

# An Analysis Of Success And Challenges Faced By The International Criminal Court On War Crimes Committed In Darfur And Uganda

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## Abstract

This paper evaluates the need for the establishment of International Criminal Court that is to governed by the Rome Statute. The fundamental aim to establish the court after the Cold War was to help end impunity for the perpetrator of the most heinous crimes, such as, matters of genocide, crimes against humanity and war crimes. Since its establishment, the ICC is facing various challenges to deal with war crimes and in prosecuting individuals who have committed such crimes. The paper deliberates upon the successes and challenges of the ICC; particularly highlights the war crimes committed in Darfur and Uganda. The examples of Sudan and Uganda have been discussed in detail and in doing so, an attempt has been made to assess whether this leading judicial body has been able to achieve its goal of deterring individuals from committing crimes and other brutalities or not. Towards the end of the study, some conclusions are put forward towards effective functioning of the court.

**Keywords:** International Criminal Court, War Crimes, Genocide, Human Rights, Rome Statute

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## Introduction

The International Criminal Court (ICC) was established as a consequence of the Rome Statute in 1998 with a purpose of prosecution of persons who committed war crimes, crimes against humanity and genocide. The proceedings of the court, being the first permanent International Criminal Court with its headquarter in The Hague, Netherlands can take place anywhere in the world. Before the establishment of ICC, criminal courts were functioning on adhoc basis. According to Luis Moreno-Ocampo,<sup>1</sup> the first chief Prosecutor of the ICC and an Argentinean lawyer, the Rome Statute guarantees that everybody has access to international justice and also ensures that victims get justice and criminal are punished for the acts.

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<sup>1</sup>Luis Moreno-Ocampo, *Keynote Address—Interdisciplinary Colloquium on Sexual Violence as International Crime: Interdisciplinary Approaches to Evidence*, (Law & Social Inquiry 35, no. 4 ,2010): p839- p846.

More than a decade has passed that this judicial body has been established with the main aim to prosecute individuals involved in heinous criminal acts. There are arguments about the effectiveness of the court. However, its success or failure can be evaluated by its track record of how successfully it has brought to justice those individuals who were responsible for the brutal acts. The ICC Statute was promulgated on July 1, 2002 when it was ratified by sixty states as required by. At present, the number of countries, which are state party to the Rome Statute of the International Criminal Court, is 123<sup>2</sup>. This indicates that still seventy-one countries that are members of the United Nations, out of a total of 193 countries, are not a state party to the ICC.

The international body, the United Nations, also affirms the consensus among nations for the establishment of the court for prosecuting and punishing individual who are involved or responsible for genocide. According to Kofi Annan, former Secretary-General of the United Nations, at the close of the World War II, many thought that the horrors and the atrocities committed during the war could never happen again. It is very unfortunate to see the repetition of those atrocities in Cambodia, Bosnia and Herzegovina and Rwanda and that become reason for the support and consensus among nations to respond in the form of formation of the court.<sup>3</sup>

In fact, at the end of World War II, various groups floated the idea of an international criminal court. The Allied Powers were quick in their reaction after finding the crimes committed by their opponents, the Axis Powers<sup>4</sup>. Consequently, the establishment of 'Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis' and the 'Charter of the International Military Tribunal (IMT) took place.<sup>5</sup>

Moreover the International Court of Justice (ICJ) at Hague took up only cases between states while ignoring the crimes committed by persons. Hence, there was an absence of a legal platform for the punishment of persons who committed the atrocious acts of genocide, war crimes and crimes against humanity and blatantly defied human rights. This has been witnessed in a number of cases over the last fifty years where the guilty persons have not been held responsible for these outrageous acts.

Therefore, the International Criminal Court can be said to have filled many gaps and shortcomings present in the international legal system. The court provides hope to many that the perpetrators of war crimes or genocide may be brought to justice. The important aspect of the court is that it acts as a deterrent and increases the possibility of preventing as well as bringing a conflict to an end.

Before the existence of the ICC, two ad hoc international criminal tribunals were formed not only to end the violence but also to deal with and punish the persons involved in heinous criminal activities. However, those ad hoc tribunals raised a feeling among various quarters about the absence of such tribunal in some other parts of the world for atrocities committed. A view was expressed that the

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<sup>2</sup><https://www.icc-cpi.int/about> (Accessed on 22nd October 2021 at 9am)

<sup>3</sup> Kofi Annan, *What is purpose of establishing ICC?* A speech presented at United Nations Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court. Italy, July, 1998.

