Obligatory essay on

THE INTERNATIONAL CRIMINAL COURT AND ITS RELEVANCE TO ZAMBIA.

BY

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Dedicated to

My parent's, **Professor Richard Siaciwena** and **Mrs. Beatrice Siaciwena,**

Thank you for being my constant guide and inspiration, teaching me the value of education like all good parents should. I thank God for blessing me with parents that genuinely care about my future and my well- being. You have both gone out of your way to provide for me and to help make my years at UNZA bearable. May God richly bless you, may he bless you with long life and health and may he establish all your plans for the future.

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LIST OF ABBREVIATIONS

AFRONET	Inter- African Network for Human Rights and Development
CICC	Coalition for an International Criminal Court
ICC	International Criminal Court
ICCPR	International Convention on Civil and Political Rights
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
NGO	Non Governmental Organisation
SADC	Southern African Development Community
UN	United Nations

INTRODUCTION

The creation of the International Criminal Court is a historic victory for human rights and international justice. It is the first permanent international institution with jurisdiction over individuals who commit the most egregious violations of human rights law. There has been codification of laws governing war; nevertheless, the twentieth century was the most ravaged century in history characterised by an increase of brutality and the majority of horrific crimes perpetrated against innocent people committed with impunity.[1]

The International Criminal Court is essential in satisfying the need for making international standards of conduct more specific and to provide an important mechanism for implementation of these standards and ensure that perpetrators are brought to justice before the International Criminal Court when national courts are unable and unwilling to do so. The Court has its roots in the early nineteenth century. However, the story begins in 1872 when Gustav Moynier, one of the founders of the International Committee of the Red Cross, proposed a permanent court in response to the crimes of the Franco-Prussian war.[2] The next serious call came after World War 1, with the 1919 Treaty of Versailles. Framers of the treaty envisaged an ad hoc international court to try the Kaiser and German war criminals. Then, after World War 2, the allies set up the Nuremberg and Tokyo Tribunals to try Axis war criminals.[3]

[1] Introduction to the International Criminal Court, Internet, iccnow.org.
[2] THE COALITION FOR AN INTERNATIONAL CRIMINAL COURT (CICC), HAND- OUT ON THE HISTIORY OF THE INTERNATIONAL CRIMINAL COURT: AT A GLANCE.
[3] Ibid.

The world, reflecting on the holocaust cried, "Never Again!"; the call for an international institution to try individuals for the most heinous crimes resonated throughout the world and many thought the founding of the United Nations would bring the world closer to a permanent court. It was only after fifty years that the world's leaders met to prepare a treaty establishing a permanent international criminal court, referred to as the Rome Statute.

Consequently, the coalition for an international criminal court was established in 1995 comprising a network of over one thousand civil society organizations from all around the world, working together towards a common goal: the establishment of a permanent, fair, effective and independent international criminal court.[4] Two to three preparatory commission meetings were held each year establishing a number of issues inclusive of drafting a complementary set of rules of procedure and evidence for investigating and prosecuting genocides, crimes against humanity, and war crimes, the financing of the court and rights of the accused.[5]

From June15–17, 1998, 160 countries participated in the United Nations Diplomatic Conference of Plenipotentiaries on the establishment of an international criminal court in Rome, Italy, where member states overwhelmingly voted in favour of the Rome statute for the international criminal court and only 7 states voted against it.[6] On 11th April,

[4] THE COALITION FOR AN INTERNATIONAL CRIMINAL COURT (CICC), HAND- OUT ON AN OVERVIEW OF THE INTERNATIONAL CRIMINAL COURT: ICC AT A GLANCE
[5] Pre- Rome Preparatory Commission Papers, Internet, iccnow.org
[6] THE HISTORY OF THE INTERNATIONAL CRIMINAL COURT, supra note 2

2002, there was a simultaneous deposit of instruments of ratification by 10 nations bringing the total to 66 ratifications, surpassing the 60 required to trigger entry into force the Rome Statute.[7]

Zambia has actively participated and shown interest in the establishing of the International Criminal Court. She signed the Rome Statute when it was opened for signature at Rome on the 18th of July, 1998 and has also been involved at regional level and participated actively in generating the SADC Memo of understanding on the International Criminal Court and developing the Ratification Kit in Pretoria, South Africa in July, 1999.

Zambia needs an independent and impartial court system operating within the highest standards of international justice.[8] Zambia made efforts to push and advance its position on the establishment of a strong, independent and effective court. This effort was made by Zambia joining hands with a bloc of countries as well as regional grouping called the LIKE-MINDED GROUP, consisting of over 60 small and medium-sized countries. The Group advanced strong non-negotiable positions on various pertinent issues in the draft statute which include, amongst other things, jurisdiction of the Court, crimes to be included in the statute, acceptance of jurisdiction and role of the prosecution.[9]

[7] The ICC Monitor, Article entitled: 'A Victory For Peace'. June 2002. Issue No. 21.
[8] Speech by Bonaventure C. Mutale, SC at the UN Diplomatic Conference on the establishment of the ICC, Rome, July 1999.
[9] REPORT ON THE RATIFICATION AND IMPLEMENTATION OF THE INTERNATIONAL CRIMINAL COURT IN ZAMBIA (AND SOUTHERN AFRICA), (Lusaka, September 2002),p.14.

The aim of the Court is to prosecute individuals who commit the most serious crimes such as mass murderers and war criminals. The relevance of the International Criminal Court to Zambia extends to its intervention in the serious crimes committed in Zambia such as torture (for example, the 1997 coup suspects and Chama Chakomboka), murder (for example Richard Nganga and Paul Tembo) and rape. It must also be observed that those persons who have committed genocide have fled into Zambia and the Court can prosecute such criminals. In so doing, the Court will be upholding justice, the rule of law and legislative protection of Human Rights and Freedom in Zambia.

Furthermore, it will encourage Zambia to prosecute egregious crimes committed by nationals regardless of their status in society as ordinary individuals or politicians or government officials. If the national judicial system does not prosecute such criminals the International Criminal Court can exercise its jurisdiction. The Court is also relevant in deterring would be Criminals in the same respect. However, in order for the Court to effectively carry out its functions it is essential that the Zambian government surrenders suspects to the Court for trial upon request. Furthermore, the provisions in our domestic legislation on international cooperation must be amended and most others repealed and replaced in order to conform to the provisions in the Rome Statute.

In this paper we will endeavor to limit the scope of our study to illustrating the significance of the International Criminal Court to Zambia with regard to its role in the international justice system and its subsequent intervention at national level. The paper is divided into four parts.

Chapter one deals with the background to the International Criminal Court explaining the establishment of the Coalition for an International Criminal Court, the various outcomes of the preparatory committee meetings leading to the establishment of the court, the outcome of the United Nations Conference held in Rome, Italy in July, 1998 as well as the role and relevance of the Court stating the basis for it's existence.

The second chapter identifies the main provisions of the Rome Statute. The relevant articles include Article 27, which provides that the Statute is to apply equally to all persons without any distinction based on official capacity and Article 40, which provides that judges are to be independent in the performance of their functions, inter alia.

The third chapter states Zambia's position on the International Criminal Court laying down its active participation and interest in the establishment of the Court. The chapter proceeds to delve into an exposition of the inadequacies of Zambian domestic legislation in relation to international cooperation.

The fourth chapter concludes the study. It makes a summary of the paper and also attempts to give to give recommendations addressing the specific need for Zambia to incorporate Part 9 of the Rome Statute into Zambian laws.

METHODOLOGY

A large portion of this work is obtained from the website of the Coalition for an International Criminal Court, that is, www.iccnow.org.

