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INTERNATIONAL CRIMINAL COURT (ICC) AND THE PROSECUTION OF HEINOUS CRIMES

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ABSTRACT

The setting up of the ICC was hailed as a fundamental revolution in the history of international criminal law. It gives hope of justice to victims of heinous crimes and also puts to rest the anxiety of the international community, knowing that a permanent body exists to bolster the rule of law and punish perpetrators of crimes that are of international concern. Doctrinally, the authors examined and found that the ICC contributes to the fight against impunity by ensuring that the most serious crimes do not go unpunished, promoting respect for international law. The mandate of the ICC is to act as a court of last resort with the capacity to prosecute individuals for genocide, crimes against humanity and war crimes when national jurisdictions are, for any reason, unable or unwilling to do so. The ICC, in its almost two decades of operation, is reported to have indicted more than forty individuals, all from Africa. The court has recently been facing some criticisms over the perceived delay and high expenses incurred in its proceedings, bias target of Africans, and veto power challenge of the UNSC and so on. With the arrival of the ICC to prosecute such crimes, national jurisdictions have been encouraged and empowered to prevent impunity. Before then, states were reluctant or unwilling to prosecute heinous crimes as a result that most of the perpetrators of such crimes are top and influential government officials. Again, most of the states have not codified those crimes in their laws, but with the Rome Statutes and the ICC, most member states have been influenced to codify laws against such crimes and are encouraged to prosecute violators. Thus, the Rome Statute is seen to have succeeded in creating a new international legal system. It is recommended that ICC jurisdiction should include other international crimes such as piracy, drugs and human trafficking and terrorism.

INTRODUCTION

Humanity has gone through the challenges of crimes at different times, and efforts are being put in place in trying to end the perpetuation of same. Human rights campaign is aimed at advancing recognition and protection of the dignity of humanity, but wars and their accompanying atrocities are relentlessly being committed against humanity. It is estimated that during the twentieth century, warlords and military leaders subjected approximately four times more civilians to crimes against humanity and war crimes than the combined total of soldiers killed in all international wars during the same time[1]. It became imperative for the international community to judicially address and prevent such violations of international

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[1] M. Cherif Bassiouni, 'International Recognition of Victims' Right'. *Oxford University Law Journal* (2006) (6) 203-210. An estimated 70-170 million have died since World War II in 250 conflicts of both international and non-international character all over the world.

humanitarian laws. Consequently, the international community demanded the establishment of the international criminal tribunals to prosecute perpetrators of recognised international crimes and ensure justice is dispensed. This will fulfil the aim of the United Nations Charter of maintaining or restoring international peace and security[2]. The end of World War II witnessed the establishment of the Nuremberg military tribunal and that of the Far East Tokyo in order to prosecute those indicted of committing heinous crimes during the period of hostilities. These tribunals were often criticised as the "victors' court" because it was the victorious allies that sat in judgement over the defeated Germans and Japanese. In spite of the criticism, O'Connor asserted that these two tribunals were the first real efforts in the modern era to establish a valid and powerful international court[3]. The early nineteen-nineties also witnessed the establishment of two tribunals by the United Nations in order to try war criminals for crimes committed within the territory of Yugoslavia and Rwanda. These tribunals are the International Criminal Tribunals for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), respectively. These tribunals recorded some good progress in prosecuting and holding accountable some of the worst and most prominent ethnic cleansers of the century[4]. Due to the progress made in these tribunals, the supporters of the ICC opined that a permanent court would work and be effective in punishing the perpetrators of such brutal crimes.[5] The experiences derived from these tribunals led to the establishment of the ICC. This position was brought out by Fujita as thus, 'The Rome statute's establishment of the permanent ICC is in fact taken from past practical experiences of the historic ad hoc international tribunals'[6].

The ICC came to be on July 1, 2002, by virtue of states adopting a unilateral treaty called the Rome Statute in 1998. It is determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes[7]. The setting up of the ICC has been hailed as a fundamental revolution in the history of international criminal law. It gives hope of justice to victims of heinous crimes and also puts to rest the anxiety of the international community, knowing that a permanent body exists to bolster the rule of law and punish perpetrators of crimes that are of international concern. Song[8] opined that the ICC contributes to the fight against impunity by ensuring that the most serious crimes do not go unpunished, promoting respect for international law. The core mandate of the ICC is to act as a court of last resort with the capacity to prosecute individuals for genocide, crimes against humanity and war crimes when national jurisdictions are, for any reason, unable or unwilling to do so[9].

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2 Abdullah Omar Yassen, International Cooperation: From the ICTY and ICTR to the ICC. *Erbil Polytechnic University Journal* (2017) (7) (1) 1-41.

