UNIVERSITY OF THE WESTERN CAPE

FACULTY OF LAW

SELF-REFERRALS TO THE INTERNATIONAL CRIMINAL COURT: LEGAL ANALYSIS, CASE STUDIES AND CRITICAL EVALUATION

A thesis submitted in partial fulfilment of the requirements for the LL.D degree

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DECLARATION

I, Michael Ddeme Mukwana, declare that the work presented in **"Self-Referrals to the International Criminal Court: Legal Analysis, Case Studies and Critical Evaluation"** is original and has never been presented to any other university or institution for an academic award. Where other works have been used, these have been duly acknowledged by complete references. It is hereby presented in fulfillment of the requirements for the award of the LL.D Degree.

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KEY WORDS
International Criminal Court
Self-referral
Complementarity
Case
Situation
Admissibility
Politics
Justice

ABSTRACT

The main contributor of situations before the International Criminal Court (hereinafter ICC) has been state parties that have referred situations on their own territory to the ICC through "self-referral". This study examines the concept of self-referral tracing the history of voluntary deferral by states of their jurisdiction over international crimes up to the enactment of the Rome Statute. The study finds that states were historically reluctant to have international crimes committed on their territory handled by other bodies or states. The self-referrals under the ICC regime are therefore a novelty in international criminal law. The legality of the act of self-referral under the Rome Statute is also examined and it is concluded that self-referrals are provided for within the Statute, although their legality has been questioned. The study establishes that self-referrals have seen unprecedented cooperation by territorial states but have also been selective in nature, targeting only non-state actors (rebel groups).The study further compares the ICC's handling of two other situations (Kenya and Darfur) which were triggered by antagonistic *proprio motu* and UN Security Council referrals respectively. The ultimate collapse of cases arising out of the Kenyan situation plus the suspension of investigations in Darfur due to non-cooperation is significant when compared with the relative successes registered with self-referred situations. The study concludes that whereas self-referrals may involve concessions to the territorial state like non-prosecution of state actors, this is a necessary evil to ensure successful investigations and prosecutions of international crimes. I recommend at the end of the study that in order to shield the office of the ICC Prosecutor from the diplomacy, dirty international politics and compromises at play in securing referrals as well as cooperation during the entire prosecution process, there should be a separate organ of the ICC handling investigations and interactions with states.

CHAPTER ONE: INTRODUCTION

1.1 Background to the study

Although self-referrals are not expressly provided for in the Rome Statute, they have become a familiar feature of the early practice of the International Criminal Court (hereinafter ICC) and, more precisely, of the strategy of the office of the ICC Prosecutor.[1] The first three situations before the ICC (The Democratic Republic of Congo, Uganda, Central African Republic) came to the Court in this way. The most recent are Mali and Gabon.[2]

Concerns have been raised on the challenges that the ICC faces as a result of States referring situations to the Court. Some of these concerns include that the practice allows States to manipulate the Court, wrongly focuses attention on only non-State actors and allows States renege on their obligations to prosecute international crimes. It is also noteworthy that such challenges have the potential of further perpetuating impunity, whereby the perpetrators of human rights violations could walk scot-free. These challenges therefore call for a legal analysis of the Rome Statute in light of the work that have so far been carried out by the Court with a viewing of identifying the lacunas that might be existing within the practice of self-referrals and how such gaps can be plugged.

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[1]A. Muller and I. Stegmiller, "Self-Referrals on Trial: From Panacea to Patient" (2010) 8 *Journal of International Criminal Justice*, 1267.

[2]On 13 July 2012 the government of Mali made a formal request to the ICC to investigate war crimes and crimes against humanity that took place in Mali since January 2012. Referral letter available at http://www.icc-cpi.int/NR/rdonlyres/A245A47F-BFD1-45B6-891C-3BCB5B173F57/0/ReferralLetterMali130712.pdf (accessed 20 July 2014); On 21 September 2016 a referral from the Government of the Gabonese Republic was made to the ICC. Referral letter also available at https://www.icc-cpi.int/iccdocs/otp/Referral-Gabon.pdf (accessed December 20 2016).

When the Rome Statute[3] was being drafted, referral of a situation by a state party was thought to have the least potential for making the ICC operational.[4] It was frequently pointed out that States were notoriously reluctant to complain against other states on a bilateral basis.[5] Interstate and international relations were since World War II defined by the Westphalian concept of sovereignty[6] and the Hegelian concept of state interest, where each state was concerned with the promotion of its own interests and pursuance of power.

There was well founded pessimism among authors following the enactment of the Rome Statute about the prospects of state referrals. T. McCormack and S. Robertson contended that as the experience of human rights treaty bodies had demonstrated, mechanisms which provided for state-based complaint procedures had been greatly under-utilised because states are reticent to initiate proceedings against other states or their nationals due to the political and diplomatic ramifications of doing so.[7] They concluded that there was therefore little to suggest that the Rome Statute's provision for state-based complaints would ever experience greater popularity. It also seemed to them much more likely that most of the ICC's work would come through UN Security Council referral rather than by way of State Party complaint.[8]

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[3]Rome Statute of the International Criminal Court (adopted 17th July 1998, entered into force 1st July 2002.
[4]A comprehensive discussion of the drafting history of the Rome Statute can be found in M.C. Bassiouni, *The Legislative History of the International Criminal Court* (2005).
[5]W. Schabas, *An Introduction to the International Criminal Court* (4th edn.) (2011) at 143; see also- P. Akhavan, "The International Criminal Court in Context: Mediating the Global and Local in the Age of Accountability" (2003) 97 *American Journal of International Law*, 712 at 716 and W. Schabas, "The International Criminal Court: Jurisdiction, Trigger Mechanism and Relationship to National Jurisdictions" in M. Politi and G. Nesi (eds.), *The Rome Statute of the International Criminal Court: A Challenge to Impunity* (2001) at 204.
[6]It consists of the fundamental right of political self-determination, the principle of legal equality between states and the principle of non-intervention of one state in the internal affairs of another state.
[7]T. McCormack and S. Robertson, "Jurisdictional Aspects of the Rome Statute for the New International Criminal Court" (1999) 23 *Melbourne University Law Review*, 635 at 642.
[8]T. McCormack and S. Robertson at 642.

M. Arsanjani and W. Reisman similarly observed that no state or government would want to invite the future court to investigate and prosecute crimes that had occurred on their territory.[9] The expectation therefore 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. J.K. Kleffner similarly argues that complementarity and its regulation in the Rome statute appeared to presuppose that its primary objective is to regulate competing claims for the exercise of jurisdiction with one or more states and the Prosecutor eager to exercise jurisdiction.[10]

The then ICC Chief Prosecutor Luis Moreno-Ocampo, in a bid to make the Court operational, came up with an ingenious interpretation of the statute in 2003 that would allow states to refer situations occurring on their own territory.[11] He adopted a policy of inviting and welcoming voluntary referrals by territorial states as a first step in triggering the jurisdiction of the Court.[12] The prosecutor noted that "*proprio motu* power is a critical aspect of the Office's independence"[13] but nevertheless adopted the policy of inviting and welcoming

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[9]M.H. Arsanjani and W.M. Reisman, "Law-in-Action of the International Criminal Court" (2005) 99 *American Journal of International Law*, 386.They echo the same opinion in M.H. Arsanjani and W.M. Reisman,"The International Criminal Court and the Congo: From Theory to Reality" in L.N. Sadat and M.P. Scharf (eds.),*The Theory and Practice of International Criminal Law* (2008) at 327,arguing that the drafters of the Rome Statute assumed that governments would be reluctant, in concrete cases, to surrender their national criminal jurisdiction to the Court. If any of the crimes listed in the Statute were committed in their respective territories or by any of their citizens, governments would, it was presumed, themselves want to prosecute the perpetrators and by effectively applying their police powers, demonstrate to their constituents (and their opponents) their ability to defend their citizens and thus gain credibility and political legitimacy. They conclude that theoretically in democratic societies governments that fail this demonstration are unlikely to remain in power long; in undemocratic societies, such failures are likely to embolden other aspirants to power.

[10]J.K. Kleffner, "Auto-Referrals and the Complementary Nature of the ICC ", in C. Stahn and G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (2009).

[11]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.

[12]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. (accessed 10 March 2010).

[13]Office of the Prosecutor, Report on the Activities Performed During the First Three Years (June 2003–June 2006) at 7.

voluntary referrals by territorial states as a first step in triggering the jurisdiction of the Court. According to W. Schabas, it is obvious that the idea of self-referrals of which there is not a trace in the *travaux préparatoires* or drafting history, of the Rome Statue emerged within the Office of the Prosecutor (hereinafter OTP) during 2003.[14] He has also referred to it as a "novel construction".[15]A few authors have waded into this debate in defence of self-referrals including D. Robinson. He finds it intriguing that "a straightforward textual application of Article 14, in a context that was expressly contemplated and uncontroversial in the negotiation of the text, has generated such a substantial literature and debate, framed in terms of innovation."[16] A. Müller and I. Stegmiller contend that self-referrals, whilst not provided for in the Rome Statute and thus not a *verbum legale*, are compatible with the legal regime established by the Statute.[17]

The self-referral practice has been applied by several states, including Uganda, the Democratic Republic of Congo (DRC), the Central African Republic (CAR) and Mali. Therefore, this paper makes legal and critical analyses of the practice of self-referrals, basing on the situations in Uganda, DRC and CAR, which were the first situations to be filed through the procedure. It also makes a comparative analysis with the situations in Darfur and Kenya which were initiated by the UN Security Council and the ICC prosecutor respectively.

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[14]W. Schabas, "Prosecutorial Discretion *v.* Judicial Activism at the International Criminal Court" (2008) 6 *Journal of International Criminal Just*ice, 731 at 731.
[15]W. Schabas, "Complementarity in Practice': Some Uncomplimentary Thoughts" (2008) 19 *Criminal Law Forum*, 5 at 7.
[16]D. Robinson, "The Controversy over Territorial State Referrals and Reflections on ICL Discourse" (2011) 9 *Journal of International Criminal Justice*, 355 at 380.
[17]A. Müller and I. Stegmiller at 1293.

1.2 Statement of the problem

Despite self-referrals playing a critical role in helping kick-start the ICC, they have been steeped in by controversy both within the domestic and international spheres. The controversy mainly stems from the politics surrounding self-referrals. Whereas the ICC position remains that there are no political considerations but purely legal, actual practice and public perceptions may differ.

Basic legal reasoning dictates that decisions are made on a purely legal, rather than on the basis of social, political, moral, or religious perspectives. Politics is seen as the clash of passions, while law has long been identified with reason whether artificial or not.[18] The separation of law and politics is one of the central beliefs on which all liberal discourse proceeds and once it is undermined everything depending on it, ranging from the style of student-teacher interaction in the classroom to the private property system, must collapse.[19] Politics is regarded not only as something apart from law, but as inferior to law. Law aims at justice, while politics look only to expediency. The former is neutral and objective, the latter the uncontrolled child of competing interests and ideologies.[20]

The drafters of the Rome Statute of the ICC cautioned that the Court "should not be seen as a way of pursuing political goals."[21] The then ICC President Philippe Kirsch in 2006 similarly reassured states that: "[t]here's not a shred of evidence after three-and-a-half years

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[18]J. Boyle, "The Politics of Reason: Critical Legal Theory and Local Social Thought" (1985) 133 *University of Pennsylvania Law Review*, 685 at 704.
[19]J. Boyle at 770.
[20]J.N. Shklar, *Legalism: Law, Morals, and Political Trials* (1964) at 111.
[21]Summary records of the meetings of the forty-sixth session, 2 May–22 July 1994, Yearbook of the International Law Commission, i, A/CN.4/Ser.A/1994, at 23, *para.* 28.

that the court has done anything political. The court is operating purely judicially."[22] The former ICC Chief Prosecutor Luis Moreno-Ocampo likewise asserted that: "…the prosecutor's duty is to apply the law without bowing to political considerations, and I will not adjust my practices to political considerations. It is time for political actors to adjust to the law…we have no police and no army but we have legitimacy."[23] Politics is portrayed as external to law, as something that needs to be overcome by independent organs acting on the basis of pre-given rules and principles.[24]

It is however not possible for legal reasoning to provide all the answers. In the event that it fails, the results come from those same political, social, moral, and religious value judgments from which the law purports to be independent.[25]The answers may also invariably come from pragmatism. Holmes, argues that the law is "what the courts ... do in fact," and it draws its content largely from "[t]he felt necessities of the time."[26]

According to J. Graubart[27], if supporters of global tribunals were truly "judicial romantics," they would be expected to condemn the type of justice practiced at Nuremberg and Tokyo. In his view, besides being completely one-sided, both tribunals were convened by the occupying victor states, who drafted the indictments and supplied the prosecutors and judges.

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[22]Voice of America, "Japan's Expected to Support International Criminal Court", 6 December 2006, available at http://www.amazines.com/article_detail.cfm/183987?articleid=183987 (accessed 10 October 2015).
[23]L. Moreno-Ocampo, "The International Criminal Court: Seeking Global Justice" (2008) 40 *Case Western Reserve Journal of International Law*, 215 at 224 *et.seq.*
[24]S.M.H. Nouwen and W.G. Werner, "Doing Justice to the Political: The International Criminal Court in Uganda and Sudan" (2011) 21 *European Journal of International Law*, 941 at 942.
[25]D. Kairys, "Law and Politics" (1984)52 *George Washington Law Review*, 243 at 244.
[26]O.W. Holmes, *The Path of the Law* (1897), cited in T C. Grey, "Holmes and Legal Pragmatism" (1989) 41 *Stanford Law Review*, 787 at 793.
[27]J. Graubart, "Rendering Global Criminal Law an Instrument of Power: Pragmatic Legalism and Global Tribunals" (2010) 9 *Journal of Human Rights*, 409 at 411.

However most of those who are deemed idealists commend the post-WWII tribunals, especially Nuremberg, as milestones in global criminal justice. He concludes that: “In order to make this claim in the face of indisputable victor’s justice, supporters necessarily invoke–often implicitly-the pragmatic-legalist approach. As legalists, they applaud the tribunals for introducing a legal model of global justice. As pragmatists, they endorse the allied decision to hold the tribunals in a political setting controlled by victor states because it enabled global justice to take place. Overall, supporters see a positive interaction between power politics and law”. [28]

S.M.H. Nouwen and W.G. Werner argue that whereas there is nothing wrong with attempts to protect the ICC from political interference, portraying it as fighting the political has a serious disadvantage: it blinds us to the reality of the intrinsic politics of the ICC itself.[29] In their view there are various ways in which the ICC is inextricably intertwined with politics: the Court was created by political decisions, it adjudicates crimes which are frequently related to politics, and it depends on a mysterious and seemingly magical ‘political will’ for the enforcement of its decisions.[30]

A problem exists as to whether self-referrals as the first mechanism that triggered the jurisdiction of the ICC are a matter of law or pragmatism and politics. Can there be a confluence of all three and justice is achieved?

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[28]J. Graubart at 409.
[29]S.M.H. Nouwen and W.G. Werner at 943.
[30]S.M.H. Nouwen and W.G. Werner at 943.Likewise E.H. Carr argues that law “cannot be understood independently of the political foundation on which it rests and of the political interests which it serves”, E.H. Carr, *The Twenty Years' Crisis 1919-1939: An Introduction to the Study of International Relations* (1939) at 166.

1.3 Research objectives

The general aim of the proposed research is to critically appraise self-referrals as a means of triggering the jurisdiction of the ICC.

The specific objectives of the research are to:

a) Examine how situations are self-referred by states to the ICC pursuant to Article 14 of the Rome Statute and if these self-referrals are firmly grounded in law;
b) Examine if a self-referral operates as a waiver of admissibility;
c) Examine whether the ICC Prosecutor is competent under the Rome Statute to actively seek self- referrals;
d) Examine if a State should be allowed to self-defer a referral to the ICC;
e) Examine the self-referrals from Uganda, Democratic Republic of the Congo and the Central African Republic presently before the ICC and explore complementarity/admissibility, case selection and OTP investigations in these situations;
f) Examine the influence, if any of politics and pragmatism on the self-referral regime;
g) Make a conclusive determination if self-referrals have served the ends of justice or the interests of referring states and the ICC Prosecutor;
h) Make recommendations for furtherance of the cause of justice.

1.4 Significance of the research

There are no express provisions in the Rome Statute specifically dealing with self-referrals. In the circumstances, several contentious questions arise which require critical study to determine if the ICC, and in particular the Prosecutor is following the right path. The present study attempts to comprehensively address these issues to help in the development of international criminal law.

My research will also determine if the dangers already discussed, have actually come to pass, ten years after the first referral to the ICC. There has been a lot of speculative criticism of self-referrals in the abstract without actually examining the actual self-referred situations before the ICC. The case studies in my thesis will put these criticisms to a test and ascertain if self-referrals have in practice been more of a lesser evil or a mechanism that should be done away with completely.

In the words of Luis Moreno-Ocampo: "The existence of the International Criminal Court with the capacity to investigate and prosecute the heads of state of State Parties constitutes both a confirmation and a departure from the principles of Westphalia. It is a departure from the traditional forms of international relations, accepted by sovereign nations that have signed the treaty. Therefore it is not a revolution, but rather an evolution from one legal system to another that is substantially different. Legal academia of the twenty –first century must analyse this new legal system that has a universal aspiration and does not pertain to a single government but helps to coordinate multiple national governments."[31]

1.5 Methodology

This study was primarily documentary research that involved a review and analysis of documents relating to the subject of criminal law and self-referrals. It is premised on the work of the ICC in situations that are the focus of the ICC, which have been triggered by specifically state referrals.

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[31]L. Moreno-Ocampo, former ICC Chief Prosecutor in a foreword to H. Olasalo, *Essays on International Criminal Justice* (2012) at xxxiv.

The materials for this study were gathered from the internet, which is a very vital tool for accessing current information on the work of the ICC, research libraries such as law section of Makerere University main library, Human Rights and Peace Centre library based at the School of Law of Makerere University, Makerere Institute for Social Research, library of the University of the Western Cape and Humboldt University among others.

1.6 Overview of chapters

The study consists of eight chapters. This first chapter is the introduction, setting out the background to the study, statement of the problem and giving an outline of the chapters.

The second chapter traces the historical background of the practice of self-referrals from medieval times, the Nuremburg trials, international criminal tribunals for Yugoslavia and Rwanda, up to the enactment of the Rome Statute.

The third chapter deals with general issues surrounding self-referrals; referral procedure, legality of self-referral, complementarity, admissibility and withdrawal of referrals.

The fourth chapter examines the case studies with a look at Uganda which referred the first situation to the ICC. It examines the history of the conflict, OTP investigations, admissibility, case selection, peace versus justice debate.

The fifth chapter is a case study of the DRC, examining the same issues dealt with in the preceding chapter apart from issues of peace versus justice but with a focus on the DRC.

Chapter six deals with a case study of the Central African Republic, the last state to self-refer a situation to the ICC and the least written about situation. I examine the same issues as in the DRC and Uganda case studies.

Chapter Seven is a comparative analysis chapter wherein a comparison is made between the self-referred situations and those that got to the ICC via the OTP *proprio motu* powers and the UN Security Council referral. I compare the investigative stages, admissibility and case selection of these situations with those of self-referrals dealt with in the preceding chapters.

Chapter eight lays out the general and final conclusion as well as recommendations.

CHAPTER TWO: HISTORY OF VOLUNTARY DEFERRAL BY STATES TO INTERNATIONAL PROSECUTIONS IN INTERNATIONAL CRIMINAL LAW.

2.1 Introduction: The concept of self-referral

This part of the thesis will attempt to trace the idea of states voluntarily deferring the prosecution of perpetrators of international crimes to other entities which in current international criminal law parlance has come to be known as a self-referral. The terminology ascribed to this idea is however divergent, with some invariably referring to it as a "state referral", "auto-referral"[32] or "voluntary referral".[33] It has been loosely defined as explaining a factual situation where a state party directly linked to the crimes refers its own situation to the Court.[34]

2.2 Early beginnings

Historically, the practice of self-referral and a State's waiver of the exercise of its jurisdiction may be traced to the first international criminal trial of Peter von Hagenbach in 1474 for crimes against "God and Man" during his Governorship over Breisach.[35] When the town of Breisach was re-taken by Austria, von Hagenbach was charged with war crimes, tried by *ad hoc* court consisting of 28 judges of the allied coalition of States and towns, convicted and beheaded.[36]

It has been suggested that the decision of the Austrian Archduke not to commit Peter von Hagenbach to trial before a local Court in Austria where the crimes had taken place mirrored

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[32]See for example, C. Kress, "Self-Referrals' and 'Waivers of Complementarity" (2004) 2 *Journal of International Criminal Justice*, 944.
[33]A.H. Mahnoush and W.M. 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 387.
[34]M.M. El Zeidy, (2008) at 213. In my opinion the state party doesn't have to have a direct link to the crimes, they only have to have been committed on its territory.
[35]M.M. El Zeidy, *The Prin* at 211.
[36]See also- E. Greppi, "The Evolution of Individual Criminal Responsibility under International Criminal Law" (1999) 5 *International Review of the Red Cross*, 531.

the early roots of the idea of voluntary deferment to an international mechanism.[37] This however has to be viewed in the context of the fact that although Peter von Hagenbach was captured under the authority of the Austrian Archduke, it was a large coalition (Austria, France, Bern and the towns and knights of the Upper Rhine) that put an end to the ambitious goals of the powerful Duke of Burgundy and it was therefore natural that he was tried before an international tribunal. It is also noteworthy that the crimes were not only committed on Austrian territory.

The idea of establishing a permanent international jurisdiction was first promoted seriously in the context of the Balkan wars 1912 -1913 and the First World War. The investigating Committee of the Balkan Wars, established by the Carnegie Endowment for International Peace 1913, reached the conclusion that it would have needed only one word of the persons in power to stop the wars and all atrocities committed during the belligerent struggles.[38] It was however unthinkable at the time of world history for a state to voluntarily ask for international prosecution of persons for crimes committed on its territory. State sovereignty was placed at a very high premium and it would outweigh any clamouring for international justice. State sovereignty meant that the ruler of a State exercised sole authority over the territory of that State that all States were juridical equal and that States were not subject to any law other than their own without their consent.[39]

[37]M.M. El Zeidy, at 212.
[38]O. Triffterer, "The Permanent International Criminal Court-Ideal and Reality" in O. Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court* , *Article by Article*, (1999) at 16.
[39]See- H.E. Yntema, "The Historical Bases of Private International law" (1953) 2 *American Journal of Comparative Law*, at 305.

2.3 Unsuccessful attempts 1919-1945

The period immediately following World War I witnessed numerous attempts to establish a variety of international criminal institutions, all of which ended up in failure.[40]

After World War I, the Treaty of Versailles[41] provided for establishment of *ad hoc* tribunals but none were subsequently established. This was due to the refusal of Germany to handover the suspected war criminals for prosecution to the allied powers. Article 227 of the treaty provided for the creation of an *ad hoc* international criminal tribunal to prosecute Kaiser Willem II of Germany for the "supreme offence against international morality and the sanctity of treaties". The Kaiser sought refuge in the Netherlands and the allies did not formally request his extradition. According to M.C. Bassiouni[42], the allies were not ready to create the precedent of prosecuting a Head of State for a new international crime and therefore used the Kaiser's flight as a convenient way of avoiding this. He concludes that the "weak military processes of international criminal justice following World War I not only failed to deter the military leaders who initiated World War I ,but enhanced their cynicism".[43]

Article 228 of the treaty also contemplated prosecution of German soldiers accused of war crimes, but by 1921 the zest and zeal of the allies to set up joint or even separate military

[40]A. Cassese, "From Nuremburg to Rome: International Military Tribunals to the International Criminal Court" in A. Cassese, P. Gaeta and J.W. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Vol.1) (2002) at 4.
[41]Treaty of Peace between the Allied and Associated Powers and Germany, concluded at Versailles, June 28 1919.
[42]M.C. Bassiouni, "From Versailles to Rwanda in Seventy -Five Years: The Need to Establish a Permanent International Criminal Court" (1997) 10 *Harvard Human Rights Journal*, 11 at 18; See also- M.C. Bassiouni, "World War I: "The War to end all Wars" and the Birth of a Handicapped International Criminal Justice System" (2002) 30 *Denver Journal of International Law and Policy*, 244.
[43]M.C. Bassiouni, "From Versailles to Rwanda in Seventy -Five Years: The Need to Establish a Permanent International Criminal Court" at 21.See also- M.M. El Zeidy, "The Genesis of Complementarity" in C. Stahn and M.M. El Zeidy (eds.),*The International Criminal Court and Complementarity From Theory to Pract*ice (vol.1) (2011) at 79; G. Werle, *Principles of International Law* (2nd edn.) (2009) at 4 *et.seq*.

tribunals had waned and developments in Europe required that Germany not be further humiliated.[44] In the interest of regional stability and political agendas, the Allies decided to forego prosecuting the suspected criminals before independent military tribunals.[45] The allies therefore asked Germany to prosecute a limited number of war criminals before the Supreme Court of Germany in Leipzig, instead of establishing an Allied Tribunal as stipulated in Article 228.[46] The resultant trials have come to be known as the 'Leipzig Trials' and they have been castigated by W. Schabas[47] as "…more like disciplinary proceedings of the German army than any international reckoning". M.C. Bassiouni reckons that they exemplified the sacrifice of justice on the altars of international and domestic politics of the Allies.[48] M.C. Bassiouni further observed that the treaty commitment to try and punish offenders if Germany failed to do so was never carried.[49] This was because the leaders of the major powers of the time were more concerned with ensuring the future of Europe than pursuing justice.

A common thread that permeates throughout this era therefore is a reluctance of states to compromise their sovereignty and a fear of prosecuting leaders of states for the precedent it

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[44]M.C. Bassiouni, "From Versailles to Rwanda in Seventy -Five Years: The Need to Establish a Permanent International Criminal Court" at 19.
[45]B. Prinz, "The Treaty of Versailles to Rwanda: How the International Community Deals with War Crimes" (1998) 6 *Tulane Journal of International and Contemporary Law*, 553 at 555.
[46]M.C. Bassiouni, "From Versailles to Rwanda in Seventy -Five Years: The Need to Establish a Permanent International Criminal Court" at 19.
[47]W. Schabas, *An Introduction to the International Criminal Court* at 4.
[48]M.C. Bassiouni, "From Versailles to Rwanda in Seventy -Five Years: The Need to Establish a Permanent International Criminal Court" at 20.
[49]M.C. Bassiouni, *Introduction to International Criminal Law* (2nd edn.) (2012) at 548.

would lay down.[50] No feasible mechanism could be initiated to enable the bringing to justice of a State official –let alone Head of State accused of war crimes or other outrages.[51]

The idea of a permanent international criminal court, however, remained. On March 24 1924, the International Association of Penal Law (hereinafter A.D.I.P) was established in Paris and one of its goals was a generalised interest in international penal law. Within two years, the association went on record in Brussels as favouring a criminal jurisdiction for the Permanent Court of International Justice. A few years after this meeting, A.D.I.P commissioned a Romanian international lawyer, Vespasian Pella, to draft an international penal code, *Revue international de Droit Pénal,* ultimately published in 1935.[52]

After the drafting of the international code, an international diplomatic conference was held in Geneva, Switzerland in 1937, sponsored by the League of Nations, resulting in Conventions for the Prevention and Punishment of Terrorism and for the Creation of an International Criminal Court being promulgated and adopted by resolution of the League of Nations Council on November 16 1937.[53] The 1937 Convention for the Prevention and Punishment of Terrorism required states to criminalize terrorist offences and provided for optional jurisdiction limited to terrorism, the application by the court of primarily the law of the state in

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[50]In *Re Piracy Jure Gentium* [1934] AC 586, Lord Sankey LC held at 589 that: “With regard to crimes as defined by international law, the law has no means of trying or punishing them. The recognition of them as constituting crimes and the trial and punishment of criminals are left to the municipal courts of each country.”
[51]A. Cassese, “From Nuremburg to Rome: International Military Tribunals to the International Criminal Court” at 5.
[52]R.A. Friedlander, The Foundations of International Criminal Law: A Present-Day Inquiry” (1983) 15 *Case Western Reserve Journal of International Law*, 13 at 19.
[53]B. Saul, “The Legal Response of the League of Nations to Terrorism” (2006) 4 *Journal of International Criminal. Justice*, 78 at 81 *et.seq.*

which the act occurred and criminal responsibility of only individuals.[54] It attracted 24 signatories: 12 being European states. The Convention for the Creation of an International Criminal Court was aimed at creating an international court for punishing terrorism offences under the terrorism convention and only got one signatory.[55]

Controversy over the nature of the provisions of the above conventions and the onset of the Second World War rendered both Conventions a "dead-letter".[56]

2.4 End of World War II, the Nuremburg and Tokyo Tribunals

It was inevitable during the Second World War that any attempts at an international criminal justice system would falter. A Latin maxim *inter arma enim silent leges* (in times of war the law falls silent) can perhaps best describe the period of war *vis a viz* criminal justice.

The end of World War II however witnessed a marked change in the way states viewed international criminal law. The horror of Nazi tyranny during World War II was too much to bear and brought about the acceptance of individual criminal responsibility as well as overcoming the classical international law paradigm of states being the exclusive subjects of international law.[57] It can therefore be surmised that that the idea of international criminal law only crystallised into legal issues only in the 20th Century.[58]

The war had a heavy toll on human life and horrible atrocities were committed. Those responsible for this sad epoch in world history had to be punished and the universal outrage

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[54]The convention came about after the assassination on October 91934, of King Alexander of Yugoslavia and the French foreign minister. The French Government proposed the creation of an international criminal court together with a Convention for the international repression of terrorism. See- V.V. Pella, "Towards an International Court" (1950) 44 *American Journal of International Law*, 37 at 38 and G. Werle at 18.
[55]B. Saul, "The Legal Response of the League of Nations to Terrorism" at 81.
[56]R.A. Friedlander, The Foundations of International Criminal Law: A Present-Day Inquiry" at 19.
[57]G. Werle at 13.
[58]G. Werle at 3.

provoked by these crimes led to a widespread conviction that never again should such events occur.[59] In the aftermath of the war, On 20 October 1943, Allies established of the United Nations War Crimes Commission (UNWCC), which was initially called the United Nations Commission. The aims of the UNWCC were to: Investigate Nazi crimes, record details and help prepare indictments; Ensure war criminals were arrested and evidence of their crimes exposed; identify the legal basis for the punishment and extradition of war criminals; and determine which actions should be included under the heading of "Crimes Against Humanity," including the crime of genocide.[60] The UNWCC completed its first list of German and Italian war criminals in December 1944, with 712 names, all of them submitted by European governments. Among those named were forty-nine high ranking Nazi officials, including Adolf Hitler, Hermann Göring, Joseph Goebbels, Heinrich Himmler, and Hans Frank. The list also included generals, administrators of occupied regions, and political appointees.

The UNWCC ultimately presented 80 lists that contained the names of 36,529 suspected war criminals, of whom 34,270 were German and 1,286 Italian). It also called for the institution of the International Military Tribunal at Nuremberg and other courts. The UNWCC was dissolved in 1948 due to rising Cold War tensions and the failure of various countries to cooperate with their obligations to extradite suspected war criminals. In other words, various countries were playing both sides. Furthermore, political machinations by the different groups were at play, which hindered UNWCC work.[61]

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[59]A. Cassese, "From Nuremburg to Rome: International Military Tribunals to the International Criminal Court", at 6.
[60]M.E. Bathurst, "The United Nations War Crimes Commission" (1945) 39 (3) *American Society of International Law*, at 568.
[61]M.C. Bassiouni, "From Versailles to Rwanda in Seventy Five Years: The Need to Establish a Permanent International Criminal Court" at 21 *et seq.*

In the spring of 1945, the four major allies met in London to devise means of punishing high-ranking Nazi war criminals and on 8 August 1945 entered into the London Agreement for the prosecution and punishment of war criminals, to which was appended the Charter establishing an International Military Tribunal (hereinafter IMT). The Tribunal that consisted of four judges and four prosecutors was established "for the just and prompt trial and punishment of the major war criminals of the European Axis" and its jurisdiction was over the crimes against peace, war crimes and crimes against humanity. In occupied Germany, the Allied powers also prosecuted in their respective zones of occupation the same crimes as the IMT, pursuant to Control Council Law No.10.[62] on the punishment of persons Guilty of War Crimes, Crimes Against Peace and Against Humanity issued by the Allied Control Council on 20 December 1945.

The International Military Tribunal For the Far East, also known as the Tokyo Tribunal was established on 26 July 1945 by the four allied powers through the Declaration of Potsdam with the intention of prosecuting illustrious Japanese officials complicit in committing or ordering the commission of atrocities during World War II. General MacArthur, Supreme Commander of the Allied Powers in Japan approved its charter on 19 January 1946 which contained its constitution, jurisdiction and functions. This Tribunal related to the war in Far East and was supposed to try the Japanese war criminals. There were 11 judges who represented every country Japan was in war with, and there was a Chief Prosecutor from USA. Unlike the Nuremberg trials where the United States, the United Kingdom, France, and the Soviet Union each sent its own prosecution team, at the Tokyo trial, there was simply one consolidated team led by Keenan, incorporating representatives from the eleven Allied

[62]CCL No.10 (Official Gazette Control Council For Germany No. 3, 31 January 1945.

countries.[63] The Statute of the Tokyo Tribunal followed mostly the Nuremberg model but it had also its own novel concepts as well.

The creation of the Nuremburg and Tokyo Tribunals in the aftermath of the Second World War, and the subsequent trials before these tribunals showed a marked shift in the handling of perpetrators of international crimes. States could no longer sacrifice international justice at the altar of political expedience. Even if criticized, the Nuremberg Tribunal and Tokyo Tribunals were a bold step on the way to a definitive system of international criminal justice. Indeed, less than one month after the coming into force of the Charter of the United Nations, by Resolution 95 (I) of 11 December 1946, the General Assembly affirmed unanimously 'the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal', but failed to specify which principles had indeed been so recognized.[64] "Nuremburg accomplished what had failed after World War I. The criminality of the worst violations of International law was from now on a firm component of the international legal system."[65]

One major drawback of both tribunals, however, is that they both dispensed "victor's justice" over the defeated Germans and Japanese *i.e.* they were tribunals of those who shared victory in war. None of the Allies were prosecuted for war crimes. In the context of my investigation, it's clear that at this point in time, states were still not willing to voluntarily refer atrocities committed by themselves to international Tribunals. The allied powers were

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[63]K. Takeda, *Interpreting the Tokyo War Crimes Trial: A Socio-political Analysis* (*Perspectives on Translation*) (2010) at 8.
[64]See generally- C. Tomuschat, "The Legacy of Nuremburg" (2006) 4 *Journal of International Criminal Justice*, 830.
[65]G. Werle at 11.

instead keener to look into the misdeeds of Germany and Japan. U.S.S.R for instance sat in judgment over Germans accused of crimes for which the Soviet Union was responsible, like the disappearance of approximately 15,000 Polish prisoners.[66] In only targeting the Germans, the Nuremburg Charter formalized the Allies' refusal to relinquish immunity for themselves for similar crimes.[67]

2.5 The cold war and new attempts at establishing an international criminal Court

The period following the Nuremburg and Tokyo tribunals has been described as "the period of silence".[68] For much of the 20th century, international criminal law was primarily the concern of domestic courts. This was due to the absence of an international enforcement mechanism for international crimes, which made the international community to resort to the traditional institutional framework of specific treaties or treaty rules aimed at imposing on states the duty to criminalise the prohibited conducts, and organising judicial cooperation for their repression. Therefore, international law was used as a tool for the co-ordination of the exercise of criminal jurisdiction by states, which has been termed indirect enforcement of international criminal law. Unfortunately, the provisions in the different treaties remained dormant for the most part during the Cold War.

Attempts at a permanent international criminal justice mechanism were dominated by the United Nations. In 1946, the UN General Assembly passed resolution 95(1) affirming the principles of international law recognized by the Charter of the Nuremberg Tribunal and the

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[66]M.C. Bassiouni, "From Versailles to Rwanda in Seventy -Five Years: The Need to Establish a Permanent International Criminal Court" at 24.
[67]K. Sellars, "Imperfect Justice at Nuremberg and Tokyo" 2011 (21) *European Journal of International Law*, 1085 at 1090.
[68]M.C. Bassiouni, "From Versailles to Rwanda in Seventy -Five Years: The Need to Establish a Permanent International Criminal Court" at 38.

judgment of the Tribunal.[69] In 1947, by resolution177 (II), the UN General assembly requested the International Law Commission to come up with a draft code of offences against the peace and security of mankind and to formulate the principles recognised in the Charter of the Nuremburg Tribunal.[70] Another committee was also established to prepare a draft statute for an international criminal court and it produced a text in 1951 which was revised in 1953.[71]

Numerous other committees and sub-committees[72] were set up by the UN General Assembly, but there was no headway made. The overriding explanation as to why the attempts at establishing a permanent international criminal justice system at this point in time failed was political stagnation caused by the Cold War which impeded the functioning of the United Nations, since member states were subsumed into two rival antagonistic blocs.[73] In the words of one author "Nuremberg and Tokyo remained cloistered in the historical memory as examples of victor's justice and the world moved on, preoccupied by the cold war, decolonization and the threat of nuclear extinction".[74] Self-referrals at this stage in world history were therefore unthinkable.

[69]UN General Assembly resolution 95(1) available at http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/033/45/IMG/NR003345.pdf?OpenElement (accessed 20 June 2010).
[70]UN General Assembly resolution 177(II) available at http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/038/84/IMG/NR003884.pdf?OpenElement (accessed 20 June 2010).
[71]Report of the Committee on International Criminal Jurisdiction, UN GAOR,7th Session ,Supp.No.12,UN Doc A/26645(1954) .
[72]For example, a special committee was created to elaborate the definition of aggression pursuant to GA Resolution 688 (VII) of 20 December 1952.
[73]A. Cassese, "From Nuremburg to Rome: International Military Tribunals to the International Criminal Court" at 10.
[74]R. Zacklin, "The Failings of *Ad Hoc* International Tribunals" (2004) 2 *Journal of International Criminal Justice*, 541 at 541.

2.6 The end of the cold war, *Ad hoc* tribunals

According to A. Cassese, the end of the cold war led to the dissipation of animosity that had characterised international relations for almost fifty years and was instead replaced with a new spirit of relative optimism.[75] J. Hagan similarly points to a post-cold war "opportunity structure" that included increased public awareness, globalization and activism in response to atrocities as a catalyst for the re-emergence of international criminal justice.[76]

Another factor advanced for the emergence of *ad hoc* tribunals after the end of the cold war is the fact that the two competing power blocs had managed to guarantee a modicum of international order, whereby they operated as the world's policemen in their respective spheres of influence and the end of the cold war created a lacuna as well as an opportunity for ethnic strife to propagate in the absence of an overseer.[77] The creation of *ad hoc* tribunals needs to be analysed with the above background in mind.

During 1991, a very serious conflict started on the territory of Yugoslavia. Many atrocities were committed which amounted to threats to international peace and security. On October 6 1992, the UN Security Council adopted Resolution 780[78], establishing a Commission of Experts to investigate and gather evidence of "grave breaches of the Geneva Conventions

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[75]A. Cassese, "From Nuremburg to Rome: International Military Tribunals to the International Criminal Court" at 10. He has also referred to the situation at the time as a "paralysis" characterized by "mutual suspicion and distrust of the Western and Eastern blocs, [which] also triggered an obsession with non-interference in domestic affairs." In this climate, "the likelihood of establishing an international criminal court was very remote." See- A. Cassese, "On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law" (1998) 9 *European Journal of International law*, 2 at 7.

[76]J. Hagan, *Justice in the Balkans: Prosecuting War Crimes in the Hague Tribunal* (2003) at 208.

[77]A. Cassese, "From Nuremburg to Rome: International Military Tribunals to the International Criminal Court" at 10; K. Anderson, "The Rise of International Criminal Law: Intended and Unintended Consequences" (2009) 20 *European Journal of International Law*, 331 at 334 argues that the ICTY owed something in its formation to the submerged interests of powerful patron states and actors.

[78] UN.Doc. S/RES/780 (1992).

and other violations of international humanitarian law" within the conflict in the former Yugoslav Republic. On 19 February 1993, following submission of the Commission of Experts First Interim Report, the UN Security Council by Resolution 808 decided to establish The International Criminal Tribunal for the Former Yugoslavia to be responsible "for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991." This Resolution further provided for the UN Secretary-General to report back on the matter of establishment of the tribunal within sixty days. On May 3, 1993, the UN Secretary General drafted a Report which contained a draft Statute for the Tribunal. Consequently, by Resolution 827, the Security Council formally established the ICTY and approved the Secretary General's draft Statute.

