The International Criminal Court and its Role in Conflict Resolution: The Emperor’s New Clothes

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Q: Can the International Criminal Court prevent or resolve conflicts?

Abstract

The International Criminal Court (ICC) is the biggest achievement in the international sphere since the creation of the United Nations. But even in its teething years, the Court is in the spotlight and the time has come to prove its mettle. The test case is Darfur, Sudan, which was referred to the Court under United Nations Security Council Resolution 1593. Several legal and academic observers have commented that the ICC needs Darfur more than Darfur needs the Court. Who needs whom and to what extent is a debate for another paper. This is a discussion and a critical analysis of the role of the International Criminal Court; not just in international criminal law but the larger geopolitical international sphere. With the ICC looking at ‘serious’ human rights violations in situations of ongoing conflicts- Sudan, Uganda, Congo- this essay is speculating if the Court is assuming a far bigger role than what the draughtsmen had envisaged- that of conflict resolution or even conflict management; especially in the face of the changing nature of global security. Within these parameters, the issues addressed here will include whether the Court can handle the task of conflict resolution and prevention within its legal framework or is the Court being made a scapegoat by the UN and the international community to show that they are “doing something” when peace is threatened. Is it a case where the ICC is being garbed in the emperor’s new clothes?
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“If you want peace, work for justice”

-Pope John Paul VI

1.1 Introduction

July 17th 1998, when 120 States voted to adopt the Rome Statute (hereafter the Statute) of the International Criminal Court (hereafter the Court or ICC), was a giant leap for human rights, peace, security and most of all justice. The Court has been vested with the power to try and punish the most serious human rights violations in cases when the national justice systems are unable to do so. United Nations (UN) Secretary General Kofi Annan called it the gift of hope for future generations.\(^1\) There are obvious and inevitable doubts and concerns about the simplicity that encapsulates the Court and its Statute. The ICC has not merely been vested with the power to uphold human rights but the emphasis may be more on peace, security and justice and significantly on \textit{peace with justice}\(^2\). Renowned legal scholars, such as Cherif Bassiouni, see the ICC as the answer to the vast tragedies of the 20\(^{th}\) century.\(^3\) It does seem like the Court is being expected to provide answers to the many tragedies and contemporary conflicts of the world. Taking an empirical scrutiny at the cases before the ICC- Darfur, Congo, Uganda- the court is entering unchartered waters for international criminal law. The issue is not whether these unchartered waters are dangerous but that perhaps such an exploration is futile. Because unlike previous

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internationally established investigatory committees and ad hoc tribunals for Yugoslavia and Rwanda, where the committee or tribunal was setup towards the end of the conflict, the cases under the investigation of the ICC are situations of ongoing conflicts. To qualify these ongoing conflicts a little more; these are situations of internal or non-international conflicts where international criminal law is premature to say the least. This makes the task laid before the Court more difficult. The international legal giant will not only be faced with serving justice but decisions and judgments made by the Court may affect the course of the conflict raising concerns over peace and stability in these areas thus, perhaps, bartering away justice for political settlements in the name of peace and stability.\(^4\) It may seem premature to scrutinise and analyse the Court at such an early stage but nevertheless a forward-looking and cautious analysis into the politics of the Court is not impossible.

The first section of this paper will briefly look into the creation of the International Criminal Court and the events that led up to that achievement. Following an understanding of the contemporary conflict scenario, the essay will delve into the cases being handled by the Court to critically infer whether the ICC is a solution or a mere scapegoat to the problem. This analysis will also require that the paper dissect the Statute that lays the foundation to the Court. A scrutiny of the Statute will reveal the flaws and shortcomings that tie the hands of the Court from even trying and punishing serious

\(^4\) Cherif Bassiouni, in several of his papers (1996, 1999, 2003), has attributed the absence of an international criminal system for most of the tragedies of the 20th century and also for the lack of prosecutions because he saw national systems bartering justice for peace. Now this paper analyses that very dilemma faced by the ICC.
human rights violations let alone provide solutions and cures to conflict situations. This essay is not a battering on the ICC but perhaps a forecast of the storm ahead.

