# The Inherent Deficiency in the International Criminal Justice System, Particularly in Investigating and Prosecuting International Crimes: The Principle of Cooperation of States as A Possible Panacea

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**Abstract**

This article is alive to the fact that some offences are so serious in nature and in most instances are committed by the most powerful individuals and States. That in view of the calibre of individuals and States who perpetrate these crimes, it becomes an onerous task for the international criminal justice system to oversee their investigation and prosecution. It is also evident that international law and international criminal law, is subject to consent, good faith among others for its implementation. This article therefore recognises the root causes of the deficiency of the international criminal justice system, particularly in investigating and prosecuting international crimes, with the principle of international cooperation of States as a possible panacea. This endeavour is carried out by analysing the international criminal justice system with special focus on the inherent deficiency in the system, particularly in investigating and prosecuting international crimes. The article highlights *super omnia* the role of the principle of cooperation of States in bringing to account perpetrators of international crimes and hence recommending how to mitigate some of the deficiencies of this system. The article *obiter dictum* also highlights *inter alia* other characteristics of international law and by extension international criminal law, which determines their efficacy or lack of it, for example, sovereignty of its subjects, composition of the United Nations Security Council with its permanent members and the extent to which they affect the efficiency of the international criminal justice system in investigating and prosecuting international crimes. Treaty provisions regulating international criminal law and justice system and the principle of cooperation of States are also referenced.

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The article also notes that the insulation by States of high-ranking government officials, heads of State and powerful individuals from the criminal jurisdiction, is an impediment to the operations of the international criminal justice system. However, the main thrust of this study remains the role of the principle of cooperation of States as a possible panacea to the inborn deficiency of the international criminal justice system in investigating and prosecuting international crimes by ensuring that international crimes do not go unpunished. Case laws and situations are cited in support of the hypothesis.

In view of the findings of this article, some recommendations and conclusions are made to strengthen the operations of the international criminal justice system particularly in investigating and prosecuting international crimes.

**Keywords**: International Criminal Justice System, International Criminal Law, Human Rights, Humanitarian Law, International Criminal Court, Nuremberg Tribunal, Tokyo Tribunal, Rome Statute, Principle of Cooperation of States, Crimes Against Humanity, War Crimes, Genocide

## 1. Introduction

The international criminal justice system has evolved and developed over time, influenced by humanity's general abhorrence of international crimes ,[1] which are gross violations of human rights and humanitarian law, during both times of peace and war. The system continues to evolve with need to respect and protect human rights, at the same time to deter criminal offenses within various jurisdictions. In view of the international crimes committed by individuals or groups, the international community has vowed to prosecute and punish the said perpetrators, and to hold them individually criminally responsible. The history and evolution of the international criminal justice system has been influenced by mankind's innate concern for human sufferings manifested *inter alia* during conflict, both internal and international, colonialism, transatlantic slave trade *et cetera*. However, the abhorrence for colonialism and slave trade has been curiously muted, particularly in the west.

In view of the above, the evolution and development of the international criminal justice system can now be broadly traced to *inter alia* the Act Prohibiting

1 Genocide, Crimes against humanity, war crimes and aggression. Slave trade and colonialism are conspicuously missing from the list of international crimes.

Importation of Slaves[2] and the *Thomas R. Gedney v Schooner Amistad*[3] case where African Slaves who had seized a ship transporting them, killed the captain and the cook, and were later arrested and charged with murder. The murder charges were dismissed, but they continued to be held in confinement and the case went up to the Supreme Court where they were freed. In apparent indictment of slavery as an international crime, it was argued in their favour that,

> … each of them are natives of Africa and were born free, and ever since have been and still of right are and ought to be free and not slaves…

Another relevant situation is the battle of Solferino, where the cruel and degrading treatment inflicted on wounded soldiers, evoked the sympathy of Henry Dunant,[4] contributing to the development of international humanitarian and international criminal laws, while American Civil War influenced Francis Lieber in coming up with a 'Code for the Government of Armies in the Field (1863)'[5] which was the military law applied to the prosecution of war crimes and, thus laying a foundation of international criminal law and humanitarian law.

The subsequent horrors and atrocities of the two World Wars (First and Second World Wars) catalysed the determination of the international community in deterring the commission of international crimes and bringing to account the perpetrators through investigations and eventual prosecutions. After the First World War it was proposed to establish an international court *vide* article 227 of the Treaty of Versailles and after the Second World War there was the establishment of international criminal judicial organs albeit initially *ad hoc,* for example, *the Nuremberg Tribunal* and *the Tokyo Tribunal*.

The determination of the international community. human rights and humanitarian activists earlier mentioned, such as Henry Dunant ,[6] Francis Lieber[7] have catalysed the quest of mankind to deter and to punish gross violations of human rights both in peace and war times.

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2 2 Stat.426, enacted March 1807.

3 1840.

4 A Swiss humanitarian and author of the Memory of Solferino which influenced the creation of International Committee for Relief to the wounded the future International Committee of the Red Cross (ICRC).

5 Also Known as the Lieber Code.

6 Henry Dunant also known as Henri Dunant, was a Swiss Christian, humanitarian, businessman, social activist and co-founder of the Red Cross.

7 Francis Lieber was a German – born US political philosopher and jurist best known for formulating the "laws of war"/ His Code for the Government of Armies…

The preamble of the UN Charter [8] expresses the resolve of the international community to protect humanity from the horrors of war and a basis of holding suspects of international crimes to account by investigating and prosecuting international crimes. The United Nations Charter in support of the foregoing states that:

> WE THE PEOPLES OF THE UNITED NATIONS DETERMINED
>
> To save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and
>
> To reaffirm faith in fundamental human rights, in the dignity and worth of human person, in the equal rights of men and women and of nations large and small,
>
> And
>
> To establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom

The genesis proper of the International criminal justice system arguably can be found in the Tokyo and Nuremberg Tribunals. These tribunals are credited with the investigations and prosecution of the Second World War criminals. However, in recent times, in some quarters the international criminal justice system stands accused of failure to properly investigate and prosecute international crimes. The foregoing indictment is particularly made in relation to the State of Israel and its alleged atrocities against the Palestinian people in the ongoing Gaza War. The United States also stands accused of violation of humanitarian laws during their invasion of Afghanistan,[9] Iraq[10] *et cetera*.

