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TOWARDS A UNIVERSAL ACCEPTANCE OF THE INTERNATIONAL CRIMINAL COURT-AFRICAN PERSPECTIVES

*

K. Aina

Introduction

The International Criminal Court (ICC)[1] was established by the Rome Statute of the International Criminal Court[2] as a permanent institution with power to exercise its jurisdiction over persons for the most serious crimes of international concern[3]. The court is supposed to be complementary to national criminal jurisdictions[4]. The creation of the ICC is a significant step taken by the members of the UN to give the necessary backing and enforcement ability and force to the Geneva Conventions of 1949[5] and series of conventions and treaties on human rights, treatment of individuals and humanitarian law. In its preamble, the statute was mindful of the millions of children, women and men that have fallen victims to various unimaginable atrocities that deeply shock the conscience of humanity, the era of impunity by perpetrators of the crimes and the threat of these grave breach of international peace and security that these offensive crimes has occasioned[6], and of more serious concern is that majority of these crimes or its perpetrators go unpunished and are never brought to book or even more annoying is that many of them come back to be celebrated and glorified as statesmen. The inability of the international community to intervene in internal affairs of states due to the principle of sovereignty and coupled with the fact that there is no permanent court in the international sphere to enforce the general principles of human rights and humanitarian law had made it possible for the perpetrators of these crimes to escape the punishment for the offence committed and justice for the victims. An unfortunate aspect of these crimes are the international cross-border effects, of refugee problems, spill over effect of so called militants and rebels and consequential civilian casualities within the concerned states, normally raise the stakes and heightens the conflicts to that of global concern. The intervention of Nigeria in the Liberian crisis was first seriously condemned globally even though it was through the ECOWAS machinery but the principal perpetrators of the crisis is now facing criminal charges before the ICC.

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[1] International Criminal Court is abbreviated ICC or ICCT
[2] http//www.org/news/facts/iccfacts.htm (accessed 1st August, 2010)
[3] Article 1 of the Rome Statute
[4] Ibid
[5] Geneva Conventions of August 12, 1949
[6] Preamble to the Rome Statute

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Generally, therefore the coming into force of the Rome Statute is a step in the right direction and a laudable attempt by the international community to fight and stop the crimes that has given the international community[7] serious concern. After years of relentless effort and five weeks of difficult negotiations, the statute of the ICC was adopted and opened for signature in Rome on 17th July, 1998. The court came into being on 1st July 2002[8].By August 2010, 111 states are members of the court[9] Seychelles and Saint Lucia will become members on the 1st November, 2010 after both ratified the statute in August 2010. Russia and United States of America (USA) have signed but did not ratify the statute[10].The United States subsequently embarked on a global campaign effort to oppose the statute and conclude non surrender agreements with some states parties. In December 2004, the United States passed the Nethercutt Amendment, which authorized the loss of economic support funds to all countries, including many key US allies which had ratified the ICC treaty but are yet to sign a bilateral immunity agreement with the United States[11].The ICC's first trial began on 26th January 2009 with the trial of Congolese militia leader Thomas Lubanga.

Historical Development of the ICC

The first International trial for the perpetration of atrocities was the trial of Peter von Hagenbach who was tried in 1474 for atrocities committed during the occupation of Breisach. When the town was retaken vonHagenbach was charged with war crimes, convicted and beheaded[12]. The Hague Convention of 1899 and 1907 was the first serious step towards codification of the laws of war in an international treaty. They include provisions protecting the rights of civilian populations. The conventions in their preamble recognize the incomplete protection offered by the convention but states that, "the inhabitants and the belligerents remain under the protection and the rule of the principles of

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[7]PayanAkhanvan, "The international Criminal Tribunal for Rwanda: the Politics and Pragmatics of Punishment" *The American Journal of International Law*, vol.90No3. (Jul; 1966), 501-510

[8]Amnesty international, April 2002.*The International Criminal Court – a Historic Development in the Fight for Justice*. http//www.amnesty.org/en/library/info/IRO40/008/2002. (Accessed 1st August, 2010).

