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Declaration

I declare that *Withdrawal of State Referrals: A Case Study of Uganda* is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

……..
Michael Ddeme Mukwana

Date: ……

Dedication

To You Dad, in loving memory. Your dream lives on.

Acknowledgements

Thank you Lord, for making **ALL** things possible.

I would also like to thank DAAD and the German people for the scholarship opportunity. I am highly indebted.

A word of thanks also goes to my supervisor Prof. Werle, and to Prof. Fernandez for their kind words of guidance and encouragement while writing this paper.

List of abbreviations

DRC Democratic Republic of Congo
ICC International Criminal Court
ICTR International Criminal Tribunal for Rwanda
ICTY International Criminal Tribunal for the former Yugoslavia
LRA Lord's Resistance Army
SPLA Sudan Peoples' Liberation Army
UN United Nations
VCLT Vienna Convention on the Law of Treaties

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CHAPTER ONE

Introduction

1.1 The Phenomenon of Self- Referrals

When the Rome Statute[1] was being drafted, referral of a situation by a state party was thought to have the least potential for making the International Criminal Ceourt (hereinafter referred to as the ICC) operational.[2] ...It was frequently pointed out that States were notoriously reluctant to complain against other states on a bilateral basis.[3] As M.ahnoush Arsanjani and W. W.Michael Reisman, two expert commentators on the ICC, have observed:

> Before and during the Rome negotiations, no one -- neither states that were initially skeptical about the viability of an international criminal court nor states that supported it -- assumed that governments would want to *invite* the future court to investigate and prosecute crimes that had occurred in their territory. To the contrary, it was assumed that the Court would become involved only in those states that were *unwilling* or refused to prosecute, staged a sham prosecution of their governmental cronies, or were simply *unable* to prosecute. There is no indication that the drafters ever contemplated that the Statute would include *voluntary* state referrals to the Court of difficult cases arising in their own territory. By voluntary referral we refer to situations in which the sole basis for satisfying the Court's admissibility test is the referral -- whether effected formally or implicitly -- by the state in which a crime or the situation subject to investigation has taken place.[4]

[1] Rome Statute of the International Criminal Court of 17th July 1998. (adopted 17th July 1998, entered into force 1st July 2002) UN Doc. A/CONF.183/9.

[2] A comprehensive discussion of the drafting history of the Rome Statute can be found in M. Bassiouni, *The Legislative history of the International Criminal Court*, (2005) vol's. 1-3, Ardsley. Ny: Transnational Publishers.

[3] W Schabas , *An Introduction to the International Criminal Court* ,,3rd ed.(2007) at p. 143 see also Claus Kress p.944.

[4] -Mahnoush H. Arsanjani and W. Michael Reisman, "Developments at the International Criminal Court : The Law-in-Action of the International Criminal Court" (,2005) 99 *American Journal of International Law*, 385 at 386-387. For further discussion on the phenomenon of self referrals, see P Gaeta "Is the Practice of 'Self-Referrals' A Sound Start for the ICC?" (2004) 2 *Journal of International Criminal Justice*, 949; ,C. Kress "'Self-Referrals' and 'Waivers of Complementarity 'Some Considerations in Law and Policy" (2004) 2 *Journal of International Criminal Justice*, 945 ; A. Cassese "Referral by States Parties" in, A. Cassese *et.al* (eds.) *The Rome Statute of the International Criminal Court: A commentary* (2002), Oxford University Press.

In summary, the expectation was for the ICC to act on its own motion against states that were unable or unwilling to prosecute since states would not, based on past experience, be expected to complain against other states. The ICC Prosecutor, in a bid to make the Court operational, came up with an ingenious interpretation of the statute that would allow states to refer situations occurring on their own territory.[5] HePrsecutor adopted athe policy of inviting and welcoming voluntary referrals by territorial states as a first step in triggering the jurisdiction of the Court.' [FN93][6] The prosecutor stated that 'while *proprio motu* power is a critical aspect of the Office's independence, the Prosecutor adopted the policy of inviting and welcoming voluntary referrals by territorial states as a first step in triggering the jurisdiction of the Court.'[7] According to W. Schabas, it is obvious that the idea of self-referrals of which there is not a trace in the travaux préparatoires, [of the Rome Statue] emerged within the Office of the Prosecutor during 2003.[8] He has also referred to it as a "novel construction".[9]

The first State toto respond to the prosecutor's overtures encouragement was Uganda [10], followed by the Democratic Republic of the Congo – DRC [11], and the Central African Republic [12].

[5] In M P. Scharf and P. Dowd "No way out? The Question of Unilateral withdrawals of Referrals to the ICC and other Human Rights Courts" , *Case Research Paper Series in Legal Studies Working Paper* 08-21,August 2008 available at http://ssrn.com/abstract=1240802, it is described as a dynamic and innovative interpretation of the Rome Statute by the prosecutor especially in light of the ambiguities built into the Statute and the lack of adjudicative history at the ICC.

[6] See Paper on some policy issues before the Office of the Prosecutor, September 2003, available at http://www.icc- cpi.int/library/organs/otp /030905_Policy_Paper.pdf.

[7] Office of the Prosecutor, 'Report on the Activities Performed During the First Three Years (June 2003–June 2006)', 12 September 2006, p. 7.

[8] "Prosecutorial Discretion v. Judicial Activism at the International Criminal Court" (2008) 6 *Journal of International Criminal Justice* , 731 at 1.

[9] W. Schabas, "'Complementarity in Practice': Some Uncomplimentary Thoughts" (2008) 19 *Criminal Law Forum*, 5 at 7.

[10] ICC Press Release, President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC (Jan. 29, 2004).

[11] ICC Press Release, Prosecutor Receives Referral of the Situation in the Democratic Republic of Congo (Apr. 19, 2004).

[12] ICC Press Release, Prosecutor Receives Referral Concerning Central African Republic (Jan. 7, 2005).

's Museveni, who shrewdly understood that the Court might put decisive pressure upon an adversary he had been unable to defeat on the battlefield. Uganda's letter of referral made reference to the 'situation concerning the "Lord's Resistance Army" in northern and western Uganda'. [FN94] The Prosecutor initially welcomed the **self** referral without further comment, although he later attempted to correct its blatant bias against one combatant group in a civil war when he informed Uganda that, in his view, 'the scope of the referral encompasses all crimes committed in Northern Uganda in the context of the ongoing conflict involving the [Lord's Resistance Army]'. [FN95]

1.2 The Law and Procedure of Self-Referrals to the ICC

States parties to the Rome Statute (hereinafter referred to as the ICC Statute) may refer to the prosecutor for investigation and prosecution any situation in which one or more crimes within the Court's jurisdiction might have been committed.[13] A situation is a set of circumstances or episodes, such as a war or untoward episodes, in which one or more of the crimes within the Court's jurisdiction have been committed.[14] The word "situation" is intended to minimise prejudicing the ICC by naming individuals too early as well as to preserve the independence and autonomy of the ICC in the exercise of its jurisdiction.[15]

[13] Rome Statute, Article 13. ICC Statute

[14] D. D N Nsereko, "Triggering the jurisdiction of the International Criminal Court" (2004) 4 *African Human Rights Law Journal*, 256 at Supra note 4 at 267.

[15] A. Maged , "Withdrawal of referrals –A serious Challenge to the Function of the ICC" (2006) 6 *International Criminal Law Review*, 2006 6:419 446 at 420-421. See also, A. Cassese "Is the ICC having teething problems ?" 4 (2006) 4 *Journal of International Criminal Justice* (2006), 434 441 - ; he quotes the ICC chief prosecutor as having said that once he investigates a situation he will do so across the board hence also looking into crimes committed by officials of the referring state.

As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.[16] The referral shall be in writing.[17]

The crimes need not to be committed in the territory of the referring state or involve its nationals.[18] It suffices that the crimes are committed on the territory of a states party or by a national of a state party.[19] States that are not party to the ICC Statute but have made declarations under article 12(3), are also allowed to refer situations to the prosecutor for investigation and prosecution, provided that they undertake to cooperate under part 9 of the statute. The right of a state that is not a party to the Statute to refer cases to the Prosecutor is limited to crimes committed in its territory or by its nationals.

The referral procedure therefore has three steps: first, a State becomes a Party to the Rome Statute and accepts the Court's general jurisdiction over the enumerated crimes therein; second, a State refers a specific situation to the Court requesting the ICC Prosecutor to look at the referral documents and thereby "triggers" the Court's jurisdiction; and third, the Court exercises its jurisdiction by commencing investigations into the self-referred situation. A self-referral from a territorial government shows an acceptance for the instigation of investigations and prosecutions against all parties involved including the referring government.[20]

1.3 The Ugandan Self-Referral

The Lord's Resistance Army (hereinafter referred to as LRA) is one of the many groups that were formed to fight the incumbent government of President Yoweri Museveni when it came

[16] Rome Statute, Article 14.
[17] Rules of Procedure and Evidence,Doc.1CC-ASP/1/3,pp.10-107, Rule 45.
[18] D. D N Nsereko, *supra* note 14 at 266.
[19] *Ibid.*
[20] C. Gallavin "Prosecutorial Discretion Within The ICC: Under The Pressure Of Justice" (2006) 17 , *Criminal Law Forum*, (2006) 17:43– 58at 50.

to power in January 1986. Whilst many of the other rebel groups were either defeated militarily or laid down their arms after peace talks, the LRA proved a hard nut to crack and has continued its brutal campaign of rape, abduction mu~~l~~tilat~~nat~~ion and pillage.[21] Having failed to defeat the LRA militarily or enter any form of peace agreement, the Ugandan Government on 16th December 2003 referred to the ICC "'the situation concerning the LRA in Northern and Western Uganda'".[22]

According to the official position of the Government of Uganda, the indictment and the arrest warrants were "'to seek a permanent end to the 20-year conflict'" and were necessitated by the continuing difficulties in effecting arrest, including the problem of protecting women and children abductees, and the lack of adequate support from regional and international partners.[23] On 29 May 2004, the Solicitor General of Uganda reiterated to the ICC Prosecutor that it was the Uganda Governments view that the ICC was "the most appropriate and effective forum" based on the gravity of the crimes, the fact that the ICC's exercise of jurisdiction would be of immense benefit for the victims and contribute favourably to national reconciliation and social rehabilitation and lastly Uganda's failure to arrest Joseph Kony (the LRA Leader) and his henchmen.[24] A senior Ugandan Government official in the Ministry of Justice who has been deeply involved in the interactions between the ICC and the Uganda Government intimated to me that at the time of the referral, leading figures in the

[21] For a detailed discussion on the LRA Rebellion, see "Behind the Violence: Causes, Consequences and the Search for Solutions to the War in Northern Uganda", Refugee Law Project Working Paper No. 11, available at http://www.refugeelawproject.org ;~~and~~ M.~~ohammed~~ el Zeidy, "~~'~~The Uganda Government triggers the first test of the Complementarity Principle: an Assessment of the First State party Referral to the ICC"~~',~~ (2005)5 *Internationa~~ernational~~l Criminal Law Review*, 83; P. Akhavan, "The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court" (2005) 99 *The American Journal of International Law*, 403.~~,~~

[22] Situation in Uganda (ICC-02/04-01/05), Decision to Convene a Status Conference on the Investigation in the Situation in Uganda in Relation to the Application of Article 53, 2 December 2005, para. 3.

