International Criminal Court (ICC)

The international criminal court governed by the Rome Statute, is the first permanent treaty based; international court established to end impunity for the perpetrators of the most serious crimes of concern to the international community.[46]

The ICC is an independent international organization and is not part of the UN system · It's seat is at The Hague in the Netherlands. The courts expenses are funded primarily by state parties; it also receives voluntary contributions from governments, international organizations; individuals corporations and other entities.[47]

As noted earlier; the introduction of the ICC was not a new development; the idea had been developed long earlier. In the 1990's after the end of the cold war; tribunals like the international criminal tribunal for the former Yugoslavia and for Rwanda were the result of the consensus that impunity was unacceptable. Because they were established to try crimes committed only within a specified time frame and during a specific conflict; there was a general agreement that an independent permanent court was needed.

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[46] About the court available at http://www.icc.int/Menus/Icc/About+the+Court accessed November 2nd 2015

[47] Part XII (article 113 – 118) of the Rome Statute

On 17 July 1998, 120 states adopted the Rome Statute, the legal basis for establishing the ICC. The Rome Statute entered into force on 1 July 2002 after ratification by 60 countries.
The ICC tries persons accused of the most serious concern to the international concern, namely genocide, crimes against humanity and war crimes.[48]

The ICC is a court of a last resort. It will not act if a case is investigated or prosecuted by a national judicial system unless the national proceedings are not genuine; for example; if formal proceedings were undertaken solely to shield a person for criminal responsibility; and those accused of gravest crimes[49]

3.2 Sudan Indictment before the ICC

3.2.1. SUDAN

Sudan, the largest country on the African continent; has been ravaged by civil war for the nearly forty years; it has been an independent nation. The country has an extremely diverse cultural and religious makeup. Approximately forty percent of the country's people are classified as Arab; while the remaining sixty percent are African. Roughly sixty percent of the country is Muslim, but there are over 600 ethnic groups and over 100 languages spoken in the country.

The current crisis in the western Sudanese province of Darfur provides another instance in which the international community was called upon to choose among existing accountability mechanisms. On September 9, 2004; Secretary of State Cohn Powell proclaimed that genocide had been taking place in Sudan and that the government of Khartoum; known as the National Islamic Front (NIF); along with government-sponsored Arab militias; called the Jarijaweed; *"bear responsibility"* for rapes, killings, and other abuses that have left over a million Sudanese homeless[50]. Prompted in part by the U.S. declaration of genocide; the Security Council adopted Resolution 1564 calling for an international investigation into reports of genocide and crimes against humanity in the province.' The subsequently created commission issued a report that

[48] See article 5 of the Rome Statute
[49] Ibid, articles 13 and 15
[50] The crisis in Darfur: testimony before the s.foreign relations comm., 108th cong.(2004) (statement jof colin l. powell, secretary, us. Dep't of state), available at http://www.state.gov/secretary/former/powell/remarks/36042.htm(on file with the Columbia law review). Accessed on 18th Nov, 2015

resulted in an Article 13(b) Security Council referral of the case to the ICC the first such referral in history. (Robert 2003)

Given the alleged involvement of the Sudanese government in the mass atrocities;[51] the brokered peace agreements indicating that the current regime will remain in power; and the apparent control of the judiciary by the military government; the ICC seems perfectly situated to handle the crimes arising under its jurisdiction. Yet, the complementarily principles of the Rome Statute and the lack of adequate transitional justice assurances associated with purely international tribunals may call for a variation on the traditionally conceived ICC framework. Such a framework; however, must have a legal basis in the Rome Statute. It must also be capable of addressing the inadequacies of an entirely Hague- based prosecution[52].

This research advocates the implementation of a hybrid system, involving the Sudanese legal community and overseen by the ICC in an effort to ensure that the domestic rule of law in Sudan is strengthened. This dual system would reap the benefits of a purely domestic prosecution; invaluable in international criminal accountability while maintaining the impartiality of a purely international mechanism. More importantly; it will serve as a means of promoting the protection of individual rights and the creation of a lasting peace.