<sup>4</sup> "Axis powers miscalculated after early advantages in World War II, Stanford scholar says" <https://news.stanford.edu/2017/12/12/axis-powers-miscalculated-early-advantages-wwii-stanford-scholar-says/> (Accessed on 22 October 2021 at 10am)

<sup>5</sup> Daniel Donovan, *International Criminal Court: Successes and failures of the past and goals for the future*. Available at: <http://www.internationalpolicydigest.org/2012/03/23/internationalcriminal-court-successes-and-failures-of-the-past-and-goals-for-the-future/>. (Accessed on October 22, 2021 at 4pm).

formation of a permanent body like ICC would have a positive impact and, therefore, there will be no doubt about its impartiality and effectiveness.<sup>6</sup>

Moreover, a feeling emerged among some that it will be more time consuming to setup an ad hoc tribunal which overall will have negative consequences beside the manifold increase in terms of the cost of investigation. Another disadvantage is that the Ad hoc tribunals are limited in terms of time and place. There is unanimity among most of the nations on the issue of perpetrators involved in heinous crimes and bringing them to justice before the national bodies. However, it is observed that in some instances, these state bodies are often reluctant or incapable to act because of the lack of political will to prosecute their own citizens or in other cases the bodies may have collapsed.

A reflection of the provisions gives one the feeling that the ICC intends to deter and prevent such widespread abuse of human rights. The persons involved in criminal acts will find no accomplice once there is assurance of zero tolerance by the international community.<sup>7</sup>

#### The Statute and Court in progression

The ICC has been established with noble objectives with the commitment to justice for the victims and punishment for the criminals. There was some reason to be positive due to the functioning of the tribunals in the past. For example, in the decades of 1990s the tribunals of Rwanda and Yugoslavia set models for delivering justice. These cases proved what was impossible to imagine; that is to say – a former head of state standing for trial until that time. As a result, this improved the outlook that a trans-national legal system could be established. These tribunals were credited to have convicted several criminals for crimes against humanity, war crimes and genocide.<sup>8</sup>

The reason to launch the ICC is not only to penalize persons who have committed acts like genocide, crimes against humanity and war crimes but also to act as a deterrent to stop such crimes to take place in prospect which has helped in assessing the success of the court. Another argument presented by Birju Kotecha<sup>9</sup> is that if the functioning of the ICC is perceived in terms of statistical data based on trials and convictions, the ICC's calculable accomplishment is somewhat inconsistent.

Furthermore, one trial has been completed with a conviction, though it is also subject to appeal. On the other hand, the counter argument by the former prosecutor Moreno - Ocampo is that the success of the court is clear from lack of international trials since it is due to enforcing domestic jurisdictions.<sup>10</sup>

Having said that, it is a fact that the ICC has laid the basis for an effective and successful judicial body. It is worth mentioning that despite the objections by Iraq, Israel, Libya, China, Qatar, the Rome Statute was passed and the treaty was ratified which showed the willingness to act against the individuals

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<sup>6</sup> United Nations Office of Legal Advisor (1998-1999), *Rome Statute of the International Criminal Court*. Available at: <http://legal.un.org/icc/general/overview.htm> (Accessed on October 30, 2021 at 3pm).

<sup>7</sup> Ibid.

<sup>8</sup> Richard Goldstone, David Tolbert, Hassan Jallow and Diane Orentlicher, Interview by Jennifer Trahan. *Impact of the Yugoslav and Rwanda Tribunals: Lessons for the International Criminal Court*, (New York, November 30, 2009).

<sup>9</sup> Birju Kotecha, *The ICC: What Counts as a success?*. Available at: <http://justiceinconflict.org/2013/09/13/the-icc-what-counts-as-a-success/>. (Accessed on November 1, 2021 at 8.45am).

<sup>10</sup> Ibid.

involved in such heinous acts. There is manifold increase in favour of and support for the ICC, particularly among the smaller nations of the world as is evident from the number of ratifications.

