

ISSN 1554-3897

*AFRICAN JOURNAL OF CRIMINOLOGY & JUSTICE STUDIES:
AJCJS; Volume 3, No. 2, July 2008*

**THE INTERNATIONAL CRIMINAL COURT:
CREATION, COMPETENCE, AND IMPACT IN
AFRICA.**

Tamfuh Y.N Wilson, LL.M, D.D.
Senior Lecturer, University of Buea, Cameroon

ABSTRACT

This article discusses the fact that the creation of the International Criminal Court (the ICC) is the fulfillment of a goal in international jurisprudence that will improve good governance in states and prevent international crimes. The author aims to expose the fact that the competence of the ICC has contributed to the development of international criminal law. Furthermore, the article reveals the strength of the ICC in relation to its impact on the African continent.

Introduction

The treaty establishing the International Criminal Court was adopted in Rome on 17 July 1998 when 120 States adopted the Statute on the International Criminal Court following a five-week long Diplomatic Conference of Plenipotentiaries. It is called the Rome Statute of the International Criminal Court, 2002 (hereinafter referred to as the ICC Statute). The Court has jurisdiction over the most serious crimes of

THE INTERNATIONAL CRIMINAL COURT: CREATION, COMPETENCE, AND IMPACT IN AFRICA.

Tamfuh Y.N Wilson

concern to the international community namely: genocide, crimes against humanity, war crimes and the crime of aggression (Articles 5, 6, and 7, ICC Statute). The ICC's jurisdiction over the above crimes became effective after 1 July 2002 when the Rome Treaty entered into force upon the deposit of the sixtieth instrument of ratification. One of the most critical developments under the Rome Statute is that nobody has immunity from prosecution including heads of State or Government, members of Parliaments, governments, commanders and superiors of military or civilian forces (Article 28, ICC Statute).

The International Court of Justice, the principal judicial organ of the United Nations, was designed to deal primarily with disputes between States. It has no jurisdiction over matters involving individual criminal responsibility. The principle *nullum crimen sine lege* is applicable here. The maxim states that there can be no crime committed, and no punishment meted out, without a violation of penal law as it existed at the time of its drafting. Another consequence of this principle is that only those penalties that had already been established for the offence at the time when it was committed can be imposed. This maxim finds expression in the Charter of the United Nations in Article 34 (1), which states that "*Only States may be parties in cases before the Court,*" and in Article 22 (1) of the ICC Statute that; "*A person shall not be criminally responsible under this Statute*

unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.” However, the preambles of both the UN Charter and the ICC Statute convey the same international vision by states. The UN Charter portrays a determination of states “*to save succeeding generations from the scourge of war...*” while in the ICC Statute states are “*mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity.*” Therefore the author sees the ICC Statute as an instrument that fortifies international resolve to save succeeding generations from the scourge of war, and to ensure that those responsible for perpetrating unimaginable atrocities on women and children are criminally responsible before the international criminal justice system. Being a recent Statute yet to be ratified by many States, the author’s analysis is based mainly on the Statute provisions, especially as the only cases before it are very few, and few authors have labored to research on the Court.

Historical Background of the ICC

According to Bassiouni (1970), it has been a long academic debate to identify the legal nature of international crimes committed by individuals and considered as serious violations of the rules of international humanitarian law. However Schwarzenberger (1968) traces the earliest trial for war crimes to Peter Von Hagenbach, in the year 1474. Hagenbach, the governor, had been placed at the helm of the

THE INTERNATIONAL CRIMINAL COURT: CREATION, COMPETENCE, AND IMPACT IN AFRICA.

Tamfuh Y.N Wilson

government of the fortified city of Breisach, by his boss, Charles the Bold, Duke of Burgundy (1433-1477), known to his enemies as Charles the Terrible. The governor, overzealously following his master's instructions, introduced a regime of arbitrariness, brutality and terror in order to reduce the population of Breisach to total submission. Murder, rape, illegal taxation and the wanton confiscation of private property became generalized practices. All these violent acts were committed against inhabitants of the neighboring territories, including Swiss merchants on their way to the Frankfurt Fair. A large coalition of countries (Austria, France, Bern and the towns of Upper Rhine) put an end to the ambitious goals of the powerful Duke. Hagenbach was defeated. Instead of remitting the case to an ordinary tribunal, an ad hoc court was set, consisting of 28 judges of the allied coalition of states and towns. The tribunal was a real international court, set up to try Hagenbach, for compliance with superior orders, and Charles the Bold, for the atrocities he ordered.

A further leap, Schinder (1988: 5) explains, was made in the twentieth century, after the First World War. The Treaty of Versailles of 28 June 1919, in its Articles 228 and 229, established the right of the Allied Powers to try and punish individuals responsible for "violations of the laws and customs of war." The German government therefore had the duty to hand over all persons accused, in order to permit

them to be brought before an allied military tribunal. Article 227 indicted those guilty of “international morality and the sanctity of treaties.” The Allied Powers agreed to establish a special tribunal composed of judges appointed by the United States, Great Britain, France, Italy and Japan to try the accused. In its decision, the tribunal will be guided by the highest motives of international policy, with a view of vindicating the solemn obligations of international undertakings and the validity of international morality. The provisions of this article anticipated the category of “crimes against peace.”

