THE INTERNATIONAL CRIMINAL COURT- PROBLEMS AND PROSPECTS IN A UNIPOLAR WORLD.

BY

JOHN OKOPI ALU AND USMAN DIBAL ANDUWIL
ALU & ASSOCIATES.

INTRODUCTION

The International Criminal Court (ICC) has brought in a new era in the protection of human rights. The ICC technically came into force on the 11th of April 2002 when the instruments of ratification of the Rome statute was simultaneously lodged by 10 countries to bring the number of the countries who had ratified the Rome Statute at the time to 66 countries.[1] Officially however, the 1st of July, 2002 is recognized as the date the ICC came into being. Protecting against genocide, crimes against humanity and war crimes, the court acts when national justice systems are unwilling or unable to do so. The ICC investigates and, where necessary, tries individuals charged with the gravest crimes which international community considers to be of concern. The ICC has emerged as another means for the enforcement of International Humanitarian law.

The Rome Statute which birthed the ICC is a landmark treaty adopted in Rome in 1998. This treaty is regarded as perhaps the most inventive and stimulating development in international law since the creation of the United Nations. Shabas enthuses that the Statute is one of the most complex international instruments ever negotiated made up of a sophisticated web of highly technical provisions, drawn from comparative criminal law and combined with a series of political propositions that touch the very heart of State concerns with their own sovereignty.[2] Devoid of any doubt, its establishment is the result of the human rights movement that has steadily taken central stage within the United Nations since Article 1 of its Charter proclaimed the promotion of human rights to be one of its purposes.[3] Accordingly, from a hesitant commitment in 1945, to an ambitious Universal Declaration of Human Rights in 1948, the international world arrived at a

[1] On the 11th of April 2002, a solemn ceremony at the UN Headquarters in New York was held when the instruments of Ratification of the Rome Statute was lodged formally and simultaneously by the representatives of Bosnia and Herzegovina, Bulgaria, Cambodia, Republic of Congo, Ireland, Jordan, Mongolia, Niger, Romania and Slovakia. Ratification ceremony at UN paves way for International Criminal Court' UN News. (11 April 2002) https://news.un.org/en/story/2002/04/32172-ratification-ceremony-un-paves-way-international-criminal-court accessed on 29th August, 2018.

[2] William A. Shabas, An introduction to the international criminal Court, (Cambridge press, 2001); The Rome Conference" took place from 15 June to 17 July 1998 in Rome, Italy, with 160 countries participating in the negotiations and the NGO Coalition closely monitoring these discussions, distributing information worldwide on developments, and facilitating the participation and parallel activities of more than 200 NGOs. At the end of five weeks of intense negotiations, 120 nations voted in favour of the adoption of the Rome Statute of the ICC, with seven nations voting against the treaty (including the United States, Israel, China, Iraq and Qatar) and 21 states abstaining. Coalition for the International Criminal Court, History of the ICC. http://iccnow.org/?mod=icchistory&idudctp=21&order=authordesc accessed 31st August, 2018.

[3] Ibid.

point where individual criminal liability is now established for those responsible for serious violations of human rights, and where an institution is created to see that this is more than just some pious wish .[4]

Against the above background, this paper would seek to analyse the challenges and prospects of the ICC in the New World Order which is Unipolar. By exploring the concept of unipolarity so as to grasp fully, the challenges and prospects of the ICC within the current international system, an attempt would be made to demonstrate how the concept of polarity in International relations played a role in the establishment of the ICC.

The paper would also examine and articulate the problems of the ICC by analysing the lack of recognition from the United States, the concept of complementarity, the ICC's reliance on the cooperation of states as well as questions that relates to its legitimacy.

THE CONCEPT OF POLARITY AND THE BIRTHING OF THE ICC

Polarity is a concept in International Relations and refers primarily to the various ways in which power is distributed within the international system. It describes the nature of the international system at any given period of time. One generally distinguishes four types of systems: unipolarity, one centre of power; bipolarity, two centres of power; three and four of more centres of power are tripolarity and multipolarity respectively.[5] Nuno have opined that theorists in international relations generally believe that the post-cold war international system is unipolar. In this regard, the United States' defense spending which is close to half of the global military expenditures; a blue-water navy superior to all others combined; a chance at a powerful nuclear first strike over its erstwhile foe, Russia; a defense research and development budget that is 80 percent of the total defense expenditures of its most obvious future competitor, China; and unmatched global power-projection capabilities is considered as the unipole.[6]

While it remains expedient to say that post the cold war, the new world order is built around a Unipolar international system, wherein the international distribution of power in culture, economics and military influences is exercised by the United States as the 'Unipole', it has not

[4] Ibid.