It is the hypothesis of this article that, international criminal justice system by its very nature is inherently constrained in investigating and prosecuting international crimes, particularly involving powerful States, individuals within states and individual citizens of militarily powerful States. Such individuals cited, include the former President of the United States George W. Bush, accused of war crimes in Iraq and Afghanistan, and Benjamin Netanyahu, Prime Minister of Israel accused of genocide and war crimes in Gaza before and after the Israel – Gaza War.[11] Generally, the inherent deficiency of the international criminal justice system can be traced to the nature and practice of international law. This

8 1945

9 2001

10 2003

11 2023

legal system lays emphasis on consent of states as a prerequisite for becoming a party to an agreement and subsequent compliance with international law and by extension international criminal justice system. International agreements are glued by the consent of States. It is persuasively argued that without consent there is no agreement. And therefore others argue that the success of the implementation of a treaty is determined by consent of States. However, be that as it may, treaties on their own, even with the consent of States, still remain just ink on paper. And therefore over and above consent of States there is need for cooperation of states, without which the international criminal justice system remains sterile. Various international treaties including the Rome Statute[12] provide that, the respect of the principle of cooperation of States is a condition *sine quo non* in dealing with the lethargy of operationalisation of treaties and the deficiency noted in international criminal justice system. In other words, the inherent deficiency of international criminal justice system may be appreciated better by studying and analysing the role of the principle of cooperation of states in breathing life into agreement including those in the realm of international criminal law.

International criminal law is a relatively recent branch of international law and like international law, its utility is based on the common consent and good faith of sovereign States[13] in conclusion of treaties, expressed by the principle of cooperation of States. In other words, the effectiveness of international law and by extension international criminal judicial organs depends on the consent and good will of States anchored on the principle of cooperation of States. States being sovereign entities and not subordinate to other States, invariably create a challenge to extra territorial judicial organs intent on issuing and enforcing laws and decisions upon them particularly within their territories.

In view of the above, the international criminal justice system suffers from inborn deficiency, attributed to its parent law – international law. However, despite its challenges as alluded, international criminal justice system remains an important judicial system which can be improved by strengthening its foundation, particularly the principles of; common consent of states, good faith, *pacta sunt servanda* and most importantly, principle of the cooperation of States which is the main subject matter of this paper.

The debate about the efficacy of international law in general and international criminal justice system in particular in investigating and

12 Articles 86, 87,88,98 among others, Rome Statute, 1998.

13 Article 26,Vienna Convention on the Law of Treaties, 1969.

prosecuting international crimes continues unabated. Scholars such as Hans Kelsen,[14] Rebecca Wallace ,[15] Malcolm Shaw[16] among others continue to debate the efficacy of international law and by extension shed light on the question of the utility of international criminal justice system. It is argued by the critics of international criminal justice system that this legal system is inherently deficient.[17]

In view of the foregoing, there is a school of thought whose proponents are *inter alia* John Austin,[18] Lassa Oppenheim,[19] which maintains the position that, international law, and in this article interpretated to include international criminal law as a branch of international law, is not law and thus its ineffectiveness. On the other hand, there is a school of thought supported by *inter alia* Rebecca Wallace, Fredrick Pollock, Rosalyn Higgins which insists that, international law despite its weaknesses is still law. The protagonists in this debate hold radical opposing views.

This debate is fuelled by situations in international and sometimes national arena, which brings to the fore the question about the effectiveness of international law and in this case international criminal law or lack of it. Human rights and humanitarian law situations, seem to create substantial fodder for this debate. For example, the Rwandan genocide is one such situation, where international law and international criminal justice system were blamed for being ineffective by failing to intervene in time. It was also accused of being incapacitated in investigating and prosecuting the alleged international crimes hence the adoption of the "Gacaca courts"[20]. For example, the Amnesty International Press Release, dated 7 April 2014, alludes to the failure of the international community; the release is titled, "The World still

14 Hans Kelsen was an Austrian jurist, legal philosopher and political philosopher. He also propagated monism and the primacy of international law in the unified legal system.

15 Rebecca Wallace is a Professor of International Human Rights Law and author of several articles in refereed journals, international law related textbooks.

16 A British legal academic, author, editor and lawyer (a practicing Barrister) is a Senior Fellow at the Lauterpacht Centre for International Law, University of Cambridge.

17 J.E.S. Fawcett, 1968, The Law of Nations, p.3, Basic Books, Inc.., Publishers, New York.

18 John Austin believed that law is the command of the Sovereign and therefore international law without such a sovereign was no law.

19 Lassa Trancis Lawrence Oppenheim was a German jurist and teacher of law who was best known for his positivist approach to international law. Oppenheim's most important book is International Law: A Treatise, 2 vol. (1905-06) He emphasised on the supremacy of national laws and national sovereignty over international law.

20 Gacaca courts – deriving their name from the Kinyarwanda word meaning "grass" (the place where communities gather to resolve disputes)- have tried 1.2 million cases.

failing to act despite Rwanda genocide shame", where it states that, "The international community has collectively failed to act on the lessons of the Rwandan genocide", the statement is attributed to Amnesty International... as the world marks the 20th anniversary of the human catastrophe which left around 800,000 dead." Another example is in the theses by Ratsch, Josh, titled, "A United Failure: The Failure of the United Nations, United States, and Global Community in Preventing and Responding to the 1994 Rwandan Genocide" (2022) Honors College Theses. 148. https://digitalcommons.murraystate.edu/honorstheses/148. In the Rwandan genocide almost one million Tutsis and moderate Hutus were slaughtered. Darfur conflict is another situation where the militia group Janjaweed [21] appeared to be law unto itself, and international law and by extension international criminal law appeared helpless in the wake of its atrocities. Similarly in the former Yugoslavia there were allegations to the effect that Muslim boys and men numbering about 7,000 were slaughtered in Srebrenica by Bosnian Serb forces as international law and international criminal justice system watched helplessly.

The inadequacy of the international criminal justice system in investigating and prosecuting international crimes was brought out strongly in the above Rwandan Genocide where the International Criminal Tribunal for Rwanda appeared intimidated by the Rwandan State and seemed to lose its vigour in investigating and prosecuting international crimes allegedly committed by the Rwandan Patriotic Front. This is illustrated in the following statement:

> Perhaps the most significant failure of the ICTR has been its unwillingness to prosecute crimes committed by the RPF in 1994, many of which constituted war crimes and crimes against humanity. Although the ICTR had a clear mandate to prosecute these crimes (its jurisdiction covers genocide, war crimes and crimes against humanity), not a single RPF case has been brought before the ICTR for prosecution, creating a sentiment among some Rwandans and international legal observers that it provided only victor's justice.[22]

It is argued by the proponents of international law such as Rebecca Wallace that, international law is a unique legal system and should not be compared with national law. This school of thought discourages approaching international law with "national law lenses." That international law cannot function like national

21 Janjaweed is a blanket term used to describe mostly armed gunmen in Darfur, western Sudan, and now eastern Chad. Using the United Nations definition, the Janjaweed comprised nomadic Arabic-speaking African tribes (i.e. Black Arabs, or Afro-Arabs), the core of whom are from the Abbala (camel herder) background with significant Lambo recruitment from the Baggara (cattle herder) people.