[23] See Submission of Information on the Status of the Execution of the Warrants of Arrest in The Situation in Uganda, ICC-02/04-01/05, 6 October 2006.

[24] See ICC-02/04-01/05-329C-Conf-AnxD.

Ugandan military had reached a consensus that the LRA could not be defeated militarily and that the only option left was to pursue other means.[25]

In the Ugandan self-referral, the ICC was tasked with "'locating and arresting the LRA leadership'".[26] In June 2004, the ICC commenced its investigations in Northern Uganda.[27] One year later, the Pre-Trial Chamber I of the ICC issued arrest warrants for five top leaders of the LRA.[28] The warrants were issued under seal to protect the victims, but subsequently were unsealed in October 2005.

The issuance of the arrest warrants and the changed geopolitics in the great lakes region at the time (The Sudanese Government which was the main funder and supplier of arms to the LRA in retaliation to Uganda's actual or perceived support of the Sudanese Peoples Liberation Army (SPLA-a Sudanese Rebel Group) stopped the assistance after a peace deal was concluded) forced the LRA to the negotiating table with the Ugandan Government. Against the backdrop of LRA demands that the ICC drop its warrants of with the Ugandan Government and anarrest, an aAgreement on Accountability and Reconciliation (29 June 2007)[29] (hereinafter 'The 29 June Agreement') was reached 29 June 2007 with the Ugandan Governmentagainst the backdrop of LRA demands that the ICC drop its warrants of arrest. In effect, the agreement was an attempt to vitiate the effects of the warrants. In the

[25] Interview conducted on 26 May 2009 at the Ministry of Justice and Constitutional Affairs offices in Uganda. The official chose to remain anonymous.

[26] ICC Press Release, 'President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC', ICC-20040129-44-En, 29 February 2004.

[27] ICC Press release "Prosecutor of the International Criminal Court opens an investigation into Northern Uganda", ICC-OTP-20040729-65-En,29 July 2004,http://www.icccpi.int/pressrelease_details &id=33&l=en.html.

[28] Situation in Uganda (ICC-02/04-53), Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005; Situation in Uganda (ICC-02/04-54), Warrant of Arrest for Vincent Otti, 8 July 2005; Situation in Uganda (ICC-02/04-55), Warrant of Arrest for Raska Lukwaya, 8 July 2005; Situation in Uganda (ICC-02/04-56), Warrant of Arrest for Okot Odhiambo, 8 July 2005; Situation in Uganda (ICC-02/04-57), Warrant of Arrest for Dominic Ongwen, 8 July 2005.

[29] availableAvailable online at http://www.newvision.co.ug/D/8/455/573798.

~~agreement,~~

~~the two sides - the LRA and the government - sought to bring to justice both the indicted and not yet indicted rebels within the jurisdiction of Uganda.~~ The agreement provid~~declar~~eds ~~*inter alia* that "~~'the parties shall promote national legal arrangements, consisting of formal and non-formal institutions and measures for ensuring justice and reconciliation with respect to the conflict"~~'.~~[30] ~~[FN22]~~ Accordingly, the formal courts provided for under the Constitution of Uganda would~~shall~~ exercise jurisdiction over individuals who are alleged to bear particular responsibility for the most serious crimes, especially crimes amounting to international crimes, during the course of the conflict~~,~~.[31] ~~[FN23] (the agreement states).~~ In addition, the established courts and tribunals ~~shall~~ would adjudicate allegations of gross human rights violations arising from the conflict.~~[32] [FN24]~~

~~The 29 June Agreement provided that the parties would 'expeditiously consult upon and develop proposals for mechanisms for implementing the principles therein'. [FN32] Both sides consulted widely within and outside Uganda on the issues of accountability and reconciliation. When the Juba peace talks re-opened in~~In February 2008, the parties signed an Annexure Agreement to the 29 June Agreement.[33] ~~[FN33]~~ The Annexure Agreement set~~s~~ out a framework by which accountability and reconciliation we~~a~~re to be implemented pursuant to the 29 June Agreement and ~~. It thus declares that 'there is national consensus in Uganda that adequate mechanisms exist or can be expeditiously established to try the~~

[30] *Ibid.* Art. 2.1.
[31] *Ibid.* Art. 6.1.
[32] *Ibid.* Art. 6.2.
[33] Available at http://www.iccnow.org/documents/Annexure_to_agreement_on_Accountability_signed_today.pdf.

offences committed during the conflict'. [FN34]

In the context of trying to implement the 29 June Agreement, the Annexure Agreement provides for a legal framework under which the indicted LRA leaders can be tried. In this regard it stated that: "'a Special Division of the High Court of Uganda shall be established to try individuals who are alleged to have committed serious crimes during the conflict'".[34], with jurisdiction to "'try individuals who are alleged to have committed serious crimes during the conflict'" [35] in Uganda. [FN35] The Division will be serviced by a Registry which among others 'shall make arrangements to facilitate the protection and participation of witnesses, victims, women and children'. [FN36] It also provides for the establishment of a Unit to carry out investigations and prosecutions in support of trials and other formal proceedings as envisaged by the (29 June Agreement). [FN37] The investigations would aim at *inter alia*: seek[ing] to identify individuals who are alleged to have planned or carried out widespread, systematic or serious attacks directed against civilians. [FN38] The agreement further provides that the Government of Uganda shall ensure that serious crimes committed during the conflict are addressed by either the Special Division or traditional justice mechanisms and any other alternative justice mechanisms established under the Agreement.[36] The prosecutions shall focus on [the] individuals alleged to have planned or carried out widespread, systematic or serious attacks directed against civilians or who are alleged to have committed grave breaches of the Geneva Conventions. [FN39]

The two agreements in summation contemplated the prosecution of the LRA leaders by the national courts in Uganda while leaving the rest of the LRA to be dealt with under the

[34] *Ibid*. Clause 7.
[35] *Ibid.*
[36] *Ibid*, Clause 23.

traditional systems of justice which shall be discussed later in this paper.

On a visit to London in early March 2008, President Museveni was asked about the status of the ICC warrants. He is reportedly to have stated that "'what we have agreed with our people is that they should face traditional justice, which is more compensatory than a retributive system. If that is what the community wants, then why would we insist on a trial in The Hague'". [FN61][37] This was in light of the peace agreements reached that provided for local justice mechanisms.

The *Daily Monitor*, a Kampala newspaper actually reported the President as saying in London that, 'Joseph Kony, the LRA leader and two of his commanders will instead be subjected to the traditional justice mechanism known as *Mato oput* – which emphasises apologies and compensation rather than punishment.' [FN62]

Reacting to the President's remarks, the former Chief Prosecutor for the International Criminal Tribunal for Rwanda (ICTR) and the former Yugoslavia (ICTY) Richard Goldstone observed thatsaid the following:

> It would be fatally damaging to the credibility of the International Criminal Court if 'Museveni was allowed to get away with granting amnesty. I just don's stance will fatally damage the credibility of the ICC'. [FN63] He added, 'I just don't accept that Museveni has any right to use the International Criminal CourtICC like this. If you have a system of international justice you've got to follow through [with] it.[38]'
> [FN64]

[37] See 'Museveni rejects Hague LRA trial' available at http://news.bbc.co.uk/2/hi/africa/7291274.stm.
[38] See Guardian Online, 'African Search for peace throws international Court into crisis' available at http://www.guardian.co.uk/world/2007/jan/09/uganda.topstories3.

The ~~complication however, is the demand by the~~ Uganda government was agitating to be left to deal with the LRA ~~. The overwhelming demand is that the ICC should~~ and to give peace a chance even if it meant~~s~~ dropping its warrants. ~~[FN67]~~ This was, however, reported only in the media and was never communicated directly to the ICC. Consequently,~~Jan Egeland, one time United Nations Humanitarian Coordinator reported to the UN Security Council that in his meetings with civil society, internally displaced persons and both the government and rebel negotiating teams 'the ICC indictments were the number one subject of discussion .... All expressed a strong concern that if the indictments were not lifted, they could threaten the progress in these most prominent talks ever for northern Uganda.' [FN68]~~

~~these~~these developments which had been ~~were~~ closely monitored by the Pre-trial Chamber II of the ICC led to a number of requests for information by the Chamber to Uganda ~~.~~[39] and consequently a decision on admissibility of the case by the Chamber on its own motion.[40]

The peace talks between the LRA and the Ugandan government are presently at a stalemate. Joseph Kony demanded the lifting of ICC arrest warrants before he could sign the final peace accord while the Government insisted that he first signs and then it would seek to have them withdrawn. On 14 ~~14~~ December 2008, t~~T~~he military forces~~ies~~ of Uganda, the DRC and Southern Sudan launched a campaign "~~(~~Operation Lighting Thunder"~~)~~ against LRA bases in the forested area of Garamba, in eastern DRC. The main camp of Kony was reportedly

[39] "Request for information from the State of Uganda on the status of execution of the Warrants of arrest" ICC-02/04-01/05-274 made on 29th February 2008,to which Uganda responded on 28 March 2008 ICC 02/04-01/05-286-Anx2 and "Request for further information from the State of Uganda on the status of execution of the Warrants of arrest" ICC 02/04-01/05-299 made on 18 June 2008 ,to which Uganda responded on 10th July 2008 ICC 02/04-01/05-305-Anx2.