Furthermore, this research provides a general description of the gross violations of international humanitarian law being perpetrated in Darfur; the conflict in Darfur; which erupted in February of 2003; has produced what the United Nations is calling one of the world's worst humanitarian disasters[53].Although numbers may be an inadequate way of measuring the magnitude of a conflict; the numbers are the most powerful means of conveying the horror suffered by the people of the region since the war began. Between 1.45 and 1.6 million people have been internally displaced; close to 200,000 have moved into neighboring Chad; over 70,000 have died; thousands have been raped; and hundreds of thousands of villages have been looted; burned, or bombarded by aerial raids. The last two years have been characterized by terrifying

[51] See Commission of Inquiry Report.
[52] Article 3 of the Rome Statute
[53] See Hilary Andersson, Screams of Sudan's Starving Refugees,BBC News (world ed.);June 26,2004, available at http://www.bbc.co.uk/2/hi/programmes/from-our-correspondent/3840 427.stm(on file with the Columbia Law Review);

attacks; destruction of whole villages, gang rapes, forced sexual servitude; abduction, arbitrary killings, and displacements[54].

The Sudanese government is currently fighting wars on two major fronts. The predominant conflict; commonly referred to as the north- south divide; involves a rebel movement; known as the Sudanese People's Liberation Movement/Army (SPLM/A) ; and the government of Sudan. This war divides the Arab-Muslims to the north, where Sudan's vast resources and policymaking are guided by the Khartoum government; and the African Christians and animists to the south, who remain excluded from power sharing and are ignored by the government. The second conflict; the war in the Darfur region; is analogous in that it involves a rebel faction fighting against individuals contracted by the Sudanese government; but it is distinguishable in that the Sudanese government in Darfur has been directly implicated in harming and displacing innocent civilians on a massive scale.

Ethnic violence began to affect the Darfur region as early as the 1980s. In 1986; the government of Sudan armed Arab militias to fight against rebel forces. After helping the government defeat the rebels; some Arab groups took it upon themselves to continue attacking civilian populations including the Zagawa, Massalit, and Fur tribes. These militia groups launched a campaign resulting in the destruction of close to 600 non-Arab villages and the deaths of roughly 3,000 people. The government encouraged the formation of an *"Arab alliance"* in order to prevent tribes of black Africans from revolting once more. When the current president of Sudan; General Omar al-Bashir; seized power in 1989; he forcibly disarmed all of the non-Arab ethnic groups while allowing politically loyal Arabs to keep their arms.

In 2002, Kenyan peace negotiations in the north-south conflict; under the administration of the Intergovernmental Authority on Development; officially opened in Naivasha. Simultaneously, in the Western region of Darfur; federated rebel groups; the Sudan Liberation Movement/Army and the Justice Equality Movement (JEM); declared an insurgence against the Sudanese government. The government responded with counterattacks in which the Janjaweed were charged with brutalizing and displacing innocent civilians in the region.

[54] See Commission of Inquiry Report,Supra note 20 at 3

Intelligence gathered by Human Rights Watch; Amnesty International, various international news agencies; as well as branches of the United Nations and the U.S. State Department; indicates that the Sudanese government bears direct responsibility for mass atrocities perpetrated by the Janjaweed militia alongside the Sudanese military in Darfur. After conducting interviews with victims and investigators in the region; Human Rights Watch concluded that "the government of Sudan is responsible for 'ethnic cleansing' and crimes against humanity in Darfur."[55] Amnesty International drew similar conclusions and described the situation by stating:

> *"The government of Sudan responded [to rebel attacks in Dar- fur] by allowing free rein to Arab militias known as the Janjawid [also spelled Janjaweed] . . . who began attacking villages, killing, raping and abducting people, destroying homes and other property. . . . At times government troops also attacked villages alongside the Janjawid, and government aircraft have been bombing villages sometimes just before Janjawid attacks, suggesting that these were coordinated. The links between the Sudanese armed forces and the Janjawid are incontrovertible[56]"*

Similar conclusions have been drawn by international news organizations. The New York Times, quoting U.S. Ambassador to the U.N. John C. Danforth reported: *"The rebels and the government and the militia all Sides are complicit in the disaster."*(Warren Hoge 2004). A BBC correspondent echoed the report of this involvement in a firsthand account of the situation: *"To watch the officials and the police of a state like Sudan which has just signed a peace agreement demolihing people's shacks under the eyes of international observer[s] and breaching international law, is quite extraordinary and unique[57]."*

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[55] Human rights watch , Darfur Destroyed: Ethnic Cleansing by Government and Militia Forces in Western Sudan 1(May 2004), available at http://hrw.org/reports/2004/Sudan 0504/Sudan0504full.pdf(on file with the Columbia law review). Accessed 2nd December 2015

[56] Amnesty int'l sudan crisis-background, available at http://web .amnestry.org/pages/sdn-background-eng on file with the Columbia law review).Accessed 2nd December 2015

[57] Eyewitness: terror in darfur, BBCnews (U.K.ed) nov.10.2004, available at https://news.bbc.co.uk/1/hi/world/africa/4000705.stm(on file with the Columbia law review). Accessed 2nd December 2015

These independent findings are supported by data gathered by preliminary U.N. reports as well as a document compiled by the U.S. State Department. A recent U.N. news wire reported that attacks on civilians; sexual violations; hostage taking; and other violations in Darfur were being perpetrated *"by all parties; including the Government of Sudan; rebel groups and the Janjaweed militias*[58]*."* Similarly, a report used by former Secretary of State Cohn Powell to testify before the Senate Foreign Relations Committee described the mass atrocities being committed in Sudan as "*genocide*" and implicated the government directly in the atrocities
In describing the wave of devastation civilians have endured; the report described a multistage process with government acting at each stage.

