International Journal of Social Science and Human Research

ISSN (print): 2644-0679, ISSN (online): 2644-0695

Volume 08 Issue 03 March 2025

DOI: 10.47191/ijsshr/v8-i3-52, Impact factor- 8.007

Page No: 1753 - 1772

Historical Review of The International Justice System and Norms

Prof Rogers Barigayomwe
Kampala International University

ABSTRACT: This thesis provided a comprehensive historical review of the international justice system and its evolving norms, tracing its origins from arbitration mechanisms to the establishment of contemporary international tribunals and the International Criminal Court (ICC). The research highlighted the critical role that international law played in addressing egregious crimes, including genocide, war crimes, and crimes against humanity, emphasizing the shift towards individual accountability in international law. The study began by examining the historical context of arbitration as a dispute resolution mechanism prior to the League of Nations, illustrating how arbitration laid the groundwork for more formalized judicial processes. The establishment of the Permanent Court of International Justice (PCIJ) and the subsequent formation of the ICC represented pivotal moments in the evolution of international justice, driven by a collective desire to prevent atrocities similar to those witnessed during World War II. Through a detailed analysis of landmark cases and legal frameworks, the thesis explored the challenges faced by the international justice system, including issues of state sovereignty, the political will of nations to cooperate, and criticisms regarding the perceived selectivity of prosecutions. The research further discussed the impact of significant legal instruments, such as the Universal Declaration of Human Rights (UDHR) and the Geneva Conventions, in shaping international norms and accountability mechanisms. This thesis concluded that, while significant strides had been made in the establishment of an international justice framework, ongoing challenges remained. The legitimacy and effectiveness of the ICC were called into question, particularly regarding its focus on African states and the lack of enforcement mechanisms. This research aimed to contribute to the discourse on international justice by providing insights into its historical development and the current state of affairs, ultimately advocating for a more equitable and effective international justice system.

KEYWORDS: International justice system, arbitration, Permanent Court of International Justice, International Criminal Court, human rights, genocide, war crimes, accountability, international law.

INTRODUCTION

The origins of the international justice system can be traced back to the concept of arbitration. Prior to the establishment of the League of Nations, international conflicts and disagreement were resolved mainly through arbitration[1]. Arbitration is a dispute resolution process whereby parties in a dispute agree that a third party or an arbitrator should evaluate the issues of contention in an agreement and issue an award[2]. It is considered an alternative dispute resolution (ADR) mechanism because it offers the conflicting parties the opportunity to resolve their dispute without formal litigation[3]. Though still relevant in present day justice mechanisms, arbitration served the purpose of conflict resolution until 1920, when the Permanent Court of International Justice was established and later started operation in 1922[4].

The origin of the contemporary international justice system is closely linked to the establishment of international tribunals and criminal courts, for the purpose of prosecuting and punishing crimes under international law[5]. Consequently, the process emphasizes the establishment of individual criminal responsibility under international law, whereby violators of international laws will be

[1]Dunbabin, J. P. (1993). The League of Nations' Place in the International System. *History* 78(254), pp. 421-442.
[2]Pappas, B. A. (2015). Med-Arb and the Legalization of Alternative Dispute Resolution, *Harvard Negotiation Law Review* 20, pp. 157 - 203.
[3]Allison, J. R. (1990). Five Ways to Keep Disputes Out of Court. Harvard Business Review, Available at. https://hbr.org/1990/01/five-ways-to-keep-disputes-out-of-court (Accessed 04 May 2020).
[4]See the history of the Permanent Court of International Justice (PCIJ). Available at. https://www.icj-cij.org/en/pcij
[5]Gordon, G. S. (2007). Toward an International Criminal Procedure' Columbia Journal of Transnational Law 45(3), pp. 635-710, at 637.

prosecuted under the international justice systems[6]. The push for the establishment of the international justice system was premised on the need to prosecute planners and organizers of war crimes and human rights abuses, perpetrators of the gravest crimes that shock the mind committed within or among states, as well as crimes that are too cumbersome for national domestic judiciary systems to prosecute[7].

As a result, the establishment of international criminal justice and norms entails: first, the recognition of the individual as a subject of international law. Second, it is a mechanism to subvert states' defensive attitude towards outside interference[8], in which only states have rights and responsibilities to prosecute crimes committed within their borders and whereby national leaders are shielded from international accountability through the principle of non-interference, which exempts a state's treatment of its own citizens from international law, and by conferring personal immunity to heads of state and diplomats and functional immunity to top public officials[9]. Thus, the international justice system is a framework to protect individuals and national rights and interests, as well as a mechanism to prosecute and check international crimes and bridge the deficiencies apparent in national domestic jurisdictions[10].

The concept of "crimes against humanity" offers the international justice system the opportunity to bypass the principle of non-interference and empowers it to hold individuals accountable for egregious acts of persecution, murder and related crimes within their own territory, even if those acts are consistent with domestic law[11]. Thus, the international justice system bridges the gap in state jurisdictions or national justice systems and offers hope for victims of abuse, who for some reasons are unable to secure justice at domestic level.

The international justice system can be traced from the concept of arbitration, which was introduced as a semi-judicial mechanism of dispute resolution, whereby an arbitrator is used to resolve disputes for parties. The rationale behind the use of arbitration as a dispute resolution process is that it is a system that diverts commercial disputes away from the legal system of specific jurisdiction to a self-regulated system[12]. The process guarantees speedy, inexpensive dispute settlements for parties who are willing to abandon the benefits of legal counsel and the possibility of judicial review if disadvantaged in litigation[13]. Arbitration involves applying relevant established customs created out of the party's own needs and views[14]. The process therefore detaches itself from the legal technicalities and substance of local laws[15]. It was the foremost means of dispute settlement at international level prior to the establishment of conventional courts[16]. International arbitration was the preferred mechanism of resolving cross-border disputes between states[17]. The neutrality it offers, together with the relative ease of the enforceability of awards, made it a more attractive mechanism for disputes than the conventional litigation practice of national courts[18].

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[6] Ibid

[7]See UNDP (2012). International justice begins at home. Available at. https://www.africa.undp.org/content/rba/en/home/ourperspective/ourperspectivearticles/2012/11/21/international-justice-begins-at-home.html (Accessed 04 May 2020).

[8]Werle, G. and Bung, J. (2010). Summary (Historical Evolution) International Criminal Justice, Humboldt-Universitätzu Berlin. Available at. http://werle.rewi.hu-berlin.de/01_History-Summary.pdf (Accessed 28 April 2020).

[9]Rodman, K. A. (2016). International Criminal Justice, *Oxford Bibliographies*. Available at. https://www.oxfordbibliographies.com/view/document/obo-9780199756223/obo-9780199756223-0196.xml (Accessed 28 April 2020)

[10]Hazan, P. (2004). *Justice in a Time of War. College Station*: Texas A & M University Press.

[11] ibid

[12]Arbitration is used in the settlement of dispute between states through the decision of one or more individuals or a tribunal or court chosen by the parties to the dispute and whereby the parties consent to abide by the decisions or award of the arbitrator or tribunal. See, Allahhi, N. (2016). The Optimization of Court Involvement in International Commercial Arbitration, *Doctoral Thesis*, University of Manchester

[13]Gaillard, E. and Savage, J. (1999). Fouchard Gaillard Goldman on International Commercial Arbitration, Kluwer Law International

[14] Supra note 99. Allahhi, N. (2016).

[15]Mistelis, L. (2003). 'ADR in England and Wales: A Successful Case of Public Private Partnership'. ADR Bulletin, Global Trends in Mediation 6(3), pp. 53-55.

[16]Carter, J. H. (2013). The Culture of International Arbitration and the Evolution of Contract Law by Joshua D. Karton Arbitration International 29(3), pp. 539–542.

[17]In arbitration the parties submit a dispute to an appointed arbitrator, or panel of arbitrators, known as the tribunal. The arbitrator or the tribunal will generally give an award following a hearing during which each party will have the opportunity to present its position.

[18]Rivkin, D. W. (2013). The Impact of International Arbitration on the Rule of Law: The 2012 Clayton Utz/University of Sydney International Arbitration Lecture. *Arbitration International* 29(3), pp. 327–360.

THE HAGUE PEACE CONFERENCES AND THE PERMANENT COURT OF ARBITRATION (PCA)

The Permanent Court of Arbitration is known as the oldest institution established for the purpose of addressing international disputes[19]. The establishment of the PCA was agreed upon in 1899, through the first Hague Peace Conference, under Articles 20 to 29 of the 1899 The Hague Convention for the Pacific Settlement of International Disputes[20]. The PCA was constituted through two separate multilateral conventions with a membership of 122 states[21]. Though it is named the Permanent Court of Arbitration, it is not a court in the traditional sense, but it was established with the mandate to provide services of arbitration with the goal of resolving international disputes between member states, and later included disputes between states and international organizations or private parties[22]. The areas of arbitration within the mandate of the PCA include issues arising from territorial and maritime boundary disputes, human rights, sovereignty, international and regional trade and international investment[23]. With the 1899 first Hague Peace Conference accenting to the establishment of an international mechanism of arbitration with a focus on peace and disarmament, the PCA was established in 1900 for the aforesaid purpose, while it began operation in 1902[24].

In line with its operational principles, each member state of the PCA were entitled to designate four jurists, from which the arbitral tribunal of the PCA were constituted. The PCA was structured to have three organs: the 'Administrative Council' that oversees its policies and budgets, a 'Panel of Independent Arbitrators' known as the Members of the Court, and a 'Permanent Bureau', with functions corresponding to those of a court registry or secretariat[25]. The PCA therefore, was premised on resolving disputes between states through the mechanisms of negotiation, enquiry, mediation, conciliation and binding judicial settlement[26].Hence, the PCA is perfectly situated at the juncture between public and private international law, as well as a mechanism to address the ever-growing dispute resolution needs of the international community.

A few years later, in 1907, came the second Hague Peace Conference, which revised the rules governing arbitral proceedings[27]. One of the proposals of the convention was the establishment of a permanent court, with judges who would devote their time wholly to the trial and decision of international cases by judicial methods. Sequel to the proposal, in 1913, the Permanent Court of Arbitration

[19]See The Hague Justice Portal report on the Permanent Court of Arbitration. Available at. http://www.haguejusticeportal.net/index.php?id=311#:~:text=Established%20by%20treaty%20at%20the,the%20settlement%20of%20international%20disputes. (Accessed 12/05/2020).