22 https://www.hrw.org/news/2014/03/28/rwanda-justice-after-genocide-20-years

law because of the uniqueness of its subjects and sometimes objects. It is further averred that international law's reliance on the principles of consent, goodwill and more importantly cooperation of States further complicates its capacity to be as effective as it should.

The subjects of international, it is argued are sovereign States and therefore relatively difficult to deal with in the absence of cooperation of States, particularly where there is need for coercion. The case of the United States and Israel are cited as examples of States whose military power has complicated attempts to subject them to the jurisdiction of the International Criminal Court and to allow for investigations and prosecution of their leaders suspected of committing international crimes. This is in contrast to subjects of national law who are individuals and can be compelled to abide by the laws of the State. States as subjects of international law have instruments of State power at their disposal, whereas the international community of States collectively lack the same. In other words, the efficacy of international law and by extension the international criminal justice system requires above all the respect and implementation of the principle of cooperation of States.

The absence of organs which are ordinarily synonymous with an independent legal system, such as the Executive, Legislature and Judiciary, may complicate the operations of international criminal justice system. The United Nations Security Council which at times is deemed to be the Executive arm of international law has its own challenges. Its composition and the veto power available to its permanent members, renders it ineffective, particularly where there is lack of unanimity in its decision and cooperation of its members. Treaty making which is the *quasi*-legislative machinery of international law is hampered by the requirement of consent and the weak enforcement mechanisms requiring the cooperation of States. The adjudicative machinery of international law, for example, the International Court of Justice, is limited by subject matter and *locus standi* and therefore there is no single universal judicial organ under one sovereign authority with binding decision and mandated to resolve international disputes. It is also apparent that the decisions of the ICJ though mandatory and final, its implementation still requires the cooperation of States.[23]

International criminal justice systems face and continue to face challenges not only in timely interventions but also as stated earlier in investigating and prosecuting international crimes. These challenges continue to raise valid

23 Article 86, Rome Statute.

questions on the efficacy of this system. It appears that the international criminal justice system is relatively impotent in relation to international crimes committed by high-ranking state officials, particularly those in power. The foregoing inadequacy can be traced to the question of cooperation or non cooperation of States as an important requirement.[24]

Examples of challenges of the international criminal justice system which readily come to mind include the seemingly impotence of its various organs in relation to leaders of powerful States such as the United States, Russia, China *et cetera* and leaders of African States, *inter alia* Kenya, Sudan, South Sudan, Rwanda, Burundi *et cetera,* who in the past and present are suspected to have committed international crimes.

It is in view of the above that this study attempts to explain what it deems as the underlying reasons that hinder the effectiveness of the international criminal justice system particularly in investigating and prosecuting international crimes.

## 2. The Role of the Principle of Cooperation of States in Investigating and Prosecuting International Crimes, as a Panacea for the Inherent Deficiency of the Criminal Justice System

### 2.1 Introduction

It is imperative to appreciate the unique nature of States as subjects of international law and in this case international criminal law. Ordinarily subjects of law relate vertically with the law and therefore are subordinate to law. In the national legal system set-up, the law is imposed on the subjects, while in contrast under international law, the subjects relate to the law horizontally and it is therefore not imposed on them, Instead the States voluntarily consent to adhere to international law or international criminal law and have the option to be bound or not. It is important to note that the subjects of international law and international criminal law are sovereign States who in contrast to individuals and other artificial entities have at their disposal instruments of power and coercion *inter alia*; armed forces, police force and therefore by their very nature suggest that enforcement of law against them is significantly more complex.

The subjects of international law and specifically international criminal law unlike national law require the voluntary procurement of their consent

24 *Ibid*.

in order to be bound by law. The subjects of international law as above stated have instruments of coercion at their disposal and therefore compelling them to adhere to an agreement is a totally different proposition and the reason why their voluntary consent is critical unlike the individual under national law.

## 2.2 Hypothesis

In view of the foregoing, it is the hypothesis of this article, that international law and by extension international criminal law and justice system requires much more than consent of States and the principle of *pacta sunt servanda*, and that the efficacy of the international criminal justice system requires the adoption of the principle of international cooperation of States as an inbuilt mechanism and mandatory requirement of every agreement.

## 2.3 International Criminal Justice System

In a bid to appreciate the topic of the current article, it is imperative to elucidate and share the concept of international criminal justice system. International criminal justice is the area of international law that's concerned with prosecuting some of the world's most serious crimes and human rights abuses. These include genocide, war crimes, torture.[25][26] It is held that through this system persons convicted of the aforementioned crimes can be brought to account and the victims ensured of justice and reparations. International criminal justice system is a legal framework within which international criminal law operates in the process of prosecuting international crimes and bringing to account persons indicted of committing international crimes. This concept of an international criminal justice system appears to have emerged after the World War II, with the establishment of the Nuremberg Trials. Its evolution is attributed to the establishment of the International Criminal Court.

International criminal justice refers to a body of laws and procedures, international courts, and institutions built to address the most severe crimes challenging the international community, namely, war crimes, crimes against humanity, genocide and aggression.

25 UN Charter, 1945.

26 https://online.lincoln.ac.uk/what-is-the-role-of-international-criminal-justice-systems

## 2.4 Evolution of the International Criminal Justice System

International Criminal Justice System has evolved over time. This could as well be before the establishment of the *ad hoc* criminal tribunals of Nuremberg and Tokyo. International criminal Court Project, states that, "…in the 1870s Gustav Moynier one of the founders of the International Committee of the Red Cross, proposed a permanent international court in response to the devastation of the Franco – Prussian War."[27] Subsequently, after the First World War, the Treaty of Versailles *vide* article 227 proposed the establishment of an international court to try the Kaiser and German war criminals. The Moscow Declaration of 1943 and the Potsdam Declaration of 1945 both raised the question of accountability of the war crimes committed by the German and Japanese governments respectively. Other *ad hoc* tribunals include, International Criminal Tribunal for Rwanda (ICTR), International Criminal Tribunal for Yugoslavia (ICTY).