[9]International Criminal Court, 2010.*The states Parties to the Rome Statute*.(http//www.ICC-Cpi.int/menies/ASP/states+parties+to+the+Rome+statute.htm) accessed on 1st September, 2010. See also Coalition for the International Criminal Court, 18th August, 2010. States parties to the Rome statute of the ICC (http//www.coalitionfetheICC.org/documents/RATIFICATIONS by region 18 August, 2010-eng.ptf) accessed on 1st September, 2010

[10] USA later unsigned the statute and opposed it and also moved ahead to persuade other states to oppose the statute. Some state entered into bilateral agreements with USA promising not to surrender American citizens or US employees to the newly established court. Many African countries signed the non surrender agreement.

[11] Judith Kelly, "Who Keeps International Criminal Court and Bilateral Non Surrender Agreements" American Political Science Review (2002) Vol 101 No 3,

[12] M. CherifBassiouni,'' From Versailles to Rwanda in 75 years. The Need to Establish a Paramount International Court.'' 10 Harvard Human Rights Journal, 11,

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the law of nations as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience". This provision is known as Martens Clause after the Russian diplomat who drafted it[13].

At the end of World War I, there was general agitation for trial of those responsible for the war. At the Paris Peace Conference, the Allies debated the wisdom of such trials as well as their legal basis. The United States opposed the idea that it will be *ex post facto* justice. The American position was that crime against laws of humanity was not issue of law but morality, and that it was not a crime for international law but an internal matter for the concerned state to prosecute, the US position turned out to be a minority position.

The Versailles Treaty recognized the right of the Allies to set up military tribunals to try German soldiers accused of war crimes.[14] There are also remarkable but unsuccessful attempts at prosecuting war criminals at localized levels. The treaties though specifically tailored towards particular situations and circumstances contributed towards development of international criminal law on the matter of an international court[15].

At the end of World War II, the four powers, United Kingdom, France, United States and Soviet Union held a conference in London and laid the groundwork for the prosecutions of Nuremberg. The agreement for the prosecution and punishment of major war criminals of the European Axis and establishment of the Charter of the International Military Tribunal (I.M.T) was formerly adopted on 8th August 1945 and signed by the representatives of the four powers[16]. The Tribunals jurisdiction was limited to crimes against peace, war crimes, and crimes against humanity[17].The Allies also established the Tokyo Tribunals that tried Japanese war criminals under similar provisions to those at Nuremberg. The General Assembly of the UN eventually adopted the Convention for the Prevention and Punishment of the Crime of Genocide[18].

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[13]The Theodor Meron "The Martens Clause Principles of Humanity and the Dictates of Public Conscience, (2000) 94 American journal of international law 78.

[14]Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles) (1919) TS4, Art 227.

[15] James F. Willies, *Prologue to Nuremberg; the Politics and Diplomacy of Punishing War Criminals* of the First World War, Westport, CT; Greenwood press, 1982

[16]Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT) Annex, (1951) 82 UNTS 279.

[17]Arieh J. Kohavi, *Prelude to Nuremberg, Allied War Crimes Policy and the Question of Punishment*, Chapelhill and London,UniversityofCarolinaPress,1998.

[18] (1951) 78 UNTS 277

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The International Law Commission (I.L.C) is a body of experts named by the United Nations and charged with the codification and progressive development of International Law, the work of the commission cannot be overemphasized. The Commission developed a 'code of crimes against the peace and security of mankind'. In the meantime, the General Assembly also established a committee charged with drafting the statute of an international criminal court, the committee submitted its report and a draft statute in 1952[19]. The International Law Commission submitted its own draft code in 1954[20]. However, further progress in this area became impossible due to the cold world war of the era.

The General Assembly eventually adopted the definition of aggression in 1974[21]. In 1981, it directed the I.L.C. to revive the work on its draft code of crimes[22]. In 1989 the then Prime Minister of Trinidad and Tobago proposed the creation of a permanent Court to deal with drug trade, and related trans national issues. This was the starting point that formed the basis of the directive of the General Assembly to the I.L.C. to consider the issue of International Criminal Court within the context of its work on the draft code of crimes[23]. The draft code was submitted to the General Assembly in 1993[24]. At the same time, the international community, established *ad hoc* tribunals to try war crimes in the former Yugoslavia.[25] The tribunals were to apply rules of International Humanitarian Law that are beyond any doubt part of the customary international law.