[20]The PCA was established through two conventions: The Pacific Settlements of International Disputes Convention of 1899 and The Hague Peace Convention of 1907. Also, see Mistelis, L. A. (2010). Arbitration Rules-International Institutions, 3rd Edition. Juris Publishing, Inc. p. 300

[21]History of the Permanent Court of Arbitration. Available at. https://pca-cpa.org/en/about/introduction/history/ (Accessed 08 May 2020).

[22]Services of the Permanent Court of Arbitration. Available at. https://pca-cpa.org/en/services/ (Accessed 08 May 2020).

[23]ibid

[24]Supra note 92. History of the Permanent Court of Arbitration

[25]The origins of arbitration. Available at. https://www.icj-cij.org/en/history (Accessed 08 May 2020).

[26]Wood, M. (2017). Choosing between Arbitration and a Permanent Court: Lessons from Inter-State Cases, ICSID Review - Foreign Investment Law Journal 32(1), pp. 1-16.

[27]Supra note 95. The origins of arbitration.

as housed in the Peace Palace in The Hague and revered for its decisions on some landmark cases such as: The Carthage and Manouba cases of 1913[28]; the Timor Frontiers of 1914[29] and Sovereignty over the Island of Palmas 1928[30] cases.

The PCA administered arbitration through conciliation and fact finding in different disputes involving states, private parties and intergovernmental organizations[31] and has evolved to capture contemporary triggers of global disputes. In the wake of environmental degradation in the 21st century, the PCA Administrative Council on 19 June 2001 adopted by consensus the "Optional Rules for Arbitration of Disputes Relating to the Environment" known as the "Environmental Rules"[32]. The Environmental Rules seek to bridge the gap in addressing environmental disputes between states and the citizens or between different states. Then, on 16 April 2002, the PCA Administrative Council adopted the environmental conciliation rules to complement the environmental arbitration rules. The PCA, through the environmental conciliation rules, offers the international community a wide variety of procedural strategies and mechanisms for addressing environmental disputes[33]. The PCA has developed into a modern, multi-faceted arbitral institution that is now perfectly situated at the juncture between public and private international law to meet the rapidly evolving dispute resolution needs of the international community.

THE PERMANENT COURT OF INTERNATIONAL JUSTICE (PCIJ)

The Permanent Court of International Justice was the first international court that was established to deliver compulsory jurisdiction. The interest in obligatory adjudication (arbitration) in the nineteenth century shifted to a call for an International Court with a compulsory jurisdiction in the twentieth century. The assembly of the League of Nations on 13 December 1920 adopted the Statute of the Permanent Court of International Justice[34]. Thus, the establishment of the Permanent Court of International Justice marked the beginning of the universal mechanism for the peaceful settlement of international disputes. The failure of the Permanent Court of Arbitration to impede the First World War informed the need for the League of Nations to reconsider the mechanism by which peaceful international dispute resolution can be achieved. Article 14 of the Covenant of the League of Nations, provided for the establishment of an international court and reads as follows:

The Council [of the League of Nations] shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an

[28]In January 1912, during the war between Turkey and Italy, the French mail steamer "Carthage" of the CompagnieGénéraleTransatlantique, was intercepted in the open sea by the destroyer "Agordat" of the Royal Italian Navy. On inspection of the "Carthage" by the Royal Italian Navy, it was found that it was carrying on board an airplane belonging to Duval, a French aviator, consigned to Duval's address at Tunis. The Italian government labelled the airplane a contraband of war, giving it power to seized the Carthage with the airplane on board. The matter was taken to the PCA and the question submitted to the arbitral tribunal was whether the Italian naval authorities were within their right when the Royal Italian Navy captured and seized the "Carthage" and whether compensation should be paid. In its decision, the PCA declared that the Italian naval authorities were not within their rights in proceeding, as they did, to the capture and seize the French mail steamer Carthage. Consequently, the PCA awarded damages in favour of the French government and ordered the Royal Italian Government to pay the sum of one hundred and sixty thousand francs to the French Republic to cover the losses and damages sustained by the private parties interested in the vessel and its voyage, by reason of the capture and seizure of the Carthage. For more details of the "Carthage" Award see: http://www.haguejusticeportal.net/index.php?id=5210

[29]The Timor Frontiers of 1914, was a dispute between the Royal Netherlands Government and the Portuguese Republic concerning the delimitation of the boundary of the island of Timor from the river NoèlBilomi and the river NoèlMeto. The Parties differed as to the effect and application of treaties which they had earlier entered in 1904 to establish the boundaries. In the case, the parties requested that the arbitrator decide on the basis of the treaties and the general principles of international law. The sole arbitrator of the PCA found the Dutch government's position to be in agreement with the original intentions of the parties to the treaties and fixed the boundary line accordingly. See Boundaries in the Island of Timor (The Netherlands v. Portugal). Available at. https://pca-cpa.org/en/cases/87/

[30]The Island of Palmas Case was a territorial dispute over the Island of Palmas between the Netherlands and the United States, which was heard by the Permanent Court of Arbitration. The Arbitrator, in conformity with Article I of the Special Agreement of January 23rd declared that the Island of Palmas forms in its entirety a part of Netherlands territory. For more details, see Reports of International Arbitral Awards Recueil des Sentences Arbitrales, Island of Palmas case (Netherlands vs. USA). Available at. https://legal.un.org/riaa/cases/vol_II/829-871.pdf

[31] Ibid. at pp. 6

[32]See the report of the Committee of Legal Advisers on Public International Law (CAHDI), 33rd meeting in Strasbourg on 22-23 March 2007. Available at. https://rm.coe.int/1680052af1 (Assessed 27 April 2020)

[33]ibid

[34]Allain, J. (2000). *A Century of International Adjudication: The Rule of Law and its Limits*, The Hague: T.M.C. Asser Press; Janis, M. W. (1992). The International Court. In Janis, M. W. (ed.), International Courts for the Twenty-First Century. New York: springer, p. 17; Tams, C. J. (2013). "The Contentious Jurisdiction of the Permanent Court". In Fitzmaurice, Tams (eds.), The Legacy of the Permeant Court of International Justice, The Hague: Nijhoff Publishers

international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly[35].

It is believed that the provision of the Covenant of the League of Nations above was meant to serve as an impediment to war, by introducing a general system that will award a jurisdiction at international level and thus diminish the incentive for war. In the light of the above, in June 1920, an Advisory Committee of jurists established by the Assembly of the League of Nations were mandated to draft a constitution for a permanent court of justice, while the Statute establishing the Permanent Court of International Justice was adopted in Geneva on 13 December 1920, marking the beginning of what may be termed the 'Hague System' of international adjudication[36].

The Permanent Court of International Justice focused on settling international disputes within the jurisdiction of a formal court. The PCIJ came into existence through the League of Nations, but it was never appended to the league, though there was a close association between the two bodies[37]. The collaboration of both bodies is reflected, inter alia, in the fact that the Assembly of the League of Nations was responsible for electing members of the PCIJ, while both the Council and the Assembly of the League usually sought advisory opinions from the Court. Also, the statute of the PCIJ never formed part of the Covenant of the League of Nations. This accounts for the fact that Member States of the League of Nations were not automatically admitted to the PCIJ, rather they were required to ratify the Court's Statute. The court had eleven judges and four deputy judges, authorized by the Covenant of the League of Nations, and established by the ratification of an independent protocol by a majority of the states which are members of the League[38]. The court lacks a mechanism to enforce its decisions, though the court's pronouncements are binding only if the parties submitting the case consent to an obligatory decision of the court.

The PCIJ existed from 1922 to 1946, and within this period it presided over 29 cases and issued 27 advisory opinions[39]. The Court's value to the international justice system was demonstrated by its development of a permanently constituted international court governed by its own Statute and Rules of Procedure and the ability to award jurisdictions on parties having recourse to the Court. The work of the PCIJ, provided clarification on a number of aspects of international law, and contributed to its development.

The PCIJ was criticized on different grounds, however, the criticisms were centred on two main issues: the State-centrism approach of the court and its lack of binding jurisdiction.

State-centrism: Article 34 of the Statute of the Permanent Court of International Justice, states that the PCIJ would handle inter-State disputes only. Consequently, when the PCIJ started operation in 1922, its jurisdiction was effectively limited to inter-State disputes[40]. Whereas the PCIJ jurisdiction is limited to states, it included member states of the League of Nations such as the Dominions of the British Empire and India, which had joined the League of Nations even though their statehood was disputed[41]. Thus, it excluded the direct participation of individuals, peoples, groups, corporate entities and international organizations, who may have concerns that should be dealt with at international level, possibly due to suppression at national jurisdictions, particularly when there is a contention between the excluded group and the state. The PCIJ therefore is a court competent to address litigations between states[42]. According to Vicuña (2001), the state-centred approach of the PCIJ was premised on the perception of state at that time as

[35]Malcolm D. E. (1991). The Covenant of the League of Nations, *Blackstone's International Law Documents*, pp. 1-8.
[36]Allain, J. (2000). *A Century of International Adjudication - The Rule of Law and its Limits.* The Hague: T.M.C. Asser Press
[37] See: The Permanent Court of International Justice. (1924). Editorial research reports 1924 (Vol.II). http://library.cqpress.com/cqresearcher/cqresrre1924123100 (Accessed 12/04/2020)
[38]ibid
[39] See history of the Permanent Court of International Justice (PCIJ). Available at. https://www.icj-cij.org/en/historypdf (Accessed 14/12/2020).
[40]See Article 34 of the Statute of the Permanent Court of International Justice. Available at. https://www.refworld.org/docid/40421d5e4.html (Accessed 02 May 2020). See also, Tams, C. J. (2013). The Contentious Jurisdiction of the Permanent Court. Leiden: MartinusNijhoff Publishers
[41]Fachiri, A. P. (1925). The Permanent Court of International Justice: Its Constitution, Procedure and Work. New York: Oxford University Press, at 53. Also, the Covenant of the League of Nations, under Article 34, supplemented by Article 35, states that the Court was open to the Members of the League and also to States mentioned in the Annex to the Covenant-. It further added that other States could participate in proceedings if they accepted the jurisdiction of the Court in accordance with the Covenant and the Statute.
[42]Anand, R. P. (1961). *Compulsory Jurisdiction of the International Court of Justice. London*: Asia Publishing House, at 18-25. See also, Spiermann, O. (2005). *International Legal Argument in the Permanent Court of International Justice: The Rise of the International Judiciary*. Cambridge: Cambridge University Press; Kammerhofer, J. (2006). *Introduction, in League of Nations,*

the only viable player in international affairs, including international law. It is also believed that the concept of limiting jurisdiction on matters between states was a strategy to shield the PCIJ from mass litigation, though this notion apparently does not conform with modern international justice standards[43].