The Government of the Federal Republic of Yugoslavia (then a union of Serbia and Montenegro) and the Republic of Srpska (the Bosnian Serb de facto government) refused to recognise the competence of the Tribunal and did not co-operate with respect to investigation and surrender of indicted individuals.[79] For instance, Slobodan Milošević, the former Yugoslav president and one of the indictees, was only transferred to the Tribunal after the collective action of states threatening to withhold financial aid to Yugoslavia unless it demonstrated compliance.[80] There were also attempts by the Yugoslav authorities to deal with the accused indicted individuals through the domestic judicial system, rather than subjecting its nationals to international jurisdiction.[81] In November 1998, the President of the Military

[79]M.C. Bassiouni, "From Versailles to Rwanda in Seventy Five Years: The Need to Establish a Permanent International Criminal Court" at 45.
[80]See- G. Mc Donald, "Problems, Obstacles and Achievements of the ICTY" (2004) 2 *Journal of International Criminal Justice*, 558 at 566.
[81]Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 to the UN General Assembly, UN Doc A/54/187 S/1999/846 AS, 25 August 1999. Available at http://www.un.org/ga/54/doc/tpiy.pdf (accessed 24 June 2011).

Court in Belgrade advised the Tribunal that it was conducting an investigation into the cases of Mile Mrkšić, who was a former Serb of the Yugoslav People's Army (JNA), Miroslav Radić, who was a former Serbian army officer, and Veselin Šljivančanin, who was a former Montenegrin officer in the JNA, and requested the Tribunal for a copy of the criminal case file and the evidence against the three accused persons.

The attitude of the Yugoslav states where the atrocities had been committed reflects a common trend that has been highlighted from the beginning of this thesis *that is,* of nationalism and state sovereignty weighing over a need for international criminal justice. The natural reaction of a State would be to insist on dealing with atrocities before its own forums and a deferral to an international tribunal was at this stage of world history unthinkable.

In 1994, the shooting down of the former President of Rwanda— Juvenal Habyarimana's plane precipitated a gruesome cycle of violence in Rwanda. Thousands of Tutsi and moderate Hutu civilians were killed, maimed or displaced. The Security Council acted again under the Chapter VII of the UN Charter and established a new *ad hoc* tribunal, the International Criminal Tribunal for Rwanda (ICTR).[82] It was established on the same considerations as the ICTY and its jurisdiction was concurrent with the national one but it had primacy. The Tribunal for Rwanda was to try the crimes committed in 1994 on the Rwandan territory or on the neighbourhood by the Rwandan citizens. Its seat was decided to be in Arusha.

Unlike the Yugoslav Government which was antagonistic towards the ICTY, the Rwandese Government supported the establishment of the ICTR in principle and as a member state of

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[82]The Statue and the judicial mechanism of the ICTR were adopted by Security Council resolution No. 955 of 1994.UN Doc S/RES/ 955(1994).

the Security Council participated fully in the deliberations on the Statute, as well as the negotiations leading to the adoption of Resolution 955.[83] Rwanda also took the initiative of proposing the establishment of an international tribunal as early as September 1994 before any serious thought or consideration had been made in that direction by other states.[84]

The zeal of the Rwandese Tutsi dominated Rwandese Patriotic Front (RPF) Government to have international prosecutions can be explained by the fact that it was a successor government which had militarily defeated the old Hutu dominated government which was largely responsible for the genocide. It was in the new government's interests that the perpetrators of genocide be tried and nationalist sentiments could not come into play. It is therefore unsurprising that the Rwandese government is only uncomfortable when mention of potential prosecution of RPF genocide suspects is made.

It is also worth noting further that in spite supporting the establishment of the ICTR in principle and participating in the deliberations leading to its establishment, Rwanda as a then member of the UN Security Council voted against Resolution 955 which established the ICTR (while China abstained). The main reason for Rwanda's action was the fact that in proposing for the establishment of an International Tribunal, the Rwandese Government "had envisaged a jurisdiction that would be under its control but would enjoy international judicial assistance and cooperation."[85] It is clear therefore that though there was a novelty in the Rwandese approach of openly and voluntarily requesting for an International Tribunal

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[83]P. Akhavan, "The International Criminal Tribunal for Rwanda: The Politics and Pragmatics" (1996) 90 *American Journal of International Law*, 501 at 504.
[84]P. Akhavan, "The International Criminal Tribunal for Rwanda: The Politics and Pragmatics" at 504.
[85]L. Waldorf, "A Mere Pretence of Justice": Complementarity, Sham Trials, and Victor's Justice at the Rwanda Tribunal"(2009-2010) 33 *Fordham International Law Journal*, 1221 at 1228 *et.seq.*; P. Akhavan "The International Criminal Tribunal for Rwanda: The Politics and Pragmatics" at 505

to prosecute crimes committed on Rwandese territory which was unprecedented, nevertheless the Rwandese had contemplated an International Tribunal under their control. State sovereignty was as such still very much paramount, therefore.

2.7 The Rome conference and the birth of the International Criminal Court

During and after the cold war, scholarly and expert work on international criminal law continued, notwithstanding intransigence by governments. This was majorly by the International Law Commission (hereinafter ILC). Atrocities in Yugoslavia, Rwanda, Cambodia, and elsewhere caused a sudden shift in world opinion towards responses to these atrocities and brought to the fore the need for a permanent international criminal Court. A request was in the circumstances made from the UN General Assembly to the ILC in 1991[86] to draft an international criminal court treaty and then in 1992 to complete this work urgently.

In 1994, the ILC prepared a draft statute for an International Criminal Court which was presented to the General Assembly of the United Nations, which then appointed an *ad hoc* committee [87] to study it and make a report. Following submission of the *ad hoc* committee's report, a preparatory committee was created by the General Assembly and charged with drafting texts for a planned conference of states.

The Diplomatic Conference on an International Criminal Court took place in Rome from 15 June to 17 July 1998 with the participation of 160 states and at 9:00 pm. On 17 July 1998, the final vote of the statute began. The Statute was adopted with 120 in favour, 7 against and 21 abstentions. However, because the way each delegation voted was officially unrecorded,

[86]GA Resolution 4654 (1991).
[87]GA Resolution 49/53 (1994).

there is some dispute over the identity of the seven countries that voted against the treaty.[88] It is certain that the People's Republic of China, Israel, and the United States were three of the seven because they have publicly confirmed their negative votes.[89] India, Indonesia, Iraq, Libya, Qatar, Russia, Saudi Arabia, Sudan, and Yemen have been identified by various observers and commentators as possible sources for the other four negative votes. The Statute was opened for signature the following day and entered into force on 1 July 2002 after the sixtieth ratification. Currently, the ICC has 123 state parties, 34 of which are from Africa, 19 from Asia-Pacific, 18 from Eastern Europe, 27 from Latin America and Caribbean States, and 25 from Western European and other states.[90]

Countries that approached the Statute negotiations were primarily concerned with protecting their sovereignty (and these tended to be the permanent members of the Security Council) and sought a limited Court under the control of the Security Council and from whose jurisdiction their own nationals could be exempted.

Of the eight situations that are currently before the ICC, four arose from self-referrals by Uganda, DRC, CAR and Mali, which are state parties to the Rome Statute. In addition, the Security Council has referred the situation in Darfur, Sudan, and Libya, both of which are non-states parties. On 31 March 2010, Pre-Trial Chamber II granted the Prosecution authorisation to open an investigation *proprio motu* in the situation of Kenya. In addition, on 3 October 2011, Pre-Trial Chamber III granted the Prosecutor's request for authorisation to

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[88]S.E. Smith, "Definitely Maybe: The Outlook for U.S. Relations with the International Criminal Court during the Obama Administration" (2010) 22 *Florida Journal of International Law*, 155 at 160.
[89]S.E. Smith at 160.
[90]As of 9 September 2015.

open investigations *proprio motu* into the situation in Côte d'Ivoire.[91] A detailed analysis of the situations in Uganda, DRC and CAR is set out in Chapter Four.

2.7.1 Self-referrals in the drafting history of the Rome Statute

A. International Law Commission

The early work of the ILC introduced the concept of a 'complaint' which expressly contemplated a complaint by a state party but there was no specific provision for a State to refer crimes on its territory (self-referral).[92] Article 25 of the draft provided that:

> 1. A State Party which is also a Contracting Party to the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 may lodge a complaint with the Prosecutor alleging that a crime of genocide appears to have been committed.
> 2. A State Party which accepts the jurisdiction of the Court under article 22 with respect to a crime may lodge a complaint with the Prosecutor alleging that such a crime appears to have been committed.

According to the ILC commentary on this draft article, the court was envisaged as a facility available to States parties to its statute, and in certain cases to the Security Council.[93] The complaint was to be the mechanism that invoked this facility and initiated the preliminary phase of the criminal procedure. The ILC envisaged such a complaint to be filed by any State party which has accepted the jurisdiction of the court with respect to the crime complained of.[94] In the case of genocide, where the court has jurisdiction without any additional requirement of acceptance, the complainant would be from a contracting party to the Convention on the Prevention and Punishment of the Crime of Genocide and thus entitled to rely on article VI of the Convention (see art. 25, *para.* 1).

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[91]For details on the situations under the ICC, see ICC, "Situations and Cases", available at http://www.icc-cpi.int/EN_MENUS/ICC/SITUATIONS%20AND%20CASES/Pages/situations%20and%20cases.aspx (accessed 27 December 2013).

[92]Draft Statute for an International Criminal Court, 1994. Text adopted by the Commission at its forty-sixth session, in 1994, and submitted to the General Assembly as a part of the Commission's report covering the work of that session.

[93]Yearbook of the International Law Commission, 1994, vol. II (Part Two) at 45.

[94]Yearbook of the International Law Commission, 1994, vol. II (Part Two) at 45.

The ILC also envisaged that resort to the Court by way of complaint should be limited to States parties.[95] This would encourage States to accept the rights and obligations provided for in the statute and to share in the financial burden relating to the operating costs of the court. The commission further noted that in practice the court could only satisfactorily deal with a prosecution initiated by complaint if the complainant is cooperating with the court under part seven of the statute in relation to such matters as the provision of evidence, witnesses, and the like.[96]

B. The *Ad hoc* committee

The *Ad hoc* committee formed to consider and discuss the ILC draft did not suggest any alterations to Article 25.[97] The official report of the debates of the *Ad Hoc* Committee reads: "[S]ome delegations expressed the view that any State party to the statute should be entitled to lodge a complaint with respect to the [core crimes]. However, the view was also expressed that only the States concerned that had a direct interest in the case, such as the territorial State, the custodial State or the State of nationality of the victim or suspect should be entitled to lodge complaints".[98]

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[95]Yearbook of the International Law Commission, 1994, vol. II (Part Two) at 46.

[96]Yearbook of the International Law Commission, 1994, vol. II (Part Two) at 46.One member of the Commission suggested that the Prosecutor should be authorized to initiate an investigation in the absence of a complaint if it appears that a crime apparently within the jurisdiction of the court would otherwise not be duly investigated (this would later become *proprio motu* power under the Rome Statute). Other members however felt that the investigation and prosecution of the crimes covered by the statute should not be undertaken in the absence of the support of a State or the Security Council, at least not at the present stage of development of the international legal system.

[97]Draft Statute for an International Criminal Court Suggested Modifications to the 1994 ILC-Draft (Siracusa-Draft) prepared by a Committee of Experts For Consideration by the United Nations General Assembly Committee on the Establishment of a Permanent International Criminal Court, Second Session, New York, 14-25 August, 1995.

[98]Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court, UN Doc.A/50/22,1995,at 112.

C. Preparatory Committee on the Establishment of an International Criminal Court

The first preparatory committee (also known as Prepcom) session (25 March-12 April 1996) observed that the complaint mechanism set out in article 25 was premised on the right of any State party, under certain conditions, to lodge a complaint with the Prosecutor alleging that a crime "appears to have been committed".[99] Some delegations found this arrangement satisfactory. Others, for different reasons, felt it needed substantial modification.

Some delegations were uneasy with a regime that allowed any State party to select individual suspects and lodge complaints with the Prosecutor with respect to them. This they felt could encourage politicization of the complaint procedure. Instead, according to these delegations, States parties should be empowered to refer "situations" to the Prosecutor in a manner similar to the way provided for the Security Council in article 23 (1). Once a situation was referred to the Prosecutor, it was noted, he or she could initiate a case against an individual. It was suggested, however, that in certain circumstances a referral of a situation to the Prosecutor might point to particular individuals as likely targets for investigation.

Some delegations felt that only those States parties to the statute with an interest in the case should be able to lodge a complaint. Interested States were identified as the custodial State, the State where the crime was committed (self-referral), the State of nationality of the suspect, the State whose nationals were victims and the State which was the target of the crime. Some other delegations opined that the crimes under the statute were, by their nature, of concern to the international community as a whole. They also noted that the jurisdiction of

[99]Summary of the proceedings of the Preparatory Committee during the period 25 March-12 April 1996.

the court would only be engaged if some Government failed to fulfil its obligations to prosecute an international crime; then, in their view, all States parties would become interested parties.

Several meetings were held and at its sixty first meeting, on 3 April 1998, the *Prepcom* took note of the draft organization of work prepared by the Secretariat and decided to transmit it to the Conference. At the same meeting, the *Prepcom* agreed to transmit to the Conference a Draft Statute for the International Criminal Court.[100]

Prepcom in its final draft moved the article on state referrals from Part V of the Draft statute to Part II and it became article 11.Two options were considered:

Option 1

> 11.[A State Party which is also a Contracting Party to the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948] [A State Party [which accepts the jurisdiction of the Court under article 9 with respect to a crime]] may lodge a complaint [referring a [matter] [situation] in which one or more crimes within the jurisdiction of the Court appear to have been committed to] [with] the Prosecutor [alleging that [a crime of genocide] [such a crime] [a crime under article 5, paragraphs [(a) to (d), or any combination thereof]] appears to have been committed] [and requesting that the Prosecutor investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.]]

Option 2

> 11 (1) A State Party [which accepts the jurisdiction of the Court under article 9 with respect to a crime] [that has a direct interest] listed under (a) to (d) below may lodge a complaint with the Prosecutor alleging that [such a crime] [a crime under article 5, paragraphs [(a) to (d), or any combination thereof]] appears to have been committed:
> (a) A State on the territory of which the act [or omission] in question occurred;
> (b) A State of custody;
> (c) State of the nationality of a suspect;
> (d) A State of the nationality of victims.
> (2) A State Party, which, for a crime under article 5, paragraph I, has accepted the jurisdiction of the Court pursuant to article 9 and is a party to the treaty concerned may lodge a complaint with the Prosecutor alleging that such a crime appears to have been committed.
> (3) As far as possible, a complaint shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the complainant State.
> (4) The Prosecutor shall notify the Security Council of all complaints lodged under article 11.

[100]Report of the Preparatory Committee on the Establishment of an International Criminal Court, Document A/CONF.183/2 [incorporating documents A/CONF. 183/2/Add.l of 14 April 1998, Addl/Corr.l of 26May 1998 andAdd.2/Rev.l of 15April 1998] at 12.

Another option considered was:

> 11 (1) A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed, requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.
> (2) As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the complainant State.
> (3) The Prosecutor shall notify the Security Council of all situations referred under this article.

D. Rome Conference

The Rome Conference had before it a draft Statute on the establishment of an International Criminal Court transmitted by the Preparatory Committee in accordance with its mandate. The main organs of the conference, i.e., the Committee of the Whole and the Drafting Committee, began their work soon after the beginning of the conference, in parallel with the plenary. In addition, a multitude of informal working groups and consultations were arranged throughout the conference, all reporting directly or indirectly to the Committee of the Whole.

During the Plenary, there was discussion on referral of complaints by states to the ICC and the delegation from Israel noted that since complaints were to be filed by States, inevitably this would create the possibility that the investigative procedure might be abused for political ends.[101] They further stated that though the danger of politicisation could perhaps not be eliminated entirely, it might be reduced by establishing more stringent criteria for the filing of complaints than were currently proposed in the draft prepared by the International Law Commission.[102] A delegation from Turkey argued that the right to lodge a complaint should be reserved for States and the Security Council, pursuant to Chapter VII of the Charter of

[101]United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome, 15 June - 1 7 July 1998. Official Records Volume II, Summary records of the plenary meetings and of the meetings of the Committee of the Whole at 119.

[102]United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome, 15 June - 1 7 July 1998. Official Records Volume II, Summary records of the plenary meetings and of the meetings of the Committee of the Whole at 119.

the United Nations.[103] In their view, a more liberal system might deter States from becoming parties to the Statute or from accepting the competence of the Court, out of fear of abuses by other States. Other delegations like that of the Swiss suggested that the Prosecutor also be given powers to trigger the jurisdiction of the Court.[104]

During CW discussions, some States proposed that the jurisdiction of the Court should primarily be triggered by States.[105] Many delegations had expressed the view that upon becoming a party to the Statute, a State should automatically accept the Court's jurisdiction over the core crimes.[106] Other States believed that an additional jurisdictional link, such as a declaration, was a precondition to the exercise of jurisdiction. Some delegations called for the consent of one or more of the following: the territorial State, the custodial State, the State of nationality of the accused and the State of nationality of the victim. Some States preferred cumulative consent, while others preferred that the consent of one of the States should suffice. It had also been noted that if the States concerned were not party to the Statute, the Court could exercise jurisdiction with their consent. Some delegations had felt that no additional consent was necessary, but there had been objections to that contention.

Most delegations felt that any State party to the Statute should be able to trigger the Court's jurisdiction, but some delegations thought that only interested States should be able to do so.[107] Some had argued that States not parties should be able to trigger the Court's jurisdiction in exceptional circumstances, while others had felt that that should not be the case. After long discussions, at its 42nd meeting on 17 July 1998 the CW adopted the draft Statute for

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[103]Summary records of the plenary meetings and of the meetings of the Committee of the Whole at 126.
[104]Summary records of the plenary meetings and of the meetings of the Committee of the Whole at 128.
[105]Summary records of the plenary meetings and of the meetings of the Committee of the Whole at 185.
[106]Summary records of the plenary meetings and of the meetings of the Committee of the Whole at 185.
[107]Summary records of the plenary meetings and of the meetings of the Committee of the Whole at 185.

the International Criminal Court.[108] In the draft statute Article 11 became Article 14.It was as follows:

> Article 14. Referral of a situation by a State Party
>
> 1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.
> 2. 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.

The above provision remained unchanged in the final statute adopted in Rome in 1998 and forms the current legal basis for states referring situations to the ICC.

2.8 Self-referral concept post-Rome conference

As already highlighted, the end of the cold war led to a more positive outlook from states towards international criminal law. Efforts at ensuring international justice continued even after Rome but with a marked shift from *ad hoc* tribunals to "internationalised" tribunals. They contained elements of domestic prosecutions and an international process. Below, I will give a brief on these tribunals with a specific focus on the self-referral theme.[109]

- **Special Court for Sierra-Leone**

  Although the conflict in Sierra Leone began in 1991, it was not until mid-2000 that any real moves were made towards accountability. Then in response to a request from the Government of Sierra Leone to the UN Secretary General for assistance in setting up a court to try offences committed in its civil war the Security Council passed Resolution. The Resolution requested that the Secretary General negotiate with Sierra Leone, and recommend further action to the Council. The Secretary General did this, producing the

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[108]Report of the Committee of the Whole, DOCUMENT A/CONF.183/8 at 104.

[109]See generally- R. Winter, "The Special Court for Sierra Leone" and C. Leang and W. Smith, "The Experience of the Extraordinary Chambers in the Courts of Cambodia" in R. Belleli (ed.) *International Criminal Justice: Law and Practice from the Rome Statute to its Review* at 100 and 143 respectively; K. Gibson, "An Uneasy Co-existence: The Relationship Between Internationalised Criminal Courts and Their Domestic Counterparts" (2009) 9 *International Criminal Law Review*, 275.

Report of the Secretary General on the Establishment of a Special Court for Sierra Leone on 4 October 2000.It is worth noting that the establishment of the Special court arose from a request from the Sierra –Leonean government which would be akin to a self-referral.[110]

- **Extraordinary Cambodian Tribunals**

Several atrocities were committed in Cambodia by the Khmer Rouge during the reign of Democratic Kampuchea between 17 April 1975 and 8 January 1979.[111] On 21 June 1997 the Cambodian government sought the assistance of the United Nations in dealing with the said atrocities (akin to a self-referral) .In March 2003 a draft agreement was promulgated. It provided for Extraordinary Cambodian Tribunals, with UN involvement and international personnel. There was disagreement thereafter with Cambodia insisting upon retaining the power to appoint judges, that Cambodian judges would be in the majority, and that the chambers be integrated as part of the Cambodian legal structure while The United Nations, on the other hand, stressed the importance of ensuring that the process that brings those most responsible to justice is one that meets international standards of justice, fairness and due process of law, and has supported the view that this could only be achieved through an international tribunal. It sought guarantees that those indicted would in fact be arrested, a prohibition on amnesties or pardons, the appointment of independent, international prosecutors, and the appointment of a majority of foreign judges. The United Nations and Cambodia negotiated these matters throughout 1999 and

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[110]S. Linton, Cambodia, "East Timor and Sierra Leone: Experiments in International Justice" (2001) *Criminal Law Forum*, 186.
[111]See- H. Hannum, "International Law and Cambodian Genocide: The Sounds of Silence"(1989)11 *Human Rights Quarterly*, 82; K. Railsback, "A Genocide Convention Action Against the Khmer Rouge: Preventing a Resurgence of the Killing Fields" (1990) 5 *Connecticut. Journal of International Law*, 457.

2000 and The United Nations eventually agreed to the establishment of a tribunal under Cambodian law controlled by Cambodians, but with international participation.[112]

- **East Timor**

  In 1999, following a referendum on self-governance, and the announcing of results, violence erupted in East Timor with murders, kidnappings, rape, property destruction, theft of homes and property. The United Nations Transitional Administration in East Timor (UNTAET) was created by Security Council Resolution 1272 (1999) to govern the country until independence later replaced by the United Nations Mission of Support in East Timor, or UNMISET).Part of UNTAET's mandate was to create a criminal justice system and it created an internationalised Special Panels for Serious Crimes.[113]

2.9 Conclusion

This chapter has traced the evolution of international criminal law with a specific focus on aspects of self-referral by states during the evolution. The brief history has clearly shown that states have been reluctant and downright resistant to the idea of voluntarily deferring prosecution of atrocities committed on their territories to international tribunals. There is a natural instinct by states to want to protect their territorial sovereignty which they feel may be compromised by surrendering to international tribunals. This instinct however doesn't preclude these very states from wanting to sit in judgement of other states or individuals from other states which are either perceived or have actually committed international crimes.

The next chapter will analyse in detail the phenomenon of self-referrals under the regime of the Rome Statute. Self-referrals are as of today the main "triggering" mechanism of the

[112]See- S. Linton, Cambodia, "East Timor and Sierra Leone: Experiments in International Justice".
[113]S. Linton, Cambodia, "East Timor and Sierra Leone: Experiments in International Justice".

ICC's jurisdiction, which is somewhat a surprise considering the conclusions above regarding states and sovereignty.

CHAPTER THREE: THE LAW AND PRACTICE OF SELF-REFERRALS

3.1 Self-referrals and the Rome Statute

The enactment of the Rome Statute brought the ICC into a crucial phase of transforming from a legal concept into a fully functioning judicial institution.[114] As one commentator aptly postulated, in earlier experiments with international criminal justice, there was no need to 'trigger' the jurisdiction because the target of prosecution was already defined by the enabling legislation, which left the prosecutor with only the burden of case selection.[115] The Rome Statute was radically different, making provision for three trigger mechanisms to wit referral by a State party which has been discussed above, Security Council referral and lastly the Prosecutor acting *proprio motu.*[116]

3.1.1 Referral by a State party or "State referral"

State referrals under the Rome Statute are dealt with specifically by Article 14 which provides that State parties to the Rome Statute may refer to the Prosecutor for investigation and prosecution any situation in which one or more of the crimes within the Court's jurisdiction have been committed.[117] A state-referral from a territorial government shows an acceptance for the instigation of investigations and prosecutions against all parties involved including the referring government.

Temporal parameters of a situation also require that a commencement date be specified. In

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[114]P. Akhavan, "The Lord's Resistance Army Case: Uganda's Submission of the first State Referral to the International Criminal Court" (1999) *American Journal of International Law,* 403 at 403.
[115]W. Schabas, *An Introduction to the International Criminal Court* at 140.
[116]For further discussion of the triggering mechanisms of the ICC, see generally D.D.N. Nsereko, "Triggering the Jurisdiction of the International Criminal Court" (2004) 4 *African Human Rights Law Journal*, 256 and H. Olásolo, "The Triggering Procedure of the International Criminal Court (2005) 5 *International Criminal Law Review*, 121.
[117]A. Muller and I. Stegmiller, "Self-referrals on Trial from Panacea to Patient" at 1275 *et.seq* dwell on the possibility of a self-referral by the UN Security Council and they dismiss it outright.

practice all referrals have indicated 1 July 2012 as a starting point of the referral which corresponds with the start of the ICC's temporal jurisdiction.[118] A referral should also indicate the geographical scope.[119]

As far as possible, a referral shall also specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.[120] The referral shall be in writing.[121] The crimes need not to be committed in the territory of the referring state or involve its nationals.[122] It suffices that the crimes are committed on the territory of a state party or by a national of a state party.[123] Upon the receipt of a referral, for the purpose of analysing the seriousness of the information received, the OTP may seek additional information from states, organs of the United Nations, intergovernmental and non-governmental organizations, or other reliable sources that he or she deems appropriate, and receive written or oral testimony at the seat of the Court.[124]

The OTP has adopted provisional regulations laying down how referrals will be dealt with.[125] The referral procedure in these regulations substantially has two steps: first, a State

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[118]W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010) at 298. He also raises a fundamental issue of whether referrals should be prospective i.e. for acts committed after the referral as well as retrospective i.e. for acts committed before the referral. A challenge that prospective referrals poses is one of the Prosecutor having a leeway to investigate a situation in perpetuity and use that as an excuse if put to task as to why charges are yet to be filed. There should perhaps be judicial control over the length of time a situation should be before the OTP for investigation.

[119]W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010) at 298.

[120]Rome Statute, Article 14(2). W.Schabas argues that the requirements in Article 14(2) are optional considering that the Ugandan, DRC and Central African Republic referrals were all "rather laconic", but no questions were raised by the ICC. See- W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* at 307.

[121]Rules of Procedure and Evidence,Doc.1CC-ASP/1/3,pp.10-107, Rule 45.

[122]D.D.N. Nsereko, "Triggering the Jurisdiction of the International Criminal Court" at 266.

[123]D.D.N. Nsereko, "Triggering the Jurisdiction of the International Criminal Court" at 266.

[124]Rule 104(2), ICC Rules of Procedure and Evidence.

[125]Annex to the "Paper on some policy issues before the Office of the Prosecutor": Referrals and Communications available at http://www.icc-cpi.int/NR/rdonlyres/278614ED-A8CA-4835-B91D-DB7FA7639E02/143706/policy_annex_final_210404.pdf (accessed 9 September 2013). These regulations were to be provisionally applied, pending completion of the Office regulations.

Party to the Rome Statute refers a specific situation to the Court requesting the ICC Prosecutor to look at the referral documents and thereby "triggers" the Court's jurisdiction[126]; and second, the Court exercises its jurisdiction by commencing investigations into the state-referred situation.

The Information and Evidence Unit in OTP is responsible for receiving, registering, and securing referrals and supporting documents received by the Office of the Prosecutor from the Security Council or a State Party.[127] In the case of a referral, the Head of the Information and Evidence Unit will immediately inform the Prosecutor of the referral and will make electronically available the referral and supporting documents to the heads of the Jurisdiction, Complementarity and Cooperation Division (JCCD), the Investigation Division and the Prosecution Division. Next, the Prosecutor will inform the Presidency of the referral. In a case where a State Party provides a referral in confidence, the Prosecutor will naturally inform the Presidency on condition of confidentiality, until such time as the referring State Party agrees to disclosure. The receipt of the referral shall be acknowledged by the Head of the Information and Evidence Unit or otherwise as directed by the Prosecutor.

The JCCD then undertakes the first phase analysis of the referral wherein issues like jurisdiction, admissibility, interests of justice, and credibility and sufficiency of information are

[126]H. Olasolo, "The Triggering Procedure of the International Criminal Court at 124 has termed this as an "activation request". The guidelines issued by the OTP answer the critical question some authors have raised as to whether a referral is a request, a demand, a suggestion or a directive- It is ultimately more of a request to investigate. See- J.D. Ohlin, "Peace, Security and Prosecutorial Discretion" in C. Stahn and G. Sluiter (eds.) *The Emerging Practice of the International Criminal Court* (2009).
[127]Acknowledgements and responses to referrals shall be sent in a manner that prevents any danger to the safety, well-being and privacy of those who provided the information or others who may be at risk by reason of the information provided.-Regulation 1.3 Provisional OTP regulations on communications and referrals.

looked into.[128] Second Phase analysis by the JCCD entails examining related communications and consider other readily-available information. JCCD may consult with the Prosecution Division and the Legal Advisory Section (LAS), as appropriate. Taking into account the reports and recommendations made pursuant to Regulation 4.5(b), and the analysis conducted by JCCD under Regulation 5.1, the Executive Committee may recommend that the Investigation Division gather information about alleged crimes identified by the referral.

The JCCD then prepare reports summarizing its analyses and submit them to the Executive Committee.[129] JCCD may make recommendations for consideration by the Executive Committee, including inter alia:

(a) That there is no reasonable basis for further analysis;

(b) That further analysis and monitoring under Regulation 5 is required;

Taking into account the reports and recommendations submitted by JCCD and the advice of the Executive Committee, the Prosecutor may determine that there is no reasonable basis for further analysis. The sender will be promptly informed of the decision and the reasons for

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[128]Among the measures available to JCCD in assessing issues of jurisdiction, admissibility and the interests of justice are:
(a) to identify situations to be monitored on an ongoing basis:
(b) to contact the State or States that would normally exercise jurisdiction and seek additional information about inter alia the existence and progress of national proceedings, unless there is reason to believe that such consultations may prejudice the future conduct of an analysis or investigation;
(c) to take appropriate steps to assess the progress of national proceedings relating to crimes within the jurisdiction of the Court;
(d) to seek additional information as appropriate, and establish and maintain contacts with States and organizations for provision of information and cooperation.
JCCD is also responsible for any reports on jurisdiction, admissibility, the interests of justice and any other matter relevant to the determination under article 53. If necessary, JCCD will obtain additional information on the alleged crimes from the Investigation Division and may consult with the Prosecution Division and LAS, as appropriate.

[129]Regulation X of the provisional regulations provides for an Executive Committee comprised of the Chief Prosecutor, the Deputy Prosecutors for Investigation and Prosecution, and the head of the Jurisdiction, Complementarity and Cooperation Division (JCCD). The purpose of the Committee is to render advice to the Prosecutor relating to the ongoing operations of the Office.

the decision and the information shall be archived. Any such decision is provisional and may be reopened in the event that new information is forthcoming.

On the other hand taking into account the reports and recommendations submitted by JCCD and the advice of the Executive Committee, the Prosecutor may determine: (a) That further analysis and monitoring under Regulation 5 is required; or (b) That advanced analysis under Regulation 6 is warranted.

The last phase of analysis is Phase III (Advanced Analysis and Planning involving the ID and JCCD. In this phase, taking into account the reports and recommendations submitted by JCCD and the advice of the Executive Committee, the Prosecutor may authorize or instruct his staff☹a) To seek additional information; (b) To receive written or oral testimony at the seat of the Court;(c) To assess the progress of national proceedings relating to crimes within the jurisdiction of the Court;(d) To prepare reports on jurisdiction, admissibility, the interests of justice and any other matter relevant to the determination under article 53;I To prepare an investigation plan on the situation or the case(s); (f) To take other appropriate measures to facilitate analysis and prepare for possible investigation.

In the event that the Prosecutor directs the preparation of an investigation plan, the Executive Committee shall establish a joint analysis team, comprising members of JCCD, the Investigation Division, and the Prosecution Division. The Investigation Division shall lead the joint analysis team and shall be responsible for preparing the investigation plan. The joint analysis team shall consult with LAS, as appropriate. JCCD will provide input to the investigation plan on the topics within its expertise. If necessary, the Executive Committee will appoint a staff member to coordinate the work performed pursuant to Regulations 6.2 and taking into

account any reports and recommendations submitted by JCCD and the joint analysis team, and the advice of the Executive Committee, the Prosecutor may determine that there is not a reasonable basis to proceed with investigation, in which case the sender will be informed in accordance with Regulation 5.5. Likewise the Prosecutor may decide to initiate an investigation pursuant to article 53 or to seek authorization from the Pre-Trial Chamber under article 15(3) of the Rome Statute.

3.1.2 Self-referral of a "situation" and selection of a "case"

A. Situation referral and preliminary examinations by the OTP

Unlike other means of triggering the jurisdiction of the ICC where the OTP may also have to identify as situation to investigate, in a self-referral the situation is already identified in the referral to the ICC. Article 14 of the Rome Statute provides for referral by a state of a "situation". 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. Pre-trial Chamber I (DRC) has elaborated the characteristics of a situation as follows: ''[s]ituations, which are generally defined in terms of temporal, territorial and in some cases personal parameters, such as the situation in the territory of the Democratic Republic of the Congo since 1 July 2002, entail the proceedings envisaged in the Statute to determine whether a particular situation should give rise to a criminal investigation as well as the investigation as such''.[130]

The word "situation" is intended to minimise prejudicing the ICC by naming individuals too

[130] PTC I, Decision on Applications for Participation in the Proceedings of VPRS-1, VPRS-2, VPRS-3, VPRS-4, VPRS-5, VPRS-6 (_Decision on Applications for Participation_), ICC-01/04-101-tEN-Corr, 17 January 2006, *para.* 65.

early as well as to preserve the independence and autonomy of the ICC in the exercise of its jurisdiction. The word "situation" should therefore not be interpreted in a narrow and restrictive manner that singles out a given party to a conflict or a group nor should it be interpreted to refer to a specific occurrence without regard to its overall context .It is the universe of aggregated potential cases.[131]

After a situation has been self-referred, the Prosecutor is supposed to make a preliminary examination before deciding to commence an investigation.[132]The OTP came up with guidelines in 2013 on how preliminary examinations into situations were to be handled.[133] In summary the OTP was to be guided by the following principles:

i) Independence in accordance with Article 42 but going beyond merely not seeking or acting on instructions. Independence also involving decisions not be influenced or altered by presumed or known wishes of any party, or in connection with efforts to secure cooperation.[134]

ii) Impartiality in accordance with article 21(3). The Office will apply consistent methods and criteria, irrespective of the States or parties involved or the person(s) or group(s) concerned.[135]

iii) Objectivity- In accordance with article 54(1), the Office will investigate incriminating and exonerating circumstances equally in order to establish the truth.

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[131]P.F. Seils, "Making Complementarity Work: Maximising the Limited Role of the Prosecutor" in C. Stahn and M.M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice* (Vol. II) (2011) at 992.

[132]The term "preliminary examination" appears in article 15(6) of the Statute, while article 42(1) provides that the OTP shall be responsible for 'examining' referrals and any substantiated information on crimes within the jurisdiction of the Court.

[133]OTP Policy Paper on Preliminary Examinations, November 2013 available at http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Policy%20Paper%20Preliminary%20Examinations%20%202013.pdf (accessed 14 November 2014).

[134]OTP Policy Paper on Preliminary Examinations at 7.

[135]OTP Policy Paper on Preliminary Examinations at 7.

In addition to the above principles, the OTP is to use statutory requirements in preliminary examinations. These are set out in article 53(1)(a)-(c) of the Rome Statute and are applied at the preliminary examination stage in order to determine whether there is a reasonable basis to proceed with an investigation, based on the information available. The requisite standard of proof of "reasonable basis" has been interpreted by the Chambers of the ICC to require "a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court has been or is being committed"[136]. Accordingly, there must be a reasonable basis to believe that the information fulfils all jurisdictional requirements, namely, temporal, subject-matter, and either territorial or personal jurisdiction.[137]

The other statutory requirement under Article 53 is admissibility and complementarity. Admissibility and complementarity will be discussed in greater detail later in this chapter but it is worth noting that at the preliminary examination stage there is not yet a "case" therefore the consideration of admissibility (complementarity and gravity) will take into account potential cases that could be identified in the course of the preliminary examination based on the information available and that would likely arise from an investigation into the situation. The identification of such potential cases is without prejudice to such individual criminal responsibility as may be attributed as a result of subsequent investigations.[138]

Under Article 53 the OTP will lastly consider interests of justice after the jurisdictional requirements are met. The Prosecutor is not required to prove that an investigation will serve

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[136]Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19-Corr, 31 March 2010, *para*. 35.
[137]OTP Policy Paper on Preliminary Examinations at 9.
[138]OTP Policy Paper on Preliminary Examinations at 11.

the interests of justice. Rather, the OTP would proceed unless there are specific circumstances which provide substantial reasons to believe that the interests of justice are not served by an investigation at that time.[139]

B. Case selection

After the self-referral passes the preliminary examination stage, the OTP initiates an investigation and conclusively determines specific cases to take to trial.[140] Unlike *proprio motu* triggering of jurisdiction, referrals both by states and the UN Security Council give the Prosecutor power to commence an investigation without requiring the authorisation of a Pre-Trial Chamber.[141] The determination of a case after investigations involves the following steps: (i) selecting regions (ii) selecting incidents, (iii) selecting groups, and (iv) selecting individual perpetrators.[142] The Prosecutor has the discretion of deciding who is to be charged, and with what crimes and has come up with a policy on case selection at the ICC in a 2003 OTP policy paper.[143] The criteria developed in this document was reiterated by the Prosecutor in an address to the 2005 informal meeting of legal advisers of ministries of foreign affairs at the UN in New York:

> "One of the most important elements of [the OTP's] strategy is to focus investigative and prosecutorial efforts … on those who bear the greatest responsibility for the most serious crimes .It is simply not feasible to bring charges against all apparent perpetrators. As such,

[139]OTP Policy Paper on Preliminary Examinations at 16.
[140]For further discussion on case selection, See- F. Guariglia, "The Selection of Cases by the Office of the Prosecutor of the International Criminal Court" in C. Stahn and G. Sluiter (eds.) *The Emerging Practice of the International Criminal Court* (2009) at 92.
[141]The Pre-Trial Chamber may only review a decision not to start an investigation. The OTP is obliged to commence an investigation, unless there is reasonable basis not to proceed.
[142]C. Stahn, "Judicial Review of Prosecutorial Discretion: Five Years on" in C. Stahn and G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (2009) at 247–279.
[143]ICC-OTP, Paper on Some Policy Issues 2003. According to Regulation 14 of the Regulations of the OTP 2009 (ICC-BD/05-01-09, available at http://www.icc-cpi.int/Menus/ICC/Legal+Texts+Tooles/ , the OTP can make use of policy papers that reflect the key principles and criteria the office is going to rely on .On 29 February,2016 the OTP issued a new draft Policy Paper on Case Selection and Prioritisation (for comments), its available at https://www.icc-cpi.int/iccdocs/otp/29.02.16_Draft_Policy-Paper-on-Case-Selection-and-Prioritisation_ENG.pdf (accessed 1 March 2016).

we will carry out focused investigations and we will prepare for trial a few cases for each situation. Case selection is carried out through careful analysis based on the principles of objectivity and impartiality, and in accordance with the criteria set out in Article 53 of the Rome Statute. Among the most important criteria is gravity …"[144]

Gravity is one of the complementarity grounds under Article 17 of the Rome Statute but the criterion for determining gravity is not stated. The OTP has adopted the following criterion as relevant in considering gravity: scale, nature, manner of commission and impact of the crimes.[145]I will consider gravity in more detail with discussion regarding its application to five case studies later on in the thesis.

3.2 Self-referrals

Within the ambit of triggering the jurisdiction of the ICC by way of state referrals i.e. ideally a state referring crimes in another state to the ICC, arose a new phenomenon of so-called "self-referrals". Rather than states complaining against other states to the ICC, they instead lodged complaints against themselves hence the terminology "self-referral", "auto-referral"[146] or voluntary referral"[147]. Below I will detail how the phenomenon arose through the office of the ICC Prosecutor.