2.1 The Creation of the International Criminal Court

Together with the development of the law of armed conflict in the 19th century, there also emerged concepts of international prosecution for humanitarian abuses. One of the first recommendations for a draft statute for an international criminal court was made in the 1860s. Its aim was to prosecute breaches of the Geneva Conventions of 1864 and other humanitarian norms. But Gustav Monnier’s, one of the founders of the Red Cross movement, idea was too radical for its times. The idea attained fruition only in Nuremberg after World War II. The events that led to Nuremberg and the trials themselves laid the groundwork for the ICC. Significantly, it was at the London Conference convened between the four major Allies - the United Kingdom, France, the United States and the Soviet Union - that laid the foundation for the prosecutions at Nuremberg. On August 8th 1945, the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis and the Charter of the International Military Tribunal were adopted. Interestingly the Nazi criminals were charged with genocide but since the term did not appear within the provisions of the Tribunal’s Statute, they were convicted of crimes against humanity. This was a significant moment in the Nuremberg trials not because the Nazis were prosecuted but because international law was ready to take the next step. In the next three years the United Nations General Assembly adopted the Convention for the Prevention and Punishment of the Crime of Genocide. But more

5 William A. Schabas, Introduction to the International Criminal Court, Cambridge: Cambridge University Press 2004
6 Ibid, pg.7
than the widening of the scope of international law, it is Article VI of the Convention that laid the path towards the formation of the International Criminal Court. An early draft of the Genocide Convention had even included a model statute for a court but again being too radical for its times, the drafters stopped short of drafting such an institution. But the idea was not completely swept under the carpet. Instead the UN General Assembly resolution called upon the International Law Commission (hereafter the Commission), a body of experts named by the UN General Assembly and charged with the codification and progressive development of international law, to prepare the statute of the court promised by Article VI of the Genocide Convention.

Over four decades later, in 1994, the Commission submitted the final draft statute for an International Criminal Court to the UN General Assembly. In the next couple of years, the Commission adopted the final draft of its Code of Crimes against the Peace and Security of Mankind. The 1994 draft statute and the 1996 draft code played crucial roles in the preparation of the Statute of the Court. In 1994 itself, the UN General Assembly pushed ahead with the aim to create an international criminal court. The most interesting aspect of the drafting of the ICC statute is that the most provisions in the Statute are results of years of debates between States. The compromises may be visible but the enthusiasm exhibited by States and other non-State actors to participate was undeniable and astonishing. And in 1998, in Rome, things came to a boil. At the Conference,  

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7 Article VI of the Convention for the Prevention and Punishment of the Crime of Genocide- Persons charged with genocide or any of the other acts enumerated in Article 3 shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.  
8 In 1995, the United Nations General Assembly decided to convene a Preparatory Committee, PrepCom as it came to be called, inviting Member States, NGOs and various other international organisations to participate.
working groups were formed to discuss, debate and form a consensus on matters such as
general principles, procedure and penalties. Though it would have seemed daunting to get
a two-thirds majority, on July 17th 1998- the concluding day of the Conference- the
result was 120 in favour with 21 abstentions and seven votes against. Close to four years
later, the required sixty ratifications were in bringing the Statute into force from July 1st
2002.9

However, these technicalities do not explain the need and enthusiasm for the creation of
the Court but it definitely indicates an underlying need for a court. From the formation of
the League of Nations, from whose ashes, came the United Nations, the overriding desire
has been to rid this world of the scourge of war.10 Several other conventions, bilateral and
multilateral treaties are all attempts at eliminating elements of war and violence. It all
seems to be measures at criminalising everything short of illegalising war itself. And now
the ICC is another step in the same direction. Precedents set by the Nuremberg trials and
the many pledges of “never again” are evidently insufficient to lift the scourge of war
from this world. The 20th century has seen a decline in the number of wars between States
but conflicts within States has increased. Between 1946- 2001, there have been 225
armed conflicts of which 34 were active in all or in part in 2001.11 Internal conflicts do
not mean that international human rights laws are not being broken. Within the
international legal premise, international conflicts are adequately covered under the four

9 William A. Schabas, Introduction to the International Criminal Court, Cambridge: Cambridge University
Press 2004
10 The first pledge in the Preamble to the United Nations is “…to save future generations from the scourge
of war…”. There is also a similar recognition of the threat of the grave crimes- as outlined in Article 5 of
the Statute of the ICC- to the peace, security and well- being of the world.
11 Nils Peter Gleditsch, Peter Wallensteen, Mikael Eriksson, Margareta Sollenberg and Havard Strand,
Geneva Conventions of 1949 and Protocol I of 1977 but non-international conflicts are less bound by these instruments. Nevertheless, the most serious violations—genocide, crimes against humanity, war crimes, extra-judicial executions, torture—of fundamental human rights have occurred and fall within the provisions of the Conventions and Protocol irrespective of the legal nature of the conflict. However, for the high levels of serious violations, there have been a negligible number of prosecutions at the national or international level. Accountability and justice has been and is being traded off for stability, peace and an end to violence that is no doubt questionable as a means to an end. But the question remains—although a speculative one—as to whether the Court will be just another agency of impunity or will the ICC be able to lift the curse of violence and conflict from this world. And if the ICC can resolve conflicts, the larger concern would be on the issue of deterrence because as Plato said over 2500 years ago:

