CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background to the Study

The international community is witnessing several conflicts today in different parts of the world. Those conflicts threaten world peace calling for conflict resolution organs that are widely and generally accepted by nations to forestall break down of law and order of global magnitude. Allied to this necessity is the increasing number of breaches of International Humanitarian Law (IHL) and International Human Right Law (IHRL) by groups and individuals today at several theatres of war and conflicts.

The necessity for such conflict resolution organs raise the issue of their jurisdiction and power to dispense justice to all manner of people. Jurisdiction has been defined as "the authority that an official organization has to make legal decisions about somebody or something".[1] Another view defined jurisdiction as "a court's power to decide a case or issue a decree".[2] This later view is otherwise described as complete jurisdiction which entails "a court's power to decide matters presented to it and to enforce its decision".[3] It will, therefore, be understood that when we talk of jurisdictional challenges and limitations we are referring to jurisdictional plea, "a plea asserting that the court lacks jurisdiction either over the defendant or over the subject matter of the case".[4]

To dispense justice according to Oxford Advanced Learner's Dictionary of Current English[5] means to provide judicial service to people. Black's Law Dictionary[6] defines justice as "the fair and proper administration of laws". Thus, in the face of the rising cases of conflicts in the world today, our searchlight is beamed at the performance of those

1. AS Hornsby, *Oxford Advanced Learner's Dictionary of Current English* (7th Edition Oxford, Oxford University Press, 2006) page 806.
2. BA Garner (Ed.), *Black's Law Dictionary* (8th Edition Minessota, U.S.A, West Publishing Co. St. Paul, 2004), Page 867.
3. *Ibid*, at P. 868.
4. *Ibid*, at P. 1189.
5. P. 422.
6. P. 881.

conflict resolution organs in the light of the challenges and limitations staring them in the face in their efforts to dispense justice.

Cases of persons accused of war crimes, crimes against peace and against humanity as in the Nuremberg trials and Yugoslavia genocide cases call for need to dispense justice both during the trial and in metting appropriate punishment upon conclusion of trial against the background of numerous challenges and limitations to the jurisdictions of the adjudicatory bodies set up to try the individuals concerned. Such jurisdictional challenges and limitations to the dispensation of justice have precedence in the trial of those accused of war crimes at the end of World War I; those tried before the Nuremberg Tribunal after World War II; and trials in other similar tribunals. Such similar tribunals are seen in the Control Council Law No. 10, Germany[7]; International Military Tribunal for the Far East (IMTFE),[8] both of which are equally the fall out of the World War II post war efforts to dispense justice with regard to the war crimes committed during the period of the war (World War II). The efforts witnessed jurisdictional questions raised by the defendants facing trials before those tribunals.

Overtime, the need to punish those responsible for war crimes had led to the prosecution of war criminals. As far back as after the American Civil War (1861 – 1865), the Confederate army officer, Henry Wirz (1823 – 1865), was executed for his maltreatment of Union prisoners of war during the civil war. Then in 1919 – 20, Turkey held courts-martial to punish those responsible for the Armenian genocide of 1915 -16. Of course, these were trials conducted in accordance with the municipal laws of nations. After the first World War and following the Treaty of Varsailes, the Leipzig War Crimes Trials held from 25 May to 16 July 1921 as part of the penalties imposed on the defeated German Government. These were trials organized by the victorious Allies and were greeted by some

7. Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, December 20, 1945, 3 Official Gazette Control Council for Germany 50-55 (1946).
8. Judgment of 12 November 1948, in Pitchard and Sonia M. Zaide (eds.) *The Tokyo War Crimes Trial*, Vol. 22 (48, 413).

criticisms particularly by the defeated Germans.

Since then the need for international adjudicatory bodies to handle cases of persons responsible for war crimes, crimes against peace and crimes against humanity had resulted in the Nuremberg trials; trials under Control Council Law No. 10, Germany; and trials by the International Military Tribunal for the Far East (IMTFE). Each of these trials received criticisms and challenges. In modern times, particularly after the period of the Cold War, several criminal tribunals were set up at one time or another as ad hoc adjudicatory bodies to handle breaches in some troubled spots of the world.

Modern international criminal tribunals also faced various jurisdictional challenges and limitations[9] and this has become the feature of the International Court of Justice (ICJ)[10] and the International Criminal Court[11] today. There is no doubt that such jurisdictional challenges and limitations have affected the dispensation of justice at a time like now that we have a lot of conflicts in several parts of the world.

These modern International Criminal Tribunals are the fall out of the increasing case of genocide, war crimes and crimes against humanity. The cases in Yugoslavia, Rwanda and Sierra Leone clearly stand out. Granted that there were similar breaches in such countries as Iraq (during the Gulf Wars), Afghanistan, Democratic Republic of Congo, Sudan, Colombia, Liberia, Central Africa Republic and South Sudan, specific attention will be paid to the cases of Yugoslavia, Rwanda and Sierra Leone where the United Nations instituted ad hoc military tribunals (for the first two) and a special court (for the case of Sierra Leone) to try those responsible for war crimes, crimes against peace, genocide and crimes against humanity.

9. As evidenced in International Criminal tribunal for the former Yugoslavia (ICTY), 1991; International Criminal Tribunal for Rwanda (ICTR), 1994; and Special Court for Sierra Leone (SCSL), 2000 for instance.
10. Established pursuant to Chapter XIV (article 92-96) of the United Nations Charter drawn up in San Francisco in 1945.
11. Rome Statute of the International Criminal Court, 1998.

Before the modern international criminal tribunals and the special court, exactly after the First World War, the international Community had in 1922 established the Permanent Court of International Justice (PCIJ) in pursuit of the understanding among the members of the League of Nations of the need for judicial settlement of disputes in the international arena. The PCIJ served till 1944 when the challenges of the Second World War halted its operation. Immediately after the World War II, the PCIJ was succeeded by the International Court of Justice (ICJ) which became the judicial arm of the United Nations.

Yet the challenges and limitations to the jurisdiction of the ICJ became enormous. Of particular importance is the problem of enforcement of the decisions of the ICJ, boycott of the proceedings of the Court by states who lost the rulings on jurisdiction and by passing of the Court in preference for the UN Security Council and UN General Assembly by states in view of lapses in the provisions of the UN Charter. Equally, the International Criminal Court (ICC) established following the experiences of the *ad hoc* tribunals and the special court faced similar challenges and limitation.

This brings to mind the outcome of the International Court of Justice (ICJ) decisions in the case concerning *The Land and Maritime Boundary Between Cameroon and Nigeria (No. 1)*[12]*; Case concerning The Land and Maritime Boundary Between Cameroon and Nigeria (No. 2)*[13]*; and Case Concerning The Land and Maritime Boundary Between Cameroon and Nigeria (No. 3)*[14] which had adversely affected the peace and tranquility of the Bakassi Peninsular. It also calls for reflection on the various warrants of arrest issued by the International Criminal Court (ICC) against some African Heads of State[15] and the ongoing trial of the Deputy President of Kenya for crime against humanity by the ICC as against express declaration by the United States of America not to become a party to the

12. [2002] F.W.L.R. (Pt. 132) 1.
13. [2002] F.W.L.R. (Pt. 133) 202.
14. [2002] F.W.L.R. (Pt. 134) 415.
15. Like those of Sudan (Ahmed Al Bashir) and Kenya (Uhuru Kenyata).

Rome Statute of the International Criminal Court which established the Court.[16] This has provided a shield to US combatant personnels at various theatres of conflicts in the world from being prosecuted by the ICC for war crimes and breaches of IHL and IHRL.

Thus, it becomes, therefore, necessary to delve into a study of those challenges and limitations to the jurisdiction of the two outstanding international courts (the International Court of Justice and International Criminal Court) in order to x-ray the effect on the dispensation of justice in the international sphere. This will enable us to proffer solution by way of recommendations at a time like now when cases of flagrant commission of crime against humanity even at domestic level have assumed global dimension. A case of notable importance is the abduction of over 200 Chibok school girls by the terrorist Boko Haram in Borno State of Nigeria and the use of female teenagers as terrorist bombers.

1.2 Statement of Problem:

The place of the International Court of Justice (ICJ) and the International Criminal Court (ICC) in the onerous task of dispensation of justice between nations and between individuals at global sphere cannot be over emphasized. They have contributed to the restoration of peace at several troubled spots of the world. As a result the seat of the ICJ has been described as the Peace Palace in The Hague. While the ICJ has mainly delved into disputes between nations and criminal related civil trials that have global connotations, the ICC has concentrated on trials of individuals on charges bordering on genocide, crimes against humanity and war crimes.

Most of these trials have been associated with various jurisdictional pleas by defendants and their counsel so much so that the time the courts needed to adjudicate and dispense justice as the circumstance demands is wasted in dealing with jurisdictional challenges raised mostly at preliminary stages of the trials. As a result, the saying that

16. See United States (US) Letter to the Secretary-General of the United Nations Regarding the Rome Statute of the International Criminal Court, 41 ILM 1014 (2002).

justice delayed is justice denied in most cases appear to be the case. A lot of efforts have been made to overcome this unfortunate situation to no avail. This study, therefore, is aimed at finding lasting solution to the vexed issue of the challenges and limitations to the jurisdiction of these courts in order to quicken the pace at which justice is dispensed in the international scene.

The problem this research is set out to solve is summarized in the following questions, the answer to which will provide lasting solution to the vexed issue of the jurisidictional challenges of the International Court of Justice and the International Criminal Court:-

(1) What is the nature of the jurisdiction of the International Court of Justice (ICJ) and International Criminal Court (ICC) as granted by the Sttautes that established them?

(2) What are the jurisidictional challenges to the dispensation of justice by the ICJ and ICC?

(3) What is the effect of the requirement by Article 96 of the United Nations Charter and Article 65 of the International Court of Justice Statute that the Court's advisory opinion should be on legal question?

(4) What is the effect of the failure of the Rome Statute of the ICC to make clear provision on the supremacy of the ICC over the National Courts?

(5) How are the decisions of ICJ and ICC enforced among states parties?

(6) How will the jurisdictional challenges to the dispensation of justice by the ICJ and ICC be addressed?

These and other problems are to be addressed in this research with the view of taking a position on the issues through recommendations of the way forward. While doing so, a wholistic view of the legal framework relating to the effective operation of the courts will be taken. Such legal framework include the United Nations Charter, Statute of the International Court of Justice and Statute of the International Criminal Court.

Attention will be paid to such conventions as the 1907 Hague Regulations (the Hague Convention of 1907); Convention on the Prevention and Punishment of the Crime of Genocide (CPPCG) of 9 December 1948; the Geneva Conventions of 1949 and the 1977 Additional Protocols; Vienna Convention on Consular Relation of 1963; and the United Nations Convention on the Law of the Sea (UNCLOS) of 10 December 1982. Other necessary conventions and treaties will also receive the attention of this study.

1.3 Research Questions

In the statement of problem above we raise six questions. These are the Research Questions for this work. These and similar questions shall be addressed in the course of this research.

1.4 Aims and Objective of Study

Pursuant to the Research Questions itemized in the Statement of Problem above, the aim and objectives of this research are as stated hereunder.

(1) To unravel the nature of the jurisidctionm of the International Court of Justice (ICJ) and International Criminal Court (ICC) as granted by the statutes that established them.

(2) To pinpoint the jurisdictional challenges to the dispensation of justice by the ICJ and ICC.

(3) To find out the effect of the requirement by Article 96 of the United Nations Charter and Article 65 of the ICJ statute that the Court's advisory opinion shoulkd be on legal question.

(4) To discover the effect of the failure of the Rome Statute of the ICC to make clear provision on the supremacy of the ICC over the National Courts.

(5) To find out how the decisions of the ICJ and ICC are enforced among states parties.

(6) To recommend how the jurisdictional challenges to the dispensation of justice by the ICJ and ICC will be addressed.

1.5 Research Methodology

In undertaking this research exercise, the method adopted is doctrinal. Primary source materials such as relevant statutes, international conventions and case laws as well as secondary source materials like text books, journal articles, newspapers and materials from the internet are relied on for this work.

Available literature on the subject matter and judicial decisions will play significant role in this research. Of prominent relevance are decisions of the International Court of Justice (ICJ), International Criminal Court (ICC) and several international tribunals. International conventions and protocols thereto are also of paramount importance in this research.

Reference shall, in the course of this research, be made to existing research work, case laws, books, journals, newspapers and published articles on relevant subject matters. Data and information for this research shall be obtained by the writer from local, national and international statutory instruments and enactments, treaties, conventions as well as customary international law.

1.6 Significance of Study

The exalted positions of the ICJ and ICC with regard to international settlement of dispute and penal responsibilities for breach of international criminal law can never be over emphasized. It will, therefore be horrifying to imagine the extent of the anarchy in the face of ensuing armed conflicts and use of force if these international judicial bodies are to be hamstrung as a result of incessant jurisdictional challenges and limitations they face from parties to dispute before them.

This research is, therefore, very relevant in that it is aimed at diagnosing the numerous jurisdictional pleas militating against the dispensation of justice by the International Court of Justice and the International Criminal Court. It will also discover those jurisdictional challenges and limitations as they affect the efficacy of those courts.

The study will further proffer solutions to those challenges and limitations so as to improve the performance of those courts.

Of greater relevance to global peace and tranquility is the effect of an ICJ and ICC with fortified jurisdiction to handle cases before them without reservations, exceptions, boycotts and bypasses by some states and institutions. This is what this dissertation aims at accomplishing. This research is, therefore, very significant in view of its focus at realizing the emergence of an International Court of Justice and an International Criminal Court in better standing than they have hitherto being.

It will, therefore, be to the credit of this dissertation that better platforms for the resolution of international conflicts will evolve. This will check the embarrassing increase of genocide, war crimes, crimes against peace and crimes against humanity in the world today. Significantly, a better positioned ICJ and ICC will curtail grave breaches of International Humanitarian Law and International Human Right Law prevalent globally in our time as respect for international conventions will be the order of the day.

1.7 Scope of Study

This dissertation covers a comparative analysis of the jurisdictional pleas raised against the International Court of Justice (ICJ) and the International Criminal Court (ICC) as they affect the dispensation of justice by these two global adjudicatory bodies. The scope of this research encompassed reference to similar tribunals in the past and submission of recommendations towards the emergence of better international courts that will meet the need of the present age.

Particularly this research work will touch three fields of law, to wit:- international law, international humanitarian law, and international human rights law; consider international and internal conflicts and past international adjudications; examine the United Nations Charter as well as the Statute of the ICJ noting the jurisdictional challenges and limitations of the Court; delve into the Rome Statute of International Criminal Court (ICC)

and discuss the Administration of Criminal Justice System; do a comparative analysis of the Jurisdictional Challenges and Limitations of the ICJ and ICC; study the breaches of IHL and IHRL; point out the hurdles to the dispensation of justice; and draw necessary conclusion making appropriate recommendations.

1.8 Limitation of Study

As earlier stated, three areas of law will be covered by this research. These are international law, international humanitarian law, and international human rights law. Incidentally not enough attention have been paid to these fields of study because they are not very popular. The resultant effect is that the much that have been written on these, particularly with regard to international humanitarian law, did not consider the solution to the reoccurring challenges to the jurisdiction of these Courts.

Also in view of the international outlook of the subject matter, only few written material can be obtained locally. The available few are from text writers, articles in journals and periodicals. Worse still, since the subject matter of this research hinges on international statutes and conventions, local case laws are virtually unavailable. In view of these, the absence or paucity of such local case laws evidently constitutes a limitation to this study.

Granted that there are some foreign materials on the subjects of the International Court of Justice (ICJ) and the International Criminal Court (ICC), the cost of assessing these materials from the internet is enormous. Again given the constant changes associated with such field of study as International Humanitarian Law, fast and persistent research effort is required to keep pace with, and meet up with current trends both nationally and internationally. It is, therefore, certainly clear that the foregoing constitute the main limitations to this research.

Moreover this work is limited to the discovery of the various Jurisdictional challenges to the operation of the International Court of Justice (ICJ) and the International Criminal Court (ICC) and proffering solution to them.

1.9 Literature Review (Previous work on International Court of Justice and International Criminal Court)

We have earlier noted the paucity of published materials with regard to our chosen subject matter of research.[17] However, there are a few books and articles on International Court of Justice and International Criminal Court.

Of paramount importance is Professor J.G. Starke's book[18], which on the chapter dealing with international disputes considered the issue of judicial settlement of disputes. The author analyzed the position of the International Court of Justice as the only organ at that time[19] for judicial settlement available to the international community. He dealt with the difference between the ICJ and an arbitral tribunal, the establishment of the court, the Statute and Rules of the Court, parties to the Statute of the Court, and judges of the court.

He further considered the jurisdiction of International Court of Justice. He dealt extensively with the Court's jurisdiction to decide contentious cases and to give advisory opinions. However, the author did not consider the jurisdictional challenges of the court. He did not also delve into the limitations facing the court with regard to the dispensation of justice. Those omissions are covered in this research.

A book by T.O. Elias,[20] Judge and Former President of the International Court of Justice, dealt with the World Court and the International legal system in one of the chapters. He examined the court, discussed its membership and composition, and examined the jurisdiction of the Court. The author considered the binding character of the Court's judgment and looked at the Court's Advisory Opinions. In another Chapter, the author dealt with the International Court of Justice and the rendering of Advisory Opinions highlighting the various advisory opinions from 1948 to 1973. The book, however, did not consider the

17 See paragraph 1.8 above.
18. JG Starke, *Introduction to International Law, (* 9th edn; London, Butterworth & Co. (Publishers) Ltd. 1984).
19. In 1984.
20. TO Elias, *The United Nations Charter and the World Court,* Nigerian Institute of Advanced Legal Studies, Lagos (1989)

jurisdictional challenges facing the court and this is what this work sets out to do and to find solutions to their effect to the dispensation of justice.

Malcolm N. Shaw QC, of Sir Robert Jennings Professor of International Law University of Leicester, in his book[21] dealt with the International Court of Justice in one of the chapters. He considered the organization of the Court and examined the jurisdiction of the Court. Again, he did not discuss the jurisdictional challenges and the limitations facing the court. We hope to address that in this research.

The book by Prof. D.J. Harris, Professor of Public International Law University of Nottingham[22] provided useful information with regard to some cases decided by the International Court of Justice. Some of those cases were considered in this work.

Apart from the books, some articles provided useful guide in the course of this research. An article by Grant Gilmore[23] analysed the limitations of the ICJ as it dealt with the Court's contentious jurisdiction submitting that it is limited to cases which the parties to a dispute are willing to bring before the Court. This provided useful information in our consideration of this vital aspect of this research.

Another article by Anthony Giustini, a legal practitioner in New York city, U.S.A.[24] x-rayed the challenges of the International Court of Justice. It looked at the past, the present and the future prospects of compulsory adjudication in International Law. However, the article did not proffer solution to the challenges and this is what the research is set to do.

Stanimir A. Alexandrov's article[25] critically analysed the jurisdiction of the ICJ. It considered critically Article 36 of the Statute of the International Court of Justice. It considered the compulsory jurisdiction of ICJ in the light of the ICJ's decision in the *Case*

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21. Malcolm N. Shaw, *International Law,* (6th edn., Cambridge University Press 2008).
22. DJ Harris, *Cases and Materials on International Law,* (6th edn. London Sweet & Maxwell 2004).
23. Grant Gilmore, "The International Court of Justice", *The Yale Law Journal* (1946) Vol. 55: 1049.
24. Anthony Giustini, "Compulsory Adjudication in International Law: The Past, The Present, and Prospects for the Future", *Fordham International Law Journal* (1985) Vol. 9, Issue 2, Article 2, P. 212.
25. Stanimir A Alexandrov, "The Compulsory Jurisdiction of the International Court of Justice: How Compulsory is it?" *Chinese Journal of International Law,* Vol. 5, Issue 1, PP. 29-38

Concerning the Land and Maritime Boundary between Cameroon and Nigeria. Then it compared the concept of ICJ's compulsory jurisdiction under Article 36 of the Court's Statute with the types of dispute under Article 25 of the International Centre for Settlement of Investment Dispute (ICSID) Convention with regard to investor-State arbitration. The article's failure to consider the jurisdictional challenges of the court is satisfied in this work.

The article by Aloysius P. Llamzon[26] assessed the jurisdiction and compliance, non-compliance and defiance in recent decisions of the ICJ and its implication and its future place in the settlement of international disputes. This was of immense assistance to this research.

Equally, an article by Attila Tanzi[27] presented the problems of enforcement of the decisions of the ICJ as a serious challenge to the jurisdiction of the Court. The article did not provide solution to the problems and this is what this work did.

Then Abraham Sofaer in his article[28] considered the ICJ and armed conflict. He examined the position of the ICJ on the use of force and noted that the reluctance of the ICJ to embrace human rights poses the danger of preference to use of force to the detriment of resort to the Court. The serious warning sounded in this article gave impetus to the resolve by this research to find a lasting solution to the problem.

Considering the issue of conflicts of jurisdiction, Tullio Treves in an article x-rayed the conflicts between the International Tribunal for the Law of the Sea and the International Court of Justice.[29] The author examined the impact of reservations to the acceptance of the compulsory jurisdiction of the International Court of Justice (ICJ). Then he went on to consider the relevance of limitations and optional exceptions to the compulsory jurisdiction

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26. Aloysius P. Llamzon, "Jurisdiction and Compliance in Recent Decisions of the International Court of Justice", *The European Journal of International Law* (2007) Vol. 18 No. 5, PP. 815-852.
27. Attila Tanzi, "Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations," *The European Journal of International Law* (1995) Vol. 6, pp. 539-572.
28. Abraham Sofaer, "The International Court of Justice and Armed Conflict", *North Western Journal of International Human Rights* (2004) Vol. 1, Issue 1, Article 4.
29. Tullio Treves, "Conflicts Between the International Tribunal for the Law of the Sea and the International Court of Justice", *International Law and Politics,* Vol. 31: 809.

of the International Tribunal for the Law of the Sea (TLOS). The author rounded off by looking at the Court, the Tribunal, and declarations made under Article 287 of the Law of the Sea Convention. The article did not consider the effect on the administration of justice and this was done in this work.

The issue of paucity of published materials is worsened when we come to the International Criminal Court (ICC). However, the few published work on the ICC are very incisive and helpful for a clear understanding and appreciation of the subject matter of this research.

Dr. Elizabeth Ama Oji's book[30] borders on accountability and responsibility for crimes under international law. Some chapters of the book dealt with the International Criminal Court, its history, jurisdiction, structure and organization as well as the courts relationship with the United Nations, particularly the Security Council. A cursory glance was made in the book at the International Court of Justice. However, the book did not address the issue of the solution to the jurisdictional challenges of the two courts. This omission was taken care of in this study.

Dakpo Akande's article[31] examined the jurisdiction of the International Criminal Court (ICC) over nationals of states not party to the ICC Statute. The author first addressed the US argument that the exercise of ICC jurisdiction over nationals of non-parties without the consent of that non-party would be contrary to international law.

The author considered the principles which support the delegation of criminal jurisdiction by states to international tribunals and discussed the precedents for such delegation. He further argued that the exercise of ICC jurisdiction over acts done pursuant to the official policy of a non-party states would not be contrary to the principle requiring consent for the exercise of jurisdiction by international tribunals.

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30. EA Oji *Responsibility for Crimes Under International Law*, Odade Publishers (2013).
31. Dakpo Akande, "The Jurisdiction of the International Criminal Court over Nationals of Non-parties: Legal Basis and Limits", *Journal of International Criminal Justice* 1 (2003), 618-650.

Finally, the article explored the limits to the jurisdiction of the ICC over non-party nationals. In particular, the article addressed the circumstances in which ICC parties are precluded from surrendering nationals of non-parties to the ICC. This article provided a solid base for some findings made in this work.

The work of David Scheffer,[32]Ambassador at Large for War Crimes Issues, U.S. Department of State, is informative about the position of the United States of America with regard to the Rome Statute of the ICC. The author highlighted the fears of the U.S with regard to "unwarranted exposure of U.S personnel to the ICC's jurisdiction during that period of time… before the United States could ratify the treaty and become a state party to it".

He noted that Article 12 of the Rome Treaty is the single most problematic part of the Statute of the Court as it purport to empower the ICC to exercise jurisdiction over the nationals of non-party states. He submitted that this runs counter to some serious norms of international law.

The writer attacked any claim to universal jurisdiction by the ICC as, according to him, that is contrary to Article 12 itself. He equally cautioned against delegating territorial jurisdiction to another state when the defendant is a national of a third state in the absence of consent by that state of nationality. He finally called for a solution to the problem of Article 12. This article shades light to the hiporisy of the US to the ICC and provides strong support to some findings made in this research.

In his own article, Dialila V. Hoover[33] of the University of St. Louis School of Law discussed the scope of universal jurisdiction and the risks that are associated with its application. The writer highlighted the various obstacles that may explain why universal jurisdiction has yet proven to be an effective tool to combat impunity. He finally proposed

32. David Scheffer, "Jurisdictional Limitation of ICC", Address at the Annual Meeting of the American Society of International Law, Washington DC, March 26, 1999.
33. Hoover, Dialila V., "Universal Jurisdiction not so Universal: A Time to Delegate to the International Criminal Court" (2011). *Cornell Law School Inter-University Graduate Student Conference Papers*. Paper 52. pp. 1-31.

that the exercise of universal jurisdiction be "removed" from the States and conferred on the International Criminal Court so that heinous crimes are punished fairly and according to uniform laws. This article helped the present work in its analysis, findings and recommendations.

For Paul Chevigny[34] in his article, universal jurisdiction in international criminal cases may be an idea whose time has finally come. He posited that the claim in the ICC Statute that the court's jurisdiction is "complementary" to that of nations emphasize its underlying purpose to drive the nations to prosecute criminals in the places where the crimes were committed, and avoid the embarrassment of having the cases prosecuted in the court or in a foreign jurisdiction.

He illustrated his views with the case of Pinochett and the involvements of Chile, Spain and Britain. He also drew analogy with the Belgian attempt to prosecute Ariel Sharon for abuses in Lebanon and the move by U.S. that truncated that as well as the U.S. hard stand to the Rome Statute which stand limited the jurisdiction of the ICC.

The author summed up with the view that recent events in the ICC provide some hope that universal jurisdiction may be applied to good effect. This assisted the stand taken in this research.

Finally, the work of Jennifer Trahan [35] on the international Criminal Court's crime of aggression deserves a consideration. The author argued that there appear to be - distinctions between the crime of aggression and the other three ICC crimes (as seen in Article 5 of the ICC Statute), which suggests that the complementarity approach to the relationship between the ICC and national courts may not be warranted for the crime of aggression.

The writer explored the reasons behind the creation of the primacy regime to govern

34. Chevigny, Paul, "The Limitations of Universal Jurisdiction" *Global Policy Forum*, March 2006, p. 35-38.
35. Trahan, Jennifer, "Is Complementarily the Right Approach for the International Criminal Court's Crime of Aggression? Considering the Problem of "Overzealous" National Court Prosecutions*" Cornell International Law Journal*, vol. 45, pp. 570-601.

the relationship between the ad hoc tribunals and domestic prosecutions in the former Yugoslavia and Rwanda, respectively. The work examined the reasons behind the creation of the complementarity regime that governs the relationship between the ICC and domestic prosecutions. It went on to discuss whether the crime of aggression should be subject to the current complementarity regime noting the problem of "all too willing" domestic court prosecutions that fail to adhere to due process.

The work reflected on whether the Rome Statute should be amended to subject the crime of aggression to a primacy regime. It also explored whether the complementarity provision could be amended to expressly cover the problem of "all too willing" domestic court prosecutions.

The work however, did not settle for a clear cut recommendation for solving the problems of the hurdles and limitations to dispensation of justice.

The omissions in that work as well as in other materials reviewed above are taken care of in the present research.

CHAPTER TWO

CONCEPTUAL FRAMEWORK AND HISTORICAL DEVELOPMENT OF INTERNATIONAL LAW

2.1 Origins and Development of International Law

International Law as we know it today is a product of the last five hundred years. To some extent it emanated and developed out of the usages and practices of modern European states in their inter-relationship and communications as well as the result of the influence of writers and jurists of the sixteenth, seventeenth, eighteenth and nineteenth centuries. These formulated some of the most fundamental tenets of International Law.

Also concepts associated with International Law like national and territorial sovereignty as well as perfect quality and independence of states emanated from political theories that formed the system of modern European states, though newly emerged non-European states equally supported some of these concepts. However, the origin of International Law must be traced to earliest times because even in the period of antiquity rules of conduct to regulate the relations between independent communities were felt necessary and emerged from the usages observed by these communities in their mutual relations.

Before the dawn of Christianity, treaties, the immunities of ambassadors, and certain laws and usages of war were found many centuries, for example in ancient Egypt and India.[1] There were historical cases of recourse to arbitration and mediation in ancient China and in the early Islamic world. It is from these early instances that modern system of International Law evolved and later developed.

2.2 Definition of International Law

To define the term "international law", we must first of all understand what is "law". Numerous definitions of law have been put forward over the centuries. The *Third New International Dictionary* from Merriam-Webster[2] defines law as follows:

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1. See A Nussbaum, *A Concise History of the Law of Nations* (revised edn. 1954) PP. 1 et seq, S Korff *Hague Rescued* (1923) Vol. 1. PP, 17-22 and H Chatterjee International Law and Inter-State Relations in Ancient India (1958).
2. M. Webster, *Third New International Dictionary*, Springfield, Massachussetes, Merriam-Webster Inc.

> Law is a binding custom or practice of a community; a rule or mode of conduct or action that is prescribed or formally recognized as binding by a supreme controlling authority or is made obligatory by a sanction (as an edict, decree, rescript, order, ordinance, statute, resolution, rule, judicial decision or usage) made, recognized, or enforced by the controlling authority.

While the above definition is broad and encompassing, we wish to direct our attention to the definition proffered by John Austin, an English man who was a prolific writer. According to Austin, law is a command from a political superior to a political inferior the breach of which attracts sanction. He proceeded to bring all the subjects we call law to a test based on this definition. International law could not pass his test and he, therefore, concluded that international law is not law. Austin's view has been subjected to various criticism.

One is who is the political superior? Is it the king or parliament? Is the political superior not subjected to any rule or limitation?

Second, who is the political inferior? Is it the members of the public or who?

The third is the issue of command. All laws do not have the command flavour.

Again, even in the municipal law sphere, Austin's definition will not fit in; the same goes with customary law. Most importantly, all states in the world regard International Law as law. This can be attested by two points. Firstly, most states have government ministry dealing with External Affair and in this ministry they have lawyers to advise them. If, therefore, what they are doing is not law then that exercise would have been useless. Secondly, when states disagree with each other, such disagreement is couched as legal issue. An example is the *Cameroon V. Nigeria* border dispute.[3] All the countries involved in the dispute, including Equatorial Guinea that intervened, referred to a legal document (a tre-

3. See the case of *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon V. Nigeria: Equatorial Guinea Intervening* [2002] F.W.L.R. (Pt. 133), pages 202 to 414.

aty) to back up their arguments. Again, when during the regime of Alhaji Shehu Shagari Nigeria asked the illegal aliens to leave the country, the home countries of those aliens protested that the quit order was a breach of legal agreement. Finally, when the United States of America attacked Libya, President Ronald Regan tried to justify his country's action by claiming that the U.S. had the right to do so.

It is, therefore, the humble submission of this work that the view[4] that the question whether international law is "law" is a verbal one not worth bordering with fitly meets the argument of the proponents of John Austin's test. This is without prejudice to the view[5] that Austin's test is more helpful than certain others. The vital point is that today the place of International Law as part of the subject, law is not in doubt.

Having gone through the definitions of law, we can now consider the definition of international law. An adaptation of the definition of international law by the American authority, Professor Charles Cheney Hyde[6], has this to say:-

> International law may be defined as that body of law which is composed for its greater part of the principles and rules of conduct which states feel themselves bound to observe, and therefore, do commonly observe in their relations with each other, and which includes also:
>
> a. the rules of law relating to the functioning of international institutions or organizations, their relations with each other, and their relations with states, and individuals; and
> b. certain rules of law relating to individuals and non-state entities so far as the rights or duties of such individuals and non-state entities are the concern of the international community.[7]

4. See AH Hart, *The Concept of Law* 2nd edn., (1994), PP. 214-215.
5. DJ Harris, *International Law*, (6th edn., London, Sweet and Maxwell, 2004).
6. See C C Hyde, *International Law* (2nd edn. 1947) Vol. 1,Para. 1.
7. JG Starke, *Introduction to International Law*, (9th edn., London, Butterworth & Co. (Publishers) Ltd. 1984), P. 3.

It is submitted that the above definition aptly explained the meaning of international law as it went beyond the traditional definition of international law as a system composed solely of rules governing the relations between states only.

2.2.1. International Law: Historical Perspective

The essential structure of international law was mapped out during the European Renaissance, though its origins lay deep in history and can be traced to cooperative agreements between peoples in the ancient Middle East. A particular instance of such agreement was that between the Jews and the Romans.[8] Other instances of these agreements were a treaty between the rulers of Lagash and Umma, in the area of Mesopotamia, in approximately 2100 BC; and an agreement between the Egyptian Pharaoh, Ramses II and Hattusilis III, the King of the Hittites, concluded in 1258 BC.

A number of pacts were subsequently negotiated by various Middle Eastern empires. Treaties, the immunities of ambassadors, and certain laws and usages of war are to be found many centuries before the dawn of Christianity, for example in ancient Egypt and India.[9] The long and rich cultural traditions of ancient Israel, the Indian subcontinent, and China were also vital in the development of international law. In addition, basic notions of government, of political relations, and of the interaction of independent units provided by ancient Greek political philosophy and the relations between the Greek city-states constituted important sources for the evolution of the international legal system. One authority, Professor Vinogradoff, aptly described this as 'intermunicipal'[10] given the fact that it was regionally limited.

Many of the concepts that today underpin the international legal order were established during the Roman Empire. The *jus gentium* (Latin: "law of nations"), for example,

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8. See 1 Maccabees 8:17-32; 11:28-37; 12: 1-23, Good News Bible, Today's English Version, Lagos, The Bible Society of Nigeria (1976).
9. See A Nussbaum, A Concise History of the Law of Nations(revised edn., 1954) PP. 1 et seq; S Korff, *Hague Recueil* (1923) Vol. 1, PP. 17-22; and H Chatterjee, *Interntaional Law and Inter-state Relations in Ancient India* (1958).
10. See Vinogradoff, *Bibliotheca Visseriana Dissertationum Jus Interntaionale Illustratium* (1923) Vol. 1 PP. 13 et seq.

was invented by the Romans to govern the status of foreigners and the relations between foreigners and Roman citizens. In accord with the Greek concept of natural law, which they adopted, the Romans conceived of the *jus gentium* as having universal application. In the Middle Ages, the concept of natural law, infused with religious principles through the writings of the Jewish Philosopher, Moses Maimonides (1135-1204), and the theologian, St. Thomas Aquinas (1224/25-1274), became the intellectual foundation of the new discipline of the law of nations, regarded as that part of natural law that applied to the relations between sovereign states.

Among the early writers who made important contributions to the infant science of the law of nations were Vittoria (1480-1546, who was Professor of Theology in the University of Salamanca; Belli (1502-1575), an Italian; Brunus (1491-1563), a German; Fernando Vasquez de Menchaca (1512-1569), a Spaniard; Ayala (1548-1584), a jurist of Spanish extraction; Suarez (1548-1617), a great Spanish Jesuit; and Gentilis (1552-1608), an Italian who became Professor of Civil Law at Oxford, and who is frequently regarded as the founder of a systematic law of nations.[11]

The writings of these early jurists reveal significantly that one major preoccupation of sixteenth century international law was the law of warfare between states, and in this connection it may be noted that by the fifteenth century the European Powers had begun to maintain standing armies, a practice which naturally cause uniform usages and practices of war to evolve.[12]

Grotius (1583-1645), the Dutch scholar, jurist, and diplomat, whose systematic treatise on the subject *De Jure Belli ac Pacis* (The Law of War and Peace) first appeared in 1625, was by general acknowledgment the greatest of the early writers on international law.

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11. For discussion of the writings of Vittoria and Suarez, see Bernice Hamilton, *Political Thought in Sixteen Century Spain* (1963).
12. JG Starke, *Introduction to International Law***,** (9th edn., London, Butterworth & Co. (Publishers) Ltd. 1984), P. 10.

This treatise earned him the description as the 'father of the law of nations', though his writing was based mainly on the writings of Gentilis. Moreso, the work by Grotius was not comprehensive enough to contain all that existed as international law in 1625.

The scholars who followed Grotius can be grouped into two schools, the naturalists and the positivists. The former camp included the German jurist, Samuel von Pufendorf (1632-94), who stressed the supremacy of the law of nature. In contrast, positivist writers, such as Richard Zouche (1590-1661) in England and Cornelis van Bynkershoek (1673-1743) in the Netherlands, emphasized the actual practice of contemporary states over concepts derived from biblical sources, Greek thought, or Roman law. These new writings also focused greater attention on the law of peace and the conduct of interstate relations than on the law of war, as the focus of international law shifted away from the conditions necessary to justify the resort to force in order to deal with increasingly sophisticated interstate relations in areas such as the law of the sea and commercial treaties.

The history of the law of nations during the two centuries after Grotius was marked by the final evolution of the modern state-system in Europe, a process greatly influenced by the Treaty of Westphalia of 1648 marking the end of the Thirty Years' War, and by the development from usage and practice of a substantial body of new customary rules.

Elements of both positivism and natural law appear in the works of the German philosopher, Christian Wolf (1679-1754), and the Swiss jurist, Emerich de Vattel (1714-67), both of whom attempted to develop an approach that avoided the extreme of each school. During the 18th century, the naturalist school was gradually eclipsed by the positivist tradition, though, at the same time, the concept of natural rights – which played a prominent role in the American and French revolutions – was becoming a vital element in international politics. In international law, however, the concept of natural rights had only marginal significance until the 20th century.

Several factors like the further rise of powerful new states both within and outside Europe, the expansion of European civilization overseas, the modernization of world transport, the greater destructiveness of modern warfare, and the influence of new inventions led to the further expansion of international law in the 19th century. There was a remarkable development during the century in the law of war and neutrality, and the great increase in adjudications by international arbitral tribunals following the *Alabama Claims Award* of 1872 provided an important new source of rules and principles.

Great writers of the 19th century like Kent (American), Wheaton (American), De Martens (Russian), Kluber (German), Phillimore (British), Calvo (Argentinian), Fiore (Italian), Pradier – Fodere (French), Bluntschli (German), and Hall (British) concentrated on existing practice, and discarded the concept of the 'law of nature', although they did not abandon recourse to reason and justice. Positivism's influence peaked during this (19th) century of expansionism and industrial revolution, when the notion of state sovereignty was buttressed by the ideas of exclusive domestic jurisdiction and non intervention in the affairs of other states – ideas that had been spread throughout the world by the European imperial powers.

The 20th century marked other important developments. The Permanent Court of Arbitration was established by the Hague Conference of 1899 and 1907. The Permanent Court of International Justice was set up in 1921 as an authoritative international judicial tribunal, and was succeeded in 1946 by the present International Court of Justice which was established in 1945. Positivism's dominance in international law was undermined in the 20th century by the impact of two world wars, the resulting growth of international organizations – e.g, the League of Nations, founded in 1919, and the United Nations, founded in 1945 – and the increasing importance of human rights. Other international organizations like the International Labour Organization and the International Civil Aviation Organization were also established.

Having become geographically international through the colonial expansion of the European powers, international law became truly international in the first decades after World War II, when decolonization resulted in the establishment of scores of newly independent states. The varying political and economic interests and needs of these states, along with their diverse cultural backgrounds, infused the hitherto European-dominated principles and practices of international law with new influences.

A feature of the latter-day evolution of international law is that the influence of writers has tended to decline, and modern international lawyers have come to pay far more regard to practice and to decisions of tribunals. Yet the spelling out of rules of international law from assumed trends of past and current practice cannot be carried too far. This was shown at the Geneva Conference of 1958 on the Law of the Sea, at the Vienna Conference of 1961, 1963, and 1968-1969 on, respectively, Diplomatic Relations, Consular Relations, and the Law of Treaties, and in the sessions 1973 -1982 of the Third United Nations Conference on the Law of the Sea (UNCLOS), when in a number of instances an apparent weight of practice in favour of a proposed rule of international law did not necessarily result in its general acceptance by the states represented at the conferences.

Nevertheless, 'natural law' writers have ceased to command the same degree of influence as formerly, perhaps because of the emergence of a number of states outside Europe and which did not inherit doctrines of Christian civilization such as that of 'natural law'. These new states (in particular the Afro-Asian group) have challenged certain of the basic principles of international law, stemming from its early European evolution in the seventeenth and eighteenth centuries. Reference should be made in this connection to the important activities in the field of study of international law, of the Asian-African Legal Consultative Committee, representing the Afro-Asian group of states. Certain sessions of this Committee have been attended by an observer from the International Law Commission, which has a standing invitation to send an observer.[13]

13. For the impact upon international law of the new Asian and other states, see Syataum, *Some Newly Established Asian States and the Development of International Law* (1961): S.P. Sinha, *New Nations and the law of Nations* (1967); RP Anand, *New States and International Law* (1972); and FC Okoye, *International Law and the New African States (1972).*

The development of international law – both its rules and its institutions – is inevitably shaped by international political events. From the end of World War II until the 1990s, most events that threatened international peace and security were connected to the Cold War between the Soviet Union and its allies and the U.S. – led Western alliance. The UN Security Council was unable to function as intended, because resolutions proposed by one side were likely to be vetoed by the other. The bipolar system of alliances prompted the development of regional organizations, for example, the Warsaw Pact organized by the Soviet Union and the North Atlantic Treaty Organization (NATO) established by the United States and encouraged the proliferation of conflicts on the peripheries of the two blocs, including in Korea, Vietnam, and Berlin. Furthermore, the development of norms for protecting human rights proceeded unevenly, slowed by sharp ideological divisions.

The Cold War also gave rise to the coalescence of a group of non-aligned and often newly decolonized states, the so-called "Third World", whose support was eargerly sought by both the United States and the Soviet Union. The developing world's increased prominence focused attention upon the interest of those states, particularly as they related to decolonization, racial discrimination, and economic aid. It also fostered greater universalism in international politics and international law. The ICJ's statute, for example, declared that the organization of the Court must reflect the main forms of civilization and the principal legal systems of the world. Similarly, an informal agreement among members of the UN requires that non-permanent seats on the Security Council be apportioned to ensure equitable regional representation; 5 of the 10 seats have regularly gone to Africa or Asia, two to Latin America, and the remainder to Europe or other states. Other United Nations organs are structured in a similar fashion.

The collapse of the Soviet Union and the end of the Cold War in the early 1990s increased political cooperation between the United States and Russia and their allies across the Northern Hemisphere, but tensions also increased between states of the north and those

of the south, especially on issues such as trade, human rights, and the law of the sea. Technology and globalization – the rapidly escalating growth in the international movement in goods, services, currency, information, and person – also became significant forces, spurring international co-operation and somewhat reducing the ideological barriers that divided the world, though globalization also led to increasing trade tensions between allies such as the United States and the European Union (EU).

Of vital importance is the fact that the armed conflicts in several parts of the world in the last decade of the 20th century resulted in various cases of war crimes, genocide and crimes against humanity. This necessitated the setting up of ad hoc criminal tribunal, for example, in Yugoslavia in 1991; in Rwanda in 1994 and a special court, in Sierra Leone in 2000. These preceded the adoption of the Rome Statute of the International Criminal Court which was adopted in 1998.

Today, in the 21st Century, heightened cases of armed conflicts and resort to use of force; multiplication of terrorist groups *like Al Queda, Al Shabaab, Boko Haram,* the Islamic State of Iraq and Syria, the Islamic State of Iraq and Levan; and numerous breaches of international criminal law pose great challenge not only to the United Nations resolve towards world peace and peaceful co-existence of member-states, but also to the two more outstanding international adjudicatory organs of the UN- the International Court of Justice (ICJ) and the International Criminal Court. These and other challenges will be x-rayed and addressed in this work.

2.3 International Humanitarian Law

International humanitarian law (IHL), or the law of armed conflict is the vital part of Public International Law that regulates the conduct of armed conflicts (*jus in bello*). IHL, inspired by considerations of humanity and the mitigation of human suffering, seeks to limit the effects of armed conflict by protecting persons who are not or no longer participating in hostilities, and by restricting and regulating the means and methods of warfare available to combatants. It comprises a set of rules, established by treaty or custom, that seeks to protect

persons and property/objects that are (or may be) affected by armed conflict and limits the rights of parties to a conflict to use methods and means of warfare of their choice.[14]

The above definition of IHL is embracive enough and accords with the International Committee of the Red Cross (ICRC) description that it includes "the Geneva Conventions and the Hague Conventions as well as subsequent treaties, case law, and customary international law."[15] It defines the conduct and responsibilities of belligerent nations, neutral nations, and individuals engaged in warfare, in relation to each other and to *protected persons*, usually meaning non-combatants. It is designed to balance humanitarian concerns and military necessity, and subjects warfare to the rule of law by limiting its destructive effect and mitigating human suffering.[16]

Serious violations of international humanitarian law are called war crimes. International humanitarian law, *jus in bello*, regulates the conduct of forces when engaged in war or armed conflict. It is distinct from *jus ad bellum* which regulates the conduct of engaging in war or armed conflict and includes crimes against peace and of war of aggression. Together the *jus in bello* and *jus ad bellum* comprise the two strands of the laws of war governing all aspects of international armed conflicts.

The law is mandatory for nations bound by the relevant treaties. There are also other customary unwritten rules of war, many of which were explored at the Nuremberg War Trials and Tokyo War Trials. By extension, they also define both the permissive rights of these powers as well as prohibitions on their conduct when dealing with irregular forces and non-signatories. International humanitarian law operates on a strict divisions between rules applicable in international armed conflict and those relevant to armed conflicts not of an international nature. This dichotomy has been criticized by James Stewart.[17]

14. GSDRC (2013). International legal frameworks for humanitarian actions: Topic guide. Birmingham, UK: GSDRS, University of Birmingham http://www.gsdrc.ord/go/topic-guides/ilfha. Visited 2/10/2014.
15. ICRC *What is international humanitarian law?*
16. GSDRC (2013). International legal frameworks for humanitarian action: Topic guide. Birmingham, UK: GSDRC, University of Birmingham htt://www.gsdrc.org/go/topic-guides/ilfa. Visited 2/10/2014.
17. Stewart, James "Towards a Single Definition of Armed Conflict in International Humanitarian Law" *International Review of the Red Cross,* (30 June 2003) **850** 313-350.

Modern international humanitarian law is made up of two historical stream:

1. the law of The Hague, referred to in the past as the law of war proper; and
2. the law of Geneva, or humanitarian law.[18]

The two streams take their names from a number of international conferences which drew up treaties relating to war and conflict, in particular the Hague Convention of 1899 and 1907, and the Geneva Conventions, the first which was drawn up in 1863. Both Conventions are branches of *jus in bello*, international law regarding acceptable practices while engaged in war and armed conflict.[19]

The Law of the Hague, or the laws of war proper, "determines the rights and duties of belligerents in the conduct of operations and limits the choice of means in doing harms."[20] In particular, it concerns itself with the definition of combatants; establishes rules relating to the means and methods of warfare; and examines the issue of military objectives.[21]

Systematic attempts to limit the savagery of warfare only began to develop in the 19th century. Such concerns were able to build on the changing view of warfare by states influenced by the Age of Enlightenment. The purpose of warfare was to overcome the enemy state which could be done by disabling the enemy combatants. Thus, "the distinction between combatants and civilians, the requirement that wounded and captured enemy combatants must be treated humanely, and that quarter must be given, some of the pillars of modern humanitarian law, all follow from this principle."[22]

The Law of Geneva can be traced to the massacre of civilians in the midst of armed conflict which has a long and dark history. Selected examples include: the massacre of the

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18. Picktet, Jean, *Humanitarian Law and the protection of war victims* Leyden: Sijthoff. ISBN 90-286-0305-0. (1975). pp.16-17.
19. The program for Humanitarian Policy and Conflict Research at Harvard University, "Brief Primer on IHL," Assessed at IHL. ihlresearch.or.Visited on 2/10/2014.
20. Picktet, Jean, *Development and Principles of International Law.* Dordrech: Martinus Nijhoff. ISBN 90-247-3199-2, (1985). p.2.
21. Kalshoven, Frits and Liesbeth Zegveld. *Constraints on the waging of war: An introduction to international humanitarian law*. Geneva: ICRC. (March 2001). p.40.
22. Christopher Greenwood in: Fleck, Dieter, ed. *The Handbook of Humanitarian Law in Armed Conflicts.* Oxford University Press, USA. ISBN 0-19-923250-4. (2008). p.20.

Kalingas by Ashoka in India; the massacre of some 100,000 Hindus by the Muslim troops of Timur (Tamerlane); and the Crusader massacres of Jews and Muslims in the Siege of Jerusalem (1099) to mention but a few. Fritz Munch sums up historical military practice before 1800: "The essential points seem to be these: in battle and in towns taken by force, combatants and non-combatants were killed and property was destroyed or looted."[23] In the 17th century, the Dutch jurist, Hugo Grotius, widely regarded as the father of public international law, wrote that "wars, for the attainment of their objects, it cannot be denied, must empty force and terror as their most proper agents."[24]

Dating back to ancient times, there have been frequent expressions and invocation of humanitarian norms for the protection of the victims of armed conflicts: the wounded, the sick and the shipwrecked.[25] The Kings of Israel in the Old Testament of the Bible prevented the slaying of the captured following the prophet Elisha's admonition to spare enemy prisoners. In answer to a question from the king, Elisha said,

> You shall not kill them. Would you kill those whom you have taken captive with your sword and your bow? Set food and water before them that they may eat and drink and go to their master.[26]

Another humane provision from the Holy Bible is found in the book of Deuteronomy as follows:

> When you besiege a city for a long time, while making war against it to take it, you shall not destroy its trees by wielding an axe against them; if you can eat of them, do not cut them down to use in the siege, for the tree of the field is man's food. Only the trees which you know are not trees for food you may destroy and cut down, to build siege works against the city that makes war with you, until it is subdued.[27]

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23. Fritz Munch, History of the Laws of War, in R. Bernhardt (ed.), *Encyclopedia of Public International Law* Volume IV (2000), pp. 1386-8.
24. Grotius, Book 3, Chapter 1: VI.
25. Bernard, Rudolf, *Encyclopedia of Public International law***,** Amsterdam North-Holland. ISBN 0-444-86245-5, Volume 2, (1992), pp. 933-936.
26. 2 Kings 6:21-23, The Holy Bible, New King James Version (NKJV), Belgium, Thomas Nelson Inc. (1982).
27. Deuteronomy 20:19,20, The Holy Bible, New King James Version (NKJV) Belgium, Thomas Nelson Inc. (1982).