Other materials that have been used include papers prepared by the Coalition for an International Criminal Court; The ICC Monitor(newspaper); the Report of the proceedings of the Diplomatic Conference on the Establishment of the Rome Convention by G.M. Kanja; papers prepared by the United Nations Department of Public Information, Amnesty International and the Lawyers Committee for Human Rights; a paper prepared by the Independent Student Coalition for the International Criminal Court; an article entitled "An NGO Perspective" by William R. Pace and Mark Thiereoff; a European Newsletter on the Coalition for the International Criminal Court; a book entitled "Crimes against Humanity" by Cherif Bassiouni; a paper prepared by the ICC secretariat for the Working Group on the Crime of Aggression; Questions and answers on the ICC prepared by the ICC secretariat; and a book entitled International Law by J.G. Starke amongst many other sources of written information.

An exclusive interview was done with the legal counsel at Afronet Mrs. Hope Chanda on October 2003 who held the view that the International Criminal Court is relevant to Zambia in trying individuals and the State when crimes against humanity are committed by the aforementioned. This is because a complainant may not be satisfied with the

finding of the Supreme Court which is the final Court of Appeal and may wish to seek further redress and the ICC provides such an avenue.

There was no readily available material on the Zambian position with regard the International Criminal Court even from institutions such as Ministry of Legal Affairs, Ministry of Foreign Affairs and Non- Governmental Human Rights Organisations. Apart from Mr. G. M. Kanja's unpublished report, this subject has not been written on. This justifies the need for this piece of work. That is to say, this essay will explain why the International Criminal Court is relevant to Zambia specifically. Moreover, it will stress the need to amend certain statutory provisions in order to conform to the Rome Statute with regard International Cooperation.

Chapter 1

Other terrorists in the mold of bin Laden are likely to arise in future, just as there are likely to be other Pol Pots or Slobodan Milosevics who will wreck havoc on substantial segments of humanity. The best way to deter mass killers is to establish without further delay a permanent international Criminal Court...

International Herald Tribune

1.0. Overview of chapter one

This chapter lays down the foundation for this dissertation by stating that the International Criminal Court came as a response to the holocaust, mass rapes, extrajudicial executions and other gross violations of international human rights and with almost total impunity by warlords and dictators. The chapter further explains the main purpose of the Coalition of the International Criminal Court since its formation on 25th February, 1995. It also gives the outcome of the United Nations Conference from 15-17 June 1998 where 160 countries participated as well as the outcomes of the nine Preparatory Committee meetings. Finally the chapter explains what the International Criminal Court is and the basis of its existence.

1.1. Background to the creation of the International Criminal Court

"Never again" was the communal vow after World War 2; the world must never see another Holocaust.Yet 50 years later, war in Bosnia, genocide in Rwanda, and the death of Pol Pot before he was tried for his crimes, all demonstrate that the global community had failed to uphold its promise. Warlords and dictators plan and commit mass rapes, extrajudicial executions, and other gross violations of international human rights and with almost total impunity. It is only by holding individuals accountable for violations of international law that the global community will be able to deal with perpetrators of the most serious crimes of concern to the national community. This is crucial both to aid present victims and deter future criminals.[1]

[1] ISC- ICC, HAND- OUT ON THE INDEPENDENT STUDENT COALITION FOR THE INTERNATIONAL CRIMINAL COURT, (Washington: ISC Publication, 2001)

1.2. Coalition for an International Criminal Court

On February 25, 1995, a small group of NGOs monitoring the UN General Assembly debate on the International Law Commission's draft Statute for an ICC met in New York and formed the NGO Coalition for an International Criminal Court, hereinafter referred to as the CICC, or 'the Coalition.'[2] The main purpose of the Coalition was to advocate the establishment of an effective and just ICC.

The Coalition would establish an informal steering committee comprised largely of groups involved in these earliest stages of cooperation including Amnesty International, Federation des International des Ligues des Droits de l'Homme, Human Rights Watch, the International Commission of Jurists, the Lawyers Committee for Human Rights, No Peace Without Justice, Parliamentarians for Global Action and the World Federalist Movement.[3] The Coalition works closely with like–minded governments and international organisations to achieve its goals.

The Coalition has sought to bring together a broad-based network of NGOs and international law experts to develop strategies on substantive legal and political issues relating to the then proposed ICC Statute. Since its establishment, the NGO Coalition has been mandated to focus on five interconnected goals.[4]

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[2] William R. Pace and Mark Thiereoff, an article entitled, "An NGO Perspective," (Kluwer Law International: 1999).
[3] Ibid.
[4] European newsletter #2, "Coalition for the International Criminal Court, March 2002.

- **Promoting education and awareness** of the ICC and the Rome Statute at the national, regional and global level.

- **Facilitating the effective participation of civil society and NGOS** in the negotiations of the Preparatory Commission for the ICC, in particular, of representatives from the south.

- **Expanding and strengthening** the global network of organizations working on the ICC.

- **Promoting Universal acceptance** and ratification of the Rome Statute, as well as promoting and facilitating technical cooperation to ensure the adoption of strong domestic implementing legislation.

- **Assuring the effective establishment of the ICC**.

  Of the 236 NGOS accredited by the General Assembly to participate in the Rome Treaty Conference, all but a few were members of the Coalition.

1.3. Outcome of the United Nations Conference, July 1998

From June15-17, 1998 160 countries participated in the UN Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court in Rome, Italy.

Here Member States overwhelmingly voted in favour of the Rome Statue for the ICC, with Senegal being the first country to ratify the Rome Statute on July17, 1998.[5]

The draft text submitted to the Diplomatic Conference was full of competing options and had over 1400 brackets indicating disagreement on the text. Through working groups, informal negotiations and open debates, a delicately balanced text emerged; a generally agreed solution was found for the many politically sensitive and legally complex issues. The Statute and the Final Act were put forward as a complete "package" for adoption. This package was the product of intense negotiations and judicious compromises designed to reach widespread agreement. India and the United States tried to amend the package. In each case a "no-action motion"- procedural device for not considering these amendments - - was adopted by an overwhelming majority.[6]

The Treaty was adopted by 120 nations voting in favour and at the Diplomatic Conference on July 17, 1998.Seven states voted against the Statute in an unrecorded vote; the names of these countries were not recorded. Three States - - China, USA and Israel - - stated their reasons for voting against the treaty. China indicated its view that the power given to the Pre- Trial Chamber to check the Prosecutor's initiative was not sufficient and that the adoption of the Statute should have been by consensus, not by a vote. The principal objection of the United States was over the application of the Court's jurisdiction to non-State parties; it also stated that the Statute must recognise the role of the Security Council

[5] THE COALITION FOR AN INTERNATIONAL CRIMINAL COURT (CICC), HAND- OUT ON THE HISTORY OF THE INTERNATIONAL CRIMINAL COURT: AT A GLANCE.
[6] The United Nations Department of Public Information, Amnesty International and the Lawyers Committee for Human Rights, Information Papers entitled, "Questions and Answers on the International Criminal Court," (New York:CICC Secretariat).

in determining an act of aggression. Israel said that it failed to comprehend why the action of transferring populations into an occupied territory was included in the list of war crimes.[7]

The Coalition for an International Criminal Court launched a campaign from The Hague calling for the worldwide ratification of the ICC Statute. The Rome Statute was left open for signature and ratification.

1.4. Outcomes of the Preparatory Commission meetings

The Preparatory Commission (PrepCom) was established by the UN General Assembly pursuant to a mandate embodied in Resolution F of the Rome Diplomatic Conference of Plenipotentiaries to draft the Elements of Crimes and Rules of Procedure and Evidence, and other instruments supplemental to the Treaty. Three sessions were convened in both 1999 and 2000. In 2001, two meetings took place and two more were held 2002 (8-19 April and 1-12 July). The NGO Coalition followed these sessions, gathered on a daily basis to exchange information concerning the ongoing developments, and organized meetings with NGOs and government delegations from all regions of the world.[8]

From 1996-1998, six sessions[9] of UN Prepatory Commissions were held at the UN HQ's in New York to work on a draft Statute to establish a permanent international criminal court. The first draft had been produced by the United Nations International Law

[7] Ibid.
[8] ICC UPDATE. 25TH EDITION, JANUARY,2002
[9] iccnow.org

Commission.NGOs attending these meetings under umbrella of NGO Coalition for an ICC advocated for a diplomatic conference to be held to finalise the treaty.