Another important point is that, in order to increase its effectiveness on the global level, the court had to be complimentary to the national courts, that as a result, will enable the states to prosecute the individuals on their own as well. In cases if a state is not able to or does not want to prosecute the perpetrators of heinous acts, the ICC serves as the last resort. Moreover, the court also checks and ensures the impartiality as well as any interference or any kind of delay on the part of the government, if a state is willing to take up a case. Since the ICC provides the means for the states in prosecuting their own criminals, it is considered as one of its successes.<sup>11</sup>

It is also pertinent to mention that the ICC through its institutional mechanism to ensure states' cooperation with its criminal prosecution.<sup>12</sup> The formation of ICC after 1 July 2002, its jurisdiction extends over all potential criminal cases that have occurred.<sup>13</sup>

A new development in enhancing the role of ICC was the inclusion of terrorism to list of crimes and to reach upon a consensus in defining terrorism in a review conference in 2009. The task of adding terrorism to the scope of ICC has yet to shape since the amendment for the inclusion of terrorism has yet to be finalised. That does not undermine the role of the court as the structure has been laid down with flexibility to the need of the changing world that should ensure its success in the days to come.<sup>14</sup>

The Kampala Conference in 2010 was an encouraging initiative for the state parties as it showed the adaptability and flexibility of the state parties to the changing transnational scenario.<sup>15</sup> During the conference, the UN Security Resolution 3314 was debated in detail. In the parameters of this resolution, aggression was included in a list of potential crimes that is within the jurisdiction of the ICC.<sup>16</sup> It is expected that the recommendations of this conference are to be implemented in letter and spirit and can take effect as a treaty on January 1, 2017.

The addition of aggression to the crimes has facilitated in extending ICC's jurisdiction and at the same time guaranteeing global peace.<sup>17</sup>

The ICC is composed of four primary organs: the Presidency, the Judicial Divisions, the Office of the Prosecutor, and the Registry<sup>18</sup>. The Assembly of States Parties serves as the Court's management, oversight, and legislative body and is not an organ of the Court.

The Office of the Prosecutor is one of the four organs of the International Criminal Court (ICC). It is headed by the Prosecutor, Karim A. A. Khan QC<sup>19</sup>, who was elected by the Assembly of States Parties.

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<sup>11</sup> Daniel Donovan, "International Criminal Court: Successes and failures of the past and goals for the future", op. cit.

<sup>12</sup> Beth A. Simmons and Allison Danner, *Credible commitments and the international criminal court*, (International Organization 64, no. 02, 2010): p225-p256.

<sup>13</sup> Rome Statute of the International Criminal Court, Article 12(2).

<sup>14</sup> Daniel Donovan, *International Criminal Court: Successes and failures of the past and goals for the future*, op. cit.

<sup>15</sup> International Criminal Court, *ICC - Review Conference of the Rome Statute concludes in Kampala*, (2010).

<sup>16</sup> Vijay Padbanaham, *From Rome to Kampala, Council Special Report No.55* (New York: Council on Foreign Relations Press, 2010), p30.

<sup>17</sup> Daniel Donovan, *International Criminal Court: Successes and failures of the past and goals for the future*, op. cit.

<sup>18</sup> <https://www.icc-cpi.int/about/otp> (Accessed on 2<sup>nd</sup> October at 10.23am)

<sup>19</sup> *British lawyer Karim Khan sworn in as ICC's chief prosecutor* in <https://timesofindia.indiatimes.com/world/europe/british-lawyer-karim-khan-sworn-in-as-iccs-chief-prosecutor/articleshow/83572226.cms>, (Accessed on 2<sup>nd</sup> October at 10.30am)

The Prosecutor has full authority over the management and administration of the Office, including its staff, facilities and other resources. The Prosecutor took office on 16 June 2021 and succeeds Ms Fatou Bensouda, who was the Court's second Prosecutor<sup>20</sup>.

The mandate of the Office is to receive and analyse referrals and communications in order to determine whether there is a reasonable basis to investigate; to conduct investigations into genocide, crimes against humanity and war crimes; and to conduct prosecutions before the Court of persons responsible for such crimes<sup>21</sup>.

By conducting preliminary examinations, investigations and prosecutions, the Office contributes to the overall objective of the Court – to help end impunity for the perpetrators of the most serious crimes of concern to the international community as a whole, and thus to contribute to the prevention of such crimes.

