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# Universal Jurisdiction and the International Criminal Court in its Quest for International Criminal Justice

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## Abstract

This study is critically analysing the lack of universal jurisdiction to the International Criminal Court (ICC) as to why the ICC is denied universal jurisdiction and what are the consequences resulting therefrom on realisation of international criminal justice. Findings show that, lack of universal jurisdiction to the ICC defeats the initial purpose of setting up a permanent ICC. Because, some nationals whose nations are not state parties to the ICC cannot be prosecuted. Meaning, an individual can commit an international crime and go unpunished by the sole reason that his state is not a party to the ICC. Seeing this threat, the Rome Statute provides for some referrals. Accordingly, cases to the ICC can be referred by state party to the Rome Statute, or by the United Nations Security Council (UNSC) when acting under Chapter VII of the Charter of the United Nations, or by non-state party when making declaration to accept the ICC jurisdiction in relation to a case, or by the prosecutor of the ICC by initiating investigations *proprio motu*. The important question to be asked is that are these referrals effective in obtaining international criminal justice? Evidently the issue is controversial. It is therefore important for the ICC to be accorded universal jurisdiction. This move is crucial in reducing often created *ad hoc* tribunals to serve the same purpose of which the ICC was created to serve. But also, the UNSC will be effective dealing with other matters of the international peace and security.

**Keywords:** Universal Jurisdiction, The International Criminal Court, International Criminal Justice, International Criminal Law, International Humanitarian Law.

## 1.0 Introduction

The Rome Statute of the International Criminal Court (ICC) 1998 stipulates the jurisdiction of the ICC in relation to: *ratione temporis* that is applicable only to state parties of the Rome Statute with respect to crimes

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committed after entering into force of the Rome Statute;<sup>2</sup> and *ratione persona* that is only individuals who are nationals of these state parties to be prosecuted by the ICC<sup>3</sup> in respect of *ratione materiae* such as the crime of genocide, crimes against humanity, war crimes and the crime of aggression.<sup>4</sup> Does this mean that a national of non-signatory state if commits these crimes cannot be prosecuted? What could be the reason(s) behind the limitation to try part of the international community and not the whole international community? The ICC is a permanent court of the international community designed to end culture of impunity.<sup>5</sup> Since, crimes under the ICC are regarded as grave crimes, they should be prosecuted no matter who committed the act, where or by what means.<sup>6</sup> This have been the *rationale* behind the general principle of international law that is, states are accorded universal jurisdiction which empowers them to prosecute person(s) accused of international crimes regardless of their nationality, place of commission of the crime, nationality of the victim, and even whether the accused is in custody or at any rate present in the forum state.

Seeing the gravity of crimes, this study investigates as to why universal jurisdiction has not been considered under the ICC? And what are the effects of not considering it? There is no doubt this has negative effects to the international criminal justice and the immediate one is that, some nationals who committed international crimes within the jurisdiction of the ICC remain untouchable. The reason being their nations are not state parties to the ICC. To rescue the situation, the Rome Statute has insisted on various referrals. Accordingly, cases to the ICC can be referred by the state party to Rome Statute,<sup>7</sup> or by the United Nations Security Council (UNSC) when acting under Chapter VII of the Charter of the United Nations,<sup>8</sup> or by non-state party when making declaration to accept the ICC jurisdiction in relation to a case,<sup>9</sup> or by the prosecutor of the ICC by initiating investigations *proprio motu*.<sup>10</sup> Important question to be asked is that, are these referrals effective in obtaining international criminal justice? It is evident that; as submitted herein above the issue is controversial

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<sup>2</sup> The Rome Statute of the International Criminal Court 1998 [hereinafter 'the Rome Statute'], arts 11(1) and 11(2).

<sup>3</sup> *ibid*, arts 1 and 25.

<sup>4</sup> *ibid*, art 5(1).

<sup>5</sup> *ibid*, Preamble and art 1.

<sup>6</sup> *ibid*, Preamble.

<sup>7</sup> *ibid*, arts 13(a) and 14.

<sup>8</sup> *ibid*, art 13(b).

<sup>9</sup> *ibid*, arts 12(2) and (3).

<sup>10</sup> *ibid*, arts 13(c) and 15.

because the problem of some nationals going unpunished has not been solved.

The UNSC has got five permanent members with casting vote. Some of these members are not parties to the ICC such as the United States of America (USA) and China. Suppose the UNSC need to act under chapter VII against nationals of USA or China, can UNSC successfully do that? Will USA or China not veto against it? Or even against France, Russia, or England who are state parties to it, if these states do not want their nationals to be prosecuted and veto against, will UNSC still be able to proceed with the action? By using the right of *proprio motu*, the ICC prosecutor, Ocampo Moreno (as he then was) had been accused of doing his work politically. And, that, he had shown failure to investigate major powers like USA but able to do that against African countries like Kenya. Therefore, the author embarks on dealing with all these queries and provides answers when critically analysing the lack of universal jurisdiction to the ICC through thorough documentary research while finding out the reason(s) of not considering the universal jurisdiction to the ICC, its consequences to the international criminal justice, as well as offering recommendations on how to address this gap.

## 2.0 Understanding the ICC

### 2.1 Historical Background of the ICC

The ICC was established in 1998 by the Rome Statute of the ICC, 1998. The ICC established as a permanent court and it came into force on July 2002.<sup>11</sup> The ICC is situated in the Hague, Netherlands. Judges for the Court were sworn in on 11 March 2003 at the inauguration session of eighteen (18) judges, three (3) of which were from Africa.<sup>12</sup> The ICC is set to adjudicate only the most serious crimes of concern to the international community such as the crime of genocide, crimes against humanity, war crimes and the crime of aggression.<sup>13</sup> Currently (2018 – 2021), His Excellency Judge Chile Eboe-Osuji from Nigeria is the president of the ICC,<sup>14</sup> and Mrs. Fatou Bensouda from Gambia serves as the head of prosecutor's office.<sup>15</sup> The difference between ICC and International Court

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<sup>11</sup> <[www.icc-cpi.int](http://www.icc-cpi.int)> accessed 16 December 2019.

<sup>12</sup> John Dugard, *International Law: A South African Perspective* (Juta & Co. Ltd 2005).

<sup>13</sup> The Rome Statute, Preamble and art 5 (1) (a), (b), (c), and (d).

<sup>14</sup> <[www.icc-cpi.int/about/presidency](http://www.icc-cpi.int/about/presidency)> accessed 16 December 2019.

