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The ICC against Entrenching Impunity: The African Tenth Anniversary View

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The International Criminal Court against Entrenching Impunity: The African Tenth Anniversary View

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“In the prospects of an International Criminal Court lies the promise of universal justice. That is the simple and soaring hope of this vision…”

Kofi Annan, United Nations Secretary – General (1999)

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Abstract

For most of the 20th century the International legal community with Africa Inclusive worked towards the creation of a permanent international criminal court. Upon which the goal of establishing a permanent institution to prosecute the most egregious violations of international criminal law culminated with the formation of the International criminal Court (ICC). As it enters its Tenth anniversary, the ICC vested with the power to prosecute the four categories of offences: the crime of Genocide, Crimes against Humanity, War Crimes, and the Crime of Aggression which are in essence the most serious crimes of international concern was indeed a reverie sprang into action.

However underneath its establishment the ICC was entrenched with the aspirations of Archiving: justice for all, Ending Impunity, Ending Conflicts, Remedying deficiencies of ad hoc tribunals, Taking over when national criminal justices are unwilling or unable to act, but most of all Deterring future war crimes and other violations contrary to the Rome Statute. It's upon the extent of the fulfillment and challenges of these raisons d'être in the African tenth Anniversary view that this article tends to analyze.
INTRODUCTION

The International Criminal Court (ICC) came into existence as a result of a multilateral convention, known as the Rome Statute that was signed on 17th July, 1998. The Rome Statute came into effect on 1st July 2002 by a vote of 120 UN member states of which seventeen states were African states, thus marking the birth of the court. With almost one hundred and thirty nine Signatories and one hundred and eighteen Ratifications, the Court is now marking its tenth year of existence. The Court consists of the presidency, Chambers, in which the judges sit, the office of the Prosecutor, which is responsible for receiving referrals, and conducting investigations and prosecutions, and the registry, which is responsible for non-judicial aspects of the administration of the Court.

In the Greater Context, the ICC is the first court of its kind. It is a permanent criminal court whose nearest relatives are the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) both of which, however, are UN Bodies that have limited geographical and temporal jurisdiction.

After a heated negotiation process in which the interests of sovereign states and human rights groups and other NGO’s clashed over the intended strength of the court, the Rome Statute bestowed upon the ICC a complementarity regime that gives States the primary claim to conduct proceedings in cases which might otherwise qualify for ICC jurisdiction. This idea is embodied in Paragraph 10 of the Rome Statute’s Preamble as the idea “that the International Criminal Court established under this statute shall be complementary to national criminal jurisdictions.”

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Unlike the ICTY and the ICTR charters which give those courts primacy over any national proceedings, the ICC is meant to be secondary and only provide a forum when the state proceedings fail. For this purpose, The court under Article 17 retains the ability to initiate investigations and prosecutions if, and only if, it is able to show that the state is either not taking any action or that the state is “unwilling or unable genuinely to carry out the investigations or prosecution.” The idea is that, “in exercising its jurisdiction, the court will be acting as extension of the territorial and national criminal jurisdictions available to states parties; by limiting such exercise to where States are unable or unwilling, the Statute shows that the Court is not also an extension of states party’s national criminal systems. It does not replace or supplant national jurisdictions”. Crucial to this regime is the consent of the states who, through their signature, “recognize the Court’s Jurisdiction over all the crimes within its jurisdiction”. The foundation of the court’s jurisdiction is State Consent and it acts only as an extension of the national systems when the States are incapable, not as an appellate Court.

To This End, The court has a very specific realm in which it is designed to function. The ICC has only subject matter jurisdiction over the crimes listed and defined within the statute itself—namely, Genocide, Crimes against Humanity, and war crimes. Additionally, the Court is limited to crimes committed after the enactment of the Statute, and the Court’s jurisdiction can only be exercised via one of three ways: referral by a state party, referral by the Security Council, or the Prosecutor may initiate an investigation based on his proprio motu power. Although Complementarity is typically deemed a safeguard for national sovereignty, it actually encompasses a dual capacity. From a simple viewpoint, complementarity allows the court to defer to national judiciaries and prevents the court from taking jurisdiction away from States.

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8 Loc. Cit. at P.64
9 HOLMES, ‘Principle of Complementarity’, Op. Cit. 6, p. 49 (citing the concerns of States that the court not function as a court of appeal)
11 This is under jurisdiction ratione temporis in Article II of the Rome Statute
12 Rome Statute for the Establishment of an International criminal Court, Article 13- 15
13 Complementarity is not precisely aligned with jurisdiction in that it hinges on admissibility, a type of “quasi-jurisdictional” standard for determining the ICC’s caseload. See Blakesley et al, ‘ASSOCIATION OF AMERICAN LAW SCHOOLS PANEL ON THE INTERNATIONAL CRIMINAL COURT, 36 Am. CRIM. L. REV 223, 247 – 49 (1999).
The interface of ICC and national jurisdiction, however, also creates an area of expansion of ICC Jurisdictional reach by allowing the Court itself to review and assess national judiciaries.