[144]Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court at the informal Meeting of Legal Advisors of Ministries of Foreign Affairs, 24 October 2005) 5–6 http://www.icc-cpi.int/library/organs/otp/speeches/LMO_20051024_English.pdf .
[145]Regulation 19(2), Regulations of the Office of the Prosecutor, ICC-BD/05-01-09 (entry into force: 23th April 2009) available at http://www.icc-cpi.int/NR/rdonlyres/FFF97111-ECD6-40B5-9CDA-792BCBE1E695/280253/ICCBD050109ENG.pdf (accessed November 10 2014).For further discussion on gravity see- K. Ambos and I. Stegmiller, "Prosecuting International Crimes at the International Criminal Court: Is there a Coherent and Comprehensive Prosecution Strategy?" (2013) 59 *Crime, Law and Social Change*, 415; M.M. de Guzman, "Gravity and the Legitimacy of the International Criminal Court", (2009) 32 *Fordham International Law Journal*,1400; K. Jon Heller, "Situational Gravity under the Rome Statute," in C. Stahn and L. van den Herek (eds.), *Future Directions in International Criminal Justice* (2009).
[146]J. Kleffner, Complementarity in the Rome Statute and National Criminal Jurisdictions (2008) at 213.
[147]OTP Report on the activities performed during the first three years (June 2003–June 2006), 12 September 2006 at 2 and 7 available at www.iccnow.org/documents/3YearReport%20_06Sep14.pdf (accessed 10 March 2010).

3.2.1 The ICC Prosecutor and the phenomenon of self-referrals

The OTP is one of the so-called four judicial organs of the ICC Court provided for in Article 34 of the Rome Statute. The OTP is "a separate organ of the Court" (Article 42 (1)), and has been entrusted with the investigative and prosecutorial functions (Art. 15, 53, 54, 58, 61). It is headed by the Prosecutor who "[has] full authority over the management and administration of the Office", and who is assisted by one or more Deputy Prosecutors (Article 42(2).

The then ICC Chief Prosecutor, Moreno Ocampo in a probably anxious 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.[148] This was in a September 2003 OTP policy paper discussing the complementary nature of the Court and the exceptions to the primacy of state jurisdiction set out in art 17 of the Rome Statute.[149] The OTP stated in the policy paper that:

> There is no impediment to the admissibility of a case before the Court where no State has initiated any investigation. There may be cases where inaction by States is the appropriate course of action. For example, the Court and a territorial State incapacitated by mass crimes may agree that a consensual division of labour is the most logical and effective approach. Groups bitterly divided by conflict may oppose prosecutions at each other's hands and yet agree to a prosecution by a Court perceived as neutral and impartial. … In such cases there will be no question of 'unwillingness' or 'inability' under art 17.[150]

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[148]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.
[149]ICC-OTP, Paper on Some Policy Issues before the Office of the Prosecutor (Policy Paper, September 2003) http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf. (hereinafter "paper on some policy issues").
[150]Paper on Some Policy Issues, at 5.

While the Prosecutor affirmed that *proprio motu* power was a critical aspect of the Office's independence, he nevertheless adopted a policy of inviting and welcoming voluntary referrals by territorial states as a first step in triggering the jurisdiction of the Court.[151]

The use of the words "as a first step in triggering the jurisdiction of the Court", probably suggests that the Prosecutor was keen to have the Court operational and saw self —referrals as the safest and non-controversial way of doing so.

Self-referrals presume a mutuality of interests between the Court and referral state that is conducive to the Prosecutors willingness to initiate proceedings and to the referral state's cooperative disposition toward the Court. This process of institutional change involved a gradual shift from the classical, competitive-based vision of complementarity—protecting the primacy of domestic jurisdiction and confining the Court to a backstopping role—to a positive, consent-based vision of complementarity—advocating consensual sharing of responsibilities and partnership between the Court and domestic jurisdictions.[152] It would eliminate the challenges that the Prosecutor would face in having to initiate proceedings *proprio motu* in respect of situations in a state's territory against its wishes.[153] P. Gaeta suggests in the same vein that the Prosecutor was motivated by the fact that the Court can work effectively only if its intervention is triggered, or at least strongly supported, by the state on whose territory the crimes were perpetrated.[154] She argues that the same may not necessarily be true when the Prosecutor decides to start an investigation by using his *proprio*

[151]Paper on Some Policy Issues, at *5*.
[152]P.M. Bernard, "The Paradox of Institutional Conversion: The Evolution of Complementarity in the International Criminal Court" (2011) 19 *International Journal of Humanities and Social Science*, 203 at 204.
[153]D.D.N. Nsereko, "Triggering the Jurisdiction of the International Criminal Court" at 267.
[154]P. Gaeta, "Is the Practice of 'Self-Referrals' A Sound Start for the ICC?" (2004) 2 *Journal of International Criminal Justice*, 949 at 950.

motu powers.[155] In such a case, it is likely that the territorial state will resist the Court's interference. This is especially true if the Court has determined, contrary to the will of the state that it is unable or unwilling to carry out genuine national proceedings.[156] The Prosecutor on the other hand justified self-referrals with the following statement:

> "Where the Prosecutor receives a referral from the State in which a crime has been committed, the Prosecutor has the advantage of knowing that the State has the political will to provide his Office with all the cooperation within the country that it is required to give under the Statute. Because the State, of its own volition, has requested the exercise of the Court's jurisdiction, the Prosecutor can be confident that the national authorities will assist the investigation, will accord the privileges and immunities necessary for the investigation, and will be anxious to provide if possible and appropriate the necessary level of protection to investigators and witnesses."[157]

The Prosecutor's move to have referrals was in contrast to his earlier stance in 2003 when he had just taken office at which stage he had stated that the number of cases that reach the ICC should not be the benchmark for measuring its success.[158] He further claimed that the absence of cases at the ICC as a result of fully functioning national Courts would be a mark of success for the ICC. This was a policy of so-called proactive complementarity[159] wherein

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[155]P. Gaeta at 950.She concludes that: "the Court has made its first steps in the guise of an institution that can assist states to obtain justice in the face of mass atrocities committed within their boundaries, rather than as an interfering international watchdog against which states have to defend themselves."

[156]P. Gaeta at 950. A. Muller and I. Stegmiller at 1268 similarly argue that in the light of fears of excessive powers for the independent Prosecutor and of politicizing the ICC articulated by a number of states during the Rome Conference, he favoured voluntary referrals by states and expressly endorsed the sovereignty-friendly policy of encouraging self-referrals. Self-referrals also promised better results in the form of enhanced state cooperation.

[157]ICC-OTP, Annex to the 'Paper on Some Policy Issues before the Office of the Prosecutor': Referrals and Communications (Policy Paper, September 2003) http://www.icc-cpi.int/library/organs/otp/policy_annex_final_210404.pdf (accessed 20 March 2010).

[158]L. Moreno-Ocampo, Prosecutor of the ICC, Statement of the Prosecutor to the Diplomatic Corps (Feb. 12, 2004), available at http://www.icc-cpi.int/library/organs/otplLOM-20040212-En.pdf. (accessed 20 March 2010).

[159]See- W. W.Burke-White, "Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice" (2008) 49 *Harvard International Law Journal*, 53; C. Stahn, "Complementarity: A Tale of Two Notions" (2008) 19 *Criminal Law Forum,* 87 and K.A. Marshall,

the ICC would participate more directly in endeavours to encourage national governments to take up prosecutions of perpetrators of international crimes.

The first State to respond to the prosecutor's overtures was Uganda[160], followed by the Democratic Republic of the Congo – DRC[161], and the Central African Republic[162]. These so-called self-referrals saw a marked departure in the relationship between states and international criminal tribunals. It was unique for a state to voluntarily ask for the prosecution of persons for international crimes committed on its territory, rather than assert its sovereign rights and handle the prosecutions itself.

3.2.2 Solicitation of referrals

It is controversial whether the OTP was within its mandate to actively solicit or seek self-referrals. One commentator contends that the ICC Prosecutors role is rather passive and as such he should only act as a recipient of a referral based on Articles 14 and 42(1) of the Rome Statute and Rule 45 of the Rules of Procedure and Evidence.[163] Article 42 (1) provides that the OTP shall only be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court. No express mandate is given to the Prosecutor to actively seek referrals, but he is also not prohibited either expressly from soliciting for referrals. In my opinion the OTP is caught up in a scenario which is created by

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Prevention and Complementarity in the International Criminal Court: A Positive Approach" (2010) *Human Rights Brief*, 21 for a detailed discussion of "Proactive"/ "Positive" complementarity.

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

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

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

[163]C. Kress at 947.

the Rome statute giving him wide investigative and prosecutorial powers.[164] It is a dilemma of what to do about a situation where crimes are being committed, no investigation or prosecution is taking place yet the initiation of a *proprio motu* investigation may be met with resistance by the relevant state.[165] Solicitation of the self-referral would help the Prosecutor by bringing the relevant state on board without any rope-pulling and antagonism.

Article 42(5) of the Rome Statute also expressly prohibits the Prosecutor from engaging in any activity which is likely to interfere with his or her prosecutorial functions or to affect confidence in his or her independence. Independence is a cornerstone of the OTP and it is submitted that by actively seeking referrals from states, he placed the office in an odd situation whereby some states started believing that they deserved something in return from the ICC for helping to kick-start it with referrals(though there was nothing of the kind from the OTP). In the Uganda situation for instance, the ICC and Uganda became more or less bedfellows and Uganda felt that the ICC could move to its whims when it started to unofficially clamour for its referral to be withdrawn. The clamour as will be seen in the discussion on withdrawal of self-referrals was unsuccessful but the fact that a state would have such a thinking in my view places the ICC in an awkward situation.

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[164]The merger of investigative and prosecutorial functions has been criticised as "blur [ring] the distinction between the function of establishing facts sufficient to warrant a prosecution and the objective determination that the investigation shows a prima facie case to be brought before the judge."- S. Rosenne, "Poor Drafting and Imperfect Organization: Flaws to Overcome in the Rome Statute" (2000-2001)41 *Virginia Journal of International law,* 164 at 175.In my opinion the "passive" Prosecutor is only tenable in a scenario where he has purely prosecutorial functions. The Rome Statute also bestows an investigative function and though these functions may get blurred, it is unrealistic to expect the prosecutor not to be pragmatic. A policeman cannot sit back, remain passive and watch while crime is being committed.

[165]A.M. Danner, "Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court" (2003) 97 *American Journal of International Law*, 510 at 510 asserts that: "The ICC Prosecutor sits at a critical juncture in the structure of the Court, where the pressures of law and politics converge."

In light of the above, it is submitted that the OTP should have as a matter of policy, rather than law, avoided actively seeking self-referrals since it seems to erode a measure of independence on the part of his office. At the very least it should in the future clarify and include a disclaimer to both the referring state and other member states that such invitations will not impede its impartiality during both the investigative and prosecutorial stage.[166] W. Schabas contends that self-referrals actually have an "interesting legal consequence of positioning the State Party at the top of the prosecutorial agenda."[167]Whereas self-referrals are perfectly legal and would ordinarily lead to a harmonious, rather than antagonistic relationship between the OTP and the referring state/government, it could have an undesired effect of giving the state the belief that it is to control the investigation and choose who to prosecute.

3.2.3 Self-referrals and nationality

Would non-nationals of a self-referring state be liable to prosecution for international crimes under the Rome Statute committed on the territory of the self-referring state? Normally, non-signatory nationals are not bound by crimes, norms or obligations newly created by a treaty.[168] One might therefore argue that, a non-party national cannot be investigated and prosecuted unless either the suspect's state of nationality accepted the Court's jurisdiction with an Article 12(3) declaration or the Security Council referred the relevant situation to

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[166]C. Kress, "'Self-Referrals' and 'Waivers of Complementarity' Some Considerations in Law and Policy" at 947 holds the same view, arguing that the policy of actively seeking self-referrals as has the danger of inadvertently giving rise to expectations of a *quid pro quo* while the Prosecutor can only promise no more than to do international justice objectively and in a fair manner. Similarly, P. Clark, "Chasing Cases: The Politics of Self-Referral" in C. Stahn and M.M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice* at 1188, argues that substantial pre-referral negotiations between the ICC and states risk at the very least to create an impression that deals have been struck, with the Court having to convince states that referrals are in their political interest.
[167]W. Schabas, *An Introduction to the International Criminal Court* at 150.
[168]Article 34 of the Vienna Convention on the Law of Treaties provides that a treaty does not create either obligation or rights for a third State without its consent. This requirement may be relaxed pursuant to Articles 35 and 36 to allow third parties to be bound by treaty provisions to which they are not a party, but only if the third party has consented to be bound, or accepted a right based on the treaty.

the Court under Chapter VII of the Charter of the United Nations.[169] This interpretation is in line with American pursuit of protection of its own non-Party State nationals from the jurisdiction of the ICC.[170]

It has been conversely argued that Article 12 of the Rome Statute provides an obligation under customary international law and as such does not violate Article 34 of the Vienna Convention, but is instead consistent with Article 38 of the Vienna Convention which provides that nothing in articles 34 and 37 precludes a rule set forth in a treaty from becoming binding upon third States as a customary rule of international law recognized as such.[171]

In my view it is clear from the ordinary meaning of the language of article 12 that the ICC can exercise jurisdiction on a non-state national if the situation from which the case has arisen has been referred to the Court by a State Party or a State not a Party to the Rome Statute which by declaration lodged with the Registrar has accepted the exercise of jurisdiction by the Court with respect to the crime in question. There is no requirement in Article 12 that the state of nationality of the accused be a party to the treaty or accept the jurisdiction of the Court.[172] The absence of such a requirement it has been argued reduces the need for ratification of the treaty by national governments by providing the court with jurisdiction over the nationals of

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[169]See- D.J. Scheffer, "How To Turn the Tide Using the Rome Statute's Temporal Jurisdiction" (2004) 2 *Journal of International Criminal Justice*, 26.
[170]See- J. Stephens, "Don't Tread On Me: Absence of Jurisdiction by the International Criminal Court over the U.S. and other Non-Signatory States" (2005) 52 *Naval Law Review*, 151. He argues that application of obligations against non-signatory parties like the U.S. violates the principles of the VCLT and while there are certain crimes subject to universal customary norms, no customary norm yet exists allowing signatory states to delegate jurisdictional rights to an international criminal authority. He concludes that assuming that a customary norm does exist, the U.S. has cemented its role as a persistent objector to it, a position to which the international community has acquiesced.
[171]Y.S. Kim, "The Preconditions to the Exercise of the Jurisdiction of the International Criminal Court: With Focus on Article 12 of the Rome Statute" (1999) 8 *Journal of International Law and Practice*, 47 at 73.
[172]See- J.J. Paust, "The Reach of ICC Jurisdiction Over Non-Signatory Nationals" (2000) 33 *Vanderbilt Journal of Transnational Law*, 1 at 6.

a non-party state.[173] Generally speaking therefore under Article 12 of the Rome Statute the ICC may exercise jurisdiction over anyone anywhere in the world.

3.2.4 Self-referral by a non-state party?

A plain reading of Article 13(a) of the Rome Statute shows that it reserves the right of referral to States Parties. A look at the drafting history of the Statute shows that the possibility of referrals by states not parties to the Statute was also not discussed before adoption of the Rome Statute. The Report of the Preparatory Committee on the Establishment of an International Criminal Court[174], which formed the basis of the discussions in Rome, referred exclusively to the possibility of referrals by states parties, a principle that found its way into the current articles 13 and 14 of the Rome Statute.

Earlier work by the International Law Commission had also proposed that:

> "… resort to the Court by way of complaint should be limited to States parties. This may encourage States to accept the rights and obligations provided for in the Statute and to share in the financial burden relating to the operating costs of the Court. Moreover in practice the Court could only satisfactorily deal with a prosecution initiated by complaint if the complainant is cooperating with the Court under Part 7 of the Statute in relation to such matters as the provision of evidence, witnesses, etc." [175]

It is however controversial whether States that are not party to the Rome Statute, but have made declarations under article 12(3) of the Rome Statute, are also allowed to refer situations to the prosecutor for investigation and prosecution. D.D.N. Nsereko contends that they can refer provided that they undertake to cooperate under part 9 of the statute and this right

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[173]D.J. Scheffer, "The United States and the International Criminal Court" (1999) 93 *American Journal of International Law*, 12 at 20

[174]Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/CONF. 183/2/Add. 1, at 35-36, 39.

[175]See- Report of the International Law Commission on the Work of its Forty-sixth Session, UN GAOR, 49th Sess., Supp. No. 10, at 89, UN Doc. A/49/10 (1994).

is limited to crimes committed in its territory or by its nationals.[176] Other authors with more compelling reasoning in my view, however contend that such declarations do not amount to referrals. They argue that States not party to the ICC may not make referrals but rather *ad hoc* declarations accepting the ICC's jurisdiction over the Rome Statute's crimes without actually becoming State Parties, thereby allowing the Prosecutor to initiate investigations related to situations in their territory at his discretion using his Article 15 *proprio motu* powers.[177] The procedural framework of Article 12(3) gives non- States Parties the discretion to make a declaration only when in their favour and it also has no consequences if the obligation to co-operate in accordance with Part 9 of the Statute is not complied with.

It is further argued by the contrary school of thought to D.D.N. Nsereko that the drafters of the Statute may have intended the Court to interpret the *ad hoc* declarations in the sense of a situation in question before the Court, but they did not mean for the Court to treat an acceptance of such declarations as analogous to a State Party referral. They rightly conclude that to treat a declaration under Article 12(3) of the Rome Statute in the same way as a state referral would grant third states a privilege that was reserved to States Parties to the Statute and thereby non-States Parties could take advantage of the powers and resources of the ICC "without sharing the burdens and obligations assumed by states parties, such as budgetary contributions and duties of cooperation".[178]

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[176]D.D.N. Nsereko, "Triggering the Jurisdiction of the International Criminal Court" at 266.
[177]S. Williams, "Article 13: Exercise of Jurisdiction", in O. Triffterer (ed.), *Commentary on the Rome Statute* , at 15 and C. Stahn, M.M. El Zeidy, and H. Olasolo, "Developments at the International Criminal Court: The International Criminal Court's *ad hoc* Jurisdiction Revisited", (2005) 99 *American Journal of International Law*, 421 at 425-426 *et. seq*.
[178]C. Stahn, M.M. El Zeidy, and H. Olasolo, "The International Criminal Court's *ad hoc* Jurisdiction Revisited" (2005) 99 *American Journal of International Law*, 421 at 425.

A. Muller and I. Stegmiller[179] approach the problem by distinguishing between Article 12(3) declarations and referrals by states. The note that in the first instance, the said declarations relate to "crimes", not "situations". Secondly, Article 12(3) does not use the term "referral" anywhere, but speaks of accepting the exercise of jurisdiction by the ICC. Thirdly, Article 13 bears the heading "Exercise of jurisdiction", whereas Article 12 covers "Preconditions to the exercise of jurisdiction".[180] They rightly conclude that the two requirements do not operate on the same level and it is mainly for this reason that a declaration under Article 12(3) does not negate the need for one of the Article 13 trigger mechanisms to be present. Therefore while non-States Parties can "send" their "own" crimes to the ICC by virtue of Article 12(3), this is not a referral within the technical meaning of the term under the Rome Statute. Declarations under Article 12(3) give rise to a special legal regime for non-States Parties operating on a level different from the referral regime.

Article 12(3) evokes a strong connotation of "self-submission" of crimes and is also similar to self-referral for both invite the ICC prosecutor to act.[181].It however does not make sense and could even be considered misleading to equate it to a self-referral under Article 14 of the Rome statute.

3.2.5 UN Security Council "self-referral"

A. Muller and I. Stegmiller draw an obvious structural parallel between the state self- referral regime and a referral to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations and Article 13 (b) of the Rome Statute.[182] They argue

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[179]A. Muller and I. Stegmiller, "Self-referrals on Trial from Panacea to Patient" at 1275.
[180]A. Muller and I. Stegmiller, "Self-referrals on Trial from Panacea to Patient" at 1277.
[181]C. Stahn, *The Law and Practice of the International Criminal Court* (2015) at 309.
[182]A. Muller and I. Stegmiller at 1275.

that if self-referrals are understood as instances in which states send their 'own' situations to The Hague, it can be legitimately asked whether the Security Council does not do something similar when it acts within the scope of its primary responsibility for the maintenance of international peace and security under Article 24(1) of the UN Charter to refer situations to the ICC.

3.3 Legality of self-referrals

There seems to be a general consensus among commentators that the Prosecutor's interpretation of the Rome Statute to allow self-referrals is a correct one. C. Kress [183] argues that the evolving practice of self-referrals and possibly one of subsequent waivers of complementarity is firmly grounded in law and commendable as a matter of legal policy.[184] His argument is premised on the view that a consensual burden sharing may be seen as a permissible application of the ICC's complementarity scheme. According to him, the duty of a state to 'exercise its criminal jurisdiction' laid out in the Rome Statute's preamble should not be interpreted too strictly so as to mean investigate, prosecute and punish nationally.[185] Instead, the territorial state should be given another option, namely to refer its situation to the ICC in order to have it investigated internationally, so as to help reach the Statute's aim of ending impunity.

Others note the lack of any provision in the Rome Statute or Rules of Evidence which bars states from making self-referrals.[186] M.M. El Zeidy also refers to the well-established principle of *aut dedere aut judicare,* which gives states the choice to either prosecute or extradite

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[183]C. Kress, "'Self-Referrals' and 'Waivers of Complementarity' Some Considerations in Law and Policy" at 945.
[184]C. Kress at 945.
[185]C. Kress at 945.
[186]See for example, M.M. El Zeidy, *The Principle of Complementarity in the Interna*
Statute at 216 and W. Schabas, "Complementarity in Practice, Some Uncomplimentary Thoughts" at 17.

an alleged perpetrator, and argues that in the case of the ICC, the choice would be that the State either prosecutes a perpetrator, extradites him to another State that is willing to prosecute or surrenders him to the Court.[187] According to him, this renders a self-referral compatible with the spirit of the Statute.[188]

J. Stigen grounds the legality of self-referrals on the fact that under international law states may waive the requirement that local remedies be exhausted before having recourse to international tribunals.[189] He cites *Cesar Chaparro Nivia and Vladimir Hincapie Galeano v. Colombia* judgement where it was held by the Inter American Court of Human Rights that: "Under generally recognized principles of international law and international practice, the rule which requires the prior exhaustion of domestic remedies is designed for the benefit of the State, for that rule seeks to excuse the State from having to respond to charges before an international body for acts imputed to it before it has had the opportunity to remedy them by internal means. The requirement is thus considered a means of defence and, as such, waivable, even tacitly." [190] In light of this a self-referral can be viewed as a waiver of the requirement under the Rome Statute that a state first exhausts the possibility of domestic prosecutions of international crimes before seeking recourse at the ICC.

Some commentators like A.H. Mahnoush and W.M. Reisman however argue that the Rome Statute places on the Court, rather than individual state parties, the right to determine whether the latter are unwilling or unable to investigate or prosecute,[191] and that this power

[187]M.M. El Zeidy, at 217.
[188]M.M. El Zeidy, at 221.
[189]J. Stigen, *The Relationship between the International Criminal Court and National Jurisdictions* (2008) at 247.
[190]Case 11.026, Report No.30/99, OEA/Ser.L/V/II.95 Doc. 7 rev. at 83 (1998).
[191]A.H. Mahnoush and W.M. Reisman, "The Law-In-Action of the International Criminal Court" at 387.

would be removed from the Court were self-referrals permitted.[192] In further support of their argument, they point to the Statute's emphasis on state participation in combating impunity for international crimes, and cite the Statute's precise and detailed nature as indicating that it was not intended to be subject to wide judicial interpretation.[193]

A look at the drafting history of the Rome Statute could perhaps settle the debate on the legality of self-referrals. It is contentious as to what the drafters of the Rome Statute envisaged a referral by a state against another state or otherwise.[194] According to W. Schabas[195], the drafting history of article 14 of the Rome Statute "leaves little doubt that what was considered was a 'complaint' by a State party *against* another State" and therefore self-referrals are based on a "novel interpretation of Article 14 of which there is not a trace in the *travaux préparatoires*." The drafting history of Article 14, however, makes no direct or implied reference of the drafters having contemplated a complaint by a State party *against another state*. The draft Article 25 with a heading "Complaint by State" which was presented by the 1998 preparatory Committee made provision for a state party to "lodge a complaint" (which in the Rome Statute became "refer a situation") but made no mention of such complaint having to be *against another state*.[196]

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[192]A.H. Mahnoush and W.M. Reisman, "The Law-In-Action of the International Criminal Court" at 390.
[193]A.H. Mahnoush and W.M. Reisman, "The Law-In-Action of the International Criminal Court" at 386 *et. seq*.
[194]It would be however a good assumption that the drafters thought that there would be a higher likelihood of a state complaining against another state rather than itself given the historical trend of states wanting to protect their sovereignty.
[195]W. Schabas, "Complementarity in Practice, Some Uncomplimentary Thoughts" at 12; A.H. Mahnoush and W.M. Reisman at 386 *et.seq* share a similar view, asserting that "[t]here is no indication that the drafters ever contemplated that the Statute would include voluntary state referrals to the Court of difficult cases arising on their own territory".
[196]The draft article is reproduced in M.C. Bassiouni, *The Legislative History of the International Criminal Court: An Article -by-Article Evolution of the Statute* at 132.

The draft Article 25 was discussed by the 1995 *ad hoc* committee and there was a view expressed that only the states concerned that had a direct interest in the case, such as the *territorial state,* the custodial state or the state of the nationality of the victim or suspect should be entitled to lodge complaints to avoid the substantial costs involved in investigating frivolous, politically motivated or unsubstantiated complaints.[197] This created two camps with one favouring limiting referrals to interested states while the other camp preferred a *carte blanche* approach where any state could refer a situation to the ICC.

Subsequently, the above divergent positions appeared in the draft texts prepared by the Preparatory Committee. The draft text on state party referrals, forwarded to the Rome Conference gave options that would either would allow referrals only by states with a "direct interest", defined as "(a) a *State on the territory of which the act [or omission] in question occurred*; [emphasis mine]; (b) a State of custody; (c) a State of the nationality of a suspect; (d) a State of the nationality of victims"[198] or referrals by any state party, without such restrictions. The restrictive proposals that limited referrals to interested states were subsequently rejected and strongly opposed by those who believed that the crimes under the ICC Statue are by their very nature of concern to the international community as a whole.[199] The final text of the Rome Statute therefore provided for *any state* making a referral to the ICC without restriction on it having to have an interest in the situation being referred.

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[197]M.C. Bassiouni, *The Legislative History of the International Criminal Court: An Article-by-Article Evolution of the Statute* at 133.
[198]United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome, Official Records, Volume III, A/CONF.183/13 (Vol. Ill), 15 June-17 July 1998.
[199]Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. 1 (Proceedings of the Preparatory during March –April and August 2006) at 34.

The fact that in the drafting history of the Rome Statute a narrow interpretation which could have limited state referrals to only interested states was rejected, shows that the drafters intended "State Party" to have the widest possible meaning and there would be no justification for excluding a territorial state from making a referral.[200] Such a restriction would in my view make international crimes only of concern to states other than a territorial state. It can therefore be safely concluded that self-referrals are firmly grounded in law.

The intentions of the drafters of the Rome Statute have over time been over-ridden by the expectations of commentators who never envisaged states self-referring situations to the ICC. Commentators like W. Schabas[201] therefore appear to have imposed their expectations on the drafters of the Rome Statute and blurred what the exact intentions of the drafters were. Much of the literature on the subject of self-referrals today safely concludes that they were never contemplated by the drafters of the Rome Statute (see chapter one of this thesis), yet the drafting history clearly shows that they were not excluded. Without careful study of the drafting history of the Rome Statute, one would easily be misled by the common thread presented by most commentators that self-referrals were not contemplated.

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[200]P. Akhavan, "Self-Referrals before the International Criminal Court: Are States the Villains or the Victims of Atrocities?" (2010) 21 *Criminal Law Forum* ,103 at 104 makes a compelling defence of self-referrals ,arguing that states are sometimes the victims rather than the villains, and restricting Article 14 to referrals by third States may render that basis for triggering the jurisdiction of the ICC largely futile. He also notes that the proliferation of powerful insurgencies, terrorist groups, and criminal organizations, has challenged the primacy of the once untouchable State in the global order.

[201]W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010) at 309 (He argues that "self-referrals are an invention of the Prosecutor").Similar arguments are presented in W. Schabas, "Complementarity in Practice: Creative Solutions or a Trap for the Court?" in M. Politi and F. Gioia (eds.), *The International Criminal Court and National Jurisdictions* (2008) 25 at 48; W. Schabas and S. Williams, "Article 17" in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, *Observers Notes, Article-by-Article* 605 at 625; W. Schabas, "Prosecutorial Discretion and Gravity" in C. Stahn and G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (2009) at 46.

3.4 Possible dangers arising from self-referrals and criticism

Authors have invariably levelled criticism on self-referrals and also warned of possible dangers arising there from. C. Kress notes that there are two possible dangers that may arise from self-referrals.[202] First, in states in which civil war is taking place, it may be that a state's request for an investigation is chiefly motivated by the wish to expose internationally the crimes allegedly being perpetrated by the other side.[203] By requesting ICC intervention, that state could be using the Court as a political weapon in the hope that its intervention could assist it in achieving its domestic political and military aims.[204] W. Schabas likewise contends that when a State is actively engaged in initiation of the prosecution process, there is potential for manipulation. "In effect, the state quite predictably uses the international institution to pursue its enemies."[205]

The second danger which is noted is that it is likely to be difficult to achieve the full cooperation of the referring state in cases where the state is torn apart by an internal conflict.[206] In such circumstances, the government authorities may well be prepared to cooperate when the crimes investigated have been allegedly committed by the opposing side; in contrast, it is unlikely that they will be fully cooperative in the investigation of crimes perpetrated by state agents.[207]

He concludes with a word of caution that although self-referrals may not give rise to legality concerns, there may be a temptation for a 'selective or asymmetrical self-referral' where the

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[202]C. Kress at 946.
[203]C. Kress at 946.
[204]C. Kress at 952.
[205]W. Schabas, ''Complementarity in Practice: Some Uncomplimentary Thoughts" at 16.
[206]C. Kress at 946.
[207]C. Kress at 946.

de jure government is itself party to an internal armed conflict.[208] He argues that in the situation in Northern Uganda, the ICC Prosecutor was aware of the problem and thus interpreted the reference to mean the 'situation concerning the Lord's Resistance Army' as covering 'crimes within the situation of northern Uganda by whomever committed'.[209]

W. Schabas notes another danger of the self-referral system to be encouraging states to defer to the ICC rather than to assume their responsibilities. According to him, the self-referral sends a troubling massage that States may decline to assume their duty to prosecute by invoking the provisions of Article 14 of the Rome Statute and self-referring situations.[210]
W. W. Burke-White describes this scenario as a "free rider problem"[211] wherein states on whose territory international crimes occur decline to prosecute allowing the ICC to carry the financial and political burden of prosecution. W. Schabas also argues that "these "flawed sophomoric experiments" [212][self-referrals] present a "trap" for the Court[213], which "distort[s] the proper role of the Court"[214], and he concludes with the hope that the Court will "grow out of this phase"[215].

My next chapters in the thesis will critically analyse if the above dangers have come to pass or if the writers were mere false prophets of doom.

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[208]C. Kress at 947.
[209]C. Kress at 947.
[210]W. Schabas, *An Introduction to the International Criminal Court* at 151.
[211]W.W. Burke-White, "Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice" (2008) 49 *Harvard International Law Journal*, 62.
[212]W. Schabas, ''Complementarity in Practice: Some Uncomplimentary Thoughts" at 33.
[213]W. Schabas, "Complementarity in Practice: Creative Solutions or a Trap for the Court?" at 22.
[214]W. Schabas, "Prosecutorial Discretion *v.* Judicial Activism at the International Criminal Court" at 761.
[215]W. Schabas, "The Rise and Fall of Complementarity", in C. Stahn and M.M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice* (2011) at 65.

3.5 Complementarity, admissibility and self-referrals

This segment of my thesis will analyse how self-referrals fit into the larger context of complementarity and admissibility before the ICC.

3.5.1 Complementarity

The term complementarity is neither found nor defined in the Rome Statute. Article 1 of the Rome Statute however provides that the ICC's jurisdiction 'shall be complementary to national criminal jurisdictions'.[216] Due to lack of a clear definition, the OTP in April 2003 commissioned a group of experts to prepare a reflection paper on the potential legal, and policy and management challenges which are likely to confront the OTP as a consequence of the complementarity regime of the Statute. The group of experts came up with an informal expert paper on the principle of complementarity in practice.[217]

The expert paper summarised the complementary regime as:

> "…recogniz[ing] that States have the first responsibility and right to prosecute international crimes. The ICC may only exercise jurisdiction where national legal systems fail to do so, including where they purport to act but in reality are unwilling or unable to genuinely carry out proceedings." [218]

Further, that it is based:

> "…both on respect for the primary jurisdiction of States and on considerations of efficiency and effectiveness, since States will generally have the best access to evidence and witnesses and the resources to carry out proceedings. Moreover, there are limits on the number of prosecutions the ICC, a single institution, can feasibly conduct."[219]

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[216]Paragraph 10 of the Preamble of the Rome Statute re-echoes the complementary nature of the ICC.
[217]ICC OTP Informal expert paper: *The principle of Complementarity in Practice* (2003), ICC-01/04-01/07-1008-AnxA 30-03-2009 1/37 CBT.
[218]ICC OTP Informal expert paper: The Principle of Complementarity in Practice at 3.
[219]ICC OTP Informal expert paper: The Principle of Complementarity in Practice at 3.

Essentially complementarity entails the international jurisdiction of the ICC not replacing national jurisdiction but simply supplementing it (or supplanting it if it defaults).[220] The complementarity principle is intended to preserve the ICC's power over irresponsible States that refuse to prosecute those who commit heinous international crimes. It balances that supranational power against the sovereign right of States to prosecute their own nationals without external interference. The initial duty and onus lies with the domestic legal orders and the ICC only comes in when the signatory state is either unwilling or unable to prosecute and if the case or situation is of sufficient gravity.[221]

How then do self-referrals fit into the complementarity regime of the ICC? By self-referring a situation to the ICC, a state in effect gives up or waives the primacy of its jurisdiction bestowed by the Rome Statute. Some commentators have also suggested that there is an automatic "waiver of complementarity" after the referral.[222] Kress contends that a self-referral to the ICC may be followed by a "waiver of complementarity", in that a deliberate

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[220]Charter of the United Nations (opened for signature 26 June 1945, entered into force 24 October 1945), Article 2(7) and 2(1) gives states "sovereign equality" and protects them from interference in matters which are essentially within the domestic jurisdiction of any state. This would include the right to prosecute the perpetrators of crimes committed within their borders.

[221]For further analysis of the principle of complementarity, see- J.K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (2008); J. Stigen, *The Relationship Between the International Criminal Court and National Jurisdictions* (2008), 199-201 and 246-250; M.M. El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (2008); J.K. Kleffner, "Auto-referrals and the Complementary Nature of the ICC" in C. Stahn and G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (2009) at 41; C. Stahn, "Complementarity: A Tale of Two Notions" 19 *Criminal Law Forum* (2008) 87 at 111 *et. seq.*

[222]For example, C. Kress at 947. M.M. El Ziedy has defined a "waiver of complementarity" as "an idiom which describes a factual situation which occurs when a state refrains from initiating domestic proceedings or explicitly conveys an intention to that effect"- M.M. El Ziedy, *The Principle of Complementarity in the International* at 213. He further expounds at 247 that a waiver of complementarity is generally understood to entail the referring State having the possibility to waive admissibility and as such based on this assumption, a waiver may take place without a self-referral and vice versa. He further gives two main implications of waiving admissibility: First, a State refrains from raising issues related to admissibility and in actual fact does not contest admissibility. Second, in response, the Court may or may not make an explicit determination on admissibility depending on the stage of the proceedings. In his view a waiver may also be understood in a much broader manner *i.e.* A State initially deciding to renounce its jurisdiction in favour of the ICC by

abstention from initiating a national investigation means that international proceedings are admissible against the passive state for the simple reason that the case is not being investigated or prosecuted. It is my contention that the use of the term "waiver of complementarity" in this respect is a misnomer given that when the territorial state fails to act and the ICC comes in, this is still the principle of complementarity at play.[223] All the territorial state possesses is the *initial* onus to prosecute, better known as primacy, which if waived cannot amount to a waiver of complementarity.[224]

Another commentator suggests that the inherent waiver of primacy in a self-referral goes against Paragraph 4 of the Rome Statute's preamble, which affirms that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.[225] He contends that the use of the verb "must" coupled with the phrase "at the national level" leaves no doubt that the preamble imposes a positive obligation to ensure effective prosecutions at the national level.[226] It is submitted that this restrictive interpretation is flawed and goes against the spirit of the Rome Statute which is to put an end to impunity. "Taking measures" at a national level should in my view

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referring its own situation is actually waiving its primacy over the situation (waiver to exercise jurisdiction as a direct consequence of a self-referral).

[223]C. Stahn, *The Law and Practice of the International Criminal Court* at 309 posits that nothing promotes complementarity quite like a self-referral, if complementarity is to be understood as the ICC acting in the place of national prosecutions.

[224]This was affirmed in *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecutor's Application for a Warrant of Arrest, ICC-01/04-01/06-1-US-Exp-Corr, at *para.* 35, wherein the Pre-Trial Chamber held that self-referrals appear "consistent with the ultimate purpose of the complementarity regime". My argument is further buttressed by M. Benzing who postulates that if one reads the complementary principle as a safeguard of national sovereignty then it is indeed convincing to argue that a state by declining to exercise that right, under general international law, may waive its primacy and so enable the Court to act. See- M. Benzing, "The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity" 7 *Max Planck Yearbook of United Nations Law*, 591 at 630.

[225]M.M. El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* at 218.

[226]M.M. El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* at 218.

not be myopically equated with prosecutions before national Courts. In the instance of a self-referral, by that very action the referring State will have "taken a measure" at the national level to ensure effective prosecution (in this regard before the ICC) and it would not have gone against the aspirations of the Rome Statute.

Waivers of complementarity, whether explicit or implied are also not provided for in the Rome Statute. Article 17 does not distinguish between various forms of referrals with regard to their admissibility or make provision for so-called waivers of complementarity in a self-referral. Paragraph 1 simply provides that "the Court shall determine that a case is inadmissible" in the described situations. Neither does article 53 indicate that the admissibility criteria should not apply when there is a self-referral.

Based on the above discussion, it is submitted that admissibility requirements and complementarity wholly apply to self-referrals. The Court as such will also have the authority, under article 19(1), to determine the admissibility on its own motion.[227] The fact that the state may have waived its right while making the self-referral to invoke the admissibility provisions does not alter statutory requirements, but it may be a factor looked into when the Court is determining admissibility.

3.5.2 Admissibility and self-referrals

Admissibility is the criterion which enables the determination, in respect of a given case[228], whether it is for the national jurisdiction or for the Court to proceed. It can be regarded as a

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[227] J. Stigen, *The Relationship between the International Criminal Court and National* Jurisdictions (2008) at 248.

[228] H. Olasalo, *Essays on International Criminal Justice* (2012) at 26 *et.seq.* however argues that admissibility determinations should extend to a situation and should not be limited to cases. He is of the view that Article 17 only refers to admissibility assessment of cases and not situations because the article was drafted before the distinction between a case and a situation was fully introduced. Articles 15 and 18 which introduce the notion

tool allowing the implementation of the principle of complementarity to a specific scenario.[229] In making this determination, the Court is guided by Articles 17, 18 and 19 of the Rome Statute.

The cornerstone of admissibility determinations is Article 17(1) of the Rome Statute which provides that:

> "a case is inadmissible before the Court where:
> (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, *unless* the State is unable or unwilling to carry out the investigation or prosecution;
> (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, *unless* the decision resulted from the unwillingness or inability of the State [...]"
> c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;

Early jurisprudence on Article 17 suggested that it provided a two-step process in the determination of admissibility. These two prongs of the complementarity test were that the state

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of a situation were only agreed upon hours to the end of the Rome Conference and there was no time to adjust Article 17.The second basis for his argument is that Article 18 dealing with "preliminary rulings regarding admissibility" refers to situations, an indication that the admissibility criterion in Article 17 must be applied to situations. Thirdly he argues that Article 53(1) (b) and Rule 48 of the Rules of Procedure and Evidence require admissibility assessments to be conducted during preliminary examination before an investigation is initiated. This can only refer to the situation phase since cases only arise after an investigation has been conducted. An example to back this argument is the preliminary examination the OTP did conduct into the situation "with respect to the 31 May 2010 Israeli raid on the Humanitarian Aid Flotilla bound for [the] Gaza Strip." referred to the ICC by the Union of the Comoros. The OTP in a statement on 6 November 2014 announced that the potential case(s) likely arising from an investigation into this incident would not be of "sufficient gravity" to justify further action by the ICC-See Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on concluding the preliminary examination of the situation referred by the Union of Comoros: "Rome Statute legal requirements have not been met" available at http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-06-11-2014.aspx (accessed 14 November 2014).See further M.M. El Zeidy, *The Principle of Complementarity in International Criminal law: Origin, Development and Practice* (2008) at 159 and 161.