### **The teething problems**

The ICC brings about a real glimmer of hope for numerous countries facing conflicts as it came into being after enough groundwork through the Rome statute. Nevertheless, it is seen by some states as a failure.<sup>22</sup> The first reason for their disappointment was the inactivity of ICC till 2009 when it opened its first case. The first chief prosecutor, Luis Moreno-Ocampo, who got recognition by revealing the corruption of Argentina in the Trial of the Juntas, has been generally critiqued for his continuous failure which has added to the reluctance of the states.

Despite the fact that the court has been fortunate in obtaining adequate funding, it has failed to accomplish a high level of prosecution. In addition to this, there has also been a geographical disproportion in its prosecution. It has been observed that the court is particular about taking action against the violator of Human rights in Africa.<sup>23</sup> This however is attributed to a number of African countries being party as well as the result of grave violations human rights. Various reasons may be attributed to it but the expectation of the public seen to have been due to the contemporary lesser number of prosecution.

Although, there is gross human rights violation on almost all continents, the emphasis of ICC's investigations has remained on Africa only. This has raised concerns in various quarters about the credibility of ICC and many term it as a tool of west though the same is only a matter of perception. Also, the failure of ICC to level charges against those perpetrators having greater chances of being brought to trial is also criticised.<sup>24</sup>

In case of Omar al-Bashir, the President of Sudan, the ICC levelled charges against the incumbent head of state for committing crimes in Darfur. It is worth mentioning that President Bashir

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<sup>20</sup> Ibid.

<sup>21</sup> *International Criminal Court Prosecutor, Outlining Vision, Calls for New Era of Engagement with Security Council to End Atrocity Crimes in Libya* in <https://www.un.org/press/en/2021/sc14710.doc.htm> (Accessed on 2<sup>nd</sup> October at 10.45am)

<sup>22</sup> International Criminal Court (ICC): An Analysis of its Successes and Failures and Challenges Faced by the ICC Tribunals for War Crimes (Accessed on 2<sup>nd</sup> October at 11am)

<sup>23</sup> [https://www.icc-cpi.int/courtrecords/cr2009\\_04528.pdf](https://www.icc-cpi.int/courtrecords/cr2009_04528.pdf) (Accessed on 2<sup>nd</sup> October at 11.20am).

<sup>24</sup> Ali Ezzatyar, *Fending off Failure: The International Criminal Court's New Chief Prosecutor, The Moderate Voice* (June 27, 2012). Available at: <http://themoderatevoice.com/151042/fending-off-failure-theinternational-criminal-courts-new-chief-prosecutor/>. (Accessed on October 2, 2021 at 12 pm).

was able to evade the arrest and avoid prosecution due to a network of support behind him. He travelled to those countries, which are signatories of ICC, but the countries did not arrest an incumbent head of state.<sup>25</sup> The inability of ICC to pressurize those states to arrest Omar has given the impression of its weakness. It is also important to note that there were at least ten other important human rights violators in Sudan who could have been easily apprehended and stood trial with a higher probability of conviction.<sup>26</sup> This action would have sent a strong message to all other violators that the noose around their necks would get tightened any time.<sup>27</sup>

Similarly, taking a look at the example of Libya, it can be noted that the referrals against Gaddafi did more harm than good.<sup>28</sup> The court has a mission to grant justice and has to put into action taking into consideration of the limits as well as performance of the court. Therefore, the argument put forward by various quarters is that it is high time that ICC has to come up to the expectations and achieve the goal for which it has been established.

One of the strong reactions on the functioning of ICC is that it is focusing more on the crimes in the African continent than on crimes committed by the armies of many Western countries in Middle East, Asia or Latin America. With regards to crime committed by individual, it is also to be noted that certain quarter in the Muslim as well as Western nations have raised their concerns about the prosecution of the then US President George W. Bush along with Tony Blair after the incidents of 9/11 and their intervention in Afghanistan and Iraq. Therefore, it is an enormous task for the ICC to take action against the powerful individuals of the powerful states, particularly in view of the limitation in the treaty relating to the jurisdiction.