3 Gerard E O'connor, The Pursuit of Justice and Accountability: Why United States should support the establishment of an international criminal court, *Hofstra Law Review Journal* (1999) (7) 941.

4 Ibid.

5 Ibid.

6 Hasakazu Fujita, 'The Tokyo Trial Revisited' In Jose Doria Hans-Peter Gasser and M. Cherif Bassiuoni (eds), *The Legal Regime of International Criminal Court* (Martinus Nijhoff Publishers, 2009) 23.

7 Preamble to the Rome Statute.

8 Sang Hyun Song, The Role of International Criminal Court in ending impunity and establishing the rule of law. UN chronicle (XIIX, 4, 2012) <https :// Chronicle. Un.org/article/role-international-criminal-court-ending impunity-establishing-the-rule-of-law> accessed 25/07/2021.

9 Ibid.

The ICC has jurisdiction in accordance with the statute for the following crimes: crimes of genocide, crimes against humanity, war crimes and crimes of aggression[10]. A consideration of these crimes reveals the gravity of the responsibilities of the court because these are crimes that have raised international concerns. They are viewed as heinous and destructive and have the capacity to threaten the peace, security and well-being of the world[11]. The ICC, in its almost two decades of operation, is reported to have indicted more than forty individuals, all from African countries. Sixteen people have been detained at The Hague. Eight have been convicted and four acquitted[12]. The court has recently been facing some criticisms over the perceived delay and high expenses incurred in its proceedings, bias target of Africans, and veto power challenge of the UNSC and so on. These criticisms notwithstanding, the ICC has made a considerable impact on international criminal justice. Song opined that the Rome Statute has changed the way the world looks at grave crimes under international law. With the arrival of the ICC to prosecute such crimes, national jurisdictions have been encouraged and empowered to prevent impunity[13]. Before the advent of the ICC, states were reluctant or unwilling to prosecute heinous crimes. This is usually as a result of two factors: first, most of the perpetrators of such crimes are top and influential government officials, due to their influence the states are most often reluctant to prosecute them, Secondly, most of the states have not codified those crimes in their laws but with the Rome Statutes and the ICC in operation most member states have been influenced to codify laws against such crimes and are also encouraged to prosecute violators. Through those influences, the Rome Statute is viewed to have succeeded in creating a new international legal system which consists of member states investigating and punishing heinous crimes.[14]

The ICC has also succeeded in establishing a system where victims of heinous crimes and witnesses are not only privileged to be protected and participate in the trial but also have the right to reparation[15]. The court, by virtue of article 68 of the Rome Statute, has been able to carve out a niche for itself in the aspect of restorative justice[16] to the victims terrorised by the perpetrators of heinous crimes. The court seeks a concept of delivering justice not only for the international community but also for the victims of such crimes. This has been considered an important innovation of the ICC.

In consideration of these grandiose and highly commendable innovations of the ICC, there is no question that the greatest impact that the ICC can ever make is to drastically reduce or completely prevent the perpetration of heinous crimes. So far, the ICC has been

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10 Articles 5 of the Rome Statute.

11 Preamble to the Rome statute.

12 Claire Felter, 'The Role of International Criminal Court' *Counsel on Foreign Relations*. <https://www.org/backgrounder/role-international-criminal-court> Accessed 27/7/2023.

13 Song (n8).

14 Ibid.

15 Article 68 of the Rome statute.

16 Restorative Justice refers to a theory of criminology in which the crime is considered to be acts against the individual rather than against the state and advocates of restorative justice posit that the person harmed should play a central role in the criminal justice process and the person who is guilty of committing the crime should be accountable and accept personal responsibility for his conduct and thereby being awarded restitutional sanctions intended to force the wrong doer to make whole the person harmed. See notes on restorative justice: Wikipedia <http://en.m.wikipedia.org> Accessed on 06/07/2023.

positioned as an instrument capable of ending the perpetration of heinous crimes[17]. The question is," Has the court been able to end the perpetration of such crimes?" It is disheartening to answer the question in the negative. This response was also given by the ICC president as: 'the very vices which ICC was created to address persist in many parts of the world'[18]. This situation can be seen in the increase of high-intensity conflict over the last 20 years of which are the common vectors of atrocity or crimes[19]. This assessment shows that the court has not been making the expected impact and discovers the reasons why perpetrators seem undeterred in the light of the obvious increase in heinous crimes despite the presence of the ICC. These reasons motivated this research. We intend to identify challenges that impede the court's effectiveness in deterring the perpetration of such crimes. Some of these challenges are:

i. *Limited jurisdiction of the ICC*: The subject matter jurisdiction of the ICC is limited only to four crimes: genocide, crimes against humanity, war crimes and crimes of aggression[20]. Whereas the Rome statute provides for only four crimes as listed to be within the ICC's jurisdiction, it is however worthy of note that the jurisdiction of the ICC for crime of aggression only became activated on July 17, 2018 as resolved by 164 members of Assembly of State Parties (ASP) on December 14, 2017[21]. The question is what then will be the resultant effect of the activation of this jurisdiction, since the proviso to the activation stipulates that the ICC would not have jurisdiction over ICC member states or nationals that have not amended the ratification in the case of the referral or proprio motu investigation?