[229] *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecutor's Application for a Warrant of Arrest, *para.* 34. For further discussion on admissibility, see B. Batros, "The Evolution of the ICC Jurisprudence on Admissibility" available at http://ssrn.com/abstract=1537605 ; D. Robinson, "A Response to William Schabas and a Reflection on Discursive Assumptions: One Vision or Many?" available at http://ssrn.com/abstract=1640263 (both accessed 20 March 2010).

must be “unwilling or unable genuinely” to investigate or prosecute.[230] It is controversial as to whether Article 17 provides a two- step process of analysing admissibility of a case or the criterion is strictly inability or unwillingness on the part of the state where the crimes are committed.[231]

Some commentators have met the above strict interpretation with derision, calling it the “slogan version” of complementarity.[232] D. Robinson argues that unlike the slogan version, the actual heading of Article 17(a) is composed of more than the famous “slogan” two prongs of unwillingness and inability.[233] Fifteen other words *i.e.* “The case is being investigated or prosecuted by a State which has jurisdiction over it” arise before the unwilling/unable exception. The fifteen words explicitly require that the case is being investigated or prosecuted by a state if it is to be rendered inadmissible and it therefore follows that if no state is investigating or prosecuting the case, then this heading cannot be satisfied, and the case cannot be rendered inadmissible before the ICC under this heading.[234] The same author cites the negative language used in article 17 *i.e.* “a case is inadmissible” to argue that if

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[230]See-for example, 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 at 1106, who asserts that “Pursuant to Article 17(1) of the Statute, a State’s ‘unwillingness’ or ‘inability’ are the factors triggering the admissibility of a case once a situation has been referred to the ICC”; W. Schabas, “The International Criminal Court Five Years on: Progress or Stagnation? Prosecutorial Discretion v. Judicial Activism at the International Criminal Court (2008) 6 *Journal of International Criminal Justice*, 731 at 757.
[231]See for example, J. Martin, “The International Criminal Court: Defining Complementarity and Divining Implications for the United States” (2006) 4 *Loyola University Chicago International Law Review* 107, at 107; H.A. Moy, “The International Criminal Court’s Arrest Warrants and Uganda’s Lord’s Resistance Army: Renewing the Debate over Amnesty and Complementarity” (2006) 19 *Harvard Human Rights Journal* , 267 at 273; 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 at 1106.
[232]For example, D. Robinson, “A Response to William Schabas and a Reflection on Discursive Assumptions: One Vision or Many?” Electronic copy available at: http://ssrn.com/abstract=1640263 and D. Robinson “The Mysterious mysteriousness of Complementarity” (2010) *Criminal Law Forum*, at 5.
[233]D. Robinson, “A Response to William Schabas and a Reflection on Discursive Assumptions: One Vision or Many?” at 20.
[234]D. Robinson, “A Response to William Schabas and a Reflection on Discursive Assumptions: One Vision or Many?” at 20.

none of the conditions rendering a case inadmissible is met, then it's automatically and logically admissible.[235]

The absence of state action has come to be termed as "inaction" or "inactivity" which renders a case admissible. In essence when a state makes a self-referral, it's a classic case of inaction since its expressly declaring that it has chosen not to take any action on international crimes and requests the ICC to come in and investigate.[236]

After critical study of Article 17 of the Rome Statute, I am in agreement with scholars who contend that inaction can render a case admissible. Article 17 (1) (a) provides that *a case is inadmissible before the Court where the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unable or unwilling to carry out genuine investigations or prosecutions.* It follows naturally and logically from reading the text of this article that where the case is not being investigated or prosecuted (so-called inaction), it will be admissible. It will also be admissible where the State is carrying out investigations or prosecutions but these have proved not to be genuine as a result of inability or unwillingness to carry out genuine investigations or prosecutions. It is therefore unfortunate that inability

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[235]D. Robinson "The Mysterious Mysteriousness of Complementarity" at 4.According to M. Benzing in "The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight Against Impunity" at 600, the drafting of this provision in a negative form "does not *per se* create a presumption, in the technical sense of the word, in favor of inadmissibility".

[236]This was envisaged in the 2003 OTP expert policy paper on complementarity wherein the experts stated at 18 that: " There may even be situations where the admissibility issue is further simplified, because the State in question is prepared to expressly acknowledge that it is not carrying out an investigation or prosecution". They conclude at 20 that: "Article 17 clearly provides for admissibility where a State is not investigating or prosecuting, and the express acknowledgement of the State merely simplifies the factual determination". The paper goes on to state that a self-referral does not affect the primacy of any other State that wishes to investigate or prosecute. Thus, for example, even if a territorial State agreed to non-exercise of jurisdiction over certain crimes in favor of ICC prosecution, other States would remain entitled to investigate and prosecute on other jurisdictional bases (active nationality, passive nationality, universal jurisdiction) and admissibility could accordingly be challenged by such States or by the accused. It further notes that it would therefore be prudent for the ICC to consult with interested States before forming such arrangements.

or unwillingness to carry out genuine investigations or prosecutions have wrongly become accepted as the *sine qua non* for admissibility.

In trying to fit self-referrals in the admissibility requirements of the Rome Statute, it has been suggested that self-referrals bring a new dimension of possible uncontested admissibility.[237] It is however controversial whether a state self-referring a situation to the ICC will have given up or waived its right to challenge the admissibility of a case arising therefrom. J. Stigen[238] argues that international law in general recognises states' rights to expressly or implicitly waive their rights and the Rome Statute does not expressly allow or prohibit such a waiver. He further argues that a self-referral should not be viewed as an automatic waiver of admissibility which in his view would be inconsistent with the purpose of the Rome Statute. He concludes that self-referring states should retain the right to challenge admissibility of any case within a situation they have referred to the ICC. J. Kleffner[239] is of the same view. He argues that since it was the self-referring state's intention to have the ICC, rather

[237]F. Lattanzi, "Concurrent Jurisdictions between Primacy and Complementarity" in R. Bellelli, *International Criminal Justice: Law and Practice from the Rome Statute to its Review* (2010) at 204 argues that in the case of a self-referral the territorial or national state itself gives an assessment of its own inability-when unwillingness is not in question, otherwise it would not have referred the situation to the Court. There is therefore a presumption of "relative" admissibility.
[238]J. Stigen, *The Relationship Between the International Criminal Court and National Jurisdictions. The Principle of Complementarity* at 248 *et.seq.* He argues as well that viewing a self-referral as an automatic waiver would be inconsistent with the purpose of the Rome Statute for the following five reasons: First, although it might accelerate the work of the Prosecutor, preventing the state from invoking the inadmissibility criteria in good faith would only increase the risk that the ICC duplicate genuine national proceedings. Second, the admissibility criteria address not only the sovereignty concerns of states but also the concerns of the world community and the individual. Although the right of the person concerned to challenge the admissibility would remain unaffected by a waiver, and although the Prosecutor remains under an obligation to always consider the admissibility, the state should retain the competence to challenge it, absent an express waiver. Third, if the self-referring state wishes to waive its right to challenge the admissibility, it may do so expressly, even at the request of the Prosecutor. It therefore seems illogical to interpret a referral as implying an *ipso facto* waiver, absent clear indications to that effect. Fourth, if self-referrals are to represent consensual approaches, as envisaged by the ICC Prosecutor, a state which wishes to challenge the admissibility of a given case should not be met with the argument that it has waived its right ipso facto when it made the referral. Fifth, if self-referrals were viewed as automatic waivers, it might discourage states from making them.
[239]J.K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (2008) at 219.

than itself, to carry out the investigation and prosecution with regards to the referred situation, it is highly unlikely this state would be inclined to subsequently challenge the admissibility of a case arising out of the situation but this possibility cannot be completely ruled out, for instance in cases where the situation has changed subsequent to the self-referral.

M.M. El Zeidy[240], on the other hand argues that a self-referring state would in fact be waiving admissibility and its primacy to exercise jurisdiction over the situation in question. He offers no convincing explanation for such an assertion save for saying that by self-referring a situation, a state refrains from initiating domestic proceedings and expressly communicates its intention to that effect. Refraining from instituting proceedings is one of the permissible grounds enshrined under the Rome Statute for the Court to assume jurisdiction.

The above debate can only be settled by examining ICC jurisprudence from the three self-referred situations presently before it. This will be handled in the next chapters of this thesis.

3.6 Withdrawal of self-referrals

Within the context of the Uganda situation arose controversy over whether a state that has referred a situation to the ICC can "self-defer" or withdraw the referral. Withdrawal of a referral would literally mean a state that has made a self-referral choosing to take it back for various reasons. This debate was largely due to statements that emanated from Uganda suggesting it wanted to withdraw its referral following a peace agreement with LRA rebels.[241]

However, neither the Rome Statute nor the Rules of Procedure and Evidence make provision

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[240]M.M. El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* at 213.
[241]See- Chapter Four of this thesis for further discussion of the Uganda situation.

for the unilateral withdrawal of a referral. Herein under are discussed some of the arguments which may possibly be raised by a state seeking to self-defer. It will later on be analysed if these would stand legally.

3.6.1 Possible Grounds for withdrawal of a referral

A. The Concept of state sovereignty

The first basis for withdrawal would be that it is an exercise of a states sovereign rights. The sovereignty and equality of states represent the basic constitutional law of the law of nations.[242] 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 instrumentalities and jurisdiction to adjudicate *i.e.* power to settle legal disputes through binding decisions or to interpret the law with binding force.[243]

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 relative and no subject is irrevocably fixed.[244] One of these matters, as already stated in the preceding paragraph, is

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[242] I. Brownlie, *Principles of Public International Law* (7th edn.) (2008) at 289.
[243] A. Cassese, *International Law* (2nd edn.) (2005).
[244] I. Brownlie at 292. Further discussion of the concept of State sovereignty can be found in G. Kor, "Sovereignty in the Dock" in J.K. Kleffner and G. Kor (eds.), *Complementary views on Complementarity* (2006) at 53 *et.seq*; A. Cassese, *International Law* at 49 *et.seq*; 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.

the ability to conduct legal actions without the interference of any external authority, unless the State has bound itself by bilateral or multi-lateral agreement which restricts its freedom to exercise such action.

A. Maged [245] argues that the act of withdrawal is a manifestation of States sovereignty and any restriction placed on a States sovereignty cannot be accepted. His argument is grounded on the *Lotus* case [246] 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 should not be seen to again try and hide behind the veil of sovereignty when the need to adhere to treaty provisions arises.

It could therefore be argued that a state can exercise its sovereign rights and withdraw the referral, considering that the offences were committed on its territory and by its nationals.

B. Interests of justice

It could be also be argued that the interests of justice may warrant a state withdrawing a referral to 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

[245]A. Maged “Withdrawal of Referrals –A Serious Challenge to the Function of the ICC” (2006) 6 *International Criminal Law Review*, 419 at 422 *et.seq.*
[246]SS. Lotus (France *v*. Turkey), P.C.I.J. (1927).

Rule of Law and Transitional Justice in Conflict and Post-conflict Societies"[247], 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.[248] 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 circumstances argue that traditional justice proposed in the Pact on Accountability 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*[249], which is used elsewhere in Africa but called other names".[250]

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[247]U.N. DOC S/2004/616 available at www.unrol.org/doc.aspx?n=**2004**%20**report**.pdf - (accessed 25 March 2010).

[248]Nuremburg Declaration, made following an International Conference on "Building a Future on Peace and Justice" 25-27 June 2007,Nuremburg, Germany. Available at www.peace-justice-**conference**.info/ (accessed 30 March 2010).

[249]*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.

[250]*Sunday Vision* (Uganda), "Rugunda Explains Otti Phone Call", 27 August 2006.

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?[251]

The ultimate question should, in my view, however be: "whose justice is it anyway?" The nature of international crimes puts them at a level above normal crimes and as such they affect not just the direct victims but the international community as a whole-hence the terminology "international crime". Justice should therefore not only be for the direct victims of the crime but the whole world, since the magnitude of the crime is to such an extent that the whole of humanity is affected. The purpose of creating the ICC was to have a permanent Court to deal with such crimes and it would defeat that very purpose to have international

[251]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).

crimes dealt with by traditional justice.[252]Traditional justice mechanisms should not be dismissed altogether but a mechanism should be found that integrates those initiatives with the activities of the ICC.[253]

Another dimension to this debate is whether prosecutions should stand aside for the purpose of peace. The stance of the ICC Prosecutor has been that peace and justice are two sides of the same coin but emphasis is placed on prosecutions, since after all it is a criminal Court.[254] In September 2007, the OTP issued a position paper on the interests of justice.[255] It emphasizes that the exercise of prosecutorial discretion where the "interests of justice" [256] provision

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[252]In Uganda the much lauded *Mato Oput* had serious documented challenges. T. Allen did research on traditional justice initiatives in Northern Uganda and he has the following criticisms: First, there were ambiguities in the ways the traditional justice rituals were being described- They were not necessarily linked to forgiveness in the sense that activists suggested. Scores of interviews showed there to be little general interest in the new public events. On the contrary, most respondents were dismissive of them, while a few thought they would make things worse by concentrating spiritual pollution. Secondly, questions were also asked by other tribes like the Madi, Langi and Iteso as to why, if they had also suffered at the hands of the LRA, should the Acholi alone do all the forgiving. Thirdly according to him, it became hard to avoid the conclusion that where ceremonies were performed, this was largely because of the availability of external support. 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* at 49-50. L.M. Keller, "Achieving Peace With Justice: The International Criminal Court and Ugandan Alternative Justice Mechanisms" (2007) 23 *Connecticut Journal of International Law*, 209 at 236 cites similar criticisms and concludes that it would be difficult to adapt *Mato Oput* to mass atrocities-it would be preferable that it complemented prosecution.

[253]See- L. Moreno-Ocampo, "Keynote Address: Integrating the Work of the ICC into Local Justice Initiatives" (2005) 21 *American University International Law Review*, 497 at 500.

[254]Fatou Bensouda, the current ICC Chief Prosecutor argues that ICC is an independent and judicial institution, which cannot take into consideration the interests of peace, which is the mandate of other institutions, such as the UNSC. In her view, justice can however have a positive impact on peace and security and she cites the example of the L.R.A. in Uganda where I.C.C. arrest warrants against Joseph Kony and his top commanders are widely acknowledged to have played an important role in bringing the rebels to the negotiating table in the Juba Peace Process. She concludes that the debate about peace versus justice or peace over justice is a patently false choice. Peace and justice are two sides of the same coin. The road to peace should be seen as running via justice, and thus peace and justice can be pursued simultaneously. See- Fatou Bensouda, *OP ED* contributor article "International Justice and Diplomacy" in *The New York Times* March 19, 2013 available at http://www.nytimes.com/2013/03/20/opinion/global/the-role-of-the-icc-in-international-justice-and-diplomacy.html?_r=0 (accessed 14 November 2014).

[255]Policy Paper on the Interests of Justice, available at http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf (accessed 20 April 2010).

[256]Article 53 of the Rome 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. J. Ohlin, "Peace, Security and Prosecutorial Discretion" in C. Stahn and G. Sluiter (eds.) *The Emerging Practice of the International Criminal Court* at 199-200 commends the then ICC Chief Prosecutor for his policy on peace and justice but rightly cautions that the comments are not legally binding since they are not a judicial interpretation of Article 53 and secondly they were the words of the Prosecutor then which could be revised or withdrawn by the next Chief Prosecutor.

is invoked is “exceptional in its nature”, that “there is a 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.” The Prosecutor further states 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 the OTP has a fitting approach in line with the mandate of the ICC. However, in some situations it is hard to draw a line between the interests of justice and those of peace. They are interlinked[257] and cannot be divorced from each other.[258] There is no sustainable, genuine peace without justice, and that justice after a situation where massive crimes have been committed has to include criminal prosecutions at least of those who are most responsible. 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 array of transitional justice processes, the pursuit of peace and the pursuit of justice should and can go hand in hand.”[259]

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[257]This linkage was re-affirmed by the Nuremberg Declaration on Peace and Justice, 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”.

[258]Some have however criticized the OTP approach as a fetter on the Prosecutors discretion, arguing that the policy paper was: "trying to impose a literal approach to legal interpretation on an expression that was intended to leave the exercise of prosecutorial discretion unfettered." See- Human Rights Watch, Policy Paper: *The Meaning of the Interests of Justice in Article 53 of the Rome Statute* (2005) at 4-5.Available at http://www.hrw.org/sites/default/files/related_material/2005_ICC_Interests_%20of_Justice.pdf (accessed 10 June 2013).

[259]“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. Available at www.refugeelawproject.org/seminars/imposingjustice.pdf. (accessed 20 March 2010).

A pertinent question, however, is whether truth commissions, amnesties and other non-prosecutorial measures like *mato oput* 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[260], "grave breaches" of the 1949 Geneva Conventions[261] and the Torture Convention[262]. Parties to the Geneva Conventions have an obligation to search for, prosecute, and punish perpetrators of grave breaches of the Conventions in the context of international armed conflict unless they choose to hand over such persons for trial by another state party hence the maxim *aut dedere aut judicare*. This obligation to prosecute is "absolute," meaning, *inter alia,* that states parties can under no circumstances grant perpetrators immunity or amnesty from prosecution for grave breaches.[263]

With respect to other crimes (war crimes-excluding those in the Geneva conventions and crimes against humanity), there is no treaty mandating states to prosecute save for the Rome Statute which creates duties for state parties thereto.[264]

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[260]See-Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948 78 U.N.T.S. 277.

[261]Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 Aug. 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (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, 6 U.S.T. 3217, 75 U.N.T.S. 85 (Geneva Convention II); Geneva Convention Relative to the Treatment of Prisoners of War, 12 Aug. 1949,6 U.S.T. 3316, 75 U.N.T.S. 135 (Geneva Convention III); and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 Aug. 1949, 6U.S.T. 3516, 75 U.N.T.S. 287 (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.

[262]Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (June 26, 1987) .See -Art.7.

[263]M.P. Scharf, "The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes" (1996) 59 *Law and Contemporary Problems*, 41 at 44.See also- M.C. Bassiouni and E.M. Wise, *Aut Dedere Aut Judicare, The Duty to Extradite or Prosecute in International Law* (1995).

[264]The Rome Statute emphasises in its preamble the duty of all states to prosecute international crimes as well as the need for "the most serious crimes of concern to the international community as a whole" not to go unpunished.

The existence of a duty to prosecute war crimes not covered by the Geneva Conventions and crimes against humanity is however still very controversial, with some writers contending that such a duty does not exist mainly because of recent state practice.[265] However under emerging customary international law there has been a marked shift with state practice decisively shifting from histories tacit endorsement of amnesties to today's consistent rejection in respect of perpetrators of serious international crimes.[266] It has however been argued that there exists a customary international law duty to prosecute such crimes as well. While it may not be practical to bring every perpetrator to trial, that duty requires at least "exemplary prosecutions" of those who bear the greatest responsibility for systematic atrocities or those implicated in the most heinous crimes. If states default on those duties by granting an amnesty or otherwise failing to prosecute such crimes, the duty to prosecute falls to the international community either through an international tribunal or national courts exercising universal jurisdiction.

The LRA arrest warrants do not charge genocide or grave breaches, but rather war crimes in an internal armed conflict and by non-state actors. In internal armed conflict, amnesties are not only permitted, but are encouraged by Article 6(5) of the Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts.[267] It provides that "At the end of hostilities, the authorities in

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[265]M.P. Scharf, " The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes" at 362 asserts that to the extent of any state practice creating customary international law in this area is widespread, it is the practice of granting amnesties or asylum to those who commit crimes against humanity rather than enforcement of a duty to prosecute. Similarly, M.C. Bassiouni, "International Crimes: *Jus Cogens* and (1996) 59 *Law & Contemporary Problems*,63 at 66 postulates that the duty to prosecute or extradite is more inchoate than established, other than when it arises out of specific treaty obligations. See also- L.N. Sadat, "Universal Jurisdiction, National Amnesties and Truth Commissions; Reconciling the Irreconcilable" in S. Macedo (ed.) *Universal Jurisdiction ,National Courts and the Prosecution of Serious Crimes under International Law* (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.

[266]D. Robinson, "Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court" (2003) 14 *European Journal of International Law*, 481 at 491.

[267]The domestic courts in South African, Chile and Peru have used this article to find that amnesties, including those granted by military or military dominated governments for murders, disappearances, and other serious

power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained". It could therefore be argued that there is no mandatory requirement for prosecutions and alternative justice mechanisms would suffice.

C. 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 which may better be served with no prosecutions.[268]

Past changes in Government in South America saw a movement away from obligations to try atrocities. In Argentina, after President Alfonsin took power in 1983 pushed through a "full stop" law in 1985 to frustrate prosecution of military officers implicated in human rights violations and in 1987 a "due obedience" law under which all but most senior officers were granted a irrefutable presumption to have erred in believing that their orders were legitimate hence rendering them criminally not liable. Similar laws were also passed in Uruguay exonerating members of the military and also preventing victims and their families from instituting civil actions against the perpetrators of human rights violations.[269]

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crimes, are consistent with international law which N. Roht-Arriaza finds "troubling". She argues that he placement of the article at the end of a section on penal prosecutions and the language on internees and detainees suggests the drafters were primarily interested in reintegrating insurgents into national life. She further cites the interpretation Article 6(5) by the International Committee of the Red Cross as: "… [an article that] attempts to encourage a release at the end of hostilities for those detained or punished for the mere fact of having participated in hostilities. It does not aim at an amnesty for those having violated international humanitarian law." See- N. Roht-Arriaza, "Combating Impunity: Some Thoughts on the Way Forward" (1996) 59 *Law & Contemporary Problems*, 93 at 97.

[268]See- M.P. Scharf and P. Dowd at 8.

[269]See- N. Roht-Arriaza, "State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law" (1990)78 *California Law Review*, 449 at 458-460.

Notwithstanding the changes in Government policy however, where treaty based obligations occur like those arising from the Rome Statute, under international law those obligations inure on the state and as such bind the successor government. States, but not their governments are the subject of international law.[270]

3.6.2 Legality of an act of self-deferral

As earlier noted, there is no express provision enabling withdrawal of a state referral in the Rome Statute or in the Rules of procedure and Evidence.[271] 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.[272] 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.

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[270]It was held in the *Velasquez Rodriguez* Case, Inter-Am. Ct. H.R. 35, OAS /ser. L/V/III. 19, doc. 13, app. VI (1988) that according to the principle of the continuity of the State in international law, responsibility exists both independently of changes of government over a period of time and continuously from the time of the act which creates responsibility to the time when the act is declared illegal. The foregoing is also valid in the area of human rights although, from an ethical or political point of view, the attitude of the new government may be much more respectful of those rights than that of the government in power when the violations occurred.
[271]The drafting history of the Rome Statute shows that in the 1990 International Law Commission draft there was a sub-section entitled "withdrawal of complaints". Two alternative versions were submitted for consideration by members of the Commission. Version A stated: "If a complaint is withdrawn, the proceedings shall be discontinued, *ipso facto*…".Version B provided that a withdrawal of a complaint "does not mean, *ipso facto*, that the proceedings shall be discontinued. The proceedings must continue until such time as the case is dismissed or there is a conviction or acquittal". The 1994 draft ILC statute however made no reference to withdrawal of complaints while at the Rome Conference the issue of the withdrawal of a complaint never arose as it was entirely omitted by the Preparatory Committee. Throughout this process no single reference to the possibility of withdrawing a complaint or a referral had been made. See- Eighth Report on the Draft Code of Crimes against the Peace and Security of Mankind, UN Doc. A/CN.4/430 and Add.1, 1990 YILC, Vol. II, Part I, *paras*. 98-99 and 145-146.
[272]G. Werle at 56.

a) 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[273] (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 State 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.[274]

In the first instance, the VCLT 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."[275] There are no terms in the Rome Statute whose ordinary or other meaning would confer a right of withdrawal.[276] 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

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[273]Vienna Convention on the Law of Treaties, entered into force 27 January 1980, 1154 U.N.T.S. 331.
[274]G. Hafner, "Article 120: Reservations", in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers Notes, Article by Article* at 1744; See also- W. Schabas, *An Introduction to the International Criminal Court* at 200.
[275]VCLT art. 31(1).
[276]*Cf.* A. Maged, "Withdrawal of Referrals –A serious Challenge to the Function of the ICC" at 422 who argues that a withdrawal is legally tenable since there is equally no provision that precludes a state from withdrawing a referral.

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".[277]

The VCLT further provides for the performance of treaty obligations "in good faith"[278]. 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"[279] as a supplemental means of interpretation to confirm the meaning deduced through Article 31 or where the meaning deduced is "ambiguous or obscure"[280]. The drafting history of the Rome Statute contains no discussion of the possibility of withdrawal of a State Party referral.[281] This fact is unsurprising, given that the self-referral phenomenon was an ingenious interpretation of the Rome Statute by the ICC Prosecutor. 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.

b) Principles of law derived from national laws of legal systems of the world

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

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[277]Rome Statute, Preamble.
[278]VCLT, art. 26.
[279]VCLT, art. 26.
[280]VCLT, art. 26.
[281]M.P. Scharf and P. Dowd, "No way out? The Question of Unilateral Withdrawals of Referrals to the ICC and Other Human Rights Courts" at 13.

help. Judges are to apply not only the concrete rules of law found in national legal systems but also the principles underlying these rules.[282] 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 world's principal legal systems.[283]

A. Maged[284] 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 should not automatically lead to the dismissal of a case.[285]

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[286] 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 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

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[282]M.M. de Guzman, "Applicable Law" at 710.
[283]M.M. de Guzman, "Applicable Law" at 710.See also-I. Caracciolo, "Applicable Law" in F. Lattanzi and W. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court* (1999) at 228.
[284]A. Maged, "Withdrawal of Referrals –A Serious Challenge to the Function of the ICC" at 427 *et.seq.*
[285]A. Maged, "Withdrawal of Referrals –A Serious Challenge to the Function of the ICC" at 427 *et.seq.*
[286]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.

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, Black's Law dictionary defines withdrawal of charges as removal of charges by the one bringing them, such as a prosecutor.[287]

If the above is to be juxtaposed with self-referrals to the ICC, it would appear that a state cannot withdraw a self-referral but can express 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. W. Schabas has rightly postulated in my view that the term "trigger" is a helpful metaphor which means that once the ICC's jurisdiction has been "triggered", it cannot be "untriggered".[288] Once the trigger of a gun is pulled, there is no turning back.

The fact that a State cannot unilaterally withdraw a referral has also been emphasised by the ICC. 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.[289] After the meeting, Phakiso

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[287]Black's Law Dictionary (8th edn.) (2004).
[288]W. Schabas, *An Introduction to the International Criminal Court* at 151.
[289]See- "ICC Registry Officials Meet with LRA Delegation", The Hague, 10 March 2008 available online at http://www.icc-cpi.int/press/pressreleases/344.htm ; "Ugandan rebels to appeal ICC warrants available at http://www.reliefweb.int/rw/rwb.nsf/db900sid/YSAR-7CNTC8?OpenDocument (accessed 10 June 2011).

Mochochoko stated that: "The LRA and government of Uganda are pursuing a political process, but the ICC is pursuing a legal process".[290] He 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 go out of the court through a legal process*." (Emphasis mine).

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 thesis, 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'[291] and the system was supposed to work through dialogue and cooperation. A unilateral action by a state to withdraw its self-referral at any stage of the proceedings would run counter to the non-antagonistic bilateral understanding that underlies the self-referral regime and would clearly not be well intentioned.

3.6.3 Contrary views on self-deferral

M.P. Scharf and P. Dowd[292], 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

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[290]'ICC Registry Officials Meet with LRA Delegation', The Hague, 10 March 2008 available online at http://www.icc-cpi.int/press/pressreleases/344.htm ; "Ugandan rebels to appeal ICC warrants

[291]C. Kress at 945.

[292]M.P. Scharf and P. Dowd, "No way out? The Question of Unilateral withdrawals of Referrals to the ICC and other Human Rights Courts" at 19.

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.[293] According to them, this limited possibility for withdrawal logically translates to the ICC, given the similar procedural regimes of the two courts. W. Schabas suggests that self-referrals can only operate properly over the medium to long term if they are followed by self-deferral.[294]

A. Maged[295] 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. The arguments presented provide a sound logical and normative basis for deferrals within a limited window, though the law as it stands does not permit this.

3.7 Conclusion

This Chapter has analysed the law and practice of self-referrals, discussing the referral procedure all the way up to the selection of a case and admissibility determinations. It was also determined that self-referrals, however controversial, are firmly grounded in law. This is premised on the fact that the Rome Statute expressly provides for state party referrals and the drafting history of the Statute shows that the drafters intended for state party referrals to

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[293] *Cayara* Case, (Preliminary Objections), Judgment of February 3, 1993, 26, Inter-American Court of Human Rights. (Ser.C) No. 14 (1993). The reasoning of the Court was that withdrawal of the application was not expressly regulated in the American Convention on Human Rights, the Statutes of the Inter-American Commission on Human Rights and the Court, the Regulations of the Commission or the Rules of Procedure of the Court but this did not mean that it could not be withdrawn. The Court found that General principles of procedural law allow the applicant party to request a court not to process its application, provided the court has not begun to take up the case. As a rule, that stage begins with the notification of the other party. Furthermore, the foundation of the Court's jurisdiction, as set forth in Article 61(1) of the Convention, lies in the will of the Commission or of the States Parties.
[294] W. Schabas, "Complementarity in Practice, some Uncomplimentary Thoughts" at 19.
[295] A. Maged, "Withdrawal of Referrals –A Serious Challenge to the Function of the ICC" at 423.

be one of the trigger mechanisms for the ICC. States on whose territory crimes are committed cannot be excluded from the definition of a State Party, although this is not what was specifically envisaged by the drafters of the Rome Statute. It has also been shown with regard to admissibility that some contend that self-referrals operate as an automatic waiver of admissibility but this is rather a misnomer. They are a waiver of primacy. Lastly, the chapter analysed the question of unilateral withdrawal of a self-referral and it was found not to be lawful within the current ICC legal regime.

The general issues raised in this Chapter will in the next Chapters be discussed with specific reference to self-referrals presently at the ICC. The case studies will analyse how the law and theory have been applied in practice.

CHAPTER FOUR: THE SITUATION IN UGANDA

4.1 Background to the conflict

The conflict in Northern Uganda, like many others on the African continent has its genesis in European colonial rule. Uganda was a product of the 1888 Berlin Conference where western powers carved out territories among themselves. This demarcation of territories had no regard to ethnicities and in Uganda, half the country had people of the Bantu ethnic group while the northern half comprised mostly Luo and Nilotics.[296] The South, which had Bantu, engaged mainly in crop farming, while the North had fishermen and pastoralists.

The British colonial administration in a bid to ease administration created inter-ethnic competition for power between these two halves of Uganda, which, coupled with the regional income inequalities, resulted in a North-South divide.[297] In the last years of its rule, the colonial administration also recruited large numbers of northerners into the armed forces, especially the Acholi, based on the myth that the Acholi were a 'martial tribe' who were also known to take orders without question.[298] The colonial administration's decision to select the military from the North was also based on a fear of the impact of arming members of consolidated kingdoms and chiefdoms in Southern Uganda. The administration thus found it safer to arm dispersed tribes in Northern Uganda.[299]

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[296] International Crisis Group, *Northern Uganda: Understanding and Solving the Conflict* (Africa Report No.77, 2004) at 2.
[297] International Crisis Group, *Northern Uganda: Understanding and Solving the Conflict* at 2.
[298] S. Lwanga-Lunyigo, "The Colonial Roots of Internal Conflict" in K. Rupesinghe (ed.), *Conflict Resolution in Uganda* (1989) at 24.
[299] H. Lunde, *Night commuting in Gulu, Northern Uganda: From spontaneous strategy to new Social Institutions,* Master's Thesis in Peace and Conflict Studies (2006) Fafo – Institute for Applied International Studies at 31, available at http://www.fafo.no/pub/rapp/549/549.pdf (accessed 12 July 2011).

The recruitment of largely people from Northern Uganda in the military by the British colonial government resulted in a mainly northern dominated army at independence in 1962.[300] At independence, Edward Mutesa, a Southerner, was appointed as a largely ceremonial president of a federal Uganda, while Milton Obote, a northerner, was made Prime Minister. Milton Obote in turn made Idi Amin, an uneducated northerner, head of the army. Idi Amin in 1966 led an armed siege on Edward Mutesa's palace, which forced the latter into exile, leading to the appointment of Milton Obote as Executive President of a new republic.

On 26 January 1971, Idi Amin overthrew his erstwhile ally and boss Milton Obote in coup and declared himself president, thereafter purging the army comprising of mostly the Acholi and Langi soldiers and replacing them with Kakwa and other Sudanic tribes which were allied to him. Idi Amin was in turn overthrown by a coalition of Ugandan exiles in Tanzania and the Tanzanian army in 1979 and thereafter Yusuf Lule, a Southerner, was appointed president of a quasi –parliamentary body called the National Consultative Commission. Yusuf Lule was soon replaced by Godfrey Binaisa who was also removed in May 1980 and replaced by Paulo Muwanga, also a southerner. Largely rigged elections were organised in 1980 and they saw a return of Milton Obote to power. Obote was overthrown for the second time on 27 July 1985 by Gen. Tito Okello Lutwa, an Acholi from Northern Uganda. Throughout these political upheavals, dominance of the North in the armed forces remained.[301]

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[300]International Crisis Group, *Northern Uganda: Understanding and solving the Conflict*; See also- T. Allen, Trial Justice: The International Criminal Court and the Lord's Resistance Army (2006) at 25 *et.seq* and F. Odoi-Tanga ,Politics, Ethnicity and Conflict in Post Independent Acholiland, Uganda 1962-2006, (2009) Unpublished Ph.D Thesis, University of Pretoria at 222-225. Available at http://repository.up.ac.za/bitstream/handle/2263/24734/Complete.pdf?sequence=7 (accessed 14 July 2011).
[301]F. Odoi-Tanga at 230-238.

However the above mentioned long hold on the military came to an abrupt end in January 1986 when Yoweri Museveni, a southern Bantu, captured power from General Tito Okello Lutwa. Majority of the remnants of the defeated national army joined forces with the disgruntled Acholi (a tribe in Northern Uganda) politicians, former Idi Amin troops and others in Juba, southern Sudan to form the Uganda People's Democratic Army (UPDA) in 1986 with the aim of recapturing power.[302] These ex-soldiers at first posed a threat to the new regime, but the new governments' carrot-and-stick approach resulted in a peace deal in June 1988 that brought most of the fighters out of the bush.[303]

Some of the UPDA fighters however continued the fight and there came an off-shoot called Holy Spirit Movement (HSM) led by self-styled prophetess, Alice Auma "Lakwena"[304] who offered hope for worldly as well as spiritual redemption at a time when the Acholi had been ousted from power and were facing what they believed to be persecution and possible extinction.[305] In November 1987, Lakwena's forces were defeated at Jinja, eighty kilometres from the capital Kampala and she escaped to Kenya.

The defeat of the HSM however did not see the end of the discontent in Northern Uganda and Joseph Kony, a relative of Alice Auma and former Catholic altar boy, quickly took up the mantle in 1987 claiming to have inherited her spiritual powers. He started what later

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[302]T. Allen, Trial Justice: The International Criminal Court and the Lord's Resistance Army at 29.
[303]T. Allen, Trial Justice: The International Criminal Court and the Lord's Resistance Army at 29.
[304]"Lakwena" was a spirit believed to have mystical powers and Alice Auma convinced her followers that she was possessed by this spirit making her a prophetess. They therefore, without question believed her command to smear themselves with shea oil which would ward off bullets fired at them by Ugandan government forces. The emergence of Alice Auma also marked the beginning of the quasi spiritual nature of this conflict. See- Refugee Law Project Working Paper No.11, "Behind the Violence: Causes, Consequences and the Search for Solutions to the War in Northern Uganda" (2004) at 5. Paper available at http://reliefweb.int/report/uganda/refugee-law-project-working-paper-no-11-behind-violence-causes-consequences-and-search (accessed 15 July 2011).
[305]K. Vlassenroot, *et.al*, "Kony's Message: A New Koine? The Lord's Resistance Army in Northern Uganda" (1999) 98 *African Affairs*, at 16 *et seq.*

became to be known as the Lord's Resistance Army (LRA) with a mission to overthrow the government and start one governed by the Ten Commandments. His worldview is steeped in apocalyptic spiritualism and he uses fear and violence to both maintain control within the LRA and sustain the conflict.[306] This phase is unique in that the grievances of the original war remain unaddressed, and yet Kony's LRA does virtually nothing to try to represent them.[307] The LRA targeted government forces but civilians of his own Acholi tribe have borne the brunt of his brutality which has entailed rape, gruesome mutilation, mass murder, kidnap, use of child soldiers and pillage.[308]

The current war can thus be actually termed as two conflicts in one: the original root causes that still need attending to and may in fact cause future conflict, and the LRA is a poor manifestation of these grievances. [309] The fundamentalist Christian LRA was largely funded and equipped by the Islamist Sudanese government which saw the LRA as a regional counterbalance to Uganda's support to the Sudanese Peoples Liberation Army (SPLA) which

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[306]Refugee Law Project Working Paper No. 11 , *Behind the Violence: Causes, consequences and the search for solutions to the war in Northern Uganda* available at http://reliefweb.int/report/uganda/refugee-law-project-working-paper-no-11-behind-violence-causes-consequences-and-search(accessed 10 March 2010).

[307]Refugee Law Project Working Paper No. 11 - Behind the Violence: Causes, consequences and the search for solutions to the war in Northern Uganda. The complexities of this war are reflected in the refusal by the Uganda Government to allow the trial of Dominic Ongwen on Ugandan soil (specifically in Gulu, Northern Uganda which bore the brunt of some LRA attacks). Following his arrest and surrender to the ICC by US Special Forces in 2015, a request was made by the ICC to the Ugandan Government to have his trial conducted in Uganda with a view of *inter alia* "[having a]better perception of the Court in Africa". This request was rejected because the Uganda Government feared the ramifications of someone viewed as a liberator against Government repression by some in Northern Uganda going on trial in his native heartland more so in a season of national elections. See-PTCII Recommendation to the Presidency to hold the confirmation of charges hearing in the Republic of Uganda, 10 September 2015 available at https://www.icc-cpi.int/iccdocs/doc/doc2056707.pdf and The ICC Presidency "Decision on the recommendation to the Presidency to hold the confirmation of charges hearing in the Republic of Uganda" 28 October 2015 available at https://www.icc-cpi.int/iccdocs/doc/doc2125380.pdf (both accessed 25 January 2016).The reason for the rejection of the request by the Ugandan Government was made known to me in an interview with a Ugandan Ministry of Justice official in 2015 (He asked to remain anonymous).

[308]See- Report of the United Nations High Commissioner for Human Rights to assess the Situation in Northern Uganda with regard to abduction of children, UN.Doc E/CN.4/2002/86 *paras.* 12-13.

[309] Report of the United Nations High Commissioner for Human Rights to assess the Situation in Northern Uganda with regard to abduction of children, UN.Doc E/CN.4/2002/86 *paras.* 12-13.

was then fighting for the autonomy of the mainly Christian and animist people of Southern Sudan from Northern Sudan Islamic Arab domination.