Lack of compulsory jurisdiction: The PCIJ lacks automatic binding jurisdiction or compulsory jurisdiction. Instead, it relies on the consent of parties, typically expressed under compromissory clauses[44]. Basically, the compromissory (compromis) clause of a treaty agreement or an optional protocol is used to enforce binding adjudication on the state parties in a situation whereby state parties are not willing to comply with the court's decision. Article 36 of the Covenant of the League of Nations requires states to opt for a jurisdictional regime, which by implication means that the PCIJ does not possess compulsory jurisdiction, but instead operates under the principle of consensualism, which is a principle that gives states the liberty to adhere to the decision of the court or not[45]. In this case, the decision of the court is not automatically binding on the states. Instead they are voluntarily binding, which means that the court's decisions are binding only if the concerned State gives consent to the decision.

THE INTERNATIONAL COURT OF JUSTICE (ICJ)

The outbreak of the Second World War (WWII) in September 1939 had some serious consequences for the performance and continuous existence of the PCIJ. Soon after the outbreak of the WWII, the PCIJ held its last public sitting on 4 December 1939 and issued its last order on 26 February 1940, with no new judges elected from 1939 until when the court seized to exist in 1946. The end of WWII ushered in a new era in world affairs, necessitating a call by the United States and the United Kingdom for the creation of a new international political order that would include the establishment of an international court. With the expression of support by China, the USSR and some other countries to the call for a new international political order, the League of Nations and the Permanent Court of International Justice (PCIJ) were replaced by the United Nations and the International Court of Justice (ICJ) through the San Francisco Conference in 1945. Contrary to the Statute of the Permanent Court of International Justice (PCIJ), the Statute of the International Court of Justice (ICJ) was an integral part of the Charter of the United Nations, causing the ICJ to function as an integral and principal organ of the United Nations[46]. In accordance with international law, the court was established to settle legal disputes among states and to provide advisory opinions to states and the United Nations' organs and specialized agencies. Accordingly, all state members of the United Nations automatically became parties to the statute of the ICJ.

The functionality of the ICJ did not change significantly compared to that of the PCIJ. Scholars such as Tams and Fitzmaurice (2013), argue that the ICJ is basically an extension of the PCIJ's jurisdiction in the sense that the Statute of the international Court of Justice was principally based on that of the Permanent Court of International Justice[47].The report of the United Nations constituted jurists from 11 countries to determine how best the ICJ could function. They recommended that: 1). the Statute of the ICJ should be based on that of the PCIJ; ii) the ICJ should retain an advisory jurisdiction; iii) the ICJ should maintain contentious/ non-compulsory jurisdiction; iv) the ICJ should have no jurisdiction over "essentially political matters" and v) the ICJ will have jurisdiction only over matters brought by states[48]. The above-mentioned recommendations are well situated within the fundamental operational diminuendos of the PCIJ, which were adopted by the ICJ. Most importantly, the ICJ maintained the two main jurisdictions of the PCIJ: contentious jurisdiction and advisory jurisdiction. Contentious jurisdiction deals with States in a dispute, who submit to the decision of the ICJ as binding on them, while Advisory jurisdiction deals with the ICJ providing advisory opinions to questions referred to the Court by the United Nations agencies[49].

Advisory Committee of Jurists for the Establishment of a Permanent Court of International Justice. New Jersey: The Lawbook Exchange, Ltd.

[43] Vicuña, F. O. (2001). Individuals and Non-State Entities before International Courts and Tribunals, *Max Planck Yearbook of United Nations Law* 5, pp. 53-66, at 55.

[44] Often times, states are reluctant to comply voluntarily when a dispute is brought against them to the International Court of Justice. When this happens, the reluctant state is usually not willing to submit itself to the court or comply with the court's decisions. In this situation, the compromissory (*compromis)* clause of the treaty agreement or optional protocol is used to enforce binding adjudication on the state parties. The compromissory clause relies on the consent given by a state in the past, especially during the time it ratified the PCIJ Statute to compel the state to adhere to the court's decisions. Under the PCIJ Statute, consent may be found in Article 36(2) of the Statute, wherein states declare to accept the compulsory jurisdiction of the court. In addition, such consent can be found in Article 36(1) and Article 37, which permits jurisdiction to be based on compromisory clauses.

[45]ibid

[46] See history of the ICJ at. https://www.icj-cij.org/en/court.

[47]Tams, C. J. and Fitzmaurice, M· (2013). Legacies of the Permanent Court of International Justice, Leiden: MartinusNijhoff Publishers.

[48]Supra note 91. See history of the Permanent Court of International Justice (PCIJ)

[49] Contentious jurisdiction deals with States in a dispute, who submit to the decision of the ICJ as binding on them, while Advisory jurisdiction, deals with the ICJ providing advisory opinion to questions referred to the Court by the United Nations Security Council,

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The ICJ has 15 judges, out of which the five permanent members to the Security Council are entitled to a judge at any particular time, while the judges are elected to serve for a term of nine years. The election of judges is the principal responsibility of the United Nations General Assembly and the Security Council. These organs vote simultaneously, but separately. In order to be elected a judge of the ICJ, a candidate is required to receive majority votes from both bodies. According to article 16 of the ICJ Statute, during their term of office, judges of the ICJ are not allowed to engage in any political or administrative functions or in any other occupation of a professional nature. Also, the judges are prohibited from taking part in a suit brought to the ICJ, for which they have previously served as a representative, agent or counsel for either of the parties, formerly served as a member of board of inquiry or commission in the matter, or as a member of arbitration for same matter[50].

As noted by Robert and Jennings (1998) and Falk, R. (1984), the main role of the ICJ is to defuse crisis situations and to help normalize relations between States[51]. According to the Charter of the United Nations, the organization's main focus is to maintain international peace and security. Therefore, the ICJ is a crucial part of the mechanism for maintaining international peace and security, in line with the United Nations goal[52]. Basically, the ICJ discharges the principal responsibility of the United Nations by delivering international justice and resolving the bilateral disputes brought to the court by States.

Some of the landmark judgments of the ICJ include the Court's Judgment delivered on the boundary dispute between Burkina Faso and Niger[53]. The judgement was accepted by both parties and have aided in building harmonious relations amongst the two countries. Another case is the dispute between Peru and Chile over the maritime frontier between the two States[54]. Also, the court resolved the dispute on conflicting claims between Argentina and Uruguay over the pulp mills on the River Uruguay[55]. The resolution of these cases is considered landmark achievements by the ICJ and credit is given to the fact that the ICJ makes decision in accordance with international treaties and conventions in force, general principles of law and judicial decisions[56].

However, just like the PCIJ, the ICJ has been at crossroads on a number of issues, particularly about its jurisdiction and adjudication of modern issues and disputes arising in the 21st century. These issues mainly focus on environmental protection, human trafficking and terrorism, among others[57]. Principally, the ICJ does not address matter arising from individuals, non-governmental organizations or private groups as it acts only on the rights and obligations of States. In that case, individual human rights violations are not addressed within the jurisdiction of the court, which apparently leaves a gap in the administration of international justice under the ICJ. Nonetheless, the ICJ contributed to strengthening the role of international law in international relations and also to the

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the General Assembly, or other organs and specialized agencies of the United Nations. However, advisory opinions given by the ICJ are not binding. Since 1946 the ICJ has given several Advisory Opinions, concerning, inter alia, the admission to United Nations membership, reparation for injuries suffered in the service of the United Nations, the territorial status of South-West Africa (Namibia) and Western Sahara, judgments rendered by international administrative tribunals, expenses of certain United Nations operations, the applicability of the United Nations Headquarters Agreement, the status of human rights rapporteurs, and the legality of the threat or use of nuclear weapons. See Gardiner, R. K. (2003). *International Law*, Longman Law Series, at pp. 488. According to Gardiner, in the exercise of its jurisdiction, only the ICJ'S decisions in contentious cases are binding and only on the parties to each particular case. Therefore, they can create res judicata with respect to the parties. He further asserts that despite this fact, "the authority of the Court is such that both its judgments and advisory opinions effectively carry equal authority as indications of international law." However, an advisory opinion lacks such binding force and cannot create a res judicata bar since there are no 'parties,' strictly speaking, before the court. In this case, advisory opinion may be classified as a "weaker" statement of the law than a judgment, though the moral and political potency of an advisory opinion is indisputable.

[50] See, Article 16 of the Statute of the International Court of Justice. Available at. https://legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf (Accessed 02 May 2020).

[51]Robert Y. Jennings, R. Y. (1998). The Role of the International Court of Justice. British Yearbook of International Law 68(1), pp. 1-63; Falk, R. (1984). The Role of the International Court of Justice, *Journal of International Affairs* 37(2), pp. 253-268.

[52]See the United Nations main organs for Peace, dignity and equality on a healthy planet. Available at. https://www.un.org/en/sections/about-un/main-organs/ (Accessed 12/03/2020)

[53] The full judgement of the Frontier Dispute between Burkina Faso and Niger. Available at. https://www.icj-cij.org/files/case-related/149/17114.pdf (Accessed 12/03/2020).

[54]Anton. D. (2014). The Maritime Dispute between Peru and Chile, E-International Relations. Available at. https://www.e-ir.info/pdf/47761 (Accessed 12/03/2020).

[55]Payne, R. C. (2010). Pulp Mills on the River Uruguay: The International Court of Justice Recognizes Environmental Impact Assessment as a Duty under International Law, The American Society of International Law - Insights, 14(9). Available at. https://www.asil.org/insights/volume/14/issue/9/pulp-mills-river-uruguay-international-court-justice-recognizes (Accessed 12/03/2020).

[56]Lowe, V. and Fitzmaurice, M. (2007). Fifty Years of the International Court of Justice, Cambridge: Cambridge University Press.

[57] Supra note 123. Ogbodo, S. G. (2012).

development of international law itself. Though, as regulator the ICJ cannot create new laws. However, the court plays a significant role in clarifying, refining and interpreting the rules of international law.

THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR)

The Universal Declaration of Human Rights (UDHR)[58] was the first global expression of rights for human beings, premised on the experiences of World War II. Given the magnitude of atrocities committed during World War II, there was a consensus within the global community that the conceptualization of rights under the United Nations Charter was not sufficient enough, thus making it fundamental to clarify the rights of individuals in other to give effect to the Charter's provisions on human rights[59]. Clarification of the rights of individuals was partly premised on the need to examine the atrocities of World War II, particularly the actions of the Nazi's, within the ambit of human rights violations, and to provide a mechanism that can forestall reoccurrence. Consequently, on 10 December 1948 the UDHR was adopted by the United Nations General Assembly Resolution 217 at the Palais de Chaillot in Paris, France, establishing principles for the rights of individuals[60]. The UDHR consists of 30 articles pertaining to individual rights. Though the declaration is not legally binding in itself, it laid the foundation for human rights principles and has been captured and elaborated on in subsequent international treaties, economic transfers, regional human rights instruments, national constitutions, and other laws[61].