#### Challenges faced by the International Criminal Court for War Crimes

Like any other international body, ICC besides achieving success and in some case failures, has been facing certain challenges when dealing with war crimes. There are various spaces where the ICC has to rejuvenate and make its performance more effective. The ICC has been handicapped by the problems of enforcement since its inception. There have been attempts at rectifying this problem, however the efforts are yet to bear fruit. ICC has to address the issue in order to achieve its mission for dispensing justice for international crimes by developing a mechanism to surmount the underlying problem of enforcement.<sup>29</sup>

#### War Crimes in Darfur

In 2003, the conflict in Darfur in Sudan attracted the attention of international community when two rebel groups started fighting the government. The government was accused of being biased and oppressive to the non – Arab population. The non – Arab population reaction in the form of fighting back led to their ethnic cleansing by the government. In the conflict between the two, hundreds of

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<sup>25</sup> Mohammed Nureldin Abdallah, *Kenyan court issues arrest order for Sudan's Bashir*. Available at: <http://www.reuters.com/article/2011/11/28/us-kenya-bashir-iccidUSTRE7AR0YA20111128>. (Accessed on October 2, 2021 at 12.34 pm).

<sup>26</sup> Ibid.

<sup>27</sup> Ali Ezzatyar, "Fending off Failure, op.cit

<sup>28</sup> Al Jazeera, "ICC issues Gaddafi arrest warrant", (June 28, 2011).

<sup>29</sup> Maryam Jamshidi, *The enforcement gap: How the International Criminal Court failed in Darfur*. Available at: [http://www.aljazeera.com/indepth/opinion/2013/03/2013325\\_62714\\_599159.html](http://www.aljazeera.com/indepth/opinion/2013/03/2013325_62714_599159.html) (Accessed on October 3, 2021 at 2.30pm).

thousands were killed. The situation in Darfur deteriorated and it was then referred by the Security Council to the ICC in March 2005 on the report of the International Commission of Inquiry on Darfur. The UN Security Council Resolution – 1564: 2004 had authorised this Commission.<sup>30</sup>

In April 2007, the former Minister of State for the Interior, Ahmed Haroun, and a Janjaweed leader, Ali Kushayb, were issued arrest warrants by ICC for crimes against humanity and war crimes.<sup>31</sup> The Sudanese government strongly protested while claiming that the ICC had no jurisdiction over it.<sup>32</sup> Sudan is not a state party to the Rome Statute. Consequently, it claims it does not need to execute the arrest warrant.<sup>33</sup>

Earlier UNSC ordered a commission to investigate and report violation of human rights in Sudan's Darfur region in September 2004. The Security Council passed Resolution: 1593 on March 31, 2005, which gave the ICC jurisdiction to probe and indict alleged crimes committed in the region after receiving the commission's report. This resolution bounds Sudan to cooperate with the ICC.<sup>34</sup> Subsequently, the ICC filed charges against Omar al-Bashir for committing war crimes and crimes against humanity on 14 July 2008.<sup>35</sup> The Prosecutor of the ICC claimed that Bashir had been the main architect of these atrocities.<sup>36</sup> The arrest warrant of Omar al-Bashir were issued by ICC for crimes against humanity and war crimes allegedly committed in Darfur on the fourth day of March in the year 2009.<sup>37</sup> The ICC has reiterated its stance that Sudan should conform to the arrest warrant. As the first ever incumbent head of the state, Bashir was charged by the court,<sup>38</sup> however, there has been wide condemnation of the arrest warrant by the Arab League and African Union.<sup>39</sup>

Moreover, Bashir has been travelling internationally. He made visits to Qatar and Egypt. Both of the countries declined to obey the order of arrest issued by the ICC. Bashir also visited Chad in 2010. Chad, which is an ICC state party, but Chad also refused to arrest Bashir.<sup>40</sup> There has been a call from Amnesty International to intercept Bashir's plane during travel as a consequence of which Bashir's plane are always escorted by Sudanese jet fighters.<sup>41</sup> However, Omar al Bashir has not been still apprehended and brought to justice. This has serious repercussions for the ICC as it is casting doubts over the credibility of its enforcement.

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<sup>30</sup> UN Security Council Resolution 1564 (2004).

<sup>31</sup> International Criminal Court, *Warrants of arrest for the Minister of State for Humanitarian Affairs of Sudan, and a leader of the Militia/Janjaweed*, (May 2, 2007).

<sup>32</sup> British Broadcasting Corporation, *Sudan defiant on Darfur suspects*, (February 27, 2007).

<sup>33</sup> Dapo Akande, *The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities*, (Journal of International Criminal Justice 7, no. 2, 2009), p333-p352.

