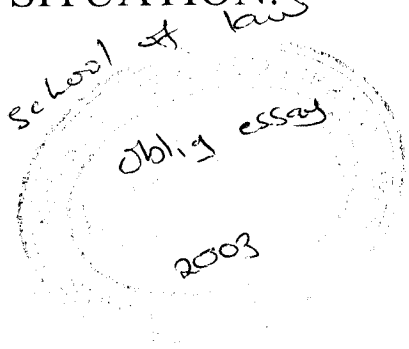
THE INTERNATIONAL CRIMINAL COURT AND ZAMBIA. THE PATH ZAMBIA SHOULDTAKE IF IT IS TO CONTRIBUTE POSITIVELY TO THE ATTAINMENT OF UNIVERSAL JUSTICE, IN THE SUBSISTING JUSTICE V. IMPUNITY SITUATION.



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An Obligatory Essay submitted to the School of Law of the University of Zambia in partial fulfillment of the requirements for the award of the degree of bachelor of laws (LLB).

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THE INTERNATIONAL CRIMINAL COURT AND ZAMBIA. THE PATH ZAMBIA SHOULD TAKE IF IT IS TO CONTRIBUTE POSITIVELY TO THE ATTINMENT OF UNIVERSAL JUSTICE IN THE SUBSISTING JUSTICE V. IMPUNITY SITUATION.

Be accepted for examination. I have checked it carefully and I am satisfied that it fulfils the requirements relating to format as laid down in the regulations governing Directed Research Essays.

DATE: 20th January 2014

SUPERVISOR: .....

Mr. S. Watae

DEDICATION

TO MY MOTHER, BERNANDDETTE MWELWA BWALYA BANDA

THE WOMAN THAT KEPT HER CANDLE OF LOVE BURNING TO SHOW ME LIGHT EVEN THROUGH THE DARKEST OF NIGHTS AND THE STRONGEST OF STORMS. FOR THAT YOU MUST HAVE RECEIVED AN EXTRA CROWN.

ALLOW ME TO THANK YOU.

ACKNOWLEDGEMENTS

To God almighty, for a great achievement such as this, You deserve the praise.

To my darling husband Ben and my little sunshine Masowe, I cherish your love, encouragement and company. Je vous aime.

To my Dad Withus Nxondho Banda, your teachings and encouragent are a great source of knowledge. See how much I've grown.

My sisters, Christine, Gladys, Idah and Alice. Oh, not forgetting brother Misheck, the world would be blue without you. There's only one bunch of you and you know I care.

Mr. Sidney Watae my supervisor, this work wouldn't have been without you. I may have not reached your " a bit high standards, but believe me you made me work. Thanks for your help.

Lastly, of course not least, I must thank the girls Waicha and Mbayi. I asked of the Lord of good friendship but he gave me more than I ever imagined; in you. You keep helping me be a better person each day. Thanx.

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CHAPTER ONE

1.1 INTRODUCTION.

The establishment of an international Criminal Court has been long over-due. Over the years, ad-hoc tribunals such as the International Criminal Tribunal for the former Yugoslavia and that for Rwanda were established to try and curb the ever-increasing levels of crimes of mass destruction. However, these were of limited jurisdiction and operation, the International Criminal Court being of universal Jurisdiction.

For this reason, July 17 1998 remains a celebrated day to many countries of the world that give their best to fight the atrocities such as those under the jurisdiction of the International Criminal Court. Unfortunately, the United States, known to the world as an all whether fighter of crimes of mass violence is not on the bandwagon. It is shocking that the world's most powerful nation has chosen to be on the wrong side of history while its companions and the rest of the world take a swipe at impunity.

The most unfortunate is the position taken by the United States, which puts many a poor country in a dilemma. They have to chose between impunity, which

comes with benefits from the United States; and promoting universal justice for a better world. This means foregoing the benefits from the United States. The paper sets out to review the position taken by Zambia after having decided to join the international community in the quest for the attainment of universal justice.

1.2 METHODOLOGY

Information in this paper was gathered from various sources. These include:

Existing literature on the topic

Reports done by experts on the topic

Case Law

Internet

1.3. CHAPTER OUTTLINE

As a matter of introduction, Chapter two deals with an analysis of the constitution of the Court and its operations. It goes further to consider the Cout's applicability to Zambia.

Chapter three considers how the court is to be used as a tool for the attainment of universal justice. It mainly concentrates on the features of the court that will ensure that universal justice is obtained.

The fourth Chapter basically considers the American position and its implications on Zambia, should Zambia enter into one of the impunity agreements with the United States.

The concluding Chapter, Chapter Five looks at what path Zambia should take to ensure that it contributes positively towards the attainment of universal justice.

CHAPTER TWO

2.1 THE INTERNATIONAL CRIMINAL COURT, HOW IT DIFFERS FROM OTHER INTERNATIONAL TRIBUNALS AND ITS APPLICATION TO ZAMBIA.

With the advent of the new-world order in which living together as a global village is the norm, there is more need now than ever before for institutions solely created to ensure that as much as possible, a common good for humanity is attained in terms of having a peaceable world in which justice prevails. Despite this being the position taken by most countries of the world, it is ironic that at the same time, the world has seen the most heinous atrocities in human history in both the last and present centuries. In trying to see to it that justice is attained for the victims of such atrocities, nations of the world came together to create a court where victims of future crimes could find some measure of justice. Such is the nature of the International Criminal Court hereinafter referred to as 'the ICC' or 'the Court', interchangeably.

It has been observed that the perpetrators of most of the atrocities complained of are world leaders. Therefore, the reason d'etre of the court's creation is on the premise that if the said leaders know there is a place where they can be held accountable for such atrocities, they may be less likely to commit them.

The establishment of the Court is set out in the Rome Statute of the International Criminal Court, hereinafter referred to as the statute; the adoption of which took

place on July 17 1998[1]. In some way, the establishment of the ICC marks the conclusion of an ambitious project which began with the first Hague Conference of 1899, that inter alia, adopted conventions codifying the laws of the seas. The Court's establishment took considerably longer than many had hoped. Having been on the horison as early as 1948[2], it was stalled by the cold war and other huddles. The work to draft the statute establishing it only resumed in 1989. Even though the final version of the Rome Statute is not without flaws, it could well be the most important institutional innovation since the founding of the United Nations.[3] At the General Assembly General Debate of the 56th Session of the United Nations in November 2001, many heads of state and foreign ministers made mention of the ICC in their interventions, demonstrating a growing worldwide support for the court. The United States, under Clinton administration portrayed a welcome move and appended the authorising signature on December 31 2000, the last possible day for signing the statute. The then American president asserted the United State's commitment to bringing perpetrators of genocide, war crimes, and crimes against humanity to justice. However, he firmly maintained that the signature did not signal the United States' approval of all aspects of the statute; but that the signature was essential for the United States to continue working with other states to influence the evolution of the ICC.[4]

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[1] W.A. Schabas, (2001), An Introduction To The International Criminal Court, Cambridge: Unuversity Press, vii

[2] GA Res. 217A (III) U.N. Doc. A/810

[3] R.C. Johansen, (1997), A Turning Point In International Relations? Establishing a permanent International Criminal Court, Notre Dame:Joan B Kroc Institute for international peace studies, 1

[4] http:www.hrw.org/press/2002/05/icc0506.htm

The Ushering in of the Bush administration shone a different light on the United States' position as regards its standing with the court. The administration announced it would undertake review of its standing towards the ICC and in no time, Congress passed the American Servicemembers Protection Act (ASPA). This piece of legislation was characterised as "The Hague Invasion Act" as it did not only prohibit any United States cooperation with the court but also provided it would attempt to penalise countries that would ratify the treaty. It further authorised the United States to use all means necessary to liberate any United States or allied persons detained on behalf of the proposed ICC. The court finally came into force on July 1 2002 with the help of many regional organisations. For example, in 2001, the Ecomomic Community of West African States (ECOWAS), the Rio Group, the Southern African Development Cooperation (SADC), the European Union (E.U.), and the Council of Europe, all took the opportunity at their annual assemblies and other meetings to reaffirm their commitment to the court and to call on their member states to ratify without delay. The Organisation of American States (OAS), was also part of the campaign process. But as can rightly be guessed, the United States was not among the states parties involved. It is hoped that the position of the current United States government- the Bush administration, will not dictate either future United States Policy or the success of the court. The implication of the position taken by the United States and how it relates to Zambia is discussed in chapter four.