The UDHR become a model for many domestic constitutions, laws, regulations, and policies that protect fundamental human rights. Many national constitutions either made a direct reference to the UDHR or incorporated its provisions; reflected the substantive content in its national legislation, as well as judicial interpretation of domestic laws. Similarly, the Universal Declaration's provisions have been incorporated into customary international law, which is binding on all states, and as a result the application of international laws are significantly referenced to the Universal Declaration[62]. Scholars such as Hannum, (1995), contend that since countries have continuously invoked the UDHR for more than 50 years, it has become part of customary international law[63].They advance the notion that since governments continually make reference to the UDHR during international conferences and in presidential speeches and many of its clauses have been incorporated in national legislations and laws, it means that the declaration has brought about a norm of customary international law, if not wholly, but at least for a considerable part of it. The notion has equally been challenged by some national judiciary systems. For example, the United States Supreme Court, in Sosa v. Alvarez-Machain in 2004, held that the UDHR "does not of its own force impose obligations as a matter of international law"[64]. While elsewhere, domestics courts have concluded that the Declaration is not in and of itself part of domestic law and therefore cannot not preclude the enforcement of domestic laws.

The UDHR remains the primary source of global human rights standards, and its recognition as a source of rights and law by states throughout the world distinguishes it from conventional obligations[65]. Almost every international instrument and or treaty about human rights in some-way made reference to the UDHR, and the same applies to other declarations of the U.N. General Assembly[66]. The Declaration was the first step in the process of formulating the International Bill of Human Rights and the global system to address human rights. For example, though not envisaged at the time of drafting the UDHR, its normative provisions were

[58]Universal Declaration of Human Rights (1948). G.A. Res. 217, U.N. GAOR, 3d Sess., U.N. Doc. A/810.

[59]See Danchin, P. "The Universal Declaration of Human Rights: Drafting History. Available at. https://ccnmtl.columbia.edu/projects/mmt/udhr/udhr_general/drafting_history_10.html (Accessed 10 April 2020).

[60] See, United Nations General Assembly Resolution 217, A/RES/217(III) Universal Declaration of Human Rights. Available at. https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_217(III).pdf (Accessed 14 May 2020). Also see, Steiner, H. J. & Alston, P. (2000). *International Human Rights in Context: Law, Politics, Morals*, (2nded), Oxford: Oxford University Press.

[61]Brown, G. (2016). The Universal Declaration of Human Rights in the 21st Century: A Living Document in a Changing World, A Report by the Global Citizenship Commission. Adelaide: Open Book Publishers.

[62]Supra not 134, at pp. 289

[63]Hannum, H. (1995). The Status of the Universal Declaration of Human Rights in National and International Law, Georgia Journal of International & Comparative Law 25, at pp. 289. Scholars are of the view that since governments continually make reference to the UDHR during international conferences and in presidential speeches and many of its clauses have been incorporated in national legislations and laws, it means that the Declaration has brought about norm of customary international law, if not wholly but at least for a considerable part of it.

[64]See Supreme Court of the United States decision on SOSA V. ALVAREZ-MACHAIN (03-339) 542 U.S. 692 (2004). Available at. https://www.law.cornell.edu/supct/html/03-339.ZO.html (Accessed 12/04/2020).

[65]Raj Kumar, C. (2003). National Human Rights Institutions: Good Governance Perspectives on Institutionalization of Human Rights, American University International Law Review 19(2), at pp. 262.

[66] Supra note 136. Hannum, H. (1995).

specifically cited in the Vienna Declaration regarding the rights of individuals to seek and enjoy asylum[67], the right to education[68], the prohibition against torture[69]and the activities of nongovernmental organizations[70].

The UDHR can be considered to be the foundation of customary international law and the pinnacle of the contemporary international justice system. The Declaration, which was anchored on the principles of universality, interdependence and indivisibility, represents the universal recognition that basic rights and fundamental freedoms are inherent to all human beings, inalienable and equally applicable to everyone, and that every human being, despite national origin, place of residence, national or ethnic origin, gender, skin colour or religious affiliation is born free and equal in dignity and rights. Thus, it laid the foundation for modern day jurisprudence and the adjudication of criminal liability, both at domestic and international levels. It became a common standard for all people and all nations in developing standard mechanisms to address injustices in times of conflicts, protect those suffering political repression, and ensure universal enjoyment of human rights. The need to address crimes centred on fundamental human rights, gave the impetus for the establishment of International Criminal Tribunals and the subsequent International Criminal Court to prosecute perpetrators and protect human dignity.

INTERNATIONAL CRIMINAL TRIBUNALS

The early stages of the International Justice System focused primarily on states' affairs, hence only cases brought by states were admissible before the courts established in that era, such as the PCIJ and ICJ. States were the focus of the international justice system prior to the Second World War (WWII). Following World War I (WWI), the call for the establishment of an international tribunal to prosecute individuals who masterminded or participated in international crimes, particularly crimes against humanity were proposed during the Paris Peace Conference in 1919[71]. The call was reiterated during the League of Nations conference held in Geneva in 1937 and the proposal was favourably considered. However, the events that followed did not allow it to materialize. Following the gross human rights violation associated with WWII, the allied powers: The United States, France, the United Kingdom and the Soviet Union deemed it necessary to prosecute the master-minders and perpetrators of the war crimes. This led to the establishment of two military tribunals: The International Military Tribunal in Nuremberg, Germany and the International Military Tribunal for the Far East in Tokyo, Japan with the mandate to prosecute and punish the major war crimes offenders in Europe and the Far East[72]. Observers such as Dempsey (1998), argue that the events of the Cold War made the establishment of an international criminal court politically unrealistic[73].

With the events of the 1990s, specifically the war in the former Yugoslavia and the genocide in Rwanda, two other international tribunals were establishment by the United Nations to prosecute the master-minders of the atrocities' committees within the territories of these two countries. It is believed that the establishment of the Nuremberg and Tokyo tribunals; the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda were the initial efforts to hold individual human rights offenders accountable at international level. The sole purpose of the tribunals was to prosecute human rights violators and to offer individual victims the opportunity to seek justice.

1. The Nuremberg and Tokyo tribunals

The concern to provide justice to the victims of the atrocities and gross human right violations recorded during WWII, led the United States, England, France and the Soviet Union to sign the "Agreement for the Prosecution and Punishment of the Major War

[67]Vienna Declaration and Programme of Action (1993). World Conference on Human Rights, 22d plenary meeting. (June 25, 1993), preamble, T1 3, 8, U.N. Doc. A/CONF.157/24 (Part 1) at pp. 8.

[68]Ibid. at pp. 11 ("States are duty-bound, as stipulated in the Universal Declaration of Human Rights and the International Covenant on Economic Social and Cultural Rights and in other international human rights instruments, to ensure that education is aimed at strengthening the respect of human rights and fundamental freedoms").

[69]Ibid, at pp. 22 (The Conference "urges all States to put an immediate end to the practice of torture and eradicate this evil forever through full implementation of the Universal Declaration of Human Rights as well as the relevant conventions").

[70]Ibid, at pp. 12-13 ("Non-governmental organizations and their members genuinely involved in the field of human rights should enjoy the rights and freedoms recognized in the Universal Declaration of Human Rights, and the protection of national law").

[71]See Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties." *The American Journal of International Law* 14, no. 1/2 (1920): 95-154.

[72]AlMadani, W. (2020). Fundamental legacy of The Nuremberg and Tokyo Trials (1945-1948). Available at. http://www.diplomatmagazine.eu/2020/02/02/fundamental-legacy-of-the-nuremberg-and-tokyo-trials-1945-1948/ (Accessed 12/04/2020). See also, Philippe, S. (2003). From Nuremberg to The Hague: The Future of International Criminal Justice. Cambridge: Cambridge University Press.

[73]The argument was that the United States and the USSR were committed to winning the Cold War, and as a result, shielded criminals that were supporting them from prosecution. Dempsey, G. T. (1998). "Reasonable Doubt: The Case Against the Proposed International Criminal Court", *Cato Policy Analysis No. 311*. Available at. https://www.jstor.org/stable/resrep04869?seq=1#metadata_info_tab_contents (Accessed 12/04/2020).

Criminals of the European Axis, and the Charter of the International Military Tribunal" also known as the "London Agreement" on 8 August 1945[74]. Following the agreement, the Nuremberg and Tokyo trials were established. The Nuremberg (Germany) trials lasted from November 1945 to October 1946, while the Tokyo (Japan) trials lasted from May 1946 to November 1948. These war crimes tribunals represent a turning point in the development of modern international criminal law, by laying the groundwork for the definition of war crimes and the prosecution of war crimes perpetrators[75].

The war crimes tribunals' jurisdiction covered four principal areas,(i)Crimes Against Peace (planning and organizing war), (ii) Crimes Against Humanity (racial persecution, which may lead to genocide), (iii) War Crimes (responsibility for crimes such as gross human right violations during war), and (iv) Conspiracy to Commit Other Crimes[76]. The Nuremberg tribunal presided over a combined trial of senior Nazi political and military leaders, as well as several Nazi organizations. The Tribunal indicted twenty-two Nazi political and military leaders and nineteen individual defendants were found guilty and sentenced with punishments ranging from prison time to the death sentence[77].

The Tokyo tribunal presided over a series of trials of senior Japanese political and military leaders. Unlike the Nuremberg tribunal, the Charter establishing the Tokyo tribunal gave the United States the authority to assign judges to the tribunal from the countries that had signed Japan's instrument of surrender which include: Australia, France, Canada, the Netherlands, China, the Soviet Union, the US, the UK, the Philippines and British India. From May 1946 to November 1948, the tribunal prosecuted twenty-five cases involving Japanese political and military leaders[78]. It is important to note that the establishment of these tribunals were significantly lopsided, whereby they were used to prosecute the atrocities committed by the allied forces while similar atrocities against them were apparently ignored. For example, the United States detonated two nuclear weapons over the Japanese cities of Hiroshima and Nagasaki on 6 and 9 August 1945, respectively. The two bombings killed between 129 000 and 226 000 people, most of whom were civilians.However, no international tribunal was set up to investigate the actions of the United States in the above-mentioned incidents and prosecute those responsible. Thus, the prosecution by the allied forces is clearly a "victor justice".