ICC AND AFRICA

The International Criminal Court (ICC) has, to date, opened cases exclusively in Africa. Cases Concerning approximately 27 individuals are open before the Court, pertaining to crimes allegedly committed in seven African States: Libya, Cote d’Ivoire, Kenya, Sudan (Darfur), Uganda (the Lord’s Resistance Army, LRA), the Democratic Republic of Congo, and the Central African Republic. In addition, the Prosecutor has also initiated preliminary examinations - a potential precursor to a full investigation-in Guinea, and Nigeria, along with several countries outside of Africa, such as Afghanistan, Colombia, Georgia, Honduras, and the Republic of Korea.

ICC prosecutions have been praised by human rights advocates. At the same time, the ICC Prosecutor’s choice of cases and the perception that the Court has disproportionately focused on Africa have been controversial. The Prosecutor’s attempts to prosecute two sitting African heads of state Sudan’s Omar Hassan Al Bashir and the late Libya’s Muammar al Gadhaf, were particularly contested, and the African Union decided not to enforce the ICC arrest warrants for either of the two leaders.

This increasing controversy on the prosecutor’s choice of cases and the ongoing perception that the Court has disproportionately focused on Africa is what steers the need for a close look and analysis on the relationship between the International Criminal Court and Africa.

Initially as stipulated earlier this relationship can be traced from as far as 20 years ago since the establishment of the Court and the Rome Statute itself. Among other African delegations, South Africa, Senegal, Lesotho, Malawi and Tanzania participated in discussions regarding the creation of an International Criminal Court (ICC) as early as 1994 when the International Law

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Commission presented a draft ICC Statute to the United Nations General Assembly for Consideration. 15 47 African states were present for the drafting of the Rome Statute, the founding treaty of the ICC, at the Rome Conference in July 1998; many of these Countries were members of the Like-Minded Group that pushed for adoption of the final statute.

Involvement of African Civil Societies is another arena that can tell the relationship between these two entities. Approximately 800 African Civil Society Organization16 are members of the Coalition for the International Criminal Court (CICC)17, representing approximately one-third of the Coalition’s global membership. However 21 African countries have national coalitions for the ICC that actively work on implementing the Rome Statute provisions into national legislation and strengthening the court’s activities in Africa.

However continuing African Support of the Court is yet another evidence that crystallizes their relationship. 43 African Countries are currently signatories to the Rome Statute of the ICC, 30 African States have ratified the Rome Statute, making Africa the most heavily represented region in the Courts membership. Approximately 20 African countries have final or draft national implementation legislations that incorporates Rome Statute Crimes and/or enables cooperation with the court. These laws ensure that the ICC’s high judicial standards exist nationally and contribute to ensuring effective cooperation with the Court.

In 2005, the African Commission on Human and Peoples’ Rights issued a resolution on ending impunity in Africa and on the domestication and implementation of the Rome Statute of the ICC. 18 It Called on Civil Society Organizations in Africa to work together and develop partnerships that further respect the rule of law internationally and strengthen the Rome Statute.19 In the 2004 to 2007 Strategic Plan of the African Union, one of the AU’s five commitments was to ensure the ratification of the ICC treaty by all countries.

African representation in the Court is also vital to this note, five of the current Courts judges are African: Fatoumata Dembele Diarra (Mali), Akua Kuenyehia (Ghana), Daniel David Ntanda Nsereko (Uganda), Joyce Aluoch (Kenya), and Sanji Mmasenono Monogeng (Botswana). One former judge Navanethem Pillay (South Africa) is now the UN High Commissioner for Human

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15 Submitted in 1994 and recommended that a conference of plenipotentiaries be convened to negotiate a treaty and enact the Statute
16 Good examples are the Coalition for Justice and Accountability (COJA), Sierra Leone, Civil Resources Development and Documentation Centre (CIRDDOC), Nigeria, Human Rights Network-Uganda (HURINET_U), Human Rights Watch (HRW), Johannesburg, International Centre for transitional Justice (ICTJ), Cape Town, International Crime in Africa Programme, Institute for Security Studies (ISS), Pretoria and the Southern Africa Litigation Centre (SALC), Johannesburg
17 An International Organization (NGO) with membership of over 2,500 organizations worldwide advocating for a fair, effective and independent International Criminal Court
18 ACHPR Resolution 87 (XXXVIII) 05 on ending Impunity in Africa and Domestication and implementation of the Rome Statute of the International Criminal Court
19 Loc. Cit. Article 4
Rights. 12 out of the 109 judicial candidates in the ICC 2009 judicial elections were African Citizens nominated by African Governments.