After the Second World War, Brownlie (1989.16) observes that a movement started up within the international community which clearly began to shape a deeper consciousness of the need to prosecute serious violations of the laws of war, with regard both to the traditional responsibility of states, and to the personal responsibility of individuals. The horrible crimes committed by the Nazis and the Japanese led to a quick conclusion of agreements among Allied Powers and to the subsequent establishment of the Nuremburg and Tokyo International Military Tribunals “for the trial of war criminals whose offences have no particular geographical location whether they be accused individually or in their capacity as members of organizations or groups or in both capacities”. This provision is stated in Article 1 of the London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, of 8 August 1945.

THE INTERNATIONAL CRIMINAL COURT: CREATION, COMPETENCE, AND IMPACT IN AFRICA.

Tamfuh Y.N Wilson

Later in 1948, the United Nations first recognized the need to establish an international criminal court to prosecute crimes such as genocide. Raphael Lemkin coined the term genocide which in Latin means “geno” (tribe or ethnic group) and “cide” (massacre). Simply, genocide meant ‘to carry out massacre on an ethnic group.’ He served, alongside Professor H. Donnediu de Vabres and V. Pella, as expert advisers to the Secretariat of the International Law Commission, responsible for the Convention relating to genocide. In resolution 260 of 9 December 1948, the General Assembly, *"recognizing that at all periods of history genocide has inflicted great losses on humanity; and being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required"*, adopted the Convention on the Prevention and Punishment of the Crime of Genocide. Article I of that convention characterizes genocide as "a crime under international law", and article VI provides that persons charged with genocide *"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 . . ."*

Since that time, the question of the establishment of an international criminal court has been considered periodically. In December 1989, in response to a request by Trinidad and Tobago, the General Assembly asked the

International Law Commission to resume work on an international criminal court with jurisdiction to include drug trafficking. Then, in 1993, the conflict in the former Yugoslavia erupted, and war crimes, crimes against humanity and genocide -- in the guise of "ethnic cleansing" -- once again commanded international attention. In an effort to bring an end to this widespread human suffering, the UN Security Council, under resolution 827 of 25 May 1993, established the ad hoc International Criminal Tribunal for the Former Yugoslavia (ICTY), with jurisdiction for the "prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991." Later, in 1994, following the Rwandan genocide, which was a slaughter of an estimated 800,000 Tutsis by Hutus, the UN Security Council, under resolution 955 of 8 November 1994, intervened and created the International Criminal Tribunal for Rwanda (ICTR) for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighboring states, between 1 January 1994 and 31 December 1994.

At its fifty-second session, the General Assembly decided to convene the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, which subsequently held in Rome, Italy,

THE INTERNATIONAL CRIMINAL COURT: CREATION, COMPETENCE, AND IMPACT IN AFRICA.

Tamfuh Y.N Wilson

from 15 June to 17 July 1998, to finalize and adopt a convention on the establishment of an international criminal court. One of the primary objectives of the United Nations is securing universal respect for human rights and fundamental freedoms of individuals throughout the world. In this connection, few topics are of greater importance than the fight against impunity and the struggle for peace and justice and human rights in conflict situations in today's world. The establishment of a permanent international criminal court (ICC) is seen as a decisive step forward. The Court is now a reality, and the author is of the opinion that in the prospect of it lies the promise of universal justice.

The Creation of the International Criminal Court

In this first section the author discusses the basis for the creation of the ICC. One of the major innovations is the need, as every criminal law will have, to deter future war criminals. In this dimension, the Court is significant as an instrument to deter future war criminals and contribute to global security, promote human rights and good governance in States. All potential warlords must be aware that depending on how a conflict develops, there is an international tribunal before which those who violate the laws of war and humanitarian law will be amenable. The International Criminal Court with headquarters at The Hague,

Netherlands is a permanent institution not constrained by time and place limitations. It will be able to act more quickly than if an ad hoc tribunal had to be established.

The ICC also serves as an instrument to bringing an end to conflicts. Once investigations start as to the perpetrators of the crimes, there is every reason for the conflict to cease as most of them begin to escape to other States while others are arrested.

The ICC Statute provides an opportunity for the international community of states to combat crimes through provisions against international conspiracy. Criminals are frequently involved in transnational or international criminal activities such as drug trafficking; and political organizations commit genocide, war crimes and crimes against humanity. Similarly, Fichtelberg (2006) writes that terrorist organizations such as Al Qaeda have membership networks that stretch across the globe, using their device roster and international reach to commit crimes in Africa, Asia and the United States. Such relations are portrayed as conspiracies and have been prosecuted both domestically and internationally as conspiracies. Thus according to Article 25 of the ICC Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person commits such a crime as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible. He is also responsible if he orders, solicits or

THE INTERNATIONAL CRIMINAL COURT: CREATION, COMPETENCE, AND IMPACT IN AFRICA.

Tamfuh Y.N Wilson

induces the commission of such a crime which in fact occurs or is attempted. Again, if, for the purpose of facilitating the commission of such a crime, a person aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission, he is criminally responsible. A solitary individual is incapable of causing the degree of destruction that would rise to the level of an international crime. This means that virtually all defendants before international courts will be part of larger organizations. Pape (2002) takes the view that war crimes are often born of extreme political opportunism and desperation. Witnesses are ready to lie to convict sworn enemies and impartial witnesses are, at times, nearly impossible to find. Truth is particularly elusive when evidence sites are despoiled, the lines of command are blurred and official orders are secret.