4.2 The referral to the ICC

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".[310]The Ugandan leader President Yoweri Museveni had long promoted a military solution, but after seventeen years of combat and aborted peace negotiations, the Ugandan government had proven unable either to vanquish or come to a peaceful settlement with the LRA.[311]It is alleged that the Ugandan government decision to refer the LRA to the ICC was part of a military strategy and international reputation campaign, rather than out of a conviction about law and justice.[312] The official Ugandan government explanation for the referral was:

> "…without international cooperation and assistance,[Uganda]…cannot succeed in arresting those members of the LRA leadership and others most responsible for the above mentioned crimes. Furthermore, Uganda is of the view that the scale and gravity of LRA crimes are such that they are a matter of concern to the international community as a whole. It is thus befitting both from a practical and moral viewpoint to entrust the investigation and prosecution of these crimes to the prosecutor of the ICC." [313]

On 29 May 2004, the Solicitor General of Uganda reiterated to the ICC Prosecutor that it was the Uganda Government's view that the ICC was "the most appropriate and effective

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[310]ICC Press release, "President of Uganda Refers Situation concerning the Lord's Resistance Army (LRA) to the ICC" 29 January 2004, available at https://www.icc-cpi.int/pages/item.aspx?name=president+of+uganda+refers+situation+concerning+the+lord_s+resistance+army+_lra_+to+the+icc (accessed 10 March 2010).
[311]S.M.H. Nouwen and W.G. Werner at 948.
[312]S.M.H. Nouwen and W.G. Werner at 948.It is further alleged that the referral was "Initiated in the Ministry of Defence – not Justice – [and it was] aimed 'to intimidate these thugs [the LRA], to show that they were sought by many more'."
[313]Government of Uganda, ''Referral of the Situation Concerning the Lord's Resistance Army", Kampala, December 2003, *para*. 25. Referral available at http://www-rohan.sdsu.edu/~abranch/Current%20Projects/Uganda%20ICC%20Referral%202003.pdf (accessed 2 February 2016).

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.[314] 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 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.[315] In the Ugandan self-referral, the ICC was requested the prosecutor pursuant to Article 14(1) of the Rome Statute to: "…investigate the situation concerning the LRA for the purpose of determining whether one or more specific persons should be charged with the commission of crimes against humanity…".[316]

In a perhaps ill-advised move, on 29 January 2004, Luis Moreno-Ocampo, the then Chief Prosecutor of the ICC, held a news conference in London with Ugandan President Yoweri Museveni by his side to announce his plans to investigate the LRA.[317]In June 2004, the ICC commenced its investigations in Northern Uganda.[318] One year later, the Pre-Trial Chamber

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[314]See- ICC-02/04-01/05-329C-Conf-AnxD.
[315]Interview conducted on 26 May 2009 at the Ministry of Justice and Constitutional Affairs offices in Uganda. The official chose to remain anonymous.
[316]Government of Uganda, ''Referral of the Situation Concerning the Lord's Resistance Army", Kampala, 16 December 2003, *para.* 40. Referral available at http://www-rohan.sdsu.edu/~abranch/Current%20Projects/Uganda%20ICC%20Referral%202003.pdf (accessed 2 February 2016).Interestingly the referral in *para*.42 also specifically requested that investigations focus on the persons most responsible for such crimes namely LRA members. No mention was made of responsibility by state actors.
[317]It has been argued that the joint public appearance of the prosecutor and the president presented a lasting image of the ICC's dependence on state power. In turn, this created serious doubts about the prosecutor's independence and how vigorously, or even whether, he would pursue accusations of army involvement. See- V.Peskin, "Caution and Confrontation in the International Criminal Court's Pursuit of Accountability in Uganda and Sudan" (2009) 31 *Human Rights Quarterly*, 655 at 656.The press conference has also been described as a "poorly staged diplomatic manoeuvre".See- A. Tiemessen "The International Criminal Court and the Politics of Prosecutions" (2014) *The International Journal of Human Rights*,1 at 8.
[318]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 (accessed 19 March 2010).

I of the ICC issued arrest warrants for five top leaders of the LRA.[319] The warrants were issued under seal to protect the victims, but subsequently were unsealed in October 2005. The warrants and requests for arrest and surrender were transmitted to Uganda and its neighbours Sudan and the Democratic Republic of Congo ('DRC'). Interpol issued 'Red Notices'[320], requesting its 184 Member States to arrest and detain the five LRA leaders with a view to their surrender to the ICC.

The issuance of the arrest warrants and the changed geopolitics in the great lakes region at the time (where 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 (a then 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 drops its warrants of arrest, an agreement on Accountability and Reconciliation[321] was reached 29 June 2007 with the Ugandan Government.

The agreement provided *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".[322]Accordingly, the formal courts provided for under the Constitution of Uganda would exercise jurisdiction over individuals who are alleged to bear particular responsibility for the most serious crimes, especially crimes

[319]Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005; Warrant of Arrest for Vincent Otti, 8 July 2005; Warrant of Arrest for Raska Lukwaya, 8 July 2005; Warrant of Arrest for Okot Odhiambo, 8 July 2005; Warrant of Arrest for Dominic Ongwen, 8 July 2005.
[320]ICC-OTP, 'Interpol Issues First ICC Red Notices' (Press Release, 1 June 2006), available at http://www.icc-cpi.int (accessed 20 March 2010).
[321]Available online at http://www.newvision.co.ug/D/8/455/573798 (accessed 20 March 2010).
[322]Agreement on Accountability and Reconciliation, Art. 2.1.

amounting to international crimes, during the course of the conflict.[323] In addition, the established courts and tribunals would adjudicate allegations of gross human rights violations arising from the conflict.[324]

In February 2008, the parties signed an Annexure Agreement to the 29 June Agreement.[325] The Annexure Agreement set out a framework by which accountability and reconciliation were to be implemented pursuant to the 29 June Agreement and 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"[326], with jurisdiction to "'try individuals who are alleged to have committed serious crimes during the conflict'" [327] in Uganda. 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.[328]

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 traditional systems of justice which shall be discussed later in this paper. A War crimes and Anti-Terrorism Division of the High Court of Uganda was created in 2008 (later designated as "Special Division International War Crimes Court"). It has so far carried out investigations and indicted one Thomas Kwoyelo, a top LRA commander for grave breaches of the

[323] Agreement on Accountability and Reconciliation, Art. 6.1.
[324] Agreement on Accountability and Reconciliation, Art. 6.2.
[325] Available at http://www.iccnow.org/documents/Annexure_to_agreement_on_Accountability_signed_today.pdf. (accessed 25 March 2010).
[326] Annexure Agreement, Clause 7.
[327] Annexure Agreement, Clause 7.
[328] Annexure Agreement, Clause 23.

1949 Geneva conventions. His trial was scheduled to start in July 2011 but was stayed by Uganda's Constitutional Court which ruled that the Director of Public Prosecutions had violated his constitutional rights by "not giv[ing] any objective and reasonable explanation why he did not sanction the application of the applicant for amnesty or pardon under the Amnesty Act, like everyone else who had renounced rebellion."[329]

On a visit to London in early March 2008, President Museveni was asked about the status of the ICC warrants in light of the peace agreements reached that provided for local justice mechanisms. He reportedly 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".[330]

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, said 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't accept that Museveni has any right to use the International Criminal Court like this. If you have a system of international justice you've got to follow through [with] it.[331]

The Uganda government was agitating to be left to deal with the LRA and to give peace a

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[329] *Thomas Kwoyelo alias Latoni v. Uganda,* Constitutional Petition No.036/11 [Arising out of HCT-00-ICD-Case No. 02/10] available at http://www.ulii.org/ug/judgment/2011/10. Thomas Kwoyelo is however still detained as of 26 November 2015.For further discussion on the Thomas Kwoyelo case, see-K.McNamara "Seeking Justice in Ugandan Courts: Amnesty and the Case of Thomas Kwoyelo" (2013) 12 *Washington University Global Studies Law Review*, 653.
[330] See-BBC News, "Museveni Rejects Hague LRA trial" available at http://news.bbc.co.uk/2/hi/africa/7291274.stm. (accessed 25 March 2010).
[331] 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 (accessed 20 March 2010).

chance even if it meant dropping its warrants. This was, however, reported only in the media and was never communicated directly to the ICC. Consequently, these developments which had been closely monitored by the Pre-trial Chamber II of the ICC led to a number of requests for information by the Chamber to Uganda [332] and consequently a decision on admissibility of the case by the Chamber on its own motion.[333]

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 December 2008, the military forces 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 destroyed.[334] This marked the resumption of hostilities and an end of peace talks.[335]

The conflict has also at the time of writing this thesis taken on an international dimension given the fact that the LRA is no longer active in Uganda but has shifted to the Democratic Republic of the Congo, Central African Republic and Southern Sudan which have become their theatres of operation for rape, murder, mutilations, pillage and abduction. The LRA have ceased to be a solely Ugandan problem and their exact agenda is unknown.

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[332]"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.

[333]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 Rome Statute.

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

[335]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 at 2.

4.3 General admissibility issues in the Uganda situation: unable, unwilling, or inactive?

Applying admissibility criteria set out earlier in Chapter 3 of this thesis to the situation in northern Uganda, the Court appears *prima facie* to have jurisdiction over the crimes alleged against the LRA leadership (crimes against humanity — sexual enslavement, rape, enslavement, murder and inhumane acts and war crimes committed in a non-international armed conflict). These are crimes within the jurisdiction of the Court, committed within the territory of a State Party to the *Rome Statute* following the Statute's entry into force.

No investigation or prosecution prior to the referral was also initiated by the Ugandan authorities in respect of the LRA leaders' alleged criminal activities. The Ugandan Solicitor General communicated to the ICC that "the Government of Uganda ha[d] not conducted and d[id] not intend to conduct national proceedings in respect of the persons most responsible for these crimes, so that the cases may be dealt with by the ICC instead."[336] This inaction would clearly render the LRA cases admissible.

The ICC did consider the question of admissibility when the Prosecution applied for five warrants of arrest in the situation in Uganda in May 2005. However, admissibility was not addressed in detail in those proceedings. In its decision to issue the warrants in July 2005, Pre-Trial Chamber II merely stated that it was satisfied that "without prejudice to subsequent determination, the case against Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo and Dominic Ongwen [...] appears to be admissible".[337]

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[336]ICC-02/04-01/05-329-Conf-AnxD.
[337]Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court at the informal Meeting of Legal Advisors of Ministries of Foreign Affairs(unsealed pursuant decision ICC-02/- 4-01/05-52, 13 October 2005) at 2.

Following peace talks between the Uganda Government and the LRA leadership which resulted in a peace agreement, in October 2008, Pre-Trial Chamber II initiated proceedings *proprio motu* to examine the impact of these developments on the admissibility of the case. The Pre-Trial Chamber went on to rule that the case remained admissible, on the basis of the inactivity of the domestic authorities.[338] The Agreement and its Annexures had not been signed or submitted to Parliament.[339] The Chamber therefore considered that it would be premature to assess the impact of any domestic laws before they came into force, and that:

> "[p]ending the adoption of all relevant legal texts and the implementation of all practical steps, the scenario against which the admissibility of the Case has to be determined remains therefore the same as at the time of the issuance of the Warrants, that is one of *total inaction on the part of the relevant national authorities*; accordingly, there is no reason for the Chamber to review the positive determination of the admissibility of the Case made at that stage".[340][Emphasis mine]

4.4 Case selection

In selecting cases to be prosecuted from the situation in northern Uganda, the Prosecutor has stated that:

> "…the criterion for selection of the first case was gravity. We analysed the gravity of all crimes in Northern Uganda committed by all groups — the LRA, the UPDF and other forces. Our investigations indicated that the crimes committed by the LRA were of dramatically higher gravity. We therefore started an investigation of the LRA. At the same time, we have continued to collect information on allegations concerning all other groups, to determine whether other crimes meet the stringent thresholds of the Statute and our policy are met."[341]

A month later, in his address to the Assembly of States Parties, the Prosecutor stated:

> "In Uganda, we examined information concerning all groups that had committed crimes in the region. We selected our first case based on gravity. Between July 2002 and June 2004, the Lord's

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[338]*Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo* and *Dominic Ongwen*, Decision on the admissibility of the case under article 19(1) of the Statute, ICC-02/04-01/05-377 , *para*s. 20-32, 44.
[339]*Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo* and *Dominic Ongwen*, Decision on the admissibility of the case under article 19(1) of the Statute, *para.* 49.
[340]*Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo* and *Dominic Ongwen*, Decision on the admissibility of the case under article 19(1) of the Statute, *para.* 52.
[341]Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court at the informal Meeting of Legal Advisors of Ministries of Foreign Affairs.

> Resistance Army (LRA) was allegedly responsible for at least 2200 killings and 3200 abductions in over 850 attacks. It was clear that we must start with the LRA".[342]

It would therefore appear that the Prosecutor adopted a quantitative approach, looking at the number of victims of atrocities committed rather than analysing the nature of these atrocities, for instance the methods of brutality employed.[343] The Prosecutor also adopted this approach in the context of Iraq, declining to open an investigation due to the small number of victims involved (4-12). According to him, the scale of the alleged crimes was of a different order than the number of victims found in other situations under investigations or analysis.[344]

Although this "numbers game" fits within the criteria set by the OTP, it has been criticised with respect to the situation in Uganda for neglecting other important dimensions to the crimes.[345] Why for instance did the Prosecutor not consider the impact of the crimes committed by the Ugandan army however few they were? Wouldn't their impact have rendered them "grave" enough? Why choose to apply one criteria?[346] My cynical view (albeit minus

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[342]Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Fourth Session of the Assembly of States Parties, 28 November - 3 December 2005, The Hague, 28 November 2005, *para.* 2.
[343]Some of the war crimes committed by UPDF (the Ugandan Army) were brought to light by the recent leakage of US Diplomatic cables by *Wikileaks*. It's for instance alleged that the UPDF killed an LRA rebel one Peter Oloya while he was in UPDF custody and claimed he was trying to escape. These cables also revealed that the US had been sharing intelligence information with Uganda had urged Uganda to consult with the US in advance if the Ugandan army intended to use US-supplied intelligence to engage in operations not governed by the law of armed conflict.
[344]OTP Statement on communications concerning Iraq, The Hague, 9 February 2006, at 8 et *seq.*
[345]W. Schabas, "Prosecutorial Discretion v. Judicial Activism at the International Criminal Court" at 747 argues that even assuming that the Ugandan People's Defence Forces have killed significantly fewer innocent civilians than the Lord's Resistance Army, is not the fact that the crimes are attributable to the state germane to the gravity of the case? He contends further that the only genuine problem of impunity with respect to the LRA perpetrators has been the inability of the Ugandan authorities to apprehend them. On the other hand with respect to the government forces he argues we are confronted with the classic impunity paradigm of individuals acting on behalf of a state that shelters them from its own courts. The very fact that state actors were involved ought therefore to have also been a factor taken into consideration.
[346]M.M. de Guzman, "Gravity Rhetoric: The Good, the Bad, and the "Political"" (2013) 107 *American Society of International Law Proceedings*, 421 at 423 argues that this dilemma emanates from the ambiguity of gravity. In her view the ICC's efforts to explain its work in terms of the "law" of gravity are therefore often perceived as efforts to mask the influence of politics. She concludes that it may therefore be advisable for the ICC prosecutor to acknowledge more fully the role that politics play in her selection decisions. Highlighting rather than obscuring the role of politics may encourage states to play a more constructive role in the work of the ICC.

evidence) is that the OTP may have used this criteria conveniently to avoid the attendant complications that would have arisen if he had also chosen state actors for prosecution. W. Schabas contends that the self-referral "…put Uganda at the top of the Prosecutorial agenda"[347], and as such, there was no way Ugandan state actors could have been selected for prosecution. The non-prosecution of state actors in this conflict may therefore exacerbate impunity, which the ICC was established to end.[348]

The Prosecutor finds himself in a dilemma with the Rome Statute not offering any definitive guidelines on how to determine gravity. This is clearly a problematic analysis to undertake and one author concludes that the choice of case will ultimately depend to a large extent on the Prosecutors personal judgement and sentiments (sometimes political) rather than on any pre-ordained criteria or gravity spectrum.[349]This is after all what discretion is all about.

4.5 Cases before the ICC: *Prosecutor v. Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo and Dominic Ongwen*.

Joseph Kony is the Chairman and Commander of the LRA while Vincent Otti was Vice-Chairman and 2nd in command. Raska Lukwiya was Army Commander, Okot Odhiambo

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[347]W. Schabas, "First Prosecutions at the International Criminal Court" (2006) 25 *Human Rights Law Journal*, 25 at 32. P.Clark, "Law, Politics and Pragmatism: The ICC and Case Selection in Uganda and the Democratic Republic of Congo" in N. Waddell and P. Clark (eds.) ,*Courting Conflict, Justice, Peace and the ICC in Africa,* at 44, in the same breath asserts that: "the ICC has been fundamentally motivated by self-interested pragmatic concerns, avoiding the fraught task of investigating and prosecuting sitting members of government who are responsible for grave crimes, while also overlooking the capacity of domestic jurisdictions to address the atrocities concerned". He contends further that: "such pragmatism reflects a new global institution that needs to get legal runs on the board in order to build support among its states parties and to be perceived as an established global actor in the fight against impunity".

[348]For a discussion on selective prosecutions see- W. Schabas, "Victor's Justice: Selecting "Situations" at the International Criminal Court" (2009-10) 43 *John Marshall Law Review*, 535 and R. Rastan, "Comment on Victor's Justice and the Viability of *ex-ante* Standards" (2009-10) 43 *John Marshall Law Review* at 569.

[349]Equality of Arms Review, The Hakanita Case: Making Sense of the Prosecutor's Approach to 'Gravity', Issue 2,March 2009;W. Schabas in Unimaginable Atrocities: Justice, Politics, and Rights at War Crimes Tribunals (2012) at 89 argues that: "…the gravity language strikes the observer as little more than obfuscation, a laboured attempt to make the determinations look more judicial than they really are ... They have undoubtedly convinced themselves that they have found a legalistic formula enabling themselves to do the impossible, namely, to take a political decision while making it look judicial."

was Deputy Army Commander as well as brigade commander of the Trinkle and Stocktree brigades while Dominic Ongwen was Brigade Commander of the Sinia Brigade of the LRA.[350] They were indicted for various counts of war crimes and crimes against humanity.[351]

The offences relate to six attacks by the LRA on IDP camps and other places in northern Uganda during 2003 and 2004. The subjects of the warrants are described as members of the LRA 'control altar', the group responsible for devising and implementing LRA strategy.[352] Raska Lukwiya was killed on 12 August 2012 and PTC II accordingly terminated proceedings against him.[353] Vincent Otti is also believed to have been killed[354] but is still listed as wanted by the ICC while Dominic Ongwen was captured in the Central African Republic on 13 January 2015 and on 17 January 2015 transferred to the ICC's custody.[355] Okot Odhiambo was reportedly killed on 14 February 2014 in Central African Republic during a battle between the LRA and the Ugandan army and following confirmation of his

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[350]*Prosecutor v. Joseph Kony* and others ICC case information fact sheet available at http://www.icc-cpi.int/NR/rdonlyres/E7F674DF-C2D8-4A86-98C1-4C9621050D4B/282225/KonyEtAllENG.pdf (accessed 23 October 2012).

[351]Warrant of Arrest for Joseph Kony (Pre-Trial Chamber II) ICC-02/04-01/05-53 (issued 8 July 2005) 12–19; Warrant of Arrest for Vincent Otti (Pre-Trial Chamber II) ICC-02/04-01/05-54 (issued 8 July 2005) 12–20; Warrant of Arrest for Raska Lukwiya (Pre-Trial Chamber II) ICC-02/04-01/05-55 (issued 8 July 2005) 8–10; Warrant of Arrest for Okot Odhiambo (Pre-Trial Chamber II) ICC-02/04-01/05-56 (issued 8 July 2005)10–12; Warrant of Arrest for Dominic Ongwen (Pre-Trial Chamber II) ICC-02/04-01/05-57(issued 8 July 2005) 8–10.

[352]Warrant of Arrest for Joseph Kony (Pre-Trial Chamber II) ICC-02/04-01/05-53 (issued 8 July 2005) at 4.

[353]*Prosecutor v. Joseph Kony* and others, PTC II decision to terminate proceedings against Raska Lokwiya, ICC-02/04-01/05-248 available at http://www.icc-cpi.int/iccdocs/doc/doc297945.PDF (accessed 23 October 2012).

[354]See-BBC News, "Otti executed by Uganda Rebels", 21 December 2007 http://news.bbc.co.uk/2/hi/africa/7156284.stm (accessed 23 October 2012).

[355]See- New York Times, "Senior Rebel from Uganda to Be Moved to the Hague", 13 January 2015 http://www.nytimes.com/2015/01/14/world/africa/ugandan-rebel-commander-to-be-tried-at-international-criminal-court.html?_r=0 (accessed 14 January 2015) and ICC Press release, "Dominic Ongwen transferred to The Hague" http://www.icccpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1084.aspx (accessed 2 February 2015).

death by DNA testing, the warrant of arrest issued against him was withdrawn on 10 September 2015. [356] Joseph Kony remains at large.

4.6 Conclusion

It must be appreciated that the Uganda situation was a challenging first test for the ICC, which was still in its nascent stage. My analysis has shown that this referral was admissible as per the criteria in Article 17. Gravity was used by the OTP to justify the non-prosecution of state actors owing to the differences in number in atrocities committed. There is ambiguity in the determination of gravity and it has been suggested that the OTP took advantage of this to hide away from bringing state actors to book and that Uganda was at the top of the prosecutorial agenda.

The Ugandan situation has shown how collaboration and cooperation between Uganda and the ICC enabled to kick-start its operations. Such cooperation of a self-referring state is critical to the success of an investigation or prosecution, but such cooperation should not be used as a bargaining chip to shield state actors from prosecution. The biggest criticism has been that such cooperation led to the shielding of state actors in Uganda.

It cannot also be denied that the issuance of the ICC warrants created pressure on the LRA rebels to get to the negotiating table with the government and it is one of the factors responsible for the present peace in Northern Uganda. It is subject to debate whether the ICC will have fulfilled its objectives merely by the fact that the conflict has all but ended in Uganda,

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[356] Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, following the confirmed death of LRA commander Okot Odhiambo, 10 September 2015. http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-stat-10-09-2015.aspx (accessed 25 September 2015).

which referred the situation.[357] In my opinion it is a great contribution by the ICC to have precipitated the present peace in Northern Uganda. Notwithstanding the lack of convictions arising from the Uganda situation, the mere fact that the arrest warrants acted as a deterrence to future attacks and forced the LRA to shift from Northern Uganda should be applauded as a victory for international criminal justice.

[357] As earlier stated, the conflict has now been "exported" to DRC, Central African Republic and Southern Sudan.

CHAPTER FIVE: THE SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

5.1 Background to the conflict[358]

A. *The first Congo war*

Since 1994, conflict has beset the Democratic Republic of the Congo (hereinafter the DRC). Like many African nations that have experienced turmoil in the twentieth and twenty-first centuries, the conflict, disorder and widespread chaos that has plagued the DRC is firmly rooted in the country's colonial history and the political crises experienced following independence in 1960.[359]

Upon achieving independence from Belgian colonial rule, the country became the 'Republic of the Congo' led by its leftist anti-colonial Prime Minister, Patrice Lumumba. Almost immediately, the state faced grave problems with a mutiny by its armed forces and a secessionist struggle from its Katanga province.[360] Within weeks of the newly-elected government taking power, Lumumba was dismissed from office by the President. After a period of chaos which saw a series of short-term governments in quick succession, Mobutu Sese Seko, Chief of Staff of the Army, took advantage of the political turmoil, seizing power in 1965.[361] He

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[358]This section is largely based on "Justice in the Democratic Republic of Congo: A Background", available at Hague Justice Portal, http://www.haguejusticeportal.net/eCache/DEF/11/284.html (accessed on 20 September 2010) and G.M. Musila, "Between Rhetoric and Action: The Politics, Processes and Practice of the ICC's Work in the DRC" ISS Monograph 164 available at http://www.iss.co.za/pgcontent.php?UID=2736 (accessed on 1 February 2011).
[359]According to M. Mamdani, *Preliminary Thoughts on the Congo Crisis* (1999), if the roots of the conflict in the Congo are to be understood, one has to dig back into the Belgian colonial system of indirect rule. The system of indirect rule divided the country into two distinct legal systems, one civic and the other ethnic.
[360]T. Turner, *The Congo Wars: Conflict, Myth and Reality* (2007) at 32-33.
[361]Justice in the Democratic Republic of Congo: A Background.

soon renamed the country, ‘Zaire’. Thirty years of dictatorial rule followed in which Mobutu perfected the practice of kleptocracy.[362]

Having declared himself against Communism, Mobutu’s regime was largely backed by the United States and the West during the Cold War, as Zaire also acted as a counter-weight to the Communist influence in Soviet-backed Angola.[363] When Zaire’s value as a strategic force diminished with the fall of Communism and the end of the Cold War, so too did United States support for Mobutu’s regime.

Pressure on Mobutu to start democratization mounted from different sides, including his erstwhile allies. The dictator would not easily succumb to the pressure for democratic transition from both internal and international sources, although his control started to weaken.His reaction to the demands for reform was intransigent and violent which prompted the west to abandon him and suspend aid.[364]

The final days of Mobutu’s reign took place in the aftermath of the 1994 Rwandan Genocide in which an estimated 800,000 Tutsis and moderate Hutus were slaughtered by Hutu *interahamwe* extremists. Faced with the advancing army of the predominantly Tutsi Rwandan Patriotic Front (RPF), a mass exodus consisting of thousands of civilians as well as Hutu perpetrators of the Genocide fled west from Rwanda into neighbouring DRC, resulting in a humanitarian catastrophe in the east of the country. Millions of innocent Hutu civilians found themselves mixed together in refugee camps with many of the *Interahamwe* militias

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[362]Mobutu plundered about USD 4 billion which was discovered in Swiss banks and other European countries after his overthrow. See- A. Hochschild, “Congo's Many Plunderers” (2001) 36 (4) *Economic and Political Weekly*, 287 at 288.
[363]Justice in the Democratic Republic of Congo: A Background.
[364]L. Ndikumana and K. Emizet, *The Economics of Civil War: The Case of the Democratic Republic of Congo* (2003) at 21.

that had perpetrated the Genocide. The Rwandan ethnic conflict had now spilled over the border into the DRC.

The arrival of refugees altered the ethnic balance in the Kivu region by increasing the marginalization of Banyamulenge traditionally associated with Rwandese Tutsi origin. By colluding with the *Interahamwe*, rival "native" ethnic groups took advantage of this opportunity to settle old antagonisms with the Banyamulenge.[365] The presence of armed Hutu refugees in eastern Congo also posed a major security threat to the new government of Rwanda.

In an attempt to gather support from "native" Congolese, the Mobutu regime adopted drastic measures against all Kinyarwanda-speaking ethnic groups (the Banyamulenge -comprising only Congolese of Tutsi origin as well and all Rwandese (comprising both Hutu and Tutsi).[366]On 28 April 1995, the transitional parliament adopted a resolution that stripped the Banyarwanda and Banyamulenge of their Congolese nationality. Then in early October 1996, the deputy governor of South Kivu ordered the Banyamulenge and Banyarwanda to leave the Congo in accordance with the 1995 parliamentary resolution, but they refused to leave and turned to Rwanda for help.

In 1996, Rwandan and Ugandan forces invaded the DRC with Rwanda seeking to pursue Hutu rebels while Uganda wanted to rout Ugandan Allied Democratic Forces rebels who were using Zaire as a safe haven to launch attacks into Uganda.[367] The Rwandan-backed rebels of the Alliance of Democratic Forces for the Liberation of Congo-Zaire (hereinafter AFDL) led by Congolese dissident, Laurent-Désiré Kabila and a Rwandan Tutsi militia group based in Congo, the *Banyamulenge*, supported by Rwanda and Uganda, successfully

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[365]L.Ndikumana and K.Emizet at 22.
[366]L.Ndikumana and K.Emizet at 22.
[367]Justice in the Democratic Republic of Congo: A Background.

overthrew the Mobutu regime in May 1997 and Kabila was subsequently installed as President of the newly re-named Democratic Republic of Congo.

This period of the DRC's history, from 1996 until the instalment of Kabila as president has become known as the 'First Congo War'. Alongside the forces of Rwanda and Uganda, Burundi and Angola also supported the AFDL's anti-government forces, while Angolan and Hutu rebels unsuccessfully attempted to support the Mobutu regime. At the start of the period, serious violations were committed against Tutsi and Banyamulenge civilians, principally in South Kivu.[368]

This period was characterised by the relentless pursuit and mass killing (104 reported incidents) of Hutu refugees, members of the former Armed Forces of Rwanda (later "ex-FAR") and militias implicated in the genocide of 1994 (Interahamwe), allegedly by the AFDL. A proportion of the AFDL's troops, arms and logistics were apparently supplied by the *Armée patriotique rwandaise* (APR), the Uganda People's Defence Force (UPDF) and by the *Forces armées burundaises* (FAB) throughout the Congolese territory. This period was also marked by serious attacks on other civilian populations in all provinces without exception, in particular allegedly by the *Forces armées zaïroises* (FAZ) retreating towards Kinshasa, the ex-FAR/Interahamwe driven back by the AFDL/APR and the Mayi-Mayi.

B. ***The second Congo war***

Laurent-Désiré Kabila was no different from his predecessor in terms of misrule. To consolidate his grip on power, he increased the predominance of people from his native province

[368]Unofficial translation of the UNHCR Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003, August 2010 at 8-9. The rest of this paragraph is also based on information from this report.

of Katanga and Congolese of Rwandan descent.[369] The visibility of Banyamulenge in key government positions created resentment among other Congolese. Kabila was seen as an instrument of the political and strategic interests of Rwanda and Uganda. Kabila's Ugandan and Rwandan backers had been allowed to remain in the DRC and received military and economic benefits.[370]

The relations between Kabila and his former Rwandan and Ugandan allies quickly soured following a decision by Kabila in late July 1998 to end military cooperation with Rwanda and Uganda and the ordering of all foreign troops to leave the country.[371] This sparked a new rebellion in 1998 pitting Rwandan, Ugandan and Burundian forces against those of Angola, Chad, Namibia and Zimbabwe who supported Kabila's government. Kabila also appealed for assistance from the Rwandan Hutu extremists in the east of DRC. This new conflict came to be known as the 'Second Congo War'.

It was a war complicated by the vast natural resources of the DRC – diamonds, copper and coltan – and the purported desires of outside states and internal rebel groups to exploit these resources and it eventually became one fought by proxy. Rwanda supported its proxy forces, the *Rassemblement Congolais pour la Democratie* (RCD), and Uganda supported the Movement for the Liberation of Congo (MLC) led by Jean-Pierre Bemba Gombo, as each state sought clandestine methods to maintain their presence and influence in the region.

Perpetual in-fighting combined with the desire to plunder the DRC's resources eventually led to several armed breakaway groups as allegiances frequently switched and the conflict

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[369]L.Ndikumana and K.Emizet at 23.
[370]Justice in the Democratic Republic of Congo: A Background.
[371]L.Ndikumana and K.Emizet at 23.

degenerated into total chaos. This period was marked by attacks on civilians believed to be Tutsi, in particular in Kinshasa, Katanga, Orientale Province, East and Kasai Occidental, Maniema and North Kivu.[372] Within the context of the war and the conflicts across the whole of the territory, civilian populations were broadly speaking the victims of serious violations of human rights and international humanitarian law allegedly by all parties in the conflicts and throughout the territory, but especially in North Kivu and South Kivu, Orientale Province (in particular in Ituri), Katanga, Équateur and also Bas-Congo.

In July 1999, the Lusaka Ceasefire Agreement was signed by the DRC, Angola, Namibia, Zimbabwe, Rwanda and Uganda under which the states agreed to cooperate in disarming the multitude of rebels operating in the region.[373] The conflict was however further complicated by tensions between Rwandan and Ugandan forces which exploded towards the end of 1999, resulting in armed clashes between these former allies that continued into 2000. In an attempt to quell the violence, the UN Security Council mandated a peacekeeping force of over 5,500 troops (

tique du Congo-MONUC) to monitor the 1999 ceasefire and facilitate humanitarian assistance.

A significant breakthrough in the conflict came at the beginning of 2001 when President Laurent Kabila was shot dead by one of his bodyguards. The Congolese Parliament voted Kabila's son, Joseph Kabila, to take power, who almost immediately sought peace talks with Rwanda and Uganda.[374] Soon after, foreign troops in the DRC began to pull out. A series of

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[372]L. Ndikumana and K. Emizet at 10.The rest of this paragraph is based on information gleaned from this UNHCR report.
[373]L. Ndikumana and K. Emizet at 10.
[374]International Crisis Group, *From Kabila to Kabila: Prospects for Peace in the Congo* (16 March 2001) available at http://www.crisisgroup.org/en/regions/africa/central-africa/dr-congo/027-from-kabila-to-kabila-prospects-for-peace-in-the-congo.aspx (accessed 24 July 2011).

peace agreements were then signed. The Sun City Agreements in April 2002 provided a framework for Congo's transition to democracy, while the Pretoria Accord and the Luanda Agreements signed in July and September 2002 respectively, formalised the withdrawal of Rwandan and Ugandan troops from the DRC.[375] Finally, following the Inter-Congolese Dialogue process, the government, various rebel groups and others including political groups signed an agreement which led to the Transitional Government established in 2003. Under this new arrangement, Kabila would remain as President with four vice presidents representing, among others, former rebel groups. Jean-Pierre Bemba Gombo of the MLC took office as one of the vice-presidents.

Officially, the second Congo war ended in 2003 when the new transitional government took power, though much of the chaos that it produced remains to this day.

C. *Micro conflicts in the DRC*

As a direct consequence of the country's troubled history and the First and Second Congo Wars, two significant 'micro conflicts' were fought in the DRC. These conflicts took place in the context of the Second Congo War, but continued after the official end of the war in 2003.

a) The 'Kivu conflict' (Eastern DRC)

The Kivu conflict in the east of the DRC has its origins in the 1994 Rwandan Genocide and the Second Congo War. Together with former Hutu Power government figures, thousands of *génocidaires* who fled into the DRC re-organised themselves as the *Forces démocratiques*

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[375] K.P. Apuuli, "The Politics of Conflict Resolution in the Democratic Republic of Congo: The Inter-Congolese Dialogue Process" (2004) 4 *African Journal on Conflict Resolution* at 71 *et.seq*. This process was held under the mediation of the United Nations Secretary General's Special Representative to the DRC, Moustapha Niasse, and South Africa's Local Government Minister, Sydney Mufamadi.

de libération du Rwanda (hereinafter FDLR).[376] This newly formed Hutu rebel group had the ultimate objective of opposing the Tutsi-dominated government of Paul Kagame in Rwanda. At various stages during the turbulent history of the DRC following the Genocide, the FDLR has received support from Kinshasa in repelling Rwandan forces.

Claiming to be defending Congolese Tutsis from the FDLR in the mineral-rich Kivu provinces, General Laurent Nkunda established the *Congrès national pour la défense du peuple* (hereinafter CNDP).[377] Nkunda's forces have also often clashed with forces of the DRC army. In a series of offensives throughout 2004, 2005 and 2006 in which the UN peacekeeping force, MONUC, provided support to the DRC army against, Nkunda's forces, the CNDP have been accused of war crimes and crimes against humanity. Nkunda has also called for the overthrow of Kabila's government, citing corruption, and continued to openly engage his army in the region throughout 2007.

Peace talks began in early 2008 after they had stalled towards the end of 2007. On 23 January 2008, the CNDP and DRC government signed a peace deal to end the conflict. The deal granted immunity to Nkunda's forces and included provisions on the withdrawal of rebel forces from the region and for the resettlement of the thousands of civilians displaced by the fighting. It also provided for the removal of the FDLR from the region.

Nevertheless, dissatisfied with the peace deal and apparent lack of progress in disarming the FDLR, the CNDP once again began hostilities in the region at the end of 2008, before

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[376] A.Z. Hale, "In Search of Peace: An Autopsy of the Political Dimensions of Violence in the Democratic Republic of Congo", Unpublished Ph.D. Thesis, University of Florida, at 124.Thesis available at http://etd.fcla.edu/UF/UFE0024248/hale_a.pdf (accessed 10 August 2012).
[377] A.Z. Hale, at 135 *et.seq.*

Nkunda's removal as head of the CNDP by Bosco Ntaganda on 4 January 2009 on the grounds of mismanagement. Nkunda was eventually arrested by Rwandese forces on 22 January 2009 when he crossed into Rwanda.[378]

In the aftermath of Nkunda's removal from the scene, the Rwandan army launched an offensive - dubbed Umoja Wetu (Our Unity), with its Congolese counterparts, against the FDLR. Senior CNDP officers were promised key positions within the Congolese army and were given guarantees that they would not be transferred out of the Kivu's. The agreement was formalized on 23 March 2009 with the formal signatures by the Kinshasa government of two separate agreements: one with the CNDP, the other with separate armed groups.[379]

On 4 April 2012 former CNDP members cited failure by the DRC government to honour its end of the agreement and launched a fresh rebellion, this time renamed 'M23'-an acronym for March 23.[380] General Bosco Ntaganda led the rebellion and he also cited Congolese government attempts to weaken his control and increased calls for his arrest and surrender to the ICC, in accordance with Congo's legal obligations to cooperate with the court.[381]

The M23 movement reached its apex with the fall of the city of Goma on 20 November 2012.[382] After a rapid rise, the M23 experienced a similarly speedy demise, defeated on 5 November 2013 by the Congolese armed forces and a 3,000-strong UN brigade consisting

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[378]J. Stearns, From CNDP to M23: The Evolution of an Armed Movement in Eastern Congo (2012) at 34.
[379]J. Stearns, From CNDP to M23: The Evolution of an Armed Movement in Eastern Congo at 34.
[380]M23 was heavily linked with the Rwandan and Ugandan Governments which allegedly provided funding and direction. See- J. Stearns, *From CNDP to M23: The Evolution of an Armed Movement in Eastern Congo* at 47.
[381]Human Rights Watch, *DR Congo: M23 Rebels Committing War Crimes: Rwandan Officials Should Immediately halt all Support or Face Sanctions*, September 11 2012, available at http://www.hrw.org/news/2012/09/11/dr-congo-m23-rebels-committing-war-crimes. (accessed December 2 2014).
[382]See- BBC News, "Goma: M23 rebels capture DR Congo city" 20 November 2012, available at http://www.bbc.com/news/world-africa-20405739 (accessed December 2 2014).

of South African, Tanzanian and Malawian soldiers.[383] Moreover, M23 had been considerably weakened by internal leadership struggles between Ntaganda and Sultani Makenga.

As of September 2014 the security situation in both North and South Kivu was still volatile with intermittent clashes between the DRC government troops and various rebel groups including the Allied Democratic Forces, Allied Democratic Forces (ADF) and Nduma Defence of Congo/Cheka (NDC/Cheka).[384]

b) The 'Ituri conflict' (North-Eastern DRC)

Ituri is often described as the bloodiest corner of the DRC.[385] The Ituri conflict is a conflict between the agriculturalist Lendu and pastoralist Hema ethnic groups in the Ituri province of north-eastern DRC. The conflict originally began as an economic conflict, but soon evolved into an ethnic one and was exacerbated by Ugandan actors and aggravated by the broader international war in the DRC.[386]

Following Congolese independence from Belgium in 1960, land certificates of questionable legal title were granted to many Hema families under Mobutu's policy of 'Zairianisation' which sought to introduce new land ownership policies as a symbolic and ideological shift

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[383]BBC News, "DR Congo claims defeat of M23 rebels" 5 November 2013, available at http://www.bbc.com/news/world-africa-2481524 (accessed 30 November 2014).
[384]Report of the Secretary-General on the United Nations Organisation Stabilisation Mission in the Democratic Republic of the Congo at 5. Report available at http://www.un.org/ga/search/view_doc.asp?symbol=S/2014/698 (accessed 4 December 2014).
[385]See- Human Rights Watch, Ituri: Covered in Blood: Ethnically Targeted Violence in North-eastern DR Congo, July 2003, at 1.
[386]Human Rights Watch, *Ituri: Covered in Blood: Ethnically Targeted Violence in North-eastern DR Congo* at 2.

from colonial rule. However, this policy brought the new land ownership system into conflict with the traditional system based on ancestral lands, as Hema families were granted title to land traditionally regarded as Lendu.[387]

The first incidents of violence occurred in 1998 committed by traditional Lendu communities in the course of protecting their land.[388] These eventually evolved beyond simply targeting landowners to targeting anyone of Hema ethnicity and built up to a climax in 1999 with the *Blukwa massacre* in which more than 400 ethnic Hemas were massacred by Lendu militias. According to historian Gérard Prunier, giving evidence in the case before the ICC against Thomas Lubanga Dyilo, so marked the beginnings of "armed ethnicisation" in Ituri. According to Prunier, where ethnicity becomes the dominant factor, violence is perpetuated because "the safest [position] is to be an armed militia man".[389]

From 2002 onwards, a large number of rebel groups and smaller factions were operating in Ituri.[390] Whilst Rwanda originally backed the RCD, and Uganda the MLC of Bemba in the Second Congo War, constant in-fighting and a lack of coherent ideology meant that the rebel groups frequently changed allegiances. Furthermore, given the usually pragmatic arrangement of rebel groups, the DRC, Rwanda and Uganda have at various points during the conflict supported a number of different groups, even in proxy wars against each other.