[5] Wikepedia, *Polarity (International Relations)* https://en.m.wikipedia.org/wiki/Polarity_(international_relations) accessed 16 August, 2018.

[6] Nuno P. Monteiro, 'Unrest Assured: Why Unipolarity Is Not Peaceful' *Mitt Press Journal* [2011/12] (36) (3) 9–40 htpp://www.mitpressjournals.org/doi/pdf/10.1162/isec_a_00064 accessed 16 August, 2018.

come without grave breaches of international humanitarian rights as well as the inexplicable action of the Unipole in its relationship with the ICC.

Cassese's observations on the bipolar international system not too far gone, indicates that it is indeed common knowledge that, despite the obvious problems of the Cold War era, the two power blocs did guarantee a modicum of international order to the extent that each of the superpowers acted as policeman and guarantor of order in its respective bloc.[7] However, the collapse of this structure of international relations ushered in a wave of negative consequences. It entailed a fragmentation of international society and intense disorder which, coupled with rising nationalism and fundamentalism, has resulted in a spiraling of (mostly) internal armed conflict with much bloodshed and cruelty.[8] The ensuing implosion of previously multi-ethnic societies, such as the former Yugoslavia and Rwanda, has led to gross violations of International Humanitarian Law on a scale comparable to those committed during the Second World War, which have shocked the conscience of the world.[9] Even though the process of establishing the ICC has been part of the International dialogue for years, the gross violations of International Humanitarian Law under the new world order which was no longer bipolar but unipolar, provided a platform for the establishment of the ICC. In giving perspective to this, Bassiouni and Blakesly trace the idea of establishing the ICC to have begun in 1899 with the first Hague convention for the Pacific Settlement of International disputes.[10]

Unquestionably, the Cold War era witnessed many such excesses (Vietnam, Cambodia, Wars as well as civil wars in Guatemala, Afghanistan, Angola and Mozambique), however, it is due to the new 'harmony' among the Five permanent members of the security council, together with intense media coverage of such events, that unprecedented opportunities have been created for the

[7] Antonio Cassese 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' [1998] European Journal of International Law (9) (1) 2-17 http://www.ejil.org/pdfs/9/1/1477.pdf ,accessed 01 September 2018.

[8] Ibid.

[9] Renowned German lawyer, Nlemeyer, observed in 1932 that international law is an edifice built on a *volcano* — state sovereignty, because when state sovereignty explodes onto the international scene, it may demolish the very bricks and mortar from which the Law of Nations is built and for this reason, international law aims to build devices to withstand the seismic activity of states to prevent or diminish their pernicious effect. Nlemeyer H.G., *Elratwdllgt Vcrfugungen des Wehgtrkhlshofc. Ihr Wesen und Out Grantn* (1932)**;** ibid

[10] Cherif M. Bassiouni and Christopher L. Blakesly, 'The need for an International Criminal Court in the New International World Order' [1992] *Vanderbilt Journal of Transnational Law* (25) (2)151-182. https://scholars.law.unlv.edu/facpub/326 , accessed 02 September 2018.

prosecution and punishment of those responsible for serious violations of International Humanitarian Law.[11]

Indeed, as the center of power in the international system gravitated towards unipolarity, it gave rise to more incidences of the violation of International Humanitarian Laws.[12] The rapid growth of the media including social media accentuated the conflicts and the fragmentation of erstwhile multi-ethnic-integrated societies.[13] This informed the need for the enforcement of International Humanitarian Law through criminal jurisdiction by the prosecution and punishment via national and international tribunals, of individuals, accused of international humanitarian law violations. Indeed, the establishment of the ICC in the unipolar international system created an international criminal jurisdiction that is concerned primarily with individual criminal responsibility as opposed to state responsibility. International criminal jurisdiction aims to enforce the obligations of *individuals* under International humanitarian law, as opposed to other methods of enforcement which concentrates on the obligations of *states.*[14] However, for inexplicable reasons, the United States as the Unipole in the current world order, who participated actively in the negotiations that culminated into the Rome Statute, voted against its adoption. These and the implication for the ICC in the none-participation of the United State as the Unipole in the operation, functionality and execution of its mandate, is one of the mainframe of this study.