<sup>15</sup> <[www.icc-cpi.int/about/otp](http://www.icc-cpi.int/about/otp)> accessed 16 December 2019.

of Justice (ICJ) is that, ICJ has jurisdiction over states and the ICC over individuals responsible for violation of International Humanitarian Law.<sup>16</sup>

The ICC is governed by the Rome Statute of the ICC, 1998 and other international law Principles.<sup>17</sup> The idea of creating an international criminal court goes back to the first Hague Convention for the Pacific Settlement of International Disputes of 1899 which includes provisions establishing the permanent court of arbitration. The permanent court of arbitration was never successful due to unwillingness of state parties to it to surrender their sovereignty.<sup>18</sup> In 1937, the world saw more efforts to fight violation of international order in attempt to end the grown culture of impunity. These more efforts were made following the 1934 Marseilles' assassination of Yugoslavia's Royal, king Alexander believed to have been carried out by the Croatian nationalists. Accordingly, more multilateral agreements were created purposely to criminalise international terrorism and to provide for mechanisms to prosecute international accused terrorists. However, due to threat of World War II (WW2) only one state ratified the treaty prohibiting international terrorism.<sup>19</sup> In 1980s, more reasons of wanting a permanent international criminal court emerged. During this period, the world experienced heinous crimes such as: hijacking of planes; hostage-taking of authoritative individuals; torture of civilians; seizure of ships in transit on the high seas; diplomats' attacks; and drug trafficking.<sup>20</sup> The illegal business of drug trafficking created very powerful and highly organised drug cartels enough to destroy legal and administrative systems of considerably not so well established states.<sup>21</sup> This experience of heinous crimes necessitated condemnation of individuals for violating international legal principles.<sup>22</sup>

The most compelling reason to the need of establishing an international judicial body was the end of the cold war.<sup>23</sup> Accordingly, the UN revisited its interest and desire in having a permanent international criminal court. The UN interest and desire on the international court was fully supported by majority of Latin America states which viewed the permanent international criminal court as an opportunity to prosecute various

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<sup>16</sup> Yusuf Aksar, *Implementing International Humanitarian Law: From Ad hoc Tribunals to a Permanent International Criminal Court* (F.cass, 2004).

<sup>17</sup> The Rome Statute, arts 21(1) and 21(2).

<sup>18</sup> Aksar (n 16) 43.

<sup>19</sup> Dugard (n 12) 174 -175.

<sup>20</sup> *ibid*

<sup>21</sup> *ibid*

<sup>22</sup> *ibid*

<sup>23</sup> *ibid*

international criminals including international drug-traffickers. Consequently, the United Nations General Assembly issued a directive to the International Law Commission (ILC) to consider and work on drafting of a statute for establishment of permanent international criminal court. The ILC started its work on early 1990s. Fortunately, in 1994 the ILC had a draft ready for discussion by the United Nations General Assembly.<sup>24</sup> To carry out the discussion, the Rome conference was convened. One hundred and twenty-seven (127) states attended the conference. After nearly two months of extreme discussions and negotiations, states were ready to vote for adopting or rejecting the draft. In adoption of the Rome Statute for the establishment of permanent international criminal court, one hundred and twenty (120) states voted in favour of the Rome Statute. Accordingly, the Rome Statute was formerly adopted on 17 July 1998.<sup>25</sup> However, the Rome Statute was rejected by seven (7) states including china, Israel, Iraq and the USA.<sup>26</sup> By December 31 of 2000, 139 countries signed the treaty. In 2002, the year of which the ICC became operational, 66 countries ratified the treaty. To date (2019) 124 countries has ratified the treaty and 139 countries signatories.<sup>27</sup>

## 2.2 The ICC

The ICC is an International Criminal Court established as an international judicial body that was a long-awaited opportunity for truth telling truth. It is the cornerstone of an international rule of law. Its establishment expected to facilitate international criminal justice against criminals of international crimes.<sup>28</sup> The ICC is a continuation of international criminal justice process that started with the establishment of the Nuremberg tribunal. There have been reluctance from some of states to join the ICC, but it is expected that in time all the states will see the importance of the ICC and accept it entirely.<sup>29</sup> For example, the ICC faces challenges of non-acceptance from USA, China, India, Iraq, Libya, Sudan, and Pakistan.<sup>30</sup>

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<sup>24</sup> ibid 176.

<sup>25</sup> ibid 177.

<sup>26</sup> ibid

<sup>27</sup> <[http://asp.icc-cpi.int/en\\_menus/asp/states%20pArticleies/pages/the%20states%20pArticleies%20to%20the%20rome%20statute.aspx](http://asp.icc-cpi.int/en_menus/asp/states%20pArticleies/pages/the%20states%20pArticleies%20to%20the%20rome%20statute.aspx)> accessed 16 December 2019.

<sup>28</sup> The Rome Statute, Preamble.

<sup>29</sup> Cherie Booth, 'Prospects and Issues for the ICC: Lessons from Yugoslavia and Rwanda' in Phillippe Sands (ed), *From Nuremberg to The Hague: The Future of International Criminal Justice* (Cambridge University Press 2003).

<sup>30</sup> <<http://asp.icc-cpi.int>> accessed 4 February 2020.

The USA signed the treaty on 31 December 2000 under the administration of His Excellency President Bill Clinton,<sup>31</sup> but it was repudiated two years later, in May 2002 by the administration of His Excellency President George W. Bush.<sup>32</sup> Justification for the repudiation being fear that American officials or military personnel might be arrested and prosecuted overseas on unfounded criminal charges.<sup>33</sup> China opposes the ICC on various grounds namely: the ICC does not accord respect to states' sovereignty as it should have; ICC's complementarity principle empowers the ICC to scrutinise municipal judicial systems; ICC's jurisdiction on war crimes does not differentiate between war crimes committed during internal conflicts and war crimes committed during international conflicts; it is also the same on the ICC's jurisdiction over crimes against humanity; there is a strong likelihood that, inclusion of crime of aggression to the ICC's jurisdiction will have a negative impact on the role of the UNSC in fighting against the crime of aggression; and power given to the office of prosecutor regarding initiation of prosecutions may adversely affect the ICC as there is a high possibility to be politically influenced.<sup>34</sup>

India objects the ICC because of the broad concept of crimes against humanity. India argues that, UNSC mandate to refer cases to the ICC, delays investigation process and compel obligation and liability to non-signatory states. And that, the Rome Statute does not articulate prohibition of the use of nuclear weapons or other weapons of mass destruction. Other grounds being: uncertainty on application of complementarity principle to the Indian Criminal Justice System; inclusion of non-international conflicts such as Kashmir and other disputes within India will fall in the category of war crimes; and the power of the prosecutor to initiate prosecution is not preferred by India.<sup>35</sup> On the side of Pakistan, objection to the ICC is based on the reasons that: the Rome Statute does not allow reservations by countries; initiations of proceedings and provisional arrest are arbitrary in nature contrary to the Pakistan legal system. This is because a twenty four (24) hours' rule for a person to be charged is contravened, and also lack of immunity for heads of state.<sup>36</sup>

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<sup>31</sup> Eric Schwartz, 'The United States and the International Criminal Court: The Case for Dexterous Multilateralism' (2003) 4 *Chicago Journal of International Law* 1, 223.