ii. *Non-state Parties*: The ICC also has the challenge of exercising jurisdiction over non-state parties unless they either voluntarily submit to the jurisdiction[22] for crimes committed within their territory by their nationals or nationals of non-member states or by virtue of referral of the UNSC[23]. The challenge of the jurisdiction of the ICC with regards to the referral is that it has become obvious that in the absence of the referral by the UNSC and the non-submission to the jurisdiction of the ICC by non-member states, heinous crimes cannot be investigated or prosecuted as in the case of Syria, thereby affecting the effectiveness of the court. The complementarity principle of the ICC also stands as a limitation to the jurisdiction of the ICC to effectively prosecute the perpetrators of heinous crimes. This principle precludes the court from investigating and prosecuting perpetrators of heinous crimes unless it can be shown that the state in question is either unwilling or unable to prosecute. Though the intent of that principle is in the interest of protecting state sovereignty, however, facts reveal that most of the

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17 Nick Grono and Anna de Courcy Wheeler, 'The Deterrent Effect of ICC on the commission of international crimes by government leaders' *International crisis group* (6/10/2012)< http://www.crisisgroup.org > accessed on 6/8/2023.

18 Chile Eboe-Osiyi, 'Remark at solemn hearing in commemoration of the 20th anniversary of the adoption of Rome statute of the international criminal court' (17th July 2018) <http://www.icc.cpi.int> Accessed on the 6/08/2022.

19 Ibid.

20 Articles of Rome Statute.

21 Coalition for the international criminal court, 'Crime of Aggression' www.coalitionforicc .com Accessed 10/8/2023.

22 Article 12(3), Rome Statute.

23 Chapter 7 of the UN chatter and article 13(b) of the Rome Statute.

national courts, especially in developing countries, are tools in the hands of the political leaders who, in most circumstances, are the perpetrators of such crimes. Whether there can be said to be a genuine judicial process in such circumstances is an issue for consideration.

iii. *ICC as a Tool*: The accusation that the ICC is being used as a tool of western imperialism against Africa, hence the call by AU member states to withdraw from the ICC pose another challenge to the efficacy of the ICC as it has the potential of undermining the legitimacy of the court within that part of the globe.

iv. *Non-cooperation of Members*: The non-cooperation of member states is another factor proven to affect the ICC in effectively prosecuting heinous crimes. The ICC has been likened to a giant without limbs and obviously needs artificial limbs to walk and work. The artificial limbs are the authorities of the member states, without which the court would not be able to fulfil its functions[24].

v. *Permanent Members of UNSC*: The non-membership and lack of adequate support by China, Russia and the United States of America in their position as permanent members of the UNSC is another factor identified as undermining the court's effectiveness in fulfilling its mandate, as those states exert great influence on other states.

vi. *The use of Veto Power***:** The court's effectiveness in prosecuting perpetrators of heinous crimes is also limited by the veto power of some of the permanent members of the UNSC, who have referral powers over non-member states. Recent events like those of Syria have glaringly displayed the ability of the veto power to frustrate the cause of international justice in cases that very well deserve the ICC's intervention.

Despite these challenges faced by the ICC, the potential of the court in prosecuting heinous crimes and its positive impact in maintaining international criminal justice is huge. For the court to remain relevant and of global influence, there is a need for the court to reassess its strategies as it strives to fulfil its role of prosecuting heinous crimes.

The International Criminal Court was established for the primary purpose of helping to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community. The creation of the ICC raised people's hopes and expectations for justice against those responsible for perpetrating heinous crimes and in achieving universal peace. These expectations were well described by the former UN secretary general, Anan, as a gift of hope to future generations and a giant step forward in the march towards universal human rights and the rule of law[25]. The ICC, since its operation on the 1st of July 2012, has been able to define its role and strategies in the international criminal justice system, raising the hope of justice for victims and making notable progress in investigations, indictment, arrest, trial, and convictions of some of those responsible for committing heinous crimes. In its two decades of operation, the court has only indicted over forty people, convicted eight, and acquitted four.[26] The role of the ICC in the prosecution of heinous crimes is being

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[24] Brownlie Ian, *Brownlie's Principles of Public International Law* (Oxford Press 2012) 217

[25] Kofi Anan, (Speech made at Campidoglio on the occasion of the adoption of the Rome Statute, July 8, 1998) <https://www.un.org//index.htm> accessed 19/7/2021.