Be that as it may, the Nuremberg and Tokyo trials contributed significantly to the development of international criminal law and served as models for a new series of international criminal tribunals that were established in the 1990s: The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda[79]. The tribunals played a significant role towards formulating an international legal system to prosecute human rights violations and consequently discourage future aggressors. They served as a precursor and model for the Universal Declaration of Human Rights of 1948, and paved the way for the establishment of the International Criminal Court.

2. International Criminal Tribunal for the Former Yugoslavia (ICTY)

The armed conflict that erupted in the Federal Republic of Yugoslavia in the early1990s was characterized by widespread and gross violation of international humanitarian laws, such as mass killings and ethnic cleansing, systematic rape of women and forced

[74]The "Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal" stipulated that a United Nations War Crimes Commission would be set up for the purpose of investigating and punishing war crimes perpetrators. The commission was established on October 1943 and one of the major consensus of the allied forces was that German war criminals will be judged and punished in the countries in which the crimes were committed, while the perpetrators whose offences have no particular geographical localization, would be prosecuted by the joint decision of the Governments of the Allies. Details of the "Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal" is available at. https://ihl-databases.icrc.org/ihl/INTRO/350?OpenDocument (Accessed 09/04/2020).

[75]Jackson, R.H. (1946). *The Case against the Nazi War Criminals*, New York: The Knopf Doubleday Publishing Group. See also, Sands, P. (2003). *From Nuremberg to The Hague: The Future of International Criminal Justice*. Cambridge: Cambridge University Press.

[76]Crowe, D. M. (2016). *The Nuremberg and Tokyo IMT Trials. A Comparative Analysis*. Palgrave Series in Asian German Studies. Geneva: Springer

[77] Three defendants were not found guilty, among them, one committed suicide before the trial and another did not stand trial due to health challenges. See, Taulbee, J. L. (2018). *War Crimes and Trials: A Primary Source Guide*. Santa Barbara, California: ABC-CLIO, LLC.

[78]Piccigallo, P. R. (1979). *The Japanese on Trial: Allied War Crimes Operations in the East, 1945–1951*. Austin: University of Texas Press; Totani, Y. (2008). *The Tokyo War Crimes Tribunal: The Pursuit of Justice in the Wake of World War II.* Cambridge, MA: Harvard University Press; Cryer, R. and Boister, N. (2008). *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments.* Oxford: Oxford University Press; Roling B. V. A. and Cassese, A. (1993). *The Tokyo Trial and Beyond: Reflections of a Peacemonger*. Cambridge: Polity Press.

[79]Supra note 152. Taulbee, J. L. (2018).

displacement of entire communities[80]. Consequently, the ICTY was established to prosecute and bring those who perpetrated these atrocities to justice in line with the provisions of the Geneva Conventions. The Geneva Conventions set out the rules of engagement during armed conflict, also known as the Humanitarian Law of Armed Conflicts. The Conventions seek to protect individuals who are not or are no longer partaking in hostilities during an armed conflict by setting rules on the behaviours and actions of engaging or combatant forces[81].The Court was established by the United Nations Security Council Resolution 827 adopted on 25 May 1993[82]. The ICTY consists of three organs: i). The Chambers; ii). The Office of the Prosecutor, and iii). The Registry, while its jurisdiction covers four areas of crimes that include: grave breaches of the Geneva Conventions, genocide, crimes against humanity and war crimes.

The ICTY was the first United Nations effort towards the restoration of peace and security in a post conflict situation through an international justice system. As noted by Rashica (2019), the ICTY set the foundations for the modern international criminal jurisprudence through the cases that the court has prosecuted and thus, champion the development of criminal practice, particularly in the area of criminal liability[83]. The ICTY apparently changed the landscape of international humanitarian law by providing victims an opportunity to appear in person in the tribunal and voice the horrors they witnessed and experienced during the war. By so doing, the court set the standard for the prosecution of those who committed or were suspected to have committed grave atrocities during armed conflicts by holding them accountable for their actions. According to Schabas and Bernaz (2011) and Shaw (2008), the ICC redefined the landscape of the international justice system, simply by holding perpetrators of international crimes accountable[84].

Given that the ICTY was the first international court for criminal justice, developing a juridical infrastructure was quite a challenge. However, the tribunal was able to formulate a legal framework for its operations: it adopted the rules of procedure and evidence, developed rules of detention and directive for the assignment of defence counsel. Together these rules established a legal aid system for the Tribunal. Within its first year of adjudication, the tribunal judges were able to draft and adopt standard rules for the court

[80]Radan, P. (2002). *The Break-up of Yugoslavia and International Law*. London: Routledge.

[81]*The Geneva Conventions* are agreements reached through a series of international diplomatic meetings, setting rules of engagement during armed conflict or the Humanitarian Law of Armed Conflicts. It seeks to protect individuals who are not or are no longer partaking in hostilities during an armed conflict; these include civilians, sick and wounded of armed forces on the field, and prisoners of war. The first convention established rules for the treatment of wounded and sick armed forces in the field. The second convention established rules on the protection of the sick, wounded, and shipwrecked members of armed forces at sea. The third convention established rules for the protection and treatment of prisoners of war in an armed conflict. The fourth convention established rules on how civilians should be protected and treated in wartime.

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: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; forcibly transferring children of the group to another group.

Crime against humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law; enforced disappearance of persons; the crime of apartheid; other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

War crimes are those violations of international humanitarian law (treaty or customary law) that incur individual criminal responsibility under international law. As a result, and in contrast to the crimes of genocide and crimes against humanity, war crimes must always take place in the context of an armed conflict, either international or non-international. Definitions were retrieved from, Rashica, V. (2019). The Main Characteristics of the International Criminal Tribunal for the former Yugoslavia During its Mandate from 1993 to 2017, SEEU Review 14(1), at 94-95.

[82]Schomburg, W. and Wild, T. (2004). *The defence rights in the practice of the international criminal tribunals*. New York: Springer Nature. See also, Schabas, W. A. (2006). The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone. Cambridge: Cambridge University Press; Shahabuddeen, M. (2012). International Criminal Justice at the Yugoslav Tribunal: A Judge's Recollection. Oxford: Oxford University Press.

[83]Rashica, V. (2019). The Main Characteristics of the International Criminal Tribunal for the former Yugoslavia During its Mandate from 1993 to 2017, SEEU Review 14(1), pp. 91 – 116.

[84] Schabas, A., W. andBernaz, N. (2011). Routledge Handbook of International Criminal Law. London: Routledge; Shaw, N., M. (2008). International Law. New York: Cambridge University Press; Cryer, R., Friman, H., Robinson, D. & Wilmshurst, E. (2010). An Introduction to International Criminal Law and Procedure. 2nd ed. Cambridge: Cambridge University Press.

proceedings[85]. Within its first 24 years of existence, the court tried and indicted 161 persons[86]. Overall, the ICTY made a significant contribution to the modern international justice system and in 2004, it published a list of five accomplishments the court made "in justice and law" that include[87]:

i The court spearheaded the shift from "impunity to accountability", raising the argument that, until very recently, the ICTY was the only court judging crimes committed during the Yugoslav conflict, and has managed to bring to justice those who participated in war crimes, of which the prosecutors in the former Yugoslavia were, as a rule, reluctant to prosecute such crimes;
ii The court has set the standard for "establishing facts in contemporary criminal prosecution", highlighting the extensive evidence-gathering and lengthy findings of fact that Tribunal judgments produced;
iii The ICTY redefined justice by "bringing justice to individual victims of war crimes", by giving them the opportunity to seek justice. This deals with the large number of victims and witnesses that had the opportunity to come forward to the tribunal to give personal account of their experience;
iv The establishment of "standard procedures in international law". The court formulated several international criminal law concepts, which had not been applied during the previous tribunals of the Nuremberg and Tokyo trials;
v The court also played a role in "strengthening the Rule of Law", specifically, the rules of engagement during armed conflict", referring to the Tribunal's role in establishing and promoting the use of international standards in war crimes' prosecutions.

3. The International Criminal Tribunal for Rwanda (ICTR)

The Rwandan genocide that led to the massacre of more than 800 000 ethnic Tutsi and politically moderate Hutu by the Hutu extremists necessitated the creation of an international criminal tribunal where victims and their relatives can seek redress. There was a global concern that the magnitude of human rights violations that happened in Rwanda in 1994 could disrupt international peace and security if it is not constructively addressed. Accordingly, the United Nations Security Council through Resolution 955 established the International Criminal Tribunal for Rwanda in November 1994.

The court was established principally to prosecute persons responsible for planning and coordinating the genocide and those who violated other international humanitarian law in the territory of Rwanda and neighbouring States between 1 January 1994 and 31 December 1994. As noted by scholars such as Sloane (2011) and Hudson and Galaway (1999), rather than focusing on the rank-and-file perpetrators who were only receiving orders from their commanders, the court focused on the high-level orchestrators of the genocide[88]. Then, due to concerns about security and logistics, the ICTR was headquartered in Arusha, Tanzania, with an office in Kigali, Rwanda, while the Appeals Chamber was located in The Hague, Netherlands. The tribunal had jurisdiction over three areas of crime: i) genocide; ii) crimes against humanity; and iii) violations of Common Article 3 of the Geneva Conventions of 1949 or of Additional Protocol II of 1977[89].

Similar to the ICTY, the ICTR consists of three organs: i) The Chambers; ii) the Office of the Prosecutor, and iii), The Registry[90]. The Trial Chambers consisted of a presiding judge and two other judges[91], which are elected by the UN General Assembly to serve for four years with renewable terms. In 1998, the Security Council raised the number of judges at the ICTR from three to nine permanent judges and in 2003 another eighteen ad litem judges were added to the court[92]. Before its closure on 20 December 2012,

[85] See Taylor. R. S., "Tribunal Law Made Simple: What is the ICTY, How Was It Established, and What Types of Cases Can It Hear?". Global Policy Forum. Available at. https://www.globalpolicy.org/component/content/article/163/29333.html (Accessed 13/04/2020).

[86]The International Criminal Tribunal for the Former Yugoslavia (ICTY) was founded on 25 May 1993 and formally ceased to exist on 31 December 2017.

[87] The achievements of the ICTY are reported in the "ICTY Completion Strategy Report". Available at. http://www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_18may2011_en.pdf (Accessed 13/04/2020). See also, Ogbodo, S. G. (2012). An Overview of the Challenges Facing the International Court of Justice in the 21st Century, Annual Survey of International & Comparative Law (18)1, at pp. 95.

[88]Sloane, R. D. (2011). "The International Criminal Tribunal for Rwanda". In Chiara Giorgetti (eds.) *The Rules, Practice, and Jurisprudence of International Courts and Tribunals*. Available at. file:///C:/Users/admin/Downloads/SSRN-id1969981.pdf (Accessed 03 February 2020).

