

CHAPTER ONE:

INTRODUCTION

1.0 CONFLICT PREVENTION: MYTH OR REALITY?

Conflicts across the world, ranging from civil wars to riots, civil protests and industrial disputes, have affected millions of people and have resulted in lost opportunities in terms of economic growth and human development. All types of conflict entail significant private and social costs. Violent conflicts, including civil wars, have been responsible for many deaths and injuries and the loss of livelihoods, due to the destruction of markets and private and public property and infrastructure, loss of employment and increase in food prices due to the scarcity of goods¹. Obsessed by the passion to contribute to the eradication of this quandary which has plagued and continue to affect humanity in one way or the other, the present paper seeks ways by which effective international judicial institutions can help prevent conflicts from the entire globe.

Conflict prevention has risen to prominence on the agendas of governments and international organizations in the post-Cold War period. This can be primarily

¹ Stewart, Frances, Valpy Fitzgerald and Associates, *War and Underdevelopment: The Economic and Social Consequences of Conflict*, Oxford: Oxford University Press, 2001; Fearon, James D. and David D. Laitin, "Ethnicity, Insurgency, and Civil War", *American Political Science Review*, XCVII, 2003, pp 75-90.

attributed to the opportunities for international cooperation brought about by the end of the Cold War, the potential instability inherent in the forging of new states, and the continuing prevalence of inter and intra-state conflict. In particular, the outbreak of increasingly violent and destructive intra-state conflicts at the beginning of the 1990s had an important influence on the priorities of international organizations undergoing restructuring in the new security environment. The inability of the international community² to effectively prevent and then manage the conflict in former Yugoslavia and the genocide in Rwanda in particular, led to a growing consensus on the moral and financial desirability of conflict prevention rather than difficult conflict resolution and costly post-conflict reconstruction.

In general terms, conflict prevention in the international arena refers to any attempt by third parties to prevent the outbreak of violent conflict.³ Conflict prevention is a multifaceted, complex process ranging from long-term or structural policy to promote stability, to short-term intensive diplomacy to resolve disputes (“preventive diplomacy”) and civilian or military intervention to monitor and/or control the early stages of conflict (“crisis management”).⁴ It also refers to attempts to stop the recurrence of violence in conflict zones (“peace-building” or “post-conflict reconstruction/rehabilitation”).⁵ It is therefore an

² “International community” is defined in this study after Martin Ortega, “all the states, international Organizations and other actors that participate in the complex life of the post-Cold War world.” In *Military Intervention and the European Union*, Chaillot Paper No. 45, (Paris: Institute for Security Studies of WEU, 2001), p. 2.

³ Renata Dwan, “Consensus: A Challenge for Conflict Prevention?” in Preventing Violent Conflict, The Search for Political Will, Strategies and Effective Tools, Report of Krusenberg Seminar, Stockholm: Stockholm International Peace Research Institute (SIPRI), 2000

⁴ *ibid*

⁵ *ibid*

activity primarily, although not exclusively, concerned with the period before the outbreak of war. Conflict prevention covers a range of activities also associated with gathering information on impending conflict (“early warning”), aid to relieve the effects of conflict, sanctions, and humanitarian intervention.⁶ Preventing the recurrence of violence also includes issues of peace-building and post-conflict rehabilitation.⁷

Many scholars have formulated despite criticisms the lee-way to conflict prevention. Amongst these means, the need for states and individuals to refrain from all sorts of disagreements which could resort to bloodshed and destruction of valuables;⁸ separation of powers,⁹ equitable distribution of state political, economic and social resources;¹⁰ good and accountable leadership;¹¹ and respect for human rights.¹² These tenets of conflict prevention seem to be idealistic; and it is the reason why the present paper proposes the reworking of the international judicial institutions.¹³ It is contemplated through this research that the departure from their traditional role of conflict resolution to conflict prevention is eminent should the courts and tribunals be vested with sufficient arsenal (financial resources, independent military might, and disciplined staff), conflict prevention could be attainable.

⁶ ibid

⁷ ibid

⁸ Moudjib Djenadou, UN Fellow at Centre for Africa’s International Relations. March to June 2006 (Interview conducted on May 1st, 2006)

⁹ Stewart Frances, *The Root Causes of Conflict: Some Conclusions*, Queen Elisabeth House, Working Paper Series No. 16, 1998.

¹⁰ Foley Duncan, “*State Expenditure from a Marxist Perspective*”, *Journal of Public Economics*, IX (1978), pp. 221-238.

¹¹ Stewart Frances, *Op Cit*.

¹² ibid

¹³ The term ‘international judicial institutions’ is used in a generic way encompassing all sorts of international courts, (arbitral) tribunals and quasi-judicial bodies, established on a permanent, semi-permanent or ad hoc basis.

It is because conflict prevention covers various stages of the cycle of conflict, (as well as the arbitrary use of multiple similar and interchangeable terms), that confusion concerning policy application arises. It needs to be carefully defined if it is to be taken forward as a realistic international multilateral goal. The idea of conflict prevention is also norm-laden: while the destructiveness of war is not contested, prescriptions relating to domestic policies, human rights, democracies, and the role of the free market in the prevention of conflict, are hotly disputed.¹⁴ This paper explores the media by which global conflicts can be prevented. It examines mediation, arbitration, and negotiation (Alternative Dispute Resolution—A.D.R) as potent ways of containing conflicts. It examines the loop holes of A.D.R, and contends that these lacunae could reliably be filled by judicial dispute settlement or in-court settlement tools.

In searching the means by which conflicts can be prevented, the paper examines the limits to the causes of conflicts as contemplated by Paul Collier, Kwesi Anning, Adekeya Adebajo, Eboe Hutchful, William Reno, and Keith Sommerville amongst others. They have posited economic underpinnings, lack of good governance and disintegration of state institutions, religious and ethnic differences, corruption and colonial imprint as causes of conflicts. They have also posited policy recommendations on how to prevent such conflicts. Despite their recommendations, global conflicts are on the increase. This brings us to the central question: in a world imbued with so much literature on types and

¹⁴ Institute for Security Studies of WEU, "Military Intervention and the European Union", *Chaillot Paper* No. 45, Paris 2001, p. 2., Dwan Renata, "Consensus: A Challenge for Conflict Prevention?" in Preventing Violent Conflict, The Search for Political Will, Strategies and Effective Tools, Report of Krusenberg Seminar, (Stockholm: Stockholm International Peace Research Institute (SIPRI), 2000)

measures of conflict prevention, with a handful of dispute settlement institutions, – what are the problems with the preventive approach that have culminated in some scholars thinking that any attempt to prevent global conflicts is a futile exercise?

The causes of armed conflict are numerous and interconnected, ranging from individual or group volition to structural inequality and injustice.¹⁵ Some causes of conflict are local¹⁶; others are the result of transformations in the international structure since the end of the Cold War¹⁷. Continuing economic decline and material insecurity are accompanied in many countries in the region by increasing political instability and conflict. Political corruption, lack of respect for rule of law, human rights violations are all common reasons heard for some of the causes of conflicts. The search for identity, ethnicity, and religious fanaticism has also sparked conflicts in some regions of Africa.¹⁸ Although, these reasons are valid, the non-existence of conflict in some countries or regions plagued by some of these crises suggests that there is somewhat a hideous cause of conflict which is yet to be unveiled in the science of conflict prevention.¹⁹ For the purpose of this paper, non-compliance with judicial standards by the international adjudicating machinery, and the lack of effective proactive measures are considered a significant cause of growing global conflicts.

¹⁵ Klugman Jeni, "Social and Economic Policies to Prevent Complex Humanitarian Emergencies: Lessons from Experience", WIDER, Policy Brief No. 2

¹⁶ Kees Kingma and Kiflemariam Gebrewold, "Demilitarization, Reintegration and Conflict Prevention in the Horn of Africa", Safer world and Bonn International Center for Conversion, July 1988, London

¹⁷ *ibid*

¹⁸ Crawford Young, "The Search for Identity: Ethnicity, Religion and Political Violence", UNRISD, Occasional Paper No. 6, World Summit for Social Development, 1994

¹⁹ David R. Smock, editor, , "Creative Approaches to Managing Conflict in Africa: Findings from USIP-Funded Projects", United States Institute for Peace, 1997

This paper acknowledges empirically proven causes of conflicts, but argues further that inefficient international judicial institutions are a lee-way for violators of international humanitarian law which in some respect contributes to the continuous proliferation of conflicts. This inefficiency in the judicial institutions has motivated some states and individuals to breach international law, and their duties and responsibilities vis-à-vis one another; thus causing a geometric increase in global conflicts. This increase has fueled pessimism amongst some scholars who argue that conflict is inert in human relations and transcends to state relationship with other states.²⁰ As a result of which conflict prevention is construed mythical.

In contributing to the safeguards necessary to achieving global peace, security and stability, the present paper examines the efficacy of the right to free and fair trial as has been effected by tribunals competent on the one hand, to trying matters relating to individual criminal responsibility, and on the other to adjudicate on matters relating to states' responsibility vis-à-vis other states. In this respect, the Dujail trial of Saddam Hussein will be examined because of the severity of the charges leveled against him and the worldwide public attention that it attracted; developments along the lines of Charles Taylor's case will be discussed and how they substantially breach the right to free and fair trial which is an essential ingredient for any tribunal carrying out a trial. Last but not the

²⁰ Interview with Dr. Moudjib Djenadou, UN Fellow at Centre for Africa's International Relations, March to June 2006 who contends that the only way to stop conflict is not to go to war. Given the different types of and ramifications of war (verbal, physical, and written), seems rather impossible as debates (verbal violence) is necessary to come out with concrete resolutions; Dr. Abdul Lamin of the Department of International Relations, Witwatersrand University contends that conflict can have many beneficiaries, who sometimes create bottle-necks for it to be stopped; Amongst beneficiaries of conflicts, are conflict analysts, soldiers who fight for a place in the deployment list, peace mediators, and academics who are often called to analyse and make policy recommendations to delimit the excesses of conflicts. (Interview conducted on May 1st, 2006)

least; allusion will also be made to Milosevic's trial which was interrupted by his death. In a nutshell, for matters relating to individual criminal responsibility, (the above mentioned cases tried by the Iraqi domestic court, the special Court for Sierra Leone that will be trying Taylor, and the ICTY which conducted the trial of Milosevic will be instructive). The question of equality before the law will also be discussed as will its relevance to the contemporary international judicial system. Equality before the law has figured out in many prominent international law documents but the unequal treatment of states, principal actor of international relations is yet to be given the weight it deserves. Though equality falls under the right to free and fair trial as one of its ensuing ingredients, it pertains more to courts that adjudicate on matters relating to state. For the purpose of this research, the ICJ will be illustrative. Cases decided by the ICJ like the Cameroon V. Nigeria, Ethiopia V. Badne will be analyzed in chapter four which relates to policy framework, and suggests measures to be met with as prerequisite for conflict prevention.

In line with the above, this paper argues that international law is law of all nations and accepted by majority of states, and it should not be of any moment to argue that its implementation is subject to ratifications by states Y or X. This over reliance on the sovereignty has culminated in disastrous effects and the concept needs to be redefined not to circumvent the realms of the jurisdiction of intentional law. The reason for this being that, allowing the concept of state sovereignty to override international law is tantamount to permitting several conflictual laws to operate in the international geopolitical scene, which could be a principal cause of global conflicts.

The paper will argue that, should the safeguards of free and fair trial, and equality before the law be practiced in the international political arena, potential adulterators of international law and traitors to world peace will be on their guard, and only when the international judicial institutions can play a deterrent function, can the much sought international peace be achieved. And this will go a long way to make conflict prevention real as opposed to skeptic beliefs.

1.1 Scope and Organization

In developing this thesis, the paper is divided into six chapters. The first chapter constitutes an introduction, a statement of the research questions, and it maps out the scope of the paper. The aim and the rationale of the research, the scope of the research, the hypothesis and methodology are also discussed in this chapter. This chapter is relevant at the start of the study because it lays the foundation for the research, and circumscribes the research within definite limits. Chapter two examines the literature related to the study. It looks specifically at the cause of conflicts as contended by scholars and policy formulators, but argues that that some of the shortcomings of international judicial institutions are in effect catalysts to continued international conflicts; and if these drawbacks are properly checked, conflict prevention could transform from a theoretical formulation to reality. The third chapter examines alternative dispute resolution (ADR) methods. The chapter is important because it gives a balanced focus as to how insufficient ADR techniques are, thus paving a way for judicial settlement of dispute, not only ADR as a reliable mediation tool which if revised could produce the much expected goal of preventing conflicts.

Chapter four sets out the operative mechanisms or standards by which international judicial tribunals operate. The requisite species to be examined here are the right to free and fair trial, and equality before the law. These basic rights are the cornerstone of every society that aspires to social justice, democracy and human rights. The implementation of these rights will be done with the aid of succinct contemporary examples (as mentioned above—Milosevic, Charles Taylor, and Saddam Hussein) which will buttress credibility in the international judicial process not only as a mediator but as a potent tool for conflict prevention. The fifth chapter offers conceptual and policy implications of past experiences apt for conflict prevention and the re-shaping of the international geopolitical stage. The chapter raises pertinent questions which serve as insights to some contemporary challenges of international law, and provide a framework for further academic research. The chapter is important because it illuminates the lacunae of international judicial institution, not as a means of discrediting them, but a way of portraying to the international community that if well rehabilitated, the international judicial machinery could work for them, save them blood and lives, and promote their stability while protecting them from alien attacks. Chapter six is the final section of the study, it will afford some policy recommendations or food for thought and provide a conclusion, which comments on the findings of the research, and difficulties encountered to facilitate future research on the subject.

1.2 Background to the Research

Since the process of transitions to democratic regimes in the late 70s, political crisis, social unrest and institutional instability have become increasingly frequent in the world. The nature of recent crisis and conflicts can be characterized as multidimensional. The combination of multiple and diverse issues such as rising levels of international crime, inefficient judicial systems, economic growth without development, growing gap between rich and poor, institutional instability and diminished *representativeness* of the political system are some of the elements that may help us understand recent global upheavals. The chapter constitutes a statement of the research problem, a literature review which examines the different causes of conflicts put across by scholars while further arguing invariably that these empirically proven causes of conflicts are true of particular conflicts and not general to world conflicts. The chapter also underscores the aim and the rationale of the research, the scope of the research, the hypothesis and methodology.

1.3 Research Problem

The search for global peace, security, and stability, has been subject of much academic debate.²¹ While in this search, some skeptics have categorically concluded that conflict is part of human existence, and can never be stamped out

²¹ Paul Collier, '*Doing well out of war: An economic Perspective*,' in Mats Berdal and David Malone (eds), Greed and Grievances: Economic Agendas in Civil Wars, (Boulder and London: Lynne Reinner Publishers, Inc 2000), Eboe Hutchful and Kwesi Aning, '*The Political economy of Conflict*', in West African Security Challenges: Building Peace in a troubled Region, (Boulder and London: Lynne Reinner Publishers, Inc; Grenville and Sohn, World Peace through World Law, 3rd ed., Harvard University Press, Cambridge, Massachusetts, 1966.

globally²², others have however, posited the construction of a state of law; the reinforcement of global cooperation amongst states; and the observance and enforcement of International Humanitarian law can help prevent conflict.²³ This research is a contribution to existing literature that suggests root causes of conflicts and the means by which they can be prevented in order to ensure and sustain global peace, security and stability. Owing to the fact that most scholars and writers²⁴ on this subject have failed to see and articulate the role contemporary judicial organs can play to affect global peace, this research contends that should the requirements of free and fair trial be met with, international judicial institutions will transcend their traditional role of mediating and adjudicating to preventing conflicts. The major question the research seeks to answer is: *can international judicial institutions serve as tools for conflict prevention?*

1.4 Research Questions

Other subsidiary questions to be looked into will evaluate the tribunals as they stand at present. They are:

- *Do International Judicial Institutions operate by the yard stick of the right to a free and fair hearing before an impartial court, and within reasonable time?*

²² Interview with Moudjib Djenadou, Op. cit: Schmoller Gustave, '*Schmoller on Class Conflicts In General*'. American Journal of Sociology, volume 20 (1914-15) pp. 504-531

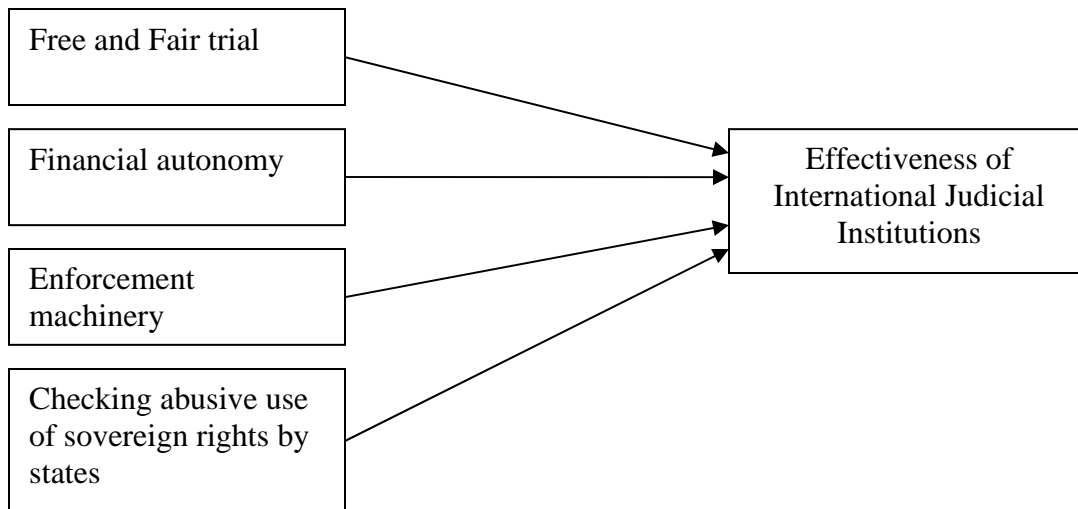
²³ Penrose, Mary Margaret, 'Lest We Fail: The Importance of Enforcement in International Criminal Law' LLM Thesis, Centre for Civil and Human Rights, University of Notre Dame, I.N, United States, 2000.

²⁴ See generally Gros Leo, The Future of the International Court of Justice, (1976); Taslim Elias, The International Court of Justice and some Contemporary problems, Essays on International Law, (1983); Damrosh Lori, The International Court of Justice at Crossroads, (1987)

- *What measures have been taken to ensure that state sovereignty does not stand as a barrier against the effective operation of the international judicial institutions? (This against the presupposition of the undermining of international justice by the US)?*
- *How effective are the International Judicial Institutions as conflict mediators if they can only pronounce the law and allow parties to kill themselves to implement it due to their lack of an enforcement machinery*
- *What do the international judicial institutions need to effectively discharge the duty of not necessarily mediating and managing, but of preventing global conflicts and their untold atrocities?*

1.5 HYPOTHESIS

Stated in hypotheses terms this research assumes that the effectiveness of the international judicial institutions is strongly associated with their capacity for free and fair trials, financial autonomy, enforcement of their judgments and checking abuse of the principle of state sovereignty. This is represented diagrammatically below.



Diagrammatical representation of Hypothesis

Scholars who are obsessed with the passion of conflict prevention have written so much on measures of alternative dispute resolution (ADR) to the exclusion of the important place the judiciary stands in this process. A few others who have written on the judiciary, have exclusively limited themselves to the International Court of Justice or Peace Palace as its fondly called, but this research seeks to undertake and portray that international judicial institutions all operate under the same canons which are free and fair trial and should these be strictly observed, there is a likelihood of the attainment of the target of conflict prevention pursuit by academics, scholars, researchers, policy makers, government organizations and civil societies.

However, this research also acknowledges that international judicial institutions will only serve as tools of conflict prevention if they possess a certain financial autonomy, have an enforcement agent, and if the abusive use of sovereign rights by states is streamlined. This research however focuses much on ensuring that the right to free and fair trial is met with. While chapter one discussed ADR and

its limits and how these pave a way for international judicial reliability, Chapter four amongst discusses the adjunct variables upon which conflict prevention depends.

1.6 Aim and Rationale

a. Aim of Research

This research principally seeks to evaluate the effectiveness of international judicial institutions in conflict prevention. The research will show in the light of some international cases adjudicated upon by the ICTY (the late Slobodan Milosevic's case)²⁵, the Special Court for Sierra Leone (the ongoing trial of former Liberia head of state, Charles Taylor), the genocide trial of Saddam Hussein (Iraqi domestic court),²⁶ the ICJ decided cases of Cameroon V Nigeria, & Ethiopia

²⁵ Wikipedia, the free encyclopedia, "Slobodan Milošević, former president of Yugoslavia, served as President of [Serbia](#) from 1989 to 1997 and then President of the [Federal Republic of Yugoslavia](#) from 1997 to 2000. He also led Serbia's [Socialist Party](#) from its foundation in 1990, One of the key figures in the [Yugoslav wars](#) during the 1990s and [Kosovo War](#) in 1999. He was indicted in May 1999, during the [Kosovo War](#), by the [UN's International Criminal Tribunal for the Former Yugoslavia](#) for [crimes against humanity](#) in [Kosovo](#). Charges of violating the [laws or customs of war](#) and grave breaches of the [Geneva Conventions](#) in Croatia and Bosnia and [genocide](#) in Bosnia were added a year and a half after that. After [demonstrations](#) following the disputed presidential election of October 2000, he conceded defeat and resigned. Less than a year later Milošević was extradited to stand trial in the [The Hague](#) but died after five years in prison with just fifty hours of testimony left before the conclusion of the trial. Milošević, who suffered from chronic heart ailments, high blood pressure and diabetes, died of a heart attack brought on by unclear circumstances. Some of his supporters believe that he was murdered in prison prior to the rendering of a verdict by his accusers. These allegations in a nutshell task the international judicial system" [direct quotation from http://en.wikipedia.org/wiki/Slobodan_milosevic], (Site consulted on February 14, 2007)

²⁶ Wikipedia, the free encyclopedia, "Saddam Hussein Abd al-Majid al-Tikriti ([Arabic](#): [نيسح ماص](#) [ي تي ركتلا دي جمل ا دب ع](#) *Saddām Ḥusayn Abd al-Majīd al-Tikrītī*, ([April 28, 1937](#)¹ – [December 30, 2006](#)^l), was the [President](#) of [Iraq](#) from [July 16, 1979](#), until [April 9, 2003](#). A leading member of the revolutionary [Ba'ath Party](#), which espoused secular [pan-Arabism](#), economic modernization, and

V Eritrea.²⁷ For the purposes of this study neither the historical evolution of these cases nor their rationale will be discussed, but the some elements pertaining to the pre-trial, hearing and post-trial which divert the court from effectively serving as a conflict prevention tool. The research stakes that international judicial institutions can play a lead role in conflict prevention which is stepping stone to global peace, security and stability.

socialism, Saddam played a key role in the 1968 coup that brought the party to long-term power. As vice president under the frail General [Ahmed Hassan al-Bakr](#), Saddam tightly controlled conflict between the government and the armed forces—at a time when many other groups were considered capable of overthrowing the government—by creating repressive security forces. In the early 1970s, Saddam spearheaded Iraq's nationalization of the Western-owned [Iraq Petroleum Company](#), which had long held a monopoly on the country's oil. In the 1970s, Saddam cemented his authority over the apparatuses of government as Iraq's economy grew at a rapid pace throughout the decade. As president, Saddam maintained power through the [Iran-Iraq War](#) (1980-1988) and the first [Persian Gulf War](#) (1991). During these conflicts, Saddam repressed movements he deemed threatening to the stability of Iraq, particularly [Shi'a](#) and [Kurdish](#) movements demanding independence or autonomy. While he remained a popular hero among many disaffected Arabs everywhere for standing up to the West and for his support for the Palestinians, U.S. leaders continued to view Saddam with deep suspicion following the 1991 Persian Gulf War. Saddam was deposed by the U.S. and its allies during the [2003 invasion of Iraq](#). Captured by U.S. forces on December 13, 2003, Saddam was brought to trial under the [Iraqi interim government set up by U.S.-led forces](#). On November 5 2006, he was convicted of charges related to the executions of 148 Iraqi Shi'ites suspected of planning an assassination attempt against him, and was sentenced to death by hanging. Saddam was [executed](#) on December 30, 2006. While the Death Penalty is a picturesque of deterrent measure, its application contravenes international humanitarian law principles; questions the authority of the US President in spearheading attacks while the UN Security Council continues to seal their lips, & also illuminates the rationale for US refusal to ratify the Rome Statute establishing the International Criminal Court.”[quoted from http://en.wikipedia.org/wiki/Saddam_hussein](Last consulted on February 14, 2007)

²⁷ Two land disputes: The difference being that while Cameroon and Nigeria fought for oil-rich Bakassi fields, Eritrea and Ethiopia fought for barren land called Badne. These two countries cases were adjudicated by the ICJ, but the verdicts stayed several years without being implemented. Rather conflicts over same zones continued unabated that one would eventually question the peace making process and the settlement of dispute mechanisms possessed by the ICJ. While Ethiopia and Eritrea are yet to have a definite resolution to their crisis, Cameroon and Nigeria managed to adhere to the ICJ verdict only after several other diplomatic mediation process championed by Koffi Annan, former UN Secretary General, and a joint Cameroon/Nigeria Commission.

There are, however, some secondary reasons for engaging in this research. These are:

- To evaluate how much the world should expect from international judicial institutions not only as conflict mediation bodies but also in their scheme to prevent the reoccurrence of such crimes as genocide, war crimes, and crimes against humanity.
- To add credibility to the international judicial institutions and make them function properly and yield better-felt results. Functioning properly herein generically refers to impartial institutions devoid of influence from whatever external or internal influence, and they should be capable of generating their own resources to aid them not only to interpret and say the law, but to enforce their verdicts beyond national boundaries.

The reason for focusing on international judicial institutions as a means of preventing conflicts is justified by the fact that, if they are accorded credibility and adequate human and financial resources by the *international community*,²⁸ and if states can get to respect their verdicts and cooperate towards the implementation of such verdicts bearing in mind that justice does not always mean that '*the law and the court should be in my favor*,' then the tribunals will serve the deterrent function against potential offenders of international law, and traitors to world peace. The enforcement of their verdicts could deter potential gross Human Rights deviants, and states that are not ready to comply with their international obligations.