[26] Felter (n12).

continuously questioned as the perpetrators of heinous crimes seem unhindered. The situations in Syria, Myanmar, Israel/ Palestine, as well as other states, continue to be accompanied by gross violations of the provisions of international humanitarian law through the perpetration of heinous crimes against the civilian population without accountability. It is this continued violation of the provisions of International Humanitarian Law (IHL) in spite of the presence of the ICC that prompts the authors to carry out this research. This work will strategically examine the role of the court, the impact the court is making in deterring heinous crimes and identify the factors that undermine the efforts of the court in prosecuting and deterring heinous crimes.

The International Criminal Court has undoubtedly made a positive contribution to universal justice and peace both within and outside the court since its establishment. There is also no doubt that the court would have made more impact if it were not limited by some structural and political challenges. The impact of these challenges on the effectiveness of the court in fulfilling its mandate has become more apparent over the years. To ensure the court functions within full capacity, it is important for these challenges to be given the deserved attention by the international community. These challenges are what the authors focused on.

JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT (ICC)

The jurisdiction of the court is limited in several ways. Some of these limitations include: Limitations with regard to subject matter, non-state parties and limitations with regard to the principle of complementarity. A look at these shows that there is a need for the contracting parties to review some positions.

SUBJECT MATTER

The subject matter jurisdiction of the ICC consists of only four crimes. These are Genocide, War Crimes, Crimes against humanity and crimes of Aggression[27]. The mandate of the ICC is to achieve universal peace and justice through the prosecution of heinous crimes; this will be an impossible task to achieve with such limited subject matter jurisdiction, as the global record of atrocious crimes is not limited to the above-mentioned crimes. Terrorism, drugs and human trafficking, piracy and other such crimes are seen as atrocious crimes and are also raising global concern because of the negative impact these crimes also have on global peace. The effect of these crimes on universal peace cannot be overlooked. These crimes are sufficiently capable of limiting the effort of the ICC in its quest to achieve universal peace and justice against heinous crimes. The devastating impact of drug trafficking on universal peace was most likely the reason why the Prime Minister of Trinidad and Tobago in 1989 re-awakened the demand for the creation of an international criminal court that would try drug trafficking offenders[28]. How drug trafficking was eventually left out of the court's jurisdiction leaves one to wonder. Due to the impact of these crimes on universal peace and justice, expanding the subject matter jurisdiction of the Court to include these crimes is important. Leaving the prevention and prosecution of these crimes to the states alone may not guarantee the achievement of universal peace against heinous crimes as envisioned by the

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[27] Article 5 of the Rome Statute.

[28] International Criminal Court, The Election of Mr Arthur N.R. Robinson to the Board of Directors of Victim Trust Fund. (20/06/2006) <https:// www.web.achieve.org> Accessed on 9/07/2021.

international community. This doubt is grounded on the fact that some of the States lack the institutional framework to deal with most of these crimes. It is our observation that the evidence of states' inadequacy in handling these crimes is the reason for the recorded increase in these crimes globally.

JURISDICTION OVER NON-STATE PARTIES

The jurisdiction of the ICC with regard to non-state parties is limited. The ICC does not have the power to prosecute heinous crimes committed within the jurisdiction of non-state parties unless such states voluntarily submit to the jurisdiction of the court[29] or the state is referred to the Court by the United Nations Security Council (UNSC). Since the creation of the ICC, no non-state party has voluntarily submitted to the jurisdiction of the court even in situations of grave violations of international criminal law within their territory. This implies that the only other means through which the Court can exercise jurisdiction over non-state parties is through UNSC referrals,[30] just like they did over the situations of Libya and Sudan. In the event that the UNSC fails to make a referral, the ICC is powerless to do anything about the non-state party, no matter how gross the violations occurring within that territory might be. This was the regrettable situation in the crisis in Syria. Syria is not a state party to the ICC, so the Court could not exercise jurisdiction over it. It is unfortunate that, to date, no one has been brought to trial over the atrocious crimes committed in Syria because the UNSC could not come to a consensus as a result of the veto exercised by China and Russia over the resolution to make the needed referral. This kind of limitation hinders the strife of courts to end impunity against heinous crimes globally, and rendering justice to victims thereof will continue to be an unrealised dream.

