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**EFFECTIVE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY: ADDRESSING THE  
CHALLENGES CONFRONTING THE INTERNATIONAL CRIMINAL COURT**

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**EFFECTIVE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY:  
ADDRESSING THE CHALLENGES CONFRONTING THE INTERNATIONAL  
CRIMINAL COURT**

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**ABSTRACT**

*This article examines the establishment, jurisdiction, and objectives of the International Criminal Court (ICC), which was created to hold national leaders and individuals accountable for war crimes, crimes against humanity, and genocide. The ICC has faced challenges that have led to concerns about its legitimacy and ability to fulfil its mandate of ending impunity for the most serious crimes of concern to the international community. The purpose of this article is to identify the current challenges facing the ICC and to provide recommendations for addressing these issues. Ultimately, this article argues that the ICC can overcome its challenges and achieve its objectives through a combination of internal reforms and increased support from the international community.*

**1.0. INTRODUCTION**

With the signing of the Rome Statute by 120 countries, the International Criminal Court was established in July 1998.<sup>1</sup> The Rome Statute stresses the need to establish the ICC to end impunity for individuals committing the ‘most

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<sup>1</sup> The Statute of the International Criminal Court, (Hereinafter the ICC) 17 July 1998, U.N. Doc. A/CONF. 183/9 (Hereinafter Rome Statute)

serious crimes of concern to the international community'.<sup>2</sup> The Nuremberg and Tokyo Tribunals' jurisdiction was expanded by the ICC, and the court intervened to emphasize the need for international peace and security by declaring her jurisdiction over four different categories of crimes, including war crimes, crimes against humanity, genocide, and the crime of aggression. As a result, the establishment of the ICC attracted significant international support.

Around the world, especially in poor nations, it has become routine practice to violate international human rights and humanitarian law. A proper International Criminal Court with some form of universal jurisdiction—that is, the ability to assume jurisdiction over an accused person regardless of where the alleged crime was committed, regardless of the accused's personality and nationality—should be established as soon as possible to handle cases that are classified as international crimes under customary international law.

This way of thinking was what prompted the establishment of the International Criminal Court by the global community.<sup>3</sup> One of the important features of the ICC is its referral capacity. There are four unique ways to refer cases to the Court:

- i) A state that has ratified the Court's Statute and is a member of the Assembly of States parties may refer a case to the court.<sup>4</sup>
- ii) A Country that has chosen to accept the ICC's jurisdiction is qualified to send a case.
- iii) The Security Council sends the case subject to veto from the five permanent members.<sup>5</sup>

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<sup>2</sup> Joel F. England, the Response of the United States to the International Criminal Court: Rejection, Ratification or Something Else? (2021) Vol. 18 (3) *Arizona Journal of International and Comparative Law*, available at <[azjournal@law.arizona.edu](mailto:azjournal@law.arizona.edu)> [Accessed September 5 2022]

<sup>3</sup> The international Criminal Court is a permanent court established under the United Nations system, having its headquarters in The Hague, Netherland

<sup>4</sup> Article 14 of the Rome Statute of the ICC

<sup>5</sup> Article 15 (7) of the Rome Statute

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- iv) The ICC Prosecutor initiates a case for investigation and prosecution *proprio motu*, (on its own discretion) on the basis of information on crimes within the jurisdiction of the of the court.<sup>6</sup>

The article is structured into seven parts, including an introduction and a history of the International Criminal Court, to properly elucidate the topic under consideration. The goals for why the court was founded as well as the ICC's jurisdiction and purview are discussed in Parts 3 and 4. Section 5 looks at the court's many obstacles, which it became clear may prohibit it from carrying out its mandate to uphold international peace and security. The possibilities and plans for the ICC are examined in Part 6, and the final remarks are found in Part 7.

### **2.0. BRIEF BACKGROUND OF THE INTERNATIONAL CRIMINAL COURT**

The United Nations recognized the need to establish a more permanent international court to handle cases relating to international crimes in 1948 after the Second World War and immediately after the conclusion of proceedings at the War Crimes Tribunals of Nuremberg and Tokyo. This was intended to provide justice for those who were victims of such heinous crimes as genocide, sexual slavery, and ethnic cleansing.<sup>7</sup>

The Rome Statute of the ICC<sup>8</sup> can be considered as an ideal treaty, which harmonized the thinking of powerful world leaders' right from the 1940s on ending impunity to serious international crimes. It was this statute that created the International Criminal Court,<sup>9</sup> as a critical permanent court to oversee the

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<sup>6</sup> Article 15 Rome Statute of the ICC

<sup>7</sup> The world leaders were confronted with this major problem especially in the case of Rwanda when the impunity of its perpetration rose to an unprecedented level; same was the cases in Serbia, the former Yugoslavia and Kosovo.

<sup>8</sup> This is also referred to as the Rome Statute or the ICC Statute

<sup>9</sup> Article 1 of the ICC Statute, available at <<http://www.un.org/law/icc/staute/>> [Accessed 20 September 2022]

trial of individuals accused of the international crimes of genocide,<sup>10</sup> crimes against humanity<sup>11</sup> and war crimes<sup>12</sup> and the crime of aggression.<sup>13</sup>

The Rome Statute clearly outlined the structure of the court, providing for its functions together with its jurisdiction.<sup>14</sup> The constituent document was however open for signature by states in July 1998 and subsequently came into force on July 1 2002.<sup>15</sup> It should be mentioned that certain countries voted against the Court's Statute at its founding in early 1997 because they were concerned about potential interference with their territorial sovereignty and internal affairs.