THE UNITED STATE (UNIPOLE) AND THE PROBLEMS OF THE ICC.

Schenoni has opined that apart from excelling in indicators of power such as population, resource endowment, economic capacity, and military might, unipoles are associated with certain foreign policy behaviours like actively participating in binding regional institutions; building ad hoc coalitions of the willing to deal with major security or economic challenges; struggling for legitimacy without applying much coercion; and respecting the sovereignty of second-tier states, who are considered as crucial partners.[15] It bears no emphasising that the character traits described

[11] Cassese n. 7
[12] Ibid.
[13] Ibid.
[14] Ibid.
[15] Luis Leandro Schenoni, 'Subsystemic Unipolarities? Power Distribution and State Behaviour in South America and Southern Africa', *Strategic Analysis Journal* [2017] (41) (1) 74-86 https://www.tandfonline.com/doi/abs/10.1080/09700161.2016.1249179, accessed on 9 August, 2018.

above are readily attributable to the United States. Importantly however and in its relations with the ICC as a global super power, the ICC lacks the sufficiency to call upon the above indicators of power in the execution of its mandate.

Indeed, the United States policy concerning the ICC has varied widely. The Clinton Administration signed the Rome Statute in 2000, but did not submit it for Senate ratification. The George W. Bush Administration, (the U.S. administration at the time of the ICC's founding), stated that it would not join the ICC. The Obama Administration subsequently re-established a working relationship with the Court as an observer.[16] The Trump Administration's policy statement as it relates to the ICC came on the 10th of September 2018, when John Bolton, the United States National Security Adviser threatened to arrest ICC judges and officials if the ICC moved to charge any American who served in Afghanistan with war crimes[17] and subsequently slammed visa restrictions and economic sanctions against the personnel of the International Criminal Court, amongst other measures. The Biden Administration has though lifted these restrictions and sanctions, but maintains that the ICC lacks jurisdiction to try US personnel.[18] Consequently, what is rather interesting however is that, rather than bringing to bear the full compliments of its powers and influence, the United States have since taken the following actions in relation to the ICC;

I). On August 2, 2002, the American Government enacted and approved the American Service Members' Protection Act, a national law that directly contrast with the mandate of the ICC. The Act, derisively labelled the Hague Invasion Act [19] prohibits US courts and authorities from providing any assistance to the ICC or any parties to any trial at the ICC, it prohibits US courts from extraditing any persons to the ICC and prohibits any agent of

[16] Wikepedia, 'The United State and the International Criminal Court' https://en.m.wikipedia.org/wiki/United_States_and_the_International_Criminal_Court ,accessed on 9 August, 2018.

[17] 'US threatens to arrest ICC judges who probe war crimes' *AFP News* (10 September 2018) https://www.afp.com/en/news/23/us-threatens-arrest-icc-judges-who-probe-war-crimes-doc-19015t1 accessed on 3rd August, 2018.

[18] United States Department of State, Ending Sanctions and Visa Restrictions against Personnel of the International Criminal Court. https://www.state.gov/ending-sanctions-and-visa-restrictions-against-personnel-of-the-international-criminal-court/ accessed on 31st December, 2021.