THE PRINCIPLE OF COMPLEMENTARITY

The ICC is not created to have primacy over national jurisdiction. The Rome Statute bestows on the states the primary obligation of prosecuting heinous crimes within their territories. The ICC is a court of last resort and can only prosecute where the state is either unwilling or unable to prosecute[31]. The essence of the adoption of this principle is to accord respect to state sovereignty. Commendable as that principle might be, it is not without effect on the efficacy of the ICC to end impunity against heinous crimes. The principle of complementarity renders cases inadmissible under the following conditions; firstly, where a state with jurisdiction has investigated or prosecuted; secondly if the case has been investigated by the state that have jurisdiction and the state decided not to prosecute, unless the decision resulted from unwillingness or inability of the State to genuinely prosecute, and thirdly where the person had already been tried or where there is no sufficient gravity to justify further action by the court. The problem is that this law is drafted with the assumption that all member states have the required institutional capacity to prosecute heinous crimes. In developing states, experiences have revealed that most of the national courts are tools in the hands of the political leaders who are often the perpetrators of heinous crimes. The situation of the Eritrean justice system was well brought out by Meckonnen[32] thus:

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29 Article 12(3) of the Rome State 2002.
30 Article 13(b) Ibid.
31 Article 17(a) of the Rome Statute.
32 Daniel Meckonnen, Transitional Justice: Framing a model for Eritrea(AV Akademikerverlag GmbH & Company. 2009)59.

> I emphasis on the fact that the Eritrean judiciary is an enfeebled state institution when it comes to the performance of two of its major tasks, namely, safely guarding fundamental rights and freedoms and restraining capricious government authority. Apparently with the most responsible individuals at the helm of political power, the possibility of ensuring accountability for crimes against humanity by Eritrean national court through the principle of complementarity is completely unthinkable at least at the moment[33].

It is saddening to admit that the situation of the Eritrean judiciary is the situation of most of the justice systems in third-world countries; the ability of these justice systems to determine matters of atrocious crimes committed by the political elites is highly questionable. It is important to point out that Article 17(2)(3) of the Rome Statute outlined situations where a court can be determined to be unwilling or unable to prosecute; however, the ICC has yet to define such a situation. This was pointed out by Judge Philip Krisch of the ICC as follows: 'the ICC will really have to invent, create and define the meaning of a state that is unable or unwilling to conduct genuine proceedings'[34]. In consideration of the above, leaving the primary responsibility of prosecuting heinous crimes to states will undoubtedly frustrate the effectiveness of the ICC in ending impunity against heinous crimes.

LEGITIMACY OF THE INTERNATIONAL CRIMINAL COURT

The Rome Statute also suffers from issues related to legitimacy. Not every State acknowledges and accepts the authority and the global mandate of the Court to prosecute heinous crimes. This is because of various reasons, and part of it was brought out by Casey[35] , thus:

> The statute assumes that there are universally accepted notions of justice and procedural fairness and that even the most closely related of the world's legal systems, common law and civil law begin from fundamentally different assumptions about the role of a criminal trial in the pursuit of justice and to say nothing of non-westerns systems such as the Sharia.[36]

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33 Ibid.

34 Michael A. Newton, The Complementarity Conundrum: Are we watching evolution or enviseration. Santaclara Journal of International Law (2010) (8)(7) 115-164. <https://digitalcommons.law.scu.edu.scuijil/vol8/1551/7. Accessed on 9/7/2022.

35 Lee A. Casey, The case against the International Criminal Court. Fordham International Law Journal (2001)(25) 838-872

36 Ibid.

Many of the Arab League of Nations are not members of the ICC, and some other states that signed the treaty now consider the court as institutionally illegitimate and any attempt by the court to exercise authority over those states is met with gross resistance and criticism. The court had witnessed some of the signatories to the statute withdrawing their signatures and some State members threatening to withdraw their membership. In 2016, Russia withdrew its signature from the ICC statute, accusing the court of failing to promote justice and that it had become a court enhancing Western imperialism[37]. In Africa, countries like Kenya, South Africa, Gambia, Namibia and Uganda had either taken steps towards withdrawal or threatened to withdraw from the ICC because of personal reasons or in response to AU (African Union) call to its member states to withdraw from the Court base on the perception that the court is being used as an instrument of western imperialism against African States[38]. This wave of withdrawal by these states had greatly threatened the legitimacy of the Court. Though most of the threats were not actualised, were it to be so, there is no doubt that the impact on the legitimacy of the court would have been devastating and that would have eventually frustrated the goal of the court to end impunity against heinous crimes. It is important to note that once a state withdraws from the ICC, the Court automatically loses jurisdiction over such a state except through UNSC referral, and the process of the referral is also bedevilled by its own challenges, like the use of veto power in the Security Council.