The ICC has taken the form of a permanent international criminal tribunal with universal jurisdiction that will try individuals responsible for the most serious international crimes such as genocide, war crimes like wilful killing and torture; and crimes against humanity which include murder, rape and enslavement. The provisions as regards the foregoing crimes are to be found in part 2 of the statute, articles 6-8. The court's jurisdiction also extends to the crime of aggression; the 'crime of crimes', over which the Court will assume jurisdiction after ensuring in every given case that it is adopted in accordance with articles 121 and 123, and setting out the conditions under which the Court shall exercise jurisdiction in respect thereof.

By paragraph 10 of the preamble and article 1 of the statute, the jurisdiction of the court is to be complementary to national criminal jurisdictions. This is taken as a way of ensuring that the international requirement of respect for state sovereignty is enhanced. As a result, states parties to the Court will be given the primary responsibility and duty to prosecute the most serious international crimes as recognised in the statute, while allowing the court to step in as a last resort if the states fail to implement their duty. That is, only if investigations and, if appropriate, prosecutions are not carried out in good faith[5]; in which case effort will be made to discover the truth and to hold accountable those responsible for

[5] article 17 of the Statute : Cases in which states party is unwilling or genuinely unable to carry out the investigation or investigation. Also included are cases were there has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice. Or as per article 20, if the investigation or prosecution carried out by the states party was not conducted independently or impartially in accordance with the norms of due process recognised by international law.

the recognised crimes. In order to determine unwillingness by a states party to prosecute a case, the court will give consideration to the principles of due process recognised by international law.

2.2 DISTINGUISHING ICC FROM AD-HOC INTERNATIONAL TRIBUNALS.

Hitherto, a number of international tribunals have been set up under the auspices of international law leading to the conception that the ICC is but a different version of the already existing tribunals such as the International Court of Justice (hereinafter referred to as the ICJ or World Court). Like the ICJ, the ICC is a permanent court with universal jurisdiction. However, unlike the ICJ, the ICC is not an organ of the United Nations. Notwithstanding this position, article 2 of the statute provides to the effect that the court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to the statute and thereafter to be concluded by the president of the Court on its behalf. As regards the cases provided for in the statute, the current position is that the Security Council of the United Nations may refer cases to the court for investigation and/or prosecution. It may also request the Court to suspend investigations for twelve months at a time it if feels that the Court proceedings might interfere with the Security Council's responsibility to maintain peace and security.[6]

[6] Articles 1(b) and 16 of the Statute.

Another distinction is that while the ICJ is a civil tribunal that considers disputes between countries recognising its jurisdiction while the ICC is a criminal tribunal prosecuting individual perpetrators of international crimes in territories of governments that have ratified the treaty, or where such individuals are nationals of countries that have ratified the treaty.

The existing ad-hoc tribunals such as the International Criminal Court for Rwanda (ICTR) and the International Criminal Court for the former Yugoslavia (ICTY) were created by the United Nations Security Council. Although they also try individuals for genocide, crimes against humanity and war crimes, their mandate is limited, in the case of the ICTY, to the region of the former Yugoslavia, and in the case of the ICTR, to crimes committed in Rwanda between April and June 1994. Setting up such ad-hoc courts is expensive and time consuming. For example, despite the urgent need for accountability in Sierra Leone, Progress in establishing the special court for Sierra Leone stalled in 2001, mainly due to the months-long impasse over the court's budget. In the interim, justice was being blatantly denied the victims for the price of a United States dollar. In addition, such tribunals are often criticised as 'victor's justice', because it is mainly the losing party that is brought before the justice-alter. It is no wonder they feel victimised even when they are genuinely in the wrong.

The ICC is different from such ad-hoc tribunals in that it will be in permanent operation with universal jurisdiction making it cheaper and more convenient

because there will be no need to set up a new tribunal with each upcoming matter. Inherent in its being a permanent institution is that at any given time, justice for all will be advocated for in relation to the crimes under consideration. In addition, even though the headquarters is at The Hague, the statute provides that the prosecutor may investigate any matter in any territory of the states parties. This will entail efficiency and cost effectiveness.

2.3 ICC APPLICATION TO ZAMBIA.

On November 13, 2002, Zambia ratified the Rome Statute.[7] The term ratification describes an international act by which a state establishes on the international plane, its consent to be bound by a treaty.[8] It goes without saying therefore that Zambia is under obligation to be bound by the statute. In consequence of this, a number of obligations are to be met by Zambia as a state party.

From the onset, it should be noted that the ICC has no practical means to enforce orders and decisions. Their enforcement largely depends cooperation by states parties. In this regard, Zambia, like other states parties, is expected to cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the court.[9] The court has authority to request Zambia for cooperation and Zambia is obliged to keep confidential such request for

[7] Human Rights Watch:The International Criminal Court– Rome Statute Ratifications, November 7 2003, 3
[8] Article 2(1) (b) of the Vienna Convention on the law of Treaties
[9] article 86 of the statute

cooperation and any documentation supporting the request, except to the extent that the disclosure is necessary for execution of the request. In addition, Zambia must ensure that national laws provide for availability of procedures for all forms of cooperation specified in the Statute.[10] This is with regard to the procedures for arrest and surrender to the ICC.

The said procedures must be as streamlined as possible and must not be onerous [11]so as to minimise delays in investigating or prosecuting. Further, Zambian laws must respect the rights of arrested persons, for instance by presuming they are innocent as per article 18 of the republican constitution; at every stage of the surrender process. As regards transit of persons being surrendered to the ICC, Zambia is obliged to authorise their transportation through its territory.

In a situation where there are competing request between surrender of a person to the ICC and extradition to another country, the ICC will ordinarily take precedence if the state requesting extradition is a state party but only when, if being a non-state party, it has no international obligation to extradite to that country.[12]

The foregoing are the duties placed upon Zambia subsequent to its ratifying the treaty. The geographical location of Zambia places it at the core of civil wars and

[10] Article 88 of the statute
[11] Artilce 91(2) (c) of the statute
[12] article 90 of the Statute

political turmoil prevalent in the sub-region. As a result, Zambia has been a peace haven for refuges and asylum seekers some of whom may be perpetrators of the heinous crimes under the jurisdiction of the ICC. Zambia's having ratified the statute entails that should any of its nationals or asylum seekers have committed the crimes in question, Zambia is obligated to prosecute them or to surrender them to the ICC upon the court's request.

The country should also put measures in place, such as a tight screening of all persons that enter its territory under the guise of refugees so as to enhance the objective of the ICC, that is, to bring to an end impunity for atrocities that deeply shock the conscience of humanity.

In light of the foregoing, it can thus be concluded that the ICC is an independent, permanent treaty body with universal jurisdiction over crimes of mass violence. Becoming a state party to the ICC encourages and helps a state to attain the highest international standards in curbing impunity, a move desirable for a better human race.

CHAPTER THREE.