<sup>34</sup> British Broadcasting Corporation, *Sudan ICC charges concern Mbeki*, (July 27, 2008).

<sup>35</sup> International Criminal Court, *Al Bashir's warrant of arrest, ICC press conference-Youtube*, (March 2009).

<sup>36</sup> Mike Corder, *Omar al-Bashir charged by Hague for orchestrating Darfur genocide*. Available at: <http://www.csmonitor.com/From-the-news-wires/2010/0712/Omar-al-Bashir-charged-by-Hague-for-orchestrating-Darfur-genocide>. (Accessed on October 4, 2021 at 9pm).

<sup>37</sup> International Criminal Court, *Al Bashir's warrant of arrest, ICC press conference-Youtube*, op.cit.

<sup>38</sup> British Broadcasting Corporation, *Arab leaders back 'wanted' Bashir*, (March 30, 2009).

<sup>39</sup> Ibid

<sup>40</sup> Xan Rice, *Chad refuses to arrest Omar al-Bashir on genocide charges*. Available at: <http://www.theguardian.com/world/2010/jul/22/chad-refuses-arrest-omar-al-bashir> (Accessed on October 4, 2021 at 9pm).

<sup>41</sup> Thomas Reuters Foundation. Available at: <http://www.trust.org/profile/?id=003D000001C4KJYIA3>. (Accessed on October 4, 2021 at 9.30pm).

The internal situation inside Sudan has been dicey which has also made the execution of arrest warrants impossible. Therefore, it is unlikely that Sudan will give in. Furthermore, the timing of the arrest warrant was also very crucial as it was issued during the time when the war against terrorism was at its peak. This further gave room to Sudan for crying foul.<sup>42</sup> The lack of cooperation on Sudan's part is posing a serious challenge to ICC in Darfur. As elucidated before, some states were also unwilling to enforce ICC's decision.<sup>43</sup> The ICC will be considered weak organisation if there is no enforcement its ICC's decisions. Since the ICC lacks an independent enforcement agency, it principally depends on various factors to effectively implement its decisions.<sup>44</sup>

Primarily, all member states are duty-bound to take de rigueur steps to implement the decisions of ICC under the Rome Statute.<sup>45</sup> This will enable the ICC to use the resources of its member states in enforcing its decisions. In condition of the state party failing to enforce ICC's decision, ICC may refer the matter to its governing body, the Assembly of member states. However, it will not be out of place to mention that the support from member states to the ICC is contingent largely upon the image of ICC as a trustworthy and highly regarded institution.<sup>46</sup> The ICC can build and maintain this image by being legally sound and impartial. Want on the part of the ICC to take in account any of these objectives has been viewed by some as leading to ineffectual trials. UN Security Council Resolution 1593 has often been cited as a failure of enforcement of ICC's decision due to its political nature. The support for ICC's work kept on decreasing with passing time in the region with the prospects for negotiated settlement increasing. The Western states preferred political and diplomatic processes over judicial prosecutions. As a consequence of which, the governments have been reluctant to move forward on implementation of the due arrest warrants of the ICC.<sup>47</sup>

The Security Council has also failed to convince the member states of the UN to put into effect the ICC's prosecutions. What to speak of pressing member states, when in June 2012 Ahmed Haroun, who became the Governor of the South Kordofan of Sudan, was assisted and provided a helicopter ride by the UN to attend a meeting to resolve a local conflict within his region.<sup>48</sup> It may be stated that the Governor was issued arrest warrant by the ICC for war crimes and crimes against humanity in Darfur along with Bashir.

It has been stated that the lack of support for the ICC is due to political expediency.<sup>49</sup> Similarly some believed that because of politicisation of the referral, the ICC has been on a weak footing. This is tarnishing ICC's image that is harmful for the very reason that it was created. Such perception whether valid or not has to be removed if the credibility of the institute is to be restored and enhanced.

#### War Crimes in Uganda

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<sup>42</sup> Maryam Jamshidi, *The enforcement gap...*, op. cit.

<sup>43</sup> Göran Sluiter, *Obtaining Cooperation from Sudan—Where is the Law*, (Journal of International Criminal Justice 6, no. 5, 2008): 871- 884.

<sup>44</sup> Gwen P. Barnes, *International Criminal Court's Ineffective Enforcement Mechanisms: The Indictment of President Omar Al Bashir*, (The Fordham Int'l LJ 34 , 2010), p1584.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid .

<sup>47</sup> Maryam Jamshidi, *The enforcement gap...*, op. cit.

<sup>48</sup> Cable News Network, *Can world court survive African Union's attack?* (June 15, 2012).

<sup>49</sup> Michelle Nicols, *ICC complains of lack of cooperation, wants more U.N. support*. Available at: <http://www.reuters.com/article/2012/10/17/us-crime-un-icc-idUSBRE89G1M720121017>. (Accessed on November 5, 2021 at 5pm).



The individual responsible behind the war crimes was Joseph K. Kony, the leader of a guerrilla group Lord's Resistance Army (LRA) in Uganda that led to ICC action against war crimes there.

The ICC has initiated investigations into the war crimes and crimes against humanity against the LRA insurgency that has been going on since 1987.<sup>50</sup>

According to a British Broadcasting report, the LRA is accused of numerous violations of human rights.<sup>51</sup> The Government of Uganda referred the matter to the ICC in December 2003. Consequently, arrest warrants were issued for Joseph Kony, Raska Lukwiya, Okot Odhiambo, Dominic Ongwen, and Vincent Otti.<sup>52</sup> Joseph Kony is the commander and chairman of the LRA while Vincent Otti is the vice chairman and second-in-command of the LRA. Moreover, Raska Lukwiya is also a high-ranking commander of LRA whereas Okot Odhiambo is the deputy army commander. Dominic Ongwen is the commander of the Sinai Brigade of the mentioned group.<sup>53</sup>

According to Hovil,<sup>54</sup> the method of investigation of ICC was also mired in controversy. Various quarters were of the view that the ICC started investigations at an unfavourable time. Furthermore, the investigation was not comprehensive and did not show the true picture. It also did not take into account the views of the victims. Moreover, this approach was seen to have jeopardized the link between the citizens and the state in war-affected areas.<sup>55</sup>

The ICC got involved in the matter as the Ugandan Government had referred the matter to it. Since the investigation was initiated at the behest of the government, it was widely regarded as unpopular with the ICC being seen as a tool of government. Moreover, the investigation was being conducted lopsidedly and the assets of the states were widely used. There was also a high level of secrecy being maintained about the offices of ICC in Uganda. Uganda also hosted a review conference of the ICC that further raised suspiciousness about the partiality of the ICC.

It is also to be noted that the government failed to protect its people from LRA, and later on initiated a counter insurgency program to deal with the rebels. This program aimed at relocating people to the protected villages it made. However, people argued it prevented them from reaching their land. People found outside the perimeters of the protected villages were seen as rebels and were killed. Seen in the context of human right, this can be considered as a grave violation of human rights to which the ICC turned a blind eye. The ICC was of the view that these acts were not grave enough to be tried under the statute which courts operates. This was a partial approach by the ICC that was criticized by the locals from the very start.<sup>56</sup>

According to Tenove,<sup>57</sup> the ICC was envisioned to be a court of last resort. However, the Ugandan government referred the matter to the ICC on the first instance. Some experts argue that it

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<sup>50</sup> Associated Press, *International Criminal Court gets its first case*. <http://www.globalpolicy.org/component/content/article/64/28451.html>. (Accessed on October 4, 2021 at 10pm).

<sup>51</sup> British Broadcasting Corporation. "Profile: Uganda's LRA rebels", (February 6, 2004).

<sup>52</sup> Ibid.

<sup>53</sup> The Hague Justice Portal, *Situation in Uganda*. Available at: <http://www.haguejusticeportal.net/index.php?id=6175>. (Accessed on October 5, 2021 at 8am).

<sup>54</sup> Lucy Hovil, *Challenging international justice: the initial years of the International Criminal Court's intervention in Uganda*, (Stability: International Journal of Security and Development 2, no. 1, 2013).

<sup>55</sup> Ibid.

<sup>56</sup> Ibid.

<sup>57</sup> Chris Tenove, *Uganda and the International Criminal Court: Debates and Developments*, (Africa Portal Backgrounder 60, 2013).

was intended to label LRA as a terrorist organization so that their political demands are ignored. The ICC's involvement also hindered negotiations as it was in the middle of peace talks between the LRA and the Ugandan government when the arrest warrants were issued.<sup>58</sup> These are the challenges that the ICC has to address; yet ICC cannot be held responsible for these deficiencies.