The Competence of International Criminal Court

This competence relates to wisdom and strength of the jurisdiction of the ICC. The Court deals with the most serious crimes committed by individuals: genocide, crimes against humanity, and war crimes. These crimes are specified in the Statute and are carefully defined to avoid ambiguity or vagueness. Crimes of aggression will also be dealt with by the Court when States Parties have agreed on the definition,

elements and conditions under which the Court will exercise jurisdiction.

According to Article 6 of the ICC Statute, "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; (e) Forcibly transferring children of the group to another group.

The crime of genocide is unique because of its element of *dolus specialis* (special intent) which requires that the crime must be committed with 'intent to destroy'. The International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, states that "Among the grievous crimes this tribunal has the duty to punish, the crime of genocide is singled out for special condemnation and opprobrium (*The Prosecutor v. Krstic*)." Crimes against humanity cover those specifically listed prohibited acts when committed as part of a widespread or systematic attack directed against any civilian population.

Aggression as a crime under the Court is still to be given a clear definition. Article 5 (2) of the Rome Statute is to the effect that "the Court shall exercise jurisdiction over the

THE INTERNATIONAL CRIMINAL COURT: CREATION, COMPETENCE, AND IMPACT IN AFRICA.

Tamfuh Y.N Wilson

crime of aggression once a provision is adopted.....defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.” The definition of aggression is however soon going to be determined without much controversy. Generally, it includes “a violent attack or threats by one country against another country” (Oxford Advanced Learner’s Dictionary). In an international conference held in Cameroon, Yaounde, (Ntsama 2001) observes that the crime of aggression should be distinguished from the act of aggression. He established that ‘an act’ of aggression was political, while ‘a crime’ of aggression was judicial or criminal in nature. The seminar, entitled “Sub-Regional Sensitization and Information Seminar on the International Criminal Court”, was organized by the Cameroonian Government in collaboration with Canada, France, the Francophonie and DePaul University, USA, as part an initiative by the Cameroonian Government to revise its Constitution and accede to the Rome Statute. The act may be considered legitimate in cases of national defence or counter-terrorism policies. A line must be drawn between the two, so that terrorists do not make use of the term aggression to escape punishment. Criminal responsibility will be applied equally to all persons without distinction as to whether he or she is a Head of State or government, a member of a government or parliament, an

elected representative or a government official. Nor may such official capacity constitute a ground for reduction of sentence. The fact that a crime has been committed by a person on the orders of a superior does not normally relieve that person of criminal responsibility. Thus article 27(1) is to the effect that "...immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person." This principle in international criminal justice is known as command responsibility, the Yamashita or Medina Standard. Tamfuh, (2008) points out that the Yamashita Standard is based upon the precedent set by the United States Supreme Court in the case of the Japanese General Tomoyuki Yamashita. He was prosecuted for atrocities committed by troops under his command in the Philippines, and was charged with unlawfully disregarding and failing to discharge his duty as a commander to control the acts of members of his command by permitting them to commit war crimes (US Military Tribunal, Nuremberg Judgment, 28 October 1948). The Medina Standard is based upon the massacre at My Lai which United States captain Ernest Medina failed to prevent. The principle holds that a commanding officer, being aware of a human rights violation or a war crime, will be held criminally liable when he does not take action. Thus command responsibility is an omission mode of individual criminal responsibility: the superior is responsible for crimes committed by his subordinates and for failing to prevent or punish them.

THE INTERNATIONAL CRIMINAL COURT: CREATION, COMPETENCE, AND IMPACT IN AFRICA.

Tamfuh Y.N Wilson

A military commander is criminally responsible for crimes committed by forces under his or her command and control. Criminal responsibility also arises if the military commander knew or should have known that the forces were committing or were about to commit such crimes, but nevertheless failed to prevent or repress their commission. There is responsibility of commanders and other superiors. A military commander is criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control. This will be as a result of his or her failure to exercise control properly over such forces. He must have known that the forces were committing or about to commit such crimes. Secondly, it should be shown that the military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution (Article 28, ICC Statute). Professor Morris argues that “those crimes (enshrined in the ICC Statute) are often committed by or with the approval of governments. It is unlikely that a government sponsoring genocide, war crimes or crimes against humanity would consent to the prosecution of its nationals for his or her participation. The ICC Statute therefore annuls municipal legislation granting immunity to heads of state or military commanders. Most decisions of the ICTY and ICTR have applied the principle of

command responsibility. The *Kambanda* Judgment (Case No. ICTR 97-23-S) for example, in which former Rwandan Prime Minister was tried and sent to 30 years imprisonment, represents a new accountability of political leadership at the national level with regard to a prime minister. Similarly, in the ICTY Judgment of *Prosecutor v. Naser Oric* (Case No.IT-03-68), Oric, Srebrenica's Muslim wartime commander was convicted and sentenced for failing to prevent the murder of four persons and for the cruel treatment of five Serb individuals detained in the eastern Bosnian town of Srebrenica between December 1992 and March 1993. Though this trend has been progressing unhindered, a contradictory position was taken recently by the ICJ in the case of *Belgium v. Congo* (ICJ, Arrest Warrant Case, 2002). The case involved the validity of an international warrant for the arrest of the then Congolese Minister of Foreign Affairs on the ground that he had committed serious violations of international humanitarian law. The judges unanimously held that customary international law grants incumbent foreign ministers, for as long as they hold their office, absolute immunity from criminal jurisdiction and inviolability. This position appears to have diluted the developing international customary rule that suspends legal immunity whenever a grave international crime has been committed.