[89]See the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War Art. 3, Aug. 12, 1949, 75 U.N.T.S. 287 (hereinafter Common Article 3); and Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977.

[90]See the ICTR Statute Art. 10. Available at. https://unictr.irmct.org/en/documents/statute-and-creation (Accessed 1 4May 2020).

[91]ICTR Statute Art. 11(a) and Art. 12.

[92] Supra note 166. Sloane, R. D. (2011). As the permanent Judges are elected by the General Assembly, the ad litem judges are appointed by the Secretary-General to assist the permanent Judges.

the ICTR indicted 93 individuals, among which 62 were sentenced, 14 acquitted, 10 referred to national jurisdiction for trial, 3 were fugitives, 2 were diseased before judgement, while 2 indictments were withdrawn before trial[93].

Overall, the ICTR played a pioneering role in the establishment of a credible international criminal justice system, particularly, by producing a substantial body of jurisprudence on genocide, crimes against humanity, war crimes, as well as forms of individual and superior responsibility[94]. It was the first ever international tribunal to deliver verdicts in relation to genocide, and the first to interpret the definition of genocide set forth in the 1948 Geneva Conventions[95]. The ICTR Charter defines genocide as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as : (a) Killing members in a group; (b) Causing serious bodily harm or mental harm to members in a group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; and (e) Forcibly transferring children of the group to another group. Also, it was the first international tribunal to define rape in international criminal law and to recognize rape as a mechanism of perpetrating genocide when the act is committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such[96].
The ICTR definition of rape has influenced both national and international standards for prosecuting sexual violence, as it has been adopted by the International Court of Justice (ICJ), the Inter-American Commission on Human Rights (IACHR), and the European Court of Human Rights (ECHR)[97]. Furthermore, the ICTR became the first international tribunal to indict members of the media for broadcasting contents intended to inflame the public to commit acts of genocide[98].

The ICTR is considered to be the modern pioneer of the international criminal justice system. The court contributed greatly to the development of substantive international criminal law and procedure. The work of the tribunal transformed the resolutions, treaties and conventions emanating from the United Nations into practical and effective tools to be used by the international criminal justice system in its efforts to end mass atrocities. Besides, the tribunal fostered national compliance with international obligations in the human rights sphere. For example, Rwanda was compelled to abolish the death penalty in order to facilitate the transfer of cases from the ICTR to its national jurisdiction[99]. The tribunal was able to transform international standards of human rights from noble aspirations into enforceable legislation and impartial judicial processes. Furthermore, the ICTR became the first International Tribunal since the International Military Tribunal in Nuremberg (1946) to hand down criminal sentence against a head of government. The tribunal convicted Jean Kambanda (the Former Prime Minister of Rwanda) for genocide and sentenced him to life in prison, thus reaffirming the principle of human equality and that no individual can be allowed to enjoy impunity on account of their official position.

[93]See e.g. The ICTR in Brief. Available at. https://unictr.irmct.org/en/tribunal (Accessed 12 March 2010)
[94] Supra note I66. Sloane, R. D. (2011)
[95]The ICTR Charter defines genocide as 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 in a group; (b) Causing serious bodily harm or mental harm to members in a group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; and (e) Forcibly transferring children of the group to another group.
[96] It was in ICTR that the first conviction for rape as a crime against humanity occurred and the first case in which rape was conceptualized as a potential component or modality of genocide. The Trial Chamber determined that “rape and sexual violence” could be methods of inflicting “serious bodily and mental harm” within the meaning of Article 2 of the Genocide Convention, as well as the ICTR Statute and thus should be classified as an instrument of genocide in the same way as any other act committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. The above decision necessitated the conceptualization of "rape" by the Trial Chamber for purposes of international criminal law, whereby rape was defined “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive”. For rape to classified as an instrument of perpetrating crimes against humanity or genocide it must merit the following: i). it must be part of a widespread or systematic attack; ii). orchestrated against civilian population; iii). on certain discriminatory grounds, particularly bordering on: ethnic, national, political, racial, or religious grounds. The ICTR also determined that rape “constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”.
[97]Wood, S. K. (2004). A Woman Scorned for the ‘Least Condemned’ War Crime: Precedent and Problems with Prosecuting Rape as a Serious War Crime in the International Criminal Tribunal for Rwanda, *Columbia Journal of Gender and Law*, 13(2), at p. 274.
[98]See e.g. The ICTR in Brief. Available at. https://unictr.irmct.org/en/tribunal (Accessed 12 March 2010).
[99] One example of how the ICTR brought changes to national justice system is the Trial Chamber’s decision not to transfer the Munyakazi case to Rwanda national court brought significant change to the country's domestic law. An appeal on the matter was upheld by the ICTR Appeals Chamber and the reasons cited in the appellate judgment could lead to even further reforms, including a clarification of the applicable punishment for those transferred to Rwanda, the exclusion of life imprisonment in solitary confinement and strengthening the witness protection program.

THE INTERNATIONAL CRIMINAL COURT (ICC)

The International Criminal Court (ICC) is a permanent international court established to investigate, prosecute and try individuals accused of committing the most serious crimes of concern to the international community. The ICC was established by the Rome Statute of the International Criminal Court in 1998, after being ratified by 60 countries. The court began operation on 1 July 2002. Following the atrocities committed during World War II, the allied powers established two ad hoc International Military Tribunals to prosecute planners and organizers of war crimes during the war. Consequently, the Nuremberg tribunal was established to prosecute German leaders while the International Military Tribunal for the Far East was established in Tokyo to prosecute Japanese leaders.

In 1948, the United Nations General Assembly proposed the establishment of a permanent international court that will be responsible for the prosecution of atrocities similar to the ones perpetrated during World War II, should they reoccur. At the request of the General Assembly, by the early 1950s, the International Law Commission (ILC) drafted two statutes for the establishment of an international permanent court, but the proposals were neglected due to the Cold War, which paralyzed the possibility of a uniformed international platform to address crimes[100]. However, following the events of the 1990s, particularly in the former Yugoslavia and Rwanda, the United Nations had to establish an ad hoc international criminal tribunal to prosecute the leaders and commanders of war crimes and crimes against humanity in these countries.

The ad hoc tribunals took the form of the Nuremberg tribunal, where victims were allowed to testify before the tribunal. However, the tribunals were criticized by some scholars such as Ferencz (1998), Yacoubian (2003) and Marler (1999), for being inefficient in the handing of the trials brought before it as the prosecution process was slow and in addition, it was difficult for victims and witnesses to travel from Rwanda to Tanzania to appear before the tribunal[101]. The above-mentioned criticisms of the tribunals and diminished the incentives to use an international tribunal to prosecute violators of international crimes. One of the main issues was that the tribunals were constituted to prosecute a particular set of –violators – the criminals on the side of the allied forces, while the belligerents of the winning side, such as the United States, were not held accountable for their criminal actions during the war.

Overy (2003), argues that the Nuremberg tribunals rejected the tuquoque (you too) defence, in order to shield perpetrators of crime on the side of the Allied forces from legal prosecution[102]. Similarly, Buruma (1995), states that the tuquoque principle was expressly forbidden in any discussion of war crimes during the Nuremberg trials, primarily because under the tuquoque principle, the defence counsels could legitimately refer to the atrocities committed by officers of the Allied forces, cases such as the bombing of Dresden by the British and the 1939 Nazi-Soviet division of Poland[103]. In any case, Nuremberg distorted the normal level playing field of the law by asserting that specific crimes were justified or unjustified depending on who committed them. In the words of Overy (2003), "the hypocrisy of the Nuremberg trials was sustained on grounds of Realpolitik" which was premised on legitimizing the victors' actions.

Consequently, the International Criminal Court was established in 2002 as a court of last resort, primarily to hold accountable those guilty of some of the world's worst crimes and to serve as a deterrent to would-be war criminals. The ICC comprises of four organs: The Presidency, the Registry, the Office of the Prosecutor (OTP) and the Assembly of State Parties[104]. The Presidency is the apex

[100]Bassiouni, M. C. (2005). *The Legislative History of the International Criminal Court: Introduction, Analysis, and Integrated Text*. Leiden: Brill Nijhoff; Dempsey, G. T. (1998). *Reasonable Doubt: The Case Against the Proposed International Criminal Court*, Cato Policy Analysis No. 311. Available at. https://www.cato.org/publications/policy-analysis/reasonable-doubt-case-against-proposed-international-criminal-court (Accessed 12/03/2020).

[101]Ferencz, B. B. (1998). International Criminal Courts: The Legacy of Nuremberg. *Pace International Law Review* 10(1), at pp. 207; Yacoubian Jr. G. S. (2003). Evaluating the Efficiency of the International Tribunals for Rwanda and Yugoslavia. *World Affairs* 165(3); Marler, M. K. (1999). The International Criminal Court: Assessing the Jurisdictional Loopholes in the Rome Statute. *Duke Law Journal*, (49)3, at pp. 829.

[102]Overy, R. (2003). "The Nuremberg trials: International law in the making", in Sands, P. (eds.), From Nuremberg to The Hague: the future of international criminal justice. Cambridge: Cambridge University Press.

[103]Buruma, I. (1995). Wages of Guilt: Memories of war in Germany and Japan. London: Vintage Press

[104]*The Presidency* is headed by the President and First and Second Vice-Presidents, who are elected by an absolute majority of the 18 judges of the Court for a three-year period which is renewable. The current President of the Court is Judge Philippe Kirsch. The judges are allocated to serve on a full-time basis in the different chambers of the Court (Pre-Trial, Trial and Appellate). The Presidency is responsible for the proper administration of the Court, although the OTP is an independent office, and as such is not administered by, but coordinates with, Presidency, as necessary.

The Registry is responsible for the non-judicial aspects of the administration and servicing of the Court and is headed by the Registrar, SilvanaArbia. The Registry is responsible for court management including defence counsel, victims and witnesses'

structure of the court, headed by the President and First and Second Vice-Presidents who are elected by and among the 18 judges of the court. The goal of the court was to bolster the rule of law, and offer justice to victims of atrocities[105]. The establishment of the court produced mixed feelings, with impoverished African countries appreciating the court by way of ratifying the Rome Statute, while major powers, including the United States, China, and Russia continually expressed ambivalence for the court[106]. Out of the 123 countries[107] that are state parties to the Rome Statute, three have withdrawn[108], whilst the present United States administration under the leadership of Donald J. Trump has ramped up U.S. opposition to the ICC, renewing debate over the court's legitimacy and ability to deter crime perpetrators[109]. The court has eighteen judges that are elected by the member states. The Judges are consciously elected to represent each of the United Nations' five regions, and are eligible to serve a non-renewable nine-year terms.