By contrast; regime change in Sudan is unlikely given the negotiation strategies taken by the United Nations to ensure peace in the country; along with the heavy economic investments that powerful world actors; including veto-bearing members of the Security Council; have in the region. Jan Pronk, the Secretary General`s special representive to United Nations announced resolution to the north-south conflict in Sudan was the key to setting the stage for peace in Darfur. Calling peace in the south a "*sine qua non*" for a resolution to the Darfur crisis; he emphasized that the peace talks between the SLM, JEM, and the Khartoum government in N'Djamena would proceed swiftly once a peace agreement in the south was secured[59]. At a subsequent meeting of the Security Council; the potential role a north-south agreement could have for resolving the situation in Darfur was also emphasized.(UN Doc. SC/8249 (Nov, 19, 2004)

The U.N. role in securing peace in Sudan both in the north-south conflict and in the Darfur situation seems to be aimed primarily at the short-term goal of establishing peace and security in the region. Based on the negotiation tactics U.N. officials have used in N'Djamena and in Naivasha; it seems clear that providing methods of accountability for members of the government is a secondary concern. The negotiation tactics imply that the international

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[58] UNnews service,tensions rise in sudan as rebels and government begin to lose control, UN.says, UN news centre, nov. 4, 2004, at http://www.un,org/apps/news/story.asp? NewsID=12445&Cr]=(on file with the Columbia law review).Accessed on 2rd December 2015

[59] The Secretary-General, Report of the Secretary-General on Sudan pursuant to paragraph 15 of Security Council Resolution 1564 (2004) and paragraph 6,13, and 16 of Security Council Resolution 1556(2004).45,delivered to the Security Council,UN.Doc.s/2004/787 2nd December 2015

community is willing to allow the government of Sudan to remain largely intact as the country moves toward peace.

In addition; the countries of the world most capable of instituting a humanitarian intervention seem unwilling to do so. Three of the five permanent Security Council members are *"heavily invested in [the] Sudanese oil sector."* Four of the five members are currently brokering arms deals with the current government. Finally, each of the five permanent members still has a strong interest in promoting state sovereignty. Instituting regime change; when such a change is not directly linked to the economy or security of a major world actor; is an unlikely event in the current global atmosphere.

While the international community has proven itself unwilling to remove the regime responsible for perpetrating these gross violations of human rights; it has also refused to let those responsible go unpunished. Despite the positioning of the veto-bearing members of the Security Council with respect to Sudan; the Council shocked the international community by referring the Darfur crisis to the ICC, (UN Doc. S/RES/ 1593, 2005). In order to ensure the long term goals of upholding the rule of law in Sudan and promoting future judiciaries' enforcement of international human rights norms; the ICC should carefully consider all of the possible methods for conducting these trials; including involvement of the Sudanese legal system itself.

3.2.2.1 Significance of Sudan indictment

Sudan as a non state party does not recognize the jurisdiction of the ICC and she is therefore not in a position to effect any arrests of the suspects.

If Bashir is brought to trial and arrested; he faces maximum sentence of life imprisonment.[60]
The lack of supervisory army for the ICC means that the ICC has no capacity to arrest Bashir and thus relies on the cooperation and willingness of state parties. The warrant could discourage possibility of peace deals in Darfur and lead to continued violence.

[60] Article 77(1)(b) of Rome Statute

3.3 Conclusion

Hence forth the criminal jurisdiction of the ICC is affected by the aforementioned issues. The question to be asked is whether international justice is appropriate for these cases arising from Africa. Secondly, whether there should be resolve for peace other than justice or that peace should be sought first and justice later on.

The Sudan indictments aforementioned reveal that international justice is not yet very welcome on the African continent.

This is what makes the relevancy of this study; the ICC and challenges faced by ICC in implementing International Justice.