²⁸ "International community" is defined in this study after Martin Ortega, "all the states, international Organizations and other actors that participate in the complex life of the post-Cold War world." "Military Intervention and the European Union", *Chaillot Paper* No. 45, (Paris: Institute for Securit Studies of WEU, 2001), p. 2. Op. cit.

b. Rationale

Realism postulates that states are the principal actors in international relations, and as such their interaction with one another is guided by the search for self gratification. This pursuit of self interests has culminated in the world invariably becoming a jungle whereby in securing their interests, states tend to trade-off global peace and respect for human rights. There is, therefore, need for a rigid and effective international judiciary which will compel states to respect the rights of other states and individuals, in line with their moral obligation in international treaties, conventions, and statutes which they have ratified and which uphold human dignity and foster global peace. States should be properly schooled to know that the decision to enter an agreement is proportionate to giving up their sovereignty, to accommodate the needs of other states who are parties to the same treaties. It is for this reason that this research contemplates that the international judiciary is the cornerstone for conflict prevention.

In addition, this research is motivated by the fact that existing literature on the means of enhancing world peace, security, stability and cooperation amongst states seems to have been myopic on the preponderant role the judiciary stands to play if properly tailored.²⁹ Rather, the few works that equally think that the judiciary needs to be restructured, base their minds only on the restructuring of the International Court of Justice without paying attention to the role of regional judicial institutions like the African Commission on Human and Peoples' Rights seating in lieu and place of the African Court, the Inter-American Court and the

²⁹ See generally Leo Gros, *The Future of the International Court of Justice*, (1976) ; Taslim Elias, *The International Court of Justice and Some contemporary Problems*, *Essays on International Law*, (1983); Lori Damrosch, *The International Court of Justice at Crossroads*, (1987)

European Human Rights Court and other special ones like – International Criminal Tribunal for Yugoslavia. These tribunals which have been created at regional levels have an indisputable role to play in the edification of International Customary Law. For the purpose of this research, however, focus will not be on the courts or tribunals, but on the standards of free and fair trial which cuts across the judicial process. Examining these will resonate with the key to using international judicial institutions as tool for conflict prevention.

1.7 Methodology

The methodology that has been used for this study is qualitative method as against quantitative method since the study does not involve statistical data collection and analysis. Ordinarily, a visit to the *locus in quo* would have been done, so as to see and get first hand information regarding the operative mechanisms of the international judicial institutions in a few trials and hearings, in order to be able to critically analyze the claim of international judicial institutions require some revamping which could culminate in their usage as tools for conflict prevent. However, due to lack of funds, the research is desk-based. It relied on some primary and secondary sources of information. Secondary source of data collection consists of existing literature on the subject of conflict, dispute settlement, international law and peace studies. These included books, journal articles, reports of investigative panels set up by groups working in the area of conflict, internet and newspaper reports. Interviews conducted around the university premises on the one hand, and interviews extracted from some newspapers and reports on the other constituted primary data which could have been supplemented with a visit to the *locus* but for lack of funds and other

logistics. The University of Witwatersrand Law, William Cullen and Wartenweiller libraries; and The South Africa Institute of International Affairs' library will be very instructive. Internet materials were another important source of information (Confer References).

CHAPTER TWO:

LITERATURE REVIEW

2.0 INTRODUCTION

The focus of the research raises three important issues which the literature will cover. The review will therefore be organized thematically in order to give it a much more functional appraisal. However, it must be stated at the outset that these issues sometimes overlap, and there might be situations where a literature piece reviewed for one theme may also be relevant to another. In that case, the literature will be reviewed with reference to the theme. In a study of this nature, the order below is pertinent opening with the background to the study. The next theme will address the causes of conflicts pointing to the fact that academicians failed to see the causal link between ineffective international judicial institutions and conflicts and the last will address the problems faced by the judiciary and the correlation between judiciary institutions and peace.

2.1 Background to the problem

Conflict prevention, management and resolution in the search for global cooperation and development of states is an essential theme. This subject is vital for the prevalence of peace, security, stability and development.

There is dissenting opinion as to whether the world can at any one time be devoid of conflict, disagreements, misunderstandings and tension of any sort.³⁰ While the realists strongly argue that states' conflict stems from human nature and its insatiable self-interest interests which tend to clash with the interest of others³¹, the neo-realist adopt a rather farcical stand of thinking that if certain institutions are put in place, the world would be physical paradise³² . The dichotomy seems to be that, the run-way of realism is centered on state interest, and given that interests vary from state to state, there is an infinite possibility of expected conflicts³³ unlike neo-realism or institutionalism which posits transgresses the paradigm of interest, and posit lay a framework for conflict prevention through institutions.³⁴

The burning universal debate is whether the world can ever be devoid of conflictual interests. While the realists believe that any attempt to bring world order and peace is tantamount to mere waste of time³⁵; this work intends to depart from the realists' pessimism³⁶ of the possibility of actually having and boasting of universal consonance of interests and ideas. Thus this work seeks to add to existing literature on how conflict can be prevented where it has not erupted, managed where it already exists, and resolved where it is escalating.³⁷

³⁰ Interview with Dr. Moudjib, UN Fellow, and Dr. Abdul Lamin, Op Cit.

³¹ Hans J. Morgenthau, *Politics Among Nations: The struggle for Power and Peace*, Fifth Edition, Revised, (New York: Alfred A. Knopf, 1978, pp. 4-15)

³² Stephen M. Walt's "*balance-of-threat*" *theory of alliance formation* (1988)

³³ Hans J. Morgenthau Op. Cit

³⁴ Stephen M Op. Cit

³⁵ Kenneth Waltz', *Theory of International Politics*, (Reading, Mass: Addison-Wesley 1979)

³⁶ Der Derian, James, '*A reinterpretation of Realism: Genealogy, Serology, Dromolog*, ' in James De Derian (ed) *International Theory: Critical Investigations*. New York University Press, 1995

³⁷ Field Shannon (ed.). *Peace in Africa: Towards a Collaborative Security Regime*. Johannesburg: Institute of Global Dialogue, 2004

While other authors have posited universal cooperation of states³⁸ as the stepping stone towards fostering development and amicable prevention and resolution of conflicts, the present research contemplates the fact that cooperation amongst states is necessary but not a condition *sine qua non* to foster world peace as long as states retain their sovereignty and discretionary powers to be or not to be bound by one treaty, convention, agreement or the other; and as long as international judicial institutions remain puppets.

While some authors think that most peacemakers wear mask of mediators, arbitrators and negotiators in the guise promoting humane treatment for all, and preaching the doctrine of order and equal opportunity for all, they are in essence searching for a means of writing their names in the good books of history in a search of payments in international currency, or to reap some form of benefit should the conflict come to an end.³⁹ However, others think that notwithstanding how much criticism, these mediators, arbitrators and negotiators often play an indisputable role in the peace process of war torn countries⁴⁰. An example in question is the recent role of Koffi Annan in the peace processes of the Democratic Republic of Congo and Ivory Coast.⁴¹

³⁸ Robert Axelrod, *The Evolution of Cooperation* (New York: Basic Books, 1984), David Carment, *Assessing State Failure: Implications for theory and Policy*, Routledges, *Third World Quarterly*, Vol. 24, Number 3/ June 2003

³⁹ Most Nigerian inhabitants of Johannesburg, South Africa after random interview contemplate that the moves taken by President Olesgun Obasanjo to militate against impunity in Africa, and to assist in pacifying wary countries by sending peacekeepers there is a tactic of winning for himself international support for an unconstitutional third consecutive Presidential mandate, and a search for the Nobel Peace Prize.

⁴⁰ Eboe Hutchful and Kwesi Aning, "*Political Economy of Conflict*" in Adebajo, Adekeye and Ismail Rashid (Eds.). *West Africa's Security Challenges: Building Peace in a troubled Region*. Boulder: Lynne Rienner Publishers, Inc, 2004.

⁴¹ UN Report of the Secretary-General, *Prevention of Armed Conflict*, 2001, [available at domino.un.org/unispal.nsf/0/b5bffc5b649239585256caa006efab6?OpenDocument] (Consulted on Feb. 089, 2007),

Worthy of note is that Realists only tried to explain the world order and the reason for the dominance of states as sole actors of the international political arena compared to the neo-realists who probe prevention of the conflict of interests of states.⁴² To Morgenthau, inter-state relationship is dominated by a search for interest or self aggrandizement. This is true though, but more relevant to the cold war era than contemporarily. Nowadays, the multiplicity of bilateral, regional, continental and international treaties and peace agreements can be construed to be a trade-off of state egocentricity to accommodate the needs of fragile and weak states. States have come to understand how insufficient they are in themselves and the devastating effects and costly nature of post conflict reconstruction. Thus, there is a general will to deviate from conflict, even to the extent of giving-up a portion of their sovereignty in the interest of national and global peace. In this regard, Morgenthau's assertions are slippery. Thus this modest piece departs from Morgenthau's speculations of continuing conflict arising from state pursuit of their diverse interests.

To do this, the work focuses on the need to add credibility to the international judicial institutions and make the existing institutions function properly and yield better felt results. Proper functioning requires that the tribunals be at liberty to take their decisions (without any external influence), and to possess some financial autonomy to assist them in conducting free and fair trial and to implement their verdicts.

⁴² Hans J. Morgenthau, Op. Cit

In order to understand the role of international judicial institutions in conflict prevention it is probably worth the salt to examine literature on the theoretical perspectives of conflict.

2.3 Causes of Conflicts: Ineffective Judicial institutions as stimulants of conflicts

There are contending theories as to the cause and motive of conflicts in the world. Conflicts seem to have a litany of literature compared to other subsidiary topics of International Relations. Scholars have not so far seen a nexus between conflict and the judiciary. Thus there is no dearth of literature on the causes of conflicts but one hardly finds any one who has contended that an ineffective judicial machinery could spark conflict. Existing literature on causes of conflict is sometimes limited in scope to address on causes in particular. Adekeye Adebajo has articulated political and cultural underpinnings to be responsible for conflicts.⁴³ This could hold true for the Sierra Leone conflict but in the face of global adversities, his speculations stand to be criticized because other conflicts like the Rwandan genocide emanate from imbalances in the distribution of economic, political and social resources. Moreover, the ongoing Sudanese conflicts have religious/and or ethnic undertones with no element of cultural or political formulations which equally go along way to excavate the lacunae in Adekeye's speculations.

⁴³ Adekeye Adebajo, *Building Peace in Africa: Sierra Leone and Guinea-Bissau*, (international Peace Academy Occasional Paper Series, Lynne Rienner, USA, 2002) pp. 79-109

Paul Collier holds the view that conflicts are fuelled by economic considerations.⁴⁴ He posits that most rebel organizations cling onto the idea of grievances in order to elicit more public support for their cause. In his hypothesis, he contemplates that a state with superfluous resources, increasing working-age population, and high unemployment rate is most likely to harbor conflict. His hypothesis, though true for many conflicts that have plagued Africa does not explain other cases in Africa. For instance, former British trusteeship of Cameroon fondly known as Anglophone Cameroon has been wailing for a fair share of economic, political, social and natural resources of the country. Despite this, discontentment has not resulted to war or any form of concrete violence as has occurred in other countries. This phenomenon consequently makes Collier's assertions fluid.

Summarily, Collier, Eboe Hutchful and Kwesi Aning argue that there are countries that have experienced conflict where natural resources were not articulated as the source of the conflict. They cited the examples of Chad and Ethiopia.⁴⁵ They acknowledged that some conflicts have been fueled by purely non-resource driven motives resulted. This is true with the cases of Angola, Afghanistan and Sudan. They, however, conceded to the fact that in the conflicts in Liberia, Sierra Leone, and the Democratic Republic of Congo (DRC) resources were one of the stimulants among other elements. They tried to strike a balance by postulating that the end of the Cold War culminated in the proliferation of arms, and ineffective post conflict demilitarization, demobilization, and

⁴⁴ Paul Collier, *'Doing Well Out of War: An Economic Prospective'*, in Mats Berdal and David Malone (eds), *Greed and Grievances: Economic Agendas in Civil Wars*, (Boulder and London: Lynne Reinner Publishers, Inc 2000) p. 91

⁴⁵ Eboe Hutchful and Kwesi Aning, *'The Political economy of Conflict'*, in *West African Security Challenges: Building Peace in a troubled Region*, (Boulder and London: Lynne Reinner Publishers, Inc, 2004, p. 199)

reintegration of ex-combatants which culminated in an outburst of wary and distressed combatants resulting several coup d'état putsch attempts.⁴⁶ While one may agree with the grievance theory, the million dollar question is what are people aggrieved about as to resort to conflicts, destruction of property, murder and assassinations? Is it about Governance? Is it distribution of resources? The answer is definitely far from the propositions of the aforementioned scholars. Because some countries have resources crisis and mismanagement, repressive regimes, and poor governance, but know no conflict. This therefore suggests that there is yet an unknown cause of conflict, and this cause is probably one that cuts across all conflicts. The present paper contemplates that inefficiencies in the international judicial machinery could be the brain-child behind skyrocketing global conflicts.

William Reno on his part contends that internal warfare is motivated by economic considerations especially with regard to the intensification of transitional commerce. He argues that there is a relationship between corruption and politics. According to Reno, conflict is bound to rise where a ruler makes life uncomfortable for his citizens by encouraging the search of his espionage as a means of escaping from squalid conditions.⁴⁷ Reno in his postulations contemplates that the absence of good governance engenders politics as a cause of conflict.⁴⁸ William Zartman on his part contemplates that the increase in conflict is orchestrated by the collapse of state structure.⁴⁹ While one may agree

⁴⁶ Robert Axelrod, Op. Cit.

⁴⁷ William Reno, *'Shadow States and Political Economy of Civil Wars'*. In Mats Berdal and David Malone (eds) *Greed and Grievances: Economic Agendas in Civil War*, (Boulder and London: Lynne Reinner Publishers, Inc, 2000) pp. 43-68

⁴⁸ *ibid*

⁴⁹ Zartman I. William (ed), *Collapse States: The Disintegration and Restoration of Legitimate Authority* (Boulder, Colorado: Lynne Reinner Publishers, 1995)

with the collapse of state theory, the lotto question is: What drives the leaders to run the state aground?

Keith Somerville, in his view tries to locate the source of conflict within the geopolitical map of Africa, which was bequeathed to it by the colonial powers. He contends that the colonial boundaries and state lines have led to the potpourri of people who hitherto had never before mixed as a group.⁵⁰ This articulation is paradoxical. While it means that even if the boundaries that existed in the pre-colonial time were maintained, there could still exist though at different levels, and with different target.⁵¹

The diverse schools of thought examined above have attempted an investigation into the causes of conflict. They have posited economic underpinnings, lack of good governance, and disintegration of state institutions, religious and ethnic differences, corruption and colonial imprints. The opinions are not quite erroneous but fail to see ultimately that conflicts emanate because the global village appears to be in a jungle, and without any concrete and deterrent law, and enforcement institutions properly tailored to, and with appropriate resources to militate against all brands of disorder, and crime in the whole globe which breed insecurity.

⁵⁰ See generally Keith Somerville, *Foreign Military Intervention in Africa*, (Pinter Publishers, London 1990)

⁵¹ Equitorial Guinea and Gabon over Corisco bay Island (1972), Malawi and Tanzania (1967), Ethiopia and Somalia (1962), Mali and Mauritania (1960), Ethiopia and Kenya over Gaduana Wells, Chad and Mali over Aouzu stripe; and Eritrea and Ethiopia over Badne, Cameroon and Nigeria over Bakassi (1994) Cited from Francis Nguendi Ikome, *The Inviolability of Africa's Colonial Boundaries: Lessons from the Cameroon-Nigeria border conflict*. Institute for Global Dialogue Occasional Paper No. 47, Johannesburg, Nov. 2004

Moreover, the fact that the problems postulated by the above authors have engendered conflicts in some areas and not in some despite the presence of similar factors suggest that there is more to conflict than has been articulated by contemporary research on the subject matter. The present paper contemplates that inefficiencies in the international judicial machinery could be the brain-child behind skyrocketing global conflicts. This research, therefore, seeks to investigate whether the international judicial institutions could be held responsible for conflicts and their consequences. The research contemplates that if the international judicial institutions are independent of other organs' influence or not subject to the will dictates of particular states, justice could be seen to be done. And this research intends also to create a nexus between global peace and international judicial organizations. An effective tribunal or court will be impartial, render free and fair judgments, possess enforceable machinery for her judgments and will treat all litigants or belligerents before it on grounds of equality. To properly execute these duties, the international judicial institutions need some financial autonomy to conduct their own affairs

2.4 Synopsis of crisis plaguing the International Judicial Mechanism and their connection with global insufficiency of Peace, Security and Stability

Numerous tensions exist over the best tactical and political means of guarding peace and security during conflict mediation. One of these, that tends to become oversimplified and polarized, concerns prosecuting perpetrators of past human

rights abuses⁵² and violators of international law. Put simply, the disagreement lies between those who say there can be no peace without justice and that there exists in international law, a positive duty to prosecute certain kinds of violations⁵³ and those who say that such views are naive, and ignore the realities of power distribution and politics on the ground, and generally serve to obstruct or inhibit the possibility of arriving at the glorious end of conflict. It is interesting to note that several International Jurists, Judges, and Policymakers, have wondered aloud as to the problems faced by the judicial machinery. However, most focused their attention mainly to the ICJ (probably because of the exorbitant role of states in international relations and international law). Other tribunals were invariably side-lined, or left out for some purpose. For instance, there is increasing ongoing campaign for the Universal Ratification of the Rome Statute which gave birth to the International Criminal Court.⁵⁴ It is therefore on the basis of this that one would think that scholars prefer to comment on the problems of the ICJ.

⁵² Paul Seils and Marieke Wierda, The International Criminal Court and Conflict Mediation, June 2005, [available in <http://www.ictj.org/images/content/1/1/119.pdf>] (on August 30, 2006)

⁵³ Ibid.

⁵⁴ The treaty has been ratified by all holders of permanent seats at the UN security Council, save for the China and the US. Being permanent members of the Security Council, one will expect them to lead (by example) all attempts at terminating impunity, and ensuring durable global peace. But in the guise of protecting the vulnerability of their citizens they have declined ratification which incites much international criticism especially on the part of the US that promotes impunity in her policies, & acts in the world. The controversy is that while the US wants to check impunity, she doesn't want to be subjected to the litmus test of other individuals or states with the mandate to ensuring global peace and security [confer <http://www.mindfully.org/WTO/2003/Rome-Statute-ICC-Ratifications7jun03.htm>] (Last consulted February, 06, 2007)

Some of the authors who have addressed the crisis of the ICJ as an International tribunal are, Leo Gross who in two Volumes⁵⁵ looks in the first part at The Role of the International Court of Justice in the Peaceful Settlement of Disputes, the place of the Court in the UN System, and the effects of the National Policies over the international jurisdiction. In part two, Gros examines the use and actual potential of the ICJ. Though national policies tend to influence the operation of the ICJ,⁵⁶ Gros fails to emphasize that domestic legislation is subservient to international law.⁵⁷ And the non respect of international law could endanger world peace and incite conflicts.

Taslim O. Elias,⁵⁸ then Judge and President of the ICJ, grouped his discourse in four parts. Part One examined the aspects of the judicial process like non-appearance, provisional measures, and the problem of admissibility of a case. In his Part two, he looked at international law and development wherein he questions the place of state sovereignty, and projects the future of ICJ. In his Part three and four, he looks at the New Economic Order and the status of Human Rights and Diplomatic Law in the International Court of Justice and how universal adherence to the Universal Declaration of Human Rights could foster the smooth running of the Judicial Machinery.” In his discourse of aspects of judicial processes, Taslim underscores the factors which if not properly taken into consideration could mar the proceedings of the court. But by not stressing

⁵⁵ L Gross, “The future of the International Court of Justice” Dobbs Ferry: Oceana Publications, 1976, Vol.I

⁵⁶ National policies influence the operation of the ICJ because states still retain their sovereignty, and most often than not tend not to enforce ICJ judgments which contravene national legislation and policies

⁵⁷ JL Kunz, [International Affairs: The International Law of the Future](#), the American Political Science Review. Josef L. Kunz. The, Vol. 38, No. 2, 354-369. Apr., 1944

⁵⁸ Taslim O. Elias, “The International Court of Justice and some contemporary Problems, Essays on International Law, Martunus Nijhoff Publishers, Boston 1983

dangers that such non-observance could have on global peace makes his work unfinished. More so, his emphasis on procedural aspects of a court hearing without due consideration of the substantive requirements, which run through the trial and their possible effect in accrediting the judiciary, and its role in ensuring global peace, opens an excavation which the present research seeks to complement.

Wilfred Jenks⁵⁹ questions the progress made by International Tribunals in respect of what is expected of them. And he further paints of the international tribunals an image of institutions the world cannot do without if it aspires to be peaceful. Jenk's affirmations are true and relevant to this research but by limiting the scope of his work to the ICJ, essential ingredients which run through all trials some of which are more relevant to criminal tribunals are left out. This research acknowledges Jenk's work, but goes beyond to examine the requirements more succinctly as they operate in all trials or hearings whether they pertain to matters of individual responsibility, state responsibility, and administrative responsibility.

Last but not the least, Lori Damrosch divides his work into five parts, in which he examines the problems of international adjudication and suitability of the ICJ with respect to certain matters and the role of the United States in the ICJ.⁶⁰ The role of the United States in international law is of particular relevance to the present research. Damrosch's suggestion that the United States should work as a corollary of the ICJ will be tested in this research. This paper contends that the

⁵⁹ . "The International Court of Justice and some contemporary Problems, Essays on International Law, Martunus Nijhoff Publishers, Boston 1983

⁶⁰ Lori Damrosch, The International Court of Justice at Crossroads, Transnational Publishers, Inc. Dobbs Ferry, New York 1987

exorbitant powers vested on the US by the UN, has given her a *laissez passer* to adulterate international law. It will address the key issue whether that excessive abusive of sovereign rights by states should be streamlined with severe deterrent measures to be meted out on persons who proliferate gross humanitarian atrocities.

Notwithstanding the above authors contributions on the restructuring of the international judicial system, all except for Wilfred Jenks based their attention on the International Court of Justice. Thus unlike Lori, Elias, and Gross, Jenks contemplates the greasing of the entire adjudication machinery for better efficacy and productivity. Other prolific writers in this vein are Grenville Clarke and Louis B. Sohn⁶¹ who proposed two alternative models for a world organization equipped to achieve and maintain total national disarmament, to enforce world law against international violence and to promote world economic and social development. The first model is based in modifying all provisions of the UN Charter. The second model provides the basis of a new world, security and development organization which would supplement the existing peace-keeping machinery of the UN, and which together with the UN would have the necessary minimum powers to prevent war.⁶² The model of Grenville and Sohn seem to tie directly with the vision of this present research but for the fact that, it does not clearly specify which world institution(s) should be retailored to achieve global conflict prevention.

⁶¹ World Peace Through World Law 3rd Ed., Harvard University Press, Cambridge, Massachusetts, 1966

⁶² *ibid*

A collection of papers presented at the ICJ/UNITAR Colloquium to celebrate the 50th Anniversary of the International Court of Justice⁶³ is rich in substance and embodies many of the crises of the ICJ in particular, but which are common to international judicial institutions in general—The right to free and fair trial and its complements, problems of admissibility before a court, competence of a tribunal, admissibility of evidence, and visits to the *locus*, etc. This collection will be examined in depth, and will greatly help to substitute interviews intended to form the primary source of evidence for this research.

Kenneth Waltz,⁶⁴ coins the concept of balance of power to be the grouping of states into various camps according to their interests. While not focusing on the international judicial institutions literature on the balance of power theory is relevant to this study. This research seeks to propose the restructuring of the global geopolitical order towards a balance of power theory which reflects the checks and balances theorem presented by John Locke; later on redefined by Montesquieu in his *l'Esprit de la Loi* in which the latter argued that there was need for a certain degree of accountability on the administration of state power censored by different organs of government into legislative, executive and judiciary. Owing to the fact that the International Treaties and Conventions which bind states tend to be jeopardized by the ambiguous or rather equivocal concept of state sovereignty, it is necessary to draw a succinct and clear cut line where the concept of state sovereignty ends. This study will add to existing literature on conflict by examining how contemporary states tend to exploit the

⁶³Increasing the Effectiveness of the International Court of Justice Martinus Nijhoff Publishers, the Hague, Netherlands, 1997

⁶⁴ "Balance of Power theory" (1979)

concept in international judicial matters to the detriment of collective peace and security.

Currently, the biggest intergovernmental organization is the UN.⁶⁵ If for instance the Council of Head of States could be established to serve as the Executive body of the UN, and the General Assembly as the Legislative or Law making body of the UN, and the ICJ, the Worlds Court, with all these arms being independent from one another, and no member functioning as a supplement to the UN today, then the world would be taking if not the final, a giant step towards preventing world conflicts.

This research intends to limit itself to the requirements of free and fair trial, equality before the law, and the place of an enforcement machinery in the international judicial system. In conducting the research and for the purpose of tribunals competent to try matters relating to the criminal responsibility of individuals, inspiration will be drawn for the cases of Slobodan Milosevic⁶⁶ and Saddam Hussein's Dujail trial. This will be used to give an insight on the possible outcome of Taylor's case. The requirements of free and fair trial and impartial constitutions of the court will be examined. In line with the proliferation of conflicts as ensuing from the lack of an enforcement gendarme, the Cameroon vs. Nigeria case over Bakassi⁶⁷ and the Egypt V. Eritrea border dispute⁶⁸ over. The

⁶⁵ 192 Member States [statistics available at <http://geography.about.com/cs/countries/a/numbercountries.htm>], (Last consulted on February 14, 2007)

⁶⁶ Reference through an interview with Sara Flounders (writer and political organizer since the first threat of breakup of Yugoslavia in the 1990s), conducted by John Catalinotto

⁶⁷ Eboh, Camilius. "Nigeria-Cameroon Fail To Set New Bakassi Pullout Date". Washington Post Online. October 15, 2005

⁶⁸ Tecola M. Hagos, "Ethiopia-Eritrea Border Dispute: Challenging the Opposition" available in www.tecolahagos.com/border_dispute, Dec. 30 2005 (Last consulted on May 18 2006)

huge reliance of US funding by the UN will also pose some insights as to whether the ICJ particularly can be impartial in the discharge of the right to equality before the law by states. In examining the International Criminal Court, the research will throw insight into the reason why some states are reluctant to ratify and or comply by the provisions of the Rome Statute, out of which have been born the ICC.

The reason for using several cases drawn from across international tribunals with that try matters with criminal responsibility, and domestic courts that try serious genocidal crimes like the Iraqi court, and the ICJ which address issues relating to state responsibility is intended to provide rational and balanced judgment of the international judicial institutions. Limiting the study to a single tribunal or court or to a single case will not be proper to conclude that the international judicial institutions are ineffective or that they can validly be channels for global peace, security and stability.

Following a brief background to the study and related literature on causes of conflicts and the crisis plaguing the international judicial institutions, the next section is an analytical framework which will investigate the relationship between variables and give a justification for the cases chosen. This Section examines the nexus between contemporary conflicts and the absence of effective international judicial policing institutions as speed-up reactors. The next section briefly examines the *modus operandi* of the research.