…When anyone makes use of his reason in inflicting punishment, he punishes not on account of the fault that is past, for no one can bring it about that what has been done may not have been done, but on account of a fault to come in order that the person punished may not commit the fault, that his punishment may restrain from similar acts those persons who witness the punishment.

2.2 Looking at Preliminary Evidence: Darfur, Uganda and Congo

2.2.1 DARFUR

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Since the Statute entered into force on July 1st 2002, the Court has quite a heap on its plate. But the most significant case has been the United Nation’s referral of the Darfur case to the Court. A UN referral is one of the trigger mechanisms\(^{14}\) enabling the Court to exercise its jurisdiction with respect to a crime as enlisted in Article 5 of the Statute. But this mechanism has always been suspect as is the “negotiated” relationship of the Court with the UN because in accordance to Article 16 of the Statute, the UN Security Council can stay an investigation of the Court for a renewable period of 12 months under Chapter VII of the UN Charter.\(^{15}\) It has been one year in March 2006 since the UN referred the Darfur case to the ICC under resolution 1593. It would be too early and unfair on the ICC to pass a judgment on the slow progress, rather lack of progress, on this case. But it is not for lack of want for progress than the loopholes sewn into the Statute that is putting up obstacles before the ICC. As independent as the Court was created to be, it is only a complementary body to national courts and respective judicial systems. The provision of complementarity\(^{16}\) is like an obstacle course as the ICC proceeds with investigations against serious violations of human rights in Sudan. The deputy prosecutor of the ICC made this situation clear when he said in a recent interview that “If the government of Sudan is prosecuting the same cases as we are, and prosecuting them genuinely, of course, the ICC will take the backseat. The ICC is not a court of first instance, but one which comes in only when the state that is responsible is either unable or unwilling to prosecute those crimes”\(^{17}\). A Special Court for Darfur has been setup by Khartoum but it is struggling in vain to try Sudanese officials for war crimes. However, this does not stop

\(^{14}\) Article 13 of the Statute states the trigger mechanisms of the Court


\(^{16}\) Article 1 of the Statute states that the Court shall be complementary to national criminal jurisdiction.

the court from investigating a referral. But none of this has stopped the carnage and
bloodbath that erupted in 2003. Nothing could better describe that the UN and anything
associated with it has no teeth than the ICC Prosecutor, Luis Moreno- Ocampo’s address
to the UN Security Council in December 2005. Speaking on Darfur, the Prosecutor said:

“We are monitoring the ongoing violence (emphasis added)… The impact of these
crimes on the delivery of humanitarian assistance and efforts to secure peace and
stability in Darfur has been recently highlighted in the November report of the UN
Secretary General on Darfur… I encourage national and international
organisations suffering such attacks to take steps to record and preserve
information and evidence and to provide these materials to us.”18

It is evident from the Prosecutor’s address that the Court is a body to monitor and
investigate before it can try and punish. There seems to be no mention of concern for
the continuing conflict as the Court waits, watches and monitors for acts of serious
violations of human rights to be committed. This is not to say that the Court is a futile
legal institution but that the ICC has not been given teeth enough to manage or
resolve conflicts even if it wanted to. On the other hand from a legal point of view, in
criminal cases, the function of settling conflicts recedes at the expense of the task of
upholding conformity with the laws.19

18 Address by Luis Moreno- Ocampo, Prosecutor of the ICC, to the UN Security Council, 13 December
2005
Conformity with the laws is not as simplistic as it seems especially in the Ugandan case. To put the Ugandan case in legal context, here is just a brief outline of the conflict. The armed conflict in Northern Uganda between the Lord’s Resistance Army (LRA) and the Ugandan government is just one of Africa’s longest running. This internal conflict, which has lasted nearly two decades, has witnessed serious war crimes that are of concern to the international community as a whole. But thirsting for peace and “the expressed desire of the people of Uganda to end armed hostilities”\textsuperscript{20}, the Ugandan government, since 2000, has expressed its willingness to grant amnesty to the LRA rebels and its leader Joseph Kony for its heinous atrocities, if they renounced the rebellion. Unsatisfied with the results of the amnesty, the Ugandan government has referred the case to the ICC in 2004, which has since been investigating war crimes there. And in September 27th 2005, the Court issued its first-ever arrest warrant for Joseph Kony and several other of the top brass of the LRA. If it seems like the ICC is smooth sailing here, it is only going to have a rough ride henceforth. With the domestic Amnesty Law hanging heavy over this case, several academicians have argued that the ICC’s efforts to attain justice through prosecution while peace still eludes the country risks achieving neither justice nor peace. Concerns also arise over whether such immunity from prosecution to any rebel who renounces and abandons involvement in an armed rebellion can be a bar to

