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OPTIMIZING THE ROLE OF THE INTERNATIONAL CRIMINAL COURT IN GLOBAL SECURITY*

Abstract

The growing threat to global peace and security today clearly undermines the primary objectives of the United Nations (the UN) to maintain international peace and security. The existing system governing global security is obviously porous. The non-compulsory nature of the jurisdiction of the International Court of Justice (ICJ) and the perceived inefficiency and politics of veto power at the Security Council of the UN necessitates further action to restore and maintain global peace and security. This paper reviews the International Criminal Court (ICC) Statute and shows how its proscriptions and other provisions will remedy the mischief in the UN system and contribute to the maintenance of global security. The paper suggests ways of optimizing the role of the ICC in maintaining global peace and security.

1. Introduction

Global security is the international protection of persons, objects, properties, institutions or situations to avoid being harmed by any risk, war, danger, threat or crime. Achieving global security is the objective of the international community. Through the ages, humankind has been on a long search for order and stable existence in society. Law plays a central role in this search, as it is the instrument with which every society creates for itself a framework of principles within which to develop. The primary objective of the United Nations Organization (the UN) is:

> To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.[1]

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[1] Art. 1(1) of the Charter of the UN, 1945.

The UN has hitherto sought to achieve these lofty objectives using the instrumentality of the Security Council, the General Assembly, and the International Court of Justice (ICJ). The Security Council has the primary objective of maintaining global security under the Charter of the UN.[2] The Council may take both measures involving and those not involving the use of force in achieving this objective.[3] On its part, the General Assembly may discuss any question or matter on the maintenance of global peace and security, and may make recommendations to the members of the UN or to the Security Council, provided the Council is not itself dealing with the same matter.[4] Finally, the ICJ is the principal judicial organ of the UN[5] with jurisdiction over matters of global peace and security.

The UN system has however not been effective in maintaining global security. Wars of aggression, grave violations of human rights and humanitarian atrocities, genocide, crimes against humanity and war crimes have continued to be the order of the day even after the inception of the UN. The UN system is emasculated by the arbitrary use of veto power at the Security Council, the fact that General Assembly resolutions lack binding force of law, and the principle that the jurisdiction of the ICJ in contentious cases is founded upon the consent of the parties[6] (which is often withheld). Again, the fact that only States and possibly international organizations (to the exclusion of individuals) are traditionally the subject of international law makes it difficult for the UN machinery to dispense sanctions to individuals who breach global security. Modern scholars tend to indicate however that individuals are also subjects of international law, even if at subsidiary level. International instruments and bodies routinely confer rights and obligations on individuals especially in the context of humanitarian and human rights law. Malcolm N. Shaw observes that modern practice does

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[2] Art. 24 *ibid.*

[3] Arts. 41 and 42 *ibid.*

[4] Arts. 10, 11, and 12 *ibid.*

[5] Art. 92 *ibid.* See *Legality of the Threat or Use of Nuclear Weapons,* ICJ Rep. [1996] 226 at 237.

[6] The ICJ noted in the *Application for the Interpretation and Revision of the Judgment in the Tunisia/Libya Case,* ICJ Rep. [1985] 192 at 216, that it was 'a fundamental principle' that 'the consent of states parties to a dispute, is the basis of the Court's jurisdiction in contentious cases,' citing here the *Interpretation of Peace Treaties case,* ICJ Rep. [1950] 71. See also *Cameroon v Nigeria,* ICJ Rep. [2002] para. 238.

demonstrate that individuals have become increasingly recognised as participants and subjects of international law.[7] In spite of this development, the UN system remains clearly incapable of restoring and maintaining global security, especially with regard to individual responsibility for international crimes. This necessitates the emergence of the ICC (the Court) with clear statutory mandate to investigate and prosecute individuals who violate global security. The thesis of this paper is that the proscriptions and other provisions of the ICC Statute will remedy the mischief in the UN system and contribute to the maintenance of global security; these provisions nonetheless raise salient issues which should be addressed.

This paper is divided into five parts. Part I is the introduction. Part II briefly reviews the establishment of the ICC as a precursor to the discussion in Part III of the objectives and activities of the Court. Part IV highlights the salient issues raised by the ICC Statute and offers suggestions for the optimization of the Court. Part V embodies the concluding remarks.

1. The International Criminal Court Statute

The Second World War (WWII) marked the climax of the breakdown of global security. After about forty million human lives were lost in the war, the international community resolved to establish an independent permanent ICC.[8] The ICC would have jurisdiction over the most serious crimes of concern to the international community as a whole. Efforts to realize this end

[7] M. N. Shaw, *International Law*, (5th edn., Cambridge University Press, Cambridge, 2005) 232. See also R. Mullerson, "Human Rights and the Individual as a Subject of International Law: A Soviet View" (1990) 1 *European Journal of International Law* 33.

[8] It was Mr. Donnedieu de Vabre, the French Judge of the Nuremberg Tribunal, who first raised the question of establishing an independent permanent ICC at the International Law Commission (ILC) on May 13, 1947 at about the same time the trials of the WWII criminals were going on. The permanent ICC did not immediately materialize. But aspirations for it were revived in the 1980s with a proposal before the UN General Assembly by Latin American states, led by Trinidad and Tobago. See letter dated August 21, 1989 from the Permanent Representative of Trinidad and Tobago to the UN Secretary-General, UN General Assembly Official Records (GAOR), 47th Session, Annex 44, Agenda Item 152, *UN Doc.A/44/195 (1989).* The matter was referred by the General Assembly to the ILC. See UN GA Resolution 44/39, UN GAOR, 44th Session, Supp. No. 49, at 311, *UN Doc. A/44/49 (1989).*

took the world community through various rigorous stages like setting up Military Tribunals in Nuremberg and Tokyo in 1946[9] to try war criminals of the WWII; and establishing the *ad hoc* International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993 to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991;[10] and the *ad hoc* International Criminal Tribunal for Rwanda (ICTR) to prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring states, between January 1, 1994 and December 31, 1994.[11]