2.5 ANALYTICAL FRAMEWORK

This research hypothesizes that restructuring the international judicial mechanisms would positively impact their capacity to effectively implement international law and prevent conflict. The study will begin with following questions: Are international judicial institutions and the International Adjudication process making the contribution to the progress towards preventing conflicts in a way that the international community expects of them? There is growing interest in many parts of the world, strongly voiced by statesmen, diplomats and jurists alike, in widening and deepening the rule of law in world affairs.

The present research is an attempt to explore the prospects on international judicial institutions if proactive measures are taken to militate against some of their internal and external inadequacies. It discusses from the standpoint of making international judicial institutions a more effective instrument of the rule of law in world affairs both in the possibility of making its jurisdiction compulsory to all matters and amending its procedure to better resolve conflicts submitted before it.

This work looks at the international judicial institutions not like a substitute but an adjunct to mediation; negotiation; and private as well as institutional arbitration. However, it is apt to state that these organs not only have a task to work towards the management and resolution, but the prevention of world conflicts. But often, their intervention is after a crisis has arisen. This research seeks to throw light on the need of proactive measures which could assist in

conflict prevention, than reactive measures usually employed after untold material and physical damage has been done.

In the world, there are in principle two types of conflicts; inter-state, and intra-state, with the former being trans-boundary in nature and the latter remaining within the confines of domestic boundaries. The diagram below is illustrative of this point. The diagram further goes to show the different intervening actors with the task to prevent, manage, and resolve conflicts, which are prerequisite for world peace, security and stability. Thus the diagram tries to establish a relationship between conflict, international judicial institutions and international peace and security as prerequisites for development.

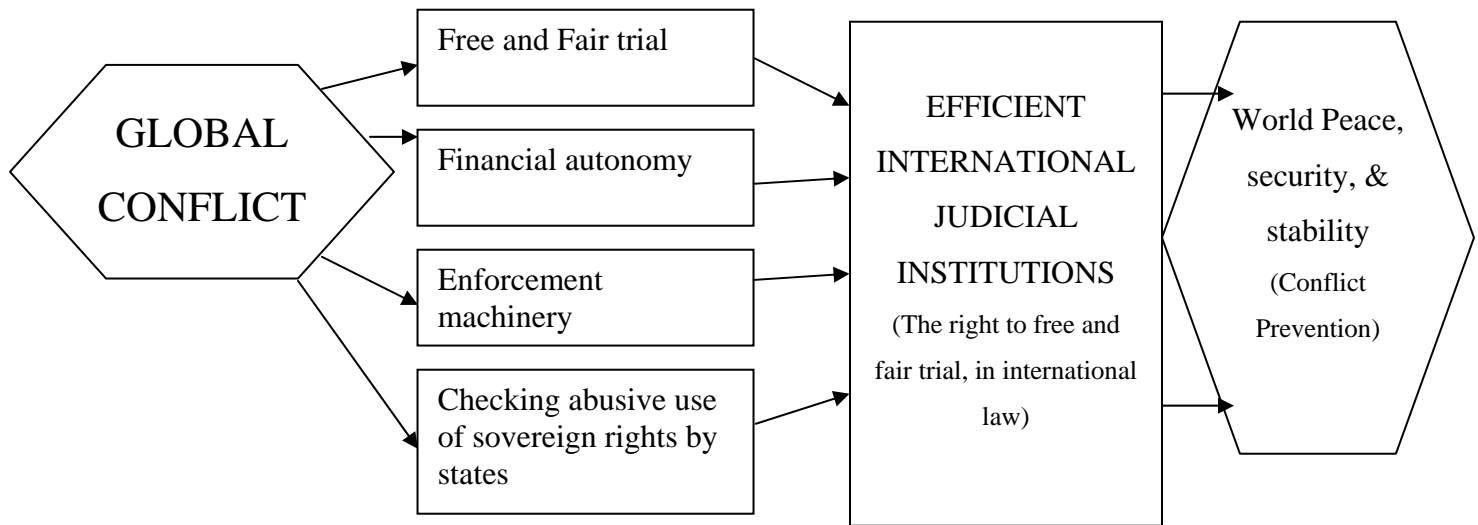


Figure 1: The causal diagram showing the interconnection between variables

The above diagram demonstrates that the international judicial institutions can significantly ensure a world of peace, security and stability in so far as the institutions are working properly. For institutions to work properly, the requirements of free and fair trial must be met with, they must possess financial autonomy, have an enforcement machinery, and there must be policies in place to check the abusive use of sovereign rights by states.

To achieve this, the research commences by examining causes of conflicts, and apparently, there is no literature which contends that ineffective international judicial institutions could be a catalyst of war. Chapter two examines other processes of conflict manage, which help to prevent conflicts. It shows the inadequacies of these processes as a result of which reliance on the judiciary as a conflict broker is imminent. While chapter three discusses in detail the right to free and fair trial as condition sine qua non which runs through all trials and adjudication processes, chapter four examines all those loop holes in the international system like the abusive use of sovereign rights by states, the need for a neutral enforcement machinery for international justice, which have all been identified as intervening variables in the diagram above.

Mindful of the fact that international judicial institutions as they are today are tailored to mediate and resolve conflicts, the research hypothesizes that, if rehabilitated, these institutions will not have the impetus to prevent conflict.

The failure of international judicial institutions in fostering peace has stemmed from the lack of cooperation and a general will by states to give credence to them. Due to the important place ascribed to the states in international relations and international politics, states have tended to use their powers of immunity

and sovereignty as a weapon to bar, the intervention of other states and or institutions in their domestic affairs. However, increasingly, the international community seems to frown at the fact that some states are using the concept of 'sovereignty' abusively and there is therefore a universal move towards coronating the judicial institutions to broker in both inter and intra-state conflicts. As a result, there is a timid movement from the concept of state sovereignty to judicial independence in the guise of securing world peace, security, and stability.

2.6 Case study justification

The key conceptual issue will deal with state sovereignty and as opposed to intervention. The sovereignty of states stands as a barricade for other states or institutions to intervene in domestic matters even when some domestic issues threaten the peace and stability of the world. The conceptual framework provides a rationale for states' incapability of handling intra-state and trans-boundary conflicts. Moreover, there is a general movement in the international community towards protecting individuals than the state, thus a state will not subject an individual or groups of individuals to inhumane and degrading treatment, and get away with. The surrounding debate here is that, though it is state power that suppresses people, not the state, but individual power-holders are actually booked to court, and this brings in the concept of individual versus state responsibility. However, the research intends to examine the judicial mediation body not only as a corollary, but a necessary institutional organ that needs to be revamped for the international community to enjoy lasting peace,

security and stability which are stepping stones to global development. In doing this, it is apt to review related literature and analyze their adequacies to meet the global search for peace, security, and stability as opposed to conflict which has covered all front papers of bulletins, and headlines of media news. The study will however analyze three main judicial institutions which are the Special Court of Sierra Leone and how it is handling Charles Taylor's case, the Iraqi court and its verdict in the Dujail trial, the ICJ and its judgments in tow celebrated cases of international law (Cameroon versus Nigeria, and Ethiopia versus Eritrea). The examination will be based on whether such trials and adjudication processes meet the requirements of free and fair trial as understood under international law. The ICJ is apt because it is the highest tribunal of the earth. In examining the parameters of equality before the law which contemplates that no one is above the law, and the presence of an enforcement machinery could boost its efficacy. Talking about the efficacy of the ICJ, the Cameroon-Nigeria, and the Ethiopia-Eritrea border dispute over Bakassi,⁶⁹ will be examined closely. The case will guide the study and reveal whether or not there were some loop holes in the present administration of Justice System of the ICJ. The study will further establish a nexus between conflict prevention and the rehabilitation of the ICJ.

- *The ICTY.* The ICTY is relevant for the purpose of this research because of its fame owing to the fact that it heard one of the world's most controversial cases. For the purpose of international criminal responsibility, its relevance is much more apparent than the ICC whose ratification has sparked much academic debate, and culminated in many lead world countries refusing to ratify. It operates as a corollary to other Criminal tribunals like the ICC and the ICTR. It seems interesting to study the ICTY at this stage because (like other

⁶⁹ Op Cit. (Note 7)

criminal tribunals—ICTR, and ICC), it hears matters at first instance and passes binding judgments not subject to appeal.⁷⁰ The cases of Slobodan Milosevic tried by the ICTY, the condemnation of Saddam Hussein in the Dujail trial will be instructive in discussing international criminal responsibility, and will provide an insight into the possible outcome of Taylor's trial currently being heard at the Hague by judges of the Special Court for Sierra Leone.⁷¹ The way Taylor's arrest was conducted, his long detention, and the prison conditions that he complained of sometime will all be instructive in the discussion of the essential requirements of the right to free and fair trial.

The reason for examining several judicial institutions of different competencies is explained by the fact that the veracity of the research could be questioned if on the basis of an analysis of a single case study analysis or limited number of adjudicated cases. Analyzing several institutions will provide a veritable picturesque of international judicial institutions.

Moreover, the choice of the tribunals with civil/administrative competences, and tribunals competent to hear matters relating to individual criminal responsibility was equally motivated by the fact that both have different issues pertaining to the right to free and fair trial. For instance, the right to equality before the law is best exemplified in the ICJ which settles disputes relating to arrested arbitrarily is best exemplified in the ICTY and tribunals like the Special Court for Sierra

⁷⁰ The power to pass final and binding judgment which other criminal tribunals can do suggest that there is some duplicity of resources in international law. Too many courts are competent to try same issues and all courts have same strength. For some reason, the need for hierarchy of courts is preponderant as it affords the right to appeal of litigants. The absence of this hierarchy of courts from the international legal system is a substantial breach of the adjunct corollaries which ensue from the right to free and fair trial discussed at a later stage of this paper.

⁷¹ The death of the Liberian warlord, or a verdict flood with so many breaches of substantive requirements of international law in the guise of ensuring public peace.

Leone which tries matters relating to individual responsibility. However some of the derivatives of fair trial like the constitution of the court, the impartiality of judges, right to be represented by counsel of ones choice, and the right to appeal run through all trials whether criminal, civil or administrative, and whether the trial relates to individual criminal responsibility or to states responsibility.

2.7 Theorizing concepts of state sovereignty vs. judicial independence (institutional intervention)

This research will be conceptualized within the framework of state sovereignty, Balance of Power, and judicial independence. State sovereignty as stipulated above stands as a set-back for the implementation of international law. This phenomenon so prevents international law from taking its due course because the concept of balance of power which in principle Montesquieu adumbrates should be separation of powers amongst different independent organs is not properly effected in the international system. Thus conflicting state interests keep on increasing, and mediation bodies are always on the walk to intervene in trans-boundary crisis. It is in this backdrop, that the conceptual framework seeks to shed some light and clarity on the above concepts and their inter-connection, and how they relate particularly to the present research.

The best place to start with the discussion of sovereignty is the approach taken by political realism⁷²: Realism is not only the dominant approach to International Relations, but it is also the one which places the most emphasis on the idea of

⁷² Hans Morgenthau, *Politics amongst Nations: The struggle for Power and Peace*, Fifth Edition, Revised (New York: Alfred A. Knopf, 1978, pp. 4-15)

sovereignty⁷³. Furthermore, it is one with by far the most simplistic conception of sovereignty. Realism takes the state as its point of departure⁷⁴; while this is often referred to as 'nation state', it is much more accurate to refer to it as sovereign state⁷⁵. According to realism, the central feature of the world is that it is divided into a series of territorial, mutually exclusive, exhaustive, sovereign states⁷⁶. The state is sovereign in two senses⁷⁷:

- The first is that there is no authority higher than the state in International Relations, and so the state need not answer to anyone other than itself.
- The second sense in which the state is sovereign is that it has exclusive jurisdiction over the land and people within it.

The immediate feasible problems with the concept of sovereignty stems first from the notion of Human Rights⁷⁸: The realist understanding of sovereignty teaches that the treatment of individuals within a state is the sole concern of that state⁷⁹; so for example, the treatment of Falun Gong members by the Chinese state is of no consequence to any other state or International Organization. Similarly, the beheading of a journalist in your country is a matter solely for your own political institutions –even if it proves that the killing was carried out by the state, and ordered by the President himself. The problem, of course is that this

⁷³ H. Bull, 'The Theory of International Politics, 1919-1969' (!972), reproduced in J. Der Derian (Ed.) *International Theory: Critical Investigations*, (Basingstoke, 1995), pp 183-4

⁷⁴ F. Haliday, *Rethinking International Relations* (London, 1975), p. 175

⁷⁵ Der Derian, James, 'A reinterpretation of Realism: Genealogy, Serology, Dromology' in Der Derian James (Ed) *International Theory: Critical Investigations*. New York University Press, 1995

⁷⁶ Walt's Stephen M. "International Relations: One World, Many Theories" (Foreign Policy, Spring 1998)

⁷⁷ Waltz Kenneth, Op. Cit. p 8.

⁷⁸ Bull H. *The Anarchical Society: A Study of Order in World Politics*, London: Macmillan, Chap. 1

⁷⁹ Carter E. H, *The Twenty Years Crisis* (London: Macmillan, 1939, 2nd edn 1946)

does not fit very well with contemporary practice⁸⁰, because states do not simply accept that other states have *carte blanche* in the relations with their own people⁸¹. If this were the case, it ended with the Second World War and the discovery of the Nazi Genocide⁸² – here was a case of a violation of human rights which simply could not be accepted under the shield of sovereignty.

The second example is much more mundane and concerns Canada's softwood lumber industry. Canada and the US though identical are different in many respects⁸³, one of which is woodland management. In the US, the great majority of timberland is privately owned while in Canada is public and controlled by the state. This means that the way in which wood is managed in both countries is different, and it's a typical explanation of sovereign prerogative. Nevertheless the US has never accepted Canada's right to manage its own woodlands as it sees fit; and has pressured the Canadian government very hard to change its practice. Canada's response has been even more revealing, because rather than simply assert sovereign authority, it has repeatedly appealed to International Tribunals to argue that its practices are licit (Cases it has won in every instance)⁸⁴. The point to underscore is that Canada does not contest that it is the business of

⁸⁰ Andrew Linklater's *Beyond Realism and Marxism: Critical Theory and International Relations* (London: Macmillan, 1990)

⁸¹ Cynthia Enloe, *Bananas, Beaches and Bases: Making Feminist Sense of International Relations* (London: Pandora Books, 1992)

⁸² Bentham J., *Introduction to the principles of Morals and Legislation*, 1789, Batoche Books, Kitchener, 2000, cited from www.ecn.bris.ac.uk/het/bentham/morals.pdf (Consulted on May 19, 2006)

⁸³ Timothy J. Conan et Michelle A. Sager, "Les implications du Federalisme dans la Politique étrangère américaine: Les relations extérieures des états fédérés" (neither city nor city of pub. cited) in www.diplomatie.gouv.fr/fr/IMG/pdf/FD001403.pdf (Last consulted on May 3, 2006)

⁸⁴ CANADA/UNITED STATES OF AMERICA: Judgment of 12 October 1984, Viewed from <http://www.icj-cij.org/icjwww/idecisions.htm> (Consulted on April 30, 2006)

others, both the United States and various international tribunals, to determine how Canada may not manage its lumber industry.

Both liberal institutionalism and some forms of Critical Theory have answers to these problems, and so provide a more nuanced understanding of sovereignty, than is provided by crude realism⁸⁵: Liberal Institutionalism accepts the importance of the state⁸⁶, but sets the state into a context of a number of intersecting and overlapping actors, non-governmental Organizations and International Organizations. Perhaps more important for understanding this approach to sovereignty is that liberal-institutionalism is *Liberal per se*⁸⁷. Moreover, liberalists argue that states cannot override the rights of its citizens, and that International Organizations and even non-governmental organizations like World Red Cross and Amnesty International can legitimately become involved in states to protect people from violations of human rights⁸⁸; Therefore not only is the internal sovereignty of states not seen as absolute, but neither is the external sovereignty of the state. Thus states are increasingly relying on other Para-state institutions to resolve their conflictual policies and interests⁸⁹. Thus since most are relying on International Tribunals to resolve disputes, the worlds secret seems to have war and conflicts totally extinct apparently lies principally on the judiciary. And its revamping is of immeasurable and imperative need to the international community that seeks a solution to increasing word conflicts. In

⁸⁵ Micheal Nicholson, *Causes and Consequensces in International Relations: A conceptual Study*, (London: Pinter 1996)

⁸⁶ A.J..R groom and Margot Light eds. *Contemporary International Relations: A Guide to Theory* (London: Pinter 1994)

⁸⁷ Steve Smith, Ken Booth and Marysia Zalewski, *International Theory: Positivism and Beyond* (Cambridge: Canbridge University Press, 1996)

⁸⁸ Philip Reynolds, *An Introduction to International Relations* (London: Longman 1994, 3rd Edn.)

⁸⁹ James E. Dougherty and Robert L. Pfaltzgraff Jr, *Contending Theories of International Relations* (New York: Harper-Collins, 1990)

this regards, it is therefore apt to examine the status the tribunals should take for its conflict preventive role. This misnomer has bred the space for the birth of tribunals. The million dollar question is: What should be the status of these tribunals if they must deliver the goods for which they were created. This research proposes that the tribunals must be independent. The terminology 'independence' is embedded with much meaning legally connotated.

Since the end of the Cold War, international criminal law has increasingly become an instrument of international human rights policy. The ad hoc international criminal tribunals for the human rights atrocities in Rwanda and the former Yugoslavia continue while the new International Criminal Court now sits in The Hague, despite trenchant US opposition to it⁹⁰.

Adjudication of crimes under international law so far has been the task of either national or international courts or tribunals⁹¹. General skepticism towards the impartiality of national courts has brought about the call for international courts. The international criminal tribunals in Nuremberg, Tokyo, The Hague and Arusha as well as the ICC were based on the presumption that perpetrators, especially high-level ones, run the risk of not receiving an impartial and fair trial in national courts. Proceedings before a tribunal composed exclusively of international judges that represent the international community could prevent the bias of national courts.

⁹⁰ Prof. Helen Stacy, International Criminal Courts and Tribunals, Lecture notes Course IR 140B: Law and Society, University of Stanford, cited from www.stanford.edu/dept/IR/course/lawsoc.html (Consulted on May 19, 2006)

⁹¹ Wieruszewski, . "National Implementation of Human Rights" in A.A An- Na'im and F.M.Ddeng (eds.), Human Rights in Africa: Cross-Cultural Perspectives, Washington, DC: Brookings Institution, pp. 243-60

On the other hand, international criminal tribunals also have been criticized for their distance between the societies affected by the crimes and the proceedings hundreds of miles away from where they were committed⁹². Having international criminal tribunals play a role in the reconciliation process seems considerably more difficult under these circumstances. Moreover, a purely international court is composed of judges none of whom is familiar with the realities “on the ground” during the respective period of victimization as well as the legal culture of the society concerned.

In order to prevent the above drawbacks, international criminal law enforcement is moving beyond the national/international-dichotomy and finds new forms of striking a balance between the need for effective, impartial and independent proceedings and proximity of such proceedings to the affected society with respect for the national judicial system in question. Several mixed tribunals and courts have been or are about to be invented in the last few years. The Kosovo War and Ethnic Crimes Courts, the mixed courts for serious criminal offences in East-Timor, and the Special Court for Sierra Leone and Khmer Rouge Tribunal for Cambodia are all examples of “internationalized” courts, composed of both international and national judges and applying international as well as national law.

The judiciary is constituted the ultimate interpreter of the constitution, and to it is assigned the delicate task of determining the extent and scope of the power conferred on each branch of government, the limits on the exercise of such powers under the law and whether any action of any branch transgresses such

⁹² Mojekwu, C. “International Human Rights: The Contemporary Issues”, Stanfordville, New York: Human Rights Publishing Group, (1980) pp 85-95

limits. It is also a basic principle of rule which permeates every provision of other authority must not only be conditioned by the constitution but also be in accordance with law and it is the judiciary and other International Judicial Organs and Tribunals which has to ensure that the law is observed and that there is compliance with the requirements of law on the part of government. This function is discharged by the judiciary through the exercise of the power of judicial review which is a potent weapon in the hands of the judiciary for the maintenance of the rule of law.

Judicial power is the power which the states must of necessity have to decide controversies between individuals or groups of individuals, or between the latter and itself whether the right relates to life, liberty or property, since in conflict of policies, and interests, states have undertaken to confer the matters to the International tribunals to strike a balance.

The United Nations Congress on the Prevention of Crime and the treatment of offenders held in Milan, Italy, 1985, adopted basic principles on the independence of the judiciary (Later endorsed by the General Assembly). These principles provide general guide lines upon which genuine independence is founded and can serve as a barometer to measure judicial independence.

1. *It is the duty of states to respect the independence of the judiciary,*
2. *It is the duty of the judiciary to decide matters impartially,*
3. *Judges must not be subject to or accept;*
 - a. *Restrictions,*
 - b. *inducements,*
 - c. *improper influence,*
 - d. *threats or interference of any kind with the judicial function,*

- e. *pressures,*
- 4. *Judges have the exclusive jurisdiction to decide all issues that come before them.*
- 5. *Judges should be properly trained and selected without any discrimination,*
- 6. *The appointment of judges should be guaranteed up to fixed retirement age or the end of their term of office,*
- 7. *Judges, may only be moved for incapacity or behavior that makes them unfit to discharge their duties.*

The deficiency of some of these ingredients has fostered a way for a weak International judicial mechanism in national and international geopolitics. Thus there is need to coronate the International Tribunal to move the world to enjoying peace which like economic resources is limited.

As conclusion, the realists have upheld the state to a point of satiety and since states are insufficient in themselves, there is a need to coronate an organ which will check the excesses of states vis-à-vis other states; define the contours of state power vis-à-vis its citizens and other states; mediate in dispute; and lay punitive sanctions against the forfeiters of the law so that it serves as a deterrence to potential transgressors. The international judicial mechanism amongst other dispute settlement process to be discussed in chapter two have been used, but the lacunae of the latter have prompted much more reliance on international judicial institutions which though imbued with some limitations can be revamped to serve as a potential key to conflict prevention.

CHAPTER THREE:

FROM ALTERNATIVE DISPUTE RESOLUTION (ADR) TO CONFLICT PREVENTION

3.0 INTRODUCTION

As our courts have grown more congested and litigation has become more expensive, there has been increasing interest in the business community in alternative forms of dispute resolution.⁹³ Alternative Dispute Resolution (ADR) refers to any means of settling disputes outside of the courtroom.⁹⁴ ADR typically includes arbitration, mediation, negotiation and conciliation.⁹⁵ As burgeoning court queues, rising costs of litigation, and time delays continue to

⁹³Scott [Michael R.](#), "Alternative Dispute Resolution: About Mediation and Arbitration", in Hillis Clark Martins & Peterson, 1998-1999 [available in <http://www.hcmp.com/Articles/mrs0399.htm>] (Last consulted on Jan. 03, 2007)

⁹⁴ Karl Mackie, "Mediation Futures." In Rethinking Disputes—The Mediation Alternative- Ed. Julie Macfarlane. Cavendish Publishing Limited, 1997, P37 1

⁹⁵ Madarlane, Julie. Dispute Resolution. - *Readings and Case Studies*- Toronto: Edmond Montgomery Publications, 1999.

plague litigants, more states have begun experimenting with ADR programs.⁹⁶ However, due to some of the limits exacerbated by the ADRs as will be discussed in subsequent paragraphs, states have again begun to trust international judicial (courts/tribunals) as a means of settling disputes amongst them.

This chapter examines the place of ADR in conflict prevention. The chapter is important because throughout history, individuals, groups, communities, societies and states have sought ways to contain their destructive behavior and to ensure a measure of order and peace in their midst. Numerous devices, mechanisms and institutions have been invented to manage, deal, resolve and prevent disputes between antagonistic actors. The most common devices and mechanisms of ADR which are widely used range from negotiation, arbitration, and mediation. In its setting, the chapter looks at the various actors involved in conflict resolution; their strengths, and weaknesses as a result of which global conflicts have continually prevailed. The chapter culminates on a positive note that international judicial institutions are better prone not only to mediate but to prevent conflicts; but this is not effected through their present status quo.

3.1 NEGOTIATION

In simplest terms, negotiation is a discussion between two or more disputants who are trying to work out a solution to their problem.⁹⁷ This interpersonal or inter-group process can occur at a personal level, as well as at a corporate or

⁹⁶ Madarlane, Julie. Rethinking Disputes: The Mediation Alternative. London: Cavendish Publishing, Limited, 1997.

⁹⁷ "Negotiation," International Online Training Program on Intractable Conflict, Conflict Research Consortium, University of Colorado, [available at: <http://www.colorado.edu/conflict/peace/treatment/negotn.htm>]

international (diplomatic) level. Negotiations typically take place because the parties wish to create something new that neither could do on his or her own, or to resolve a problem or dispute between them.⁹⁸ The parties acknowledge that there is some conflict of interest between them and think they can use some form of influence to get a better deal, rather than simply taking what the other side will voluntarily give them.⁹⁹ They prefer to search for agreement rather than fight openly, give in, or break off contact.¹⁰⁰

When parties negotiate, they usually expect give and take. While they have interlocking goals that they cannot accomplish independently, they usually do not want or need exactly the same thing.¹⁰¹ This interdependence can be either win-lose or win-win in nature, and the type of negotiation that is appropriate will vary accordingly.¹⁰² The disputants will either attempt to force the other side to comply with their demands, to modify the opposing position and move toward compromise, or to invent a solution that meets the objectives of all sides. The nature of their interdependence will have a major impact on the nature of their relationship, the way negotiations are conducted, and the outcomes of these negotiations.¹⁰³

⁹⁸ Lewicki Roy J., David M. Saunders and John W. Minton, *Negotiation, 3rd Edition* (San Francisco: Irwin McGraw-Hill, 1999), 5.

⁹⁹ Ibid. 7.

¹⁰⁰ Wertheim E., "Negotiations and Resolving Conflicts: An Overview," College of Business Administration, Northeastern University, [available at: <http://web.cba.neu.edu/~ewertheim/interper/negot3.htm>] (Consulted on Jan. 03, 2006)

¹⁰¹ Lewicki, Saunders, and Minton, op. Cit.

¹⁰² Ibid

¹⁰³ Ibid.

Mutual adjustment is one of the key causes of the changes that occur during a negotiation. Both parties know that they can influence the other's outcomes and that the other side can influence theirs. The effective negotiator attempts to understand how people will adjust and readjust their positions during negotiations, based on what the other party does and is expected to do.¹⁰⁴ The parties have to exchange information and make an effort to influence each other. As negotiations evolve, each side proposes changes to the other party's position and makes changes to its own. This process of give-and-take and making concessions is necessary if a settlement is to be reached. If one party makes several proposals that are rejected, and the other party makes no alternate proposal, the first party may break off negotiations.¹⁰⁵ Parties typically will not want to concede too much if they do not sense that those with whom they are negotiating are willing to compromise.