However there are a number of Africans who occupy high level positions at the court, including the following: Deputy Prosecutor Fatou Bensouda (The Gambia); Judge Fatoumata Dembele Diarra (Mali), First Vice President Akua Kuenyehia (Ghana), and Deputy Registrar Didier Preira (Senegal).

To this point the query that most African writers have had is thus still ‘is the ICC a western court unfairly focusing on Africa’, a controversy arising solely on the prosecutor’s choice of cases, despite the presence of a strong founded relationship between the International Criminal Court and Africa. However in the alternate does this long founded relationship spearhead the Prosecutor’s African Biased choice of cases against all other abundant impunities worldwide?

CONTEXTUAL VIEW OF THE ICC OBJECTIVE

In its Fifty-second session the General Assembly decided to convene the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Court, subsequently held in Rome, Italy to finalize on the adoption of the Rome statute that gave rise to the International Criminal Court, under which one of the primary objectives of the United Nations was securing universal respect for human rights and fundamental freedoms of individuals throughout the world. In this connection no issues were considered as of great importance than the fight against impunity and the struggle for peace and justice and human rights in conflict situations in today’s world, thus the establishment of a permanent International Criminal Court was seen as a decisive step forward. However it was under this threshold that the ICC was entrenched with the objectives to: archive justice for all; end impunity; help end conflicts; remedy deficiencies of ad hoc tribunals; take over when national criminal justice is unwilling or unable to act; and to deter future war criminals

Archive Justice for all

The founding principles of creating the ICC was amongst others to ‘Archive Justice for All’, seemingly an international criminal court was called as the missing link in the international legal system, noting the fact that the International Court of Justice at the Hague could only handle cases between States, not individuals. Without an international criminal court for dealing with individual responsibility as an enforcement mechanism, acts of genocide and egregious violations of human rights did indeed often go unpunished. It is also undisputable that the last 50 years before the creation of the ICC, there have been many instances of crimes against humanity and war crimes for which no individuals were held accountable. In Cambodia in the 1970s, an estimated 2 million people were killed by the Khmer Rouge. In armed conflicts in Mozambique, Liberia, El Salvador and other countries, there has been tremendous loss of civilian life,
including horrifying numbers of unarmed women and children. Massacres of civilians continued later in Algeria and the Great Lakes region of Africa.²⁰

As a founding principle ‘archiving justice for all’ was entrenched to imply the vision that the global community had in creating the ICC, upon which they rightly expected that the victims of crimes should be at the heart of the court, however in doing so rebalancing international justice in favour of those victims, witnesses and communities was also tantamount, but also to deliver justice for all in the end, by building greater trust and credibility to the international criminal court.²¹

Whilst under the same objective the need to ensure that there is a fair balance of rights between the defence and the prosecution was also at heart. Eliminating the fact that only too few persons of a certain nature are convicted or prevented from reoffending, such as what has been currently termed as selective justice, was also an idea vested within the concept of justice for all.²²

Gender justice is also another horizon that the ‘justice for all’ objective entrenches, noting the fact that this emerged as a challenge even during the preparatory commissions to the Rome statute, which were arguably reflective of the absence of an existing consensus on the best way to combat impunity for crimes committed against women.²³

As the ICC conducts its first rape prosecutions,²⁴ amongst other issues, there is currently an ambiguity in the existing international criminal jurisprudence regarding the appropriateness of considerations of consent in rape prosecutions. On the other hand, the argument has been made that consent should be excluded given the highly coercive circumstances within which the rapes being prosecuted are alleged to have taken place.²⁵

Notably all the cases the ICC has in its books are in Africa, which can only reinforce the impression of a legal institution with too few teeth picking on the world’s weakest states. The ICC is seemingly focusing on economically weak and politically vulnerable countries of which many African countries fulfill these criterions.²⁶ But as if that is not enough by a judgment of 14 march 2012 the ICC has now given its first guilty verdict in the case of The Prosecutor V

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²² Loc. Cit. p. 72
²³ GREWAL Kiran (2012), ‘Prosecuting Rape In The ICC: Towards ‘Gender Justice’ Or Creating New Binaries?’, paper presented in the ‘Justice for All’ Conference held on 14-15 February 2012 Sydney, Australia
²⁴ THE PROSECUTOR V JEAN-PIERE BEMBA GOMBO ICC-01/05-01/08
²⁶ NMEHIELLE Vincent, former Principal Defender of the Special Court for Sierra Leone, added that ‘the ICC has a political agenda’ during the ‘Africa: proving ground for International Criminal Court’ held in 20th August 2008 in Cape Town, South Africa
Thomas Lubango Dyilo,\textsuperscript{27} where the accused was found guilty of war crimes specifically enlisting and conscripting of children under the age of 15 years and using them to participate actively in hostilities, however this indictment has taken nearly six years to be reached.