First Session (25 March – 12 April 1996).[10] This was an opportunity for states to negotiate and draft the text of a statute for a permanent international criminal court, following discussions at the two ad hoc committee sessions in 1995 and consideration by the General Assembly's 6th committee in November 2002. The motivation was the need to limit impunity for most egregious Human Rights crimes that have proliferated in the last several years. During this session, the Court's subject matter of jurisdiction was considered, inter alia, and the crimes defined.

Second Session (12 – 30 August 1996).[11] Here the rules of criminal procedure and evidence were proposed to be in the Statute. It was also suggested that the Statute be amended to require judges, when applying rules in specific cases, to apply rules of the Statute and those promulgated by the International Criminal Court. Some changes were made to some Articles and issues of fair trial and the rights of the accused were also discussed (Articles 25, 26, and 27).

Third Session (11-21 February, 1997).[12] The International Committee of the Red Cross (IRC) and Amnesty International gave their contributions. Amnesty International gave the definition of criminal persecution. There was also the inclusion of terrorism.

[10] Internet, iccnow.org.
[11] ibid.
[12] ibid.

Fourth Session (14-15 August, 1997).[13]Amnesty International contributed by raising the issues of organizing the Court and guaranteeing fair trial. The International Peace Bureau gave an analysis of issues and recommendations for action July, 1997. The Lawyers Committee for Human Rights contributed by stressing the need for an independent prosecutor.

Fifth Session (1-12 December, 1997.[14] The aspect of effective state cooperation was underlined in this session.

Sixth Session (16 March – 3 April 1998).[15] Contributions made bordered on the financing of the Court as well as principles for a just, fair and effective International Criminal Court.

Seventh Session (26 February- 9 March 2001).[16] At its Seventh Session, the Preparatory Commission considered five items, these being, the Relationship Agreement between the Court and the United Nations, the Financial Regulations and Rules of the Court, the Agreement on the Privileges and Immunities of the Court, the Rules of Procedure of the Assembly of States Parties and the crime of aggression.

Eighth Session (24 September-5 October 2001).[17] The items considered at the Seventh Session were further considered and discussed. Other items that were considered were the

[13] ibid.
[14] ibid.
[15] ibid.
[16] The United Nations, PCNICC/2001/L.3/Rev.1/Add.1, material for the ICC Prepcom Working Groups.
[17] The United Nations, PCNICC/2001/L.1/Rev.1, material for the ICC Prepcom Working Groups.

basic principles governing a headquarters agreement to be negotiated between the Court and the host country and the budget for the first financial year.

Ninth Session (8 to 19 April 2002).[18] Issues that were considered during this session were the establishment of a trust fund for victims, establishment of an effective advisory committee on nominations, ensuring the independence of the prosecutor in the draft financial rules of court, ensuring that the Court will be able to recruit temporary qualified specialist personnel, including gratis personnel, rapidly, and pledging advances of the first year assessments.

1.5. The role and relevance of the International Criminal Court

1.5.1 What is the International Criminal Court?

On 1st July 2002 the Rome Statute of the International Criminal Court entered into force, triggering the jurisdiction of the first permanent and independent court tasked with the obligation of investigating and bringing to justice individuals who commit the most serious violations of international humanitarian law, namely, war crimes, crimes against humanity, genocide, and once defined aggression. Unlike the International Court of Justice in The Hague, whose jurisdiction is restricted to States, the Court will have capacity to indict individuals.[19] The Court was created on the basis of the Rome Statute, a treaty adopted on July17, 1998 in Rome at the United Nations Diplomatic Conference of Plenipotentiaries.

[18] ibid.
[19] ICC UPATE. 25TH EDITION. JANUARY 2002.

The International Criminal Court is complementary to national jurisdictions, and will act only when national systems are unable or unwilling to genuinely carry out investigations or prosecutions of such crimes. To this effect, the primary national legislation and practices should enable States to bring to justice the persons responsible for the crimes under the Rome Statute. The jurisdiction of the Court is not retroactive.[20]It will only apply to those crimes that are committed after the entry into force of the Rome Statute. The international Criminal Court was established on 11th April, 2002, when the simultaneous deposit of instruments brought the total to 66, surpassing the 60 required to trigger entry into force of the Rome Statute.

The International Criminal Court offers new hope in cases where other avenues for bringing the perpetrators of the worst atrocities have failed.

As aforementioned, the legal framework of the Court was established at a UN sponsored conference in Rome with representatives of 160 countries. Following intense deliberations, the Rome Statute was adopted on 17 July, 1998 and by the established deadline of 31st December 2002, 139 countries had signed and rarified the Statute.

The work of the Court will be overseen by the States Parties. They will also provide management oversight regarding the administration of the Court. The States Parties cannot interfere with the judicial functions of the Court. Any disputes concerning the Court's judicial functions are to be settled by a decision of the Court itself.

[20] ibid.

1.5.2. The basis and necessity of the Court's existence

One major question that asked is, "why do we need another international court? Why not use the International Court of Justice?" The simple answer is that the International Court of justice, the principal judicial organ of the United Nations, was designed to deal primarily with the disputes between States. It has no jurisdiction over matters involving individual criminal responsibility and until adoption of the Rome Statute of the International Criminal Court; there was no permanent international mechanism capable of prosecuting the worst violations of humanitarian and human rights law. Since the International Criminal Court is a permanent, independent institution capable of addressing the crimes identified in the Rome Statute on an ongoing basis and the world over, it will be able to act more quickly than if an ad hoc tribunal had to be established.

The two ad hoc Tribunals for the former Yugoslavia and Rwanda were created by the UN Security Council to deal with egregious crimes in these regions during specific periods of time; they were not intended to address violations that occur elsewhere or to prevent violations in the future.[21] The International Criminal Court on the other hand is not restricted to time and place limitations.

1.6. Conclusion

This Chapter has given us a brief historical background of the creation of the International Criminal Court stating the establishment of the Coalition and the outcomes of the Preparatory Committee meetings and the United Nations Diplomatic Conference of Plenipotentiaries. The chapter concludes by explaining the role and relevance of the Court.

[21] The United Nations Department of Public Information, Amnesty International and the Lawyers Committee for Human Rights, Information Papers entitled, "Questions and Answers on the International Criminal Court," (New York:CICC Secretariat).

Chapter 2

The International Criminal Court is a permanent mechanism that could hold responsible individuals accused not just of garden-variety human-rights violation but more so those accused of the worst atrocities under law: genocide, crimes against humanity, or systematic slaughter of helpless civilians... there has not been such an institution since the [1948] Universal Declaration Of Human Rights.

Richard Dicker For Newsweek International.

MAIN PROVISIONS OF THE ROME STATUTE

2.1 Introduction

Chapter two outlines the main provisions of the Rome Statute, in the context of the objective of this dissertation, which is, to state the relevance of the International Criminal Court to Zambia. These provisions include articles 4 and 5 which inform us of the legal status and powers of the court and the crimes within the jurisdiction of the Court respectively. Other Articles refer to the important aspects of individual criminal responsibility, independence of the judges, privileges and immunities, rights of the accused, and reparations to victims amongst other important provisions.

2.2 Legal status and powers of the Court and the Crimes within the jurisdiction of the Court.

2.2.1. Legal status and Powers of the Court

The International Criminal Court was established on the 11th of April 2002 as a permanent institution having the power to exercise its jurisdiction over persons for the most serious crimes of international concern. This is provided for under Article 1 of the Rome Statute, which establishes the Court. The Article further provides that the International Criminal Court shall be complementary to national criminal jurisdictions. According to Article 4 of the Statute, the Court shall have legal personality as well as such legal capacity as is sufficient for the exercise of its functions and the fulfilment of its purposes.