The United States of America, China, Israel, Libya, Qatar, and Yemen are a few of the nations that voted against the Rome Statute's implementation; under the terms of the current agreement, these nations are not state parties to the Rome Statute. The main concern for the US was that its military and government employees may be subject to political prosecution and other types of international retaliation.<sup>16</sup>

### **3.0. KEY OBJECTIVES OF THE INTERNATIONAL CRIMINAL COURT**

The following are the primary goals of the ICC that were considered by the international community and states that have ratified its Statute:

#### **3.1. Ending Impunity**

Article 1 to the Rome Statute of the ICC clearly identifies the major aims and objectives of the Court. The most important objective of the court is the punishment of core International Crimes.<sup>17</sup> The court seeks to establish the rule

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<sup>10</sup> Article 6

<sup>11</sup> Article 7

<sup>12</sup> Article 8

<sup>13</sup> Article 8

<sup>14</sup> Article 5 Statute of the ICC

<sup>15</sup> ICC Overview, available at <<http://www.un.org/law/icc/staute/romefra.htm>> [Accessed 20 September 2022]

<sup>16</sup> "The United States Defends Position on international Criminal Court" available at <<http://usinfo.state.gov/dhr/archive>> [Accessed 25 September 2022]

<sup>17</sup> Rome Statute of the International Criminal Court, 17 July 1998, 2187 U.N.T.S. 90 (hereinafter Rome Statute), preamble.

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of law throughout the international community and put an end to the impunity for significant international crimes.<sup>18</sup> This is accomplished by enforcing adherence to particular international law principles with the intention of criminalizing and punishing offenders of fundamental international crimes.<sup>19</sup> The major responsibility of the court therefore is to act as a court of last resort to prosecute offenders for genocide, War Crime, crime against humanity and the crime of aggression,<sup>20</sup> where national governments are unable or unwilling to do so.

### **3.2. Increasing Respect for International Law.**

Paragraph 11 of the Statute Preamble states, “resolved to guarantee lasting peace and enforcement of international justice.”<sup>21</sup> The promotion of global criminal justice is the goal here. That is done in order to foster greater adherence to international law, particularly human rights and humanitarian law.<sup>22</sup> When the rules and decisions of the court are obeyed, it leads to a situation where crimes are exposed and discouraged.<sup>23</sup> This might significantly improve accountability within the international community, which would ultimately result in an end to the practice of international crimes going unpunished.<sup>24</sup>

### **3.3. Ensuring International Peace and Security**

The objective of ensuring peace and security has primarily been the overall aim for the creation of the United Nations as well as the International Criminal ad-hoc tribunals. According to Article 24 of the United Nations Charter, the International Criminal Court (ICC), which receives its authority from the Rome Statute rather than the Security Council Resolutions like the ad hoc criminal

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<sup>18</sup> The Declaration of the High-level Meeting of the General Assembly on the Rule of law at the National and international levels, A/67/L. 1, September 19, 2012.

<sup>19</sup> *ibid*

<sup>20</sup> Article 5 ICC Statute

<sup>21</sup> Rome Statute, preamble

<sup>22</sup> See Badagard and Klamberg, “The Gatekeeper of the ICC, p. 653

<sup>23</sup> Mirjan R. Damaska, “What is the point of International Criminal Justice?” *Chicago-Kent Law Review* 83 (2008), p. 344

<sup>24</sup> *Ibid*

tribunals, is also burdened with the duty of preserving world peace and security.<sup>25</sup>

### **3.4. Giving Reparations to Victims of International Crimes**

The interests of those who have been harmed by international crimes can be seen as the ICC's main priority. According to the court's preamble, women, girls, together with men have for decades have been victims of all kind of crimes.<sup>26</sup> Crime victims are explicitly allowed to participate in court proceedings in cases involving them under the court's Statute and the Rules of Process and Evidence.<sup>27</sup> There is a good reparation system put in place in the interest of victims in the Statute.<sup>28</sup>

In all cases, the interest of the victims of crime are always put into consideration.<sup>29</sup> The Victims and Witness Unit (VWU), an integral component of the Court Registry, is tasked with ensuring the safety and well-being of individuals participating in court proceedings, particularly victims.<sup>30</sup> This includes providing necessary security measures, as well as offering critical information and assistance to enable victims to effectively engage with the legal process.