In ancient India, there are records (the Laws of Manu for example) describing the types of weapons that should not be used:

> When he fights with his foes in battle, let him not strike with weapons concealed (in wood), nor with (such as are) barbed, poisoned, or the points of which are blazing with fire.[28]

There is also the command not to strike a eunuch nor the enemy "who folds his hands in supplication… Nor one who sleeps, nor one who has lost his coat of mail, nor one who is naked, nor one who is disarmed, nor one who looks on without taking part in the fight."[29]

Islamic law states that "non-combatants who did not take part in fighting such as women, children, monks and hermits, the aged, blind and insane" were not to be molested.[30] The first Caliph, Abu Bakr, proclaimed, "Do not mutilate. Do not kill little children or old men or women. Do not cut off the heads of palm trees or burn them. Do not cut down fruit trees. Do not slaughter livestock except for food."[31] Islamic jurists have held that a prisoner should not be killed, as he "cannot be held responsible for mere acts of belligerency."[32]

Islamic law did not spare all non-combatants however. In the case of those who refused to convert to Islam, or to pay an alternative tax, Muslims "were allowed in principle to kill any one of them, combatants or non-combatants, provided they were not killed treacherously and with mutilation."[33]

The codification of humanitarian norms has important bearing from the Armistice Agreement and Regularization of War signed and ratified in 1820 between the authorities of the then Government of Great Colombia and the Chief of the Expeditionary Forces of the

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28. The Laws of Manu VII.90.
29. The Laws of Manu VII.91-92. see also Singh, Nagendra: "Armed conflicts and humanitarian laws of ancient India," in C. Swinorski, *Studies and Essays on International Humanitarian Law and Red Cross Principles,* The Hague: Kluwer Law International ISBN 90-247-3079-1. (1985), pp;531-536.
30. Khadduri, Majid *War and Peace in the Law of Islam.* New York, NY Lawbook Exchange. ISBN 1-58477-695-1, (2006) pp.103-4.
31. Hashmi, Sohail H., *Islamic political ethics: civil society, pluralism, and conflict* Princetown, N.J: Princetown University Press. ISBN 0-691-11310-6, (2002), p.211.
32. Mc Coubrey, Hilaire *International Humanitarian Law,* Aldershot, UK: Ashgate Publishing ISBN 1-84014-012-7, (1999), pp.8-13.
33. Khadduri, Majid, *War And Peace in the Law of Islam,* New York, NY Law book Exchange, ISBN 1-58477-695-1, (2006) pp.105-106.

Spanish Crown, in the Venezuelan city of Santa Ana de Trujillo. This treaty was signed under the conflict of independence, being the first of its kind in the West.

A more systematic approach was initiated in the 19th century. In the United States, a German immigrant, Francis Lieber, drew up a code of conduct in 1863, which came to be known as the Lieber Code, for the Union Army during the American Civil War. The Lieber Code included the human treatment of civilian populations in the areas of conflict, and also forbade the execution of prisoners of war (POWs).

At the same time, the involvement during the Crimean War of a number of such individuals as Florence Nightingale and Henry Dunant, a Genevese businessman who had worked with wounded soldiers at the Battle of Solferino, led to more systematic efforts to prevent the suffering of war victims. Dunant wrote a book, which he titled A Memory of Solferino**,** in which he described the horrors he had witnessed. His reports were so shocking that they led to the founding of the International Committee of the Red Cross (ICRC) in 1863, and the convening of a conference in Geneva in 1864, which drew up the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field.[34]

The Law of Geneva is directly inspired by the principle of humanity. It relates to those who are not participating in the conflict, as well as to military personnel *hors de combat.* It provides the legal basis for protection and humanitarian assistance carried out by impartial humanitarian organizations such as the International Committee of the Red Cross (ICRC).[35] This focus can be found in the Geneva Conventions.

The Geneva Conventions are the result of a process that developed in a number of stages between 1864 and 1949. It focused on the protection of civilians and those who can no longer fight in an armed conflict. As a result of World War II, all four conventions were revised, based on previous revisions and on some of the 1907 Hague Conventions, and re-

34. Christopher Greenwood in: Fleck, Dieter, ed., *The Handbook of Humanitarian Law in Armed Conflicts.* Oxford University Press, USA, ISBN 0-19-923250-4, (2008), p.22.
35. Picktet, Jean *Development and Principles of International Law***,** Dordrecht: Martinus Nijhoff. ISBN 90-247-3199-2, (1985), p.2.

adopted by the international community in 1949. Later conferences have added provisions prohibiting certain methods of warfare and addressing issues of civil wars. The detail of the Geneva Conventions up to 1949 is as follows:

(1) The Geneva Convention *for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* was adopted in 1864. It was significantly revised and replaced by the 1906 version,[36] the 1929 version, and later the First Geneva Convention of 1949.[37]

(2) The Geneva Convention *for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* was adopted in 1906.[38] It was significantly revised and replaced by the Second Geneva Convention of 1949.

(3) The Geneva Convention *relative to the Treatment of Prisoners of War* was adopted in 1929. It was significantly revised and replaced by the Third Geneva Convention of 1949.

(4) The Fourth Geneva Convention *relative to the Protection of Civilian Persons in Time of War* was adopted in 1949.

There are three additional amendment protocols to the Geneva Convention:

1. Protocol I (1977): Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the protection of Victims of International Armed Conflicts. As of 12 January 2007 it had been ratified by 167 countries.

36. "Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 6 July 1906". International Committee of the Red Cross Retrieved July 20, 2013.
37. 1949 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field.
38. David P Forsy, *The International Committee of the Red Cross: A Neutral Humanitarian Actor*. Routledge (June 17, 2007), P. 43 ISBN-0415-34151-5.

2. Protocol II (1977): Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts. As of 12 January 2007 it had been ratified by 163 countries.
3. Protocol III (2005): Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem. As of June 2007 it had been ratified by seventeen countries and signed but not yet ratified by an additional 68.

The Geneva Conventions of 1949 may be seen, therefore, as the result of a process which began in 1864. Today they have "achieved universal participation with 194 parties". This means that they apply to almost any international armed conflict.[39] The Additional Protocols, however, have yet to achieve near-universal acceptance, since the United States and several other significant military powers (like Iran, Israel, India and Pakistan) are by June 2007 not parties to them.[40]

The two strains of law, IHL and the laws of war, began to converge with the adoption of the 1977 Additional Protocols to the Geneva Conventions, although provisions focusing on humanity could already be found in the Hague law (i.e the protection of certain prisoners of war and civilians in occupied territories). The 1977 Additional Protocols, relating to the protection of victims in both international and internal conflict, not only incorporated aspects of both the law of The Hague and the Law of Geneva, but also important human rights provisions.[41]

The basic rules of International Humanitarian Law (IHL) are:

1. Persons *hors de combat* (outside of combat), and those not taking part in hostilities, shall be protected and treated humanely.

39. Christopher Greenwood in: Fleck, Dieter, ed.. *The Handbook of Humanitarian Law in Armed Conflicts*. USA, Oxford University Press, ISBN 0-19-923250-4, (2008) pp.27-28.
40. http://www.gsdrc.org/go/topic-guides/ilfha.Visited 2/10/2014.
41. Kalshoven + Zegveld (2001) p.34.

2. It is forbidden to kill or injure an enemy combatant who surrenders, or who is *hors de combat.*

3. The wounded and the sick shall be cared for and protected by the party to the conflict which has them in its power. The emblem of the "Red Cross", or of the "Red Crescent", shall be required to be respected as the sign of protection.

4. Captured combatants and civilians must be protected against acts of violence and reprisals. They shall have the right to correspond with their families and to receive relief.

5. No one shall be subjected to torture, corporal punishment, or cruel or degrading treatment.

6. Parties to a conflict, and members of their armed forces, do not have an unlimited choice of methods and means of warfare.

7. Parties to a conflict shall at all times distinguish between the civilian population and combatants. Attacks shall be directed solely against military objectives.[42]

Well known examples of such rules include the prohibition on attacking doctors or ambulances displaying a red cross. It is also prohibited to fire at a person or vehicle bearing a white flag, since that, being considered the flag of truce, indicates an intent to surrender or a desire to communicate. In either case, the persons protected by the Red Cross or the white flag are expected to maintain neutrality, and may not engage in warlike acts themselves; in fact, engaging in war activities under a white flag or a red cross is itself a violation of the laws of war.

These examples of the laws of war address:

(1) declaration of war;[43]

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42. De Preux, *Basic rules of the Geneva Conventions and their Additional Protocols.* 2nd edition. Geneva: ICRC. (1988), p.1.

43. The UN Charter (1945) Article 2, and some other Articles in the Charter curtails the right of member states to declare war, as does the older and toothless Kellog-Briand Pact of 1928 for those nations who ratified it, but used against Germany in the Nuremberg War Trials

(2) acceptance of surrender;

(3) the treatment of prisoners of war;

(4) the avoidance of atrocities;

the prohibition on deliberately attacking civilians; and the prohibition of certain inhuman weapons.

It is a violation of the laws of war to engage in combat without meeting certain requirements, among them the wearing of a distinctive uniform or other identifiable badge, and the carrying of weapons openly. Impersonating soldiers of the other side by wearing the enemy's uniform is allowed, though fighting in that uniform is unlawful perfidy, as is the taking of hostages.

From the fore going, it is appreciable that International Humanitarian Law today contribute significantly to the mitigation of the sufferings of war. In this era of several armed conflicts in which the co-alition of the U.S.A, French, United Kingdom and their allies are battling with ISIS and ISIL in Iraq and Syria; and Nigeria, Cameroon, Chad and their neighbours are challenging the Boko Haram in the North Eastern part of Nigeria, it is necessary to ensure that the horror of war is not allowed to be so devastating to the point of loss of human dignity and senseless disregard to the protection of the lives of civilians and non-combatants in those territories. It is note worthy that the surveillance of the Amnesty International in some of these theatres of international and internal armed conflicts appear to be providing the needed watch that will ensure that things do not go off hand. This leads us to a consideration of a similar platform, the International Human Rights Law.

2.4 International Human Rights Law

The body of international law designed to promote and protect human rights at the international, regional and domestic levels is described as International Human Rights Law. It is, as a form of international law, primarily made up of treaties, agreements between states intended to have binding legal effect between the parties that have agreed to them;

and customary international law, rules of law derived from the consistent conduct of states acting out of the belief that the law required them to act that way. While not legally binding, other international human rights instruments contribute to the implementation, understanding and development of international human rights law and have been recognized as a source of political obligation.[44]

International Human Rights Law (IHRL) can be enforced on a domestic, a regional or an international level. When states ratify human rights treaties, they commit themselves to respecting those rights and ensuring that their domestic law is compatible with international legislation. Parties may be able to resort to regional or international mechanisms for enforcing human rights when domestic law fails to provide a remedy for human rights abuses.

Though distinct from each other, International Human Rights Law is closely related to International Humanitarian Law. What makes them distinct is the fact that they are regulated by legally discrete frameworks, and they usually operate in different contexts and regulate different relationships. Their close relation is because the substantive norms they contain are often similar or related: both provide, for example, a protection against torture. Generally, human rights are understood to regulate the relationship between states and individuals in the context of ordinary life, while humanitarian law regulates the actions of a belligerent state and those parties with which it comes into contact, both hostile and neutral, within the context of an armed conflict.[45]

From the foregoing, human rights have been defined as "the freedoms, immunities, and benefits that, according to modern values (especially at an international level), all human beings should be able to claim as a matter of right in the society in which they

44. Human rights, A very short introduction, Author Unknown, p. 42.
45. Provost, Rene *International human rights and humanitarian law*, Cambridge, UK, Cambridge University Press (2002), p.8 ISBN 0-511-04186-1.

live."[46] This definition accords with the famous statement in the Universal Declaration of Human Rights as follows:

> Disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people ... All human beings are born free and equal in dignity and rights.[47]

By the Universal Declaration of Human Rights, the member states of the United Nations pledged to work together to promote the thirty Articles of human rights that, for the first time in history, had been assembled and codified into a single document. In consequence, many of these rights, in various forms, are today part of the constitutional laws of democratic nations.

The Universal Declaration of Human Rights (UDHR) is a UN General Assembly declaration that does not in form create binding international human rights law. Many legal scholars cite the UDHR as evidence of customary international law. Thus it has become an authoritative human rights reference, providing the basis for subsequent international human rights instruments that form binding international human rights law.

From 1948 to 1966, the UN Human Rights Commission worked to create a body of international human rights law based on the Declaration and to establish the mechanisms needed to enforce its implementation and use. In 1966, the two wide-ranging Covenants that form part of the International Bill of Human Rights (namely the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural

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46. BA Garner (Ed.), *Black's Law Dictionary* (8th Edition U.S.A., West Publishing Co. St. Paul, Minessota, 2004), p. 758.
47. Preamble and Article 1 of the Universal Declaration of Human Rights adopted by the United Nations on December 10, 1948.

Rights) were adopted. Both of them, the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR), became international law in 1976. Together with the Universal Declaration of Human Rights, these two covenants comprise what is known as the "International Bill of Human Rights".

A number of other human rights treaties have been adopted at the international level. These are generally known as Human rights instruments. Some of the most significant ones include the following:

(1) the Convention on the Prevention and Punishment of the Crime of Genocide (CPCG), adopted in 1948 and entered into force in 1951;

(2) the Convention Relating to the Status of Refugees (CSR), adopted in 1951 and entered into force in 1954;

(3) the Convention on the Elimination of All Forms of Racial Discrimination (CERD), adopted in 1965 and entered into force in 1969;[48]

(4) the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), adopted in 1979 and entered into force in 1981;[49]

(5) the United Nations Convention Against Torture (CAT), adopted in 1984 and entered into force in 1987;[50]

(6) the Convention on the Rights of the Child (CRC), adopted in 1989 and entered into force in 1990;[51]

(7) the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW), adopted in 1990 and entered into force in 2003;

48. OHCHR. Web archive.org. 30 May 2008. Retrieved 9 October 2011.
49. Convention on the Elimination of All Forms of Discrimination against Women. United Nations. Retrieved 9 October 2011
50. OHCHR. Web.archive.org. 9 March 2008. Retrieved 9 October 2011.
51. Convention on the Rights of the Child. INICEF. Retrieved 9 October 2011.

(8) the Convention on the Rights of Persons with Disabilities (CRPD), adopted in 2007 and entered into force on May 3, 2008;[52] and

(9) the International Convention for the Protection of All Persons from Enforced Disappearance, adopted in 2006 and entered into force in 2010.

There is currently not enough international courts to administer international human rights law, but quasi-judicial bodies exist under some UN treaties (like the Human Rights Committee under the International Covenant on Civil and Political Rights-ICCPR). The International Criminal Court (ICC) has jurisdiction over the crime of genocide, war crimes and crimes against humanity. The European Court of Human Rights and the Inter-American Court of Human Rights enforce regional human rights law. The United Nations human rights bodies do have some quasi-legal enforcement mechanisms. These include the treaty bodies attached to the seven currently active treaties, and the United Nations Human Rights Council complaints procedures, with Universal Periodic Review and United Nations Special Rapporteur (Known as the 1235 and 1503 mechanisms respectively).[53]

Despite several cases of violation of human rights,[54] enforcement of these rights has not been fully realized and in some cases appear to be unattainable goals. Discrimination is rampant throughout the world. Thousands are in prison for speaking their minds. There is a ridiculous case of the incarceration of a journalist for describing a serving senior police officer as controversial.[55] Torture and politically motivated imprisonment, often without trial, are commonplace, condoned and practiced-even in some democratic countries.

It is, therefore, submitted that the international community should pay more attention to the enforcement of human rights than in creation of human rights instruments.

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52. Convention on the Rights of Persons with Disabilities. United Nations. 30 March 2007. Retrieved 9 October 2011.
53. OHCHR. Human Rights Council Complaint Procedure. Retrieved 6 February 2009.
54. For example, Amnesty International's 2009 World Report show that individuals are tortured or abused in at least 81 countries; face unfair trials in at least 54 countries; and restricted in their freedom of expression in at least 77 countries.
55. For instance, the October 2014 detention of the AIT (African Independent Television) journalist by A.I.G. Joseph Mba in charge of FCT Abuja, Nigeria.

There is today no lack of such instruments. What is staring the world in the face is the paucity of such international adjudicatory mechanisms to check the increasing cases of human rights violation in our world. The time to address this by the United Nations should be now. This should be done by empowering the existing international courts to assume jurisdiction in cases of human rights abuses. Fortunately, the ECOWAS court for Human Rights has recently braced the challenge and is now more proactive in this direction.

2.5 The Relationship between International Human Rights Law and the Domestic Legal System

The application of international law by national courts depends on a decision by domestic legal systems. At present, there is no general rule of international law providing how States should incorporate international law into municipal legal system. In fact, there is not even a general obligation that States should make international law enter into the national realm.

The fact that in its origin international law was exclusively concerned with the international public realms of States explains why national legal systems do not have detailed rules concerning the relationship with international law. Traditionally, in this area States have been divided into dualists and monists. However, it is said that even dualist countries often show themselves open to the reception of customary international law as applicable law by domestic courts.[56]

In the United States, the Supremacy Clause allows the automatic incorporation of ratified treaties, and puts them in the position to be applied by national courts. Though the constitutional provision of the United States refers to treaties only, the clause has been interpreted as inclusive of customary law.[57] The effects in the field of human rights can be seen in *Filartiga v. Pena Irala*.[58] In this case it was necessary for the United States to ratify a specific human rights treaty for domestic courts to assert their jurisdiction to handle a torts case for torture and homicide committed in Paraguay, by a Paraguayan national against another Paraguayan.

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56. Higgins, Problems and Process (Oxford, 1994), p. 210.
57. Henkin, *Foreign Affairs and the US Constitution* (Oxford, 1996), p. 218.
58. 630 F 2nd 876 (2nd Cir. 1980).

Direct effect of international law on national law allows international human rights law to rely on national courts for implementation. This seems as an excellent solution for the lack of *imperium* affecting decisions by international tribunals. This seems also as an excellent alternative for the laziness with which legislative power of the States may discharge its obligation to adopt national legislation to the requirements of international treaties. But it is clear that direct effect alone is not enough, because international rules, even if they succeed in entering into national legal systems, still they are subject to possible restrictions imposed by the State.

The State, for example, might adopt legislation in contradiction with the international rule, or it could promulgate norms restricting the possibility that an international treaty may be invoked by individuals before national courts. In this context, especially in Latin-America, the supervisory bodies of human rights have actively contributed to dilute the frontier between national and international law, restricting the power of the State to limit the effects of international law that has already become part of their system.

It is interesting to observe how the Inter-American Court of Human Rights has changed its position concerning the self-executing character (direct effect) of the American Convention on Human Rights in the sphere of national legal systems of States Parties. In 1986, in an Advisory Opinion[59] requested by Costa Rica in relation to the interpretation of Article 14.1 of the American Convention, on the right of reply, the Court held that it could not decide on the self-executing character of this provision in Costa Rica, as this was a question to be exclusively decided by the State of Costa Rica.

Twenty years after, the position of the Inter-American Court appears to be radically different and demonstrates how the boundary between domestic law and international law

59. Inter-American Court of Human Rights Advisory Opinion OC-7/86.

of human rights is becoming weaker and very easy to cross. In the *Almonacid Arellano et al v. Chile* [60], one of the arguments put forward was the incompatibility of the Amnesty Law of 1978, enacted by Pinochet and which has been applied by Chilean courts in a number of human rights cases, with the American Convention. Irrespective of the examination of the merits of the case with regard to the compatibility of that amnesty law and international commitment assumed by Chile in the American Convention, it is worth nothing that the court came close to declaring that there is an obligation for the Parties to grant direct effect to the American Convention.

Specifically it is paragraph 124 of the Judgment that constitutes a radical change of position if compared to the Advisory Opinion of 1986. The court said:

> The court is aware that domestic judges and courts are bound to respect the rule of law, and therefore, they are bound to apply the provisions in force within the legal system. But when a State has ratified an international treaty such as the American Convention, its judges, as part of the State, are also bound by such convention. This forces them to see that all the effects of the provisions embodied in the convention are not adversely affected by the enforcement of laws which are contrary to its purpose and that have not had any legal effects since their inception. In other words, the Judiciary must exercise a sort of "conventionality control" between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights. To perform this task, the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American

60. Inter-American Court of Human Rights Judgment of 26 September 2006.

> Court, which is the ultimate interpreter of the American Convention [61].

The above judgment appear to subject states to the obligation to make treaty provisions self-executing and to give judges the power to invalidate legislation which is incompatible with treaties. This position, we submit with respect, is neither provided for in the American Convention on Human Rights nor in international law. Kelseen himself, a monist author in so far as he suggested the utility of the international and national legal system wrote that:

> The question as to whether in a case of a conflict between national and international law the one or the other prevails can be decided only on the basis of the national law concerned; the answer cannot be deduced from the relation which is assumed to exist between international and national law. Since according to positive national law, it is not excluded that in the case of a conflict between this law and international law the former is to be considered as valid, we shall here assume that the state organs are bound to apply national law even if it is contrary to international law [62].

In most African states, the position is that the provisions of human rights prescriptions, as contained in the Universal Declaration of Human Rights as well as the African Charter on Human and Peoples Rights, have been embodied in the constitutions of those states[63]. They, therefore, form part of the domestic legal system. Moreso, the African Charter on Human and Peoples Rights has been incorporated specifically by the National Assembly of Nigeria into the municipal laws of the country [64]. As a result, the enforcement

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61. Inter-American Court of Human Rights Judgment of 26 September 2006, para. 124
62. Kelseen, *Principles of International Law*, p.p. 565-66
63. For instance in Nigeria , Chapter IV of The Constitution of the Federal Republic of Nigeria 1999 (as amended) contain the fundamental rights provisions which are *in pari material* with the dictates of the Universal Declaration of Human Rights and the African Charter on Human and Peoples Rights.
64. See the Schedule to African Charter on Human And People's Rights (Ratification and Enforcement) Act, Cap 10, The Laws of the Federation of Nigeria 1990.

of international human rights in the domestic legal system of most African states, particularly Nigeria, is without much difficulty.

Yet the fact remains that such application of international human rights in the domestic legal system is not self executing as the Inter-American Court of Human Rights tended to portray in its judgment of 26 September 2006. It must rely on the willingness of States to assume their international obligations, as contained in various treaties, to ensure its enforcement in the domestic legal system.

2.6 The Link between International Humanitarian Law and International Human Rights Law.

International Humanitarian Law (IHL) and International Human Rights Law (IHRL) are today, no doubt, near relations. The position, however, has not been so from the out set. Rather they were assigned formerly to separate legal categories and only revealed the common attributes which would seem to promise many fruitful exchanges in the future as they came under the persistent scrutiny of modern analysis.[65]

Two kinds of reasons explain the almost total independence of international humanitarian law from human rights law immediately after World War II.[66] The first reason relate to the genesis and development of the branches concerned.[67] The law of war has its roots in Antiquity. It evolved mainly during wars between European states, and became progressively consolidated from the Middle Ages. This is one of the oldest areas of public international law; it occupies a distinguished place in the writings of the classical authors of this branch. Its international aspect is also emphasized by the contributions of Christianity and the rules of chivalry and of *jus armorum*.

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65. On this point, see "The Relationship between international humanitarian law and human rights law: Bibliography", p.572.
66. For an overall view of the development of the relationship between the two branches of international law, see AH Robertson, "Humanitarian law and human rights" in C Swinarski (ed), *Studies and essays on international humanitarian law and Red Cross principles*, in honour of Jean Picket, CICR / Martins Nijhoff, Geneva / La Haye, 1984, p.793; D Schindler, "The International Committee of the Red Cross and human rights", IRRC, No. 208, January – February 1979, p.3.
67. See for example D Schindler, ibid., pp.4-7.

Human rights are concerned with the organization of State power vis-à-vis the individual. They are the product of the theories of the Age of Enlightenment and found their natural expression in domestic constitutional law. In regard to England, mention may be made of the 1628 *Petition of Rights*, the 1679 *Habes Corpus Act* and the 1689 *Bill of Rights*; for the United States of America, the 1776 *Virginia Bill of Rights*; for France, the 1789 *Declaration of the Rights of Man and the Citizen*. It was only after the Second World War, as a reaction against the excesses of the Axis forces, that human rights law became part of the body of the public international law. The end of the 1940s was when human rights law was the first placed beside what was still called the law of war. The question of their mutual relationship within the body of international law can be considered only from that moment. But human rights law was still too young and undeveloped to be the subject of analyses, which require a better – established sphere of application and a more advanced stage of technical development.

The other reasons are institutional in nature. The most important one relates to the fact that United Nations bodies decided to exclude all discussion of the law of war from their work, because they believed that by considering that branch of law they might undermine the force of *jus contra bellum*, as proclaimed in the Charter, and would shake confidence in the ability of the world body to maintain peace.[68] In 1949, for example, the United Nations International Law Commission decided not to include the law of war among the subjects it would consider for codification.[69] In addition to this there was a certain dichotomy between the International Committee of the Red Cross (ICRC) and the United Nations, which was only partly due to the latter's elimination of the law of war from its discussions.

68. AH Robertson, *op.cit*. (note 66), p.794; D. Schindler. *op.cit*. (note 66), p.7.
69. *Year book of the International Law Commission*, 1949, p.281.par.18.

A more profound reason was the ICRC's determination to preserve its independence, a determination which was strengthened by the political nature of the United Nations.[70] Human rights which were seen as being within the purview of the United Nations and bodies specifically set up to promote and develop those rights, were thus distanced from concerns of the ICRC, which continued to work solely in the area of the law of war. These institutional factors affected the development of the rules: the United Nations, the guarantor of international human rights, wanted nothing to do with the law of war, while the ICRC, the guarantor of the law of war, did not want to move any closer to an essentially political organization or to human rights law which was supposed to be its expression. The result was a clear separation of the two branches.

This separation was manifested in the preparatory work for the major instruments in these areas: the Universal Declaration of Human Rights of 1948 and the Geneva Conventions of 1949. The Universal Declaration of Human Rights (UDHR) of 1948 completely bypassed conflicts, while at the same time human rights were scarcely mentioned during the drafting of the 1949 Geneva Conventions.[71] Notwithstanding this position, a link was established between these two branches of international law unintentionally through the Geneva Conventions and the Human Rights Conventions.

The Geneva Conventions made mention of human rights on a number of issues. For instance, they were mentioned in the context of the protection of civilian population in territory occupied by the enemy. Moreso, Article 3 common to the four conventions also gave rise to references to human rights. The most solemn reference to human rights came from President of Diplomatic Conference that gave rise to the 1949 Geneva Conventions, Max Petit Pierre, during the signing ceremony, when he spoke of the parallelism between and the common ideal of Geneva Conventions and the Universal Declaration of Human Rights.

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70. *Seventeenth International Red Cross Conference Report*, Stockholm.1948, p.48.
71. D. Schindler, *op.cit*. (note 66), p.7. See also J.G.Lossier, "The Red Cross and the International (sic) Declaration of Human Rights", IRRC, No. 5, May 1949, pp. 184 – 189.

He noted that the text of the Conventions incorporated and expressed in concrete terms some of the rights proclaimed by the Declaration.

> The day after tomorrow, we shall celebrate the anniversary of the Universal Declaration of the Human Rights of Man which was adopted by the General Assembly of the United Nations on December 10th, 1948. It is, we think interesting to compare that Declaration with the Geneva Conventions. Our texts are based on certain of the fundamental rights proclaimed in it - respect for the human person, protection against torture and against cruel, inhuman or degrading punishments or treatment. Those rights find their legal expression in the contractual engagements which your Governments have today agreed to undertake. The Universal Declaration of the Human Rights of Man and the Geneva Conventions are both derived from one and the same ideal…[72]

The implications of those statements should not be over estimated; they were very sporadic and rarely placed in an operational context. The scope of the conventions remains dependent on the objective concept of the protected person, defined according to his status in relation to the events of war (sick, wounded, prisoner of war, civilian), with very little room for the idea of attributing supreme subjective rights, without any distinction, deriving solely from the quality of being human.[73] On the other hand, even in very likely contexts, such as the protection to be afforded to those who have violated the law of war and the presumption of innocence, human rights are not mentioned at all.[74]

From the fore going it is clear that the two systems are related but distinct, and must remain so. They complement each other. Their norms and standards, however, apply in

72. Final Record of the Diplomatic Conference of Geneva of 1949. Vol. II, Section b, p. 536.
73. Ibid., Vol. II Section A, p.813ff.
74. Ibid, p.321.

times of peace, but many of them also apply in times of war. International Humanitarian Law (IHL) which is also referred to as the law of Armed Conflict or the law of war, provides universally accepted constraints on waging war.[75] Furthermore, it aims at protecting the fundamental human right of victims and non-combatants in the event of armed conflict. Seemingly working complementarily with International Human Rights Law (IHRL), the aim is supported by a key resolution adopted by the World Human Rights Conference[76] which began by stating: "peace is the underlying condition for the full observance of human rights and war is their negation". Moreover, the same resolution recognized that it is through international humanitarian law that fundamental rights of the human being can be best protected in armed conflicts.

The close relationship between Humanitarian Law and Human Rights Law was further enhanced during World Conference on Human Right held in Vienna, Austria in June 1993. The World Conference, while adopting the Vienna Declaration and Programme of action,[77] noted that:

> Effective international measures to guarantee and monitor the implementation of human rights standards should be taken in respect of people under foreign occupation, and effective legal protection against the violation of their human rights should be provided in accordance with human rights norms and international law, particularly the Geneva Convention of 1949 and other applicable norms of international law.[78]

Grave concern was also expressed by the Vienna World Conference about continuing violations of human rights in several parts of the world irrespective of standards contained in international human rights instruments and international humanitarian law. The

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75. See generally Kalshoven F, Constraints on the Waging of War, 2nd edition, Geneva, ICRC, (1991).
76. The 1968 World Human Rights Conference which held in Tehran, Iran under the United Nations auspices.
77. Adopted on 25 June 1993 by the World Conference on Human Rights.
78. 1993 Vienna Declaration, para. 13.

World Conference equally expressed deep concern about violations of human rights during armed conflict, affecting the civilian population, particularly women, children, the elderly and the disabled. States and all parties to armed conflicts were urged by conference to observe strictly international law as prescribed in the Geneva Conventions of 1949 and other rules and principles of international law, as well as minimum standards laid down in international conventions for protection of human rights.

A consideration of some UN Security Council Resolutions and the work of other bodies responsible for monitoring and implementing international law will manifest clearly the inter linking of human rights and humanitarian law.[79] This is so irrespective of some arguments by governments and military establishments that IHL should be kept separate and apart from HRL since the two legal regimes have different political constituencies. This argument ignores the fact that Human Right Law also applies in times of war, save for the human rights that may be suspended temporarily during war time.

This raises a vital point with regard to the position of the United States of America on the relationship between HRL and IHL since September 11, 2011. Before that date, HRL norms were implicitly considered applicable during armed conflict in at least some situations, but after the terrorist attacks on some strategic public buildings in the U.S.A., the United States took a position that IHL applied as the exclusive applicable body of law during armed conflict. One, therefore, wonders the rational behind the refusal of the U.S. to sell arms to Nigeria for the prosecution of the war against terrorists in the North Eastern part of the country on the lame excuse of human rights violations allegedly by the Nigerian military in the course of the war against Boko Haram in Adamawa, Borno and Yobe states in the North East Nigeria.

79. See, for example, the UN Security Council Resolution 808 of 1993 on the conflict in the former Yugoslavia which led to the establishment of an International Criminal Tribunal for the Prosecution of Serious Violation of International Humanitarian Law in the former Yugoslavia; Resolutions 670 and 674 of 1990 on Iraq's occupation of Kuwait.

A better explanation can only be found in the Advisory Opinion rendered by the International Court of Justice (ICJ) in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (UN General Assembly)*.[80] The ICJ held as follows:

> The court considers that the protection offered by human rights conventions does not cease in case of armed conflicts as regards the relationship between international humanitarian and human rights law. Some rights may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.

The ICJ concluded that human rights law is the general applicable law and that international humanitarian law is the *lex specilis*.

Whatever is the position, it is very clear that there is a progressive link between International Humanitarian Law and International Human Rights Law today. This link has contributed positively to the advancement of International Law.

2.7 Definition of Terms

Some legal concepts, terms and terminologies will be mentioned and used from time to time in the course of this research. It will therefore, be necessary at this stage to define those concepts so that their use will in no way inhibit clear and unambiguous understanding of this work.

2.7.1 Judicial Adjudication of International Disputes

Judicial adjudication of international disputes can be defined as "the legal process of resolving interstate dispute judicially in a court".[81] The idea of submitting interstate disputes to a third party for settlement is not a new one. As early as the time of the Greek city-states, there existed a relatively well-developed system of dispute settlement by reference to the

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80. ICJ Judgment of 7 July 2004.
81. See generally Garner BA, (Ed), *Black's Law Dictionary* (8th Edition U.S.A., West Publishing Co. St. Paul, Minessota, 2004), pp. 45 & 862.

Delphic Amphictyonies. Scholars describe this process as a rudimentary form of third party settlement based on law and customs of correct behaviour.[82]

Again, the Italian city-states born during the Renaissance period adopted a practice of referring their disputes to the Catholic Church in Rome, which was to judge, not mediate, the difference between the parties.[83] Modern nation states, particularly the United States and United Kingdom, continued this tradition. The signing of the 1794 Jay Treaty ended the American Revolution and set up a commission to dispose of the remaining disputes.[84] Although the commission was composed of United States and British nationals, not neutral judges, it applied law and court-like procedure.[85]

Within the United States itself, the idea of international adjudication grew. In 1843 and 1844, the Massachusetts legislature passed resolutions urging creation of an international procedure for the amicable, third party settlement of disputes. Vermont did likewise in 1852.[86]

In May 1871, the United States and United Kingdom once again chose a form of international adjudication in setting up the *Alabama* tribunal through their signing of the Washington Treaty.[87] During the Civil war the frigate *Alabama* had been particularly successful in preying on union shipping after leaving British ports and joining Confederate naval forces. The *Alabama* tribunal-composed of one American citizen, one British citizen, and three neutral – applied specified rules of international law and awarded the United States $15,000,000 damage.[88] Not only did the British pay the sum, but in the year 1888, 235 members of the British Parliament sent the United States a communication asking that

82. C Philipson, *The International Law and Custom of Ancient Greece and Rome* (1911).
83. A Bozeman, *Politics and Culture in International History* 266-67 (1960).
84. Treaty of Amity, Commerce and Navigation, Nov.19, 1794. United States – Great Britain, 52 *Parry's T.S.* 243 (commonly known as the Jay Treaty).
85. S Bosenne, *The World Court: What it is and How it Functions*, pp. 12-13 (1973).
86. D Fleming, The United States and the World Court (rev. ed. 1968). In 1840, New Hamphere farmer William Ladd proposed an international court of nations in his "Essays on a Congress of Nations". See W. Ladd, Essays on Congress of Nations (reprinted 1916).
87. Treaty for the Amicable Settlement of all causes of Difference, May 8, 1871, Great Britain – United States, 143 *Parry's T.S.* 145 (Washington Treaty).
88. See Lapardelle & Polotis, 2 *Receuil des Arbitrage Internationales*, 713 (1923).

a permanent arbitration treaty be negotiated between the two states.[89]

Attention then became focused on the establishment of a permanent world adjudicatory body.[90] A lot of activity towards arbitration followed culminating in the establishment of the Permanent Court of Arbitration as a result of the Hague Conference of 1899 and 1907. An eminent scholar has argued that the Permanent Court of Arbitration is neither permanent nor a court.[91] This work is in agreement with this view as the operation of the body turned out to justify the argument of the erudite jurist.

Outside Europe, the Central American Republics made some attempts at establishing a functioning means of third party settlement. Prominent result of the attempts was the establishment of the Central American Court of Justice on December 20, 1907. The Central American Court of Justice heard ten cases between 1908 and 1918. It intervened on its own motion in a number of circumstances reminding parties of their obligation to settle disputes peacefully and offering to mediate. The court expired ten years after its creation, as per the terms of its convention.

Following the end of World War I, the League of Nations system established the Permanent Court of International Justice (PCIJ) which was replaced by the International Court of Justice (ICJ) in 1946. Numerous other courts have been established by the international community. Some of the existing international courts and tribunals today can be listed as follows:

1. International Court of Justice (ICJ)
2. International Tribunal for the Law of the Sea (ITLOS)
3. European Court of Justice (ECJ)
4. European Court of Human Rights (ECHR)
5. African Court of Human Rights (ACHR)

89. D Fleming, *supra* note 40, at 17.
90. Patterson, The United States and the Origin of the World Court, 91 *Pol. Sci. Q* 279, 280-81 (1976 – 77).
91. See G C Nwakoby, *The Law and Practice of Commercial Arbitration in Nigeria*, Enugu, Iyke Ventures Production, (2004), p. 164.

6. Inter – American Court of Human Rights (IACHR)

7. International Criminal Court (ICC)

8. Ad Hoc War Crimes Tribunals (e.g. ICTY, ICTR & SCSL).

Our main concentration in this work is on the International Court of Justice (ICJ) and the International Criminal Court (ICC). More will be said on these two in due course.

2.7.2 International Criminal Law

International Criminal Law can be said to be a body of international law designed to prohibit certain categories of conduct commonly viewed as serious atrocities and to make perpetrators of such conduct criminally accountable for the offences they committed. Principally International Criminal Law deals with genocide, war crimes, crimes against humanity, as well as the crime of aggression.

Some precedents in international law can be found in time before World War I. However, it was only after the war that a truly international tribunal was envisaged to try perpetrators of crimes committed in this period. Thus, the Treaty of Versailles stated that an international tribunal was to be set up to try Wilhelm II of Germany (otherwise called Kaiser William). In the event however, the Kaiser was granted asylum in the Netherlands. Yet, the Leipzig war crimes trials held from 25 May to 16 July 1921 to try some Germans as part of the penalties imposed on the German government under the said Treaty of Versailles.

After World War II, the Allied Powers set up an international tribunal to try not only war crimes, but crimes against humanity committed under the Nazi regime. Nuremberg Tribunal held its first session in 1945 and pronounced judgments on 30 September/1 October 1946. A similar tribunal was established for Japanese war crimes (the International Military Tribunal for the Far East). It operated from 1946 to 1948.

Following the beginning of the war in Bosnia, the United Nations Security Council established the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1992

and, following the genocide in Rwanda, the International Criminal Tribunal for Rwanda (ICTR) in 1994. The International Law Commission commenced preparatory work in 1993 for the establishment of a permanent International Criminal Court (ICC). In 1998, at a Diplomatic Conference in Rome, the Rome Statute establishing the ICC was signed. The ICC issued its first arrest warrants in 2005.

International criminal law is a subset of international law. As such, its sources are the same as those that comprise international law. The classical enumeration of those sources as contained in the statute of the International Court of Justice[92] is as follows: treaties, customary international law, general principles of law (and as a subsidiary measure judicial decisions and the most highly qualified juristic writings). The ICC statute contains an analogous, though not identical, set of sources that the ICC may rely on.[93]

The prosecution of severe international crimes – including genocide, crimes against humanity, and war crimes – is necessary to enforce international criminal law and deliver justice to victims. This is an important component of transitional justice, or the process of transforming societies into rights – respecting democracies and addressing past human rights violations. Investigations and trials of leaders who have committed crimes and caused mass political or military atrocities is a key demand of victims of human rights abuses. Prosecutions of such criminals can play a role in restoring dignity to victims, and restoring trusting relationships in society.

The most important institution of international criminal law today is the International Criminal Court (ICC). There are several ad hoc tribunals in addition as follows:

(1) International Criminal Tribunal for the former Yugoslavia (ICTY)

(2) International Criminal Tribunal for Rwanda (ICTR).

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92. See Article 38(1) of the 1946 Statute of the International Court of Justice (ICJ).
93. See Article 21 of Rome Statute of International Criminal Court (ICC) of 17 July 1998 (which entered into force on 1 July 2002).

Also some "hybrid" courts and tribunals exist – judicial bodies with both international and national judges – as follows:

(1) Special Court for Sierra Leone, (investigating the crimes committed during the Sierra Leone Civil War)

(2) Extraordinary Chambers in the Courts of Cambodia, (investigating the crimes of the Red Khmer era)

(3) Special Tribunal for Lebanon, (investigating the assassination of Rafik Hariri)

(4) The War Crimes Court at Kosovo.

2.7.3 International Crimes

An international crime has been defined as "an act universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state that would have control over it under ordinary circumstances".[94] Today, international criminal liability exists at least in respect of war crimes, crimes against humanity, genocide and torture. Other crimes such as terrorism – related crimes, enforced disappearances and extrajudicial killings can arguably also be considered international crimes.

Under the Rome Statute of the International Criminal Court, 1998,[95] the ICC has the jurisdiction to try international crimes. However, for international crime to be established, three conditions must be satisfied. These are:

(1) The criminal norm must derive either from a treaty concluded under international law or from customary international law, and must have direct binding force on individuals without intermediate provisions of municipal law,

(2) The provision must be made for the prosecution of acts penalized by international

94. *US v. List et al*, 19 February 1948, Trials of War Criminals Before the Nuremberg Tribunals under Control Council Law No. 10 (Washington DC: US Government Printing Office, 1950) Vol IX 1230, 1241.
95. Article 5 of Rome Statute of International Criminal Court.

law in accordance with the principle of universal jurisdiction, so that the international character of the crime might show in the mode of prosecution itself (e.g, before the International Criminal Court), and

(3) A treaty establishing liability for the act must bind the great majority of countries.[96]

2.7.4 War Crimes

War crimes are conducts that violate international laws governing war. Instances of these are killing of hostages, abuse of civilians in occupied territories, abuse of prisoners of war and devastations that is not justified by military necessity.[97]

The term, "war crimes" is defined under the Statute of the International Criminal Court[98] as follows:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(i) Willful Killing;

(ii) Torture or inhuman treatment, including biological experiments;

(iii) Willfully causing great suffering, or serious injury to body or health; etc.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts (three of which are hereunder distilled out of a total list of 26):

(i) subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interests, and which cause death to or seriously endanger the health of such person or persons;

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96. BA Garner, (Ed), *Black's Law Dictionary* (8th Edition U.S.A., West Publishing Co. St. Paul, Minessota, 2004), P. 834
97. Supra, P. 1614.
98. Article 8 (2) of the Statute

(ii) committing outrages upon physical dignity, in particular humiliating and degrading treatment; and

(iii) committing rape, sexual slavery, enforced persecution, forced pregnancy, enforced sterilisation, or any other form of sexual violence also constituting a grave breach of the Geneva Convention.

In paragraph 2 (c) and (e) of the same Article 8 of the Statute of the ICC acts constituting serious violations of article 3 common to the four Geneva Conventions of 12 August 1949 in the case of an armed conflict not of an international character; and other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law are enumerated as also constituting war crimes. This buttresses the fact that war crimes are also committed during internal armed conflicts.

2.7.5 Genocide

Genocide has been defined as "an international crime involving acts causing serious physical and mental harm with the intent to destroy, partially or entirely, a national, ethnic, racial, or religious group".[99] Going by the definition proffered by the *New International Webster's Comprehensive Law Dictionary,* genocide simply is "the systematic extermination of racial and national group".[100]

Raphael Lemkin (1900 – 1959), the Polish teenager that mastered nine languages by the age of 14, including French, Spanish, Hebrew, Yiddish, and Russian, defined genocide in 1943 in the following words:

> Generally speaking, genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to

99. BA Garner (Ed.), *Black's Law Dictionary* (8th Edition U.S.A., West Publishing Co. St. Paul, Minessota, 2004), p. 707.
100. Typhoon International Corpn. 2004, p. 527

> signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups.[101]

Of paramount importance is the definition provided for in Article 2 of the Genocide Convention of 1948[102] which stated that genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) killing members of the group;

(b) causing serious bodily or mental harm to members of the 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; and

(e) forcibly transferring children of the group to another group.

The above definition is retained in Article 6 of Rome Statute of International Criminal Court (ICC) while Article 6 of the Convention[103] provided that persons charged with genocide or any of the acts enumerated in Article 3 (of the Genocide Convention) shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

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101. Raphael Lemkin, *Axis Rule in Occupied Europe*, Washington DC. Carnegie Endowment for International Peace. (1944).
102. Convention on The Prevention and Punishment of the Crime of Genocide, adopted by Resolution 260 (III) A of the United Nations General Assemble on 9 December 1948.
103. Article 6 of the Genocide Convention of 1948.

2.7.6 Crimes Against Humanity

Black's Law Dictionary defined "crime against humanity" as follows:

> A brutal crime that is not an isolated incident but that involves large and systematic actions, often cloaked with official authority, and that shocks the conscience of humankind,[104]

Article 6(c) of the Charter of the International Military Tribunal annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis[105] defined Crimes Against Humanity in the following words:

> murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecution on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

The concept of crimes against humanity underwent a gradual evolution following the Nuremberg and Tokyo trials. In the *Eichmann Case***,**[106] the court stated that crimes against humanity differ from genocide in that for the commission of genocide specific intent is required which is not the case with crimes against humanity. In the *Barbie case,*[107] the court provided the following definition of crimes against humanity:

> Crimes against humanity were inhuman acts and persecution committed in a systematic manner in the name of a state practicing a policy of ideological supremacy, not only against persons by reason of their membership of a racial or religious community, but

104. BA Garner (Ed.), *Black's Law Dictionary* (8th Edition U.S.A., West Publishing Co. St. Paul, Minessota, 2004), pp. 400-401.
105. Signed on 8 August 1945.
106. See *Attorney-General of the Government of Israel v. Adolf, the Son of Karl Adolf Eichmann,* Case No. 40/61 (1961).
107. See *Matter of Barbie,* France. Court of Cassation (Criminal Chamber) October 6, 1993 and January 6, 1984.

also against the opponents of that policy whatever the form of their opposition.

In effect, crimes against humanity encompass serious attacks on human dignity or a grave humiliation or degradation of human beings. The Rome Statute of International Criminal Court requires that crimes against humanity be committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. Such crimes can be committed in time of peace as well as during an armed conflict.

Article 7 (1) of the Statute[108], therefore, has the most comprehensive definition of crimes against humanity. It stated that 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation or forcible transfer of population;

(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(f) Torture;

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as

108. Rome Statute of the International Criminal Court.

impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the court;

(i) Enforced disappearance of persons;

(j) The crime of apartheid; and

(k) Other inhumane acts of a similar character internationally causing great suffering, or serious injury to body or to mental or physical health.

Article 7(2) of the Statute defined 'Attack directed against any civilian population', 'Extermination', 'Enslavement', 'Deportation or forcible transfer of population', 'Torture', 'Forced pregnancy', 'Persecution', 'The crime of apartheid', and 'Enforced disappearance of persons'.

Article 5(1) of the Statute gives the international Criminal Court (ICC) the jurisdiction with respect to the following crimes:

(a) The crime of genocide;

(b) Crimes against humanity;

(c) War crimes; and

(d) The crime of aggression.

2.7.7 Grave Breaches

The most serious crimes are termed grave breaches, and provide a legal definition of a war crime. Grave breaches of the Third and Fourth Geneva Conventions include the following acts if committed against a person protected by the convention:

(1) willful killing, toture or inhumane treatment, including biological experiments;

(2) willfully causing great suffering or serious injury to body or health.;

(3) compelling a protected person to serve in the armed forces of a hostile power;

(4) willfully depriving a protected person of the right to a fair trial if accused of a war crime.

Also considered grave breaches of the Fourth Geneva Convention are the following:

(1) taking of hostages

(2) extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly

(3) unlawful deportation, transfer, or confinement.

Nations who are party to the Geneva Convention of 1949 must enact and enforce legislation penalizing any of these crimes. Nations are also obligated to search for persons alleged to commit these crimes, or persons having ordered them to be committed, and to bring them to trial regardless of their nationality and regardless of the place where the crimes took place.

The principle of universal jurisdiction also applies to the enforcement of grave breaches when the UN Security Council asserts its authority and jurisdiction from the UN Charter to apply universal jurisdiction. The UN Security Council (UNSC) does this via the International Criminal Court just as it did when the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda were established to investigate and/or prosecute alleged violations.

2.7.8 Human Rights

Numerous definitions of the phrase "human rights" abound among text writers, but none has won general acceptability. This is the reason why we should first discover the meanings of "right" and "human" before delving into a definition of human rights. Moreso, the question of what is meant by a "right" is itself controversial and the subject of serious jurisprudential debate.[109]

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109. See WN Hohfeld, 'Fundamental Legal Conceptions as Applied to Judicial Research',23 *Yale Law Journa*l, 1913, p.16; Shestack, 'The Jurisprudence of Human Rights' in Heron *Human Rights in International Law,* vol. 1, p. 69; Malcon N. Shaw**,** *International Law***,** 4th edition, Cambridge University Press, (1997) p. 196.

The word "right" is derived from the Latin word *rectus* which in the noun form means that to which a person has a just and valid claim, whether it be land, a thing, or the privilege of doing something or saying something. A right is in general, a well founded claim, and when a given claim is recognized by the civil law, it becomes an acknowledged claim or legal right enforceable by the power of the state.[110] It could as well be said that a legal right is any advantage or benefit conferred upon a person by a rule of law.[111]

The dictionary definition of the word "human" presented it as "pertaining to, characteristics of, or having the nature of mankind.[112] It is clear from the above explanations and definitions that human rights are those rights which are characteristics of, or common to human beings. The phrase "human rights" has, therefore, been defined as:

> The freedoms, immunities, and benefits that, according to modern values (especially at an international level), all human beings should be able to claim as a matter of right in the society in which they live.[113]

The Supreme Court of Nigeria, in the case of *Ransome Kuti v. A – G, Federation*[114] defined human right in the following words:

> A human right is a right which stands above the ordinary laws of the land which is in fact antecedent to the political society itself. It is a primary condition to a civilized existence and what has been by our constitution since independence is to have these rights enshrined in the constitution so that the right could be immutable to the extent of the non-immutability of the constitution itself.