2.2.2. Crimes within the Courts jurisdiction

The crimes that are within the jurisdiction of the Court are stated in Article 5 of the Statute. These include:

a) Genocide;

b) Crimes against humanity;

c) War crimes;

d) Aggression.

However, it should be noted that the Court will only exercise jurisdiction over the crime of aggression once the crime has been defined. Nevertheless, the other three crimes have been defined and the Court can exercise its jurisdiction. Article 6 defines genocide by listing acts such as killing members of the group; causing serious bodily or mental harm to members of the group and deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, etcetera .

According to R. Lemkin,[1] the jurist who coined the term 'genocide', genocide is characterised by mass killings involving unique circumstances. The offending nation, or perpetrator, is usually a non-democratic country that views the targeted group as a barrier or threat to maintaining power, fulfilling an ideology, or achieving some other goal.

The term 'crimes against humanity' has come to mean anything atrocious committed on a large scale.[2] However this is not the original meaning; neither is it the technical one. The

[1]Raphael Lemkin, "Axis Rule In Occupied Europe,"(1994, Unpublished article)
[2] Cherif Bassiouni, *"Crimes Against Humanity in International law,"* (Dordrecht, 1992)

term originated in the 1907 Hague Convention preamble, which codified the customary law of armed conflict. This codification was based on existing State practices that derived from those values and principles deemed to constitute the "laws of humanity," as reflected throughout history in different cultures.

The Nuremberg Charter represents the first time that crimes against humanity were established in positive international law and that category of crimes has been included in the Statute of the International Criminal Court, as well in the Statutes of the International Criminal Tribunal for the Former Yugoslavia, hereinafter referred to as the ICTY and the International Criminal Tribunal for Rwanda, hereinafter referred to as the ICTR. Crimes against humanity include the following acts when committed on a systematic or large scale basis and directed against a civilian population: murder; extermination; torture; rape; enforced prostitution and other sexual abuse; arbitrary deportation and forcible transfers of population; arbitrary imprisonment; enslavement; persecution on political, racial or religious grounds; and other inhumane acts. The International Criminal Court has expanded the list of specific acts to include the crimes of enforced disappearance of persons and apartheid.[3]

Crimes against humanity overlap with genocide and war crimes. Nevertheless, crimes against humanity are distinguishable from genocide in that they do not require an intent to "destroy in whole or in part," as cited in the Geneva Convention, but only target a given group and carry out a policy of wide spread or systematic" violations. Crimes are also distinguishable from war crimes in that they not only apply in the context of war-

[3] Internet article, Amnesty International, "International Criminal Court: Making the Right Choices," Part 1. P.27, iccnow.org

they apply in times of war and peace. Crimes against humanity have been evidenced in prosecutions before some national courts. The most notable of these trials include those of Paul Touvier, Klaus Barbie, and Maurice Papon in France, and Imre Finta in Canada. Paul Touvier was sentenced to life imprisonment for crimes against humanity, that is, for murdering seven Jewish hostages, an act he never denied.[4] In fact Touvier worked closely with former Gestapo chief Klaus Barbie.[5]

Barbie committed his most terrible crimes, as head of the Fourth Section of the Gestapo.[6] He was responsible for many individual atrocities, including the capture and deportation to Auschwitz of forty- four Jewish children in the village of Izien. In due course, Barbie was tried in Lyon and sentenced to life imprisonment in 1987 for his crimes against humanity. Maurice Papon was found guilty of complicity in crimes against humanity.[7] He had been charged in 1997 on the basis of his activities from 1942 to 1944 as Secretary General in Bordeaux for the Gironde region. Specifically he was charged with complicity in wartime arrests of hundreds of Jews and in their subsequent internment at the custodial camp at Merignac, outside Bordeaux.[8] Imre Finta, on the other hand, was acquitted of war crimes in 1990.

Crimes against humanity constitute a non-derogable rule of international law, that is, they are subject to international law. No perpetrator can claim the "defence of obedience to superior orders" and no statute of limitations contained in the laws of any State can apply.

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[4] International Herald Tribune, Article by Barry James entitled, "Touvier, Jailed French War Criminal, Dies at 81, Obituary," Thursday, July 18, 1996, p.2.
[5] Internet, Article Review, "Frenchman Faces Charges of Crimes Against Humanity," elibrary.com/getdoc.asp?pubname=All_Things_Considered_NPR&puburl=&
[6] Internet article, "Klaus Barbie (The butchery of Lyon)," www.boliviaweb.com/barbie.html
[7] Internet article, Dr. Robert Faurisson, "The Maurice Papon Trial," www.zundelsite.org/famisson
[8] Internet article, Ibid.

Furthermore, no one is immune from prosecution for such crimes, not even a head of State. Article 7 provides for this crime.

War crimes are defined in Article 8 of Statute and this definition includes wilful killing, torture or inhuman treatment, wilfully causing great suffering, or serious injury to body or health. These are acts covered under the provisions of the Geneva Convention.

2.3. Individual Criminal Responsibility; Irrelevance of official Capacity; and Statute of Limitations

2.3.1. Individual criminal responsibility

Individual criminal responsibility is a basic tenet of international law that individuals are individually responsible for crimes under international law. As the Nuremberg Tribunal declared: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." A corollary of the fundamental principle of individual responsibility is that "there can be no collective penal responsibility for acts committed by one or several members of a group".[9]Article 25 of the Rome Statute further emphasises that a person becomes criminally responsible and consequently liable for punishment whether they commit this offence jointly with another or induces the commission of such crime.[10]

A case in point is one that was handled by the Nuremberg Tribunal to try 'Major War Criminals' and when the Tribunal turned to the question of individual criminal

[9] Internet article, Amnesty international, "International Criminal Court: Making the Right Choices," iccnow.org

[10] Article 25(2), (3) (a) and (b).

responsibility of the twenty-two defendants, one of the defendants, Goring, was convicted of the first two counts for, inter alia, his knowledge of the aggressive plans to the Nazi Party and his leading role in the rearmament in preparation for aggression.[11]

The exceptions to this principle are laid down in Article 31 of the Rome Statute as grounds for excluding criminal responsibility.

2.3.2. Irrelevance of official capacity

The Court shall have equal jurisdiction over natural persons and persons with official capacity alike as provided for under Articles 25 and 27 of the Statute. It should be noted that immunities or special procedural rules which may attach to the official capacity of a person shall not bar the Court from exercising its jurisdiction over such a person. A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control as the case may be, as a result of his or her failure to exercise control properly over such forces in circumstances where, for instance, the military commander or person either knew or owing to the circumstances at the time, should have known that his forces were committing or about to commit such crimes or that the military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.[12]

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[11] ICC Secretariat, "Historical Review of Developments relating to Aggression," materials prepared for the Working Group on the Crime of Aggression, PrepCom 8-19 April 2002

[12] Article 28 of the Rome Statute.

2.3.3. Non-applicability of Statute of Limitations

The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.[13] A statute of limitations for crimes against humanity or war crimes would be inconsistent with the pledge of the three Allied Powers, the United Kingdom, the United States and the Soviet Union, on behalf of the 33 United Nations in the Moscow Declaration of 30 October 1943 to pursue those responsible for such crimes "to the uttermost ends of the earth" and "to deliver them to their accusers so that justice may be done". [14] None of the international instruments defining these crimes or providing International jurisdiction over them contains statutes of limitation. The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity provides that "[n]o statutory limitation shall apply" to genocide, other crimes against humanity and war crimes "irrespective of the date of their commission".