The anarchy that ensued as a result of these arrangements, the lack of any political structure in the province, and the simple necessity of protection, facilitated the emergence of yet more militia groups. The predominantly Hema *Union des patriotes congolais* (UPC) led by

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[387]Justice in the Democratic Republic of Congo: A Background.
[388]K. Vlassenroot and T. Raeymaekers, "The Politics of Rebellion and Intervention in Ituri: The Emergence of a New Political Complex?" *African Affairs*, 385 at 391.
[389]*Prosecutor v. Thomas Lubanga Dyilo*, Transcript of Trial Proceedings, 26 March 2009, at 42 *et.seq.*
[390]Human Rights Watch, *Ituri: Covered in Blood: Ethnically Targeted Violence in North-Eastern DR Congo*.

Thomas Lubanga Dyilo, the Ngiti *Force de résistance patriotique en Ituri* (FRPI) and the Lendu *Front des nationalists et intégrationnistes* (FNI) became the main protagonists in the ethnic violence.

Under the terms of the Luanda Agreements signed in 2002 between Uganda and the DRC, Ugandan troops began to withdraw from Ituri. However, the immediate consequence of this was increased instability, marked particularly by increasing attacks on MONUC peacekeepers. As a result, the UN Security Council authorised[391] the deployment of 'Operation Artemis', an 1800-strong Interim Multinational Emergency Force which was launched on 12 June 2003. Transferred to EU command, the operation stabilised the situation ready to be transferred back to UN command under MONUC in late 2003. By 2007, disarmament and demobilisation of the remaining militia and rebel groups had begun, and today the province is largely peaceful.

5.2 DRC suit at The International Court of Justice (ICJ)

In 1999, the DRC instituted proceedings against Rwanda, Uganda and Burundi before the International Court of Justice (ICJ) in The Hague to challenge the use of force and armed activities on its territory during the Second Congo War. In its application, the DRC challenged the armed aggression of each country which it claimed had involved, *inter alia*, violations of its sovereignty and territorial integrity, violations of international humanitarian law and massive human rights violations. Beginning in August 1998 with the occupation by Burundian, Rwandan and Ugandan troops of the eastern cities of Goma and Bukavu, each

[391]UNSC Resolution 1484 (2003).

Application cited various incidents of massacres, rape, systematic looting and human rights violations committed by the foreign troops and their rebel allies within the DRC.

The cases concerning Burundi and Rwanda were removed from the list of ICJ cases in 2001, though a new application was instituted in 2002 against Rwanda. In its Judgment of 3 February 2006, the ICJ found that it had no jurisdiction to hear the case against Rwanda.

The Court its judgement against Uganda noted the "complex and tragic situation which has long prevailed in the Great Lakes region" and observed that "instability in the DRC in particular has had negative security implications for Uganda and some other neighbouring States."[392] The Court found that Uganda had "violated the principle of non-use of force in international relations and the principle of non-intervention", and had "violated its obligations under international human rights law and international humanitarian law".[393] According to the ICJ, through the conduct of its armed forces in the DRC, Uganda was responsible for, *inter alia*, acts of killing, torture, the destruction of villages and inciting ethnic violence. Uganda was directed to pay reparations to the DRC, which were to be agreed through bilateral negotiations between the states.

5.3 DRC self-referral to the ICC

The DRC signed the Rome Statute on 8 September 2000 and ratified it on 11 April 2002. Under the DRC's legal system, the Rome Statute could only apply domestically through an Act of Parliament and a Rome Statute implementation bill remains pending before the DRC parliament at the time of writing this paper.

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[392]Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, ICJ Reports 2005, 25, *para.* 26.

[393]Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment at *para.* 345.

The ICC Prosecutor consistently repeated his desire for the Court to target those bearing the greatest responsibility for the grave crimes committed in the DRC in order to end impunity for mass atrocities. Soon after taking office, the ICC Prosecutor received a large amount of information from victims and human rights organizations about the conflict in the DRC, especially concerning events in the Ituri region, near the Ugandan border. In September 2003, he made it known to the Assembly of States Parties that he was inclined to consider an investigation on his own initiative and thereby exercise his *proprio motu powers* under Article 15 to initiate formal investigations.[394] However, efforts were made to elicit a referral from the DRC government, as the Prosecutor realised this would greatly increase the prospects of serious investigations and appropriate guarantees for ICC staff.[395]

On 3 March 2004, the DRC government referred the situation of crimes committed anywhere on its territory to the ICC for investigation, by way of Article 14 of the Rome Statute. In this referral, the DRC government asked the Prosecutor to investigate the situation in order to determine if one or more persons should be charged with crimes dating from 1 July 2002. On 23 June 2004, the Prosecutor made the decision that he would open investigations in the interests of justice and the victims.[396] To facilitate these investigations, an Accord on

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[394]See- ICC press release dated 19 April 2004 available at http://www.icc-cpi-int/Menus/ICC/Situations+and+Cases/ (accessed 28 December 2014).He specifically said that: "I stand ready to seek authorisation from a Pre-Trial Chamber to start an investigation under my *proprio motu* powers. Our role could be facilitated by a referral or active support from the DRC. The Court and the territorial State may agree that a consensual division of labour could be an effective approach."

[395]An excerpt of the letter by the ICC prosecutor to the DRC president is reproduced by P. Kambale, "The ICC and Lubanga: Missed Opportunities" available at http://forums.ssrc.org/african-futures/2012/03/16/african-futures-icc-missed-opportunities/#fn-2780-8 (accessed 2 January 2015). The Prosecutor wrote: "Since the International Criminal Court will not be in a position to try all the individuals who may have committed crimes under its jurisdiction in Ituri, a consensual division of labour could be an effective approach. We could prosecute some of those individuals who bear the greatest responsibility for the crimes committed, while national authorities, with the assistance of the international community, implement appropriate mechanisms to deal with others. This would send a strong sign of the commitment of the Democratic Republic of the Congo to bring those responsible for these crimes to justice. In return, the international community may take a more resolved stance in the reconstruction of the national judiciary and in the re-establishment of the rule of law in the Democratic Republic of the Congo."

[396]See- the ICC press release dated 23 June 2004 available at http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/ (accessed 10 January 2015).

Judicial Cooperation (cord de coopération judiciaire) and an Interim Protocol on Privileges and Immunities of the ICC were signed between the OTP and DRC authorities. The accord was necessary in the absence of a law implementing the Rome Statute at the national level.

G.M. Musila[397] conducted in-depth research on the DRC situation. In the view of the officials he interviewed, the government's referral of the situation to the ICC was premised on the supposed role the Court could play in the stabilisation of the country by promoting the rule of law and democracy after many years of armed conflict.[398] The government considered the ICC as integral to the post-conflict renewal project.[399] In summation he found that a largely failed criminal justice system, the absence of effective and independent judicial institutions in view of partisan leanings in the judiciary, and lack of resources informed the decision to refer the situation to the ICC.[400]

W.W. Burke -White[401] takes a differing and cynical view of the referral arguing that it was a weapon to be used by the DRC president against his political rivals. His argument is premised on the fact that as already stated in the background to the conflict, the transitional government was based on a power sharing agreement wherein Joseph Kabila would be president

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[397]G.M. Musila, "Between Rhetoric and action: The Politics, Processes and Practice of the ICC's Work in the DRC" ISS Monograph 164 available at http://www.iss.co.za/pgcontent.php?UID=2736 (accessed 10 January 2015).
[398]G.M. Musila, "Between Rhetoric and action: The Politics, Processes and Practice of the ICC's Work in the DRC" at 32.
[399]G.M. Musila, "Between Rhetoric and action: The Politics, Processes and Practice of the ICC's Work in the DRC" at 32.
[400]These factors are alluded to in the letter referring the Congo situation by President Joseph Kabila wherein he stated that: "Because of the exceptional situation in my country, the competent authorities are unfortunately not capable of conducting investigations of these aforementioned crimes, nor are they able to conduct the necessary prosecutions without the participation of the International Criminal Court."
[401]W.W. Burke -White, "Complementarity in Practice: The International Criminal Court as Part of a System of Multi- Level Governance in the Democratic Republic of Congo" (2005) 18 *Leiden Journal of International Criminal Law*, 557 at 564 *et.seq.*

and there would be four vice presidents representing each of the four factions in the DRC civil war. He contends that within this framework the political actors had a strong incentive to position themselves for electoral victory by undermining the other. In his view international criminal justice offered a powerful mechanism to discredit enemies and reshape the domestic political landscape.

W.W. Burke –White provides further context to his argument by pointing out that Joseph Kabila was a relative new comer on the DRC political scene and wasn't directly involved in the then ongoing conflict in Ituri and Kivu. He was thus very unlikely to have been the target of ICC investigations yet several reports to the Prosecutor had implicated Jean-Pierre Bemba, one of Kabila's vice presidents in war crimes and crimes against humanity in the Ituri region.

5.3.2 OTP investigations

Within the DRC, the OTP focused its investigations on Ituri province because it deemed the atrocities committed there to be the gravest in the Congolese conflict. In the words of the Prosecutor, at the outset of the investigation, Ituri was singled out as being one of the most violent regions in the DRC.[402]

This decision has been criticised by some like P. Clark[403] who allege that that Ituri was chosen only because it is the most isolated from the political arena in Kinshasa.[404] He contends that in particular, there is less clear evidence to connect President Kabila to atrocities

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[402]ICC Press release, 17 March 2006 ICC-OTP-20060302-126-En, available at http://www.ICC-CPI-INT/pressreleases/133.html (accessed 12 January 2015).
[403]P. Clark, "Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda" in N. Waddel and P. Clark (eds.) *Courting Conflict? Justice Peace and the ICC in Africa* (2008).
[404]P. Clark, "Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda" in N. Waddel and P. Clark (eds.) *Courting Conflict? Justice Peace and the ICC in Africa* (2008).at

committed in Ituri, although it is suspected that he has previously supported various rebel groups in the province, including Germain Katanga's FRPI. This differs from violence in other provinces, particularly North and South Kivu and Katanga, where government forces and Mai Mai militias backed by Kabila are directly implicated in serious crimes. Therefore, investigations and prosecutions in Ituri display the least capacity to implicate high ranking officials in the current DRC government.

P. Clark further contends that the Prosecutor's focus on Ituri was also informed by the fact that there is less clear evidence to connect President Kabila to the atrocities committed in the region, while neglecting the violence in other provinces, particularly North and South Kivu and Katanga, where government forces and Mai Mai militias backed by Kabila are directly implicated in serious crimes.[405]

OTP investigations in Ituri have also been criticised for investing only in low-intensity and short "hit and run" investigations as well as relying on the cooperation of the Congolese government and the UN Mission in the Congo (MONUC) rather than on collecting direct victim testimony or using the material already collected by local NGOs for information on crimes and analysis of the cases.[406]

It is alleged that non-investigation of state orchestrated crimes was a crucial consideration for the ICC, as it needed to maintain good relations with Kinshasa to ensure the security of ICC investigators and other personnel working in the volatile eastern provinces. MONUC's

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40. See also-W.W. Burke -White, "Complementarity in Practice: The International Criminal Court as Part of a System of Multi- Level Governance in the Democratic Republic of Congo" for a similar view.

[405]P. Clark "Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda" at 43.

[406]P. Kambale, "The ICC and Lubanga: Missed Opportunities".

major peacekeeping presence in Ituri – the largest in the country – was vital in these ICC security calculations.[407] The ICC also wanted to avoid implicating government officials in the lead-up to Congo's first post-independence elections, held in July 2006. Foreign donor pressure on the ICC to avoid causing political instability was severe, as the international community (principally the UN and the European Union) poured US$500m towards the elections, the most expensive in the UN's history.[408]

5.4 Case selection and admissibility issues in the DRC Situation: Unable, unwilling, or inactive and grave enough?

Unlike the Uganda situation where the Pre-Trial Chamber declined to go into the intricacies of why the case cases were admissible, merely stating that they "appeared" to be admissible, in the DRC cases, the Pre-Trial Chamber went into considerable detail to explain the admissibility of the cases.

5.4.1 Cases arising from the DRC situation

I will now give backgrounds to each of these DRC cases and enumerate how they have been handled with respect to admissibility and explore why these specific cases were selected.

1. ***Prosecutor v. Thomas Lubanga Dyilo***

Lubanga, an ethnic Hema of Congolese nationality, was the founder and president of the *Union des patriotes congolais* (UPC) and the founder and Commander-in-Chief of the *Forces patriotiques pour la libération du Congo* (FPLC).[409] Both the UPC and FPLC were

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[407]P. Clark, "Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda" at 40.
[408]P. Clark, "Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda" at 40.
[409]*Prosecutor v. Thomas Lubanga* , PTCI decision on confirmation of charges, available at http://www.icc-cpi.int/iccdocs/doc/doc266175.PDF (accessed 12 December 2011).

active militia groups in the Ituri conflict whose history I detailed earlier in this chapter. On 17 March 2006, Thomas Lubanga Dyilo became the first suspect to be arrested and transferred to the custody of the ICC. Lubanga was arrested by authorities of the DRC in March 2005 and had been imprisoned in Kinshasa immediately prior to his transfer to The Hague in March 2006.[410]

Charges

Lubanga was formally charged on the basis of his individual criminal responsibility with three counts of war crimes for enlisting and conscripting children under the age of 15 and using them to participate actively in hostilities. The charges against Lubanga fall under articles 8 (2) (b) (xxvi) and 8 (2) (e) (vii) of the Rome Statute, concerning the use of children in Ituri to participate in an international armed conflict fought between September 2002 and June 2003, and a conflict not of an international character from June 2003 until August 2003.

In confirming the charges against Lubanga, PTCI found sufficient evidence to establish substantial grounds to believe that when the predominantly Hema FPLC was founded in 2002, a common plan existed between Lubanga and other FPLC commanders to further their war effort by forcibly recruiting minors, or having them volunteer, into the ranks of the FPLC.[411] According to the prosecution, children conscripted and enlisted into the ranks of the FPLC underwent rigorous military training and were used in active hostilities, including the infamous attack on Bogoro village in 2003. Lubanga and other FPLC commanders are alleged to have used children as personal bodyguards.

[410]He was arrested by the DRC government on charges of genocide and crimes against humanity pursuant to Articles 164,166 and 169 of the DRC Military Criminal Code.
[411]*Prosecutor v. Thomas Lubanga*, PTCI decision on Confirmation of charges.

The charges laid against Lubanga by the OTP and confirmed by PTCI have been criticised for being too minimal compared with the charges that the DRC government had earlier preferred against him.[412] These concerns about the charges brought led to a request[413] for leave by the Women's Initiatives for gender justice to submit observations as *amicus curiae* in the *Lubanga* case. They contended that there is information publicly available to the effect that serious crimes such as sexual slavery, rape, cannibalism, murder, abduction and torture have been committed by a wide range of militia groups including the UPC/FPLC, FNI , FAPC and these had not been included in the charges laid by the Prosecutor. This application was however declined by PTCI which held that the investigations in the Situation in the DRC were then on-going and the Prosecutor had not taken any decision not to investigate or prosecute.[414] It is interesting then why the Prosecutor chose to lay charges on Lubanga before completion of investigations, and it remains to be seen if Lubanga may be re-arrested to face other charges in future.

The above seems to suggest that the Prosecutor was perhaps quick to act in seeking an arrest warrant to put the Congolese authorities off from prosecuting Lubanga. Lubanga had been in custody since March 2005 and following the ICC arrest warrant in February 2006, he was quickly transferred to The Hague in March 2006. It could be argued that the Prosecutor was bent on having Lubanga surrendered and it did not matter much to him if investigations were incomplete or if Lubanga was to face minimal charges. Former investigators in the DRC have indicated that without explanation, the Prosecutor told the team to drop a year and a

[412]A counter argument is that there is no hierarchy of international crimes. Rendering use of child soldiers as a "minimal crime" compared to crimes against humanity has no legal nor normative basis and belittles a crime which the international community must have considered grave enough for inclusion in the Rome Statute.
[413]ICC-01/04-313 13-11-2006 1/19 CB PT, Request submitted pursuant to rule 103(1) of the Rules of Procedure and Evidence , 10 November 2006.
[414]ICC-01/04-373 20-08-2007 1/5 SL PT, Decision on the Request submitted pursuant to rule 103(1) of the Rules of Procedure and Evidence, 17 August 2007.

half of investigative work and focus solely on the use of child soldiers. In the words of one: "I cannot remember how and when the explanation was given, but it was important for the office [of the prosecutor] to present a case before the court."[415]

To add to the controversy, some have argued that for most Congolese, Thomas Lubanga did not fit into the category of persons bearing “the greatest responsibility” for the crimes committed during the second phase of the Congolese war.[416] He has been described as a mid-level actor in the conflict in Ituri with a large percentage of the crimes committed in Ituri being committed by the RCD-ML, of which Lubanga was only one among several “ministers.” Only in the beginning of 2003 did he create his own militia, the *Union des Patriotes Congolais* (UPC), also with the support and at the initiative of officers of the Ugandan army. As was the case with most of the militia in Ituri, however, the UPC’s operations were under the effective strategic control of the Ugandan army, whose officers retained command and control of military operations, including those during which crimes were committed against the civilian population.

Some commentators have therefore argued that the OTP and the court in general appear to have used the Lubanga trial to justify their existence. [417] The Prosecutor’s focus on Lubanga was also a complete departure from his statement made as soon as he had taken office that

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[415]See- K. Glassborow, “DRC: ICC Investigative Strategy under Fire”, Institute for War and Peace Reporting, available at http://www.ictj.org/en/news/coverage/article/2075.html (accessed 7 February 2011).
[416]P. Kambale, “The ICC and Lubanga: Missed opportunities”.
[417]W. Schabas, “First Prosecutions before the International Criminal Court” at 36 asserts that both PTCI and the Prosecutor were “impetuous” and “perhaps anxious to have a real defendant before the Court”. He concludes that in so doing, they have offered an interpretation of the Rome Statute which is arguably more intrusive with respect to the criminal justice of States than was ever intended.

his investigative and prosecutorial efforts and resources would be devoted to situations involving senior level perpetrators who bear the greatest responsibility, such as the leaders of the State or organisation allegedly responsible for those crimes.[418]

Questions have also been raised about the narrow geographical approach the ICC took in the Lubanga case. The OTP resisted investigating the wider dimensions of Lubanga's crimes, notably the alleged training and financing of Lubanga's UPC by the Ugandan and Rwandan governments.[419]Investigations into international financiers and backers by the OTP could potentially have implicated key figures in both Uganda and Rwanda.[420] Despite the regional issues highlighted by the Lubanga case, the ICC Prosecutor in 2006 indicated that investigations had been temporarily suspended until the proceedings on present charges were to end.[421]The reason for suspension of investigations were inter alia the security situation in Ituri and the impact of upcoming elections in the DRC. [422]

The absence of charges against government officials who bear greater responsibility has given credence to the perception that the ICC is powerless to take on those on whom it must rely for its investigations or those whose prosecution would compromise delicate regional

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[418]2003 OTP Paper on some policy issues before the Office of the Prosecutor at 3.

[419]Human Rights Watch, Unfinished Business: Closing Gaps in the Selection of ICC Cases at 12; P. Clark, "Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda" at 41.

[420]A UN report implicated Uganda as being responsible for the creation of almost all the armed groups, training their militias, selling them weapons and even lending soldiers to rich Hema to massacre Lendu civilians. The report also details the roles played by the Rwandese and DRC governments in fanning the conflict. See- Monuc Special Report on the events in Ituri January 2002-December 2003 available at http://reliefweb.int/sites/reliefweb.int/files/resources/93F81A37C5B409E785256EEC00679CE1-unsc-drc-16jul.pdf (accessed 12 December 2014); T. Turner, (2007) at 158 describes Ituri as Uganda's "wild west" where a number of high-ranking Ugandan officers were becoming very rich. It was governed by 'divide and rule' with the Ugandans backing various factions in the bloody militia combat while the Rwandans and the Kinshasa government each backed their own contenders.

[421]PTC I, "Situation in the Democratic Republic of the Congo, In the case of *Prosecutor v. Thomas Lubanga Dyilo*: Prosecutor's Information on Further Investigation", Doc. ICC-01/04-01/06-170, The Hague: ICC, 28 June 2006, *para*. 7.

[422]PTC I, "Situation in the Democratic Republic of the Congo, In the case of *Prosecutor v. Thomas Lubanga Dyilo*: Prosecutor's Information on Further Investigation".*para.9*

balances. Even if the problem is one of perception rather than actual compromised independence, it has nonetheless created a profound credibility gap for the ICC.[423]

Admissibility/Complementarity pre-trial determinations

Thomas Lubanga's case was referred to PTCI and the Prosecutor made an application for a warrant of arrest. In a ruling delivered in February 2006 PTCI held that when the DRC president sent the letter of referral to the OTP on 3 March 2004, it appears that the DRC was indeed unable to undertake an investigation and prosecution of the crimes falling within the jurisdiction of the Court and the case was therefore admissible. In the chambers view, "…this is why the self-referral of the DRC appears consistent with the ultimate purpose of the complementarity regime, according to which the Court by no means replaces national jurisdictions, but is complementary to them."[424]

PTCI further held that the self-referral or statement by the government of a State that it is unable to investigate or prosecute is not binding on the Court, thereby throwing out the notion of uncontested admissibility or waiver of complementarity arising from self-referrals.[425]In this breath PTCI found that the general statement from the Prosecution that the DRC national system continues to be unable in the sense of article 17(1) (a) to (c) and (3) of the Rome Statute does not correspond to the reality in DRC since the DRC national judicial system had undergone significant changes from 2004 particularly in the Ituri region which

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[423]Human Rights Watch, Unfinished Business: Closing Gaps in the Selection of ICC Cases at 16.
[424]*Prosecutor v. Lubanga* (ICC-01/04-01/06-8), Decision on the Prosecutor's Application for a Warrant of Arrest (10 February 2006) *para.* 34. Available at http://www.icc-cpi.int/iccdocs/doc/doc236260.PDF (accessed 23 December 2014).
[425]See footnote 26 in the *Prosecutor v. Lubanga* Decision on the Prosecutor's Application for a Warrant of Arrest decision.

resulted *inter alia* in the issuance of two arrest warrants for Thomas Lubanga Dyilo in March 2005.[426]

Notwithstanding the finding that the DRC judicial system was able to conduct prosecutions, PTCI further held that: “the DRC cannot be considered to be acting in relation to the specific case before the Court [...]” since before Lubanga’s surrender to the ICC by the DRC he was in custody and being prosecuted for genocide and crimes against humanity while at the ICC he was charged for recruitment of child soldiers. Proceedings in the Congo were not based upon the policy or practice of enlisting, conscripting and active use of children under the age of fifteen in armed conflict.

PTCI endorsed the inactivity theory, holding that: “The Chamber considers that the admissibility test of a case arising from the investigation of a situation has two parts. The first part of the test relates to national investigations, prosecutions and trials concerning the case at hand insofar as such case would be admissible only if those States with jurisdiction over it remained inactive in relation to that cased or are unwilling or unable, within the meaning of article 17(1) (a) to (c), 2 and 3 of the Statute”. PTC I further held that: “[…] no State with jurisdiction over the case against Thomas Lubanga Dyilo is acting, or has acted, in relation to such case. Accordingly, in the absence of any acting State, the Chamber need not make any analysis of unwillingness or inability.” [427] This was strange considering PTCI had already made an analysis with respect to inability and found that the DRC national judicial system had undergone significant change since 2004 and as such it was incorrect for the Prosecutor to broadly say that the DRC was unable.

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[426]*Prosecutor v. Lubanga*, Decision on the Prosecutor’s Application for a warrant of arrest, *para.* 36.
[427]*Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecutor’s application for a warrant of arrest, *para.* 40.

With respect to gravity, PTCI interpreted the gravity threshold to require that the conduct at issue was "systematic (pattern of incidents) or large-scale."[428] In this regard, PTCI stated that "due consideration must be given to the social alarm such conduct may have caused the international community."[429]PTCI did not, however, explain what it meant by "social alarm." Additionally, PTCI declared that the gravity threshold requires the Court to prosecute only "the most senior leaders suspected of being the most responsible for the crimes within the jurisdiction of the Court . . . in any given situation."[430] PTCI justified the latter requirement by reference to the Court's deterrent mission, stating that prosecuting senior leaders will maximize deterrence because "other senior leaders in similar circumstances will know that solely by doing what they can to prevent the systematic or large-scale commission of crimes within the jurisdiction of the Court can they be sure that they will not be prosecuted by the Court."[431]

Trial

On 26 January 2009, the trial of Thomas Lubanga began in The Hague, a first before the ICC. The Prosecution concluded its case against Lubanga on 14 July 2009 after 74 days of hearings and the testimony of twenty eight witnesses. The trial represents not only the inaugural case at the ICC, but also the first international criminal proceedings in which victims have been allowed to directly participate in the proceedings with representation by legal counsel.

[428]*Prosecutor v. Lubanga, Decision* on the Prosecutor's Application for a warrant of arrest, *para*. 46.
[429]*Prosecutor v. Lubanga, Decision* on the Prosecutor's Application for a Warrant of arrest, *para*. 46.
[430]*Prosecutor v. Lubanga,* Decision on the Prosecutor's Application for a Warrant of arrest, *para*. 50.
[431]*Prosecutor v. Lubanga, Decision* on the Prosecutor's Application for a Warrant of arrest decision, *para*. 54.

Thomas Lubanga was found guilty on 14 March 2012, of the war crimes of enlisting and conscripting of children under the age of 15 years and using them to participate actively in hostilities. He was sentenced on 10 July 2012 to a total of 14 years of imprisonment.[432] On 1 December 2014, the Appeals Chamber confirmed, by majority, the verdict declaring Thomas Lubanga guilty and the decision sentencing him to fourteen years of imprisonment.

2. *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*

Germain Katanga (alias "Simba") is a Congolese national of Ngiti ethnicity. During the Ituri conflict, Katanga was the commander of the *Force de résistance patriotique en Ituri* or FRPI (Patriotic Resistance Force in Ituri).[433] Pursuant to a peace process in the DRC and the establishment of the Transitional Government in 2003, Katanga was appointed Brigadier-General of the Armed Forces of the DRC (*Forces Armées de la République Démocratique du Congo* - FARDC) along with other former militia leaders in an attempt to resolve the country's conflicts.[434] Following the killing of nine UN peacekeepers in Ituri in February 2005, Katanga was arrested by the DRC authorities and remained under house arrest in Kinshasa until his transfer to the ICC. The Prosecutor at the ICC filed an Application for the issuance of an arrest warrant for Germain Katanga in June 2007, which Trial Chamber I issued under seal in July 2007. On 17 October 2007, Katanga was surrendered to the custody of the ICC by the Congolese authorities, with his arrest warrant unsealed the following day.[435] Katanga made his initial appearance before the Court on 22 October 2007.

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[432]"Thomas Lubanga sentenced to 14 years for Congo war crimes", The Guardian online, http://www.guardian.co.uk/law/2012/jul/10/icc-sentences-thomas-lubanga-14-years (accessed 11 November 2012).
[433]Report of the Secretary-General on the United Nations Organisation Stabilisation Mission in the Democratic Republic of the Congo, *para*.12.
[434]*Prosecutor v. Germain Katanga* and *Mathieu Ngudjolo Chui*, Decision on confirmation of charges, ICC-01/04-01/07-717, *para*.7.
[435]Statement by Fatou Bensouda, Deputy Prosecutor, during the press conference regarding the arrest of Germain Katanga, ICC-OTP-20071019-258.

Mathieu Ngudjolo Chui, a Congolese of Lendu ethnicity, is the former leader of the *Front des nationalists et intégrationnistes*, or FNI (National Integration Front) operating in the Ituri conflict. Under the same initiative which saw Katanga integrated into the FARDC, Ngudjolo Chui was appointed Colonel in 2006. Ngudjolo Chui had previously held positions in the Army in the former Zaire, but deserted prior to the first Congo War. On 6 July 2007, a warrant for the arrest of Ngudjolo Chui was issued under seal, and unsealed on 7 February 2007 following the arrest and transfer of the accused to The Hague by the Congolese authorities. Ngudjolo Chui made his initial appearance before the ICC on 11 February 2008.

In a Decision delivered on 10 March 2008, Pre-Trial Chamber I at the ICC joined the cases of Katanga and Ngudjolo Chui following a request to that effect filed by the Prosecution, and after determining that it would neither prejudice the two accused nor be contrary to the interests of justice.[436] The decision notes the alleged co-responsibility of Katanga and Ngudjolo Chui for crimes committed in certain attacks in the Ituri province in 2003.

Charges

After confirmation of charges hearings, on 26 September 2008, Pre-Trial Chamber I found that there was sufficient evidence to establish substantial grounds to believe that Katanga and Ngudjolo Chui were responsible for ten counts of crimes against humanity and war crimes.[437] The Chamber confirmed the following charges against the accused: three crimes against humanity for murder, rape and sexual slavery, as well as seven war crimes for using children under the age of 15 to take active part in hostilities, deliberately directing an attack

[436] *Prosecutor v. Germain Katanga,* Decision on the Joinder of the Cases against Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07-257.
[437] *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on confirmation of charges, ICC-01/04-01/07-717.

on the civilian population, wilful killing, destruction of property, pillaging, and sexual slavery and rape. Nevertheless, the Chamber found that there was insufficient evidence to establish grounds to believe that the accused committed the further charges, of inhuman treatment, outrages upon personal dignity and other inhumane acts.

The Prosecution alleges that Katanga and Ngudjolo Chui jointly committed the crime of using children under the age of fifteen as bodyguards and combatants during the Ituri conflict. The other charges against the two rebel commanders are based on their individual criminal responsibility under Article 25 (3) (a) for jointly committing through other persons the various crimes against humanity and war crimes.[438]The Prosecution further alleges that throughout the Ituri conflict forces under the command of Katanga and Ngudjolo Chui implemented a policy of systematically targeting the civilian Hema population.

The limiting of charges to only Katanga and Ngujolo has been criticised just like in the Lubanga case for them only being low level perpetrators. As noted in the history of the conflict, it was fuelled by the involvement of Ugandan, Rwandan and DRC forces, and as such PTCI in the *Lubanga* case held the Ituri conflict to be international in character[439], largely due to the fact that Uganda was a major supplier of weapons to armed groups in the region (See also the International Court of Justice's condemnation of the role of the Ugandan People's Defence Force (UDPF) on the territory of the DRC, which the Trial Chamber relied upon in its determination)[440]. The international nature of the conflict was also confirmed in the Katanga and Ngujolo confirmation of charges decision with PTCI holding that:

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[438]*Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on confirmation of charges.
[439]*Prosecutor v. Thomas Lubanga*, Decision on confirmation of charges at *para.*209.
[440]ICJ, Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda), Judgment, I.C.J. Reports 2005, 19 December 2005.

> "There is also sufficient evidence to establish substantial grounds to believe that Uganda directly intervened in this armed conflict through the Ugandan People Armed Forces ("the UPDF"). The evidence presented establishes direct participation of significant numbers of UPDF troops in several military operations on behalf of different armed groups including the UPC takeover in Bunia in early August 2002, the FNI/FRPI takeover in Bogoro in February 2003 and of Bunia in early March 2003.There is also sufficient evidence to establish substantial grounds to believe that Uganda was one of the main supplier of weapons and ammunitions to these armed groups and that the respective recipients' ability to successfully attack other groups was aided by this Ugandan military assistance."[441]

Admissibility/Complementarity pre-trial determinations

The first admissibility determination in this case was done at the stage of application of an arrest warrant for Germain Katanga. PTCII determined that, *inter alia*, it was "of the view that the circumstances of the [...] case warrant an initial determination of the admissibility of the case prior to the issuance of a warrant of arrest." It went on to rely on the same conduct test used in the Lubanga case, thereby finding that:

> "When, as in the present case, the existence of national proceedings is the sole reason for a possible finding of inadmissibility, it is a condition *sine qua non* for such a finding that national proceedings encompass both the person and the conduct which is the subject of the case before the Court. In this regard, the Chamber finds that, on the basis of the evidence and information provided in the Prosecution Application, the Prosecution Supporting Materials and the Prosecution Response, the proceedings against Germain Katanga in the [Democratic Republic of the Congo] do not encompass the same conduct which is the subject of the Prosecution Application."[442]

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[441] *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on confirmation of charges at *para.*240.
[442] *Prosecutor v. Germain Katanga*, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, ICC-01/04-01/07-4.

Prior to the start of the trial, the defence for Germain Katanga filed an *ex parte* motion before Trial Chamber II challenging the admissibility of the case pursuant to Article 19 (2) of the Rome Statute by arguing that a trial would violate the principle of complementarity enshrined in the Rome Statute. Of particular relevance to my study of self-referrals, the defence argued that it considers the decision by the DRC to terminate the investigation and not to prosecute Germain Katanga to be not due to its inability or unwillingness to effectively prosecute, but rather due to its wish to rely on the Court.[443]

The defence further argued that here is no basis in law for the "same conduct" test which imposes an "absolute requirement for identical charges", thereby departing from the proper and natural interpretation of Article 17 of the Rome Statute.[444]It was further argued that the DRC demonstrated a clear intention on the part of the DRC to prosecute Katanga for crimes against humanity committed during the attack on Bogoro and even if the same conduct test were to be applied the charges confirmed by the Pre-Trial Chamber .[445] The defence lastly argued that the test currently employed and developed in the *Lubanga* case is the wrong test to be applied in the assessment of admissibility.[446] Rather than the "same conduct" test, which the defence argued amounts to primacy rather than complementarity, the defence forwarded a combined "comparative gravity"/ "comprehensive conduct" test. Under this test, the defence claimed that investigations against Katanga in the DRC "were of the same or

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[443]*Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute) ICC-01/04-01/07-1213-tENG at *para.* 22.In this respect, the defence also argued that the fact that the authorities of the DRC themselves referred the situation in the DRC to the Court is not relevant for a determination of the admissibility of the case and that the general reference contained in the letter of referral cannot, in and of itself, be a basis for admissibility.
[444]*Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui,* Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case, at *para*.12.
[445]*Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui,* Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case, at para.16.
[446]In the *Lubanga* case already discussed earlier in this chapter, PTCI ruled that an indictee should be charged before national Courts with the same conduct as at the ICC for a case to be inadmissible.

greater gravity as the charges brought by the ICC Prosecutor" and thus the case before the ICC violates complementarity.[447]

On 12 June 2009, Trial Chamber II unanimously dismissed the motion, finding no grounds to support the submission that complementarity had been violated. It endorsed self-referrals by holding that: "…if a State considers that it is more opportune for the Court to carry out an investigation or prosecution, the State will still be complying with its duties under the complementarity principle, if it surrenders the suspect to the Court in good time and cooperates fully with the Court in good time in accordance with Part IX of the Statute."[448]

The Chamber also held that it is not in a position to ascertain the real motives of a state which expresses its unwillingness to prosecute a particular case. A state, in the view of Trial Chamber II, may for whatever reason decide to self-refer a situation for investigation.[449] This finding is in my view inconsistent with the requirement in Article 17 of the Rome Statute that the unwillingness must be "genuine". How can a determination of "genuiness" be made without ascertaining the motives of a state? The trial Chamber avoided making a ruling on the same conduct test complained of but confirmed that the DRC had "quite clearly decided to allow the court to institute proceedings" and was "quite clearly unwilling to prosecute" Katanga.[450] The Chamber stated that only one of the two criteria ('unable' or 'unwilling') had to be satisfied, and that the DRC had clearly demonstrated its desire for the ICC to prosecute the case.

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[447] *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case, *para.*13-14.
[448] *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case, *para.*79.
[449] *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case, *para.*80.
[450] *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case, *para.95.*

The matter later went on appeal with Katanga *inter alia* challenging the Trial Chamber's construction of Article 17(1) (a) and (b) of the Rome Statute, arguing that it had erroneously enlarged the definition of unwillingness in a manner not intended by the drafters of the Statute and not in compliance with its objective and purpose; and contrary to the fundamental values underlying the complementarity principle.[451] On 25 September 2009, the Appeals Chamber rejected each of Katanga's five grounds of appeal. The Appeals Chamber held that Article 17 did not bar the case against Katanga because the DRC, prior to the filing of Katanga's motion challenging the admissibility of the case, had closed the domestic proceedings against Katanga.[452] The relevant provision (Article 17(a)) states that a case shall be inadmissible if "the case *is being* investigated or prosecuted by a State which has jurisdiction over it".

The Appeals Chamber of the ICC further held that: ''[i]naction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court, subject to article 17(1) (d) of the Statute''.[453]Where inaction arises, there is no need to look into unwillingness or inability by a state.

The Appeals Chamber adopted the same approach as previous Pre-Trial Chambers[454] to the issue of complementarity confirming the view that a cooperative approach between States parties and the ICC in the form of self-referrals is consistent with the complementarity

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[451]*Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the Appeal of Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497 at para. 61 (hereinafter Katanga Appeals decision).
[452]Katanga Appeals decision, *para.80.*
[453]Katanga Appeals decision at 3.
[454]See for example, *Lubanga Warrant Decision*, at *para.* 29; and *Situation in Uganda*, Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005 (Public Redacted Version), ICC-02/04-01/05 (2005) at *para.*37.

scheme under Article 17 and that it furthers the Statute's object and purpose of ending impunity for international crimes. It held that the sovereign decision of a state to relinquish its jurisdiction in favour of the ICC may be seen as complying with the duty to exercise its criminal jurisdiction as envisaged in the sixth paragraph of the preamble to the Rome Statute.[455]

The Katanga appeals decision has been criticised for being sound in law but propagating a flawed policy. The view of this school of thought is that the Chamber's decision effectively authorises the prosecution to engage in practices that may be inconsistent with one of the fundamental principles underlying the founding of the ICC(of the Court being one of last resort), at least to the extent that a state closes national proceedings simply because it would prefer that the ICC bear the cost of prosecuting the case, rather than because of any real inability on the part of the state's judicial system.[456] B. Batros on the other hand argues that however important the goal of promoting national proceedings may be, it is unrealistic to expect a judicial chamber to pursue that goal by interpreting a provision in a way that leads to the direct and concrete result of impunity.[457]

Trial

On 21 November 2012, Trial Chamber II decided to sever the charges against Mathieu Ngudjolo Chui and Germain Katanga and on 18 December 2012 the same chamber acquitted Mathieu

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[455]Katanga Appeals decision at *para*.85.
[456]S. Sácouto and K. Cleary, "The Katanga Complementarity Decisions: Sound Law but Flawed Policy" (2010) 23 *Leiden Journal of International Law,* 363 at 369.This article concludes by recommending that there should be a policy shift in the Prosecutors case selection strategy whereby he should not select cases that are already being prosecuted and investigated by states, rather than a policy shift to not accepting self-referrals at all.
[457]B. Batros, "The Judgment on the Katanga Admissibility Appeal: Judicial Restraint at the ICC" (2010) 23 *Leiden Journal of International Law*, 343 at 356.

Ngudjolo Chui of the charges of war crimes and crimes against humanity. The decision was taken unanimously.[458]

Germain Katanga was on 7 March 2014 found guilty of four counts of war crimes and one count of crime against humanity committed in Ituri, DRC.[459] He was sentenced to twelve years imprisonment on 23 May 2014.

3. *Prosecutor v. Bosco Ntaganda*

Bosco Ntaganda is an ethnic Rwandan Tutsi who fought for the Rwandan Patriotic Front (RPF) during the Rwandan genocide in 1994 and during this war he came to be called "The Terminator" due to his ruthlessness.[460] He was the alleged Deputy Chief of General Staff for Military Operations of the Hema *Forces patriotiques pour la libération du Congo* (FPLC), the military wing of the *Union des patriotes congolais* (UPC).[461] In his position within the UPC, Ntaganda was ranked third in its hierarchy behind Thomas Lubanga.

On 22 August 2006 and on 13 July 2012, two warrants of arrest were issued by the ICC against Mr. Ntaganda.

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[458] ICC Press release, "ICC Trial Chamber II acquits Mathieu Ngudjolo Chui" 18 December 2012 available at http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/news%20and%20high-lights/Pages/pr865.aspx (accessed 18 December 2012).
[459] ICC Press Release, "Germain Katanga found guilty of four counts of war crimes and one count of crime against humanity committed in Ituri, DRC" 7 March 2014 available at http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr986.aspx (accessed 12 December 2014).
[460] Strongman of the Eastern DRC: A Profile of General Bosco Ntaganda, Rift Valley Institute Briefing, 12 March 2013 available at http://www.riftvalley.net/publication/strongman-eastern-drc#.VKZjL8mxWjc (accessed 12 December 2014).
[461] Justice in the Democratic Republic of Congo: A Background.