The parties must work toward a solution that takes into account each person's requirements and hopefully optimizes the outcomes for both. As they try to find their way toward agreement, the parties focus on *interests*, *issues*, and *positions*, and use cooperative and/or competitive processes to come to an agreement.

a. Obstacles to Negotiation

In intractable conflicts, removing the obstacles to negotiation is the critical first step in moving toward negotiated agreements. Sometimes people fail to

¹⁰⁴ Ibid

¹⁰⁵ Ibid

negotiate because they do not recognize that they are in a bargaining position. They may fail to identify a good opportunity for negotiation, and may use other options that do not allow them to manage their problems as effectively.¹⁰⁶ Or, they may recognize the need for bargaining but may bargain poorly because they do not fully understand the process and lack good negotiating skills. This lacuna is well filled in judicial litigation where the referring judge is usually a skilled and well schooled mediator and custodian of the law.

Moreover, in cases of intractable conflict, parties often will not recognize each other, talk with each other, or commit themselves to the process of negotiation.¹⁰⁷ They may even feel committed, as a matter of principle, to not negotiate with an adversary. In such cases, getting parties to participate in negotiations is a very challenging process. In addition, both parties must be ready to negotiate if the process is to succeed. If efforts to negotiate are initiated too early, before both sides are ready, they are likely to fail. Then the conflict may not be open to negotiation again for a long time. This limitation can be checked by an effective policed community where possible treats to communal peace or humane relationship between individuals are well censored, and considering the exacerbating effects which such disagreements may propel, an effective court system with deterrent safeguards is well preferred.

¹⁰⁶ Ibid

¹⁰⁷ Harold S. Saunders, "We Need a Larger Theory of Negotiation: The Importance of Pre-Negotiating Phases," pp. 57-70 in *Negotiation Theory and Practice*, eds. J. William Breslin and Jeffrey Z. Rubin, (Cambridge: Program on Negotiation Books, 1991), 64.

Prior to negotiation, parties must be aware of their alternatives to a negotiated settlement. This unfortunately is never always the case, as there are always different degrees of skepticism from disputants. Disputants must however believe that a negotiated solution would be preferable to continuing the current situation, that a fair settlement can be reached, and that the balance of forces permits such an agreement.¹⁰⁸ William Zartman refers to this as the belief that there is a "Way Out."¹⁰⁹ Weaker parties must feel assured that they will not be overpowered in a negotiation, and parties must trust that their needs and interests will be fairly considered in the negotiation process.

In many cases, conflicts become "ripe" for negotiation when both sides realize that they cannot get what they want through a power struggle and that they have reached a mutually hurting stalemate.¹¹⁰ If the parties believe that their ideal solution is not available and that foreseeable settlement is better than the other available alternatives, the parties have a "Zone of Possible Agreement"

¹⁰⁸ Ibid

¹⁰⁹ By Jacob Bercovitch, Jeffrey Z. Rubin, *Studies in International Mediation: Essays in Honour of Jeffrey Z. Rubin*, Palgrave 2002, Zartman I. William, *Negotiations and Prenegotiations in Ethnic Conflicts: The Beginnings, The Middle, and the Ends*. In *Conflict and Peacemaking in Multiethnic Societies*. Ed. Joseph V. Montville. Lexington, Mass.: Lexington Books, 1990

¹¹⁰ Roger Fisher, "Negotiating Power: Getting and Using Influence," pp. 127-140 in *Negotiation Theory and Practice*, eds. J. William Breslin and Jeffrey Z. Rubin, (Cambridge: Program on Negotiation Books, 1991), 128.

(ZOPA).¹¹¹ This means that a potential agreement exists that would benefit both sides more than their alternatives do.

However, it may take some time to determine whether a ZOPA exists. The parties must first explore their various interests, options, and alternatives. If the disputants can identify their ZOPA, there is a good chance that they will come to an agreement. But if they cannot, negotiation is very unlikely to succeed. In addition, each side must believe that the other side is willing to compromise. If the parties regard each other with suspicion and mistrust, as is most often the case, they may conclude that the other side is not committed to the negotiation process and may withdraw.¹¹²

When there is little trust between the negotiators, making concessions is not easy. First, there is the *dilemma of honesty*.¹¹³ On one hand, telling the other party everything about your situation may give that person an opportunity to take advantage of you. However, not telling the other person anything may lead to a stalemate. The *dilemma of trust* concerns how much you should believe of what the other party tells you. If you believe everything this person says, then he or she could take advantage of you. But if you believe nothing this other person

¹¹¹ Brad Spangler, *Zone of Possible Agreement (ZOPA): What is a ZOPA and Why Does it Matter?*, June 2003, [Available in <http://www.beyondintractability.org/essay/zopa/>] (Last consulted on Jan. 03, 2007)

¹¹² Saunders, Op. Cit., The recent case of rebel denunciation of Mbeki's mediation in the Ivorian conflict is also illustrative. The Ivorian rebels intimated that Mbeki was taking sides with incumbent President Laurent Gbagbo despite the fact that the latter's Presidential mandate had come to its natural-constitutional end.

¹¹³ Lewicki, Saunders, and Minton, Op. Cit.

says, then reaching an agreement will be very difficult. The search for an optimal solution is greatly aided if parties trust each other and believe that they are being treated honestly and fairly.¹¹⁴

In many cases, the negotiators' relationship becomes entangled with the substantive issues under discussion.¹¹⁵ Any misunderstanding that arises between them will reinforce their prejudices and arouse their emotions. When conflict escalates, negotiations may take on an atmosphere of anger, frustration, distrust, and hostility. If parties believe that the fulfillment of their basic needs is threatened, they may begin to blame each other and may break off communication. As the issue becomes more personalized, perceived differences are magnified and cooperation becomes unlikely. If each side gets locked into its initial position and attempts to force the other side to comply with various demands, this hostility may prevent negotiators from reaching agreement or making headway toward a settlement.¹¹⁶ In addition, parties may maintain their commitment to a course of action even when that commitment constitutes irrational behavior on their part. Once they have adopted a confrontational approach, negotiators may seek confirming evidence for that choice and ignore contradictory evidence.¹¹⁷ In an effort to save face, they may refuse to go back on previous commitments or to revise their position.

¹¹⁴ Roger Fischer, Op. Cit

¹¹⁵ Roger Fisher, William Ury, *Getting to Yes: Negotiating Agreement Without Giving In*, 2nd edition, ed. Bruce Patton, (New York: Penguin Books, 1991).

¹¹⁶¹¹⁶ E. Wertheim, *Negotiations and Resolving Conflicts: An Overview*; [available at: <http://web.cba.neu.edu/~ewertheim/interper/negot3.htm>] (Last consulted on January 03, 2006)

¹¹⁷ Lewicki, Saunders, and Minton, Op. Cit.

To combat perceptual bias and hostility, negotiators should attempt to gain a better understanding of the other party's perspective and try to see the situation as the other side sees it.¹¹⁸ In some cases, parties can discuss each other's perceptions, making a point to refrain from blaming the other. In addition, they can look for opportunities to act in a manner that is inconsistent with the other side's perceptions. Such de-escalating gestures can help to combat the negative stereotypes that may interfere with fruitful negotiations. In ideal circumstances, negotiators also establish personal relationships that facilitate effective communication. This helps negotiators to focus on commonalities and find points of common interest.

Finally, if the "right" people are not involved in negotiations, the process is not likely to succeed. First, all of the interested and affected parties must be represented. Second, negotiators must truly represent and have the trust of those they are representing. If a party is left out of the process, they may become angry and argue that their interests have not been taken into account. Agreements can be successfully implemented only if the relevant parties and interests have been represented in the negotiations,¹¹⁹ in part because parties who participate in the negotiation process have a greater stake in the outcome. Similarly, if constituents do not recognize a negotiator as their legitimate representative, they may try to block implementation of the agreement. Negotiators must therefore be sure to

¹¹⁸ Fisher and Ury, Op. Cit. 23.

¹¹⁹ Morton Deutsch, "Cooperation and Competition," in *The Handbook of Conflict Resolution: Theory and Practice*, eds. Morton Deutsch and Peter Coleman (San Francisco: Jossey-Bass Publishers, 2000), 22

consult with their constituents and to ensure that they adequately deal with constituents' concerns.¹²⁰

These concerns are related to what Guy and Heidi Burgess call the "scale-up" problem of getting constituency groups to embrace the agreements that negotiators create.¹²¹ In many cases, participation in the negotiation process helps negotiators to recognize the legitimacy of the other side's interests, positions, and needs. This transformative experience may lead negotiators to develop a sense of respect for the adversary, which their constituents do not share. As a result, negotiators may make concessions that their constituents do not approve of, and they may be unable to get the constituents to agree to the final settlement. This can lead to last-minute breakdown of negotiated agreements.

The ending of the Cold War and East-West tensions has not brought about universal peace. Far from it, more conflicts within and between states now characterize the international system. Many of these conflicts arise from clashes of ideology, or from religious and ethnic tensions. These conflicts can best be dealt with and managed by some form of third party assistance. Mediation and other forms of ADR have been used as a peaceful tool of managing and preventing deadly. These have been fruitful in that violent conflicts have globally reduced; but the quandary is that conflicts continue to be with us, and threaten our peace and security, as a result of which, court settlement of disputes is

¹²⁰ Frei, D. (1976). "Conditions affecting the effectiveness of international mediation." *Peace Science Society (International) Papers*, 26: 67-84.

¹²¹ Paul Wehr, Heidi Burgess, and Guy Burgess, *Justice Without Violence*, Lynne Rienner, 1994

preferred, but this too is no better because of an absence of tools an enforcement machinery could frustrates the enforcement of judgments contemporarily. By their very nature mediators cannot impose a settlement they can only achieve a settlement if the parties in dispute are prepared to cooperate. It is therefore not surprising to find that the parties in dispute, their issues, past relationship, etc. should have such an influence on the course and outcome of mediation. When these features lend themselves to cooperation, a mediator may realize a settlement; when they do not as is most likely the case, it is most unlikely that a mediator will be successful.¹²² Thus resort to the courts whose judgments are binding and enforceable is often preferred.

3.2 Arbitration

Arbitration is a method of having a dispute between two or more parties resolved by impartial persons who are knowledgeable in securities industry disputes.¹²³ Those persons are called arbitrators. Arbitration of disputes with broker/dealers has long been used as an alternative to the courts because it is devised as a prompt and inexpensive means of resolving complicated issues. There are certain laws governing the conduct of an arbitration proceeding that must be considered by those planning to use arbitration to resolve the dispute. Most importantly, perhaps, is the fact that an arbitration award is final and binding, subject to review by a court only on a very limited basis. Parties should

¹²² Gross-Stein, J. "*Structures, strategies, and tactics of mediation: Kissinger and Carter in the Middle East.*" *Negotiation Journal*,. 1985: 331-347

¹²³ Dunlop, John T.; and Arnold. M. Zack, *Mediation and Arbitration of employment Disputes*. San Francisco: Jossey-Bass, 1997

recognize, too, that in choosing arbitration as a means of resolving a dispute, they generally give up their right to pursue the matter through the courts.

The nuisance of arbitration is that, the choice of a single arbitrator may culminate in the latter tending to have more powers over the contract than the contracting parties themselves, and in the phase of the human weakness of the arbitrator, arbitrary awards tend to be impartial, nepotistic and favorable to one party than the other. Thus there is always often a need to seek judicial remedy at a collegiate court of law, or in a system which provides for appellate jurisdiction to parties dissatisfied with the arbitrator's verdict.

a. Arbitration as a Solution for Protracted and Intractable Conflicts

Can arbitration serve as an alternative mechanism of dispute resolution, as opposed to "conventional" methods such as submitting a dispute to an international or national court or seeking a negotiated agreement? Historically, arbitration was successfully used by the ancient Greeks and the Vikings to solve interstate and intrastate conflicts. In more recent history, arbitration played an important role in solving international border disputes.¹²⁴ Currently, however, negotiation and mediation are the prevalent mechanisms for resolving international conflicts. This fact can be attributed to a lack of established enforcement mechanisms for international law, and the resulting difficulty of enforcing international arbitral awards. However, arbitration continues to be an

¹²⁴ Jay Rothman, "Conflict Management Policy Analysis," in *From Confrontation to Cooperation*, by J. Rothman, Newbury Park, CA: Sage, (1992). pp.146-163

effective tool for conflict resolution, especially for international and national commercial or investment disputes, as well as labor disputes.

3.3 Mediation

Mediation has been used to settle international conflicts ranging from sovereignty disputes between centuries-old enemies, to battles over the independence of colonies, to struggle over natural resources.¹²⁵ Despite its growing use, the process of mediation remains mysterious. Each year, neutral parties embark on fresh attempts to resolve disputes between antagonists, with little insight into the experiences of their predecessors.¹²⁶ Given its importance in contemporary diplomacy and its potential as a peacemaking process, this section closely examines the merits and drawbacks of mediation as a tool for conflict resolution.¹²⁷ The most active mediating body, the UN, has offered good offices or mediation assistance in a plethora of disputes. Also are the notable efforts of leaders like Thabo Mbeki, South Africa's President in the DRC, Sudan, and Ivory Coast; Promoters of conflict prevention, management and resolution are the Civil Society and intergovernmental organizations. The civil society is an embodiment of religious, cultural, humanitarian, social, and economic organizations. Some of these include Crisis Group International, the Anglican

¹²⁵ L. Susskind and E. Babbitt, overcoming the obstacle of effective mediation, in Jacob Bercovitch and J. Z. Rubin, *Mediation In International Relations: Multiple Approaches top Conflict management*, New York 1992, p 30

¹²⁶ Ibid

¹²⁷ ibid

and Catholic clerics, the Institute for Transitional Justice, and the Amnesty International¹²⁸.

a. Mediation by individuals or goodwill ambassadors

By individual mediation, reference here is made to mediation coordinated by an individual not fulfilling official duties. As individuals *qua* individuals, mediation may differ with respect to the degree of their willingness, availability of resources, ability to perform the tasks required, knowledge, skills, experience and other attributes. The problem with individual mediation is that mediators tend to hold different beliefs, values and attitudes which they try to impose on the parties and this usually meets resistance from one of the disputants.¹²⁹ This affects the objective they seek and their range of options in mediation. The strategies of and mediation of individual are more directly related to their capabilities and subjective experiences, than to the external contextual stimuli that impinge on them. Individual mediation can therefore exhibit greater flexibility no experimentation than mediation by political incumbents.¹³⁰

b. Mediation by Institutions and Organizations

The complexity of the international environment is such that states and nations can no longer facilitate the pursuit of human interests, nor satisfy their demands

¹²⁸ *ibid*

¹²⁹ J Bercovitch, 'The Structure and Diversity of Mediation in International Relations' in Jacob Bercovitch and J. Z. Rubin, *MEDIATION IN INTERNATIONAL RELATIONS: Multiple Approaches to Conflict management*, New York 1992 pp. 11-14

¹³⁰ *ibid*

for an ever-increasing range of services.¹³¹ Consequently, phenomenal growth in the number of international, transitional and other non-state actors, all of whom affect issues of war and peace, knowledge, and responsibility and environment and survival.¹³² These functional systems of cavities or organizations have become, in some cases, more important providers of services than states.¹³³ They have also become in the modern international system, very active participants in the search for institutions and proposals conducive to peace.¹³⁴

Three kinds of organizations are important to the understanding of international politics and conflict resolution; (a) regional organizations, (b) international organizations, and (c) transnational organizations. Intergovernmental organizations represent local or global collections of *states* signifying their intention to fulfill the obligations of members set forth in their formal treaty.¹³⁵ Transnational organizations represent *individuals* across countries who have similar feelings, cognitions, knowledge, skills, interests, who meet together on a regular basis to promote the special interests of their members.¹³⁶ Whereas regional and international organizations are 'governmental' in origin, imbued with political purposes, largely staffed by official representatives, transnational organizations are 'non-governmental' in origin, and insofar that they are not really 'public' organizations, they can afford to be more creative and less

¹³¹ *ibid*

¹³² *ibid*

¹³³ *ibid*

¹³⁴ *ibid*

¹³⁵ J Bercovitch, 'International Mediation: A study of the Incidence, Strategies and Conditions of Successful Outcomes' *Cooperation and Conflict*, 2 (New York 1986) pp. 155

¹³⁶ J Bercovitch, *Op. cit.*

inhibited in the policy positions they advocate than international organizations.¹³⁷

Ideally, successful mediation can result in: the cessation of violence; agreements that allow each party to save face both internationally and domestically; good precedents in the eyes of the world community; arrangements that will insure implementation of whatever agreements have been reached; and better relationships among the disputing parties. Of course, not all of these objectives can be achieved every time a mediator steps in. The extent of a mediator's success, however, may be measured by the number of these objectives that are achieved.¹³⁸

Mediation has an added advantage over the courts in that some of them like NGOs are usually present on the field, and have an in-depth appreciation, and mastery of the causes of the conflict, and thus are best tailored to answer to the worries of the suffering people. Secondly, victims of alleged violations usually find it too difficult to institute actions before international tribunals. This is primarily because there is a general lack of funds to pursue such matters which in most cases re herd in foreign countries,¹³⁹ there is equally the lack of credibility in the tribunals and no surety that the state being so powerful will not use its exorbitant might to crush them down. Last but not the least, persons who have had the occasion to present a matter before an international adjudicating body,

¹³⁷ *ibid*

¹³⁸ *ibid*

¹³⁹ It could be generally frustrating for s victim of human rights violation resident in the Great Lakes region to institute an action against her government before the African Court which sets in the Gambia

have had difficult task trying to prove the exhaustion of local remedy¹⁴⁰ rule which is a prerequisite condition *sine qua non* for the seizure of international judicial institutions. Thus motivated, by this, some people usually welcome the curative hands of goodwill ambassadors, and the civil society for which they don't pay anything, but seek a common solution to restorative, and reconciliatory justice.

In conclusion, the main advantages of alternative dispute resolution are speed and economy. While a lawsuit usually takes one to five years to reach a conclusion, arbitration is usually completed within several months. Mediations are even faster. And negotiation could save the parties much time and resources if they trust each and acknowledge that their ideal solution is not available and that foreseeable settlement is better than the other available alternatives of violence and breach of contractual commitments. The swiftness and relative simplicity of these processes typically result in significantly lower legal fees and costs.

However, there are also disadvantages to mediation and arbitration. Mediation can be a waste of time and money if the parties are not ready (either in terms of their knowledge of the facts surrounding the controversy, or in terms of attitude) to reach a settlement. Since mediation is not binding, this is really the only potential drawback.

¹⁴⁰ Nyuykonge Charles' (personal) experience at the African Human Rights Moot Court Competition in which top African Law students are called upon to argue a simulation of cases before top human rights lawyers, judges of international tribunals, Senior Law Professors, and international policy makers seating in lieu and place of the African Commission which hears matters on behalf of the yet to be instituted African Court (cf. <http://www.chr.ac.za/mootcourt>)

Arbitration, which is binding, deserves more careful consideration. Arbitration of a dispute may be undesirable where the facts relating to the dispute are within the control of the other side. There are many methods available to discover facts during the pre-trial phase of a lawsuit filed in court, but pretrial discovery is much more restricted in arbitration. Another potential disadvantage of arbitration is the tendency of arbitrators to reach compromise decisions—an arbitrator is more likely than a judge or a jury to "split the baby." Finally, belligerents considering arbitration need to be aware that an arbitrator's decision, though fully binding and enforceable through the courts, is almost never subject to judicial review. Since there is usually no way to appeal an arbitration decision, there is a greater possibility of an erroneous outcome which permeate reliance on rather judicial means of dispute settlement than ADR. However, settlement of disputes by the judiciary knows its own limitations and it is in the face of such adversity that the present thesis contemplates that revamping the international judicial machinery could serve as a potent tool for conflict prevention.

At this juncture, it is apt to visit the international judicial institutions and examine the yard stick by which they operate. The next chapter will examine the constituent elements of the right to free and fair trial and the right to equality of states before the law; in the light of recent cases adjudicated by international tribunals and some what domestic courts (the Dujail trial by the Iraqi court).

CHAPTER FOUR:

INTERNATIONAL JUDICIAL INSTITUTIONS AND “FREE AND FAIR” TRIAL

4.0 INTRODUCTION

This Chapter is a predictor of the effectiveness of international judicial institutions. It examines the requisite standards by which international judicial institutions work, and their weaknesses which have impeded their efficiency and

threatened global peace. Some of its provisos interwove between international criminal institutions and the ICJ which is competent to try matters relating to state responsibility. The imperative of looking at especially these lacunae and the shortcomings of international judicial institutions is motivated by the fact that, their weaknesses have given latitude to states to abrogate international law, and this has greatly frustrated peace and security in the world. It is contemplated that should the proposal that ensue from this research be meted out on the international judicial institutions, the world will be closer to attainment peace, security and stability.

Numerous tensions exist over the best tactical strategic and political means of securing peace and security. One of these –which tend to be oversimplified and polarized concerns the prosecution of perpetrators of past human rights abuses. Put simply, the disagreement lies between those who say there can be peace without justice and those who say that such views are naïve, otherwise conceptualized as the meeting point between Truth and Reconciliation Commissions (TRC)¹⁴¹ versus forgive and forget.¹⁴² Contemporarily, TRCs have been seen to work well pursuant to conflicts that plagued Sierra Leone and Liberia¹⁴³ and have also served as a potent tool to democratizing South Africa in

¹⁴¹ A truth commission or truth and reconciliation commission is a commission tasked with discovering and revealing past wrongdoing by a government, in the hope of resolving conflict left over from the past. [Definition available at http://en.wikipedia.org/wiki/Truth_Commission] (Last consulted on February 13, 2007)

¹⁴² Stauffer, Jill "Seeking the Between of Vengeance and Forgiveness: Martha Minow, Hannah Arendt, and the Possibilities of Forgiveness" *Theory & Event* - Volume 6, Issue 1, 2002,] consulted on Jan. 19, 2007

¹⁴³ McLaughlin Abraham, *staff writer of the Christian Science Monitor*, "Mercy Vs. justiceas Liberia heals itself: Liberia's new truth and Reconciliation Commission seeks a balance between punishment and forgiveness," *The Christian Scince Moniro*, 26 Oct 2006 {available in <http://www.reliefweb.int/rw/RWB.NSF/db900SID/EK0I-6V35MR?OpenDocument>] consulted on Jan. 19, 2007; [Rosalind Shaw](#), *Rethinking Truth and Reconciliation Commissions: Lessons from Sierra*

the Post apartheid.¹⁴⁴ These glaring examples have yielded positive results and continuous violence which could lead to more loss of life physical, psychological and material damage, and in the name of vengeance or retribution serve as precedence for the elimination of all rooms of violence as tool of dispute settlement. It is for this reason, that the execution of Saddam has probed unanswered questions as to the legality of the execution in the face of plethora of human rights instruments which frown at the capital sentence and continued to destabilize Iraq for instance.¹⁴⁵

4.1 Genesis of the Right to Free and Fair Trial

The right to free and fair trial has figured prominently in the efforts made in recent years to guarantee human rights. This right is important at this juncture because it is a requisite which runs through all trials. In 1948, it was affirmed in the Universal Declaration of Human Rights¹⁴⁶ and the American Declaration of Human Rights and Duties of Man.¹⁴⁷ Subsequently, it has been included as a key undertaking in the United Nations Draft Covenant on Civil and Political

Leone, February 2005 | Special Report No. 130, of the United States Institute of Peace [available in <http://www.usip.org/pubs/specialreports/sr130.html>

¹⁴⁴ Henrard, Kristin, Post Apartheid South Africa's Democratic Transformation Process: Redress of the Past, Reconciliation and Unity in Diversity, 2002 2002 [available in http://www.ethnopolitics.org/ethnopolitics/archive/volume_I/issue_3/henrard.pdf] consulted on Jan. 19, 2007

¹⁴⁵ Dahr Jamail and Ali al-Fadhily, “Saddam Execution Set to Destabilise Iraq Further” ‘The execution of former dictator Saddam Hussein Saturday could bring more instability in an increasingly violent and chaotic occupation.’ BAGHDAD, Dec. 30 (IPS) [available in <http://ipsnews.net/news.asp?idnews=36021>] consulted on Jan. 19, 2007

¹⁴⁶ Resolution 217 (III), General Assembly, Third Sess., Off.Rec.,pt.I, 71; printed in 1949. 43 A.J.I.L, Supp., p. 27

¹⁴⁷ Human Rights in American States, P.A.U., preliminary edition, 1960, p.155.

Rights¹⁴⁸, the Inter-American Draft Convention on Human Rights¹⁴⁹, the European Convention on Human Rights¹⁵⁰ and the African Charter on Human and Peoples' Rights.¹⁵¹

4.2 Basic Fair Trial Criteria

The United Nations and European texts lay down a number of conditions which a court conducting a trial/hearing must satisfy. Both the UN and the European texts require that the courts should be *independent and impartial*. These are obvious and overlapping. The primary meaning of *independent* is independence of other organs in the sense of the doctrine of separation of powers¹⁵²: in particular, a judge must not be subject to control or influence of the executive, legislative or any constitutive body.¹⁵³ *Impartial* frowns on any possibility of courts siding with any of the disputants for the ICJ, or prejudgments against an accused in criminal trial. On the other hand, although both texts protect a fair trial, in particular cases and not in an abstract sense, it is unreasonable to assume that lack of fair trial may be shown not only to events occurring in a trial but by reference to the charges or dispute before the court in respect of its independence. If it can be shown that this is potentially unsatisfactory and that it

¹⁴⁸ Art. 6, European Treaty Series no. 5.

¹⁴⁹ Art. 6, Final Act of the 4th

¹⁵⁰ Charter of the International Military tribunal at Nuremberg, Art. 16; Charter of the international Military tribunal for the Far East;

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¹⁵² Kirsh, P. et al, Initiation of Proceedings by the Prosecutor, in cases et al, The Rome Statute of the International Criminal Court: a commentary, Vol. I, Oxford, Oxford University,

¹⁵³ *ibid*

has had in fact a significant and continuing effect upon the court's behavior, then the requirement of independence may not be met.

4.3 What is a fair Trial?

The right to a fair trial is a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms, the most prominent of which are the right to life and liberty of the person. It is guaranteed under Article 14 of the International Covenant on Civil and Political Rights (ICCPR), which provides that "everyone [state] shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." When people are deprived of this right, then discontentment sets in, and can take different dimensions. These different forms of discontentment usually bring people into factions and thus conflicts ensue. The right to a fair trial is applicable to both the determination of an individual's rights and duties; and determination of state responsibility in a suit at law and with respect to the determination of any responsibility or charge against him or her.