Upon request from Rwanda, the General Assembly in November 1994 created a second *ad hoc* tribunal charged with the prosecution of genocide and other serious violations of international humanitarian law committed in Rwanda and in neighboring countries during the year 1994. In establishing the Rwanda Tribunal, however, the Security Council decided that "drawing upon the experience gained in the Yugoslavia,[26]a one step process and a single resolution would suffice[27]" initially. The United States proposed that the jurisdiction of the Yugoslavia Law Tribunal be extended to Rwanda, but this was

[19] UN Doc. A/2135 (1952)
[20] UN Doc A/2645 (1954)
[21] GR RES. 3314 (XXIX) (1974)
[22] GA Res. 36/106 (1981)
[23] GA Res. 44/89
[24] James Crawford, "The ILC's Draft Statute for an International Criminal Tribunal", (1994) 88 American Journal of International Law 140; see also, Report of the International Law Commission on the Work of its forth-sixth Session, 2 May 22 July 1994, UN Doc A/49/10 chap. 11 paras. 23-41
[25] The International Criminal Tribubal for the former Yugoslavia, established in 1993
[26](1993), UN Dos. S/25 704
[27] See report of the Secretary-General pursuant to paragraph 5 of Security Council Resolution 955 (1994) UN Doc. S/1995/134/at 2-3 Para. 7

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rejected on the basis that it would lead to a single permanent judicial institution. However, the statutes of the two tribunals were identical. They share the same prosecutor as well as the appeals chamber. The rulings and decision of the *ad hoc* tribunals were of paramount importance towards the development of a jurisdiction for the establishment of the ICC. Infact, the rulings on a variety of matters encouraged debates on the establishment of a single International Criminal Court[28].

The rulings helped in the drafting of the ICC statute and enabled the drafters to avoid some loopholes in the new ICC statute. Also, important is that the work of the tribunals served as a model for the ICC. The role of the prosecutor also helped to douse the fears of some who thought the persecutor will become the irresponsible political agent of some states[29]. Quite clearly the lessons from the tribunals were that there is an urgent need for permanent International Criminal Court.

Following years of negotiations towards the establishing of a permanent international court, the United Nations convened a conference in Rome in June 1998 with the aim of finalizing a treaty. On the 17th July 1998, the Rome Statue of the International Criminal Court was adopted by a vote of 120 to 7, with 21 countries abstaining. The seven countries that voted against the treaty were, China, Iraq, Israel, Libya, Quater, the United States and Yemen[30]. The Rome Statute became binding treaty on 11 April 2002 when the number of states that had ratified it reached 60[31].

Jurisdiction

(1) **Territorial Jurisdiction.**

There was a serious disagreement on the territorial jurisdiction of the court. Some States support the idea that the court should be invested with universal jurisdiction but due to the strong opposition by the United States[32], a compromise position was adopted allowing the court to exercise jurisdiction only under the following circumstances.

[28]William A. Schabas, *An introduction to the International Criminal Court*, 2001 Cambridge University Press, 13.
[29]Coalition for the International Criminal Court. History of the ICC (http//www.ICCnow.org/mod=ICChistory) accessed on 9 September 2010)
[30]http//www.icc-cpi,int/menus/ICC/Aboutiheld court. (accessed on 9 September 2010)
[31] Article 126, Rome statute
[32] Elisabeth Wilmshurst, 'Jurisdiction of the Court 'in Roy S. Lee (Ed), *The International Criminal Court;* ; the making of the Rome statute.'' The Hague: Kluwer law international p. 136.

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i. Where the person accused of committing a crime is a national of a state party or where the person's state has accepted the jurisdiction of the court.
ii. Where the alleged crime was committed on the territory of a state party (or where the state on whose territory the crime was committed has accepted the jurisdiction of the court[33]), or
iii. Where a situation is referred to the court by the UN Security Council[34].

