

THE EFFICACY OF THE INTERNATIONAL CRIMINAL COURT.

NAME:

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## **Introduction.**

In considering the truth or lack thereof in the Security Adviser's statement, it is important to give due regard to the context in which it was said. This was at a time when the ICC had declared intention to investigate the activities of the USA in Afghanistan and those of its ally, Israel. What followed the declaration, then, was a frenzy by the USA government to obstruct any such endeavor by making agreements with states against the efforts of the ICC and declaring the court, in Bolton's words, 'ineffective', 'unaccountable', and 'outright dangerous'<sup>1</sup>. Whether the statement is warranted is a question which is set to be answered in the ensuing discussion.

The ICC, with its official seat at the Hague, is a court of international legal status which applies the rules and principles of international criminal law to the facts of crimes of international concern or interest such as the crimes of genocide, crimes against humanity, war crimes and the crime of international aggression.

Founded in 1988 through the consensus of 160 states, the creation of the ICC by the authority of the Rome Statute was a response to the violence and wars that characterized the 21<sup>st</sup> Century<sup>2</sup>.

There had been countless efforts before such action by nations seeking to achieve world peace including arbitration which was coined in the pre-medieval times, the establishment of

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<sup>1</sup> The Guardian, 'John Bolton threatens war crimes court with sanctions in virulent attack: US national security adviser calls ICC illegitimate and says 'we will let it die on its own'' (10, 09, 2018) *US foreign policy*, *The Guardian*.

<sup>2</sup>D. Mundis, 'New Mechanisms for the Enforcement of International Humanitarian Law' (2001) 95 *American Journal of International Law* 934.

international customary law in the middle ages and the signing of the Treaty of Vienna in the 19<sup>th</sup> Century<sup>3</sup>.

The 20<sup>th</sup> Century, however, was more desirous of more rampant and institutionalized action than any other being the century of enlightenment and therefore revolutions and upheavals. In 1914 the World War commenced and disrupted the world order despite the Treaty of Westphalia<sup>4</sup> which was meant to avert such occurrence. This was followed by the creation of the League of Nations which evidently failed as there was a World War 2 shortly after. The end of the cold war would bring nations to the awareness that more needed to be done other than the drafting and signing of agreements and the creation of tribunals such as the Nuremberg and the Tokyo tribunals on an *ad hoc* basis. A permanent system of international criminal justice was needed and thus the International Criminal Court was born.

The objectives of the adjudication by the court are found in the preamble of the statute creating it<sup>5</sup> and are laid out as preservation of the unity of all peoples, protection of the weak against atrocities, preservation of the peace, security, and well-being of all nations, promotion of international cooperation against the impunity of the perpetrators of international crime and to guarantee lasting respect for international law and the enforcement of international justice. In doing this, the court is obligated to work in close coordination with the national criminal justice systems of the states involved and with consideration of the Charter of the United Nations which

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<sup>3</sup>D. Mundis, 'New Mechanisms for the Enforcement of International Humanitarian Law' (2001) 95 *American Journal of International Law* 934.

<sup>4</sup>The Editors of Encyclopaedia Britannica. 'Peace of Westphalia'. Encyclopædia Britannica. (Encyclopædia Britannica, Inc, January 23, 2019) Retrieved from <https://www.britannica.com/event/Peace-of-Westphalia>, Accessed February 28, 2019.

<sup>5</sup>Preamble to the Statute of the International Criminal Court.

recognizes the equality of all states<sup>6</sup> and provides for the peaceful resolution of international conflicts<sup>7</sup>. To this extent, therefore, John Bolton is mistaken in so far as he supposes that the ICC is an unnecessary institution since its purpose derives from a history of impunity in international crime and other failed institutions.

The court is also necessary, logically speaking, as war-torn countries are unlikely to have mechanisms to address the atrocities that have been or are being committed in the subsistence of the war, corruption at the state level may hinder the attainment of justice for the victims of serious crimes which normally affect masses and finally there is the fact that the rest of the world has a stake and is concerned with the persecution of crimes of a certain nature for purposes of asserting the authority of international instruments, averting their repetition or propagation onto other territories.