\textsuperscript{20} Preamble to the Amnesty Act 2000
prosecution by the ICC. The nuances of amnesties will be explored further when the essay analyses the Statute of the Court in a later section.

The underlying concern for the Ugandans is to keep the amnesty alive, especially, for the sake of a conflict with no end in sight. The continuing conflict in Uganda, as in the case of Darfur, is a reiteration of the Court’s insufficiencies in dealing with cases of preserving or even serving justice in situations of ongoing conflicts. The crucial question is how to reconcile the amnesty with the prosecution by the ICC. The situation could not have been made clearer by the Acholi leaders of northern Uganda during their visit to The Hague in March 2005:

“Arising from these meetings, the Prosecutor has been asked to address the following: that he is mindful of our traditional justice and reconciliation process, that he is mindful of our peace process and dialogue, that is why he is continually assessing the situation, that whoever has already benefited from the amnesty will not be investigated or prosecuted.”

This statement is just one indication of the significance of political processes—peace negotiations and dialogues—in the functioning of the ICC, especially in situations of ongoing conflicts given the fragility of the situation. Even non-governmental organisations (NGOs), that played a crucial part in the creation of the Court, are

cautious about its role in conflict prevention. Though they believe that the ICC can help deter ongoing atrocities, end cycles of violence and restore the rule of law; civil society actors are not unaware of the further violence and disruption to a peace process that the Court’s action could cause.23

2.2.3 DEMOCRATIC REPUBLIC OF CONGO

The Court’s actions are also crucial in the case of the Democratic Republic of Congo (hereafter DRC or Congo). DRC was the first case the Prosecutor of the ICC, Luis Moreno-Ocampo, said his office had selected as the most urgent situation to be followed on July 16th 2003. Less than a year later, following a referral from the Congolese authorities, DRC became the focus of the ICC’s first investigation. If the Court needs Darfur and Uganda to prove its legitimacy and usefulness, then it needs DRC more. And not only has the court issued an arrest warrant, the suspect, Thomas Lubanga, is also in its custody. It may be a small cookie point for the Court but definitely an optimistic one if nothing more. The Court is under immense pressure to produce results in Lubanga’s case. Defence is already challenging the circumstances of the arrest, claiming the Lubanga has been deprived of liberty since August 2003 when he was brought to Kinshasa to attend the peace talks. The provisional lawyer, Jean Flamme, further alleged that since his arrest in 2005, Lubanga has been kept incarcerated for approximately one year without having rights, access to any trial and without being informed of any of the charges against him. The heavy consequences of delays in sending an accused for trial have haunted international jurisdictions since the appeals chamber of the UN Rwanda tribunal decided

in 1999 that a top accused should be released because he had been held for eleven months in "illegal custody under the tribunal's authority" and had to wait several more months before appearing before a judge in Arusha. The decision concerning Jean Bosco Barayagwiza, former leader of a Rwandan Hutu extremist party and founder of the infamous radio RTLM, was later reversed by the appeals chamber.

Another significant and unprecedented aspect of the Congo trials is that victims will play an important official role in the proceedings. The Statute does provide for victims to be represented by their own lawyer where they can argue for compensation, for instance, at the end of the case. But the trial chamber in the DRC case ruled in January 2006 that six victims can be represented in court during the investigations, although the exact role they would play in terms of assisting the chamber is still being worked out.24 Observers are not only seeing these developments as the growing role of the victims in international human rights and humanitarian laws but also the shaping of rules in practice. But none of these developments, in far away Hague, has stopped rebel groups from continuing their operations in eastern DRC.25 As is evident in the Darfur and Ugandan cases, the ICC can do little, if nothing, to stop or ease a conflict.