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110. Hon. Justice Oputa C.A. *Human Rights is the Political and Legal Culture of Nigeria*. 2nd Memorial Idigbe Lectures, Lagos, Nigerian Laws Publications Ltd. (1989), p. 39.
111. *Uwaifo V. A – G Bendel State & Ors.* (1982) 7 S.C. 124 at 273.
112. *Websters Encyclopedic Unabridged Dictionary of the English Language*, New Jersey, Graimercy Book, (1994), p.691.
113. BA Garner (Ed.), *Black's Law Dictionary* (8th Edition U.S.A., West Publishing Co. St.Paul, Minessota, 2004), p. 758.
114. (1975) 2 NWLR (Pt. 6) 211 per Kayode Eso JSC

It follows therefore, that human right is of prime concern in every legal system. As such its enforcement is specifically provided by states in their constitution.[115] There are, however, some rights which cannot be enforced as they are mere aspirations to be realized in the future[116]. A proactive judicial system, both at national and international level, which is unencumbered in its operations is very necessary for the realization of those human aspirations that will make for a conducive co-existence of the citizens in the society[117].

115. For instance, see Section 46 of the Constitution of the Federal Republic of Nigeria 1999 (as amended).
116. For instance, those fundamental objectives and directives principles of state policy enumerated in the Nigerian Constitution are not actionable.
117. See Chapter II of The Constitution of the Federal Republic of Nigeria, 1999 (as amended).

CHAPTER THREE

THE UNITED NATIONS CHARTER AND THE JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE (ICJ)

3.1 Formation of the United Nations

The United Nations may be defined "in a simplistic way as an organization of independent states… which have accepted the obligations contained in the United Nations Charter signed at San Francisco on 26 June 1945… It must be stressed that it would be perhaps more correct to describe the United Nations, in the light of its present structure, as distinct from its form as contemplated in the Charter, as a system rather than as an organization, *strictor sensu,* for it operates through a multiplicity of related or associated organs and units-some with a certain degree of autonomy- which are interconnected and integrated into one complex".[1]

The earliest concrete plan for a new world organization began under the aegis of the US State Department in 1939.[2] The text of the "Declaration by United Nations" was drafted by U.S. President, Franklin D. Roosevelt; British Prime Minister, Winston Churchill; and Roosevelt aide, Harry Hopkins, while meting at the White House on 29 December 1941. Roosevelt first coined the term United Nations to describe the Allied countries. Roosevelt suggested the name as an alternative to the name "Associated Powers". The term "United Nations" was officially used on 1st and 2nd January 1942, when 26 governments signed the Declaration. By early 1945 it had been signed by 21 more states.

During the World War II, the United Nations became the official term for the Allies. In order to join, countries had to sign the Declaration and declare war on the Axis.

The idea for the future United Nations as an international organization emerged in declarations signed at the wartime Allied Conferences: the Moscow conference and the

1. JG Starke, *Introduction to International Law* (9th Edition, London, Butterworth & Co. (Publishers) Ltd. 1984), Page 601.
2. Townsend Hoopes and Douglas Brinkley, FDR and the Creation of the U.N. (1997) PP 1-55.

Tehram Conference in 1943.

From August to October 1944, representatives of the Republic of China, Britain, the U.S.A. and the USSR met to elaborate plans at the Dumbarton Oaks conference in Washington, D.C. Those and later talks produced proposals outlining the purposes of the United Nations Organization (UNO), its membership and organs, as well as arrangements to maintain international peace and security and international economic and social cooperation. Governments and private citizens worldwide discussed and debated these proposals.

At the Yalta Conference, it was agreed that membership would be open to nations that had joined the Allies by 1 March 1945. Brazil, Syria and a number of other countries qualified for membership by declarations of war on either Germany or Japan in the first three months of 1945 – in some cases retroactively.

On 25 April 1945, the United Nations Conference on International Organization began in San Francisco. In addition to governments, a number of non-government organizations, including Rotary International and Lions Clubs International received invitations to assist in the drafting of a charter. After working for two months, the fifty nations represented at the conference signed the Charter of the United Nations on 26 June 1945. Poland which was unable to send a representative to the conference due to political instability, signed the charter on 15 October 1945. The charter stated that before it would come into effect, it must be ratified by the Governments of the Republic of China, France, the USSR, the United Kingdom and the United States of America, and by a majority of the other 46 signatories. This occurred on 24 October 1945, and the United Nations was officially formed.

By the formation of the United Nations Organization, the League of Nations, which had existed since the end of World War I, formally dissolved itself on 18 April 1946 and transferred its mission to the United Nations. An integral part of the United Nations Charter

which came into force on 24 October 1945, as stated above, is the Statute of the International Court of Justice (ICJ).

3.2 The United Nations Charter

The San Francisco conference which held in April 1945 drafted the United Nations Charter. This was signed on 26 June 1945 and came into force on 24 October 1945. The Statute of the International Court of Justice is an integral part of the Charter.

Several amendments have been made to some parts of the UN Charter. Notably amendments to Articles 23, 27 and 61 of the Charter were adopted by the General Assembly on 17 December 1963 and came into force on 31 August 1965. A further amendment to Article 61 was adopted by the General Assembly on 30 December 1971, and came into force on 24 September 1973. An amendment to Article 109, adopted by the General Assembly on 20 December, 1965, came into force on 12 June 1968.

The UN Charter, as amended, has been the guide for the operation of the United Nations Organization (UNO) in almost 60 years of its existence. Article 7(1) of the Charter lists the principal organs of the UN as the General Assembly, Security Council, Economic and Social Council, Trusteeship Council, International Court of Justice, and the Secretariat. Article 7(2) of the Charter empowers the UN to set up subsidiary organs.

Chapter XIV of the UN Charter (covering Articles 92 to 96) deal with the International Court of Justice (ICJ). By Article 92 of the Charter, the ICJ shall be the principal judicial organ of the UN. Under Article 93 of the UN Charter, all members of the United Nations are automatically parties to the Statute of the ICJ. Non-members of the UN may become parties to the Statute of the Court on condition to be determined in each case by the General Assembly on the recommendation of the Security Council.

3.3 The World Court

The idea of peacefully settling disputes at international level is a very old one. Systems of mediation and arbitration were known, but not the establishment of a permanent

bench of judges to settle disputes, employing strict judicial techniques. The first attempt at creating the world court was made with the preparation and adoption of the Covenant of the League of Nations. The League was the predecessor of the United Nations and was created at the end of World War I.

Under a mandate of the Article 14 of the Covenant of the League of Nations, a concrete shape was given to the idea of a Permanent Court of International Justice (hereinafter referred to as "the Permanent court" or "the PCIJ"). The Permanent Court was established with 15 judges elected by the Assembly and the Council of the League of Nations. They represented the main forms of civilization and the principal forms of legal systems of the world.

The PCIJ became a principal organ of the League of Nations. In the League arrangement political question was to be taken to the Council of the League of Nations while legal question was to be taken to the PCIJ. The Statute, which governed the operation of the Permanent Court, was however an instrument independent from the Covenant of the League of Nations.

Only States could be parties before the Permanent Court. But it was empowered to give advisory opinions to the Assembly and the Council of the League of Nations. The PCIJ, which came into operation in 1922 and ceased functioning in 1940 with the outbreak of the Second World War, dealt with 29 contentious cases and gave 27 advisory opinions.

The Permanent Court was dissolved in 1946 as a result of a decision at the San Francisco Conference to create a new International Court of Justice (the ICJ) on the same lines as the PCIJ, but as a principal judicial organ of the United Nations. Contrary to the Statute of the PCIJ, the Statute of the ICJ is an integral part of the Charter of the United Nations.[3] Both instruments were adopted on 26 June 1945, and came into force on 24 October 1945.

3. Article 92 of the United Nations Charter. See also *the Barcelona Traction Case, Preliminary objection* ruling delivered on 24 July 1964 between *Belgium v. Spain* ICJ Reports 1964, Pages 6-166.

3.4 Establishment of International Court of Justice (ICJ)

The general lines of work of the International Court of Justice (ICJ) was established under Chapter XIV (Articles 92 to 96) of the Charter of the United Nations Organization. Article 92 of the UN Charter states that the ICJ shall be the principal judicial organ of the United Nations and shall function in accordance with the provisions of the Statute of the Court which is annexed to the UN Charter.

By Article 93 of the Charter, all members of the UN are *ipso facto* parties to the Statute of ICJ. A non-member of the UN may become a party to the Statute of the Court on conditions to be determined in each case by the UN General Assembly upon the recommendation of the Security Council.

Article 94 of the UN Charter provides that each member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party. Failure of a party to a case to perform the obligations incumbent upon it under a judgment rendered by the Court will provide the other party the choice of approaching the Security Council, which may, if it deems it necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

The effect of the provisions of Article 94 of the Charter seems to have stared Nigeria in the face after the decision of the ICJ in the *Case concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea Intervening).*[4]

Sovereignty over the Bakassi Peninsula and areas in the Lake Chad Basin was the source of this long-running territorial dispute between Nigeria and Cameroon. With estimated populations of 37,500 and 60,000, respectively,[5] and significant resources located therein, both states had claimed the Bakassi Peninsula and Lake Chad basin for at least 20

4. [2002] F.W.L.R. (Pt. 133), Pages 202 to 414.
5. See Counter-Memorial of the Federal Republic of Nigeria *(Cameroon v. Nigeria)* [1999] ICJ Rep, Pleadings, paras. 33, 416 (May), ICJ Doc CR 2002/9, at 45, Para. 134 (1 Mar. 2002).

years and, despite years of bilaterial negotiations, no diplomatic progress had been achieved. Armed clashes throughout the region continued. The stalemate caused increasing frustration on the part of Cameroon; indeed, just before its 1994 application to the ICJ, 34 of its soldiers had reportedly died in a border skirmish.

Cameroon submitted the case unilaterally, and invoked the ICJ's jurisdiction pursuant to both states' declarations adhering to Article 36(2) of the ICJ Statute. Upon commencement of the case, Nigeria initially contested jurisdiction, arguing that both states had already agreed to settle the dispute through existing bilateral channels.[6] Despite its initial resentments, Nigeria later participated fully throughout the ICJ proceedings. On the ground, armed conflict continued while the case was pending.

The ICJ's October 2002 judgment awarded Cameroon the Lake Chad boundary it sought, and allocated around 30 villages to Cameroon and a few to Nigeria. The Court also awarded Cameroon the Bakassi Peninsula. Nigeria won the Maritime-related ruling contained in the Judgment and much of the boundary between Lake Chad and Bakassi. The Court explicitly obligated both parties to withdraw their military, police, and administration from the affected areas 'expeditiously and without condition'.[7] As for Equatorial Guinea, the intervener, the ICJ drew the maritime boundary in a manner favourable to it.

Soon after the ICJ judgment, Nigeria issued an official statement which appeared to accept parts of the decision it considered fair or favourable while rejecting other parts it found 'unacceptable'. Nigeria pleaded its Constitution's principles of federalism as a reason for non-compliance: since 'all land and territory comprising the nation of Nigeria is specified in the Constitution', the federal government could not give up Bakassi until the requisite national and state assemblies amended the Constitution.[8] President Obasanjo of

6. Preliminary Objection of Nigeria, *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria)* [1998] ICJ Rep. 275 at para 18; [2002] F.W.L.R. (Pt. 132) 1.
7. *Land and Maritime Boundary between Cameroon and Nigeria* [2002] ICJ Rep. 303, at para. 325.
8. 'Cameroon: Bakassi: Why the ICJ Judgment is Unacceptable-Government'. Africa News Service. 24 Oct 2002. Available in Lexis. News Library. Allnews file.

Nigeria explained the country's position thus: '[w]e want peace, but the interest of Nigeria will not be sacrificed…[W]hat may be legally right may not be politically expedient'.[9] A Cameroonian politician, however, believed that Nigeria's official position is one of deliberate indifference – it neither accepts nor rejects the verdict.[10]

Some viewed Nigeria as being recalcitrant and its position as troubling holding that both countries had agreed in advance to respect whatever decision the ICJ arrived at. President Paul Biya of Cameroon reported that he and President Obasanjo had agreed to abide by the ICJ judgment in a meeting with UN Secretary-General, Kofi Annan on 5 September 2002, and the United Nations issued a press statement to that effect.[11] Nigeria contested the existence of any such agreement contending that they had merely discussed confidence-building measures to reduce tension on the border and mandated Annan's staff to issue a statement.

Others viewed the Nigerian government's position as understandable when one considers that it was under tremendous internal political pressure not to respect the judgment especially with regard to Bakassi, as various large Nigerian groups have opposed it and called for war, if necessary. Ethnic Nigerians in the area also feared unequal treatment and persecution by Cameroon.[12]

The international community had taken interest in ensuring compliance with the ICJ's judgment, and had subjected Nigeria to substantial diplomatic pressure. While the United States and France had pressured Nigeria to accept the ruling, the United Kingdom took the lead – the British High Commissioner to Nigeria stated: '[ICJ] judgments are binding and not subject to appeal. Nigeria has an obligation under the United Nations

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9. Ogwuda. 'Bakassi: I'm Ready for Talks with Biya, says Obasanjo'. *Vanguard Newspaper* (Lagos), 30 October 2002. Available at www.allafrica.com.
10. 'Nigeria Has No Substantive Claim on Bakasi-Cameroonian Politician'. *Weekly Trust* (Kaduna). 13 December 2002. Available at www.allafrica.com.
11. 'Nigeria Defends Defiance of World Court Border Ruling'. UN Press Release SG/T/2344 (10 September 2002).
12. A P. Llamzon 'Jurisdiction and Compliance in Recent Decisions of the International Court of Justice' EJIL (2007) Vol. 18 No. 5, 815 at 836.

Charter to comply with the judgment'.[13] The British Foreign Minister for Africa then met with the ambassador to remind him that President Obasanjo had promised to abide by the Judgment. This hard line softened considerably, however, to asking that Nigeria 'establish a dialogue with Cameroon to find a political way forward', possibly because of the possibility that Nigeria was indeed ready to resort to war.[14]

Following intensive mediation efforts by the UN Secretary-General, Kofi Annan, the two states on 12 June 2006 entered into an agreement setting out a 'comprehensive resolution of the dispute' over the Bakassi peninsula in reliance upon the ICJ demarcation.[15] In August 2006, both states held a joint ceremony to mark the transfer of control over the peninsula through the withdrawal of Nigerian troops from the northern part of the territory.

While the *Cameroon v. Nigeria* ICJ judgment compliance case ended in mutual agreement of the parties, in the case of *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras: Nicaragua Intevening,*[16] Honduras had in January 2002 made a formal accusation of non-compliance under Article 94(2) of the UN Charter against El Salvador asking the Security Council to make recommendations to induce Salvadorans obedience of the ICJ judgment.

Again, in the case of *Territorial Dispute (Libya v. Chad)*[17] over the Aouzou Strip, despite the fact that both parties submitted the dispute to the ICJ and equally recognized the decision of the court awarding the entire Aouzou Strip to Chad, Libya under Col. Moamar Gadafi still did not comply with the ICJ decision. This necessitated Chadian Ministry of Foreign Affairs formal protest on 30 January 1997 and threat to take the matter to the Security Council under Article 94(2) of the UN Charter. However, following a call for

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13. Paulson. 'Compliance with Final Judgment of the Intenrational Court of Justice since 1987' EJIL (2004) Vol. 98, 434 citing *Agence France Press.* Doc. FBIS-AFR-2002-1025 (25 October 2002).
14. Ibid.
15. See 'Cameroon, Nigeria Sign Agreement Ending Decades-Old Border Dispute'. UN Press Release AFR/1397. 12 June 2006.
16. [1992] ICJ Rep 351.
17. See ICJ Judgment of 3 February 1994 reported in [1994] ICJ Rep 6.
UN or specialized agency to request advisory opinions of the ICJ on legal questions arising within the scope of their activities.

peace by President Deby of Chad and mutual visits by both heads of state signaling a 'definitive reconciliation of the two countries' in 1998, the UN Security Council intervention became unnecessary as Chadian sovereignty over the disputed Aouzou Strip was recognized by Libya.

Under Article 95 of the UN Charter, the establishment of the ICJ does not prevent members of the United Nations from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future.

By Article 96 of the Charter, the General Assembly or the Security Council may request the ICJ to give an advisory opinion on any legal question. Moreover, the General Assembly may under Article 96(2) authorize any other organ of the UN or specialized agency to request advisory opinions of the ICJ on legal questions arising within the scope of their activities.

The request of advisory opinion takes the form of a written document containing an exact statement of the question upon which the opinion is requested and such request is to be accompanied by all relevant documents.

3.5 Analysis of the ICJ Structure

The structure of the ICJ is manifest in its Organization and Procedures. We shall analyze these in this paragraph.

3.5.1 Organization of the Court

The International Court of Justice is composed of 15 judges elected for a period of nine years; no more than one national of any State may be a member of the Court.[18] The judges represent the main legal systems of the world.

The Court elects, for a term of three years, the President and Vice-President of the Court. The Court is assisted by a Registry, headed by a Registrar.

18. Article 3(1), Statute of the International Court of Justice.

Elections are held every three years for five vacancies of the Court each time. Eligible as judges are persons of high moral character and possessing the qualifications required in their respective countries for appointment to the highest judicial offices, or jurisconsults of recognized competence in international law.[19] Although no specific quota to different regions of the world is assigned, so far the practice has been to elect one judge from each of the States which are Permanent Members of the Security Council, three judges from Asia, three judges from Africa, two judges from Latin America and one judge each from Western Europe and other States and from the Eastern Europe States. The election is held simultaneously both in the General Assembly and the Security Council, each voting independently of the other. In order to get elected, a candidate must obtain an absolute majority in both forums.

The Court may establish chambers composed of three or more judges. Such Chambers were constituted upon request of the parties, for example, in the *Gulf of Maine*,[20] *Frontiers Disputes*,[21] *ELSI*[22] and *Land, Island and Maritime Frontiers*[23] cases. The Court also established a special chamber for environmental matters. It should be pointed out that a judgment rendered by a chamber is considered a judgment of the Court.

All the judges of the Court, including ad-hoc judges, constitute the Bench of the Court in a case. No member can be dismissed unless in the opinion of the members he/she has ceased to fulfill the required conditions.[24]

During his/her term of office, no judge should engage in any political or administrative functions or in any other occupation of a professional nature.[25] Further, no judge may participate in a case brought before the Court in which he/she has previously

19. Article 2 of the Statute.
20. See the *Delimitation of Maritime Boundary in the Gulf of Maine (Canada v. United States)*, ICJ Reports 1984.
21. *The Frontier Dispute (Burkina Faso v. Republic of Mali*), ICJ Reports 1986.
22. *Elettronica Sicula S.p.A (ELSI) (United States v. Italy)*, ICJ Reports 1989.
23. *The Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras: Nicaragua Intervening)*, ICJ Reports 1993.
24. Article 18 of the Statute.
25. Article 16 of the Statute.

been involved as agent or counsel for one of the parties, as a member of a commission of inquiry, or as a member of a national or international tribunal or arbitration.

In this sense, a member of the Court may declare that he/she should not take part in the decisions in a particular case. It is also open to the President of the Court to suggest that for some special reasons one of the members of the Court should not sit in a particular case and should give his/her notice accordingly. In case of disagreement between the judge concerned and the President, the matter shall be settled by a decision of the court.

In order to maintain equality in the status of the parties, the Statute provides that where a judge of the nationality of one of the parties is sitting on the bench, the opposing party may choose an additional judge. Such a judge need not be a national judge, but should be a national of the party which is not represented on the bench. Further, each of the parties may choose such a judge if neither of them has its national sitting on the bench. Judges so chosen by the parties have the same rights and duties as the members of the Court for the duration of the proceedings.[26] It was on the basis of this provision that Judge Bola Ajibola of Nigeria sat as Ad hoc Judge in the *Case concerning The Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea Intervening)* in which he wrote a powerful dissenting opinion.[27]

The official languages of the Court are English and French. If the parties agree, the case can be conducted and the judgment delivered exclusively in either English or French.

The Court may also authorize, at the request of a party, a language other than French or English to be used by that party. In such a case, an English or French translation has to be attached to the judgment.[28]

In general, each party to a dispute bears its own costs for the procedure. Nevertheless, the Court may decide that all or part of a party's cost be paid by the other party.[29]

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26. Article 31 of the Statute.
27. [2002] F.W.L.R. (Pt. 134) Pages 415 to 586.
28. Article 39 of the Statute.
29. Article 64 of the Statute and Article 97 of the Rules of the Court.

3.5.2 Procedure of the Court

The Statute of the ICJ, in chapter 3, establishes procedures for the conduct of a case before the Court. The provisions of the Statute are supplemented by the Rules of the Court. The current Rules were promulgated in 1978. The Court, while being faithful to the provisions of the Statute, treats matter concerning procedure with the necessary flexibility.

States parties to a dispute may commence a case after notifying it to the Registrar of the Court. Upon receipt of either the notification of the special agreement or a written application, the Registrar of the Court will communicate the application to all concerned. The Members of the United Nations will be informed through the Secretary-General. The Registrar communicates the application to any other States entitled to appear before the Court.[30]

Agents appointed by the parties represent them before the Court. They may have the assistance of counsel or advocates. The agents, counsel and advocates of the parties before the Court enjoy privileges and immunities necessary for the independent exercise of their duties.[31]

The ICJ may, without prejudice to the decision as to its jurisdiction in the case, where necessary, indicate interim measures for the protection of the rights of one of the parties.[32]

Such measures are also aimed at preserving the situation under dispute with a view to giving full effect to the final decision of the Court. In some cases, the Court had first ordered interim measures of protection and later found itself without jurisdiction. See the case of *Anglo-Iranian Oil Co. (United Kingdom v. Iran*).[33] In other cases, it had rejected the request for interim measures of protection on the ground that the nexus between the rights to be protected and the measures sought was not established. See, for instances, the case of the

30. Article 40 of the Statute.
31. Article 42 of the Statute.
32. Article 41 of the Statute.
33. ICJ Judgment on Jurisdiction of 22 July 1952.

Legal Status of the South Eastern Territory of Greenland.[34]

Once the matter has been brought before it, the Court may indicate measures not only at the request of one of the parties, but also on its own initiative. The Court can order interim measures of protection even if there is a special agreement between the parties not to preserve the *status quo*. Generally, such a conflict does not arise, as, in most cases, interim measures of protection are ordered only upon the request of one of the parties. Furthermore, the Court may indicate measures other than those requested by a party, or it may reject the application *in toto*.

The Court indicates such measures by way of an order. Even if such an order does not have the character of a recommendation, it has a binding effect.

See *LaGrand Case (Germany v. United States of America*).[35]

The Court must give notice of the measures indicated to the parties concerned and to the UN Security Council.[36]

It must however be noted that, as interim measures of protection are not a judgment of the Court within the meaning of Article 94 of the United Nations Charter, the Security Council cannot be called upon to enforce them. However, a party that has failed to comply with an order is under obligation to compensate the other party.

Article 79 of the Rules of the Court governs decisions on preliminary objections. Preliminary objections are those that require a decision before the court can proceed to consider the dispute on its merits. As the Court itself pointed out, while delivering judgment on preliminary objection in the case of *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*,[37] the purpose of a preliminary objection is to avoid not merely a decision on, but even any discussion of, the merits. In some cases, if issues concerning jurisdiction and merits, on facts, cannot strictly be separated, the Court, with the agreement

34. PCIJ Series A/B No. 58.
35. ICJ Judgment of 27 June 2001; 40 ILM 1069 (2001).
36. Article 41(2) of the Statute.
37. ICJ Reports 1964, P. 44.

of the parties, may join the preliminary objections to the merits phase of the case. Preliminary objections are an issue only in the cases where one State party, accepting the optional jurisdiction of the Court, brings a case against another State party on the basis of the declaration that State submitted under Article 36(2) of the Statute.

The bases of an objection include an objection to the capacity of a State to present a claim before the Court; an objection to the jurisdiction of the Court to pronounce upon the merits of a case because of an applicable reservation; an objection on the ground that the matter has already been decided; or that the matter is pending in another forum between the same parties.

Objections can also be raised on the ground that the instrument conferring jurisdiction is no longer in force, or that the instrument was not relevant at the critical point in time when the dispute arose, or that the dispute is essentially within the domestic jurisdiction; or that the matters at issue are not governed by international law.

Objections have also been raised on the ground that diplomatic means of settlement have not been exhausted, or that the issues involved are essentially political in nature, or that the matter is under considerations before the Security Council of the United Nations. Objections that local remedies have not been exhausted have been raised in cases brought before the Court by States pursuant to an infringement of the rights of their nationals.

The Court has not accepted objections to its jurisdiction on the ground that the issues involved are essentially political. See the judgment on the preliminary objection in the case of the *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America).*[38] It has rejected the argument that it should not entertain jurisdiction in a matter, which is also being considered by the Security Council of the United Nations. This was in *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. U.K. and U.S.A.).*[39]

38. ICJ Reports 1984.
39. ICJ Reports 1998.

As provided by Article 62 of the Statute of the Court, a State which is not a party to a dispute can intervene in the case if it has an interest of a legal nature that is likely to be affected by a decision in the case. However, it is for the Court to decide upon its request.

In practice, the Court rarely allows intervention of a third party. Nicaragua was allowed to intervene in the *Land, Island and Maritime Frontier Dispute case,* although only in respect of the Legal Regime of the Gulf of Fronseca. A resolution adopted in 1999 by the Institute of International Law,[40] made some useful suggestions in understanding Article 62 of the Statute of the ICJ.

The phrase, "matters of legal nature", means that the rights/obligations of the intervening State under public international law can be affected by the final decision of the Court.

Intervention does not require the existence of a jurisdictional link between the parties to the dispute and the third State.

Intervention by a third State does not mean that, once admitted, the intervening State becomes a party to the dispute. The intervening State is not entitled to nominate a judge ad hoc. However, with the consent of all the parties, an intervener may become a full party to the proceedings. The decision of the Court in relevant part(s) is also binding upon the State that is allowed to intervene.

Further, according to Article 63 of ICJ Statute, a State, which is a party to an international convention, can intervene in a case in which the construction of the provision of the Convention is at issue. This was the position in the case of *Wimbeldon (France, Italy, Japan and the United Kingdom v. Germany*)[41] in which Poland was allowed to intervene. In the case of *Haya de la Torre (Columbia v. Peru),*[42] Cuba was allowed to intervene in the

40. See the Resolution on "Judicial and Arbitral settlement of Disputes involving more than two states", adopted by the Institute of International Law at its Berlin Session (1999).
41. PCIJ, Series A, No. 1 1923.
42. ICJ Reports 1951.

proceedings. In such a case, the decision given by the Court is equally binding on the intervening State. An international organization, however, does not have a right to intervene in any case before the Court, it only has the right to be informed of any proceedings in which the interpretation of its constituent instrument, or any Convention adopted thereunder, is in issue.[43] Further, the Court may ask such an organization to furnish information or it may supply information on its own initiative.

Proceedings before the Court take place in two phases: the written and the oral proceedings. The written memorials and counter-memorials, and, if necessary, replies, are presented to the Court through the Registrar in the order prescribed and within the time fixed by the court for this purpose. The President of the Court, in consultation with the Registrar convenes a meeting of the parties before deciding upon the deadlines and the order in which the written memorials and counter-memorials should be submitted.[44]

The Court determines the number of sittings and the time allocated to each party. For this purpose, the Court passes the necessary orders and makes all necessary arrangements for the taking of evidence.[45] The oral proceedings before the Court involve the presentation of arguments by the agents, counsel and advocates and also the hearing of witnesses and experts. The hearings of the Court are under the control of the President or, in his absence, of the Vice President, and, in the absence of both, under the control of the most senior judge of the Court. The oral hearings are open to the public unless the Court decides otherwise or unless the parties demand that the public be not admitted. Minutes are prepared at each hearing and signed by the Registrar and the President, and they alone are authentic.

Where service of a notice upon a person other than the agents, counsel and advocates is necessary, the Court sends such a notice to the government of the State in whose territory the notice has to be served. A similar procedure is also applied to obtain

43. Article 34 of ICJ Statute.
44. Article 49 of the Rules of the Court.
45. Article 48 of the Statute.

evidence on the spot.[46] Similarly, the Court may at any time entrust any individual, body, bureau, commission, or to her organization that it may select, with the task of carrying out an inquiry or giving an expert opinion.[47] The Court may make an on-site visit for a better appreciation of the case as in the case of *Gabcikovo-Nagymaros Project (Hungary v. Slovakia*[48].

Once the Court declares the hearing closed, it deliberates on the matter in private and the proceedings of the court are kept confidential. The deliberation of the Court are based on issues or questions for decision identified by the President of the Court and finalized in consultation with other judges. Each judge, in the reverse order of seniority (i.e commencing from the most junior judge), presents his/her views by way of answers to the questions drawn up by the Court. These comments are in the form of notes, which are circulated to all the judges. These notes are strictly for the court, and enable it to form an initial idea of where the majority opinion may lie.

At the end of the case, the registry destroys the notes. Further deliberations follow, with judges expressing their comments orally.

Once the Court forms a broad idea of the decision involved and the majority ascertained, a drafting committee of three members of the Court is constituted. The preliminary draft judgment is secret and is open to further discussions and suggestions. The drafting committee revises the draft in the light of the discussion, and presents a revised draft for two readings by all the judges. At the end of the second reading, the final vote is taken. Each decision is taken by an absolute majority of the judges present. Abstentions are not allowed. A judge who has failed to attend a part of the oral proceedings or deliberations, but who has nevertheless not missed anything essential, can participate in the vote. If a judge is incapable of attending the meeting, he/she can send his/her vote by correspondence.

46. Article 44 of the Statute.
47. Article 50 of the Statute.
48. ICJ Reports 1997.

In case of a tie in the votes, the vote of the President determines the outcome of the decision.

On a few occasion, the respondent State has failed to appear before the Court to defend itself, having questioned the jurisdiction of the Court to adjudicate upon the matter brought before it by the applicant State.

For instance, Iran did not appear in the case of *United States of America Diplomatic and Consular Staff in Tehran (United States of America v. Iran),*[49] a case the United States of America brought before the Court on the basis of the optional protocols to the Vienna Convention on Diplomatic Relations, 1961; the Vienna Convention on Consular Relations, 1963; and the Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran, 1955.

On a few occasions, the respondent State withdrew from the proceedings, having lost its argument against the jurisdiction of the Court. For instance, the United States of America did not participate in the merits phase of the proceedings of *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v. United States of America)*[50].

On such occasions, it is not uncommon for the non-appearing State to make available to the Court its point of view, either through formal communications or through informal means. In such cases, the Court makes every efforts to gather information concerning the positions of the non-appearing State from various sources, including official statements. The Court also communicates these facts to the non-appearing State for its confirmation. Lack of denial is sufficient for the Court to be satisfied that the allegations of facts on which the Applicant State bases its claim are well founded.

In the case of non-appearance of a party, the other party can request the Court to decide in favour of its claim. However, the Court must be fully satisfied, not only that it has

49. Disposed off by the ICJ on 24 May 1980.
50. ICJ Reports 1986.

jurisdiction in accordance with Articles 36 and 37 of the Statute of the Court, but also that the claim is well founded in fact and law[51]. It must be noted, though, that while the Court is expected to do everything possible in its power to appreciate the case of the defaulting party on the basis of the available facts and communications, its efforts, as the Court itself pointed out, cannot be expected to fully substitute or represent the interest of the defaulting State, which it alone can defend vigorously by participating in the proceedings.

The judgment of a Court may not go beyond the scope of the claims made by the parties or the submissions made in the unilateral application to the Court.

The Court may give a declaratory judgment or judgment requiring performance. A declaratory judgment covers questions of jurisdiction, interpretation of international treaties concerning the existence or non-existence of a legal principle or relationship, and questions of whether there has been an infringement of a right (without pronouncing upon a wrong resulting from such infringement).

The Court may also declare lack of jurisdiction, or it may decline to give a decision because the dispute has already been resolved as a result of the conduct of the defendant. It is not necessary, in any case, for the Court to pronounce upon the merits of the dispute, but it could impose an obligation upon the parties to seek a settlement corresponding to their special circumstances by means of negotiations in good faith.

The judgment states the reason for the decision and contains the names of the judges who took part in its decision. Judges who do not fully share the reasoning of the Court, and those who disagree with its contents, are entitled to deliver their separate or dissenting opinions. The judgment, once delivered, is final and without appeal, and is binding upon the parties. Article 59 of the Statute makes it clear that such decisions of the Court have binding force between the parties and in respect of that particular case. This means that decisions of the International Court of Justice do not have the status of a precedent (*stare decisis*).

51. Article 53 of the Statute of the Court.

However, the decisions of the ICJ, the reasons generally given in a case and the interpretation of applicable law have high persuasive value, and are treated with some caution by the ICJ itself as subordinate sources of international law.

A judgment once rendered, can be revised on application made by a party if some fact, of such a nature as to be a decisive factor, was, when the judgment was given, unknown to the Court and also to the party claiming revision.[52] However, the earlier lack of knowledge of the fact on the part of the State seeking revision of the decision of the Court should not be due to any negligence on its part.

The application for revision can be made only within six months of the discovery of the fact. However, no application for revisions may be made after the lapse of 10 years from the date of the judgment. The Court may require previous compliance with the terms of the judgment before it admits proceedings in revisions. In addition, the proceedings for revision can be commenced by a judgment of the Court expressly recording the evidence of the new fact, and recognizing that it has such a character as to lay the case open to revision, and declaring the application for revision as admissible. It is understood that the proceedings of a case involving an application for revisions will be subject to the same procedure as the original case.

A judgment is binding upon the parties in accordance with Article 2 and Article 94(1) of the United Nations Charter. In case of failure by one party to comply with the obligations arising from the decisions of the Court, the other parties can have recourse to the Security Council for the enforcement of the decision.

The Security Council may, at its own discretion, make recommendations or decide on other measures, which can be taken to give effect to the judgment. The measures can be indicated by the Security Council in this regard only under Chapter VI of the United Nations Charter, meaning that they amount to a recommendation.

52. Article 61 of the Statute.

By Article 94 of the United Nations Charter, each member of the United Nations undertake to comply with the decisions of the International Court of Justice in any case to which it is a party. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

The challenges of non-compliance of ICJ decisions manifested in the aftermaths of the Court's decisions in the cases of *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras: Nicaragua Intervening*[53]); *Territorial Dispute (Libya v. Chad)*[54]*; Gabcikovo – Nagymaros Project (Hungary v. Slovakia)*;[55] *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria);*[56] *Avena and Other Mexican Nationals (Mexico v. United States;*[57] and *LaGrand (Germany v. United States)*.[58] However mutual meetings and consultations, without direct intervention of the UN Security Council, resulted in post judgments agreements in these cases.

After almost seventy years of functioning by the UN, the instances in which action by the Security Council has been invoked under Article 94(2) are still rare: this Article was used by the UK in 1951 with respect to the *Anglo-Iranian Oil Co. case (UK v. Iran)*; by Nicaragua in 1986 in the case of the *Military and Paramilitary Activities Against Nicaragua (Nicaragua v. USA)*; and by Bosnia-Herzegovina, in 1993 in the case against the Federal Republic of Yugoslavia (later called Serbia and Montenegro).

3.6 Scope of the Jurisdiction of ICJ

The International Court of Justice has jurisdiction in two types of cases: firstly, contentious issues between states in which the Court produces binding rulings between

53. ICJ Reports 1993.
54. [1994] ICJ Rep.6.
55. ICJ Reports 1997.
56. ICJ Reports 2002.
57. [2004] ICJ Rep. 128.
58. [2001] ICJ Rep. 466.

states that agree, or have previously agreed, to submit to the ruling of the Court; and secondly, advisory opinions, which provide reasoned, but non-binding, rulings on properly submitted questions of international law, usually at the request of the United Nations General Assembly, the Security Council or other organs and specialized agencies of the United Nations. While the first category is described as the Court's *Contentious Jurisdiction*, the second category is referred to as its *Advisory Jurisdiction.*

A distinction can be made between incidental jurisdiction and mainline jurisdiction. *Incidental jurisdiction* relates to a series of miscellaneous and interlocutory matters; for example the power of the Court to decide a dispute as to its own jurisdiction in a given case; its general authority to control the proceedings; its ability to deal with interim measures of protection; and the discontinuance of a case. *Mainline jurisdiction*, on the other hand, concerns the power of the Court to render a binding decision on the substance and merits of a case placed before it.

The Statute of the ICJ establishes that for contentious jurisdiction, only States can be parties before the Court.[59] However, States are entitled to sponsor the claims of their nationals against other States. This is generally done by way of diplomatic protection. Such protection under international law can be exercised by the State of nationality only after the person concerned has exhausted local/judicial remedies available in the jurisdiction of the State in which the person has suffered the legal injury.

Exhaustion of local remedies is more than a procedural requirement. Without their exhaustion, no remedies for legal injury can be envisaged at the international level. On the other hand, for a foreign national to exhaust local remedies, such remedies should not only be available, but they should also be effective and not merely notional or illusory.[60]

59. Article 34(1) of the Statute of the ICJ.
60. *The Case Concerning Ahmadu Sadi Diallo (Guinea v. D.R. Congo) Preliminary Objections*, ICJ Judgment of 19 June 2012; 46 ILM 709 (2007).

However, these are matters for judgment in a given case.

The question has also been raised as to whether an individual could renounce through a contract with a foreign government his/her right to seek diplomatic protection from the State of his or her nationality. It is argued that the exercise of diplomatic protection is a right of the State, and its nationals cannot therefore seek its exemption through a contract; this can only be exercised at the discretion of the State. It is also common nowadays for States to agree, in bilateral treaties, to submit dispute concerning foreign investment directly to arbitration outside their jurisdiction without requiring the investing company or individuals to exhaust local remedies.

It is understood that a State cannot sponsor the claims of its national against another State of which he or she or the entity is also a national. Further, in the case of persons with dual or multiple nationality, only the State with which the person enjoys a "genuine link" can exercise diplomatic protection. This is illustrated by the case of *Nottebohm (Liechtenstein v. Guatemala)*.[61] Nottebohm, a German national by birth, took up residence in Guatemala in 1905, and also made it the centre of his business activities. He visited Germany just before the outbreak of the Second World War, and then again in around March 1939. In October of the same year, about a month after the war began, he went to Liechtenstein and applied there for naturalization. This was granted to him on 13 October 1939. After receiving the Liechtenstein passport he applied for a Guatemalan visa. When he returned to Guatemala in 1940 the change of his nationality was registered in the Register of Aliens. A similar amendment was also made to his identity document, and the Civil Registry of Guatemala issued another certificate to the same effect. In 1943 he was arrested as a result of war measures and taken to the United States, where he was interned for more than two years. After his release in 1946 he was not allowed to return to Guatemala. He then

61. Preliminary Objections: ICJ Reports 1953, pp. 111-125; First Phase: ICJ Reports 1955, PP.4-65; Second Phase: ICJ Reports 1955.

left for Liechtenstein. In 1949, his properties in Guatemala were confiscated. In 1951, Liechtenstein took up the matter of Nottebohm and filed an application before the International Court of Justice against Guatemala alleging wrongful acts and claiming restitution and compensation.

For the purpose of invoking the jurisdiction of the Court, Liechtenstein relied upon its own Declaration under Article 36(2) of the Statute dated 29 March 1950 and the Declaration made by Guatemala on 27 January 1947 under the same Article of the Statute.

Guatemala objected to the jurisdiction of the Court on the ground that the declaration it made had expired on 26 January 1952, a few weeks after the filing of the application and long before the power of the Court under Article 36(6) of the Statute, arguing that it was confined to the question of whether the dispute was within the categories mentioned in Article 36(2) of the Statute. It urged the Court not to pronounce upon the Declaration, which was valid only for a special term.

The Court held that it was an international tribunal, which was pre-established by an international instrument defining its jurisdiction and regulating its operations. It was also pointed out that it was the principal judicial organ of the United Nations. Accordingly, in the absence of any agreement to the contrary the Court like any other international tribunal, not being an arbitral tribunal constituted by a special agreement by the Parties, had the power under Article 36(6) to interpret the instruments, which govern its jurisdiction. It also held that once the Court seized of the matter, it had to exercise its power, and the lapse of the Declaration thereafter did not affect the jurisdiction of the Court. The Court unanimously, therefore, rejected the preliminary objection by an order issued on 18 November 1953.

On the merits of the case, Liechtenstein claimed in its application restitution and compensation on the ground that Guatemala had acted towards Nottebohm, a citizen of Liechtenstein, in a manner contrary to international law. Guatemala, on the other hand,

argued that Liechtenstein's claim was inadmissible. While it relied on several grounds for this purpose, a primary ground on which it sought to oppose the claim of Liechtenstein concerned the nationality of Nottebohm, on whose behalf Liechtenstein had approached the Court. The main issue in this case therefore revolved around the alleged irregularity of Nottebohm's naturalization in Liechtenstein or Nottebohm's Liechtenstein nationality.

The Court accordingly confined its examination to whether the naturalization conferred on Nottebohm could be legally upheld as a basis for proceedings before the Court. The Court did not question the right of Liechtenstein to grant its nationality to any person according to its laws. It was mainly concerned with the legal right of that State at the international level to provide diplomatic protection in respect of every person claimed as its nationals against another State.

The central point that the Court stressed in this case was that, "nationality is a legal bond having as its basis a social factor of attachment, a genuine connection of existence, interests and sentiments". The Court then found on the basis of the facts of the case, that Nottebohm did not have a bond of attachment or a genuine link with Liechtenstein.

It was also of the opinion that Nottebohm continued to have a close connection with Guatemala and that this was not affected by his naturalization in Liechtenstein. For this reason, the Court came to the conclusion by 11 votes to 3 that Guatemala was under no obligation to recognize the nationality accorded by Liechtenstein, and hence that Liechtenstein did not have the right to extend its diplomatic protection to Nottebohm against Guatemala.

The Nottebohm case is a standard citation on the question of "genuine link", which is central to the extension of diplomatic protection by a State to its nationals. The fact that Nottebohm maintained close connections with Guatemala, even after his naturalization in Liechtenstein, seemed to have weighed heavily against the right of the latter State to extend its diplomatic protection to him.

It is also held that where the legal interests of company are injured in a foreign jurisdiction, only the State in whose jurisdiction the company is incorporated has the right to sponsor its claims and not the State of nationality of the shareholders, even if they constitute a majority share holding in the company, except where: (1) the rights of the shareholders are directly affected; (2) the company has ceased to exist in the country of incorporation; and (3) the State of incorporation is the country responsible for the injury of the company. See the case of *Barcelona Traction, Light and Power Co. Ltd. (Belgium v. Spain).*[62]

The Barcelona Traction, Light and Power Co. Ltd., (hereinafter called Barcelona Traction) was a Canadian joint stock company formed in Toronto (Canada) in 1911. The greater part of its share capital belonged to Belgium nationals. Barcelona Traction also owned the shares of several other companies, some of which were operating in Spain under Spanish law. The company was chiefly concerned with the construction and operation of electric power plants. As a result of a series of measures taken by the Spanish Government, Barcelona Traction was adjudicated bankrupt in Spain on 12 February 1948, and later subjected to liquidation measures. Canada made several representations to Spain on behalf of Barcelona Traction, but did not succeed in getting its grievances redressed. Later, Belgium took up the case of its nationals who were significant majority shareholders of the company.

Belgium filed a case before the Court, invoking Article 36(1) of the Statute of the Court. In particular, it relied on Article 2 and 17 of the Treaty of Conciliation, Judicial Settlement and Arbitration between Belgium and Spain of 19 July 1927.

Belgium claimed that the Spanish authorities acted contrary to international law against Barcelona Traction, which resulted in damage to the company and its shareholders.

62. Preliminary objections: ICJ Reports 1961; New application: ICJ Reports 1964, pp. 6-166; Second Phase: ICJ Reports 1970, pp. 3-357.

Accordingly, Spain was under an obligation to restore in full to Barcelona Traction its property, rights and interests, and ensure compensation for all other losses. Alternatively, Spain should pay Belgium compensation equivalent to the value of the property, rights and interests of Barcelona Traction. As another alternative, Spain should at least pay to Belgium compensation equivalent to the amount of shares of the capital of Barcelona Traction owned by Belgium nationals, together with the amount of the sums standing due on 12 February 1948 in favour of Belgium nationals.

Before the Court could proceed with the matter on the basis of the memorial filed by Belgium and the preliminary objection raised by Spain, Belgium informed the Court, in accordance with Article 89 of the Rules of the Court that it wished to withdraw from the case. Later Belgium and Spain engaged in negotiations, but as these did not result in any agreement, Belgium presented a new application for the Court to hear the case.

In its first preliminary objection, Spain contended that the discontinuance of the proceedings earlier precluded the applicant from recommencing the proceedings. The Court agreed with Spain that discontinuance was a procedural matter and should be examined in the context of the circumstances of the case. However, the Court rejected Spain's argument that discontinuance signified renunciation of any further right of action unless the right to start new proceedings had been expressly reserved. In the absence of any clear intention on the part of Belgium to renounce its right to recommence the proceedings at the time of seeking discontinuance, the burden of proof was placed on Spain to show that discontinuance meant actual renunciation of that right. According to the Court, Spain could not offer any such evidence, and in particular it found that Spain, when agreeing to the request of Belgium for discontinuance under Rule 89, had not attached any conditions.

The Court also rejected the contention of Spain that Belgium, by its conduct had misled Spain about the significance of the discontinuance of the proceedings before the Court. Such a conduct, Spain argued, amounted to an estopel, precluding Belgium from

exercising the right to recommence the proceedings before the Court. In the view of the Court, Spain had been unable to establish any misleading intention on the part of Belgium, and by recommencing the proceedings Belgium had not put Spain at any disadvantage. According to the Court, Spain would be able to raise all the objections to the jurisdiction of the Court, which it had contemplated pleading prior to the discontinuance of the proceedings.

Spain also argued that recommencement of the proceedings was contrary to the spirit of the Hispano-Belgian Treaty of Conciliation, Judicial Settlement and Arbitration of 19 July 1927, which according to Belgium, conferred jurisdiction upon the Court. The preliminary procedure before discontinuance was said to have already exhausted the basis of the jurisdiction provided by the Treaty and it could not therefore be relied upon once again. The Court rejected this argument and held that the procedures established by the Treaty could not be regarded as exhausted so long as the right to bring new proceedings existed and until the case had been prosecuted to judgment.

The second preliminary objection related to the combined effect of Article 17(4) of the 1927 Treaty, which provided for disputes between parties thereunder to be submitted to the Permanent Court of Justice, and Article 37 of the Statute of the ICJ, which transferred the subsisting competence of the PCIJ to consider a case to the ICJ.

Spain argued that the termination of the PCIJ had also resulted in the termination of obligations under Article 17(4) of the Treaty in respect of Spain because Spain originally had not been a member of the United Nations when it was formed, and of which the Statute of the Court was an integral part. Spain argued that it had become a member of the Untied Nations, and hence to the Statute of the Court, only in December 1955, and because of the gap between 1945 and 1955, Article 37 of the Statute could not be treated as a basis to revive the obligations Spain had had under Article 17 of the Treaty. The Court rejected this argument. It considered that Article 37 imposed three conditions which the Belgium

application fully met: the Treaty of 1927 was in force and Article 17 (4) was an integral part of that Treaty; both the parties to the dispute were parties to the Statute; and the matter was referred to the ICJ as the competent forum. The Court further held that once the obligation was revived, it could operate only in accordance with the Treaty that provided for it and continued to relate to any dispute arising after the Treaty came into force. For this reason, the Court rejected the second preliminary objection.

The third preliminary objection related to the capacity of Belgium to expouse the claims of Belgian nationals, which, according to Spain, were different from the interests of Barcelona Traction. The fourth preliminary objection related to the exhaustion of local remedies.

In view of the mixed questions of law and facts, and particularly, in view of the close relationship between the questions raised in the third and fourth preliminary objections and the issue of denial of justice, which is a question relating to merits, the Court attached them to the merits of the case.

The Court first addressed itself to the right of Belgium to exercise diplomatic protection of Belgium shareholders in a company incorporated in Canada. The complaint concerned measures taken not in relation to Belgian nationals, but to the company itself. The Court noted that in municipal law the concept of company was founded on a firm distinction between the rights of the company and those of the shareholders. Accordingly, only the company was endowed with a legal personality, and only it could pursue a legal action on its own behalf in respect of injuries suffered, even if such an injury in fact was also an injury to several of its shareholders. In the present case, the measures complained about were not aimed at shareholders directly, and the injury suffered was a consequence of such measures against the company itself.

The Court also considered whether there might not be, in the present case, special circumstances serving as exceptions to the general rule. Two situations were studied: (a) the

fact that the company had ceased to exist; and (b) whether the protecting State of the company lacked the capacity to take action. The Court found that while Barcelona Traction had lost all its assets in Spain and had been placed in receivership in Canada, the corporate entity of the company had not ceased to exist, nor had the company lost its capacity to take corporate action. Similarly, there was no dispute about the incorporation of the company in Canada where it had its registered office, and about the company's Canadian nationality, which was generally acknowledged. Canada, therefore, being the national State of the company, in fact had exercised protection for Barcelona Traction for a number of years. According to the Court, whatever the reasons for the Canadian Government's change of attitude, which resulted in that Government not acting on behalf of Barcelona Traction after a certain point in time, that fact could not constitute a justification for the exercise of diplomatic protection by another State. In the view of the Court, Canada continued to retain its capacity to protect Barcelona Traction.

Belgium argued that it could make a claim when investments by its nationals abroad were prejudicially affected and thereby affected the State's national economic resources. However, the Court noted such a right could only exist in the form of a treaty or a special agreement, which Belgium could not establish. Belgium further based its rights to espouse the claims of its nationals, shareholders in Barcelona Traction, on grounds of equity. The Court rejected this also on the ground that acceptance of any such right on the part of Belgium would open the door to competing claims on the part of different States, which would create a climate of insecurity in international economic relations.

In view of the above, the Court held that the third preliminary objection was valid.