The standards against which a trial is to be assessed in terms of fairness are numerous, complex, and constantly evolving. They may constitute binding obligations that are included in human rights treaties to which the state is a party.¹⁵⁴ But, they may also be found in documents which, though not formally

¹⁵⁴ Edward McWhinney, *The International Court of Justice and the Western Tradition of International Law* (Nijhoff, 1987), p. 89; M. Lachs, *Essays in the Development of International Legal Order* (1980), p. 43

binding, can be taken to express the direction in which the law is evolving.¹⁵⁵ These standards will be discussed progressively as they apply to pre-trial, the hearing and to post-trial. Given the complexity around such standards, only those directly relevant to the present paper will be discussed in the sections below.

4.3.1 Pre-trial Rights

1. The prohibition on arbitrary arrest and detention

Article 9(1) of the ICCPR provides that “everyone has the right to liberty and security of person.” The liberty of a person has been interpreted narrowly, to mean freedom of movement, which is interfered with when an individual is confined to a specific space such as a prison or a detention facility.¹⁵⁶ Security has been taken to mean the right to be free from interference with personal integrity by private persons.¹⁵⁷ Under Article 9(1) “No one shall be subjected to arbitrary arrest or detention” and “No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.” The principle of legality embodied in the latter sentence substantively and procedurally mandates that the term “law” should be understood as referring to

¹⁵⁵ William S. Schabas, *An Introduction to the International Criminal Court*, Second Edition, Cambridge University Press, 2004; Nagendra Singh, *The Role and Record of the International Court of Justice*, Martinus Nijhoff Publishers, London 1989

¹⁵⁶ Nigel S Rodley, [The Treatment of Prisoners Under International Law](#), [Oxford University Press](#), 2000

¹⁵⁷ *ibid*

an abstract norm, applicable and accessible to all, whether laid down in a statute or forming part of the unwritten, common law.¹⁵⁸

The prohibition of arrest brings to mind the arrest of Saddam Hussein. In line with Art. 9(1), the legality and the procedure followed to arrest Saddam is infested with malice.¹⁵⁹ Having not received statutory or constitutive mandate or authorization from the UN in line with his application to militate against terror, and to search for weapons of mass destruction from Iraq, Bush's furtherance with such foreign policy which today is frowned at by the international community, fellow Americans and close republican associates can be construed as a substantive breach of international law. On the basis of this, and not retrogressing into Iraq's past, Saddam's arrest can be construed arbitrary. Bush by master-minding the arbitrary arrest of Saddam is in breach of Art. 9(1), of the ICCPR.

Moreover, prohibition of arbitrary arrest suggests that the arrest should be in accord with the law. Can breach of agreement be used to justify arbitrary arrest? The handing over of Charles Taylor to the Special Court of Sierra Leone by Obasanjo in contravention of an agreement not to have him (Taylor) extradited to be indicted could render Taylor's arrest arbitrary as it is incongruent with the law binding to both Obasanjo (mediator), and Taylor.

The failure of the international judicial institutions to see and redress some of these statutory breaches is an intolerable lack of foresight which is culminating in

¹⁵⁸ Op. Cit,

¹⁵⁹ Warrants of arrest are usually served prior to the said arrest. This was not the case with Saddam. He went under U.S custody soon after his arrest—and only a few weeks later was he served a warrant and charged.

the incapacitation of the international judicial institution. This has devastating implications on the peace and security of countries concerned as in most cases¹⁶⁰; there is divided opinion amongst citizens as to the way former public figures are being treated.¹⁶¹ Ensuring therefore that arbitrary arrest is stamped out of the international community is key to pacifying the world. For instance, the arrest, detention, and execution of Saddam seemed to have generated more conflict in Iraq and anti-American sentiments.¹⁶² It is suspected that the subsequent execution of Taylor could spark even more conflict and insecurity in the region as despite his barbaric acts, some Liberians saw him as a president who cared for, and provided for their needs despite his shortcomings.

2. The right to legal counsel

The right to be provided and communicate with counsel is the most scrutinized specific fair trial guarantee in trial observation practice, because it has been demonstrated to be the one that is most often violated. Principle 1 of the Basic Principles on Lawyers¹⁶³ states that “[all] persons are entitled to call upon the

¹⁶⁰ Clear evidence is Taylor’s case which will be tried in the Hague by the Special Court for Sierra Leone in search of a venue where the outcome of the trial will not implicate the peace of the country or the broader region: *suggestive of an acknowledgment that there are some people who were loyal to him for some reason.*

¹⁶¹ While supporters of former warlords still afford their support for, and justification for the acts of the latter, there is always another faction (victim of the treachery or administrative excesses) who applauds the impeachment or the criminalization of their former leaders. *See generally the protest and mixed feelings generated by Saddam’s execution.*

¹⁶²Badri Raina, ‘The Saddam Murder,’ Press report in ZNET,[available at <http://www.zmag.org/content/showarticle.cfm?ItemID=11750>](Last consulted on February 13, 2007) For further reference please contact Badri R.:badri.raina@gmail.com

¹⁶³ Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990 [available at <http://www.ohchr.org/english/law/lawyers.htm>] (Consulted on Jan. 13, 2007)

assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.” However the right to counsel is also an important element of the right to adequate facilities for the preparation of a defense and the right to a defense. Principle 5 of the Basic Principles on Lawyers and Principle 17 of the Body of Principles specifically provide that when a person is arrested, charged or detained he or she must be promptly informed of the right to legal assistance of his or her choice. Article 7 of the Basic Principles on Lawyers requires governments to ensure that all persons arrested or detained should have access to a lawyer within 48 hours from arrest or detention. An individual's right to choose counsel thus begins to run when a suspect or accused is first taken into custody, regardless of whether s/he is formally charged at that moment. Furthermore, if the accused cannot afford his or her own counsel, the relevant authorities must provide a lawyer free of charge if the interests of justice so require. Whether or not the interests of justice require such an appointment depends primarily on the seriousness of the offence and the severity of the potential penalty. Principle 8 of the Basic Principles on Lawyers requires the authorities to ensure that all arrested, detained or imprisoned persons have adequate opportunities to be visited by and to communicate with their lawyer without delay, interception or censorship, in full confidentiality. When the lawyer and his or her client meet they may be in sight of a law enforcement official, but cannot be within hearing range.

Skeptics and law critics argue lawyers are liars¹⁶⁴ because even when a matter is very clear and glaring, people still need lawyers to defend them. The rationale for this is that lawyers are well schooled in substantive as well as adjectival or

¹⁶⁴ Personal interview carried out at the University of Witwatersrand, amongst non-law students. 80%+ of respondents not very at home with the need to be defended by counsel.

procedural law, and tend to know how to plead for, and ensure a fair hearing for their clients. Regrettably, in many international trials save for those conducted before the ICJ; (because states usually seize the court through lawyers of their choice) the requirements of this right are most often not met with. Following the arrest of persons alleged to have committed gross violations of human rights, their bank accounts are most often usually freezed or they have restrictive and limited access to it. This greatly affects the choice of counsel of ones choice; even if eventually the court intervenes to offer judicial assistance of counsel to the accused, the impartiality of such short listed lawyers can always be questionable.¹⁶⁵ The court usually chooses lawyers depending on their financial strength at the time, and may not at times be in possession of funds to pay for the lawyer(s) chosen by the accused.¹⁶⁶ The difficulty of getting counsel of ones choice amongst others infests the judicial process with irregularity and account for humongous non-reliance on the judiciary as a dispute settlement institution. This can be construed to account for some of the mixed reactions to trials which attract international attention. The de-escalating nature of such conflicts and ensuing mixed reactions can sometimes lead to continuous inter-state war, and civil strife which could be checked through policy by which the choice of the accused's lawyer(s) is unconditionally his freedom, and the court has to ensure that (whether or not the accused) is in possession of the means, she gets counsel of his/her own choice.

¹⁶⁵ This could perhaps be the reason why Saddam Hussein at some points of the Dujail Trial will *contempt the court* and speak for himself, when he realized that his lawyers arguments were not reflecting his stand, or were providing loopholes for the Prosecution to use against him.

¹⁶⁶ Human Rights Watch, *"The Iraqi High Tribunal and Representation of the accused"* A Human Right Watch briefing Paper, Vol. 1, February 2006. [available at <http://hrw.org/backgrounder/mena/iraq0206/iraq0206.pdf>] (Last consulted on February 14, 2007) See p. 1, Paragraphs 2 & 3

3. *The prohibition of torture and the right to humane conditions during pretrial Detention*

Article 7 of the ICCPR prohibits torture—or cruel, inhuman or degrading treatment or punishment—and is a norm of customary international law that also belongs to the category of *jus cogens*.¹⁶⁷ The definition of and protection against torture was elaborated in the 1984 Convention against Torture: Art 1(1): ... the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. The definition of torture, which is prohibited by the ICC Statute as a crime against humanity when committed on a widespread or systematic basis, is slightly broader than in the Torture Convention. Unlike the Torture Convention, the ICC Statute definition includes acts committed independently of any public official (i.e. by private individuals with private motives). Under Article 2(2) of the Torture Convention no exceptional circumstances whatsoever, “whether a state of war or a threat of

¹⁶⁷ Jus cogens, ([Latin](#) for “compelling law”) is a peremptory norm of general application. It is a fundamental principle of [international law](#) considered to have acceptance among the international community of [states](#) as a whole. Unlike ordinary [customary law](#) that has traditionally required consent and allows the alteration of its obligations between states through [treaties](#), peremptory norms cannot be violated by any state “though international treaties or local or special customs or even general customary rules not endowed with the same normative force”. [definition available at http://en.wikipedia.org/wiki/Peremptory_norm], (Last consulted on February, 13 2007)

war, internal political instability or any other public emergency” may be invoked as a justification of torture.³⁷ States parties are obliged to take effective legislative, administrative, judicial and other measures to prevent acts of torture in any territory under their jurisdiction [Article 2(1)]. Furthermore, according to Article 2(3), superior orders may not be invoked as a justification of torture. Article 10 of the ICCPR provides in paragraph 1 that “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.” It should be stressed that, unlike the prohibition against torture in Article 7 of the ICCPR, which demands non- interference on the part of state authorities, the right to humane treatment imposes a positive obligation on states. This obligation is intended to ensure the observance of minimum standards with regard to conditions of detention and the exercise of a detainee's rights while deprived of liberty. The line between Articles 7 and 10 is, admittedly, sometimes hard to draw, as evidenced by the case law of the Human Rights Committee (HRC). In general, it may be said that inhuman treatment as referred to in Article 10 pertains to a “lower intensity of disregard for human dignity than that within the meaning of Article 7.” While the prohibition of torture and other cruel, inhuman or degrading treatment or punishment covers specific attacks on personal integrity and applies to all persons, whether in any form of detention or not, Article 10 relates more to the general state of a detention facility and/or the conditions of detention and is meant to encompass only the treatment of persons actually deprived of liberty. According to the HRC, states cannot invoke a lack of adequate material resources or financial difficulties as justification for inhuman treatment and are obliged to provide detainees and prisoners with services that will satisfy their essential needs. For instance, detainees have a right to food, to clothing, to adequate medical attention and to communicate with their families. Generally, the Standard Minimum Rules, Basic

Principles on Prisoners and Body of Principles are important reference tools regarding the rights of prisoners.

In recent times, we have heard Taylor complaining about the prison conditions of The Hague.¹⁶⁸ This is further given impetus when we recall that Slobodan Milosevic died in the Hague prison before the completion of his trial. In an interview conducted by John Catalinotto, over The Milosevic Case,¹⁶⁹ Sara Flounders, an active writer and political organizer since the breakup of Yugoslavia contended that Milosevic died of lack of medical attention from the hands of US and NATO forces 'who had destroyed Yugoslavia'.¹⁷⁰ People who hold a strong and passionate belief that such perpetrators of human rights violations did more good to their nations and could do better will definitely manifest discontent if such public figures were given a dehumanizing sentence. And their disgruntlement will even be worst if news were to reach them that such people had been ill-treated to death.

International prison conditions should be standard, and must take cognizance of the fact that whether in lawful custody, prisoners still have right to minimum statutory rights like the right to health and life, and the right to decent living which if abrogated could culminate in them suing for them. International prisons are of particular relevance because they attract much press and public attention.

¹⁶⁸ Castle [Stephen](#), "*Taylor: Hague prison conditions 'draconian'*" The [Independent, \(London\), Jul 22, 2006](#) [available at http://www.findarticles.com/p/articles/mi_qn4158/is_20060722/ai_n16669934], (Last consulted on February 14, 2007)

¹⁶⁹ Interview conducted on March 27, 2006

¹⁷⁰ Amnesty International, "*Medical Concern: Political prisoners in need of medical attention, CUBA,*" 12 October 1999, [available at <http://web.amnesty.org/library/Index/engAMR250401999?OpenDocument&of=COUNTRIES%5C%5CCUBA>], (consulted on February 14, 2007)

They are supposed to lay precedence to be followed by domestic prisons. Making them short-cut to the graves of former public figures is a catalyst to conflict and it is therefore preponderant that they meet minimum conditions of decency which satisfy the basic human rights of detainees.

4.3.2. The hearing

Article 14 of the ICCPR is undoubtedly the most pertinent to this review. It specifically provides for equality before the courts and for the right to a fair and public hearing by a competent, independent and impartial tribunal established by law, regardless of whether a criminal trial or a lawsuit is involved (paragraph 1). The remainders of its provisions— paragraphs 2 to 7—contain a catalogue of “minimum [procedural] guarantees” belonging to an individual in the determination of any criminal charge against him/her. The following section elaborates the meaning of the rights set out in Article 14 in the order in which they arise.

1. Equal access to, and equality before, the courts

The first sentence of Article 14(1) provides that “All persons shall be equal before the courts and tribunals” and has been interpreted to signify that all persons or states requesting judicial hearing must be granted, without discrimination, the right of equal access to a court. This, on the one hand, means that establishing separate courts for different groups of people based on their race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status would be a contravention of Article 14(1). On the other

hand, the establishment of certain types of special courts with jurisdiction over all persons belonging to the same category, such as military personnel, remains a thorny issue. According to the HRC, this practice is not prohibited under Article 14(1) as long as the procedural guarantees set forth in it are observed; in addition, the HRC has not ruled across the board that military courts may never try civilians. At the same time however, there is an increasingly widespread view that the trials of civilians by military courts lack legitimacy. This interpretation, endorsed by many human rights NGOs, is also supported by the provisions of the Basic Principles on the Independence of the Judiciary. Paragraph 5 of the Basic Principles provides that “Everyone shall have the right to be tried by *ordinary courts or tribunals* using established legal procedures.” The second sentence of Article 14(1) relates to the right to a fair and public hearing by a competent, independent and impartial tribunal established by law. It includes the basic components of due process of law which is, in criminal cases, further supplemented by the other provisions of Articles 14 and 15.

The right to equality before the law has been interpreted narrowly up till date to prohibition of any form of discrimination based on race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹⁷¹ It has ascribed the responsibility to ensuring and enforcing this right on states, but not articulated and emphasized its importance amongst states.¹⁷²

¹⁷¹ Art. 14(1) International Covenant on Civil and Political Rights

¹⁷² Figgis, Gerson to Grotius, pp. 190, 216, 220, 242; Hershey, *Essentials*, pp. 58, 148; Hicks, in *A.J.I.L.* (1908), II, 531-532; Hicks, in *A.S.I.L. Proceedings* (1909), III, 239; Lawrence, *Essays*, pp. 194 - 204; Lawrence, *International Law*, pp. 52, 268; Maine, *Ancient Law*, p. 103; Moore, *Principles of American Diplomacy*, p. 197; Olney, in *A. J. I. L.* (1907), I, 418; Reeves, in *The University Record* (1917), III, 254; Scott, *The Hague Peace Conferences*, I, 456; Taylor, *Int. Pub. Law*, §§ 51, 69, pp. 75, 98; Twiss, *Law of Nations*, p. xvii; *Venez. Arbit.*

Examining the concept of equality especially to states attracts particular attention in contemporary society where much debate about the rationale of the United States exorbitant and some what *supra legis* powers. The United States as highest contributor of UN funds in 2006 contributed a ceiling budget of 22 percent, which in 2006 was \$423,464,855 of the total \$1,924,840,250.¹⁷³ This works out to be a contribution of about \$1.42 per American citizen, according to 2006 census data. Japan, the second largest contributor to the regular budget at 19.47 percent, pays \$374,727,900 or about \$3.94 per citizen in comparison. With such landslide budgetary difference, America seems more to be a dictate of the course of events of the UN, and spells out through its permanent seat at the Security Council what policy the UN should take. This prowess neutralizes the principle of equality before the law in the international community where the US exerts much influence and affluence. For instance, despite recent cries that Bush be indicted for war crimes,¹⁷⁴ the UN Security Council has paid a deaf ear. Moreover, Bush has ignored the American *exit strategy*¹⁷⁵ call and adopted an

Cohen's argument), p. 1259; Vreeland, *Hugo Grotius*, pp. 241-242; White, *Seven Great Statesmen*, p. 77.

¹⁷³ Peggy Atherlay, published by 'All about the United Nations Budget' United Nations Association of the USA, June 2006, [For more information or verification, call_Peggy Atherlay, UNA-USA's Communications Director, at 212-907-1320 or email him at patherlay@unausa.org]

¹⁷⁴ International Commission of Inquiry On Crimes Against Humanity Committed by the Bush Administration, *Final Verdict released on September 13, 2006* [available in <http://www.bushcommission.org/?q=node/50>] Last consulted on January 20, 2007

¹⁷⁵ Keith Olbermann, "Only this president, only in this time, only with this dangerous, even messianic certitude, could answer a country demanding an exit strategy from Iraq, by offering an entrance strategy for Iran. Only this president could look out over a vista of 3,008 dead and 22,834 wounded in Iraq, and finally say, "Where mistakes have been made, the responsibility rests with me" — only to follow that by proposing to repeat the identical mistake ... in Iran. Only this president could extol the "thoughtful recommendations of the Iraq Study Group," and then take its most far-sighted recommendation — "engage Syria and Iran" — and transform it into

*entrance strategy*¹⁷⁶ into Iraq to the much disagreement of the international community, his closest collaborators, and Republican Party mates.¹⁷⁷ The sending to Iraq of more troops has been construed as a calculated attempt to continually increase the massacre of US soldiers and to amplify the loss of lives of thousands of Iraqi innocent children, women and civilians. This is ocular proof of failure of US foreign policy and the adverse effects of such policy necessitate a quick stay of execution by the international judicial machinery. Such silence adds to its inefficacy, and makes one wonder whether such silence could ensue from the US humongous financial and administrative control of the UN. Such silence is a booster to prospective tyrants to obliterate international law, and disregard the search for global peace, and do not only go to destabilize the global community and the affected countries, but creates permanent global insecurity and stability as the world is moving into somewhat two camps now: strict Islamists with anti-western feelings versus pro-Americans which could result in another world war to the much distress of a plethora of people and movements quenchlessly thirsting tools of conflict prevention. Thus affording strict adherence to *equality before the law* which is a subset of the right to free and fair trial, is step to conflict prevention.

2. *The right to a fair hearing*

“threaten Syria and Iran” — when al-Qaida would like nothing better than for us to threaten Syria, and when Iranian President Mahmoud Ahmadinejad would like nothing better than to be threatened by us. This is diplomacy by skimming; it is internationalism by drawing pictures of Superman in the margins of the text books; it is a presidency of Cliff Notes.”

¹⁷⁶ *ibid*

¹⁷⁷ CTV.ca News Staff, *Bush steps up battle in Iraq with more troops*, Jan. 10 2007, [available in http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20070109/iraq_report_070110/20070110?hub=TopStories&s_name=] Last consulted on January 20, 2007

The right to a fair hearing as provided for in Article 14(1) of the ICCPR encompasses the procedural and other guarantees laid down in paragraphs 2 to 7 of Article 14 and Article 15. However, it is wider in scope, as can be deduced from the wording of Article 14(3) which refers to the concrete rights enumerated as “minimum guarantees.” Therefore, it is important to note that despite having fulfilled all the main procedural guarantees laid out in paragraphs 2-7 of Article 14 and the provisions of Article 15, a trial may still not meet the fairness standard envisaged in Article 14(1). The single most important criterion in evaluating the fairness of a trial is the observance of the principle of equality of arms between the defense and the prosecution. Equality of arms, which must be observed throughout the trial, means that both parties are treated in a manner ensuring their procedurally equal position during the course of a trial. It would be difficult to identify in advance all of the situations that could constitute violations of this principle. They might range from denying the accused and/or counsel time to prepare a defense to excluding the accused and/or counsel from an appellate hearing when the prosecutor is present.

The right to a fair hearing, though universally acclaimed and upheld probes to mind the questions: Are not all persons charged by the International Criminal Court likely to be guilty? Though each of the four *ad hoc* international criminal tribunals since the Second World War has acquitted some of the accused of all or some of the charges, the truth is that most persons and especially public figures charged usually end up either serving the term,¹⁷⁸ or die before the publication of the verdict.¹⁷⁹ The fate of a prominent figure like Charles Taylor whose name has

¹⁷⁸ Saddam Hussein is a contemporary (at the time the research is being carried out) vivid example.

¹⁷⁹ Slobodan Milosevic is an example to note in this respect.

been flirted with by the media and of whom no academic writing seems to see anything good would not be far from this.

3. *The right to a competent, independent and impartial tribunal established by Law*

The basic institutional framework enabling the enjoyment of the right to a fair trial is that proceedings in any civil, administrative or criminal hearing are to be conducted by a competent, independent and impartial tribunal established by law [Article 14(1)]. The rationale of this provision is to avoid the arbitrariness and/or bias that would potentially arise if criminal, civil or administrative components of due process of law which will alter the transparency of the judicial process.

There is a common legal saying in legal parlance that a judge does not go to court leaving behind his human nature. This statement holds true for the fact that judgments of even the most renowned and learned judges or tribunals have been revised on appeal. The setting of international judicial institutions is in a way that such arbitrariness is censored. Judges *seat in a college*, and their verdict is determined by majority vote as to whether the accused be acquitted or convicted, or as to whether a claim should be held in favor of state *A* or state *B*. However, the fact that most cases heard by international judicial institutions are most of the times heard at first and last instance (subject to no further appeal and compulsorily binding on the accused, belligerents or disputants), infringes against one of the basic determinants of the right to free and fair trial which is the right to appeal.¹⁸⁰ The deficiency of independence and impartiality in the character of any judicial institutions weakens the judiciary of such country or

¹⁸⁰ Charney, *"Is International Law threatened by multiple International Tribunals?"* Recueil des Cours 1998, Tome 271, The Hague 1999, pp. 105-382.

community and goes a long way to cause state structures to dilapidate. And this usually breeds an atmosphere fertile for corruption as judges tend to be corruptible, lack of accountability in the governance, and uneven distribution of state political, economic and social resources which are catalysts of conflicts as discussed above in the literature review.

4. The right to a presumption of innocence

According to Article 14(2) of the ICCPR “Everyone charged with a criminal offense shall have the right to be presumed innocent until proved guilty according to law.” As a basic component of the right to a fair trial, the presumption of innocence, *inter alia*, means that the burden of proof in a criminal trial lies on the prosecution and that the accused has the benefit of the doubt. Despite the fact that Article 14(2) does not specify the standard of proof required, it is generally accepted that guilt must be proved “to the intimate conviction of the trier of fact or beyond a reasonable doubt, whichever standard of proof provides the greatest protection for the presumption of innocence under national law.” The presumption of innocence must, in addition, be maintained not only during a criminal trial *vis á vis* the defendant, but also in relation to a suspect or accused throughout the pre-trial phase. It is the duty of both the officials involved in a case as well as all public authorities to maintain the presumption of innocence by “refrain[ing] from prejudging the outcome of a trial.” It may also be necessary to pay attention to the appearance of an accused during a trial in order to maintain the presumption of innocence, for instance, it may be prejudicial to require the accused to wear handcuffs, shackles or a prison uniform in the courtroom.

In line with the above discussion on the impartiality of the court, a trial may be devoid of fairness orchestrated by its wide which engenders analytical comments which when amalgamated with public opinion culminate in the judge being implicitly enticed to take sides, thereby going into the court room with a preliminary bias. Attempts to convince him to the contrary may be difficult especially if he has seen and heard victim's account from the media. This is a rather difficult problem to compound, but Chapter five of the paper will make some policy recommendations in this respect.¹⁸¹

5. The right to a public hearing

Article 14(1) of the ICCPR also guarantees the right to a public hearing, as one of the essential elements of the concept of a fair trial. However, it also permits several exceptions to this general rule under specified circumstances. The publicity of a trial includes both the public nature of the hearings—not, it should be stressed, of other stages in the proceedings— and the publicity of the judgment eventually rendered in a case. It is a right belonging to the parties, but also to the general public in a democratic society. The right to a public hearing means that the hearing should as a rule be conducted orally and publicly, without a specific request by the parties to that effect. The court or tribunal is, *inter alia*, obliged to make information about the time and venue of the public hearing available and to provide adequate facilities for attendance by interested members of the public, within reasonable limits. The public, including the press, may be excluded from all or part of a trial for the reasons specified in Article

¹⁸¹ Smallman Lawrence, “*Impartial judgement for Saddam?*” Aljazeera News archives, Updated on Monday, December 15, 2003 [available at <http://english.aljazeera.net/news/archive/archive?ArchiveId=42189>] (consulted on February 14, 2007)

14(1), but such exclusion must be based on a decision of the court rendered in keeping with the respective rules of procedure. The public may be excluded for reasons of “morals, *ordre public* or national security in a democratic society, or when the interest of the private lives of the parties so requires.” The public may also be excluded “to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

Moral grounds for the exclusion of the public are usually asserted in cases involving sexual offences. The term *ordre public* in this specific context has been interpreted to relate primarily to order within the courtroom, while reasons of national security may be advanced so as to preserve military secrets. In both the latter cases, however, the restriction applied must correspond to the principles observed *in a democratic society*, a qualification that seeks to prevent arbitrariness in decisions to close trials. Lastly, the public may be barred from a trial in the interests of justice, but only in special circumstances and to the extent strictly necessary in the opinion of the court. Emotional outburst(s) by the spectators of a trial has been cited as an example of when this provision could come into play. While the number of instances that could merit the closing of a trial are fairly broad, this is not the case when the pronouncement of a judgment is involved. Under Article 14(1) judgments “shall be made public” except where the interest of juvenile persons otherwise requires or where the proceedings concern matrimonial disputes of the guardianship of children. The possible exceptions from publicity are thus defined more narrowly and precisely. A judgment is considered to have been made public either when it was orally pronounced in court or when it was published, or when it was made public by a combination of those methods. In any event, its accessibility to all is the determining factor. The judgment must provide reasons sufficient to permit the accused to lodge an appeal, and must be delivered within a reasonable time of the hearing.