Charges

On 9 June 2014, Pre-Trial Chamber II unanimously confirmed charges consisting in 13 counts of war crimes (murder and attempted murder; attacking civilians; rape; sexual slavery of civilians; pillaging; displacement of civilians; attacking protected objects; destroying the enemy's property; and rape, sexual slavery, enlistment and conscription of child soldiers under the age of fifteen years and using them to participate actively in hostilities) and five counts of crimes against humanity (murder and attempted murder; rape; sexual slavery; persecution; forcible transfer of population) against Bosco Ntaganda allegedly committed in 2002-2003 in the Ituri Province, Democratic Republic of the Congo.[462]

Surrender

Ntaganda continued for a long time to be at liberty and even served as a general in the mainstream DRC army in spite of ICC arrest warrants over his head.[463]According to news reports, when asked why an indicted ICC suspect was serving in the DRC army, the DRC president replied: “Because we want peace now. In Congo, peace must come before justice."[464]

On March 18, 2013 Ntaganda to the shock of many walked into the U.S. Embassy in Kigali, Rwanda and asked to be delivered to the ICC in the Netherlands.[465] He was the first wanted indictee to surrender to the ICC and his trial is scheduled to open on 2 June 2015 before Trial Chamber VI.

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[462]*Prosecutor v. Bosco Ntaganda*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda,ICC-01/04-02/06-309 09-06-2014 1/98 EC PT.

[463]The Guardian, “Congo conflict: 'The Terminator' lives in luxury while peacekeepers look on”, available at http://www.guardian.co.uk/world/2010/feb/05/congo-child-soldiers-ntaganda-monuc (accessed 7 February 2011).

[464]The Guardian, “Congo conflict: 'The Terminator' lives in luxury while peacekeepers look on”.

[465]The Guardian, “Notorious warlord gives himself up to International Criminal Court” http://www.theguardian.com/world/2013/mar/19/africa-congo.

Admissibility/Complementarity pre-trial determinations

The rulings on warrants of arrest and confirmation of charges in the Bosco Ntaganda case do not contain any matter of particular relevance to my study of self-referrals, with specific reference to admissibility and complementarity. Nevertheless it is worth noting that there has been criticism of the fact that Bosco Ntaganda's boss in the CNDP rebel group, Laurent Nkunda has never been indicted by the ICC.[466]

4. *Prosecutor v. Callixte Mbarushimana*

Callixte Mbarushimana had been the Executive Secretary of the *Forces Démocratiques pour la Libération du Rwanda -Forces Combattantes Abacunguzi* (FDLR) since July 2007 and after the arrest of the FDLR's President Ignace Murwanashyaka in November 2009, he became the *defacto* FDLR leader.[467] The OTP alleged that from January to September 2009 there was a protracted armed conflict between the FDLR and DRC government forces in the provinces of North Kivu and South Kivu in the DRC and during this conflict several attacks were directed by the FDLR troops against the civilian population.[468]

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[466]The ICC in a 2008 press release "DRC: ICC warrant of arrest unsealed against Bosco Ntaganda" ,ICC-OTP-20080429-PR311 ,available at http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200206/press%20releases/drc_%20icc%20warrant%20of%20arrest%20unsealed%20against%20bosco%20ntaganda (accessed 19 March 2011) acknowledged that Ntaganda took up the position of Chief of Staff of the CNDP under the command of Laurent Nkunda. The release further stated that: "The CNDP is one of the groups against which there are credible reports of serious crimes committed in the two Kivu provinces- including sexual crimes of unspeakable cruelty - as well as the FDLR forces, local armed groups and individual members of the regular army. The Office of the Prosecutor is in the process of moving on to its third case in the DRC, with other applications for arrest warrants to follow in the coming months and years. In particular, we are collecting information about crimes committed in the North and South Kivu. We are also considering the role of those who organized and financed the militia." Seven years later, as of the time of writing this thesis, no action has been taken against Nkunda inspite of glaring evidence of his crimes.

[467]*Prosecutor v. Callixte Mbarushimana*, Decision on the confirmation of charges, ICC-01/04-01/10-465-Red. at *para*.5.

[468]*Prosecutor v. Callixte Mbarushimana*, Decision on the confirmation of charges, *para.6*.

On 11 October 2010 Callixte Mbarushimana was arrested by French authorities in France and on 25 January 2011 he was transferred to The Hague.

Charges

Callixte Mbarushimana faced five counts of crimes against humanity: murder, torture, rape, inhumane acts and persecution; and six counts of war crimes: attacks against the civilian population, destruction of property, murder, torture, rape and inhuman treatment.[469]

Admissibility/Complementarity pre-Trial Determinations

On 16 December 2011, Pre-Trial Chamber I decided by majority to decline to confirm the charges against Mr. Mbarushimana on the basis of evidence presented by the prosecution and he was released from the ICC's custody on 23 December 2011.[470]

5. *Prosecutor v. Sylvestre Mudacumura*

Like Callixte Mbarushimana, Sylvestre Mudacumura was alleged to be a leading figure in FDLR. On July 13, 2012, Pre-Trial Chamber I issued an arrest warrant against him alleging nine counts of war crimes (attacks against the civilian population, murder, mutilation, cruel treatment, rape, torture, destruction of property, looting, and attacks on human dignity) committed in the Kivu regions from January 20, 2009, to the end of September 2010, pursuant to Article 25(3) (b) of the Rome Statute of the ICC.[471]The arrest warrant has yet to be executed and he is currently at large.

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[469]*Prosecutor v. Callixte Mbarushimana*, Arrest warrant, ICC-01/04-01/10-2-tENG 19-10-2010.
[470]*Prosecutor v. Callixte Mbarushimana*, Decision on the confirmation of charges, ICC-01/04-01/10-465-Red.
[471]*Prosecutor v. Sylvestre Mudacumura*, Decision on the Prosecutor's Application under Article 58, ICC-01/04-01/12-1-Red.

5.5 Conclusion

This chapter has traced the history of the DRC conflict up to the involvement of the ICC. The jurisprudence arising from the ICC with regard to the DRC situation has shown a clear endorsement of the self-referral phenomenon as one of the ways of a state exercising its duty to prosecute.

From the ICC jurisprudence in the DRC situation there has also evolved the so-called "same conduct" test wherein the conduct and the charges before a national tribunal and the ICC should be the same for a case to be rendered inadmissible. This test is however very controversial yet the appeals chambers declined to elucidate further on its application. It was only elucidated later in the Kenya situation and this is discussed in Chapter Seven of this thesis.

It has also been shown in this chapter that prosecutions in the DRC have been one sided with only rebel leaders being targeted and no government officials being investigated. This in my view is a consequence of the need for the ICC to have the cooperation of the DRC government in investigations. It is a dilemma that would have occurred irrespective of the trigger mechanism.

The need not to ruffle powerful feathers is also evident in the non-targeting of the backers and financers of the DRC rebel leaders. Even though the Prosecutor expressed readiness to interest himself in the actions of actors outside the DRC, such as financial backers of the armed groups who may be based outside the country,[472] unfortunately, he emphasized that governments would investigate these financiers on their own,[473] which situation leaves a gap

[472]Chief Prosecutor on Cooperation; Congo/Ituri Investigation. Available at http://www.wikileaks.org/plusd/cables/03THEHAGUE2779_a.html (accessed 28 November 2013).
[473]Chief Prosecutor on Cooperation; Congo/Ituri Investigation.

which can be exploited by states to protect their citizens and interests. However, the statements made by the Prosecutor raise a fundamental question of how a state would investigate and implicate itself, if it took the decision to support an armed group. The ICC needs to assume the responsibility of investigating and prosecuting senior State officials of countries alleged to have backed and financed armed groups, without leaving such role to the States' authorities. This would expose the process to political manipulation and thereby fail to achieve the desired results.

As shown in the background to the DRC conflict, the conflict was largely a proxy war pitting rebel leaders supported by Uganda, Rwanda, Angola, Zimbabwe and the DRC.[474] One commentator correctly notes that the warlords were not insignificant figures, but they were nevertheless not at the top of the chain of command, either.[475] In a 2003 OTP policy paper[476] and in an address to the 2005 informal meeting of legal advisers of ministries of foreign affairs at the UN in New York, the Prosecutor had emphasised that one of the most important elements of his strategy

bear the greatest responsibility for the most serious crimes. Failure to investigate and prosecute high level leaders in the DRC runs counter to the Prosecutors own clearly stated strategy and the fight against impunity. Impunity cannot be ended when senior leaders at the top of the chain of command are left scot-free. It sends a bad message that atrocities can be committed through proxy armies and rebel groups. Therefore, it would be prudent that the Prosecutor considered investigating and prosecuting the financiers of conflicts as well, other

[474]The conflict has therefore come to be called "Africa's First World War". See- A. Shah "The Democratic Republic of Congo", *Global Issues*, available at http://www.globalissues.org/article/87/the-democratic-republic-of-congo (accessed 19 July 2011).
[475]K. Roth, "The International Criminal Court Five Years on: Progress or Stagnation?" (2008) 6 *Journal of International Criminal Justice*, 763 at 764.
[476]ICC-OTP, Paper on Some Policy Issues, 2003.

than only the rebel leaders, since the former potentially perpetuate violence and heinous crimes through financial and military means.

CHAPTER SIX: THE SITUATION IN THE CENTRAL AFRICAN REPUBLIC

6.1 Background to the conflict

This is the least publicised of the three self-referrals before the ICC. There is no clear reason why the Central African Republic (hereinafter C.A.R) is rarely or never in the news but the author contends that it is probably because there is no struggle over minerals like is the case in the DRC or the shocking images of mutilation by the LRA in Uganda. Below, I will give a background to the conflict, albeit from the limited available information.

Since the death of its first head of government, Barthelemy Boganda, in a plane crash on the eve of independence (on 29 March 1959), governance of the C.A.R has been blighted by personal power struggles at the top.[477] Boganda's spiritual heir Abel Goumba succeeded him as prime minister and was favourite to become president when the territory became independent on 13 August 1960.[478]However, the then minister of the interior David Dacko who was supported by French colonialists, surrounded parliament with a band of pygmies armed with poison arrows and forced the deputies to elect him first president of a sovereign Central African Republic.[479]

On 31 December 1965, Col. Jean-Bedel Bokassa a former captain of the French army who had become Chief of Staff took power in a coup, overthrowing David Dacko. He abolished the constitution, proclaimed himself president for life in 1972 and later "Emperor" Bokassa

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[477]See- M. Glasius "'We Ourselves, We are Part of the Functioning': The ICC, Victims, and Civil Society in the Central African Republic"(2008) *African Affairs* ,49; S. Spittaels and F. Hilgert, *Mapping Conflict Motives: Central African Republic* (2009).
[478]International Crisis Group, *Central African Republic Anatomy of a Phantom State*, (Africa Report No.136 – 13 December 2007) at 4.Available at http://www.crisisgroup.org/~/media/Files/africa/central-africa/central-african-republic/Central%20African%20Republic%20Anatomy%20of%20a%20Phantom%20State.pdf . (accessed 20 December 2015).
[479]International Crisis Group, *Central African Republic Anatomy of a Phantom State* at 4.

I of a new monarchical Central African Empire in 1976. His regime was characterized by numerous human rights atrocities.[480]

C.A.R thereafter had a succession of coups with Bokassa being overthrown by a French backed coup in 1979 which brought David Dacko to power.[481] David Dacko was in turn overthrown by Gen. Andre Kolingba in 1981.[482] Due to mounting pressure from France, the IMF and local critics, in 1991, President Kolingba announced the creation of a national commission to rewrite the constitution to provide for a multi-party system.[483] Multi-party presidential elections were conducted in 1992 but were later cancelled due to serious logistical and other irregularities. Ange-Félix Patassé won a second-round victory in rescheduled elections held between 22 August and 19 September 1993, and was controversially re-elected for another six year term in September 1999.[484]

Salary arrears, labour unrest, and unequal treatment of military officers from different ethnic groups led to three mutinies against the Patassé government in 1996 and 1997.[485] The French succeeded in quelling the mutinees, and it later requested six African countries (Burkina Faso, Gabon, Mali, Senegal, Chad and Togo) to contribute military contingents to a regional peacekeeping force which occupied the C.A.R capital, Bangui until 1998 when they were relieved by the 1,350 strong UN Mission for the Central African Republic (MINURCA).[486]

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[480]US State Department Background Note: Central African Republic, available at http://www.state.gov/r/pa/ei/bgn/4007.htm#history (accessed 25 May 2011).
[481]International Crisis Group, *Central African Republic Anatomy of a Phantom State* at 6.
[482]Crisis States Working Papers Series No.2, *The Tormented Triangle: The Regionalisation of Conflict in Sudan, Chad and the Central African Republic* at 6. Kolingba, a member of the Yakoma tribe that inhabits parts of southern CAR, ruled as a corrupt military dictator and catered mainly to the Yakoma-populated southern belt of CAR while enjoying French support.
[483]International Crisis Group, *Central African Republic Anatomy of a Phantom State* at 8.
[484]US State Department Background Note: Central African Republic.
[485]US State Department Background Note: Central African Republic. See also - Crisis States Working Papers Series No.2, *The Tormented Triangle: The Regionalisation of Conflict in Sudan, Chad and the Central African Republic* at 6.
[486]International Crisis Group, *Central African Republic Anatomy of a Phantom State* at 14.

Economic difficulties caused by the looting and destruction during the 1996 and 1997 mutinies, energy crises, and government mismanagement however continued to trouble Patassé's government through 2000. On 28 February 1999 the last French soldiers left the C.A.R capital while in March 2000 the last of the UN forces also departed.[487] In May 2001, rebel forces within the C.A.R. military who were supposedly led by former President and Army General Andre Kolingba (It has been suggested that he was "beleaguered" and "pushed to the front" by younger officers), attempted a military coup by attacking Patassé's presidential palace.[488] After several days of heavy fighting, forces loyal to the government, aided by a small number of troops from Libya and the Congolese rebel Movement for the Liberation of the Congo (MLC) led by D.R.C warlord Jean-Pierre Bemba, were able to put down the coup attempt but violent indiscriminate repression soon followed.[489]

In October 2001, Patassé dismissed his army chief of staff Francois Bozizé after questioning his loyalty in the May 2001 coup attempt.[490] Several attempts were made to arrest Bozizé but he fled to Chad and later France where he claimed the birth of a rebel guerrilla group under his orders. On 25 October 2002 supporters of General Bozizé commemorated the first anniversary of their leader's dismissal by staging a lightning raid on Bangui intending to take power. Patassé resisted the attack with support from troops led by his Chadian head of security Abdoulaye Miskine, DRC warlord Jean-Pierre Bemba and a Libyan contingent.[491]

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[487]US State Department Background Note: Central African Republic.
[488]International Crisis Group, *Central African Republic Anatomy of a Phantom State* at 12 et.seq.
[489]US State Department Background Note: Central African Republic at 13.
[490]US State Department Background Note: Central African Republic.
[491]US State Department Background Note: Central African Republic.

The tide however shifted in Bozizé's favour following regional involvement. General Bozizé evaded his police escort in France and made his way to Chad where President Idriss Déby placed personnel from his "Force 4" Presidential Guard at Bozizé's disposal; Joseph Kabila, head of state of DRC, supplied the necessary armaments; and his neighbour on the other bank of the Congo, President Denis Sassou Nguesso, funded the operation while President Omar Bongo of Gabon, the most senior figure in the region, only gave his blessing.[492] On 15 March 2003 Bozizé successfully led a coup, capturing Bangui while Patassé was out of the country.

In May 2005 Bozizé was elected President of the C.A.R in relatively free elections but soon after, in September 2006, rebel activity in the north western and north eastern part of the country intensified, resulting in the government losing control over parts of its territory.[493] The rebels demanded that the government address the grievances of the population in the marginalised northern parts and include representatives in the government.[494] In November 2012, Séléka, a coalition of rebel groups, took over towns in the northern and central regions of the country. These groups eventually reached a peace deal with Bozizé's government in January 2013 involving a power sharing government but this deal broke down and the rebels seized the capital in March 2013 with Bozizé fleeing the country.[495] Serious crimes and human rights violations have since 1 August 2012 occurred along with changes in Government and these resulted in a second self-referral on 30 May 2014.

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[492] International Crisis Group, *Central African Republic Anatomy of a Phantom State* at 16.
[493] US State Department Background Note: Central African Republic.
[494] G. Ingerstad, *Central African Republic Trapped in a Cycle of Violence? Causes, Conflict Dynamics and Prospects for Peace* (2014) at 29.
[495] G. Ingerstad, Central African Republic–Trapped in a Cycle of Violence? Causes, Conflict Dynamics and Prospects for Peace at 29.

6.2 National attempts at prosecution of international crimes committed in the C.A.R conflict

In June 2003, the *Procureur de la République de* Bangui (C.A.R Public Prosecutor) commenced investigations into incidents in the C.A.R that occurred between October 2002 and 15 March 2003.[496] On 5 September 2003, the *Doyen des Juges d'Instruction près le Tribunal de Grande Instance de Bangui* ("Senior Investigating Judge") brought legal proceedings against Jean-Pierre Bemba, charging him with using troops to undermine the security of the C.A.R and with aiding and abetting murder, rape and pillage. These were joined with proceedings already initiated against Patassé and others.[497]

On 28 August 2004, the Public Prosecutor applied to the Senior Investigating Judge to terminate the criminal proceedings against Jean-Pierre Bemba for the 2002-2003 events in the C.A.R. The application was initiated by the Public Prosecutor on the ground that although the evidence established that Bemba had made his troops available to Patassé, it was unproven that Bemba was aware, in advance, of their eventual use or that he directly participated in the commission of the crimes perpetrated by his troops.[498] On 16 September 2004, the Senior Investigating Judge issued an "*Ordonnance de non lieu partiel et de renvoi devant la Cour Criminelle*" ("Order of 16 September 2004" deciding that Bemba enjoyed diplomatic immunity as Vice-President of the DRC, and was protected from prosecution for complicity in the crimes of premeditated murder, rape, theft *et al*, committed by his fighters in the C.A.R. He determined that the accused Bemba and five others should be dismissed from

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[496]*Prosecutor* v. *Jean-Pierre Bemba Gombo*, Decision on the admissibility and abuse of process challenges ICC-01/05-01/08-802 at 3(hereinafter Bemba Decision on the admissibility and abuse of process challenges).
[497]Bemba Decision on the admissibility and abuse of process challenges.
[498]Bemba Decision on the admissibility and abuse of process challenges at 4.

the proceedings.[499]However, the judge also referred the case against Patassé and others to the *Cour Criminelle* of the CAR for trial.

Thereafter, on 11 December 2004, counsel acting on behalf of President Bozizé, sent a letter to the Bangui Court of Appeal in the "*Etat Centrafricain I Patassé et Autres*" case, submitting, on behalf of the C.A.R, a request to refer war crimes committed on C.A.R territory in 2002 to the ICC, under Article 14 of the Rome Statute. The letter proposed severing the proceedings, referring the crimes of rape, murder, destruction of movable and immovable property and pillaging during the events of 2002 to the ICC. It was suggested that if the ICC Prosecutor initiated an investigation, it would be conducted using means not available to the C.A.R.[500]

On 16 December 2004, the Indictment Chamber of the Bangui Court of Appeal issued a judgment, which partially upheld the appeal of the Public Prosecutor of the Bangui Court of Appeal. The Bangui Court of Appeal determined that the "blood crimes" committed in connection with the events in 2002 constitute war crimes pursuant to Article 8 of the Statute and fall under the jurisdiction of the ICC. It ordered the severance of the case against Mr. Patassé, Jean-Pierre Bemba and others for these crimes and directed the prosecution to submit the matter to the competent authority for referral to the ICC.[501]

The Advocate-General before the Bangui Court of Appeal lodged a "*pourvoi en cassation*" (appeal on points of law) on 20 December 2004, against the Appeals Judgment of 16 December 2004. The *Cour de Cassation* issued its judgment on 11 April 2006 confirming the

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[499]Bemba Decision on the admissibility and abuse of process challenges at 5.
[500]Bemba Decision on the admissibility and abuse of process challenges at 6.
[501]Bemba Decision on the admissibility and abuse of process challenges at 7.

Appeals Judgment of 16 December 2004 and directed the national prosecution to seize the ICC of the proceedings against Mr. Patassé, Jean-Pierre Bemba and others. The *Cour de Cassation* indicated, inter alia, that recourse to international justice was the only means of preventing impunity for crimes allegedly committed in the C.A.R since 1 July 2002 by Mr Patassé, Mr Jean-Pierre Bemba, and others. The Court indicated that the C.A.R judicial services are clearly unable to investigate or prosecute the alleged perpetrators and observed that the ICC is the forum to try perpetrators of the most serious crimes in the event that States are genuinely unable to try them.[502]

6.3 Self-referral to the ICC

The Central African Republic ratified the Rome Statute on 3 October 2001. In the course of the intense fighting between Patassé and Bozizé, both sides allegedly committed atrocities such as rape, killing, and looting, against the civilian population. President Bozizé, "portraying himself as the saviour of Central Africans from DRC mercenaries" sought to take his erstwhile enemies to the ICC.[503] On 7 January 2005, the ICC Prosecutor received a letter dated 18 December 2004, sent on behalf of the Government of the C.A.R. In the letter, the situation, involving crimes against humanity and war crimes falling within the jurisdiction of the ICC and committed throughout the territory of the C.A.R since 1 July 2002, was

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[502]Bemba Decision on the admissibility and abuse of process challenges at 8.
[503]M. Glasius "'We Ourselves, We are Part of the Functioning': The ICC, Victims, and Civil Society in The Central African Republic" at 52.

referred to the Court.[504] The letter specifically requested the Prosecutor to open an investigation into this situation with a view to determining whether Patassé, Bemba, Koumtamadji *alias* Miskine or others, should be charged with these crimes.[505]

After reviewing the information received, the Prosecutor found that the conditions required by the Rome Statute for launching an investigation were satisfied and on 10 May 2007, he informed the C.A.R government, Pre-Trial Chamber III and the ICC President of his decision to open an investigation. The decision to launch an investigation was made public on 22 May 2007, two years after the referral having been received by the OTP.[506]

6.3.1 OTP investigation

The investigation focused on the most serious crimes mainly committed during the peak of violence in 2002-2003 in the C.A.R. In particular, these were mass rapes and other acts of sexual violence perpetrated against hundreds of civilian victims by armed groups.[507]

6.4 Case selection

Only one case has been selected by the OTP directly from the C.A.R situation *i.e. Prosecutor v. Jean-Pierre Bemba Gombo.* The second case, *Prosecutor Jean-Pierre Bemba Gombo,*

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[504]ICC Office of the Prosecutor Press Release, "Prosecutor Receives Referral Concerning Central African Republic," January 7, 2005. On 30 May 2014, the ICC Prosecutor received a second self-referral from the Central African authorities regarding crimes allegedly committed on CAR territory since 1 August 2012. The situation is assigned to Pre-Trial Chamber II and as of 20 January 2015 is at investigation stage. See-Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a second investigation in the Central African Republic available at https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1043.aspx (accessed 18 July 2015).

[505]ICC-01/05-01/08-29-Conf AnxlA and ICC-01/05-01/08-721-Anx 19; CAR-OTP-0001-0135 to 0137 at 136.

[506]Situation in the Central African Republic, Case No. ICC-01/05, Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic (30 November 2006); Press Release, Office of the Prosecutor, ICC, Prosecutor Opens Up Investigation in the Central African Republic, ICC-OTP-PR-20070522-220_EN (22 May 2007).

[507]OTP, Background to the Situation in the Central African Republic, ICC-OTP-BN-20070522-220-A_EN.

Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu, and *Narcisse Arido* is for offences against the administration of justice connected with the initial case against Bemba.[508]

The arrest and indictment of Bemba was met with cynicism in his native DRC, having come just over a year after a hotly contested election in which Bemba was pitted against President Joseph Kabila in the 2006 presidential run-off. Bemba was subsequently to take up the position of senator and official leader and spokesperson of the opposition in the DRC National Assembly.[509] While the arrest and prosecution of Bemba was celebrated mostly by victims in the Central African Republic, others wondered why the charges against Bemba only related to events in the C.A.R and not the DRC, where Bemba's rebel movement (the MLC) is reported to have committed atrocities in Ituri during the 1998–2003 war.[510]

M.Glasius conducted in-depth research comparing local perceptions of the ICC's work in the C.A.R. One of his conclusions was that civil society figures and human rights advocates agree that both sides in the 2002–2003 conflict are guilty of human rights violations, and

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[508]Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido were charged with offenses against the administration of justice under Article 70 of the Rome Statute. It is alleged that they bribed witnesses to give false testimony in the main trial of Jean-Pierre Bemba. The defendants as part of a network led and coordinated by Bemba perpetrated the crimes in different ways under Article 25(3) of the Rome Statute, including by committing, soliciting, inducing, aiding, abetting, or otherwise assisting in their commission. They each allegedly played a different role in the evidence tampering.See- Open Society Justice Initiative, "The Trial of Bemba *et al*. before the International Criminal Court" available at https://www.opensocietyfoundations.org/sites/default/files/briefing-bembaetal-20150929.pdf (accessed 10 August 2015).

[509]The perception in the DRC is that the prosecutor targeted Bemba because he wanted the cooperation of Congolese President Joseph Kabila in the ICC's investigations in DRC. Bemba was Kabila's chief political rival in DRC at the time of his arrest. See-Human Rights Watch, *Unfinished Business Closing Gaps in the Selection of ICC Cases* (2011) at 33 and Worldwide Movement for Human Rights Press Release, "Victims question the ICC about lack of proceedings against Jean-Pierre Bemba for crimes committed in the DRC : Judges dismiss the request considering that the Prosecutor's investigation is still open" available at https://www.fidh.org/en/region/Africa/democratic-republic-of-congo/Victims-question-the-ICC-about (accessed 20 November 2015).

[510]For further discussion of Bemba's involvement in the DRC conflict, see Chapter 5 of this thesis.

that, in principle, both protagonist sides should therefore be punished.[511] Patassé, one of the chief protagonists was not charged despite widespread calls for him to be brought to justice and he died in April 2011.[512]

6.5 Admissibility issues in the C.A.R Situation: Unable, unwilling, or inactive and Grave enough?

As already mentioned above, there is presently only one case directly emanating from the C.A.R situation i.e. *Prosecutor v. Jean- Pierre Bemba* and below I will analyse how the admissibility and complementary determinations were made in that case.

Prosecutor v. Jean- Pierre Bemba.

Jean-Pierre Bemba is a Congolese national who, as President and Commander-in-Chief of the *Mouvement de Libération du Congo* ("MLC"), is alleged to have allied with forces loyal to Ange-Félix Patassé, the then president of C.A.R, following an invitation by the latter. It is further alleged that during the conflict between Ange-Félix Patassé and François Bozizé, MLC forces led by Mr. Bemba, committed crimes against the civilian population, in particular, rape, murder and pillaging. He effectively acted as a military commander and had effective authority and control over the MLC troops which allegedly committed the above-

[511]M. Glasius, "'We Ourselves, We are Part of the Functioning': The ICC, Victims, and Civil Society in The Central African Republic" at 55. An Amnesty International Report of 10 November 2004, *Central African Republic: Five months of war against women*, noted that combatants loyal to General Bozizé, including their allies from Chad, are carried out rapes in the areas that they occupied. Areas where the combatants are reported to have carried out widespread rapes include Kaga-Bandoro (342 km north of Bangui), Bossangoa (305 km northwest of Bangui), Sibut (188 km north of Bangui) and Damara (76 km north of Bangui). By March 2004, Amnesty International was not aware of any action taken against suspected perpetrators of rape between October 2002 and 15 March 2003 under General Bozizé's command and concluded that the true extent of rape and other forms of violence against women in areas controlled at the time by combatants loyal to General Bozizé has yet to be uncovered; Human Rights Watch has also documented C.A.R government forces committing serious abuses including summary executions and the wholesale destruction of villages against the civilian population in the north-eastern and north western regions of C.A.R, since May 2005.See- Human Rights Watch, *Central African Republic: ICC Opens Investigation* available at http://www.hrw.org/en/news/2007/05/22/central-african-republic-icc-opens-investigation (accessed 27 July 2011).

[512]Human Rights Watch, Unfinished Business Closing Gaps in the Selection of ICC Cases.

mentioned crimes. Further, Mr. Bemba knew that MLC troops were committing crimes and did not take all necessary and reasonable measures within his power to prevent or repress their commission.[513]

Charges

Mr. Bemba is allegedly criminally responsible, as military commander, of two counts of crimes against humanity: murder and rape (article 7(1) (g) of the Statute as well as three counts of war crimes i.e. murder, rape and pillaging.[514]

Arrest

On 23 May 2008, Pre-Trial Chamber III issued a warrant of arrest under seal and a request for provisional arrest addressed to the Kingdom of Belgium (On 10 June 2008, Pre-Trial Chamber III issued a new warrant of arrest replacing that issued on 23 May 2008, adding to the charge of murder, constituting both a war crime and a crime against humanity).[515] On 24 May 2008, Bemba was arrested by Belgian authorities and subsequently on 3 July 2008 he was transferred from Belgium and surrendered to the ICC in The Hague.[516] On 4 July 2008 Bemba appeared before Pre-Trial Chamber III for the first time. His trial started on 22 November 2010 and Judgment is scheduled for 21 March 2016.

Admissibility/complementarity determinations

In issuing an arrest warrant against Jean-Pierre Bemba on 10 June 2008, PTC III held that there was no reason to conclude that Jean-Pierre Bemba's case is not admissible, particularly since there is nothing to indicate that he was already being prosecuted at national level for the crimes referred to in the Prosecutor's Application for an arrest warrant (same conduct

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[513]*Prosecutor v. Jean-Pierre Bemba Gombo* , Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424(hereinafter *Bemba* confirmation of charges decision) at 159.
[514]*Bemba* confirmation of charges decision.
[515]Copy of the warrant available at https://www.icc-cpi.int/iccdocs/doc/doc484212.pdf (accessed 25 Dec 2014).
[516]ICC Press Release, "Surrender of Jean-Pierre Bemba to the International Criminal Court" ICC-CPI-20080703-PR335.

test that was already adopted in the *Lubanga* case).[517] On the contrary, it was found to appear that the C.A.R judicial authorities abandoned any attempt to prosecute Jean-Pierre Bemba for the crimes referred to in the Prosecutor's Application, on the ground that he enjoyed immunity by virtue of his status as Vice-President of the DRC. Accordingly, on the basis of the evidence and information provided by the Prosecutor, the Chamber found the case concerning Jean-Pierre Bemba admissible.[518]

While confirming the charges against Bemba on 15 June 2009, PTC II upheld PTC III's decision on admissibility and further noted that since that decision, there had been no change in the circumstances to negate the earlier finding on jurisdiction and admissibility.[519]

Counsel for Bemba filed an application before Trial Chamber III challenging the admissibility of the case pursuant to Articles 17 and 19(2) of the Rome Statute on 25 February 2010.[520] It was *inter alia* argued that the case was inadmissible because there had been an effective national investigation followed by domestic proceedings on the same allegations before the ICC.[521] It was further contended that C.A.R authorities showed willingness and had the ability to prosecute the accused and that the case lacked sufficient gravity to justify the involvement of the ICC.[522]

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[517] *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the prosecutors application for a warrant of arrest, ICC-01/05-01/08-704-Red3-tENG, *para.*40.
[518] *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the prosecutors application for a warrant of arrest, *para.*40
[519] *Bemba* confirmation of charges decision, *para.*21 and 22.
[520] ICC-01/05-01/08-704-Red3-tENG.
[521] *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the admissibility and abuse of process challenges ICC-01/05-01/08-802, *para.* 74 (hereinafter *Bemba* Decision on admissibility).
[522] *Bemba* Decision on admissibility

With regard to Complementarity, it was submitted by the defence that referrals by a State Party should be without influence from the prosecution. It was argued that "self-referral", as occurred in this instance in C.A.R, was not supported by the text of the drafting history of the Statute, and that by inviting a State to utilise Article 14(1) of the Statute, the prosecution avoids the kind of judicial scrutiny that is available under Article 15 of the Statute. It was further argued that by encouraging State "self-referrals", the prosecution is at risk of manipulation by transient governments which, having seized power in a coup d'état, may attempt to exploit the Court in order to eliminate their enemies.[523] It was lastly contended that if the Prosecutor therefore chooses to activate the jurisdiction of the Court, it is argued that this should be under Article 15(1) of the Statute.

Trial Chamber III found that the events which form the basis of the charges in the case of the *Prosecutor v. Jean Pierre Bemba Gombo* had been investigated by a State which has jurisdiction over it, namely the C.A.R. against the accused as required by article 17 (1) (a) ,secondly it was not a case where the State "decided not to prosecute the person concerned" (Article 17(l)(b) of the Statute) because the C.A.R decided the accused should be prosecuted by the ICC; thirdly it wasn't a case where the person concerned "has already been tried for conduct which is the subject of the complaint" (Article 17(l)(c) of the Statute) - there has been no decision on the merits by a competent court. Finally, the case satisfied the gravity test (Article 17(l) (d) of the Statute).[524]

Trial Chamber III also made a ruling on inability, basing solely on the submissions made by counsel for C.A.R and observations made by the C.A.R *cour de cassation*. It held that:

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[523]*Bemba* Decision on Admissibility, *para.*75.
[524]*Bemba* Decision on Admissibility, *para.*261.

"given the relative complexity and extent of the prosecution case against the accused for crimes alleged committed in 2002-2003, the Chamber accepts that the prosecuting authorities and the national courts in the C.A.R would be unable to handle the case against this accused nationally. Indeed, as the *Cour de Cassation* observed, the lack of any meaningful progress in the case since the Senior Investigating Judge charged the accused, demonstrates the inability on the part of the C.A.R to establish "genuine proceedings", a conclusion that is seemingly reinforced by the quotations from the statement of the Senior Investigating Judge taken by the prosecution and relied on in this context by the defence. This determination that the C.A.R national judicial system is unable to investigate effectively or try the accused leads inevitably to the conclusion that for the purposes of Article 17(3) of the Statute, the national judicial system of the C.A.R is "unavailable"."[525]

It is clear from the above that self-referrals make admissibility determinations far easier to make since the relevant state provides ample material to demonstrate its inability. The reasoning of the Trial Chamber was sound in light of the material before it but it in my view also does not bode well with encouraging national domestic prosecutions. The OTP should in my view engage more deeply with states, not with the view of them referring situations, but with a view of assisting their judiciaries to handle international crimes. Inability should not be incurable.

Trial Chamber III also made a ruling on the issue of solicitation of the referral which had been complained of by the defence and had arisen earlier in the DRC situation. It held that

[525]*Bemba* Decision on Admissibility, *para*.246.

there was no evidential foundation for the suggestion that the Prosecutor, improperly or otherwise, influenced the C.A.R's "self-referral" under Article 14 of the Statute.[526] The allegation of impropriety in the view of Trial Chamber III depended entirely on speculation by the defence, composed largely of quotations from NGO reports and from politicians, along with assertions as to the motives of various key players.[527] It went on to hold that in any case the Appeals Chamber had in the context of striking a balance between the complementary principle and the goal of ending impunity cautioned against inappropriately deterring States from relinquishing jurisdiction in favour of the ICC.

The above finding is an endorsement of self-referrals and it but also raises policy questions as to who can police the interactions between the OTP and states? Most of these communications are confidential yet they ultimately affect the rights of accused persons. In the instant case the defence could only speculate on motives and rely on NGO reports plus politicians but as a *quasi*-judicial body, the OTP should in my view be more transparent in its dealings with states.

Jean-Pierre Bemba Gombo's appealed against Trial Chamber III's decision on admissibility but the appeal was dismissed with the Appeal chamber holding that when a trial Chamber is presented with the question of whether the outcome of domestic judicial proceedings was a decision not to prosecute in terms of article 17 (1) (b) of the Statute, the Trial Chamber should accept *prima facie* the validity and effect of the decisions of domestic courts, unless presented with compelling evidence indicating otherwise.[528]

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[526]*Bemba* Decision on Admissibility, *para.*260.
[527]*Bemba* Decision on Admissibility, *para.*259.
[528]Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled "Decision on the Admissibility and Abuse of Process Challenges",ICC-01/05-01/08-962.

6.5 Conclusion

A study of the C.A.R self- referral has shown that like all others before it, prosecutions have been selective with state actors not being targeted by the Prosecutor. Unlike the other self-referrals where the sitting governments were targeting rebel groups operating on their territories, the C.A.R referral targeted former C.A.R government officials and their rebel backers from the DRC who resisted a putsch against a democratically elected government in the C.A.R.

The fact that none of the former rebels of Bozizé nor his Chadian government allies have been indicted for prosecution in spite of the ICC's investigation having started on May 22 2007 clearly illustrates that there is an element of victor's justice and the ICC is being used to settle local scores. My thinking is that the picture would have been entirely different had Bozizé's coup been un-successful. The C.A.R situation would have been self-referred to the ICC by Ange-Félix Patassé alleging crimes by Bozizé and his rebel cronies who would now be on trial instead of Jean-Pierre Bemba. It could therefore be deduced that a referral by Patassé to the ICC was aimed at settling political scores with his nemesis Bozizé. The old criticism of victor's justice levied on the Nuremberg trials resurfaces and it would appear to be okay to commit international crimes so long as you are a victor in a conflict.

In my view, bearing in mind protracted proceedings before the local Courts before a decision was made that the ICC, I infer that the government of C.A.R is fully capable of prosecuting those who allegedly committed human rights abuses. According to one commentator, there were practical and political advantages to the C.A.R regime of turning the work over to the ICC. Leaving the matter to an international tribunal can insulate a regime from the political

consequences of an unpopular prosecution or a travesty of justice, or provide it with a convenient method of dealing with opposition to the prosecution by relieving it of direct responsibility for it.[529]

[529]O. Fiss, "Within the reach of the State: Prosecuting Atrocities in Africa" (2009) 31 *Human Rights Quarterly*, 59 at 68.

CHAPTER SEVEN: COMPARATIVE ANALYSIS OF SELF-REFERRALS AND THE SITUATIONS IN KENYA AND DARFUR

7.1 Introduction

This part of the paper will make comparative analysis between the situations in Kenya and Darfur, Sudan which came to the ICC by way of the prosecutor exercising *proprio motu* powers and UN Security Council referral respectively and with the self-referrals already analysed in the preceding chapters. I will analyse how the cases were selected, how the investigations were conducted, and how admissibility issues were decided. From this analysis, I will make deductions on how these two methods of triggering the jurisdiction of the ICC can compare with self-referrals. The analysis will help draw up conclusions on which of these trigger mechanisms guarantee a better avenue to international justice before the ICC.

7.2 The situation in Kenya.

Below, I will discuss the situation in Kenya as part of my comparative analysis with self-referred situations before the ICC.

7.2.1 Background to the conflict

Kenya attained independence on 12 December 1963 from Britain and for many decades, on the face of it, post independent Kenya was regarded as one of the most stable and comparatively more peaceful African countries.[530] This stability started to fall apart in the 1990's.

[530]M.C. Nmaju, "Violence in Kenya: Any Role for the ICC in the Quest for Accountability?"(2009)3 *African Journal of Legal Studies*, 79. See also- G. Musila, "Options for Transitional Justice in Kenya: Autonomy and the Challenge of External Prescriptions" (2009) 3 *International Journal of Transitional Justice*, 447.

In late 1991, concerted domestic and international pressure on the Moi government, including the suspension of aid by the World Bank and bilateral donors pending economic and human rights reforms, forced it to repeal a 1982 amendment to the constitution and legalize a multiparty system(this amendment had followed a failed coup in 1982).[531] One year later, in December 1992, elections finally took place which were preceded by violently suppressed *saba saba* riots and ethnic violence involving attacks on the Luo community.

The above attacks were politically motivated and the attackers vowed to drive non-Kalenjins and opponents of the ruling Kenya African National Union (KANU) from the Rift Valley Province.[532] The violence later spread to other provinces in Kenya and reached its height in March 1992.By September 1992, it is estimated it had caused the deaths of 779 people, injured 600 people, rendered as many as 56,000 families homeless and resulted in property damage of over Kenya Shillings 210 million [US $2,625,000].The violence continued post-election and by its end it is estimated that 1,500 people had died and had displaced over 300,000. It is important to note that the government response to the violence was characterized by inaction toward the attackers and outright hostility against others who sought to help the victims.