[19] Tonic Blotter, 'It All Makes Sense Now - Blackwater and the ICC' *Global Policy Forum Newsletter* (New York, 1 October 2007) https://www.globalpolicy.org/component/content/article/164/28560.html , accessed 23 August, 2018.

the International Criminal Court from conducting in the United States or any territory subject to the jurisdiction of the United States, any investigative activity relating to a preliminary inquiry, investigation, prosecution, or other proceeding at the ICC. [20] Egregiously also, the Act authorizes the President to extract by military force, if necessary, any "covered United States persons" in the custody of the ICC.[21] Blotter, highlights that in other words, the Act authorizes the US to militarily invade the sovereign country of the Netherlands, heretofore also known as a US ally and member of NATO.[22]

II). The Rome Statute includes Article 98, which provides as follows:

> Article 98(2) *Cooperation with respect to waiver of immunity and consent to surrender* :
> The Court may not proceed with a request for surrender which would under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

The international agreements mentioned in Article 98(2) of the Rome Statute are referred to in several terms, including **Article 98 agreements**, **bilateral immunity agreements** (BIAs), **impunity agreements**, and **bilateral non-surrender agreements**. Starting in 2002, the United States began negotiating these agreements with individual countries, and has concluded at least one hundred such agreements. Countries that sign these agreements with the United States agree not to surrender Americans to the jurisdiction of the International Criminal Court.[23] The United States of America, whilst not been a party to the Rome statute and the ICC, continues to exploit Article 98 of the Rome Statutes with these agreements, weakening the efficacy of the ICC to successfully achieve its mandate.

[20] Section. 2004, American Service Members' Protection Act, 2002
[21] Section. 2007, American Service Members' Protection Act, 2002
[22] Blotter. n.16
[23] Georgetown University Law Library, *International Criminal Court - Article 98 Agreements Research Guide*. <http://guides.ll.georgetown.edu/article_98>, accessed on 2, September, 2018.

III). The United States have been alleged to have engaged in possible International Humanitarian Law violations by the use of Private Military Companies (PMCs) in armed conflicts where PMCs have 'taking direct part in the hostilities' and civilians who were not 'participating directly in the hostilities have been killed'.[24] In June 2003 and following the United States invasion of Iraq, the American Government retained the services of a Private Military Company called Blackwater Worldwide (Blackwater) to provide protective services for the United State, State's Department. On September 16, 2007, heavily armed private soldiers working for Blackwater shot and killed seventeen Iraqi civilians, wounding twenty-four others whilst escorting a convoy at Nisour Square in the Mansour district of Baghdad, the capital of Iraq.[25] While Darcy writes, emphasising that the concept of direct participation in hostilities during a situation of armed conflict has become a prominent and, at times, contentious issue in International Humanitarian Law,[26] the International Criminal Tribunal for the former Yugoslavia (ICTY) in relation to 'taking direct part in the hostilities' in its final Judgement in the case of *Prosecutor v. Tadic*, held that;

> it is unnecessary to define exactly the line dividing those taking an active part in hostilities and those who are not so involved. It is sufficient to examine the relevant facts of each victim and to ascertain whether, in each individual's circumstances, that person was actively involved in hostilities at the relevant time.[27]

PMCs retained by the United States in Iraq have been accused of committing murder and torture[28], crimes against inhumanity provided for under Article 7 of the ICC. Indeed the participation by

[24] Article 3 of the 1949 Geneva Conventions provides minimum international protection to "persons taking no active part in the hostilities," while the Additional Protocol I to the Geneva Conventions provides in Article 51(3) that civilians lose certain protections against the effects of hostilities "for such time as they take a direct part in hostilities."

[25] Jeremy Scahill, '*Blackwater: The Rise of the world's most powerful mercenary army'* (Nation Books 2007).

[26] Shane Darcy, Direct Participation in Hostilities *Oxford Bibliographies* (2016).

http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0137.xml

accessed 3 September 2018.

[27] *Prosecutor v. Tadic*, Final Judgment, Case No.IT-94-1-T, Trials Ch., 7 May 1997, para.616.

[28] Schahill n. 22, (p.221) ; On April 28, 2004, the Abu Ghraib prison scandal was blown into the open when CBS's 60 minutes II broadcast graphic images depicting US Soldiers torturing and humiliating Iraqi prisoners.

PMCs in the conduct of war, civil or not, and the allegations of possible violations against International Law by PMCs challenge the traditional theory of International Law, which argues that only states and its institutions can carry out a war and violate the laws of war, a new type of perpetrator has emerged, that of a PMC to commit international crimes[29] which in this instance and in the contemplation of the American Service Members' Protection Act 2002, are covered United States persons.

OTHER PROBLEMS OF THE ICC.