The Court did not consider it necessary to deal with the fourth preliminary objection on the exhaustion of local remedies, as it upheld the third preliminary objection.

By 15 votes to 1 the Court further held that it had no jurisdiction. Despite this vote, three judges supported only the operative portion of the judgment for different reasons.

Judge Tanaka felt that the third and fourth preliminary objections should have been dismissed, and that the Belgian Government's allegation concerning the denial of justice was unfounded. Judge Jessup came to the conclusion that a State, under certain circumstances, had a right to present a diplomatic claim on behalf of shareholders who were its nationals, but Belgium had not succeeded in proving the Belgian nationality, between the critical dates, of those natural and juristic persons on whose behalf it had sought to claim. Judge Gross held that it was the State whose national economy was adversely affected that possessed the right to take action but that proof of Barcelona Traction's direct connection to the Belgian economy had not been produced.

Of the other 12 members of the majority who supported the operative paragraphs of the judgment, several appended separate opinions, judges Fitzmaurice, Tanaka and Gross felt that the measures taken by the Spanish authorities were in the nature of expropriation, amounting to confiscation, which was contrary to international law, as claimed by Belgium. Some judges felt that, by denying the *jus standi* of Belgium and refraining from pronouncing upon the fourth preliminary objection on exhaustion of local remedies, the Court had missed an opportunity to contribute to the clarification and development of international business litigation and international economic relations in international law, and even simply the general international law obligations in the sphere of the treatment of foreigners. This is seen in the separate opinions of Judges Fitzmaurice, Jessup and Tanaka.

During the extended proceedings in this case, a variety of controversial legal issues were considered. Diplomatic protection of corporations and shareholders as juridical and natural persons, and the right of a third State, not being a State of legal incorporation, were primary issues. Other issues included: the distinction between injury to the rights of a company and injury to the interests of shareholders, and lifting of the corporate veil to determine effective nationality; the application of the test of a genuine link to corporate entities; and in general the status and personality of a company in international law. The

issue of whether disguised appropriation amounts to confiscation was yet another issue. The Court did not offer any conclusive pronouncement on any of these issues. This case is presently being cited for the principle established in the third preliminary objection to wit: only the State in whose jurisdiction the company is incorporated has the right to sponsor its claims and not the State of nationality of the shareholders even if they constitute a majority shareholding in the company, except in the three circumstances already itemized, viz: (1) where the rights of the shareholders are directly affected; (2) where the company has ceased to exist in the country of incorporation; and (3) where the State of incorporation is the country responsible for the injury of the company.

3.6.1. Basis for Jurisdiction

The basis for jurisdiction is the consent of the States parties to a dispute. Consent can be expressed in one of the following ways:

(1) **Special Agreement**

The conclusion of a special agreement (*compromise*) to submit the dispute after it has risen. For example, a *compromise* was concluded between Hungary and Slovakia on 7 April 1993, by which they submitted to the Court the dispute concerning the Gabcikovo-Nagymaros Project. The dispute concerned the construction and operation of the Gabcikovo-Nagymaros Barage system. See *Gabcikovo – Nagymaros Project (Hungary v. Slovakia)*[63]

(2) **Jurisdictional Clause**

Another way of conferring jurisdiction on the Court is through the inclusion of a jurisdictional clause in a treaty. Generally, through this *compromissory clause* the States parties agree, in advance, to submit to the Court any dispute concerning the implementation and interpretation of the treaty.

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63. [1997] ICJ Reports, P.7.

By Article 36(1) of the Statute of ICJ, "the jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the charter of the United Nations or in treaties and conventions in force".

Several treaties contain such *compromissory clause* conferring jurisdiction upon the Court in respect of the parties to those treaties.

(3) **Declarations made under Article 36(2) of the State**

The jurisdiction of the International Court of Justice also exists by virtue of declarations made by States, that they recognize as compulsory its jurisdiction in relation to any other State accepting the same obligation in all legal disputes concerning the matters specified in Articles 36(2) of the Statute. This method of conferring jurisdiction on the ICJ is also known as the Optional Clause.

Article 36(2) of the Statute of the ICJ provides as follows:

"The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

a. the interpretation of a treaty;
b. any question of international law;
c. the existence of any fact which, if established, would constitute a breach of an international obligation;
d. the nature or extent of the reparation to be made for the breach of an international obligation".

(4) **The Doctrine of Forum Prorogatum**

In accordance with the *Forum Prorogatum* doctrine, the Court infers the consent of the State, expressed in an informal and implied manner, and after the case has been brought before it. The Court has upheld its jurisdiction even where consent has been

given after the initiation of proceedings, in an implied or informal way or by a succession of acts.

For example, in the *Corfu Channel Case (United Kingdom v. Albania)*[64], the Court pointed out that Albania, not a party to the Statute, would have been entitled to object to the jurisdiction of the Court, by virtue of the unilateral initiation of the proceedings by the United Kingdom. Nevertheless, as indicated in its letter of 2 July 1947 to the Court, Albania accepted the recommendation of the Security Council and the jurisdiction of the Court for this case. Therefore Albania was precluded thereafter from objecting to the jurisdiction.

(5) **Conditional and Unconditional Jurisdiction**

Under Article 36(3) of the Statute, declarations may be made "unconditionally or on condition of reciprocity on the part of several or certain States, or for a certain time". This provision seems to contemplate "not a limitation of the jurisdiction accepted but a condition as to the operation of the declaration itself".[65] In other words, it is possible for a State making a declaration under Article 36(2) to specify the time limits and the States in respect of which it would operate. In that sense, the provision contemplates a principle of reciprocity in the form of a choice of partners[66].

(6) **Reservations to Jurisdiction**

Declarations under Article 36(2) can be made with such reservations as the author State may deem fit to specify. See *Fisheries Jurisdiction (Spain v. Canada)*.[67] It is understood that the jurisdiction of the Court exists only to the extent there is common ground between the declarations of each of the parties on the given subject matter. Reciprocity is therefore an important feature of the Optional Clause system.

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64. [1947-48] ICJ Reports, PP 4-27.
65. See M O Hudson. The Permanent Court of International Justice, 1928 – 1942. New York. NY, Macmillan, (1943) pp. 66-67.
66. Thirlway, Hugh. International Customary Law and Codification, *Netherlands Year Book of International Law*, Vol. 15. The Hague/London/New York, Kluwer Law International, (1984) PP. 103-107.
67. ICJ Reports 1998, para. 44.

Reservations can exclude dispute for which a solution is not reached through diplomatic means, or for which the parties had agreed on some other methods of settlement or disputes relating to events occurring in time of war or conflict. A common form of reservation excludes dispute that come within the domestic jurisdiction of a State. This type of reservation is also known as the "automatic" reservation. This type of reservation was questioned by Judge Lauterpacht in the Preliminary Objection Judgment in the case of *Certain Norwegian Loans (France v. Norway).*[68]

3.6.2 Jurisdiction Rationae Temporis

There is no time limit for submission of a dispute to the Court. However, as mentioned previously, several States, while submitting their declarations under Article 36(2), prescribed time qualifications for a dispute to come within the scope of the declaration; such as arising before or after a specified date. Some declarations exclude situations or disputes arising prior to the date from which they come into force. However, the expiry or revocation of a declaration after initiating proceedings will not affect the jurisdiction. See the cases of *Nottebohm (Liechtenstein v. Guatemala)*;[69] and *Right of Passage over Indian Territory (Portugal v. India).*[70]

The time factor is also important in determining whether, in a given case, the ICJ has inherited the jurisdiction of the PCIJ. See the Preliminary Objection Judgment in the case of *Barcelona Traction, Light and Power Co. Ltd. (Belgium v. Spain).*[71]

3.7 Submission to Jurisdiction by States

As already stated above,[72] the jurisdiction of the ICJ in contentious proceedings is based on the consent of the States to which it is open. As a result, in the following eight

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68. ICJ Reports 1957.
69. [1953] ICJ Reports, PP. 116-125.
70. [1957] ICJ Reports, PP. 125, 142.
71. ICJ Reports 1964.
72. See sub-paragraph 4.6.1.

cases, the Court found that it could take no further steps upon an Application in which it was admitted that the opposing party did not accept its jurisdiction:

(1) Treatment in Hungary of Aircraft and Crew of the United States of America (United States of America v. Hungary);

(2) Treatment in Hungary of Aircraft and crew of the United States of America (United States of America v. USSR);

(3) Aeriel Incident of 10 March 1953 (United States of America v. Czechoslovakia);

(4) Antarctica (United Kingdom v. Argentina);

(5) Antarctica (United Kingdom v. Chile);

(6) Aeriel Incident of 7 October 1952 (United States of America v. USSR);

(7) Aeriel Incident of 4 September 1954 (United States of America v. USSR); and

(8) Aeriel Incident of 7 November 1954 (United States of America v. USSR).

Article 38, paragraph 5 of the present Rules of the ICJ which came into force on 1 July 1978 provides that: "When the Applicant State proposes to found the jurisdiction of the Court upon consent thereto yet to be given or manifested by the State against which such application is made, the application shall be transmitted to that State. It shall not however be entered in the General List, nor any action be taken in the proceedings, unless and until the State against which such application is made consents to the Court's jurisdiction for the purpose of the case".

Article 38, paragraph 5 of the Rules of Court has been applied with regard to the following:

(1) an Application filed by Hungary on 23 October 1992, instituting proceedings against Czech and Slovak Republic;

(2) an Application filed by the Federal Republic of Yugoslavia on 16 March, 1994, instituting proceedings against the Member States of NATO;

(3) an Application filed by Eriteria on 16 February 1999, instituting proceeding against Ethiopia; and

(4) an Application filed by Rwanda against France on 18 April 2007.

As far as the Application filed by the Congo against France on 11 April 2003 and another filed by Djibouti against France on 9 January 2006 are concerned, the Respondent consented to the Court's jurisdiction. That consent led to those cases being entered into the General List with effect from the date of receipt of the consent as respectively *Certain Criminal Proceedings in France (Republic of the Congo v. France)*[73]; and *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)***.**[74]

Once this consent is expressed by the State upon which an application is made, that State is said to have submitted to the jurisdiction of the ICJ. The form in which this consent is expressed determines the manner in which a case may be brought before the Court. This is the same as what we have discussed earlier as basis for jurisdiction.[75] For emphasis, we hereby revisit the matter herein below.

(a) **Special agreement**

Article 36, paragraph 1 of the Statute provides that the jurisdiction of the Court comprises all cases which the parties refer to it. Such cases normally come before the Court for notification to the Registry of an agreement known as a *special agreement* and concluded by the parties specially for this purpose. There are instances of cases submitted to the Court by means of special agreement.[76]

In the case of *Corfu Channel (United Kingdom v. Albania)*,[77] the Parties made a special agreement after delivery of Judgment on the Preliminary Objection. The case concerning the *Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)*[78] was submitted by means of an application, but the Parties had previously

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73. Discontinued on 16 November 2010.
74. Disposed of on 4 June 2008.
75. See sub-paragraph 4.6.1. above
76. *Asylum (Colombia v. Peru); Minquiers and Ecrelos (France v. United Kingdom); Sovereignty over Certain Frontier land (Belgium v. Netherlands); North Sea Continental Shelf (Federal Republic of Germany V. Denmark); North Sea Continental Shelf (Federal Republic of Germany v. Netherlands); Continental Shelf (Tunisia v. Libya); Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. USA); Land, Island and Maritime Frontier (El Salvador v. Honduras); Territorial Dispute (Libya v. Chad); Gabcikovo-Nagymaros) Project (Hungary v. Slovakia); Kasikili/Sedulu Island (Botswana v. Namibia); Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia); Frontier Dispute (Benin v. Niger); and Sovereignty over Pedra Branca/Pulam Batu Puteh, Middle Rocks and South Ledge (Malaysia v. Singapore).*
77. ICJ Reports 1947 – 48, PP. 4-27.
78. ICJ Judgment of 18 November 1960.

concluded an agreement on the procedure to be followed in submitting the dispute to the Court.

By virtue of Article 40, paragraph 1 of the Statute of the Court, and Article 39 of the Rules of Court, when bringing a case before the court either by notification of the special agreement or by a written application addressed to the Registrar of the Court, the subject of the dispute and the parties must be indicated.

(b) **Cases provided for in treaties and Conventions**

Article 36, paragraph 1, of the Statute provides also that the jurisdiction of the Court comprises all matters specially provided for in treaties and conventions in force. In such cases a matter is normally brought before the Court by means of a written *application instituting proceedings*[79], this is a unilateral document which must indicate the subject of the dispute and the parties[80] and, as far as possible, specify the provision on which the applicant found the jurisdiction of the court.[81]

The list of treaties and conventions governing the jurisdiction of the International Court of Justice in contentious cases include the following:

(1) American treaty on pacific settlement, Bogota, 30 April 1948;

(2) Convention on the Prevention and Punishment of the Crime of Genocide, Paris, 9 December 1948;

(3) Revised act for the pacific settlement of international disputes, Lake Success, 28 April 1949;

(4) Convention Relating to the Status of Refugees, Geneva, 28 July 1951;

(5) Treaty of peace with Japan, San Francisco, 8 September 1951;

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79. With the exception of the cases listed above under footnote 76, which were brought by the notification of a special agreement, all contentious cases have been brought before the Court by reason of an application instituting proceedings, irrespective of whether the Court's jurisdiction was founded on a provision in a treaty or convention, declarations recognizing the Court's jurisdiction as obligatory made by each of the parties to the dispute, or any other alleged form of consent.

80. Article 40, paragraph 1, of the Statute

81. Article 38 of the Rules of the Court.

(6) Treaty of friendship (India/Philippines), Manila, 11 July 1952;

(7) Universal Copyright Convention, Geneva, 8 September 1952;

(8) European Convention for the Peaceful Settlement of Disputes, Strasbourg, 29 April 1957;

(9) Single Convention on Narcotic Drugs, New York, 30 March 1961;

(10) Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes, Vienna, 18 April 1961;

(11) International Convention on the Elimination of all forms of Racial Discrimination, New York, 7 March 1966;

(12) Convention on the Law of Treaties, Vienna, 23 May 1969;

(13) Convention on the Suppression of the Unlawful Seizure of Aircraft, The Hague, 16 December 1970;

(14) Treaty of Commerce (Benelux/USSR), Brussels, 14 July 1971;

(15) Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Montreal, 23 September 1971;

(16) International Convention Against the Taking of Hostages, New York, 17 December 1979;

(17) General Peace Treaty (Honduras/El Salvador), Lima, 30 October 1980;

(18) United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 1985;

(19) Convention on treaties concluded between States and international organizations or between international organizations, Vienna, 21 March 1986;

(20) United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, 20 December 1988;

(21) United Nations Framework Convention on Climate Change, New York, 9 May 1992;

(22) Convention on Biological Diversity, Rio de Janeiro, 5 June 1992;

(23) Convention on the Prohibition of the Development, Production, stockpiling and Use of Chemical Weapons and their Destruction, Paris, 13 January 1993.

To these instruments must be added other treaties and conventions concluded earlier and conferring jurisdiction upon the *Permanent Court of International Justice,* for Article 37 of the Statute of the International Court of Justice stipulates that whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the *Permanent Court of International Justice,* the matter shall, as between the parties to the Statute, be referred to the International Court of Justice. The *Permanent Court* reproduced, in 1932, in its *Collection of Texts* governing the Jurisdiction of the Court[82] and subsequently in Chapter X of its *Annual Reports*[83] the relevant provisions of the instruments governing its jurisdiction. By virtue of Article 37 of the Statute of the ICJ referred above, some of these provisions now govern the jurisdiction of the International Court of Justice. Also there are other instruments that came into force as from 1993 and which equally confer jurisdiction on the court.

(c) **Compulsory Jurisdiction in legal disputes**

The Statute provides that a State may recognize as compulsory, in relation to any other State accepting the same obligation, the jurisdiction of the Court in legal disputes. These cases are brought before the Court by means of written applications. The conditions on which such compulsory jurisdiction may be recognized are stated in paragraphs 2-5 of Article 36 of the Statute of the ICJ, which read as follows:

"2. The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state

82. P.C.I.J., Series D, No. 6, fourth edition.
83. P.C.I.J., Series E, Nos. 8 – 16.

accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

a. the interpretation of a treaty;

b. any question of international law;

c. the existence of any fact which, if established, would constitute a breach of an international obligation;

d. the nature or extent of the reparation to be made for the breach of an international obligation.

3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.

4. Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court.

5. Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptance of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms."

A very vital question is how compulsory is the compulsory jurisdiction of the International Court of justice? In actual fact, the "compulsory jurisdiction" of the International Court of Justice is not truly compulsory. As stated before, the Court's jurisdiction is based on the consent of the parties. States have the option to accept or not to accept the court's jurisdiction and can do so under terms and conditions they determine themselves. However, once a State has granted its consent, and when a dispute that falls within the scope of that consent is submitted to the Court, the State must subject itself to the Court's jurisdiction. It is that legal obligation that is at the root of the term "compulsory".

This view is in accord with the submission of a text writer.[84]

(d) **Forum Prorogatum**

If a State has not recognized the jurisdiction of the Court at the time when an application instituting proceedings is filed against it, that State has the possibility of accepting such jurisdiction subsequently to enable the Court to entertain the case: the Court thus has jurisdiction as of the date of accepting in virtue of the rule of *forum prorogatum.*

(e) **The Court itself decides any question as to its jurisdiction**

Article 36, paragraph 6, of the Statute provides that in the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court. Article 79 of the Rules lays down the conditions which govern the filing of preliminary objections. Preliminary objections have been raised in at least 36 cases including the case of the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening).*[85]

Questions of jurisdictions or admissibility have been raised in at least 18 cases. See, for instance, the case of *LaGrand (Germany v. USA).*[86]

(f) **Interpretation of a judgment**

Article 60 of the Statute provides that in the event of dispute as to the meaning or scope of a judgment, the Court shall construe it upon the request of any party. The request for interpretation may be made either by means of a special agreement between the parties or of an application by one or more of the parties.[87] An application for interpretation was made by Colombia in respect of the *Asylum (Colombia v. Peru*)[88] case, another by Tunisia (along with an application for revisions) in respect of the Judgment delivered by the court on 24 February 1982 in the *Continental Shelf (Tunisia v. Libya*) and another by Nigeria in

84. Stanimir A. Alexander, "The Compulsory Jurisdiction of the International Court of Justice: How Compulsory Is It?" *Chinese Journal of Intenrtaion Law,* Vol. 5, Issue 1, pp. 29-38.'
85. [2002] F.W.L.R. (Pt. 132) 1 to 95.
86. [2001] ICJ Rep. 466.
87. Article 98 of the Rules of the Court.
88. Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case filed on 20 November 1950 and Disposed of on 27 November 1950.

respect of the Judgment delivered by the Court on 11 June 1998 in the *Case Concerning Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening) Preliminary Objections*. A request for Interpretation of the Judgment of 31 March 2004 in the Case concerning *Avena and Other Mexican Nationals (Mexico v. USA)* was filed by Mexico on 5 June 2008. This application instituting proceedings was filed with a Request for the Indication of Provisional Measures which the Court dealt with in its Order on the indication of provisional measures of 16 July 2008.

(g) **Revision of a judgment**

An application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revisions, always provided that such party's ignorance was not due to negligence.[89] A request for revision is made by means of an application.[90]

An application for revision and interpretation of the Judgment was filed by Tunisia in respect of the Judgment of 24 February 1982 in the case concerning the *Continental Shelf (Tunisia v. Libya).*

On 24 April 2001, Yugoslavia filed an application for revision concerning the Court's Judgment of 11 July 1996 on the Priliminary Objection in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro*)[91]. On 10 September 2002, El Salvador filed an application for revision concerning the Judgment delivered by the Court on 11 September 1992 in the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras: Nicaragua intervening)***.**

89. Article 61, paragraph 1, of the Statute
90. Article 99 of the Rules of the Court.
91. 46 ILM 188 (2007).

3.8 Jurisdictional Limitations and Challenges of ICJ

The International Court of Justice's contentious jurisdiction is substantially limited to cases which the parties to a dispute are willing to bring before it. This point will be better appreciated when Article 14 of the Covenant of the League of Nations (the covenant) which established the Permanent Court of International Justice (PCIJ) is compared with Article 36(1) of the Statute of the ICJ.

Article 14 of the Covenant provides: "The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it."

Article 36(1) of the Statute of the ICJ provides: "the jurisdiction of the Court comprises all cases which the parties refer to it and *all matters specially provided for in the Charter of the United Nations* or in treaties and conventions in force."
The italicized words are for emphasis.

It is clear that the italicized words in Article 36(1) of the Statute are the addition to the operative words indicating the jurisdiction of the PCIJ. Those words seem, at first sight, to have added something to the jurisdiction of the ICJ. On a second thought, however, and bearing in mind that the Charter of the United Nations confers no jurisdiction on the ICJ, the reference to "matters specially provided for" in Article 36(1), therefore, is nugatory.

What this means is that the contentious jurisdiction of the ICJ is limited to what the parties to a dispute are willing to bring before the court, no more, no less.

Again, under the so-called "optional compulsory jurisdiction" clause in the Statute of the PCIJ which has been continued without important change in Article 36(2) of the ICJ Statute, States adhering to the Court may, however, declare that they recognize the court's jurisdiction as "compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation…" Actually many States have made this declaration. However, many of those declarations by the States were so fogged over with

reservations and exceptions that they did not in fact notably extend the Court's jurisdiction beyond the caprice and whim of the declarant States.

For instance, such a declaration by the United States of America in 1946, following a resolution adopted by the US Senate[92] to that effect had a proviso that the declaration shall not apply to (a) disputes which the parties entrust to other tribunals, (b) "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States as determined by the United States," and (c) disputes arising under a multilateral treaty unless all parties to the treaty are also parties before the Court or the United States specially agrees to the Court's jurisdiction.

The reservation excepting disputes "essentially" within the domestic jurisdiction "as determined by the United States" leaves the United States a free hand to determine whether any particular dispute shall be submitted to the court. The declaration authorized by the Senate resolution was filed on behalf of the United States.[93]

Furthermore, the provision of Article 96 of the UN Charter and Article 65 of the Statute of the ICJ, authorizing the Court to give advisory opinion on any "legal" question has worked a limitation in this branch of the Court's jurisdiction. This is because it appears that on each reference the Court will be expected to initially determine whether the question referred is "legal" or "non-legal". A case that illustrated this came before the PCIJ in 1923; that was *the Eastern Carelia case.*[94] The case grew out of hostilities between Russian and Finnish forces following the Russian Revolution. A peace treaty concluded at Dorpat in 1920 provided *inter alia* for the withdrawal of Finnish troops from certain communes which were to be "reincorporated in the State of Russia and… attached to the autonomous territory of Eastern Carelia… which shall enjoy the national right of self-determination." Annexed to the peace treaty was a "Declaration of the Russian Delegation with regard to the autonomy

92. SENATE RESOLUTION 196, 79th Congress, 2nd Session (1946), 92 Congress Record, August 2, 1946, at 10850.
93. See *New York Time*, July 16, 1946, P. 3, Col. 5.
94. *Status of Eastern Carelia***,** PCIJ, Ser. B, No. 5 (Advisory Opinion 1923).

of Eastern Carelia" which, on behalf of the "Socialist Federative Republic of the Russian Soviets," "guaranteed" to the Carelian population that "(2) that part of Eastern Carelia which is inhabited by the said population shall constitute, so far as its internal affairs are concerned, an autonomous territory united to Russia on a federal basis." In 1921, following an attempted revolt against Russian Sovereignty in Eastern Carelia, the Finnish Government brought the matter before the League Council. An attempt made through the Estonian Government to have Russia submit the matter to the Council as a non-member State, met with Soviet refusal on the ground that the question was purely domestic, the references to Carelian autonomy in the Dorpat Treaty and the annexed Declaration being merely descriptive of an existing situation and not intended to create treaty obligations.

After a year's delay the Council, at the suggestion of Finland, referred to the PCIJ the question whether those references in the Treaty and Declaration constituted "engagement of an international character" which Russia would be under a duty, towards Finland, to carry out. Finland appeared before the Court and submitted a voluminous dossier. Russian participation was limited to a splenetic telegram signed by Tchitcheria, Commissar for Foreign Affairs, which stated that Russia found it impossible to take part in the proceedings before the Court, which were "without legal value either in substance or in form," briefly rehearsed the Russian position in a series of "Whereases," denied the right of the "so-called League of Nations" to intervene, and in conclusion referred to the shabby treatment of Russia by the League Powers in a number of instances as demonstrating the impossibility of an impartial hearing, under League auspices, of any question involving Russia.

The resulting opinion, seven of the eleven judges who sat on the case concurring, stated the facts and concluded that, although in form the Court was being asked to give an advisory opinion, nevertheless "answering the question would be substantially equivalent to deciding the dispute between the parties," and, Russia having declined to participate, " the

Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court. "The Court therefore finds it impossible to give its opinion on a dispute of this kind."

The Council, having received the Court's reply, took note of it, and, after discussion, entered in its minutes a somewhat irritated justification of its own procedure. The Eastern Carelians then retired from the international stage.

The light the above case throw on the advisable limits of the court is the essence of citing it. It is to support the proposition that the jurisdiction of the Court to give advisory opinions is limited to questions that are legal questions. Outside this confine, the Court will be without jurisdiction. It is thus certain that both in its contentious and advisory jurisdictions, the Court is limited as we have shown above.[95]

Allied to the jurisdictional limitations of the ICJ is the problems of enforcement of the decisions of the Court. This is indeed a great challenge to the International Court of Justice. Granted that Article 94(2) of the UN Charter provided that if any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment, it has been observed above[96] that the instances in which action by the Security Council has been invoked under Article 94(2) are still rare. Specifically mentioned were the *Anglo-Iranian Oil Co. case (UK v. Iran);*[97] *Military and Paramilitary Activities Against Nicaragua (Nicaragua v. U.S.A.)*[98]*, and the case of Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro).*[99]

95. See also Grant Gilmore, "The International Court of Justice," 55 *Yale L.J,* 1945-1946, PP. 1048-1066.
96. See Paragraph 4.5.2 above
97. ICJ Reports (1951) 89.
98. ICJ Judgment of 27 June 1986.
99. 46 ILM 188 (2007).

Regrettably, in the few instances that the Security Council was invoked under Article 94(2) of the UN Charter, it turned out that the argument towards a revision, and questioning of the validity, of the judgment of the court laid credence to the fear that recourse to the Security Council under Article 94(2) could be seen as a threat to the legal authority of the judicial decisions of the Court. This is because the arguments by the defaulting States provided opportunities of political revisions of the Court's decision.[100]

More seriously, as in *the Anglo-Iranian Oil Co. case*, it resulted on the Security Council not doing much apart from holding a debate similar to the kind submitted by the parties to the Court after the UK proposed under Article 94(2) that the Security Council should call upon Iran to comply with a pronouncement of the Court. The UK's call was contained in a letter dated 28 September 1951 which was brought before the Security Council as a matter of extreme urgency with regard to the failure by the Iranian Government to comply with the provisional measures indicated in the Court's Order of 5 July 1951.

Members of the Security Council took up arguments from the parties which were similar to the same arguments they made before the ICJ. Iran objected on the validity of the Court's Order on the basis that the Court was not competent in the case by virtue of Articles 1(2) and 2(7) of the UN Charter. Several members of the Council took different positions. Later a draft resolution, submitted by the United Kingdom and revised several times, was eventually withdrawn. The UN Security Council could do nothing further. Such inactivity in enforcement of the decision of the Court poses the danger of states resorting to armed conflict and use of force as we will soon see.[101]

Another serious challenge to the ICJ is that the Court has been plagued by the problem of the so-called "non-appearing respondent". Despite their prior acceptances of both the Statute of the Court and, consequently the Court's power under Article 36(6) of ICJ

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100. This is the stand of a text writer on this issue. See, for example, Attila Tanzi, "Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations", 6 *European Journal of International Law* (1995) 539-572.

101. See Paragraph 5.2 below.

Statute to decide questions of its own competence, states have adopted a practice of boycotting the Court's proceedings in order to contest jurisdiction. By its decision to withdraw from any further proceedings in the case of *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.A.)*[102] initiated by Nicaragua, United States – commonly seen as a supporter of judicial settlement – has joined the ranks of the non-appearing respondents.

The Republic of Nicaragua submitted an application to the I.C.J. on April 9, 1984 alleging that the United States was using military force against Nicaragua in violation of international law. The United States had, three days before the filing of Nicaragua's application, notified the Secretary-General of the UN that its 1946 declaration under the Optional Clause would not apply to disputes with any Central American state. The Nicaraguan application to the I.C.J. indicated that it intended to rely on the compulsory jurisdiction of the I.C.J. under article 36(2) of the Court's Statute.

Although it was not contested that the United States had accepted the jurisdiction of the I.C.J by virtue of the United States declaration of Consent of 1946, the United States maintained, among other things, that Nicaragua had not accepted the same obligation and that the United States declaration of Consent had been validly modified to exclude cases brought by Central American States. The issues raised by the United States action and discussed in the I.C.J.'s judgment of Nov. 26, 1984 strike not only at the purpose and effectiveness of the I.C.J. but also at international law itself, which basically relies on the good faith and cooperation of sovereign states.

In response to the Court's decision finding jurisdiction, the United States announced in January, 1985 that it would boycott further proceedings in the case. As a result of its general displeasure with the Court's actions, the United States has cancelled its 1946 acceptance of compulsory jurisdiction under the Optional Clause.

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102. 1984 I.C.J. 392, 429 (Judgment of Nov. 26 on Jurisdiction and Admissibility).

Again, the Charter of the United Nations does not encourage international adjudication. Instead, it continues the focus on political settlement and the Court is routinely by-passed in favour of the Security Council and the General Assembly.

To be sure, the Charter requires states to settle their disputes "by peaceful means, and in conformity with the principles of justice and international law…" as provided in Article 1, paragraph 1, of the U.N. Charter. In addition, Article 2(3) of the Charter reiterates duty of peaceful settlement and article 2(4) places a ban on the use of force. The Charter does not, however, give the Court a major role in relation to these provisions.

Article 24 confers "primary responsibility for the maintenance of international peace and security" upon the Security Council, not the Court. In addition, Article 33(1) gives states absolutely free hand in deciding how to resolve their controversies. Article 33(1) of the UN Charter states:

> The parties to any dispute, the continuance of which is likely to endanger… international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

Although it is clear that states must chose some form of peaceful dispute settlement, the framers of the Charter thought it wise to give states as wide a choice as possible among methods including negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means.

Where the Charter does express some preference for a particular method of settlement, that method is political. Expressing confidence in political resolution of disputes, Article 37(1) requires that a failure to reach a solution by one or all the means listed in Article 33 results in an obligation to refer the dispute to the Security Council. In

addition, even before negotiation or mediation fail, any state, whether a member of the United Nations or not is permitted access to the Security Council for dispute resolution under Article 35 of the Charter. Thus, it is the Security Council, not the International Court of Justice, which has the truly compulsory competence to address disputes in the United Nations system.

The Charter's only hint at a specific role for judicial settlement can be found in Article 36. In recommending "appropriate procedures or methods of adjustment," the Security Council under article 36(3) "should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice…" The very language of article 36(3) does not give judicial settlement a very large role. The Security Council is not empowered to refer a dispute to the Court. Instead, it can only recommend that the parties themselves refer the dispute to judicial settlement. Such a recommendation is not binding on the states involved. Moreover, nothing in Article 36 requires the Security Council to make such recommendation in the first place.

As has been noted[103] in describing the Court's minor role in the Charter, Article 95 of the Charter makes clear that states are perfectly free to use tribunals other than the International Court of Justice. Once again, the Court can be by-passed. In addition, decisions issued by the Court are limited in their effect. By the terms of Article 59 of the Court's Statute, the Court's decisions are binding only upon the parties in the particular case.

Finally, the ICJ faces the challenge of opposition to any amendment to the UN Charter and Statute of the Court that could ensure any improvement to the jurisdiction of the Court. The need for such amendment stems from the paucity in the quantity and quality of declarations under the Optional Clause. The hesitation on the part of states to make Optional Clause declarations and the large number of sweeping reservations are strong evidence of the real

103. See Giustini, Anthony: "Compulsory Adjudication in International Law: The Past, The Present, and Prospects for the Future" (1985) *Fordham International Law Journal*, Vol. 9, Issue 2, Article 2,p.212 at 231.

views held by states on the usefulness of the Court.

Perhaps no situation better underscores the hostility of some states towards judicial settlement and the Court than that surrounding two resolutions passed by the UN General assembly in 1970 and 1971.[104] The object of these resolutions was to persuade states to respond to a questionnaire as part of a proposed review of the role of the Court. The idea of even reviewing the Court's role was strongly opposed by Socialist and some Third World States. Even the Western nations in reality, by their reservations were not actually in support of any such review. This scenario, therefore, calls to question the position the Court should take in the face of increasing armed conflict and use of force in the world today. A consideration of this important issue is our next concern.

3.9 ICJ's Position in the Face of Increasing Armed Conflict and Use of Force.

The creation of the International Court of Justice has not effectively reduced the number or severity of international conflicts. In fact our world is full of violence between states today. This highlights the importance of the ICJ and its role when it comes to the use of force. Though the Court rarely makes a statement about the use of force, it is certain that when states submit to the ICJ's jurisdiction deliberately and the court hands down a ruling about the use of force, they abide by what the ICJ tells them to do. States and lawyers refer to ICJ rulings repeatedly as guides to their conduct. They do not always follow the court's rulings, but they look at them and they consider them. If they find a decision lacking in logic and practicality, they make a judgment to that effect, and sometimes engage in conduct inconsistent with such a ruling. But that does not mean that States do not take those rulings seriously. Therefore, when the ICJ speaks, each occasion is a great opportunity to influence those ends that are served potentially by an ICJ decision – peace, justice, and humanitarian rights.

104. GA Res. 2725, 25 U.N. GAOR Supp. (No. 28) at 128, U.N.Doc. A/8238 (1970); and GA Res. 2818, 26 U.N. GAOR Supp.(No. 29) at 137, U.N.Doc. A/8568 (1971).

The Court has in fact carved out a potentially significant role in the area of use of force in international security. We will go through a series of points that show where the ICJ has indicated through some ruling or some practice that it intends to keep itself in the game when it comes to use of force decisions. We shall equally see the defaults of the ICJ on this matter.

First, the ICJ has insisted on the right to decide its own jurisdiction.[105] That, in itself, gives the Court great power to become involved in these kinds of questions. Second, the Court has broadly construed treaties to assume power over use of force situations. The case of *Oil Platforms (Iran v. U.S.A.)*[106] is an example: the Court took a Friendship, Commerce, and Navigation treaty and found that even though this treaty did not address the issue of use of force directly, because the parties used the treaty to engage in commerce and be friends, the preliminary words of the treaty were enough of a ground to take jurisdiction. And this decision was made even though a separate treaty between Iran and the United States, the Agreement of Cooperation of 1959,[107] actually dealt with the use of force and reserved to each party the right to do whatever it needed to do in its national security interests. So, the Court has shown a willingness, and indeed maybe an eagerness, to construe treaties that are before it broadly to take jurisdiction over use of force issues.

Next, the Court in the case of *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.A.)*[108] broadly construed the concept of customary international law to assume authority over use of force decisions, even where the states involved took reservations from a multi-lateral treaty covering the same area of the law that "customary law" covered. The Court also has broadly construed its advisory opinion jurisdiction, as it did in the case of *Legality of the Use by a state of Nuclear Weapons in Armed Conflict*

105. As provided by Article 36(6) of the Statute of ICJ.
106. [1996] I.C.J. 803 (Dec. 12).
107. Defense Agreement, Mar. 5, 1959, U.S. – Iran, T.I.A.S. No. 4189.
108. [1986] I.C.J. 14 (June).

(WHO),[109] to take an active role in deciding the legality of possessing or using nuclear weapons. Furthermore, in the case of *Question of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lokerbie (Libya v.U.K.)*[110], the court took jurisdiction to decide the legality of Security Council resolutions bearing upon international security as it did also in 1998 in the case on the same subject matter involving Libya and USA.

In taking jurisdiction over these cases, the Court has disregarded or treated lightly doctrines limiting the ICJ's power or discretion to avoid political questions. The court has swept aside any indication in the earlier jurisprudence of the Permanent Court of International Justice, and in scholarly work, urging the Court to be reluctant to exercise jurisdiction in the use of force cases.[111]

In the area of provisional measures, the Court has shown its willingness to assert itself, even in a use of force or security context, or at least to retain the right to assert itself. See, for example, the cases of *Application of the Convention on the Prevention and Punishment of the Crime of Genocide(Bosnia and Herzegovina v. Serbia and Montenegro)*[112]and *Legality of Use of Force (Yugoslavia [Serbia and Montenegro] v. Belgium).*[113] This is very significant not only because now provisional measures must be treated as mandatory rules, but because the Court has no tradition of applying the provisional measures doctrine in a manner similar and analogous to the way the U.S. or Britain applies preliminary injunctive law with strong emphasis on likelihood of success. The ICJ in the case of *Vienna Convention on Consular Relations (Paraguay v. USA)*[114] declined even to address the issue of likelihood of success. The language the Court used, and the way the Court went about issuing preliminary relief, explicitly avoided an

109. [1996] I.C.J. 226, 240 (July).
110. [1992] I.C.J. (April 14); See also *Lockerbie case (Libya v. U.S.A.)* [1998] ICJ. 115 (February 27).
111. Abram Chayes, A Common Lawyer Looks at International Law, 78 *HARV. L. REV*. 1396, 1413 (1965).
112. [1993] I.C.J 3 (April 8).
113. [1999] I.C.J. 124 (June 2).
114. 1998 I.C.J. 426 (April 9).

evaluation of the meaning of the treaty at issue, causing the United States to feel that it could disregard the preliminary order.

The effect of the fore going gives the Court a substantial set of opportunities to speak out on the use of force issues. It is necessary for the Court to decide to give opinions that will deal with use of force questions that could have a major impact either in terms of articulating principles that are followed by states (and therefore a major impact in shaping the law on conduct of states), or undermining the Court's credibility and status by articulating principles that fail to serve the practical and conceptual needs of international security.

Therefore, the important jurisdiction that the Court has carved out for itself, based on all the principles that we have just described, is neither good nor bad. Much depends on how the jurisdiction is used. Incidentally, the ICJ, with regard to the law on use of force, has not developed the needed set of rules needed to positively impact on the world. Clearly the Court started off on the wrong foot and much must be done to improve the chances that the ICJ will play a constructive and meaningful role going forward.

Looking at article 2(4) of the UN Charter which provides that "all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations" the ICJ appear to toe the path that force may not be used without Security Council approval even to advance Charter purposes. Again looking at Article 51 of the UN Charter, the Court appear to maintain the ground that self-defence may be exercised only in response to an "attack", even though that provision states that nothing in the Charter should be read to limit that "inherent" right.

But Article2(4) of the UN Charter at one point refers to the purposes of the Charter as a relevant factor in evaluating the use of force. And we know what the Charter stands for, it is not a mystery, it is written there. The Charter stands for human rights. The Charter

stands for equal treatment of women and men. The Charter stands for religious freedom. The Charter stands for states not being able to acquire other territory through the use of force. The Charter suggests specific moral and ethical principles and those principles have in fact been developed in subsequent treaties.

NATO's (North Atlantic Treaty Organisation's) intervention in Kosovo to stop the monstrous treatment of Kosovars, even though the UN Security Council had not authorized the use of force, could be supported because very strong moral and legal case existed for its use. Though some international lawyers concluded that what NATO did in Kosovo was illegal by accepted principle, they still agreed that it was necessary and morally justifiable.

The same limited approach is applied under Article 51 of the UN Charter. The greatest evil of all evils, Professor Louis Henkin wrote in an article based on a debate at the New York City Bar Association,[115] is using force, even in self-defence.

In the case of *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.A.)*,[116] the ICJ interpreted an attack in a way that significantly narrowed the inherent right of self-defence. Anything short of a full-fledged attack, such as providing arms, strategic advice or tactical assistance to a country that was trying to overthrow a government of another country, cannot be considered an attack under Article 51 for purposes of collective self-defence. That served the Soviet Union's purposes very well. They were assisting communist groups and governments around the world in trying to undermine elected governments. So long as they did not engage in an all-out attack, the US and other allies could not use force to counter their efforts.

Under long-accepted traditional principles, what rule should be applied when you have a lesser attack? It would seem that if you have a lesser attack you can only respond in a lesser way; you can only respond with lesser, proportionate measures, individually or

115. Louis Henkin, "Conceptualizing Violence: Present and Future Development in International", 60 *ALB. L. REV.* 571,573 (1971).
1116. [1986] I.C.J. 4, para. 19 (June 27).

collectively. But in the above mentioned case, the Court created a new category of attacks that denied the collective use of force. It also purported to establish formalistic requirements of notice of requests or cooperative defence that no one had ever heard of, and limited collective self-defence to military action on the territory of the state that had been attacked. It is submitted that the authority of the decision in this case is questionable. The decision certainly has not facilitated the defence of sovereign states or the respectability of international law.

The threat of terrorism has led the U.N. Security Council, at least to interpret self-defence in a manner that is far more robust than the ICJ's approach. Security Council resolutions adopted after 9/11[117] did not explicitly authorize the use of force in Afghanistan. But they do say that the U.S. is justified in exercising self-defence, and call on all states to act to assure that the Taliban regime will perform its obligations under international law. Resolution 1373 details, like a statute, the obligations of states vis-a-vis terrorists that operate within their boarders.[118] Those opposed to the military actions in Kosovo and Afghanistan on the basis of their understanding of the provisions of the U.N. Charter are misinterpreting the Charter , it is hereby submitted with due respect. The horrendous holocaust of the Second World War could have been avoided if force was used early enough against the Nazis when there was still an opportunity to stop them. While the use of criminal law is a proper part of any effort to end international crimes, states have to use force to stop people determined to engage in terrorism or major violations of human rights. The same is true of monsters like Milosevic[119] and Shekau.[120]

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117. September 11, 2001: The date the *AL Quada* terrorists hit the United States of America in an unprecedented fashion.
118. U.N.SCOR, 65th session, 4385 meeting at 1, U.N Dec. S/RES 1373 (2001).
119. Slobodan Milosevic, former President of former Yugoslavia
120. Shekau, leader of the terrorists Boko Haram in North East of Nigeria.

The use of force in Rwanda would have prevented the single most monstrous act of disregard of human suffering that took place since the Cambodian mass murder. President Clinton came to Africa and apologized for what he had failed to do. Allowing those people to die without using force to protect them was disgraceful, even though it was clear that acting without Security Council approval to stop that genocide would have violated the Charter.

Today, the menace of the *Boko Haram, Al Shabab*, the Muslim Brotherhood and Islamic State of Iraq and Syria (ISIS) proponents (all affiliates of *Al Queda*) is staring the world in the face while member states keep on paying lip service to the effort to stamp out the insurgents. It is only a determined resolve to use force to check the challenge of terrorism in the world today that can solve the problem created by insurgency. To think that in Nigeria, for instance, some people are openly attacking the former Chief of Army Staff, General Azubike Ifejirika (Rtd), for his frontal attack against *Boko Haram* insurgents when he was in office is mind-boggling.

The chance for the ICJ to retrace its step and hand down decisions that support the use of force in appropriate cases should not be missed by the court. Humanitarian law and defence of human rights are bound up with the rules governing the use of force. The ICJ's reluctance to embrace human rights stems ultimately from the same moral neutrality in interpreting international law that underlines its use of force attitudes. The use of force is necessary sometimes to preserve life and human rights. So long as some states' area is controlled by thugs (as the *Boko Haram* terrorists are doing now in Adamawa, Borno and Yobe states of North Eastern Nigeria), force (adequate force) must be given its proper position in law if human rights are to be taken seriously and made a universal reality. To fail to give the desired direction on this matter through seasoned rulings will be a serious minus on the side of the ICJ.

3.10 Conflicts of Jurisdiction

The growth in number of international courts and tribunals, sometimes labelled with the slightly derogatory term "proliferation" raises questions of coordination and conflict between these various courts and tribunals and brings concepts to the attention of international lawyers whose interest was previously restricted to the domestic law of the jurisdiction of courts, such as the effect of *lis pendens* and forum shopping.

These problems are made particularly acute because international courts and tribunals are growing in number within an international system that has no unified judiciary. The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY), in the decision on the Defence Motion for Interlocutory Appeal on Jurisdiction in the case of *Prosecutor v. Tadic*,[121] remarked, "In international law, every tribunal is a self-contained system (unless otherwise provided)." Consequently, there are no general rules by which to sort questions of coordination and conflict. These questions are to be solved within each "self-contained system" – in other words, within the context of the international court or tribunal to which the case has been brought. Sometimes these questions are addressed by the instruments regulating a specific court or tribunal.

To quote again from the ICTY, these instruments sometimes "provide otherwise". When this is the case, the questions are solved by applying the applicable rules of the international court or tribunal in which a case has been brought. When the international instruments regulating that court or tribunal do not envisage such problems directly, it will be a matter of interpretation. In this section of our research, we will explore some of these questions in regard to possible conflicts between the International Court of Justice (the Court) and the International Tribunal for the Law of the Sea (the Tribunal).[122]

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121. Case No. IT – 94 – 1 – AR 72, para. 11 (International Crim. Trib. For the former Yugoslavia, App. Chamber, Oct. 2, 1995), reprinted in 35 I.L.M. 32 (1996).

122. See United Nations Convention on the Law of the Sea of 10 December 1982, Annex VI: Statute of the Tribunal for the Law of the Sea, U.N. Doc. A/CONF. 62/121 (91982), reprinted in 21 I.L.M. 1245, 1345 – 50 (1982).

Two kinds of conflicts might develop: conflicts of jurisdiction and conflicts of jurisprudence. Many views have been expressed regarding the possibility that the jurisprudence of the Tribunal might diverge from that of the Court, either on questions concerning the law of the sea or on general problems of international law. These views range from concern over a looming risk of fragmentation in international law to the idea that "the risk should not be exaggerated"[123] and that the coexistence of various – and not necessarily unanimous – judicial voices can improve the growth of international law and the settlement of disputes. While the later view is shared, it is not the wish of this work to enter into this discussion here. Leaving aside conflicts of jurisprudence, this research address conflicts of jurisdiction between the Court and the Tribunal.

3.10.1 Conflicts of Jurisdiction Between the ICJ and the Tribunal for the Law of the Sea

There is no doubt that the jurisdiction of both the Court and the Tribunal may encompass cases concerning the "interpretation or application" of the 1982 United Nations Convention of the Law of the Sea (the Convention).[124] The conflict is more theoretical than practical, however, as submission of the same case to the Court and to the Tribunal is not possible.

When a case is submitted by notification of a special agreement, the parties will inform either the Court or the Tribunal. The potential jurisdiction of the body to which the case has not been submitted becomes irrelevant. From the parties' perspectives, however, the choice between these two judicial bodies entitled to judge the case is relevant. In the negotiation leading to the special agreement, the problem of forum selection will take on a new dimension that goes beyond the usual dilemma of choosing between arbitration and the Court. This new dimension is the choice between two permanent judicial bodies with

123. Stephen M. Schwebel, Address by the International Court of Justice to the General assembly of the United Nations (Oct. 27, 1998).

124. Articles 279 and 286 of the Convention specify that the provisions on the settlement of disputes of the Convention refer to disputes concerning the interpretation and application of the convention. See Convention on the Law of the Sea, Articles 279 and 286, reprinted in 21 I.L.M. at 1322 (1982).

different characteristics: one is an old, well-established body with general jurisdiction, and the other is a new, specialized body.

When a case is submitted by application, one could imagine the possibility of "forum shopping," in the sense that the disputing party that takes the initiative has the advantage of choosing, as between the Court and the Tribunal, the forum that it prefers. This is not the case, however, in practice. Article 282 of the Convention is a mechanism that efficiently precludes forum shopping as well as questions of overlapping litis-pendence-questions that might follow from conflicting choices made by the disputing parties. Article 282 states:

> If the states parties that are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree.

Article 282 favours any compulsory dispute settlement mechanism that is binding on the disputing parties, at the expense of both the Tribunal and other dispute settlement bodies with compulsory jurisdiction under Article 286 and 287 of the Convention. If the disputing parties have agreed previously to confer jurisdiction on a given dispute settlement body, then neither party can object to that body's jurisdiction on the grounds that jurisdiction belongs instead to the court or tribunal competent under Articles 286 and 287.

In the relationship between the Court and the Tribunal, the most interesting aspect of Article 282 is that the acceptance by all parties to a dispute of the Court's compulsory jurisdiction, under Article 36, paragraph 2 of the Court's Statute can be considered the "agreement" mentioned in Article 282. This may be disputed in formal terms, but the

consensual aspect - which seems to be the fundamental requirement of Article 36, paragraph 2 – undoubtedly exists,[125] so that it is reasonable to conclude that the parties have agreed "otherwise". Thus, in light of Article 282, whenever both parties to a dispute have accepted the "optional clause," the Tribunal, if seized by an application, and so requested, should declare that it has no jurisdiction. Conversely, if the Court is so seized, it should reject the defendants' claim that, because the parties have chosen the Tribunal under Article 287, the Court lacks jurisdiction.

According to Article 282, the jurisdictional priority given to the Court over the Tribunal, as between states that have accepted the optional clause, applies to all cases of compulsory jurisdiction of the Tribunal "provided for" in part XV of the Convention. Consequently, Article 282 does not seem to apply to the compulsory jurisdiction of the Sealed Disputes Chamber of the Tribunal because this jurisdiction is provided for in Article 187, which is in Part XI – not Part XV – of the Convention. The impact is relatively minor because it concerns only disputes between the states. The other disputes under Article 187, which involve non-state parties, are outside the Court's jurisdiction *ratione personae.*

A real conflict, however, might arise. It is theoretically possible that, in a dispute concerning the interpretation of Part XI of the Convention, one state party would seize the Court under Article 36, paragraph 2, while the other state party would seize the Sealed Dispute Chamber under Article 187.

3.10.2 The Impact of Reservations to the Acceptance of Compulsory Jurisdiction of the Court.

The priority set out in Article 282 of the Convention functions only if the dispute is encompassed by the compulsory jurisdiction agreement in force between the parties. When either party has excluded dispute from their agreement, the priority cannot apply. Reservations to declarations accepting the compulsory jurisdiction of the court are a means

125. See Preliminary Objection, *Anglo-Iranian Oil Co. case (U.K. v. Iran)* [1952] I.C.J. 93, 106, 110 (July 22).

of obtaining such exclusion.