The above-mentioned courts have given hope to citizens globally that, persons who commit international crimes will be held to account, despite their influence and standing within their respective States. This is supported by the statement that:

> The recent proliferation of international criminal courts inspired human rights activists and votaries of international criminal justice to make triumphant gestures. Their jubilation is readily understandable, since these courts have added teeth – even if milk ones to norms that outline internationally punishable conduct.[28]

## 2.5 Raison *de'tre* of the International Criminal Justice System

The commission of international crimes during conflict, whether national or international has necessitated the need to punish the perpetrators, compensate the victims and in the future to deter others, as was illustrated in the case of the *Prosecutor v. Kordic.*[29] The reason for the existence of international criminal justice system as alluded earlier is succinctly explained by the 2004 report by the then UN Secretary-General Kofi Annan, where he described international criminal tribunals and by extension international criminal justice system as:

> Seeking to advance a number of objectives, including bringing to justice those responsible for serious violations of human rights and international humanitarian

27 International Criminal Court Project.

28 Mirjan Damaska, What is the Point of International Criminal Justice, *Chicago-Keny law Review* [Vol 83:1.

29 Case No. IT-95-14/2. A judgment, 1073 (17 December 2004) (discussing the aims of retribution and deterrence, among others).

law, putting an end to such violations and preventing their recurrence, securing justice and dignity for the victims, establishing a record of past events, promoting national reconciliation, re-establishing the rule of law, and contributing to the restoration of peace."[30]

History illustrates situations where international crimes have been committed and in most of such situations the perpetrators have escaped Scot free or delayed their arrest as a result of States being unable or unwilling to bring them to account. Examples include until recently apprehended Rwandese national, Felicien Kabuga, who was free for almost 30 years after being indicted of genocide and crimes against humanity. The foregoing impotence of the national legal system is explained by Hersch Lauterpact in his preference to theory of monism, when he states that, *"international law is best suited in protecting human rights and that national legal system is often complicit in the perpetration of crimes against the citizenry (the quote is note verbatim and the italics is author's)"*

According to Amnesty International, victims in some States may be denied justice due to "a lack of political will to investigate crimes and prosecute those responsible, weak criminal justice systems, and the marginalisation of victims in society."[31] In instances such as these, international criminal law systems work to hold perpetrators to account – and even take steps to "ensure that the crimes are never repeated."[32]

## 2.6 Successes of the International Criminal Justice System

The level of cooperation of States seems to determine the extent of the success of international criminal justice system. This is illustrated by the past experiences of various situations (the Kenya situation, the Sudan situation, The United States and Israel situations). Without the cooperation of States, international criminal justice will remain a mirage and a moving target which will therefore continue to be elusive. In other words, without the cooperation of States the international criminal justice system will remain impotent and international crimes will go unpunished and perpetrators of such crimes will be emboldened,

30 The Secretary-General, Report of the Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, 38, U.N. Doc. S/2004/616 (23 August 2004) [hereinafter Secretary–General's Report]. Given the Key role the United Nations plays in all existing international and hybrid tribunals except the ICC, I consider this list the most authoritative expression of the views of the international community regarding the purposes of international criminal tribunal.

31 https://www.amnesty.org/en/what-we-do/international-justice/

32 *Ibid*.

and others will repeat the same without fear of being brought to book and to account. This assertion is put differently:

> The success of the International Criminal Court ("ICC" or "Court") will be determined by the level of cooperation it receives from States. Having no police force, military, or territory of its own, the ICC will need to rely on States Parties to, among other things, arrest individuals and surrender them to the Court, collect evidence, and serve documents in their respective territories. Without this assistance, the ICC will encounter great difficulty conducting its proceedings.[33]

The above is also supported by the following statement:

> Without the essential cooperation of states, international justice simply cannot function. Without cooperation, ICC investigations and prosecutions can be severely delayed or rendered impossible. As the ICC does not have its own police force, national law enforcement authorities, sometimes with the support of international organizations, must arrest and surrender ICC suspects to The Hague.[34]

Cooperation of States with the International criminal court can only become a reality if the state parties adopt a positive attitude to the court and see it as an important partner in the administration of international criminal justice. State parties must embrace the court by cooperating with it in every possible way to ensure that the operations of the court are smooth, and that the administration of justice is not just done but seen to be done. The foregoing is supported by the following statement:

> Cooperation with the ICC can often be reduced to simple terms: states either have the political will to cooperate, or they don't. While this is true of many high-profile cases, a failure to cooperate can also stem from governments lacking adequate resources or expertise relevant to the prosecution of alleged Rome Statute crimes.[35]
>
> Bring national legislation in line with the Rome Statute to facilitate better cooperation; Ratify the Agreement on Privileges and Immunities of the ICC, to ensure that ICC officials can conduct their work around the world safely and independently, while securing rights of the defence.[36]

The International Criminal Justice System, despite the challenges arising out of it's nature has come a long way. It has prosecuted international crimes starting with the international crimes committed after the Second World War.

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33 *Valerie Oosterveld, Mike Perry, John McManus,* The Cooperation of States With the International Criminal Court, *Fordham International Law Journal,* 2001, Volume 25, Issue 3, article 14.

34 State cooperation (https://www.coalitionfortheicc.org/fight/strong-ICC/state-cooperation)

35 *Ibid*.

36 *Ibid*.

The said crimes were heard and determined by the Tokyo and Nuremberg Tribunals. Similar crimes have been prosecuted by other *ad hoc* tribunals *inter alia*;The International Criminal Tribunal for Rwanda where Jean Paul Akayesu, among others were indicted and convicted of various international crimes. The International Criminal Tribunal for Yugoslavia (ICTY) where Ratko Mladic was indicted and convicted for committing war crimes, crimes against humanity and genocide by the International Criminal Court and sentenced to life imprisonment. There are examples of fugitives from the international criminal justice system being brought to account many years later due to the cooperation of states. Such examples include the war criminals of the First and Second World Wars, indicted by the various criminal tribunals including Tokyo and Nuremberg. Others were indictees of the International Criminal Tribunal for Rwanda (ICTR) e.g. Felicien Kabuga, International Criminal Tribunal of Yugoslavia (ICTY) e.g. Goran Hadzic.