These efforts culminated in the convening of the Rome Conference attended by 160 States from June 15 to July 17, 1998, which adopted the ICC Statute on the last day of the Conference. The ICC came into effect on July 1, 2002. It was established by Article 1 of the Statute. It is a permanent institution and has the power to exercise jurisdiction over persons for the most serious crimes of international concern–genocide, crimes against humanity, war crimes *and aggression*–and shall be complementary to national criminal jurisdictions. The ICC has a mission to fulfil the aspirations of the UN for a secure world. So, it is brought into relationship with the UN by Article 2 of the Statue. The seat of the ICC is at The Hague in the Netherlands, though the Court may sit elsewhere when it considers it desirable.[12]

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[9] These tribunals were set up by the Nuremberg Charter i.e., the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, August 8, 1945, 8 UN Treaty Series (UNTS) 249 and the Charter of the International Military Tribunal for the Far East (Tokyo Tribunal) 1946, respectively. By the General Assembly Resolution 95(1) on December 11, 1946 the UN endorsed and unanimously adopted the principles of international law recognised by the Nuremberg and Tokyo Charters and the judgments of the tribunals.

[10] The ICTY was set up by the UN Security Council in 1993, pursuant to Resolution 808 of February 22, 1993 and Resolution 827 of May 25, 1993, as amended by Security Council Resolution 1166 of May 13, 1998 and Security Council Resolution 1329 of November 30, 2000.

[11] The ICTR was set up by the UN Security Council Resolution 955 of November, 1994.

[12] Art. 3 of the ICC Statute.

There are two ways in which the ICC has overcome the identified shortcomings of the UN system in global security. It has compulsory international criminal jurisdiction and can prosecute individual perpetrators of global security (not just apportion state responsibility like the ICJ does).

A. Compulsory International Criminal Jurisdiction

Unlike the ICJ jurisdiction that is activated by the consent of the parties, the ICC has compulsory jurisdiction over international crimes. A state which becomes a party to the ICC Statute thereby accepts the jurisdiction of the Court. The Court may exercise its jurisdiction with respect to an international crime if:

(a) A situation in which one or more of such crimes appears to have been committed is referred to the ICC prosecutor by a state party;
(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 UN; or
(c) The prosecutor has *proprio motu* initiated an investigation in respect of such a crime.[13]

In the case of paragraphs (a) and (c) above, the Court may exercise its jurisdiction if one or more of the following states are parties to the statute or have accepted the jurisdiction of the Court, that is: (i) the state on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the state of registration of that vessel or aircraft; (ii) the state of which the person accused of the crime is a national. In other words, the need for consent of a state of territoriality or nationality is dispensed with. Jurisdiction of the Court is automatic and compulsory for states parties.

In the case of a situation concerning non-states parties, paragraph (b) above empowers the Security Council, pursuant to its power of action with respect to threats to the peace, breaches of the peace and acts of aggression under Chapter VII of the UN Charter, to make a referral. Thus, even if a state is neither a party to the UN Charter nor the ICC Statute its citizens are still subject to the ICC jurisdiction. The ICC will still have jurisdiction over any international crime committed in the territory of such state. This is so for two reasons. First, the crimes within the ICC

[13] See Arts. 13 and 15, *ibid*.

jurisdiction have crystallised into customary international law binding on all States irrespective of treaty affiliation and from which no derogation is allowed. Second, the power of the Security Council to bind non-States parties to the ICC Statute derives from the UN Charter which in Article 2(6) provides that:

> The organization shall ensure that states which are not members of the United Nations act in accordance with these principles so far as may be necessary for the *maintenance of international peace and security*.[14]

Giving the Court compulsory global criminal jurisdiction helps to ensure that it can investigate and prosecute all acts or omissions amounting to breaches of global security, no matter where they are committed.

B. Individual Criminal Responsibility

Malcolm N. Shaw observes that despite the modern trend in making international law binding on individuals,[15]only States have traditionally been recognised as subject of this system of law. This made it difficult to actually punish individuals who committed breaches of global security. Today, the ICC Statute has entrenched individual criminal responsibility in international law. According to Article 25 of the ICC Statute, the Court shall have jurisdiction over natural persons only. Under the statute, a person shall be individually responsible and liable for punishment if he, with intent and knowledge, commits a crime; orders, solicits or induces the commission of such a crime; aids, abets or otherwise assists in the commission of the crime; or in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose; or attempts the commission of a crime. This provision on individual criminal responsibility is without prejudice to the responsibility of states under international law. It is a bold step forward. What hitherto obtained was that individual perpetrators of the worst breaches of global security hid under the principle that individuals were not subjects of international law and went scot free while the state on behalf of which the crime was committed received

[14] Emphasis added.

[15] *Supra*, note 8 at 177. However, it is less clear that in practice this position was maintained. The Holy Sea (particularly from 1871 to 1929), insurgents and belligerents, international organizations, chartered companies and various territorial entities such as the League of Cities were at one time or another treated as possessing the capacity to become international persons. See the *Western Sahara case*, ICJ Rep. [1975] 12 at 39, 59.

political reprimand or ineffective economic sanctions that did not go far enough in curbing the menace. Making individual perpetrators of international crime responsible for their acts or omissions is the major role the ICC Statute plays in global security today.

2. Objectives and Activities of the Court

The objective of the UN system in global security is to eradicate grave crimes that threaten the peace, security and well-being of the world. Sharing the same objective, the ICC affirms that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.[16] To this end, the statute vests jurisdiction in the Court with respect to (a) genocide, (b) crimes against humanity, (c) war crimes, *and (d) the crime of aggression*. Jurisdiction over the first three crimes is conclusive and already operational, but inconclusive over the fourth. The Court shall exercise jurisdiction over *the crime of aggression* once provision is adopted in accordance with Articles 121 and 123 of the Statute setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime.