<sup>32</sup> *ibid* 234; See also *the Columbia Encyclopaedia*, 50788.

<sup>33</sup> *ibid* (Columbia); Inedit, Future Challenge to the ICC, in *Gender, Justice and the ICC*, A seminar for women judges 10-12 October 2002, Budapest-Hungary at Central European University, (Unpublished); Brian Lee, 'The International Criminal Court' (2000-2001) 2 *Florida Coastal Law Review* 197; See also Schwartz (n 31) 234 – 235.

<sup>34</sup> <[www.icc-cpi.int/en](http://www.icc-cpi.int/en)> (accessed 10 May 2017).

<sup>35</sup> *ibid*

<sup>36</sup> *ibid*

It is important for these countries to understand that the ICC was established to cure impunity and to protect present and future international community from threats of grave crimes.<sup>37</sup> Therefore, it is irrelevant to a state to think of immunity or complementarity principle in relation to its legal system. Furthermore, it is very unlikely, the crime of genocide, war crimes, the crime of aggression, and crimes against humanity to be committed by mere people. Undeniably, these crimes involve large groups of people and always committed by people with authority over these large groups these are head of states, military commanders, ministers etc. Accordingly, names like Omar al-Bashir, Slobodan Milosevic, Joseph Kony, Jean-Pierre Bemba Gombo are very relevant. As they all held positions on their states. Exclusion of individuals of this cadre (head of states, military commanders, ministers and the like) therefore, it will mean that, impunity against international community will not come to an end, and it will be as good as not having the ICC at all. It would be to the best interest of the international community if these states realise the importance of the ICC by becoming party to the ICC. This way, as state parties will have the right to make amendments rather than objecting it. The Rome Statute gives this right to state parties as it is provided that:

After the expiry of seven year from the entry into force of this statute, any state party may propose amendments thereto. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations, who shall promptly circulate it to all state parties.<sup>38</sup>

Nonetheless, this study recommends that, the proposal should focus on giving more power to the ICC rather than taking power from it. The proposal such as universal jurisdiction to be given to the ICC, it is very much preferred. Presence of universal jurisdiction to the ICC will ensure that nationals from third states can be prosecuted without controversy. It is also very important to note that, the adoption of the Rome Statute of the ICC is a gift of hope and humanity to future generations.<sup>39</sup> And it is also a giant step forward in the march towards universal human rights, civilization, and international rule of law.<sup>40</sup> This is an accomplishment which, not long ago, seemed impossible.<sup>41</sup>

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<sup>37</sup> The Rome Statute, Preamble.

<sup>38</sup> *ibid*, art 121.

<sup>39</sup> M. Bergsmo, 'The Jurisdiction Regime of the ICC' (1998) 6 *European Journal of Crime, Criminal Law and Criminal Justice* 4, 345.

<sup>40</sup> *ibid*

<sup>41</sup> *ibid*

### 2.3 Jurisdiction of the ICC

The ICC has jurisdiction over individuals who are national of states parties to the ICC and not states.<sup>42</sup> Jurisdiction of the ICC is complementary to national criminal jurisdictions.<sup>43</sup> The Rome Statute establishes complementarity principle applicable to the ICC over domestic courts of state parties.<sup>44</sup> This means that, pursuant to the Rome Statute of the International Criminal Court, the ICC will not be entitled to exercise jurisdiction if:

[t]he case is being investigated or prosecuted by a state which has jurisdiction over it unless the state is unwilling or unable genuinely to carry out the investigation or prosecution;<sup>45</sup> or, the case has been investigated by a state which has jurisdiction over it and the state has decided not to prosecute the person concerned unless the decision resulted from the unwillingness or inability of the state genuinely to prosecute;<sup>46</sup> or, the person concerned has already been tried for conduct which is the subject matter of the complaint;<sup>47</sup> or, a trial by the court is not permitted under Article 20(3);<sup>48</sup> and the case is not sufficient to justify further action by the court.<sup>49</sup>

Therefore, the core principle to enable the ICC to exercise its jurisdiction is unwillingness or inability of the state to exercise national jurisdiction over the culprit. Unwillingness may be seen in three justifications such as: the proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the ICC; or there has been unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; and the proceedings were not or are not being conducted independently or impartially and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.<sup>50</sup> On the other hand, inability of the state can be deduced from

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<sup>42</sup> The Rome Statute, arts 1 and 25.

<sup>43</sup> *ibid*, art 1.

<sup>44</sup> Phillipe Sands (ed), *From Nuremberg to The Hague: The Future of International Criminal Justice* (Cambridge University Press 2003).

<sup>45</sup> The Rome Statute, art 17(1) (a).

<sup>46</sup> *ibid*, art 17(1) (b).

<sup>47</sup> *ibid*, art 17(1) (c).

<sup>48</sup> *ibid*, art 17(1) (c).

<sup>49</sup> *ibid*, art 17(1) (d).

<sup>50</sup> *ibid*, art 17(2); *See also* Van der Wilt Harmen and Sandra Lyngdorf, 'Procedural Obligations under the European Convention on Human Rights: Useful Guidelines for the Assessment of 'Unwillingness and Inability' in the Context of the Complementarity Principle' (2009) 9 International Criminal Review 40.



the following: when there is a total or substantial collapse or unavailability of its national judicial system; or it is unable to arraign the accused person or unable to obtain necessary evidence and testimony or otherwise unable to carry out its proceedings.<sup>51</sup> Therefore, jurisdiction of the ICC is not superior to that of national courts. The ICC is not in hierarchy form with national courts. The Rome Statute recognises precedence of municipal courts in dealing with international crimes.<sup>52</sup> This is an evidence of an intention to respect and honour states' sovereignty. However, the ICC stands as a valuable tool to fill in where municipal courts cannot.<sup>53</sup>

The ICC exercises its jurisdiction with respect to crimes committed after entry into force of the Rome Statute that is after 1 July 2002.<sup>54</sup> Crimes entertained at the ICC do not differ much with those crimes prosecuted at the Nuremberg and Tokyo tribunals, but the ICC has included the new and wider jurisdiction for crimes against humanity eliminating any need for a connection to the armed conflict.<sup>55</sup> Crimes under jurisdiction of the ICC are limited to the most serious crimes of international concern.<sup>56</sup> These are; the crime of genocide, crime against humanity, war crimes, and the crime of aggression within the meaning of the Charter of the United Nations.<sup>57</sup> Genocide is a type of crimes against humanity but it is different from other crimes against humanity.<sup>58</sup> The essential difference is that genocide requires intent to exterminate a protected group. The preamble of the Genocide Convention recognises that all periods of history, genocide has inflicted great losses on humanity and reiterates the need for international cooperation to liberate humanity from this scourge. The crime of genocide is unique because of its element of *dolus specialis*.<sup>59</sup> Crimes against humanity are serious acts of violence which harm human beings by striking what is most essential to them such as; their lives, liberty, physical welfare, health, and/or dignity. They are inhumane acts

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<sup>51</sup> The Rome Statute, art 17(3).