After the establishment of the International Criminal Court in 1998, a quarter of acentury later, it is noted that among its achievements, is the sentencing of persons who have been found culpable of various international crimes prohibited by the Rome Statute. The Court today finds support from citizens across the globe, even though the same not always being the case in relation to States. The lack of support from some States is explained by the apathy synonymous with perpetrators of international crimes being often States. The foregoing is expressed thus, "despite this crucial role, its work and independence continue to be frequently challenged."[37]

In terms of successes of the international criminal justice system and particularly attributable to the International Criminal Court, the ICC is said to be currently investigating abuses in 17 countries, *inter alia*, Ukraine, Darfur and Libya. The Ukraine and Russian situations are also now subjects of the ICC. The statistics are as follows when the ICC was celebrating its 20 years; 31 cases have been brought before the ICC, some of them involving more than one suspect; ICC judges have issued 37 arrest warrants; thanks to cooperation from States, 21 people have been detained in the ICC detention centre and have appeared before the Court; 12 people remain at large. Charges have been dropped against 3 people due to their deaths. ICC judges have also issued 9 summonses to appear, 10 convictions and 4 acquittals.[38]

37 Declaration issued by HR/VP Josep Borrel on behalf of the EU to mark the date.

38 https://www.eeas.europa.eu/eeas/20-years-international-criminal-justice-against-most-horrific-crimes_en

## 2.7 Challenges of the International Criminal Justice System

The challenges witnessed by the international justice system include the lack of law enforcement organs e.g. a police force of its own, it lacks investigative organs of its own with power to carry out independent investigations in member states and must rely on the same states who are in instances complicit in the commission or omission of the said crimes. There is also poor cooperation by member States in supporting the foregoing including the apprehending of indictees who are on the run. The foregoing was illustrated in various situations, *inter alia*, Kenya, Sudan, Rwanda, Uganda, Israel, United States *et cetera*.

Bringing to account individuals from militarily powerful States has been alluded to as a major challenge facing the International Criminal Court. Israel has been cited as such a State, and it is stated that, "if arrest warrants are issued, the court would rely on its 124 member States, to enforce them."[39] And that, "it is unclear which countries would be willing to arrest Netanyahu or Gallant."[40] This difficulty is also evident in bringing to account persons who are citizens of the United States, indicted of international crimes in the situations in Iraq and Afghanistan. The need for cooperation by the powerful States wa eloquently expressed by the United State's Chief Prosecutor for the Nuremberg trials, Supreme Court Justice Robert H. Jackson who stated that, "we cannot successfully cooperate with the rest of the world in establishing a reign of law unless we are prepared to have that law sometimes operate against what would be our national advantage." [41] As much as it is difficult to prosecute indictees from powerful States, it is also evident that some of the said indictees have demonstrated apprehension of travelling freely after the court indictments. For example, President Putin cancelled his BRICS Summit travel to South Africa, considering that South Africa is a State Party to the Rome Statute and is obliged to arrest Putin on the indictment the court issued against the Russian leader in March for war crimes involving the abduction of children from Ukraine. This was after his host Cyril Ramaphosa urged him not to attend.

Even in instances where States have signed and ratified the Rome Statute, another challenge which faces the international criminal justice system is the unimpressive record of domestication of the statute, therefore, posing a problem of implementation of the instrument within the jurisdiction of State Parties.

39 https://www.washingtonpost.com/world/2024/07/06/israel-gaza-starvation-hunger-icc-netanyahu

40 *Ibid*.

41 https://foreignpolicy.com/2024/05/07/icc-arrest-warrant-israel-netanyahu-gaza/

This is expressed as follows:

> Despite the rapid pace of the ratification of the Rome Statute, very few States to date have passed the domestic laws necessary to cooperate with the ICC. However, it is very important that all States Parties adopt comprehensive legislation implementing the obligations under the Rome Statute by the time the ICC is established....[42]

International criminals being financially well endowed often are highly mobile and therefore have the capacity to move easily across international borders into other jurisdictions. In so doing they can evade detection and arrest.

## 3. Cooperation of States as a panacea of the deficiency of the international criminal justice system

### 3.1 Forms of International Cooperation

The principle of cooperation of States is multifaceted. Cooperation of States, therefore, sheds deeper insights into the various requirements necessary for States to fulfil their responsibilities in relation to the ICC. According to the Coalition for the International Criminal Court, forms of state cooperation include the following activities, *inter alia*:

> Designate focal points within state agencies and departments to improve channels of communication and coordination around ICC cooperation requests and needs; Train police, military forces, lawyers, judges, and prosecutors so that the ICC system of international justice is integrated among all relevant domestic authorities; Sign voluntary framework agreements - of which very few have been concluded - with the ICC to expedite state cooperation with requests related to: Witness relocation; Enforcement of sentences; Interim release of defendants; Acquittal of suspects;[43]

> Bring national legislation in line with the Rome Statute to facilitate better cooperation; Ratify the Agreement on Privileges and Immunities of the ICC, to ensure that ICC officials can conduct their work around the world safely and independently, while securing rights of the defence.[44]

The United Nations Convention Against Transnational Organized Crime does provide for several forms of international cooperation in combating organized

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42 *Valerie Oosterveld, Mike Perry, John McManus,* The Cooperation of States With the International Criminal Court, *Fordham International Law Journal,* 2001,Volume 25, Issue 3, article 14.

43 State cooperation (https://www.coalitionfortheicc.org/fight/strong-ICC/state-cooperation)

44 *Ibid*.

crime which would also be relevant to the international criminal justice system. This Convention has a unique provision which provides for the statement of purpose.[45] It identifies international cooperation in criminal matters as a "treaty purpose", which would be an important provision in international criminal instruments. The wide array of international cooperation modalities provided by the Convention are, *inter alia,* judicial cooperation, such as extradition and mutual legal assistance, to law enforcement cooperation or other types of cooperation, such as joint investigations and cooperation to conduct special investigative techniques.