The International Criminal Court will not infringe on the jurisdiction of national courts. It will not supersede, but will complement national jurisdiction (Article 1, ICC Statute).

THE INTERNATIONAL CRIMINAL COURT: CREATION, COMPETENCE, AND IMPACT IN AFRICA.

Tamfuh Y.N Wilson

Zeidy (2006) claims that the ICC Statute provides national courts with primary jurisdiction to prosecute heinous crimes, but that this primacy is not absolute because a state loses its primacy when it manifests unwillingness or inability to exercise its jurisdiction over a specific case. Thus national courts will continue to have priority in investigating and prosecuting crimes within their jurisdiction. If a national court is willing and able to exercise jurisdiction, the International Criminal Court cannot intervene and no nationals of that State can be brought before it except in cases referred to it by the United Nations Security Council acting under Chapter VII of the UN Charter dealing with “Action with respect to threats to the peace, breaches of the peace, and acts of aggression.” Article 39 of the UN Charter states that “the Security Council shall determine the existence of any threats to the peace, breaches of the peace, and acts of aggression and shall recommend, or decide what measures shall be takento maintain or restore international peace and security.”

The principle of universal jurisdiction is very important and has been mentioned by the ICC Statute. According to this principle, states can claim jurisdiction over persons whose alleged crimes were committed outside the boundaries of the prosecuting state, regardless of nationality or country of residence. In 1993, the Belgium Parliament voted the law on universal jurisdiction, giving it power to judge people

accused of war crimes, crimes against humanity or genocide. The Belgium court succeeded in 2001 to arrest and convict four Rwandans for their involvement in the Rwandan genocide. In September 2005, Chad's former President and dictator Hissen Habre was indicted for crimes against humanity, torture, war crimes and other human rights violations by the Belgium court. Arrested in Senegal following requests from Senegalese courts, he was put under house arrest to be sent to Belgium. The Belgian court faced a quick explosion of suits- Prime Minister Ariel Sharon was accused of involvement in the 1982 Sabra-Shatila massacre in Lebanon, and some Israelis deposed a suit against Yasser Arafat for his presumed responsibility for terrorist actions. In 2003, Iraqi victims of a 1991 Baghdad bombing deposed a suit against George H.W Bush, Collin Powel and Dick Cheney. Confronted with this sharp increase in deposed suits, Belgium established the condition that the accused person must be Belgian or present in Belgium. Universal jurisdiction is premised on the concept that certain crimes are so serious that all humanity has reason to bring the perpetrators to justice, regardless of the place of the offence or of the nationalities of the offenders or victims. The question of consent versus the universality principle has been raised. John (2002), comments that the requirement of the consent of the state on whose territory the crime was committed would be unnecessary if the court's basis of jurisdiction were universality.

**THE INTERNATIONAL CRIMINAL COURT:
CREATION, COMPETENCE, AND IMPACT IN
AFRICA.**

Tamfuh Y.N Wilson

The jurisdictional relationship between the ICC and non-party states became a subject of academic debate in 2001. Scharf (2001), the then US Ambassador-at-Large for War Crimes issues, stated that the Rome Treaty of the International Criminal Court “purports to establish an arrangement whereby United States armed forces operating overseas could be conceivably prosecuted by the international court even if the United States has not agreed to be bound by the treaty.... contrary to the most fundamental principles of treaty law.” The United States later secured the adoption of Security Council resolutions no. 1422 (2002), 1487 (2003), 1497 (2003), 1593 (2005) and launched a campaign for the conclusion of bilateral non-surrender agreements. On 30 June 2002, when the Rome Statute was about to enter into force, the US declared that it would vote against a resolution renewing for six months the mandate of the UN Mission in Bosnia and Herzegovina (UNMIBH) and threatened to do the same with respect to all other UN peacekeeping operations if US military personnel participating in such operations were not granted an exemption from the ICC jurisdiction. None of the resolutions above can be qualified as an exercise of the Security Council’s power to request the ICC not to commence or proceed with investigations or prosecutions under Article 16 of the Rome Statute, as this provision was not conceived to cover future and hypothetical cases. It should be observed that by adopting resolutions 1422 and 1487 it would seem that the

Security Council acted *ultra vires*, since no threat to the peace can be found in order to justify the exercise of Chapter VII powers.

On 1 August 2003, the Security Council adopted resolution 1497, authorizing the establishment of a Multinational Force in Liberia in order to support the peace process in that country. Paragraph 7 provides that “current or former officials or personnel from a contributing state, which is not a party to the Rome Statute of the ICC, shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to the Multinational Force or United Nations Stabilization Force in Liberia, unless such exclusive jurisdiction has been expressly waived by that contributing state”. According to (Roscini, 2006), the above resolutions prevent the exercise of the ICC jurisdiction over nationals or personnel of all states non-parties to the Rome Statute, not just of the United States. A state non-party not wishing that its personnel participating in peacekeeping missions enjoy the permanent or temporary exemption by the ICC jurisdiction could only ask the Security Council to amend the resolutions and remove the exemption with regard to its nationals and personnel.