3.4 Recommendations

The ICC should be accommodative to the role played by traditional means of justice especially when peace cannot easily be achieved through justice. The ICC should give opportunity to the concern of local justice and at most amend some of its procedure so as to be an instrument of peace.

Furthermore, the ICC should adopt a broad concept of justice that is relevant to victims. Sometimes, the western retributive system may not be the best at a given time.

The ICC should be cautious and should employ well qualified prosecutors in the area of criminal law such that when selecting charges sufficient evidence is gathered; other than having a case being thrown for being insufficient arising from prosecutions' inadequacies.

The ICC needs to have a proper method and means of effecting arrest of the perpetrators other than relying on the willingness of state parties; which most if not all times; do not have the capacity to effect these arrests.

The ICC should be in place to appreciate and understand the socio-economic and political contexts that have given rise to commission of such crimes. This study will help when it is time to administer justice.

CHAPTER FOUR

CHALLENGES FACED BY ICC IN IMPLEMENTING INTERNATIONAL JUSTICE

4.0 Introduction

This chapter shows the major challenges faced by International Criminal Court in Bashir case. It describes the fact that if the court is to gain credibility from the masses, then it has to resolve issues in regard to peace versus justice, amnesty, uncooperative states, lack of its own force, witnesses, nature of evidence required, issues of complementarity and the timing of the ICC activities. The court will also have to prove itself that it is not a political tool as how it is being viewed presently as targeting African leaders.

When Justice Nsereko was being interviewed for his job at the ICC about the possible challenges that the court would face, he was in a position to outline the following;[61]

"Credibility of the court in the eyes of the skeptics. The handling of the relations between the court and those states that are not only non-parties but are also hostile to the court. Securing the co-operation of state parties and others in having court's processes executed.
The enormity and complexity of the cases that will come before the court.
Meeting the expectations of thousands of victims through the implementation of the victim-participation scheme under the Rome Statute. The challenge arises out of a sheer number of victims that may be involved in a "situation" or "case" and the court's duty to determine their eligibility for participation, the modalities of participation, and maintaining the balance between their rights on the one hand and the interests of the accused and the public at large to a fair, impartial, and efficient trial, on the other."

The researcher therefore elaborates on the particular challenges facing the criminal jurisdiction of the court.

[61] See Questionnaire to ICC Judicial Candidates, 2007 Elections, Coalition for the International Criminal Court (CICC). Available at http://www.iccnow.org/documents/Nserekopuestionnairel.pdf accessed 21 December, 2015.

4.1 Major challenges

4.1.1 Peace versus Justice

This issue is of concern when considering which of the above options should prevail over the other. It is clear that the main purpose of the court is to offer justice; however, situations where there is a compromise for peace brings the role of the court in jeopardy.

According to Chris Dolan,[62] the ICC involvement in Sudan imposes a foreign conception of justice and has led to a false polarization of the interests of justice and peace. With this he argues that the ICC prosecutor to step back and allow domestic institutions to work. The ICC offers retributive justice against local desire for restorative justice; this is seen as a concept of the western mode of justice system which undermines the African mode of resolving conflict.

Firstly, is the argument "no peace without justice." Here it is argued that atrocities committed in the past must imperatively be dealt with in order to build sustainable peace.[63] According to Archbishop Desmond Tutu of South Africa:

Experience world-wide shows that if you do not deal with a dark past such as ours, effectively look the beast in the eye, that beast is not going to lie down quietly; it is going, as sure as anything, to come back and haunt you horrendously. (Desmond, 1996)

Secondly, the case contributes to peace on a global level by boosting the credibility and effectiveness of the ICC. The ICC faced serious difficulties in the years after its creation due to U.S hostility and a complete lack of cases.

Much as it can be seen that the case will test the credibility of the ICC and that the influence of the indictments has led to such developments, however the challenge still remains that as long as there is no compromise by government over the indictments, Bashir will remain at large. The issue is whether the ICC can waive the indictments for the sake of peace.

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[62] See International Justice in Africa: Prospects and Challenges. Report of Workshop Proceedings 17 July 2008. Available at http://www.refugee-rights.org/Publications/2008/Workshop accessed on Dec 15. 2015.

[63] See http://www.nnwi.org accessed on 17, Dec, 2015.