[40] Decision no. ICC-02/04-01/05 on the Admissibility of the case by Pre- Trial Chamber II of the ICC under article 19(1) of the Statute.

destroyed.[41] This marked the resumption of hostilities and an end of peace talks.[42]

2.5 RESEARCH QUESTIONS ~~In an interview with an official of the Ugandan ministry of justice, I was informed that the Uganda Government had all but given up hope in the peace talks and now viewed a military solution as the only option to end the conflict.~~

1.4

Although the envisaged withdrawal of the referral is at the moment ~~-~~not plausible, given the change in the situation on the ground after collapse of peace talks and resumption of hostilities, it has raised ~~a~~ very pertinent ~~area~~ questions which need to be clarified, namely these:~~that has to be reflected on.~~ Can Uganda withdraw the referral it made to the ICC as was suggested by President Museveni? What would the effect of that withdrawal be, if any? Would the withdrawal be binding on the ICC and future regimes in Uganda? If a withdrawal is non~~'~~t permissible~~ossible~~, what alternative avenues can be pursued in the circumstances? This paper seeks to explore these pertinent questions. These are relatively new issues and as such I do not aspire to give answers that are cast in stone. Rather, I will ~~give~~ present ~~-~~the legal position as I believe it to be and thereby contribute to the jurisprudence on the subject.

[41] See Northern Uganda/LRA historical chronology available at http://www.securitycouncilreport.org/site/c.glKWLeMTIsG/b.2880391/.

[42] In a response to an ICC request for further information, Uganda stated that " 'in the absence of the final peace agreement and in view of the ongoing military hostilities, the provisions of the Agreement are irrelevant in respect of the indicted fugitives'". See ICC-02/04-01/05-369-Anx2,p.2.

1.5 SIGNIFICANCE OF THE RESEARCH

The suggestion by the Ugandan president that Uganda may consider making a withdrawal of its referral to the ICC created a lot of controversy. It has been the subject of wide ranging debate and given that this is an area not expressly provided for in the Rome Statute, I intend to make my humble contribution by making an in depth analysis and come up with my view on the subject, with the hope that a common position can be reached thereby helping in the development of International Criminal Law.

1.6 LITERATURE REVIEW

What is so far published on the subject are two articles. One of these articles is by Abel Maged.[43] He argues that a withdrawal of a referral is possible during the early stages of proceedings which involve evaluation of a referral, the investigation stage and the prosecution. According to him, a withdrawal is only unacceptable after confirmation of charges since after confirmation of charges there is a substantial basis to believe that the person(s) accused have committed a crime within the jurisdiction of the Court and an action to withdraw would suggest trying to shield them.

M. P Scharf and P. Dowd[44] on the other hand argue that withdrawal of a referral is only possible in the narrow temporal window between when a referral is made and when the Court

[43] A. Maged, *supra*.

[44] "No way out? The Question of Unilateral withdrawals of referrals to the ICC and other human rights courts" *Case Research Paper Series in Legal Studies Working Paper* 08-21, August 2008 available at

exercises its discretion. Their argument is based on comparable international practice by the Inter-American Court of Human Rights which has recognized a unilateral withdrawal of a referral by the Inter-American Commission within the very narrow temporal window between when a referral is made to the Court and when the Court actually exercises its jurisdiction over that case or referral. According to them, this limited possibility for withdrawal logically translates to the ICC, given the similar procedural regimes of the two courts and the Prosecutor of the ICC has no reason not to recognize this very limited form of withdrawal, considering the flexibility and versatility that the Prosecutor has shown with the Rome Statute to date.

The emergent view from the literature is that there is at least a limited possibility of a State to withdraw a referral in the infant stages of proceedings. This study aims to test the validity of this school of thought with specific reference to Uganda.

1.7 KEYWORDS

a) **Self-Referral.**
b) **International Criminal Court.**
c) **Withdrawal.**
d) **Admissibility.**
e) **Situation.**
f) **Lord's Resistance Army.**
g) **Peace.**
h) **Justice.**
i) **Sovereignty.**
j) **Jurisdiction.**

http://ssrn.com/abstract=1240802.

1.8 SCOPE

The research will be centered on Uganda and the possibility of the Self-referral to the International Criminal Court being withdrawn.

1.9 METHODOLOGY

The research will be mainly desk research, with analysis of relevant writings on the subject matter in textbooks, journal and newspaper articles. I will also look at the International Criminal Court Statute and official United Nations and Ugandan Government documents. A few interviews will also be conducted in the Uganda justice, law and order sector.

1.10 OVERVIEW OF CHAPTERS

The study is divided into five chapters. Chapter one provides the introductory background to the study. At the heart of Chapter two is the potential grounds on which Uganda may base a withdrawal of its referral. Chapter three deals with the central thrust of this study, which is whether Uganda can lawfully withdraw its self-referral. Chapter four is dedicated to discussing the alternative avenues Uganda can per sue to get a deferral and lastly, Chapter five summarises the discussion, concludes this paper and gives recommendations in relation to the self-referral regime.

CHAPTER TWO

Potential Grounds for withdrawal of Uganda's Self-Referral

2.1 Introduction

Neither the ICC Statute nor the Rules of Procedure and Evidence make provision for the withdrawal of a referral. If Uganda were to make a unilateral withdrawal of its referral to the ICC, ~~However,~~ herein under are discussed some of the grounds on which such an action could be based.

~~a state may base a claim to withdraw a referral to the ICC.~~

2.1.1 The Concept of State Sovereignty

~~**Potential grounds for Uganda to seek withdrawal of its referral**~~

~~Neither the ICC Statute nor the Rules of Procedure and Evidence make provision for the withdrawal of a referral. However, herein under are discussed some of the grounds on which a state may base a claim to withdraw a referral to the ICC.~~

- ~~**The concept of state sovereignty**~~The first basis for withdrawal would be that it is an exercise of Uganda's sovereign rights.

The sovereignty and equality of states represent the basic constitutional law of the law of nations.[45] This principle is emphasised by the United Nations Charter wherein it is provided that: "[t]he organisation is based on the principle of Sovereign equality of all its members", while the Rome Statute "[re-affirms] the Purposes and Principles" of the UN Charter in its preamble.

Sovereignty includes sweeping powers and rights including the power of the central authorities of a state to exercise public functions over individuals located in a territory also known as jurisdiction. Normally jurisdiction will entail jurisdiction to prescribe i.e (power to enact legal commands or authorisations binding upon the individuals and state

[45] I. Brownlie, *Principles of -Public International Law*, 7th edn. (2008) at ~~Oxford university press p.~~289.

instrumentalities and jurisdiction to adjudicate i.e power to settle legal disputes through binding decisions or to interpret the law with binding force.[46]

Matters within the competence of states under general international law are said to be within the reserved domain, the domestic jurisdiction, of states which is is relative and no subject is irrevocably fixed.[47] One of these matters, as already stated in the preceding paragraph , is the ability to conduct legal actions without the interferences of any external authority, unless the State has bound itself by bilateral or multi lateral agreement which restricts its freedom to exercise such action.

It could therefore be argued that Uganda can exercise its sovereign rights and withdraw the referral, considering that the offences were committed on its territory and by its nationals. The affirmation of the complementary character of the ICC jurisdiction implies the idea that primary responsibility in repressing serious crimes of international concern falls on national criminal tribunals.[48]

2.1.2 Interests of Justice

3.1.5 Neither the Statute nor the Rules include any provision that preclude a state from withdrawing a referral that it has submitted to the ICC.[49] Maged further argues that State

[46] A. Cassese , *International Law*, 2nd edn. (2005)edition , Oxford University Press. 2005

[47] I. Brownlie, *Supra*, 8at 292. Further discussion of the concept of State sovereignty can be found in G.erben Kor, ' SoveriegntySovereignty in the Dock' in J.K Kleffner & G .Kor (eds), *Complementary views on Complementarity* (2006) p.53-77 T.MC Asser press at 53-77; A. Cassese, *supra* note 46 at 49-53; F. Gioia, "State Sovereignty, Jurisdiction, and 'Modern' International Law: The Principle of Complementarity in the International Criminal Court", (2006) 19 *Leiden Journal of International Law* 1095.

[48] P Benvenuti Complementarity of the international criminal court to national jurisdictions in Essays on the International Criminal Court vol.1 F Lattanzi and W. Schabas eds p.21-50 at 21.See also Federica Gioia State Sovereignty, Jurisdiction, and 'Modern' International Law: The Principle of Complementarity in the International Criminal Court *Leiden Journal of International Law*, 19 (2006), pp. 1095-1123.

[49] Supra note 7 at 422

withdrawal in this case should not be considered incompatible with the objects and purpose of the Statute, unless it is made after confirmation of charges or during trials, for the purpose of shielding an accused person from criminal responsibility. The spirit of the ICC statute is laid out in the Preamble in which the contracting parties emphasise that "the most serious crimes of concern to the international community as a whole must not go unpunished and …their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation"[50]

Principle of Complementarity

The affirmation of the complementary character of the ICC jurisdiction implies the idea that primary responsibility in repressing serious crimes of international concern falls on national criminal tribunals.[51]

On the international level though, there is no common superior court. Therefore, when a conflict of competence arises between a national and an international court, the situation is delicate. ICC should not have automatic competence, because there would be a violation of the principle of complementarity. At the same time, ICC should not be the court to decide if a domestic court is unwilling or unable to bring to justice the criminals because it is the risk of being seen as a court of control. This is why another body or another court should hold this authority. The International Court of Justice is not the suitable court to decide in this matter, since it has jurisdiction over states and not over individuals or over the conflicts aroused between national and international courts. To establish a special court to have authority in cases of conflict of jurisdiction

[50] ICC Statute ,Preamble (4) and (6)
[51] P Benvenuti Complementarity of the international criminal court to national jurisdictions in Essays on the International Criminal Court vol.1 F Lattanzi and W. Schabas eds p.21-50 at 21

between domestic courts and ICC means time and money. One may think that the Security Council would be the proper organ to decide in this matter,

even if it is a political body, on the same grounds that it is the organ to decide if an

act of aggression occurred or to defer a situation to the ICC[52]

It could be also be argued that the interests of justice in the Uganda situation would better be served by means other than international prosecutions before the ICC. Justice has wide ranging definitions and is perceived by different societies differently. In a 2004 report by the Secretary General of the United Nations on "The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies"[53], it was stated that the United Nations views justice as:

> "an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Justice implies regard for the rights of the accused, for the interests of victims and for the well-being of society at large. It is a concept rooted in all national cultures and traditions and, while its administration usually implies formal judicial mechanisms, traditional dispute resolution mechanisms are equally relevant."