3.1 The Rome Statute: Does it help the Court in preventing or Resolving Conflicts

It might be too early to pass a judgment on any of the cases currently before the ICC. However, as the analysis into each of the cases showed, the Court is faced with a

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Herculean task. At this juncture, a scrutiny of the Statute of the ICC will reveal the strengths and weaknesses of its functioning within ongoing conflict situations. From the various and real situations presented above, it is evident that each conflict is different and thus their resolutions or solutions are necessarily different. But law is not selective and provides for a general, rather a one-size approach to situations that fall within its ambit. For the sake of not foreclosing this discussion, reservations of one-size-fits-all approach shall not be made here.

3.1.1 Waiting for the Act to be Committed:
The ICC is concerned with “the most serious crimes of concern to the international community as a whole”. Falling within the realm of serious crimes of concern, as stated in Article 5 of the Statute, are (a) The crime of genocide (b) Crimes against humanity (c) War crimes (d) The crime of aggression. All four crimes have been prosecuted, perhaps in a rather embryonic form, by the Nuremberg International Military Tribunal (IMT) and other post-war courts (emphasis added). It is Article 5(1)(d) that is the real sleeper in the Court’s subject-matter jurisdiction. While the Plenipotentiaries at the Rome Conference were able to agree that the crime of aggression should be part of the Court’s subject-matter jurisdiction, they could not come to a consensus on either the definition or the mechanism for judicial determination of whether or not the crime had actually occurred.26 And in accordance with Articles 121 and 123 of the Statute, the crime of aggression is still being given shape. At the PrepCom, several States advocated to adopt the definition

26 William A. Schabas, Introduction to the International Criminal Court, Cambridge: Cambridge University Press 2004
laid out by a UN General Assembly Resolution 3314 in 1974 in the wake of Vietnam. It states that

"Aggression is the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations, as set out in this definition." 27

Even before 1974, individuals were held criminally responsible for waging a war of aggression at the Nuremberg trials. The IMT stated in no uncertain terms that waging a war of aggression “is not only an international crime; it is the supreme international crime differing only from the other war crimes in that it contains within itself the accumulated evil of the whole”. 28 Though the crime of aggression, as Justice Robert H Jackson said, “is the greatest menace of our times”, the question of determining whether the crime has been committed or not is a political issue. The ICC, the UN and Member States need to look back at the IMT for support in this matter. In its judgment for the trial of German Major war criminals, the Nuremberg Court “looked closely at some of the events which preceded the acts of aggression”. 29 It can be argued here the IMT was a court established by the victorious allies and so there was no debate about whether the defeated were aggressive or not. Though shrouded in victor’s justice, it cannot be denied that the Nuremberg Court was acting independently as it was prosecuting individuals not States. Going further back in time,

27 http://jurist.law.pitt.edu/3314.htm
28 See the judgment of the IMT for the trial of German Major War Criminals http://www.yale.edu/lawweb/avalon/imt/proc/judnazi.htm#common
29 Ibid.
there is sufficient legal support not to be thrown into disarray about the crime of aggression. The principle of an unjustifiable war can be traced back to the Briand-Kellogg Pact of 1928 in which the signatories renounced war between nations. In the Geneva Protocol of 1924 for the Pacific Settlement of International Disputes, parties to the Protocol declared that a “war of aggression…constitutes an international crime”. The crime of aggression is already an evolving principle that the ICC needs to take a few steps further. Though within the realm of unstable and ever-changing geopolitics, giving the ICC the power to determine independently before trying and punishing an act of a crime of aggression, especially in a situation of ongoing conflict, can give the Court the capacity to intervene in a conflict way before the atrocities may be committed. I would argue here that jurisdiction over the crime of aggression is essential as a conflict prevention tool for the Court. Though the elements of this crime are yet to be established and the Statute has not set out any hierarchy to the crimes within the Court’s jurisdiction, it is the crime of aggression that can lead to genocide, war crimes and crimes against humanity. Without a consensus on the crime of aggression, the Court may be handicapped in preventing or even managing conflicts if it has to wait for grave breaches of human rights to occur to even be able to consider an investigation.

Even with crimes that have been well-defined under the Court’s jurisdiction, compromises have been made. With respect to war crimes States at the Rome Conference made a convenient compromise. The gravest restriction on the Court’s jurisdiction is the “opt-out” clause. According to this provision as stated in Article 124 of the Statute,
States that become party to the Statute may declare that they will not accept the Court’s jurisdiction with regard to war crimes for a period of seven years after the entry into force of the Statute. Regarding the “opt-out” clause, opinions vary from detrimental to a positive outlook that a limited restriction of the Court’s jurisdiction is better than no jurisdiction at all, as currently is the situation with the crime of aggression. Another window left open is mens rea - the mental element. With the help of this provision, persons convened before the Court can allege ignorance, unintentional behaviour or the existence of circumstances precluding wrongfulness in order to be relieved of individual criminal responsibility. Article 30 of the Statute insists on the clause “intent and knowledge” while committing the act. And the grounds for excluding criminal responsibility are identified by Articles 31 to 33. But with significant and sufficient evidence to the contrary, evasion of criminal culpability will not always be the case.

