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**THE POWERS OF INTERNATIONAL CRIMINAL
COURT IN PROSECUTING CRIMES; WAR CRIMES,
CRIMES AGAINST HUMANITY AND GENOCIDE**

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Abstract

No single state can combat genocide, war crimes and Crimes against humanity. It takes the International Court to combat International Crimes. The creation of international Criminal court and it's role in combating these crimes is what this paper will examine. This paper will look at the functions of International Court in prosecuting these crimes, the challenges facing this court as it seeks to do this noble duty and the recommendations that will enable her to achieve this noble duty.

Keywords: *International Court, Prosecuting Crimes, War Crimes and Genocide*

1. INTRODUCTION

The idea of some kind of internationally arbitrated justice system to preserve peace and punish crimes against humanity has become a popular one, spawning the creation of the International Criminal Court (ICC) in The Hague, which was enacted in 1998 and opened in 2002¹.

International Criminal Court established as a global response to the problem facing humanity was saddled with a lot of responsibilities. Such as powers: These powers includes but not limited to: The power to investigate, the power to prosecute, the power to arrest and the power to punish crimes within the court's jurisdiction.

The international body operates on the principle of complementarity. It can only prosecute when states won't or can't prosecute crimes within the jurisdiction of the court. Some of the crimes within the jurisdiction of the court include crimes against humanity, war crimes, genocide and aggression.

Global peace and security has really threatened at the historic development of the human race. Battles and wars destroyed a lot of lives and property. Some wars were fought even without obeying the rule of engagement because there was no such strong body to compel obedience to such rules.² Crimes against humanity were rampant and even genocides were witnessed in some states. Rwanda genocide was a real example to the great evils of the notion of ethnic cleansing.³ The Geneva Conventions of 1949, granted protections to soldiers, sailors, prisoners of war, and civilians after the conclusion of World War II but an international court with real criminal jurisdiction was necessary for the maintenance of world peace and security.

However the emergence of the United Nations was seen as a real solution to the problem of world peace and security. Thus the birth of this child called the United Nations was heralded with great pomp and pageantry. The UN Charter gave to the General Assembly the responsibility, among other things, to initiate studies and make recommendations for "promoting international co-operation in the political field and encouraging the progressive development of international law and its codification." The International Law Commission (ILC) is a body of experts named by the UN General Assembly and charged with codification and progressive development of international law. After the Second World War, the General Assembly had asked the Commission to prepare what are known as the 'Nuremberg Principles', a task it completed in 1950, and the 'Code of Crimes Against the Peace and Security of Mankind', a job that took considerably longer time and resources. Much of the work on the draft statute of an international criminal court and the draft code of crimes went on within the Commission in parallel, as if the two tasks were hardly related.

¹ <http://mehr.org/History.htm>, accessed 2nd August, 2019.

² <http://www.internationalcrimesdatabase.org/Crimes/CrimesAgainstHumanity>, accessed 2nd August, 2019.

³ The Geneva Conventions of 1949.

The General Assembly also established a committee that was in charge of drafting the statute of international criminal court. Composed of seventeen States, it submitted its report and draft statute in 1952.

In 1989, Trinidad and Tobago introduced a suggestion in the General Assembly for the establishment of a specialized international court to combat drug trafficking. The General Assembly requested that the ILC complete the draft statute.' This draft became the basis for the negotiating text for the treaty of the International Criminal Court ("ICC") that would be approved by 120 nations in Rome in 1998 and subsequently known as the Rome Statute⁴.

Thus the International Criminal Court became a reality after many struggles and it was charged with the enormous duties of prosecuting crimes within her jurisdiction. Such crimes include crime against humanity, genocide, war crimes and others. However this work will examine the power of the International Criminal Court to prosecute crimes, the power to arrest offenders and above all the complementary nature of the court.

Charles Taylor, the former president of Liberia, was tried and convicted in April 2012 on 11 charges arising from war crimes, crimes against humanity, and other serious violations of international humanitarian law, committed from November 30, 1996 to January 18, 2002 during the course of Sierra Leone's civil war by the Special Court for Sierra Leone. He was subsequently sentenced to 50 years in jail. The success of this special court also inspired the creation of the International Criminal Court.