The problem of the possible exercise of jurisdiction over nationals of non-parties is exacerbated by the fear that the Prosecutor might start *proprio motu* (of his own motion) politically motivated proceedings against United States citizens participating in military operations abroad. The

**THE INTERNATIONAL CRIMINAL COURT:
CREATION, COMPETENCE, AND IMPACT IN
AFRICA.**

Tamfuh Y.N Wilson

United States has also criticized the disparity between the Rome Statute and several provisions of its Constitution, in particular those providing for immunities of state officials and for the right to be tried by a jury. The inclusion of the crime of aggression, which might affect the primary responsibility of the Security Council in the maintenance of international peace and security and submit to judicial review states' actions to protect their national security and their foreign policies, has also been criticized. The risk highlighted by the United States is that senior United States officials may be at risk of criminal prosecution for national security decisions involving such matters as responding to acts of terrorism, preventing the proliferation of weapons of mass destruction, and deterring aggression (American Service members' Protection Act, Section 2002, Para.9).

**The Impact of the International Criminal Court
on African States.**

There are clear indications that the ICC is winning grounds in Africa. According to Article 13 (a) (b) and (c), of the ICC Statute, cases come before the International Criminal Court in one of three ways: the United Nations Security Council may refer a "situation" using its powers under Chapter VII of the UN Charter regardless of where or by whom the crime or crimes in question were committed; a situation may be

referred to the Prosecutor by a country that has ratified the Rome Statute; or the Prosecutor may initiate an investigation on his or her own (but may only pursue it with the approval of the Pre-Trial Chamber). Except in the case of a Security Council referral, the ICC will only be able to exercise jurisdiction over crimes committed by nationals or on the territory of countries that have ratified the ICC. There are current cases before the International Criminal Court. Many situations have been reported where the Chief Prosecutor has opened an official investigation. The author has looked into the very practical work of the ICC, and interestingly some countries in Africa are resorting to it for a solution to conflicts and the protection of human rights.

Without the pioneering work of the ICTR and the ICTY, it would have been difficult to create the ICC. The ICTR serves as an important bridging device between the immediacy of the crises of the moment that led to its creation and the long-term quest for a permanent global framework of international criminal justice. With the adoption in July 1998 of the Statute of a permanent International Criminal Court by 120 States at a Diplomatic Conference of Plenipotentiaries in Rome, the latter vision has been realized. The ICTR delivered the first judgment in history for the crime of genocide, as well as the first conviction of an individual for rape as a crime against humanity in the case of *Prosecutor v. Jean Paul Akayesu* in September 1998. In the same month, it became the first international tribunal to convict a head of government for genocide. This was Jean

THE INTERNATIONAL CRIMINAL COURT: CREATION, COMPETENCE, AND IMPACT IN AFRICA.

Tamfuh Y.N Wilson

Kambanda, former Rwandan Prime Minister and head of government at the time of the genocide, who was sent to life imprisonment. He is currently serving his prison sentence in Mali, one of the African countries that have entered into agreements with the UN to enforce the international tribunal's sentences.

Judge Pillay (2002), President of the ICTR, observes that the concept of universal jurisdiction is a perfect illustration of the globalisation of justice. It is an important avenue to tackle impunity not only in the future, but even at present – at a time when so many violations of humanitarian law are occurring but appear to be caught in between the cracks of the architecture of international justice because, on the one hand, the ad hoc tribunals do not have jurisdiction over the events that generate these crimes and, on the other, the ICC has just become operational and will not have retrospective jurisdiction. The first attempt to apply the principle of universal jurisdiction in an African country was, however, aborted. This was the attempt by victims and human rights groups to prosecute former Chadian leader Hissene Habre in Senegal for crimes against humanity and torture allegedly committed when he was Head of State of Chad. But the Court of Cassation of Senegal ruled in March 2001 that Senegal had no jurisdiction to prosecute Habre for crimes committed in Chad, reversing the indictment of the

Investigating Judge which had been confirmed by the Chambre d'Accusation.

From 16 February to 1 June 2006, key developments took place at the ICC having an impact on Africa. The first execution of an arrest warrant was issued in the case of *The Prosecutor v. Thomas Lubanga Dyilo*. This is the first case ever to have been initiated before the ICC. On 17 March 2006, Mr. Thomas Lubanga Dyilo, a Congolese national, was arrested in the Democratic Republic of Congo (DRC) and transferred to The Hague, pursuant to a warrant of arrest issued under seal by Pre-Trial Chamber (PTC) I on 10 February 2006. He is charged with the war crimes of enlisting, conscripting, and using children under the age of fifteen to actively participate in hostilities committed in the territory of the DRC since July 2002. Dyilo is under detention at the Hague, at the Court's detention centre. A series of procedural steps are developing.