These reservations may have a general purport or may be specific to law of the sea matters. For example, general reservations may exclude disputes for which the compulsory jurisdiction of the court was accepted by the other party less than twelve months prior to the filing of the application (such as the reservations of New Zealand,[126] the Philippines,[127] and the United Kingdom[128], or disputes with states not recognized by the state making the reservation (such as the declaration of India[129]). Reservations addressing the law of the sea may be very broad (such as those made by India[130] and by Malta[131] which exclude all disputes concerning maritime areas under their sovereignty and jurisdiction, including the delimitation of these areas) or may be focused on specific issues (such as those made by New Zealand[132] and the Philippines[133] which concern only disputes regarding fisheries in the exclusive economic zone, and respectively, natural resources of the scabbed of archipelagic waters and of the continental shelf).

It emerges clearly from these reservations that states have excluded disputes from compulsory jurisdiction of the Court that they cannot exclude from compulsory jurisdiction of a court or tribunal under the Convention. The fisheries case between Spain and Canada is an example because, when the underlying events occurred, neither state was a party to the Convention. See *Fisheries Jurisdiction Case (Spain v. Canada).*[134] The case concerned the boarding on the high seas of a Spanish fishing vessel (the *Estei*) by a Canadian patrol boat, in pursuance of the Canadian Coastal Fisheries Protection Act of the Northwest Atlantic Fisheries Organization (NAFO). Canada claimed that its acceptance of the compulsory jurisdiction of the Court did not apply to the case because the dispute was covered by a

126. See Declarations Recognizing Jurisdiction: New Zealand, para. 2, 1995 – 1996 Y.B. I.C.J. 106, 107.
127. See Declarations Recognizing jurisdiction: the Philippines, id at 110,111.
128. See Declarations Recognizing Jurisdiction: the United Kingdom, id at 120.
129. See Declarations Recognizing Jurisdiction: India, para. 8, id at 95, 96.
130. See id. Para. 9, at 99.
131. See Declarations Recognizing Jurisdiction: Malta, id at 102.
132. See Declarations Recognizing Jurisdiction: New Zealand, id at 106.
133. See Declarations Recognizing Jurisdiction: the Philippines, id. At 110.
134. 1998 I.C.J. (December 4).

reservation and management measures taken by Canada with respect to vessels fishing in NAFO Regulatory area… and the enforcement of such measures."[135] In its judgment of December 4, 1998, the Court relied on the Canadian reservation in finding that it had no jurisdiction.

Had both Spain and Canada been parties to the Convention at the time the boarding occurred, the situation would have been quite different. No provision in the Convention excludes, or permits the exclusion of, conservation or management measures and their enforcement on the high seas from the compulsory jurisdiction of the courts and tribunals mentioned in Article 287. Article 297, paragraph 3, excludes from such compulsory jurisdiction disputes relating to the coastal state's sovereign rights with respect to living resources and makes it clear that these are resources in the exclusive economic zone.[136]

Article 298, paragraph 1 (b) of the Convention, which permits declarations excluding disputes concerning law enforcement activities from compulsory jurisdiction, specifies that these activities must be "in regard of the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under Article 297, paragraph 2 or 3" – that is to say, in the economic zone.[137]

Once a reservation excludes a dispute from the compulsory jurisdiction of the Court, Article 282 cannot function, and the rules on compulsory jurisdiction of the convention are to be applied.

3.10.3 The Relevance of Limitations and Optional Exceptions to the Compulsory Jurisdiction of the Tribunal.

To determine which disputes can be brought to the Court and to the Tribunal unilaterally, it is insufficient to examine the impact of the reservations on the acceptance of the optional clause by the disputing parties. It is necessary to verify whether one or more of

135. See Counter – Memorial of Canada (Jurisdiction) (Spain V. Canada) 1996 I.C.J. Pleadings (Fisheries Jurisdiction case) (Feb. 29, 1996).
136. Article 297 of Convention on the Sea.
137. Article 298, paragraph 1 (b) of Convention on the Law of the Sea.

the limitations of, or optional exceptions to, the applicability of the rules on compulsory jurisdiction, set out in Articles 297 and 298 of the Convention, apply.

For instance, if one of the parties has accepted the optional clause with a reservation concerning disputes regarding the "determination and delimitation of its maritime boundaries," the ability to bring a case to a court or tribunal depends on whether one of the parties has made a declaration stating it does not accept the jurisdiction of such courts or tribunals under Article 298, paragraph 1 (a) of the Convention. If such a declaration has been made, there would be no compulsory settlement clause in force between the parties, unless the requirements for "compulsory" conciliation under Article 298 are satisfied. If such a declaration under Article 298, paragraph1 (a), has not been made – as is the case for India and Malta, which have made the above-mentioned reservation to their acceptance of the optional clause – a party will be entitled to invoke the obligation under the Convention to submit the dispute to the jurisdiction of a court or tribunal.

Some aspects of a complex dispute may come under the jurisdiction of the Court, while others fall under the jurisdiction of the Tribunal or of another court or tribunal competent under the Convention. This can happen for several reasons:

(1) the effect of reservations to acceptance of the optional clause of Article 36, paragraph 2 of the ICJ statute;

(2) the statute of the Court; or

(3) limitations and optional exceptions under Articles 297 and 298 of the convention.

In any such situation, each court would be competent to rule on different questions. While there would be no overlapping litispendence strictly speaking, the connection between the questions submitted to the Court and to the Tribunal would make it impractical and risky that the Court and the Tribunal hear in parallel (or in sequence) the different connected questions.

The parties must be flexible and must try to concentrate the whole of their dispute before one court or tribunal. They should consider granting competence over the entire case to the one court or tribunal that has been seized. The parties may do this by their acquiescence, and by the *forum prorogation* clauses included in the Rules of the Court and of the Tribunal.[138]

States also can prevent such a situation by drafting skillfully their declarations. An interesting example is the declaration of June 25, 1996, in which Norway modified its acceptance of the Court's compulsory jurisdiction. The declaration confirms such acceptance:

> Provided, however, that the limitations and exceptions, relating to the settlement of disputes pursuant to the provisions of, and the Norwegian declarations applicable at any given time to, the United Nations Convention on the Law of the Sea of 10 December 1982… shall apply to all disputes concerning the law of the Sea.[139]

Through this declaration, Norway excludes all disputes that cannot fall under the compulsory jurisdiction of a court or tribunal according to the Convention, either because of the limitations set out in Article 297 or because of a declaration by Norway utilizing an optional exception set out in Article 298. In this way, with respect to disputes concerning the law of the sea, Norway accepts the jurisdiction of the Court, under Article 36, paragraph 2, of the Statute, with exactly the same scope as it has under the Convention's compulsory jurisdiction clauses – and their limitations and exceptions.

In light of this, it makes sense for states that have accepted the optional clause to make a declaration of preference for the Court under Article 287 with regard to disputes with states that also have made the declaration – not only when they have not accepted the

138. See Article 38, paragraph 5 of the International Court of Justice; and Article 54, paragraph 5 of the Rules of the Law of the Sea

139. Declarations Recognizing Jurisdiction:Norway,1995 – 1996 Y.B. I.C.J. 108, 109.

optional clause, but also with regard to disputes with other states having accepted the clause. The Court's jurisdiction, when excluded by reservations to the acceptance of the optional clause, may be "restored" on the basis of Article 286 and 287. It also makes sense for states that have accepted the optional clause to prefer the Tribunal in their declarations under Articles 287. The states that are in this category (Austria, Greece, Portugal, and Uruguay) will be under the compulsory jurisdiction of the court for disputes with other states accepting the optional clause and under the jurisdiction of the Tribunal for disputes with other states preferring the Tribunal under Artcle287. If reservations to the optional clause exclude the jurisdiction of the Court, in most cases, due to the low number of preference for the Tribunal, arbitration will be the applicable procedure.

3.10.4 The Court, the Tribunal, and Declarations made under Article 287 of the Law of the Sea Convention.

It may be said that the Court and the Tribunal are in competition (not in conflict) to attract declarations of preference under Article 287 by states parties to the Convention. It seems more important, however, to note that the Court and the Tribunal are in competition, together and not one against the other, with arbitration. Arbitration is the procedure that states parties can declare under Article 287, that they are presumed to prefer in the absence of a declaration, and that applies whenever two parties to a dispute have not expressed the same preference.

What has happened in practice? Out of 127 states parties, only twenty have expressed a preference under Article 287. These preferences are as follows:[140]

* ten for the tribunal (including Argentina, Austria, Cape Verde, Chile, Germany, Greece, Portugal, Tanzania, and Uruguay),
* six for the Court (Algeria, the Netherlands, Norway, Spain, Sweden and the United Kingdom),

140. Declarations Recognizing Jurisdiction:Norway,1995 – 1996 Y.B. I.C.J. 108, 109.

* four for the Tribunal and the Court without stating a preference between the two (Belgium, Finland, Italy and Oman), and
* one for arbitration (Egypt).

This data must be considered in light of acceptances of the optional clause of Article 36, paragraph 2, of the Statute of the Court, made by states parties to the Convention. There were forty-four (out of sixty-one) states at the beginning of 1988. of these forty-four, thirty-two have made no declaration under Article 287, while twelve have made one such declaration. These declarations demonstrate:[141]

* five prefer the Court (the Netherlands, Norway, Spain, Sweden, and the United Kingdom),
* one prefers the Court and the Tribunal (Finland),
* four prefer the Tribunal (Austria, Greece, Portugal, and Uruguay),
* one has declared that it rejects the jurisdiction of the Court for any dispute. (This is the position taken by Guinea-Bissau even though such declaration is not, it would seem, within the terms of Article 287).

The states parties bound to the compulsory jurisdiction of the Court (either under the optional clause or under Articles 286 and 287) number forty-six, including Italy and Oman. Those bound by the compulsory jurisdiction of the Tribunal number thirteen, including Belgium, Finland, Italy, and Oman. The obligation of these states to submit to the jurisdiction of Court or of the Tribunal only applies to disputes between states having accepted the jurisdiction of the Court or of the tribunal. For all other disputes, arbitration remains competent according to Article 287.

An initial observation prompted by this data is that the over whelming majority of states having expressed a preference have selected permanent judicial bodies. Only two

141. See Division for Ocean Affairs and the Law of the Sea, U.N. Office of Legal affairs, *Settlement of Disputes Mechanism: Choice of Procedure by States Parties Under Article 287 of the Convention* (last modified Feb. 17,1999) ,<http://www.un.org/Depts/los-sdm1.htm>. Algeria accepts the jurisdiction of the Court only with a prior agreement between both parties concerned in the case.

states have expressed a preference for arbitration. It may be added that the policy of limiting the impact of the rules in Article 287 favouring arbitration can be pursued by declaration such as those made by Finland, Italy, and Oman – choosing the Court and the Tribunal without expressing a preference. This policy was clearly expressed by Italy in its declaration choosing the Court and the Tribunal:

In making this declaration under article 287 of the Convention on the Law of the Sea, the Government of Italy is reaffirming its confidence in the existing international judicial organs. In accordance with Article 287, paragraph 4, Italy considers that it has chosen "the same procedure" as any other state party that has chosen the International Tribunal for the Law of the Sea or the International Court of Justice.[142]

A second observation prompted by the data is that the great majority (approximately two-thirds) of states parties to the Convention have neither accepted the optional clause nor made a declaration under Article 287. In light of this observation, one may ask whether the states that have expressed no preference are satisfied with the "residual rule" of Article 287, paragraph 5, stating that "if the parties have not accepted the same procedure for the settlement of the dispute," compulsory jurisdiction under the Convention belongs to an arbitral tribunal. The answer may be affirmative in some cases, when the state in question has a deeply rooted attachment to arbitration or equally deeply rooted reasons for mistrust of the Court and the Tribunal. This might be the case for the United States, whose government, in transmitting the Convention to the senate for its advice and consent, made it clear that it intends to express a preference for special arbitration, general arbitration.[143] This also should be the position of any states making the choice for arbitration, such as Egypt.

142. *Multilateral Treaties Deposited with the Secretary-General, status as of 31 December 1997*, at 812,U.N. Doc. ST/LEG/SER.B/16(1998). In the original French version of its declaration, Italy expresses its confidence in the "*organs permanents de justice internationale*." A better translation thus would have been "permanent" instead of "existing" international judicial organs.

143. See *Letter of Submittal of the Secretary of State to the President of the United States* (Sept. 23,1994*), reprinted in Special Supplement: Message from the President of the United States and Commentary Accompanying the United Nations Convention on the Law of the Sea*, 7 GEO. INT'L ENVTL.L.REV. 77, 79 (1994); *Commentary on the 1982 United Nations Convention on the Law of the Sea,reprinted in id*.at 87.

In most cases, however, the lack of declaration may well have explanations different from a preference for arbitration.

One may think of bureaucratic passivity – the well-known trend of bureaucracies (including foreign affairs bureaucracies) not to make moves that are not strictly necessary or required. One may also think of the assumption, closely allied with bureaucratic passivity and in this case clearly wrong – that inaction has no consequences. It is also possible that inaction is a "wait-and-see" attitude derived from a lack of knowledge about the Tribunal.

In conclusion, states parties to the Convention must consider seriously the issues surrounding declarations they are entitled to make under Article 287. More than the choice between the Court and the Tribunal, the important choice states must make is the one between permanent dispute settlement bodies and arbitral tribunals.

The *M/V "Saiga" Case (No.2)* demonstrates why states should consider seriously the pros and cons of their choices under Article 287.[144] Neither party to the dispute, Saint Vincent and the Grenadines and Guinea, had made a declaration under Article 287. Consequently, when Saint Vincent and the Grenadines started proceedings on the merits, it requested the establishment of an arbitration tribunal, as arbitration was the only procedure competent to deal with the case under Article 287. At the same time, invoking Article 290, paragraph 5, Saint Vincent and Grenadines also requested that the Tribunal prescribe provisional measures pending the constitution of the arbitration tribunal. When the parties discussed the organization of the case between themselves and with the President of the Tribunal during the days preceding the hearings concerning the request for provisional measures, they agreed to transfer jurisdiction on the merits of the case from the yet-to-be-constituted arbitral tribunal to the Tribunal.[145] Even though the reasons were not publicized, it is reasonable to infer that this agreement may have been influenced significantly by the

144. See M/V "Saiga" (No. 2) Case, order on Provisional Measures (St. Vincent v. Guinea), 37 I.L.M. 1202 (Int's Trib. L. Sea, Mar. 11, 1998).
145. See id. Para. 28.

cost and organizational burdens that international arbitration imposes on the parties. In this case, two states that had made no declarations under Article 287 consequently found their situation uncomfortable when a dispute arose and an arbitration panel was to be constituted.

3.11 Effect on the Administration of Justice

We have observed in the foregoing paragraphs the limitations and challenges to the jurisdiction of the International Court of Justice. These have affected the administration of justice adversely as can be summarized hereunder.

The Court's contentions jurisdiction is limited to cases which the parties to a dispute are willing to bring before it. Any addition to these obviously leads to challenge on the admissibility of such a suit before the Court.

Many of the Optional Clause declarations by states under Article 36(2) of the ICJ Statute were so fogged over with reservations and exceptions that they did not notably extend the Court's jurisdiction beyond the caprice and whim of the declarant state. This again is another ground for possible challenge to the jurisdiction of the Court.

The requirement of Article 96 of the UN Charter and Article 65 of the Court's Statute that the Court's advisory opinion should be on "legal" question constitute a limitation in this branch of the Court's jurisdiction. Granted that there are few cases of challenge yet on this ground, it is very obvious that a challenge on this ground any time is likely to be sustained.

The problem of enforcement of the decision of the ICJ is a big challenge to the Court. We have already seen several instances of this and if no positive step is taken to curb this challenge, the credibility of the Court will be at stake.

The problem of "non-appearing respondents" and boycotting of the Court's proceedings is another challenge to the Court. To prevent its adverse effect on the administration of justice and the integrity of the Court a solution must be sought concerning this.

The tone and tenor of the UN Charter which focus more on political settlement than international adjudication had led to by-passing of the ICJ in favour of the UN Security Council and UN General Assembly. It is very necessary, therefore, to revisit the position of the Court in relation to the two powerful organs of the United Nations

The allowance in Article 95 of the UN Charter that states are perfectly free to use tribunals other than the International Court of Justice further created room for the by-passing of the Court. This calls for a re-consideration that will firmly assure the sanctity of the jurisdiction of the Court.

The hesitation on the part of the states to make Optional Clause declarations and the large number of sweeping reservations coupled with oppositions to any amendment to the UN Charter and the Statutes of the court are strong evidence and indication of the real views held by states on the usefulness of the court. Again this calls for a change in the interest of better operation of the Court.

Increasing armed conflicts in the world today and the precarious position of the ICJ on the issue of use of force pose a great challenge to the future of the Court. This is another area that must be given serious consideration so that the relevance of the Court in the present day world will not be compromised.

The proliferation of international courts and tribunals within an international system that has no unified judiciary lead to conflicts of jurisdiction between the ICJ and those courts and tribunals. This calls for decisive legislation to avoid chaos and anarchy in the international adjudicatory system.

The resultant effect of these is the side-lining of judicial settlement of disputes in international spheres. This portends great danger to the administration of justice among states today. This is so much so in the face of the increasing clamour for use of force and the decreasing recourse to international adjudication. Something must, therefore be done to save the court and administration of justice from being extinct. This will certainly be attended to in the concluding chapter of this research.

CHAPTER FOUR

THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT (ICC) AND THE ADMINISTRATION OF CRIMINAL JUSTICE SYSTEM

4.1 Diplomatic Conference in Rome

The Rome Statute of the International Criminal Court (often referred to as the International Criminal Court Statute or the Rome Statute) is the treaty that established the International Criminal Court (ICC). It was adopted at a diplomatic conference in Rome on 17 July 1998[1] and it entered into force on 1 July 2002. Member-states to the statute stood at 122 as of 1 May 2013. The statute, among other things, established the court's functions, jurisdiction and structure.

Four core international crimes, namely genocide, crimes against humanity, war crimes and the crime of aggression, were established by the Rome Statute. Under the ICC Statute, the International Criminal Court can only investigate and prosecute the four core international crimes in situations where states are "unable" or "unwilling" to do so themselves.[2] The Court has jurisdiction over crimes only if they are committed in the territory of a state party[3] or if they are committed by a national of a state party[4]; an exception to this rule is that the ICC may also have jurisdiction over crimes if its jurisdiction is authorized by the United Nations Security Council.[5]

Following years of negotiation, aimed at establishing a permanent international tribunal to prosecute individuals accused of genocide and other serious international crimes, such as crimes of aggression[6], the United Nations General Assembly (UNGA) convened a

1. "The International Criminal Court: An Introduction". Retrieved 25 November 2012. the Official language of the ICC are Arabic, Chinese, English, French, Russian and Spanish and the working languages are currently English and French.
2. See Article 17(1)(a) of the ICC Statute, 1998.
3. See Article 12(2)(a) of the ICC Statute, 1998.
4. See Article 12(2)(b) of the ICC Statute, 1998.
5. See Article 13(b) of the ICC Statute, 1998.
6. The International Criminal Court does currently not have jurisdiction regarding the crime of aggression. An amendment to the Rome Statute to expand the ICC's jurisdiction towards that crime is currently in the process of ratification. Under no circumstances will the Court be able to actually exercise jurisdiction with regard to the crime before 1 January 2017.

five-week diplomatic conference in Rome in June 1998 to finalize and adopt a convention on the establishment of an international criminal court. On 17 July 1998, the Rome Statute was adopted by a vote of 120 to 7, with 21 countries abstaining.[7]

Due to the fact that the way each delegation voted was officially unrecorded, there is some dispute over the identify of the seven countries that voted against the treaty. It is certain that the People's Republic of China, Israel, and the United States[8] were three of the seven because they have publicly confirmed their negative votes; India, Indonesia, Iraq, Libya, Qatar, Russia, Saudi Arabia, Sudan, and Yemen have been identified by various observers and commentators as possible sources for the other four negative votes with Iraq, Libya, Qatar, and Yemen being the four most commonly identified.

On 11 April 2002, ten countries ratified the statute at the same time at a special ceremony held at the United Nations headquarters in New York City, bringing the total number of signatories to sixty, which was the minimum number required to bring the statute into force, as defined in Article 126.[9] The treaty entered into force on 1 July 2002; the ICC can only prosecute crimes committed on or after that date.[10]

The statute was modified in 2010 after the Review Conference in Kampala, Uganda, but the amendments to the statute that were adopted at that time are not effective yet.

4.2 Establishment of the Court

The ICC was established in response to the most heinous crimes committed during the conflicts which marked the twentieth century. The first global attempt to establish an international tribunal to judge political leaders accused of war crimes was made during the Paris Peace Conference in 1919 by the Commission of Responsibilities. The issue was

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7. The sum of (a) states parties, (b) signatories and (c) non-signatory United Nations member states is 194. The number is one more than the number of UN member states (193). This is due to the Cook Islands being a state party but not a UN member state.
8. J R Bolton, 27 April 2002, *International Criminal Court: Letter to UN Secretary General Kofi Annam.* US Department of State. 41 ILM 1014 (2002).
9. See Article 126 of the Rome Statute of the ICC, 1998.
10. See Article 11(1) of the Rome Statute of the ICC, 1998.

addressed again at a conference held in Geneva under the auspices of the League of Nations on 1-6 November 1937, which resulted in the conclusion of the first convention stipulating the establishment of a permanent international court to try acts of international terrorism. The convention was signed by 13 governments, but was never ratified, and the convention never entered into effect.

The United Nations stated that the General Assembly first recognized the need for a permanent international court to deal with atrocities of the kind committed during World War II in 1948, following the Nuremberg and Tokyo Tribunals.[11] At the request of the General Assembly, the International Law Commission (ILC) drafted two statutes by the early 1950s but these were shelved as the Cold War made the establishment of an international criminal court politically unrealistic.[12]

Benjamin B. Ferencz, an investigator of Nazi war crimes after World War II and the Chief Prosecutor for the United States Army at the Einsatzgruppen Trial, one of the twelve military trials held by the U.S authorities at Nuremberg later became a vocal advocate of the establishment of an international rule of law and of an International Criminal Court. In his first book published in 1975, entitled Defining International Aggression – The Search for World Peace, he argued for the establishment of such an international court.[13]

The idea was revived in 1989 when A.N.R. Robinson, then Prime Minister of Trinidad and Tobago, proposed the creation of a permanent international court to deal with the illegal drug trade. The UN General Assembly asked that the ILC resume its work on drafting a statute. The conflicts in Bosnia-Herzegovina and Croatia as well as in Rwanda in the early 1990s and the mass commission of crimes against humanity, war crimes, and genocide led the UN Security Council to establish two separate temporary ad hoc tribunals

11. United Nations Department of Public Information, December 2002, *The International Criminal Court.* Retrieved 5 December 2006.
12. G T Dempsey. (16 July 1998). "Reasonable Doubt: The Case Against the Proposed International Criminal Court". Cato Institute. Retrieved 31 December 2006.
13. B B Ferencz, Biography. 9 January 2008. Archived from the original on 9 January 2008. Retrieved 1 March 2011.

to hold individuals accountable for these atrocities, further highlighting the need for a permanent international criminal court.

In 1994, the ILC presented its final draft statute for an ICC to the United Nations General Assembly and recommended that a conference of plenipotentiaries be convened to negotiate a treaty and enact the Statute. Following several committees sittings and reports, the UNGA convened a conference in Rome in June 1998 and on 17 July 1998, the Rome Statute of International Criminal Court was adopted.

Following the adoption of the Rome Statute, the United Nations convened the Preparatory Commission for the International Criminal Court. As with the Rome Conference, all States were invited to participate in the Preparatory Commission.

Among its achievements, the Preparatory Commission reached consensus on the Rules of Procedure and Evidence and the Elements of Crimes. These two texts were subsequently adopted by the Assembly of States parties. Together with the Rome Statute and the Regulations of the Court adopted by the judges, they comprise the Court's basic legal texts, setting out its structure, jurisdiction and functions.

4.2.1 Rome Statute of the International Criminal Court

The Rome Statute of the International Criminal Court is called so because it was adopted in Rome, Italy. It was adopted on 17 July 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.

The Statute is an international treaty, binding only on those States which formally express their consent to be bound by its provisions. These States then become "Parties to the Statute".

In accordance with its terms, the Statute entered into force on 1 July 2002, once 60 States had become Parties. As of 1 May 2013, 122 States are Parties to the Rome Statute. The States Parties meet in the Assembly of States Parties which is the management oversight and legislative body of the Court.

The basis for the establishment of the International Criminal Court (ICC) is clearly outlined in the Rome Statute of the International Criminal Court.[14] This can be summarized as follows:

(1) the consciousness that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and the concern that this delicate mosaic may be shattered at any time;

(2) the mindfulness that during the 20th century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity;

(3) the recognition that such grave crimes threaten the peace, security and well being of the world;

(4) the affirmation that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation;

(5) the determination to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes;

(6) the recall that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes;

(7) the reaffirmation of the Purposes and Principles of the Charter of the Untied Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations;

14. See the Preamble of the Rome Statute of the International Criminal Court

(8) the emphasis in this connection that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict in the internal affairs of any State;

(9) the determination to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole;

(10) the emphasis that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions; and

(11) the resolution to guarantee lasting respect for the enforcement of international justice.

All the above objectives led to the agreement and adoption of the Rome Statute of the International Criminal Court by the United Nations Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court on 17 July 1998.

Part 1 of the Statute[15] deals with the establishment of the Court which shall be a permanent institution, have power to exercise jurisdiction over persons for the most serious crimes of international concern, and be complementary to national criminal jurisdictions.[16] The relationship of the Court with the United Nations is determined by an agreement approved by the Assembly of States Parties to the ICC Statute and concluded by the President of the Court on its behalf.[17]

The seat of the Court is at The Hague in the Netherlands by virtue of an agreement between the Court and the host state. The Court is authorized to sit elsewhere whenever it is considered desirable.[18]

15. Articles 1 to 4.
16. Article 1 of the ICC Statute, 1998.
17. Article 2 of the ICC Statute, 1998.
18. Article 3 of the ICC Statute, 1998.

The legal status and powers of the Court is provided for in Article 4 of the Statute of the Court. The Court may exercise its functions and powers, as provided in the Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.[19]

4.2.2 Structure of the International Criminal Court

In June 2010, two amendments to the Rome Statute of the International Criminal Court were adopted by the Review Conference in Kampala, Uganda. The first amendment criminalizes the use of certain kinds of weapons in non-international conflicts.[20] It has been ratified by 14 states parties and is in force in three of them.[21] The second amendment specifies the crime of aggression. It has been ratified by 11 States parties and is in force in two of them. However, per the language of the amendment, the Court will only have jurisdiction over the crime of aggression after two additional conditions are met: (1) the amendment has entered into force for 30 States parties and (2) on a date after 1 January 2017, the Assembly of States Parties has voted in favour of allowing the Court to exercise jurisdiction. The ICC is governed by an Assembly of State Parties. The Court consists of four main organs: the Presidency, the Judicial Divisions, the Office of the Prosecutor and the Registry.[22]

As of May 2013, 122 states had become states parties to the statute of the court, including all of South America, nearly all of Europe, most of Oceania and roughly half the countries in Africa. A further 31 countries, including Russia, had signed but not ratified the Rome Statute. The law of treaties obliges these states to refrain from "acts which would defeat the object and purpose" of the treaty until they declare they do not intend to become a

19. Article 4 (2) of the ICC Statute, 1998.
20. Resolution RC/Res.5: Amendments to article 8 of the Rome Statute (PDF). International Criminal Court 2010-06-10. Retrieved 2011-03-13.
21. Chapter XVIII, Penal Matters 10a: Amendments to article 8 of the Rome Statute of the International Criminal Court. United Nations Treaty Collections. 2013-09-25.Retrieved 2013-09-25.
22. Article 34 of the ICC Statute, 1998.

party to the treaty.[23] Three of these states – Israel, Sudan and the Untied States – have informed the UN Secretary General that they no longer intend to become states parties and, as such, have no legal obligations arising from their former representatives' signature of the Statute.

41 United Nations member states have neither signed nor ratified or acceded to the Rome Statute; some of them, including China[24] and India[25], are critical of the Court. On 21 January 2009, the Palestinian National Authority formally accepted the jurisdiction of the Court. On 3 April 2012 the ICC Prosecutor declared himself unable to determine that Palestine is a "state" for the purposes of the Rome Statute and referred such decision to the United Nations. On 29 November 2012 the United Nations General Assembly voted in favour of recognizing Palestine as a non-member observer state.

4.2.2.1 Assembly of States Parties.

The Court's management oversight and legislative body, the Assembly of States Parties, consists of one representative from each state party.[26] Each state party has one vote and "every effort" has to be made to reach decisions by consensus.[27] If consensus cannot be reached, decisions are made by vote.[28] The Assembly is presided over by a president and two vice-presidents, who are elected by the members to three-year terms.

The Assembly meets in full session once a year in New York or The Hague, and may also hold special sessions where circumstances require.[29] Sessions are open to observer states and non-governmental organizations.

The Assembly elects the judges and prosecutors, decides the Court's budget, adopts important texts (such as the Rules of Procedure and Evidence), and provides management

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23. Article 18 of The 1969 Vienna Convention on the Law of Treaties.
24. China's Attitude Towards the ICC, Lu Jianping and Wang Zhixiang, *Journal of International Criminal Justice*, 2005-07-06.
25. India and the ICC, Usha Ramanathan, *Journal of International Criminal Law*, 2005.
26. Article 112(1) of the Rome Statute of the ICC, 1998.
27. Article 112(7) of the Rome Statute of the ICC, 1998.
28. Ibid.
29. Article 112(6) of the Rome Statute of the ICC, 1998.

oversight to the other organs of the Court.[30] The Assembly is allowed to remove from office a judge or prosecutor who "is found to have committed serious misconduct or a serious breach of his or her duties" or "is unable to exercise the functions required by this Statute".[31]

The states parties cannot interfere with the judicial functions of the Court.[32] Disputes concerning individual cases are settled by the Judicial Divisions.[33]

In 2010, Uganda hosted the Assembly's Rome Statute Review Conference. In 2011, New York hosted the Assembly's Rome Statute Review Conference.

4.2.2.2 Presidency

The Presidency is responsible for the proper administration of the Court, with the exception of the office of the prosecutor.[34] It comprises the President and the First and Second Vice-Presidents, three judges of the Court who are elected to the Presidency by their fellow judges for a maximum of two three-year terms.[35] On 11 March 2009, Judge Sang-Hyun Song of Republic of Korea was elected President of the International Criminal Court, while Judges Diarra (Mali) and Kaul (Germany) were elected First and Second Vice-Presidents respectively. The judges of the Court again elected the presidency pursuant to Article 38 of the Rome Statute on 11 March 2012.

The Presidency shall, in discharging its responsibility under Article 38(3)(a) of the Rome Statute, co ordinate with and seek the concurrence of the Prosecutor on all matters of mutual concern.[36] The Presidency, which serve on full-time basis, has three main responsibility, namely judicial/legal functions, administration and external relation. In the exercise of its judicial/legal functions, the Presidency constitute and assigns cases to chambers, conducts judicial review of certain decisions of the Registrar and concludes

30. Article 36 and 112(2) of the Rome Statute of the ICC, 1998.
31. Article 46(3) of the Rome Statute of the ICC, 1998.
32. Article 46(3) of the Rome Statute of the ICC, 1998.
33. Article 46(4) of the Rome Statute of the ICC, 1998.
34. Article 38(3)(a) of the Rome Statute of the ICC, 1998.
35. Article 38(1) of the Rome Statute of the ICC, 1998.
36. Article 38 (4) of the Rome Statute of the ICC, 1998.

court-wide cooperation agreement with states.

As stated earlier, the Presidency is responsible for the proper administration of the Court, with the exception of the office of the Prosecutor. It oversees the work of the Registry. Among the responsibility of the Presidency in the area of external relations is to maintain relations with states and other entities and to promote public awareness and understanding of the Court.

4.2.2.3 Judicial Divisions

The Judicial Divisions consist of the 18 judges of the Court, organized into three chambers–the Pre-Trial Chamber, Trial Chamber and Appeals Chamber – which carry out the judicial functions of the Court.[37] Judges are elected to the Court by the Assembly of States Parties. They serve nine-year terms and are not generally eligible for re-election. All judges must be nationals of states parties to the Rome Statute, and no two judges may be nationals of the same state.[38] They must be "persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices".[39]

The prosecutor or any person being investigated or prosecuted may request the disqualification of a judge from "any case in which his or her impartiality might reasonably be doubted on any ground".[40] Any request for the disqualification of a judge from a particular case is decided by an absolute majority of the other judges.[41] A judge may be removed from office if he or she "is found to have committed serious misconduct or a serious breach of his or her duties" or is unable to exercise his or her functions.[42] The removal of judge requires both a two-thirds majority of the other judges and a two-thirds majority of the states parties.[43]

37. Article 34(b) and 39 of the Rome Statute of the ICC, 1998.
38. Article 36 of the Rome Statute of the ICC, 1998.
39. Article 36(3)(a) of the Rome Statute of the ICC, 1998.
40. Article 41(2) (a) and (b)of the Rome Statute of the ICC, 1998.
41. Article 41(2)(c) of the Rome Statute of the ICC, 1998.
42. Article 46(1) of the Rome Statute of the ICC, 1998.
43. Article 46(2)(a) of the Rome Statute of the ICC, 1998.

4.2.2.4 Office of the Prosecutor

The Office of the Prosecutor is responsible for conducting investigations and prosecutions. It is headed by the Chief Prosecutor, who is assisted by one or more Deputy Prosecutors. The Rome Statute provides that the Office of the Prosecutor shall act independently,[44] as such no member of the Office may seek or act on instructions from any external source, such as states, international organizations, non-governmental organizations or individuals.

The Prosecutor may open an investigation under three circumstances:

(1) when a situation is referred to him or her by a state party;

(2) when a situation is referred to him or her by the United Nations Security Council, acting to address a threat to international peace and security; or

(3) when the Pre-Trial Chamber authorizes him or her to open an investigation on the basis of information received from other sources, such as individuals or non-governmental organizations.

Any person being investigated or prosecuted may request the disqualification of a prosecutor from any case "in which their impartiality might reasonably be doubted on any ground"[45] Requests for the disqualification of prosecutors are decided by the Appeals Chamber.[46] A prosecutor may be removed from office by an absolute majority of the states parties if he or she "is found to have committed serious misconduct or a serious breach of his or her duties" or is unable to exercise his or her functions.[47] However, critics of the Court argue that there are "insufficient checks and balances on the authority of the ICC prosecutor and judges" and "insufficient protection against politicized prosecutions or other abuses".[48] Henry Kissinger said that the checks and balances are so weak that the prosecutor

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44. Article 42 of the Rome Statute of the ICC, 1998.
45. Article 42(7) of the Rome Statute of the ICC, 1998.
46. Article 42(8) of the Rome Statute of the ICC, 1998.
47. Article 46(1) & (2) of the Rome Statute of the ICC, 1998.
48. US Department of State, 30 July 2003. *Frequently Asked Questions About the U.S. Government's Policy Regarding the International Criminal Court (ICC).*

"has virtually unlimited discretion in practice".[49] Some efforts have been made to hold Kissinger himself responsible for perceived injustices of American foreign policy during his tenure in government.[50]

As of 16 June 2012, the Prosecutor has been Fatou Bensouda of Gambia who had been elected as the new Prosecutor on 12 December 2011. She has been elected for nine years. Her predecessor, Luis Moreno Ocampo of Argentina had been in office from 2003 to 2012.

4.2.2.5 Registry

The Registry is responsible for the non-judicial aspects of the administration and servicing of the Court.[51] This includes, among other things, "the administration of legal aid matters, court management, victims and witnesses matters, defence counsel, detention unit, and the traditional services provided by administrations in international organizations, such as finance, translation, building management, procurement and personnel". The Registry is headed by the Registrar, who is elected by the judges to a five-year term.[52] The current Registrar is Herman Von Hebet who was elected on 8 March 2013.

The Registrar and the Deputy Registrar shall be persons of high moral character, be highly competent and have an excellent knowledge of and be fluent in at least one of the working languages of the Court.[53] The Registrar shall set up a Victims and Witnesses Unit within the Registry to provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counseling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses.[54]

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49. H A Kissinger, "The Pitfalls of Universal Jurisdiction". *Foreign Affairs.* July/August 2001, P.95.
50. "Why the law wants a word with Kissinger". Fairfax Digital. April 30, 2002.
51. Article 43(1) of the Rome Statute of the ICC, 1998.
52. Article 43(2),(4) and (5) of the Rome Statute of the ICC, 1998.
53. Article 43(3) of the Rome Statute of the ICC, 1998.
54. Article 43(6) of the Rome Statute of the ICC, 1998.

4.2.3 Procedure of the Court

The working of the International Criminal Court (ICC) manifests on how trials are conducted by the Court; rights of accused persons before the Court; and attitude of the Court with regard to victims as well as other issues. These are considered hereunder.

4.2.3.1 Trial

Trials are conducted under a hybrid common law and civil law judicial system, but it has been argued that the procedural orientation and character of the court is still evolving.[55] A majority of the three judges present, as triers of fact, may reach a decision, which must include a full and reasoned statement.[56] Trials are supposed to be public, but proceedings are often closed, and such exception to a public trial have not been enumerated in detail.[57] In camera proceedings are allowed for protection of witnesses or defendants as well as for confidential or sensitive evidence.[58]

Hearsay and other indirect evidence is not generally prohibited, but it has been argued that the court is guided by hearsay exceptions which are prominent in common law systems.[59] There is no subpoena or other means to compel witnesses to come before the court, although the court has some power to compel testimony of those who are invited to testify or treat their refusal to testify as misconduct likely to attract the sanction of the Court. The Court may sanction persons present before it who commit misconduct, including disruption of its directions, by administrative measures other than imprisonment such as temporary or permanent removal from the courtroom, a fine or other similar measures provided for in the Rules of Procedure and Evidence.[60]

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55. W A Schabas. *An Introduction to the International Criminal Court*. Cambridge University Press. (2011) P. 302.
56. Ibid, P. 322.
57. Ibid, PP.303-304.
58. Ibid, P. 304.
59. Ibid, P. 312.
60. Article 71(1) of the Rome Statute of the ICC, 1998.

4.2.3.2 Rights of the accused

The Rome Statute provides that all persons are presumed innocent until proven guilty beyond reasonable doubt,[61] and establishes certain rights of the accused and persons during investigations.[62] These include the right to be fully informed of the charges against him or her; the right to have a lawyer appointed, free of charge; the right to a speedy trial; and the right to examine the witnesses against him or her.

To ensure "equality of arms" between defence and prosecution teams, the ICC has established an independent Office of Public Counsel for the Defence (OPCD) to provide logistical support, advice and information to defendants and their counsel. The OPCD also helps to safeguard the rights of the accused during the initial stages of an investigation. However, Thomas Lubanga's defence team say they were given a smaller budget than the Prosecutor and that evidence and witness statements were slow to arrive.[63] The trial court procedures are similar to the US Guantanamo military commissions.[64]

4.2.3.3 Victim participation and reparations

One of the great innovations of the Statute of the International Criminal Court and its Rules of Procedure and Evidence is the series of rights granted to victims.[65] For the first time in the history of international criminal justice, victims have the possibility under the Statute to present their views and observations before the Court.

Participation before the Court may occur at various stages of proceedings and may take different forms, although it will be up to judges to give directions as to the timing and manner of participation.

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61. Article 66 of the Rome Statute of the ICC, 1998.
62. The rights of persons during investigation are provided in Article 55 of the Rome Statute of the ICC, 1998. Rights of the accused are provided in Part 6, especially Article 67 of the Statute. See also Amnesty International, 1 August 2000.
63. S Hanson, Africa and the International Criminal Court. Council on Foreign Relations (17 November 2006).
64. W Shawcross. Justice and the Enemy: From the Nuremberg Trials to Khaled Sheikh Mohammed. *Public Affairs*. (2002) P. 120. See also *The New Zealand Law Journal.* Butterworths. 2003. (2012) P. 468.
65. Ilaria Bottigliero. "The International Criminal Court-Hope for the Victims" 32 *SGI Quarterly.* (April 2003) PP. 13-15.

Participation in the Court's proceedings will in most cases take place through a legal representative and will be conducted "in a manner which is not prejudicial or inconsistent with the rights of the accused and a fair and impartial trial".

The victim-based provisions within the Rome Statute provide victims with the opportunity to have their voices heard and to obtain, where appropriate, some form of reparation for their suffering. It is this balance between retributive and restorative justice that will enable the ICC, not only to bring criminals to justice but also to help the victims themselves obtain justice.

Article 43(6) of the Rome Statute of the ICC establishes a Victims and Witnesses Unit to provide "protective measures and security arrangements, counseling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses."[66] Article 68 sets out procedures for the "Protection of the victims and witnesses and their participation in the proceedings."[67] The Court has also established an Office of Public Counsel for Victims, to provide support and assistance to victims and their legal representatives.[68] Article 79 of the Rome Statute establishes a Trust Fund to make financial reparations to victims and their families.[69]

4.2.4 Cases before the International Criminal Court

This aspect of the ongoing research provides background on current ICC cases and examines issues raised by the actions of the ICC in Africa. Till date ICC has opened cases exclusively in Africa. Cases concerning many individuals are open before the Court, pertaining to crimes allegedly committed in seven African States: The Libyan Arab Jamahiriya, Kenya, Sudan (Darfur), Uganda (The Lord's Resistance Army, LRA), the Democratic Republic of Congo (DRC), the Central Africa Republic (CAR) and Cote d'

66. See Article 43(6) of the Rome Statute of the ICC, 1998.
67. Article 68 of the Rome Statute of the ICC, 1998.
68. International Criminal Court, 17 October 2006. *Report on the activities of the Court* (151KB)
69. Article 79 of the Rome Statute of the ICC, 1998.

Ivoire. The prosecutor had recently secured convictions. In addition, the prosecutor had initiated preliminary examinations-a potential precursor to a full investigation – in Cote d' Ivoire, Guinea, and Nigeria, along with several countries outside of Africa, such as Aghanistan, Colombia, Georgia, Honduras, and the Republic of Korea.

Of those crimes committed in the seven Africa states, three were referred to the court by the concerned states parties themselves-Uganda, Democratic Republic of Congo and the Central Africa Republic; two were begun *Proprio motu* by the Prosecutor-Kenya and Cote d' Ivoire. Additionally , the government of Mali has referred the situation in the country to the Prosecutor. As Mali is a state party to the Rome Statute, the prosecutor can now directly open a formal investigation once she has concluded the preliminary examination.

The situation in some African States and the cases before the ICC are considered herein below.

(a) Situation in Democratic Republic of the Congo

In March 2004, the government of the Democratic Republic of the Congo, a state party, referred to the prosecutor "the situation of Crimes within the Jurisdiction of the Court allegedly committed anywhere in the territory of the DRC since the entry into force of the Rome Statute, on 1 July 2002".[70] On 23 June 2004, the prosecutor decided to open an investigation into the matter and on 4 July 2004, the case was allocated to the Pre-Trial Chamber 1. In February 2008, at the time of the arrest of the third suspect, the prosecutor announced that this arrest had closed the ICC investigation in Ituri.[71]

On 17 March 2006, Thomas Lubanga, former leader of the Union of Congolese Patriots' Milita in Ituri became the first person to be arrested under a warrant issued by the

70. International Criminal Court, 19 April 2004. Prosecutor receives referral of the situation in the Democratic Republic of Congo. Retrieved on 30 October 2012. See also international criminal court, 23 June 2004. The Office of the Prosecutor of the International Criminal Court opens its first investigation. Retrieved on 15 October 2012.

71. ICC – Africa 8th Edition, Coalition for the International Criminal Court, 2008-02-01, accessed on 30 October-2012.

court; he also became the first suspect to face trial at ICC for the war crime of using child soldiers.[72] The prosecutor has stated that his trial will only be on the allegation of using child soldiers and other allegations will be followed up in subsequent prosecution.[73] Originally, Lubanga's trial was to begin on 23 June 2008[74] but it was halted on 13 June when the court ruled that the prosecutor's refusal to disclose potentially exculpatory material had breached Lubanga's right to fair trial.[75] The prosecutor had obtained the evidence from the United Nations and other sources on condition of confidentiality, but judges ruled that the prosecutor had incorrectly applied the relevant provisions of the Rome Statute and, as a consequence, "the trial process has been ruptured to such a degree that it is now impossible to piece together the constitutent elements of a fair trial".[76] The Court lifted this suspension on 18 November 2008. Lubanga's trial began on 26 January 2009.

On 14 March 2012, the court, by unanimous verdict of the Trial Chamber, found Lubanga guilty as a co-perpetrator in the crimes of conscription and enlisting children as soldiers the court first verdict since its establishment over a decage ago.[77]

Germain Katanga and Mathieu Ngudjolo Chui[78] participants in the Ituri Conflict have also been surrendered to the court by the Congolese authorities. Both men are charged with six counts of war crimes and three counts of crimes against humanity, relating to an attack on village of Bogoro on 24 February 2003 in which at least 200 civilians were killed,

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72. Case No. ICC-01/04-01/06: *The Prosecutor v. Thomas Lubanga Dyilo*.
73. International Proecutor say Congolese Warlord may face additional War Crimes charges**,** First Global Select, 7 August 2006. Visited on 30 October 2012. Interntaional Criminal Court, 13 June 2008. Decision on the consequences of non-disclosure of exculpatory materials covered by Article 51(3)(e) agreements and the application to stay the prosecution of the accused together with certain other issues raised at the Status Conference on 10 June 2008. PDF (2.11.MB). Retrieved on 30 October 2012.
74. International Criminal Court, 13 March 2008: The Trial in the case of Thomas Lubanga Dyilo will commence on 23 June 2008. Retrieved on 30 October 2012.
75. International Criminal Court. 13 June 2008. Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54 (3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008. PDF (2.11.MB). Retrieved on 30 October 2012.
76. See foot note No. 75.
77. *http//www.globalpost.com/dispatches/global post-blogs/commentary/icc-first-guilty-verdict-thomas-lubanga* assessed on 13 Nov. 2012.
78. Case No. ICC-01/04 – 01/07: *The Prosecutor V. Germain Katanga and Mathieu Ngudjolo Chui.*

the charges against both men include murder, sexual slavery and using children under the age of fifteen years to participate actively in hostilities. The hearing to confirm the charges against them began on 27 June 2008. The trial against the two men started on 24 November 2009.

Also, on 20 August 2010, the prosecutor requested Pre-Trial Chamber 1 to issue a warrant of arrest against *Callixte Mbarushimana*[79] who is the executive secretary of the forces democratiques de liberation du Rwanda.

On 28 September 2010, the Pre-Trial Chamber complied with the request and issued a sealed warrant which was unsealed on 11 October 2010, the day French authorites arrested Mbarushimana. The suspect was transferred to the ICC on 25 January 2011. His confirmation of charges hearing was held from 16 to 21 September 2011. By a 2 to 1 majority, the Pre-Trial Chamber ruled on 16 December 2011 that the confirmation was declined. After the prosecution's appeal against the decision was rejected, Mbarushimana was released on 23 December, 2011.[80]

(b) Central African Republic: The Trial of Jean Pierre Bemba

In December 2004, the government of the Central African Republic (CAR), a state party, referred to the prosecutor "the situation of crimes within the jurisdiction of the court committed anywhere on the territory of the CAR since 1 July 2002, the date of entry into force of the Rome Statute."[81]

The allegation against Bemba date to when his movement for the Liberation of Congo rebel army was invited by Ange-Felix Patasse, former president of CAR, into the Capital, Bangui, to fight rebels who were fighting against Patasse. In November 2005, the Office of the Prosecutor held meetings with the government, judiciary authorities, civil

79. Case No. ICC-01/04-01/10: *The Prosecutor V. Callixte Mbarushimana.*
80. "Callixte Mbarushimana is released from the ICC custody" Press release ICC, 23 December 2011.
81. International Criminal Court, 15 December 2006. Prosecution's 2006 Decision Requesting Information on the Status of the Preliminary Examination of the situation in the Central African Republic (PDF) Retrieved 02 November 2012.

society and International community representatives in CAR to gather additional information for the preliminary analysis.

On 22 May 2007, the prosecutor announced his decision to open an investigation,[82] focusing on allegations of killing and rape in 2002 and 2003, a period of intense fighting between government and rebel forces.[83] The case has been allocated to Pre-Trial Chamber III.[84] On may, 2008 Jean-Pierre Bemba, the former Vice-President of the Democratic Republic of the Congo was arrested during a visit to Belgium under a sealed warrant under accusation of war crimes and crimes against humanity committed in CAR.[85] He was transferred to the ICC on 3 July 2008. His confirmation of charges hearing, taking place from 12-15 January 2009, resulted in the charges being confirmed on 15 June 2009, his trial began on 22 November 2010.[86]

(c) Situation in Uganda: The Trial of Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen

In December 2003, the government of Uganda, a state party to the Rome Statute referred to the prosecutor the situation concerning the Lord's Resistance Army (LRA) in Northern Uganda. The prosecutor decided to open an investigation into this matter on 29 July 2004, and on 5 July 2005, the situation was assigned to pre-Trial Chamber II.[87] The suspects were alleged to have committed crimes against humanity of murder, enslavement, sexual enslavement, rape and serious bodily injury and war crimes of inducing rape, attacking civilians, enlisting child soldiers, cruel treatment of civilians, pillage and murder.

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82. International Criminal Court, 22 May 2007. *Prosecution opens investigation in the Central African Republic.* Retrieved 02 November 2012. See also, International Criminal Court, 22 May 2007. *Background: situation in the Central African Republic (PDF).* Retrieved 02 November 2012.
83. Nora Boustany, 23 May 2007, "Court examines alleged Abuses in Central African Republic." *The Washington Post*, P. A16. Retrieved 02 November 2012.
84. Case No. ICC – 01/05 – 01/08: *The Prosecutor V. Jean Pierre Bemba.*
85. *Congo Ex-Official is Held in Belgium on War Crimes Charges***,** AFP, 25 May 2008 Retrieved on 02 November 2012.
86. *ICC information page on Bemba.* Retrieved 18 March 2011.
87. Case No. ICC-02/04-01/05.