On the greater part the ICC is also hampered by the geopolitics of international justice. The world’s biggest powers including the US, China and Russia, have not signed on, nor have many nations in our backyard, the Asia-Pacific region. This limits the courts reach and erodes the idea of a globally endorsed set of standards for all.

However in view of all these challenges it is to a great extent right to say that, the ICC’s founding vision of ‘\textit{justice for all}’ through the provision of court rooms in which the most senior officials accused of heinous crimes against humanity must defend their actions remains a distant goal.

An International Criminal Court will never mean international police to turn on every street corner, nor will most of the world’s victims of crimes against humanity ever get their day in court. The toll that world wars, regional conflicts, guerilla wars, localized violence, state repression and terrorism took throughout the 20\textsuperscript{th} century was unprecedented, and world today has the weapons and imaginations to wreak even more grievous harm in the future. But international laws do give us cause to pause and think, if only by establishing clearly what is wrong and who should be held to account seemingly archive true justice for all.

\textbf{End Impunity and deterring future war criminals}

The Judgment of the Nurnberg Tribunal\textsuperscript{28} stated that “\textit{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}”\textsuperscript{29} -- establishing the principle of individual criminal accountability for all who commit such acts as a cornerstone of international criminal law. According to the Draft Code of Crimes against the Peace and Security of Mankind \textsuperscript{30}, by the International Law Commission at the request of the General Assembly, this principle applies equally and without exception to any individual throughout the governmental hierarchy or military chain of command. And the Convention on the Prevention and Punishment

\textsuperscript{27} ICC-01/04-01/06 case originating from the Democratic Republic of Congo, The verdict was rendered in Trial Chamber I, composed of Judge Adrian Fulford (United Kingdom), as presiding judge, Judge Elizabeth Odio Benito (Costa Rica) and judge Rene Blattmann (Bolivia). Although the first two judges have written separate and dissenting opinions on some issues

\textsuperscript{28} Trial of the Major War Criminals before the International Military Tribunal, vol I Nurnberg 1947, P. 223

\textsuperscript{29} \textit{Loc. Cit.}

\textsuperscript{30} Completed in 1996
of the Crime of Genocide\textsuperscript{31} recognizes that the crime of genocide and other egregious crimes may be committed by constitutionally responsible rulers, public officials or private individuals.\textsuperscript{32}

Most perpetrators of war crimes and crimes against humanity throughout history have gone unpunished. In spite of the military tribunals following the Second World War and the two recent existing ad hoc tribunals namely the International Criminal Tribunals for the former Yugoslavia and for Rwanda, the same holds true for the twentieth century. That being said, it is reasonable to conclude that most perpetrators of such atrocities have believed that their crimes would go unpunished. Effective deterrence is a primary objective of those who worked to establish the international criminal court. For once it was clear that the international community will no longer tolerate such monstrous acts without assigning responsibility and meting out appropriate punishment to heads of State and commanding officers as well as to the lowliest soldiers in the field or militia recruits it was and is hoped that those who would incite a genocide; embark on a campaign of ethnic cleansing; murder, rape and brutalize civilians caught in an armed conflict; or use children for barbarous medical experiments will no longer find willing helpers.\textsuperscript{33}

The International Criminal Court since its establishment was visioned as the vital and indispensable centerpiece of the international system of criminal justice. It was further created as a hope for ending impunity for international crimes, a vehicle with which generations are presumed to be significantly able to advance the cause of justice and in so doing, reduce and prevent unspeakable impunities.\textsuperscript{34}

Ending impunity as a visionary role of the International Criminal Court at its heart is vested with the duty of stopping mass atrocities going unpunished, seeking prosecutions of those bearing the greatest responsibility (high level perpetrators) in such atrocities but also providing healing to the affected communities by convicting such responsible perpetrators.\textsuperscript{35}

The ICC’s task is indeed rightly restricted to bring those bearing the greatest responsibility for the greatest of crimes against humanity.\textsuperscript{36} This policy means it can focus its deterrent effect where this will have the greatest impact, and allows it to provide at least some form of justice to the greatest possible number of victims. It follows, however,\textit{ that its prosecutions alone cannot succeed in bringing an end to impunity}. Its investigations will leave hundreds, if not thousands, of suspected perpetrators untouched. In 1999, five years after the Genocide in Rwanda, an estimated 120,000 suspects were still awaiting trial in its overcrowded prisons.