2.4. Organs of the Court; Independence of Judges; and Independence of Prosecutor

2.4.1. Organs of the Court

The organs of the Court as laid down in Article 34 include: The Presidency; an Appeals Division; a Trial Division; and a Pre- Trial Division; the Office of the Prosecutor; and the Registry. Article 36 states the qualifications, nominations and election of judges. Particularly, article 36(3) (a) states that the judges are to be chosen from among persons

[13] Article 29 of the Rome Statute.
[14] Internet article, Amnesty International, "International Criminal Court: Making the Right Choices," Part 1. P.73, iccnow.org

of high moral character, impartiality and integrity that possess the qualifications required in their respective States for appointment to the highest judicial offices. These candidates must have established competence in criminal law and procedure as well as the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings or competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court.

2.4.2. Independence of judges

Impartiality as a condition for the exercise of judicial function is now recognised as a general principle of law.[15]Article 10 of the Universal Declaration of Human Rights guarantees everyone the right to fair and public trial by "an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him". Article 40(2) states that judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence. No two judges may be nationals of the same State and they may only serve one nine-year term. A judge may be removed from office if he or she is found to have committed serious misconduct or a serious breach of his or her duties. These safeguards and many others are intended to ensure independence, integrity and competence and to prevent outside political influence.[16]

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[15] Ibid. P.2.

[16] United Nations Department of Public Information, Amnesty international and the Lawyers Committee for Human Rights, "Questions & Answers on the International Criminal Court," (New York, CICC Secretariat).

2.4.3. Independence of the Prosecutor

The Statute of the Permanent International Criminal Court ensures the independence of the Prosecutor.[17] Furthermore, Guideline 4 of the United Nations Guidelines on the Role of Prosecutors declares: "States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability."

The qualifications and expectations of the Prosecutor are similar to those required of judges, for instance, the prosecutor , who will be acting on behalf of the entire international community should be of high moral character, impartial, independent and highly competent.[18]

2.5. Privileges and Immunities

The International Criminal Court shall enjoy such privileges and immunities as are necessary for the fulfilment of its purpose.[19] This includes privileges and immunities for the judges, the Prosecutor, the Deputy Prosecutors, the Registrar, the staff of the Office of the Prosecutor and the staff of the Registry, counsel, experts, witnesses or any other person required to be present at the seat of the Court.[20] To ensure against abuse of privileges and immunities, the Court should be able to waive them on its own initiative.[21] Representatives of States Parties to the statute attending meetings of the assembly and its subsidiary organs equally enjoy privileges and immunities. This also applies to these

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[17] Article 42(1)
[18] Internet article, Amnesty International, " International Criminal Court: Making the Right Choices Part 2," P. 22, iccnow.org
[19] Article 48 of the Rome Statute.
[20] Ibid.
[21] Internet article, Amnesty International, " International Criminal Court: Making the Right Choices Part 4," P. 49, iccnow.org

Representatives participating in the proceedings of the Court. However, it is well accepted that immunities for high officials are not applicable with respect to international tribunals. This has been illustrated by the *Milosevic case* before the ICTY; it was also upheld by the *Pinochet case*, that is, *Regina v Bartle and the Commissioner of Police for the Metropolis and others EX Parte Pinochet.*[22]

The Rome Statute and relevant national implementing legislation such as that adopted by the United Kingdom and Canada, will allow countries to surrender their own heads of states and other officials to the International Criminal Court in response to requests for cooperation, reinforcing the *Milosevic* precedent.[23]

2.6. Rights of the Accused and the Right to Appeal

2.6.1. Rights of the accused.

Article 67 of the Rome Statute lays down the rights of the accused which include entitlement to a fair and public hearing and such hearing to be conducted impartially and without delay. The accused must also be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks.[24] The Nuremberg Tribunal has been criticised because the Tribunal had been established solely by the victorious allies and did not include neutral or German judges;

[22]25 Nov. 1998 (on appeal from a Divisional Court of the Queen's Bench Division,).
[23]Lawyers Committee for Human Rights, "Universal Jurisdiction: Meeting the Challenge Through NGO Cooperation." Discussion Paper for Conference Participants. April 2002.
[24] Article 67 1(a) of the Rome Statute.

counsel for the accused had limited access to the information in the possession of the prosecution; one accused was tried in absentia; and those convicted were denied the right to appeal.

The Rome Statute, on the other hand, clearly states in Article 67 (1) (c) that an accused must not be tried in absentia and further has the right to appeal under Article 81.

The guarantee of assigning legal assistance where the accused does not have any as provided for in Article 67 (1) (d) is an important one, especially in cases where an unpopular suspect is unable to find a competent counsel or any counsel at all.

2.6.2. The right to appeal

The full rights to appeal and revision of both a conviction and a sentence are assured in the Rome Statute.[25] Article 14(5) of the ICCPR provides: "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law". If the conviction is reversed on grounds which amount to a finding of miscarriage of justice, the person covered should have a right to compensation. Article 81 is an improvement of Article 25 of the Yugoslavia Tribunal's statute and Article 24 of the Rwanda Tribunal's Statute which do not expressly authorise a challenge to sentences.[26]

[25] Article 81

[26] PrepCom No. 4 (4-15 August 1997): Amnesty International Making the Right Choices Part 2. Organizing the Court and guaranteeing fair trial (Amnesty International's Basic Principles).

2.7. Protection and Reparation of Victims and Witnesses.

2.7.1. Protection of victims and witnesses

Article 68 of the Rome Statute provides for the protection of victims and the witnesses and their participation in the proceedings. Victims, witnesses and their families remain vulnerable to intimidation and retaliation as a result of trial, often long after the accused has been convicted or acquitted.[27] Therefore, the Court has an obligation in accordance to the Statute to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.

2.7.2. Reparations to victims

Victims or their dependants have an enforceable right to claim restitution, compensation and rehabilitation from those responsible for violations of their human rights.[28] The United Nations Commission on Human Rights reaffirmed in Resolution 1997/29, of 1st April 1997 that "pursuant to internationally proclaimed human rights and Humanitarian law principles, victims of grave human rights should receive in appropriate cases, restitution, compensation and rehabilitation."

A wide variety of international instruments have recognized this right including the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. Victims of grave human rights violations and their families have the right to reparations, including restitution, compensation and rehabilitation. The court itself has the power to award such reparations since it is unlikely that national courts, which were unable or

[27] Ibid, at 52.
[28] Ibid, at. 57.

unwilling to bring the person responsible to justice, will be able or willing to award reparations or to enforce the award.

2.8. Reservations

There are to be no reservations made to the statute. The statute expressly prohibits all reservations.[29] Permitting reservations would defeat the object and purpose of the statute - to bring to justice those responsible for the worst crimes in the world - by allowing states parties to redefine crimes, to add defences not consistent with international law or avoid obligations to cooperate with the court. It would also lead to an unworkable system in which each state would have undertaken a different set of obligations, instead of common international commitments.

2.9. Conclusion

The provisions of the Rome Statute were arrived at through the Preparatory Commission sessions where various human rights organisations submitted suggestions for inclusion in the statute. There was consideration for what other major conventions provided especially United Nations documents as well as making improvements where the Yugoslavia and Rwanda tribunal's statutes fell short.

[29] Article 120.

Chapter 3

Zambian delegation advocates for the creation of an independent and impartial court which shall be an effective complement to national criminal justice systems operating within the highest standards of international justice.

Mr. Bonaventure C. Mutale, SC
(Then Attorney General of Zambia).

THE ZAMBIAN POSITION

3.1. Introduction

The essence of this chapter is to state, specifically, the role and relevance of the International Criminal Court, pointing out the importance of incorporating the provisions on International cooperation that are laid down in the Rome Statute into Zambian domestic legislation. This chapter will begin by giving information of Zambia's active participation and interest in the establishment of the Court, making mention that Zambia signed the Statute, as well as her contributions during the course of establishing the Court and then proceed to discuss the role and relevance of the Court to Zambia specifically and conclude by assessing the aspect of incorporating the provisions on International Cooperation into Zambian law. Three Zambian Acts will be scrutinised in this regard, that is, the Extradition Act, the Mutual Legal Assistance Act and the Penal Code.