Article 12(a) allows the Security Council to refer any case where it appears that a crime under the statute has been committed to the prosecutor acting under chapter VII of the Charter of the United Nations. This referral having been exercised under chapter VII of the UN charter is irrespective of and not limited to the states members of the Rome statute. The forth position is that provided under article 12(3); where a state not a party to the statute accepts the exercise of jurisdiction by the court by a declaration lodged with the registrar, with respect to the crime in question. The accepting state must however cooperate with the court without any delay or exception.

Crimes within the Jurisdiction of the Court

The jurisdiction of the Court is limited to those crimes described as most serious crimes of concern to the international community as a whole[35]. These crimes have been broken down into four categories.

a. The crime of genocide
b. Crimes against humanity
c. War crimes
d. The crime of aggression

The statute provided detailed definition of the crimes except for the crime of aggression. The court will not exercise its jurisdiction over the offense of aggression[36] until such time as the states parties agree on a definition of the crime and set out the conditions under which it may be prosecuted[37].In June 2010, the ICC's first review conference in Kampala, Uganda

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[33] Art. 12 ,see also David Schaffer, Address at the Annual Meeting of the American Society of International Law http//www.ICCnow.org/documents/David Schaffer-address on ICC pdf accessed on 10 September, 2010.
[34] Art 12 (a)
[35] Art. 5 (1)
[36] Art 6, Art 7, Art 8
[37] Art. 5(2)

expanded the definition of 'crimes of aggression' and the ICC's jurisdiction. However, the ICC will not be able to prosecute for this crime until 2017[38].

Many states desire to add certain crimes prevalent or inimical to their security was turned down. For instance the proposal of India to add use of nuclear weapons and other weapons of mass destruction to be included as a war crime were turned down. The attempt to add drug trafficking and terrorism was also turned down because principally states were unable to agree on the acceptable definition of the crime[39].

The crime of genocide is defined to mean any of the acts listed below with intent to destroy, in whole or in part, a national ethnic, racial or religious group,

a. Killing members of a group
b. Causing serious bodily or mental harm to members of a group;
c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
d. Imposing measures intended to prevent births within the group;
e. Forcibly transferring children of the group to another group[40].

Crime against humanity is defined as any act committed as part of a widespread or systematic attack directed against any civilian population with knowledge of the attack. These are:

a. Murder
b. Extermination
c. Enslavement
d. Deportation or forceful transfer of population
e. Imprisonment or other severe deprivation of physical liberty or violation of fundamental rules of international law;
f. Torture
g. Rape, sexual slavery, enforced prostitution
h. Forced pregnancy, enforced sterilization or any other form of social violence of comparable gravity;

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[38] http//www.csmonotor.com/USA/foreign policy/2010/0615/US-oppose-ICC-Ibid-to-make-aggressive-a-crime-under-international-law accessed September 10, 2010.
[39] See for example the Indian position DilipLahiri, 17 July 1998. Explanation of vote of the adaption on the statute of the international criminal court.(http://indianembassy.org /policy/ICC/ICC adoption July.1998.html) Embassy of India, Washington, D.C. accessed on September10, 2010.
[40] Art 6

i. Persecution against any identifiable group etc.
j. Enforced disappointment of persons,
k. The crime of apartheid
l. Other inherent acts of similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.
   Article7(2) defines and explains the meaning of and the ingredients of the offences[41].

War crimes also falls within the jurisdiction of the court when committed as part of a plan or policy or as part of a large scale commission of such crimes. An important innovation was the inclusion of armed conflict not of international character. Also acts committed against civilian populations who are not part of any hostilities including members of armed forces who have laid down their arms and those placed on *hors de combat* by sickness, wound, detention or any other cause[42]. However, situations of internal disturbance and tensions, such as riots, isolated and sporadic acts of violence or other acts of similar nature do not constitute conflicts and of international character[43]. An important inclusion of war crime are crimes committed against women like rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and any other form of sexual violence also constituted a serious violation of article 3 common to the Geneva Conventions.

The list of war crimes committed during non-international armed conflicts has been criticized for not including ban on intentionally starving the civilian population, using certain weapons or willfully causing widespread long term and severe damage to the natural environment. What critics and international activist should understand is that this convention is the very first successful treaty of widespread acceptance amongst states members of the UN, on international criminal law. It is certainly a product of compromise as it affects sovereignty (a jealously protected right). Rhe crimes as described in the Rome statute are quite extensive and are capable of arresting the current crimes whether international or national dimensions.