Evasion of criminal culpability is of more concern in the case of conflicts of an internal or non-international nature. Several intensive academic explorations into the changing nature of conflicts has revealed that internal conflicts have been the dominant form of conflicts in the post-World War II period and certainly since the late 1950s. Existing norms of international law are inadequate to deal with atrocities committed in internal armed conflicts. The only provision with the ICC Statute that explicitly deals with internal conflicts is Article 8 that enumerates the elements of war crimes. Within this article, paragraph 2 letters (c), (d), (e) and (f) stipulates the elements of war crimes.


applicable to situations of “armed conflict not of an international character”. These provisions are in no way unprecedented. Article 8(2)(c) refers to serious violations of article 3 common to the four Geneva Conventions of 1949. This provision in the Statute is a recollection of article 4 of the International Criminal Tribunal of Rwanda (ICTR) Statute and the International Criminal Tribunal of Yugoslavia’s (ICTY) jurisprudence in interpreting article 3 of its own statute. This widening of scope of international law to be able to address changing forms of violence and conflict is definitely a step forward for the ICC. However legal scholars have correctly claimed that one step has been taken backwards. The elimination of an opening formula- “such violations shall include, but not limited to…”- at the beginning of Article 8 implies that the list contained in the Statute with regards to war crimes in internal conflicts is binding, closed and exhaustive. This would amount to a serious restriction on the Court’s jurisdiction regarding serious violations not expressly included in the Statute. Not only is it a restriction on the jurisdiction of the ICC but also on the evolution of law because the provision leaves no room for interpretation. It clearly shows that States were not willing to accept unchartered and undetermined restrictions to domestic jurisdictions. The specific mention of elements of war crimes applicable to internal conflicts also undoes the trend of creating one corpus of law encompassing all conflicts, perhaps thus avoiding confusion and an unjust application of law. Given the time taken for international law to grow this far, these evolutions, though on a short leash are a big step in the right direction. If not to the Court’s own benefit, provisions of the Statute concerning war crimes, especially those

relative to internal armed conflicts can and hopefully will be widely used by domestic legislators, tribunals both national and international and legal literature to further determine the state of international law in this field.34

3.1.2 Amnesties- Balancing Peace and Justice:

Whether national criminal legislations incorporate international law or not it is essential that the Court evolves to incorporate elements of national criminal legislations. Here the essay is referring in particular to amnesties. Amnesties are more often than not a political carrot when parties to a conflict come together to negotiate peace. It may even be granted by a government, as in the Ugandan case, to induce the rebellions to renounce violence and put down their arms. In several case- Cambodia, El Salvador, Haiti and South Africa- the United Nations itself was involved in pushing forward, negotiating and endorsing the granting of amnesty as a means of restoring peace and democratic government. There are no legal constraints to negotiating an amnesty for a peace deal. This is another rather large loophole left to the interpretation of the judges of the ICC, which in all possibility would lead them to construe that the Statute permits the recognition of an amnesty exception to the jurisdiction of the Court.35 Though the Statute itself is overtly silent on the subject, its preamble suggests that deferring a prosecution because of a national amnesty would be incompatible with the purpose of the Court. The Preamble:

Affirms that the most serious crimes of concern to the international community as a whole must not go unpunished and that their *effective prosecution* must be ensured…

Recalls that it is the duty of every State to exercise its *criminal jurisdiction* over those responsible for international crimes.