A similar definition of "Justice" was arrived at in the June 2008 Nuremberg Declaration on Peace and Justice.[54] Justice is defined therein as "accountability and fairness in the protection and vindication of rights, and the prevention and redress of wrongs".

It can therefore be surmised that the concept of justice revolves around different mechanisms designed to achieve the goal of providing accountability and fairness. Uganda may in the

[52] *Cf* Frederic Megret who asserts that Complementarity has a dual nature. A recognition of sovereignty versus a threat to sovereignty, why would states want to join the ICC? Theoretical exploration based on the legal nature of Complementarity in J. Kleffner and G Kor (eds) ,Complementary Views on Complementarity TMC Asser Press 2006.

[53] UN DOC S/2004/616.

[54] Nuremburg Declaration, made following an International Conference on "Building a Future on Peace and Justice" 25-27 June 2007,Nuremburg, Germany.

circumstances argue that traditional justice proposed in the Pact on Accountability[55] provides for both accountability and fairness. Uganda's former Internal affairs Minister, Ruhakana Rugunda, is quoted to have stated in 2006 that: '[Uganda]doesn't encourage impunity' but in the case of the LRA will use alternative justice, *Mato Oput*[56], which is used elsewhere in Africa but called other names'.[57]

Many questions have however been raised about the above mentioned form of traditional justice. Since *Mato Oput* is an Acholi traditional reconciliation mechanism, would the LRA/M victims in other parts of Uganda (such as Lango, Teso,and parts of Karamoja) – whose justice systems include punishments such as expulsion from the community, and the withdrawal of all protection from the individual – accept *Mato Oput*? If not, is it necessary to integrate other traditional mechanisms of reconciliation and accountability from other affected communities? Given the fact that the crimes committed in Northern Uganda were against the international community as a whole , would the traditional mechanism meet the minimum international requirements for accountability in accordance with Uganda's international treaty obligations? More specifically, would the key individuals be held accountable by a competent, independent and impartial tribunal? Would the individuals accused enjoy due process rights including information about allegations against them, and an opportunity to defend themselves?[58]

[55] *Supra.*

[56] *Mato oput* literally means drinking of the bitter root from a common cup. It refers to traditional rituals performed by the Acholi (one of the tribes most affected by LRA atrocities) to reconcile parties formerly in conflict, after full accountability. See E. K Baines " The Haunting of Alice: Local Approaches to Justice and Reconciliation in Northern Uganda" (2007) 1 (1) *International Journal of Transitional Justice* 91.

[57] H. Mukasa, 'Rugunda Explains Otti Phone Call', *Sunday Vision*, 27 August 2006.

[58] See M. Ssenyonjo, "The International Criminal Court and the Lord's Resistance Army Leaders: Prosecution or Amnesty?" (2007) *Netherlands International Law Review*, 51 at 65. For further discussion on the dangers of traditional justice, see T. Allen, 'Ritual (Ab)use? Problems with Traditional Justice in Northern Uganda' in N. Waddell and P. Clark, *Courting Conflict? Justice, Peace and the ICC in Africa*, (2008) , Royal African Society. .

The ultimate question should, in my view, however be: 'whose justice is it anyway?'. It is submitted that it should ultimately be about justice for the victims of the conflict. If these victims of the conflict are willing to have the LRA perpetrators go through traditional justice which places an emphasis on cleansing and forgiveness, rather than prosecutions, they should have the final say on the matter. There is a danger of wanting to set an example to the International Community of putting an end to impunity while the victims of the conflict are ignored and they become mere pawns in a game of international politics. As one commentator put it:

> '…ever since the International Criminal Court seized itself of the situation in northern Uganda, many within the international and local communities have been complicit in shifting attention away from the true scale of what has been done to people and the range of actors involved, focusing instead on the infinitely more manageable task of prosecuting a handful of individuals from only one of the many parties to the conflict – and in the process ensuring the institutional interests of a fledgling global governance mechanism, the ICC.'[59]

Another dimension to this debate is whether prosecutions should stand aside for the purpose of peace. The stance of the ICC Prosecutor has unfortunately been that peace and justice are two divergent paradigms and that emphasis is placed on prosecutions.

~~Article 53 ICC Statute authorizes the Prosecutor to decline to proceed with an investigation or a prosecution when it would not be in 'the interests of justice'. The Statute itself does not try to elaborate on the specific factors or circumstances that should be taken into account in consideration of the interests of justice issue.~~

~~The 'interests of justice' reference in Article 53 provides the Prosecutor with a very useful safety valve. For this reason, his attempts to codify when and how such discretion might be~~

[59] The False Polarisation of Peace and Justice in Uganda; Paper Presented by Moses Chrispus Okello , Head of Research and Advocacy Department, Refugee Law Project Uganda at the *International Conference on Peace and Justice 25 -27 June 2007 Nuremberg, Germany.*

~~employed look rather like a self-inflicted wound.~~

In September 2007, the Office of the Prosecutor issued a position paper on the interests of justice~~is subject~~.[60] It~~The paper~~ emphasizes that the exercise of prosecutorial discretion where the 'interests of justice' [61] provision is invoked is 'exceptional in its nature' , that 'there is a ~~presumption~~presumption in favour of investigation or prosecution', and further that 'the criteria for its exercise will naturally be guided by the objects and purposes of the Statute--namely the prevention of serious crimes of concern to the international community through ending impunity.'~~ These assertions should be evident enough, in that they flow more or less automatically from the provisions of the ICC Statute. But the Office of t~~The Prosecutor ~~goes~~ further states that:~~on to a more questionable affirmation, namely~~ '~~that~~ there is a difference between the concepts of the interests of justice and the interests of peace and that the latter falls within the mandate of institutions other than the Office of the Prosecutor'.

It is submitted that Prosecutor's dismissive approach towards alternative justice mechanisms is misguided. It is, in some situations, hard to draw a line between the interests of justice and those of peace. They are interlinked[62] and cannot be divorced from each other. According to one commentator:

> 'There is no choice to be made between pursuing peace and pursuing justice, for if you are seeking positive peace then justice is not optional, it is an integral part of peace. Done wrongly (as we would argue has happened in northern Uganda), the pursuit of international justice can undermine the pursuit of peace, but done correctly, as we are seeking to do through the establishment of a whole

[60] Policy Paper on the Interests of Justice, available at http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf.

[61] Article 53 of the ICC Statute authorises the Prosecutor to decline to proceed with an investigation or a prosecution when it would not be in 'the interests of justice'. It does not elaborate on the specific factors or circumstances that should be taken into account in consideration of the interests of justice issue.

[62] This linkage was re-affirmed by the Nuremberg Declaration on Peace and Justice, *supra*, wherein it is stated in the preamble that: "*Acknowledging* that peace, justice, human rights and development are at the heart of the international community; that they are interlinked and mutually reinforcing".

array of transitional justice processes, the pursuit of peace and the pursuit of justice should and can go hand in hand'.[63]

The office of the ICC Prosecutor should therefore, in my view, not close its eyes to the needs of peace and throw them at the doorstep of other institutions. Justice should not be equated with prosecutions like the ICC would like it to appear. Peace may after all be the best form of justice for some societies. Betty Amongi, a Ugandan MP from the war- ravaged Northern region has observed that: 'the greatest justice to the people who have been suffering for the past 20 years is to have peace'.[64] ~~This comment is directed at those who contend that sometimes international prosecution should stand aside in favour of peace processes. [FN80]~~

A pertinent question, however, is whether truth commissions, amnesties and other non-prosecutorial measures like *mato oput*[65] are acceptable under international law as genuine measures to deal with international crimes. Criminal prosecution is required for some of the crimes within the ICC's jurisdiction, to wit Genocide[66], "grave breaches" of the 1949 Geneva Conventions[67] and the Torture Convention[68].

[63] "Imposed Justice and the need for Sustainable Peace in Uganda" , Paper presented by Dr.Chris Dolan, Refugee Law Project Uganda at the *Beyond Juba Project/AMANI Forum training in Transitional Justice for Parliamentarians ,Entebbe, Uganda,18 Jul. 08.* .

[64] See-IRIN, 'Uganda: Gov't Ready for Conditional Truce with Rebels', Kampala, 25 August2006, available at http://www.irinnews.org/report.aspx?reportid=60463.

[65] See *Supra* note 56.

[66] See Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948.

[67] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 Aug. 1949, (Geneva Convention I); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 Aug. 1949 (Geneva Convention II); Geneva Convention Relative to the Treatment of Prisoners of War, 12 Aug. 1949 (Geneva Convention III); and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 Aug. 1949(Geneva Convention IV). Each of these Conventions contains a specific enumeration of "grave breaches", which are war crimes under international law for which there is individual criminal liability and for which states have a corresponding duty to prosecute or extradite. Grave breaches include wilful killing, torture or inhuman treatment, wilfully causing great suffering or serious injury to body or health, extensive destruction of property not justified by military necessity, wilfully depriving a civilian of the rights of fair and regular trial, and unlawful confinement of a civilian.

[68] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, June 26,

With respect to other crimes (war crimes and crimes against humanity), recent state practice appears to support a duty to prosecute and the body of jurisprudence supporting this notion is growing.[69] The matter is however still controversial, with some writers contending that such a duty doesn't exist.[70] As such, in the absence of a clear-cut bar under international law, amnesties and other alternative mechanisms may be considered a legitimate response to these crimes.[71]

The LRA arrest warrants do not charge genocide or grave breaches, but rather war crimes in an internal armed conflict and by none state actors. It could therefore be argued that there is no mandatory requirement for prosecutions and alternative justice mechanisms would suffice.