Looking at the publicity of the judgment element of the right to public hearing and relating it to the recent execution of Saddam Hussein, was the video display of the death not one to traumatize some people? And was that not an instance where the ICJ or ICC Presidents or even both should have sent warning messages denouncing the repetition of the publication of such videos? Can their silence not be construed to mean that they are rendering international judicial institutions subservient to national judicial institutions? What better chance could we see or hear the law speak and take precedence than this? This and more only go a long way to buttress the argument that the international judicial institutions are losing their salt and value as a result of which justice has been left at the whims and caprices of states. This needs to be urgently checked in the interest of world peace.

6. The right to prompt notice of the nature and cause of criminal charges

In the determination of any criminal charge against him/her everyone shall be entitled, in full equality “to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.” This duty to inform relates to an exact legal description of the offense (“nature”) and of the facts underlying it (“cause”) and is thus broader than the corresponding rights granted under Article 9(2) of the ICCPR applicable to arrest. The rationale is that the information provided must be sufficient to allow the preparation of a defense. When information may be deemed to have been “promptly” supplied, has not been uniformly interpreted, but has generally been taken to coincide with the “lodging of the charge or directly thereafter, with the opening of the preliminary judicial investigation or with the setting of some other hearing that

gives rise to clear official suspicion against a specific person.” The information must also be provided to the accused in a language which s/he understands, meaning that translation is mandated and that its form, oral or written, will depend on the manner in which the “charge” is initially conveyed. An indictment must, obviously, be translated in writing.

The problem with prompt notice is usually the way it is done. As it is said, it must be done promptly, and in most cases, done by the police who are not sufficiently schooled in the law or schooled in foreign law, and in the discharge these delicate task of international humanitarian law usually use weapons of intimidation, and expropriate information from the accused in a manner incongruent with common wit, and repugnant to natural justice.¹⁸² The presentation and explanation of the charge to the accused is more than likely to be exaggerated to add impetus to the reason for the arrest.

7. The prohibition on double jeopardy

“No one shall be liable to be tried or punished again for an offence for which he has already been convicted or acquitted in accordance with the law and penal procedure of each country” [Article 14(7)]. The prohibition of *ne bis in idem* or of double jeopardy is aimed at preventing a person from being tried—and punished—for the same crime twice. The issue here is what the relevant jurisdiction is. According to some interpretations, including that of the HRC, double jeopardy applies only to prohibit a subsequent trial for the same offense

¹⁸² See Pictures of war crimes in <http://www.albasrah.net/warcrimes.htm> (Last consulted on Feb. 14, 2007); Clark R and Others, “A Report on United States War Crimes Against Iraq to the Commission of Inquiry for the International War Crimes Tribunal” [available at <http://deoxy.org/wc/wcindex.htm>], (Last consulted on February 14, 2007)

within the jurisdiction of one state, but is not valid with regard to the national jurisdiction of two or more states. On the other hand, some hold the view that this is “too general and too absolute.” An interesting question raised by the establishment of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, and by the Statute of the International Criminal Court is whether retrials of persons by those tribunals after the completion of proceedings in a national jurisdiction, permitted under certain circumstances, violate the principle of double jeopardy. The prevailing view is that they do not. More so, there are also the questions as to what will constitute punishment at first instance in a particular case. For the purpose of this research, punishment can take the form of any deprivation of legal entitlement, or any moves towards redressing a particular situation caused by one's acts. This can be construed as an act of penitence, and can be construed reformatory. Thus, confining someone who is showing good intentions to change may defeat the purpose of justice which seeks to reform and reintegrate previous human rights violators and traitors to national or regional peace. This is the case with Charles Taylor who realizing how much a danger he was to his country and to the broader west African community gave-up power for which he was constitutionally elected (sufficient punitive measure to him) just to be indicted a couple of months after. Should his trial culminate in his conviction, not acknowledging his benevolence of repudiating power, or alluding to the deal with Obasanjo not to extradite him in which he was betrayed by Obasanjo's (mediator) breach of contractual agreement, he could be rightfully apprehended for having committed *ne bis in idem*.¹⁸³

¹⁸³ Ne bis in idem, which translates literally from [Latin](#) as "not twice for the same", means that no legal action can be instituted twice for the same cause of action. It is a legal concept originating in [Roman Civil Law](#), but also found in [common law](#) jurisdictions.

4.3.3 Post-trial Rights

1. *The right to appeal*

“Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law” [Article 14(5)]. The right to appeal is aimed at ensuring at least two levels of judicial scrutiny of a case, the second of which must take place before a higher tribunal.¹⁸⁴ The review undertaken by such a tribunal must be genuine.¹⁸⁵ This, among other things, means that appeal proceedings confined only to a scrutiny of issues of law raised by a first instance judgment might not always meet that criterion.¹⁸⁶ Appeal proceedings must also be timely.¹⁸⁷ The immediate effect of the exercise of the right to appeal is that a court has to stay the execution of any sentence passed in the first instance until appellate review has been concluded.¹⁸⁸ This principle applies unless the convicted person voluntarily accepts that the sentence be implemented earlier. The right to appeal belongs to all persons convicted of a crime regardless of the severity of the offense and of the sentence pronounced in the first instance.¹⁸⁹ The guarantees of a fair trial must be observed in all appellate proceedings. The right to appeal is not only limited to criminal trials. It also cuts across administrative as well as matters relating to state

¹⁸⁴ Burke-White, *“International Legal Pluralism, Diversity or Cacophony?: New Sources of Norms in International Law”* – Symposium, Michigan Journal of International Law 2004, pp. 963-979.

¹⁸⁵ Ibid

¹⁸⁶ Ibid

¹⁸⁷ Hafner, *Risks Ensuing from Fragmentation of International Law*, Official Records of the General Assembly, 55th session, Supplement No. 10 (A/55/10); Hafner, *Pros and Cons ensuing from Fragmentation of International Law, Diversity or Cacophony?: New Sources of Norms in International Law* – Symposium, Michigan Journal of International Law 2004, pp. 849-863.

¹⁸⁸ Koskenniemi, *Global Governance and Public International Law*, Kritische Justiz 2004, pp. 241-254; Dupuy, *The Danger of Fragmentation or Unification of the International Legal System and the ICJ*, NYU Journal of International Law and Politics 1999, pp. 791

¹⁸⁹ Dupuy, *Op. Cit.*

responsibility, or matters submitted to ADR processes unless expressly stipulated to the contrary.

In practical terms, the right to an appeal has been more domesticated than internationalized.¹⁹⁰ Most national legislation provide for at least two levels of juridical jurisdictions: These are mainly courts of first instance which are the magistrate's court to try civil matters, the high court to try criminal matters, and customary courts to try complex matters relating to native customary practices and beliefs. The appellate courts hear matters emanating from the courts of original jurisdiction or courts of first instance. Some of them are the courts of appeal, administrative courts, and *ad hoc* tribunals. Other countries afford constitutional courts and some are signatories to regional tribunals which are highest courts of the land, and hear matters at tertiary instance.

The rationale for a judicial system with tripartite jurisdictional set up is to ensure fairness and non-arbitrariness in the verdict of a particular court. The lack of an appellate institution or clearly definite hierarchy of international judicial institutions vehemently jeopardizes the advantages that litigants or weak and aggrieved states stand to benefit from international justice. This substantive lack which violates the right of free and fair trial can be construed as one of the catalyst for distrust in the international judicial institutions as a result of which

¹⁹⁰ Though the right to appeal is existent in international criminal justice (Art. 81 of the Rome Statute), it is limited to one appeal, not better than most domestic legal set-ups which provide at least two possibilities of appeal. This advantages in a way some accused persons who have the occasion of being tried by their domestic law and courts as was the case with the Dujail trial—and potentially questions the international criminal justice system as to why several courts are competent to try same kinds of offences. The ensuing problem is that several different and may be opposing judgments may emanate from same offence since international customary law which is not codified; and in some cases judgment may be biased where only one judge seats as against a college of judges for international criminal tribunals.

states who are supposed to be its builders have turned their back to see international justice dilapidate.

2. The right to compensation for miscarriage of justice

“When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him” [Article 14(6)]. It should be noted that compensation for miscarriage of justice may be granted only after a conviction has become final and that the claim may be brought regardless of the severity of the offense involved. There are three additional conditions that must be cumulatively met:

- i) a miscarriage of justice must have been subsequently officially acknowledged by a reversal of the conviction or by pardon;
- ii) the delayed disclosure of the pertinent fact(s) must not be attributable to the convicted person, or the aggrieved disputant and
- iii) the convicted person or disputant must have suffered punishment as a result of the miscarriage of justice. The phrase “according to law” does not mean that tribunals or states can ignore the right to compensation by simply not providing for it, but rather that they are obliged to grant compensation pursuant to a mechanism provided for by law.

The right to compensation for miscarriage of justice is possible in a set-up which affords for the right to an appeal. Matters tried in international judicial institutions are tried at first and last instance and in most cases disputants or

accused persons are bound to sign an undertaking to respect the verdict of the court/tribunal. This rule tends to break off any possibility of miscarriage of justice.

CHAPTER FIVE:

INTERNATIONAL JUDICIAL INSTITUTIONS AND CONFLICT PREVENTION: POLICY IMPLICATIONS

5.0 INTRODUCTION

Contemporary justifications of international judicial organizations especially international criminal tribunals (ICTs), often stress the role of such tribunals in deterring future humanitarian atrocities. But hardly any academic commentary has attempted to explore in-depth this deterrence rationale. Chapter three of this paper has utilized statutory safeguards of the right to free trials to extrapolate some of the precincts of international judicial institutions despite their preference to ADR. The Chapter demonstrated those lacunae to show that there was still much for the international community to do in the road to securing global peace. Deterrent sanctions could scare-off potential perpetrators of grievous humanitarian atrocities, and detractors of world peace (terrorists, repressive

regimes, and tyrannical/dictatorial leadership.) Chapter four analyzes whether a potential perpetrator of humanitarian atrocities or violator of international norms and standards would likely be deterred by the risk of future prosecution or whether states will continually credit the ICJ as an international judicial dispute settlement institution.

This chapter argues that deterrent measures are key to global conflict prevention. consequently, severity of punishment; strict surveillance of the abusive use of sovereign rights by states; the rethinking of 'ratification as prerequisite for state adherence to particular treaties'; the need to the rethink concepts of TRC versus forgive and forget to be given international statutory recognition as against the capital sentence; and the need for a neutral international enforcement mechanism to implement verdicts of the international judicial institutions - are central to conflict prevention.

5.1 Severity of Punitive measures as a deterrent to potential traitors of International Peace and states prone to abrogate international law.

Sanctions are a form of non-military coercion whereby a court, tribunal or mediator applies leverage to try to change the conduct of disputants or potential wary people.¹⁹¹ Sanctions can be economic, political, diplomatic or cultural, imposed unilaterally or multilaterally, comprehensively or selectively.¹⁹²

¹⁹¹ Compare George E. Bisharat, "Sanctions as Genocide," *Transnational Law & Contemporary Problems*

Yale Human Rights & Development Law Journal 11 (No. 2): (2001), pp379-425

¹⁹² Garfield, R., and Neugut, A. "Epidemiological Analysis of Warfare." *Journal of the American Medical Association* pp266(5): pp688-692, 1991.

Sanctions are always negative conditions imposed on parties in conflicts; positive inducements are conditions or incentives.¹⁹³

Sanctions are imposed to induce a state or an individual to change his actions.¹⁹⁴ The driving force behind sanctions is often the need to demonstrate resolve, express outrage, or to deter future objectionable policies by increasing the associated costs.¹⁹⁵ The changes required may affect the conflict directly—such as demonstrating progress in negotiations or reducing a threat against another country or group of individuals—or indirectly—for instance, demonstrating progress in democratization, protection of human rights reform.¹⁹⁶

Sanctions can be used to increase the costs to the target regime of using violence in a conflict with another state or against an internal opposition, to make other options appear more attractive.¹⁹⁷ The ICJ or international criminal tribunals (ICT) may require the disputants to take specific actions to affect a conflict or refrain from specific behaviors which would incite or exacerbate conflict.¹⁹⁸ Sanctions may contribute to conflict prevention or mitigation by discouraging

¹⁹³ *ibid*

¹⁹⁴ *ibid*

¹⁹⁵ *ibid*

¹⁹⁶ Minear, Larry, et al. *"Towards more humane & effective sanctions Management,"* Occasional paper, # 31 Thomas J. Watson Jr. Institute, pp 126-'27, 1998. A brief overview of Security Council applied sanctions, informal background paper prepared by the Department of Political Affairs, United Nations secretariat, Interlaken 2, p 127

¹⁹⁷ Kimberly Ann Elliott, *"Evidence on the Costs and Benefits of Economic Sanctions,"* Speech given before the Subcommittee on Trade Committee on Ways and Means, United States House of Reps Washington, DC, October 23, 1997 [available at <http://www.iie.com/publications/papers/paper.cfm?ResearchID=294>] (website consulted on February 09, 2007)

¹⁹⁸ Biersteker, Thomas J. et al.. Targeted Financial Sanctions. A Manual for the Design and Implementation. Contributions from the Interlaken Process. Brown University: Watson Institute for International Studies. 2001

the target from engaging in violent conflict or by undermining its capacity to wage war. Sanctions can be used to maintain or restore international or internal peace and security, to prevent or reduce the use of force, to contain a conflict, or to reduce a threat posed by the target country.

Sanctions can be enacted prior to violent conflict to pressure the target government to take actions to prevent or mitigate conflict or to stop actions believed to be exacerbating conflict.¹⁹⁹ The ICJ or ICT may enact sanctions during the rising stages of an internal conflict to compel the regime to take actions to defuse the conflict. Sanctions may be imposed during violent conflict to contain the conflict by reducing the use of force.

Sanctions have been tested to be a potential arsenal to prevent or censor political rivalry. The South African apartheid regime feeling pressures from the international community could not keep on with the dehumanizing practice of segregation motivated by race.²⁰⁰ The international effort to apply diplomatic and cultural sanctions against South Africa became concerted by the 1960s, with mixed results. The three components of diplomatic sanctions (formal exclusion, legitimacy for the anti-apartheid movement, and lack of recognition for the homelands) failed to coerce domestic change during this period but set the stage for increasing bilateral and multilateral measures. They also had substantial direct and indirect effects within South Africa such as supporting domestic opponents of the regime and undermining the internal social and economic foundations of the apartheid framework. At the peak of international momentum

¹⁹⁹ *ibid*

²⁰⁰ Jentleson Bruce (UC-Davis); "Transforming a Pariah State: International Dimensions of the South African Transition," *Africa Today*, 1st and 2nd quarters, 1995:75.

for global sanctions in the mid-1980s, numerous international organizations and states adopted partial economic sanctions against South Africa,²⁰¹ supplementing existing diplomatic restrictions, arms embargoes, and other voluntary measures. The Commonwealth strengthened its measures from 1985 to 1987.²⁰² The US equally opposed and adopted substantial restrictions in 1986 in this regard. The European Community followed suit. Although not the sole cause of the South African transition, sanctions enhanced pressure on the government both directly and indirectly. These sanctions pathetically were only temporary, abrupt, or *ad hoc*. Their internationalization and integration of sanctions as deterrence in international customary norms is key of conflict prevention and could save the worlds people untold loss of lives, inestimable quantum of blood; and severe material and psychological damage.²⁰³ Thus, taking it on board as a deterrent for conflict prevention should be prioritized by the ICJ and the ICTs.

Punitive measures are good, but truth and reconciliation commissions are much more appetizing: severe punitive measures under the whims and caprices of the judiciary make diplomacy harder and by so doing they make conflict resolution short of violence—both among and within countries. As to the latter, just imagine if such trends had existed so strongly in the world in the immediate aftermath of the fall of apartheid. Would it have been possible for South Africans, black and white, to have decided together that a Truth and

²⁰¹ Gary Clyde Hufbauer, Jeffrey J. Schott, Kimberly Ann Elliott, *Economic Sanctions Reconsidered: History and Current Policy*, Institute for International Economics, Washington, DC, 1990.

²⁰² Lisa L. Martin, *Coercive Cooperation: Explaining Multilateral Economic Sanctions*, Princeton: Princeton University Press, 1992.

²⁰³ Art. 41 & 42 of the UN Charter

Reconciliation process should put a premium on peace instead of retributive justice? South Africa's wise decision may well have been impossible in an atmosphere in which leftist lawyers were continuously filling briefs for revenge in courts all over Europe, and the sympathetic media trumpeting far and wide the nobility of their crusade.

Sanctions administered by a certified and constitutive legal institution subject to strict surveillance by a group of well schooled academics and professionals could seldom be adulterated by the whims and caprices of a single individual. Thus vesting the power of control of sanctions for international adjudication and criminal offences on a college of well reputed judges could be administered as deterrence and consequently the key to conflict prevention as explained in the light of the above

5.2 Strict surveillance of the abusive use of sovereign rights by state: humanitarian intervention versus state sovereignty

The present day ideas of state sovereignty, and its corollary of non-intervention, have their roots in the Peace Treaty of Westphalia (1648), a political compromise reached in the aftermath of the Reformation and wars of religion.²⁰⁴ The Peace came with the realization that no state could impose its own universal values on others. The principles of territorial integrity and political sovereignty, the lynchpins of the Westphalia system, were accepted only when all sides came to terms with this fact. This conception of sovereignty has remained largely

²⁰⁴ C. V. Wedgwood, *The Thirty Years War* Jonathan Cape, London 1938.

unchanged to the present,²⁰⁵ though with a few mutations relating to the movement from states to human security.

The experience of World War II and the subsequent formation of the UN heralded the beginning of a new universalism that fundamentally challenged the Westphalia principle of absolute state sovereignty. The Holocaust made it graphically clear that the principle of state sovereignty must be limited to a degree, and that human beings must be able to assert individual rights even in the face of national governments.²⁰⁶ Martin Cook suggests that "without thinking of the consequences, governments reacted to the horrors of genocide by committing themselves at a declaratory level to intervene in the internal affairs of states when abuses to their citizens rise to a level that is 'universally unacceptable'."²⁰⁷ This was followed with the evolution of a new body of law and moral thought (and various Non-Governmental Organizations concerned with it) that sits uncomfortably with the older system of state sovereignty. This newer system speaks the language of the responsibility of the international community and of universal human rights.

²⁰⁵ *ibid*

²⁰⁶ Arend, Anthony C. and Robert J. Beck, *International Law and the Use of Force: Beyond the UN Charter Paradigm*, London ; New York : Routledge, 1993.

²⁰⁷ Cook Martin L., *The Future Operating Environment: Ethical Implications*, Paper Presented at the 7th Canadian Conference on Ethical Leadership, 28-29 Nov. 2006 [available at http://www.cdaacd.forces.gc.ca/ccel_conference_ccdel/engraph/doc/DrMartinCook_Presentation.pdf] (Last consulted on 11th February, 2007)

Cook points out that "the declaration of moral and legal principle in the absence of a clear delineation of authority lies at the root of the ambiguity of the humanitarian intervention in Kosovo."²⁰⁸ The principles were clearly stated, and to a large extent agreed on, but the authority and the means to implement them were unclear. The UN Security Council is the nearest thing to a universally valid legal authority, but it is rare that it finds the political unanimity to enforce the principles. In the case of Kosovo, North Atlantic Treaty Organization (NATO) possessed both the political will and military means, but lacked the universal authority.²⁰⁹ At the heart of the dilemma is a serious misfit between moral ideals (which press for defense of innocent victims of ethnic cleansing) and the limits of the presently possible in terms of international law and military power.²¹⁰

The concept of humanitarian intervention in a sovereign state for the expressed purpose of curbing human rights violations has gained currency in the last decade. Beginning with the Gulf War of 1991²¹¹, where Allied Forces came to the aid of the Kurds in Iraq²¹², and following on with interventions in Somalia,

²⁰⁸ Martin Cook, *"Two Roads Diverged, and We Took the One Less Traveled: Just Recourse to War and the Kosovo Intervention"*, in William J. Buckley (ed.), *Kosovo: Contending Voices on Balkan Interventions*, p. 267.

²⁰⁹ Di Nolfo, Ennio, ed. *The Atlantic Pact Forty Years Later: A Historical Appraisal*. Berlin, 1991. Essays published on the occasion of NATO's fortieth anniversary in 1989.

²¹⁰ *ibid*

²¹¹ Freedman, Lawrence, and Karsh, Efraim. *The Gulf Conflict, 1990 - 1991: Diplomacy and War in the New World Order*. Princeton, NJ: Princeton University Press, 1993.

²¹² Schubert, Frank N., and Kraus, Theresa L., eds. *The Whirlwind War: The United States Army in Operations Desert Shield and Desert Storm*. Washington, DC: Center of Military History, U.S. Army, 1995.

Rwanda and Sierra Leone, the legitimacy of humanitarian intervention was raised high on the agenda of international debate.²¹³

These debates reached a climax in 1999, when NATO made the unprecedented move of engaging in a 78-day air war in Kosovo against the government of Yugoslavia on account of the atrocities perpetrated against Kosovo Albanians.²¹⁴ What was significant about the Kosovo campaign was not just that human rights were the primary justification for breaking the sovereign right of Yugoslavia, but also that the intervention was carried out with neither the consultation nor the consent of the United Nations Security Council or General Assembly.²¹⁵

Humanitarian intervention sits uneasily in the stable of legitimate operational concepts as it imposes upon the deeply entrenched concept of state sovereignty which eschews external intervention a prescriptive and universalistic idea of human rights.²¹⁶ Sovereignty touches on the very essence of statehood. And insofar as human rights limit or qualify the rights of sovereignty, they fundamentally challenge the status quo of international relations.²¹⁷ Hence the importance that many states have accorded to the debate over humanitarian

²¹³ Krauthammer Charles, "Trusteeship for Somalia," Washington Post, October 9, 1992, p. A27; Georgie Anne Geyer, "Without a Helping Hand," Washington Times, November 22, 1991, p. F1; and Peter Hakim, "Saving Haiti from Itself," Washington Post, May 31, 1992, p. C1.

²¹⁴ Timothy W. Crawford and Alan J. Kuperman, ed.'s, [Gambling on Humanitarian Intervention: Moral Hazard, Rebellion and Civil War](#) (New York: Routledge, 2006), 100 pp.

²¹⁵ Johnstone Diana, "FOOLS' CRUSADE Yugoslavia, NATO and Western Delusion", [Monthly Review Press](#), New York, N.Y, May 26, 2003; D Johnstone, FOOLS' CRUSADE Yugoslavia, NATO and Western Delusions, [Pluto Press](#), London, Sept. 2002; p 328.

²¹⁶ Donnelly, "Humanitarian Intervention", 37 Journal of International Affairs, 311 No.2, 1984.

²¹⁷ Thomas G. Weiss, "The Sunset of Humanitarian Intervention? The Responsibility to Protect in a Unipolar Era," Security Dialogue 35 (2), June 2004, p. 139.

intervention.²¹⁸ While the United States did not invent either the practice or the concept of humanitarian intervention, it has taken the lead over the past dozen years in making decisions about its employment.²¹⁹ This is natural, for with great power comes great responsibility and, despite complaints about American unilateralism and America generally throwing its weight around, the truth is that governments of most states look to and expect the United States to take the lead in providing common international security goods.²²⁰

The policy dilemmas that face individual states and the international community at large can be summed up with three questions: Shouldn't gross human rights violations be a legitimate justification for humanitarian intervention in the internal affairs of a state? Are there instances when such interventions can legitimately proceed in the absence of the authorization of the UN Security Council? And finally, should the norm of humanitarian intervention, as exemplified by Kosovo, be allowed to become entrenched as a norm of international behavior? This section will outline the most compelling arguments offered by opponents of humanitarian intervention, and show how its supporters can address them. In so doing, a case for a limited and heavily qualified right to intervention will be made, and the debates surrounding the US denial to commit herself to the jurisdiction of the ICC despite her ever ready availability to assist in humanitarian intervention.

²¹⁸ *ibid*

²¹⁹ Bellamy Alex J and Williams Paul, "Who's Keeping the Peace?" *Regionalization and Contemporary Peace Operations*, International Security 29:4 (Spring 2005), p. 166.

²²⁰ James Kurth, *Models of Humanitarian Intervention*, Somalia Watch Analysis, Posted on 6 Sept 2001, [available at <http://www.somaliawatch.org/archivesep01/010906402.htm>], (Last consulted on February 11, 2007)

Opponents to humanitarian intervention proceed by pointing out that it is simply illegal according the UN Charter, the primary legal document that governs international relations. Most states and legal scholars agree that the UN Charter spells out a general prohibition on the use of force. This is made clear in Article 2(4) which states that: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state or in any other manner inconsistent with the purposes of the United Nations."²²¹

The charter allows for two exceptions to the rule first, the right to respond with force to an armed attack (Article 51), and second, when the use of force is authorized by the Security Council to maintain or restore international peace and security (Article 42). Nowhere in the Charter are humanitarian grounds set out as legitimate grounds for military interventions. One of the justifications for the legitimate use of military force is a response to international aggression and gross violation of human rights as recognized by international customary law and practice.

Legal scholars who support the right to intervene argue that Article 2(4) does not contain a general and comprehensive prohibition on the use of force, and that it merely regulates conditions under which force is prohibited. They argue that the Charter allows for exceptions to Articles 51 and 42 and it is therefore open to

²²¹ Charter of the United nations

others.²²² Despite declaratory policies to the contrary, state practice actually supports this view.²²³ It is widely accepted that force can be used legitimately to intervene to protect and rescue one's nationals abroad, free people from colonial domination, and to fight terrorism. The protection of people from gross violations of human rights is the newest addition to this list.

Seeking objective criteria for defining these exceptions, some scholars draw upon *Just War* theories to argue that states possess the inherent rights to use force above and beyond the restrictions imposed by the UN Charter.²²⁴ Hugo Grotius, for example, explicitly justifies the use of force to restrain or discourage wrongdoing inside a given state.²²⁵ According to *Just War* theory, each case for the use of force must pass a set of stringent criteria which includes just cause, being launched for the right intention, being considered only as a last resort, and the employment of means that are proportional.²²⁶ In order for this right to be exercised in a non-arbitrary manner, states would need to declare in advance

²²² Arend Anthony C and Beck Robert J, *International Law and the Use of Force*. Routledge (UK), 2003

²²³ Teson [Fernando R.](#), *Humanitarian Intervention: An Inquiry into Law And Morality*, Transnational Publishers; London, 3 Revised Updated edition, September 30, 2005

²²⁴ Falk R., '*Post-Cold War Illusions and Daunting Realities*', in: Roger Williamson (ed.), *Some Corners of a Foreign Field. Intervention and World Order*, London 1998, p. 145.