4.1.2 Co-operation by states not party to Rome Statute

According to international law and the 1969 Vienna convention, an international treaty does not create obligations to non party members without their consent
(pacta tertiis nec nocent nec prosunt).[64] The cooperation of non party states with the ICC is envisioned by the Rome Statute of the ICC to be of voluntary nature.[65]

Wenqi[66] argues that even states that have not acceded to the Rome Statute might still be subjects to an obligation to co-operate with ICC in certain cases. For instance, when a case is referred to the ICC by the UN Security Council, all UN member states are obliged to co-operate, since its decisions are binding for all of them.[67]

Also there• is an obligation to respect and ensure respect for international humanitarian law (IHL), which stems from the Geneva Conventions and Additional Protocol I,[68] which reflect the absolute nature of IHL.[69] Although the wording of the conventions might not be precise as to what steps have to be taken, it has been argued that it at least requires non-party states to make an effort not to block actions of ICC in response to serious violations of those conventions.[70]

Article 99 of the Rome Statute provides that..... In relation to co-operation in investigation and evidence gathering, it is implied from the Rome Statute[71] that the consent of a non-party state is a prerequisite for ICC prosecutor to conduct an investigation within its territory; and it seems that

[64] See Article 34 Vienna Convention on the Law of Treaties 1969.

[65] Article 85 (5) (a) of Rome Statute.

[66] Zhu Wenqi. "On Co-operation by states not party to the ICC." International Review of the Red Cross, no. 861 (2006), p. 87-110.

[67] Article 25 of the UN Charter.

[68] Article 89 of Additional Protocol 1(1977) to the Geneva Conventions.

[69] Military and Para Military activities in and against Nicaragua (Nicaragua v USA), Merits, Judgment, ICJ Reports 1986, p. 114, Para. 220.

[70] See Zhu Wengi, op. cit note 196.

[71] Article 99 of Rome Statute.

it is even more necessary for him to observe any reasonable conditions raised by that state, since such restrictions exist for states party to the statute.[72]

Taking into account the experience of the ICTY (which worked with the principle of primacy, instead of complementarity), some scholars have expressed their pessimism as to the possibility of ICC to obtain cooperation of non-party states.[73]

As for the actions that ICC can take towards non-party states that do not cooperate, the Rome Statute stipulates that the court may inform the Assembly of States Parties or Security Council, when the matter was referred by it, when non- party state refuses to co-operate after it has entered into an ad hoc arrangement or an agreement with the court.[74]

How the ICC will resolve for instance the boycott of African leaders towards its indictment of president Bashir still remains a point of concern as well as a challenge. This may necessitate the ICC to take a tougher stand since most of the African states are party to the Rome Statute.

4.1.3 Amnesties and national reconciliations

Amnesty is the act of a sovereign officially forgiving certain classes of persons who are subject to trial but have not been convicted.[75]

The Rome statute allows the Security Council to prevent the court from investigating or prosecuting a case,[76] and article 53 allows the prosecutor the discretion not to initiate an investigation if he or she believes that "an investigation would not serve the interests of justice.[77] Does this imply it supports amnesties?

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[72] Wengi, 2006

[73] Ibid.

[74] Article 87 (5) Rome Statute.

[75] Blacks Law Dictionary 93 (8th ed. 2004).

[76] Rome Statute article 16.

[77] Ibid, article 53.

According to Justice Nahamya,[78] international law should prosecute particular crimes, particularly genocides, crimes against humanity, war crimes, and crimes incorporated with those categories.

Amnesties also violate the victims' rights of justice, truth, judicial protection, reparations, and access to a court under international law.[79] Also Kleffner argues that third parties are not bound to respect amnesties or pardons concerning the core crimes of the statute and could therefore prosecute offenders under the principal of universality.[80]

Arguing against amnesty, the Defence of the Special Court for Sierra Leone (SCSL) submitted in Prosecutor v Morris Kallon, Brima Bazzy Kamara:[81]
'Whatever the effect the amnesty granted in the Lome Agreement may have on a prosecution for such crimes as are contained in Article 224 in the national courts of Sierra Leone it is ineffective in removing the universal jurisdiction to prosecute persons accused of such crimes that other states have by written letter of the crimes. It is also ineffective in depriving an international court such as the Special Court of jurisdiction'.

Uganda[82] as well as DRC,[83] have enacted Amnesty law. In Uganda the amnesty act is in conflict with t he Rome Statute. For example it provides that;
'...amnesty' means a pardon, forgiveness, exemptions or discharge from criminal prosecution or any other form of punishment by the state,..[84]

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[78] Nahamya, op. cit note 84.

[79] Slye, 2002, The Legitimacy of Amnesties Under International Law and General Principles of Anglo- American Law: Is a Legitimate Amnesty Possible?, 43 Va. 3. Int'l L. 173, 192-197 (2002).

[80] Kleffner, 2003, The Impact of Complementarity on National Implementation of Substantive Criminal Law, 1 JICJ (2003) 86 at 107.