2.1.3 Change of Government

Lastly, a change of Government in Uganda may bring about a radical change of policy and thereby a decision to withdraw the referral. A different regime may view the referral to the ICC as having been erroneous and choose to withdraw the referral to suit political ends. In the United States of America for instance, the new regime of Barrack Obama ordered a suspension of the controversial Guantánamo Bay military tribunals, in one of his first actions after being sworn in. Within hours of taking office, Obama's administration filed a motion to

1987) See Art.7.

[69] See T. H Clark, "The Prosecutor of the International Criminal Court , Amnesties and the Interests of Justice: Striking a Delicate Balance" , (2005) 4 *Washington University Global Studies Law Review*,389 at 400.

[70] See L.N Sadat, " Universal Jurisdiction ,National Amnesties & Truth Commissions; Reconciling the Irreconcilable", in S. Macedo (ed.) *Universal Jurisdiction ,National Courts and the Prosecution of Serious Crimes under International Law*, University of Pennsylvania Press ,(2004) at 202-204; M. P Scharf, " From the eXile Files: An Essay on Trading Justice for Peace", (2006) 63 *Washington & Lee Law Review*, 339 ; L.M Keller, "Achieving Peace with Justice: The International criminal Court and Uganda Alternative Justice Mechanisms", (2007-2008) 23 *Connell Journal of International Law*, 209.

[71] C. Tomuschat, "The Duty to prosecute International Crimes Committed by Individuals", in *Cremer et al, Festschrift für Steinberger* (2002),315 at 343.

halt the war crimes trials for 120 days, until his new administration could complete a review of the much-criticised system for trying suspected terrorists.[72]

2.2 Conclusion

This chapter has analysed the potential grounds on which Uganda could base its withdrawal of its referral. My next chapter will consider whether those grounds would be sufficient in enabling Uganda to successfully withdraw its referral from the ICC.

~~In distinguishing the 'interests of peace' from the 'interests of justice', the Prosecutor is reading too much into the term. He is trying to impose a literal approach to legal interpretation on an expression that was intended to leave the exercise of prosecutorial discretion unfettered. Lamenting the fact that 'interests of justice' is not defined simply misses the point. Sometimes, legal texts cannot codify concepts that require the exercise of common sense and good judgment by responsible professionals. In any event, an attempt at definition would have broken down at the Rome Conference, given profound disagreements about how the Prosecutor should be governed in situations like that posed where a peace process requires justice to take a back seat.~~

[72] See Guardian Online, "Obama orders halt to Guantánamo Bay tribunals" ,http://www.guardian.co.uk/world/2009/jan/21/barack-obama-guantanamo-bay-tribunals.

The linkage between peace and justice was reaffirmed by the June 2008 Nuremberg Declaration on Peace and Justice[73] wherein it is stated in the preamble that:

> *"Acknowledging* that peace, justice, human rights and development are at the heart of the international community; that they are interlinked and mutually reinforc_ Yet, ever since the International Criminal Court seized itself of the situation in northern Uganda, many within the international and local communities have been complicit in shifting attention away from the true scale of what has been done to people and the range of actors involved, focusing instead on the infinitely more manageable task of prosecuting a handful of individuals from only one of the many parties to the conflict – and in the process ensuring the institutional interests of a fledgling global governance mechanism, the ICC.[74]

[73] From 25-27 June 2007, more than three hundred policy makers and practitioners gathered in Nuremberg, Germany, to attend the International Conference "Building a Future on Peace and Justice", organized by the Governments of Finland, Germany and Jordan in cooperation with the Crisis Management Initiative (CMI), Helsinki, the International Center for Transitional Justice (ICTJ), New York, the Friedrich Ebert Stiftung (FES), Berlin, the Centre for the Study of Violence and Reconciliation (CSVR),Johannesburg, the Working Group on Development and Peace (FriEnt), Bonn, the Centre for Peace building (KOFF) – swisspeace, Berne, and the Georg August University, Goettingen. At the conclusion of the conference, its participants agreed that the conference organizers would elaborate a declaration. It was drafted under the auspices of H.E. President Oscar Arias of Costa Rica by a group of international experts designated by the conference organizers, and consulted, before its publication in June 2008, with practitioners and civil society organizations.

[74] The False Polarisation of Peace and Justice in Uganda *Presentation made by Moses Chrispus Okello, Head of Research and Advocacy Department, Refugee Law Project International Conference on Peace and Justice – 25th -27th June 2007 Nuremberg, Germany*

CHAAPTER THREE

Legality, Efficacy and Legitimacy of the act of Withdrawal

3.1 Introduction.

This part of the paper deals with the central thrust of my research; whether the withdrawal would have legal effect and/or legitimacy. For the withdrawal to have legal effect/legitimacy, it should be based on a sound legal footing.

It should in the first instance be noted that tThere is no express provision enabling withdrawal

of a state referral in the ICC Statute or in the Rules of procedure and Evidence. In the absence of such a provision, for interpretation purposes, recourse can be made to Article 21 of the Statute which details the law applicable and a hierarchy of sources. Article 21 brings the legal sources of general international law into a hierarchy and adds some precision.[75]

~~The Rome Statute does not expressly provide for withdrawal of a State Party referral anywhere, either on its face or under more nuanced scrutiny.~~ Herein under I will discuss the various sources as laid out in Article 21 with relation to the situation in Northern Uganda and analyse whether in the end result the Rome Statute can be interpreted as permitting the withdrawal of the referrals.

3.1.1 Applicable Treaties and the Principles and Rules of International Law

Article 21(b) of the Rome Statute provides for the use of applicable treaties and the principles and rules of international law as an aid in interpretation. In this respect, the Vienna Convention on the Law of Treaties[76] (hereinafter VCLT) naturally qualifies as an "applicable treaty" for interpretation purposes. According to Gerhard Hafner, one of the drafters of the Rome Statute, since the Statute constitutes a treaty concluded among States after the entry into force of the VCLT, the latter is applicable to the Statute in relation to States parties which are also Parties to the VCLT whereas the other States Parties to the Statute have to resort to customary international law which nevertheless has conformed to the regime of the VCLT.[77]

[75] G. Werle, *Principles of International Criminal Law*, (2005) TMC Asser Press, at 56.
[76] Vienna Convention on the Law of Treaties, entered into force 27 January 1980, 1154 U.N.T.S. 331.
[77] G. Hafner, "Article 120: Reservations", in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, (1999)Baden-Baden at 1744; See also W. Schabbas, *An Introduction to The International Criminal Court*,(2007),3rd edn., Cambridge University Press at 200.

In the first instance, the VCLT's requires that a treaty be interpreted with "the ordinary meaning" of its terms "in their context" and "in the light of its object and purpose."[78] There are no terms in the Rome Statute whose ordinary or other meaning would confer a right of withdrawal.[79] With regard to the object and purpose of the Rome Statute, an act of withdrawal would it is submitted only interfere with the functioning of the Court and promote impunity. States would be able to decide when prosecutions of international crimes are least convenient for them and thereby withdraw referrals on a whim. Such a scenario would be in contradiction with the object and purpose of the Statute, which is that "the most serious crimes of concern to the international community…must not go unpunished".[80]

The VCLT further provides for the performance of treaty obligations "in good faith" [81].A unilateral withdrawal would, it is submitted, be a means of avoidance of the obligations imposed by the Rome Statute and would therefore fail the "good faith" test.

Finally, the VCLT allows for recourse to "the preparatory work of the treaty and the circumstances of its conclusion"[82] as a supplemental means of interpretation to confirm the meaning deduced through Article 31 or where the meaning deduced is "ambiguous or obscure"[83]. The drafting history of the Rome Statute contains no discussion of the possibility of withdrawal of a State Party referral.[84] This fact is unsurprising, given that the self-referral phenomenon was an ingenious creation of the ICC Prosecutor and the delegates in Rome

[78] VCLT art. 31(1).
[79] *Cf.* A. Maged , *supra*, who argues that a withdrawal is legally tenable since there is equally no provision that precludes a State from withdrawing a referral.
[80] Rome Statute, Preamble.
[81] VCLT, art. 26.
[82] *Ibid.*
[83] *Ibid.*
[84] M. P Scharf and P. Dowd, *supra* at 13.

could not have contemplated its emergence.[85] However, the absence of discussion of withdrawal, the minimal consideration of self-referral, the drafters' heavy focus on issues of complementarity and jurisdiction, and the language of the draft statute itself, taken as a whole, convey the strong impression that the drafters did not intend to provide a State with the power to unilaterally withdraw a referral from the Court and did intend to bind States to their obligations under the Statute.~~The glaring absence of such a provision, taken together with the abundance of other procedural safeguards available to both the State Party and the Prosecutor, strongly suggests that the Statute simply does not allow a referral to be withdrawn. Rather, the Statute as a whole conveys the impression that once a referral has been made and the Court has exercised its jurisdiction, control and power over the referral lies entirely in the hands of the Court.~~[86]

~~It is submitted that a State may make a defacto withdrawal of a referral but this would have no effect on the ICC. There is no provision enabling withdrawal of a state referral in the ICC Statute.~~[87]~~Abel Maged argues that since there is equally no provision that precludes a State from withdrawing a referral but concedes that the states withdrawal wouldn't preclude the ICC from exercising its jurisdiction if one or more of the crimes referred to in Article 5 of the Statute have been committed~~

~~Uganda may make unilateral declaration or statement to the international Criminal Court asserting that as a sovereign state, it seeks to withdraw the referral but this would be of no legal consequence.~~

3.1.2 Principles of Law derived from National Laws of Legal systems of the world

[85] See- p. 1 of this paper.