2. Research Methodology

The system of method followed in this research is the use of secondary data such as resource materials from internet, textbooks, law journals, newspapers and law reports.

2. CONCEPTUAL CLARIFICATION

2.1 War Crimes

The term "war crimes" refers to serious breaches of international humanitarian law committed against civilians or enemy combatants during an international or domestic armed conflict, for which the perpetrators may be held criminally liable on an individual basis. Such crimes are derived primarily from the Geneva Conventions of 12 August 1949 and their Additional Protocols I and II of 1977, and the Hague Conventions of 1899 and 1907. Their most recent codification can be found in article 8 of the 1998 Rome Statute for the International Criminal Court(ICC)⁵.

⁴ <http://legal.un.org/icc/rome/proceedings/contents.htm>, accessed 2nd August, 2019.

⁵Article 8, Rome Statute.

2.2 Crimes against Humanity

The definition of ‘crimes against humanity’ is codified in article 7 of the Rome Statute of the International Criminal Court (ICC)⁶. “It encompasses crimes such as murder, extermination, rape, persecution and all other inhumane acts of a similar character (willfully causing great suffering, or serious injury to body or to mental or physical health), committed ‘as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack’.

2.3. The Crime of Genocide

Since it was initially formulated in 1948, in article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide, the definition of ‘genocide’ has remained substantially the same. Article 6 of the Rome Statute⁷ borrows from this Convention and for example, defines the crime of genocide as “any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.” The definition is followed by a series of acts representing serious violations of the right to life, and the physical or mental integrity of the members of the group.

It is the specific intention to destroy an identified group either “in whole or in part” that distinguishes the crime of genocide from a crime against humanity

3.1 SOURCES OF THE POWER OF INTERNATIONAL CRIMINAL COURT

Part I Establishment of the Court

Article 1: The Court

⁸An International Criminal Court (the Court) is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

Article 2: Relationship of the Court with the United Nations

⁹The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf.

Article 3: Seat of the Court

1. ¹⁰The seat of the Court shall be established at The Hague in the Netherlands (‘the host State’).

⁶Article 7, Rome Statute.

⁷Article 6, Rome Statute.

⁸ Article 1, Rome Statute.

⁹ Article 2, Rome Statute.

¹⁰Article 3, Rome Statute.

2. The Court shall enter into a headquarters agreement with the host State, to be approved by the Assembly of States Parties and thereafter concluded by the President of the Court on its behalf.
3. The Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute.

Article 4 Legal status and powers of the Court

1. ¹¹The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.
2. The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State

4.1 Crimes under the jurisdiction of International Criminal Court is contained in the Rome statute

¹²Rome statute which established the court also listed and defined crimes under the jurisdiction of the International Criminal Court.

Herein is the provision of Article 5 of Rome Statute.

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:
 - a) The crime of genocide;
 - b) Crimes against humanity;
 - c) War crimes;
 - d) The crime of aggression.

4.2. The Power to Prosecute

The International Criminal Court (ICC) investigates and, where warranted, tries individuals charged with the gravest crimes of concern to the international community: genocide, war crimes and crimes against humanity.

Court aims to hold those responsible accountable for their crimes and to help prevent these crimes from happening again.¹³

The International Criminal Court will also have jurisdiction over nationals of a State party who are accused of a crime, in accordance with Article 12(2) (b). Again, the Court can also prosecute nationals of non-party States that accept its jurisdiction on an ad hoc basis by virtue of a declaration, or pursuant to a decision of the Security Council. Creating jurisdiction based on the nationality of the offender is the least controversial form of

¹¹Article 4, Rome Statute.

¹² http://legal.un.org/icc/statute/99_corr/cstatute.htm, accessed August 6th, 2019.

¹³ <https://www.icc-cpi.int/about>, accessed August 7, 2019.

jurisdiction and was the absolute minimum proposed by some States at the Rome Conference. Cases may arise where the concept of nationality has to be considered by the Court. In accordance with general principles of public international law, the Court should look at whether a person's links with a given State are genuine and substantial, rather than it being governed by some formal and perhaps even fraudulent grant of citizenship.