Furthermore, the Trust Fund for Victims is another good initiative found in the Statute. The Trust Fund for Victims (TFV) is an independent body established by the Rome Statute of the International Criminal Court (ICC).<sup>31</sup> It was created with the mandate of providing assistance and support to victims of the crimes under

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<sup>25</sup> Article 2 Rome Statute and 115(b) which clearly explains the relationship between the ICC and United Nations together with the funding of the court. It must be noted that the United Nations Security Council has the power to extend the jurisdiction of the court by making referrals of cases to the court in line with Chapter VII of the U.N. Charter, basically, ensuring international peace and security is seen as the major aim of such referral

<sup>26</sup> Rome Statute, Preamble

<sup>27</sup> This is in line with article 68 of the Rome Statute, International Criminal Court, Rules of Procedure and Evidence, IT/32/ Rev. 50, 2015, rules 89-93 (hereinafter RPE)

<sup>28</sup> Article 75 of the Rome Statute and Rules of Procedure and Evidence, particularly rules 94-99

<sup>29</sup> Article 53 (1) (c), Article 53 (2) (c) of the Rome Statute

<sup>30</sup> Article 43 (6) of the Rome Statute, and Rules 16-19 of the Rules of Procedure and Evidence.

<sup>31</sup> Article 79 of the Rome Statute, rule 98, Rules of procedure and evidence.

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the jurisdiction of the ICC. The TFV operates through two distinct programs: the Assistance Program, which provides physical, psychological, and material support to victims, and the Reparations Program, which provides reparations to victims and their families.

The Reparations Program is the first of its kind in international criminal justice and provides for both individual and collective reparations. Overall, the TFV plays a critical role in ensuring that the rights and needs of victims of international crimes are addressed and recognized.

### **4.0. THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT**

From its inception, the International Criminal Court was endowed with international jurisdiction, rendering it an international court. The court is empowered to have jurisdiction over and in respect of crimes committed in and within the territory of a State party.<sup>32</sup> An individual can be prosecuted under the ICC statute for a criminal offence he/she committed anywhere around world, in as much as they are citizens of a State party to the Statute.<sup>33</sup>

It must be noted that the jurisdiction of the court is limited to the crimes committed on or after July 1, 2002, the official date of the establishment of the court. The implication of the above is that the court cannot investigate or prosecute any crime that was committed before date of the establishment of the court. Under the Statute of the ICC four types of crimes are provided for, although at the moment, the court only assumes jurisdiction over three of the crimes. This is because what constitutes definition of aggression as a fourth crime under the statute is yet to be made known.

Article 6 of the Rome Statute delineates the crime of genocide and provides a comprehensive definition of the acts that constitute this crime. According to the Statute, genocide is committed with the intent to destroy, in whole or in part, a

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<sup>32</sup> Article 12(2) (a) of the Rome Statute

<sup>33</sup> Article 12(2)(b) of the Rome Statute



national, ethnic, racial, or religious group. The acts that constitute this crime include killing members of the targeted group, inflicting serious bodily or mental harm upon members of the group, and deliberately creating conditions of life designed to bring about the physical destruction of the group, such as by denying access to food or forcibly transferring children of the group to another location.

In addition, measures intended to prevent births within the group, such as forced sterilization, are also considered genocidal acts. The inclusion of these various acts in the definition of genocide underscores the gravity of this crime and the urgent need to hold accountable those responsible for its commission.<sup>34</sup> Article 7 of the International Criminal Court's statute defines the category of Crimes against Humanity. This provision stipulates that the crime must be part of a widespread or systematic attack against the civilian population, and the perpetrator must have knowledge of such an attack.

The Crimes against Humanity enumerated in the statute include:

- i) Murder
- ii) Extermination
- iii) Enslavement
- iv) Deportation or Forced Transfer of a Population
- v) Imprisonment or other forms of Deprivation of Liberty
- vi) Torture
- vii) Rape, Sexual Slavery, Enforced Prostitution
- viii) Enforced Pregnancy, Enforced Sterilization,
- ix) Sexual Violence
- x) Persecution based on Political, Racial, National, Ethnic, Cultural, Religious, or Gender grounds
- xi) Apartheid and;

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<sup>34</sup> Article 6 of the Rome Statute

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- xii) Inhumane Acts causing great suffering or serious injury to the body or to mental or physical health.<sup>35</sup>

Article 8 of the International Criminal Court prohibits and provides jurisdiction over war crimes. Specifically, the court has jurisdiction over war crimes committed as part of a plan or policy, or as part of a large-scale commission of such crimes.<sup>36</sup> The Rome Statute considers several acts as war crimes, including murder, causing great suffering or injury, hostage taking, attacking civilian populations, sexual violence, and the enlistment of children under the age of 15 into armed forces.<sup>37</sup>

The fourth crime outlined in the Statute of the International Criminal Court (ICC) is that of aggression. This crime is defined as the use of armed force by one State against the sovereignty, territorial integrity, or political independence of another State, or in a manner that is inconsistent with the Charter of the United Nations. According to United Nations General Assembly Resolution 3314 (XXIX) of 14 December 1974, any of the following acts, regardless of whether or not they are accompanied by a declaration of war, qualify as acts of aggression: those clearly enumerated in Article 8 (a-g) of the Rome Statute.<sup>38</sup>

Despite efforts by state parties, reaching a consensus on the precise definition of the crime of aggression has proven to be challenging. Nevertheless, progress was made in June 2010 during the Rome Statute review conference held by the Assembly of States in Kampala, Uganda. During this conference, a definition of the crime of aggression was adopted. In the conference, aggression was defined to mean the planning, preparation, initiation or execution of an act of using

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<sup>35</sup> Article 7 of the Rome Statute

<sup>36</sup> Article 8(1) of the Rome Statute. See generally the Nuremberg Tribunal. The charter provides for the prosecution of individuals for crimes against peace, war crimes and crimes against humanity