3.1 THE ICC AS A TOOL FOR THE GLOBALISATION OF JUSTICE: HOW UNIVERSAL JUSTICE IS TO BE ATTAINED.

The ultimate goal of any civilised legal order is the attainment of justice. There is however, certain complexity in the structure of the idea of justice. It may be said to consist of two parts; a uniform or constant feature summarised in the precept 'treat like cases alike', and a shifting or varying criterion used in determining when, for any given purpose, cases are alike or different.[13] In this vein, justice is taken to be a process; a complex and shifting balance between many factors, of which equality is but one. It could therefore be said that to apply a law justly to different cases is simply to take seriously the assertion that what is to be applied in different cases is the same general rule, without prejudice, interest or caprice.[14] This position is easily attainable at national level where in most cases, the constitutional framework provides a suitable media through which the justice process can operate and reach an intended goal. However, a similar expectation on such universal scale as the ICC calls for is a daunting endavour on all stakeholders.

Implicit in the universal scale of the ICC's operation is the fact that the law to be administered thereby is international law[15] that calls for adherence by all peace-

[13] L.A. Hart, Concepts of Law, 163
[14] www.ieer.org/pubs/#ruleoflaw
[15] This position is supported many human rights activists like Fiona McKay, director-Lawyers' Committee for Human Rights. She referred to the ICC as an embodiment of international law and justice, on March 11 2003 during the ICC Inauguration- The Monitor, Issue 24, April 2003, 9

loving nations of the world, not as a matter of choice, but of obligation, especially that the Court's jurisdiction hinges on crimes that are injurious and demeaning to humanity as a whole. The Rome statute and the Court are responses, not to the best but to the worst in humanity. Therefore, their process and success signals one of the greatest hopes for peace and the rule of law in the 21st century. Their universal application by its very nature presupposes agreement on basic values in the international community. The leveling of the playing field for all states-parties is tantamount to the establishment of a general rule by which no number of states will be taken to be more equal than others.

The foregoing position in itself is a firm foundation for a general consensus that what is underway is a solid platform of the rule of law as opposed to a rule of power where nationals of powerful states are treated as sacred lambs that are never to be placed upon the justice alter, while those of the less powerful or powerless states are taken to be sacrificial lambs, to be given up for the betterment of humanity. For if states are to submit to a judgment on "denial of justice" to a foreigner, they must be able to agree as to the fundamental principles of justice, a fair trial and lack of arbitrariness. If they are to conclude an extradition treaty, they must agree on the definition of a political crime. Furthermore, if they are to be bound by common rules of neutrality, they must have common rules over, say, private trade; lest there be complete absence of equality of treatment.[16]

[16] W.Friedmann, (2001), Legal Theory 5th edn, New Delhi: Universal law publishing co., 555

It can therefore be inferred that international law demands a broad similarity of social values. With it in place, intense collaboration can rightfully be anticipated and consequently attained, resulting in the establishment of a just international legal order. The similarity of social values of the states parties to the ICC manifests in their detest for crimes of mass violence. The said crimes, that is genocide and war crimes have been defined and their elements set out so that from wherever a perpetrator hails, they will still fall within defined boundaries in which the same rules will apply. It is hoped, however, that the crime of crimes, being aggression, will be defined soon enough before disputable inclusions thereto and exclusions therefrom, which may lead to derailment of the judicial process, arise.

Aside from a possible bit of setback due to the non-definition of the crime of aggression, the states parties have generally agreed upon basic values in their pursuit for a successful international legal order with particular regard to the portion of criminal law under consideration. The said basic values hinge on the justice implicit in the general principles of criminal law. They include:

3.2 The Jurisdiction ratione temporis And The Non-retroactivity Ratione Personae Principles.

The above principles provide to the effect that the court is a prospective institution in that it cannot exercise jurisdiction over crimes committed prior to the

entering into force of the statute.[17] On this premise, no person shall be criminally responsible under the statute, for conduct prior to the entry into force of the statute.[18] As regards states that become parties to the statute subsequent to its entry into force, the court will have jurisdiction over crimes committed after the entry into force of the statute with respect to that state;[19] that is, the court will only exercise jurisdiction as regards that state, for crimes committed after the particular country becomes a state party. In this regard, article 126 of the Rome statute provides that the statute enters into force for the said states on the first day of the month after the sixtieth day following the deposit of the state's instrument of ratification. The move is to ensure that there is a threshold from which point cases will be considered to be under the jurisdiction of the court; thereby ensuring that the courts operations are prospective. In addition, this entails equitable treatment of states parties by ensuring that in all countries, only cases that occur after a certain date are considered. In this manner of operation, distribution of equal justice is enhanced.

The statute has been criticised for its inability to reach into the past and prosecute atrocities committed prior to its coming into force. The answer to this objection is entirely pragmatic. A retrospective approach would have resulted in very few states; the court's most fervent advocates included, recognising jurisdiction of such an ambit. However, failure to prosecute retrospectively does not quiet wipe the slate clean as it does, in a way, grant a form of impunity to

[17] Rome Statute, art. 11(1)
[18] ibid, art.24(1)
[19] Ibid, art. 11(2)

previous offenders[20] in that if these were neither prosecuted by their own governments nor brought before a special tribunal, they go scot-free as the Court has no jurisdiction to prosecute them. It should be noted though that the Court's jurisdiction had to start from a fixed point in time if to avoid opening the flood gates in the history of international criminal law that would have led to anarchy and resulted in a seriously stifled backlog of cases. The result of this would have been a denial of the very justice that the ICC seeks to attain.

No route down memory lane would have been long enough to accommodate all the aggrieved parties. Someone would have felt left out and cried foul at every point of the way. In this regard, the lesser evil in the journey to ending impunity was to take a prospective approach from a fixed date. Those responsible for atrocities committed prior to entry into force of the Rome Statute, may and should be punished by national courts.[21] Where the state of nationality or the territorial state refuses to act, an increasing number of states are now provide for universal jurisdiction for such offences.[22] These could be made use of. For example, bearing in mind that Belgium had domesticated international crimes in its laws, a Belgian lawyer, acting on behalf of the Iraqi people, indicted one general Frank, a United States official, for war crimes committed in the just ended Iraqi war.

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[20] W.A. Schabas,(2001), An Introduction to the International Criminal Court, London: Cambridge University Press. 57

[21] S.R. Ratner & Anor.,(1997), Accountability For Human Rights Atrocities in International Law, Beyond the Nuremburg Legacy, Oxford: Clarendon Press165

[22] N. Roht-Arriaza,ed. (1995), Impunity in International Law and Practice, London: Oxford University press, 97

In light of the foregoing, it can rightfully be concluded that a more just world is attainable through the prospective approach taken by the ICC. Needless to say that the help of the world's states through deliberate national policy and political will is paramount in this quest universal justice.

3.3 The Individualistic approach Of The Court In Proscuting Cases.

Criminal law is a law that makes a person's intention in relation t commoiting a crime a requirement of prime import.[23] The said intention or knowing behaviour is referred to as mens rea (guilty mind) or mental element. In this light, an individual who causes accidental harm to another, may be liable before some other body, but will by and large not be held responsible before the criminal courts. This is evidenced in a number of cases; among them, the case of ***R. v. Wolomosi Phiri***[24] in which although the defendant had actually committed the murder in question, and had done so callously, he was not punished ordinarily but was given special punishment in form of detention at the president's pleasure because of his impaired mental faculties.

Lack of intention is therefore a valid defence to criminal offences. It must be noted however, that there are varying degrees of intention ranging from mere

[23] Intention being a personal attribute, article 2 provides that the ICC will jurisdiction over natural persons, pursuant to the Statute. In addition, only such persons as are above 18 at the commission of the crime will be prosecuted. Those below the age of 18 are exempt from the court's jurisdiction- article26.
[24] 5 N.R.L.R. 184

negligence and recklessness to full-blown intent with premeditation.[25] On this basis, if one is to be found not criminally liable, they must fall without the parameters determining the degrees of intent; that is, the varying degrees of intention, from the lowest to the highest should not apply to them. It was on this basis that the holding in ***DPP v. Smith***[26] was to the effect that the defendant was guilty of murder. Because, although the defendant had not intended to commit murder, he had acted in such a reckless manner that had consequently resulted in death.