Echoing provisions found in the Nuremberg Charter and the 1948 Genocide Convention, the Statute declares that rules in either national or inter- national law that create immunities or otherwise shelter individuals from criminal prosecution are of no effect before the Court. Traditionally, immunities have taken two main forms: first, some States, through their constitutions or ordinary legislation, provide that their own heads of State and in some cases other government officials or elected representatives are immune from prosecution; secondly, under both customary international law and international treaties, incumbent heads of State, foreign ministers and diplomats cannot be prosecuted by the courts of other States. Some States have had to consider constitutional amendments in order to eliminate such special regimes and thereby make their legislation consistent with the Statute. In its 2002 ruling in the Arrest Warrant case, the International Court of Justice recognized that an incumbent or former minister of foreign affairs would not have immunity before an international tribunal like the International Criminal Court, where it has jurisdiction. However, the Court did not consider that Article 27 of the Statute provided it with a basis for concluding that incumbent heads of State and similar officials, such as foreign ministers, were not protected by traditional immunities, as a matter of customary international law.

There is an important practical exception, however, that can serve to shield certain classes of persons from prosecution. The Court is prohibited, pursuant to Article 98(1), from proceeding with a request for surrender or assistance if this would require a requested State to act inconsistently with its obligations under international law as concerns a third State, unless the latter consents. Diplomatic immunity falls into such a category. This means that, while a State party to the Statute cannot shelter its own head of State or foreign minister from prosecution by the International Criminal Court, the Court cannot request the State to cooperate in surrender or otherwise with respect to a third State. Nothing prevents the State party from doing this if it so wishes, and once the head of State was taken into the actual custody of the Court, he or she would be treated like any other defendant. Similarly, the Court is also prohibited from proceeding in a request for surrender that would require a State party to act inconsistently with certain international agreements reached with a third State.¹⁴

¹⁴ Understanding The International Criminal court, Public Information and Documentation Section Registry, International Criminal Court Maanweg174 2516AB, The Hague, The Netherlands, page79-82.

4.2.1 The Trial

¹⁵Trials take place at the seat of the Court in The Hague, unless the judges decide to hold the trial elsewhere. This issue has been raised in several cases. The accused must be present at his or her trial, which is held in public, unless the Chamber determines that certain proceedings be conducted in closed session in order to protect the safety of victims and witnesses or the confidentiality of sensitive evidentiary material.

At the commencement of the trial, the Trial Chamber causes the charges against the accused to be read out to him or her and asks whether he or she understands them. The Chamber then asks the accused to make an admission of guilt or to plead not guilty.

What happens if the accused makes an admission of guilt? First, the Trial Chamber ensures that the accused understands the nature and consequences of the admission of guilt, that the admission is voluntarily made by the accused after sufficient consultation with his or her lawyer and that the admission of guilt is supported by the facts of the case that are contained in the evidence and charges brought by the Prosecution and admitted by the accused. Where the Trial Chamber is satisfied that these conditions have been met, it may convict the accused of the crime charged. If it is not satisfied that the conditions have been met, the Chamber shall consider the admission of guilt as not having been made, in which case it shall order that the trial be continued.

4.2.2 Conducting the Trial

¹⁶At trial, the Prosecution and Counsel for the Defence have the opportunity to present their case. The Prosecution must present evidence to the Court to prove that the accused person is guilty beyond all reasonable doubt. This evidence may be in the form of documents, other tangible objects, or witness statements. The Prosecution must also disclose to the accused any evidence which may show that he or she is innocent.

The Prosecution presents its case first and calls witnesses to testify. When the Prosecution has finished examining each witness, the Counsel for the Defence is given the opportunity to also examine the witness.

Once the Prosecution has presented all its evidence, it is the turn of the accused, with the assistance of his or her counsel, to present his or her defence.

4.2.3 Presentation of Evidence

¹⁷All parties to the trial may present evidence relevant to the case. Everyone is presumed innocent until proven guilty according to law. The Prosecution has the burden of proving that the accused is guilty beyond all reasonable doubt. The accused has the right to examine

¹⁵ <http://bura.brunel.ac>, accessed August 6th, 2019.

¹⁶ https://www.icc-cpi.int/CourtRecords/CR2014_04595.PDF, accessed August 6th, 2019.