[81] 13 March 2004. cited in Nahamya, op cit note 208.

[82] See Chapter 294, Laws of Uganda 2000.

[83] An enactment on 12. July 2008, see International Justice in Africa: Prospects and Challenges. Report of Workshop Proceedings 17 July 2008, available at http://www.refugee rights.org/Publications/2008/Workshop accessed 20 Dec 2015.

[84] See Chapter 294, section 1(a)

Section 2 also provides that;

...An amnesty is declared in respect of 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 furtherance of the war or armed rebellion; or ... assisting or aiding the conduct or prosecution of the war or armed rebellion ... person referred to ... 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.[85]

Since the Rome Statute is not bound by the Amnesty Act, it can proceed with the prosecution despite the pardon granted by the government[86].

According to Philippe Kirsch, former ICC president, "some limited amnesties may be compatible" with a country's obligation genuinely to investigate or prosecute under the statute.[87]

4.1.4 4 Complementarity

Article 17 of the Rome Statute states that .... the ICC is a court of last resort and that states have a duty to exercise criminal jurisdiction. If they are unable or unwilling to do so, then the ICC may get involved.[88] With respect to this principle, can local mechanisms of justice including non-judicial systems — work in concert with the process undertaken by the ICC?[89]

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[85] Ibid, section 2,

[86] T. Allen, Trial Justice: The International Criminal Court and the Lord's Resistance Army, Zed Books, London 2006, p. 90.

[87] A. Dworkin, The International Criminal Court: An End to Impunity? Crimes of War Project, December 2003 available on http://www.crimesofwar.org/archive/archive-iustice.html. Accessed on 20 Dec 2015.

[88] See article 17 Rome Statute.

[89] See J. B. Kroc, "The Relationship between International Criminal Justice and Conflict Resolution: Focus on the ICC", A working meeting, Institute for Peace and Justice, University of San Diego, December 12-13, 2005. Available at http://www.sandieeo.edu/peacestudies/documents accessed on 20 Dec, 2015.

This situation is rather puzzling in regard to for example the Sudan people whose traditional systems of justice may not resemble western ideas of adjudication since they are not punitive in nature.[90]

A question considered was whether such traditional systems of justice can be considered to fulfill the criterion of complementarity in light of the work of the ICC.[91]

Complementarity seems to apply in cases where the alternative systems of justice contain a punitive element. It thus suggests that, a system must incorporate a criminal prosecution and this system must be written into law. For example the Gacaca courts in Rwanda involve punishment and therefore complementarity could apply, meaning that the ICC would respect the mode of justice and not take up the case.[92]

The ICC though might argue that it has only indicted single accused cases and that indigenous systems can work in concert with the ICC to try lesser cases, can use traditional processes and the amnesty law to reconcile and reintegrate into their communities.[93]

There is a need for the ICC to involve and appreciate the national means of justice and reconciliation and not to always align them to the western notion of justice.

4.1.5 Evidence and Witnesses

Under article 54 of the Rome Statute, the ICC has a duty to investigate both inculpatory and exculpatory matters. It cannot just later disclose exculpatory material. Prosecutors have the duty to present evidence of a "unique investigating opportunity" to the pre-trial chamber. There are also clear protocols with regard to handling witnesses and the accused. This approach is very

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[90] Ibid.

[91] Ibid.

[92] Ibid.

[93] Ibid

restrictive and critical.[94] A vivid example is the case of Thomas Lubanga. His case was stayed and he was about to be acquitted of all charges due to procedural irregularities in gathering evidence. The judges called into question the prosecution's use of article 54 (3) (e) of the Rome Statute which provides; The Prosecutor may:

> *e) — "Agree not to disclose, at any stage of the proceedings, documents or information that the prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents".*

According to the Judges, the prosecution's general approach has been to use the article to obtain a wide range of materials under the cloak of confidentiality, and then to identify from these materials evidence to be used at the trial. This has required the prosecution to seek consent from the information providers for each piece of evidence they wish to use or must disclose, and has proved a cumbersome and unworkable system.[95]

In the view of the chamber, this is the exact opposite of the proper use of the provision, which is to allow the prosecution to receive such confidential information or documents on an exceptional not routine basis.[96]

The chamber has maintained that, in accordance with article 67(2)[97] of the Statute; the disclosure of exculpatory evidence in the possession of the prosecution is a fundamental aspect of the accused's right to a fair trial. At the time of the decision to stay the proceedings, there was no

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[94] See colloquium of Prosecutors of international Criminal Tribunals on "The Challenges of International Criminal Tribunals on "The Challenges of International Criminal Justice." Available at http://www.ictr.orgJENGLISH/colloguiumO4/reports/final-report.pdf accessed Dec 20, 2015.