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[41] Art 7
[42] Art 8(2)
[43] Art 8(2) (d)

Complimentarity

The ICC is not a court of first instance but a court of last resort. The jurisdiction of the court is only activated when the national courts have failed. Article 17 of the statute[44] provides that a case is inadmissible if:

a. The case is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable genuinely[45] to carry out the investigation or prosecution.
b. The case has been investigated by a state which has jurisdiction over it and the state has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the state genuinely to prosecute.
c. The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the court is not permitted under article 20 paragraph 3[46]; .
d. The case is not of sufficient gravity to justify further action by the court

Article 20, paragraph 3, specifies that if a person has already been tried by another court, the ICC cannot try such a person again for the same conduct unless the proceedings in the other court:

a. Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the court; or
b. Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

Structure

The Court's supreme organ is the Assembly of States, it is the governing organ of the Court[47]. The Court itself is composed of four main organs. These are;

(a) The Presidency
(b) An Appeals Division, a Trial Division and a Pre-Trial Division;
(c) The office of the Prosecutor;

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[44] Marie – Claude Roberge,''The New International Criminal Court: A preliminary assessment' ICRC (1998) No 325, p. 671-691 (http//www.ICRC/hob/eng/siteengO.nsf/html/57JPJI) (accessed on 2 September, 2010)
[45] Art 20
[46] Art 112
[47] Art 34

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(d) The Registry

The Assembly of States

The Assembly of States is composed of representative of each state party to the statute. Other states which has signed the statute or the Final Act may be granted observer status in the Assembly[48]. The main functions of the Assembly are:

1. To consider and adopt as appropriate recommendations of the preparatory commission
2. Provide management oversight to the presidency, the prosecutor and the registry regarding the administration of the court;
3. Consider the reports and activities of the Bureau established under paragraph 3 and take appropriate action in this regard;
4. Consider and decide the budget of the court;
5. Decide whether to alter in accordance with article 36, the number of Judges;
6. Consider pursuant to article 87, paragraph 5 and 7, any question relating to non-cooperation;
7. Perform any other function consistent with the provision of the statute or the rules of procedure and evidence.

The Assembly must meet at least once in a year at the seat of the court[49] at the headquarters of the United Nations. The Assembly is also empowered to hold special sessions where circumstances requires[50]. Each state party is entitled to one vote and the statute enjoins parties to reach its decision by 'consensus', only when there is no consensus may the Assembly resort to voting before reaching its decisions. The Assembly is presided over by a President who is appointed for a three year term. The President is supported by two Vice-Presidents elected by the member states for the same term.

The Assembly shall also have a Bureau consisting of the President, and the two vice-presidents and 18 members elected by the Assembly for the three year term. The main functions of the Bureau are to assist the Assembly in the discharge of its responsibilities[51]. Apart from the Bureau the assembly may also establish subsidiary bodies including an independent oversight mechanism for inspection, evaluation and investigation of the court in order to enhance its efficiency and economy. All judicial functions of the Court can only

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[48] Art 112 (1)
[49] Hague, in the Netherlands, or New York see Art 3,
[50] Art 112 (6)
[51] Art 112 (3) (a)

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be exercised by the judicial divisions of the Court and not by the Assembly, who cannot interfere in the individual cases before the Court[52].

Presidency

The Presidency is responsible for the general and proper administration of the court with the exception of the office of the Prosecutor. The Presidency is to coordinate with and seek the concurrence of the Prosecutor on all matters of mutual concern within their function[53]. The Presidency is composed of the President and first and second vice-presidents who may to act in the absence of the President[54].

Judicial Divisions

The Courts Judicial Divisions or chambers is divided into 3. These are the:-

1. Pre-trial
2. Trial
3. Appeals chamber of the Court.

The pre-trial chamber is composed of 6 judges, and 3 of the judges may sit or its function may be carried out by 3 of the judges, so that 3 of the 6 forms a quorum. The statute in the alternative allows a single judge to sit. The trail chamber also composed of 6 judges, but its quorum is 3, while that of the appeal chamber is composed of 6 judges and all the judges of the appeal chambers must sit on matters before it[55].