Precisely, what the ICC Statute is trying to prevent and punish is a hugely important question, as it provides an insight into what role the Court is set up to play and how, by playing this role, it can foster global security. A good review of the elements of international crimes has been done by authors like Kriangsak Kittichasaree, *International Criminal Law*[17] and Antonio Cassese, *International Criminal Law*.[18] This paper attempts to ascertain how precisely the proscription and punishment of these international crimes may help in restoring and maintaining global security.

Article 6 of the ICC Statute makes genocide an international crime. For the purpose of the ICC Statute, genocide means any of the following acts committed with intent to destroy, in whole of in part, a national, ethnic, racial, or religious group, as such: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on

[16] Preamble to the ICC Statute, para. 4.
[17] (Oxford University Press, Oxford 2001).
[18] (Oxford University Press, Oxford 2003).

the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent birth within the group; and forcibly transferring children of the group to another group. By proscribing genocide the ICC Statute assumes a crucial role in the campaign for global peace and security and a conscious move to equal respect for all groups of the human family. Genocide is the gravest form of humanitarian atrocity. If the ICC regime succeeds in halting incidents of genocide, that will be a sure plus for global peace and security. Through its activities the Court is pursuing the objective of eradicating genocide. In *ICC Prosecutor v Omar Hassan al-Bashir*,[19] the Sudanese President al-Bashir is indicted for three counts of genocide committed against the Fur, Masalit and Zaghawa ethnic groups in Sudan. Al-Bashir's genocide caused grave human rights and humanitarian abuses and culminated in the breakup of the country into Sudan and South Sudan on July 1, 2011. In reaction, the ICC issued its first and so far only arrest warrant for counts of genocide. As at October, 2012, proceedings in the case are stayed pending when al-Bashir is arrested. One is however optimistic that this commendable trend will send shivers down the spines of prospective perpetrators of genocide.

Crimes against humanity rank next in gravity to genocide among international crimes. Article 7 of the ICC Statute proscribes crimes against humanity. For the purpose of the ICC Statute, crime against humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: murder; extermination; enslavement; deportation or forcible transfer of population; torture; rape; sexual slavery; enforced prostitution; persecution; enforced disappearance of persons *etc*. Curbing the spate of perpetration of crimes against humanity is yet another plus for the ICC in the campaign for global security. These are crimes that deal devastating blow on human life and dignity and shatter the peace of the world. The ICC is not flinching from the proscription of these crimes. In *ICC Prosecutor v Germain Katanga and Matthieu Ngudjolo Chui*,[20]

[19] Case No. ICC-3-2-2010, App. Ch., decision reversing Pre-Trial Chamber (PTC) 1's decision not indicting the accused with genocide.

[20] Case No. ICC–24–11-2009, ICC T. Ch. II.

the perpetrators are charged with the crimes against humanity of murder, rape and sexual slavery. These crimes were allegedly perpetrated in the village of Bogoro in the Ituri District of Eastern Democratic Republic of Congo (DRC) from January to March 2003. Hopefully, by prosecuting this and related cases the ICC will bring peace to DRC which seems jinxed with constant socio-political strife.

Again, in *ICC Prosecutor v Callixte Mbarushimana,*[21] the accused is charged with the crimes against humanity of murder, torture, rape, inhumane acts and persecution. So many other charges of crimes against humanity on the situations in Northern Uganda,[22]Central African Republic,[23]Darfur Sudan,[24]Kenya,[25] and Ivory Coast[26] are being prosecuted at the ICC. Though proceedings in all these cases are still on-going as at October, 2012, they give hope that the global community through the ICC is now all out to punish criminals against humanity and thereby maintain global security.

Till date, law has not been able to ban war-making. The best that has been done is to prescribe rules governing war. The breach of these rules constitutes war crimes. Article 8 of the ICC Statute proscribes war crimes. These are crimes committed in violation of international humanitarian law applicable during armed conflicts. The statute proscribes war crimes committed during both international and internal armed conflicts. The proscription of war crimes encapsulates the basic laws and customs applicable in both categories of armed conflicts. These basic rules ensure the adoption of the principles of distinction, proportionality and precaution, which govern hostilities and limit

[21] Case No. ICC–25-1–2011.

[22] For instance, *ICC Prosecutor v Joseph Kony & 4 Others* Case No.ICC–8-7–2005, ICC PTC II.

[23] *ICC Prosecutor v Jean-Pierre Bemba* Case No. ICC–24–5–2008, ICC PTC III.

[24] *ICC Prosecutor v Ahmad Muhammad Harun and Ali Muhammad Abd-al-Rahman*Case No.ICC–2–5–2007, PTC III; *ICC Prosecutor v Omar Hassan Ahmad al-Bashir* Case No.ICC–4–3–2009, PTC I; *ICC Prosecutor v BaharIdriss Abu Garda* Case No. ICC-17-5-2009, PTC I; *ICC Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus* Case No.ICC-17-8-2009, ICC PTC I.

[25] *ICC Prosecutor v Samoei Ruto and 6 Others* Case No. ICC-8-3-2011, ICC PTC II.

[26] *ICC Prosecutor v Laurents Gbagbo* Case No. ICC-27-11-2011, ICC PTC I.

their scope, means and methods. The statute provides specific principles governing each type of armed conflict.