In the Kenya situation in 2014, the ICC Prosecutor sought information from Kenya, a State Party to the Rome Statute without success. Considering that fugitives seek refuge in State Parties to relevant treaties and hide proceeds of crime in the member States, the following cooperation provisions of the Organised Crime Convention relating to access of additional evidence, information and seizing of proceeds of crime and possibility of extradition would be useful to the ICC in carrying out its mandate of prosecuting international crimes, by seeking, *inter alia,* "...avenues to obtaining additional evidence, or accessing information, and freezing, seizing and confiscating proceeds of crime or property, as well as arresting and extraditing fugitives that would otherwise be immune to prosecution."[46]

In addition, there are other criminal law useful cooperation provisions in the Convention which, "allows States parties to choose from a variety of mechanisms that enable and facilitate international cooperation between States parties."[47] Such mechanisms include extradition (art. 16), mutual legal assistance (art. 18), joint investigations (art. 19), international cooperation to conduct special investigative techniques (art. 20, paras. 2 and 4), transfer of sentenced persons (art. 17), transfer of criminal proceedings (art. 21) and law enforcement cooperation (art. 27). Many times, the indictees seek refuge in member states and therefore the need for extradition, mutual legal assistance, joint investigations, international cooperation to conduct special investigative techniques *et cetera* arises.

45 Art. 1 of the United Nations Convention Against Transnational Organized Crime.

46 Digest of cases of International Cooperation in Criminal Matters Involving the United Nations Convention Against Transnational Organized Crime as a Legal Basis.

47 Digest of international cooperation in criminal matters involving United Nations Convention Against Transnational Organized Crime as a Legal Basis.

## 3.2 The Principle of International Cooperation of States

The importance of upscaling the efforts of increasing the number of states involved in cooperation of States is deemed to be crucial in dealing with "… impunity and to protect the victims of genocide, war crimes and the crimes of aggression."[48]

In elucidating on the significance of the principle of international cooperation of States in the realm of international law and relations, the author of the book entitled '*"Public International Law"*[49] states as follows:

> "the glue which binds international law is cooperation of States, a condition *sine quo non*. He furthers states that, "…without cooperation of States there would be no international law. International laws are founded on cooperation of States, whether be it customs or treaties. The implementation of international law is also dependent on cooperation of States."

It is evident that the international community of States require each other to realise their individual and collective objectives. No State is an island and therefore in the realm of international relations their survival is pegged on their ability to relate and more importantly to cooperate with each other. It is noteworthy that international relations ride on the back of diplomatic relations which *vide* its preamble is founded on the principle of promotion of friendly relations *via* cooperation of states.

## 3.3 Principles of International Law Concerning Friendly Relations and Cooperation among States

The principle of cooperation of states today finds expression in both international customary law and international treaties. Cooperation of States can be traced back to practice between States. This practice was in diverse areas, *inter alia*; trade relations, diplomatic relations, military cooperation *et cetera*. While in the realm of international treaties, cooperation of States is cemented in agreements. The significance of this principle led to the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States In Accordance with the charter of the United Nations, Unga Res. 2625 (XXV) (Declaration on Friendly Relations).

It is noted that even with the evolution and establishment of international criminal courts, there is still need for the support of States in effecting the rulings

48 President of the Assembly of States Parties to the Rome Statute Sidiki Kaba.

49 Owuor MA, Public International Law, (LawAfrica, 2023).

and decisions of international criminal courts. The foregoing is conceded by the statement that:

> Because no cluster of effective supranational institutions yet exist to enforce international criminal law, the effective operation of international criminal court must depend on the unstable reserve of political will, especially in world capitals. Without the cooperation and support of individual states, international courts are doomed to impotence: for example, they have no power to arrest, to compel the production of evidence, nor to enforce judgments.[50]

Apart from the support of States, there is also need for the same from regional organizations and the European Union has expressed its support by stating as follows:

> The EU views the International Criminal Court (ICC) as the cornerstone in the fight against impunity and to help victims of atrocities to achieve justice.[51] The EU is resolved to continue protecting the independence of the Court and the integrity of the Rome Statute. The EU promotes the national implementation of the Rome Statute and its principle of complementarity, in particular by strengthening national justice systems. The EU also encourages the universal ratification of the Rome Statute and full cooperation with the Court.[52]

## 3.4 Cooperation of States vide the United Nations Charter

International law and international criminal justice system depend entirely on the principle of cooperation of States in realising their objectives. The extent to which States cooperate determine the level of success in the realization of the rules of international law and in this case international criminal justice. Cooperation of States is a mandatory precondition for the successful implementation of international law considering that States are sovereign and independent states. The United Nations Charter *vide* article 1(3) provides that:

> Among the purposes of the United Nations is 'to achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.[53]

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50 Mirjan Damaska, What is the Point of International Criminal Justice, *Chicago-Keny law Review* [Vol 83:1.

51 https://www.eeas.europa.eu/eeas_en

52 *Ibid*.

53 1945

## 3.5 Cooperation of States vide the Rome Statute

It is evident that the success of international law is not only based on consent of States but more importantly the cooperation of States. It is one thing to consent to be bound by an agreement and entirely a different thing to realise the provisions of the agreement by cooperating with the relevant organs of the agreement and other State Parties. Cooperation under international law has assumed such a critical role to the extent that it is now considered a principle of international law, and the efficacy of international law and by extension international criminal law is now anchored on the principle of cooperation of States. For example, the Rome Statute now provides for the principle of cooperation of States *vide* article 86.

The well-being of the international community is dependent on the principle of cooperation of States. States cannot enjoy their absolute international legal personality without cooperation and in particular the exercise of their capacity to enter into legal relations with other States. It is only with the exercise of the latter that States are able to fully appreciate their statehood.

The critical role of the principle of cooperation of States as an imperative requirement for realising the objectives of the international criminal justice system and particularly in investigating and prosecuting international crimes is forcefully presented by the Coalition for the International Criminal Court, thus:

> According to the Coalition for the International Criminal Court, on the issue of state cooperation, it states that, 'without the essential cooperation of states, international justice simply cannot function. Without cooperation, ICC investigations and prosecutions can be severely or rendered impossible. As the ICC does not have its own police, national law enforcement authorities, sometimes with the support of international organizations, must arrest and surrender ICC suspects to The Hague.[54]

The Rome Statute *vide* article 86[55] provides that:

> States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.

Considering that the International Criminal Court by its very nature i.e., lacking its independent investigative organs with authority to operate within State Parties, that the ICC lacks its own police to carry out arrests and detention

54 State cooperation (https://www.coalitionfortheicc.org/fight/strong-ICC/state-cooperation)

55 1998.

within member States, that it lacks detention facilities in the territory of member states and in the absence of explicit permission of member States. The ICC must therefore rely on the cooperation of States. The foregoing requires that in order for the ICC to undertake its mandate, it may require to make certain requests to State Parties. The foregoing requests have previously been made in various situations which include, Kenya, Sudan, Uganda among others. For example, *vide* article 87(1)(a),[56] it provides that:

> The Court shall have the authority to make requests to States Parties for cooperation. The requests shall be transmitted through the diplomatic channel, or any other appropriate channel as may be designated by each State Party upon ratification, acceptance, approval or accession.