3.2. Zambia's active participation in the establishment of the Court

Zambia has been an active participant of the global process that has seen the creation of the International Criminal Court. Zambia actually signed the Rome Statute when it was open for signature at Rome on the 18th July, 1998.[1] The First Secretary, Legal, at the Zambian permanent mission to the United Nations in New York, Mrs Encyla Sinjela had represented Zambia at the six Preparatory Committee meetings. From 27 to 29 April 1998 there was a SADC Ministers of Justice and Attorneys General Meeting in

[1] INTER- AFRICAN NETWORK FOR HUMAN RIGHTS AND DEVELOPMENT (AFRONET), HAND-OUT ON THE ICC PROFILE, (Lusaka, 2001).

Swakopmund in Namibia. Zambia was represented by the then Minister of Legal Affairs, Vincent Malambo.

This meeting adopted the ten principles of consensus on the establishment of the International Criminal Court. The said ten principles formed the basis for the negotiation by SADC member states at the Rome Diplomatic Conference on the establishment of the International Criminal Court.[2]

The then Attorney General, Mr. Bonaventure C. Mutale, SC represented Zambia at the United Nations diplomatic conference on the establishment of the International Criminal Court on 17th June 1990. He stated that the International Criminal Court would be an independent and impartial Court which would be an effective complement to national criminal justice systems operating within the highest standards of international justice.[3] This is the reason why Zambia advocated for the establishment of the Court.

A further effort made by Zambia in the establishment of this Court was her joining hands with over 60 small and medium-sized countries forming a part of a bloc of countries as well as regional groupings called the LIKE-MINDED GROUP.[4] This became a leading force in negotiating for a strong and effective International Criminal Court, advancing strong non-negotiable positions on various important issues in the draft statute. These included the role of the prosecutor, jurisdiction of the Court and crimes to be included in the statute, amongst other issues. Zambia ratified the Rome Statute on 13th November 2002.

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[2] G.M. Kanja, *Report of the proceedings of the Diplomatic Conference on the establishment of the Rome Convention,* unpublished (Lusaka, 1998), p.14. Mr. Kanja was, at the time of writing this work, the Principal State Advocate of the Ministry of Legal Affairs.

[3] Ibid, pg. 15.

[4] ibid, pg. 15.

3.3. The Role and Relevance of the Court to Zambia

The general application of the Court in Zambia is generally that which is laid down in paragraph 1.5. above, which states that the major role of the Court is to investigate and bring to justice individuals who commit the most serious violations of International Humanitarian law including war crimes and crimes against humanity.

Most importantly, the International Criminal Court is complementary to national jurisdiction. Narrowing this down to Zambia it entails that, in the first place, Zambia ratifying and the Rome Statute is a preventive measure rather than a cure in the sense that in the event that, for instance, war breaks out in Zambia, whatever war crimes would be committed in that event would be tried by the International Criminal Court such as wilful killing, torture or inhuman treatment or intentionally directing attacks against the civilian population. Of course, this is for as long as persons who commit these offences are surrendered to the International Criminal Court for trial in accordance with Article 89 of the Rome Statute. This will improve the justice system in Zambia because 'justice delayed is justice denied'.

If Zambian humanitarian law has to be firm it needs to provide protection for far and wide situations and readily available solutions to intervene where there are grave beaches of this law. A government that waits to implement human rights conventions after there has been grave breach of humanitarian law rather than before such breach occurs is not completely concerned about upholding its citizens' rights, and ensuring remedies are available.

There are numerous murders that have been committed in Zambia in the political circles, for instance, and the fact that the government has been suspected to perpetrate these crimes the scenario is always that insufficient reasons are given to explain the cause of death. Often times interested persons and the citizenry at large are unsatisfied with the findings of the state and it is at such a point that an individual should be able to plead the Rome Statute and seek further redress from the International Criminal Court.[5] Cases in point include the murders of: Edward Shamwana, lawyer and National Party chairman; Cuthbert Ng'uni, Member of Parliament, Chama South; Baldwin Nkumbula, Businessman; Paul Tembo, Politician/ Businessman; Major Wezi Kaunda, Retired Army Officer; Lawyer; UNIP Lusaka Urban district chairman; Ronald Penza, Economist/Politician- Member of Parliament(Mbala); Clement Pumulo, secretary Electoral Commission of Zambia; and Richard Ngenda, lawyer.[6]

Findings of the Ronald Penza case,[7] for example, reveal that on the night he was shot dead at his home, the gunmen were reported to have stolen a laser disc and stereo leaving five vehicles in the car park. Goods alleged to have been stolen at a neighbouring house were left at Penza's house. Furthermore, six people were reported to have been at his house yet the police killed eight people and two youths accused of killing him were acquitted by the Lusaka High Court. Preliminary information shows that Penza's death is likely associated with the non- delivery of diamond proceeds to parties involved in an

[5] Interview with Mrs. Hope Chanda, Legal Counsel, Afronet, Lusaka, 17th October, 2003.
[6] AFRONET POSITION PAPER SERIES ON JUSTICE AND MEMORY: A QUESTION OF HISTORY AND ACCOUNTABILITY, PAPER No. 3. (Lusaka, June – August 2002). Pp. 4 – 23.
[7] Ibid, Pp. 9 – 13.

arms sale that had just taken place. The parties to the arms, diamonds and drug trafficking ring were mostly persons in high public and security office. Further preliminary information[8] shows that Penza may not have been part of the core group, but had intimate knowledge of the undertakings and was about to expose the activities of the persons involved in diamond smuggling for UNITA as a stepping- stone to his presidential ambitions.

The official explained cause of his death is murder in aggravating circumstances. However, a lot of gaps and questions remain unanswered. Where interested persons are not satisfied with the investigations in a case of this nature and are further not satisfied with the finding of the court, in this case the acquittal by the High Court, they would be able to appeal to the International Criminal Court, of course after the matter has been tried by the final court of appeal, which tries accused persons regardless of their official capacity. This can only occur when the Zambian government responds to a request by the International Criminal Court to surrender such a person to the Court after a complaint has been submitted to the Court or where the Court itself feels it is vital to request for any suspect to be surrendered for trial.

It should be noted that persons who have committed genocide have also fled into Zambia and for as long as the jurisdiction of the International Criminal Court is invoked these individuals can be tried.

[8] Ibid, p.11.

3.3.1. Police violence and torture

A major area that would require the intervention of the Court is police violence and torture. Widespread human rights violations by the police have continued. Police use excessive force to disperse political gatherings deemed to be illegal, seriously injuring unarmed demonstrators in the process. Torture and ill-treatment of criminal suspects during interrogations are still routine. Relatives, often women and children, of suspects are illegally detained by the police in order to obtain information as to their whereabouts or to put pressure on suspects to give themselves up. One related incident was reported by the Legal Resources Foundation[9] where two police officers in Chipata, Eastern Province, battered and murdered two people for asking why their relative was detained. Numerous cases have been reported by the Legal Resources Foundation where relatives are battered and, in other instances, murdered for allegedly knowing the whereabouts of a missing relative suspected to have committed an offence.

Another case in point on police violence is that of Alison Phiri who died in police custody following his arrest on suspicion of theft. Post-mortem results indicated that he was assaulted and tortured, allegedly by police, while in custody. An inquest into Alison Phiri's death was scheduled for November 2003 but no inquest has been held as yet.[10]

A poignant specific incident of police brutality was under the Movement for Multi- Party Democracy (MMD) Government which involved the torture of the treason suspects following the 28 October 1997 botched coup d'etat. More than 10 soldiers involved were arrested and subsequently charged with treason. Before their trial, all the soldiers were

[9] Legal Resources Foundation, The LRF News, Issue No. 34, December, 2001. Pg. 1.
[10] Case being handled by the Legal Resources Foundation in Lusaka; see the publication of this case in the Report by Amnesty International (2003).

brutally tortured by police and other security officers. As a result of that remorseless torture, some of the suspects, such as Corporal Robert Chikulo, died in prison.[11] This also emphasises the fact that torture is still being committed on a large scale.