So far, the ICC has not charged anyone with war crime in an international armed conflict. This is a puzzle. For, during the lifetime of the statute, the US, Britain and Australia formed the "coalition of the willing" and invaded Iraq on the pretence that Iraq possessed Weapons of Mass Destruction (WMD), beginning in March 2003 until the last troupe of US soldiers was withdrawn in December 2011. Anthony Dworkin reported that the coalition committed wilful killing, torture and inhuman treatment in Iraq. The coalition wilfully caused great suffering and serious injury to the body and health of Iraqis.[27]Similarly, Thomas Franck and Martti Koskenniemi reported that in the invasion, the coalition caused extensive destruction of Iraqi civilization and unlawfully and wantonly appropriated Iraqi oil wealth in a manner not justified by military necessity.[28]War crimes were also committed in the international armed conflict between Russian and Georgia in August, 2008, following a previous Georgian war in South Ossetia and Abkhazia.[29] About 2,000 South Ossetian, 228 Georgian and 872 Abkhazian civilians were killed in the war.[30] This writer thus urges the ICC prosecutor to charge the perpetrators of these international war crimes accordingly. These crimes are not subject to any statute of limitation.[31] To gain global acceptance and legitimacy the ICC Statute must apply generally to all and sundry.

Again, it is urged that the ICC prosecutor should investigate the 2011 bombing campaign of the North Atlantic Treaty Organisation (NATO) in Libya. In its campaign in Tripoli

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[27] Anthony Dworkin, "Iraq and the 'Bush Doctrine' of Pre-Emptive Self-Defence". Available at *www.crimesofwarproject.org/currentevents,* p. 11. Retrieved on August 10, 2011.

[28] Thomas Franck and Martti Koskenniemi, "Article 51 and the Bush Doctrine of Self-Defence". Available at *www.crimesofwarproject.or/currentevents,* p. 2.Retrieved on August 11, 2011.

[29] No Author, "2008 South Ossetia War". Available at *www.maybenow.com,* p. 4. Retrieved on August 1, 2011.

[30] This is contained in a November 2008 Amnesty International report, which citied both Georgia and Russia for war crimes. Available *ibid*., p. 69. Retrieved on August 1, 2011.

[31] Art. 29 of the ICC Statute.

Libya from May to October 2011, against forces loyal to ousted Muammar Gaddafi, NATO allegedly directed attack against a civilian population, killing civilians.[32] This amounts to war crime. The NATO attack was an international armed conflict since it involved the military operation of foreign states (the US, Britain, France *etc)* in Libya. Being directed against a civilian population made it a serious violation of the laws and customs applicable in international armed conflict.

However, the ICC is investigating and prosecuting cases of war crime falling out of internal armed conflicts. In *ICC Prosecutor v Germain Katanga and Matthieu Ngudjolo Chui*,[33] the accused persons are charged with the war crime of committing outrages upon personal dignity during internal armed conflict in the village of Bogoro in the Ituri District of Eastern DRC from January to March 2003. Proceedings in the case are on-going as at October, 2012.

The ICC has also commenced proceedings in the war crimes allegedly committed in the internal armed conflict that took place in Sudan in 2007. In *ICC Prosecutor v. Bahar Idriss Abu Garda*,[34] the accused person is charged with the war crime of intentionally directing attack against personnel, installations, material, units, or vehicles in a humanitarian assistance or peacekeeping mission for allegedly attacking African Union Peacekeepers at the Haskanita Military Base in Darfur, Sudan in September 2007. Similarly, the accused persons in *ICC Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo*,[35] are charged with the same crime allegedly committed during an attack carried out on September 29, 2007, against African Union Mission in Sudan (AMIS), stationed at the Haskanita Military Group Site in the locality of Umm Kadada, North Darfur in Sudan. Proceedings in both cases are equally on-going as at October, 2012.

The ICC has initiated fresh proceedings in the situation in the Democratic Republic of Congo (DRC). In *ICC Prosecutor v. Thomas Lubange Dyilo*,[36] the accused was charged with the war crime of conscripting children below the age of fifteen and using

[32] Nigerian Television Authority (NTA) Network News 9 pm, May 30, 2011.
[33] Case No. ICC-24-11-2009, ICC T.Ch. II.
[34] Case No. ICC-17-5-2009, ICC PTC I.
[35] Case No. ICC-17-8-2009, ICC PTC I.
[36] Case No. ICC-17-3-2006, ICC T. Ch. I.

then to participate actively in hostilities, committed in the DRC for the period beginning from September 2002, when the Force Patriotiques pour la Liberation du Congo (FPLC) was founded, and ending in August 2003. Similarly, the accused persons in *ICC Prosecutor v. Germain Katanga and Matthieu Ngudjolo Chui,*[37] were charged with the same crime as in *Djilo* committed in the village of Bogoro in the Ituri District of Eastern DRC from January to March 2003.[38]

Generally, the proscription of war crimes by the ICC Statute is a bold step at curbing the disastrous effect of war on humankind. International law may not be able to ban war making totally but it does place a limit to the conduct of a belligerent. It prescribes limits to the means and methods of warfare, and defines protected persons, objects and objectives against which attacks cannot be directed. As Benjamin B. Ferencz puts it, the statute makes it clear that 'war-making is no longer a national right but has become and henceforth would be condemned as an international crime'.[39] It is hoped that the norms of this statute will play invaluable role in maintaining global peace and security. But the statute also raises salient issues that need be resolved for the optimization of the Court.

3. Optimizing the Role of the ICC for Global Security: Issues and Concerns

No doubt, the ICC Statute has good objectives: to eradicate grave crimes that threaten global peace, security and well-being. But the emergence of the statute and the activities of the Court so far have raised fundamental issues that cast doubt on their viability. Observers are beginning to ask: Is the ICC not a cure worse than the ailment? In checking genocide and other crimes against international order under compulsory international jurisdiction, is the ICC not just another tool for continuation of imperialism and hegemony by the West and Europe? Does such hegemony not implicate racism (by whites), the cultural destruction of non-westerners, material exploitation, selective conviction and elimination through imprisonment (especially of radical voices) and all the other ills that the ICC is said to have set out to cure in the first place? Is the statute, as it stands, well equipped to curb

[37] Case No. ICC-24-11-2009, ICC T.Ch. II.