²²⁵ Vincent, R. J. 'Grotius, Human Rights, and Intervention.' In Hugo Grotius and International Relations, eds. Hedley Bull, Benedict Kingsbury, Adam Roberts. Oxford: Clarendon Press, 1990, 241 - 256.

²²⁶ Oudraat Chantal de Jonge, *Intervention in Internal Conflicts: Legal and Political Conundrums*, Working Paper No 15 , Carnegie Endowment for International Peace, Global Policy Paper, August 2000 p. 6.

their criteria for intervention, (e.g., in cases covered by Article 3 of the Geneva Conventions or in cases covered by the statutes of the international criminal tribunals set up for the former Yugoslavia or Rwanda), as well as their means of intervention. Forcing states to define in advance the parameters under which they would consider military intervention might introduce a measure of predictability into the process and could have a deterrent effect on future violators of human rights. It also hedges against arguments about double standards and accusations that interventions are only for self-serving reasons.

Opponents to humanitarian intervention choose to avoid legal hair splitting over the issue of whether human rights constitutes a "just cause" and instead appeal to the long established and widely accepted the norm of state sovereignty. Article 2(7) of the UN Charter summarizes the status quo character of international law as it prohibits even the UN from intervening in matters that are essentially "within the domestic jurisdiction of any state". Opponents to Kosovo point out that there is universal agreement that Kosovo is a province of an independent state, and that there was at the time no support for its independence. As such NATO's actions in Kosovo were clearly an intervention inside the territory of an internationally recognized sovereign state.

Intervention in a sovereign state for humanitarian purposes, they argue, attempts to impose a pseudo-universalistic conception of human rights on weaker states, and can be used to mask other self interested motives. It remains a fact that many people, even if dissatisfied with their governments, are deeply suspicious of

outside interference.²²⁷ Sovereignty protects one against outsiders trying to topple the government or set up a puppet regime and impose their views of what is good or right hence the particularly strong attachment of countries recently liberated from colonial rule to the principle of non-intervention.²²⁸

One can reply to such arguments by questioning the conception of sovereignty itself. First of all, if one believes that rights of states are ultimately derived from the rights of individuals, then the principle of state sovereignty has a human rights component to it. If the rights of individuals are blatantly disregarded, then one must question the status of that state's sovereign claim. Also, military intervention is increasingly used in situations where states have collapsed or have reached near collapse. In such cases, the validity of their claim to sovereignty is also far from clear.

Second, it can be argued that in practice the concept of sovereignty has always been frayed at the edges. In the present, there is an increasing discrepancy between legal sovereignty and Robert Keohane's "operational sovereignty", that is, the amount of autonomy that a state can actually enjoy. Stanley Hoffman notes the "growing discrepancy between the norms of sovereignty and the traditional legal organization of the international system on the one hand, and

²²⁷ Nye, Joseph S., Jr. "Redefining the National Interest" *Foreign Affairs* 78, No. 4, July – August 1999: p 22

²²⁸ Glyn Berry, "*Sovereignty as the responsibility to prevent, protect, and rebuild*" volume 25 *The Ploughshares Monitor*, no. 1, Spring 2004,

the realities of a world in which the distinction between domestic politics and international politics is crumbling" on the other. He gives the example of sovereignty being severely challenged by economic interdependence, arguing that whatever their attempts at insulation most states are deeply marked by events and decisions that originate from outside their borders. This is reinforced by international institutions (like the IMF and WTO) whose role is to constrain operational sovereignty.²²⁹

If indeed non-intervention is founded on sovereignty, then it stands to reason that the parameters of the norm must shift as sovereignty and statehood are redefined. As the exclusive status and inviolable nature of sovereignty and statehood are eroded, intervention as a legal concept becomes less objectionable.

Moving on to the issue of authorization, opponents to humanitarian intervention highlight the view that the power to authorize interventions is vested solely in the Security Council. Chapter VII of the UN Charter provides the authority with which the Security Council can impose coercive measures and disregard the principle of non-intervention in domestic affairs of states if it determines that a particular problem poses a "threat to international peace and security". Hence interventions, such as Kosovo, that circumvent the Council are illegal.

²²⁹ Stanley Hoffman, "Sovereignty and the Ethics of Intervention, in Stanley Hoffman (ed) *The Ethics and Politics of Humanitarian Intervention* (Notre Dame, Indiana: University of Notre Dame Press, 1996).

Many developing states, particularly those marked by the colonial experience, remain suspicious of humanitarian intervention outside of the UN framework. Several have argued that this amounts to meddling in their internal affairs, and have expressed fears of abuse by the US in particular.²³⁰ Mindful of their colonial histories, resistance is strongest where intervention entails attempts to police domestic behavior than in cases of civil war and chaos. While it is true that much of the opposition stems from the fact that many of these states have skeletons in their own closets with respect to human rights, the concern over the abuse of humanitarian intervention remains valid. The UN Security Council, as flawed an institution as it may be, helps to ensure that interventions will not be launched for self-serving reasons. Arguably a right to unilateral intervention that circumscribes the UN could lead to a weakening of the prohibition of the use of force; and efforts to restrict its use in relations between states potentially undermine the entire UN system.

Supporters of humanitarian intervention concede these points, but argue that the current system whereby the Security Council determines whether a situation merits military intervention by certifying the situation a "threat to international peace and security" provides an insufficient guarantee that the council will intervene when the next atrocity occurs.²³¹ As the case of Kosovo illustrates, the

²³⁰ Christopher M. Ryan, "Sovereignty, Intervention, and the Law: A Tenuous Relationship of Competing Principles," *Millennium: Journal of International Studies* 26 (1997), p. 77; and Samuel M. Makinda, "Sovereignty and International Security: Challenges for the United Nations," *Global Governance* 2, no. 2 (May – August 1996), p. 149.

²³¹ Joseph E. Schwartzberg, "High Level Panel Nears Agreement on Security Council Makeup and Humanitarian Intervention," *Citizens for Global Solutions*, July 28, 2004 [available at <http://www.globalpolicy.org/security/reform/cluster1/2004/0728threetier.htm>], (consulted on February 11, 2007)

Security Council can easily be held hostage by the veto of one of its five permanent members. It is a fact that NATO circumvented the Security Council on account of the almost certain vetoes by Russia and China.²³²

The former UN Secretary General Kofi Annan, amongst other critics of the UN, challenged present day UN status quo. In his remarks to the General Assembly, he referred to the prevailing interpretation of the Charter as "Old Orthodoxy" that called out for immediate amendment. He argued that protecting international peace is important, but protecting the rights of peoples and individual human beings is equally fundamental to the aims of the Charter. According to Annan, the UN Charter was "never meant as a license for governments to trample on human rights and human dignity. Sovereignty implies responsibility, not just power." He went so far as to endorse the "clear determination expressed by NATO" on the basis of a policy of "diplomacy backed by force".²³³

The war in Iraq raised some difficult questions for many thoughtful scholars. Even if Saddam Hussein's regime posed a threat to international security, the security of the United States or to the security of its neighbors, couldn't the war be justified on humanitarian grounds, as necessary to free the Iraqi people from a

²³² Fred Weir, Russia, "China Looking to Form 'NATO of the East'?" (A Six-Member Group, Seeking to Balance US Power, Meets in Moscow Wednesday), *Christian Science Monitor*, October 26, 2005 [available at <http://globalpolicy.igc.org/nations/sovereign/integrate/2005/1026sco.htm>] (consulted on February, 11 2007)

²³³ David Little, "Force and Humanitarian Intervention: The Case of Kosovo", in William J. Buckley (ed.) *Kosovo: Contending Voices on Balkan Interventions* p. 357.

particularly odious dictatorship? And where is the place of the general principle the stronger person/state has a moral obligation to come to the rescue of weak and helpless people living under brutal regimes? Yet in expanding the notion of humanitarian intervention, is there not a danger of creating a rationale for a new form of American imperialism? And in any case, what right does the United States--or for that matter any nation--have to determine when and where to intervene?

The answers to these questions are strictly subjective. The United States has security interest almost all over the world, and she and her citizens turn to be the more likely target of terrorist attacks. Prolonged and undue request for authorization from the UN to protect her national interests, and to monitor potential traitors of world peace before they (traitors to world peace) strike, could sometimes reach fruition after an attack already. Thus it is not in all cases that the US should be expected to await the response of the international community before engaging in a pacification scheme. However, for the purpose of world order, such authorization is prerequisite for humanitarian interventions to take its due course.

Despite the legal, political, and practical problems raised by humanitarian intervention, it is clear that at the very least a qualified right of intervention needs to be established. To refuse to intervene at all in cases of gross violations of human rights is morally unacceptable, and to rule out humanitarian intervention

completely would encourage unilateral interventions, which are more inclined to abuse than multilaterally administered interventions.

The challenge for the international community is therefore to lay down the legal and political framework for humanitarian intervention. The primary task at hand will be to establish an objective set of criteria that set out legitimate situations that warrant military interventions. Without such criteria, any intervention force is liable to face confusion about its mandate, the nature of the military deployments, and its rules of engagement. *Just War* theory provides a starting point for formulating and building consensus over such criteria.

Recognizing that the challenge is as much political as it is legal, every effort must be made to assuage the suspicions that states harbor towards humanitarian intervention. There is a clear need to restrict the scope of unilateral and self-interested state intervention, particularly where intervention is forcible. Righteous causes such as human rights are notoriously open to conflicting interpretations, and history has shown that the stated cause of interventions is not always the actual motive or intention. Any right to intervention must necessarily be a limited and highly qualified one. The eventual legal framework should maintain or even raise barriers to illegitimate intervention. It should define the areas, conditions, procedures for legitimate cases, and proceed as far as possible on the broad basis of consent. The old presumption against unilateral intervention ought to stand. Finally, when considering collective interventions,

there is a need to give careful consideration to how they can be organized in such a way as to provide as much impartiality as possible.

The current absence of a legal framework for carrying out interventions contributes to the unease that states feel when considering such actions or that the international community tends to flirt about when it is unilaterally carried out by one country. While developing a legal and political framework to regulate unilateral interventions for humanitarian purposes will not ensure action, it will hedge against abuse, and is a necessary condition to deter and stop humanitarian disasters in the future.

5.3 The rethinking of 'ratification as prerequisite for state adherence to particular treaties.

In domestic legislation, what constitutes a law must not necessarily be what each and every citizen thinks good for him/her. Rather law is a bill passed by parliament, supposedly representing the people and which the President or Head of the executive promulgates.

In contrast to this situation, international law seeks that each state (equivalent to individuals in domestic legislation) must append their signatures by way of ratification to be bound by any treaty. This is a great stalemate to the universalization of international law. The rummage around a concerted action from states militating against international criminal acts, power abuse by sovereign states, genocide, war crimes, crimes against humanity, and to set

conflict prevention strategies as adroitness for global conflict prevention has been sidelined. This has fueled recent unending debates as to the appropriateness of the principle by which ratification is prerequisite for states to be bound under international law.²³⁴ The proponents of the idea of ratification as request for consent to be bound argue that different states have different policies, priorities and strategic plans, and that being compulsorily bound by some treaties will jeopardize their vision, and their ability to meet the social, economic and political amenities of their citizens, and it is thus in the interest of their citizens and for the sake of avoiding inter-states conflicts that they prefer to stay away from certain treaties, or to undersign reservation clauses with respect to some treaties. This is the case of the United States that has preferred to amongst others states and despite her patriarchy in leading humanitarian gestures, decided to decline the ratification of the Statute of Rome instituting the International Criminal Court. Though the US under the Clinton's administration signed and assisted in laying the ground work for the establishment of an international criminal body to check international criminal acts, and that contravene international customary law like genocide, war crimes, and crimes against humanity, the Bush administration has refused to ratify or accede to the treaty. The rationale for Bush's denial to ratify is motivated by the fact that ratification will mean trading off some of its sovereignty to some foreign due process law and possibly to an unrestrained prosecutor. Johan Bolton contemplates that it was not just the vulnerability of American soldiers who would be in the most jeopardy²³⁵, but "the president, the cabinet officers who

²³⁴ Glossary of terms used in international law relating to treaties and conventions [available at <http://hrli.alrc.net/mainfile.php/glossary/130/>] (consulted on February 11, 2007)

²³⁵ Note should be taken of the fact that most peacekeeping operations usually involve Americans, and a plethora of UN workers are citizens of the US.

comprise the National Security Council, and other senior civilian and military leaders responsible for our defense and foreign policy."²³⁶

On the other hand, those who argue that ratification should not be a basis for consent to be bound argue that the law is in the interest of all, and in that in the oneness of nations, there shouldn't be different norms of international law for country X, and others for country Y.²³⁷ They advocate a picturesque application of what obtains in domestic legislation for international law. Their postulation is grounded by the fact that it is costly to run different sets of international legislation as different lawyers and judges will have to be schooled not only in the specific areas of law, but in the substantive law of the particular agreements and the domestic laws of signatories of the particular treaty. In the same light, several pieces and tenets of international law render the globe into a globe, and continually allying the world into camps as a result of which another world war could ensue.

Whether or not ratification should be the basis for determining consent to be bound under a treaty, note should be taken of the fact that the ultimate goal at the end of the day is to live in peace. Obtaining such peace is subject to the fulfillment of duties and rights and obligations *vis-a-vis* other states. It is for this reason that there is a need for norms to streamline the excessive use of sovereign

²³⁶John R. Bolton, Under Secretary for Arms Control and International Security, "*The United States and the International Criminal Court*", Remarks to the Federalist Society, Washington, DC November 14, 2002

²³⁷ Christian J. Tams, Enforcing Obligations Erga Omnes in International Law, Series: [Cambridge Studies in International and Comparative Law](#), No. 44, Year Omitted from website [available at <http://www.cambridge.org/catalogue/catalogue.asp?isbn=9780511134104>] (consulted on February 11, 2007)

rights by some states at the expense of others. In as much as such rules however lay ratification as a prerequisite of determining consent to be bound, certain circumstances which threaten international security and world peace will definitively have to stand out as exceptions to the rule. If behavior that suggests a contravention of norms of international customary norms is perpetrated by Cameroon, Nigeria or Switzerland, then she may not need to have ratified a treaty like the Convention on the Prevention and Punishment of the Crime of Genocide.²³⁸ However, rethinking ratification as a sole prerequisite may fall under the norms and status quo of the UN which Koffi Annan, former UN Secretary General labeled "Old Orthodoxy" and called out for immediate amendment.²³⁹

5.4 The need to rethink the concepts of 'TRC versus forgive and forget' to be given international statutory recognition as against the capital sentence.

Most genocide and major collective atrocities that dominated the 20th Century have been identified not only as the result of a vicious circle of violence and refusal to address historical grievances, but also an ineffective international judicial policing system as has been discussed in the previous chapters. In most cases they were the result of the failure of concerned communities to build a strong transition between the past, the present and the future. Today, a new and fast growing framework called transitional justice is trying to study such a

²³⁸ Adopted by Resolution 260 (III) A of the U.N. General Assembly on 9 December 1948. Entry into force: 12 January 1951.

²³⁹ [Joshua Cooper Ramo](http://www.time.com/time/magazine/article/0,9171,53443-1,00.html), "The Five Virtues Of Kofi Annan, " TIME NEWSPAPER IN PARTNERSHIP WITH CNN, Sunday, Aug. 27, 2000 [AVAILABLE AT <http://www.time.com/time/magazine/article/0,9171,53443-1,00.html>], P. 2, (Lat consulted on February 11, 2007)

phenomenon. How to deal with past atrocities or conflicts and still build strong foundations for communities to live together in peace, while preventing future conflicts? Which model should be adopted: Restorative or retributive justice? Or is it possible to apply them concurrently? For many, the proper response to the perpetrators of human rights abuses, violence, ethnic cleansing, or genocide, must be criminal proceedings by some sort of tribunal, a court of law (international law, perhaps) duly authorized to render judicial dispositions. To Archbishop Tutu and many others, the only reasonable price would be one able to “purchase” peace, implying reconciliation, and perhaps forgiveness.²⁴⁰ But truth commissions cannot by their nature deliver this sort of justice. Tutu adds that, restorative justice reflects a fundamental and venerable *African* value of healing and nurturing social relationships at the expense of exacting vengeance, of nothing less than a quality of humane sociality: *ubuntu*.²⁴¹ However, adopting restorative models at the expense of retribution means promoting impunity, and its adjunct calamities. Retributive justice on the other hand prolongs violence which could culminate in lost of lives, sweat and blood together with physical and material damage.²⁴² There is therefore a need to strike a balance between retribution and restoration.

In the interest of law and order in the society, the international judicial institution will rather have to create a framework for retributive and restorative justice to work. This could be applied as the gravity of the case demands. However, should a culprit show signs of remorse with which the international community

²⁴⁰ Tutu, Desmond Mpilo.. “Reconciliation in Post-Apartheid South Africa: Experiences Of the Truth Commission.” In Hopkins, Jeffrey (Ed.), *The Art of Peace: Nobel Peace Laureates Discuss Human Rights, Conflict and Reconciliation*. Ithaca, NY : Snow Lion Publications. 2000

²⁴¹ *ibid*

²⁴² Jeffery, Anthea, *The Truth about the Truth Commission*, South African Institute of Race Relations. Johannesburg, 1999

is satisfied, adopting retribution may incite chaos especially as their followers will protest court rulings, express their discontent and dissatisfaction for the course of justice in ways which could eventually take several tenure, amongst which continuous conflict and insurgence are the most common. The international judicial institutions charged with prosecuting violators of international criminal law and with mediating in disputes between states should reserve for themselves the prerogative of what judgment to meet out, and should further ensure that such judgment is eventually enforced. In this vein, punitive measures such as the capital punishment which have been outlawed in international law should remain inscribed in the law as a deterrence and used once in several decades or centuries to only die-hard and unrepentant souls who stand as threat to the world's peace and security.

5.5 The need for a neutral international enforcement mechanism to implement verdicts of the international judicial institutions.

The International Court of Justice (ICJ) has encountered many problems in relation to its limited jurisdiction. Although it is a very different Court to the ICC, as it tries matters between states as opposed to individuals for a wide range of disputes, the lacunae have been incorporated into the Statute of Rome. The ICJ's famous '*Optional Clause*' and attached reservations contained in Article 36 of its charter, in effect allow states to voluntarily and conditionally accept its jurisdiction²⁴³. This voluntary jurisdiction has resulted in less than a third of the member states of the UN having accepted the optional clause, and even several

²⁴³ Cassese, A Attitudes of states towards international law, International Law in a Divided World, Oxford University Press, Oxford 1986

of the powerful states having withdrawn from it, including the United States.²⁴⁴ The 'lofty ideals' of the Court were quickly replaced by 'political realities'.²⁴⁵ The court's inability to enforce its judgment seriously hampers its credibility within the international arena. It has led to inequitable jurisdiction, where one set of rules exists for one nation state, and a different set of rules, or even a complete absence of rules exists for another nation state. This is reflected in the ICJ's relatively poor track record in ensuring the enforcement of interim measures, and even several judgments, such as the Corfu Channel, Fisheries Jurisdiction, US Diplomatic and Consular Staff in Tehran, the Bakassi case, Ethiopia and Eritrea over Badne and Nicaragua cases.²⁴⁶

This '*voluntary*' jurisdiction, where the acceptance of jurisdiction in international law has been subject to additional State consent²⁴⁷ is in direct contrast to the ICC. The ICC has the capacity for '*universal*' jurisdiction - it has the potential to exercise its jurisdiction in every corner of the earth and the resources to apprehend its convicts.²⁴⁸ This universality is embedded in Article 13(b) of the Statute of Rome, which proclaims that the Security Council, under Chapter VII of the UN Charter, can refer to the Prosecutor a situation in which one or more of the crimes contained in the Statute appear to have been committed. This

²⁴⁴ Coalition for the International Criminal Court, Questions and Answers on the International Criminal Court, July 2002[available at <http://www.iccnw.org/documents/iccbasics/Q&AJuly2002.pdf>] (Last consulted on January 25, 2007)

²⁴⁵ Scott, G.L. and Carr, C.L. *The ICJ and compulsory jurisdiction: the case for closing the clause*. American Journal of International Law, Vol. 81, No.1, 1987

²⁴⁶ Harris D. J, Cases and Materials on International Law, 5th edition, Sweet & Maxwell, London, 1998.

²⁴⁷ Coalition for the International Criminal Court, Op Cit

²⁴⁸ Wilkins, R.G. (2002) Ramifications of the International Criminal Court for War, Peace and Social Change, February 12, [available at <http://www.lifesite.net/Idn/2002/feb/020212a.html>] (Last consulted on January 25, 2007)

principle applies even if the State in question is not a party to the Statute, such as the United States.²⁴⁹ Thus the Security Council is able to bypass the nationality and territorial principles that apply if a State were to refer a situation or a prosecutor were to initiate his own investigation, giving the ICC hitherto unprecedented jurisdictional reach.²⁵⁰ This is a major advance for the credibility and enforcement of international law, as it is a step forward towards ensuring that only one set of international rules applies to every nation state.

Apart from the prohibition on reservations in relation to the ICC's jurisdiction, Part 13 of the Rome Statute states that no reservations in any regard can be made once the treaty has been ratified, though States may propose amendments at a Review Conference seven years after the treaty has entered into force. The UN Security Council in accordance with its voting procedures²⁵¹ can amend the Constituent Instrument of the ad hoc ICTR and ICTY at any time. A final point on jurisdiction—the ICC's jurisdiction is not geographically limited to a particular state or states, as is the case with the ICTY and ICTR, which focus on former Yugoslavia and Rwanda respectively, and not restricted to a particular time period, as is the case for the ICTR. Therefore it is less likely to be criticized as carrying out 'victor's justice'.²⁵² The lack of enforcement machinery in the ICJ

²⁴⁹ Hain, P. (2000) Calling all tyrants, Guardian Unlimited, August 29, [available at <http://www.guardian.co.uk/yugo/article/0,2763,360393,00.html>] (Last consulted on January 25, 2007)

²⁵⁰ Wilkins, R.G. Ramifications of the International Criminal Court for War, Peace and Social Change, February 12, 2002 [available at <http://www.lifesite.net/Idn/2002/feb/020212a.html>] (Last consulted on January 25, 2007)

²⁵¹ Coalition for the International Criminal Court, The ICC and ad Hoc International Criminal Tribunals – A comparison of provisions, [available at <http://www.iccnw.org/pressroom/factsheets/FS-CICC-AdHocTribunals.pdf>] (Last consulted on January 25, 2007)

²⁵² Human Rights Watch. Questions and Answers about the ICC and the United States, [available at <http://www.hrw.org/campaigns/icc/usqna.htm>] (Last consulted on January 25, 2007)

has rendered it a toothless bull dog. The fact that the ICJ pronounces her judgments and allows states (belligerents or disputants) to implement probes criticisms as to the effective of the institution in dispute resolution. This ICC on the contrary possesses an enforcement machinery/institution—the prison at the Hague where detainees and accused persons for gross violations of human rights are incarcerated or called to serve their term in case of prosecution.²⁵³ The need for a global gendarme to enforce the judgments of international judicial institutions is key to conflict prevention.

In conclusion, the above discussions reveals that the international community is not yet well tailored to militate against conflict. The above explain why for some reason conflict analysts consider conflict mediation farcical. However, in the discussion of the issues, some recommendations have been made on how the fight pro conflict prevention can be enhanced. This will more efficiently serve as a deterrent to potential perpetrator of humanitarian atrocities or violator of international norms and standards (whether as individuals likely to be charged before the ICTs or as states, potential offenders of international law of treaties) would likely be deterred by the risk of future prosecution or whether states will continually credit the international judicial motor of the ICJ as a dispute settlement institution.

²⁵³ Francis Nguendi Ikome, *The Inviolability of Africa's Colonial Boundaries: Lessons from the Cameroon-Nigeria border conflict*. Institute for Global Dialogue Occasional Paper No. 47, Johannesburg, Nov. 2004

CHAPTER SIX:

POLICY RECOMMENDATIONS AND CONCLUSION

6.0 SUMMARY AND CONCLUSIONS

With the limited jurisdiction possessed by the ICJ, states always had the latitude to succumb to or refuse to be bound by any of its decisions. This state of affairs culminated in power holders, heads of governments adulterating the Divine principle of equality of all human beings, and subjected some of their fellow brethren to torture, and all sorts of inhumane and degrading punitive measure (most often to protect political interest and rival all opposition). Such human abuses went court-free because of the exaggerated reliance on the concept of sovereign rights of states by other states and the international community in general. However, during the 1990s, the international community took unprecedented steps to limit the impunity all too often associated with mass slaughter, forced dislocation of ethnic groups, torture, and rape as a weapon of war. Along with two genocides and many other widespread crimes, the decade was marked by the creation of international criminal justice mechanisms and the application of universal jurisdiction to hold perpetrators of the most serious

crimes to account. Due to inherent difficulties in rendering justice for these crimes, there have been failings, but the new approaches have nonetheless made great strides. The quandary facing the international judicial institution (whether they be adjudicators of matters relating to state responsibility/obligation under statute or whether they be adjudicators of matters relating to individual criminal responsibility) rests around the right to *free and fair trial*. While it must be acknowledged that this right possesses lots of challenges, and that minor procedural, and some inevitable slip-ups could occur, they nonetheless infringe on the fairness of the trial.

As bad as things seem at the moment, it's important to keep a sense of optimism (conflicts can be prevented). Contrary to conventional wisdom, and perhaps all our intuitions, there has been a very significant trend decline—a high point in the late 1980s and very early 1990s—in the number of wars taking place, both between and within states, in the number of genocidal and other mass atrocities, and the number of people dying violent deaths as a result of them, in the number of nascent opposition/criticisms of international justice receives and in the number of states that blatantly abrogate international law and uphold their sovereign rights at the expense of world peace.²⁵⁴ There are now 40 per cent fewer conflicts taking place than there were in 1992. In the case of serious conflicts (defined as those with 1000 or more battle deaths in a year) and mass killings there has been an 80 per cent decline since the early '90s, and an even more striking decrease in the number of battle deaths. Whereas most years from

²⁵⁴ Gareth Evans, Preventing deadly Conflict: how can we do better? Address by Gareth Evans, President of International Crisis Group, to Foreign Policy Association 'Off-the-Record' Lecture Series, New York, 6 December 2006 [available at: <http://www.crisisgroup.org/home/index.cfm?id=4567>] (consulted on January 25, 2007)

the 1940s through to the 1990s had over 100,000 such reported deaths—and sometimes as many as 500,000 – the average for the first years of this new century has been more like 20,000. Of course violent battle deaths are only a small part of the whole story of the misery of war: 90 per cent or more of war-related deaths are due to disease and malnutrition rather than direct violence, as we have seen, for example, in the DRC and Darfur. We have equally seen the almost complete evaporation of interstate wars, between governments. But the trend decline in battle deaths is significant, and highly encouraging.