The United States of America, though not a member of the ICC, has often criticized the ICC for various reasons, the legitimacy of the court is one of such reasons. In 2018, John Bolton, who was the United States' security adviser, attacked the court, asserting that the court is illegitimate and that, for all intents and purposes, the ICC is already dead[39]. Trump also reinforced the contention by asserting that the ICC has no jurisdiction, no legitimacy and no authority[40]. The United States is a permanent member of the UNSC and, as such, has the power to veto any attempt by the UNSC to refer matters concerning the USA to the International Criminal Court. The USA has been antagonistic towards the ICC to the extent that John Bolton threatened to arrest ICC Judges and Officials if the Court moves to charge any American citizen who served in Afghanistan with war crimes[41]. To ensure the court does not exercise jurisdiction over American citizens, America executed over a hundred bilateral immunity agreements (BIA) with some ICC member states (Nigeria inclusive). By the agreement, signatories agreed not to surrender any American found in their territory to the ICC for prosecution over any core international crimes[42]. In spite of the court's lack of legitimacy in some quarters, 123 States are still members of the ICC. This goes to prove that many states still believe in the establishment of the Court as an institution with a global mandate to fight impunity against heinous crimes. It is evident that the outcry against the legitimacy of the ICC is being carried out by States that were under investigation, like Sudan

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37 Rebecca Hersher, Russia Withdraw Support for ICC<https://www.npr.org/sections/thetwo-way/2016/11/16/50229321>. Accessed 12/07/2023.

38 Jump up, The International Criminal Court and African Sovereignty. <https://www.jumpup.org>. Accessed on 13/07/2022.

39 Blog In the Spotlight, The legitimacy of the International Criminal Court. (international Law Blog) <https://internationallaw.blog>. Accessed 13/07/2021.

40 Donald Trump, Trump's UN General Assembly Speech (25, September, 2018). <https://theatlantic.com>. Accessed on the 13/07/2021.

41 AFP News, US threatens to Arrest ICC Judges who Probe War Crimes.(10/09/2018). https://www.afp,com/en/news/23/us-threatens-threatens-arrest-icc-judges-probe-war-crime-doc-19015t1. Accessed 15/07/2021.

42 The Bilateral Immunity Agreement as contain in the American Servicemen Protection Act (ASPA) 2002.

and Kenya, or States making every effort to ensure that their citizens are not subjected to prosecution by the Court, like the USA. No matter how minute the criticism might be, it is important that it be adequately addressed. America exerts influence on many States because of its position as a world power, and the likelihood of swaying many to its position, thereby affecting the credibility of the Court is very high.

STATES' COMPLIANCE WITH INTERNATIONAL CRIMINAL COURT ORDER

The Rome Statute requires State party members to fully cooperate with the ICC in the performance of their responsibilities. States are under the obligation to cooperate with the court in investigation, arrest, collection of evidence and protection of key witnesses. The over-reliance of the Court on the cooperation of State members is crucial to the effective function of the Court. This is because the court lacks an enforcement mechanism. Oosterveld and Perry, and McManus brought out this situation as 'States corporation is a key element and tantamount to the mandate of the ICC because the ICC has no police force, military or territory of its own'[43]. The Rome Statute requires state cooperation in twofold: The general commitment to cooperate with investigations, arrest and surrender and cooperation by ensuring that the provisions of the Rome Statute are domesticated[44].

Despite the agreement to cooperate with the ICC, the challenge at the moment is that, over the years, state members have proven to be unwilling to cooperate with the Court. That attitude amounted to a clog in the court's wheel of justice. In 2009 and 2010 the ICC issued arrest warrants against the president of Sudan, Omar Al-Bashir and it is a well-known fact that Al-Bashir visited Chad on the 21 and 23 July 2010, Kenya in August 2010, Malawi on 8 May 2011 and South Africa[45], yet to execute the arrest warrant against him did not take place as the states refused to comply with the ICC order to make the necessary arrest. ICC reported the various situations of non-compliance with the UNSC and the ASP[46]. Reacting to the blatant disregard of ICC order, Judge Antonio Cassese stated that the provision on state cooperation with the court should be clarified and strengthened to leave no loopholes available to those states who are unwilling to allow the court to exercise criminal jurisdiction over persons under their control[47].

The fact that this challenge requires urgent attention is obvious. This is because without securing unflinching commitment by member States to comply with ICC orders, the Court does not have the ability to function. Where the court fails to function, the purpose of creating the Court is defeated; hence, securing the full cooperation of member states is a necessity to the fulfilment of the mandate of the ICC and thereby ending impunity against heinous crimes.

INTERNATIONAL POLITICS OF THE INTERNATIONAL CRIMINAL COURT

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43 Valerie Oosterveld,Mike Perry and John Mcmanus, The Cooperation of States with International Criminal Court
(2011)(25)(3) Fordham International Law Journal.767

44 Article 87 Rome Statute 2002.

45 Konstantinos Magliveras and Gino Naldi, The ICC Address non-compliance by state parties: The Malawi decision. African Journal of Legal Studies (2013) (6) (1) 1 3 7 –11 51.