The significance of the principle of cooperation of States via making of requests is brought out succinctly in the case of *The Prosecutor v. Omar Hassan Ahmad Al Bashir,*[57] ICC, July 2017.

Acting in terms of article 89(1) and 91 of the Rome Statute,[58] the Court registry consequently requested member States to cooperate in arresting and surrendering. President Al-Bashir should he set foot in their territories. This request was made to Kenya in the year 2010, August, when Al Bashir visited the Country during the promulgation of the Constitution of Kenya, 2010. A similar request was made to South Africa in May 2015, when it was learnt from press reports that the Sudanese president intended to visit South Africa for an African Union Summit in Johannesburg. In both cases, Kenya and South Africa did not cooperate as requested by the ICC though citing different reasons for non-cooperation. Kenya claimed that arresting Bashir would have jeopardised its position as a regional mediator, including in relation to Sudan. South Africa gave its own reasons, the first being that arresting Al Bashir would have been in violation of Customary international law regarding head of State immunity and that UNSC Chapter VII, referrals to the ICC did not constitute a waiver of Sudan's immunity. There was also South Africa's defense that it had a host agreement concluded with the African Union. Even though Kenya and South Africa did not cooperate with the court, Omar El Bashir still remained a fugitive and in some instances failed to travel, in fear that the principle of cooperation of states could lead to his arrest, detention and prosecution. Therefore, the principle

56 *Ibid*.

57 Case no. ICC-02/05-01/09-139,ICL 1568 (ICC 2011.

58 *Ibid*.

of cooperation of States in the realm of international criminal justice system continues to hang over the heads of indictees like the Sword of Damocles.

Article 89[59] provides that:

> The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 91, to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests fo*r arrest and surrender.*

A classic case of the principle of cooperation of states between the Court and Central African Republic vide article 89,[60] is the *Prosecutor v. Dominic Ongwen.*[61]

Following self-referral by Uganda in December 2003, the OTP began investigations into the situation in July 2004, issuing a sealed warrant of arrest a year later for five leaders of LRA including Ongwen. Ten years after the issuance of the unsealed warrant of arrest, in January 2015, Ongwen was surrendered to ICC custody by the Central African Republic.

There have been arguments on the fate of sources of international law, i.e., treaties versus international customs in case of conflicts. The *Omar El Bashir* case did raise the question of which law was superior to the other between the Rome Statute on cooperation of States by arrest and surrender to the Court of an indictee versus the primacy of immunity of heads of States as provided by international customary law. See below herein:

> Article 98[62] of the Rome Statute leaves it to the Court and not to the State Party to address the matter of conflict between obligations under the Rome Statute and obligations under international customary law. And that the court may not proceed with a request for surrender or assistance that would require a requested State to go against its obligations under international law.

In order for the cooperation of States with the International Criminal Court to bear fruit, State Parties must domesticate the Rome Statute and provide for organs, procedures and internal mechanisms which then can realise the requests made by the court. The foregoing requires that State Parties bring national legislation in line with the Rome Statute to, *inter alia*; facilitate better cooperation; ratify the Agreement on Privileges and Immunities of the ICC, to

59 1998.

60 Rome Statute.

61 ICC-02/04-01/15.

62 *Ibid*.

ensure that ICC officials can conduct their work around the world safely and independently, while securing rights of the defence.

The above-mentioned is captured in the Rome Statute vide article 88[63], which states that, States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part.

The International Criminal Court also recognises that the inability of states to cooperate with the Court does not solely rely on the ratification of the relevant treaty i.e., the Rome Statute. It is apparent that in some instances, the inability to cooperate is attributable to the lack of information, knowledge and skills in the area of the respect, promotion and protection of international criminal law, among the persons mandated to cooperate with the Court. Awareness campaigns have been promoted in various ways. For example, the ICC has advanced the principle of cooperation with States through the organization of or participation in high level regional cooperation seminars and symposiums, technical events to enhance cooperation, and events with focus on the legal profession.[64] To date the Court has organized over 50 events, gathering over 1000 external participants from more than 90 State Parties and non–State Parties to the Rome Statute, alongside over 40 international and regional organizations, national bar associations and civil society organizations.[65]

The Kenya ICC cases[66] illustrated the significance of the principle of cooperation of States in investigating and prosecuting international crimes. The prosecutor of the International Criminal Court in the Kenya cases complained to the Court and alleged that the Republic of Kenya was not cooperating with the Court and was in breach of its statutory obligation. The Court alleged that Kenya had refused to supply information to the Court regarding one of the accused persons. The prosecutor claimed that this information was within the possession of the government and was crucial in prosecuting its case. Kenya in defence argued that the information sought was subject to national laws and could not be availed without conforming to the specific laws.

The claim of non-cooperation of Kenya was made by the prosecutor of the ICC in the *Prosecutor v William Ruto*[67] as follows:

63 *Ibid*.

64 https://www.icc-cpi.int/about/cooperation

65 *Ibid*.

66 *Prosecutor v. Kenyatta, Prosecutor v. Ruto.*

67 No. ICC-01/09-01/11 V Oosterveld, M Perry, and J McManus, //The Cooperation of States With the International Criminal Court//, *Fordham International Law Journal*, Volume 25, Issue 3 2001

> I wish to say a few words about the failure of the Government of Kenya to cooperate fully and effectively with my investigations in this case. From the time that the Prosecution submitted its revised 8 April 2014 Request to the Government of Kenya, the material the Government sent us simply did not respond to a significant portion of our Revised Request for Records. In short, most of the material sought in my Revised Request was not provided. This is despite the fact that ICC Judges clearly confirmed that my Revised Request was valid and dismissed all of the Government's objections to it.[68]
>
> In this situation, the most relevant documentary evidence regarding the post-election violence could only be found in Kenya. Yet, despite assurances of its willingness to cooperate with the Court, the Government of Kenya failed to follow through on those assurances.[69]
>
> Ultimately, the hurdles we have encountered in attempting to secure the cooperation required for this investigation have in large part, collectively and cumulatively, delayed and frustrated the course of justice for the victims in this case.[70]

In the Kenya case, the investigation and prosecution of international crimes alleged to have been committed in Kenya ran into headwinds, due to claims of non-cooperation of the Kenya State as expressed by the Office of the Prosecutor. In view of this case it is clear that without the cooperation of the State, the international criminal justice system remains helpless. The above statement by the Prosecutor of the ICC neatly sums up the importance of the principle of cooperation of States and the dilemma the international criminal justice system faces when the principle of cooperation is breached. The foregoing is further supported in the statement that:

> The success of the International Criminal Court ('ICC' or 'Court') will be determined by the level of cooperation it receives from States. Having no police force, military, or territory of its own, the ICC will need to rely on States Parties to, among other things, arrest individuals and surrender them to the Court, collect evidence, and serve documents in their respective territories. Without this assistance, the ICC will encounter great difficulty conducting its proceedings.[31]

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article 14.