With due regard to the seriousness of the crimes under consideration, the Rome Statute sets a high standard for the mental element, requiring in article 30 that [u]nless otherwise provided, the material elements of a given offence must be committed with 'intent and knowledge.' The article goes further to provide that a person has mens rea with respect to conduct when that person means to engage in the conduct. In addition, a person has intent with respect to a consequence when that person means to cause that consequence or is aware that it will occur in the ordinary course of events. On this basis, in ***The Queen v. Instan***[27] the accused was convicted of manslaughter because she ought to have known the consequence of her act of starving her aunt would most probably lead to death.

Considering the nature of Criminal Law, the importance of setting a standard in determining mens rea cannot be over-emphasised. It is argued that humanity,

[25] J. Pradel, (1995), Droit P`enal Compar`e,Paris: Dalloz ,251
[26] [1961] A.C. 290
[27] [1893] 1 Q.B. 450

being endowed with a conscience, possesses high levels of discernment of right from wrong, not necessarily because there are sanctionable rules, but because it is inherent in them to know right from wrong. However, if this were the strict position, there would be no wrong-doing in the world and the establishment of courts would have been vanity. The attainment of justice in Criminal Law would have no genesis without a set level of mens rea. It is for this reason that such defences as 'superior orders'[28] by a subordinate, would not, in themselves hold, as there has to be establishment of individual criminal responsibility of the superior, in persona, which has to be proved beyond reasonable doubt. In addition, the accused has to prove that he was under legal obligation to obey orders of the government or the superior in question; that he did not know the order was unlawful, or that the order was not manifestly unlawful.[29] This provision will ensure that justice is done against perpetrators. It does not allow them to hide behind whatever orders as a defence to committing such heinous acts.

3.4 The Need For A Fair Trial.

The establishment of a case against an accused will not in itself entail that he is guilty of the offence as charged. There is a presumption of innocence recognised in article 66 of the Statute. The burden is placed upon the prosecution to rebut the said presumption and prove that the accused is guilty beyond reasonable

[28] provided for under article 33 of the Rome Ststute.
[29] For purposes of article 33, orders to commit genocide or crimes against humanity are unlawful.

doubt. In ***Barber`a, Messegue and Jabardo v. Spain,***[30] the presumption of innocence was taken as requiring inter alia, *that when carrying out their duties, the members of the court should not start with the preconceived idea that the accused has committed the offence charged...*[31]. When one is presumed innocent, it goes without saying that certain minimum requirements be met at their trial. Most of the requirements so hinted upon are embedded in the fundamental right to a fair trial.

The right to a fair trial or hearing, also enshrined in article 10 of the Universal Declaration of Human Rights and at local level, article 18 of the Zambian constitution, is recognised in the chapeau of article 67 of the statute. The article provides for entitlement to a public hearing with due regard to the provisions of the Court, a fair hearing conducted impartially in full equality with minimum guarantees which include, the right to be informed in detail of the nature, cause and content of the charge with the help of an interpreter where need arises. Also included is the right to adequate time and facilities for the preparation of the defence, the right to communicate with counsel of one's choice. If the accused lacks the finances to pay for their representation in a case in which justice demands that they be legally represented, such representation is to be availed at no cost to them. In addition there are the rights to be tried without undue delay, to be present at the trial, the right to examine witnesses in accordance with the rules of procedure and evidence, the right to remain silent without such

[30] (1988) December 6,Series A, No. 146, paragragh 77.
[31] This position is also supported in the General Comment on article 14 of the Internation Convention on Civil and Political rights by the Human Rights Committee.

silence being a consideration in the determining of guilt or innocence, the right to give unsworn oral or written statement in their behalf. The accused is also protected against any reversal of the burden of proof or an onus of rebuttal.

Although the right to a fair trial generally is supportive of the accused, its element of presumptive innocence brings to the fore the fact that an accused remains innocent and must be so treated, until pronounced guilty by a competent court. In this way justice is achieved because only persons that are proven guilty will face the penalties. In this vein, justice is taken to be duo-facetted, always available for both parties to a dispute, but taking the side of unfairly treated or the more humane position so to speak.

In addition to the foregoing general principles of Criminal law, the ICC hopes to further its operations in the quest for universal justice by such means as constitutional compatibility of the states parties' constitutions with the ICC Statute, the complimentarity principle, the regional legal representation in the selecting of judges and the establishment of the Trust Fund for victims.

3.5 Constitutional Compatibility With The ICC.

The ICC is working towards the globalisation of justice and for such a mammoth task to be achieved, the court, to the greatest extent possible, needs to work in

collaboration with national constitutions of the states parties. Problems are inevitable.

However, while different constitutions give rise to different questions, three issues have arisen with particular regularity as regards compatibility with the ICC[32]. These include; prohibitions on the extradition of nationals, which some constitutions prohibit. Given that the court will not prosecute in absentia, The ICC must gain physical control over the suspect for the trial to take place. For this reason, states are obliged to co-operate with the ICC in arrest or surrender of persons; be they nationals or not. The question arose due to the fact that 'surrender was used interchangeably with extradite.

The Statute distinguishes the two by defining surrender as the delivering up of a person by a state to the court while extradite is defined as the delivering up of a person by one state to another. The difference between the two words being so apparent, a misunderstanding should not arise. Moreover, having invested in the creation of the ICC, states are obliged to go by the provisions of their negotiated product if justice is to be attained.

The second issue is as regards immunities, considering that many states grant certain state actors' immunity from prosecution. The scope and extent of such immunities vary greatly. For example, Zambian parliamentarians enjoy immunity as far as utterances made inside parliament are concerned. The Zambian

[32] http://www.hrw.org

president is immune from prosecution for lawful acts done in his official capacity while in office. It has been suggested that such immunities only apply to domestic proceedings as the ICC's operations will not be impended by an individual's official capacity[33].

The third issue relates to the constitutional prohibition of life/perpetual imprisonment primarily arising in Latin America. The Statute provides for life imprisonment " when justified by the extreme gravity of the crime and the individual circumstances of the convicted person."[34]It should be noted that life imprisonment will not be the norm and is subject to a mandatory review process pursuant to article 110, after a person has served 25 years. Further by article 80, the Statute provides that the provisions therein, do not affect the penalties provided for, or prohibited at national level. This ensures that justice is attained both at national and international level.

3.6 The Complimentarily Principle.

Nations have the obligation to prosecute international crimes like those covered by the Rome Statute. However, all too often, they have failed to meet this obligation, thereby allowing those who commit genocide, war crimes and crimes

[33] Article 27 of the Statute. However, considerations may be made as regards the arrest or surrender of international diplomats.
[34] Article 77 (1) (b) of the statute

against humanity to avoid justice altogether. This was the driving-force behind the establishment of the ICC. Accordingly, the Statute gives the ICC jurisdiction over these crimes when states fail to act.

The complementarity principle recognises and respects the sovereignty of states and accords to them the primary duty to prosecute the said crimes.[35] This principle is recognised in the preamble of the statute as a fundamental means of enhancing international co-operation. The circumstances that warrant the ICC to investigate or prosecute a matter are genuine inability or unwillingness to investigate or proceed with the matter by the nation which ordinarily has jurisdiction over it.[36] This is to ensure that if justice cannot be got at national level, then at least the international plane should provide the victims with hope for redress.

3.7 Regional Legal Representation In The Selection Of Judges.

Constituting the first bench for the ICC was a daunting task especially that firstly, not only were the most experienced judges in the fields of Criminal and International law sought, but the said judges had to equitably represent the major regions of the world with as much neutrality as possible in gender.