<sup>37</sup> Article 8(20 (a-f) of the Rome statute of the ICC, 1<sup>st</sup> July 2002, available at <<http://www.icc-cpi.int/iccdocs/PIDS>> [Accessed 12 October 2022]

<sup>38</sup> Article 8 (a-g) of the Rome Statute

armed force by a state against the sovereignty, territorial integrity or political independence of another state.<sup>39</sup>

At the Kampala conference, the acts of aggression was explained to include acts of invasion, military occupation by use of force, blockade of ports or coasts. A person who is effectively in a position of authority to control or command the political or military acts of the state can also commit an act of aggression, it should be emphasized.<sup>40</sup> It must be noted that the ICC is a treaty-based court, which implies that countries can decide whether or not they want to be a party to the Rome Statute.<sup>41</sup>

Owing to this, the ICC cannot be said to have universal jurisdiction, rather, the Court as it were can assume jurisdiction in relation to the under listed crimes:

- i. The Court may try or prosecute citizens of a non-party states in cases directed to the international criminal court prosecutor or a state party or by the United Nations Security Council;<sup>42</sup>
- ii. The ICC may also assume jurisdiction over citizens of non- party state who has committed a crime on the territorial soil of a state that is a party to the ICC Statute or has accepted the jurisdiction of the Court in relation to that crime.<sup>43</sup>
- iii. The ICC will in addition assume jurisdiction over citizens of a non-party State where the non-party State has consented to the exercise of jurisdiction in respect to specific crime.<sup>44</sup>

Under Article 17 of the Rome Statute, it is clear that although the ICC may have jurisdiction over a case, it could be prevented from prosecuting that case if such

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<sup>39</sup> See the Open Society Foundations, Fact Sheet for international Crimes, available at <<http://www.opensocietyfoundation.org>> [Accessed 28 September 2022]

<sup>40</sup> *ibid*

<sup>41</sup> Judge Phillippe Kirsch, President of the ICC, address at the Rayburn House Office building(February 13, 2009), available at <<http://globalsolutions.org/files/>> [Accessed 28 September 2022]

<sup>42</sup> Article 13 of the Rome Statute.

<sup>43</sup> Article 12 (2) of the Rome Statute.

<sup>44</sup> Article 12(3)

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case is considered not admissible. The international Criminal Court shall consider a case inadmissible thus:

- i. Where the case in question is already being investigated or prosecuted by the State with effective jurisdiction on the case, except such State is unwilling and unable to genuinely carry out the investigation or prosecution
- ii. Where the case in question has already been investigated by a State with effective jurisdiction on the case, and such a State decided not to prosecute the individual (s) involved.
- iii. Where the individual involved already has been tried for acts which is the subject matter of the complaint and such trial by the court is not allowed by article 20
- iv. Where the case in question does not attract sufficient gravity to justify the attention of the court<sup>45</sup>

The ICC's intervention in the criminal cases of States is predicated on the principle of complementarity. Under this principle, the ICC is empowered to carry out its functions as a court of last resort, and by extension, helping in the development of the judicial systems of sovereign States.<sup>46</sup> However, if the court is able to determine that the country in question is not willing or unable to investigate or prosecute, the complementarity principle will be discarded and such a case will be admitted at the international criminal court.

The willingness and ability of the investigating country to ensure genuine and effective proceedings is what typically determines whether the principle of

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<sup>45</sup> See article 17 of the Rome Statute

<sup>46</sup> Judge Phillippe Kirsch, president of the ICC, Address at the Rayburn House office Building (February 13, 2009) <[http://globalsolutions.org/file/general/philippe\\_Kirsch\\_2-13-09.pdf](http://globalsolutions.org/file/general/philippe_Kirsch_2-13-09.pdf)> [Accessed September 8 2022]

complementarity stops a case from being considered at the international criminal court.<sup>47</sup>

## **5.0. PRESENT CHALLENGES FACING THE INTERNATIONAL CRIMINAL COURT**

The International Criminal Court (ICC) is committed to promoting international peace and security by pursuing international criminal justice through the prompt trial of individuals who have committed international crimes. However, the ICC is currently facing numerous challenges that threaten its ability to carry out this mission effectively.<sup>48</sup> The International Criminal Court (ICC) is currently facing significant challenges that threaten to undermine its legitimacy.

These challenges have raised concerns about the court's ability to effectively carry out its mandate of holding individuals accountable for war crimes, crimes against humanity, and genocide.<sup>49</sup> The effective resolution of the challenges confronting the ICC is crucial as it impacts the international community's confidence in approaching the court. Failure to address these challenges will impede the court's ability to fulfil its mandate of ensuring international peace and security. The challenges faced by the ICC include, but are not limited to:

### **5.1. Restricted Jurisdiction**

The jurisdiction of the ICC is limited. One of the primary challenges facing the International Criminal Court (ICC) is its limited jurisdiction, which restricts its ability to effectively prosecute international crimes. The ICC is only authorized

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<sup>47</sup> *The Prosecutor v. Germain Katanga and Muthieu Ngudjolo Chiu*, Case No. ICC-01/04-01/07 the court in this case gave the reason admitting the case despite the motion challenging the case.