On 8 July 2005, the court issued its first public arrest warrants for the five senior leaders of the LRA. However, till date, none of the indictees have yet been arrested but Lukwiya was killed in fighting on 12 August 2006[88] and Otti is said to have been killed in 2007, apparently by Kony. The other three suspects are believed to be in Southern Sudan or the North western Ituri province of the DRC.

The government of Uganda is currently in peace talks with the LRA. The LRA's leaders have repeatedly demanded immunity from ICC prosecution in return to an end to the insurgency.[89] The government of Uganda says it is considering establishing a national tribunal that meets international standards, thereby allowing the ICC warrants to be set aside.

(d) Situation in Republic of Kenya: The Trial of William Samoei, Joshua Arap Sang, Francis Kirimi Muthaura, Uhuru Kenyatta and Muhamed Hussein Ali

On 31 March 2010, Pre-Trial Chamber of the ICC authorized the prosecutor to investigate the 2007-2008 Kenya crises.[90] This was the first time the prosecutor had requested such an authorization; all other investigation have been triggered by either the corresponding government or by the United Nations Security Council.

On 15 December 2010, the prosecutor applied for summonses to appear for six alleged perpetrators. In the first case,[91] William Samoei Ruto, Joshua Arap Sang and Henry Kossey are to stand trial for a three count charge of crimes against humanity related to murder, forcible population transfer and "persecution". In the second case[92], Francis Muthaura, Uhuru Kenyatta and Mohammed Hussein Ali are to stand trial for crimes against humanity related to murder, forcible population transfer, rape, "persecution" and other inhumane acts. On March 2011, the Pre-Trial Chamber issued summonses for all six alleged

88. BBC News, 23 January 2008. *Uganda's LRA confirm Otti dead.* Retrieved on 22 November 2012.
89. Associated Press. 30 May 2007. *Human Right Watch: Ugandan rebels must face justice, even if not before international court.* Retrieved 24 January 2008.
90. *ICC Press release on the authorization of investigations regarding Kenya.* Retrieved on 3 March 2011.
91. *The Prosecutor v. William Samoei Ruta & Ors.* Case No. ICC-01/09-01/11.
92. *The Prosecutor v. Francis Muthaura & Ors.* Case No. ICC-01/09-02/11.

perpetrators to appear before the court on 7 and 8 April 2011 respectively. The indictees personally appeared before the court for trial.

(e) Situation in Libya: The Trial of Saif Al-Islam Gaddafi and Abdullah Al-Senussi

As a consequence of the 2011 Libyan civil war and its brutal suppression, the UN Security Council voted on 26 February 2011 in Resolution 1970 unanimously to refer the situation in Libya to the ICC.[93] Other than the referral of the situation in Darfur, Sudan, to the ICC in March 2005, this is only the second time that the Security Council has referred a situation to the ICC, and the first time that it has done so unanimously. China and United States had abstained in 2005, but this time voted in favour of referral to ICC.[94]

On 3 March 2011, the prosecution opened an investigation. On 16 May 2011, the prosecutor requested a Pre-Trial Chamber of the Court to issue warrants of arrest against Muammar Gaddafi, his son Saif Al-Islam, and the head of Libya's intelligence, Abdullah Senussi, for allegedly committed crimes against humanity. This request was granted on 27 June 2011, resulting in the second ICC warrant of arrest against an incumbent head of state, the other being Sudan's Omar al-Bashir.[95]

The UN Security Council Resolution provides the ICC with jurisdiction over war crimes, crimes against humanity and genocide occurring in Libya since that date, even though Libya is not a state party to the court. Incidentally, Col. Muammar Gaddafi died during the civil strife in his country and was not prosecuted by the ICC.

(f) The Situation in the Republic of Cote d' Ivoire: The Trial of Laurent Gbagbo

On 19 May 2011, the prosecution informed the Presidency of the court about his intention to request the authorization to open a formal investigation on the situation of Cote d' Ivoire (Ivory Coast) since 28 November 2010.[96] A day later, the presidency issued an

93. UN Slaps Sanctions on Libya Regime. Al Jazeera, 27 February 2011. Retrieved 10 March 2011.
94. In Swift, Decirive Action, Security Council imposes Tough Measures on Libyan Regime Adopting Resolution 1970 in Wake of Crackdown on protesters. UN 26 February 2011. Retrieved 27 February 2011.
95. Pre-Trial Chamber 1 issue three warrants of arrest for Muammar Gaddafi, Saif al-Isllam Gaddafi and Abdulla al-Senussi. International Criminal Court, 27 June 2011. Retrieved June 2011.
96. Prosecutor Letter to the Presidency ICC. Retrieved 22 may 2011.

order assigning the situation to Pre-Trial Chamber II,[97] which was on 22 June 2011 modified by establishing a Pre-Trial Chamber III and assigning the situation in Cote d' Ivoire to it. On 23 June 2011, the prosecutor formally requested the authorization from a Pre-Trial Chamber to begin an investigation into crimes allegedly committed in Cote d' Ivoire.[98] While Cote d' Ivoire is not a state party to the Rome Statute, it has repeatedly and by different administrations accepted the ICC jurisdiction.[99] On 3 October 2011, Pre-Trial Chamber III authorized the investigation to be conducted by the prosecutor.

(g) The Situation in Darfur, Sudan: The Prosecution of Omar Hassan Ahmed Al Bashir and Others.

ICC jurisdiction in Sudan was conferred by the UN Security Council, as Sudan is not a party to the court. U.N. Security Council Resolution 1593, in 2005, referred the situation in Darfur dating back to July 1, 2002, to the ICC Prosecutor.[100] The Resolution was adopted by a vote of two in favour, none against, and with four abstention – the United States, China, Algeria, and Brazil.[101] While Sudan is not a party to the ICC and has not consented to its jurisdiction, the court argues that the Resolution is binding on all U.N. member states, including Sudan. Under the ICC statute, the ICC was authorized, but not required, to accept the case.[102] It could be recalled that the Security Council has in September 2004, established an International Council Commission of Inquiry on Darfur under Resolution 1564, maintaining that the Sudanese government had not met its obligation under previous Resolution.[103] In January 2005, the commission reported that it

97. Decision Assigning the Situation in the Republic of Cote d' Ivoire to Pre-Trial Chamber II ICC. Retrieved 22 May 2011.
98. ICC Prosecutor request Judges for authorization to open an investigation in Cote d' Ivoire. International Criminal Court. Retrieved 25 June 2011.
99. Declaration Accepting the Jurisdiction of the International criminal Court. International Criminal Court. Retrieved 22 May 2011.
100. See UN Press release. "Security Council Refers Situation in Darfur, Secretary General Welcomes. Adoption of Security Resolution Referring Situation in Darfur, Sudan to ICC Prosecutor". March 31, 2005. SG/SM/9797 – AFR/1132: http://www.icc-cpi int/menus/icc/situations+and+cases/cases/.
101. U.N. Security Council Resolution 1593 (2005), March 31, 2005.
102. Frederic L. Kirgis. "UN Commission's Report on Violations of International Humanitarian Law in Darfur: Security Council Referral to the International Criminal Court." *American Society of International Law Insight Addendum,* April 5, 2005.
103. See S/RES/1564 920040. September 18, 2004

had compiled a confidential list of potential war crimes suspects and "strongly recommend[ed]" that the Security Council refer the situation to the ICC.[104] Following the Council's referral, the office of the Prosecutor initiated its own investigation in June 2005. The Sudanese government also created its own special courts for Darfur in an apparent efforts to stave off the ICC's jurisdiction; however, the court's efforts were widely criticized as insufficient.

On 2 May 2007, the ICC issued arrest warrants for Jan Jaweed Militia leader, Ali Kushayb and Minister Ahmad Harun for being key suspects accused of war crimes and crimes against humanity.[105] However, Sudan claims the court has no jurisdiction over this matter[106] and refuses to hand over the suspects.[107] The ICC on the application of the chief prosecutor issued arrest warrant for president of Sudan, Omar al Bashir, on ten counts of genocide, crimes against humanity and war crimes.[108] On 3 February 2010, the Appeals Chamber of ICC reversed the Pre-Trial Chamber's rejection of the genocide charge, ruling that the PTC had applied a too stringent standard of proof. Subsequently, the first Trial Chamber issued a second warrant of arrest against al-Bashir on 12 July 2010, in which he was charged with genocide against three ethnic groups in Darfur.[109] Al-Bashir was the first sitting head of state indicted by the ICC. Al-Bashir denies all the charges.

The first time that a suspect appeared voluntarily before the court when a summon was issued to him was on 17 May 2009. Bahar Idriss Abu Garda, commander of the United Resistance Front, A Darfuri Rebel group, was accused of responsibility for the attack on the African Union's Peace keeper in North-Darfur on 29 September 2007, where twelve soldiers were killed.

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104. See Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General. S/2005/60.January 25,2005.
105. Case No. ICC-02/05-01/07: *The Prosecutor v. Ahmad Harun and Ali Kushayb*.
106. International Court names top suspects in Darfur War Crime, Voice of America, 2007-02-27, accessed on 3 October 2012.
107. Alexandra Hudson, 2 May 2007. ICC judges issue arrest warrant for Darfur suspects. Reuters. Retrieved on 3 May 2007.
108. *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*. Case No. ICC-02/05-01/09.
109. Interntaional Criminal Court (12 July 2010). *Pre-Trial Chamber 1 issue a second Warrant of Arrest against Omar Al-Bashir for counts of Genocide.*

On 8 February 2010, pre-Trial Chamber 1 of the court ruled that there was insufficient evidence to proceed to trial on charges[110] against Abu Garda,[111] On 23 April 2010, this chamber also declined the prosecutor's application to appeal the decision. Under the Rome Statute, such a move to the appeals chamber can only be made once leave of the Pre-Trial Chmber has been granted. Both decisions do not preclude the prosecution from subsequently requesting the confirmation of the charges against Abu Garda if such a request is supported by additional evidence.[112]

Also on 16 June 2010, Abdallah Barda and Saleh Jerbo, leaders of small Dafuri Rebel groups, were also charged[113] with war crimes for their alleged roles in the attack described above. On 17 June 2010, they faced Pre-Trial Chamber 1, which rules that there are reasonable grounds for their prosecution.

4.2.4.1 Fall outs of International Criminal Court Investigation of Situation in Darfur, Sudan

(i) Sudanese reaction:

The Bashir Administration has rejected ICC Jurisdiction over Darfur as a violation of its sovereignty and an instrument of western pressure for regime change and accused the court of being part of a neocolonialist plot against a sovereign African and Muslim State.[114] The Bashir administration has repeatedly denied that genocide or ethnic cleansing is taking place in Darfur and has accused the Prosecutor of basing his investigation on testimony by rebel leaders and "spies" posing as humanitarian workers.[115]

The government has barred ICC personnel from speaking to Sudanese officials, and authorities have taken a hard-line stance against Sudanese suspected of sympathizing with

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110. *The Prosecutor V. Bahar Abu Garda* Case No. ICC-02/05-02/09.
111. See International Criminal Court (8 February 2010). *"Pre-Trial Chamber 1 Decline to Confirm the charges against Baha Idriss Abu Garda".*
112. See International Criminal Court (26 April 2010). *"Pre-Trial Chamber 1 Rejects the Prosecutor's Application to Appeal".* Retrieved 17 July 2010.
113. *The Prosecutor V. Abdallah Barda and Saleh Jerbo* Case No. ICC-02/05-03/09.
114. *BBC Monitoring.* "Sudanes Leader Calls International Court Tool of Imperialist Forces**"** [State owned] *Suna News Agency,* August 20, 2008' Marlise Simons and Neil Macfarquhar, "Bashir Defies Arrest Order on War Crime Charges**",** *The New York Time,* March 6, 2009.
115. See *Sudan Tribune.* "Sudan warns UN Chief over ICC" via *BBC Monitoring.* August 18, 2008; the *Associated Press* (AP) "Sudan Dismisses ICC Proceedings on Darfur Reiterates Refusal to Hand Over Any suspects". July 11, 2008.

the[116] ICC prosecution attempt. The government also responded by expelling over a dozen international aid organization that it accused of collaborating with ICC. In July 2010, when a second ICC warrant was issued for Bashir, Sudan expelled two senior humanitarian officials from Darfur.

It is the contention of this work that while many advocates hope the arrest warrant will weaken Bashir's hold in power, Sudanese resentment of the Court's actions could have the reverse effect and rally the nation to his side. It is further contended that the warrants have not intensified Bashir's international isolation. The Sudanese leader has engaged in aggressive diplomatic outreach to allied states, travelling to multiple friendly countries in the weeks following the warrant issuance. For instance, in July and August 2010, al-Bashir travelled to Chad and Kenya, neither of which turned him over to the ICC despite being state parties; the ICC has reported both member states to the UN Security Council and the ICC Assembly of State parties.[117] To worsen the matter, President Bashir travelled to Nigeria in July 2013 without Nigeria handing him over to the ICC. Nigeria is a party to the ICC treaty statute.

In late June, 2015 South Africa refused to arrest Al Bashir while attending an AU meeting in South Africa despite a ruling of a South African Court to that effect.

(ii) Regional reactions:

The Sudanese government has rallied support from many Arab and African leaders, and among regional organizations such as the African Union (AU), the Arab League, the Community of Sahel-Saharan states (CEN-SAD), and the Organization of the Islamic Conference (OIC), all of which have criticized the ICC and called, unsuccessfully to date, for a deferral of prosecution by the United Nations Security Council. The decision to prosecute an African head of state has notably sparked a backlash among African governments, and the African Union has resolved not to cooperate with the ICC in carrying out the arrest warrant.

116. http://www.fas.org/sgp/crs/row/RL4665.pdf.visited on 30th October 2012.
117. Jurist.org 28 Aug 2010. "ICC reports Kenya to UN over Al-Bashir Visit". Retrieved 6 September 2010.

Some African and Middle Eastern commentators and civil society groups have praised the decision to pursue Bashir as a step against impunity in the region, while others expressed concern that the move displayed bias or a neocolonial attitude towards Africa.[118]

(iii) U.S. reactions:

The Obama administration has expressed support for the ICC investigation and prosecution of War Crimes in Sudan, and Administration officials have repeatedly stated that those responsible for serious crimes in Darfur should be held responsible. In July 2009, the Obama Administration's Special Envoy on Sudan, retired General J. Scott Gration, stated that U.S. engagement with Sudan in the context of peace negotiation "does not mean that Bashir does not need to do what is right in terms of facing the International Criminal Court and those charges".

In response to a question at an August 2009 press conference in Nairobi, Kenya, American Secretary of State, Hilary Clinton said "The actions by the ICC sent a clear message that the behaviour of Bashir and his government were outside the bounds of accepted standard and that there would no longer be impunity… The United States and others have continued to support the need to eventually bring President Bashir to justice."[119] President Obama subsequently stated in an interview that "it is a balance that has to be struct. We want to move forward in a constructive fashion in Sudan, but we also think that there has to be accountability, and so we are fully supportive of the ICC".[120] Also in August 2010, Obama expressed "disappointment" that Kenya had hosted Bashir "in defiance of International Criminal Court arrest warrants.[121]

(iv) African Union objections

The African Union has strongly objected to certain ICC actions, causing some

118. See *The Daily Champion,* Lagos, Nigeria "Al-Bashir's indictment", August 6, 2008. See also, Paul Ejimbe, "Before Al-Bashir goes on Trial", *The Guardian,* Lagos, Nigeria July 28, 2008.
119. US State Department/Hillary Rodham Clinton, "Remarks with Kenyan Foreign Minister Moses Wetangula" Kenyatta International Conference Centre, Nairobi, Kenya, August 5, 2009.
120. The White House. "Interview of the President by South African Broadcasting Corporation", July 14, 2010.
121. The White House. "Statement by President Obama on the Promulgation of Kenya's New Constitution". August 27, 2010.

backers of the court to be concerned that it could lose the support of its largest regional block. In particular, the AU objects to ICC attempts to prosecute sitting heads of state in Sudan and Libya, and has decided not to enforce arrest warrants for Bashir or Gaddafi.

Also at an AU summit in January 2011, the AU Assembly additionally endorsed Kenya's request for a deferral of prosecution there. Such a deferral could only be enacted through action by ICC judges or at the U.N. Security Council, and neither has moved to do so. AU Commission Chairman Jean Ping has repeatedly accused the ICC Prosecutor of relying on "double standard" with regard to Africa. At the same time, African parties to the ICC have refrained from withdrawing from the court.[122]

4.2.5 Judgments, Sanctions and Their Enforcement

The first judgment of the International Criminal Court was delivered in the case of *The Prosecutor v. Thomas Lubanga Dyilo.*[123] Mr. Lubanga Dyilo, a Congolese national was on 14th March 2012 convicted of the war crimes of enlisting and conscripting of children under the age of 15 years and using them to participate actively in hostilities in the context of an armed conflict not of an international character from 1 September 2002 to 13 August 2003 (punishable under Article 8(2)(e)(vii) of the Rome Statute of the ICC). The verdict was rendered by Trial Chamber 1. He was sentenced on 10 July 2012 to a total of 14 years of imprisonment. The time he spent in the ICC custody will be deducted from the total sentence. He is detained for the time being, at the Detention Centre in The Hague.

On 1 December 2014, the Appeals Chamber confirmed, by majority, the Verdict declaring Mr. Lubanga guilty and the decision sentencing him to 14 years of imprisonment. The Trial Chamber 1 had on 7 August 2012 issued a decision on the principles and the process to be implemented for reparations to victims in the case, which is currently subject to appeal.

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122. See generally John Mukun Mbaku, International Justice: The International Criminal Court And Africa. The Brookings Institution: Africa Growth Initiative.
123. Case No. ICC-01/04-01/06.

Another judgment of the International Criminal Court is in the case of The *Prosecutor v. Germain Katanga.*[124] On 7 March 2014, Trial Chamber II found Germain Katanga alleged commander of FRPI, guilty, as an accessory, within the meaning of Article 25(3)(d) of the Rome Statute, of one count of crime against humanity (murder) and four counts of war crimes (murder, attacking a civilian population, destruction of property and pillaging) committed on 24 February 2003 during the attack on the village of Begoro, in the Ituri district of the Democratic Republic of the Congo (DRC). The Chamber acquitted Germain Katanga of the other charges that he was facing.

On 25 June, 2014, the Defence for Germain Katanga and the Office of the Prosecutor discontinued the appeals against the judgment in the Katanga case. The judgment is now final. On 23 May 2014, Trial Chamber II, ruling in the majority, sanctioned Germain Katanga to a total of 12 years imprisonment. The Chamber also ordered that the time spent in detention at the ICC-between 18 September 2007 and 23 May 2014 – be deducted from his sentence. Decisions on possible victim reparations will be rendered later.

In the case of *The Prosecutor v. Mathieu Ngudjolo Chui,*[125] the accused person was on 18 December 2012 acquitted by the Trial Chamber II of the charges of war crimes and crimes against humanity and ordered his immediate release. On 21 December 2012, he was released from custody. The Office of the Prosecutor has appealed the verdict.

Several other matters are currently pending before the ICC. One of them is the matter of *The Prosecutor v. Uhuru Mugal Kenyatta.*[126] The accused is the President of the Republic of Kenya. Summons for him to appear before the court on accusation of having committed crimes against humanity in the post-election violence in Kenya was issued against him on 8 March 2011. The Initial Appearance hearing was fixed for 8 April 2011

124. Case No. ICC-01/04-01/07.
125. Case No. ICC – 01/04 – 02/12.
126. Case No. ICC-01/09-02/11.

while confirmation of charges hearing was on 21 September to 5 October 2011. Decision on the confirmation of charges was on 23 January 2012. The opening of trial was vacated as notice of withdrawal of the charges against him, Uhuru Mugal Kenyatta, was filed on 5 December 2014.

Now that we have considered the few judgments of the Court, we now turn to consider generally on the operational pattern of the ICC.

4.2.5.1 Judgment and Sentence

Once the parties have presented their evidence, the Prosecution and the Defence are invited to make their closing statements. The Defence always has the opportunity to speak last. The judges may order reparations to victims, including restitution, compensation and rehabilitation. To this end, they may make an order directly against a convicted person.[127]

After hearing the victims and the witnesses called to testify by the Prosecution and the Defence and considering the evidence, the judges decide whether the accused person is guilty or not guilty. The sentence is pronounced in public and, wherever possible, in the presence of the acused,[128] and victims or their legal representatives, if they have taken part in the proceedings.

The judges may impose a prison sentence, to which may be added a fine or forfeiture of the proceeds, property and assets derived directly or indirectly from the crime committed. The Court cannot impose a death sentence. The maximum sentence is 30 years. However, in extreme cases, the court may impose a term of life imprisonment.[129]

Convicted persons serve their prison sentence in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept convicted persons.[130] The conditions of imprisonment are governed by the laws of the State of enforcement and must be consistent with widely accepted international treaty standards

127. Article 75(2) of the Rome Statute of the ICC, 1998.
128. Article 76(4) of the Rome Statute of the ICC, 1998.
129. Article 77 of the Rome Statute of the ICC, 1998.
130. Article 103(1) of the Rome Statute of the ICC, 1998.

governing the treatment of prisoners. Such conditions may not be more or less favourable than those available to prisoners convicted of similar offences in the State of enforcement.[131]

4.3 The Scope of the Jurisdiction of the ICC

Article 5 of the Rome Statute of the ICC lists the crimes that will come within the jurisdiction of the Court, namely: genocide, crimes against humanity, war crimes, and the crime of aggression. Article 6 provides that the crime of genocide will for purpose of ICC prosecution be defined as is currently defined under Article 2 of the Genocide Convention of 1948. Both crimes against humanity and war crimes provided under Article 7 and 8 respectively have been carefully defined in the statute to incorporate crimes from different treaty and customary sources, which 120 states at the Rome Conference agreed were "the most serious crimes of international concern".[132] The court will have jurisdiction over all the crimes except aggression once the statute enters into force.

Articles 5(2), 121 and 123 of the statute together provide that the court will have jurisdiction over the crime of aggression when a suitable definition is accepted by a two thirds majority of all ICC state parties, at a Review Conference to be held 7 years after the entry into force of the statute. This has been done.[133] The provisions in the crime of aggression must also set out the conditions under which the court may exercise jurisdiction over this crime which must be consistent with the UN Charter.

The procedural provisions of the statute have been drafted to create an optional balance between the following priorities:

(a) the need for an independent, apolitical, representative international court, which can function efficiently to bring to justice those responsible for the most serious crimes of concern to the international community as a whole;

131. Article 106(2) of the Rome Statute of the ICC, 1998.
132. Article 1 Rome Statute of International Criminal Court, 1998.
133. See Para. 6.1 above

(b) the right of states to take primary responsibility for prosecuting such crimes, if they are willing and able;

(c) the need to give victims of such crimes adequate redress and compensation;

(d) the need to protect the rights of accused persons; and

(e) the role of the Security Council in maintaining international peace and security, in accordance with its powers under chapter vii of the Charter of the UN.[134]

These considerations are all reflected in the functions and powers of the court and its relationship with other entities as set out under the statute.[135]

4.3.1 Matters within the Competence of the Court

The court derives its jurisdiction from its constituent sovereign state parties. Therefore, in order for the court to have jurisdiction over a particular criminal act, a state party must have some connection with that act. This connection can be established in one of two ways set out in Article 12 of the Rome Statute:

(a) the ICC has jurisdiction over crimes which are committed within the territory of a state party by a perpetrator of any nationality. This is the *Territorial Jurisdiction;*

(b) the ICC also has jurisdiction over crimes which are committed by nationals of a state party, regardless of where these crimes were committed.

This is the *Personal Jurisdiction*.

The temporal or timeline jurisdiction is of crucial importance. It is important that crimes committed before a country becomes a state party cannot be tried by the ICC. That is, until the statute has entered into force in a country, the court has no jurisdiction there. As the court only came into existence on 1st July, 2002, it only has jurisdiction over crimes committed since July, 2002. This means that the court is not competent to try any crime by any person in any territory before that date. For countries that ratify the statute after the 1st

134. Mohammed Landan, '*An overview of the Rome Statute of International Criminal Court'* in *An Introduction to the International Criminal Court,* Nigerian Institute of Advanced Legal Studies, Lagos, 2005.

135. See Claus Kress and Flavia L (eds.): *The Rome Statute and Domestic Legal Orders:-General Aspects and Constitutional Issues*, Vol. 1 Baden-Ba-den – Nomos, 2010.

day of July, 2002, the court only has jurisdiction or competence from after the entry into force of the statute in that country.

If the court does not have territorial or personal jurisdiction over a crime, there are two other circumstances in which the ICC can exercise limited jurisdiction on a case by case basis. They are:

(a) the government of the country that is not a state party may make a declaration under Article 12(3) of the Rome Statute that it is going to accept the court's jurisdiction over its territory and its nationals in relation to a particular incident. However, this requires those in power in a given country to voluntarily give the court jurisdiction in a given case. It is contended that as the crimes covered by the Rome Statute tend to be crimes of the powerful, this may be difficult to bring about;

(b) the Security Council of the United Nations may deem a particular situation to be a threat to international peace and security under chapter vii of the UN Charter. If it does this, it may decide to refer the situation to the ICC so that it can prosecute individuals involved. However, this requires consensus among the five permanent members of the Security Council – China, USA, Russia, United Kingdom and France and so may be very difficult to bring about.

In each of the above cases, the competence of the court is restored. Nevertheless, the best way to ensure that serious breaches of international criminal law in a country do not go unpunished is to lobby the government to ratify the Rome Statute.

4.3.2 The Complementarity of the International Criminal Court with Domestic Jurisdiction

The ICC will only start a prosecution if the state party is not making bona fide effort to discover the truth and to hold accountable those responsible for genocide, crimes against humanity and war crimes. The principle that the court will only step in as last resort when a state is unable or unwilling to prosecute is called the principle of complementarity. It is laid out in Article 17 of the Rome Statute.

Customary International Law has for a long time reserved to the state the competence to exercise jurisdiction over criminal offence committed within its territory. It is now the practice for states as they enter into treaties to affirm the right of the state to exercise jurisdiction in such cases. Such is the case in many of the conventions on human rights as well as the conventions on humanitarian law.

Before the advent of the United Nations, state jurisdictions over persons and events occurring within its territory had been subsumed under the claim to matters falling within the exclusive domestic jurisdiction. But the exclusivity of domestic jurisdiction has been progressively wilted down by states yielding ground to international determination and adjudication, where the domestic process falls below the 'international standard'. This is why, even when under a treaty, domestic courts are empowered to interpret and apply international law; the competence of an international tribunal envisaged under such a treaty is activated only when local remedies have been exhausted.

In *Dauda Jawara case, Gambia,*[136] the African Commission on Human and Peoples Rights held:

> Three major criteria could be deduced from the Practice of the Commission in determining this rule namely: the remedy must be available, effective and sufficient. A remedy is considered available if the petitioner can pursue it without impediment, it is deemed efficient if it offers a prospect of success, and it is found sufficient, if it is capable of redressing the complaint.

The rule of exhaustion of local remedies is, thus hinged on two planks: failure of the individual to exhaust where it exists and defect occasioned by act of omission of the state.

136. Case No. 147/95.149/96.

Also, since state has the right to protect its national for a wrongful act committed by another state under international law, before it can exercise such right, the practice allows the state alleged to have committed the breach to remedy it at the national level-thus allowing local remedies to be exhausted. It should be noted that until recently, international law did not make very clear distinctions between criminal and non-criminal acts.[137]

The ICC follows, generally this tradition of giving the domestic Criminal Jurisdiction a concurrent space in matters covered by it. Thus, the court established under the ICC is complementary to the national criminal jurisdiction. The nature of this complementarity and its implications for law enforcement under the statute of the ICC is the central focus of this aspect of this work.

At the early phase of the development of international humanitarian law, the assumption was that national jurisdiction would enforce penal law embodied therein. The Hague Conventions and Hague Regulations of 1899 and 1907 respectively require states to apply the relevant provisions within their state, thus, involving the activity of municipal courts. Also the Hague Convention of 1954 for the Protection of Cultural Properties stipulates:

> The High Contracting Parties undertake to take within the framework of their criminal jurisdiction all necessary steps to prosecute and impose penal or disciplinary sanction upon those persons of whatever nationality, who commit or order to be committed a breach of the present Convention.[138]

The corresponding provision of the Geneva Convention of 1949 and the protocols I and II of 1977 not only continues with the universality of jurisdiction principle contained in The Hague Conventions and Regulations but also deepen it by authorizing a state to hand

137. *Finnish Ships Arbitration in Finland v. Great Britain* (1934) 3 RIAA 1479; *Mining and Rly. Co Case, Great Britain v. Mexico* (1911) 5 RIAA 191.
138. See Article 28 of the Hague Convention for the Protection of Cultural Property, 1954.

over persons to be tried to another High contracting party for trial.[139]

Thus, Article 49 of the Geneva Convention provides:

> …Each High contracting party shall be under the obligation to search for persons alleged to have committed or to have ordered to be committed, such grave breaches, and shall bring such persons regardless of their nationality, before its own court. It may also, if it so prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial by another High contracting party.[140]

Active intervention in the enforcement of International Humanitarian Law came in the wake of the Second World War with the establishment of Nuremberg Tribunal.[141] Because the tribunal was empowered by victors and those indicted and tried were not so many, it was able to carry out its functions much more effectively than subsequent similar *ad-hoc* tribunals such as those in the former Yugoslavia and Rwanda. In the former Yugoslavia, the contending parties might have had reasons neither to exercise domestic jurisdiction over the indicted persons nor to cooperate with the criminal tribunal. This created problems for the working out of the complementarity.

Thus, Article 9(1) provides that the International Tribunal shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January, 1991. But Article 9(2) is explicit on the relative status of the two jurisdictions.

It provides:

> The International Tribunal shall have supremacy over the national courts.

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139. See ICRC: *Understanding Humanitarian Law: Basic Rules of the Geneva Convention and their Additional Protocol,* Geneva. 1983 p.11. See also Convention II Article 50, Convention III, Article 129, Convention IV, Article 146.
140. See also Article 50.
141. Harris: *Cases and Materials on International Law,* 5th Edn. Sweet & Maxwell London, 1998 pp. 738-740.

> At any stage of the proceedings, the International Tribunal may formally request national courts to defer to the competency of the international tribunal in accordance with the present statute and the rule of procedure and evidence of the International Tribunal.[142]

However, the Statute of the International Criminal Court is not so explicit. The problems faced by these *ad-hoc* tribunals even if occasioned by their peculiar circumstances and the fact that they were based on Security Council Resolutions, led to the search for a more permanent solution. The immediate factors that triggered off the search for and establishment of such permanent institution, the ICC, included:

i. millions of children, women and men that have been victims of unimaginable atrocities, during this century (20th century) deeply shock the conscience of mankind;

ii. the fact that grave crimes threaten the peace, security and well-being of the world; and

iii. the determination that the most serious crimes of concern to the International Community as a whole must not go unpunished by taking measures at the national level and by enhancing international cooperation and put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.[143]

By insisting on the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes and establishing an independent permanent international

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142. Article 10 also reinforces the primacy of the International Tribunal. It states
    a. No persons shall be tried before a national court for acts constituting serious violations of international humanitarian Law under the present statute for which he or she has already been tried by the International Tribunal.
    b. A person who has been tried by a national court for acts constituting serious violations of International humanitarian law may subsequently be tried by the International Tribunal only if
    c. the acts for which he or she was tried was characterized as an ordinary crime, or
    d. The national court proceedings were not impartial or independent, were designed to shield the accused from International Criminal responsibility or the case was not diligently prosecuted.
143. Preamble to the Statute of ICC.

court, in relationship with the United Nations, with jurisdiction over the most serious crimes of concern to the international community, parties to the statute laid the foundation for the complementarity between the two. This is further elaborated in the substantive provisions of the statute. The issue of complementarity of the two jurisdictions is stated in many provisions of the Statute.

It first appeared in paragraph 10 of the preamble. The very first Article of the statute affirms this when it state that:

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

But the explicit statement on complementarity does not resolve the issue of possible conflict and therefore primacy and other eminent practical problems that may result if the state fails to cooperate with the court.

Article 17 of the statute lays the ground rules for determining the nature of the complementarity between the jurisdiction of the court and jurisdiction of the national courts. It stipulates:

> Having regard to paragraph 10 of the preamble and Article 1, the court shall determine that a case is 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 genuinely 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;

(d) the case is not of sufficient gravity to justify further action by the Court.[144]

In order to determine unwillingness in a particular case, the court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

(a) the proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the court referred to in Article 5;

(b) there has been an unjustified delay in the proceedings which in the circumstance is inconsistent with an intent to bring the person concerned to justice;

(c) the proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstance, is inconsistent with an intent to bring the person concerned to justice.[145]

Finally, in order to determine inability in a particular case, the court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the state is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings[146].

144. See Article 17(1)(a)-(d), Rome Statute of the ICC, 1998.
145. See Article 17(2)(a)-(c), Rome Statute of the ICC, 1998.
146. Article 17(3), Rome Statute of the ICC. See also Osita Eze, "The Complementarity of ICC Regime: Problems and Prospects" in *An Introduction to the International Criminal Court,* Nigerian Institute of Advanced Legal Studies, Lagos 2005, P.159.

Article 20(3) referred to in Article 17 deals with genocide – Article 6, crimes against humanity – Article 7 and war crimes – Article 8. It excludes the crime of aggression which is the only other crime listed in Article 5 of the statute. It has been observed that ICC state Parties did not significantly debate whether the crime of aggression should be subject to a complementary or primacy regime and these may in future years want to do so leading to possible amendment of Article 17 [147].

While the relevant paragraph of Article 17 deals with on-going process of investigation and prosecution and decision not to prosecute by a state having jurisdiction, Article 20(3)(a) deals with a case where a person who has been tried by another court for conduct prescribed under Articles 6, 7 and 8. The court is barred from trying a person who has been tried by another court with respect to the same offence or conduct unless the proceedings in the 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 circumstance, was inconsistent with an intent to bring the persons concerned to justice[148].

It is quite clear from the above that unlike statute of the International Criminal Tribunal for Former Yugoslavia where there is explicit provision enthroning the supremacy of the Tribunal over domestic courts, the statute of the ICC makes the exercise of the jurisdiction of the court contingent on the exercise of jurisdiction by domestic Criminal Justice System. The contingency is based on the failure of the domestic jurisdiction to comply with due process as recognized by international law or on lack of genuiness or

147. J Trahant. 'Is Complementarity the Right Approach for the International Criminal Court's Crime of Aggression? Considering the Problem of "over-zealous" national Court Prosecutions. 25 *Connel Int'l L.J.* pp. 569 – 601 (2012).

148. Article 20(3) (a) and (b), Rome Statute of the ICC, 1998.

inability to bring the suspected offender to justice. The Court will also not exercise jurisdiction where the crime is not of "sufficient gravity".

However, where the matter is referred to the court under chapter vii of the UN Charter, this would supersede the competence of the domestic jurisdiction to deal with such matters.

There are many copious provisions of the Rome Statute which clearly show instances of complementarity between the court and domestic jurisdictions. Under Article 18 of the Rome Statute, the prosecutor is required to defer to the states investigation of persons where the state has notified the court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in Article 5. The Pre-Trial Chamber may on the application of the prosecutor decide to authorize the investigation[149]. A state concerned or the Tribunal may appeal against a ruling of the Pre-Trial Chamber.

Article 19 of the Rome Statute which deals on challenges to the jurisdiction of the court further provides an understanding of the complementarity of the jurisdiction of the court and national, domestic jurisdiction. This article is hereunder reproduced for easy appreciation of the point being made:

1. The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.
2. Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:
    (a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58;

149. See Article 18(2), Rome Statute of the ICC, 1998.

(b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or

(c) A State from which acceptance of jurisdiction is required under article 12.

3. The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court.

4. The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall take place prior to or at the commencement of the trial. In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial. Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court, may be based only on article 17, paragraph 1(c).

5. A State referred to in paragraph 2(b) and (c) shall make a challenge at the earliest opportunity.

6. Prior to the confirmation of the charges, challenges to the admissibility of a case or challenges to the jurisdiction of the Court shall be referred to the Trial Chamber. Decisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber in accordance with article 82.

7. If a challenge is made by a State referred to in paragraph 2(b) and (c), the Prosecutor shall suspend the investigation until such a time as the Court makes a determination in accordance with article 17.

8. Pending a ruling by the Court, the Prosecutor may seek authority from the Court:

(a) To pursue necessary investigative steps of the kind referred to in article 18, paragraph 6;

(b) To take a statement or testimony from a witness or complete the collection and examination of evidence which had begun prior to the making of the challenge; and

(c) In cooperation with the relevant States to prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest under article 58.

9. The making of challenge shall not affect the validity of any act performed by the Prosecutor or any order or warrant issued by the Court prior to the making of the challenge.

10. If the Court has decided that a case is inadmissible under article 17, the Prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17.

11. If the Prosecutor, having regard to the matters referred to in article 17, defers an investigation, the Prosecutor may request that the relevant State make available to the Prosecutor information on the proceedings. That information shall, at the request of the State concerned, be confidential. If the Prosecutor thereafter decides to proceed with an investigation, he or she shall notify the State in respect of the proceedings of which deferral has taken place.

Finally in this respect, the principle of *ne bis in idem*- prohibition of double jeopardy is relevant in understanding complementarity. Except as provided in the statute, no person shall be tried before the court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the court. No person shall be tried by

another court for a crime referred to in Article 5 of which the person has already been convicted or acquitted by the court[150].

4.3.3 Cooperation between the Court and States

Even where the issue of jurisdiction between the court and national jurisdiction is settled, there may still be practical problems that may impede the exercise of that jurisdiction. In case of arrest and surrender of persons alleged to have committed crimes to the court, the requested state shall comply, subject to the right of persons sought for surrender to bring a challenge before the national court on the basis of the principle of *ne bis in idem* under Article 20 [151]. There is also provision for dealing with situations where any other state has made a request for extradition of the same person for the same conduct which forms the basis of the crime for which the court seeks the person's surrender[152].

In urgent cases, the court may request provisional arrest of the person sought pending presentation of the request for surrender and the documents supporting the request as specified in Article 91 [153]. The obligation of state parties under the statute can be deduced from general international law governing treaties *pacta sunt servanda.* This treaty admits of no reservation.[154] There is also express provisions which impose direct obligations of states as seen in Articles 86 of the Statute.

The obligation of the parties under Article 1 accepts the jurisdiction of the court over the most serious crimes and the complementarity between it and domestic jurisdictions. State parties are under obligation to cooperate with the Court in its investigation and prosecution of crimes within its jurisdiction.[155]

It is also obvious that states are required to ensure that there are procedures available

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150. See Article 20 of the Rome Statute of the ICC, 1998.
151. See Article 89 of the Rome Statute of the ICC, 1998.
152. See Article 90 of the Rome Statute of the ICC, 1998.
153 See Article 92 of the Rome Statute of the ICC, 1998.
154. See also Article 120 of the Rome Statute of 1998. Despite this provision, a curious reservation is contained, albeit for a fixed period, in Article 124. Under this provision, a state may not accept the jurisdiction of the court where a crime is alleged to have been committed by its national on its territory. This is for a period of 7 years from the entry into force of the Statute and may be withdrawn any time. See also Articles 8 and 12(1) and (2).
155. See Article 86 and 87 of the Rome Statute of the ICC, 1998.

under their national law for all of the forms of cooperation specified, such as: surrender of person to court,[156] request for arrest and surrender,[157] request for provisional arrest.[158] Article 93 also include a list of requests which states parties are required to comply with in accordance with the relevant provisions of the statute and under the procedures of national law. These include, among others, protection of victims and witnesses, execution of searches and seizures; the service of documents, including judicial documents; the examination of places or sites including the exhumation and examination of grave sites. Article 93(1) provides for any other assistance which is not prohibited by the law of the requested state, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the court.

There are express provisions in the statute for dealing with requests listed above, where such requests conflict with the law of a state or touch on matters of national security, or are prohibited in the requested state on the basis of an existing principle of general application. Even though the spirit of the relevant provisions require states to make efforts to cooperate with the court, the requested states have the ultimate right to deny the request for assistance[159].

It is observed that the provisions on sentence are sufficiently flexible, especially given that sentence of imprisonment may be served only in states designated by the court from a list of states which have indicated to the court their willingness to accept sentenced persons, and subject to conditions attached to such acceptance, to enable the court to effectively manage the regime[160].

On the enforcement of fines and forfeiture measures, Article 109 urged states parties to give effect to fines and forfeitures ordered by the court, without prejudice to the rights of bona fide third parties, and in accordance with the procedure of their national law.

156. See Article 89 of the Rome Statute of the ICC, 1998.
157. See Article 91 of the Rome Statute of the ICC, 1998.
158. See Article 92 of the Rome Statute of the ICC, 1998.
159. See Article 93(3) – (6) of the Rome Statute of the ICC, 1998.
160. See Articles 103-107 of the Rome Statute of the ICC,1998.

An inevitable question to ask is what happens if a state commits a breach and refuses to remedy it in accordance with well established principles of international law. Under general international law, a state party to a treaty can bring an action against another state for a breach. The provisions of the statute follow the general practice in treaty law to provide for modes for resolving disputes.

If a party, whether state or individual, contests the jurisdiction of the court, it is for the court to decide the matter. In a case of other disputes between two or more states parties relating to the interpretation or application of the Statute which is not settled by negotiations within three months of their commencement, they shall be referred to the Assembly of States Parties. The Assembly may itself seek to settle the dispute or may make further recommendations on further means of settlement of the disputes including referral to the International Court of Justice(ICJ) in conformity with the statute of the International Court of Justice as provided in Article 119(2) of the Rome Statute of the ICC, 1998.

Those processes by themselves do not ensure the effective compliance with the obligation under the statute as under International Law. What ensures compliance can be found in the common interest of all Nations to maintain order and the integrity of the International Legal Order. And with the collective will of parties, nourished by the principle of reciprocity, this is practically achievable.

4.3.4 Ratification and Domestication of Rome Statute

The Rome Statute of the ICC is basically a comprehensive piece of legislation that in the main reaffirms the purposes and principles of the Charter of the United Nations, which among other things, stipulates that all states shall refrain from the threat or use of force against the territorial integrity or political independence of any state. More specifically, the statute recognizes that grave crimes threaten the peace, security and well-being of the world. Thus, determined to put an end to impunity for the perpetrators of these crimes, a machinery was set in motion to establish the International Criminal Court.

By virtue of Article 125 of the Rome Statute, the statute is subject to ratification by signatory states. Nigeria ratified the Rome Statute of the International Criminal Court on 27th September 2001. What this means, is that Nigeria has voluntarily submitted to the authority and jurisdiction of the court and is therefore expected to cooperate and give maximum assistance to the court as required by the statute.

As regards ratification by Nigeria, an issue that quickly comes to mind is whether or not Nigeria has to domesticate the Rome Statute. However, by Law of treaty, the Rome Statute is a treaty and to that extent it requires domestication having regard to section 12 of the 1999 Constitution of the Federal Republic of Nigeria (as amended).

In theory, ratification is the approval by the Head of the State or the government of the signature appended to the treaty by the duly appointed plenipotentiaries. In modern practice, however, it has come to possess more significance than a simple confirmation, being deemed to represent the formal adoption by states of its consent to be bound by a treaty. The practice of ratification rests on the following national demands:

(a) States are entitled to have an opportunity of re-examining and reviewing instruments signed by their delegates before undertaking the obligation therein.

(b) Often a treaty calls for amendments or adjustments in municipal law. The period between signature and ratification enables states to pass the necessary legislation or obtain the necessary parliamentary approval, so that they may therefore proceed to ratification[161]

The development of constitutional system of government under which various organs other than the Head of State are given a share in the treaty-making power has increased the importance of ratification.[162] At the same time, in each country, the procedure

161. Epiphany Azinge, 'Ratification of the Statute of the International Criminal Court and its Challenges for Nigeria' in *An Introduction to International Criminal Court* (NIALS, Lagos, p. 183, 2005).

162. Oppenheim, International Law, 8th Ed., 1955 vol. 1 pp. 903-918 and *The Commentary by the International Law Commission, 1996.*

followed in this regard differs. For instance, often states insist on parliamentary approval or confirmation of a treaty although the treaty expressly provides that it operates as from signature, whereas other states follow the provisions of the treaty and regard it as binding them without further steps being taken.

As regards the Rome Statute, it should be expected that ratification cannot be deemed to have been made without the approval of the National Assembly. In international law, it is customary to submit certain treaties to parliament for approval. A good example is treaties of alliance.

Consequently, while in theory, the Head of State or his representative is free to ratify a treaty, in practice, parliamentary approval is imperative because of the subject matter of the treaty. Treaties derogating from the private rights of citizen, treaties imposing a charge on public funds etc., also belong to this category. The proper approach to ratification is that Rome Statute of the ICC after signature by the authorized Nigeria's representatives is laid before the National Assemble for deliberation before ratification and domestication.

4.3.5 Principle of Universal Jurisdiction

The principle of universal jurisdiction is classically defined as 'a legal principle allowing or requiring a state to bring criminal proceedings in respect of certain crimes irrespective of the location of the crime and the nationality of the perpetrator or the victim'.[163] This principle is said to derogate from the ordinary rules of criminal jurisdiction requiring a territorial or personal link with the crime, the perpetrator or the victim.[164] But the rationale behind it is broader: 'it is based on the notion that certain crimes are so harmful to international interests that states are entitled – and even obliged – to bring proceedings against the perpetrators, regardless of the location of the crime and the nationality of the

163. See for example, Kenneth C. Randall, 'Universal jurisdiction under international law', *Texas Law Review*, No. 66 (1988), pp. 785-8.

164. The territorial link has been gradually overcome by two criteria allowing for extraterritorial jurisdiction, such as jurisdiction over crimes committed out-side the territory by the state's own nationals (active personality jurisdiction) or crimes committed against a state's own nationals (passive personality jurisdiction). This later possibility has been challenged by some states.

perpetrator or the victim'.[165] Universal jurisdiction allows for the trial of international crimes[166] committed by anybody, anywhere in the world.

Examples of universal jurisdiction cases include: an extradition request by a Spanish Court seeking to try former Chilean President, Augusto Pinochet, for crimes such as torture, murder, illegal detention, and forced disappearances (1998) ;[167] the prosecution and conviction of two Rwandan nuns, Sister Maria Kisito and sister Gertrude, by a court in Belgium for war crimes committed during the 1994 Rwandan genocide (2001); the prosecution and conviction of Nikola Jorgic, a former leader of a paramilitary Serb group, and Novislav Djajic, a Serbian soldier, by German courts for acts of genocide committed in Bosnia and Herzegovina (1997); and the investigation and indictment of former president of Chad, Hissene Habre by a Belgium court for crimes against humanity, torture, war crimes and other human right violations committed during his presidency in Chad (2005).

Other similar cases are the *Eichman case*[168] in 1961; the *Demanjuk case*[169] in 1985; and the *Butare Four case*[170] in 2001. Historically, universal jurisdiction can be traced back to the writings of early scholars of note, such as Grotius,[171] and to the prosecution and punishment of the crime of piracy.[172] However, it was after the second World War that the idea of universal jurisdiction gained ground through the establishment of the International Military Tribunal and the adoption of new conventions containing explicit or implicit clauses on universal jurisdiction such as the Geneva Convention of 1949.

It has been contended that the recognition of universal jurisdiction by the state as a principle is not sufficient to make it an operative legal norm.[173] There are basically three

165. Mary Robinson, 'Foreword', *The Princeton Principles on Universal Jurisdiction, Princeton University Press*, Princeton, 2001, p.16.
166. Such as piracy, slavery, crimes against humanity, war crimes, torture, and genocide.
167. House of Lords, 24 March 1999; (1999) 2 WLR 827 (HL).
168. See Supreme Court of Israel, *Eichmann* case, at 298 – 300.
169. *Demanjuk v. Petrovsky*, US Court of Appeal 6th Cir. 31.10.1985; ILR 79,546.
170. Cour d' Assises de Brusselles, 8 June 2001, available at <http://www.asf. be/Assises Rwanda'/fr/fr-ve> (last visited March 2014).
171. See Grotius, *De Jure Belli ac Pacis,* 1625, Vol. ii, Chap xxi, para. 3, 1-2.
172. See for instance *United States v. Smith* 18 US (S. West) 153 at 161-2 (1820).
173. See Xavier Philippe, "The Principles of Universal Jurisdiction and complementarity: how do the two principles intermesh? "*Selected articles on international humanitarian law*, Vol. 88 No. 862 June 2006, p. 375 at 379.

necessary steps to get the principle of universal jurisdiction working: the existence of a specific ground for universal jurisdiction, a sufficiently clear definition of the offence and its constitutive elements, and national means of enforcement allowing the national judiciary to exercise their jurisdiction over these crimes. If one of these steps is lacking then the principle will most probably just remain a pious wish.[174]

The International Criminal Court does not currently have universal jurisdiction. A strong case has been made of the necessity for states to delegate the exercise of universal jurisdiction to the ICC.[175] The argument put forward by proponents of this view stem from a number of factors.