1. COMPLEMENTARITY

As can be gleaned from the Preamble of the Rome Statute, the ICC is premised on the theory of complementarity placing it in a position that is subordinate to national courts.[30] It represents the idea that state parties, rather than the ICC**,** will have priority in proceeding with cases within their jurisdiction.[31] The complex and interconnected provisions of Articles **12** (specifying **ICC** jurisdiction), **13** (delineating the grounds for initiating an ICC case), and **17** (providing the textual basis for making the requisite rulings on admissibility) together form a composite regime to balance ICC power against the residual responsibilities of states.[32]

Statutorily, under Article 17 of the Rome Statute, cases are only admissible by the ICC where national courts are unwilling or unable to genuinely prosecute or investigate the case. Under the complementarity principle of the Rome Statute, Article 13 (a)-(c), provides for the ICC to acquire jurisdiction to admit a case after a crime has been committed under Article 5 through;

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[29] Stella Ageli, 'Private Military Companies (PMCs) and International Criminal Law: Are PMCs the New Perpetrators of International Crimes?' *Amsterdam Law Forum.* [2016] (8) (1) 28-47 *amsterdamlawforum.org/article/view/352* , accessed on 3, September, 2018.

[30] Paragraph 10 of the Preamble to the Rome statute provides; Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.

[31] Linda E. Carter, 'The Principle of Complementarity and the International Criminal Court: The Role of Ne Bis in Idem.' *Santa Clara Journal of International Law* [2010] (8) (8) 165-198 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1479628 accessed 23 July 2018.

[32] Michael A. Newton 'The Complementarity Conundrum: Are We Watching Evolution or Evisceration?' *Santa Clara Journal of International Law* [2010]. (8) (7) 115-164 https://digitalcommons.law.scu.edu/scujil/vol8/iss1/7/accessed 9 September, 2018.

a. A referral to the ICC by a state party to the ICC treaty;

b. The UN Security Council may initiate a case;

c. The ICC prosecutor may initiate a case.

However, Article 12 (2) (a) & (b) of the Rome Statute with regards to the first two procedures of initiating a case, additionally requires that either of the state where the crime took place, or the state of the nationality of the accused, consents to the ICC's jurisdiction either by reason of being a state party that has already ratified the ICC treaty or under Article 12 (3), a state consents to the jurisdiction of the Court by making and lodging a declaration to that effect with the Registrar of the Court. It is safe to assume that a case initiated by the Security Council relating to a state party to the ICC automatically grants the ICC jurisdiction.

Instructively also, under Article 17 (1) (a)-(c), a case cannot proceed before the ICC if the case is being investigated or prosecuted by a State which has jurisdiction over it or the case has been investigated by a state that has jurisdiction and decides not to prosecute (unless the State is unwilling or unable genuinely, to carry out the investigation or prosecution) or the person concerned has already been tried for the conduct which is the subject of the complaint. As such, if a case is being actively pursued by a domestic court with proper jurisdiction or if a domestic court has already tried the accused for the conduct in question, the ICC cannot prosecute.

Under Article 17 (2) a state is considered unwilling to genuinely prosecute where the domestic proceedings are delayed unjustifiably, not independent or impartial, or conducted for the purpose of shielding the accused from the ICC, or where no domestic proceedings are taking place. Lastly, under Article 17 (3),a state is considered unable to genuinely prosecute or investigate international crime where its national judicial system is unavailable or has substantially collapsed. In this context, Newton observes that;

> The provisions of the Rome Statute preserves a careful balance between maintaining the integrity of domestic adjudications and authorizing a supranational court to exercise power where domestic systems are inadequate. In preserving this delicate balance, complementarity is best viewed as a restrictive principle rather than an empowering one; while the ICC has affirmative powers as a supranational court, the textual predicates

necessary to make a case admissible are designed to constrain the power of the Court.[33]

In spite of the elaborate provisions of the complementarity principle of the Rome Statute, several questions remain unanswered. They are enumerated hereunder as follows;