<sup>52</sup> Sands (n 44) 74.

<sup>53</sup> *ibid* 75; See also Antonio Cassese, *International Criminal Law* (Oxford University Press 2003).

<sup>54</sup> The Rome Statute, art 11(1).

<sup>55</sup> Andrew Clapham, 'Issues of Complexity, Complicity and Complementarity: From the Nuremberg Trials to the Dawn of the New International Criminal Court' in Phillipe Sands (ed), *From Nuremberg to The Hague: The Future of International Criminal Justice* (Cambridge University Press 2003).

<sup>56</sup> The Rome Statute, art 1.

<sup>57</sup> *ibid*, arts 5(1), 5(2), 6, 7 and 8.

<sup>58</sup> *Prosecutor v Kayishema Clement and Ruzindana Obed*, ICTR-95-1-T, 1999, Decision of the trial case for war crimes, crimes against humanity, and genocide of 21 May 1999.

<sup>59</sup> *Prosecutor v Jean Kambanda*, ICTR-97-23-S, 1998, Judgment and Sentence of 4 September 1998; See also *Bosnia and Herzegovina v Yugoslavia* (1996) ICJ; See also *Prosecutor v Kayishema Clement* (n 58).

because their extent and gravity go beyond limits tolerable to the international community, which must demand their punishment.<sup>60</sup> Crimes against humanity also transcend the individual because when the individual is assaulted, humanity comes under attack is negated. It is therefore the concept of humanity as victim which essentially characterise crimes against humanity.<sup>61</sup> War crimes are defined to include grave breaches of the four Geneva Conventions, 1949, other serious violations of the laws and customs applicable in international armed conflict, and other serious violations of the laws and customs applicable in armed conflict which are not of an international character.<sup>62</sup>

### 3.0 An Overview of the Doctrine of Universal Jurisdiction

#### 3.1 Meaning of Jurisdiction and Universal Jurisdiction

The term jurisdiction under the international law has several meanings. It includes; the legal capacity or power of a state to establish, enforce, and adjudicate rules of law within its boundaries.<sup>63</sup> In other words, jurisdiction concerns with the power of state to affect people, property and circumstances and reflects the basic principles of state sovereignty, equality of state and non-interference in domestic affairs. Jurisdiction is a vital and indeed central feature of state sovereignty, for it is an exercise of authority which may alter or create or terminate legal relationships and obligations.<sup>64</sup> Jurisdiction may also mean, a territory within which political or judicial authority may be exercised.<sup>65</sup> Jurisdiction under judicial authority may be categorised into two types namely; civil jurisdiction and criminal jurisdiction. Jurisdiction can further be classified into five other categories which may be termed as jurisdictions or principles such as; territorial principle, nationality principle, passive personality principle, protective principle and universality principle. Discussion herein is based on criminal jurisdiction specifically under universality principle *alias* universal jurisdiction. Universality principle or universal jurisdiction, enables mandate to each state to adjudicate international crimes.<sup>66</sup> Universality principle or universal jurisdiction empowers any state to

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<sup>60</sup> *Prosecution v Jean Kambanda* (n 59).

<sup>61</sup> *ibid*

<sup>62</sup> The Rome Statute, art 8.

<sup>63</sup> William Slomanson, *Fundamental Perspectives on International Law* (West Thomas Learning 2000).

<sup>64</sup> Malcom Shaw, *International Law* (Cambridge University Press 2003).

<sup>65</sup> Bryan Garner, *Black's Law Dictionary* (Thomson Business 2004).

<sup>66</sup> Shaw (n 64) 592-593.

exercise judicial jurisdiction over a crime committed in a foreign country which violates not only municipal law but also international law. Crimes in violation of international law are referred to as international crimes.<sup>67</sup>

Under universal jurisdiction, crimes in violation of international law may be punished by any state which obtains custody of perpetrator(s) of the international crime(s).<sup>68</sup> It is immaterial as to whether the prosecuting state has a traditional *nexus* with the international crime committed.<sup>69</sup> This can be evidenced in the case of *Re Pinochet*,<sup>70</sup> whereby the crime was committed in Chile, against Chilean people, by the Chilean President (General Augusto Pinochet) but the case was tried in England which it has no connection with all the three elements. The doctrine of universal jurisdiction therefore, establishes that, international atrocities should not go unpunished because of sovereign immunity or by any other grounds state can advance on their favour. This is because international crimes are 'type of crimes which are so heinous that their perpetrators should not be untouched...'.<sup>71</sup> The *ratio decidendi* that was set by the England court in the Pinochet's case was landmark reasoning in establishing just principle.<sup>72</sup> It has been established that, invoking universal jurisdiction has helped a great deal in obtaining international criminal justice. Evidently, most judicial decision that applied universality principle has been reported in the past decades than in any other time of international law development.<sup>73</sup> Therefore, universal jurisdiction has become an important yet controversial issue in international law. The international movements on protection of humanity such as, international human rights and international humanitarian movements, advocates for universal jurisdiction as a clear means of promoting accountability for gross human rights and humanitarian violations.<sup>74</sup> A denial of universal jurisdiction to the ICC, is a setback towards realisation of these movements.

Therefore, universal jurisdiction opens a wide range of obtaining justice by allowing any state to exercise its judicial powers against perpetrators of international crimes with no regards to the link of territoriality or

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<sup>67</sup> Dugard (n 12) 156.

<sup>68</sup> Ian Brownlie, *Principles of International Law* (Oxford University Press 1990).

<sup>69</sup> Kenneth Randall, 'Universal Jurisdiction under International Law' (1987-1988) 66 Texas Law Review 785.

<sup>70</sup> 48 ICL Q (1997) 687.

<sup>71</sup> Henry Kissinger, 'The Pitfalls of Universal Jurisdiction: Risking Judicial Tyranny' (2001) 80 Foreign Affairs 4, 86; See also Luc Reydam, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford University Press 2003).

<sup>72</sup> Kissinger (n 71) 88.

<sup>73</sup> Reydam (n 71) 1.