<sup>48</sup> Richard Steinberg, *Contemporary Issues Facing the International Criminal Court* (Leiden, Netherlands: Nijhoff Publishers 2016), p .23

<sup>49</sup> Milena Sterio, "The International Criminal Court: Current Challenges and Prospect of Future Success" Vol 52, Issue 1, Art 21, Case Western Reserve Journal of International Law, (2020) p. 468, available at: <<https://scholarlycommons.law.case.>> [Accessed 28 September 2022]

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to investigate and prosecute a specific set of crimes,<sup>50</sup> including war crimes, crimes against humanity, and genocide. This narrow focus can limit the court's ability to address other serious crimes, such as human rights abuses and corruption, which are also of concern to the international community.

As a result, the ICC's level of performance has been called into question, and its ability to achieve its mandate of ending impunity for the most serious crimes has been challenged. Although the International Criminal Court (ICC) began operating with jurisdiction over war crimes, crimes against humanity, and genocide, the crime of aggression was initially excluded. The ICC Statute has not yet provided a precise definition of the crime of aggression, nor has it specified the conditions under which jurisdiction can be assumed.<sup>51</sup>

The temporal limitation on the jurisdiction of the ICC poses a significant challenge to the court's mandate to hold perpetrators accountable for the most serious crimes of concern to the international community. By only assuming jurisdiction over crimes committed after July 1st, 2002, the ICC is effectively prevented from adjudicating offenses that were committed prior to its inception, irrespective of the gravity of such crimes. As a result, numerous victims of crimes that predate the establishment of the ICC have been denied justice, as they are unable to seek legal redress for the harm they suffered.

This temporal limitation is a result of the Rome Statute, the treaty that established the ICC. The ICC's jurisdiction is limited to crimes committed on the territory of a state party or by a national of a state party, and to crimes referred to the court by the United Nations Security Council. Additionally, the court can only prosecute crimes committed after July 1st, 2002, the date on which the

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<sup>50</sup> Akua Kuenyehia, "The International Criminal Court: Challenges and Prospects, (Annual lecture on Human Rights and Global Justice, Center for International Law and Justice; March 21 2011), p. 2

<sup>51</sup> International Criminal Court, Handbook on Ratification and Implementation of the Kampala Amendments to the Rome Statute, (Liechtenstein Institute on Self-Determination 2012), available at <<http://crimeofaggression.info/documents/1/handbook.pdf>> [Accessed 5 October 2022]

Rome Statute entered into force. While this limitation was intended to provide states with the opportunity to ratify the Rome Statute and allow the court to build its credibility and legitimacy, it has created a gap in accountability for victims of pre-2002 crimes.

Again, the ICC is restricted in exercising jurisdiction over non- member states. The jurisdiction of the court is invoked when an international crime is committed within the territory of a member state or committed by its citizens.<sup>52</sup> The operation of the court is greatly restricted in a situation in which the country where the specific crime was committed is not a state party to the Rome Statute of the ICC. However, it must be noted that by Article 12 (3) of the ICC Statute, countries regarded as non-member States are permitted to willingly give up to the court's jurisdiction in respect to a specific crime.

It is usually rare to have non-State parties willingly submitting to the jurisdiction of the international criminal court when international crimes are committed. On the other hand, the court has on several occasions assumed jurisdiction over non- member states based on prompt referral from the United Nations Security Council.<sup>53</sup> The United Nations Security Council would usually make this kind of referral when its mandate of maintaining international peace and security is invoked.<sup>54</sup>

## **5.2. Unnecessary Focus on the African States**

The establishment of the ICC was greatly aided by the African Union (AU) member states. The Rome Statute was swiftly and early ratified by African member states, which contributed to the establishment of the court.<sup>55</sup> There has

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<sup>52</sup> Article 12 of the Rome Statute

<sup>53</sup> Instances here include the situations in Sudan and Libya, See Julius Onyoni Opini, *The Role of the ICC in Maintaining Justice: Issues, Challenges and the Way Forward* (Master Thesis, University of Nairobi, 2016), p. 36

<sup>54</sup> Julius Onyoni OPini, *The Role of the ICC in Maintaining Justice: Issues, Challenges and the Way Forward* (master Thesis, University of Narobi, 2016), p. 36

<sup>55</sup> United Nations. 2002, *Ratification Ceremony at the UN paves way for the International Criminal Court*. Rome: United Nations 2016: available at <[www.un.org/apps/news/story.asp](http://www.un.org/apps/news/story.asp)> [Accessed on 2 October 2022]

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been a perceived bias against the African States based on the decisions of the ICC, particularly between 2008 -2016. The African Union Assembly has criticized most of the court's investigations and prosecutions. Some African states have accused the ICC of conspiracy and tagged the court as part of a larger neo-colonial project of instituting regime change and subjugating African political institutions.<sup>56</sup>

Of the eleven cases before the ICC for investigation, ten of such cases involve the African States including: the Central African Republic<sup>57</sup>, Cote d'Ivoire<sup>58</sup> and the Democratic Republic of Congo. There are other countries like Kenya<sup>59</sup>, Libya<sup>60</sup>, Mali, Sudan, Uganda, Gabon, Guinea, Nigeria and Burundi are also under preliminary investigation. Uganda referred the first case to the ICC.<sup>61</sup> However, because of the court's decisions, the African Union Assembly has criticized most of the decisions of the ICC's investigations and prosecutions.