The court's jurisdiction spans over four categories of crimes under international law: i) genocide, or the intent to destroy in whole or in part a national, ethnic, racial, or religious group; ii). war crimes, or grave breaches of the laws of war, which include the Geneva Conventions' prohibitions on torture, the use of child soldiers, and attacks on civilian targets, such as hospitals or schools; iii) crimes against humanity, or violations committed as part of large-scale attacks against civilian populations, including murder, rape, imprisonment, slavery, and torture; and iv) crimes of aggression, or the use or threat of armed force by a state against the territorial integrity, sovereignty, or political independence of another state, or violations of the UN Charter[110].

The Statute of the ICC was drafted such that the court was established to complement national criminal justice systems[111]. Thus, the court can investigate and prosecute individuals only if there is clear evidence suggesting that the State concerned does not, cannot or is unwilling to prosecute a particular individual or crime[112]. Under the complementarity principle, states retain the primary

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matters, outreach, the administration of legal aid, detention unit, and other general administrative matters such as finance, translation, building management, procurement and personnel.

The Office of the Prosecutor is headed by a Chief Prosecutor, who is elected by the Assembly of States Parties. The current incumbent is Luis Moreno Ocampo, who took office on 16 June 2003. The Chief Prosecutor is assisted by two Deputy Prosecutors. The OTP is independent of other organs of the Court but coordinates its activities with other parts of the Court as necessary. The mandate of the OTP is to conduct investigations and prosecutions of crimes that fall within the jurisdiction of the Court.

Assembly of States Parties (ASP) consists of all States which are party to the Rome Statute. The ASP has a Bureau composed of a President, two Vice-Presidents and 18 members. It also has several smaller working groups that meet throughout the year to discuss in more detail issues such as the definition of the crime of aggression. It has a Secretariat based at the Court in The Hague. The ASP meets in plenary session at least once a year in The Hague and/or New York.

[105]The Rome Statute of the International Criminal Court. Available at. https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf.

[106] Supra note 181. Felter, C. (2020).

[107]See: The States Parties to the Rome Statute. Available at. https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (Accessed 12/03/2020). Out of the 123 state parties, 33 are African States, 19 are Asia-Pacific States, 18 are from Eastern Europe, 28 are from Latin American and Caribbean States, and 25 are from Western European and other States.

[108] Supra note 181. Felter, C. (2020). In 2016, several African countries were determined to part way with the ICC, but for some reasons they still maintain their membership. However, three African countries: South Africa and the Gambia and Burundi withdrew from the Rome Statute.

[109] Supra note 181. Felter, C. (2020).

[110]Barnett, L. (2013). The International Criminal Court: History and Role, Library of Parliament. Available at. https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/BackgroundPapers/PDF/2002-11-e.pdf (Accessed 12/03/2020).

[111]The complementarity approach mentioned in the Preamble of the Statute and in Article 1 is novel in international criminal justice in that states have the primacy of criminal jurisdiction. When understood in this sense, it is easy to see how the Plenipotentiaries at the Rome conference viewed complementarity as a basis of incentive for States to ratify the Rome Statute in that it represents a complete shift from the precedence of the two ad hoc Tribunals, which have primacy of jurisdiction over any state. However, the complementary nature of Court and national jurisdictions is hinged on the willingness and ability of a state to exercise jurisdiction over its own nationals for war crimes, crimes against humanity and genocide. According to the complementarity principle, trials concerning crimes within the jurisdiction of the Court remain the primary responsibility of States. Also, see Chung, C. (2019). The International Criminal Court 20 Years after Rome – Achievements and Deficits. In Werle G., Zimmermann A. (eds.) *The International Criminal Court in Turbulent Times. International Criminal Justice Series*23. The Hague: T.M.C. Asser Press.

[112]The contentious nature of the complementarity principle, which the ICC was premised on warrants clarification of the concept. The complementarity principle usually comes up when discussing admissibility issues and some scholars and analysts argues that the term 'complementarity principle' of the Rome Statute is somewhat of a 'misnomer'. Though at the periphery, Complementarity principle seem to suggest a good relationship between national and international justice, but in reality, the two systems seem to work in opposition to each other. Article 17(1) of the Rome Statute states that a case is inadmissible when it is being investigated or prosecuted by a state that has jurisdiction over it. Also, a case will be inadmissible in a situation whereby the state intentionally decided not to prosecute a certain matter. According to Article 17(2) of the Rome Statute, the threshold for determining

responsibility for trying the perpetrators of the most serious of crimes and the ICC can only intervene where the state fails or is incapable of fulfilling its responsibility[113]. The functional modality of the ICC is such that when a State becomes a party to the Rome Statute, it agrees to submit itself to the jurisdiction of the ICC with respect to the crimes enumerated in the Statute. The Court can initiate investigation or prosecution over cases where the alleged perpetrator is a national of a State Party or where the crime was committed in the territory of a State Party. The trail proceeding is triggered in one of following ways: i) a member country can refer a situation within its own territory to the court; ii) the UN Security Council can refer a situation; or iii) the prosecutor can launch an investigation into a member State propriomotu, or "on one's own initiative[114].

Based on its precedence, the ICC has been assessed by different scholars with divergent connotations. According to Moreno-Ocampo (2008), the ICC has made significant contributions to the international justice system. Haigh (2008) posits that the court is a leading actor in the area of the enforcement of international justice, a forerunner in its commitment to global justice for the victims of crimes and atrocities and a mechanism to hold criminals accountable[115]. Lüder (2002) holds that the court has been instrumental in creating a global discussion on justice in the wake of massive human rights violations and atrocities and in so doing has aided international peace[116], while Scheffer and Cox (2008) commended the court for being at the vanguard of global and regional human rights and democracy movements[117]. The ICC's procedures, practices, policies, investigations and trials have set the bar for justice standards around the world. So far, the court through the office of the Prosecutor, has opened 12 official investigations with an additional nine preliminary examinations, 45 individuals have been indicted by the court, including Ugandan rebel leader Joseph Kony, former Sudanese president Omar al-Bashir, Kenyan president Uhuru Kenyatta, Libyan leader Muammar Gaddafi, Ivorian president Laurent Gbagbo, and DR Congo vice-president Jean-Pierre Bemba.

Despite its contributions to international justice standards, the ICC has been criticized on different fronts. One of the most profound criticisms of the ICC is that, unlike the national justice system, the court lacks an enforcement or compliance mechanism, such as police or military forces that can apprehend suspects, gather evidence or enforce the court's decisions and rulings. For these tasks, the Court relies on the cooperation of existing national criminal justice systems. Article 86 of the Rome Statute provides that: "States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court."[118]

Given that The Rome Statute is a creature of treaty by States, its powers are therefore limited to the rules of international law concerning treaties[119]. Based on the Vienna Convention on the Law of Treaties, 'A treaty does not create either obligations or rights

unwillingness: i). whether the process was aimed at shielding the person concerned from criminal liability for crimes within the jurisdiction of the ICC as listed under Article 5; ii) whether there has been an unjustified delay in the proceedings which is inconsistent to intent to bring the person concerned to justice; and iii) whether the proceedings were not or are not conducted with independence or impartiality. Article 17(3) provides that in order to determine inability in a particular case, the Court shall consider whether the state is "unable to obtain the accused or the necessary evidence and testimony" or otherwise unable to carry out its proceedings, due to a "total or substantial collapse" or unavailability of its national judicial systems. The above provisions regarding the threshold for states unwillingness and inability underscores the fact that the ICC is not intended to relegate national justice systems. Rather, the ICC fills the gap left by national courts' where they are incapable to perform their primary tasks of prosecuting crimes. See, Schabas, W. A. (2004). *An Introduction to the International Criminal Court* (2ndeds.) Cambridge University Press. Gallant, K. (2003). The International Criminal Court in the system of states and international organizations. *Leiden Journal of International Law* 16, pp. 553–591.

[113] See ICC Handbook: Understanding the International Criminal Court. Available at. https://www.icc-cpi.int/iccdocs/pids/publications/uicceng.pdf (Accessed 12/03/2020).

[114]See Part 2: 'Jurisdiction, Admissibility and Applicable Law' of the Rome Statute of the International Criminal Court. Available at. https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf.

[115]Moreno-Ocampo, L. (2008). The International Criminal Court: Seeking Global Justice. *Journal of International Law* 40(1), pp. 215 -225

[116]Lüder, S. R. (2002). The legal nature of the International Criminal Court and the emergence of supranational elements in international criminal justice, *International Review of the Red Cross* 84(845), at pp. 85.

[117]Scheffer, D. and Cox, A. (2008). The Constitutionality of the Rome Statute of the International Criminal Court. *Journal of Criminal Law and Criminology*, 98(3), at pp. 983.

[118] See Article 86 of the Rome Statute of the International Criminal Court. Available at. https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf

[119]In accordance with a well-established principle of international law, the Rome Statute is an international treaty that is binding only to States which are parties to it. According to Art. 34 of the Vienna Convention on the Law of Treaties: 'A treaty does not create either obligations or rights for a third State without its consent'. Wallace and Martin-Ortega (2009) argues that under international law, a treaty, although it may be identified as comparable in some degree to a Parliamentary Statute within municipal law, differs from the latter in that it only applies to those States which have expressly agreed to its terms. States agree to the terms of the Rome Statute when they ratify it and thus are bound by the terms of the treaty provisions. The process of ratification is

for a third State without its consent'[120]. This implies that States are obligated to abide by the provisions of a treaty they are a party to, while such obligation is limited to the parties. With respect to Part IX of the Rome Statute, the obligation by states to cooperate and assist the Court are applicable only to States that are party to the Rome Statute. It is only in limited cases where situations are referred to the Court by the Security Council that a wide number of non-party states are expected to comply.