<sup>74</sup> *ibid*

nationality between the state seeking to protect its security.<sup>75</sup> Universal jurisdiction relies on national authorities to enforce international prohibitions. It is basically filling a gap left where other more basic doctrines of jurisdiction provide no basis for national proceedings.<sup>76</sup> Where international law recognises this form of jurisdiction, states have in effect acknowledged that any other states may or must investigate and prosecute a given crime, even if there is absent links of usual jurisdiction.<sup>77</sup>

### 3.2 Crimes under Universal Jurisdiction

Universal jurisdiction cannot be invoked with respect to all crimes but only with respect to certain crimes.<sup>78</sup> Primarily, nature of crimes under universal jurisdiction is heinous. This is a nature of crimes that are grave, atrocity, and are universal. Crimes that are prosecuted under universality principle are as follows; piracy on the high seas (the first crime to be subjected to universal jurisdiction), slavery, and terrorism.<sup>79</sup> Other listed crimes under universality principle includes; crimes against humanity and war crimes. These crimes are declared as universal crimes because they are affecting international community and violating fundamental principles of humanity.<sup>80</sup> Genocide and torture also falls under universal jurisdiction.<sup>81</sup> Harming diplomats, hijacking aircraft and engaging in wartime activities are added to the list.<sup>82</sup> Furthermore, the Geneva Conventions of 1949 enlist grave breaches which are of universal concern to be any of the following acts: wilful killing; torture or inhuman treatment, including biological experiments; wilful causing great suffering or severe injury to body or health; and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully.<sup>83</sup>

The International Criminal Tribunal for Rwanda (ICTR) Statute, 1994 enlists violations of Article 3 common to Geneva Conventions, 1949 and the Additional Protocols of 1977 to be crimes under universal

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<sup>75</sup> *ibid* 5.

<sup>76</sup> Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford University Press 2003).

<sup>77</sup> *ibid* 106.

<sup>78</sup> *ibid* 108.

<sup>79</sup> *ibid*

<sup>80</sup> Broomhall (n 76); *See also* Richard Overy, 'The Nuremberg Trials: International Law in the Making' in Phillipe Sands (ed), *From Nuremberg to The Hague: The Future of International Criminal Justice* (Cambridge University Press 2003); *See also* Clapham (n 55) 31, 40.

<sup>81</sup> Dugard (n 12) 157.

<sup>82</sup> Slomanson (n 63) 214.

<sup>83</sup> The Geneva Convention I 1949, art 50; the Geneva Convention II 1949, art 51; the Geneva Convention III 1949, art 130; *See also* the Geneva Convention IV 1949, art 147.

jurisdiction.<sup>84</sup> These crimes includes but not limited to: violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; collective punishments, taking of hostages, acts of terrorism, outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; and pillage, the passing of sentences and carrying out of executions without previous judgment pronounced by a regular constituted court, affording all the judicial guarantees which are recognised as indispensable by civilized people, and threats to commit any of the foregoing acts. These crimes attract universal jurisdiction because they are typically dangerous to the entire international community. The perpetrators of these crimes are deemed to be in conflict of all mankind. Any nation where the perpetrator is found is expected to arrest and try the perpetrator or extradite the same to a state that is capable to prosecute.<sup>85</sup> Thus, universal crimes are broadly interpreted to include each crime *prima facie* endangers and threatens peace and security of the international community. This aspect qualifies them to be crimes under universal jurisdiction.

### 3.3 Application of the Universal Jurisdiction

True universal jurisdiction applies only in the case of crimes under international customary law, in respect of which all states have the right to prosecute. Such crimes are limited *inter alia* to piracy, war crimes and crimes against humanity, torture and the crime of genocide.<sup>86</sup> It is insisted that, universal jurisdiction shall not be applied in political motivations. The reason being, caution to be taken against world legal instability that can destroy or cause violation of individual human rights.<sup>87</sup> The main principle in invoking the application of universal jurisdiction in relation to an offence of universal concern, establishes that, it is immaterial as to whether traditional *nexus* is present. Accordingly, any state may arrest and prosecute the alleged offender of international crimes, as well as upon conviction punish the offender of offences subject to universal jurisdiction.<sup>88</sup> Crimes under international law have customarily attracted

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<sup>84</sup> The Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY), art 4 and Article 7(1); *Prosecutor v Jean Paul Akayesu* ICTR-96-4, 1998; See also *Prosecutor v Anton Furundija* ICTY- IT-95-17/1-T, 1998; See also *Prosecutor v Ivica Rajic alias Victor Andric* ICTY-IT-95-12-R61.

<sup>85</sup> Slomanson (n 63) 214.

<sup>86</sup> Dugard (n 12) 157.

<sup>87</sup> Cherif Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice' (2001) 42 *Virginia Journal of International Law* 81.

<sup>88</sup> Lias Bantekas and Susan Nash, *International Criminal Law* (Cavendish Publishing 2003).

universal jurisdiction in two independent ways. These are; based on the heinous, repugnant nature and scale of the offence, and on the inadequacy of national enforcement legislation about offences committed in locations not subject to the authority of any state, such as the high seas.<sup>89</sup> It cannot be overemphasized that, these two bases for attracting universal jurisdiction are independent and conjunctive.<sup>90</sup> The importance of this observation is that, to certainly articulate a crime as an international crime that is subject to universal jurisdiction, an effort shall be made to identify which of the two, nature and scale, or that of an act perpetrated on the high seas, is appropriate.<sup>91</sup> In the case of *Re Rohrig*<sup>92</sup> it was decided that, although war crimes of serious and revolting nature were committed and they do attract universal jurisdiction, a Dutch special cassation court wrongly assimilated the basis for asserting universal jurisdiction over war crimes to that of piracy.<sup>93</sup> It is important to note that, a state exercises universal jurisdiction when it seeks to punish conduct that is totally foreign, that is conduct by and against foreigners, outside its territory and its extensions, and not justified by the need to protect self-interest.<sup>94</sup>

#### 4.0 Universal Jurisdiction and the ICC

It is evident that, the Rome Statute does not reflect the current move towards universal jurisdiction for the crime of genocide, war crimes, the crime of aggression, and crimes against humanity.<sup>95</sup> The Rome statute was denied this type of jurisdiction from early days of its formation and negotiations stages. At the last session of the preparatory committee of the ICC, just before the convening of the Rome conference, Germany tabled a proposal whereby the court could exercise jurisdiction over any suspect irrespective of whether the territorial state, custodial state, or any other state concerned was a party to the statute.<sup>96</sup> The Germany proposal was based on assumption that, there existed universal jurisdiction under international law for the crimes under the jurisdiction of the ICC and thus the court should be placed in the same favourable position as states to

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<sup>89</sup> ibid

<sup>90</sup> ibid

<sup>91</sup> ibid

<sup>92</sup> (1950) 17 ILR 393.

<sup>93</sup> ibid

<sup>94</sup> Reydam (n 71) 5.

<sup>95</sup> Mariacarmen Colitti, 'Geographical and Jurisdictional Reach of ICC: Gaps in the International Criminal Justice System and a Role for Internationalized Bodies' in Cesare Romano and others, (eds), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford University Press 2004).