The panel of judges is composed of seven women and eleven men. It is by far the most gender sensitive panel among all international tribunals. With a total of

[35] International Criminal Court; Making the International Criminal Court Work- A Handbook For Implementing The Rome Statute, Vol. 13, No. 4(G),14
[36] Article 17 of the Statute.

eighteen judges; there are three representatives from Africa, Three from Asia, four from Latin America, one Eastern Europe and seven from the Western Europe and others group.

The judges were formerly sworn into office during an inauguration held on 11th march 2003. The regional representation ensures that the whole international community feels a part of the judicial process and will therefore be willing to participate and meet their obligations, thereby enhancing the globalisation of justice.

3.8 The Establishment Of The Trust Fund For Victims.

At whatever level in the legal order, justice cannot be fully attained without addressing the issue of reparations to the victims, establishing general principles for restitution, compensation and rehabilitation.[37] On the basis of this principle, the ICC establishes a Trust Fund for the victims of and families affected by the crimes.[38] The Trust Fund is a necessary and integral component of the court's restorative structure that will ensure reparation and assistance to victims of genocide, crimes against humanity and war crimes. In particular, the Fund will be an important complement to the reparations orders of the Court in such cases as when perpetrators do not have sufficient funds to pay for such an order.

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[37] C. Muttukumaru (2001) Reparation of Victims, in Lattanzi & Schabas, Essays on the Rome Statute, Cambridge: University press, 303

[38] Article 79 of the Statute

The Fund is to be under a Board of Directors elected by the Assembly of states with particular regard to equitable geographical distribution, and also taking into account the need to ensure equitable gender distribution and equitable representation of the principle legal systems of the world.[39] The said directors are to serve for a three-year term in their individual capacity. They are to be of high moral character, impartiality and integrity; and should have competence in the assistance of victims of serious crimes.[40] All this is done to ensure that justice is not only done, but is seen to be done.

It is incumbent upon every civilised legal system to put in place measures and set up minimum standards that ensure the attainment of the ultimate goal of the system; that is justice. In the case of the ICC, the foregoing measures compound into the minimum standard requirement for the globalisation of justice.

[39] PCNICC/2002/2, annex XIV
[40] The International Criminal Court Monitor, Issue 24, April 2002

CHAPTER FOUR.

4.1 ZAMBIA AND THE ICC: WHAT WOULD BE ZAMBIA'S POSITION IF IT RATIFIED THE UNITED STATES' "ARTICLE 98" AGREEMENT.

As pointed out in chapter one, Zambia's having ratified the Rome Statute entails that should any of its nationals or asylum seekers have committed the crimes over which the ICC has jurisdiction, Zambia is obliged to prosecute them or to surrender them to the ICC, in appropriate cases, upon the Court's request.

Notwithstanding the foregoing position, which in essence applies to all states parties to the ICC, article 98 of the Statute recognises agreements among ICC member states to resolve competing claims to prosecute a suspect. For example, if one government sends a soldier to another country where he commits a war crime, both the sending and the host governments would have legitimate interest in prosecution. Article 98 permits them to enter into an agreement ordering their claims - to decide which prosecution would take priority.[41] The statute requires the ICC to defer to the resulting national court process, assuming that it is conducted in good faith. Ordinarily, non-prosecution of any crime which falls under the jurisdiction of the Court by a state party automatically invokes the Court's power to prosecute the perpetrator of the crime in question.

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http://www.hrw.org/editorials/2002/icc0930.htm

It must be emphasised that the said article 98 is only applicable as between and / or among states that have either signed the Rome Treaty or those that have gone further and ratified it, like has the Zambian government.

4.2 THE UNITED STATES' ARTICLE 98 AGREEMENTS.

On December 31 2000, the United States under the Clinton administration signed the treaty ushering in the ICC amid calls that it was inadvertently flawed. This was taken by the international community to be a reasonable move, if only because it allowed the United States to remain engaged in shaping this new institution. The assumption had been that United States would wait and see how the court operated before moving forward through ratification. However, this was not so. Soon after taking up office, the Bush administration notified the United Nations, on May 6, 2002, that the United States did not intend to become a party to The Rome Statute.[42] This was only about four months after the signing the statute. Earlier, in June 2001, the European Union issued a common position expressing full support for the early establishment of the ICC, and encouraging the Bush administration to cooperate with the court but to no avail. The timing of this decision could not have been worse for the United States. It was so ironic and put the Bush administration in an awkward position of seeking law-enforcement cooperation in tracking down terrorist suspects while opposing a historic new law-enforcement institution for comparably serious crimes. As a result, the unsigning of the treaty by the United States has undoubted aggravated

[42] http://www.state.gov/t/pm/rls/fs/2002/23426.hmt

relations between the United States and the European Union, as well as some emerging democracies, who are among the court's strongest supporters. Some countries such as South Africa and Argentina, had already ratified the treaty and viewed the court as an important insurance policy against retrenchment;[43] thereby straining there relations with the United States.

In a statement issued by ambassador for war crimes, Pierre-Richard Prosper at the withdrawal of the United States signature from the ICC, it was emphasised that the Bush administration was not going to war with the Court. However, barely six weeks later the United States launched a comprehensive campaign against the ICC. This was in stark contrast with the ambassador's statement. The campaign involved several components. Included were:

Security Council Resolution 1422. This was one of the key prongs in the Bush administration's campaign to undermine the ICC. On June 18 2002, United States diplomats presented two resolutions at a Security Council meeting to discuss the mandate for peace-keeping forces in Bosnia-Herzegovina. The first resolution was to exempt only those forces deployed in Bosnia while the second was to exempt peacekeepers in all United Nations operated or mandated operations. The United States diplomats attempted to justify these proposals as an effort to make peace-keeping more efficient and effective when in fact they sought to undermine the ICC.

[43] http://www.hrw.org/press/2002/05/icc0506.htm

In the draft resolution governing peace-keeping in Bosnia-Herzegovina, the United States urged the Security Council to agree that persons from contributing states acting in connection with such operations should enjoy in the territory of all member states, other than the contributing states, immunity from arrest, detention and prosecution with respect to all acts arising out of the operation and that the immunity should continue after the termination of their participation in the operation for all such acts. This was starkly a subtle way of getting around the provisions of the Statute.

The alternative comprehensive draft resolution proposed that identical operative language cover all United Nations peacekeeping operations. By enshrining immunity from arrest, detention and prosecution for peacekeepers not only in the state that hosts a peacekeeping operation, but also in every other United Nations member state. The proposal if let through would have drastically altered the obligations of states parties to the ICC such as Zambia; specifically, the obligation to surrender an accused to the Court would have been weightless. In fact, both proposals would have entailed that states parties do not turn over to the ICC, persons accused of being behind atrocities on the territory of other member states or on their own territory. The result of this would have been an outright rewrite of the ICC Treaty in addition to a requirement to nullify the national laws of many states parties that have now incorporated the ICC's "prosecute or surrender" obligation in their national laws.

Such a result would also have been inconsistent with article 27 of the Statute which establishes the "irrelevance of official capacity" rule by providing that immunities under national or international law do not bar the ICC from assuming jurisdiction so that high ranking officials do not hide behind the veil of official capacity. The provision is consistent with a strong movement in international law against granting immunities for those who commit serious human rights crimes. The United States proposals would have reversed this trend and sent a dangerous signal to peacekeepers that they are above the law. The European governments rightfully rejected these proposals as a frontal assault on governments' obligations to the Court.

Having been unsuccessful with its bid, the United States vetoed renewal for the United Nations peacekeeping mission in Bosnia-Herzegovina. The United States further threatened to veto the renewal of all peacekeeping missions if the Council members did not agree to the text of Resolution 1422. Eager to preserve peacekeeping operations, Security Council members adopted the text, on July 12 2002, despite its serious flaws. The gist of the Resolution is that it grants immunity to personnel from ICC non-states parties involved in United Nations established or authorized missions for a renewable twelve-month period.