According to Louise Parrot,<sup>59</sup> in order to maintain the dignity of the ICC, the prosecutorial discretion must be exercised cautiously. There should be a system of checks and balances that in place. If it is not exercised meticulously, the ICC may lose its dignity and will be seen as an institution that is driven by political motives. The ICC is passing through difficult times and it must ensure by all means that to grant justice and at the same time not jeopardising peace.

## Conclusion

Despite the fact that the ICC is a prime judicial body that is ratified by 123 countries, it is still caught up in issues of enforceability. It is also interesting to note that at present there are 71 countries that have not ratified the Rome Statute. These countries are shying away from ratifying it so that they do not fall under ICC's jurisdiction. This factor is causing a problem in administering justice across board, as the body will not have jurisdiction in the countries that have not ratified its statute.

Furthermore, the essence of justice is lost when it is not administered across board. All the cases currently being investigated by the ICC are for alleged commission of war crimes in Africa. International Criminal Law purports to give justice across board rather than selective justice. That is to say that the concentration of ICC's ongoing investigation is conspicuous in the African Continent has cemented the notion of partiality of the ICC.

As observed in the previous paragraphs, once a country becomes a state party to the ICC, it is incumbent upon the state to extend full cooperation to the Court. It is also to be noted that the ICC is dependent on the states, since it does not have an enforcing body of its own. However, it has been widely seen that despite being a state party, the states have failed to cooperate with the judicial body for one reason or other. Resultantly, this has a negative impact on the working of the court as it undermines its authority and impedes justice. Furthermore, the state parties must also help in executing the arrest warrant issued by the ICC. In this regard, in the year 2012, the state parties executed five of the eighteen arrest warrants issued. It shows the lack of cooperation from the state parties.

The Rome Statute envisages the participation of the victims in the court proceedings to deliver justice. This is aided by the Victims' contribution to impartial and efficient trials. In view of the fact that the International Criminal Justice System does not have a concept of jury, the victims are the only popular participants in the proceedings of the trial. This has been a stepping-stone towards delivering justice as the previous tribunals lacked such innovation. Another important development is that it also carries a significant importance under the statute of the ICC, as the court wants to sensitize itself with the gravity of situation by giving the victim the right to participate.

The Rome Statute stipulates that the International Criminal Court is a court of last resort and it will intervene where national courts have failed to address international crimes. The Rome Statute

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<sup>58</sup> Ibid.

<sup>59</sup> Louise Parrott, *The role of the International Criminal Court in Uganda: Ensuring that the pursuit of justice does not come at the price of peace*, (Australian Journal of Peace Studies 1, no. 1, 2006).

comes into play when national courts fail to investigate crimes within its jurisdiction and, hence, prosecute their perpetrators. Nevertheless, it remains the primary responsibility of the state for prosecuting the perpetrator of these crimes. Generally speaking, there are occurrences when barbaric crimes are committed with impunity that does not fall in the scope of ICC's charter and the national courts do not take cognizance for multifarious reasons. All things considered, it is recommended that the ICC statute should include reprehensible crimes like rape, sexual slavery, enforced prostitution, human trafficking and other forms of sexual violence as a distinct category of war crimes, given the fact that these crimes comprise grave breaches of laws and customs in an armed conflict.

The ICC should also have a mechanism where it can also assess the actual reasons for state referrals. Given these points, the state referring violations on its own accord to the ICC should not be understood as comprehensive endorsement of international criminal justice. From time to time, some countries have referred cases in order to manipulate the judicial process for their own political reasons.

With this intention, a revamping and restructuring of the prosecutor's office is the need of the time. The success of ICC depends upon the successful prosecution and conviction of the individuals. However, looking at its performance, the Office of the Prosecutor has to improve in in this regard. There needs to be critical assessment of the output of prosecutor's office. In support of this argument, there have been instances when, even the ICC judges have been critical of the prosecutor's office. Therefore, the prosecutor's office needs to have a team of dedicated, professional and competent individuals for successful prosecution and conviction of the individuals.

In a nut shell, what the ICC needs is to increase its deterrent potential in order to curb the serious crimes threatening the peace, security and well-being of individual and international community. As discussed above, there have been instances when the ICC has tried to deter the further commission of crimes; however, there is more to be done as it has not been successful in letter and spirit.

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