A number of reasons contributed to these turnarounds, including the end of the era of colonialism, which generated two-thirds or more of all wars from the 1950s to the 1980s; and of course the end of the Cold War, which meant no more proxy wars fuelled by Washington or Moscow, and also the demise of a number of authoritarian governments, generating internal resentment and resistance, that each side had been propping up. But more significantly, the huge upsurge in activity in conflict prevention, conflict management, and post-conflict peacebuilding activity that has occurred over the last fifteen years, with most of this being spearheaded by the much maligned UN, but with the World Bank, donor states, a number of regional security organizations and literally thousands of NGOs playing significant roles of their own and more especially the birth of ad hoc international criminal tribunals and eventually the ICC to check impunity as a result of which prospective and potential delinquents and lawbreakers of international law, and traitors to world peace have now been deterred.

Early warning and proactive mechanisms have been put in place have been of tremendous assistance to the peace of the world. The role of ADR is also plausible. A web of these has greatly contributed to preventing and managing conflicts. However, due to the loopholes and shortcomings of ADR most belligerents have sought in-court dispute resolution. This is suggestive of the fact that the courts hold the secret key to world peace amongst individuals as well as states, and which should be released. There are however difficulties in the discharge of such mandate which range from the frailty of the *right to free and fair trial* which runs across both criminal, civil and administrative tribunals to and the problems identified in chapter four. The determination of the said problems, redefinition of some concepts of international law mentioned in chapter four, and cooperation between states and the judiciary on the one hand, and states, judiciary and actors of the ADR on the other, could bring a glorious end to world conflicts or at worst prevent conflicts for decades and why not centuries.

6.1 Limitations to the Study and Directions for further research

Although not affecting the substance of the final research, some limitations are nevertheless, to be fairly raised with regard to this study.

First of all due to the logistical and time constraints, this end product cannot claim an exhaustion of all tenets to have concluded that international judicial institutions can serve as key to conflict prevention. In fact conflict prevention is a complicated area of pragmatic international relations, and it is limited in literature. There are as many causes of conflicts as there are conflicts, and as

many tools of conflict prevention as there are conflicts: This diversity has culminated in many of the assertions in the present research being unfairly grounded, and some based on assumptions from a personal point of view and understanding of international political and legal issues.

Furthermore, at inception, primary evidence on the operative mechanisms of the international judicial institutions was supposed to constitute a greater quotient of the *modus operandi*, but the reluctance of the judicial institutions to release information made it difficult for the research to be well grounded. Much reliance was supposed to be on the primary evidence because so far there has been very limited (almost inexistent) literature or media coverage linking international judicial institutions to conflict prevention. However, it has taken much commitment to come out with this modest piece of research, and the author should be grateful for prospective research in this light to go beyond his speculations and use some of the questions raised especially in chapter four as a stepping stone towards the re-shaping of the international geopolitical and legal environment.

REFERENCES

Adekeye Adebajo, (2002), *Building Peace in Africa: Sierra Leone and Guinea-Bissau*, International Peace Academy Occasional Paper Series, Lynne Reinner, USA.

Arend, Anthony C. and Robert J. Beck, (1993) *International Law and the Use of Force: Beyond the UN Charter Paradigm*, London; New York: Routledge.

Axelrod Robert, (2003), *The Evolution of Cooperation* (New York: Basic Books, 1984), David Carment, *Assessing State Failure: Implications for theory and Policy*, Routledges, *Third World Quarterly*, Vol. 24, Number 3

Bellamy Alex J. and Williams Paul D., (2005), *"Who's Keeping the Peace? Regionalization and Contemporary Peace Operations,"* *International Security* 29:4.

Bercovitch J, (1986) 'International Mediation: A study of the Incidence, Strategies and Conditions of Successful Outcomes' *Cooperation and Conflict*, New York.

Bercovitch J, (1992) *'The Structure and Diversity of Mediation in International Relations'* in Bercovitch Jacob and Rubin J. Z., *Mediation In International Relations: Multiple Approaches to Conflict management*, New York.

Bercovitch Jacob, (2002) *Studies in International Mediation: Essays in Honour of Jeffrey Z. Rubin*, Palgrave,

Bull H, (1984), *The Anarchical Society: A Study of Order in World Politics*, London: Macmillan.

Bull H., (1995), 'The Theory of International Politics, 1919-1969' (1972), reproduced in Derian J. Der (Ed.) *International Theory: Critical Investigations*, Basingstoke.

Carter E. H, (1939) *The Twenty Years Crisis*, London: Macmillan, 2nd edn

Cassese, (1986) *Attitudes of states towards international law: International Law in a Divided World*, Oxford University Press, Oxford.

Collier Paul, (2000), '*Doing well out of war: An economic Perspective*,' in Berdal Mats and Malone David, *Greed and Grievances: Economic Agendas in Civil Wars*, Boulder and London: Lynne Rienner Publishers, Inc.

Cook Martin, (2000) "Two Roads Diverged, and We Took the One Less Travelled: Just Recourse to War and the Kosovo Intervention", in William J. Buckley (ed.), *Kosovo: Contending Voices on Balkan Interventions*.

Crawford Timothy W. and Kuperman Alan J., (2006), *Gambling on Humanitarian Intervention: Moral Hazard, Rebellion and Civil War*, New York: Routledge.

Damrosch Lori, (1987) *The International Court of Justice at Crossroads*, Transnational Publishers, Inc. Dobbs Ferry, New York.

Der Deriam, James, (1995), '*A reinterpretation of Realism: Genealogy, Serology, Dromology*' in James De Deriam (Ed) *International Theory: Critical Investigations*, New York University Press.

Deutsch Morton, (2000), "*Cooperation and Competition*," in Deutsch Morton and Coleman Peter *The Handbook of Conflict Resolution: Theory and Practice*, eds. San Francisco: Jossey-Bass Publishers, 22

Dougherty James E. and Pfaltzgraff Robert L. Jr, (1990) *Contending Theories of International Relations*, New York: Harper-Collins.

Dunlop, John T and Arnold M Zack, 1997 *Mediation and Arbitration of employment Disputes*. San Francisco: Jossey-Bass.

Eboe Hutchful and Kwesi Aning, (2004) "*Political Economy of Conflict*" in Adebajo, Adekeye and Ismail Rashid (Eds.). *West Africa's Security Challenges: Building Peace in a troubled Region*. Boulder: Lynne Rienner Publishers, Inc,

Enloe Cynthia, (1992) *Bananas, Beaches and Bases: Making Feminist Sense of International Relations*, London: Pandora Books.

Ennio Di Nolfo, ed. (1991), *The Atlantic Pact Forty Years Later: A Historical Appraisal*. Berlin. Essays published on the occasion of NATO's fortieth anniversary in 1989.

Falk R., (1998), '*Post-Cold War Illusions and Daunting Realities*', in: Roger Williamson (ed.), *Some Corners of a Foreign Field. Intervention and World Order*, London.

Ferry Dobbs, (1987) *The International Court of Justice at Crossroads*, Transnational Publishers, Inc. Dobbs Ferry, New York.

Fisher Roger, (1991), "*Negotiating Power: Getting and Using Influence*," pp. 127-140 in Breslin J. William and Rubin Jeffrey Z, *Negotiation Theory and Practice*, Cambridge: Program on Negotiation Books, 128.

Frances Stewart, (1998) *The Root Causes of Conflict: Some Conclusions*, Queen Elisabeth House, Working Paper Series No. 16.

Freedman Lawrence, and Karsh, Efraim. (1993), *The Gulf Conflict, 1990 - 1991: Diplomacy and War in the New World Order*. Princeton, NJ: Princeton University Press.

Frei, D, (1976) "Conditions affecting the effectiveness of international mediation." *Peace Science Society (International) Papers*.

Grenville and Sohn, (1966), *World Peace through World Law*, 3rd ed., Havard University Press, Cambridge, Massachusetts.

Groom A.J.R and Margot Light eds. (1994) *Contemporary International Relations: A Guide to Theory*, London: Pinter.

Gros L, (1976), "The future of the International Court of Justice" Dobbs Ferry: Oceana Publications, Vol. I

Haliday F, (1975), *Rethinking International Relations*, London.

Hoffman Stanley, (1996) "*Sovereignty and the Ethics of Intervention*," in Hoffman Stanley (ed.) *The Ethics and Politics of Humanitarian Intervention* Notre Dame, Indiana: University of Notre Dame Press.

Johnstone D, (2002), *FOOLS' CRUSADE Yugoslavia, NATO and Western Delusions*, Pluto Press, London, (Sept).

Kingma Kees and Kiflemariam Grebrewold, (1988) *Demilitarization, Reintegration and Conflict Prevention in the Horn of Africa, Safer world and Bonn International Center for Conversion*, London.

Lewicki Roy J, Saunders David M. and Minton John W, (1999), *Negotiation, 3rd Edition* San Francisco: Irwin McGraw-Hill.

Linklater Andrew (1990) *Beyond Realism and Marxism: Critical Theory and International Relations*, London: Macmillan.

Little David, (2000) *"Force and Humanitarian Intervention: The Case of Kosovo"*, in William J. Buckley (ed.) *Kosovo: Contending Voices on Balkan Interventions*.

Martin Lisa L., (1992), *Coercive Cooperation: Explaining Multilateral Economic Sanctions*, Princeton: Princeton University Press.

Micheal Nicholson, (1996), *Causes and Consequences in International Relations: A conceptual Study*, London: Pinter.

Mojekwu, C. (1980) *"International Human Rights: The Contemporary Issues"*, Stanfordville, New York: Human Rights Publishing Group.

Morgenthau Hans J., (1978), *Politics among Nations: The struggle for Power and Peace*, Fifth Edition, Revised, New York: Alfred A. Knopf

Nagendra Singh, (1989) *The Role and Record of the International Court of Justice*, Martinus Nijhoff Publishers, London

Nicholson Micheal, (1996), *Causes and Consequences in International Relations: A conceptual Study*, London: Pinter.

Peck Connie and Lee Roy S., (1997), *Increasing the Effectiveness of the International Court of Justice* Martinus Nijhoff Publishers, the Hague, Netherlands,

Reno William, (2000), '*Shadow States and Political Economy of Civil Wars*'. in Berdal Mats and Malone David Greed and Grievances: Economic Agendas in Civil War, Boulder and London: Lynne Reinner Publishers, Inc.

Reynolds Philip, (1994), An Introduction to International Relations, London: Longman 3rd Edn.

Rothman Jay, (1992), "*Conflict Management Policy Analysis*," in Rothman J. From Confrontation to Cooperation, Newbury Park, CA: Sage.

Saunders Harold S, (1991), "*We Need a Larger Theory of Negotiation: The Importance of Pre-Negotiating Phases*," pp. 57-70 in J. Breslin William and Jeffrey Z. Rubin, Negotiation Theory and Practice, Cambridge: Program on Negotiation Books.

Schabas William S, (2004), An Introduction to the International Criminal Court, Second Edition, Cambridge University Press.

Schubert Frank N, and Kraus, Theresa L, (1995), The Whirlwind War: The United States Army in Operations Desert Shield and Desert Storm. Washington, DC: Center of Military History, U.S. Army.

Smith Steve, Booth Ken and Zalewski Marysia, (1996) International Theory: Positivism and Beyond, Cambridge: Cambridge University Press

Sommerville Keith, (1990), Foreign Military Intervention in Africa, Pinter Publishers, London

Stewart Frances, Valpy Fitzgerald and Associates, (2001,) War and Underdevelopment: The Economic and Social Consequences of Conflict, Oxford: Oxford University Press.

Susskind L. and Babbitt E, (1992), *"Overcoming the Obstacle of Effective Mediation,"* in Jacob Bercovitch and J. Z. Rubin, Mediation In International Relations: Multiple Approaches Top Conflict Management, New York.

Taslim O. Elias, (1983) "The International Court of Justice and some contemporary Problems, Essays on International Law, Martunus Nijhoff Publishers, Boston

Teson Fernando R. (2005), Humanitarian Intervention: an Inquiry into Law and Morality, Transnational Publishers; London, 3rd Revised Updated edition.

Tutu Desmond Mpilo, (2000), *"Reconciliation in Post-Apartheid South Africa : Experiences Of the Truth Commission."* in Hopkins, Jeffrey (Ed.), The Art of Peace: Nobel Peace Laureates Discuss Human Rights, Conflict and Reconciliation. Ithaca, NY: Snow Lion Publications.

Vincent, R. J. (1990) '*Grotius, Human Rights, and Intervention.*' in Bull Hedley, and Kingsbury Benedict, Hugo Grotius and International Relations, Adam Roberts. Oxford: Clarendon Press.

Waltz' Kenneth (1979), *Theory of International Politics*, Reading, Mass: Addison-Wesley

Wedgwood C V, (1938) *The Thirty Years War*, Jonathan Cape, London

Wehr Paul, Heidi Burgess, and Burgess Guy, (1994), *Justice Without Violence*, Lynne Rienner.

Wieruszewski, (1987) "*National Implementation of Human Rights*" in An- Na'im A.A and Ddeng F.M, *Human Rights in Africa: Cross-Cultural Perspectives*, Washington, DC: Brookings Institution.

Zartman I. William, (1990), *Negotiations and Pre-negotiations in Ethnic Conflicts: The Beginnings, the Middle, and the Ends.*" in Montville Joseph V, *Conflict and Peacemaking in Multiethnic Societies*. Ed. Lexington, Mass:' Lexington Books.

Zartman William I. (1995), *Collapsed States: The Disintegration and Restoration of Legitimate Authority*, Boulder, Colorado: Lynne Reinner Publishers.

Policy Documents

Atherlay Peggy, (2006) '*All about the United Nations Budget*' United Nations Association of the USA, June, [For more information or verification, call Peggy Atherlay, UNA-USA's Communications Director, at 212-907-1320 or email him at patherlay@unausa.org.

Biersteker, Thomas J. et al. (2001) Targeted Financial Sanctions: A Manual for the Design and Implementation. Contributions from the Interlaken Process, Brown University: Watson Institute for International Studies.

Klugman Jeni, *"Social and Economic Policies to Prevent Complex Humanitarian Emergencies: Lessons from Experience"*, WIDER, Policy Brief No. 2

Oudraat Chantal de Jonge, (2000) *"Intervention in Internal Conflicts: Legal and Political Conundrums"*, Working Paper No 15 , Carnegie Endowment for International Peace, Global Policy Paper, August.

Renata Dwan, (2000) *"Consensus: A Challenge for Conflict Prevention?"* in Preventing Violent Conflict, The Search for Political Will, Strategies and Effective Tools, Report of Krusenbergh Seminar, (Stockholm: Stockholm International Peace Research Institute (SIPRI).

Smock David R., editor, (1997), *"Creative Approaches to Managing Conflict in Africa: Findings from USIP-Funded Projects"*, United States Institute for Peace.

Newspaper Articles

Berry Glyn, (2004) *"Sovereignty as the responsibility to prevent, protect, and rebuild,"* Vol. 25 The Ploughshares Monitor, no. 1.

Eboh, Camilius. (2005) *"Nigeria-Cameroon Fail To Set New Bakassi Pullout Date,"* Washington Post Online. October 15,

Geyer, Georgie Anne, (1991) "*Without a Helping Hand*," Washington Times, November 22.

Hakim Peter, (1992) "*Saving Haiti from Itself*," Washington Post, May 31, p. C1.

Jentleson Bruce, (1995) "Transforming a Pariah State: International Dimensions of the South African Transition," Africa Today, 1st and 2nd quarters.

Krauthammer Charles, (1992) "Trusteeship for Somalia," Washington Post, October 9.

Internet Articles Cited

"Negotiation," International Online Training Program on Intractable Conflict, Conflict Research Consortium, University of Colorado, [available at: <http://www.colorado.edu/conflict/peace/treatment/negotn.htm>]

Basic Principles on the Role of Lawyers, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990 [available at <http://www.ohchr.org/english/law/lawyers.htm>] (Consulted on Jan. 13, 2007)

Bentham J., Introduction to the principles of Morals and Legislation, 1789, Batoche Books, Kitchener, 2000, [available at www.ecn.bris.ac.uk/het/bentham/morals.pdf] (Consulted on May 19, 2006)

Canada V United States Of America: Judgment of 12 October 1984, [available at <http://www.icj-cij.org/icjwww/idecisions.htm>] (Consulted on April 30, 2006)

Christian J. Tams, Enforcing Obligations Erga Omnes in International Law, Series: Cambridge Studies in International and Comparative Law , No. 44, Year Omitted from website [available at <http://www.cambridge.org/catalogue/catalogue.asp?isbn=9780511134104>] (consulted on February 11, 2007)

Coalition for the International Criminal Court, Questions and Answers on the International Criminal Court, July 2002[available at <http://www.iccnw.org/documents/iccbasics/Q&AJuly2002.pdf>] (Last consulted on January 25, 2007)

Coalition for the International Criminal Court, The ICC and ad Hoc International Criminal Tribunals – A comparison of provisions, [available at <http://www.iccnw.org/pressroom/factsheets/FS-CICC-AdHocTribunals.pdf>] (Last consulted on January 25, 2007)

Conan Timothy J. et Michelle A. Sager, “Les implications du Federalisme dans la Politique étrangère americaine: Les relations exterieures des etats federés” (neither city nor city of pub. cited) [available at www.diplomatie.gouv.fr/fr/IMG/pdf/FD001403.pdf] (Last consulted on May 3, 2006)

Cook Martin L., *The Future Operating Environment: Ethical Implications*, Paper Presented at the 7th Canadian Conference on Ethical Leadership, 28-29 Nov. 2006 [available at http://www.cdaacd.forces.gc.ca/ccel_conference_ccdel/engraph/doc/DrMartinCook_Presentation.pdf] (Last consulted on 11th February, 2007)

CTV.ca News Staff, *Bush steps up battle in Iraq with more troops*, Jan. 10 2007, [available in http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20070109/iraq_report_070110/20070110?hub=TopStories&s_name=] Last consulted on January 20, 2007

Dahr Jamail and Ali al-Fadhily, *“Saddam Execution Set to Destabilise Iraq Further”* ‘The execution of former dictator Saddam Hussein Saturday could bring more instability in an increasingly violent and chaotic occupation.’ Baghdad, Dec. 30 (IPS) [available in <http://ipsnews.net/news.asp?idnews=36021>] consulted on Jan. 19, 2007

Elliott Kimberly Ann, *“Evidence on the Costs and Benefits of Economic Sanctions,”* Speech given before the Subcommittee on Trade Committee on Ways and Means, United States House of Representatives Washington, DC, October 23, 1997 [available at <http://www.iie.com/publications/papers/paper.cfm?ResearchID=294>] (website consulted on February 09, 2007)

Gareth Evans, *Preventing deadly Conflict: how can we do better?* Address by Gareth Evans, President of International Crisis Group, to Foreign Policy Association ‘Off-the-Record’ Lecture Series, New York, 6 December 2006 [available at

<http://www.crisisgroup.org/home/index.cfm?id=4567>] (consulted on January 25, 2007)

Glossary of terms used in international law relating to treaties and conventions [available at <http://hrli.alrc.net/mainfile.php/glossary/130/>] (consulted on February 11, 2007)

Hain, P. (2000) Calling all tyrants, Guardian Unlimited, August 29, [available at <http://www.guardian.co.uk/yugo/article/0,2763,360393,00.html>] (Last consulted on January 25, 2007)

Human Rights Watch. Questions and Answers about the ICC and the United States, [available at <http://www.hrw.org/campaigns/icc/usqna.htm>] (Last consulted on January 25, 2007)

International Commission of Inquiry On Crimes Against Humanity Committed by the Bush Administration, *Final Verdict released on September 13, 2006* [available in <http://www.bushcommission.org/?q=node/50>] Last consulted on January 20, 2007

Joshua Cooper Ramo, *"the five virtues of kofi annan"*, time newspaper in partnership with CNN, Sunday, Aug. 27, 2000 [available at <http://www.time.com/time/magazine/article/0,9171,53443-1,00.html>], p. 2, (last consulted on February 11, 2007)

Kristin Henrard, *"Post Apartheid South Africa's Democratic Transformation Process: Redress of the Past, Reconciliation and Unity in Diversity,"* 2002 [available in

<http://www.ethnopolitics.org/ethnopolitics/archive/volumeI/issue3/henrard.pdf>
consulted on February 11, 2007

Kurth James, *"Models of Humanitarian Intervention,"* Somalia Watch Analysis,
Posted on 6 Sept 2001, [available at
<http://www.somaliawatch.org/archivesep01/010906402.htm>], (Last consulted on
February 11, 2007)

Schwartzberg Joseph E., *"High Level Panel Nears Agreement on Security Council
Makeup and Humanitarian Intervention,"* Citizens for Global Solutions, July 28, 2004
[available at
<http://www.globalpolicy.org/security/reform/cluster1/2004/0728threetier.htm>],
(consulted on February 11, 2007)

Scott Michael R. , *"Alternative Dispute Resolution: About Mediation and Arbitration",*
in Hillis Clark Martins & Peterson, 1998-1999 [available in
<http://www.hcmp.com/Articles/mrs0399.htm>] (Last consulted on Jan. 03, 2007)

Seils Paul and Marieke Wierda, *The International Criminal Court and Conflict
Mediation*, June 2005, [available in
<http://www.ictj.org/images/content/1/1/119.pdf>] (on August 30, 2006)

Shaw Rosalind, *Rethinking Truth and Reconciliation Commissions: Lessons from Sierra
Leone*, February 2005 | Special Report No. 130, of the United States Institute of
Peace [available in <http://www.usip.org/pubs/specialreports/sr130.html>]
consulted on Jan. 19, 2007

Stacy Helen, International Criminal Courts and Tribunals, Lecture notes Course IR 140B: Law and Society, University of Stanford, [available at www.stanford.edu/dept/IR/course/lawsoc.html/] (Consulted on May 19, 2006)

Stauffer, Jill “ Seeking the Between of Vengeance and Forgiveness: Martha Minow, Hannah Abraham McLaughlin, *Staff writer of The Christian Science Monitor*, “Mercy vs. justice as Liberia heals itself: Liberia's new Truth and Reconciliation Commission seeks a balance between punishment and forgiveness. The Christian Science Monitor, 26 Oct 2006 [available in <http://www.reliefweb.int/rw/RWB.NSF/db900SID/EK0I6V35MR?OpenDocument>] consulted on Jan. 19, 2007;

Tecola Hagos M., “Ethiopia-Eritrea Border Dispute: Challenging the Opposition” [available at www.tecolahagos.com/border_dispute], (Last consulted Dec. 30 2006) UN Report of the Secretary-General, *Prevention of Armed Conflict*, 2001, [available at domino.un.org/unispal.nsf/0/b5bffcd5b649239585256caa006efab6?OpenDocument] (Consulted on Feb. 08, 2007),

Weir Fred, “Russia, China Looking to Form ‘NATO of the East’?” (A Six-Member Group, Seeking to Balance US Power, Meets in Moscow Wednesday), *Christian Science Monitor*, October 26, 2005 [available at <http://globalpolicy.igc.org/nations/sovereign/integrate/2005/1026sco.htm>] (consulted on February, 11 2007)

Wertheim E., *Negotiations and Resolving Conflicts: An Overview*; [available at: <http://web.cba.neu.edu/~ewertheim/interper/negot3.htm>] (Last consulted on January 03, 2006)

Wilkins, R.G. (2002) Ramifications of the International Criminal Court for War, Peace and Social Change, February 12, [available at <http://www.lifesite.net/Idn/2002/feb/020212a.html>] (Last consulted on January 25, 2007)

INTERVIEWS

Djenadou Moudjib, UN Fellow at Centre for Africa's International Relations. March to June 2006 (Interview conducted on May 1st, 2006)

Keith Olbermann, "Only this president, only in this time, only with this dangerous, even messianic certitude, could answer a country demanding an exit strategy from Iraq, by offering an entrance strategy for Iran. Only this president could look out over a vista of 3,008 dead and 22,834 wounded in Iraq, and finally say, "Where mistakes have been made, the responsibility rests with me" — only to follow that by proposing to repeat the identical mistake ... in Iran. Only this president could extol the "thoughtful recommendations of the Iraq Study Group," and then take its most far-sighted recommendation — "engage Syria and Iran" — and transform it into "threaten Syria and Iran" — when al-Qaida would like nothing better than for us to threaten Syria, and when Iranian President Mahmoud Ahmadinejad would like nothing better than to be threatened by us. This is diplomacy by skimming; it is internationalism by drawing pictures of Superman in the margins of the text books; it is a presidency of Cliff Notes (interview extracted from CNN Online News)

Sara Flounders (writer and political organizer since the first threat of breakup of Yugoslavia in the 1990s), conducted by John Catalinotto

LAMIN Abdul, Lecturer at the Department of International Relations, University of Witwatersrand, Johannesburg, South Africa (Interview conducted on May 1st, 2006)

Personal interview carried out at the University of Witwatersrand, amongst non-law students. 80%+ of respondents not very at home with the application of the right to be defended by counsel. Most argued that legal levy is not affordable in most cases.

Legal Texts

African Charter on Human and Peoples' Rights, 1981

American convention on Human Rights, 22 November 1968

Charter of the United Nations, 1950

Constitutive Act of the African Union, 2000

Convention Establishing Central American Court of Justice, 20 Dec. 1907

Convention with respect to the Laws and Customs of War on Land, 29 July, 1899

European Convention for the Protection of Human Rights and Fundamental Freedoms (as amended by Protocol No. 11—September 2003)

General Act of Pacific Settlement of Disputes, 26 Sept. 1928

Hague Convention, 1907

International Covenant on Civil and Political Rights, 23 March 1976

International Covenant on Economic, Social and Cultural Rights, 16 Dec. 1966

Optional Protocol for signatures concerning Compulsory Settlement of Disputes,
29 April 1958

Protocol on the Peace and Security Council of the AU, 2002

Resolution 217 (III), General Assembly, Third Official Session. Rec. pt. I, 71;
printed in 1949, 43 A.J.I.L, Supp., p. 27

Resolution 260 (III) A of the U.N. General Assembly on 9 December 1948. Entry
into force: 12 January 1951.

Treaty of Amity, Economic Relations & Consular Rights (U.S/Iran), 1958

Universal Declaration of Human Rights, 10 Dec. 1948

Vienna Convention on Consular Relations, 24 April 1963

Vienna Convention on Diplomatic Relations, 18 April 1961