[38] Again, proceedings in both cases are still on-going as at October, 2012.

[39] Benjamin B. Ferencz, 'Enabling the International Criminal Court to Punish Aggression', (2006) 6 *Washington University Global Studies Law Review* 1 at 13.

twenty-first century menace to global security in a fair and objective manner? Is the ICC not a mask for the evisceration of state sovereignty and global domination with all the risks of totalitarianism that are entailed? These issues are raised and addressed in this part of the paper.

A. Security Council's Power to Pre-determine Aggression

Article 39 of the UN Charter empowers the Security Council to make predetermination that act of aggression has occurred before measures are taken to restore or maintain international peace and security. Scholars like Carrie McDougal[40] contend that this provision applies to the effect that the Council's predetermination is a condition for the exercise of the ICC jurisdiction over aggression. This contention seems to find support in Articles 5, 121 and 123 of the ICC Statute which make aggression an inchoate crime subject to amendment that must be consistent with the Charter of the UN. This issue of predetermination is responsible for why aggression has not metamorphosed into a full international crime today.

Article 5(1) (d) of the Statute places aggression as the fourth, i.e., the last crime within the ICC's jurisdiction. However, Article 5(2) provides that the Court shall exercise jurisdiction over this crime once a *provision* is adopted in accordance with Articles 121 and 123 (amendment provisions) defining the crime and setting out the conditions under which the ICC shall exercise jurisdiction with respect to this crime. In any case, such a *provision shall be consistent with the relevant provisions of the Charter of the UN.*[41]

At the First Review Conference of the ICC Statute held in Kampala Uganda in May/June 2010, Liechtenstein, which chaired

[40] C. McDougal, 'When Law and Reality Clash – the Imperative of Compromise in the Context of the accumulated Evil of the Whole: Condition for the Exercise of the International Criminal Court's Jurisdiction over the Crime of Aggression', (2007) vol. 7 *International Criminal Law Review*, 277 at 279.

[41] Emphasis added.

the Special Working Group on the Crime of Aggression,[42] proposed an amendment to the crime. The amendment which was adopted on June 11, 2010 defines aggression in accordance with UN General Assembly Resolution 3314 (XXIX) 1974 to mean:

> Invading another state; bombing another state; blockading the ports or coastlines of another state; attacking the land, sea, or air forces, or marine or sea fleets of another state, violating a status of forces agreement; using armed bands, groups, irregulars or mercenaries against another state; allowing territory to be used by another state to perpetrate an act of aggression against a third state.[43]

This definition is likely to be generally acceptable as it merely codifies existing jurisprudence on aggression. However, the aspect of the amendment setting out the conditions under which the Court shall exercise jurisdiction with respect to aggression is unlikely to receive general acceptance. The amendment retains the principle that the ICC prosecutor must wait for a determination of the Security Council regarding an act of aggression. If the Security Council determines that an act of aggression has taken place, the prosecutor may initiate proceeding. If the Security Council does not act within six months, the prosecutor can proceed provided the Pre-Trial Chamber of the Court approves of that move.[44] This implies that the Security Council's power of predetermination can oust the ICC jurisdiction if a state begins a war of aggression and concludes same within six months, and the Council consistently fails to make determination within the period. It shows that the Court cannot act proactively to stop ongoing aggression. It cannot for instance make an order

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[42] The Special Working Group on the Crime of Aggression (SWGCA) was directed by the Assembly of States Parties to the ICC Statute to form a definition for the crime of aggression.

[43] Resolution RC/Res. 6: the Crime of Aggression (PDF) International Criminal Court 10 June 2010. Available at *www.iccnow.org* p. 2. Retrieved on September 11, 2011. While the amendment will come into force one year after being ratified (i.e., on June 11, 2011) the amendment text says that only crimes of aggression committed one year or more after the thirtieth ratification are within the jurisdiction of the Court. Furthermore, a decision is to be taken by the Assembly of States Parties with a two-thirds majority votes on January 1, 2017 to actually exercise jurisdiction. See *ibid.*, at 4.

[44] *Ibid.*

restraining a party from committing aggression. This is unduly preferential to the Council, which seems to have primacy over the Court. Sadly, the Review Conference made no progress here. The retention of the Security Council's power of predetermination is the greatest undoing of the Court. Coupled with its power of deferral,[45] the Security Council is still in a very comfortable position to decide whether the Court investigates or prosecutes any crime of aggression or not. Of course, if the Council does not determine an act of aggression has taken place in a given incident, and the prosecutor proceeds with the approval of the Pre-Trial Chamber, the Council will immediately enter a deferral under Article 16 and the Court is effectively ousted.

If the question is whether the Security Council should make predetermination on the existence of aggression as a condition for the exercise of ICC jurisdiction over the crime, the answer should be a firm 'no'. The ICC jurisdiction should not depend on the Security Council determination. Truly Article 39 of the UN Charter provides that:

> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or *acts of aggression* and shall make recommendations, or decide what measures *shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.*

But the Security Council's power of determination under this provision is exclusive only where the Council wants to make recommendations or take measures under its power in the Chapter VII of the UN Charter. The power is not exclusive in a situation where the ICC prosecutor has taken hold of or is investigating or prosecuting a crime. No power of predetermination for ICC jurisdiction flows from Article 39 of the UN Charter. Elizabeth Wilmshurst correctly observes that:

> It is clear that the Council does not have *exclusive* responsibility with regard to threats to international peace and security. Its responsibility is exclusive only for the purpose of its powers

[45] The Security Council's power of deferral is a different issue raised in this paper and addressed below, note 59.