[86] ~~No Way Out? The Question of Unilateral Withdrawals of Referrals to the ICC and other Human Rights Courts Michael P. Scharf and Patrick Dowd Case Research Paper Series in Legal Studies Working Paper 08-21 August 2008 p.11available at http://ssrn.com/abstract=1240802.~~

[87] ~~Achieving peace with Justice: The International Criminal Court and Ugandan Alternative Justice Mechanisms L M Keller 23 Conn. J. Int'l L. 209 2007-2008 at 222.~~

Article 21 further provides for the recourse to principles of law derived from national laws of legal systems of the world when the sources enumerated in Section 1.1 above are of no help. Judges are to apply not only the concrete rules of law found in national legal systems but also the principles underlying these rules.[88] An applicable principle also need not be accepted unanimously by all the worlds legal system but there must be evidence that it is applied by a representative majority including the worlds principal legal systems.[89]

A. Maged[90] analyses various domestic legal systems (both Civil and Common Law) and how they deal with the issue of withdrawal of criminal cases. Such scenarios are usually as a result of reconciliation, compensation to a victim or an out-of-Court settlement and it does not make much sense to continue with a prosecution when the aggrieved party has lost interest. He concludes that the withdrawal of criminal complaints is a permitted practice in several national legal systems but such a withdrawal shouldn't automatically lead to the dismissal of a case.[91]

It is my contention that what is allowed in domestic jurisdictions is for a complainant to express an *intention to withdraw a complaint* and not the complainant doing the actual withdrawal. This intention is usually put in writing[92] and the ultimate action of withdrawing a criminal matter ultimately lies with a prosecutor who weighs many factors including the interests of the public which may outweigh the wishes of the complainant, before deciding to withdraw a charge. The justification for this could be the fact that prosecutions (other than

[88] M. McAuliffe de Guzman, "Applicable Law" in O. Triffterer (ed), *supra* at 710.
[89] *Ibid* ; see also-I. Caracciolo, "Applicable Law" in F. Lattanzi and W.A. Schabbas (eds.), "Essays on the Rome Statute of the International Criminal Court" (1999) *il Sirente* at *228.*
[90] *Supra* at 427-434.
[91] *Ibid.*
[92] For instance in Uganda, a complainant who doesn't wish to proceed with a matter earlier reported to police records an "additional statement" expressing his change of heart and requesting the authorities to withdraw charges.

private prosecutions permitted in some jurisdictions) are conducted by and in the name of the state and therefore when a matter is taken up by the police, it is no longer a private matter but one that affects society as a whole. A decision to withdraw would therefore have to involve a prosecutor who represents the state/the people. Accordingly, Blacks Law dictionary defines withdrawal of charges as removal of charges by the one bringing them, such as a prosecutor.[93]

If the above is to be juxtaposed with self-referrals to the ICC, it would appear that Uganda cannot withdraw the referral but can express an intent to withdraw its complaint based on a change in circumstances. There are greater international interests at play which may outweigh narrow national considerations and the ICC would be best placed to make a decision as to whether to discontinue proceedings, notwithstanding a states sovereign rights. International crimes affect the international community as a whole and not only those in the territory where they are committed.

A.Maged [94] argues that the act of withdrawal is a manifestation of States sovereignty and any restriction placed on a State's sovereignty cannot be accepted. His argument is grounded on the *Lotus* case [95] where it was held by the Permanent Court of International Justice that restrictions upon the independence of states cannot be presumed. I am however of the view that by entering into conventions and treaties, states do give up a measure of their sovereignty. According to Article 12 of the Rome statute, each Party to the Statute " accepts the jurisdiction of the Court with respect to the crimes referred to in article 5". As such, a state which voluntarily relinquishes a measure of its sovereignty through treaties shouldn't be

[93] Black's Law Dictionary (8th ed. 2004).
[94] *Supra.*
[95] SS. Lotus (France *v.* Turkey), P.C.I.J. (1927).

seen to again try and hide behind the veil of sovereignty when the need to adhere to treaty provisions arises.

3.1.3 Timing of a withdrawal

M. P Scharf and P. Dowd [96], as was shown in the literature review at the start of this paper, argue that withdrawal of a referral is possible in the narrow temporal window between when a referral is made and when the Court exercises its discretion. Their argument is based on comparable international practice by the Inter-American Court of Human Rights which has recognized a unilateral withdrawal of a referral by the Inter-American Commission within the very narrow temporal window between when a referral is made to the Court and when the Court actually exercises its jurisdiction over that case or referral. According to them, this limited possibility for withdrawal logically translates to the ICC, given the similar procedural regimes of the two courts.

A. Maged [97] on the other hand argues that a withdrawal is only impossible after confirmation of charges by the ICC since it is only at this stage that a withdrawal would be tantamount to shielding an accused and contrary to the objective of the Rome Statute of ending impunity.

It is my contention that the above arguments are flawed. The ICC and the Inter-American Court of Human Rights may have similar procedural regimes but this should not translate into the precedents and practices of one automatically binding the other. The Courts have dissimilar purposes and objectives, one is a human rights court while the other is specifically for trial international crimes. A "one fits all" approach would be dangerous and unecessary.

[96] *Supra*.
[97] *Supra*.

A. Maged's contention that it is only at the stage of confirmation of charges that a withdrawal would be tantamount to shielding an accused contrary to the objectives of the Rome Statute is in my view also erroneous. Any attempt by a state to purport to withdraw a referral from the moment it is transmitted to the ICC would in my opinion be tantamount to trying to frustrate the work of the prosecutor and would not be in good faith. When a state makes a referral, the jurisdiction of the ICC is thereby "triggered" and the ICC prosecutor thereafter studies the relevant circumstances specified in the referral and the accompanying supporting documentation before deciding on whether to act on the request to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of international crimes. He does not require the authorisation of the Pre-Trial Chamber to commence investigations.[98]

There are many options available to a state (these will be comprehensively discussed in the next chapter) in the event that circumstances on the ground have changed and a state feels that it can be able to prosecute, rather than unilaterally withdrawing a referral.

The notion of self- referrals is based on an understanding that states cooperate with the ICC to make the court operational. As discussed in Chapter one of this paper, the ICC Prosecutor adopted a policy of inviting voluntary self-referrals by states and states including Uganda that responded to his overtures did so on the understanding that they were handing over prosecutions to the ICC and they would thereafter work with the ICC to bring perpetrators of international crimes to justice. This has been aptly termed 'consensual burden sharing'[99] and the system was supposed to work through dialogue and cooperation. A unilateral action by

[98] Rome Statute, article 14.
[99] C. Kress, supra at 945.

Uganda to withdraw its self-referral at any stage of the proceedings would run counter to the non-antagonistic bilateral understanding between Uganda and the ICC and would clearly not be well intentioned.

It is therefore perhaps for good reason that the Rome Statute empowers the ICC Prosecutor to commence an investigation *proprio motu* whenever he receives information on crimes within the jurisdiction of the Court. This power can be exercised even if a state has purported to withdraw its referral. In the Democratic Republic of Congo (DRC) situation, the ICC Prosecutor emphasised that in the absence of a referral by the DRC, he was ready to use his *proprio motu* powers and start an investigation after being duly authorized by the Pre-Trial Chamber.[100]

The fact that a State cannot unilaterally withdraw a referral has also been emphasised by the ICC. ~~A clear distinction should it is submitted be drawn between the political processes and the law on this matter.~~ On March 10 2008, an LRA delegation, led by the rebel groups then chief negotiator, David Matsanga and also numbering several lawyers and advisors, met members of the ICC Registry including senior legal advisor Phakiso Mochochoko.[101] ~~,~~ After the meeting, Phakiso Mochochoko stated ~~was adamant~~ that: 'The LRA and government of Uganda are pursuing a political process, but the ICC is pursuing a legal process,'[102] .He~~He went on further to~~ added that : "'As far as the ICC is concerned, the arrest warrants remain valid and enforceable, and the expectation from the court is that the government of Uganda should enforce them. *The matter came to the court through a legal process, and it can only*

[100] See press release, Prosecutor Receives Referral of Situation in Democratic Republic of Congo available at http://www.un.org/News/Press/docs/2004/afr903.doc.htm.

[101] See 'ICC Registry Officials Meet with LRA Delegation', The Hague, 10 March 2008 available online at http://www.icc-cpi.int/press/pressreleases/344.html ; 'Ugandan rebels to appeal ICC warrants', available at http://www.reliefweb.int/rw/rwb.nsf/db900sid/YSAR-7CNTC8?OpenDocument.

[102] *Ib~~i~~id.*

go out of the court through a legal process.'" [103] (emphasis mine).

3.1.4 Successor governments

A unilateral action to withdraw a referral by the present Government in Uganda would not bind successor governments. In Uganda, such foreign policy decisions are made by the executive arm of government and whenever there is a change in government, the new regime has the liberty to come up with a new policy direction. However, since the unilateral action would not have any legal effect, it does not matter much if a successor government chooses to reverse it to the *status quo ante*.

4.1.4 Blacks Law dictionary defines withdrawal of charges as removal of charges by the one bringing them, such as a prosecutor.[104]

The Rome Statute does not expressly provide for withdrawal of a State Party referral anywhere, either on its face or under more nuanced scrutiny. The glaring absence of such a provision, taken together with the abundance of other procedural safeguards available to both the State Party and the Prosecutor, strongly suggests that the Statute simply does not allow a referral to be withdrawn. Rather, the Statute as a whole conveys the impression that once a referral has been made and the Court has exercised its jurisdiction, control and power over the referral lies entirely in the hands of the Court.[105]

3.1.5 Conclusion

The unilateral withdrawal of a State Party referral from the ICC would appear to violate the Rome Statute according to the Vienna Convention on the Law of Treaties (VCLT).[106] The Vienna Convention naturally qualifies as an "applicable treaty" for interpretation of the Rome Statute, pursuant to Article 21 of the Statute.204 Gerhard Hafner, one of the drafters of the Rome Statute and a former member of the International Law Commission, has stated that "since the Statute constitutes a treaty concluded among States after the entry into force of the VCLT, the latter is applicable to the Statute in relation to States parties which are also Parties to the VCLT whereas the other States Parties to the Statute have to resort to customary international law which nevertheless has conformed to the regime of the

[103] *Ibid.*

Michael P. Scharf and Patrick Dowd [104] Black's Law Dictionary (8th ed. 2004),

[105] No Way Out? The Question of Unilateral Withdrawals of Referrals to the ICC and other Human Rights Courts Michael P. Scharf and Patrick Dowd Case Research Paper Series in Legal Studies Working Paper 08-21 August 2008 p.11available at http://ssrn.com/abstract=1240802.

[106] Vienna Convention on the Law of Treaties, concluded at Vienna 23 May 1969, entered into force 27 January 1980; 58 U.K.T.S (1980), Cmnd 7964; 1154 U.N.T.S. 331[hereinafter Vienna Convention].