While waiting for a possible renewal of the Resolution or even obtaining a permanent blanket immunity for its forces, the United States came up with "Article 98 Agreements." The agreements are in form of a pledge aimed at ICC

states parties promising that in case a United States National accused of any crime of mass violence was found on their territory, they would harbour him and hand him over to the United States instead of prosecuting him or surrendering him to the ICC. This is a clear contravention of the states obligation to "prosecute or surrender" and not many states parties were willing to pursue this path. Consequently, the United States started and is still using coercion to woo states onto its side. For example, on June 12 2002, the United States Defence Secretary, one Donald Rumsfeld , announced that Washington would oppose spending on a new NATO headquarters in Brussels until Belgium repealed its universal jurisdiction law that allows the perpetrators of atrocities to be prosecuted in Belgian courts.[44] Rumsfeld made the threat even though Belgium adopted legislation in April 2002 providing ample protection against misdirected cases, while allowing its courts to continue as a forum of last resort for atrocity victims.

In addition, United States envoys have been circling the globe threatening to cut off military aid and other benefits from any government that would not agree never to send a United States suspect to the ICC by a given date. The European Union and its associated states have stood up to this strong-arming, but weaker and more vulnerable governments are having a harder time resisting. They genuinely value the role to be played by the ICC but are also in dire need of America's resuscitating 'carrot'. As a result, a good number of these states have opted to enter into secret "article 98 agreements" in exchange for 'bread.'

[44] http://www.hrw.org/editorials/2003/icc061803.htm

The global view is that the main reason why the United States unsigned the Treaty and has even gone to such lengthy extents to maintain its position is that an increasingly influential faction in the Bush administration believes that Unites States military and economic power is so dominant that the United States is no longer served by International Law.[45] However, the United States also has its own version.

According to the Bush administration, the unsigning of the treaty was inevitable because of what the United States Department of State termed "significant problems with the ICC Treaty." [46]They include:

JURISDICTION: In its fact sheet for the bureau of Political-Military affairs[47], the Department of State avers that the ICC purports to have jurisdiction over certain crimes committed in the territory of a state-party, including by nationals of a non-party. Thus the Court would have jurisdiction for enumerated crimes alleged against United States nationals, including service members, in the territory of a party (article 12); even though the United States is not a party. The Department of State goes further to state that the United States objects to the investigation or prosecution of its citizens for such offences as the ICC purports to have jurisdiction over because the United States has not consented to the treaty which has no safeguards to ensure against politically motivated investigations and prosecutions. The argument as regards jurisdiction should not arise as the

[45] http://www.hrw.org/editorials/2002/icc0630.htm
[46] http://www.state.gov/t/pm/rls/fs/2002/23426.htm
[47] Dated August 2, 2002

exercise of jurisdiction by the ICC is in conformity with international legal norms pertaining to exercise of jurisdiction over foreigners. One of the bases upon which a particular country can assume jurisdiction over foreigners is the territorial principle. Under this principle, a state will, as a general rule, exercise jurisdiction over any person found within its territory, or over any matter that occurs within its territory. Even people on temporal basis or in transit are subject to the said jurisdiction. In addition, by virtue of the Universality Principle, a state can assume jurisdiction in respect of international crimes; that is, offences prohibited by International Law or the international community as a whole. The concept of universal crimes was recognised in article 19 of the Geneva convention on the High Seas and article 105 of the 1982 Convention on the Law of the Seas. Today, the international community, the United States included, considers such crimes as crimes against humanity, genocide and war crimes as crimes against humanity. It is on the basis of the Universality principle that Adolf Eichman, one of the principle perpetrators of the holocaust, was successfully arrested, tried and found guilty. Therefore, being of near universal application, the ICC is not and can not be said to be acting to the detriment of non states parties when all it is doing is conform to International Law norms as regards the crimes under its umbrella. It should be noted at this point that lack of consent to the jurisdiction of the Court is irrelevant considering the gravity of the crimes under consideration. Though it would be costly to prosecute the said crimes under the universality principle, and questions of impartiality would arise under the Territorial principle, these crimes would still be thus prosecuted and by and large, with the

cooperation of the states harbouring the suspected perpetrators, justice would be attained in one form or the other. The ICC comes in handy to afford the nations an international, just and impartial legal framework with a permanent seat for easier operation, especially in cases where the perpetrator's country of origin refuses to prosecute or have the wrongdoer handed over to either the country that claims territorial jurisdiction or universal jurisdiction for the crime under consideration.

NEW CRIMES: A state party to the treaty can opt out of crimes added by amendment to the statute, thereby exempting its nationals from the ICC's jurisdiction for these crimes. A non-party cannot opt out, as per article 121 of the treaty. The writer's view is that his article, particularly paragragh 5, the court should have considered a more balanced position such as not considering crimes contained in the amendment when the said crimes are committed on the territory of a state party that has not ratified or accepted the amendment. If the crimes under consideration are committed by such a state's national, on the territory of a state that ratified the amendment, the Court's jurisdiction should be extended thereto. In other words, for purposes of amended crimes states parties that do not ratify should be considered as non-parties. This would promote equal treatment of equals, a principle component of distributive justice.

AGGRESION: The Department of State argues that the crime of aggression is included within the Court's jurisdiction but has not been defined. The parties to

the treaty will amend it to define this crime and specify the conditions for exercise of jurisdiction over it (section 5). In addition, only parties to the treaty can opt out of the jurisdiction of the court over the crime of aggression per article 21. Further, many states advocate conditions for the working of the ICC that could bring the Court into conflict with the Security Council and the United Nations charter.

The crime of aggression, generally taken to be an unprovoked attack or harmful action by one country against another[48] is hard to define in specific terms as the circumstances have to be evaluated from case to case. It is hoped that an enumerated inclusive definition will be come up with before conflict as regards what should or should not be included arises. States-parties' opting out of the Court's jurisdiction has already been discussed above. As regards conditions for the working of the ICC, it can generally be said that the Treaty establishing the Court has to the highest degree possible, conformed to International Law norms of which provisions of the United Nations Charter is but a part. Therefore, conflict in this regard does not arise.

PROSECUTOR: The Prosecutor can proceed with any investigation on his or her own initiative with the agreement of two or more judges of a three-judge panel (article 15). The provision of the article, unlike the way the Department of State puts it is to the effect that the prosecutor is to analyse the seriousness of the information received in addition to which he may seek additional information from the states, organs of the United Nations, inter-governmental or non-governmental

[48] P.H. Collin (1999) Law Dictionary (3rd edition), New Delhi, Universal Book Stall, 8

organisations, or other reliable sources that are deemed appropriate, and may receive written or oral testimony at the seat of the court.[49] It is only at this point that the prosecutor is obliged to submit to the pre-trial chamber a request for authorisation for an investigation, the request being accompanied by any supporting material collected.[50] After consideration of the request as well as the supporting material, the Pre-Trial Chamber will consider whether or not there is a basis to proceed with the investigation. If the investigation is proceeded with and the perpetrators of the crimes are prosecuted, they are to be afforded a fair trial within the highest standards of due process, including the right to counsel, the right to remain silent, the presumption of innocence and the right to multiple appeals if they so wish. These safeguards of course depend on the quality and expertise of the people applying them. The wide representation of the world's regions reflected in the selection of experienced and specialised judges ensures that there is impartiality. With a history of having a positive influence in the setting up the tribunals dealing with allegations of war crimes, genocide and crimes against humanity in the former Yugoslavia and Rwanda, the United States would have had a chance at exerting influence over selection of prosecutors and judges and equally important, the creation of the Court's culture. However, in order to save face, the United States regrettably chose to stay on the wrong side of history.