> under Chapter VII which includes deciding upon economic sanctions and other responses to breaches of the peace.[46]

Any rule that would subject judicial proceedings for an alleged crime of aggression to the veto power of each of the permanent members of the Security Council should be rejected as fundamentally flawed both in international law and international legal policy. The use of veto power by Russia and China, especially, in Security Council's resolution in the on-going crisis in Syria, and in the situation in Sudan *etc.*, makes one worry that members of the Council can easily oust or control the Court as they wish. International criminal justice should not sacrifice its legitimacy at the altar of power politics. Global security should not be compromised with the selfish interest of anyone. This writer shares the hope of Claus Kress that:

> The political leadership will soon be inspirited with a genuine will to secure the life, property and institutions of the world, and should assume its responsibility to close, ideally by consensus, the statute's most prominent lacuna–before it becomes permanent and thereby turns into a legitimacy gap.[47]

This living enthusiasm is preferable to the pretended compromise that Carrie McDougal envisions, which calls for a spirit of compromise only from one side, that is, the vast majority opposing a grant of exclusive power to the Security Council.[48] McDougall suggests 'that the ability of the five permanent members of the Security Council to exercise their veto is a necessary component of the *compromise* solution that is to be successful'.[49] The present writer joins in disagreeing with McDougall on this view. The deplorable note of stronger permanent members of the Security Council against the rest of the world is too loud to bear. The rest of the world is urged instead not to bow to the alleged demand of real politicking, but to work for a peaceful world where aggression will be punished by the Court without the Security Council or anyone having power of predetermination.

A pragmatic way of excluding the predetermination power of the Security Council is to amend Article 5(2) of the ICC

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[46] Elizabeth Wilmshurst, quoted in United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Official Records*, vol. 1, Final Documents, Annex 1, 72.

[47] C. Kress, 'The Crime of Aggression before the First Review of the ICC Statute', (2007) 20 *Leiden Journal of International Law* 864.

[48] *Supra* note 41 at 279.

[49] *Ibid*., at 280.

Statute, expunging therefrom any reference to the UN Charter. This will make it clear that the Security Council has functions of a political nature assigned to it, whereas the ICC exercises purely judicial functions. Also Article 2 of the ICC Statute should be amended to break the relationship between the UN and the ICC and make the ICC an independent international legal person.

B. Non-proscription of Weapons of Mass Destruction (WMD)

The ICC Statute prohibits weapons, projectiles, materials and methods of warfare which, by their nature, can cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles, material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to the statute. This is to be done by an amendment in accordance with the relevant provisions of Articles 121 and 123 of the statute.[50] The Annex required to be added to the Statute making a comprehensive list of prohibited weapons has not been made till date, so the proscription of WMD remains inchoate. This raises the issue as to whether the statute is well poised to handle the deadliest forms of threat to global peace and security in the twenty-first century. Kriangsak Kittichaisaree observes that this prohibition is beyond doubt a rule of customary law. He adds that:

> The problem, nevertheless, is that at present the international community of nations has not been able to universally endorse a comprehensive ban on the use of the most obvious candidate for this prohibition – nuclear weapons, chemical and biological weapons and anti-personnel landmines, among others.[51]

In the more pessimistic view of Antonio Cassese, 'it is extremely unlikely that such amendment will ever be agreed upon'.[52] The failure of the First ICC Review Conference (2010) to adopt the required Annex dramatically answers the scepticism of Cassese. The ICC Statute has thus failed to incorporate provisions that are meaningful and relevant to modern armed conflicts. As things stand now, the ICC Statute governs nineteenth, but ignores

[50] Art. 8(2) (b) (XX) of the ICC Statute.
[51] *Supra* note 18 at 180.
[52] *Supra* note 19 at 60.

twenty-first, century war technology. It is submitted that any general prohibition of weapons which by their nature can cause superfluous injury or unnecessary suffering or that are inherently indiscriminate must eventually contemplate WMD. This has always been a concern to some, if not all, of the world powers, who seem to be afraid of losing their right to modern war technology. Whenever you hear the UN or the US with Britain or France warning Iran or North Korea not to proliferate nuclear war technology, know that one war power is afraid of losing monopoly of modern war technology to another. I do not know why they are inventing and gathering these deadly weapons, who they want to use it to kill. Their actions threaten our world. Actually, it is not the UN or the US that should carry propaganda on WMD, it is the ICC that should prosecute and punish those who make wars by unconventional means and methods. The failure to proscribe WMD lays the ICC Statute open to ridicule. The statute prohibits bullets which expand or flatten in the human body, but not WMD. This is absurd. The next Review Conference is hereby urged to draw up a comprehensive prohibition of WMD for inclusion in the Annex to the statute. The list must include nuclear weapons, chemical and biological weapons and anti-personnel landmines, among others.

C. Non-Proscription of International Terrorism

International terrorism is the use or threat of violence to intimidate or cause panic, especially as a means of affecting cross-boundary political conduct. Terrorism is not a composite of the several distinct offences already proscribed under the statute. It has distinct *mens rea* not already captured in other specific international crimes to wit: the intention to use violence or threat of it to terrorize or intimidate the public, especially for political purposes. It is notorious that one man's terrorist is another man's freedom fighter. Nelson Mandela would once have been termed a terrorist. Same goes for the Mau-Mau fighters in colonial Kenya. But recent developments like the September 11, 2001 attack in the US and the bombing of the UN house in Nigeria on August 26, 2011, now clarify the distinction between terrorism and freedom fighting. We do not think anyone will characterize the activities of the *boko haram* in Nigeria or of *al-shabab* in Somalia as freedom fighting. Anyone who is fighting for freedom should be able to come out openly, state their grievances and utilize the conventional means and methods of fighting. If on the other hand you are fighting as a faceless group, wasting innocent lives and burning down government institution and religious houses for no known cause you will rightly be called a terrorist.