68 https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-05-12-2014-2.aspx ICC » Press and Media » Press Releases » Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the withdrawal of charges against Mr. Uhuru Muigai Kenyatta.

69 *Ibid*.

70 *Ibid*.

The significance of the principle of cooperation of States as a principle of international law and by extension international criminal law and its weight in the realization of the objectives of the international criminal justice system is noted by the fact that in relation to this principle the Rome Statute has a whole section exclusively dealing with this principle and states as follows:

> an entire Part of the Rome Statute is dedicated to matters of international cooperation and judicial assistance.[71]

It is stated that cooperation of states can be illustrated in two ways: one by showing a general commitment to cooperate and secondly, by domesticating the commitment in national law. The first way of demonstrating commitment to cooperate has been problematic, as was revealed by the OTP. The second method of domestication has been fulfilled in Kenya by the enactment of the International Crimes Act which is the domestication of the Rome Statute in Kenya. However, the domestication of the Rome Statute has fallen short of the objectives of the statute failing to create an independent Court capable of adjudicating disputes brought before it. The International Crimes Act has dedicated significant parts of the Act to issues relating to cooperation between the States and the International Criminal Court. For example, Part III[72] (provisions relating to request for assistance), Part IV[73] (provisions relating to arrest and surrender of persons to ICC) and Part V[74] (provisions relating to domestic procedures for other forms of cooperation)

According to article 86,[75] "States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court."[76]

Cooperation of States ordinarily should be preceded by friendly relations. This assertion is supported by the provisions of the 1970 UN General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, which states:[77]

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71 *Ibid*.

72 International crimes Act (Laws of Kenya).

73 *Ibid*.

74 *Ibid*.

75 Statute of the International Criminal Court, 1998.

76 *Ibid*.

77 General Assembly Resolution 2625 (XXV) 24 October 1970.

> No State or group of States has the right to intervene directly or indirectly, for any reason whatever in the internal or external affairs of any State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or its political, economic or cultural elements, are in violation of international law.

Even though the above declaration is not deemed to be legally binding, it is now regarded as, 'a precise statement of the rule of non-intervention in customary international law.'[78] The foregoing seems to find support in article 2(7) of the United Nations Charter. This article is qualified by reference to Chapter VII, which does not preclude intervention in matters considered internal, in case of gross violation of human rights. It is also argued that 'any modern notion of 'humanitarian intervention' would be bedevilled by the same subjectivity and potentially self–serving designs of military powerful nations as was the case in the nineteenth century.'[79]

The International Criminal Court continues to emphasize on the importance of the principle of cooperation of States in the continued relevance of the international criminal justice system. The significance of the system cannot be overemphasized. The effectiveness of the international criminal justice system is intertwined with the principle of cooperation of States to the extent that without the cooperation of States the justice system is stillborn and cannot stand.

The above assertion was supported by the ICC Registrar Peter Lewis when he stated that:

> After 20 years of operation, the Court is busier than ever dealing with crimes that shock the conscience of the world. All we have achieved in the last two decades has only been possible because of the support and cooperation of our States Parties, international organisations, and civil society. As we face new challenges, that cooperation and support is more important than ever.[80]

## 4. Recommendations

International law and international criminal justice system can be strengthened by adopting the principle of cooperation of States as the guiding principle of all the herein below actions:

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78 *Nicaragua v. USA* (Merits) 1986, ICJ Rep. 14 at pp. 98, 109-10.

79 S. Davidson, *Human Rights*, see chapter 1, Open University Press, 1993.

80 International Criminal Court, Press Release: 1 July 2022, International Criminal Court marks 20th anniversary.

- Adopting the position that as part of the principle of cooperation of States, a State which has signed and ratified a human rights or humanitarian law treaty, should be prohibited from 'unsigning the treaty which would be in breach of the principle.'
- That cooperation of States principle includes strengthening the principle of *pacta sunt servanda* and adopting it as a norm of *jus cogens.*
- That cooperation of States principle includes strengthening the principle of good faith in relation to international treaties, by adopting the position that once a State has become party to an agreement then it's presumed that it has done so in good faith and in the spirit of cooperation.
- That cooperation of States Principle includes reforming the United Nations Security Council and including a more equitable geographical representation of States and the repeal of the veto power.
- Strengthening of the principle of cooperation of States, by making it mandatory for State Parties to treaties to cooperate with the organs of the treaty in implementing its provisions.
- Demanding that international criminal law treaties provide for the principle of cooperation of States in investigating and prosecuting international crimes as a purpose of the treaty.
- Modifying the principle of sovereignty of States, by adopting the position that the concept of sovereignty is not absolute particularly in human rights and humanitarian law issues.
- Adopting the position that international customary law should not be used to violate the principle of cooperation of States.
- Adopt the position through an international instrument that where there is a conflict between international treaty and international custom, international treaty shall prevail.
- The prosecution of heads of States or high ranking State officials should be in international courts outside the jurisdiction of the national court of the suspects.
- Adopt the position that immunity *ratione materiae* and immunity *ratione personae* do not apply to cases concerning human rights violations in general and international crimes in particular.

## 5. Conclusion

International law and by extension international criminal justice system is inherently deficient as a result of their 'genetic constitution' *ab initio*. International law and international criminal law included are laws of independent and sovereign

States and therefore their compliance to law is relatively challenging because their adherence to law is subject to consent, goodwill and most importantly cooperation of States, which remains critical for the effective enforcement of international criminal law.The foundation of international law and international criminal justice system remains consent, goodwill and cooperation of States. In other words, there is need to persuade States that it is in their interest to respect, promote and protect international law and in this case international criminal law. It is apparent that the deficiency of the international criminal justice system in investigating and prosecuting international crimes can partially be cured by embracing the principle of cooperation of States.This principle is a peremptory requirement if the international criminal justice is to succeed in combating international crimes.