[49] article 15, paragragh 2
[50] Article 15, paprgragh 3 of the Statute

COMPLIMENTARITY: The ICC is required to defer to national prosecution unless the court finds that the state is unwilling or unable to carry out the investigation or prosecution (article 17). By leaving this decision ultimately to the ICC, the Treaty would allow the ICC to review and possibly reject a sovereign state's decision not to prosecute, or a sovereign court's decision of not guilty or dismissal with prejudice in specific cases.

The concept of complimentarity entails that the ICC respects state sovereignty and recognises the importance of independence of jurisdiction exercised by states. The United States accepts the responsibility to investigate its own citizens for offences under the jurisdiction of the ICC should such offences occur. It is further argued that the policy of the United States is to encourage states to pursue credible justice within their own institutions, consistent with their responsibilities as sovereign states.[51] This is a way of conceding to the provisions of the Statute in that the Court is put in place to ensure that sovereign states diligently carry out their responsibilities in the pursuit of credible justice failure to which the court will invoke its jurisdiction. With such a policy in place, were it a state party, the United States would have worked harmoniously with other states parties to attain universal justice since due process of law exercised by a state party in investigating or prosecuting a case precludes the court from invoking its jurisdiction. The principle of complimentarity only seeks to put states on the straight and narrow so as to curb crimes of mass violence. It should be therefore supported and not discredited.

[51] http://www.state.gov./t/pm/rls/fs/23428.htm

Instead of having a permanent criminal court, the United States advocates for alternatives which it claims are more suitable and give more confidence. The Department of State opines that states should pursue credible justice at home rather than abdicating responsibility to an international body. These are the same words of the ICC but said differently. The ICC does not take the pursuit of credible justice at home as an alternative but as a starting point because some states have and continue to operate unjustly where crimes of mass violence are concerned. It is only then that the court can invoke its jurisdiction to investigate and/or prosecute the wrong-doer. The ICC is to operate at arms' length as a supervisor ensuring that states carry out the duties incumbent upon them as sovereign states.

In addition, it is proposed by the United States that where domestic legal institutions are lacking, but domestic will is present, the international community must be prepared to assist in creating the capacity to address the violations be it through political, financial, legal or logistical support. Where domestic will is non-existent, the international community can intervene through United Nations Security Council, consistent with the United Nations Charter.

Further, ad-hoc international mechanisms may be created under the auspices of the United Nations Security Council, as was done to create the International Tribunals for the former Yugoslavia and Rwanda, or hybrid courts consisting of

international participants and the affected state participants can be authorised as in the case of Sierra Leone. There are times when the international community offers more verbal assistance than tangible action, resulting in many a wrong-doer going unpunished. The ICC will ensure that the perpetrators of the heinous crimes under the Court's jurisdiction are prosecuted. As regards tailor-made tribunals, these are costly to set up and they take a very long time thereby delaying the attainment of justice. Some cases go unpunished because of the bureaucracy in setting up tribunals.

In view of their arguments, the United States picks on article 98 as an instrument to "avoid any disruptions that might be caused by the treaty". This is to be done in conjunction with all those nations that sign the so called "Article 98 Agreements." The essence of the agreements is that ratifying states pledge not to hand over United States national who are perpetrators of the heinous crimes under consideration, to the ICC but instead hand them over to the United States.

Not being a state party, the United Nations has no standing as regards provisions of the Treaty which only apply to states parties, such as article 98.

If Zambia were to sign the article 98 impunity agreement, it would be violating the Rome Statute because any state that has ratified the Rome Statute may not lawfully sign an agreement providing immunity from ICC prosecution with a state that has repudiated or has not signed the Rome Statute.

The Rome Statute grants the court jurisdiction over the crimes of genocide, war crimes and crimes against humanity if they occur in the territory of a state party or were committed by its nationals.[52] While the Statute allows a state to conduct its own investigation and prosecution, the Court retains the authority to investigate or prosecute if a state is unwilling to do so. The authority acts as a guarantee against impunity and is fundamental. Zambia's signing the 'article 98 agreement" would therefore be treacherous as it would be supporting universal justice on the one hand and impunity on the other. This would undercut the jurisdictional regime established in the Statute.

In the instances covered by an impunity agreement such as the "article 98 agreement", the ICC would be unable to prosecute individuals over which it should have jurisdiction. By turning over to the United States a person on the basis of the "article 98" agreement, Zambia would be preventing the court from stepping in and exercising jurisdiction if the United States proves unwilling to conduct an appropriate investigation or prosecution. By definition, any state that has repudiated the Rome Statute is unwilling to subject its investigations and prosecutions to ICC scrutiny. By granting a repudiating state, particularly the United States, exclusive jurisdiction over ICC crimes, Zambia would be opening the door to impunity since the "article 98 agreements" effectively alter the jurisdictional regime as established under the Rome Statute.

[52] As per section 12 of the Statute

For this reason, Zambia's entering into an impunity agreement with the United States would violate Zambia's obligations under the Statute. Moreover, the agreement itself would not be legally valid under article 98 since the article only applies to states parties of the ICC of which the United States is not one. In order to have consistency as regards article 98(2) which pertains to conformity with international agreements in the surrender of diplomats, and article 12 which deals with jurisdiction of the court over both states parties and states that are not party to the ICC, article 98(2) must be read as a routing mechanism. Only state parties can benefit from an agreement that allows them first chance at prosecuting their own nationals for ICC crimes committed on the territory of another state. Jurisdiction-routing as applies to the ICC is not favoured by some countries such as the United States and international organisations like the Human Rights Watch. However, it is consistent with the over-all goal of the Statute; to ensure that the crimes under the Court's jurisdiction are prosecuted by national courts subject to ICC scrutiny or by the ICC itself. Jurisdiction-routing still favours the guarantee against impunity which is fundamental to the Rome Statute. Therefore, Zambia's signing of the "article 98 agreement" with the United States would be tantamount to violating the object and purpose of the Statute.

Having signed or rather ratified the Rome Statute, Zambia is, according to the Vienna Convention on the Law of Treaties, "obliged to refrain from acts that would defeat the object and purpose" of the Rome Statute. The purpose of the Statute as made clear in the preamble and articles 12 and 27, is to establish a

system of individual accountability for the most serious international crimes. As the United States has repudiated the Statute, it has rejected the complimentary role of the ICC. That is, the United States has not agreed to the ICC's authority to assess national prosecutions and step in where appropriate and, in effect it has not taken steps to eradicate impunity. By entering into an "article 98 agreement with the United States, Zambia would be defeating the very object and purpose of the Statute thereby demeaning the establishment of the Court.

As a matter of policy, Zambia's facilitating of widespread immunity for United States nationals through the negotiated bilateral agreement with the United States would provide a dangerous precedent. Zambia would be endorsing a two-tier rule of law: one that applies to United States nationals and another that applies to the rest of the world's citizens. This would significantly weaken International Law. States, Zambia included, should therefore work together in resisting the Bush administration's ideologically driven attack on the ICC.

In addition, if Zambia contributes to the United States' success in obtaining impunity agreements from many states by being a signatory itself, it may encourage other nations, particularly those opposed to the ICC, to pursue similar immunity for their own citizens. Considering the fact that Zambia's geographical position is at the core of war-torn Central Africa, tyrants in some of the surrounding nations would turn Zambia into a haven for perpetrators of atrocities

to the disadvantage of justice attainment and national security. This would fundamentally undermine the Court.

It is also important for Zambia to recall that article 98(2) was essentially inserted into the Statute at the behest of the United States. States agreed to its insertion in order to retain the United States involvement in the ICC project. Since the United States officially repudiated the ICC, Washington eliminated the underlying rationale for a bilateral agreement with the United States, since the Bush administration would refuse to surrender an American suspect to the ICC even if the Court found that the United States investigation or prosecution had been a complete sham.