Thus, in October 2016, South Africa wrote to notify the United Nations Secretary General of its plan to cease to be a member of the ICC,<sup>62</sup> although a High Court in South Africa in February 2017 decided that the South African government's notice to withdraw from the court was invalid and unconstitutional.<sup>63</sup> Therefore, on March 7 2017 the South African government withdrew and revoked its earlier

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<sup>56</sup> Richard Steinberg, *Contemporary Issues Facing the International Criminal Court*, Brill/Nijhoff (2016), p. 350, see also Malone B. "Africans Push the UN to Call off Racist court", Al-Jazeera, 15 November 2013, available at <[www.aljazeera.com/indepth/features/2013/11/](http://www.aljazeera.com/indepth/features/2013/11/)> [Accessed 3 October 2022]

<sup>57</sup> *Prosecutor v. Jean- Pierre Bemba Gombo, Case No. ICC-01/05-01/08*

<sup>58</sup> *Prosecutor V. Laurent Gbagbo, Case No. ICC-02/11-01/11*

<sup>59</sup> *Prosecutor v. Francis Kirimi Muthaura & Uhuru Kenyatta, Case No. ICC-01/09-02/11 (case alleging crimes against Humanity).*

<sup>60</sup> *Prosecutor v. Muammar Gaddafi & Ors, Case no. ICC-01/11-01-11-01/11 (a warrant of arrest issued against him for crimes against humanity)*

<sup>61</sup> Milena Sterio, "The International Criminal Court: Current Challenges and Prospect of Future Success", *Case Western Reserve Journal of International Law* (2020), 52, p. 469

<sup>62</sup> Chan and Simons, "South Africa to withdraw from the International Criminal Court", *New York Times* October 21, 2016, available at: <[www.nytimes.com/2016/10/22/world/Africa/](http://www.nytimes.com/2016/10/22/world/Africa/)>, [Accessed 7 October 2022]

<sup>63</sup> "ICC withdrawal Unconstitutional and invalid high court rules" Available at <[www.news24.com/SouthAfrica/news/](http://www.news24.com/SouthAfrica/news/)> [Accessed 15 September 2022]



decision to leave the court.<sup>64</sup> Similarly, Burundi in October 2016 indicated its intention to pull out of the ICC as soon as the court commenced investigation on the political situation in the country<sup>65</sup>.

Several other African nations, including Gambia, Uganda, Kenya, and Namibia, have announced their intentions to withdraw from the International Criminal Court (ICC). Their decision stems from the perception that the court has unfairly targeted African leaders, while ignoring war crimes committed in other parts of the world. Specifically, these nations have cited the fact that all of the individuals indicted by the ICC since its establishment have been from Africa. Furthermore, they argue that the court has made no effort to investigate or prosecute war crimes associated with the 2003 invasion of Iraq or the recent crimes against humanity committed in Syria.<sup>66</sup>

### **5.3. Cumbersome Procedures for Victim Participation**

According to article 68 of the ICC statute, victims may participate in the prosecution process at the appropriate moment as long as it does not interfere with their personal interests or jeopardize their right to a fair trial.<sup>67</sup> It is important to note that victim participation in ICC proceedings is determined solely by the relevant chamber of the court. However, the involvement of victims in the trial process at the ICC is subject to a rigorous set of procedures that may have negative emotional effects on the victim. The prolonged trial process at the ICC may lead to significant psychological trauma for victims of crime.

### **5.4. Absence of Independent Police Force**

As a court of last resort, the International Criminal Court (ICC) operates under the complementarity principle, which stipulates that it can only intervene in cases where national courts of member states are either unable or unwilling to

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<sup>64</sup> “South Africa formally revokes ICC withdrawal.” available at <http://ewn.co.za/2017/03/08/> [Accessed 15 October 2022]

<sup>65</sup> Burundi’s notification to the United Nations Security Council, available at: <https://treaties.un.org/doc/> [Accessed 22 October 2022]

<sup>66</sup> *ibid*

<sup>67</sup> Article 68 of the Statute of the ICC

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investigate and prosecute international crimes. Consequently, the ICC relies on national governments to apprehend and surrender perpetrators for investigation and trial. However, this poses a significant challenge to the ICC in fulfilling its mandate of maintaining international peace and security.

It is difficult for national leaders, who may be implicated in international crimes, to surrender themselves or their subordinates for investigation and trial by the ICC. In the absence of an independent police force capable of entering member states to apprehend and investigate perpetrators, especially in situations where states are unable or unwilling to prosecute, impunity will continue to prevail. For example, when the ICC indicted President Al Bashir, the government of Sudan refused to cooperate with the ICC prosecutor to surrender him for trial.

The enforcement of ICC decisions is crucial to fulfilling its mandate of world peace and security. For the ICC to enforce its decisions, the cooperation of member States is required. According to Valerie, cooperation of member States is an important element in realizing the mandate of ICC. This is owing to the fact that the ICC has no police force, no military and no territory of its own.<sup>68</sup> Thus, it relies on the goodwill of States to investigate, arrest collect evidence, the protection of witnesses and the sentencing of persons who are perpetrators of serious international crimes.