Ciampi (2006) explains recent initial proceedings before the Court. On 20 March 2006, the PTC I held an initial public hearing during which the identity of Mr. Lubanga was verified. The PTC I also satisfied itself that Lubanga had been informed of the crimes which he is alleged to have committed, and his rights under the Rome Statute, including the right to apply for interim release pending trial. The hearing was mandatory under Article 61 (1) of the Statute, which provides that "Upon the surrender of the person to the Court, or the person's appearance before the Court

**THE INTERNATIONAL CRIMINAL COURT:
CREATION, COMPETENCE, AND IMPACT IN
AFRICA.**

Tamfuh Y.N Wilson

voluntarily or pursuant to a summons, the Pre-Trial Chamber shall satisfy itself that the person has been informed of the crimes which he or she is alleged to have committed, and of his or her rights under this Statute, including the right to apply for interim release pending trial.”

Progress has been made by the ICC in areas of investigations. The officials of the Court are concentrating efforts on pretrial preparation for the case against Thomas Lubanga. The Prosecutor, Mr. Moreno Ocampo, and the Deputy Prosecutor for Prosecutions, Ms. Fatou Bensouda, paid an official visit to Kinshasa from 2 to 4 April 2006. The visit took place against the backdrop of the investigation underway in the DRC and was the Prosecutor’s first visit to a country in respect of which an investigation has been opened.

The ICC has also made some visits in Africa to sensitize the people. From 21 to 26 February, the Court organized information meetings in Bunia and Goma, two towns in the west of the DRC, for the purposes of informing NGOs operating in the field of human rights and the protection of victims, including religious bodies, about the ICC and the participation of victims in proceedings before the Court. This is the first mission on the field since PTC I issued its decision on participation of victims in the situation in the DRC.

The Central African Republic (CAR) referred itself to the court on January 6, 2005. The case has been allocated to Pre-Trial Chamber III. On 13 April 2006, the Court of Cassation of the Central African Republic investigating charges of murder and rape committed by former President Ange-Felix Patasse and former Congolese Vice-President Jean-Pierre Bemba said that they could not secure the arrest of the suspects, despite international arrest warrants, and therefore requested the ICC to take responsibility.

Uganda, a 'state party' of the court referred a situation to the court on January 29, 2004. The Chief Prosecutor decided to open an investigation into this matter and the situation was assigned to Pre-Trial Chamber II. In February 2005 the United Nations Secretary General observed that the Lord's Resistance Army (LRA), government soldiers and government-organized Local Defense Units had all committed crimes against children, and the LRA was a serious violator. On October 14, 2005 the ICC issued its first public arrest warrants for five senior leaders of the Lord's Resistance Army alleging:

1. -that Leader Joseph Kony committed the crimes against humanity of murder, enslavement, sexual enslavement, rape and serious bodily injury and the war crimes of murder, cruel treatment of civilians, attacking civilians, pillage, inducing rape and enlisting child soldiers.

**THE INTERNATIONAL CRIMINAL COURT:
CREATION, COMPETENCE, AND IMPACT IN
AFRICA.**

Tamfuh Y.N Wilson

2. -that Kony's deputy, Vincent Otti, committed the crimes against humanity of murder, sexual enslavement and serious bodily injury and the war crimes of inducing rape, attacking civilians, enlisting child soldiers, cruel treatment of civilians, pillage and murder.
3. -that Odiambo reportedly led an attack on Barlonya refugee camp in February 2004 when more than 300 people were massacred.
4. -that LRA commander Raska Lukwiya committed the crime against humanity of enslavement and the war crimes of cruel treatment of civilians, attacking civilians and pillage.
5. None of the indictees have yet been arrested, and they are believed to be either in Southern Sudan or Northern Democratic Republic of the Congo (DRC). Ongwen died in 2005 during hostilities with the Ugandan army. Investigations had long commenced.

In addition to the situations in the DRC and in Uganda, investigations remain ongoing in the situation of the Darfur (Sudan), which was referred to the Prosecutor by the Security Council with resolution 1593 (2005) of 31 March 2005. The Prosecutor's application for warrant of arrest is issued under Article 58 of the ICC Statute against Omar Hassan Ahmad AL Bashir. Article 58 is to the effect that, at any time after the initiation of an investigation, the Pre-Trial

Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court. The arrest of the person is also necessary to ensure the person's appearance at trial, and that he does not obstruct or endanger the investigation or the court proceedings. The arrest is also intended to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances. Thus, upon investigation of crimes allegedly committed in the territory of the Darfur, the Sudan, on or after 1 July 2002, the Prosecution has concluded that there are reasonable grounds to believe that Omar Ahmad (hereafter referred to as "AL BASHIR"), bears criminal responsibility for the crime of genocide under Article 6 (a), killing members of the Fur, Masalit and Zaghawa ethnic groups ("also referred to as target groups"), causing serious bodily or mental harm to members of those groups, and (c) deliberately inflicting on those groups conditions of life calculated to bring about their physical destruction in part; for crimes against humanity under Article 7 (1) committed as part of a widespread and systematic attack directed against the civilian population of Darfur with knowledge of the attack, the acts of (a) murder, (b) extermination, (c) forcible transfer of population, (d) torture, and (e) rape; and war crimes under Article 8 (2)(e)(i) of the ICC Statute, for