¹⁷ <http://hrlibrary.umn.edu/instate/iccrulesofprocedure.html>, accessed August 6th, 2019.

the Prosecution's witnesses, and to call and examine witnesses on his or her own behalf under the same conditions as the Prosecution's witnesses.

When the personal interests of victims are affected, the Court allows their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and fair and impartial trial.

Their views and concerns may be presented by their legal representatives.

In a judgment rendered on 11th July, 2008, the Appeals Chamber granted victims the right to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of evidence, although this right lies primarily with the parties, namely the Prosecution and the Defence. This right is subject to stringent conditions, namely proving that the victims have a personal interest in doing so, and to the request's consistency with the rights of the defence and the requirements of a fair trial.

Victims must also comply with disclosure obligations, notify the request to the parties, and comply with the Court's orders on the protection of certain persons. Lastly, the appropriateness of the victims' request is subject to the judges' assessment.

4.2.4 Judgment and Sentence

Once the parties have presented their evidence, the Prosecution and the Defence are invited to make their closing statements. The Defence always has the opportunity to speak last. The judges may order reparations to victims, including restitution, compensation and rehabilitation. To this end, they may make an order directly against a convicted person. After hearing the victims and the witnesses called to testify by the Prosecution and the Defence and considering the evidence, the judges decide whether the accused person is guilty or not guilty. The sentence is pronounced in public and, wherever possible, in the presence of the accused, and victims or their legal representatives, if they have taken part in the proceedings.

The judges may impose a prison sentence, to which may be added after or forfeiture of the proceeds, property and assets derived directly or indirectly from the crime committed. The Court cannot impose a death sentence. The maximum sentence is 30 years. However, in extreme cases, the Court may impose a term of life imprisonment. Convicted persons serve their prison sentences in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept convicted persons.

The conditions of imprisonment are governed by the laws of the State of enforcement and must be consistent with widely accepted international treaty standards governing the treatment of prisoners. Such conditions may not be more or less favourable than those available to prisoners convicted of similar offences in the State of enforcement.

4.2.5 Appeals and Revision

¹⁸Any party may appeal the decisions of a Pre-Trial or Trial Chamber. The Prosecution may appeal against a conviction or acquittal on any of the following grounds: procedural error, error of fact or error of law.

The convicted person or the Prosecution may also appeal on any other ground that affects the fairness or reliability of the proceedings or the decision, in particular on the ground of this proportion between the sentence and the crime.

The legal representatives of the victims, the convicted person, or a bona-fide owner of property adversely affected by an order for reparations to the victims may also appeal against such an order.

Unless otherwise ordered by the Trial Chamber, a convicted person remains in custody pending an appeal. However, in general, when a convicted person's time in custody exceeds the sentence of imprisonment imposed, the person is released. In addition, in the case of an acquittal, the accused is released immediately unless there are exceptional circumstances.

The convicted person or the Prosecution may apply to the Appeals Chamber to revise a final judgment of conviction or sentence where:

- i. new and important evidence has been discovered;
- ii. it has been newly discovered that decisive evidence, taken into account at trial and upon which the conviction depends, was false, forged or falsified;
- iii. one or more of the judges has committed an act of serious misconduct or serious breach of duty of sufficient gravity to justify the removal of that judge or those judges from office under the Rome Statute.¹⁹

4.3. The Complementary Nature of the International Criminal Court

²⁰When the outline for an international criminal court was established, it quickly became evident that in order for the court to not only appease the reluctant states, but maximize its usefulness on the international stage, the court had to be complementary. This role of a complementary institution maintains the domestic jurisdiction of the individual states to prosecute their own criminals if they find the evidence to prosecute as well as possess a functioning judicial body to properly convene a fair and just trial. By limiting the role of the ICC to complementary, the Rome Statute and the states that are party to the treaty created a last resort institution that will only be utilized if the country is unable or unwilling

¹⁸ http://hrlibrary.umn.edu/instate/Rome_Statute_ICC/Rome_ICC_part8.html, accessed August 6th, 2019.

¹⁹ Understanding The International Criminal Court, Public Information and Documentation Section Registry, International Criminal Court Page 26, 33-37.