Nonetheless, this is seen as a structural weakness because the court is unable to guarantee the execution of its own judgments.<sup>69</sup> It must be noted that the responsibility of states to fully cooperate is of two types: first is the duty to cooperate through arrest, investigation and surrender.<sup>70</sup> Additionally, they have

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<sup>68</sup> Valerie Oosterveld, Mike Perry and John MacManus, "The Cooperation of States with the international Criminal Court" *Fordham International Journal* 23, No. 3 (2001); p. 767

<sup>69</sup> Hans-peter Kaul and Claus kress, "Jurisdiction and Cooperation in the Statute of the International Criminal Court, Principles and Compromies" (1999) 2, *Yearbook of International Humanitarian Law*, P. 157

<sup>70</sup> Article 87 of the statute of the ICC

a responsibility to take action to include the Rome Statute's requirements in their State legislation and national laws.<sup>71</sup>

### **5.5. Lack of Sufficient Support from UN Security Council Permanent Members.**

One of the key challenges confronting the International Criminal Court (ICC) pertains to the limited participation of crucial members of the United Nations Security Council, namely the United States, China, and Russia, who are not state members of the ICC. While China has outrightly refused to sign the Rome Statute, Russia and the United States have declined to ratify the ICC Statute. Of note, during the presidency of George W. Bush in August 2002, the United States signed into law the American Service Members' Protection Act (ASPA), which specifically prohibits major government agencies from collaborating with the ICC.

ASPA also restricts participation in United Nations peacekeeping operations and prevents the United States Army from providing support to State Parties to the Statute. The exclusion of these influential countries hinders the ICC's capacity to investigate and prosecute international crimes and weakens its legitimacy as a global institution of justice. The American Service Members' Protection Act further empowers the U.S. Army to engage the use of force to release any U.S. citizen detained by the court.<sup>72</sup>

The United States has also gone ahead to enter into several Bilateral Immunity Agreements, the BIA referred to as Article 98 Agreements. It signed this agreement with countries to stop the arrest and surrender of specific set of Americans to the ICC for prosecution. These people include current and former government officials, military personnel, and ordinary Americans at work.<sup>73</sup> States that refuse to sign BIA with the United States of America are often

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<sup>71</sup> Article 88 of the Statute of the ICC

<sup>72</sup> Elizabeth Orji "Responsibility for Crimes Under International Law" (Lagos, Odade Publishers 2013) p. 251

<sup>73</sup> Ibid, at p. 252

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punished through denial of military aid and economic support funds.<sup>74</sup> The perceived lack of participation by the United States of America and other states typically viewed as superpowers has been regarded as a significant impediment to the legitimacy of the International Criminal Court.

### **5.6. Enforcement of ICC Judgements**

Presently, the ICC lacks a permanent prison facility where those found guilty of international crimes can go to jail to fulfil their sentences. The ICC has no prison, and usually relies on Member States for subsequent enforcement of sentences of imprisonment.<sup>75</sup> State parties are to voluntarily lend their assistance by agreeing to let those who have been found guilty of international crimes serve their sentences in state prisons they control.<sup>76</sup>

By Article 103 (3) (a),<sup>77</sup> State Parties are expected to share in the responsibility of enforcing orders of imprisonment issued by the court. Where State Parties fail to offer this assistance, then the Netherlands as the host country is to take up the responsibility to provide such facility for the convicted criminal. Under the Rome Statute, once a convicted person has been sentenced, the ICC will immediately name the State where the individual would serve his jail term.<sup>78</sup>

One major challenge with this kind of arrangement is the possibility of moving convicted persons to State with no prison facility that suits the international requirements.<sup>79</sup> The ICC also may not be able to guarantee the safety and wellbeing of the convicted persons transferred to consenting State parties.

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<sup>74</sup> Mathew Weed, "International Criminal Court and the Rome Statute: 2010 Review Conference," Congressional Research Service 5 (2021) available at <<http://www.fas.org/sgp/crs/row/r41682.pdf>> [Accessed September 18 2022]

<sup>75</sup> Elizabeth Orji, "Responsibility for Crimes under International Law, (Lagos, Odade Publishers 2013), p. 247

<sup>76</sup> *ibid*

<sup>77</sup> Rome Statute of the ICC

<sup>78</sup> Article 103(1) (a) Rome Statute.

<sup>79</sup> *Ibid*, at P. 248

### **5.7. Weakness in Investigation and Prosecution Processes**

One additional challenge facing the ICC pertains to its rules of procedure governing the gathering of evidence and pre-trial proceedings, which may impede the court's effectiveness. Specifically, the Pre-Trial Chamber is responsible for determining whether a charge should be issued against an accused individual, a process that can be protracted and resource-intensive. In many cases, victims may be required to invest significant financial resources in the pre-trial stage before their cases can be scheduled for a hearing.