First, it is commonly established that international crimes cannot be considered merely as domestic matters but rather fall under the scope of universal jurisdiction. The core crimes within the ICC's jurisdiction – genocide, crimes against humanity, war crimes, and the crime of aggression – are crimes of universal jurisdiction that are recognized under customary international law. In addition, paragraph 5 of the Preamble of the Rome Statute specifically provides that impunity must end for perpetrators of international crimes. Because the ICC has a legitimate interest on the basis of the universal nature of the crimes to prosecute nationals of non-party States, the Court's jurisdiction is deemed to be concurrently universal and territorial.[176] On the same note, at the time the Rome Statute was adopted in 1998, South Korea along with Germany and the NGO coalition proposed to confer universal jurisdiction on the Court. Thus, to impose limits on the jurisdiction of the ICC is contrary to the primary purpose of the Rome Statute.[177]

Second, the court has jurisdiction over states that have accepted the jurisdiction of the court, have become parties to the Rome Statute by ratifying it, or have accepted its

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174. Ibid.
175. See particularly Hoover, Dalila v., "Universal Jurisdiction not so Universal: A Time to Delegate to the International Criminal Court" (2011) *Cornell Law School Inter- University Graduate Student Conference Papers*, Paper 52, p.1 at 23.
176. Michael P. Scharf, The United States and the International Criminal Court: The ICC's Jurisdiction over the National of Non- Party State: A Crilique of the U.S. Position 64 *LAW & CONTEMP. PROBS*. 67 at 76 (2001).
177. Cedric Ryngaert, The International Criminal Court and Universal Jurisdiction: A Fraught Relationship, 12 *NEW CRIM.L. REV*. 498 at 498 (2009).

jurisdiction by lodging a declaration with the Registrar.[178] Thus these States have freely delegated some of their sovereign powers to the ICC when they ratified the Rome statute, namely the right for the Court to exercise universal and territorial jurisdiction.[179]

Conversely, States that are not parties to the Rome Statute view the exercise of the ICC jurisdiction as a threat to their State sovereignty. Their concern rests essentially on Articles 1, 12, 13 and 17 of the Rome Statute. We shall come back to this issue shortly.[180]

Third, unlike some scholars and commentators who assert that the delegation of criminal jurisdiction over nationals of a State to an international court, either territorial or universal, where that State is not a party to the "relevant" treaty is "impermissible",[181] it has been argued[182] that the delegation to an international court is well established under customary law of universal or territorial jurisdiction. Because certain crimes are so heinous, the international community has agreed to the establishment of international courts intended to act as the delegated and joint authority of States seeking to achieve the same collective purpose, namely, to end impunity for perpetrators of crimes of universal concern. Several international courts or tribunals, ad hoc Tribunals for the Former Yugoslavia ("ICTY") and for the Rwanda ("ICTR") among others specifically exercise criminal jurisdiction over nationals of States that are not parties to a relevant treaty and have not consented to such exercise. Unlike the ICC which is a creature of a U.N Security Council Resolution[183] which exercises its powers that U.N. States Members have delegated to it collectively. Similarly, the Nuremberg International Military Tribunal can be seen as an international tribunal of delegated universal jurisdiction.[184] In its Report to the Security Council, the U.N. Commission of Expert in the Former Yugoslavia stated:

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178. Article 12, Rome Statute of the ICC, 1998.
179. Robert Cryer, International Criminal Law vs State Sovereignty: Another Round?, 16 *EUR. J. INT'L.L*. 979 at 985 (2005).
180. See para. 6.4 below.
181. See Madeline Morris, High Crimes and Misconceptions: The ICC and Non-Party States, 64 *LAW & CONTEMP. PROBS*. 13 at 17 (2001)
182. Hoover, supra note 175, at 2.7.
183. See SC Res. 827 (1993) which establishes the ICTY and SC Res. 955 (1994) which establishes the ICTR.
184. Scharf, *supra* note 176, at 105.

> States may choose to combine their jurisdictions under the universality principle and vest the combined jurisdiction in an international tribunal. The Nuremberg International Military Tribunal may be said to have derived its jurisdiction from such combination of national jurisdiction of the states parties to the London Agreement setting up the Tribunal [185].

Arguably, because the Security Council's authority derives from Article 25 of the Charter of the United Nation, a treaty, the ICTY and the ICTR can be viewed as international tribunals of delegated criminal jurisdiction to prosecute cases where the crime occurred on the territory of a U.N. State Member regardless of the perpetrator's nationality.

Fourth, the delegation of the exercise of universal jurisdiction to the ICC will grant the Prosecutor the power to pursue an international crime without having to consult another authority.[186] Many states, including the United States, have already questioned the impartiality of the ICC Prosecutor. U.S. ambassador to the United Nations, Bill Richardson, stated that,

> [T] here is also a need for checks and balances with respect to the decisions of a single Prosecutor, who in theory also could be influenced by personal and political considerations…[187]

The United States fear was and still is today without merit. Indeed Article 46 and 47 of the Rome Statute specifically provide for the removal of and disciplinary measures against the Prosecutor on the ground of misconduct or serious breach of the Prosecutor's duties. Through an amendment to the Rome Statute, the ICC Prosecutor could have non-party States appoint some of their nationals to assist him in the investigation and prosecution

185. *Interim Report of the Independent Commission of Experts Established Pursuant to Security Council Resolution* 780 (1992), 73 U.N. Doc. S/25274 (1993).
186. E K Leonard, Establishing an International Criminal Court: The Emergence of a New Global Authority? Case #258, Pew Case Studies in International Affairs, Ed. August 2002, available at http. www.usc.edu/calis.
187. M Lohr & W Lieutzau, One Road Away from Rome: Concerns Regarding the International Criminal Court, 9 *U.S.A.F. ACAD. J. LEGAL STUD*. 33 (1998-1999).

of a case. This would not only minimize these states' concern but would also provide additional assistance to the Prosecutor's office which currently lacks the means and resources to prosecute the crimes.

Fifth, and lastly, the ICC tries crimes that are recognized under international law or the law of the State where the crime was committed.[188] These crimes can be recognized either by custom or treaty, or both.[189] Although Article 5 of the Rome Statute limits the jurisdiction of the Court to certain crimes, these crimes are considered *jus cogens* norms[190] by most States and commentators.

Article 11 of the Rome Statute further limits the Court's jurisdiction to crimes committed after the Rome Statutes entered into force. However, the true debate is not whether States will ever agree on the exact definition of a particular crime. The crime of aggression, for instance, although provided for in the Rome Statute, was not defined until the first Review Conference took place in 2010[191] because States parties could not agree on the definition of the crime. However, as Professor Leila Sadat stated,

> It is [certainly] possible to view the drafters in Rome merely as scribes writing down existing customary international law, rather than as legislators prescribing laws for the international community." [192]

Thus, although states may disagree on the exact definition of a particular crime, they have nevertheless proven that they can define the scope of that crime based upon existing customary international laws.

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188. Scharf, *supra* note 176, at 79.
189. *Ibid.* at 83.
190. *Ibid*. at 80.
191. Review Conference of the Rome Statute of the International Criminal Court 31 May- 11 June 2010, Kampala, *Official Records,* available at http*://wwal.icc-cpi.int//Menus/ASP/ Review Conference/Clast visited March 10, 2014.*
192. Scharf, supra note 176, at 80.

On the whole, the universality principle ought to be included in the Rome Statute through various amendments according to uniform laws and in line with the Rome Statute's primary purpose to end impunity for perpetrators of these crimes. This will render to the international community as a whole a sense of proper justice.

4.4 The Primacy of the International Criminal Court

As was shown clearly in paragraph 6.3.2 above, the relationship between the International Criminal Court(ICC) and national courts under the Rome Statute at present is that of complementarity. This is because the current position is that a case becomes "inadmissible" before the ICC if there are national investigations and/or prosecutions, unless there is unwillingness or inability to investigate or prosecute.[193] In other words, the national courts have the "first bite at the apple" and can trump ICC prosecutions of crimes falling within their jurisdiction (with certain exceptions).

By contrast, the relationship between national courts and the two ad hoc tribunals- the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)- is one of "primacy". The ICTY and ICTR have the first option to prosecute, thereby trumping national court proceedings. It is submitted that there were good reasons for creating the "primacy" regime in the context of the ICTY and ICTR, as well as good reasons for creating the "complementarity" regime in the context of the ICC – at least as to the three crimes that the ICC may currently adjudicate (genocide, war crimes and crimes against humanity).[194]

Even though agreement on the definition of aggression and conditions for the ICC's exercise of jurisdiction over the crime was reached after more than ten years of extensive negotiations, there was no significant debate as to whether the crime should be subject to a primacy or complimentarity regime. Rather, the general approach during the aggression

193. See Article 17 of the Rome Statute of the ICC, 1998.
194. See Jennifer Trahan, Is Complementality the Right Approach for the International Criminal Court's Crime of Aggression? Considering The Problem of "Overzealous" National Court Prosecutions', 45 *CORNELL INT'L L. J.* 569 at 571 (2012).

negotiations was to disturb the integrity of the Rome Statute as little as possible when incorporating the crime into it. Thus, beyond adding articles on the definition of and conditions for the ICC's exercise of jurisdiction over the crime only minimal additional changes were made to the Rome Statute.[195] As a result, the existing Rome Statute's complementarity regime remains intact and will apply to the crime of aggression.

It has been argued[196] that there were sound reasons why the ICC on the one hand and the ICTY and ICTR (along with the Special Court for Sierra Leone and the Special Tribunal for Lebanon) on the other take fundamentally different approaches to the relationships between their tribunals and national court prosecutions given the different contexts in which the tribunals were created and the different methods by which they were created and the different purpose they serve. For instance, the ICTY Statute[197] creates a primacy relationship whereby ICTY prosecutions may trump national court prosecutions. Specifically, Article 9 of the ICTY Statute states as follows:

> Concurrent jurisdiction
>
> 1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.
> 2. The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal…[198]
>
> (Underlining mine for emphasis).

195. The definition is contained in a new Article, 8 bis. The conditions for the ICC's exercise of jurisdiction are contained in new Articles 15 bis and 15ter.
196. Trahan, supra note 194 at 573.
197. Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, U.N. SCOR, 48th Sess. U.N. DOC. SIRES 1827 (May 25, 1993) 32 ILM. 1159 (1993).
198. Article 9 of the ICTY Statute.

The Security Council was able to adopt this approach because its power is derived from Chapter vii of the UN Charter, under which the Security Council has pre-eminent authority to take measure to restore "international peace and security". The Security Council created the ICTY by Security Council resolution due to a concern that the various constituent parts of the former Yugoslavia would not have agreed to the formation of the tribunal through a multilateral treaty, as well as concerns about the time it would have taken to negotiate such a treaty.[199]

This primacy regime creates "a jurisdictional hierarchy in which domestic jurisdictions retain the ability to prosecute perpetrators but which preserves an inherent supremacy for the international tribunal".[200] The Statute clearly indicates a desire to still have national prosecutions-the ICTY certainly would not possess the capacity to try all of the perpetrators of crimes committed in the former Yugoslavia – but the ICTY would retain "primacy" in order to prevent multiple courts from simultaneously exercising jurisdiction over an accused. Primacy ensured that the ICTY would have "unbounded legal discretion to order the national courts to defer to the international tribunal 'at any stage of the proceeding.'[201] The framers of the ICTY Statute took the extraordinary and unprecedented step of making concurrent jurisdiction subject to the primacy of the Tribunal because of doubts about the effectiveness and impartiality of national courts.

The ICTY's approach particularly made sense because of the context in which the Tribunal was created – armed conflict in which ethnic groups were pitted against each other, including Croats, Serbs, and Bosnian Muslims, with Serb and Kosovar Albanian hostilities erupting in 1999.[202] Because of these ethnic dimensions, one concern was that national courts might conduct "sham" prosecutions to shield perpetrators from justice. The ICTY

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199. Bartram S. Bron, Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals, 23 *YALE J. INT'LL*. 383 at 387 (1998). ("Creating the ICTR in this way was a shortcut that avoided the need for the negotiation and ratification of a treaty").
200. Michael A. Newton, Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court, 167 *Mil. L. Rev.* 20 at 42 (2001).
201. Ibid.
202. See paragraph 3.7.1 above.

Appeals Chamber recognized this concern in the case of *Prosecutor v. Tadic*[203] as follows:

> When an international tribunal such as the present is created, it must be endowed with primacy over national courts. Other- wise, human nature being what it is, there would be a perennial danger of international crimes being characterized as 'ordinary crimes' or proceedings being 'designed to shield the accused,' or cases not being diligently prosecuted.
>
> If not effectively countered by the principle of primacy, any one of those strategems might be used to defeat the very purpose of the creation of an international criminal jurisdiction to the benefit of the very people whom it has been designed to prosecute…[204]

Indeed, the 1993 ICTY Statute already reflected such concerns, as seen in the Article governing double-jeopardy (*non-bis-in-idem*), which provides that national court prosecutions will not preclude ICTY prosecutions under the following conditions:

> (a) the act for which [the defendant] was tried [before the national court] was characterized as an ordinary crime; or
>
> (b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.[205]

In fact, when national courts in the former Yugoslavia first started prosecuting war crimes, ethnic bias often tainted the trials.[206] By and large, majority ethnicities were more concerned with prosecuting crimes that minority ethnicities perpetrated against the majority,

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203. Case No. IT-94-1-AR 72. Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995).
204. Supra.
205. Article 10 of the ICTY Statute.
206. See Jennifer Trahan & Bogdan Ivanisevic, Justice at Risk: War Crimes Trials in Croatia, Bosnia and Herzegovina, and Serbia and Montenegro (2004), available at http://www.hrw.org/reports/2004/10/13/justice-risk.

rather than crimes the majority committed against minority ethnicities. Clearly, it would have been problematic for such ethnically tainted trials to have precluded ICTY prosecutions. One can only imagine the domestic prosecution of a figure such as Ratco Mladic in a bid to prevent his trial at the ICTY-for example, a trial based upon improperly framed charges or inadequately presented evidence, resulting in far too lenient a conviction and sentence. The approach of primacy coupled with the double-jeopardy provisions ensured that such sham prosecutions would not preclude ICTY prosecutions.

The same "primacy" approach was adopted in the ICTR Statute,[207] which largely mirrors the ICTY statute.[208] The statute's drafters decided that the ICTR- which has now finished most of its prosecutions of key perpetrators of the 1994 genocide-could trump national court prosecutions through its primacy approach, but national courts again would have complementary jurisdiction.[209] At the ICTR, there was likely less of a concern of Rwandan courts "shielding" persons from justice through prosecutions and more of a concern that the decimated Rwandan judiciary would be "unable" to conduct prosecutions of key genocidaires.[210] Fairness to national court proceedings may have been an initial concern as well, and it certainly developed into a concern when the ICTR was asked to consider whether to refer cases back to the national judiciary in Rwanda, as it (like the ICTY) is permitted to do under Rule 11 bis.[211] Due to earlier fair trial concerns, only recently has the ICTR made Rule 11 bis referrals back to Rwanda.

The ICC statute, by contrast, creates a complementarity regime, whereby national court investigations or prosecutions will preclude ICC prosecutions if national authorities

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207. Article 8 of the ICTR Statute.
208. See Note 197 above.
209. Articles 8 (concurrent jurisdiction) and 9 (non-bis-in-ide) of the ICTR Statute mirror Articles 9 and 10 of the ICTY Statute, creating a "primacy" regime between the ICTR and national court proceedings, with the caveat that sham domestic proceedings do not prevent ICTR trials.
210. "Unable" refers to "states that lack the basic material resources to conduct an effective prosecution, the examples mentioned most often being Rwanda…. and Somalia." Kerin Jon Heller, A sentence Based Theory of Complementarity, 53 *HARV. INT'L L.J.* 202 at 208-09 (2011).
211. See Rule 11 bis, Rules of Procedure and Evidence of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.

are willing and able to investigate and/or prosecute the case. Thus, the ICC will "supplement" domestic investigations and prosecutions, and only act when domestic authorities fail to take the necessary steps. This gives the "first bite at the apple" to national courts. However, a strong case has been made for the amendment of the Rome Statute to ensure that the crimes within the jurisdiction of the Court, particularly the crime of aggression, is made subject to the primacy regime.[212] The realization of this lofty ideal is still in the waiting

4.5 Jurisdictional Limitations and Challenges of the ICC

The International Criminal Court is a treaty-based court with limited jurisdiction. It is binding only on states that ratified the Rome statute of 1998 that established it unless a special agreement exists between the Court and a non-party state.[213] One hundred and fourteen states have ratified the Rome Statute as on 12 October, 2014, while the United states, Russia, China, India and Israel among other states are not parties to the Rome statute.

The ICC has jurisdiction *ratione temporis* only over crimes that were committed after the Rome Statute entered into force in 2002, while national courts can prosecute perpetrators of crimes committed before 2002.

Particularly, Article 12 of the Rome Statute provides that the ICC may only investigate and prosecute crimes that were

(1) committed on the territory of, or by a national of, a contracting State to the Rome Statute;

(2) committed on the territory of, or by a national of, a State that has consented *ad hoc* to the jurisdiction of the ICC; or

(3) referred to the ICC by the Security Council of the United Nations under Article 13.

212. Trahan, supra note 194 at 586-601.
213. S D Murphy, *Principles of International Law,* 145 (Thomson West 2006).

Thus, if the Security Council refers the case to the ICC, jurisdiction extends to the territory of any state. In the absence of a Security Council referral, the ICC will not be able to investigate crimes committed either by nationals of a state that has not ratified the Rome Statute, or on the territory of a State that has not ratified the Rome Statute.

Furthermore, states that are not parties to the Rome Statute are usually quick to point out limitations to the jurisdiction of the ICC from Articles 1, 12, 13 and 17 of the Rome Statute.

Article 1 of the Rome Statute provides that the ICC is designed to complement national courts. Thus, non-party States argue that Article I is specifically designed to limit the authority of the ICC over states.

With regard to Article 12 under which the ICC may exercise jurisdiction over nationals of non-party States that have committed a crime in the territory of a party state, non-party States see this exercise of jurisdiction as another violation of their sovereignty. The United States, for instance, argues that the exercise of jurisdiction by the ICC over U.S. nationals without its consent violates international law on the ground that a treaty cannot impose obligations on non-party States without their consent.[214] The Position of the U.S. is typified in the stand of David Scheffer, U.S. Ambassador at Large for War Crimes Issues who stated as follows:

> The single most problematic part of the Rome Treaty is Article 12. Let us be clear what Article 12 states. It is not an article that grants the Court universal jurisdiction over the list of crimes in Article 5. A proposal to that effect was defeated at Rome. Rather, in the absence of a Security Council referral, Article 12 establishes, as a precondition to jurisdiction over Article 5 crimes, that when there

214. See Dapo Akande, The Jurisdiction of the International Criminal Court over National of Non-parties: Legal Basis and Limits, *JOURNAL OF INT'L CRIM. JUST*. 6/8 at 620 (2003)...

> is a referral of a situation by a State Party or when the Prosecutor has initiated an investigation of a situation, either (1) the state of territory where the crime was committed or (2) the state of nationality of the accused, must be a State Party to the treaty or have accepted the jurisdiction of the Court with respect to the crime in question.[215]

Continuing, David Scheffer opined as follows:-

> However, even if you believe that Articles 11, 22, and 24 have nothing to do with the nationals of non-party states and their rights, Article 12 runs counter to some serious norms of international law if it purports to empower the Court to exercise jurisdiction over non-party nationals … Let me begin with the question of universal jurisdiction as a rationale for jurisdiction. As everyone agrees, Article 12 of the Rome Treaty rejects universal jurisdiction for the Court. Yet there is an argument that States delegate to the ICC their right to prosecute domestically individuals of any nationality for certain international crimes of universal jurisdiction. But the foundation of that argument are paper thin. The ICC treaty itself relies explicitly not on universal jurisdiction but on the consent to jurisdiction either by the act of becoming a state party or by special consent under Article 12 paragraph 3.[216]

The stand of the non-party states, particularly the U.S., on Article 12 of the Rome Statute is equally extended to Article 13. Article 13 of the Rome Statute grants the ICC authority to prosecute international crimes committed by nationals of nonparty States that

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215. David Scheffer, "International Criminal Court: The Challenge of Jurisdiction", Address at the Annual Meeting of the American Society of International Law, Washington, D.C. March 26, 1999, P.30 at 31.
216. Supra, at P.32

are referred by a state party or the Security Council to the Prosecutor. Indeed, the international community may request the Security Council to adopt a resolution under Chapter vii of the United Nation charter to mandate non-party states to co-operate with the ICC in cases of threats or breaches to the peace.[217] Thus, if a U.S. national commits an international crime in a state party to the Rome statute, the ICC has authority to prosecute the U.S. national without the consent of the United States. Similarly, if a U.S. national commits a crime in a non-party state that poses a threat or breach of peace, the Security Council can refer the case to the Court where the Court would not otherwise have authority to hear it. The United states sees these instances as a violation of international law. However, its approval of the U.N. Security Council Resolution 1970 ("Resolution 1970") to respond to the massive shootings of Libyan civilians perpetrated by security forces under the control of Muammar Qadhafi[218] provides otherwise. It is contended[219] that when the United states approved Resolution 1970, it consented to some extent to the authority of the ICC to investigate and prosecute international crimes committed by a non-party state's national, including a U.S. national.

Another ground for the grouse of the non-party States with regard to the authority of the ICC is in Article 17 of the Rome Statute. Article 17(2) grants authority to the ICC to investigate and prosecute perpetrators of international crimes if a State is unable or unwilling to investigate or prosecute the crime. In its determination, the ICC considers whether (1) the State only held judicial proceedings for the purpose of shielding the accused from criminal responsibility, (2) the national court unjustifiably waited too long to have the judicial proceedings establishing an intent contrary to bring the perpetrator to justice, or (3) the proceedings are not being conducted independently or impartially.

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217. Ryngaert, *supra* note 177, at 498.
218. Resolution 1973, S/RES/1973, adopted by the Security Council on 17 March 2011
219. Hoover, supra note 175 at 26.

However, some scholars and commentators denounce the dangers associated with the Court's discretion to assess the terms "unable" and "unwilling", positing[220] that deducing implied consent to the delegation of the exercise of universal jurisdiction to the ICC due to failure of states to investigate or prosecute would defeat the purpose of having States join the Rome Statute at the first place.

It is clearly obvious in 2015, thirteen years after the Rome Statute came into force, that the International Criminal Court continues to face difficult, ongoing tasks and challenges that need urgent and simultaneous attention. Firstly, there are many areas where the Court must improve and make its own work more efficient. These include areas of an administrative nature, such as the IT system, but also judicial work.

Secondly, the Court needs greater international recognition and more members than the current number of States Parties.

Thirdly, the Office of the Prosecutor, above all, must develop in an effective body for prosecuting international crimes. This is because the Office of the Prosecutor is seen as the engine of the Court while systematic efforts for professional investigations and effective cooperation are the fuel for the entire Court. The Court needs a highly professional prosecutorial engine.

Also the ICC judges have to cope in their work with a number of problems and challenges few of which are highlighted hereunder. The first is that the role of the Pre-Trial Chambers and their relationship with the Trial Chambers as set forth in the Rome Statute have not yet been definitively clarified by the judges. How can a sensible division of labour between pre-trial and trial proceedings be achieved?

The second, and a particularly serious problem for the Court, is the necessary provision of protection to witnesses and victims. Far more so than in Central Europe, witnesses and victims from African "situation States", such as Kenya, the Democratic

220. Ryngaert, supra note 177 at 498.

Republic of the Congo, Uganda or Dafur/Sudan, who are prepared to testify are often at great risk and face concrete threats. And this is where the problems start: procedural rules explicitly permit witnesses and victims to be made anonymous through "redactions"-i.e. the blacking out of details, especially their names – and to make them unrecognizable in submissions and witness statements; however, this also fundamentally threatens the rights of the accused to a fair trial. In general, the system and excessive practice of thousands of such "redactions" has a huge problem both for the Prosecutor's staff as for Chambers. But it is difficult, so difficult to change this, in particular if tactical advantages can be gained therefrom.

The third is that there is still dispute between the Court's chambers about the role that victims of crimes (and their organizations) can play in the various stages of the proceedings. The dilemma clearly is: granted that victim participation as envisaged by the statute is desirable, how can this be achieved without affecting the proceedings? It is the view of the second Vice-President of the Court, in a key note presented at Salzburg Law School on International Law,[221] that the current system of victim participation is not satisfactory. According to him, it is symbolic at best and has also been distorted, at times, by certain practices of legal representatives of victims. He cited, as an example, the phenomenon that lawyers collect mandates from African victims; with these documents they apply to be admitted as legal representatives of victims and to obtain legal assistance funds from the Court, which are quite generous – and it is often unclear whether, after wards, they still inform and seek the views of the victims concerned. He submitted that this is untenable, the victims must be given a genuine and authentic participation, may be through the appearance of Elders or self-chosen representatives of African villages affected by the crimes in question.

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221. Hans-Peter Kaul, The International Criminal Court-Current Challenges and Perspectives, Salzburg Law School on International Criminal Law, 8 August 2011, p. 8.

Apart from the above challenges related to judicial work and to the internal functioning of the Court, there are some inherent limitations and continuing challenges facing the ICC which we shall now consider.

Firstly, it has become more known in the last years that the ICC is absolutely, one hundred percent, dependent on effective cooperation with State Parties in preparing criminal cases, in particular when it comes to the key issue of arrest and surrender of the accused; this lack of any form of executive power is another weakness of the Court, its Archiles' heel, so to speak. The matter is simple: no arrests, no trials.

Secondly, another limiting factor in that is the unprecedented, indeed gigantic difficulty the Court faces in order to obtain the evidence required, it has to conduct the necessary, complex investigations in regions thousands of kilometers away from The Hague, regions where travel is difficult, the security situation is volatile and it may be difficult to collect the evidence.

Thirdly, genocide, crimes against humanity and war crimes are usually committed during armed conflict as a result of orders "from the top" issued by all kinds of rulers, who at the same time make every effort to cover up their responsibility for the crimes. In pursuing its task, therefore, the Court will almost inevitably be caught between the poles of brutal power politics on the one hand and law and human rights on the other. Consequently, the work of the Court will often continue to be hampered by adverse political winds or indeed political reproach of every colour – and we have seen this in particular in the Darfur situation.

Fourthly, since 2007 it has become particularly noticeable that certain States Parties are trying to restrict funding for the Court. This is apparent above all in persistent, mantra – like repetitions of a somewhat irrational demand for zero nominal growth – when quite often the same States make sweeping demands for, for example , more outreach or victims work of the Court or more situations, more work are referred to the court.

Fifthly, there is a further phenomenon, a further challenging reality which can affect the court's international position or make its work the subject of international debate or even controversy: this concerns the temptation for some States, including powerful States and permanent members of the Security Council to somehow instrumentalise the Court, to use it for their political purposes and interests.

Already the so-called self-referrals of some African States Parties as Uganda and Democratic Republic of Congo have led to comments that leaders of those states used the ICC against political opponents. But as a legal, as a judicial institution governed by the Rome Statute the judges of the Court have to apply its articles – and there is no doubt that there were state Party referrals under article 13 (a) of the Statute – and there is also no doubt that terrible mass crimes have been committed in Uganda and the Democratic Republic of Congo which the ICC had to investigate and prosecute.

It is well known that the referral of crimes committed in Dafur/Sudan through Security Council resolution 1593 in 2005 and the subsequent ICC activities including the arrest warrant against President Bashir led to considerable international debate. A further noteworthy case is obviously the referral of the Libya situation through Security Council Resolution 1970 in March of 2011. From the ICC perspective it was positive that the decision of the Security Council, the highest authority of the United Nations, was this time unanimous. There were also positive editorials and comments, underlining the fact that the Security Council decision demonstrates very clearly that the ICC is nowadays part of the international reality.

There are also other, less positive elements and circumstances to be considered, three of which are mentioned hereunder. First, the entire financial burden of the Libya investigation and ICC work was again put on the ICC, its states parties and not on the United Nations and this affected the court's budgetary planning for 2011/2012.

Second, nationals of Non-States Parties, for example US nationals, were exempted from ICC jurisdiction, with exactly the same provisions, as used in Security Council resolutions adopted during the Bush Administration. Third, the Court, its Presidency was not consulted at all, was not even informed as a courtesy measure before this referral. The point is that what states, powerful states or the Security Council decide with regard the ICC cannot be held against the Court. At the same time, lack of support or political moves by states which make the role of the ICC questionable or even controversial may lead to misunderstandings or even criticisms to which the Court, as a purely judicial, neutral and non- political institution, cannot respond.

Sixthly and finally, there is another challenge: all possible ways and means must be exhausted to ensure that the ICC will have, after 2017, to the extent possible, jurisdiction with regard to the crime of aggression. This is a task essentially for the States Parties which have to ratify, support and implement the crime of aggression amendments adopted in a historic breakthrough, in a consensus decision in Kampala in June 2010. So far, Austria, Bolivia, Botswana, Brazil, Eztonia, Germany, Liechtenstein, the Netherlands, Peru, Spain, South Africa, Switzerland, Trinidad and Tobago have made concrete commitments to early ratification. Early ratification by as many States Parties as possible is also the best protection against possible attempts to reopen the Kampala compromise.

From the fore going, it is patently clear that the lack of executive power when it comes to the issue of arrest and surrender of accused person, the difficulty in obtaining the required evidence, adverse political winds from the top where the order leading to the commission of the crime emanated, restriction by some States Parties of funding for the Court while making sweeping demands on ICC, the temptation for some states to instrumentalise the Court and use it for their political purposes and interest, and the realization of the efforts to criminalize aggression are the challenges inherent in the jurisdiction of the ICC.

4.5.1 United States and the ICC

It is certain that the United States of America was among the countries that participated in the five-week diplomatic conference convened in Rome in June 1998 by the United Nations General Assembly to finalize and adopt a convention on the establishment of an international criminal court. The Rome Statute of the International Criminal Court (ICC) was subsequently adopted on 17 July 1998 by a vote of 120 to 7 with 21 countries abstaining.

Though the identity of the 7 countries that voted against the treaty could not easily be ascertained, it was strongly believed that the People's Republic of China, Israel, and the United States[222] were three of the seven because they later publicly confirmed their negative votes. On the part of the United States, a letter signed by John R. Bolton, US under Secretary of state for Arms Control and International Security Washington on April 27, 2002 and addressed to Kofi Annan, the UN Secretary General reads as follows:

> This is to inform you in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000.
>
> The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this treaty.[223]

While few US public officials[224] pay lip service to the necessity of the ICC,

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222. John R. Bolton, 27 April 202, International Criminal Court: Later to UN Secretary General Kofi Annam. US Department of State. 41 ILM 1014 (2002).
223. Ibid
224. For instance David Scheffer, Ambassador at Large for War Crimes Issues U.S. Department of State; and Madeleine Albright US Secretary of State. See David Scheffer, "International Criminal Court: The Challenge of Jurisdiction', Address at the Annual Meeting of the American Society of International Law Washington, DC, March 26 1999, P. 30.

some others[225] have sought points of weakness to discredit the Court outrightly. Yet there exist clear manifestation of hypocrisy on the part of the United States of America with regard to the jurisdiction of the ICC over nationals of non-party states. The US has vigorously objected to the possibility that the ICC may assert jurisdiction over its nationals without its consent.[226] As a result of its opposition to the ICC, the US has sought to use a variety of legal and political tools to ensure that the ICC does not exercise jurisdiction over its nationals. This strategy has included: the enactment of legislation restricting cooperation with the ICC and with states that are parties to the ICC,[227] the conclusion of agreements with other states prohibiting the transfer of US nationals to the ICC,[228] and the adoption of Security Council resolutions preventing the ICC from exercising jurisdiction over those nationals of non-parties that are involved in UN authorized operations.[229]

Ironically, the United States has championed Security Council resolutions to confer jurisdiction on the ICC on other non-party states such as Sudan[230] and Libya[231] and went on to express support for the ICC investigation and prosecution of War Crimes in those countries. In the case of Sudan, in July 2009, the Obama Administration's Special Envoy on Sudan, retired General J. Scott Gration, stated that U.S. engagement with Sudan in the context of peace negotiation "does not mean that Bashir does not need to do what is right in terms of facing the International Criminal Court and those charges".

The referral of the situation in Libya to the ICC was the first time such referral was done unanimously. Though the United States joined China to abstain from voting in the

225. D Scheffer, Ibid, P. 31; and Henry Kissinger. See Henry A. Kissinger, "The Pitalls of Universal Jurisdiction," Foreign Affairs. July/August 2001, P.95.
226. J O Scheffer, "The United States and the International Criminal Court", 93 *American Journal of International Law* (AJIL) (1999) 12, 18.
227. The American Servicemenber's Protection Act, 2002, Pub. L. No. 107-206. For analysis of this statute, see Johnson, "The American Servicemember's Protection Act: Protecting Whom?", 43 *Virginia Journal of International Law* (VJIL) (2003) 405
228. Reports indicate that by July 2003, 51 states (including parties to the ICC Statute) have concluded such agreements with the US. See htt://www.iccnow.org/documents/otherissues impunity agreem.html.
229. See SC Res. 1422 (2002) and SC Res. 1487 (2003).
230. SC Res. 1593 (2005).
231. SC Res. 1970 (2011).

case of Sudan (while actually supporting the referral), both countries voted in favour of the referral of the situation in Libya to the ICC. Incidentally, the two countries, Sudan and Libya, are non-party states to the ICC Statute just as the United States. This attests to the high level of hypocrisy on the part of the United States to the ICC.

4.5.2 ICC and Africa

Till date ICC has opened cases exclusively in Africa. Cases concerning many individuals are open before the Court, pertaining to crimes allegedly committed in seven African states, namely: The Libyan Arab Jamahiriya, Kenya, Sudan (Darfur), Uganda, the Democratic Republic of Congo (DRC), the Central African Republic (CAR) and Cote d' Ivoire. Two realities gave impetus to Africa's strong support for the establishment of the ICC: the carnage that gripped Rwanda in 1994 and the need to find ways to prevent powerful countries from preying on weaker ones.

There was urgent need in Africa to squarely confront impunity and the mass violation of human rights, as well as prevent militarily, politically and economically stronger countries from invading weaker ones. In terms of the latter, the inclusion of "crimes of aggression" – "the planning, preparation, initiation or execution of an act of using armed force by a state against the sovereignty, territorial integrity or political independence of another state," – was especially attractive to African countries. By 2012, 43 African countries were already signatories to the Rome Statute and, of these, 31 were already states parties.

The prosecutor had recently secured convictions.[232] In addition, the prosecutor initiated preliminary examinations – a potential precursor to a full investigation – in Cote d' Ivoire, Guinea, and Nigeria, along with several countries outside of Africa, such as Aghanistan, Colombia, Georgia, Honduras, and the Republic of Korea.

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232. See the case of *The Prosecutor v.. Thomas Lubanga Dyilo* (Case No. ICC – 01/04-01/06.

Increasingly, however, African countries have come to be critical of the ICC and relations between Africa and the court are currently severely strained. In fact, the African Union (AU) has asked its members to implement a policy of non-compliance and non-cooperation with the ICC.

The Court's current exclusive focus on African cases has not gone down well with African states. The same appears to apply to the U.N. Security Council referrals to ICC which are similarly biased. It is baffling whether crimes that fall within the ICC's jurisdiction have only been committed in Africa. Throughout the world, serious crimes of concern to the international community as a whole are being committed, yet the ICC has devoted its resources to prosecuting mostly African cases. African governments argue that the ICC is practicing a form of "selective justice" and that it is avoiding diplomatically, economically, financially and politically strong countries, such as the United States, the United Kingdom, Russia and China, because these countries can threaten the ICC's existence.

Many Africans are now joining their leaders to challenge the moral integrity of the ICC, with some arguing that the Court is opting for political expediency instead of the universal justice spelled out in the Rome Statute. Unfortunately, the ICC is yet to adequately and effectively allay the fears of Africans and convince them that the court's work is based exclusively on the belief that "the most serious crimes of concern to the international community as a whole must not go unpunished"[233] and not on political and other unrelated considerations.

At a summit held in 2013 in Addis Ababa, the AU resolved that no sitting African head of state should be required to appear before an international tribunal and demand that the ICC should not proceed with the trial of President Uhuru Kenyatta of Kenya. The AU, however, has not been successful in passing a motion to withdraw African countries from the ICC.

233. Para. 4 of the Preamble of the Rome Statute of the ICC, 1998.

Specific areas of concern to African Union are the situations in Sudan (with regard to summons for the arrest of Bashir) and in Kenya (with regard to the trial of President Uhuru Kenyatta and Deputy President Ruto). In late June, 2015 ICC fresh attempt to have El Bashir arrested while attending AU meeting in South Africa failed leading to re-newed argument on the activities of ICC in Africa.

On the other hand, some African countries like Botswana have disagreed publicly with the AU's decision against cooperation and compliance with the ICC and have argued that African countries ought to keep their obligations under the Rome Statute. In addition former UN Secretary-General, Kofi Annan, and Nobel Peace laureate, Archbishop Desmond Tutu, have urged African countries to remain with the ICC.

Incidentally it does not appear that the stand of African states parties to the Rome Statute is a withdrawal from the ICC; hence no motion has been adopted to that effect. Rather the case of the AU is the endorsement of requests for deferral of prosecution of sitting head of states. Also A.U. has called for an end to ICC's seeming double standard in handling cases relating to Africa.

Restoring trust in the ICC among Africans is a monumental task that will require the type of robust dialogue, which is currently not taking place between the ICC and African countries. Supporters of the ICC believe that the appointment of former Gambian justice minister, Fatov Bensouda, as chief prosecutor of the ICC should provide an opportunity for the latter to amend its relationship with Africa.

4.6 Responsibility for Breaches of IHL

Individual criminal responsibility for the crimes listed in Article 5 of the Rome Statute of the ICC, 1998 is provided for in Article 25[234]. By Article 25(1), the International Criminal Court shall have jurisdiction over natural persons pursuant to the ICC Statute.

234. Article 25, Rome Statute of the ICC, 1998.

Article 25(2) provides that a person who commits a crime within the jurisdiction of the ICC shall be individually responsible and liable for punishment in accordance with the Rome Statute.

A person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the court if that person:

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

    (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

    (ii) Be made in the knowledge of the intention of the group to commit the crime;

(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;

(f) Attempts to commit such a crime by taking action that commence its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be

liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose [235].

Article 25 (4) provides that no provision in the ICC Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

The question of State responsibility was considered by the International Court of Justice in the *"Genocide" case (Bosnia and Herzegovina v. Serbia and Montenegro)*[236] which held that the Applicant had not proved that instructions were issued by the authorities of the FRY to commit the massacres at Srebrenica and that the FRY did not exercise the required effective control.

The ICJ had earlier in 1986 held in the case of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.A.)*[237] that for the conduct of a person or group of persons to give rise to the responsibility of a State, it would in principle have to be proved that that State had *effective control* over such conduct.

By Article 28[238], a military commander or person effectively acting as a military commander or a superior shall be criminally responsible for crimes within the jurisdiction of the ICC committed by forces under his or her effective command and control or by subordinates, as a result of his or her failure to exercise control over such forces or subordinates.

It follows, therefore, that the establishment of the ICC ushers in accountability, responsibility of individuals for breaches of IHL and IHRL, particularly the crimes mentioned in the ICC Statutes. Moreso, when it is established that a state has effective control over the conduct of some individuals which amount to a breach of IHL or IHRL, the ICJ can exercise jurisdiction over such a case.

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235. Article 25(3), Rome Statute of the ICC, 1998.
236. I.C.J. Judgment of 26 February 2007; 46 ILM 185 (2007).
237. I.C.J. Judgment of 27 June 1986.
238. Article 28, Rome Statute of the ICC, 1998.

CHAPTER FIVE

JURISDICTIONAL CHALLENGES OF THE ICJ AND ICC

5.1 Analysis of the Jurisdictional Challenges of the ICJ

Attention was given to the above named topic of this chapter earlier in this work.[1] It is intended herein to devote time to analyse the issues raised in the earlier paragraphs for the purpose of demonstrating the seriousness of the issue of jurisdictional challenges of the two international courts we are dealing with in this research.

For the International Court of Justice (ICJ) at least three vital issues are considered hereunder. These are: the fact that the contentions jurisdiction of the ICJ is limited to cases submitted by parties; the reality that the Optional Clause declarations by most state parties are fogged with reservations; and the omission that the advisory jurisdiction of the ICJ is limited to legal question.

5.1.1 Contentious Jurisdiction of ICJ limited to cases submitted by parties

We have seen from Article 36(1) of the Statute of the International Court of Justice (ICJ) that "the Jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force." Bearing in mind that the Charter of the United Nations confers no jurisdiction on the ICJ, it was submitted earlier[2] that the reference to "matters specially provided for" in Article 36(1) is, therefore, nugatory. The sum total of this is that the contentious jurisdiction of the ICJ is limited to what the parties to a dispute are willing to bring before the Court.

This limitation, it is hereby submitted, has been the ground for the challenge to the jurisdiction of the International Court of Justice in a number of instances. In the *Confu Channel Case (preliminary objection)*[3] there was such challenge. The resultant effect has

1. See paragraphs 5.1 and 6.5 above.
2. See paragraph 5.1, page 183.
3. [1948] ICJ 15.

been that once there is no consent, and no submission by the other party to the dispute, the case must be removed from the Court's list as was the case in 1956 in respect of the British references of disputes with Argentina and Chile concerning Antarctica in which both Argentina and Chile denied jurisdiction.[4]

The International Court of Justice noted in the *Application for the Interpretation and Revision of the Judgment in the Tunisia / Libya Case*,[5] that it was 'a fundamental principle' that the consent of states parties to a dispute, is the basis of the Court's jurisdiction in contentious cases. The ICJ in a few other cases[6] further noted that, 'its jurisdiction is based on the consent of the parties and is confined to the extent accepted by them' and that 'the conditions to which such consent is subject must be regarded as constituting the limits thereon … The examination of such conditions relates to its jurisdiction and not to the admissibility of the application'.

The resultant effect is that in most contentious cases before the International Court of Justice much time is spent at the preliminary stages trying to iron out the issue of the challenges to the jurisdiction of the court. These challenges, it is hereby submitted are inherent in the jurisdiction of the court as enshrined in Article 36(1) of the ICJ Statutes.

5.1.2 Optional Clause Declarations fogged over with Reservations

Another basis of jurisdiction of the International Court of Justice, as well as the challenges to the Court stems from Article 36(2) of the Statutes of the ICJ. It stipulates that:

> The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
>
> a. the interpretation of a treaty;

4. See [1956] ICJ 12 and 15.
5. [1985] ICJ Reports, pp. 192; 216; 81 1LR, pp 419, 449
6. See the cases of *Cameroon v. Nigeria* [2002] ICJ Reports, pp.303. 421; and *Democratic Republic of the Congo v. Rwanda* [2006] ICJ Reports, pp.6,18.

b. any question of international law;

c. the existence of any fact which if established, would constitute a breach of an international obligation;

d. the nature or extent of the reparation to be made for the breach of an international obligation.[7]

The above provision referred to as the Optional Clause, was intended to operate as a method of increasing the Court's jurisdiction, by the gradual increase in its acceptance by more and more states. Actually many states have made this declaration. However, as pointed out earlier[8], many of those declarations by the States were so fogged over with reservations and exceptions that they did not in fact notably extend the court's jurisdiction beyond the caprice and whim of the declarant states.

A clear example is the declaration by the United States of America in 1946 with the provision that the declaration shall not apply to (a) disputes which the parties entrust to other tribunals, (b) "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States as determined by the United States," and (c) disputes arising under a multilateral treaty unless all parties to the treaty are also parties before the Court or the United States specially agrees to the Court's jurisdiction.

An instructive case in this regard is the case of *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.A.)*[9]. The Republic of Nicaragua submitted an application to the ICJ on April 9, 1984 alleging that the United States was using military force against Nicaragua in violation of international law. The United States had, three days before the filing of Nicaragua's application notified the Secretary-General of the UN that its 1946 declaration under the Optional Clause would not apply to disputes with any Central American State. The Nicaraguan application to the ICJ indicated that it intended to

7. Article 36(2), Statute of the ICJ.
8. See paragraph 5.1.
9. [1984] ICJ 392, 429 (Judgment of Nov. 26 on Jurisdiction and Admissibility).

rely on the compulsory jurisdiction of the ICJ under article 36(2) of the Court's Statute.

Although it was not contended that the United States had accepted the jurisdiction of the ICJ by the United States declaration of consent of 1946, the United States maintained, among other things, that Nicaragua had not accepted the same obligation and that the United States declaration of consent had been validly modified to exclude cases brought by Central American States. The issues raised by the United states action and discussed in the ICJ's judgment of Nov. 26, 1984 strike not only at the purpose and effectiveness of the ICJ but also at international law itself, which basically relies on the good faith and cooperation of sovereign states.

In reaction to the Court's decision finding jurisdiction, the United States announced in January, 1985 that it would boycott further proceedings in the case. As a result of its general displeasure with the Court's actions, the United States has cancelled its 1946 acceptance of compulsory jurisdiction under the Optional Clause.

The case that clearly demonstrated the effect of the reservations to the jurisdiction of the ICJ is the *Fisheries Jurisdiction Case (Spain v. Canada*)[10]. The case concerned the boarding on the high seas of a Spanish fishing vessel (*the Estei*) by a Canadian patrol boat in pursuance of the Canadian Coastal Fisheries Protection Act of the Northwest Atlantic Fisheries Organization (NAFO). Canada claimed that its acceptance of the compulsory jurisdiction of the Court did not apply to the case because the dispute was covered by a reservation and management measures taken by Canada with respect to vessels fishing in NAFO Regulatory area and the enforcement of such measures. In its judgment of December 4, 1998, the Court relied on the Canadian reservation in finding that it had no jurisdiction.

Again, the said Article 36(2) of ICJ Statute was the basis of the preliminary objection raised by Nigeria in the *Case Concerning The Land and Maritime Boundary*

10. [1998] ICJ (December 4).

Between Cameroon and Nigeria (Cameroun v. Nigeria) (No.1)[11]. Nigeria's first preliminary objection to Cameroon's claim with regard to the Bakassi Penisula and the Lake Chad Basin was:

(1) that Cameroon, by lodging the application on 29 March, 1994, violated its obligation to act in good faith, acted in abuse of the system established by article 36, paragraph 2, of the Statute, and disregarded the requirement of reciprocity established by Articles 36, paragraph 2, of the Statute and the terms of Nigeria's declaration of 3 September, 1965;

(2) that consequently the conditions necessary to entitle Cameroon to invoke its Declaration under Article 36, paragraph 2, as a basis for the Court's jurisdiction did not exist when the application was lodged; and

(3) that accordingly, the Court is without jurisdiction to entertain the application[12].

The International Court of Justice, relying on its earlier decision in the Case Concerning *Right of Passage Over Indian Territory (Portugal v. India)*[13] rejected Nigeria's argument and held, *inter alia* that any State party to the Statute, in adhering to the jurisdiction of the Court in accordance with Article 36, paragraph 2, accepts jurisdiction in its relations with states previously having adhered to that clause.

The Court could arrive at the above decision because there was no reservation in any of the declarations made by the two states. In the majority of cases where jurisdictional challenges are raised with regard to Optional Clause declarations pursuant to Article 36(2) of the ICJ Statute, the declarations were made conditional and dependent upon reciprocity for operation. This means that the court will only have jurisdiction under Article 36(2) to the extent that both the declarations of the two parties in dispute cover the same issues. This informed the view of the court in the *Norwegian Loan Case (France . Norway)*[14],

11. [2002] F.W.L.R. (Pt. 132) 1 at 6 Ratio 1.
12. Ibid, pp.49 & 50.
13. [1957] I.C.J. reports, p.146.
14. [1957] ICJ Reports, p.23; 24 ILR, p. 782.

where the court noted:

> Since two unilateral declarations are involved, such jurisdiction is conferred upon the Court only to the extent to which the declarations coincide in conferring it. A comparison between the two declarations shows that the French declaration accepts the Court's jurisdiction within narrower limits than the Norwegian declaration; consequently, the common will of the Court's jurisdiction exists within these narrower limits indicated by the French reservation[15].

5.1.3 Advisory Opinion Limited to Legal Question

The provisions of Article 96 of the UN Charter and Article 65 of the ICJ Statute authorizing the international Court of Justice (ICJ) to give advisory opinion on any "legal" question appear to be a ground for the challenge of the Court's jurisdiction. This is because it appears that on each reference the court will be expected to initially determine whether the question referred is "legal" or "non-legal". In 1923, a case that really illustrate this assertion came before the Permanent Court of International Justice (PCIJ); that was the *Eastern Carelia case*[16]. The case grew out of hostilities between Russian and Finnish forces following the Russian Revolution. A peace treaty concluded at Dorpat in 1920 provided *inter alia* for the withdrawal of Finnish troops from certain communes which were to be "reincorporated in the State of Rusia and … attached to the autonomous territory of Eastern Carelia … which shall enjoy the national right of self determination". Annexed to the peace treaty was a "Declaration of the Russia delegation with regard to the autonomy of Eastern Carelia" which, on behalf of the "Socialist Federative Republic of the Rusian Soviets," "guarranted" to the Carelia population that "(2) that part of Earstern Carelia which

15. [1957] ICJ Reports, p.23; 24 ILR, p. 786
16. *Status of Eastern Carelia*, PCIJ, Ser. B, No. 5 (Advisory Opinion 1923).

is inhabited by the said population shall constitute, so far as its internal affairs are concerned, an autonomous territory united to Russia on a federal basis." In 1921, following an attempted revolt against Russian Sovereignty in Eastern Carelia, the Finnish Government brought the matter before the League Council. An attempt made through the Eastonian Government to have Russia submit the matter to the Council as a non-member State, met with Soviet refusal on the ground that the question was purely domestic, the references to Carelian autonomy in the Dorpat Treaty and the annexed Declaration being merely descriptive of an exisiting situation and not intended to create any treaty obligations.

After a year's delay the Council, at the suggestion of Finland, referred to the PCIJ the question whether those references in the Treaty and Declaration constituted "engagement of an international character" which Russia would be under a duty, towards Finland, to carry out. Finland appeared before the Court and submitted a voluminous dossier. Russian participation was limited to a splenetic telegram signed by Tchitcheria, Commissar for Foreign Affairs, which stated that Russia found it impossible to take part in the proceedings before the Court, which were "without legal value either in substance and in form," briefly rehearsed the Russian position in a series of "Whereases", denied the right of the "so-called League of Nations" to intervene, and in conclusion referred to the shabby treatment of Russia by the League Powers in a number of instances as demonstrating the impossibility of an impartial hearing, under League auspices, of any question involving Russia.

The resulting opinion, seven of the eleven judges who sat on the case concurring, stated the facts and concluded that, although in form the Court was being asked to give an advisory opinion, nevertheless "answering the question would be substantially equivalent to deciding the dispute between the parties", and Russia having declined to participate, "the court being a Court of Justice, cannot, even in giving advisory opinions, depart from the

essential rules guiding their activity as a Court. The court therefore finds it impossible to give its opinion on a dispute of this kind".

The Council, having received the Court's reply, took note of it, and, after discussion, entered in its minutes a somewhat irritated justification of its own procedure. The Eastern Carelia then retired from the international stage.