46 Ibid.

47 Antonio cassese, The statute of the International Criminal Court: Some Preliminary Reflections. https//:www.ejil.org. Accessed on 12/07/2021.

The nature of the ICC makes the court subject to international politics, and over the years, it has become obvious that who will be tried and for what offence such a person will be tried is dependent on international politics. This power politics has negatively impacted the efficacy of the court to dispense justice without fear or favour. The power politics of the court have obviously affected the court in several ways, and some of these include:

i. *The United Nations Security Council referrals*: The UNSC have the authority to refer a matter to the ICC or to defer a matter before the ICC,[48] but over time, the world witnessed the UNSC referring or not referring matters based on their individual political interest. The situation in Syria and Libya was almost the same, but while that of Libya was referred to the ICC, the resolution referring the Syrian situation was vetoed by their allies in the council, that is, Russia and China who based their decision on the reason that the situation in Syria is best handled internally. The agitations by various civil society groups and Syrian citizens clamouring for the court's intervention were to no avail.

ii. The office of the prosecutor (OTP) cannot be considered neutral, as it has also been seen to be a participant in the game of international politics as well. When USA invaded Iraq and their operations in Afghanistan and Libya, there were allegations of atrocious crimes committed by the American Military, yet the prosecutor showed unwillingness to conduct an investigation on those allegations, concerning Iraq he stated that the events occurred on territories of Iraq and that Iraq is not a member of the Assembly of state parties. He also showed no interest in investigating the allegations concerning the other states as well. It is interesting to point out that Libya and Sudan were also not members of the ICC, yet their situations were referred to the ICC. To state that Iraq is not an ICC member and, as such, the allegations are not worthy of the prosecutor's investigation is to state the obvious.

iii. Some state leaders also use the court as a political instrument to act against rebels so as to reinforce their regime. This was typical of the DR Congo and Ugandan situations, where their leaders referred the rebels to the ICC in order to consolidate their regimes[49].

The ICC has been subjected to the influence of international politics, and maintaining an impartial front is becoming a challenge. The court is losing credibility as a result of that. We agree with the assertion of Geis and Mundt that although the ICC was established as an impartial Arbiter of international justice but both the timing and nature of its indictments issued to date suggest that the intervention of the ICC in situations of ongoing conflict is influenced by broader external factors[50].

It is saddening to see a body that has been created to be an impartial arbiter in dispensing justice being affected by international politics to the extent that it has become

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48 Article 13 and 16 of the Rome Statute 20002.

49 Clerk Phil, Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda in Waddell Nicholas & Clark Phil (eds) Courting Conflict: Justice, Peace, and the ICC in Africa (Royal Africa Society Mess, 2008) 41-42.

50 Jacqueline Geis and Alex Mundt, The Impact of Timing of International Criminal Indictments on Peace Processes and Humanitarian Action <http://www.brookings.edu>. Accessed 14/07/2021.

obvious that who gets referred by the UNSC or investigated by the prosecutor is dependent on the political power at play. This could make some parties not to have confidence in the court, as such have no regard for its orders or pronouncements.

CONCLUSION

The establishment of the ICC has raised the hopes and expectations of the international community. It was expected that the Court would end impunity against heinous crimes and thereby lead to deterring the commission of such crimes, but almost two decades down the line, the court has faced criticisms for not meeting the expectations vested in it. However, since the court's establishment, it has been able to make a significant impact on international peace and justice in creating a deterrence against heinous crimes, influencing domestic legislations against heinous crimes and influencing civil society groups to create extra judicial pressures against the perpetration and perpetrators of heinous crimes. There is, however, no doubt that the court would have made more impact if it were not limited by some challenges. The power to prosecute heinous crimes by the ICC emanates from the Rome Statute. The court can only prosecute and make reparations according to the extent of the authority provided to it by the Rome Statute. The ICC's power to prosecute is limited to only four heinous crimes that are contained in the Rome Statute, but this is not exhaustive. Terrorism, Drugs and Human Trafficking, Piracy are heinous and are negatively impacting universal peace as much. Non-member states' cooperation, the legitimacy of the court, accusations of bias against African states, politics of the ICC and the exercise of the veto power of the UNSC are some of the challenges undermining the efficacy of the International Criminal Court.