<sup>96</sup> ibid 420.

exercise the jurisdiction.<sup>97</sup> Nevertheless, this proposal was supported with only 30 countries. The USA was among the states against universal jurisdiction to the ICC. USA argued that, the Rome Statute contravenes USA laws on the protection of individual human rights as it does not provide same level of *modus operandi* in dealing with and protection of individuals as it is required by the USA bill of rights. Based on USA's argument, the Rome Statute does not support or provide for: the doctrine of presumption of innocence; the right to remain silent; the right to be tried by jury; the right to choose legal representative; the right to speedy and public trial; and the right to conduct cross examination of witnesses.<sup>98</sup>

This argument is received by overwhelming criticism by many professionals. Critics maintain that, USA's argument is unfounded due to the truth that, protections of individual human rights in the Rome Statute is by far comprehensive than protections provided for in the USA's Constitution.<sup>99</sup> Since the ICC is intended to help end the culture of impunity, there laid hope that, the Rome Statute would have explicitly provided for the universal jurisdiction in favour of the ICC. The movement that would have helped the ICC to prosecute international crimes to signatories and non-signatories.<sup>100</sup>

Nonetheless, some elements of the universal jurisdiction on the ICC have been detected. These are as follows: First; the action of the UNSC to refer cases to the ICC when acting under chapter VII of the UN charter<sup>101</sup> brings universal jurisdiction to the ICC. This is because, the referral of the UNSC binds even third states that is non-signatories to the Rome Statute establishing the ICC. The UNSC's referral power as used in this context, is a mechanism by which the ICC can exercise its jurisdiction over an alleged offender in absence of traditional *nexus* to the committed crime that is 'it is regardless of where the offence took place and by whom it was committed, and regardless of whether the state concerned has ratified the statute or accepted the court's jurisdiction'.<sup>102</sup> The relevant example is the case of *Omar al-Bashir of Sudan* before his era came to an abruptly end forthwith coup d'état of his government on 11 April 2019. During his era (30 June 1989 – 11 April 2019), his government continued to defend him relying on the reason that, Sudan is the ICC's non-signatory state and therefore the ICC cannot try him. But the case was opened following the referral by the

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<sup>97</sup> *ibid*

<sup>98</sup> Broomhall (n 76) 164, 178-179; *See also* Inedit (n 33).

<sup>99</sup> Inedit (n 33).

<sup>100</sup> *ibid* 689.

<sup>101</sup> The Rome Statute, art 13 (b).

<sup>102</sup> Dugard (n 12) 193.

UNSC acting under chapter VII of the UN charter. The decision of the UNSC is expected to be obeyed by the members of the UN.<sup>103</sup> It is only where the UNSC refers a case to the ICC, that the jurisdiction of the court can be said to transcend the jurisdiction of state party and hence to be described as universal.<sup>104</sup>

This brings about controversy, on one hand; the ICC is at the position to exercise its power over states parties but on the other hand can also exercise the said power to the third states who did not accept its jurisdiction. These third states being also members of the UN are bound to respect the UN decisions. A critical issue to consider is, what if these third states are neither UN members nor ICC's state parties? There is a view that, when the UNSC acting under chapter VII is a strong exception ever.<sup>105</sup> Therefore, being UN member or not, or being ICC's state party or not is immaterial when the UNSC refers the case to the ICC. Trying to figure it out, can UNSC bring major countries to justice by way of referral power? Consider the USA, is not state party to the ICC, but it is permanent member to the UNSC, in addition to that, it has casting vote (veto power). Can UNSC refer a USA national's case to the ICC? It is a fact that, the answer will be in negative if the USA does not wish their nationals to be prosecuted and much less by the ICC.

When Russia proposed that, the UNSC should act under chapter VII against the USA nationals, with respect to Iraq war, Condoleezza Rice, Secretary of State (as she then was) threaten to veto it. Russia responded that, they will have to go to the general assembly, but later Russia detected that, His Excellency President the late Saddam Hussein, Iraq's President (as he then was) was not that popular even to his fellow Arab countries to get majority vote in favour of prosecuting USA nationals. As a result, Russia withdrew the proposal and thus the UNSC never acted under chapter VII against the USA nationals.<sup>106</sup> Therefore, the UNSC's referral power itself is not that much effective in bringing to justice criminals whose nations are non-signatories to the ICC. It has been observed that, UNSC was never able to act against USA nationals but it managed to act against Sudan nationals. Can it be said that, the UNSC has power over weak states and it is weak to strong states? The issue is controversial and debatable. But, clearly depending of UNSC's referral power alone to catch

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<sup>103</sup> The Charter of the United Nation 1945, art 25.

<sup>104</sup> Ben Brandon, 'Jurisdiction and Complementarity' in Ben Brandon and Max Du Plessis (eds), *The Prosecution of International Crimes: A Practical Guide to Prosecuting ICC Crimes in Commonwealth States* (Commonwealth Secretariat 2005).

<sup>105</sup> Dr. Gracieux Mbuzukongira, Public International Law Expert, during lecture session at the University of Iringa, Iringa – Tanzania, in 2015.

<sup>106</sup> *ibid*



even nationals of non-signatory states to the ICC, defeats effort towards realisation of international criminal justice. This is because, substantial number of nationals guilty of international crimes will go unpunished.

Thus, the universal jurisdiction still stands at great chance to serve the purpose of the ICC creation that is to end the culture of impunity. If the world is real determined to end this horrible culture, the ICC must be accorded universal jurisdiction. The ICC crimes are under universal jurisdiction and thus strengthen and consolidate the doctrine of universality.<sup>107</sup> States are accorded universal jurisdiction why not the ICC? Crimes under the ICC are international crimes and attracts universal jurisdiction, therefore, the ICC jurisdiction is bound to expand to universal jurisdiction. Second; other element of the universal jurisdiction under the Rome Statute is when state party may refer a case to the ICC on which crimes were committed on its territory by national(s) whose state is not party to the ICC.<sup>108</sup> The ICC is a variation.<sup>109</sup> When states are joining the Rome Statute, they also extend their jurisdiction over the crimes of genocide, war crimes, the crime of aggression, and crimes against humanity occurring on their territory to an international criminal court.<sup>110</sup> Additionally, they are also confirming their own jurisdiction over those crimes.<sup>111</sup> For example, if a national of state Y, a non-signatory state, commits crimes that are within the jurisdiction of state X, a signatory state, the crime falls within the jurisdiction of both state X and the ICC.<sup>112</sup> In this circumstance, state X can prosecute. It is only when state X is unwilling or unable, the ICC can come into play. Thus, the ICC operates in analogous way to a foreign jurisdiction.<sup>113</sup>

Therefore, if the UNSC fails to act under chapter VII and with absence of the universal jurisdiction to the ICC, this means, the crime will go unpunished. This contravenes the international community determination that, the culprit must be brought to justice. The determination is shown by establishment of *ad hoc* tribunals from Nuremberg to the ICTR and to the creation of the permanent ICC. Even if the UNSC succeed to act under chapter VII, the state concerned will always evoke the defence of not being the party to the ICC. Bulgaria invoked the defence of not being state

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<sup>107</sup> Marc Weller, 'Undoing the Global Constitution: UN Security Council Action on the ICC' (2002) 78 International Affairs (Royal Institute of International Affairs 1994) 4.