The Convention Against Torture only provides for the Government to be tried for this offence but does not provide for individuals who equally commit this offence to be tried. Above all, once Zambia implements the Rome Statute individuals will be able to seek recourse from the International Criminal Court because it has the power to try individuals who commit human rights violations. What this means is that even though Article 15 of the Zambian Constitution prohibits torture, or inhuman or degrading punishment or other like treatment, there are still numerous cases where persons have been subjected to torture or such degrading treatment. Consequently, in the event that the decision of the Supreme Court, as the final court in Zambia is not satisfactory to the person or persons seeking redress, an appeal may be made to the International Criminal Court which will try the matter with expertise owing to the fact that the Court is specialised in human rights cases. This will help put an end to the prevailing disregard of peoples' right not to be subjected to torture and uphold the sanctity of citizens' human rights.

3.4. Compliance of Zambian Domestic Legislation with the Rome Statute

Article 88 of the Rome Statute clearly stipulates that

> States parties shall ensure that there are procedures available under their national law for all the forms of cooperation which

[11] Inter – African Network for Human Rights and Development (AFRONET), *Police Brutality in Southern Africa – A Human Rights Perspective*. (Lusaka: AFRONET, 2000), pg. 191.

are specified under this Part.

'This Part" refers to Part 9 which covers International Cooperation and Judicial Assistance. For the purposes of this Chapter, three selected statutes, amongst others, shall be analysed with regard to their compliance with the above quoted article of the Rome Statute. These Statutes are: The Extradition Act,[12] The Mutual Legal Assistance in Criminal Matters Act,[13] and The Penal Code.[14]

3.4.1. The Extradition Act

This Act does provide an obligation to extradite[15] persons who commit extraditable offences. However, section 4(1) of this statute states that the granting of this extradition is limited to occasions where the person to be extradited commits an offence which is punishable under the laws of the requesting country. Section 4(1) is in line with section 13 which defines "extraditable crime" as an offence committed against the law in force of the Republic and punishable under the laws of the Republic. It must be noted that the laws of the Zambian Republic have not criminalised war crimes, crimes against humanity and genocide which have been adequately provided for in the Rome Statute. This makes it difficult for Zambia as a state party to comply with all the forms of cooperation under Part 9 of the Rome Statute where the persons to be prosecuted have committed either genocide or a war crime, for example, because these are not considered as crimes under the laws of Zambian Republic. This contradicts the very essence of Zambia being a state party to the Rome Statute and its intention to assist in the promotion of International

[12] Chapter 24 of the Laws of Zambia.
[13] No. 19 of 1993, Chapter 98 of the Laws of Zambia.
[14] Chapter 87 of the Laws of Zambia.
[15] Section 5 of the Extradition Act.

Human Rights. This will only be possible when sections 4(1) and 13 are amended to expand the definition of "extraditable crime" and further that extradition should not be limited to the crimes covered under the national laws alone, such as murder,[16] but must extend to include the crimes covered in Articles 5 to 8 of the Rome Statute also.

Another provision in this Act that must be repealed in order for it to comply with the Rome Statute is section 10 which gives a period of fifteen days within which a person must be surrendered to the requesting country. This is clearly in conflict with Article 29 of the Rome Statute which does away with any statute of limitations. Furthermore, the Extradition Act under Part C, which deals with extradition to Zambia from declared commonwealth countries, provides that extradition shall not apply to Zambian citizens.[17] This places an immunity on Zambian citizens which is in contravention with Article 27(2) of the Rome Statute, which provides that immunities are not a bar to the exercise of the International Criminal Courts' jurisdiction. Section 40 of the Extradition Act in Part C also provides for lapse of time, which must also be repealed if it has to comply with the provision in the Rome Statute.

3.4.2. The Mutual Legal Assistance in Criminal Matters Act

This is an Act that provides for the implementation of treaties for mutual legal assistance in criminal matters and other related matters. This Act does not authorise the extradition, or the arrest or detention with a view to extradition of any person.[18] However this is not in line with the spirit of the Rome Statute which, as aforementioned,[19] makes it clear that

[16] Section 200 of the Penal Code, Chapter 87.
[17] Section 34 of the Extradition Act.
[18] Section 4(2) of the Mutual Legal Assistance in Criminal Matters Act.
[19] Article 88 of the Rome Statute.

all states parties must ensure that there are procedures available under their national laws for all the forms of cooperation. Section 4(2) of this Act must then be repealed.

Section 11(1) (a) of this Act is another provision that has to be repealed. According to this section the Attorney General may refuse a request for assistance by a foreign state in circumstances where the request relates to the prosecution or punishment of a person who commits an offence of a political character. This means that if, for instance, a political leader, the likes of Hissen Habre, was living in exile Zambia, and such person committed an offence of a political character Zambia would take the same stance that Senegal initially took[20] and refuse to prosecute such an individual since section 11(1) of this Act does not oblige Zambia to comply to such a request. Again, this section is inconsistent with Article 88 of the Rome Statute and the promotion of International Human Rights.

Furthermore, section 11(2)[21] authorises the Attorney General to refuse a request by a foreign state where the request relates to the prosecution or punishment of a person who commits an offence that would not have constituted an offence against Zambian law. Using the crime of genocide as an example, this means that persons who have fled into Zambia from Rwanda for fear of being prosecuted or punished in Rwanda cannot be tried in Zambia regardless of a request made by Rwanda to be assisted by the Zambian judicial system since section 11(2) does not grant such an obligation. Needless to say, this is contrary to what has been laid down by the Rome Statute[22] and individuals who have fled into Zambia in this regard cannot be tried for as long as this provision remains the same.

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[20]Human Rights Watch, *The Case Against Hissene Habre, an "African Pinochet"*, In HABRE PRESS KIT, COMPILATION, p.1

[21] The Mutual Legal Assistance in Criminal Matters Act.

[22] Article 88 of the Rome Statute.

Lastly, under this Act, section 11(2) (c) makes reference to failure to prosecute owing to lapse of time. This aspect has been explained above by way of criticising section 10 of the Extradition Act for being inconsistent with Article 29 of the Rome Statute which disregards every statute of limitations. The same explanation applies to section 11(2) (c) of the Mutual Legal Assistance Act.

3.4.3. The Penal Code Act

This Act will be analysed by way of considering the crimes that are under the jurisdiction of the International Criminal Court and the failure of this Act to provide for these crimes. Article 5 of the Rome Statute lists the crimes that are under the jurisdiction of the International Criminal Court and as aforementioned, these crimes are: genocide; crimes against humanity; war crimes; and the crime of aggression, which is yet to be defined. The Penal Code does not criminalise these offences and therefore, when taken together with sections 4 (1), and 13 of the Extradition Act and sections11 (1) (a) and 11 (2) (c) of the Mutual Legal Assistance Act which do not oblige Zambia to comply to requests to prosecute persons who commit offences that are not considered to be offences under Zambian law, it is clear that the Penal Code is not in conformity with the Rome Statute.[23]

Article 98 acknowledges that a state party may receive a request from another state party for the extradition of the same person. It is in light of this provision that Zambian laws must conform to the provisions of the Rome Statute, in the sense that Zambia will receive requests from other countries to assist in the prosecution of certain persons but for as long as the crimes in the Rome Statute are not considered as crimes under Zambian law, then

[23] Ibid.

Zambia shall not be able to assist in this regard even when expected to do so by virtue of being a State Party to the Rome Statute.