I). The first situation arises when a State Party refers a situation to the Prosecutor under Article 13. It has been argued that if for example, a State Party refers a case to the Prosecutor, has the state completely relinquished all control over the case, or may it withdraw the referral at a later time? Essentially, the threshold inquiry is whether a state referral should be a "reversible right".[34] Notably, the ICC statute is silent on this. However, if a state could defeat the jurisdiction of the ICC by simply revoking its previous consent to the Court, there would be no limit to the politicization and polarization that would accompany any state referral. Therefore, a state could invoke its "reversible right" on any pretext, even if it merely disagreed with a specific charge or the person being investigated; such a legal posture would create an untenable imbalance of power in that states would be empowered to simply dictate charges and perpetrators to the ICC.[35]

II). Another issue is whether the specific cases within a larger situation are severable and thus subject to prosecution in *either* the domestic courts or the ICC in accordance with the complementarity principles. It is indeed conceivable that states could even envision prosecution of some individuals domestically, while consenting to ICC authority over other perpetrators facing charges for the same conduct under the same circumstances.[36] Allowing states to sever a situation may have the same effects as a "reversible right" of referral. The consistency and fairness of adjudications could easily be undermined if the referring state were able to dictate to the Court the specific circumstances and offenders over which the self-referral empowers the Court. This could lead to the conclusion that a situation should not be severable: either a state refers the entire situation or does not refer the case at all.[37] On the other hand, there is no textual support at all in the Rome Statute for a presumption

[33] Ibid.
[34] Ibid.
[35] Ibid.
[36] Ibid.
[37] Ibid.

that a state referral operates as a wholesale abandonment of the preexisting right of the state to prosecute selected offenders under the complementarity principle.[38]

III). The Court does not follow any standardized procedures for deferring to domestic jurisdictions, so there is no authoritative precedent or template to indicate when a situation would better be handled domestically. In fact, the former President of the Court, Judge Phillipe Kirsch, publicly acknowledged that the ICC "will really have to invent, create, and define the meaning of a state that is unable or unwilling to conduct genuine proceedings.[39]

2. ARTICLE 13 (b) ROME STATUTE); THE UN SECURITY COUNCIL MAY INITIATE A CASE.

Arising from the Complementarity principle is the nature of the jurisdiction the ICC seeks to exercises with regards to none-state parties. This is as problematic as it comes for the sole reason that universality and sovereignty comes into play. While there are several places where jurisdiction is used in the Rome statute, our focus in this section is on the exercise of the jurisdiction of the ICC as provided for under Section 13 of the Rome Statute which is hereunder reproduced;

Article 13

Exercise of jurisdiction

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;

(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or

[38] Ibid.
[39] Ibid.

(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

Discernible from the above provision and as may be readily conceded , Article 13 (a) and (c) are reconcilable in as much as it relates and refers to a state party who has ratified the Rome statute or consented to the jurisdiction of the Court. Article 13(b) provides quite a bit of a challenge as it goes against the particulars of customary International Laws when it tries to foist a 'universal jurisdiction'[40] on the ICC using the instrumentality of the Security Council of the United Nations. It is essential to note that the Security Council of the United Nations has 5 permanent members (who are often disagreeable) that exercise exclusively, the right to veto any decision of the United Nations.

Since the legitimacy of a State is intrinsically linked to territory, which it necessarily has sovereignty over, its ability to exercise criminal jurisdiction derives from the fact that as a sovereign nation, it has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender jurisdiction.[41] As a rule of primacy and especially in legal parlance, establishing jurisdiction is central to the prosecution of any issue before a court. The ICC must establish proper jurisdiction to assert judicial and penal authority over offenders, especially if they are not citizens of state parties to the Rome Statute and the crimes they committed were not committed in the territory of a state party to the Rome Statute. In 2009 and 2010 for instance, the ICC issued arrest warrants for Omar Bashir, the president of Sudan which is not a state party to the Rome statute on the strength of a referral by the security council pursuant to Article 13 (b) over alleged possible war crimes including genocide in Sudan's Darfur province.[42] The workability of Article 13 (b) requiring the referral by the security council to the ICC is further undermined by the fact that China, the United States and Russia (three out of the 5 countries that have an exclusive right to veto the decisions of the Security Council) are not

[40] Universal jurisdiction allows states or international organizations to claim criminal jurisdiction over an accused person regardless of where the alleged crime was committed, and regardless of the accused's nationality, country of residence, or any other relation with the prosecuting entity. Wikipedia, 'Universal jurisdiction' https://en.wikipedia.org/wiki/Universal_jurisdiction accessed 10 September, 2018.