²⁰ http://www.mpil.de/files/pdf3/mpunybenzing_7.pdf, accessed August 1st, 2019.

to prosecute their war criminals. This entails many factors that must each be examined before an indictment or even an investigation is launched by the ICC.

First, is the country's judicial system intact? Many war crimes are committed during times of civil war, or in the recent case of Libya, the civil war often leads to regime change. If a new court is not established, and the state is therefore unable to launch an investigation or hold a court proceeding, then the ICC can step in as a support unit and take over the case. Also, if circumstances arise that invoke a sense of bias for or against a criminal who is being prosecuted, such as the case of President Al-Bashir of Sudan for the crimes committed in Darfur in which his country will never consider indicting him, then the ICC can step in and take over the case, as they have done.

In order to determine if the state is unwilling the court needs to examine if the proceedings are impartial, if the criminal is being shielded by government lackeys or whether there is an unjustifiable delay in the proceedings. The role of a complimentary court counts as a success because it limits the authority the court possesses, and it enables the states themselves to take the initiative in prosecuting their own criminals.

By limiting the power of the court, the Rome Statute correctly prevented the court from growing into an unrestricted power.²¹

Rationale for the Complementary nature of The International Criminal Court
Complementarity is a new concept in the context of the allocation of concurrent jurisdiction between international and national courts and tribunals.

Given the considerable implications of the establishment of an international criminal court in terms of state sovereignty, complementarity was strongly supported by States. According to this mechanism, States retain their right (and duty) to exercise their criminal prerogatives over persons responsible for the commission of international crimes. At the same time, the newly established international criminal court ensures that, in case of failure to investigate or prosecute at the domestic level, impunity is fought at the international level.

The choice of complementarity responded also to the specific features of the ICC, a permanent international criminal court with extremely wide potential jurisdiction, but limited structural and financial resources. Complementarity was also seen as the best tool to foster states' adhesion to the ICC Statute – an international treaty – and to ensure their cooperation with the Court.

²¹ <http://intpolicydigest.org/-2012/03/23/-international-criminal-court-successes-and-failures-of-the-past-and-goals-for-the-future>, accessed August 9th 2019.

The complementary relationship between the Court and States is regulated through the procedures for the admissibility of cases before the former. It is generally said that the Court.²²

- i. Shall intervene – as a doctor entrusted to combat the virus of impunity – when States fail to take action, or where their action is not deemed genuine. In case of disputes over which forum shall exercise jurisdiction, the international Judges are in charge of deciding, in accordance with the statutory provisions. By doing so, they are not only arbiters of the Court's jurisdiction; they are also in charge of the delicate task of evaluating the conformity of domestic proceedings with the statutory provisions and criteria.
- ii. Since its adoption, complementarity was subject to extensive doctrinal elaboration. Complementarity has been regarded to as both the mechanism that regulates the concurrent jurisdiction between the Court and national jurisdiction, and as an incentive for States to take action, in accordance with statutory requirements. Much attention has been devoted to the interpretation of the statutory provisions regulating the Court's activation and the exercise of its complementary jurisdiction. This is because of the consequences of complementarity in terms of States' compliance with their duty to prosecute, in particular through implementation of provisions on international crimes within their legal systems, and to the concrete realization of the relationship between the Court and domestic jurisdictions.²³

5.0 RECOMMENDATIONS AND CONCLUSION

The need for a standing police for the International Criminal Court cannot be overemphasized. If International Criminal Court must carry out efficiently its duty of prosecuting crimes against humanity, genocide and war crimes then she must go beyond relying on the member states to arrest, prosecute and punish international criminals. The International Criminal Court must raise the police force that will be loyal to the court for the Purpose of enforcing its legal mandate.

Beyond this the International Criminal Court should increase the effort to increase awareness about its existence and its legal mandate. More people should know about the powers of the international Criminal court to punish international criminals. I believe that it will prevent the commission of these international crimes.

²² Rome Statute of the International Criminal Court, A/CONF/183/9, hereinafter referred to as ICC Statute, Rome Statute or Statute.

²³ The system of The International Criminal Court: Complementarity in International Criminal Justice, Beatrice Pisani, School Of International Studies, University of Trento, Page 44.