\textsuperscript{31} Adopted by the United Nations in 1948
\textsuperscript{33} \textit{Loc. Cit.}
\textsuperscript{34} Statement issued by the by then Deputy Secretary-General of the United Nations Ashe-Rose Migiro on 12\textsuperscript{th} December 2011
\textsuperscript{35} SINGH Param-Preet (2010), ‘Making Kampala Count: Advancing The Global Fight Against Impunity At The ICC Revies Conference’, Human Rights Watch, p. 54
\textsuperscript{36} \textit{Loc. Cit.} p. 74
The impunity gap that emerges between what international and domestic criminal courts can accomplish under circumstances, and what victims expect and deserve in the way of justice, can often represent significantly a threat to the goals of peace and stability as any militia leader still at large. The sense of justice gained from a high level prosecution will likely be significantly undermined if no accompanying effort is made to hold account the local perpetrators who damaged the lives of victims most directly.

The fight against impunity therefore requires a broader range of tools, and no discussion of its progress and future can afford to ignore the contribution of even non-judicial accountability mechanisms. These operate independently of the criminal justice system, and can range from truth commissions, such as those made famous in South Africa, to documentation initiatives and community service programmes for perpetrators suspected of less serious crimes.

Notably there is no single approach to how this should be done, and all such initiatives must be carefully tailored to the complexities of a given conflict. There are, however clear lessons to be drawn from the extensive range of experiences now available for instructive comparison: from the groundbreaking truth Commissions of South Africa to the innovative outreach programmes of Sierra Leone.

Non-Judicial mechanisms cannot simply be left to fill the impunity gap of their own accord. In order to fulfill their potential, it is crucial that both judicial and non-judicial approaches are fully integrated in pursuit of this common goal. This does not simply mean that clear communication channels must be established and kept open but rather institutions established outside of the courts must also be given the autonomy and independence necessary to engage perpetrators or uncover information that is not part of criminal trials. Most importantly, procedures must be established to ensure these mechanisms are themselves accountable to the rule of law and international standards of human rights, and do not themselves become forums for further injustice.

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37 Loc. Cit.
38 A good example being the situation in Kenya were due to the 2007/ 2008 post election crisis over 1300 people died and nearly 500,000 people were displaced due to the violence. But amazingly only six people were taken before the International Criminal Court accused for the atrocities, leaving hundreds more.
39 Also known as truth and reconciliation commission, tasked with discovering and revealing past wrongdoing by a government or non-state actor in the hope of resolving conflict left over from the past.
40 Established by president Nelson Mandela after apartheid, popularly considered a model of truth commission.
41 Ibid.
42 Was designed to increase awareness within Sierra Leone of the mandate and operations of the special court for Sierra Leone, including promoting knowledge about human rights and humanitarian law issues to the public at large.
43 Such as the two jointly worked in the situation in Rwanda: Gacaca Courts on one side which involves the system of community justice inspired by tradition and established in 2001 in Rwanda in the wake of the 1994 Rwandan Genocide, while on the other hand the International Criminal Tribunal for Rwanda situated in Arusha, Tanzania plays its part on the other.
The era of impunity has been a long one, it currently persists and still has potentiality of further persisting in the future, but with a serious study of what has been achieved to date by the International Criminal Court and the entire international criminal justice, and with a concrete effort to fully utilize all available resources, I believe the UN Secretary General will soon be right in ushering a new era of accountability.  

Help End Conflicts

In various situations such as those involving ethnic conflict, violence begets further violence; one slaughter is the parent of the next. The guarantee that at least some perpetrators of war crimes or genocide may be brought to justice was in essence seen to act as a deterrent and enhances the possibility of bringing a conflict to an end. Two ad hoc international criminal tribunals, one for the former Yugoslavia and another for Rwanda, were created in the latter decades with the hope of hastening the end of the violence and preventing its recurrence.

However in the course of carrying out its duties there are situations where by the objectives of the ICC come in to conflict. Such situations include situations where the objective of ending conflicts contravenes the objective of deterring crimes or issuing justice to victims.

However proponents of the ICC see no conflict between two of its main declared aims, achieving justice for victims and ending conflicts.

The ICC on the other side faces criticism from two directions about its role in deterring violators and promoting peace.