And Emphasises that the International Criminal Court established under this Statute shall be complementary to *national criminal jurisdictions*.36

Nevertheless, there are provisions within the Statute that indicates that the Court, under certain circumstances, can recognise an amnesty exception to its jurisdiction. The UN Security Council can legally require the Court to defer an investigation or proceeding already in progress, even if it is with respect to upholding an amnesty, if two requirements are met: firstly the Security Council has determined the existence of a threat to peace, a breach of the peace or an act of aggression under article 39 of the UN Charter and secondly where the resolution requesting the Court’s deferral is consistent with the purposes and principles of the UN with respect to maintaining international peace and security under article 24 of the UN Charter. But as suggested by Michael Scharf, the ICC is not necessarily compelled to abide by such a UN resolution because according to a decision of the Appeals Chamber of the ICTY in the Tadic case, the Court could assert that it has the authority to independently assess whether the requirements for a UN resolution requesting an ICC deferral have been met or not as part of it incidental power to determine the propriety of its own

36 Ibid. emphasis the author’s own
jurisdiction.\footnote{Ibid.} Regardless of the UN leash around the ICC, the Prosecutor of the Court can choose to terminate an investigation or stop a proceeding where, under Article 53, it is concluded that there are “substantial reason to believe that an investigation would not serve the interests of justice”. The Prosecutor’s decision will be reviewed by the Pre-Trial Chamber, who would then evaluate whether the amnesty or prosecution would better serve the “interest of justice”.

In situations of ongoing conflicts, especially in internal conflicts with lesser legal resources, the “interest of justice” may just be a euphemism signifying that peace is more important than justice and that the latter may have to be shelved. It was evident in the Prosecutor’s response to the Acholi Leaders’, of northern Uganda, request to be mindful of the peace process and political development in the country:

“I am mindful of traditional justice and reconciliation processes and sensitive to the leaders’ efforts to promote dialogue between different actors in order to achieve peace… I also recognize the vital role to be played by national and local leaders to achieve peace, justice and reconciliation. We agreed on the importance of continuing this dialogue in pursuit of the common goal of ending violence.”\footnote{Statements by the ICC Chief Prosecutor and the visiting delegation of Acholi Leaders from Northern Uganda, The Hague, 18 March 2005, http://www.icc-cpi.int/press/pressreleases/96.html}

But the “interest of justice” could not be clearer than in the Geneva Conventions of 1949. According to a statement made by the International Committee of the Red Cross (ICRC), the interpretation of the relevant provision of the Conventions on
amnesties are encouraged “for those detained or punished for the mere fact of having participated in hostilities”. It is clear here that amnesties are not encouraged for those having violated the humanitarian law. And the Conventions are referred to several times in the Statute within the elements of each crime that falls within the jurisdiction of the Court. Ending violence is the common goal but a thorough reading of the law shows that impunity is not an option, most often than not.

4.1 Conclusion

Through an empirical review and critical analysis of the Statute of the ICC, this paper has enumerated the various stumbling blocks for the Court. And I say stumbling blocks because as has been evidenced above the ICC can function though on a short leash. It needs to be remembered here that the essay was trying to forecast whether the Court could deter conflicts- resolve or even prevent or manage them irrespective of their character- international or internal-which may be a step further from the role envisaged for it. The ICC is a treaty organisation and by that very implication means that it would be dysfunctional without the cooperation of those States party to its Statute. With regards to non- Member States, the, Article 12 (3) provides that that State “may accept the exercise of jurisdiction by the Court with respect to the crime in question” (emphasis added). It is not just a matter of jurisdiction because even if the Court can exercise jurisdiction, undetermined cooperation from State parties is suspect. For instance, the Prosecutor can conduct on- site investigations without the consent of the State but only

after the Pre-Trial Chambers has clearly established that a State cannot grant permission for lack of an appropriate authority within its judicial system. Scholars have pointed out that such power based on judicial leave cannot be effectively utilised.\textsuperscript{40} Arresting and surrendering suspects also depends solely on cooperation from the State. The Court’s warrant for arrest is determined to be legitimate by a national competent judicial authority who initially takes the suspect into custody. In some States, specific legislations need to be implemented in order to authorise cooperation with the Court.

This is not an exhaustive list of the inevitable need for States to cooperate with the Court but an indication of the strictures in the Court’s functioning. However, these difficulties arise because of the lack of the Court’s ability to enforce. The regular enforcement of criminal law has always required coercion and the authority to deploy coercive power internationally still remains firmly in the hands of States.\textsuperscript{41}, which the Statute in many ways relieves the States of such a responsibility. In the Preamble of the Statute, it states:

\begin{quote}
Reaffirming… in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations…

Emphasising in this connection that nothing in this Statute shall be taken as
\end{quote}

\textsuperscript{40} William A. Schabas, \textit{Introduction to the International Criminal Court}, Cambridge: Cambridge University Press 2004
authorising any State Party to intervene in an armed conflict or in the internal affairs of any State.\textsuperscript{42}