<sup>108</sup> The Rome Statute, art 12(2) (a).

<sup>109</sup> Inedit (n 33) 693; See also David Scheffer, 'The ICC: The Challenge of Jurisdiction' (1999) 93 American Society of International Law Proceedings 68.

<sup>110</sup> *ibid* 70

<sup>111</sup> *ibid*

<sup>112</sup> *ibid*

<sup>113</sup> *ibid*

party to the ICJ when Israel complained against it.<sup>114</sup> This practice is very common to many states, to end this, the ICC must have universal jurisdiction. Through this jurisdiction, all states are made sensitive to the international dimension of the grave crimes, the perpetration of which endangers the international peace and security.<sup>115</sup> The ICC has been designed to create a permanent facility that serves for all the situations of this type that might arise. Hence if there is an ICC that works and that has jurisdiction over the area and perpetrators of future crimes, the world will not be in need to create other *ad hoc* or internationalised tribunals.<sup>116</sup> An effort needed to revise the Rome Statute so that the ICC will be a court that is much closer to those for whom justice is administered.<sup>117</sup>

#### 4.1 Reaching Out of the ICC to State Parties

A state which becomes a party to the Rome Statute, thereby accepts the jurisdiction of the ICC with respect to the crime of genocide, war crimes, crimes against humanity, and the crime of aggression.<sup>118</sup> The ICC exercise its jurisdiction over state parties only with respect to the crimes committed after entry into force of Rome Statute for that state that is crimes committed after the said state becomes party to the ICC and not after operation of the ICC itself.<sup>119</sup> In case this state which has become party to the ICC wishes that, the ICC should try even crimes committed on its territory prior it became party to the ICC, shall make declaration to that effect<sup>120</sup> and the ICC will have jurisdiction over such crimes but the crimes must be committed after the entry into force of the Rome Statute.<sup>121</sup> The ICC can exercise its jurisdiction over state party when this state is unwilling or unable to prosecute the offenders in respect to crimes committed by them which falls within the jurisdiction of the ICC.<sup>122</sup> The case against the nationals of the state party to the ICC can be brought by state party itself where crimes committed within its territory by its

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<sup>114</sup> *Israel v Bulgaria* (1959) ICJ 127.

<sup>115</sup> Alain Pellet, 'Internationalize Courts: Better Than Nothing...' in Cesare Roman and others (eds), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford University Press 2004).

<sup>116</sup> Luigi Condorelli and Théo Boutruche, 'Internationalized Criminal Courts and Tribunals: Are they Necessary?' in Cesare Roman and others (eds), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford University Press 2004).

<sup>117</sup> *ibid* 436.

<sup>118</sup> The Rome Statute, art 12(1).

<sup>119</sup> *ibid*, art 11(2).

<sup>120</sup> *ibid*, art 12(3).

<sup>121</sup> *ibid*, art 11(1).

<sup>122</sup> *ibid*, art 17.

national.<sup>123</sup> For example, the case against Thomas Lubanga Dyilo and others of Democratic Republic of Congo (DRC) was referred to the ICC by the DRC President, His Excellency President Joseph Kabila (as he then was).<sup>124</sup> The case to the ICC can also be referred by state party where its national committed crimes in another state.<sup>125</sup>

Furthermore, state party is reached by the ICC when a case is referred to the ICC by the UNSC when acting under chapter VII of the UN charter.<sup>126</sup> Normally this happen when the state is unwilling or unable to prosecute the offenders. And, when the prosecutor has initiated an investigation and refers it to the ICC.<sup>127</sup> For example, the ICC prosecutor Moreno Ocampo (as he then was), initiated investigation for the crimes committed in Kenya following the post-election violence of December 2007. Speaking on press conference about Kenya situation on 1 April 2010, Ocampo stated that:

...There will be justice in Kenya. To contribute to the prevention of crimes during the next election [2012] we [Office of the Prosecutor (OTP)] must proceed promptly. We will. ...The investigation will focus on those most responsible for the most serious incidents. We will try to conduct an expeditious investigation, aiming to present a sample representative of the crimes committed. ...We have to collect evidence to finally decide on the names of those who could go to trial. Our duty is to investigate both incriminating and exonerating information.<sup>128</sup>

However, the Rome Statute gives a room to state parties, to declare that, for a period of seven years after the entry into force of the statute for the state concerned, it does not accept the jurisdiction of the court with respect to the category of war crimes as stipulated under Article 8 when a crime is alleged to have been committed by its nationals on its territory.<sup>129</sup>

## 4.2 Reaching Out of the ICC to Non-State Parties

Generally, states which are not party to the treaty are not bound with such treaty, and thus have neither obligations nor rights arising from such treaty.<sup>130</sup> But, in matter involves international customary law, non-

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<sup>123</sup> *ibid*, art 13 (a).

<sup>124</sup> [www.icc-cpi.int](http://www.icc-cpi.int) (accessed 11 May 2017).

<sup>125</sup> The Rome Statute, art 12(2) (a).

<sup>126</sup> *ibid*, art 13 (b).

<sup>127</sup> *ibid*, art 13 (c).

<sup>128</sup> <https://www.icc-cpi.int/Pages/item.aspx?name=20100401&ln=en> accessed 8 February 2020.

<sup>129</sup> The Rome Statute, art 124.