**THE INTERNATIONAL CRIMINAL COURT:
CREATION, COMPETENCE, AND IMPACT IN
AFRICA.**

Tamfuh Y.N Wilson

intentionally directing attacks against the civilian population as such, and (v) pillaging a town or place. The Prosecution does not allege that AL BASHIR physically or directly carried out any of the crimes. He committed these crimes through members of the state apparatus, the army Militia/Janjaweed in accordance with Article 25 (3)(a) of the ICC Statute (indirect perpetration or perpetration by means.) The application states that AL BASHIR has been President of the Republic of Sudan, exercising both *de jure* and *de facto* sovereign authority, Head of the National Congress Party and Commander in Chief of the Armed Forces. He sits at the apex of, and personally directs, the state's hierarchical structure of authority and the integration of the Militia/Janjaweed within such structure. He is the mastermind behind the alleged crimes. He has absolute control. The evidence establishes reasonable grounds to believe that he intends to destroy in substantial part the Fur, Masalit and Zaghawa ethnic groups. The situation affirms that justice and accountability are critical to achieve lasting peace and security in Darfur. The Prosecution has issued an arrest warrant on Monday 14 July 2008, for AL BASHIR to appear before the ICC. AL BASHIR's *mens rea* includes the fact that he has genocidal intent. In his attacks, AL BASHIR forces consistently made statements such as "*the Fur are slaves, we will kill them*"; "*You are Zaghawa tribes, you slaves.*" The language used by perpetrators of rape made also clear the genocidal intent underlying their actions: "*After they abused*

us, they told us now we would have Arab babies and if they could find any Fur woman, they would rape them again to change the color of their children.” As a result of the attacks to the villages, at least 2,700, 000 people, most of them members of the target groups, have been forcibly expelled from their homes. The indictment of AL BASHIR marks the first time prosecutors at the world’s first permanent war crimes tribunal have issued charges to a sitting head of state. This indeed, is a great development in the direction of peace and the promotion of human rights, not only for Africa, but for the world at large. Since the start of investigation, the Prosecution has collected statements and evidence during 105 missions conducted in 18 countries. Throughout the investigation, the Prosecutor has examined incriminating and exonerating facts in an independent and impartial manner (International Criminal Court, The Office of the Prosecutor, www.icc-cpi-int).

On 1 August 2003, the Security Council adopted resolution 1497, authorizing the establishment of a Multinational Force in Liberia in order to support the peace process in that country. Paragraph 7 provides that “current or former officials or personnel from a contributing state, which is not a party to the Rome Statute of the ICC, shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to the Multinational Force or United Nations Stabilization Force in Liberia, unless such exclusive jurisdiction has been expressly waived by that contributing state”.

**THE INTERNATIONAL CRIMINAL COURT:
CREATION, COMPETENCE, AND IMPACT IN
AFRICA.**

Tamfuh Y.N Wilson

Nevertheless, there is one fundamental reason why justice, local and international, must be Africa's number one priority: the current situation of the African continent, with its wars and poverty, have as their root cause the impunity that thrives in a lack of accountability and the rule of law. To move forward, therefore, African countries will have to take far more seriously the question of justice in the continent, taking a cue from the work of the Arusha Tribunal and other related developments. The recognized weakness of human rights protections at a continental level in Africa led to the adoption of the Protocol on an African Court of Human Rights at the summit of the Organization of African Unity in Ougadougou in 1998. It is regrettable that, since the adoption of the Protocol, only five African States have ratified it. The International Criminal Court will be a step forward in accountability for human rights abuses, and African States should ratify it. However, to the extent that its jurisdiction will not be over individuals but over States, it will not provide a complete solution. In order to prevent being at the receiving end of any potential abuses of international justice, African States must pass domestic legislation empowering their judicial institutions to try individuals for genocide, crimes against humanity, war crimes, and torture.

Conclusion, Criticisms and Recommendations.

The writer has surveyed the creation of the ICC, its competence and its impact on some African States. Many states that are signatories already to the Statute of Rome have a political sense of security. The wars in the past that were fought with impunity are likely going to reduce in their regularity and intensity. Rape, other sexual crimes, genocide, and much more, will be punished. Charles Taylor is facing charges for atrocities committed when he was President in Liberia, AL BASHIR has been issued a warrant of arrest relating to genocide, crimes against humanity and war crimes committed in Sudan This took place very recently, Monday 12 July 2008, Lubanga Dyilo is being tried for crimes committed in Uganda and the DRC. The judges of the ICC seem to be meeting the requirements of men and women of impartiality and renown. This is a court put in place whose credibility depends on the cooperation of states that are signatories to it. During the last ten years, the UN Security Council has succeeded with the two ad hoc tribunals of Rwanda and the Former Yugoslavia. This tells us that the ICC will succeed more following these jurisdictional principles.

However, one of the weaknesses of Africa's participation in the ICC is that of the weakness of their national jurisdictions. As the Court's jurisdiction can only be invoked when national courts are unwilling or unable to prosecute, it

**THE INTERNATIONAL CRIMINAL COURT:
CREATION, COMPETENCE, AND IMPACT IN
AFRICA.**

Tamfuh Y.N Wilson

is doubtful that African States, where the kinds of crimes under the subject mater jurisdiction of the ICC -- genocide, crimes against humanity, war crimes and aggression -- are committed by the state or its agents, will be able to prosecute these crimes effectively without independent judicial institutions. The implication of this weakness is that, while many States with developed national jurisdictions will be able to exercise jurisdiction over their citizens who commit these crimes, Africans may become the majority of the accused persons arraigned before the ICC. Such a scenario could create an impression of uneven justice.