The judges of the court must be persons of high moral character, impartial, and of high integrity who possess the requisite qualification for their office. The judge's are elected by the assembly of states and nominated by any of the party states. The person nominated judge of the court must also be nationals of the state parties and each state is not allowed to be represented by more than one person. The candidate nominated must be:-

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[52] Coalition for the international criminals court, Assembly of states parties (http//www.ICCnow.org/(accessed 1 September.2010).
[53] Art 38
[54] International Criminal Court, 2 March, 2009. Judge Song (Republic of Korea) elected president of the international criminal court; judges Diarra (Mai) and Kanl (Germany) elected first ands second vice-presidents respectively. (http//www.ICC-CPI/Menus/Go? Id = 3ff 10683-6d9b.hm) accessed 2 September, 2010
[55] Art 38

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1. Person who have established competence in criminal law and procedure, and the necessary relevant experience whether as judge, prosecutor[56] or in other similar capacity in criminal procedure or,
2. Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the court[57].

The prosecutor or any person being investigated or prosecuted may request for the disqualification of a judge from any proceedings in which his or her impartially might reasonably be doubted on any ground. Any request for disqualification of a judge is decided by an absolute majority of the other judges[58]. The judges are expected to be independent in the performance of their functions. The judges may also with the concurrence of the President excuse the judge from the exercise of a function under the statutes[59]. A judge may however be removed from office if he or she is found to have committed serious misconduct or a serious breach of his or her duties under the statute or as provided by the rules of procedure and evidence or he or she is unable to exercise the functions of his office under the statute.[60] The careful and extensive provisions are made to ensure an impartial and transparent corrupt free judicial system. The selection process will also ensure balancing in the ultimate choice of judges between the party states and all members state with the majority actually electing the judges. This makes the eventual choice free from attacks as being lopsided or unfair in the choice, ensuring not only the general geographical spread of the judges but also ensuring that the very best hands are employed in the service of the court[61].

The Office of the Prosecutor

The office of the prosecutor is responsible for conducting independent investigations and prosecutions. The office of the prosecutor is separate organ of the court and is not under the control of the President or the Judges in the conduct of its functions.

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[56] Art 36
[57] Art 36(3)
[58] Art 41
[59] Art 41(1)
[60] Art 46
[61]Holdstone and Spinson 'Evaluating the Role of the International Criminal Court as a Legal Response to Terrorism Havard Human Rights Journal (2003) vol 16.P.13 at 23.

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The prosecutor is the head of the office and is assisted by one or more deputy prosecutors[62] and are required under the statute to be of different nationalities. The prosecutor receives referrals and any substantiated information on crimes within the jurisdiction of the court[63].The Rome Statute while providing the prosecutor *propriomotu* powers also provides for a detailed and extensive guide on the exercise of his powers as well as administrative and legal checks on his discretionary powers. The Prosecutor is also accountable to the Assembly of states and to the ICC judiciary[64]. It is important here to examine the complex rules in the statute on the duties of the prosecutor and the extent of his powers and determine how independent he really is and the extent of his discretionary powers.

In initiating an investigation as a prelude to prosecution, the first limitation to the powers of the prosecutor is the jurisdiction of the court. The ICC is limited in its jurisdiction to only crimes against humanity, war crimes or genocide as defined in the Rome statute occurring only after July 1, 2002 the date of entry into force of the statute[65]. Except where the Security Council refer a matter to the prosecutor, the ICC only can exercise its jurisdiction where the crime is committed in the territory of a state party[66]. Another serious huddle to surmount is that the categories of persons that may provoke the investigation of a crime is limited only to three ,these are:

1. The UN Security Council may refer a situation to the prosecutor under chapter VII powers;
2. The States party to the treaty
3. The Prosecutor himself may initiate the investigation into a particular situation upon his receipt of information from external sources[67].