VCLT."205 Additionally, given the frequent use of the VCLT by the other human rights bodies for addressing issues of withdrawal and jurisdiction, the VCLT provides an appropriate means for analyzing this issue and complements the preceding case law.

First and foremost, a withdrawal would contradict the VCLT's provision requiring that a treaty be interpreted with "the ordinary meaning" of its terms and "in the light of its object and purpose."[107] The ordinary meaning of the terms of the Rome Statute appears to reject the possibility of withdrawal of a referral. A withdrawal would only interfere with the functioning of the Court, in contradiction with the object and purpose of the Statute, which is the prosecution of "the most serious crimes of concern to the international community" through cooperation between national jurisdictions and the Court.207 The preceding case law of the other human rights bodies has elevated the meaning of this provision with respect to human rights treaties.

Applying the Inter-American Court's ruling in *Caesar*, such a withdrawal "would render inoperative the Court's jurisdictional role, and consequently, the human rights protection system established" in the Rome Statute.208 Even if a State sought to withdraw a referral for the sake of exercising its own criminal jurisdiction, the Statute provides a multitude of cooperative procedural options that negate the need for unilateral action.

The VCLT also calls for the performance of treaty obligations in good faith;209 a unilateral withdrawal directly violates this provision, as a withdrawal is a means of avoidance of the obligations imposed by the Rome Statute. As Judge Jackman noted in *Caesar*, and the ICCPR Human Rights Committee affirmed, "good faith compliance is of even greater importance in the area of international human rights law, where what is at stake is not the impersonal interests of states but the protection of the fundamental rights of the individual."210 This attempt to avoid certain obligations under the Statute also implicates Article 44 of the VCLT, which concerns "separability of treaty provisions."211 Whether withdrawal of a referral is seen as a State Party's violation of the basic referral procedure, the admissibility or jurisdiction

Finally, the VCLT allows for recourse to "the preparatory work of the treaty and the Circumstances of its conclusion" as a supplemental means of interpretation where the treaty leaves the meaning of any terms "ambiguous or obscure."216 The ordinary meaning of the Rome Statute is fairly clear for the purposes of this discussion, but an examination of the draft history together with the finished Statute overwhelmingly conveys that the drafters intended to preserve the strong jurisdiction of the Court once exercised and bind States Parties to their obligations.

In the final analysis, if Uganda were to make a unilateral declaration or statement to the international Criminal Court asserting that as a sovereign state, it is withdrawing the referral,

[107] Vienna Convention, *supra*, art. 31(1).

such a withdrawal would be of no legal consequence or efficacy.

The conspicuous absence of an express provision allowing a State to withdraw a referral, taken together with the abundance of other procedural mechanisms available to both a State Party and the ICC Prosecutor and the cooperative nature of the self-referral regime, strongly suggests that the Rome Statute simply does not allow a referral to be withdrawn. Rather, the Statute as a whole conveys the impression that once a referral has been made, control and power over the referral lies entirely in the hands of the Court [108] which has the ultimate say.

[108] M P. Scharf and P. Dowd, *supra* at 11.

~~The restriction on Uganda's jurisdiction over international crimes is not presumed but an actual fact borne out of it having ratified the Rome Statute, Uganda is bound by its provisions and can as such since it doesn't make provision for the withdrawal of referrals, such an act is legally not possible.~~ **CHAPTER FOUR**

Alternative

Avenues for Deferral

4.1 Introduction

Considering that the referral by Uganda cannot be unilaterally withdrawn as discussed, I will hereunder consider the avenues that can be pursued i~~I~~n the event that a peace deal is reached and Uganda would like to try LRA leaders in the Special Division of the Uganda High Court and deal with the rank and file through *mato oput* and other forms of traditional justice.

~~POTENTIAL PROCEDURE FOR DEFERRAL~~

4.1.1 Challenge on admissibility

One of the avenues that can be pursued is ~~Another disposition which might be used is that~~ a challenge on admissibility under ~~of article~~article 19 (2).[109] This article would allow Uganda to challenge the admissibility of the case by the ICC on the ground that it is investigating or prosecuting the case. It represents a classic example of the principle of complementarity at play. This principle emphasises the primacy of national jurisdictions.The initial duty and onus to prosecute lies with domestic legal orders and the ICC only comes in when the signatory

[109]Article 19 (2) reads as follows: "Challenges to the admissibility of a case on the grounds referred to in article17 or challenges to the jurisdiction of the Court may be made by:… a State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted….".

state is either unwilling or unable to prosecute and if the case or situation is of sufficient gravity.[110]

Usually a state may challenge the admissibility of a case only once and prior to or at the commencement of the trial.[111] However, in exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial.[112] Uganda could challenge therefore, the admissibility of its situation before ICC, at a late stage of the proceedings, considering its exceptional circumstances. Uganda has jurisdiction over any crimes committed by ICC indictees and, pursuant to Article 19(2) (b) of the Rome Statute, is therefore empowered to challenge admissibility

The possibility of Uganda challenging admissibility of the LRA case is explored in depth by W. Burke-White and S. Kaplan[113] .They assert that ~~The Court would admit the request and Uganda would go on with its own proceedings. If later on, the Ugandan justice system would prove to be unable to conduct proceeding or the Ugandan authorities to be unwilling to punish the perpetrators of the international crimes, the Prosecutor of the ICC could start a new investigation, this time *proprio motu*.~~

such a challenge brought by the Ugandan government would likely raise three key questions for consideration by the Pre -Trial Chamber of the ICC: (i) Is Ugandan 'estopped' from challenging admissibility? (ii) Has Uganda raised the admissibility challenge at the earliest

[110] See Article 1 and para. 10 of the Preamble of the Rome Statute.

[111] Rome Statute, Article 19(4).

[112] *Ibid.*

[113] W W. Burke-White and S.Kaplan, "The International Criminal Court and an Admissibility Challenge in the Uganda Situation" (2009)7 *Journal of International Criminal Justice* 257.

possible opportunity? and (iii) Do the proposed domestic proceedings meet the requirements of the Statute?[114]

With regard to the first question, it could be argued that by self-referring the LRA case, Uganda waived the rights it would have otherwise had to challenge hence bringing into operation the principle of estoppel. However, as already highlighted, the Rome Statute makes provision for multiple challenges on admissibility being made even after the commencement of a trial in the event of exceptional circumstances, thereby removing any possibility of estoppel. This was confirmed by Pre-Trial Chamber II in the Decision on the admissibly of the case in Uganda[115], which held that:

"By its very nature, the determination of the admissibility of a case is subject to change as a consequence of a change in circumstances. This idea underlies the whole regime of Complementarity."[116]

It further held that:

"the determination of admissibility is meant to be an ongoing process throughout the pre-trial phase, the outcome of which is subject to review depending on the evolution of the relevant factual scenario."[117]

Uganda is therefore not estopped from making a challenge on admissibility since there is a statutory allowance for multiple challenges.

The second potential issue in an admissibility challenge is the 'earliest opportunity' requirement under Article 19(5) Rome Statute. The purpose of this requirement is

[114] *Ibid* at 274.
[115] *Supra* note 38.
[116] *Ibid* at 15.
[117] *Ibid* at 16.

presumably to maximize the efficiency of proceedings, such that the ICC does not waste resources on an investigation or prosecution only to have the case subsequently deemed inadmissible when a challenge could have been brought earlier.[118] The provision however doesn't provide further guidance on what amounts to the earliest opportunity to make a challenge.[119] In the Ugandan case, this requirement would probably require the challenge to be made the moment it has been decided that circumstances dictate such a challenge to be made.

Lastly, the challenge must be based on clear evidence that Uganda is both able and willing to prosecute pursuant to Article 17 of the Rome Statute. If this is the case, in order to meet the standards of Article 17, Uganda will have to provide compelling evidence that it is in fact undertaking genuine domestic proceedings. The term "genuine" underlies that only those national criminal proceedings undertaken with the serious intent of eventually bringing the and thus mainly serves to stress the need for effective prosecution already referred tom in the Preamble of the Rome Statute.[120] In the event that national jurisdictions are permitted to try ICC crimes, they should maintain credible, independent, and impartial prosecutions; adhere to international fair trial standards; and render penalties that reflect the gravity of the crimes, with imprisonment as the principal penalty.[121] Whether the intended Ugandan domestic proceedings would meet the "genuiness" test is subject to debate but most commentators assert that much still has to be done as will be shown below.

[118] W. W Burke-White and S. Kaplan, *supra* at 276.
[119] D.D N Nsereko, "Preliminary Rulings Regarding admissibility" in OttoTriffterer (ed.), *supra* at 657-658.
[120] M. Benzing "The Complementarity regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity" (2003)7 *Max Planck Yearbook of United Nations Law*, 591 at 605.
[121] C. L Ukuni, " Un-triggering the Jurisdiction of the International Criminal Court: The Ugandan Referral of the Situation concerning the Lord's Resistance Army in Northern Uganda to the International Criminal Court"(2008),A Dissertation Submitted to the Faculty of Law of the University of Pretoria, In Partial Fulfilment of the Requirements for the Degree of Masters of Law LLM (Human Rights and Democratisation in Africa) ,available at http://www.up.ac.za/dspace/bitstream/2263/8065/1/ukuni.pdf.

It has been postulated that for Ugandan domestic proceedings to meet the test above, it will require far more than just an elusive signature on a peace deal.[122] Specifically, the Pre Trial Chamber should demand evidence that the accused are in custody and that the Ugandan judiciary has taken action against them, presumably in the form of a domestic investigation or indictment.[123] Ideally, then, before initiating an admissibility challenge, the Ugandan government would wait until it had the necessary legal framework in place to prosecute, had a signed final peace deal, had secured custody over the accused, and had initiated domestic proceedings.[124]

K. Phillip Apuuli[125], in the same vein, asserts that that the LRA leaders would have to first hand themselves over to Ugandan authorities for trial and Uganda would have to domesticate the Final Peace Agreement with the LRA and the Rome Statute into its law.[126] Further, Uganda would also have to make a law spelling out the functions of the proposed special court, the offences to be tried and the specific jurisdiction giving powers for the judges who will handle the related offences.[127] Another potentially sticky point is the fact that Ugandan law provides for the imposition of the death penalty for some offences like murder[128]whereas the Rome Statute provides for imprisonment for specified number of years, the maximum of which is thirty years and life imprisonment when justified.[129] Uganda would therefore have to guarantee that penalties imposed are in tandem with those in the Rome Statute.