<sup>130</sup> The Vienna Convention on the Law of Treaties, 1980, art 34; *See also* Jordan Paust, 'The Reach of ICC Jurisdiction over Non-Signatory Nationals' (2002) 33 *Vanderbilt Journal of Transnational Law* 1.

signatories will be bound regardless of absence of their consent.<sup>131</sup> When a new tribunal is established to prosecute what admittedly are alleged violations of international customary law that is law already extant at the time over which there is a universal jurisdictional competence and responsibility.<sup>132</sup> Thus why, when UNSC acting under chapter VII refers a case to the ICC, third states will be bound because the chapter is characterised with crimes which falls under international customary law. However, there is no such a guarantee, as UNSC permanent member who is not an ICC signatory may veto against prosecution of its nationals. Third states will also be subjected to the ICC jurisdiction when makes declaration to accept the jurisdiction of the court in relation with case.<sup>133</sup> For example, a situation in Uganda, in a case against leaders of Lord's Resistance Army (LRA) was referred to the ICC by the Ugandan President, His Excellency President Yoweri Kaguta Museveni after making the required declaration.<sup>134</sup> Some might assume, simply because state is not a party, therefore its nationals will not be prosecuted by the ICC. This is because the system is not yet clear. Consider the following testimony from a victim of armed conflict due to ethnic violence and greed of natural resources in DRC that resulted to estimated 5.4 million deaths.<sup>135</sup>

My husband and I were sleeping in our house. The children were sleeping in house next door. The soldiers arrived and they brought my daughter to our house where they raped her in presence of my husband and me. Afterwards they demanded that my husband rape our daughter but he refused so they shot him. Then they went into the other house where they found my three sons. They killed all three of my boys. After killing them, two soldiers raped me one after the other.<sup>136</sup>

This testimony gives rise to: the crime of genocide that is killing members of the group<sup>137</sup> because the armed conflict was primarily between Hutu and Tutsi ethnic groups; to crimes against humanity that is murder, torture,

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<sup>131</sup> The Vienna Convention, art 38; *See also* the Additional Protocol I to the Geneva Conventions of 1949, art 1(2).

<sup>132</sup> Paust (n 130) 3.

<sup>133</sup> The Rome Statute, art 12(3).

<sup>134</sup> <[www.icc-cpi.int](http://www.icc-cpi.int)> (accessed 20 June 2017); *See also* Sarah Darehshori, 'Lessons for Outreach from the Ad Hoc Tribunals, the Special Court of Sierra Leone, and the International Criminal Court' (2008) 14 New England Journal of Comparative Law 2.

<sup>135</sup> Havard Humanitarian Initiative, 'Now, The World is Without Me: An Investigation of Sexual Violence in Eastern Democratic Republic of Congo' (A Report by the Havard Humanitarian Initiative with Support from Oxfam America, 2010) <<https://hhi.harvard.edu/publications/now-world-without-me-investigation-sexual-violence-eastern-democratic-republic-congo>> accessed 12 February 2020.

<sup>136</sup> *ibid* 24.

<sup>137</sup> The Rome Statute, art 6.

rape; and to war crimes that is wilful killing, torture or inhumane treatment, wilful causing great suffering or severe injury to body or health and violations of common Article 3 to the Geneva Convention.<sup>138</sup> If these crimes are committed by nationals of non-signatory's states, does it mean, they are exempted from ICC prosecution? The answer should be in negative, but unfortunately the answer is sometimes in affirmative. This happens, when UNSC fails to refer a case to the ICC against non-signatory state if the decision to refer is not supported by its permanent members, whose casting vote is very crucial and very strong. These crimes attract universal jurisdiction and must be prosecuted as they fall under international customary law. On the other hand, cases against nationals of non-signatories may be brought to the ICC by state party in which those crimes were committed.<sup>139</sup> Problems, arise when a national of non-signatory state commit international crime(s) within a territory of non-signatory state and the latter have not made a declaration to accept the ICC jurisdiction.

## **5.0 Conclusion and Recommendations**

### **5.1 Conclusion**

In view of the foregoing, it is evident that, the permanent ICC was established to try major crime namely; the crime of genocide, war crimes, crimes against humanity and the crime of aggression. These crimes are crimes under the international customary law. This branch of law attracts universal jurisdiction to the ICC yet, it has not been given. Despite there being a system that enables referral of cases to the ICC, it does not warrant the satisfaction of realisation of the international criminal justice. As aforementioned, the UNSC's referral power is not a guarantee that nationals whose state is not a party to the ICC can be brought to justice. This is because, the veto power possessed by the permanent members of the UNSC can interfere with any efforts to punish its nationals.

Furthermore, the power of the ICC prosecutor to initiate investigation which may result to the opening of the case is still have some doubts. This is due to previous experience to relate this power to political influence. Examples given establishes that, ICC prosecutor's office, have managed to initiate criminal proceedings against nationals of African states of which majority are considered to be weak states and leave out westerns states which are considered strong states. The Republic of Kenya emerged as a

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<sup>138</sup> *ibid*, arts 7 and 8.

<sup>139</sup> *ibid*, art 12(2) (a).

strong example to cement the argument. Additionally, referral by state party against national whose nation is non-signatory to the ICC, for the crime committed within state party's territory, is not a guarantee. This is because, it depends on the readiness of the state party to refer the case to the ICC. The same argument is advanced on the referral by non-signatory state. Primarily, it depends on its willingness to make declaration to accept the ICC's jurisdiction for an international crime to be prosecuted against its nationals. Further, relying on states to exercise jurisdiction against perpetrators of the international crimes is also not a guarantee that it will be able to have the same strength of ending the culture of impunity as the ICC.

It is also shown hereinabove that, the ICC is facing some challenges of non-acceptance by few countries. For example, a state party to the ICC can make declaration not to accept the jurisdiction of the ICC on the category of war crimes as stipulated under Article 8 of the Rome Statute. This non-acceptance (and/or lack) of ICC jurisdiction by non-state members significantly hampers efforts to ending the culture of impunity. Thus, the view that ICC must be accorded universal jurisdiction is founded with immense importance because in absence of the same, there is a danger of some perpetrators to remain untouched and go unpunished. It is therefore, in the interest of international criminal law that no crimes shall go unprosecuted and no criminal shall go unpunished. Fail to prosecute some nationals for the atrocities they have committed is to violate this interest.

Additionally, there is an obligation to every country to protect the international customary law. This explains the reason behind the creation of the Nuremberg tribunal and Tokyo tribunal where the USA, UK and Russia felt the obligation and created these tribunals even though Germany and Tokyo was not part of it. Therefore, the duty of protecting global community from these atrocities is inevitable and every country should take the lead. Once the ICC has explicitly accorded universal jurisdiction, reference of the case to the ICC will not be the matter of state party or non-signatories when making declaration. Any individual will be able to refer a case to the ICC. However, one must comply with complementarity principle applicable as admissibility procedure of cases to the ICC.

## **5.2 Recommendations**

It is therefore recommended that; the ICC should be accorded with universal jurisdiction to be fully effective. This way, it will be able to administer international criminal justice to whoever commits crimes under its jurisdiction. Once the ICC has explicit universal jurisdiction, the current controversies or rather misunderstandings will disappear. There will be no

need to the UN to establish *ad hoc* tribunals or to internationalise national courts to prosecute international crimes. The UNSC will be effective dealing with other matters of the international peace and security. This will also ensure that, the core reasons for establishing the ICC, that is no crime will go unprosecuted, and international criminal justice will be served. Furthermore, the power given to state parties to reject the jurisdiction of the ICC regarding category of war crimes is excessive therefore, this power should be removed. In order to achieve this, amendment of the Rome Statute is advised.

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