Moreover, some of the issues addressed during pre-trial proceedings could conceivably be resolved during the trial process, further complicating matters. Another significant challenge relates to the difficulty of conducting investigations and collecting evidence related to serious crimes committed in areas that are geographically remote from the court. Some of the regions may be difficult to access and unsafe to penetrate for investigation.<sup>80</sup> Another major problem is the limitation of financial resources in carrying out investigation and other important assignments of the court.<sup>81</sup>

### **5.8. Attacks by Hostile Non-Member States**

The ICC is also faced with serious challenges from non-member states who from time to time seek to prevent the ICC prosecutor from investigation and at the same time strive to weaken and discredit the operation of the court.<sup>82</sup> During the Trump administration, the United States government launched a severe attack on the International Criminal Court (ICC). Secretary of State Michael Pompeo announced that the United States would impose a visa ban on any ICC officials found to be involved in investigating US citizens for international crimes

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<sup>80</sup> This fact was stated by Chief Prosecutor Moreno- Ocampo, while addressing the fourth Assembly of States parties to the Rome Statute in the Hague, (November 28, 2005)

<sup>81</sup> *ibid*

<sup>82</sup> Marina Riera, Support Needed to Tackle ICC Shortcomings: Court Faces Internal, External Challenges on 21<sup>st</sup> Anniversary, Human Rights Watch, July 16, 2019

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committed in Afghanistan.<sup>83</sup> Thus, in April 2019, the United States subsequently revoked the visa of the ICC prosecutor.<sup>84</sup>

### **6.0. THE WAY FORWARD**

In order to fulfill its mandate of maintaining global peace and security, the International Criminal Court (ICC) relies on the complementarity principle outlined in its statute to prosecute international crimes when domestic courts are unable or unwilling to do so. To effectively carry out this principle, the ICC requires a robust police force capable of freely entering member countries where such crimes have been committed to apprehend and try offenders of international crimes.

However, the current level of cooperation from state parties in this regard has been limited. It is not feasible for the ICC to rely solely on national governments to apprehend and hand over offenders for trial, as these leaders may themselves be perpetrators of international crimes and are unlikely to voluntarily surrender themselves or their subordinates for trial. The ICC could follow the model of the International Court of Justice (ICJ), which has the Security Council enforcing its major decisions.

Establishing an independent police force or an organ to enforce its decisions would further enhance the ICC's mandate of maintaining international peace and security within the international community. Therefore, this paper argues that the ICC must explore alternative options for ensuring the apprehension and trial of offenders of international crimes to strengthen its ability to effectively carry out its mandate.

In combating international crimes, the domestication of the Court's Statute by member States is widely considered a crucial approach. This is particularly important given that national courts serve as the primary arena for the

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<sup>83</sup> *ibid*

<sup>84</sup> *ibid*

prosecution of international crimes. By using their national legislation to domesticate and execute their obligations under the Rome Statute, State parties can significantly augment the scope and jurisdiction of their national courts. This, in turn, expands the range of crimes that can be prosecuted, such as war crimes, crimes against humanity, and genocide, even when these offenses are committed within their territorial boundaries. Thus, national courts are empowered to effectively carry out their mandate of prosecuting international crimes at the domestic level.

In order to enhance the International Criminal Court's (ICC) ability to end impunity for international crimes, the prosecutor must continuously collect evidence and prosecute not only heads of states and prominent leaders but also other individuals who commit lower level offenses. Focusing on the latter group would enable the prosecutor to gather evidence and witnesses more easily, leading to better convictions.

To ensure effective justice delivery and world peace and security, a review of the ICC's trial procedures is urgently needed. Specifically, the Pre-Trial Chamber should be eliminated as part of this review process. By implementing these recommendations, the ICC can strengthen its mandate and more effectively fulfill its role in international criminal justice. The Trial Chamber could actually deal with most of the cases presented to the Pre-Trial Chamber. This can serve as a means eliminating delays in the trial process.<sup>85</sup>

Considering the limited number of cases currently being handled by the International Criminal Court (ICC), it is suggested that the activities of the pre-trial chamber be merged with the trial chamber to optimize efficiency. By doing so, the ICC can streamline its processes and better allocate its resources towards the trial proceedings. Such a consolidation of the pre-trial and trial chambers

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<sup>85</sup> Douglas Guilfoyle, A Tale of Two Cases: lessons for the prosecutor of the International Criminal Court(Part 11), (Aug 29, 2019) Available at: <<http://www.ejotalk.org/>> [Accessed 25 October 2022]

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may contribute to the ICC's ability to fulfill its mandate of bringing perpetrators of the most serious crimes to justice.<sup>86</sup>

### **7.0. CONCLUSION**

The International Criminal Court (ICC) is widely recognized as a significant judicial institution in the international criminal justice system, playing a key role in ending impunity for international crimes and promoting global peace and security. Since its creation and effective operation in 2002, the ICC has been instrumental in holding national leaders accountable for serious international crimes. Nevertheless, the current challenges confronting the court threaten its existence and legitimacy.

The identified challenges in this paper are not insurmountable, and the court must take urgent action to address them. The ICC should critically review its policies, practices, investigative and prosecutorial approaches, and make necessary adjustments and changes. An independent and competent group assigned with the responsibility of assessing the criticisms and challenges faced by the court could also provide valuable insight and solutions for the court's future.

This paper proposes a way forward in extensive terms, emphasizing the importance of addressing the challenges facing the court. In conclusion, the ICC must take immediate steps to confront these challenges and ensure its continued effectiveness in the international criminal justice system.

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<sup>86</sup> *ibid*



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