Zambia should therefore join hands with proponents of international justice in opposing United States efforts to exploit article 98(2) of the Statute by entering into impunity agreements with states parties and signatory states to the ICC. At stake is the integrity of the ICC, a vital instrument for international justice.

CHAPTER FIVE

5.1 THE IDEAL PATH IF ZAMBIA IS TO MAKE A POSITIVE CONTRIBUTION TO THE QUEST FOR THE ATTAINMENT OF UNIVERSAL JUSTICE.

The very first positive step taken by Zambia as a contribution towards the attainment of universal justice was envisaged in its ratifying of the Rome Statute on November 30, 2002. With the said ratification came certain obligations and rights the meeting and enforcement of which act as a check in ensuring that the path to the intended goal is maintained.

The obligations include the requirement that Zambia is to comply with requests From the ICC for cooperation and assistance with the ICC's investigations and prosecutions. Part 9 of the Rome Statute sets out the details of this obligation and the types of assistance a state party like Zambia, may be asked to provide, thereby contributing to the attainment of universal justice. These include arresting and surrendering suspects, enforcing the orders and judgments of the ICC, including seizing and forfeiting proceeds of crime, protecting victims and witnesses.

The entailment of the part 9 obligations is that since Zambia ratified the Statute, it subjected itself to the ensuring that the norms of justice are promoted, both at national and international level. Therefore, at national level, Zambia cannot be seen to pass or adopt laws that are contrary to the attainment of national and

ultimately international justice. In the same vein, on the international level, Zambia cannot be seen to enter into any kind of agreement the content of which would be injurious to the intended goal of the ICC; that is, the attainment of justice. The greatest threat to the ICC at present constitutes in the American led impunity agreements referred to as "article 98 agreements"[1], which Zambia should at all costs avoid being party to, if it is to make a positive contribution to the quest for the attainment of universal justice.

In the said quest, there is a general obligation to comply as provided for under article 86 of the Statute. The article provides to the effect that states parties, in this particular situation the requirement is that Zambia shall, in accordance with the provisions of the Statute, cooperate fully with the Court in its investigation and prosecution of the crimes within the jurisdiction of the Court. The ICC has no police of its own and will have to depend on the cooperation of states parties at most points of its operation. Therefore, it is incumbent upon Zambia as a state party, to ensure that it does not refuse to comply with any request for assistance or cooperation. However, there are circumstances in which, as of right, Zambia would refuse to assist or cooperate with the Court, even though the same are of a limited nature. They include:

Protection of national security as provided for under articles 72 and 93(4) on the basis of which Zambia, as a state party may deny a request for assistance, in whole or in part. It must be noted though that such denial would only hold if the

[53] The details as regards the form that such agreements take have been discussed in Chapter Four.

request concerns the production of any documents or disclosure of evidence which relates to national security. Provided that all reasonable steps to find a way to provide the information without prejudicing its national security had been taken.

Another situation in which Zambia may exercise its right to refuse a request for assistance is as pertains to article 93(1)(1) which states that a state may refuse a request for assistance of the kind not specified in the Rome Statute but referred to in article 93(1)(1), if providing the assistance requested is prohibited under national law. The assistance alluded to is of any kind, gotten with a view to facilitating the investigation or prosecution of crimes within the jurisdiction of the Court. Even then, Zambia first has to try to provide the assistance requested in an alternative manner or subject to conditions, such as on a confidential basis for the sole purpose of new evidence.[1]

Evident from the rights of states to deny assistance or cooperation with the court is the fact that there has to be a balance between national interest and the quest for the attainment of universal justice. It should be pointed out that if Zambia's national laws and procedures are drafted and formulated in such a way as to promote justice at national level, the national law in general will become a channel towards the attainment of the ICC goal, being universal justice. In addition, there has to be a deliberate effort made to ensure that ICC norms are reflected in the Zambian constitution. Now that the Zambian constitution is being

[54] Article 93(8)(b) of the Rome Statute

amended is the best time for civil society and other stakeholders advocating for the ICC to ensure that ICC norms are advanced into being part of the supreme law of the land. This would be a leap on the right direction.

Zambia also has an obligation to arrest and/or surrender a suspect when requested by the ICC.[1] To this effect Zambia should see to it that national procedures for the arrest and surrender of ICC suspects are available. The country cannot be seen to pass laws or work procedures that are contrary to its obligations as an ICC state party. As per article 59, if Zambia receives a request for the arrest and surrender or the provisional arrest of a person, it must take immediate steps to arrest that person following its national procedures and part 9; hence the importance of having national procedures compatible with ICC. The arrested person is promptly to be brought before the competent judicial authority to determine that the said person is the one named in the warrant[55], that the arrest was lawful[56]and that the arrested person's rights have been respected.[57] The arrested person also has a right to interim release or bail.[58] While ensuring that persons accused of committing the crimes of mass violence are duly arrested, the Court ensures that the procedure is carried out with due process under the presumption of innocence. The presumption of innocence when dealing with suspects is a pertinent contribution towards the attainment of

[55] Article 88 of the Rome Statute.
[56] Article 56(2)(a) of the Rome Statute
[57] Article59(2) (b) of the Rome Statute
[58] Article 59(2)(c) of the Rome Statute

universal justice. Therefore, Zambia should amply pursue the presumption of innocence route.

As regards the surrender of persons, this has to be done upon request by the ICC. This is the obligation at the core of the American impunity agreements. Zambia, as an ICC state party, is expected to surrender suspects to the ICC. If it happened that the country from where the suspect hails entered into an extradition agreement, the ICC's request will take precedence if the other country is also a state party. Where the requesting state is not a state party, consideration would be made as to whether Zambia has international obligation to extradite. In cases where it does not, then surrender to the Court takes precedence. However, in cases where Zambia does have the international obligation to extradite to a particular country, then it has to make a decision as to whether it would surrender the suspect to the ICC or extradite him to his country of origin. The decision should be made after due consideration of certain factors. For example, if the crime was committed on Zambian soil, the perpetrator would ordinarily be expected to be prosecuted in Zambia unless there are provisions to the contrary.

In this regard, the Zambian constitution provides to the effect that the supreme law of the land is to bind all persons in Zambia. No mention of nationality is made. Therefore, implicit in the provision is the fact that all persons found within

[59] Article 59(3) sets out some factors that national judicial authority must take into account in making a decision on the application for bail.

the boundaries of Zambia are subject to the Zambian jurisdiction, no matter where they hail from. In this vein and as a matter of policy, it would be inconceivable for Zambia to discredit itself as against its own constitutional norms by entering into impunity agreements that starkly place American nationals above the law. Such a move would not only be at the expense of the Zambian nationals, but the entire community of nations and most unforgivable, it would be at the expense of universal justice. Note that the writer is not against international obligations to extradite that are many a time states agree to. The content of the American impunity agreements is deliberately aimed at demeaning the concept of justice and placing the United States above International Law.

Zambia should take into consideration the fact that it is peripheralised by war-torn countries as a consequence of which it has an influx of refugees. Some of the refugees are possible tyrants that may have committed such atrocities as are within the Court's jurisdiction. They come to seek refuge in Zambia while in most cases, they leave behind powerful tyrants as heads of government. Being uncertain as regards their continued stay in power, most dictators would come up with one or the other form of impunity agreements. The result would be the turning of Zambia into a den of tyrants harboured in an impunity-encouraging manner, thereby suffocating the quest for the attainment of universal justice.

The said agreements must therefore be rejected by Zambia as a country advocating for a more peaceable and just world. Only then can Zambia be truly

said to be on the right path and contributing positively towards the attainment of universal justice.

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