The ICC has been able to prosecute heinous crimes in some situations and has also made recommendations for the reparation of victims. There is without doubt that the court has not reached its full potential due to glaring limitations challenging its efforts. The establishment of the court has brought a major shift in international criminal law as the court prosecutes base on individual liability as against states and does not regard the common law principle that immunizes serving state leader against prosecution for crimes committed hence leaders who are alleged of committing heinous crimes are liable to prosecution even while serving. Kenyatta was tried while in office, and Al-Bashir was indicted while in office. One of the innovations of the Rome Statute, unlike other international criminal tribunals, is the provision of restorative justice. Victims of heinous crimes have the right to participate in the proceedings not just as witnesses but as victims, and they have the right to apply for reparation for the harm or damages they suffered.

The jurisdiction of the court to prosecute heinous crimes can only be activated through the following: Where the Prosecutor proprio motu initiates investigation by the authorization of the pre-trial chamber; where a matter was referred to the court by the UNSC; where a state party refers the matter to the court or where a non-state party refers the matter to the court via an application to voluntarily submit to the jurisdiction of the court. In the absence of a Non-State Party voluntarily submitting to the court's jurisdiction and the UNSC not making a referral, the ICC cannot exercise jurisdiction over those states. For the court to prosecute a matter, such a matter must also pass the admissibility threshold; otherwise, the ICC cannot prosecute.

The ICC's jurisdiction is also limited by the complementarity principle. It is a court of last resort. States have the primary responsibility of prosecuting heinous crimes committed within their territories, and the Court can only assume jurisdiction where the state is either unable or unwilling to do so. That notwithstanding, the ICC is making a significant impact on domestic laws so as to ensure that states build the capacity to prosecute heinous crimes[51].

ICC relies heavily on states' cooperation in order to function efficiently. This was recently recorded as a challenge, despite undertakings by State members to cooperate, the refusal by some state parties to arrest former president Al-Bashir of Sudan shows how incapable the ICC is without state cooperation. The importance of obtaining state cooperation with the ICC cannot be overemphasised because some of these States lack the institutional capacity to prosecute heinous crimes, others are either bedevilled by corruption or lack of political will to bring perpetrators of heinous crimes to justice.

The need for the UNSC to reflect on the effect of prioritising personal political interest over and above universal peace and justice should be revisited. Due to political interest, the UNSC has failed to extend the jurisdiction of the court to non-member states by their referral power as it was intended to be. The effect of the UNSC's political use of veto is the reason why no one in Syria has been prosecuted for the heinous crimes committed during the Syrian crisis. These actions by some of the UNSC permanent members are making the Council lose integrity and influence, and also encouraging their allies to continue perpetrating heinous crimes. It is important for the court to consistently advance against criticism and challenges in order to fulfil its noble mandate of deterring heinous crimes.

RECOMMENDATIONS

There is a need to encourage, enforce and strengthen states' cooperation with the ICC. The assembly of state parties need to bring out workable modalities that ensure cooperation by members with the court. It is also needful that the Rome Statute be amended to include penalties for non-compliance by member states with the court's orders. Such penalties can include imposition of economic sanctions, reduction of foreign aid or denying travel Visas to the political leaders and their family members. The sanctions must be imposed on erring states.

There is a need for the establishment of a permanent police force under the umbrella of the ICC who are to function within a workable modality set up by the Assembly of State Parties to ensure respect for state sovereignty. The police are to be used where all measures to ensure compliance prove abortive. The establishment is to reduce as much as possible the negative impact of the state's non-compliance on the efficacy of the Court. States should be encouraged to establish credible national judicial processes with the motivation to prosecute heinous crimes. This will address the limitations of the ICC imposed by the complementarity principle. States also need to train prosecutors, judges, police and other relevant stakeholders on the intricacies of prosecuting heinous crimes. There is a need for the ICC and ASP to encourage the domestication of the Rome Statute in states that have not yet domesticated it. This will encourage systematic legal reforms, which will in turn strengthen domestic legal systems in the bid to end impunity against heinous crimes.

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[51] Jane Stronseth, Is the ICC making a Difference https://www.justsecurity.org Accessed on 20/7/2021.

ICC needs to work tirelessly and impartially to justify its legitimacy. The court must remain and be seen to be impartial in its dealings with all situations that require its intervention. It must relentlessly investigate and indict perpetrators of heinous crimes from every part of the world. The court should take steps to strengthen its relationship with Africa, the USA and the Arab League Nations in order to gain their support and loyalty. The relationship between the ICC and the UNSC needs to be strengthened. Presently, three of the permanent members of the UNSC, that is, China, Russia and the USA, are not members of the ICC, and that has an impact on the legitimacy of the court. The ICC and the ASP need to make an effort to get these states on board. There is a need for an amendment to be made to the Rome Statute in order to extend the subject matter jurisdiction of the ICC to include other international crimes such as piracy, drugs and human trafficking and terrorism.