[41] Girard v. Wilson, 354 U.S. 524, 529 (1957) https://supreme.justia.com/cases/federal/us/354/524/ accessed 7 September, 2018.

[42] Toby Sterling, 'ICC reports Jordan to U.N. Security Council for not arresting Sudan's Bashir' Reuters (11 December 2017) https://www.reuters.com/article/us-icc-sudan-jordan/icc-to-report-jordan-for-failing-to-arrest-sudans-bashir-idUSKBN1E516C accessed 7 September, 2018.

party to the Rome Statute. As such, arguments proliferate that the Security Council would be unable to do anything to bring perpetrators of international crimes to book from those countries, thus engendering a regime where the enforcement of justice becomes selective.[43]

Closer home and in the light of the Bashir's case, it must be emphasized that though Nigeria has ratified the Rome statute and as such is a state party, nowhere is the ICC mentioned as exercising any Judicial power amongst the courts recognized under the Constitution of the Federal Republic of Nigeria 1999 (As Amended) to determine the rights and obligations of the people of Nigeria.[44] So unless the Federal Republic of Nigeria expressly goes further to domesticate the Rome Statute and consequently amend its Constitution to reflect the ICC therein as a Court with judicial powers within its territory in conformity with Article 12 (3), any challenge to the act of the Government of Nigeria before the courts to extradite its national for prosecution before the ICC would be resolved in favour of the Applicant because the ICC is not imbued with jurisdiction to try offences committed by Nigerians in Nigeria's territory under Customary International Law.[45] To that extent, it continues to be argued that despite the inflated claims regularly made on behalf of 'universal jurisdiction', territorial jurisdiction remains the primary basis of international legal authority, recognized by all States and supported by centuries of consistent practice.

Brownlie sums it up when he states that the principle that the courts of the place where the crime is committed may exercise jurisdiction has received universal recognition, and is but a single application of the essential territoriality of the sovereignty, the sum of legal competences, which a state has.[46]

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[43] Felix E. Eboibi, 'Jurisdiction of the International Criminal Court: Analysis, Loopholes And Challenges' *Nnamdi Azikwe University Journal of International Law and Jurisprudence*. [2012] (3) 28-46 **https://www.ajol.info/index.php/naujilj/article/view/136309** accessed 8 September 2018.

[44] Section 6, Constitution of the Federal Republic of Nigeria 1999 (As Amended).

[45] As a fundamental premise of treaty law, states should be bound to a treaty only by voluntarily relinquishing part of their sovereign rights manifested through the signing and implementation of the treaty into domestic systems. Newton citing Vienna Convention on the Law of Treaties art. 12, 14, May 23, 1969, reprinted in 8 I.L.M. 679.

[46] Brownlie Ian, 'Brownlie's Principles of Public International Law,' (Oxford Press, 2012).

3. THE ICC'S OVER RELIANCE ON STATE COOPERATION.

The ICC quite rightly, has been likened to a giant without arms and legs. It needs artificial limbs to walk and work. And these artificial limbs are state authorities. If the cooperation of states is not forthcoming, the ICC cannot fulfill its functions.[47] It has no means at its disposal to compel states to cooperate with it. The Rome Statute like the International Criminal Tribunal for the former Yugoslavia (ICTY) Statute before it, places excessive reliance on state cooperation as the primary means of achieving the mandated objectives of prosecuting persons for violations of International Humanitarian Law.[48] The ICC having no police force of its own, with insufficient funding, must rely on international cooperation in order to effect arrests and execute its mandate. It has proved extremely difficult to achieve significant state cooperation in complying with the Court's orders to arrest and deliver indicted persons to the ICC and to provide assistance in evidentiary matters.[49] Impunity would grow and thrive when states and international authorities refuse to arrest indicted individuals.