The prosecutor must evaluate the information made available to him with the view to determine whether there is any reasonable basis to proceed under the statute, and whether the case appears to fall within the jurisdiction of the court[68]. Upon the proper evaluation

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[62] Art 42 (2)
[63] Ad
[64] Allison Marston Danner, "Enhancing the Legitimacy and Accountability of Prosecutor Discretion at the International Criminal Court' 97 AJIL 510
[65] Art 11 (1) and where a state ratifies the treaties after July 1, 2002, the ICC will only have jurisdiction only over crimes committed after the entry into force of the treaty for that state id. Art 11(2)
[66] A state may accept the jurisdiction of the court. Although not a party to the treaty for a particular situation id.
[67] Such sources may be persons who are themselves victims of the crimes, human rights activities and non governmental organizations.
[68] Art 15 (4)

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which may entail his taking evidence from victims and oral testimony at the seat of the court. The prosecutor upon his being satisfied of the seriousness of the case, must now submit the result of his investigation and conclusions before the Pre-trial chamber of the court[69]. If the Pre-trial chamber agree that there is a reasonable basis to proceed with an investigation and that the case appears within the courts jurisdiction, it must then authorize the commencement of an investigation. Where the Pre-trial chamber refuse the application the prosecutor may make another application and submit new facts or evidence[70]. In cases where the prosecutor decides not to go on with an investigation, he may do so having concluded that there is no sufficient basis for a prosecution[71] the case is inadmissible under Art 17, or (c) the prosecution is not in the interest of justice, taking into account all the circumstances, including the gravity of the crime, the interests of the victims and the age or infirmity of the alleged perpetrator and his or her role in the alleged crime. If the referral was done by a State[72] or made by the Security Council[73] the prosecutor will inform them of his decision. The state making the referral or the Security Council may apply to the Pre-trial chamber for a review of the prosecutor's decision, and the Pre-trial chamber may also ask the prosecutor to review his decision.. In other cases the Pre-trial chamber may review the decision of the prosecutor not to proceed with investigation and the decision of the prosecutor may only be effective if confirmed by the Pre-tial chamber. This clearly shows that the much criticized discretionary powers of the prosecutor as being too wide and unmanageable is not as extensive as being touted as it is clearly subject to the strict oversight control of the Pre-trial chamber[74].

Another important consideration before the prosecutor can investigate any case submitted to him is the issue of admissibility .Danner was of the view that the admissibility provisions of the statute "ensure that his prosecutions are complementary to National prosecutions, they restrict his *ProprioMotu* powers, and they create a complex and potentially politically charged series of procedural hurdles that he must negotiate'[75] where he decides to initiate an investigation, he must inform all states members of the statute, and the state who would normally exercise jurisdiction over the matter. If one of the states informs the prosecutor that it is already investigating the matter, the prosecutor must defer

[69] The Pre-trial chamber comprise of three judges of the court with powers to review the decision of the prosecutor whether to proceed with an investigation or not

[70] Art 15 (3)

[71] Art 53 (2)

[72] Ibid, referral under Art 14

[73] Art 13 (b)

[74] See John R. Bolton, "The Risks and the Weaknesses of the International Criminal Court from Americans Perspectives " 64 Law and Contemporary Problems.' No 1 p.167

[75] Allson Marshal Darner, supra in note

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to the state. The prosecutor may however challenge the states assertion that the case is inadmissible in the ICC because of an ongoing domestic investigation or prosecution. He may petition the Pre-trial chamber to find a case admissible in the face of a domestic investigation or prosecution if the state is unwilling or unable to investigate or prosecute the case[76]. This also brings to fore the supplementary provisions of the statute: The case will be inadmissible where, (a)The case is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable to genuinely carry out the investigation or prosecution; (b) The case has been investigated by a state which has jurisdiction over it and the state has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability to prosecute; (c) The person concerned has already been tried for the conduct which is the subject of the complaint.

Justice Arbour is of the view that the entire admissibility regime will require that the prosecutor puts the domestic justice system of criminal justice on trial[77]. In opposing the objection by the state, the prosecutor may have to prove that the state's criminal justice system has been manipulated to favour the person being investigated or incompetent. Danner concludes that these questions have far ranging political overtones and will pose a significant challenge for the ICC's prosecutor[78].