States have their various laws on national terrorism like the (Nigerian) Prevention of Terrorism Act 2011. But the ICC Statute does not proscribe international terrorism which is about the gravest crime being committed everywhere in the world today. This raises the issue as to whether the ideology of the statute is in tandem with the present reality of global security, or whether it actually addresses the real security concerns of the people of the world today. It is imperative to include international terrorism as a core crime in the ICC Statute. This is one of the most heinous crimes that strike at the heart of global peace and security. Its indiscriminate nature claims the lives of innocent, unsuspecting victims. The Rome Conference of 1998 seriously considered including the crime within the statute and placed it in Resolution E as part of the Final Act of the Conference, which the Review Conference may later consider including within the ICC's jurisdiction. But the First Review Conference, 2010 did not complete this inclusion. Essentially the reason behind resistance to the inclusion is the fear of politicization of the ICC. The League of Arab States opposed the inclusion on the ground that the international community has not yet been able to define 'terrorism' in such a way as to be generally acceptable.

This fear of politicization is not real. International terrorism is by no means more political than aggression nor any other international crime under the ICC jurisdiction. As for definition, Article 1(2) of the Convention for the Prevention and Punishment of Terrorism of November 16, 1937 defined terrorism as:

> Criminal act directed against a state and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or to the general public.[53]

General Assembly Resolution 53 on "Measures to Eliminate Terrorism" adopted on December 11, 1995 adopts implicitly and improves on the definition of terrorism quoted above, and reiterates that:

> Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the consideration of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.[54]

[53] This provision never entered into force. See *League of Nations Publications* C.94.M.47.V.

[54] *UN Doc. A/RES/5/53.*

The latest multilateral effort to define 'terrorism' in an international agreement appears in Article 5 of the UN Convention for the Suppression of Terrorist Bombing 1998. It provides:

> Each state party adopts measures as may be necessary, including where appropriate, domestic legislation to ensure that *criminal acts* within the scope of this Convention, in particular where they are *intended or calculated to provoke a state of terror in the general public or in a group of persons or particular persons,* are under no circumstances justifiable by considerations of a political, philosophical, racial, ethnic, religious or other similar nature and are punished by penalties consistent with their grave nature.[55]

The quoted paragraphs represent giant strides in providing a generally acceptable definition of international terrorism. This crime is long-overdue for inclusion within the ICC jurisdiction. It is urged that the next Review Conference of the ICC should move the crime from Resolution E into the Statute as a core crime. The Review Conference should build upon the quoted definitions in distilling the definition of international terrorism and formulating the elements of the crime. The definitions may not be perfect, but at least they can serve as a guide to the meaning and elements of the crime sought to be proscribed. Everyone knows it is both desirable and feasible for the ICC to exercise jurisdiction over international terrorism. But the political will to adjust national or group behaviour or interests for global security is lacking.

Terrorism has taken a drastic dimension in the world today. The insurgence of al Qaeda, al-shabab, ansar al-dine, boko haram, etc., and the July 22, 2011 bombing of the office of the Prime Minister of Norway are recent worrisome dimensions to terrorism. They demand immediate inclusion of the crime in the ICC jurisdiction. Giving the ICC active jurisdiction over international terrorism should be the natural reaction to incidents like the bombing of the UN House in Abuja. The UN works globally for peace, security and international cooperation and an attack on the UN is, in the words of William Hague, an attack on

[55] Adopted by UN General Assembly Resolution 52/164 of December 15, 1997, UN General Assembly Official Records (GAOR), 52nd Session, Supp. No. 49, *UN.Doc. A/52/49* (1997). Italicisation is the present author's.

these principles.[56] UN Secretary-General Ban Ki-Moon calls it an assault on those who devote their lives to helping others.[57]

D. Independence of the ICC and Security Council's Power of Deferral

The statute gives the Security Council a role in terms that violate international law, which may thwart the generality of application of its principles and lead to miscarriage of justice. The Council has power to refer situations to the ICC, to defer investigation or prosecution at the Court, and set conditions for the exercise of the Court's jurisdiction over aggression. All these when some permanent members of the Council like the US, Russia and China are not ready to ratify the statute. This raises the issue as to the independence of the ICC.

Article 16 of the Statute gives the Security Council power to defer investigation or prosecution at the ICC. It provides thus:

> No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

This provision contains no limit as to the number of possible renewals the Council can make. In effect, the Council can bar the ICC prosecutor permanently from conducting an investigation or prosecution. Through this provision the ICC Statute accepts that justice through the Court could undermine international peace and security. With this provision in force the ICC will never be independent. It will always work in line with the whims of the Security Council which may at all times defer investigation or prosecution of its members and allies. Article 16 should be expunged from the Statute at the next Review Conference so as to arrest the threatened primacy of the Security Council over the ICC. Article 16 does not only negate the doctrine of separation of powers, it undermines the human rights of the parties before the Court. It abrogates the rights of the parties to have their cause

[56] UK Foreign Secretary William Hague, Quoted in D'Banj and Mo'Hits, 'UN House in Abuja Bombed!'Available at *www.perculiarinternationalmagazine.org*, p. 4. Last accessed on August 26, 2011.

[57] UN Secretary General, Ban Ki-Moon's reaction to the bombing of the UN House in Abuja, quoted *ibid*., at 5.

heard. It perpetuates impunity of the offender. It will be contrary to rule of law if the ICC system does not leave the discretion to investigate or prosecute a situation solely with the prosecutor, but makes it somewhat dependent on political decisions. The power of the prosecutor to institute or undertake criminal proceedings or to discontinue it at any stage should be subject only to his conscience and good faith. In its exercise, the prosecutor should only be required to have regard to the public interest, the interest of justice and the need to prevent the miscarriage of justice.[58]

E. Fusion of Investigation and Prosecution Powers in the ICC Prosecutor

Articles 15 and 42 of the ICC Statute fuse the investigation and prosecution roles in the ICC prosecutor. These roles are mutually exclusive. Their fusion in one body raises issues of bias and partiality of the Court. The fusion also touches and concerns the presumption of the innocence of the accused person. Concern over this fusion reflects, at least in part, this author's background as a lawyer of common law provenance. A civil law practitioner would likely not be bothered by this as judges in some civil law countries investigate cases as part of their adjudicatory function. Be that as it may, the statute adopts adversary, not inquisitorial criminal procedure[59] and should fine-tune the system at the Court in line with the trend in the adversary traditions where investigation and prosecution powers are separated.