[95] See Stay of Proceedings in the Thomas Lubanga Dyilo case. Coalition of International Criminal Court. Available at http://www.iccnow.org accessed Dec 20, 2015

[96] Ibid.

[97] The section provides; "In addition to any other disclosure provided for in this statute, the prosecutor
shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the court shall decide."

agreement with the UN to allow disclosure of confidential documents to the chamber of the defence. Therefore the chamber halted the trial proceedings because it deemed the possibility of a fair trial to be in jeopardy.

This standard requirement is rather strict and favours the alleged criminals to the detriment of the victims. These regulations should be softened for the prosecution; otherwise most alleged criminals will go scot free.

Furthermore, the choice of crimes for the indictees charge sheet is often un satisfactory. The requirement that prosecution should have sufficient evidence; Most times all the crimes under the statute have been committed but evidence available (especially witnesses) are but a few. This imposes a challenge in that most crimes are left out of the charge sheet.

Suffice it to say that as Justice Nsereko admitted the challenge with the victim participation arises out of the sheer number of victims that may be involved in a "situation" or "case" and the court's duty to determine their eligibility for participation and maintaining the balance between their rights on the one hand and the interests of the accused and the public at large to a fair, impartial, and efficient trial on the other.

4.1.6 No Armed force of its own

The ICC has got no force of its own; therefore it lies on the willingness of a state party or state parties to effect the arrests. The case of Bashir illustrates this. The arrest of Bashir has become challenging to the ICC because of a lack of armed force to effect the warrants of arrest. For instance when Bashir was to attend a conference in Uganda, the ICC prosecutor stated clearly that Uganda has an obligation as a state party to arrest Bashir.[98] This however seems a loose talk especially after the African leaders unanimously resolved not to cooperate with the ICC in Libya.[99]

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[98] H. Mukasa, Arrest Bashir, ICC Asks Uganda, The New Vision Tuesday, July 14, 2009, p 1.

[99] ibid.

Lack of a distinguished force to effect arrest leads to miscarriage of justice and renders the body to a barking dog without teeth to bite.

Important to note is the fact that most of the member states to Rome Statute have signed but not ratified the Statute into their local legislation. For instance Uganda ratified the Statute but has not yet had an Act of parliament, which means the police force has no law under which it can affect arrests on persons accused of committing crimes provided for in the Rome Statute.

4.2 Conclusion

The challenges exposed in this discussion leave the position of the ICC undetermined. The fact that states agreed upon to an international court which ought to be impartial, they should not render its work impossible.

4.3 Recommendations

The ICC should be given room to carry out justice, though this form of justice should be seen as a way of bringing peace. The challenges realized do far need to be revised and worked upon for improved justice delivery.

The Rome Statute should be incorporated into the local legislative sphere for full ratification. This will enable the states to have good grounds to prosecute persons who are alleged to have committed international crimes as provided for in the Rome Statute.

The Amnesty Acts of different state parties should be amended to reconcile with the Rome Statute to avoid conflict between the two.

National judicial systems should be strengthened considerably such that they gain trust from the ICC. They should be equipped with the required expertise into criminal law.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.0 Introduction

This chapter gives a summary of conclusions and recommendations. The research is divided into four main chapters. Each chapter has its specific conclusions and recommendations.

5.1 Conclusions

This research endeavored to explore the field of international criminal justice under the auspice of the ICC; Informational regarding to international justice are hence forth assessed in the chapters. Below is a conclusive over view of every chapter.

Chapter one is an introductory mark and it appreciates the fact that there has been a general realization of discontent and misconception towards the international justice system and in this regard there is a need to explore on the use of this which formed the basis for the research; challenges facing the criminal jurisdiction of the international criminal court.

Chapter two focused on international criminal justice, the experience that befell the world in the Second World War that led to the establishment of the Nuremberg and Tokyo tribunals, was the world's realization of the need for International justice though this has been viewed as victor's justice.

Less than fifty years later the world faced the most egregious atrocities committed in Rwanda and the former Yugoslavia. This led to the establishment of the ICTY and ICTR respectively.

Taking note of Akhavan, the ICTY and ICTR have significantly contributed to peace building in post war societies, as well as to introducing criminal accountability into the culture of international relations. Both institutions have helped to marginalize nationalist political leaders and other forces allied to ethnic war and genocide, to discourage vengeance by victim groups,

and to transform criminal justice into an important element of the contemporary international agenda.