It is therefore incontrovertible that the ICC depends on the cooperation of States to be able to arrest persons alleged to have committed heinous crimes within the jurisdiction of the Court as provided by the Rome Statute, transfer these persons to the seat of the Court, perform searches and seizures in the territory of States if the individual refuses to cooperate, or compel reluctant witnesses to appear before the Court. The Rome Statute assumes that state parties will act rationally in arresting and surrendering individuals who reside within their territorial borders, indicted by the ICC. The reality seems to suggest that this assumption is more likely to happen when it is in the interests of the state. It is argued that when the ICC issues an arrest warrant for a senior government official or head of state like that of Omar Al-Bashir of the Republic of Sudan or a person with otherwise State-backing, the state is usually not willing to comply with such request, whereas States are quick to act if the warrant is issued on a person suspected to be an opposition to the government. In this regard, four convictions that involved the Ahmad al-Faqi al-Mahdi Case, the Jean-Pierre Bemba et al. Case, the Germain Katanga Case, and the Thomas Lubanga Dyilo Case are often cited as examples of where States acted swiftly in honour of the ICC arrest warrant because the cases were in the interest of the concerned states[121]. In the above-mentioned cases, the individuals that were arrested and surrendered to the ICC were opposition to the governments that arrested them. When compared with other cases that involve government officials, for example the case of former President al-Bashir, you will observe the lack of interest by states to act with regard to the arrest and surrender of the individual. Despite the fact that the ICC issued an arrest warrant for President al-Bashir, the government of South Africa and Uganda refused to honour the request while, when Al-Bashir visited these states, instead they cited presidential immunity. Such discordant behaviour by states underscore the notion held by some spectators that the ICC is inefficient, as well as incapable of deterring crimes. Apparently, without a mechanism of enforcing it arrest warrants, the ICC's survival and scope of influence will remain severely challenged, despite the elaborate provisions of the Rome Statute.

considered as an indication by a ratifying state that it has consented to abide with the letter of the law contained in the treaty. A consenting state therefore agrees not to depart from the covenant obligations placed upon it, whilst it will seek to enjoy the benefits derived from the treaty's provisions. States that have not ratified the Rome Statute, but have signed the treaty are bound as a matter of practice to the terms of the treaty. Article 89 of the Rome States provides that 'The Court may transmit a request for the arrest and surrender of a person ... to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person'. The lexical reading of the above provision is that the ICC can make requests for arrest and surrender of an indicted person to both states' parties and non-state parties. However, the law of treaties is apparent that non-states parties are not obliged to act or adhere to instructions emanating from the provisions of the treaty, thereby buttressing the argument that the functionality of the international justice system is still largely premised on state sovereignty. See Wallace, R. M. M. and Martin-Ortega, O. (2009). *International Law* (6th eds.), London: Sweet & Maxwell Thomson Reuters. Furthermore, requests for cooperation from States Parties are made by the Court. It is the primary responsibility of the ICC to requests the corporation of a certain state in the prosecution of a specific case. According to the general provisions for cooperation contained in Article 87 of the Rome Statute, the requests for State Corporation are to be made through the state parties designated diplomatic channels and, in the language, adopted by States at the time of ratification.

[120]Article 34 of the Vienna Convention on the Law of Treaties. Available at. https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

[121]Ahmad al-Faqi al-Mahdi was a Malian Warlord involved with a non-state militia that is linked to Al Qaeda in the Islamic Maghreb. Jean-Pierre Bemba, was a leader of a rebel group operating in the Central African Republic. Germain Katanga on his part was an active member of non-state militia that was opposing the government of the Democratic Republic of Congo, While Thomas Lubanga Dyilo, just like Katanga was a member of a militia group that were opposing the government. The duo was arrested by the government of the Democratic Republic of the Congo and surrendered to the ICC. In the above examples, one can deduce an obvious trend; the individuals that were arrested and surrendered to the ICC were opposition to the governments that arrested them. When you compare the above example with cases involving powerful government official like that of former President al-Bashir, you will see the lack of interest by states to act with regards to arrest and surrender of the individual. Despite ICC issuing arrest warrant for President al-Bashir, the government of South Africa and Uganda refused to honour the request, citing presidential immunity. Such discordant behaviour by states underscore the notion held by some spectators that the ICC is inefficient, as well as incapable of deterring crimes. For details of the above mentioned cases see, International Criminal Court, The Prosecutor v. Ahmad Al Faqi Al Mahdi, International Criminal Court 2016; International Criminal Court, The Prosecutor v. Jean-Pierre Bemba Gombo, Aime Kilolo Musamba, Jean-Jacques; Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, International Criminal Court 2016; International Criminal Court, The Prosecutor v. Germain Katanga, International Criminal Court 2014; International Criminal Court, The Prosecutor v. Thomas Lubanga Dyilo, International Criminal Court 2012.

Another issue is that the ICC is perceived to be biased against Africa by some scholars and African leaders. Critics such as Dunlap (2019) contend that the court is condescending and reinforces Western perspectives and standpoints as universal maxims valid for all people and all nations[122]. The concern is that the ICC is yet another instrument of foreign intervention in a long history of Western/Northern interference in African affairs. In May 2013, during a meeting of the African Union, Hailemariam Desalegn, AU chairman and Prime Minister of Ethiopia said that the "ICC prosecutions have degenerated into some kind of race hunting"[123].Also, Richard Goldstone, a former prosecutor of the tribunals for Rwanda and Yugoslavia, acknowledges that the ICC's indictments are skewed. In an article titled "Does the ICC target Africa?"[124]. Goldstone stated that the ICC does appear "too focused on prosecuting crimes committed on the continent of Africa, while paying scant regard to similar situations elsewhere in the world." He observed that although the prosecutor's office said it had looked at other cases in Afghanistan, Georgia, Palestine and Colombia, no warrants were issued for suspects outside Africa. In defence of its focus on cases that originated from African countries, the ICC argues that almost all the investigations were initiated upon referral by African governments and in some cases by the UN Security Council. It further argues that Africa is home to some of the world's weakest states that are plagued with conflict and therefore possess weak national legislations, prompting the application of the complementarity principle. According to Luis Moreno-Ocampo, the ICC's first prosecutor, Africa is marred by the breaches of international criminal law: sexual assault, forced displacement and massacre, which the ICC is particularly investigating and hence Africa seems to be the focus of the court.

Also, the ICC has been criticized for taking a lackadaisical approach in its prosecutions. In its first 18 years of existence and despite the huge expenditure that is well over one billion dollars[125] the ICC has secured just eight convictions and 4 acquittals[126]. According to Human Rights Watch, the ICC's "performance gaps due to various factors have become very evident, underscoring the need for changes in policy, practice, and state support"[127].

The ICC was formed partly as a mechanism of achieving the United Nations goal of ensuring world peace. However, the court has been criticized for doing the opposite. Analysts, such as Arsanjani, Al Hussein and Wierda (2006) argue that the ICC may in fact pose an obstacle to conflict resolution and peace. The contention is that the presence of the ICC diminishes the incentive for warlords to seek truce and thus prolonging ongoing wars and conflict, while on the other hand it makes leaders reluctant to relinquish power if they criminal indictment[128].The summary of the above-mentioned argument is that removing the possibility for amnesty may undermine the incentive for settlement, and therefore encourage warlords to continue fighting rather than face a possible prison sentence. However, the notion above has been challenged by Popovski (2000), who argues that the pursuit of justice cannot present an obstacle to peace. He added that the peace process is incomplete if it is not accompanied by effective justice, while durable peace can only be possible if it is premised on responsible justice

CONCLUSIONS

As observed from the chapter, the international justice system and norms has transcended three main stages of evolution that include the arbitration era, the International Criminal Tribunal era and the International Criminal Court of Justice era. The quest for long-term international peace has in the decades following the end of World War II, created and sustained the evolution of the justice system from the era of arbitration to a permanent international criminal court of justice. The end of World War II saw the awakening of the crimes of genocide and related crimes, but the quest for an international justice mechanism that will hold accountable the perpetrators of crimes that shock the conscience persisted. Despite the deadlock of the Cold War, the high-stakes disagreements on ideological levels that would have served to cripple the dream for a permanent international justice mechanism, the desire persisted.

[122]Dunlap, C. (2019). Why the case against the International Criminal Court (ICC) is the stronger one. Available at. https://sites.duke.edu/lawfire/2019/12/05/why-the-case-against-the-international-criminal-court-icc-is-the-stronger-one/ (Accessed 12 April 2020).

[123]Tadesse, K. (2013). African leaders urge International Criminal Court to transfer charges against Kenyan president," The Associated Press, 27 May 2013.

[124]Goldstone, R. (2009). Does the ICC target Africa? *EQ: Equality of Arms Review*, Issue 2. Available at. file:///C:/Users/admin/Downloads/EQNewsMarch09_low_res.pdf (Accessed 13 May 2020)

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[126]See the ICC Facts and Figures. Available at. https://www.icc-cpi.int/about (Accessed 12 April 2020).

[127]See, Human Rights Watch Briefing Note for the Eighteenth Session of the International Criminal Court Assembly of States Parties. Available at. https://www.hrw.org/news/2019/11/18/human-rights-watch-briefing-note-eighteenth-session-international-criminal-court (Accessed 02 May 2020).

[128]Arsanjani, M. H., Al Hussein, Z. and Wierda, M. (2006). Peace v. Justice: Contradictory or Complementary, Proceedings of the Annual Meeting (American Society of International Law) Vol. 100, pp. 361-373, New York: Cambridge University Press

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Despite the countless military campaigns carried out in the name of ideology and identity, it persisted. The international community has never abandoned the quest for a permanent international criminal justice mechanism. The arbitration era focused on disputes between states, while the tribunal era focused on crimes of genocide, war crimes and crimes against humanity, among others. During the arbitration era, the states were considered as the only and most important players at the international level, hence individual complaints were not entertained in international arbitration. However, the establishment of International Criminal Tribunals in the post-Cold War era was a step in the process of establishing a system of international criminal justice. Though the tribunals were restricted by statute in their jurisdiction, they were models and/or microcosms of what a permanent international justice system would look like.

The creation of international tribunals helped to revive the dream of a permanent international criminal justice mechanism and the creation of the ICC as a court of last instance. While the ICC has demonstrated that it is possible to have a permanent international criminal court that can prosecute international criminals, even though they are shielded by national domestic laws, it also has its own shortcomings. Chief among them is the lack of corporation from powerful states, particularly some permanent members of the United Nations Security Council, including China, Russia, and the United States. The visual antagonism of these states on the ICC in most cases incapacitates the court's ability to deal with situations that fall under its nominal jurisdiction, but contrary to the interests of these states. The court exercises its jurisdiction predominantly over situations in Africa, and virtually all its convictions have been of individuals of African origin.

While it is evident that crimes under the ICC's jurisdiction features egregiously in Africa, the court is perceived as maintaining a lopsided focus on Africa. The argument is that even though there is staunch violation of human rights in Africa, same situations are applicable elsewhere, but due to jurisdictional and political obstacles, the ICC has focused on the African region, leading some observers to term the court an instrument of neo-colonialism. The above-mentioned perception of the ICC by African leaders propelled the quest for an African Criminal Court within the African regional justice mechanism that will serve to address international crimes committed in the continent in the spirit of 'African solutions to African problems'. Thus, the next chapter shall provide a review of the African human rights and justice system.

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