The first criticism emanates from a worry that in the nonideal conditions of societies experiencing violent conflict, the quest for legal accountability conflicts with the task of reaching a peace agreement between warring parties; peace and justice may not go together and sometimes one must shake hands with devils in order to secure the peace.

Notably indicting tyrants is well known to be at the apex of the ICC’s objectives it is to some point not necessarily the best course of action. The international community must think about the possible consequences of arresting perpetrators of crimes against humanity. “Should we prosecute Mugabe, despite (the possibility) this could increase the chance of further deterioration of the situation in Zimbabwe or should we give him the chance to walk off if this would

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44 “the old Era of impunity is over” an unrealistic statement by the UN Secretary General Ban Ki-Moon in his address to the 2010 concluded review conference of the international criminal court held in Kampala, Uganda


46 NMEHIELLE Vincent, former Principal Defender of the Special Court for Sierra Leone, speech during the ‘Africa: proving ground for International Criminal Court’ conference held on 20th August 2008 in Cape Town, South Africa


contribute a more stable peace situation?” I am not personally too against the former if this will bring peace and stability to Zimbabwe.49

The same was evidenced in the arrests warrants issued against the late Libyan leader Muammar Gaddafi and the Current Sudanese president Omar Al Bashir, where critiques showed that by doing so the international criminal court instead of promoting its objectives of international justice, issuing such warrants may to a large extent prove an obstacle to peace and stability in the respective regions.50

The second avenue of criticism comes from those who argue that justice, understood as legal criminal accountability, is insufficient and perhaps even counterproductive in terms of the long-term goal of building a sustainable future without acts of egregious crimes seemingly ending conflicts.51 Situations in Zimbabwe and Sudan may act as best examples to this note.

To this end it is right to say that the ethical challenge of achieving a morally appropriate balance between the pursuance of legal accountability and helping end conflicts on the other hand, is thus hard to solve since fulfilling one may endanger the persistence of the other.

The potential clash between peace and justice objectives can sometimes be circumvented by pursuing a sequential approach, for example by getting a peace agreement now, the dealing with justice many years later. This is what has been happening in Latin America a decade or two after transitions to democracy. However, most of those transitions explicitly granted amnesty to enable handovers of power, and it is only many years down the track that those amnesties are being wound back.52

A further response is to acknowledge the tensions between peace and justice and to recognize that pragmatism and recent history indicate that justice cannot always claim primacy. While impunity for people who have committed the gravest acts of inhumanity is morally repugnant, sometimes doing a deal with perpetrators is unavoidable and necessary to prevent further conflicts and suffering. This is partly because the reality of conflict is such that multiple warring parties are likely to have committed atrocities. Unless one party has been utterly vanquished, peace negotiations will often assemble parties responsible for grave abuses and a deal will depend on their agreeing to end the conflict. Because perpetrators are unlikely to want a prison

49 The same was stated by VILLA-Vecencio, former executive director of the Institute for Justice and Reconciliation during the ‘Africa: proving ground for International Criminal Court’ conference held on 20th August 2008 in Cape Town, South Africa
50 The same was stated by HANSEN Thomas Obel (PhD-Aarhus university, Denmark), an assistant professor (international law) at the United States International University in Nairobi, Kenya on 18th May 2011
cell as a reward for their hard-won peace agreement, mediators have frequently used amnesties as an incentive.\textsuperscript{53}

More than four million people have died during the DRC’s civil war and its aftermath. Conflict in Sierra Leone cost hundreds of thousands of lives. The toll in Darfur is increasing daily. Not forgetting Uganda’s LRA still cost a lot of lives in the northern parts of Uganda. It is tempting and understandable to take a righteous stance and say that deals should not be done with those responsible for atrocities. However, to date, it is difficult for the ICC to tell victims of these conflicts that the prosecution of a small number of people such as Joseph Kony should take precedence over a peace deal that may end the appalling conditions they endure and the daily risks they face.

\textbf{Remedy Deficiencies of ad hoc Tribunals}

The establishment of the recent existing ad hoc tribunals immediately raised the question of "selective justice". Why has there been no war crimes tribunal for the "killing fields" in Cambodia and the rest of the areas with impunities? It is from this view that a permanent court was created with the belief that it could operate in a more consistent way.\textsuperscript{54}

The creation of ad hoc international criminal tribunals in the 1990’s has preserved a central role for national courts. The Security Council used its chapter VII powers under the United Nations charter to create two ad hoc tribunals in emergency circumstances. The ICTY (International Criminal Tribunal for the former Yugoslavia) which sits in The Hague,\textsuperscript{55} and the International Criminal Tribunal for Rwanda (ICTR) sitting in Arusha, Tanzania.\textsuperscript{56}