The ICC procedure should be restructured to separate the powers. Separation has fundamental advantages over fusion. If, for instance, the prosecutor's mind is biased at the investigation stage the bias may be carried through to prosecution to the detriment of the suspect. If the prosecutor has strong convictions concerning the result of his investigation this will ossify at prosecution and prejudice the accused person's right to presumption of innocence.

In the major national systems operating common law, like Nigeria, the roles are separated with the police investigating and the Attorney General prosecuting. In England and Wales, the police investigate and the Crown Prosecution Service (CPS) prosecutes. In the US, the prosecutor does not initiate his own

[58] This is also the position in national systems. See in the case of Nigeria, *Diepreye Alamieyeseigha v. Federal Republic of Nigeria* [2006] 16 Nigerian Weekly Law Reports (NWLR) (Pt. 1004) 1 Court of Appeal (CA).

[59] See Arts. 62 – 76 of the Statute.

investigation. He relies on the result and the evidence collected through police investigation. Separation of these roles is less pronounced in civil law countries, yet major national systems operating the latter tradition endeavour to separate the roles. In Germany, for instance, the police investigate crimes—a role auxiliary to the ensuing prosecution by the prosecutor.

The fusion of investigation and prosecution roles at the ICC is a fundamental procedural defect. The next Review Conference should separate the roles in line with what obtains in the national systems. A body responsible for international criminal investigation should be established for the ICC. The body should be able to make balanced investigation of situations and come up with incriminating as well as exculpating information. The investigator should be independent of the prosecutor. The prosecutor should step in only after investigation and use the result of the investigation for prosecution. The work of the investigator will help the prosecutor to perform his duties in an objective manner. Objectivity demands that the prosecutor actively utilizes incriminating as well as exculpatory evidence at trial. This approach will safeguard the guaranteed right of the accused to fair trial and presumption of innocence and reduce the chances of bias on the part of the prosecutor.

F. Undue Focus of the ICC on Africa

The operations of the Court seem unduly focused on Africa, overlooking or condoning similar crimes committed in other parts of the world. This raises the issue of whether the ICC is western imperialism in disguise. Africa is worried, justifiably, that the continent seems to be the target of the ICC. All the seven situations under investigation and prosecution so far by the ICC are in Africa–the DRC, Uganda, Central African Republic, Sudan, Kenya, Libya and Ivory Coast. Only Africans (including three Presidents of states: al-Bashir of Sudan, former Ivorian President Laurents Gbagbo and now deceased Muammah Gaddafi of Libya) have been indicted in the twelve cases so far instituted at the ICC. This is so despite the fact that acts similarly amounting to international crimes have been committed in other parts of the world in the lifetime of the ICC. President George W. Bush led the coalition of the willing that committed international crimes in Iraq in 2003. President Vladimir Putin led Russia to commit

international crimes in the war against Georgia in August 2008. Why have these Presidents of states not been indicted like their counterparts in Sudan, Ivory Coast and Libya? The Court has double standards. That is why. That is what raises fear of hidden objectives other than international criminal justice. Africa fears that the ICC is western imperialism in disguise. To buttress this fear, the League of Arab Nations joined voice with Africa to condemn the ICC indictment of al-Bashir. Likewise, the African Union condemned the warrant of arrest against now deceased Muammah Gaddafi. The ICC does not seem to be doing much to dispel the palpable suspicion and fear of bias against Africa.

To play its role in maintaining global security, the ICC should expand its operations to other parts of the world and do so objectively. The Court should investigate and prosecute the crimes against humanity committed in the invasion of Iraq by the coalition of the willing in March 2003. It should investigate the same crimes committed in the Russian war against Georgia resulting from Georgian invasion of South Ossetia and Abkhazia in August 2008 and the chronic armed conflicts between Israel and Palestine. If the ICC proceeds with the arrest of al-Bashir, let it also arrest Bashar al-Assad for committing similar crimes in the on-going armed crackdown on protester in the uprising in Syria. Let the ICC Statute be applied generally and equally to everyone everywhere in the world. Focusing unduly on Africa alone will only polarize the world and nibble at global peace and security.

G. Evisceration of State Sovereignty and International Totalitarianism

Even if the ICC is not western imperialism in disguise, one can express genuine fear that it concentrates a key power in an institution and by so doing eviscerates the sovereignty of states, especially weaker states, in Africa or otherwise. A situation where the ICC can indict and possibly prosecute a sitting President of a state marks a radical departure from what international law and relation used to be. More importantly, the location of such power in one global institution portends ill by making it a tool potentially for totalitarianism on a global scale. Most institutions are ultimately amenable at some point in their history to abuse, none perhaps more so than criminal courts. As we speak, every tyrannical regime from Russia to Myanmar readily resorts to the criminal justice process to stifle opposition. The ICC's potentials for such abuse on a global scale cannot be gain-said.

4. Conclusion

A great majority of people in the world will crave peace and orderly existence but there seem to be strong socio-political or ideological factors perpetuating continual terror, war, strife and discord across the globe today. The pre-2002 legal and institutional framework adopted by the international community for ensuring global security became obviously ineffective, necessitating the establishment of the ICC by the Rome Conference. There is hope that the ICC will play a significant role in restoring global peace and security. But that hope will be realized only if the salient issues identified in this paper are resolved, ideally by consensus of the world political leadership according to law.