It would have been to the benefit of the Court here to perhaps insist on the assistance of the State parties in the pursuance of the purposes of the United Nations, which of course falls within Chapter VII of the United Nations Charter. But perhaps to give the ICC a streak of its own persuasive power may have been useful. However, in the case of internal armed conflicts the Statute expressly, though not persuasively enough, states under Article 8(f) that:

\begin{quote}
Nothing in paragraph 2(c) and (e) shall affect the responsibility of the Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State by all legitimate means.
\end{quote}

Besides the issue of enforcement, the ICC needs the support of States because the actions of the Court have a direct impact on individuals who live on the territory of sovereign States and are subject, first and foremost, to their jurisdiction.\textsuperscript{43} These may be just technical issues but the serious loopholes that hamper the capacity of the Court to be an effective deterrent in conflicts and serious violations of human rights have been critically evaluated above, though not exhaustively. However, in the event that the Court fails to obtain the cooperation of the State, matters begin to have political discolorations. The Court can refer the matter to the Assembly of States or in the event that the Security

\textsuperscript{42} See \url{http://www.un.org/law/icc/statute/romefra.htm} for the Statute of the ICC

Council referred the case to the Court, the Security Council under the provision of Article 87 (7). However, the Statute does not stipulate what measures the Assembly of States or the Security Council should take, perhaps, to the benefit of the Court. This is not to say that States are always uncooperative. Such situations may or may not arise when the case is not referred to the Court by the State in which the crime has occurred; otherwise cooperation, though not necessarily, is implicit. Certain scholars have pointed out an over-reliance on justice ignores the fact that potential victims are better served if they are not allowed to be made victims in the first place.\(^44\) Law is not pre-emptive, but if States could push ahead in arriving at a consensus on the crime against peace, which is now called the crime of aggression; it would be a start in the right direction. The ICC can be effective as a preventive mechanism only if it can have jurisdiction as soon as it is aware of the planning and/or preparation for unleashing violence and crimes of a serious nature. And even with such jurisdiction, there are several States, including the United States of America, who are not party to its Statute; thus restricting the Court to a peripheral element of the system for regulating international life.\(^45\) This is not to say that there is no light at the end of the tunnel. For the first time in history, the ICC provides the global community with an institution, an agency and a method to address the most heinous international crimes on a regular, consistent and continuous basis (emphasis added). Universality of application can be achieved in time. And in time, the Court will also be able to not only punish crimes but also prevent them as it would have developed a societal picture of accepted norms through its legal processes. The ICC will be able to,

perhaps, standardise codes of conduct with the aim of creating expectations of regular and honest behaviour on a global level, which then needs to trickle down to community levels—what Francis Fukuyama defines as social capital.

The biggest hurdle in the ICC’s path towards preventing and resolving conflicts is that war itself is not illegal. Criminalising war/conflict was a dilemma faced by the draughtsmen of the Hague Conventions of 1907, which states in the Preamble that it is necessary “to bear in mind the case where the appeal to arms has been brought about by events which their care was unable to avert”. So long as war is justified by law and is within the bounds of legality, the ICC might find it legally impossible to prevent a just war. It is beyond the Statute for the Court to assess the justification of a conflict except through trying and punishing acts that are deemed unlawful within the laws of war, human rights law and humanitarian law. But this might not be hurdle for the Court resolving conflicts as much as it would be for it to prevent them. It also needs to be taken into consideration here that conflicts are between or within States not individuals.

Prosecuting persons for human rights violations and other violations of laws of war is indisputable but this legal mechanism seems oblivious to the fact that conflicts are not caused because of human rights violations but because of other more intricate and complex reasons—economic, social and political—which unfortunately mere prosecutions are insufficient to resolve. It needs to be pointed out here that the ICC is just one of the several instruments of international law and only addresses some of the concerns within

47 Hague Convention IV 1907: Convention Respecting the Laws and Customs of War on Land http://www.yale.edu/lawweb/avalon/lawofwar/hague04.htm
48 Article 1 of the Rome Statute states the Court “shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern…”
the global legal framework. The various agencies - ICC, ICJ and other ad hoc tribunals - should complement each other and work cooperatively so that impunity is not given a chance. There is a small loophole in this proposal as well. The arm of the international law does not extend into legislations and social contracts within a State; meaning the crusaders of international law will, yet again, have to wait and monitor till serious "violations of concern to the international community as a whole" are committed to reach out and lay down the law. Nevertheless, to give the ICC and international law the benefit of the doubt, international law can only evolve further. And although it may be the emperor’s new clothes for the Court, it may be of more help to national and domestic judicial authorities seeking peace with justice.