3.4.4. International Cooperation and Judicial Assistance

Apart from Article 88 of the Rome Statute there are other Articles under Part 9 of the Rome Statute to which Zambian laws must conform. Generally, Part 9 refers to situations where the International Criminal Court requests states parties to surrender suspects to the Court for trial. All States Parties must assist the Court in its work[24] by responding to the Courts requests to either surrender a person for trial to the Court[25] or take evidence to the Court[26] or even allow for the examination of places or sites.[27]

Part 9 of the Rome Statute, principally Articles 86 to 93 must be reflected in Zambian legislation, particularly in the Extradition Act and the Mutual Legal Assistance Acts. This will guarantee that Zambia meets the expectations of the International Criminal Court with reference to international cooperation.

International examples where cooperation with international laws has been in issue include the *Hissen Habre case* and the *Milosevic case.* Hissen Habre's one- party regime was marked by widespread atrocities.[28] Habre was living in exile in Senegal, where he was indicted on charges of torture and crimes against humanity before the Senegalese courts ruled that he could not be tried there.[29] Senegal was the first country to ratify the Rome Statute and by bringing Habre to justice Senegal was taking an historic step

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[24] Article 86 of the Rome Statute.
[25] Ibid, Article 89.
[26] Ibid, Article 93 (1) (b).
[27] Ibid, Article 93 (1) (g).
[28] Human Rights Watch, *The Case Against Hissene Habre, an "African Pinochet"*, In HABRE PRESS KIT, COMPILATION, p.1
[29] Ibid, p.1.

towards ending the cycle of impunity that has the plagued the continent of Africa. However, the Senegalese highest court later ruled that Habre could not be tried for crimes allegedly committed in Chad because Senegal did not have a long- arm law like Belgium's.[30] Senegal's President, nevertheless, agreed to hold Habre pending his extradition to a country where he could get a fair trial.

In the *Milosevic case* the Serbs had to cooperate with the international criminal tribunal.[31] The first deadline to arrest Milosevic was March 31, and the Serbs met that by arresting Milosevic just a few minutes after the deadline and by sending two Bosnian Serb indictees to The Hague. Yugoslavia was obligated to extradite Milosevic to face trial for alleged atrocities against ethnic Albanians in the 1998-99 Kosovo conflict.[32] When Kostunica took office as President he seemed to insist that this was something that could be handled internally. He was unwilling to even discuss handing over his autocratic nationalist predecessor, Slobodan Milosevic for trial before the tribunal. Consequently, he was the last person in the coalition to sign off on delivering Milosevic to The Hague but he went along with it because he understood that that it was necessary.[33]

3.5. Conclusion

The International Criminal Court is very necessary to a nation like Zambia. This is because politicians have been murdered on suspicion that the particular government in power at any given time had the upper hand in the commission of such atrocious activities. Nevertheless, nobody has been put on trial for some of these offences and even

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[30] Op. cit, Reed Brody, *'Justice Comes to Chad'*, (March 20, 2002). In HABRE PRESS KIT, COMPILATION, p.5.
[31] Internet Article, *Cooperating with the Tribunal*, (http:// www.hrw.org/justice/)
[32] Internet Article, *Kostunica will not meet UN Prosecutor,(* http:// www. hrw.org/justice/)
[33] Cooperating with the Tribunal, supra note 85.

where suspects have been tried; the outcome of the cases has left a lot to be desired. . Police violence is still on the increase, characterised by the torture of suspects in order to obtain information. These individuals and the police through the Attorney General are rarely put on trial for these offences and the penalties are not adequate as deterrents. The International Criminal Court may request for the surrender of persons who commit such atrocities.

Zambia, as a state party to the Rome Statute, must contribute to the advancement of International Human Rights and must cooperate with the efforts that are made by the International Criminal Court. This can be done by making amendments to the statutes that have been analysed in this chapter. This entails, repealing provisions that are contrary to the spirit of the Rome Statute such as the sections of the Extradition Act and the Mutual Legal Assistance Act that have been scrutinised as well as incorporating the crimes under the Rome Statute into the Penal Code. Furthermore, the other Articles under Part 9 of the Rome Statute, on the subject of International Cooperation and Judicial Justice must be integrated into domestic legislation.

This chapter has delved into an exposition of the practical human rights violations that are taking place on the ground. It then proceeds to express the need for the Zambian government to incorporate the Rome Statute into domestic legislation in order for citizens seeking further redress to have a forum before the International Criminal Court.

Chapter 4

The measure of any government's commitment to human rights protection goes beyond instituting mechanisms of redress of human rights violations...

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GENERAL CONCLUSION RECOMMENDATIONS AND PROSPECTS FOR THE FUTURE:

4.1. Summary

This dissertation has examined the role and relevance of the International Criminal Court to Zambia. The study began by giving a historical background to the creation of the Court based on the communal vow after World War 2 that the World must never see another Holocaust. The International Criminal Court is a realisation of that vow and now Warlords and dictators who plan and commit gross violations of international human rights can be surrendered to the International criminal Court for trial. The Court is necessary for the purpose of aiding present victims and deterring future criminals. The Court also has the jurisdiction to try persons in their individual capacity.

The study outlined the main provisions of the Rome Statute which empowers the International Criminal Court pointing out, inter alia, that there is individual criminal responsibility under the Statute. Moreover, it is irrelevant for an individual to plead that they committed the offence in their official capacity. The study further established that the statute of limitations does not apply. It also explained other important aspects such as the independence of judges, rights of the accused, protection of victims and witnesses.
The study concluded by analysing the necessity of Zambia domesticating legislation incorporating Part 9 of the Rome Statute Chapter. One focused on the background of the Court, stating the role of the Coalition for an International Criminal Court as well as the basis and necessity of the existence of the Court.

The first chapter focused on the background of the Court. The chapter laid down the role of the Coalition for an International Criminal Court. It also explained the basis and necessity of the existence of the Court.

The main focus of the second chapter was to outline the main provisions of the Rome Statute in order to enable us understand how the Court must function with regard to the independence and qualifications of Court officials, treatment towards accused persons, victims and witnesses, amongst other important aspects.

Chapter three stated Zambia's position on the International criminal Court stressing the need for Zambian laws to be in conformity with the Rome Statute. This was accomplished by taking into account three statutes and in so doing pointing out their inadequacies with reference to international cooperation and further emphasizing the need to incorporate Part 9 of the Rome Statute into Zambian domestic legislation.

4.2. Recommendations

1. Zambia should put in place appropriate domestic legislation for the purpose of giving effect to the provisions of the Rome Statute. The domestic legislation should, among other things, criminalise all the Rome Statute Crimes and provide for cooperation with the ICC. The process of putting in place domestic legislation should be preceded by an implementation workshop with all the stakeholders who would ensure that the envisaged provisions of the Rome Statute are in harmony with Zambian Laws.

2. The government should consider working with International NGOs that have been assisting other countries on drafting ICC legislation. These NGOs include the Coalition for an International Criminal Court, Parliamentarians for Global Action and Lawyers Committee for Human Rights. Countries such as Senegal have benefited from this assistance.

3. The government should work with the media and NGOs to sensitise the public about the ICC. In particular, the public should be made aware that there is an international body with powers to investigate and try individuals for crimes against humanity, war crimes and genocide.

4. A similar sensitisation programme must be conducted for the judiciary, the police, the Law Association of Zambia and other stakeholders.

5. The University of Zambia school of Law should include the international criminal content in its syllabus in order to sensitise students on ICC. The subject of the ICC could form part of International Law or Human Rights Law or both. It may also help if there is an ICC association for students in the Law School.

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The Rome Statute

The United Nations Declaration of Basic Principles of Justice for Victims of crime and Abuse of Power

The Universal Declaration of Human Rights

The Zambian Constitution

The Zambian Extradition Act

The Zambian Mutual Legal Assistance Act

The Zambian Penal Code Act