It should be realized that even with the above tribunals in place, there was still a need to set up the ICC. The challenges faced by the international tribunals impose a general challenge in administration of international criminal justice.

The chapter further analysed the jurisprudential aspects challenging the international justice system; the positivist thinking views international law as not law at all because it lacks sanctions, threat or coercion.

Grotius defined the law of nations as based on the mutual consent of states and according to Higgins, law is made by sovereign states, rather than by one overall sovereign. Thus, the fact that there is no overall sovereign authority does not detract from the status of international law as law.

The chapter clarified that the challenge in effecting international criminal justice arises from the absence of a special organ to carry out that purpose. Also, International justice relies much on the cooperation of state parties as provided in the preamble of the Rome Statute. State cooperation cannot be easily eyed due to domestic intricacies before a state can decide to forward a case to International court.

Chapter three looked at the criminal indictments; it expounds on Sudan's case before the ICC at Hague and how it is being handled.

The chapter also discussed the indictment for President Omar El Bashir, it being the first warrant of arrest for a sitting president; he is criminally responsible as an indirect co-perpetrator for war crimes on civilian population m Darfur.

The case presents a shift of presidential immunity whereby the sitting heads of te can now be prosecuted for heinous crimes. This however has received massive and general protest from Russia and China, permanent members of the Security Council, and from African leaders who

approved a resolution to abstain from cooperation with the ICC, as well demonstrations from his statesmen and women.

Sudan as non state party does not recognize the jurisdiction of the ICC and she is therefore not in a position to effect any arrests of the suspects. The lack of supervisory army for the ICC means that the ICC has no capacity to arrest Bashir and thus relies on the cooperation and willingness of the states. The warrant could discourage the possibility of a peace deal in Darfur and lead continued violence.

The question to be asked is whether international justice is appropriate.
Secondly, whether there should be resolve for peace other than justice or that peace should be sought first and justice later on.

The Omar Al Bashir case reveals that international justice is not yet very welcome on the African continent. Bashir's indictment is heavily opposed by African leaders and there is a public outcry for it to be dropped.

Chapter four shows the major challenges faced by the ICC in Sudan's Omar Al Bashir It depicts the fact that if the court is to gain credibility from the masses, then it has to resolve issues in regard to peace versus justice, amnesty, un cooperative states, lack of its own force, witnesses, nature of evidence required, issues of Complementarity and the timing of the ICC activities. The court will also have to prove itself that it is not a political tool as how it is being viewed presently as geting African leaders.

The challenges exposed above leave the position of the ICC undetermined. The fact that states agreed upon to an international court which ought to be impartial, they should not render its work impossible.

The ICC should be given room to carry out justice though this form of justice should be seen as a way of bringing peace. The above challenges need to be revised and worked upon for improved justice delivery.

5.2 Recommendations

Though the ICC faces several challenges, the relevance of the court in promoting international justice should not be ignored or understated. Henceforth the researcher would like to make the following recommendations;

The Rome Statute should be incorporated into the local legislative sphere for full ratification. This will enable the states to have good grounds to prosecute persons who are allegd to have committed international crimes as provided for in the Rome Statute.

The Amnesty Acts of different state parties should be amended to reconcile with the Rome Statute to avoid conflict between the two.

National judicial systems should be strengthened considerably such that they gain trust from the ICC. They should be equipped with the required expertise into criminal law.

International criminal justice should be involved in university curricula. This can create awareness among the academia which can be a considerable step in resolving future conflict.

More so, international justice system must promote a consciousness of the importance of international courts even among populations far removed from the kinds of conflicts examined by the ICC.

The ICC should be accommodative to the role played by traditional means of Justice especially when peace can not easily be achieved through justice. The ICC should give opportunity to the concern of local justice and at most amend some of its procedure so as to be an instrument of peace.

Furthermore, the ICC should adopt a broad concept of justice that is relevant to victims. Sometimes, the western retributive system may not be the best at a given time.

The ICC should be cautious and should employ well qualified prosecutors in the area of criminal law such that when selecting charges sufficient evidence is gathered; other than having a case being thrown for being insufficient arising from prosecutions' inadequacies.

The ICC needs to have a proper method and means of effecting arrest of the perpetrators other than relying on the willingness of state parties which most if not all times do not have the capacity to effect these arrests.

The ICC should be in place to appreciate and understand the socio-economic and political contexts that have given rise to commission of such crimes. This study will help when it is time to administer justice.

There is a proposal that the ICC should deliver justice using national, sub regional or regional mechanism, such that for the sake of Africa, the ICC can create a strong African constituency for international justice.

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