Each Tribunal was set to have jurisdiction over Genocide and crimes against humanity; the ICTY can however prosecute ‘violations of the laws or customs of war’, and grave breaches of the Geneva Conventions and the ICTR can reach violations of the Geneva Conventions’, common article 3 and the Geneva Protocol II.\textsuperscript{57}

The Security Council did not suppose that these international courts could handle all war crimes from the Yugoslavia prosecutions and Rwandan conflicts, and recognized concurrent jurisdiction in national courts. Several European states have prosecuted cases arising out of the Yugoslavia conflict, where defendants were discovered among refugee populations. Although it is important

\textsuperscript{53} Loc. Cit.
\textsuperscript{55} Established in 1993
\textsuperscript{56} Established by Resolution 955 of 8\textsuperscript{th} November 1994
\textsuperscript{57} KIRK Gabrielle and GOLDMAN Olivia Swaak (eds.), ‘\textit{Substantive And Procedural Aspects Of International Criminal Law}’, The of experience of International and National Courts, Volume I, commentary p. 123
to note that these prosecutions are indeed limited. It is through these deficiencies that the system of ad hoc tribunals was seen as a weak one hence could not be the most favorable one.

Ad hoc tribunals are initially seen as subject to limits of both time and place, specifically the ICTY and the ICTR which were by their practice and establishment limited to certain geographical boundaries and time limitations. A good example being the ICTR which was limited first geographically to acts which took place within the boundaries of Rwanda, however it was also secondly limited in time, in the sense that in the 1994 preceding years, thousands of refugees from the ethnic conflict in Rwanda were murdered, but the mandate of that Tribunal is to date limited to events that occurred in 1994. Crimes committed since that time are not covered.

However greater reference has been made to "tribunal fatigue". The delays inherent in setting up an ad hoc tribunal can have several consequences: crucial evidence can deteriorate or be destroyed; perpetrators can escape or disappear; and witnesses can relocate or be intimidated. Investigation becomes increasingly expensive, and the tremendous expense of ad hoc tribunals may soften the political will required to mandate them.\textsuperscript{58}

In the Greater Context, the establishment of the ICC successfully marked it as the first court of its kind.\textsuperscript{59} It is a permanent criminal court unlike the temporary ad hoc tribunals, the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) whose are its nearest relatives both of which, however, are UN Bodies that have limited geographical and temporal jurisdiction while on the other hand the ICC is an independent court acting universal in scope and permanent in nature.\textsuperscript{60}

\textbf{Take over when national criminal justice is unwilling or unable to act}

Nations to date agree that criminals should normally be brought to justice by national institutions. But in times of conflict, whether internal or international, such national institutions are often either unwilling or unable to act, usually for one of two reasons. Governments often lack the political will to prosecute their own citizens, or even high-level officials, as was the case in the former Yugoslavia. Or national institutions may have collapsed, as in the case of Rwanda.\textsuperscript{61}

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The Rome statute encourages states to exercise their jurisdiction over the ICC Crimes. Its preamble\textsuperscript{62} states that the effective prosecution of the ICC crimes must be ensured by taking measures at the national level and by enhancing international cooperation. In addition, it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes. Nevertheless, there is nothing explicit in the statute imposing an obligation to prosecute the ICC crimes.\textsuperscript{63}

However it is important to note that the term ‘complementarity’ which makes the ICC a court of last resort directly describes the initial role of prosecuting individuals responsible for the most heinous crimes to states,\textsuperscript{64} thus the ICC can only exercise its jurisdiction where the state party of which the accused is a national, is unable or unwilling to prosecute. The reason this principle came in place was the fear on the part of many prospective state parties that the ICC would become a supra-national criminal court and would result in countries losing domestic control of criminal prosecutions.\textsuperscript{65}

To this note i would personally object the functionality of the principle of complementarity in several ways, first in the sense that the countries in which war crimes are committed are exactly those which require a court like the ICC. For example, there is little chance that a French national will be accused of war crimes, but if they were, i would expect French judicial processes were sufficient to prosecute a war criminal.\textsuperscript{66}

However it’s undisputable that a great possibility exist that some countries such as Zimbabwe\textsuperscript{67} whose nationals may be subject to prosecution by the ICC can set up Kangaroo courts\textsuperscript{68} which are designed so that the government does not have to hand over its officials to the ICC. So exactly those who the ICC is most required to punish, are those who avoid the court’s jurisdiction by having fake trials.