[122] W. W Burke-White and S. Kaplan, *supra* at 276.
[123] *Ibid.*
[124] *Ibid* at 277.
[125] K. P Apuuli, "The ICC'S Possible Deferral of the LRA Case to Uganda" (2008) 6 *Journal of International Criminal Justice* 801.
[126] *Ibid.* at 812.
[127] *Ibid.*
[128] See Article 22 (1) of the 1995 Constitution of the Republic of Uganda.
[129] Rome Statute, Article 77.

It is also controversial whether accountability based on traditional justice would be sufficient to meet the requirements of Article 17. This issue was discussed at length in Chapter Two of this paper. My view is that basing on international trends, there must be some prosecutions to accompany the traditional justice mechanisms.

The above suggestions of what Uganda needs to do in order for its domestic proceedings to be considered genuine are however only speculative and not conclusive or binding. The Pre-Trial Chamber handling the Case against Joseph Kony *et al* will have the final say on whether the proposed Ugandan domestic proceedings meet the tests of admissibility. The Pre-Trial Chamber, on its own motion moved itself to determine the admissibility of the case after noting the new developments in the matter.[130] It determined that it remains a fact that the final peace agreement has not been signed and neither the agreement nor the annexure have been submitted to parliament.[131] It was in the circumstances held that: "It is not until both documents [final peace agreement and the annexure] can be regarded as fully effective and binding upon the parties that a final determination can be made regarding the admissibility of the Case, since the Chamber will only be in a position to assess the envisaged procedural and substantive laws in the context and for the purposes of article 17 of the Statute after they are enacted and in force"[132]

It follows from the above that until a final peace agreement is signed and the relevant matters therein are properly implemented by both parties, no challenge on admissibility can be made.

4.1.2 Security Council Deferral

[130] *Supra* note 110.
[131] *Ibid* at 26.
[132] *Ibid.*

Under the ICC statute, the Security Council can request the Court to refrain from, or suspend an investigation or prosecution for twelve months pursuant to article 16. According to D. D N Nsereko, although the Security Council's action is billed as a "request", it's actually a command to the Court to suspend its activities with respect to a matter and to defer to the Security Council's jurisdiction. [133] This request to the ICC must be enacted by the Security Council in a resolution adopted under Chapter VII of the Charter of the United Nations.

The Security Council will exercise the powers enumerated above if it has determined the existence of a threat to the peace, a breach of the peace, or an act of aggression under Article 39 of the U.N. Charter and the resolution requesting the court's deferral must be consistent with the purposes and principles of the United Nations with respect to maintaining international peace and security, resolving threatening situations in conformity with principles of justice and international law, and promoting respect for human rights and fundamental freedoms under Article 24 of the U.N. Charter.

In practice, article 16 allows the Council to request the Court not to investigate or prosecute when the requisite majority of its members conclude that judicial action –or the threat of it – might harm the council's efforts to maintain peace and security pursuant to the Charter.[134] It allows for political solutions to some of the worlds crises and these are best suited for the Security Council.

[133] D. D N Nsereko, "The Relationship between the International Criminal Court and the United Nations Security Council", (2007) 13 *Zeitschrift für Internationale Strafrechtsdogmatik 500* at 502.

[134] M. Bergsmo and J. Pejic, "Article 16 Deferral of Investigation or Prosecution" in O. Triffterer, *supra* at 599.

It is however unlikely that the UN Security Council would move to pass any resolution stopping the ICC from proceeding with the case against the LRA. According to one commentator, it is "hard, if not impossible, to contemplate a situation in which a refusal to recognise a national amnesty could constitute a threat to international peace."[135] There is also no act of aggression likely to be committed as a consequence of the ICC prosecution or a breach of peace. The ICC arrest warrants against the top LRA leadership actually had the effect of putting pressure on the LRA who were forced to the negotiating table and no longer had a safe haven in Southern Sudan where they were originally launching their attacks from.[136] This is one of the reasons for the relative peace in Northern Uganda at the time of writing this paper.

It would therefore be a hard sell to convince the Security Council that the very international criminal justice process that had critical role to play in restoring peace in Northern Uganda is now the very obstacle to peace. In the words of one commentator,

> "if I were the Security Council, one of the permanent five, I would be very reluctant to set a precedent in which I allowed myself to be held hostage by the likes of Kony. You could substitute for Kony, the FARC, the Taliban or various other potential defendants down the road, who would very quickly learn from this precedent that all you need to do to avoid ICC prosecution would be to threaten to not enter into a peace agreement, or to resume the war, unless you were granted indefinite Article 16 protection. You can just see the Security Council essentially being forced, year after year, to pass these embarrassing resolutions giving impunity to the most thuggish rebel groups on earth. It is not a path I would readily go down and, certainly, I do not think it should be pursued for a case like this where it is not necessary."[137]

4.2 Conclusion~~For the Court to defer proceeding to Ugandan jurisdiction the accused persons should be in the custody of Ugandan courts, which intend to~~

[135] J. Dugard, "Possible Conflicts of Jurisdiction with Truth Commissions", in A. Cassese *et al.* (eds.) *The Rome Statute of the International Criminal Court: A Commentary*, *supra* note 4 at 701- 702.
[136] See K. P Apuuli, *supra* at 802.
[137] K. Roth, in a discussion on "The International Criminal Court Five Years on: Progress or Stagnation?" (2008) 6 *Journal of International Criminal Justice*, 763at 768.

~~prosecute them; Uganda should have passed laws that reflect the grave seriousness of the international crimes and the prescribed penalties, and make provisions for sentencing addressing the gravity of those crimes; a fair trial should be ensured according to international standards; and adequate safeguards for the protection of witnesses should exist. [FN74~~

This chapter has analysed the options available for deferral of the LRA case to Uganda and from my analysis a challenge on admissibility would be a more viable option in seeking a deferral. Critical is the fact that admissibility challenges can be made at any stage of proceedings and that multiple challenges can be made. My next chapter will make concluding remarks and some recommendations.

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CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

This study has analysed the self- referral phenomenon with particular emphasis on Uganda's self –referral and the possibility of its self referral being withdrawn. It has been shown that a

referral once made to the ICC cannot be withdrawn. Hereunder some conclusions and recommendations will be made.~~OUR~~

5.1 CONCLUSIONS

The ICC is still in its infancy and has faced challenges that the drafters of the Rome Statute could never have envisaged. One of those challenges was the threatened or suggested withdrawal of Uganda's referral which was the very first matter handled by the Court. My personal perception of this threatened withdrawal is that it amounted to no more than political posturing and the Ugandan Government was and still is committed to cooperating with the ICC in the arrest and prosecution of Joseph Kony and other indicted LRA leaders. Ugandan Government officials have stated as much privately and in communication to the ICC.

Although the threatened withdrawal did not, and is not likely to happen, it exposed the ICC to the fact that it is operating under a legal regime that is not clearly spelt out and that it may thereby be used for political machinations. In a bid to make the ICC quickly operational, the ICC Prosecutor as earlier discussed in this paper came up with the idea of states self referring matters to the Court and started inviting voluntary self-referrals. The Prosecutor and Uganda became more or less bed fellows and this created room for manipulation for the furtherance of political ends. It is therefore unsurprising that a suggestion was made that Uganda may withdraw its referral; Uganda was in effect saying: "You invited us in, made us feel comfortable, we should be able to show ourselves out when it suits us since we are partners".

Many questions have also been raised as to whether the Ugandan referral should have been accepted in the first place[138], given that Uganda is a relatively stable country with a fully fledged and functioning judiciary. On 29 May 2004, the Solicitor General of Uganda reiterated to the ICC Prosecutor that the national judicial system was "widely recognised for its fairness, impartiality and effectiveness". [139] It is submitted that none of the reasons stated for the referral warranted the ICC exercising jurisdiction. The principle of complementarity emphasises that nation states are the primary and most appropriate forum for prosecuting international crimes and as such the ICC should have encouraged Uganda to fulfil its obligations under the Rome Statute. Uganda admittedly was unable to effect the arrests of Joseph Kony and other LRA rebels but it must be noted that the ICC does not have a police force, army or other apparatus of its own to effect the arrest itself. By the time of the referral, the combined armies of Uganda, Sudan and the Democratic Republic of the Congo had failed to arrest or kill Joseph Kony and it is therefore perplexing how a body like the ICC without an enforcement apparatus expects to arrest the indictees.

My analysis of law and jurisprudence of the subject at hand has shown that Uganda cannot legally unilateral withdraw its referral. It is submitted that if it were permissible, it would have created a dangerous precedent of States using the ICC at will to fulfil their whims and ultimately defeat the course of justice. Impunity would reign. The ICC Statute has sufficient safeguards for the handling of cases in the event that circumstances on the ground have changed. Even if Uganda sought to withdraw a referral for the sake of exercising its own criminal jurisdiction, the Rome Statute provides a multitude of cooperative procedural options that negate the need for unilateral action.

[138] See e.g., W. A Schabas, 'Complementarily in Practice': Some Uncomplimentary Thoughts' *supra*, at 6.
[139] See ICC-02/04-01/05-329C- Conf- AnxD.

It should however be noted that a danger still remains of Uganda refusing to co-operate with the ICC thereby frustrating the course of justice. "Self-referrals" are dependent on the co-operation of states making the referral. Such states ultimately have to aid the ICC in evidence gathering, identification of potential witnesses and the arrest of suspects. In the event that a state chooses to withdraw its co-operation, it is submitted that it- in- effect withdraws the referral as well.

5.2 RECOMMENDATIONS

It is recommended that the next assembly of state parties considers amending the Rome Statue so that express provisions are inserted to govern self -referrals. It has been shown in this paper that the present legal regime was not designed with self referrals in mind and there is therefore a lacuna which has resulted in the present confusion.

The ICC should also shift away from accepting referrals merely for the purpose of showing that it is functioning. Emphasis should be placed on helping national prosecutions given the limited funding available to the ICC and the fact that prosecutions at a national level are easier and more convenient to conduct.[140]

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