### **The mandate of the International Criminal Court.**

As succinctly put by Bolton in the quoted statement, the International Criminal Court is, above all else, meant to work toward holding perpetrators of the most egregious atrocities accountable for their crimes, providing justice to the victims, and deterring future abuses. The authority of the court is more comprehensively described in its founding statute under the head of jurisdiction.

The ICC has three kinds of jurisdiction which are personal, territorial and crime-based.

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<sup>6</sup>Article 2 (1) of the Charter of the United Nations.

<sup>7</sup>Article 33 of the Charter of the United Nations.

Personal jurisdiction is provided for in Article 25(1) of the Rome Statute which gives the ICC the mandate to adjudicate matters in which the accused persons are natural persons who had attained 18 years at the time of the commission of the crime. The provision protects the interests of young offenders even in cases of international crime and aids the court in its quest for justice since it is mandated to prosecute any person above the age of 18. Indeed the court has applied this principle in prosecuting individuals for their wrongful acts instead of the approach of state responsibility which is seen in the case of the International Court of Justice. This ensures that justice is served against the specific persons who committed or propagated the commission of crimes against humanity. The court is further enabled by Article 20 of the Rome Statute which declares the accused person's status and standing in his own country irrelevant. This has allowed the court to prosecute several sitting heads of state for their involvement in crimes against humanity.

Territorial jurisdiction grants the ICC has the mandate to hear and determine cases of atrocities which took place within the boundaries of states that are signatory to the Rome Statute. This kind of jurisdiction does not apply retrospectively in that the court is not mandated to prosecute crimes which occurred in a country before the particular country conceded to its jurisdiction<sup>8</sup> as this would be unjust. Moreover, the ICC only has the jurisdiction to prosecute matters from countries whose courts are unable to prosecute them perhaps due to imminent bias or lack of resources or they have expressed unwillingness to prosecute. The court therefore only complements the national justice system, supplementing it where necessary<sup>9</sup> and to such end is a

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<sup>8</sup>Article 126 of the Statute of the International Criminal Court.

<sup>9</sup>*Prosecutor v. Kony et al* Case No. ICC-02/04-01/05-377, Pre-Trial Chamber Decision on Admissibility under Article 19(1), 10 March 2009.

viable reprieve in cases where justice is not served at the home nation. The court then serves to fulfill the maxim ‘The law shall not suffer wrong to be without remedy’.

Crime-based jurisdiction is to the effect that the court has original jurisdiction to adjudicate cases involving ‘the most serious crimes of concern to the international community as a whole’<sup>10</sup>.

Crimes which qualify as such are specifically listed thereafter as the crimes of genocide, international aggression, crimes against humanity and war crimes. This provision gives the court leeway to prosecute serious crimes out of its own initiative as it has severally done in a bid to bring justice even to the people who cannot seek it on their own<sup>11</sup>.

In carrying out its mandate, the court is structured in such a way as to have four arms, each with specialized functions.<sup>12</sup> These are the presidency, chambers, prosecutor and registry.

The presence of these structures and their use thereof is intended to ensure the effective operation of the court which has so far received 8,874 communications about alleged crimes, dismissed 4,002 of those and persecuted to completion 22 cases with some convictions and dismissals.<sup>13</sup> The reasons for the low level of success is attributable to a number of aspects, some of which are the court’s own faults and others are from the stakeholders who are supposed to lend an active hand in the attainment of international criminal justice.

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<sup>10</sup>Article 5 of the Statute of the International Criminal Court.

<sup>11</sup>Press Release : 15 December 2010, Kenya’s Post Election Violence: ICC Prosecutor presents cases against six individuals for crimes against humanity|ICC-OTP-20101215-PR615 Retrieved from <https://www.icc-cpi.int/Pages/item.aspx?name=pr615>.

<sup>12</sup>Understanding the International Criminal Court, pages 9-12.

<sup>13</sup>International Criminal Court, September 2010, [Communications, Referrals, and Preliminary Examinations](#). Retrieved 24 December 2010.