Another weakness of the approach of African countries to the ICC is that, while European States came to the ICC negotiations fully informed about the practice and experience of the ICTY, African Governments, not having been strongly engaged with the work of the International Criminal Tribunal for Rwanda at a political and financial level, participated in the ICC deliberations without a full grasp of the reference point in their own backyard – the ICTR. This situation has tended to create an appearance that the ICC process is driven by perspectives that lack the input of African experience and ownership. Indeed, were it not for the engagement of the Arusha Tribunal itself and non-governmental organizations familiar with its work in the meetings of the Preparatory Committee on the establishment of the Court and the Preparatory Commission of the ICC,

perhaps no contributions would have been made to the creation of the Court from the perspective of the Arusha Tribunal's jurisprudence and operational experience. Examples of important contributions by the ICTR to the ICC include influential proposals and advocacy on the whole question of justice for victims, which led to the adoption of the establishment of a Trust Fund for victims in the Rome Statute.

In the adoption within national laws of provisions of universal jurisdiction, Africa is also found wanting, although it is not alone: most other parts of the world are yet to embrace this principle. Universal jurisdiction means the assertion by a state of jurisdiction over perpetrators of human rights crimes such as genocide, crimes against humanity, war crimes and torture, regardless of the place of occurrence of the crime, the nationality of the accused and the victims.

The ICC will certainly play the role of a pioneering institution to strengthen national jurisdictions to harmonize their criminal law principles with that of the ICC. In conclusion, there are several legitimate reservations to the new phenomenon of justice without borders. Some observers query whether it will not be victors' justice, or the justice of the strong against the weak. Has the international community been selective in the conflicts it has chosen to address? Africans share these reservations. The challenge facing the international community is to ensure that an

THE INTERNATIONAL CRIMINAL COURT: CREATION, COMPETENCE, AND IMPACT IN AFRICA.

Tamfuh Y.N Wilson

architecture of justice is established that truly enforces the rule of law, binding the strong as well as the weak in the international system. It should narrow the differences that exist between the laws or customs of war applicable in internal and in international conflicts, thus improving protection of human rights of individuals. The ICC is on its way of making significant advances in international humanitarian law pertaining to the legal treatment and punishment of sexual violence in wartime. Together with the ICTR and ICTY, there are hopes, from our above essay, that international criminal justice will contribute enormously to good governance, international peace and security and the strengthening of international principles of the rule of law.

The problem still remains as to how to combat crimes by international cooperation before they escalate into genocide, war crimes and crimes against humanity. There is yet no mechanism for such intervention in Africa. Power (2002) observes for example that in relation to the Rwandan genocide, many states were reticent, and that if they had reacted in time many souls would have been saved from death before the heat of the slaughter. States should quickly respond to cries of minorities or ethnic differences taking up political dimensions that subsequently escalate into genocide such as that between the two ethnic groups, the Tutsis and the Hutus in Rwanda. In his work, (Ubah, 2007) seems to touch slightly on some of the societal reasons for

organized crime, which are also reasons behind the eruption of genocides, war crimes and crimes against humanity. He says;

Crisis experiences are experiences that occur out of revelation, discovering, and awareness of a situation that sharply contrasts from what one is used to. A good example of one form of crisis experience and marginality may be a first time experience of race-consciousness. A consciousness, which arises in a person, when he/she becomes aware, that others treat him/her in a certain way, because he/she belongs to a particular race or distinctive foreign land.

Thus situations of ethnic cleansing, which is a crime against humanity, are provoked by a group of people expressing ethnic-consciousness. This is a similar sentiment with anti-colonial protests, linguistic differences and the claims for minority rights in many parts of the world. If these cries are heard and attended to in time by leaders of the states concerned, it will prevent the escalation of genocide, war crimes and crimes against humanity.

Onwudiwe (2007) also points out that nationalism constituted a cause for terrorism in the latter part of the nineteenth and the beginning of the twentieth century. This era of terrorism was characterized by nationalists who advocated nationhood for citizens who were under colonial command. Some nationalists were eager to rid their

**THE INTERNATIONAL CRIMINAL COURT:
CREATION, COMPETENCE, AND IMPACT IN
AFRICA.**

Tamfuh Y.N Wilson

countries of imperial occupation by any means possible, including by the use of terror. Most colonial empires, such as Britain, Manchu China, Austria-Hungary, and Ottoman Turkey were the targets of nationalists who adopted terrorism. Unlike the anarchists, nationalistic forces did not focus on ideology; rather, their main motive was to rule their own nations.

How then do governments in Africa draft their constitutions in order to raise leaders void of selfish sentiments of ethnicity and racism. How will the decision against AL BASIR recompense the millions who have died in Sudan, the thousands who have been raped, the thousands who are suffering in refugee camps in Chad, Cameroon and other states? International jurisprudence is still to discover a court for effective preventive adjudication.

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**THE INTERNATIONAL CRIMINAL COURT:
CREATION, COMPETENCE, AND IMPACT IN
AFRICA.**

Tamfuh Y.N Wilson

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