Investigation can only proceed if and only if the Pre-trial chamber confirms and gives permission to the prosecutor to proceed. He may therefore proceed with his investigation after the approval. The prosecutor, if he wishes to arrest the persons investigated, will have to return to the Pre-trial chamber to issue a warrant of arrest; and once the accused is arrested the Pre-trial chamber will have to sit and confirm the charges on which the prosecutors wish to try the accused person. The hearing is not a summary trial, the prosecutor must furnish the Pre-trial chamber with enough evidence for it to conclude that "there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged[79]". Each charge is considered on its own merit and the Pre-trial chamber may confirm charges with sufficient evidence while it may decides that there is no sufficient evidence.

Critics have argued that there is "insufficient checks and balances on the authority of the ICC prosecutor and Judges and insufficient protection against politicized prosecution or

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[76] Art 18 (1)

[77] Danner, supra, CivillanoTurone, "Power and Duties of the Prosecutors in the Rome Statute of the International Criminal Court: a Commentary 1901, 1907 (Antenio Cassese et al. eds, 2002) 1137.

[78] Art 58

[79] Art 61

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other abuse[80]." Henry Kissinger was of the opinion that the checks and balances are so weak that the prosecutor "has virtually unlimited discretions in practice[81]". Bolten criticized the prosecutor of the ICC as being accountable to no-one, comparing the structures of the ICC to National structures, he said, *The prosecutors will answer to no superior executive power, elected or unelected. Nor is there any legislature anywhere in sight, elected or unelected. In the Rome statutes the prosecutor, and his or her as yet uncreated investigating, arresting and detaining apparatus is answerable only to the court and then only partially*[82].

Ruth Wedgewood, was also very critical of the Rome statute on various grounds, that the "statute displaces the traditional power of the Security Council, requiring that a vote for suspension of ICC action be renewed every 12months in the face of changing Council membership", etc. She was of the view that this was tantamount to "arrogation of power with far wider implications[83].

The prosecutor of the ICC like any other prosecutor requires some level of independence and discretion to be able to function properly in his office[84]. The description of the prosecutor as an institution with no oversight is overblown. The decision to vest the prosecutor with *propriomotu* powers may seem alarming, but the fact is that this only places greater importance on the sensible discharge of the prosecutors' mandate and on other checks and balances in the ICC regime than would a system with more direct state control. The delicate balances must be reached by the prosecutor to, not only act as a counter-weight to state power and control, but to also understand that the ICC depends heavily on state support to discharge its mandate effectively. The ability to reconcile these opposites is the hallmark of the prosecutor's duties.

The very stringent measures taken in the statute to vest the oversight arm of the court with oversight responsibilities over the prosecutor, the stages and steps that must be complied with by the prosecutor are serious limitations to arbitrariness.

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[80]US department of State, 30 July 2003. Frequently Asked Questions about the US governments policy regarding the International Criminal Court (ICC) (http//www.state.govt/pm/iris/fs/23428.htm (accessed 3 September 2010

[81] Henry Kissinger, "The Pitfalls of Universal Jurisdiction ,"Foreign Affairs, July/August 2001, p. 95 accessed 2 September 2010

[82] John Bolton, supra at p 175

[83]Ruth Wedgwood;" The International Criminal Court. An American view" 94 EJIL 93, 04 97

[84]Guiselpe Di Federio, Prosecuterial Independent and the democratic requirements of at 378

Conclusion

Indeed the crimes of genocide, war crimes and crime against humanity are crimes of great concern to the international community. These crimes have been committed by persons with impunity and recklessly without fear of any consequence. For long the whole world have looked on and seems to be handicapped by general principles of international law. The ICC has been generally acclaimed as the very first effort towards a combined international effort to punish and more importantly to reduce if not stop these crimes . All states that are yet to ratify should do so now, and endeavor to make necessary amendments as state parties, than to remain on the outside and make effort to ensure the success of the treaty. No state has yet argued against the principles and ***raisin deter*** of the statute but the machinery of achieving the reason is what they argue against. They should work towards a compromise. All the prosecutions that have been taken up by the court are not only justified but appropriate and this gives a positive indication for the future.

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