4. THE QUESTION OF LEGITIMACY OF THE ICC.

The Rome statute also suffers from issues directly related to legitimacy. Casey writes that the Statute assumes that there are universally recognized and accepted notions of law, justice, and procedural fairness.[50] He argues further that even the most closely related of the world's legal systems, the Common Law and the Civil Law, begin from fundamentally different assumptions about the role of a criminal trial in the pursuit of justice. This is to say nothing of non-Western systems, such as the Sharia.[51]

RECOMMENDATION AND CONCLUSIONS.

The Human Rights Watch, a Non-Governmental Organization which has adopted a primary mandate to defend the rights of people worldwide stated in June 1998, as follows;

[47] Casese n. 8
[48] Ibid.
[49] Reuters n. 38.
[50] Casey n.45
[51] Ibid.

> the potential impact of the ICC is enormous. By holding individuals personally accountable, the Court could be an extremely powerful deterrent to the commission of genocide, crimes against humanity and serious war crimes that have plagued humanity during the course of this century. Not only is the establishment of the Court an opportunity to provide critical redress to victims and survivors, but potentially to spare victims from the horrors of such atrocities in the future. If effective, the ICC will extend the rule of law internationally, impelling national systems to themselves investigate and prosecute the most heinous crimes-- thus strengthening those systems-- while guaranteeing that where they fail, the ICC can operate to ensure that justice prevails over impunity.[52]

While it remains undoubtedly true that the ICC can have enormous impact, it would however, be too presumptive to think that the discussions leading to the creation of the ICC, which Bassiouni and Blakesly, in their paper traced from 1889[53] could have been concluded in the 5 weeks conference and negotiations that took place from 15 June to 17 July 1998 in Rome. It must be noted that arising from the said conference where only 120 states out of the 160 that participated in the conference voted in support of the creation of the ICC, South Africa, Burundi and Gambia, have since withdrawn from the ICC[54] while 3 of the 5 permanent members of the Security Council, including the United States as the *Unipole* in the current international system, has not ratified the Rome statute. This appears to cast a dim prospect for the future for the ICC.

Importantly also and since the ICC came into being on the 1st of July, 2002 and in its 20th year of existence, it has secured 8 convictions and 2 acquittals in 26 cases that have been brought before it.[55] Even on these achievements, it has continued to attract severe criticism from the United States.[56]

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[52] Human Rights Watch, *Justice in the Balance: Recommendations for an Independent and Effective International Criminal Court* (June 1998) http://www.hrw.org/reports98/icc/ accessed 2 September 2018.

[53] Bassiouni and Blakesly n.10

[54] Bob Koigi, 'Future of ICC in doubt after African countries withdraw' *Euractiv*.De (Nov 11, 2016) https://www.euractiv.com/section/global-europe/news/future-of-icc-in-doubt-after-african-countries-withdraw/ accessed 11 September, 2018.

[55] ICC website https://www.icc-cpi.int/about accessed on 08/26/2018

[56] AFP n. 15; John Bolton criticised the ICC for attaining just eight convictions despite spending more than $1.5 billion, and said that had not stemmed atrocities around the world.

Progressively, it is our view that the discussion and negotiations on the creation of the ICC has to be a continuous process. It must be seen as a never ending dialogue because of the need to ensure the protection of International Humanitarian Law so as to avoid the total evisceration of the world because of the actions of state actors and the global realities where conflicts appears to be a rather recurring decimal. The signatories and the propagators of the ICC must look to devise and insert a review mechanism, wherein the ICC and the Rome Statute can be rejigged to accommodate the interest of other states that are not signed in on the grounds that their peculiar needs or idea of justice is not accommodated under the Rome Statute. In this regard, it is necessary to emphasise that the ultimate success of the ICC is achievable if the 5 permanent members of the security council can be encouraged to join the ICC, as their power and influence is integral to the ICC achieving its mandate.

While it is undoubtedly true that the influence of the Rome Statute would extend deep into domestic criminal law, enriching the jurisprudence of national courts and challenging prosecutors and judges to greater zeal in the repression of serious violations of human rights, which in recent years, National courts have shown, a growing enthusiasm for the use of international law materials in the application of their own laws,[57] the Statute itself, and eventually the case laws of the International Criminal Court, if functionally renegotiated, will no doubt, further contribute immensely in this area.

[57] Shabas n. 1

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