The above case was cited to throw light on the advisable limits of the court. The essence is to support the proposition that the jurisdiction of the International Court of Justice (ICJ), which is the successor of the Permanent Court of International Justice (PCIJ), to give advisory opinions is limited to questions that are legal questions. Outside this confine, challenges to the Court's jurisdiction will be inevitable.

5.2 ICC Jurisdiction Limited to States Parties

The International Criminal Court (ICC), being a treaty-based court with jurisdiction, is binding only on States that ratified the Rome Statute of 1998 that established it unless a contrary intention is shown. As provided by Article 12 of the Rome Statute of the ICC, the court has jurisdiction over crimes that are committed within the territory of, or by a national of a state party. In other words, the Court's jurisdiction may be either territorial or personal. Any attempt outside these confines to exercise jurisdiction in a case, without more, will be faced with a jurisdictional challenge.

There are, however, two other circumstances in which the ICC can exercise limited jurisdiction on a case by case basis. These are considered hereunder.

5.2.1 Agreement Between ICC and non-state parties

ICC can exercise jurisdiction with regard to a crime committed on the territory of, or by a national of, a state that is a non-state party if that state has consented ad hoc to the jurisdiction of the Court "by declaration lodged with the Registrar"[17] of ICC.

17. Article 12(3) of the Rome Statute of the ICC, 1998.

Article 12(3) of the ICC Statute provides for declaration by a state which is not a party to the Rome Statute which provides the basis of the court's jurisdiction with regard to that state. It provides as follows:

> If the acceptance of a State which is not a party to this Statute is required under paragraph 2, that state may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.[18]

One may think that there will be no case of jurisdictional challenge of the ICC by a non-State Party that has lodged a declaration with the Registrar as envisaged above. Such challenge may be unlikely given the fact that the declaration was voluntarily made by the State in question. The effect of Article 12(3) declaration, therefore, binds the declaring state to cooperate with the court without any delay or exception in accordance with part 9 of the ICC Statute.[19]

5.2.2 Security Council Referral

The other circumstance in which the ICC can exercise jurisdiction in the territory of, or with regard to a national of a non- Party state is when the case in question is referred to the Court by the Security Council of the United Nations under Article 13 of the ICC Statute. What this means is that if the Security Council refers the case to ICC, jurisdiction extends to the territory of any state. In the absence of a Security Council referral, the ICC will not be able to investigate crimes committed either by national of a state that has not ratified the Rome Statute, or on the territory of a state that has not ratified the Rome Statute. However,

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18. Ibid.
19. Articles 86 to 102 of the Rome Statute of the ICC, 1998.

a third circumstance exist whereby the Prosecutor can initiate investigation in respect of a crime in accordance with Article 15[20].

It can be seen that the jurisdiction of the ICC is limited to the consent to jurisdiction either by the act of becoming a state party or by special consent under Article 12(3); UN Security Council referral; and by initiative of the Prosecutor. Any thing outside these is open to jurisdictional challenge.

5.2.3 Challenges to ICC Jurisdiction

The International Criminal Court (ICC) is faced with paucity of judicial authorities dealing with challenges to the jurisdiction of the Court. Yet the situation in Darfur, Sudan provides a clear instance of Sudaness government and African Union objections. Also text writers provide clear picture of the fact that some states are hell bent on opposing the jurisdiction of the ICC. A notable example is the United States of America as exemplefied in the view of a text writer:-

> The USA is completely against the establishment and functioning of the ICC and defies its jurisdiction in all possible ways. It further goes to suggest for the setting up of a forum alternative to the Court, i.e, kind of Truth and Conciliation Commission created in South Africa. According to them, the Jurisdictional mechanism of the ICC goes against the fundamental American notion of sovereignty, check and balances, and national independence. Currently U.S. military forces, civilian personnel and private citizens are active in peacekeeping and humanitarian missions in different parts of the earth. The US concern is that its own national may be brought before the Court without the consent of the United States government. The United States also objects to the power to trigger the ICC

20. Article 13(C) of the Rome Statute of the ICC, 1998.

> mechanism being conferred on the independent Prosecutor. She has always felt comfort about references by the Security Council, where it has a veto which it is not afraid or generally too embarrassed to use. But it is distinctly unhappy about the other routes, over which it has no direct control.[21]

Moreover, African countries have started to be critical of the International Criminal Court leading to a strained relationship currently between Africa and the Court. Consequently, the African Union (AU) has directed member – States of the Union to implement a policy of non-compliance and non-cooperation with the ICC particularly with regard to issue of arrest and surrender of sitting heads of state.

5.3 Institutional Challenges of the ICJ

The International Court of Justice (ICJ) is faced with other challenges to its jurisdiction which are institutional in nature. These institutional challenges are the problem of enforcement of decisions of the Court; the challenge of "non-appearing respondents"; and the issue of boycott of the Court. These are considered hereunder.

5.3.1 Problem of Enforcement of Decisions

The problem of enforcement of the decisions of the International Court of Justice reared its ugly head in a number of cases. Some instances are the *Anglo – Iranian Oil Co. case (UK v. Iran)*[22]*; Military and Paramilitary Activities in and Against Nicaragua (Nicearagua v. U.S.A.)*[23]; and *the case of Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro).*[24] The unsuccessful parties in these and numerous other cases failed, refused and/or neglected to enforce the judgment of the court. This is indeed a great challenge to the ICJ.

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21. M Shaheen Chowdhory, Jurisdictional Problems of the International Criminal Court, Chittang University Journal of Law, (2003) Vol. vi. pp. 1-8.
22. [1951] ICJ Reports 89.
23. ICJ Judgment of 27 June 1986.
24. 46 ILM 188 (2007).

It is true that Article 94(2) of the United Nations Charter made provision for recourse to the Security Council in such cases for the Council to, if it deems it necessary, make recommendations or decide upon measures to be taken to give effect to the judgment, but in the few instances cited above where the Security Council was invoked under Article 94(2) of the UN charter the issue canvassed tended towards a revision and questioning of the validity of the judgment of the Court. Thus, it appeared that referring such cases to the Security Council was a threat to the legal authority of the judicial decisions of the ICJ.

5.3.2 Challenge of "non-appearing respondents"

This is another serious challenge to the ICJ. In some cases the party against whom applications were filed in the ICJ refused, failed and/or neglected to appear before the Court to defend the action.

In the case of *United States Diplomatic and Consular Staff in Teheran (United States v. Iran),*[25] Iran failed to appear before the Court, but put forward the assertion that the Court could not and should not entertain the case in two communications addressed to the Court. Though the ICJ proceeded to deliver judgment in the case, the Court could not be afforded an opportunity to deliver a further judgment on the reparation for the injury caused to the United States Government as the U.S. discontinued the case before the Court due to the continued absence of Iran.

5.3.3 Boycott of the Court

A similar challenge to the one of "non-appearing respondent" is that of boycott of the Court. This is manifested where one of the parties to a case decides not to appear before the Court or to boycott further proceeding following a ruling not favourable to it.

The case of *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.A.*)[26]illustrates this assertion. In reaction to the Court's decision finding

25. [1980] I.C.J. Reports, p. 3
26. [1984] I.C.J. 392, 429 (Judgment of Nov. 26 on Jurisdiction and Admissibility).

jurisdiction, the United States announced in January, 1985 that it would boycott further proceedings in the case and it did so.

5.4 Institutional Challenges of the ICC

The International Criminal Court (ICC) is further faced with a number of institutional challenges and limitations. These are inherent in the Court's jurisdiction and can be pinpointed as follows:-

(1) lack of executive power when it comes to the issue of arrest and surrender of accused person;

(2) the difficulty in obtaining the required evidences;

(3) adverse political winds from the top where the order leading to the commission of the crime emanated;

(4) restriction by some States Parties of funding for the Court while making sweeping demands on ICC; and

(5) the temptation for some states to instrumentalise the Court and use it for their political purposes and interests.

5.4.1 Lack of executive power in arrest and surrender of accused person

The situation in Darfur, Sudan, particularly the prosecution of Omar Hassan Ahmed AL Bashir and others,[27] demonstrates the challenge and limitation facing the ICC with regard to the failure, refusal and/or neglect to execute warrants of arrest issued by the Court by even member-states of the UN including States Parties to the Rome Statute of the ICC, 1998. By its Resolution 1593, the UN Security Council in 2005 conferred jurisdiction on the ICC with regards to the situation in Sudan, a non state Party to the ICC and thereby referred the situation in Darfur, Sudan dating back to July 1, 2002 to the ICC Prosecutor.

27. See, for instance, Case No. ICC – 02/05-01.07: *The Prosecutor v. Ahmad Harun and Ali Kushayb;* and the case No. ICC-02/05-01/09: *The Prosecutor v. Omar Hassan Ahmad Al Bashir.*

Following the Security Council referral, the office of the Prosecutor initiated its own investigation in June 2005. The Sudaness government also created its own special courts for Darfur in an apparent effort to stave off the ICC's jurisdiction; however, the efforts of the courts were widely criticized as insufficient.

On 2 May 2007, the ICC issued arrest warrants for Jan Jaweed militia leader, Ali Kushayb and Minister Ahmad Harun for being key suspects accused of war crimes and crimes against humanity. See *The Prosecutor v. Ahmad Harun and Ali Kushayb*.[28] However, Sudan claims the court has no jurisdiction over this matter and refuses to hand over the suspects. The ICC on the application of the Chief Prosecutor issued arrest warrant for president of Sudan, Omar Al Bashir, on ten counts of genocide, crimes against humanity and war crimes. See *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*[29].

On 3 February 2010, the Appeals Chamber of ICC reversed the Pre-Trial Chamber's rejection of the genocide charge, ruling that the Pre-Trial Chamber had applied a too stringent standard of proof. Subsequently, the first Trial Chamber issued a second warrant of arrest against Al-Bashir on 12 July, 2010, in which he was charged with genocide against three ethnic groups in Darfur, Up till now[30] the warrant of arrest issued against the Sudaness President has not been executed despite the fact that several member – states of the UN, including states parties to the ICC Statute, have hosted him.[31]

Moreover, the African Union has asked its members to implement a policy of non-compliance and non-cooperation with the ICC on the issue of arrest and surrender of accused persons, particularly sitting African heads of state. The lack of power of execution of warrants of arrest issued against accused persons, therefore, constitute a serious challenge to the exercise of the jurisdiction of the ICC

28. Case No ICC-02/05-01/07.
29. Case No. ICC-02/05-01/09.
30. In August, 2015.
31. The latest being South Africa in June, 2015

5.4.2 Difficulty in obtaining evidence

The International Criminal Court faces another challenge arising from the difficulty in obtaining evidence required to prosecute accuse persons in some cases. The difficulty stems from the fact that the Court has to conduct the necessary, complex investigation preparatory to the trials in regions thousands of kilometers away from The Hague. The situation is heightened in these regions by the dangerous terrain making travelling to be difficult and the security situation volatile. As a result, collection of evidence becomes very difficult.

5.4.3 Adverse Political Wind from the top

The crimes within the jurisdiction of the ICC, particularly genocide, crimes against humanity and war crimes, are usually committed as a result of the orders "form the top" issued by the rulers who make every effort to cover up their responsibility for the crimes. In its effort to ensure that the most serious crimes of concern to the international community do not go unpunished the ICC is pitched against those who issued the orders from the top which resulted to the acts of impunity.

In view of the foregoing, the work of the ICC is often hampered by adverse political winds from the top. We could see this in the operation of the Court in Darfur, Sudan where the administration of Al Bashir rejected ICC jurisdiction over Dafur as a violation of its sovereignty and an instrument of western pressure for regime change. Again, in the matter of *The Prosecutor v. Uhuru Mugal Kenyatta*[32], a notice to withdraw the charge was filed on 5 December 2014 in view of the difficulty in obtaining evidence due to the adverse political wind from the top. This, therefore, is a serious challenge to the smooth operation of the Court.

32. Case No. ICC-01/09-02/11

5.4.4 Restriction of Funding by some state parties while making sweeping demands

Another serious challenge to the ICC is attitude of some state parties with regard to the funding of the Court. This became noticeable since 2007 when these state parties started to restrict their contribution to the financing of the International Criminal Court. At the same time these same state parties have continued to make sweeping demands for such issues as more outreach or victims work of the Court. In some cases referral of more situations or more work are made to the ICC.

5.4.5 Instrumentalizing the Court for Political Purposes and Interests

An equally challenging phenomenon is the temptation to instrumentalize the Court and use it for political purposes and interest. This concerns some powerful States and permanent members of the UN Security Council and some African Situation States.

Particularly the UN Security Council Resolution 1970 of 26 February 2011 in which the situation in Libya was referred to the Court was seen in some quarter as using ICC as instrument for the political purposes and interests of some powerful states in the Council. However, the unanimity of the vote by members of the UN Security Council negatived this view.

Again, the so-called self-referrals of some African States parties as Uganda and Democratic Republic of Congo have been criticized as having been targeted against political opponents. Also this allegation has not been substantiated.

5.5 Primacy Regime

The jurisdictional challenges facing the ICJ and the ICC differ when we come to the issue of primacy. This clearly affects the ICC and appear not to have effect on the ICJ as far as the Statutes establishing the two Courts are concerned. By virtue of the ICJ Statute, and its civil nature, the Court can not defer to any other court once the matter is within Article 36 of the ICJ Statute. It is not clearly so with the ICC, a criminal court. The reason is that the ICC does not enjoy the primacy regime like the two ad hoc tribunals, ICTY and ICTR,

but a complementarity regime whereby it is mandated to defer to national courts once they are willing and able genuinely to carry out the requisite investigation or prosecution as can be deciphered from Article 17 (1) (a).[33]

This is because the national courts have the "first bite at the apple". This limits the power of the ICC to effectively punish perpetrators of impunity who usually use sham prosecutions by national courts to protect offenders from being prosecuted by the Court. It is hoped that appropriate amendment to the Rome Statute of the ICC will be made to ensure that the crimes within the jurisdiction of the Court, particularly the crime of aggression when it comes into force as from sometime in 2017 or thereafter, are made subject to the primacy regime.

The resultant effect of the numerous jurisdictional challenges encountered by the ICJ and ICC as outlined above is that they have affected the dispensation of justice by these two international courts. Our focus, therefore, will now be directed to a consideration of the true position.

5.6 The Challenges and Limitations to Dispensation of Justice

There is no doubt that the challenges and limitations to the jurisdiction of the International Court of Justice (I.C.J.) and International Criminal Court (I.C.C.) constitute a distraction to dispensation of justice in the international sphere. In most cases, such challenges and limitations truncate judicial settlement of dispute and lead to either resort to use of force or to other methods other than judicial settlement. One instance of this is evident in unilateral decision of one of the parties to a case not to appear before the Court or to boycott further proceeding following a ruling not favourable to it.

A case in mind is the case of *United States Diplomatic and Consular Staff in Teheran (United States v. Iran)*[34]. In that case, the United States brought before the Court,

33. Article 17 (1) (a) of the Rome Statute of the ICC, 1998.
34. [1980] I.C.J. Reports, p.3.

by application, complaints against Iran following the occupation of its Embassy in Teheran by Iranian militants on 4 November, 1979. Its main complaint was against the capture and holding as hostages of its diplomatic and consular staff.

When the United States requested an indication of provisional measures against Iran, the Court held that there were no more fundamental prerequisites for relations between States than the inviolability of diplomatic envoys and embassies. It therefore indicated provisional measures in order to ensure the immediate restoration to the United States of its embassy premises and the release of the hostages. In its decision on the merits of the case, at a time when the situation complained of still persisted, the Court in its Judgment of 24 May 1980 found that Iran had violated and was still violating obligations owed by it to the United States under conventions in force between the two countries and rules of general international law; that the violation of these obligations engaged Iran's responsibility and that the Government of Iran was under an obligation to secure the immediate release of the hostages, to restore the Embassy premises, and to make reparation for the injury caused to the United States Government. The Court reaffirmed the cardinal importance of the principles of international law governing diplomatic and consular relations.

It is significant to note that the Court gave judgment notwithstanding the absence of the Iranian Government in the case before the Court and after rejecting the reasons put forward by Iran in two communications addressed to the Court for its assertion that the Court could not and should not entertain the case. The Court was not called upon to deliver a further judgment on the reparation for the injury caused to the United States Government since, by Order of May 12 1981, the case was removed from the list following discountenance.

Because of non-appearance of Iran before the ICJ and the discontinuance of the case before the Court, the issues were transferred to the Iran – United States claims Tribunal

which has since been sitting in The Hague. In effect the stance of Iran truncated judicial resolution of the matter before the ICJ, particularly with regard to the issue of reparations.

Similarly, the ICC has suffered boycott of its proceedings in a number of cases involving the refusal of local authorities to surrender subjects of arrest warrants to the Court. For instance, Bosco Ntaganda, subject to an ICC arrest warrant since 22 August 2006 on charges of recruiting and using child soldiers in Ituri has not been surrendered to the ICC by the local authorities and moreover has been appointed General of the national Army.[35] This situation in DR Congo compares with the case of President el Bashir in Sudan whose arrest warrant has not been executed by the various African nations where he visited, for example Kenya, Nigeria and South Africa.

Again, in the case of *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.A.)*[36], the U.S. boycotted further proceeding in the matter following the Court's decision upholding that it has jurisdiction to entertain the matter. Such boycott of the ICJ or ICC by States Parties portends great danger to the efficacy of those courts as international judicial umpires. This manifests clearly when such States Parties withdraw from playing their expected roles to the court, for instance in the area of financial contributions.

Finally, the few instances were non-successful state parties to a dispute fail, refuse and/or neglect to comply with the decision of the Court have not only not urgured well for the Courts continued relevance in international dispute settlement, but has resulted in chain reactions that affected international law and relations. A clear instance can be seen in the cases of *Avena and Other Mexican Nationals (Mexico v. U.S.A.)* [37], *LaGrand (Germany v. U.S.A.)*[38]*; and Breard [Vienna Convention on Consular Relations (Paraguay v. U.S.A.)]*[39].

35. Human Rights Watch, 'DR Congo: Arrest Bosco Ntaganda for ICC Trial' (13 April 2012), available at: http://www.hrw.org/news/2012/04/13/dr-congo-arrest-bosco-ntaganda-icc-trial accessed 29 April 2012.
36. 1984 I.C.J. 392.
37. [2004] I.C.J. Rep. 128.
38. [2001] I.C.J. Rep. 466.
39. [1998] I.C.J. Rep. 248.

LaGrand and Avena (together with its progenitor Breard) are ICJ cases concerning the United States of America's application of the Vienna Convention on Consular Relations[40] (hereinafter called Vienna Convention). Under Article 36 of the Vienna Convention, which the United States ratified in 1949, local authorities are required to inform all detained foreign nationals 'without delay' of their right to have their consulate notified of their detention, and to unfettered consular communication. US law enforcement officials were not fully aware of this notice requirement, however, and it was not uncommon for convicted foreign nationals never to have spoken with their consulates concerning their incarceration.

The case of *Breard* concerned Angel Francisco Breard, a death penalty convict and national of Paraguay who was not afforded Vienna Convention protection by US. In that incident, the Governor of Virginia refused to consider an ICJ preliminary order calling upon the US to 'take all measures at its disposal to ensure that Angel Fransico Breard is not executed pending the final decision in these proceedings' and executed Breard. Because of this, no final judgment was reached.

Both cases of *LaGrand* and *Avena* involved such violations. The former, LaGrand, concerned Walter and Karl LaGrand, two German nationals, both of whom were convicted and sentenced to death in Arizona in 1984. They were never informed of their Article 36 right to communicate with German consular officials; indeed it was only in 1992 that Germany was notified of the detentions, at which time it began to issue diplomatic requests urging clemency. Karl LaGrand was executed on 24 February 1999 following unsuccessful clemency appeals. Germany then filed an application before the ICJ against the United States, alleging a violation of the Vienna convention and that the execution of Walter LaGrand should thus be stayed. The ICJ immediately issued a provisional order stating that

40. Vienna Convention on Consular Relations, 24 April 1963, 596 UNTS 261.

'[t]he United States of America should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision of these proceedings'[41] The United States Supreme Court declined to exercise original jurisdiction over Germany's motion to enforce the ICJ provisional order, and Walter LaGrand was executed later that day.

Avena was also related to prisoners sentenced to death; this time, it was Mexican nationals. In an effort to prevent the execution of 54 of its citizens sentenced to death in 10 separate jurisdictions within the US, Mexico instituted a case before the ICJ in 2003, alleging failure to comply with Article 36 of the Vienna convention[42]. While such violations also occurred in non-capital cases, Mexico chose to focus on those 54 convicts because of the life-or-death nature of the penalty. It sought and obtained provisional measures from the ICJ prohibiting the US from executing any of the Mexican nationals involved prior to final judgment. None of the prisoners was indeed executed before the ICJ's *Avena* decision.

The jurisdictional basis of both cases, *LaGrand* and *Avena*, instituted unilaterally by Germany and Mexico, was the Vienna Convention's Optional Protocol on Compulsory Settlement of Disputes, which the United States ratified. Article 1 of the optional Protocol provides for compulsory jurisdiction in the ICJ over 'disputes arising from the interpretation or application of the Convention'. In both cases, the United States never contested the Optional Protocol's applicability.

Judgment: The execution of Walter LaGrand in 1999 despite the ICJ's order of provisional measures, coupled with lingering uncertainty about their obligatory character, may have prompted the ICJ to declare (for the first time) in 2001 final judgment that its orders on provisional measures are binding. The ICJ also ruled that by failing to inform the LaGrand brothers of their right to consular notification following their arrest, and by not permitting 'review and reconsideration' of their convictions and sentences in light of the

41. Provisional Measures Order, *LaGrand* (Germany v. U.S.A.) ICJ Rep. 9 at para. 29.
42. Application Instituting Proceedings, *Avena and Other MexicanNationals (Mexico v. U.S.A.)* [2004] ICJ Rep. 128, at para 9 – 13.

treaty violation, the United States had breached its obligations under the Vienna Convention. The ICJ then prescribed two explicit obligations for the United States: (1) to give Germany a general assurance of non-repetition of US treaty obligations under the Vienna Convention; and (2) to review and reconsider by taking into account any violation of rights under the Vienna Convention, the convictions and sentences of German nationals sentenced to severe penalties.

Similarly, the ICJ's final judgment in Avena held that the Mexican death row prisoners in the US were entitled to a determination of whether failure to notify the Mexican consul had resulted in prejudice. The judgment affirmed rights and that the US was in breach thereof; in the process, the ICJ disregarded the US argument that the procedural default rule barred such reconsideration. Likewise rejected, however, was Mexico's claim that a violation of the Vienna Convention automatically annuls a criminal judgment. The Court ultimately ordered reconsideration of the sentences of the Mexican nationals, and that review should be done by judicial, instead of executive officials.

Post-Judgment: Compliance with the obligations mandated by the LaGrand final judgment has met mixed success. US actions seem to have adequately addressed the obligation of non-repetition, as programmes set up by the United Sates to promote understanding and observance of the Vienna Convention, which began as a response to Breard, continued after the LaGrand judgement. The US Department of State has called for strict compliance by law enforcement officials. It has extensively co-ordinated with numerous federal agencies, as well as with states having large foreign population. Indeed, in the *Avena* final judgment itself, the ICJ stated that the ongoing US programme to improve consular notification was adequate.

The second obligation – to review and reconsider convictions in light of the Vienna convention – has probably not been complied with. A reasonable interpretation of the obligation would entail some procedure to determine whether the violation affected the

substantive outcome of the case in question. Both the US and the ICJ have stated that the obligation should not apply to German (or Mexican) nationals alone, but to all foreign nationals. However, state and federal judges faced with the issue have generally ignored the re-determination requirement of *LaGrand*, refusing to offer review and reconsideration in accordance with its terms either because the remedy sought for the Vienna Convention was considered inappropriate, or because of the procedural default rule.

Because of their close connection in fact and law, the US's adherence to *LaGrand* should ultimately be assessed in conjunction with *Avena*, which has a more interesting compliance narrative. Avena's provisional remedies order was a direct test of whether the ICJ's final judgment in *LaGrand* (which as stated above, ruled for the first time that provisional measures are binding) would be obeyed. Although other factors may have been at play, *Avena's* provisional measures order, unlike that of Breard and *LaGrand*, was respected, as none of the Mexican nationals was executed pending final judgment.

For almost a year after the *Avena* judgment, there was little reason to believe that the US's imperfect post-*LaGrand* compliance record would improve significantly, given the similar normative requirements of both judgments. Some commentators certainly took on that rather pessimistic view about compliance[43].

There were a few encouraging signs; the execution of an Oklahoma foreign national was stayed, for example, in reliance upon *Avena*. The decisive US act of compliance occurred, however, on 28 February 2005, when President George W. Bush declared, in a memorandum to the Attorney General:

> I have determined, pursuant to the authority vested in me as President by the Constitution and laws of the United States, that the United States will discharge its international obligations under

43. *See, for instance, Paulson, 'compliance with Final Judgments of The International Court of Justice since 1987', 98 AJIL (2004) 434 at 452.*

> the decision of the International Court of Justice in the case concerning Avena … by having state courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision[44].

While the ultimate effect of President Bush's determination that 'the United States will discharge its international obligations' under *Avena*, especially in terms of granting re-examinations to foreign convicts who were not afforded consular notice under the Vienna Convention, will only be clear in the coming months and years, the Memorandum alone seemed to have significant effect upon the judicial branch, as evidenced by the US Supreme Court's decision in *Medellin v. Dretke*[45] and its grant of certiorari in *Bustillo v. Johnson* and *Sanchez – Llmas v. Oregon*[46].

The new tone of compliance set by the Executive saw its limits tested when the Supreme Court's divided decision in *Sanchez – Llmas* and *Bustillo* finally came out. Although one may have speculated that the Supreme Court's grant of certiorari following *Breard* and *Medellin* may have signaled willingness to interpret Vienna Convention protection not in a manner consistent with the ICJ's, such did not arise, perhaps due to the by then changed composition of the Court. The Supreme Court's 28 June 2006 decision held, in essence, that even assuming *argundo* that the Vienna Convention creates judicially enforceable rights, suppression of a police statement (procured from a foreign detainee not notified of his right under the Convention) is not an appropriate remedy for the violation, and that states may apply their procedural default rules to claims under the Convention. In doing so, the Court reaffirmed *Breard's* finding that while ICJ decisions deserve 'respectful consideration', they are not binding. The Supreme Court thus refused to comply with *Avena's* interpretation that the Vienna Convention precluded reliance on procedural default

44. President George W. Bush, Memorandum for the Attorney General (28 Feb. 2005) available at www.whitehouse.govc/news/releases/2005/02/20050228-18.html.
45. 125 S Ct 686 (2004).
46. 126 S Ct 2669 (2006).

rules where the 'default' was traceable to the state failure to provide consular notification. Because the decision confined itself to very specific issues, the broader questions of a foreign national's right to sue directly to enforce his or her Vienna Convention rights remains unresolved, along with the Executive's determination of the US's obligations with respect to the 51 Mexican nationals named in *Avena*.

The saga far from over, however. In a fascinating new series of twists, the Texas Court of Criminal Appeal brushed aside President Bush's executive determination and refused to review Medellin's conviction. *Medellin* then returned the case yet again on certiorari to the US Supreme Court; interestingly, the Bush administration has sided with *Medellin* and filed a brief urging the Court to grant certionari. Solicitor General Paul Clement told the Justices that, if not reversed, the Texas Court's decision 'will place the United States in breach of its international obligations' to comply with *Avena* and will 'frustrate the President's judgment that foreign policy interests are best served by giving effect to that decision'. The Supreme Court agreed to hear the case on 30 April 2007.

To add even further complexity to its compliance responses, the President's determination to 'discharge its international obligations' under the ICJ judgment is tempered by the United States decision to withdraw from the Optional Protocol of the Vienna Convention[47], effectively revoking the compulsory jurisdiction of the ICJ over the US as regards the Vienna Convention. In a 7 March 2005 letter to the UN Secretary General, US Secretary of State, Condoleeza Rice, stated:

> [t]his letter constitutes notification by the United States of America that it hereby withdraws from the [Consular Convention's optional Protocol concerning the Compulsory Settlement of Disputes]. As a consequence of this withdrawal, the United States will no longer

47. See Liptak, 'U.S. Says It Has Withdrawn from World Judicial Body', *NY Times*, 10 Mar. 2005, at A16.

> recognize the jurisdiction of the International Court of Justice reflected in that protocol.

Leaving aside the important question of whether unilateral withdrawal from a multilateral treaty is valid under international law [48], withdrawal from the Optional Protocol is not encouraging for future enforcement of the Vienna Convention within the United States, worse still for the dispensation of justice in the international realm.

5.7 National and International Criminal Jurisdiction to Punish Grave Breaches of IHL and the Competence of the Courts

International treaties provide invaluable guidance on this. Under Article 49 of the First Geneva Convention and its corresponding articles in the other Conventions, each contracting party is under the obligation to search for persons accused of grave breaches "and shall bring such persons before its own courts". It may also, if it prefers, "hand such person over for trial to another High contracting party concerned" rather than, it is implied, "trying them in its own court".

Article 84 of the Third Geneva Convention of 1949, relative to prisoners of war contains a rule that can shed light on the attitude of international law to this question. It says

> A prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining power expressly permit the civil courts to try a member of the armed forces of the Detaining power in respect of the particular offence alleged to have been committed by the prisoner of war. In no circumstance whatsoever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally

48. See Resman and Arsanjani, 'No Exit? A Preliminary Examination of the Legal Consequence of United States' Withdrawal from the Optional Protocol to the Vienna Convention on Consular Relations', in M.G. Kohen, *Promoting Justice, Human Rights and Conflict Resolution Through International Law: Liber Amicorum Lucius Caflisch.* (2007) at 897.

> recognized, and in particular, the procedure of which does not afford the accused the rights and means of defence provided for in Article 105.[49]

In connection with another kind of breach, Article 66 of the Fourth Convention relative to civilian persons requires the courts to be "properly constituted, non-political military courts".

Article 75, para. 4 of Protocol I which deals with the treatment of civilian persons who are in the power of a party to the conflict states that

> No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court.

All these provisions appear to indicate a general policy in international law regarding courts, which is basically as follows:

(a) the courts that are to try persons committing one of the grave breaches specified in the conventions or protocol I shall be the national courts of the power in whose hands the accused persons are, or the national courts of another power to which those persons are handed over;

(b) these national courts may be military or civilian, depending on the existing laws of the detaining power, and there is accordingly no need of special courts for the grave breaches mentioned in the international texts;

(c) the national tribunals must offer the essential guarantees of independence and impartiality as generally recognized and be constituted in accordance with the law;

(d) consequently, courts that on account of their composition or activities may be described as political courts may in no circumstances be used;

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49. Article 84, Geneva Convention relative to the Treatment of Prisoners of War (Third Geneva Convention) adopted on 12 August 1949.

(e) the courts trying aliens must be the same as those trying nationals of the country for the same kind of grave breaches.

It is contended that the general delegation of powers to national courts empower those states to use their own legal systems.

The competence of national courts is a matter to be settled by domestic legislation, but a number of international legislations will be of useful guide in this context. Article 49(2) of the First Geneva Convention and the corresponding articles in the other three Conventions require each High Contracting party to search for persons accused of grave breaches:

> …. and shall bring such persons, regardless of their nationality, before its own courts. It may also if it prefers, hand such persons over for trial to another High Contracting Party concerned provided such High Contracting party has made out a prima facie case.

It is submitted that this provision establishes a rule of national jurisdiction rather than a rule of competence, for it does not determine the competence of each and every national courts but does determine, much more fully, the jurisdiction of the state. It is obvious that state jurisdiction in relation to grave breaches is determined in accordance with the physical whereabouts of the accused persons, irrespective of their nationality. Consequently, international law establishes obligation to try persons accused of grave breaches but does not specify in which country they should be tried. It therefore leaves the state detaining the accused person to decide whether to try him in its own court or hand him over to another state concerned. The only thing that the state holding the accused may not do is to refrain from bringing him before its national courts whilst also refraining from handing him over.

Thus, the entire problem of the competence of national courts is to be settled by each state as it sees fit. All states have their own rules regarding competence.

Having said that, it is further submitted that the International Criminal Court (ICC) has both the jurisdiction and competence, under relevant provisions of the Rome Statute of the ICC, 1998, to try cases of grave breaches of IHL which the national courts are "unwilling or unable genuinely to carry out the investigation or prosecution".[50] Such relevant provisions are Article 1 talking of the complementarity of the ICC to national courts; Article 5 dealing on crimes within the jurisdiction of the ICC; Article 12 prescribing preconditions to the exercise of jurisdiction; and the whole of Part 9 dealing with international cooperation and judicial assistance.

Equally, it may be argued that by virtue of Articles 34, 35, 36, 37 and 38 of the Statute of the ICJ, the International Court of Justice has the jurisdiction and competence to handle cases touching on grave breaches of IHL where states are parties like in the case of *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*.[51] How the two international courts, ICJ and ICC, intermesh on this will be the subject of our next discussion.

5.8 Conflicts of Jurisdiction: ICJ Compared with ICC

The sphere of influence of the ICJ and ICC are marked out by statutes. Article 34 (1) of the Statute of the International Court of Justice provides that "only states may be parties in cases before the Court"[52] On the other hand, Article 25 (1) of the Rome Statute of the International Criminal Court states that "the Court shall have jurisdiction over natural persons pursuant to this Statute".[53]

It is clear, therefore, that while the ICJ focuses on adjudication of cases and matters between states, the ICC targets natural persons alleged to have committed the offences

50. Article 17 (1) (a), Rome Statute of the ICC, 1998.
51. I.C.J. Judgment of 26 February 2007; 46 ILM 185 (2007).
52. Article 34(1) of the Statute of the International Court of Justice.
53. Article 25(1), Rome Statute of the ICC, 1998.

within the Court's jurisdiction.[54] Furthermore, the cases already dealt with by the ICJ border on the civil rights and obligations of states, whilst those of the ICC center on individual criminal responsibility.

Given the above scenario, is the relationship between the ICJ and ICC competitive or complementary? If it is competitive, the issue of conflict of jurisdiction between the two international courts will arise. If, however, it is complementary, there will be no ground to talk about conflict of jurisdiction between them.

The history of the two courts affords an answer to the above poser. Since the creation of the ICJ in 1946, the Court as of April 2014 had entered 160 cases onto its general list for consideration before the Court. In most of these cases, only nation – states have standing to bring forward claims or to defend such claims, but certain United Nations bodies and agencies, such as the UN General Assembly have the power to submit questions for advisory opinions before the ICJ. The Court, therefore, provided a conducive platform for the determination of civil rights and obligations of nation – states *inter se* since the end of World War 11, a role the PCIJ had played since after negotiations following World War 1.

Observations that there is the need for adjudicatory platform to handle cases of individual criminal responsibility in the wake of World War 11 and thereafter led to the establishment of several ad hoc tribunals as we have already seen.[55] It was a search for an "independent permanent International Criminal Court" "to put an end to impunity for the perpetrators" of "such grave crimes (that) threaten the peace, security and well –being of the world"[56] that culminated in the establishment of the International Criminal Court (ICC). It is, therefore, without doubt that the ICC was established to complement the ICJ and not to compete with it. It follows, therefore, that the basis for conflict of jurisdiction between the

54. See Article 5, Rome Statute of the ICC, 1998.
55. See Chapter three above.
56. See the preamble of the Rome Statute of the ICC, 1998.

ICJ and ICC is lacking since the two courts run parallel to each other.

5.9 The Hurdles to Dispensation of Justice

There is no doubt that despite the availability on ground of the legal framework and the adjudicatory bodies to tackle the cases of grave breaches of international humanitarian law and international human right law in various parts of the world today, there still exist hurdles to dispensation of justice. A number of factors account for such hurdles, a diagnosis of which will pave way for recommendations that will have lasting impact in the international adjudicatory system and procedures.

First, individuals are effectively prohibited from bringing cases before the courts, with the exception of limited possibilities of petitions to the International Criminal Court propelling investigations that may or may not lead to prosecutions. For instance, in the petition forwarded to the ICC by the son of the late former governor of old Anambra State, Dr. Josef Umunnakwe Onoh (son of late C.C. Onoh) against Oba Rilwan Akiolu of Lagos for threatening to drown the Igbo in the lagoon if they vote against his preferred candidate, ICC's Head of Information and Evidence Unit in the office of the prosecutor, M.P. Dillion, said: "Under Article 53 of the Rome Statute, the prosecutor must consider whether there is a reasonable basis to believe that crimes within the jurisdiction of the court have been committed, the gravity of the crimes, whether national systems are investigating and prosecuting the relevant crimes, and the interests of justice".[57] Thus, an individual can not *suo motu* initiate prosecution before the courts.

Second, states on the other hand are in most cases reluctant to initiate proceedings before the courts for the fact that those at the helm of affair in the states are culpable in those cases. This is the position with the International Criminal Court where most States Parties hesitate to initiate investigations by the Prosecutor due to the level of involvement of top government officials in the alleged crimes. Similarly, state referrals to the Court are

57. See *Daily Sun Newspaper* Lagos Nigeria of Monday, August 24, 2015

rampantly dictated by political considerations as desire to square up with political opponents in most cases motivate such referrals.

Third, the slow process of the judicial system in the International Court of Justice, for example, where much time is spent in filing memorials and counter memorials, make the Court unattractive in cases requiring immediate response. As a result some nations, most of the time disregard the court and resort to such self-help efforts as use of force.

Fourth, most of the existing judicial bodies are unable to effectively address major international issues due to the fact that most of the courts were established in order to serve a specific treaty or international organization, and they are limited in their subject matter jurisdiction. Because these bodies are not structured to judge matters like environmental cases, for instance, their staffs lack the expertise to do so. Non-specialized international judges often are unable to apply the complex, vague and incomplete norms of international environmental law. The ICJ itself, in the *Gabcikovo - Nagymaros Project (Hungery v. Slovakia*[58] admitted that the application of the international environmental law is not an easy task. In that case, the ICJ judges had to be educated in the environmental and scientific aspects of the dispute before they judged the case.

Fifth, The procedure of first of all training the judges on specialized subject matters before they judge the particular case before them has been described as one additional time and funds consuming element of the international judicial procedures. This is the basis of call for establishment of such courts as an International Court of the Environment[59] to by pass such time and expense before judging such specialized subject matters.

Sixth, the efficacy of the courts suffers from a lack of enforcement power. State parties to the dispute are responsible for complying with court decisions. Where there is a failure to comply with a decision of the court not much is done to enforce compliance in most cases as

58. ICJ Reports 1997
59. Mark A. Drumbl, Waging War Against the World: the Need to Move from War Crimes to Environmental Crimes. *Fordham International Law Journal Nov. 1998*

was the case in a number of ICJ cases[60]:

Finally, failure, refusal and/or neglect of some state parties to meet their financial obligations to the courts is a clog in the wheel of dispensation of justice. Some states do so to emphasize their relevance and press home their desire to dictate the judicial tune as payers of the piper. This stance has been adopted by some of the most powerful states especially when decisions of the courts do not favour them.

These hurdles must be tackled in order to have more effective international courts that will meet the challenges of the 21st century world. We shall, therefore, seek for solutions to these challenges and limitations in the last chapter of this work.

60. *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras: Nicaragua Intervening)* ICJ Reports 1993; *Territorial Dispute (Libya v. Chad)* [1994] ICJ Rep. 6; *Gabcikovo – Nagymaros Project (Hungary v. Slovakia)* ICJ Reports 1997; *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea Intervening)* ICJ Reports 2002; *Avena and Other Mexican Nationals (Mexico v. United States)* [2004] ICJ Rep. 128; and *LaGrand (Germany v. United States)* [2001] ICJ Rep. 466.

CHAPTER SIX

CONCLUSION, FINDINGS AND RECOMMENDATIONS

6.1 Summary

In this work, it has become unassailably clear that the two international courts, the subject matters of this research, are today facing serious jurisdictional challenges and limitations which affect the dispensation of justice in the international scene. We have equally observed the similarities and dissimilarities of these challenges and limitations facing the ICJ and ICC in their adjudicatory jurisdictions and the effect in the administration of international criminal justice system.

Such challenges and limitations are not substantially different from what had obtained in the past with regard to various ad hoc criminal tribunals set up by the international community at various times and locations to tackle similar breaches and acts of impunity. The peculiarity of the challenges and limitations facing the ICJ and ICC is, however inherent in their jurisdictions, that is the Statutes establishing them as can be summarized herein below.

Firstly, while the contentious jurisdiction of the International Court of Justice is limited to what the parties to a dispute are willing to bring before the Court, the jurisdiction of the International Criminal Court is limited to the consent to jurisdiction either by the act of becoming a state party or by special consent under Article 12, paragraph 3 of the Rome Statute of the International Criminal Court.

Secondly, another basis of jurisdiction for the two courts, ICJ and ICC, as well as the challenges and limitations thereto, flow from declarations made by relevant states parties to any of the Courts. With the ICJ, this is based on the provisions of Article 36 (2) of the Statute of the ICJ, while Article 12 (3) of the Rome Statute of the ICC provide the backbone of such declarations with regard to the ICC. At various material points in time, States Parties are seen trying to circumvent those declarations through reservations.

Thirdly, both Courts are further faced with a lot of institutional challenges and limitations which affect the dispensation of justice by the two international Courts. For the ICC, such challenges inherent in its jurisdictions are lack of executive power when it comes to the issue of arrest and surrender of accused person; the difficulty in obtaining the required evidence; adverse political winds from the top where the order leading to the commission of the crime emanated; restriction by some States Parties of funding for the Court while making sweeping demands on ICC; and the temptation for some states to instrumentalise the Court and use it for their political purposes and interests. For the ICJ, the problem principally is that of hesitance of states who are parties to the disputes in complying with the decision of the Court and independent mechanism of enforcement of the decisions of the court.

Fourthly, the problem of "non – appearing respondents" and boycotting of the Court's proceeding as well as the failure, refusal and/or neglect to execute warrants of arrest issued by the Court is similarly common to both courts. While the case of *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.A)*[1] illustrates the ICJ experience, the situation in Darfur, Sudan, particularly the prosecution of President Omar Hassan Ahmed Al Bashir and others,[2] demonstrates that of the ICC.

Finally, the question of primacy is a matter intrinsically related to the ICC and pose serious challenge to it by virtue of the express provisions of the Court's jurisdiction in the ICC statute. While the ICJ is not hindered in its practices by this, the ICC has to subordinate to national courts at appropriate cases once they are willing or able genuinely to carry out the investigation or prosecution.[3]

1. 1984 I.C.J. 392, 429 (Judgment of Nov. 26 on Jurisdiction and Admissibility).
2. For instance, Case No. ICC-02/05-01/07: *The Prosecutor v. Ahmad Harun and Ali Kushayb*; and case No. ICC-02/05-01/09: *The Prosecutor v. Omar Hassan Ahmad Al – Bashir.*
3. Article 17 (1) (a), Rome Statute of the ICC, 1998.

The effect of the jurisdictional challenges and limitations facing the ICJ and ICC on the dispensation of justice can be summed up as follows: in most cases such challenges and limitations truncate judicial settlement of dispute and lead to either resort to use of force or other methods other than judicial settlement; faith in judicial resort wane due to the very nature of the courts, particularly the ICC, which prohibit individuals from bringing cases before the Courts; states on the other hand are in most cases reluctant to initiate proceedings before the courts for the fact that those at the helm of affair in the states are the one culpable in the cases; the slow process of filing memorials and counter - memorials in the ICJ make the court unattractive in cases requiring immediate response; most of the existing judicial bodies are unable to effectively address major international issues due to the fact that most of the courts were established in order to serve a specific treaty or international organization, and they are limited in their subject matter jurisdiction; and the efficacy of the courts suffers from a lack of enforcement power[4]. These are serious minus to the onerous task of dispensation of justice and call for serious remedy to the situation.

6.2 Findings

The following findings flow from this work and they form the basis of our recommendations in the next paragraph:-

1. The jurisdictional challenges to the dispensation of justice by the International Court of Justice and International Criminal Court are inherent in their jurisdiction, that is in the Statutes of the two respective Courts. Those challenges will be re-occuring as long as the Statutes of the ICJ and ICC remain unamended.
2. It was also found out that there is a serious lack of a strong enforcement mechanism with regard to compliance with the decisions of the Courts; compelling attendance of parties before the Courts; and execution of warrants of arrest issued by the Courts.
3 The present position of the United Nations Charter, it was found out, tilt towards

4. See paragraphs 3.11, 4.5 and Chapter 5 above.

political settlements of disputes championed by the United Nations General Assembly (UNGA) and the United Nations Security Council (UNSC) instead of judicial settlement of disputes for which the International Court of Justice (ICJ) was set up.

4. The research also revealed that the judgments of the ICJ are binding only on the parties to the dispute and its decisions do not serve as *stare decisis.*

5. It was also discovered that the provisions of the United Nations Charter in relation to the operation of the ICJ and ICC are inadequate and therefore hinders smooth operation of the Courts.

6.3 Recommendations

1. Ammendment of the statutes establishing the International Court of justice (ICJ) and International Criminal Court (ICC) to address the following issues:

   (a) To give the Prosecutor greater latitutde to investigate and prosecute cases arising from individual petitions;

   (b) To address the question of primacy regime with regard to the ICC, particularly as concerning the crime of aggression when it comes into force;

   (c) To curtail the issue of slow process of adjudication before the ICJ by introducing front-loading as is the case in most High Courts today in Nigeria[5] in order to do away with the long delay in filing memorials and counter-memorials before the court by waiting for court's direction instead of going straight by the time schedule specified in the rules;

   (d) To make the ICJ's and ICC's appellate jurisdictions to cover, not just cases handled by the Courts' Trials Chambers, but also matters that originate from other international and national courts in order to check the menace of sham national prosecutions aimed at shielding perpetrators of heinous crimes as

5. See, for instance, the High Court of Anambra State (Civil Procedure) Rules, 2006.

well as curtail the multiplicity of international courts in various spheres of influence, for instance in environmental cases as has been proposed by text writers.[6]

(e) To cover changes to the substantive applicable law of the courts; changes to the procedural rules that control the work of the courts; and changes to the mandates of the two principal international courts, that is the ICJ and ICC;

(f) To revisit Article 59 of the ICJ statute in order to make judgments of the ICJ to have binding effect and serve as *stare decisis* so as to enhance the relevance and power of the Court as well as fortify its jurisdiction; and

(g) To make the crimes that fall within the jurisdiction of the ICC[7] to be subject to the universality principle, having regard to the primary purpose of the Rome Statute to end impunity for perpetrators of those crimes, so as to check-mate the hypocrisy of such non-state parties as the USA who support prosecutions by the Court in other countries and turn round to shield their nationals from similar prosecution on the lame excuse of not being parties to the Rome statute.

2. Amendment of the United Nations Charter to address the following issues:

(a) To give the United Nations Security Council (UNSC) mandatory powers, free from any vetoe by the permanent members of the council by changing "may" to "shall" wherever necessary in the articles of Chapter VII of the Charter[8];

(b) To check the problems of "non-appearing respondents" and boycotting of the Court's proceedings with regard to the ICJ; and lack of executive power

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6. See Dionysia-Theodora Avgerinopoulou, The Role of the International Judiciary in the Settlement of Environmental Disputes and Alternative Proposals for Strengthening International Environmental Adjudication. *Yale Center for Environmental Law and Policy* New Haven, CT 23-25 October 2003, PP.1-18
7. See Article 5 of the Rome Statute of the ICC, 1998.
8. Made up of Artiucles 39 to 51 of the Charter of the United Nations.

when it comes to the issue of arrest and surrender of accused person, the difficulty in obtaining the required evidence, adverse political winds from the top where the order leading to the commission of the crime emenanted, restriction by some States Parties of funding for the Court while making sweeping demands on it, and temptation for some states to instrumentalize the court and use it for their political purposes and interests with regard to the ICC;

(c) To de-emphasize the issue of political settlement of disputes, where the United Nations Security Council (UNSC) and the United Nations General Asembly (UNGA) hold sway, and encourage juidicial settlement by increasing the power of ICJ at the expense of the UNSC and UNGA ensuring that where the UN Charter require states to settle their disputes "by peaceful means, and in conformity with the principles of justice and international law…",[9] a major role should be given to the ICJ towards the actualization of that objective as well as plugging all loophole for by-passing the Court; and

(d) To make clear provision empowering the ICJ to give decisive rulings on use of force issues in view of the escalation of terrorism in the world today, particularly the menace of the *Al Queda* and the affiliates (*Boko Haran, Al Shabab,* the Muslim Brotherhood, ISIS[10] and ISIL[11]) at various theatres in the world currently which demands adequate judicial backing, by way of effective rulings on use of force, to effectively and effectually curtail the scourge.

9. Article 1, paragraph 1, of the U.N. Charter
10. The Islamic State of Iraq and Syria (ISIS).
11. The Islamic State of Iraq and Levan (ISIL).

3. Efforts should be made by the United Nations General Assembly (UNGA) towards greater international recognition of the International Criminal Court through the mobilization of more member states to the Rome Statute by adopting necessary resolutions to encourage membership as the power and competence of the court lies in greater recognition by the international community.

4. A more proactive security measure that will ensure the safety of witnesses before, during and after the trials before the ICC and which equally guarantee fair trial to the defendants should be put in place by every state hosting such trials to solve the current problematic situation of "redactions" (i.e. the blacking out the details of the witnesses) which fundamentally threatens the right of the accused person to a fair trial.

5. Victims of crimes should be given genuine and authentic participation in the trials concerning them so much so that apart from providing to them legal representations, efforts should be made to allow Elders chosen by the victims to appear on their behalf and equally represent them in every matter affecting their interest to be handled by the ICC such as funding to ensure that whatever palliative measures undertaken by the Court in the course of the participation of the victims get to them.

6. Apart from upgrading the IT (Information Technology) system of the two courts, ICJ and ICC, to make the operation of the Courts quicker and more effective, there is the need to ensure that the standard of the administration of the Courts is maintained in terms of manpower and equipment needs to make for expeditious disposal of matters before the Courts.

7. The judges and staff of the Courts should be afforded the opportunity of regular training and re-training in specialized subject matters in order to be able at all times to effectively address major international issues as they arise.

If the above recommendations are implemented, the roadblocks to the dispensation of justice by the International Court of Justice (ICJ) and the International Criminal Court (ICC) will be removed and the Courts will function far better than before.

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