Opposing or deferring the jurisdiction of the court is another area where this principle of complementarity shows great weaknesses, a Country such as United States of America is a good example on this.\textsuperscript{69} However such challenge wouldn’t have existed if only the Rome Statute was created as a supranational law where rights of all sovereign nations will be equally limited

\textsuperscript{62} Preamble to the Rome Statute for the Establishment of an International Criminal Court
\textsuperscript{63} CRIMINAL LAW FORUM (1999), ‘Special Issue On The International Criminal Court’, 10:1 Criminal Law Forum 1
\textsuperscript{65} Loc. Cit.
\textsuperscript{67} Used merely as illustration
\textsuperscript{68} Trial upon which the principles of law and justice are disregarded or perverted
\textsuperscript{69} The US was amongst the seven states that voted against the adoption of the Rome Statute
against one another by explicitly submitting their right to make judicial decisions to the International Criminal Court for violations of the most serious crimes known to man.\textsuperscript{70}

The US did oppose the ICC from the beginning,\textsuperscript{71} indeed surprising and disappointing many people. Human Rights organizational and Social Justice Groups around the world, and from within the US, were very critical of the US stance given its dominance in world affairs. It later signed up to the ICC but just before December 2000 deadline to ensure that it would be a state party that could participate in decision making about how the court works.\textsuperscript{72} However by May 2001, the Bush administration ‘unsigned’ the statute, threatening to use military force if US nationals were held at The Hague. The US continues to pressure many countries to sign agreements (bilateral) not to surrender US citizens to the ICC.\textsuperscript{73}

But why would a country, often vocal in the area of human rights, and often amongst the first to promote human rights as a global issue in the past refuse to sign up to an international law and institution designed to protect human rights?\textsuperscript{74}

In my view, the jurisdiction of the ICC should to a better extent be that of a supranational institution. No country should have a choice whether criminals should be prosecuted before it or not, indeed, the principle of complementarity allows a shield to be placed in front of those accused of the gravest crimes against humanity, by allowing their governments to prosecute them, defer or oppose the ICC jurisdiction for their alleged serious offences.

\textsuperscript{70} NO PEACE WITHOUT JUSTICE INTERNATIONAL (1999), ‘Ratification Now! Campaign for The Establishment Of The International Criminal Court Before 2000: A Manual For Legislators’, Roma, no peace without justice; Currently the United Nations Security Council and its Subordinate organizations such as the International Court of Justice are the only globally accepted supranational tribunals.

\textsuperscript{71} During the drafting of the Rome Statute, the US demanded that the work of the court should be controlled by the United Nations Security Council, of which it is permanent Veto-holding member

\textsuperscript{72} On 31\textsuperscript{st} December 2000 president Clinton demonstrated US support for the court by signing the Rome statute

\textsuperscript{73} It launched a worldwide campaign for the other countries to enter into illegal impunity agreements committing them not to surrender US nationals accused of genocide, crimes against humanity and war crimes to the court. US Laws were enacted, including the American Service members Protecting Act and the Nethercutt Amendment, requiring the government to withdraw military and other assistance from countries that refused to sign agreements. In some cases, the United States lobbied governments supporting the Court not to ratify the Rome Statute

\textsuperscript{74} The campaign has to date shown great failure. In June 20004, The united States withdrew a United Nations Security Council resolution seeking to renew previously enacted resolutions purporting to grant exemptions to nations of non-state parties to the Rome statute involved in peace keeping missions; The world wide campaign for impunity agreements has also indeed failed, approximately more than 100 states signed agreements with US most agreements have not been ratified and have not entered into force; many states such as South Africa and Tanzania refused to sign agreements upholding their commitment to international justice; Moreover the US government has even supported some of the ICC’s work, In march 2005 the US decided not to oppose a Un Security Resolution referring the situation in Darfur to the prosecutor
CONCLUSION

The creation of a permanent international criminal court has been seen as a desirable objective for a long time. Although the issue was actively considered soon after World War II, historical circumstances, particularly the Cold War, did indeed prevent agreement on its establishment until a conference was held in 1999 in Rome. By the time the Rome Conference began, there was wide agreement on the general objective of such a court. Nevertheless the conference was later successful but indeed difficult as it became the theater of a number of conflicts between different legal systems and political interests.

The basic objective of the establishment of an international criminal court was to replace a culture of impunity for the commission of very serious crimes, which has existed and still exists to a large extent, with a culture of accountability. The establishment of an international criminal court is in many ways the culmination of a series of international efforts in that direction. Those efforts however, have to date often been frustrated for a variety of reasons, and in any event have been highly selective. Justice is indeed an important objective which lies underneath all the specific objectives that the international criminal court is envisaged with; it is nevertheless an important objective in its own right. Thus fulfilling any such specific objective of the international criminal court, such fulfillment must be ascertained in line with the greater objective of not only ensuring justice is done, but also seen to be done.