One aspect that has come into the spotlight as impeding or contributing to the impediment of justice at the ICC is the method of case initiation. Under the Rome Statute, the court can take up cases brought before it by a request from the prosecutor which has been authorized by the Pre-Trial Chamber<sup>14</sup>, those taken by up by the court's initiative or Self-referral<sup>15</sup> or those from the request of the United Nations Security Council<sup>16</sup>. The challenges facing the court herein can be drawn from a number of cases that the court has been able to handle:

In the case against the perpetrators of the Post-Election Violence of 2007-2008 in Kenya, for instance, the then Prosecutor initiated proceedings on the 15<sup>th</sup> of December, 2010<sup>17</sup> with its admissibility being confirmed in 2018. The court then went on to constitute a court which would hear the case. This was a clear show of due diligence on the part of the judicial officers. What then was the course of the substantive delay which has marked many other cases that are presented before the ICC? In the first instance, the prosecutor was ill-prepared as is observed from the crumbling of her cases beginning with the one against Mr. Mwaura which was withdrawn on the grounds of undetermined facts 3 years after its initiation. The prosecutor also sought several adjournments which led to the delay of the cases and during which time the case was further weakened by the suspicious disappearances of key witnesses and evidence along with multiple instances of witness tampering.

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<sup>14</sup>Article 15 of the Charter of the International Criminal Court.

<sup>15</sup>Article 14 of the Charter of the International Criminal Court.

<sup>16</sup>Article 13 of the Charter of the International Criminal Court.

<sup>17</sup> Press Release : 15 December 2010, Kenya's Post Election Violence: ICC Prosecutor presents cases against six individuals for crimes against humanity ICC-OTP-20101215-PR615 Retrieved from <https://www.icc-cpi.int/Pages/item.aspx?name=pr615>.

Another impediment in the court's quest for justice is the frustration of investigations due to a lack of cooperation from all the concerned. In the above-mentioned case of the post-election violence, there was a deliberate lack of cooperation by the Kenyan Government with the Prosecution in her attempt to bring justice to the victims of the post-election violence which saw her lack important pieces of evidence and fail to secure key witnesses.<sup>18</sup> As a matter of fact, the state went to great heights to obstruct Mrs. Bensouda's efforts.

The ICC has also been hard hit by the question of its legitimacy. While the court has international legal status as provided for in its founding statute to which 123 States are signatories, the ICC is often ineffective in the execution of orders as many countries do not consider it a binding institution on them. The court has come under severe challenge especially by African countries which hold that the court actively victimizes them compared to the Western nations. There have even been resolutions at the African Union with an aim to plan a strategy for exit from the Rome Statute<sup>19</sup> which also adopted a resolution not to cooperate with the ICC in indicting the Sudanese President, Omar-al-Bashir who has been charged at the court for instigating a campaign of violence and rape against civilians in Darfur.

## **Conclusion.**

The ICC is a permanent institution for adjudication of international crimes established in response to failed efforts of *ad hoc* tribunals which were created to address international crime

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<sup>18</sup>Statement : 4 December 2014 Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the status of the Government of Kenya's cooperation with the Prosecution's investigations in the Kenyatta case.

<sup>19</sup>African Union Summit. January 2017. 'ICC Withdrawal Strategy'. Retrieved from [https://www.hrw.org/sites/default/files/supporting\\_resources/assembly\\_au\\_draft\\_dec.\\_1\\_-\\_19\\_xxviii\\_e.pdf](https://www.hrw.org/sites/default/files/supporting_resources/assembly_au_draft_dec._1_-_19_xxviii_e.pdf), and [https://www.hrw.org/sites/default/files/supporting\\_resources/icc\\_withdrawal\\_strategy\\_jan.\\_2017.pdf](https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan._2017.pdf).



issues arising out of wars and unrest in countries. The court has been given sufficient mandate in the Rome Statute including the power to self-initiate proceedings against suspected individuals including jurisdiction to address matters of crime against humanity.

As shown above, the ICC has exhibited a will to persecute crimes by utilizing the structures and resources at its disposal, self-initiating cases to ensure that justice is granted even to those unable to seek it and also acting on communications made to the court concerning the commission of crimes in countries. Its inability to deliver a better record has therefore been as a result of the failure of some of its instruments such as the prosecution but also largely due to frustration by countries which refuse to cooperate alongside the war wedged against it by the African Union which has challenged its legitimacy and propagated impunity. Whilst the court has not exhibited a 100% success rate, it has been an indispensable instrument in the fight against international crime and not the dangerous tool described by Bolton. The court's only misgiving in so far as Bolton's statement is concerned, is being indiscriminate in the pursuit of international criminal justice.

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