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[531]Human Rights Watch, *Divide and Rule: State-Sponsored Ethnic Violence in Kenya* (1993). Available at http://www.hrw.org/legacy/reports/1993/kenya1193.pdf (accessed 29 March 2012).
[532]The motive for the violence was: first, to prove the government's assertion that multi-party politics would lead to tribal chaos. Second, to punish ethnic groups that are perceived to support the political opposition, namely the Kikuyu, Luhya and Luo. Third, to terrorize and intimidate non-Kalenjins to leave the Rift Valley Province, Kenya's most fertile farmland, and to allow Kalenjins to take over the land through intimidation and violence. Finally, the violence plays a part in renewed calls by Kalenjin and Maasai politicians for the introduction of *majimboism*-- a federal system based on ethnicity--which would mandate that only members of these minority groups would have political and economic power in the Rift Valley Province, which has the largest number of Parliamentary seats and is the base of Kenya's agricultural economy. See- Human Rights Watch, *Divide and Rule: State-Sponsored Ethnic Violence in Kenya* at 124.

In the run-up to the 1997 elections, similarly orchestrated violence occurred in the Coast province, parts of Nyanza, and the Rift Valley province. In the coastal region it is estimated that a total of 104 people were killed in the violence, at least 133 more were injured, hundreds of structures were damaged, and other property was damaged or stolen leading to large losses.[533]

History was to repeat itself following disputed elections in 2007. On 27 December 2007, Kenya held its fourth multi-party Parliamentary and Presidential elections, in which the then sitting president, Mwai Kibaki of the Party of National Unity (PNU) was subsequently declared the winner of the presidential elections thus beating primary rival, Raila Odinga of the Orange Democratic Movement (ODM).[534] As a consequence of the strongly contested election result that was thought to have been rigged[535], countrywide violence broke out between the supporters of the two main opposing political camps along ethno-regional lines.

As stated above, the overriding factor that 'lit the spark' that caused the post-election violence was the disputed result of the Kenyan Presidential election of 2007 that led many of the disgruntled and aggrieved individuals to mete out violence onto others. However, it could be argued that the conflict could also have been ignited by other equally important underlying factors that built up, and galvanised in an emotive environment for years unaddressed. As a consequence, it has been said that the root cause of the 2007 / 2008 conflict

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[533]Human Rights Watch, *Playing with Fire: Weapons Proliferation, Political Violence, and Human Rights in Kenya* (2002). Available at http://www.hrw.org/reports/2002/kenya/Kenya0502-06.htm (accessed 14 August 2012).
[534]BBC News, "Odinga Rejects Kenya Poll Result", Monday 31 December 2007.
[535]Forensic investigations into post-election violence related deaths: An investigative report by the Independent Medico-Legal Unit (IMLU), 24 February 2008, 3 available at http://www.imlu.org/wp-content/plugins/download.../download.php?id=7 (accessed 21 August 2012); See also- Commission of Inquiry into Post-Election Violence (CIPEV) Report, VII available at http://www.knchr.org/LinkClick.aspx?fileticket=Qd38...tabid=87 (accessed 21 August 2012).

lay in the then weak national constitution of Kenya that had significantly and progressively eroded a healthy 'checks and balances' system in favour of strong dictatorial presidential powers enjoyed by an incumbent with little restraint.[536]

It has also been advanced that the conflict could have been propagated by Kenya's political landscape being deeply divided along ethnic or tribal lines; although others argue that it is an issue of oversimplification to see the post 2007 elections violence through only ethnic – tribal lenses.[537] Other key underlying causes of the violence have been suggested as including: various historical grievances over resource distributions (especially accessibility to land), the deliberate manoeuvres to weaken key government institutions (like the judiciary), and the gradual loss of the state's monopoly of legitimate force, which permitted an outgrowth of politically motivated armed militias and gangs, and economic - political exclusion of some groupings.[538]

The importance and impact of democratic governance, resource distribution, ethnicity and patron–client relations as factors that perpetuate conflict or violence can thus not be emphasised enough in Kenyan politics. It is clear that although Kenya had previously experienced

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[536]G. Musila, "Options for Transitional Justice in Kenya: Autonomy and the Challenge of External Prescriptions" and S.D. Mueller, "Dying to Win: Elections, Political Violence, and Institutional Decay in Kenya" (2011) 29 *Journal of Contemporary African Studies*, 99.
[537]Report from OHCHR Fact-finding Mission to Kenya, 6-28 February 2008 at 3. See also- T.O. Hansen, "The Policy Requirement in Crimes against Humanity: Lessons From and for the Case of Kenya" (2011) 43 *George. Washington International Law Review*, 1.
[538]See- D. Branch and N. Cheeseman, "Democratization, Sequencing and State Failure in Africa: Lessons from Kenya" (2008) 108 *African Affairs*, 430; N. Cheeseman, "The Kenyan Elections of 2007: An Introduction" (2008) 2 *Journal of Eastern African Studies*,166; S.D. Mueller, "The Political Economy of Kenya's Crisis" (2008) 2 *Journal of Eastern African Studies*,185 ; M. Bratton and M. Kimenyi, "Voting in Kenya: Putting Ethnicity in Perspective" (2008) 2 *Journal of Eastern African Studies*,272; M. wa Githinji and F. Holmquist, "Kenya's Hopes and Impediments: the Anatomy of a Crisis of Exclusion" (2008) 2 *Journal of Eastern African Studies*, 344 ; G. Lynch, "The Fruits of Perception: "Ethnic Politics" and The Case of Kenya's Constitutional Referendum" (2006) 2 *African Studies*, 65.

geo-ethno-politic clashes in past multi-party elections in the 1990's[539], none had been as violently devastating since independence from British rule in 1963.[540]

7.2.3 Efforts geared towards resolving the post-election conflict in Kenya

When politically inspired violence broke loose in Kenya after the disputed 2007 elections, the international community took keen interest in resolving the conflict. At the centre of the dispute resolution, was the African Union that appointed a panel of eminent African personalities led by the former UN Secretary General Kofi Annan that instituted a national dialogue and reconciliation process that brought two disputing parties to agree on a four-point agenda to wit : ending the violence and restoring fundamental rights and liberties, addressing the humanitarian crisis as well as promoting reconciliation healing and restoration, overcoming the political crisis and finally working on with long-term issues and solutions.[541]

The above process resulted into three salient agreements among the main warring parties to the conflict.[542] These were a power-sharing agreement that laid foundation for the creation of a coalition government composed of Mwai Kibaki and Raila Odinga[543], an agreement for the establishment of a commission of enquiry to investigate election violence in Kenya with a view to recommending appropriate "measures with regard to bringing to justice those persons responsible for criminal acts"[544] and the last agreement concerned establishing a body

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[539] Report from Office of the United Nations High Commissioner for Human Rights Fact-finding Mission to Kenya, 6-28 February 2008 at 6.
[540] J. De Smedt at 581.
[541] S. Brown at 4. See also- C.L. Sriram and S. Brown, *A Breakthrough in Justice? Accountability for Post-Election Violence in Kenya*, Centre on Human Rights in Conflict Policy Paper No.4 (2010) at 3.
[542] T.O. Hansen at 3.
[543] See- "Acting Together for Kenya: Agreement on the Principles of Partnership of the Coalition Government" available at http://www.dialoguekenya.org/docs/Signed_Agreement_Feb281.pdf (accessed 9 February 2011).
[544] Agreement on the Commission of Enquiry on Post-Election Violence at 1.

in form of a truth, justice and reconciliation commission that would inquire into all human rights that occurred during the violent post-election period.[545]

The commission of inquiry to investigate human rights violations and the violence in the aftermath the 2007 Kenyan elections was eventually constituted, and it executed its mandate.[546] It stated in its report (hereinafter "Waki Report") that it determined that crimes against humanity may have been committed in the context of the post-election violence and therefore recommended the creation of a special tribunal for Kenya (hereinafter "Special Tribunal") with the mandate to prosecute those bearing the greatest responsibility for these crimes.[547]

In addition to the above recommendation, the Commission further recommended that if for whatever reason the said Special Tribunal was never established or if established but it did not satisfactorily execute its functions, a list containing the names of and relevant information on those suspected to bear the greatest responsibility for crimes falling within the jurisdiction of the proposed Special Tribunal would be forwarded through Kofi Annan to the ICC Prosecutor with a request to proceed with an investigation and prosecution of such suspected persons.[548]

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[545]Agreement available at http://www.dialoguekenya.org/docs/KenyanNationalDialogue_Truth&Justice.pdf (accessed 9 February 2011).

[546]The members of the commission were Justice Philip Waki (chairman), Gavin McFadyen (commissioner), and Pascal Kambale (commissioner), nationals of Kenya, New Zealand, and the Democratic Republic of Congo, respectively.

[547]A. Okuta, "National Legislation for Prosecution of International Crimes in Kenya" (2009) 7 *Journal of International Criminal Justice*, 1064.

[548]A. Okuta, "National Legislation for Prosecution of International Crimes in Kenya". Kenya signed the Rome Statute on 11 August 1999, and ratified on 15 March 2005, becoming the 98th State Party.

With the above developments on the Kenyan political landscape, the country was confronted with two alternatives: to create the proposed hybrid court to investigate and prosecute those responsible for the human rights violations or face the consequences of the conflict being investigated and tried by the ICC. The Kenya government (hereinafter GOK) failed to meet a January 2009 deadline to establish the special tribunal.

7.2.4 ICC Intervention

Following the GOK failure to establish the Special Tribunal[549], Kofi Annan transmitted the list of suspects to the ICC Prosecutor[550] just after GOK officials visited *The* Hague to sign an agreement pledging prosecutions of the crimes within a year through a special court or other domestic judicial mechanism, or self-referral of the situation to the ICC.[551] Signed agreements notwithstanding, Kofi Annan finally concluded that Kenya was only buying time and had no intention of doing anything. It was also reported at the time that some of the individuals that were believed to have played a key role in instigating or planning the gross human rights violations were part of the Kenyan Parliament and Cabinet that vetoed the establishment of the Special Tribunal.[552]

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[549]The proposed bill to establish a special tribunal was rejected twice by Kenyan law makers. See- *The Star* Newspaper, "How MP's rejected the Special Tribunal for Kenya Bill" available at http://www.the-star.co.ke/weekend/siasa/17012-how-mps-rejected-the-proposed-special-tribunal-for-kenya-bill- (accessed 20 October 2012).

[550]ICC, Office of the Prosecutor, Press Release, ICC Prosecutor Receives Sealed Envelope from Kofi Annan on Post-election Violence in Kenya (July 9, 2009) available at http://www.icc-cpi.int (accessed 25 October 2012).

[551]Agreed Minutes of the Meeting between Prosecutor Luis Moreno-Ocampo and the Delegation of the Kenyan Government (July 3, 2009), available at http://www.icc-cpi.int/NR/rdonlyres/6D005625-2248-477A-9485-FC52B4F1F5AD/280560/20090703AgreedMinutesofMeetingProsecutorKenyanDele.pdf (accessed 7 June 2012).

[552]See- S. Brown at 3. For years, after the Waki Commission Report came out, it was reported that key PNU and ODM political elites worked together to frustrate, prevent, and institute measures that stopped the accountability process from proceeding.

The ICC prosecutor engaged extensively with the GOK, pushing first for the Special Tribunal for Kenya envisioned in the Waki report, and then for the three pronged strategy: with the ICC prosecuting those most responsible; national accountability proceedings as defined by the Kenyan Parliament, such as a Special Tribunal, for other perpetrators; and other reforms and mechanisms such as the Justice, Truth and Reconciliation commission to shed light on the full history of past events and to suggest mechanisms to prevent such crimes in the future.[553] He also sought to elicit a referral directly from the GOK and when this was not forthcoming following about one year of discussions and delays, in November 2009, Prosecutor Moreno-Ocampo exercised his *proprio motu*[554] powers for the first time and requested judicial authorization to investigate the post-election violence in Kenya.[555] On March 31, 2010, the Pre-Trial Chamber II of the ICC authorized the Court's Prosecutor to investigate Kenya situation with a view to determining nature of crimes, and their perpetrators.[556]

It is submitted that this background illustrates how the involvement of neutral parties can help in bringing state actors in international crimes to justice. If Kenya had self-referred the situation to the ICC, the government officials who had a key role in the violence would most

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[553]ICC Press Release, "ICC Prosecutor Supports Three-Pronged Approach to Justice in Kenya", 30 September 2009, available at http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200109/press%20releases/pr456, (accessed 7 June 2012).

[554]The *proprio motu* powers of the ICC Prosecutor are provided for under article 15 (1) of the Rome Statute that states that "the Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the court. This singular provision empowers the Prosecutor of the court on his own accord to undertake investigations in a situation that he or she has picked interest in as opposed solely to relying on referrals (of situations) by the state parties or the UN Security Council. The Prosecutor ultimately retains the power to decide which of the cases referred to her, or initiated by her, should be investigated or discarded. It should be also emphasised that under both triggering mechanisms that is to say, state party referrals and *proprio motu* powers, the Prosecutor only opens investigations of nationals of countries that have ratified the Rome Statute or individuals who committed an alleged crime in a country that has ratified the Rome Statute. For further discussion, see J.J. Fork, "Pro-Choice: Achieving the Goals of the International Criminal Court through the Prosecutor's *Proprio Motu* Power" (2011) 34 *Boston College International and Comparative Law Review*, 53.

[555]Situation in the Republic of Kenya: Request for authorisation of an investigation pursuant to Article 15, ICC Doc.ICC-01/09-3 (November 26, 2009).

[556]Situation in the Republic of Kenya, Case No. ICC–01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya available at http://www.icc-cpi.int/iccdocs/doc/doc854287.pdf. (accessed 7 June 2012).

probably have been shielded and only government opponents would have been targeted. The obvious direct involvement of government officials in the violence probably explains why Kenya did not opt to self-refer the situation like Uganda, DRC and the C.A.R did.

It is therefore unsurprising that the GOK has had an antagonistic attitude towards the ICC.[557] When the powers that be in Kenya sensed a heightened interest in the ICC prosecutions, the Kenyan Parliament in December 2010, passed a non-binding motion to withdraw from the ICC hoping to create legitimacy to use ultimately to persuade the wider pan-African movement to protest the ICC's supposed singular biased focus on Africa.[558] The African Union in its January 2011 penultimate summit, did not gather enough support to endorse the withdrawal but instead supported Kenya's attempt to have the ICC defer its proceedings through the UN Security Council framework.[559] The permanent members of the UN Security Council were not also convinced when the GOK presented its case in February/March 2011 arguing that ICC trials posed a serious threat of renewed violence that wound endanger international peace and security.[560]

The above circumstances thus far show quite succinctly why several years after the politically motivated violence ended, the GOK made little credible and systematic attempts to investigate and prosecute those suspected to be responsible for the commission of the atrocities. Clearly, despite the strong popular desire for accountability through prosecutions, the

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[557]It has been argued that so long as support for the ICC carried little political risk, that Kenya had no qualms in ratifying and complying with the Rome Statute. Conversely, the more politically risky compliance became, the more likely it was that Kenya and its ICC suspects would attempt to defy rather than cooperate with the ICC.S.D. Mueller, Kenya and the International Criminal Court (ICC): Politics, the Election and the Law, (2014) 8 *Journal of Eastern African Studies*, 25 at 29.
[558]S. Brown and C.L. Sriram at 12.
[559]Daily Nation, "AU endorses Bid for ICC deferral", 1 February 2011.
[560]For additional details on the Kenyan government's unsuccessful attempts to have the ICC case dismissed or deferred, see- International Crisis Group, *Kenya: Impact of the ICC proceedings* (Africa Briefing No. 84 ,2012) at 8 *et seq*.

threat of ICC involvement, and public assurances of support at the highest levels, the government never created the hybrid tribunal or initiated systematic trials in regular courts.[561] There was vested interest in sabotaging the proposed judicial process since the Achilles heel of purely domestic or hybrid domestic/international prosecutions was that many of those in charge of promoting and setting them up were in fact among those whom they would prosecute.[562]

Driven by the desire to secure long-term peace, reconciliation and stability, and to un-do the historical injustices that had over time been perpetuated in Kenya, there also arose proposals from the GOK to create a 'Transitional Justice and Reconciliation Commission' modelled on the bodies created in other conflict prone countries.[563] Indeed, in 2008, the Truth, Justice and Reconciliation Commission (TJRC) was set up with a mandate to investigate, analyse, and report on what happened between 1963 and 2008 in regards to gross violations of human rights, economic crimes, illegal acquisition of public land, marginalisation of communities, ethnic violence, the context in which the crimes occurred, and educate the public about its work. The TJRC was part of the accountability component of Agenda Four of the National Accord signed in 2008. The TJRC, however, had no power to prosecute, but to recommend prosecutions, reparations for victims, institutional changes, and amnesty in exchange for truth for perpetrators who did not commit gross human rights violations. However, the establishment of such a body was viewed as a calculated venture to circumvent the accountability requirements set by the international community since it would be mandated to grant amnesties to perpetrators. It hence becomes clear that the different responses of the GOK

[561] S. Brown and C.L.Sriram at 3.
[562] S. Brown and C.L. Sriram at 3.
[563] A. Okuta at 1071. See also- G. Musila, "Options for Transitional Justice in Kenya: Autonomy and the Challenge of External Prescriptions" at 446.

were not driven by the need to prevent impunity but political considerations of the day. Evidently, the leaders of the day were not willing to cooperate in bringing themselves or their colleagues to face their day in the ICC and the ICC prosecutor had to option but to exercise his *prorio motu* powers.

Furthermore, although Kenya had signed and ratified the Rome Statute prior to the 2007 post-election violence, it had not domesticated the Statute until mid-2008, after the violence had occurred. Thus, while it could be argued that Kenya's international obligations under the Statute already existed at the time of the violence, it could equally be argued that any reliance on domestic implementing legislation would be retroactive and therefore unlawful.[564]

It was also argued that the Kenyan local courts by then had a backlog of hundreds of thousands of cases and a reputation for corruption,[565] which necessitated the intervention of the ICC to take over jurisdiction. It could thus be concluded that corruption within the judiciary would affect the process of conducting genuine investigations and prosecutions, which ground would be relied upon by the ICC to take over jurisdiction. In fact, the African leaders have argued that Kenya has reformed its judiciary and therefore in position to prosecute such cases.[566]

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[564]L.M. Wanyeki, "The International Criminal Court's cases in Kenya: Origin and Impact", Institute for Security Studies Papers, Paper No. 237, August 2012 at 8.
[565]Aljazeera News, African Union floats ICC walkout after Kenyatta asks for case to be tossed available at http://america.aljazeera.com/articles/2013/10/10/kenyatta-asks- icccasebetossedwhileafricanunionfloatswalk-out.html. (accessed 18 September 2012).
[566]France 24 International News, "African Union asks ICC to transfer Kenyatta case", 27 May 2013.

The TJRC released its final report on 22 May 2013. The report implicated among others President Uhuru Kenyatta and his deputy William Ruto in planning incitement and financing violence during 2007/2008 post-election violence.[567] However, it does not recommend any action against the duo, arguing that they are already being prosecuted for the same crimes. The TRJC also recommended for further investigation and prosecution of high-profile personalities in their administration over allegations of inciting and the violence following the 2007 elections. It further recommended that the Director of Public Prosecutions investigates the people implicated in the violence.[568]

However, the Kenyan National Assembly has discussed a Bill that seeks to give MPs powers to debate and alter the TJRC report, with a view of removing names of key members in government.[569] This latest move by the legislators strongly gives credence to the argument of the ICC's jurisdiction of the Kenyan situation.

7.2.5 ICC investigation and case selection process in the Kenya situation

As pointed out earlier, failure of the GOK to implement the Waki Commission report recommendation to establish a Special Tribunal led to the handover of a confidential list of 20 alleged perpetrator names (that would have potentially been tried by recommended Special Tribunal) in a sealed envelope to Kofi Annan, who subsequently handed over the same to the ICC Prosecutor for possible investigation and prosecution.[570] This list perhaps laid the very foundations upon which the ICC Prosecutor would build his cases, and make his initial case selection that was eventually brought before the court. From the above background, it

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[567]BBC News, "Uhuru Kenyatta and William Ruto named in Kenya TRJC report", 22 May 2013.
[568]BBC News, "Uhuru Kenyatta and William Ruto named in Kenya TRJC report", 22 May 2013.
[569]Daily Nation, "MP raises red flag over attempt to alter Truth report", December 7 2013; Capital News, "MPs want power to edit TJRC report", November 28, 2013.
[570]ICC Press Release, "ICC Prosecutor receives Sealed Envelope from Kofi Annan on Post-Election Violence in Kenya", 9 July 2009. See also- OTP, Situation in the Republic of Kenya: Request for Authorisation of an Investigation Pursuant to Article 15, ICC Doc. ICC- 01/09.

becomes clear that the Waki Commission Report pre-determined the route that the ICC Prosecutor would take in picking incidents to be examined, individuals to be investigated, and cases to be selected for prosecution before the court.

Perhaps influenced by the selective prosecution criticism that was raised in connection to the Uganda and DRC state referrals, the Prosecutor this time focused on leaders on both sides of the conflict. Consequently, the Chamber issued summonses to appear for three individuals associated with incumbent president Mwai Kibaki, namely then Head of Public Services, Francis Muthaura, then Minister for Finance and current President, Uhuru Kenyatta, and then Head of Kenya's Police Forces, Mohammed Ali. Additionally, three persons associated with Raila Odinga's presidential campaign– then Minister of Higher Education and current Deputy President, William Ruto, then former Minister of Industrialization Henry Kosgey and radio presenter, Joshua Sang were also summoned by the Court. All six appeared voluntarily in The Hague during initial proceedings in the case in April 2011.[571]

There have nevertheless been calls for the OTP to broaden its investigations in Kenya to cover crimes committed by the Kenyan police during the post-election violence and crimes against humanity and war crimes committed by a local militia and the Kenyan security forces in Mt. Elgon, violence that shares many of the hallmarks of the post-election violence currently under investigation.[572]

Aside from the calls for expansion of the investigation, there has been great antagonism between the GOK and the ICC with regard to investigations involving the cases presently

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[571]See in-depth discussion of these cases in section 7.2.6 of this chapter.
[572]See- Human Rights Watch, *Unfinished Business: Closing Gaps in the Selection of ICC Cases*.

before the Court. In May 2014 it was reported that the ICC case against Deputy President William Ruto was moving forward despite "tremendous difficulties" related to witnesses according to ICC Chief Prosecutor Fatou Bensouda.[573]

Asked about the status of the Ruto case at a news conference at United Nations headquarters, Ms. Bensouda said, "We are having tremendous difficulties, as usual, with our witnesses not wanting to come forward or changing their minds at the last minute." The Chief Prosecutor had in the past complained about "unprecedented intimidation" of witnesses in the Kenya cases and the ICC in 2013 accused Kenyan journalist Walter Barasa of attempting to bribe prosecution witnesses in the Ruto case.

It was also reported in the Guardian in July 2014[574] that there was concern for the prosecution about the high drop-out rate of witnesses testifying against Uhuru Kenyatta, and their struggles to find new witnesses. This was thanks to "unprecedented intimidation", according to ICC chief prosecutor Fatou Bensouda. Kenyan human rights lawyers described how potential witnesses have been cajoled and bullied into withholding their testimony. These tactics allegedly include paying off witnesses; threatening the families of witnesses who have accepted witness protection; publicising the identity of witnesses; and violence against witnesses, including mysterious disappearances.

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[573]Daily Nation (Kenya), "Bensouda cites difficulties with Ruto witnesses", http://mobile.nation.co.ke/news/Bensouda-cites-tremendous-difficulties-with-Ruto-witnesses/-/1950946/2314088/-/format/xhtml/-/mdh9nuz/-/index.html (accessed 12 August 2014).
[574]The Guardian, "ICC Should Drop Charges against Kenyatta – For Now", http://www.theguardian.com/world/2014/jul/17/icc-uhuru-kenyatta-kenya (accessed 12 August 2014).

The challenges faced by the OTP in investigations led to the filing in November 2013, of a confidential *ex parte* application, arguing that the GOK failed to comply with an initial request, issued in April 2012 under article 93 (1) of the statute, to produce financial and other records relating to Uhuru Muigai Kenyatta.[575] On March 31, 2014, the chamber adjourned the provisional trial commencement date to October 7, 2014, to allow further time for the resolution of certain cooperation matters between the GOK and the Prosecution.[576] On April 8, 2014, the OTP transmitted a revised request to the GOK.

In September 2014, the Chamber issued an order vacating the trial commencement date of 7 October and scheduled two additional status conferences.[577] There were two adjournments subsequently again over insufficiency of evidence to prove Mr. Uhuru Kenyatta's alleged criminal responsibility beyond reasonable doubt. The Prosecution requested that the case be further adjourned until the GOK fully executes the Revised Request. The OTP was clearly flogging a dead horse and finally on 3 December 2014 Trial Chamber V (B) of the ICC issued a decision rejecting the request for a further adjournment of the case against Uhuru Kenyatta.[578] This was the final nail in the coffin of the investigation into crimes committed by Uhuru Kenyatta and although the OTP still has the opportunity of bringing fresh charges with new evidence gathered, it appears very unlikely that it will be successful considering that the investigations are wholly dependent on cooperation form the GOK. Perhaps a change of Government with a new president hostile to Uhuru Kenyatta may change the OTP's fortunes.

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[575] *Prosecutor v. Uhuru Muigai Kenyatta*, Article 87(7) Application, ICC-01/09-02/11-866-Conf-Exp.
[576] *Prosecutor v. Uhuru Muigai Kenyatta*, Decision on Prosecution's applications for a finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional trial date, ICC-01/09-02/11-908.
[577] *Prosecutor v. Uhuru Muigai Kenyatta*, Order vacating Public trial date of 5 February 2014, convening a status conference, and addressing other procedural matters, ICC-01/09-02/11-886.
[578] *Prosecutor v. Uhuru Muigai Kenyatta* ,Decision on Prosecution's Application for a further adjournment , ICC-01/09-02/11-981.

7.2.6 The Kenya situation cases before the Pre-Trial Chamber II

Upon conclusion of investigations on December 15, 2010, the Prosecutor submitted two applications Pre-Trial Chamber II that requested that summonses be issued for six Kenyan suspects of believed to be responsible for committing crimes against humanity during the election violence period.[579] Subsequently on March 8, 2011, Pre-Trial Chamber II issued summonses for the six Kenyans to appear before Pre-Trial Chamber II in early April of the same year.[580] Below is a breakdown of the two cases;

1. ***Prosecutor versus William Samoei Ruto, Henry Kiprono Kosgei and Joshua Arap Sang.***

William Samoei Ruto was the former Minister of Higher Education, Science and technology of the Republic of Kenya and one of the most prominent Kalenjin politicians[581] , Joshua Arap Sang was the head of operations at Kass FM in Nairobi, the Republic of Kenya while Henry Kiprono was a Member of Parliament representing Tinderet Constituency in Nandi Kosgei District, Rift Valley Province and Chairman of the Orange Democratic Movement (ODM). He also served as Minister of Industrialization till 4 January 2011.[582]

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[579]See- *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Prosecutor's Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang (Dec. 15, 2010); *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Case No. ICC-01/09-02/11, Prosecutor's Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali (Dec. 15, 2010).
[580]See- *Prosecutor* v. *Ruto, Kosgey & Sang*, Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, (March 8, 2011); *Prosecutor v. Muthaura, Kenyatta & Ali*, Case No. ICC-01/09-02/ 11, Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, (March 8 2011).
[581]"William Samoei Ruto", The Hague Justice Portal, http://www.haguejusticeportal.net/index.php?id=12475 (accessed 20 August 2012).
[582]Prosecutor's Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, ICC-01/09-30-Red.

William Ruto allegedly provided essential contributions to the implementation of the common plan to punish PNU supporters in the event that the 2007 presidential elections were rigged, which allegedly aimed at expelling them from the Rift Valley, with the ultimate goal of creating a uniform Orange Democratic Movement (ODM) voting bloc.[583] He allegedly participated by way of organising and coordinating the commission of widespread and systematic attacks that meet the threshold of crimes against humanity, in the absence of which the plan would have been frustrated.

Joshua Arap Sang, by virtue of his influence in his capacity as a key Kass FM radio broadcaster, allegedly contributed in implementation of the common plan enumerated above by: (i) placing his show Lee Nee Eme at the disposal of the organisation; (ii) advertising the organisation's meetings; (iii) fanning violence by spreading hate messages and explicitly revealing a desire to expel the Kikuyus; and (iv) broadcasting false news regarding alleged murder(s) of Kalenjin people in order to inflame the violent atmosphere.[584]

Henry Kiprono Kosgei was allegedly the principal planner and organiser of crimes against PNU supporters.in 2006, along with Ruto, he joined the leadership of ODM later became its chairman. He had held various ministerial positions before the post-election violence and after the 2007 elections he was appointed minster for industrialisation.[585]

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[583]Prosecutor's Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang.
[584]Prosecutor's Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang at *para*.42.
[585]Prosecutor's Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang at *para*.38-41.

The Prosecutor presented 6 counts charging the 3 suspects with crimes against humanity of murder, deportation or forcible transfer of population and persecution. On 23 January 2012 PTC II declined to confirm charges against Henry Kiprono Kosgei, finding insufficient sufficient evidence to establish substantial grounds to believe that he was criminally responsible as an indirect co-perpetrator with Mr. Ruto and others in accordance with article 25(3) (a) of the Statute or under any other alternative mode of liability for the crimes against humanity referred to in counts 1, 3 and 5.[586] Charges against the other two suspects were confirmed.

Admissibility /Complementarity pre-trial determinations

The GOK on 31 March 2011 filed an application challenging the Admissibility of the case against William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang pursuant to Article 19(2) (b) of the Statute. The application also related to the case of *Prosecutor v. Francis Kirimi, Muthaura, Uhuru Muigai Kenyatta* and *Mohammed Hussein Ali* discussed below and I will discuss the admissibility issues in detail while dealing with that case.

2. ***Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali.***

Francis Kirimi Muthaura was the former head of the Public Service and Secretary to the Cabinet of the Republic of Kenya. Uhuru Muigai Kenyatta was then Deputy Prime Minister and former Minister for Finance of the Republic of Kenya. Mohammed Hussein Ali was

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[586] *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgei and Joshua Arap Sang*, Decision on the Confirmation of Charges Pursuant to Article 61(7) (a) and (b) of the Rome Statute available at http://www.icc-cpi.int/iccdocs/doc/doc1314535.pdf (accessed 10 August 2012).

Commissioner of the Kenya Police in during the post-election violence, having been appointed in 2004 by President Mwai Kibaki.[587]

From 24 until 28 January 2008, the Mungiki criminal organisation allegedly carried out a widespread and systematic attack against the non-Kikuyu population perceived as supporting the Orange Democratic Movement (ODM) (mostly belonging to Luo, Luhya and Kalenjin ethnic groups) in Nakuru and Naivasha. It is alleged that between November 2007 and January 2008, *inter alia*, Muthaura, Kenyatta, Mohammed Hussein Ali and members of the Mungiki, allegedly created a common plan to commit these attacks. According to the alleged plan, it was envisaged at the meetings that the Mungiki would carry out the attack with the purpose of keeping the Party of National Unity (PNU) in power, in exchange for an end to government repression and protection of the Mungiki's interests. The Prosecutor further alleged that that Ali, in his role as Commissioner of the Kenya Police, personally authorised the use of excessive force in attacks against ODM supporters.[588]

Charges

The Prosecutor presented ten counts charging the other 3 Suspects with crimes against humanity of murder, deportation or forcible transfer of population, rape and other forms of sexual violence, other inhumane acts and persecution.[589]

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[587]See- *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali,* Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali http://www.icccpi.int/iccdocs/doc/doc1037052.pdf and "Mohammed Hussein Ali , Hague Justice Portal at http://www.haguejusticeportal.net/index.php?id=12472 (both accessed 10 August 2012).

[588]"Mohammed Hussein Ali", Hague Justice Portal.

[589]*Prosecutor v. Francis Kirimi Muthaura,Uhuru Muigai Kenyatta and Mohammed Hussein Ali* ,Decision on the confirmation of charges pursuant to Article 61(7)(a) and (b) of the Rome Statute,ICC-01/09-02/11-382-Red at 42.

PTC II through a majority decision decided to confirm the charges against Francis Kirimi Muthaura and Uhuru Muigai Kenyatta but declined to confirm against Mohammed Hussein Ali, holding that it found that there are no reasonable grounds to believe that Ali is an indirect co-perpetrator, because his contribution to the commission of the crimes was not essential.[590] The OTP later withdrew charges against Francis Kirimi Muthaura submitting that the current evidence did not support the charges laid against him and that it had no reasonable prospect of securing evidence that could sustain proof beyond reasonable doubt.[591]

As mentioned earlier in this chapter during the discussion on the Kenya investigation, on 3 December 2014 Trial Chamber V (B) of the ICC issued a decision rejecting the Prosecution's request for a further adjournment of the case against Uhuru Kenyatta and instead directed the Prosecution to file a notice, within one week, indicating either (i) its withdrawal of the charges in this case, or (ii) that the evidentiary basis has improved to a degree which would justify proceeding to trial. Accordingly on December 5 2014 the ICC Chief Prosecutor withdrew charges against Uhuru Kenyatta stating that: "…given the state of the evidence in this case, I have no alternative but to withdraw the charges against Mr. Kenyatta…I am doing so without prejudice to the possibility of bringing a new case should additional evidence become available."[592]

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[590]See- http://www.icc-cpi.int/NR/exeres/7036023F-C83C-484E-9FDD-0DD37E568E84.htm (accessed 20 July 2011). See also- http://www.icckenya.org/background/ (accessed 7 June 2012). PTC II found that the Prosecutor's evidence failed to satisfy the evidentiary threshold required under the Rome Statute to bring Kosgey and Ali to trial.

[591]*Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta,* Decision on the withdrawal of charges against Mr Muthaura, ICC-01/09-02/11-696, 18 March 2013.

[592]Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the withdrawal of charges against Mr. Uhuru Muigai Kenyatta, 5 December 2014 available at http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-05-12-2014-2.aspx (accessed 29 July 2015).She highlighted the following challenges faced in the investigation:

i)Several people who may have provided important evidence regarding Mr. Kenyatta's actions, have died, while others were too terrified to testify for the Prosecution;

ii)Key witnesses who provided evidence in this case later withdrew or changed their accounts, in particular, witnesses who subsequently alleged that they had lied to my Office about having been personally present at crucial meetings;

General Admissibility /Complementarity pre-trial determinations

On 31 March 2011, the GOK filed an application before PTCII pursuant to Article 19 of the Rome Statute challenging the admissibility of the Case. In its application, the Government of Kenya cited "the fundamental and far-reaching constitutional and judicial reforms" both recently enacted and anticipated, as well as "the investigative processes that are currently underway" pointing out, inter alia, that a new constitution was adopted in August 2010 which incorporates a Bill of Rights that strengthens "fair trial rights and procedural guarantees" in the criminal justice system. According to the GOK, the new constitution remedies past deficiencies and weaknesses in the dispensation of the administration of justice in Kenya and also empowers Kenyan national courts to deal with the cases currently before the ICC, without needing to pass legislation establishing a special tribunal. Further, the adoption of the new constitution and related reforms such as the appointment of a new Chief Justice and High Court judges, also "meant that Kenya is able to conduct national criminal proceedings for all crimes arising from the post-election violence".[593]

The GOK further contended that the process investigating crimes arising out of the 2007-2008 post-election violence "will continue over the coming months", and that steps currently undertaken and those envisaged with respect to all cases at different levels, will be finalized "by September 2011".[594]

iii)The Kenyan Government's non-compliance compromised the Prosecution's ability to thoroughly investigate the charges, as recently confirmed by the Trial Chamber.

[593]Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2) (b) of the Statute, ICC-01/09-02/11-96, *para.*12.

[594]Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case. *para.*13.

PTCII held that in the absence of information, which substantiates GOK's challenge that there are ongoing investigations against the three suspects, there remains a situation of inactivity. It determined that the case is admissible following a plain reading of the first half of article 17(l) (a) of the Statute and there was no need to delve into an examination of unwillingness or inability of the State, in accordance with article 17(2) and (3) of the Statute.[595]

Kenya subsequently lodged an appeal lodged an appeal, arguing that the PTC II's decision should be reversed because it contained serious legal, factual, and procedural errors.[596] It challenged the "same conduct" test applied by PTCII arguing that: "it cannot be right that in all circumstances in every Situation and in every case that may come before the ICC the persons being investigated by the Prosecutor must be exactly the same as those being investigated by the State if the State is to retain jurisdiction."[597] The Appeals chamber confirmed the same conduct test holding that when the Court has issued a warrant of arrest or a summons to appear, for a case to be inadmissible under article 17 (1) (a) of the Statute, national investigations must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court. The words "is being investigated" in this context signify the taking of steps directed at ascertaining whether this individual is responsible for that conduct, for instance by interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses.[598]

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[595]Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case, *para.*39.
[596]*Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Judgment on the Appeal of the Republic of Kenya Against the Decision of Pre-Trial Chamber II of 30 May 2011, entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", http://www.icc-cpi.int/iccdocs/doc/doc1223134.pdf (Immediately hereinafter Appeals Chamber Judgment).
[597]Appeals Chamber Judgment *para.*41.
[598]Appeals Chamber Judgment at 3.

The above admissibility challenge is characteristic of the antagonistic relationship that exists when international criminal proceedings are initiated without the consent of the territorial state. In the self-referrals already examined, all the admissibility challenges were brought by the indicted suspects rather than the referring states which by the mere fact of referral already prima facie acquiesce to the admissibility u of cases that may arise. It is also significant since it marked the first time since the Rome Statute entered into force that a State Party has challenged the Court's assertion of jurisdiction over its nationals on the basis that the State Party itself is investigating the incidents at issue.[599]

7.3 The Situation in Darfur, Sudan

This is the second situation in my comparative analysis. Below I will give a historical background to the crisis and thereafter give a detailed analysis.

7.3.1 Background to the Darfur crisis

Greater Darfur, a territory composed of three states (North, South, and West Darfur), is located in the northwestern region of Sudan, bordering Chad to the west, Libya to the northwest, and Central African Republic to the southwest with an estimated population of four to five million people.[600] Several of the region's ethnic groups straddle both sides of the frontier between Chad and Sudan, and historically there has been significant migration and trade across the border. While the region's peoples are mostly Muslims, they are diverse ethnically, linguistically, and culturally.

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[599]C.C.Jalloh, "Kenya *vs.* The ICC Prosecutor" (2012) 53 *Harvard International Law Journal*, 269 at 270.
[600]Human Rights Watch, *Darfur in Flames: Atrocities in Western Sudan*, April 2004 at 6.Available at www.hrw.org/reports/2004/sudan0404/sudan0404.pdf (accessed 10 September 2012).

Darfur has been affected by intermittent bouts of conflict for several decades. Pastoralists from the north, including the northern Rizeigat, Mahariya, Zaghawa, and others, typically migrate south in search of water sources and grazing in the dry season. Beginning in the mid-1980s, when much of the Sahel region was hit by recurrent episodes of drought and increasing desertification, the southern migration of the Arab pastoralists provoked land disputes with agricultural communities.

These disputes generally started when the camels and cattle of Arab nomads trampled the fields of the non-Arab farmers living in the central and southern areas of Darfur.[601] Corridors that had been long agreed upon for the movement of cattle were no longer respected by both sides. Often the disputes were resolved through negotiation between traditional leaders on both sides, compensation for lost crops, and agreements on the timing and routes for the annual migration.[602] In the late-1980s, however, clashes became progressively bloodier through the introduction of automatic weapons which were easy to access to due to the armed conflict in South Sudan and in neighboring Chad.[603]

There were also contentious political issues in the region. In Darfur, Arab tribes felt that they were not sufficiently represented in the Fur-dominated local administration and in 1986, a number of Arab tribes formed what became known as the "Arab alliance" aimed at establishing their political dominance and control of the region. Fur leaders on the other hand

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[601]See also-Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General at *para.* 55.

[602]This however ended when President Nimeiri introduced new structures of local administration and formally abolished the tribal system. The administrators of the new structures were appointed by the central Government and significantly weakened tribal structures. They were largely viewed as not being impartial .See- Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General at *para.* 57.

[603]Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General at *para.* 58.

distrusted the increasing tendency of the federal government to favor Arabs. Arabs from the northern Nile Valley had controlled the central government since independence. This fear of Arab domination was exacerbated by the Sadiq El Mahdi government (1986-89) policy of arming Arab Baggara militias from Darfur and Kordofan known as “muraheleen.”

In 1988-1989, the intermittent clashes in Darfur evolved into full-scale conflict between the Fur and Arab communities. The situation also developed a more political character for a number of reasons. In a pattern that was to be repeated several times throughout the 1990s, rather than working to defuse tensions and implement peace agreements, the Khartoum government inflamed tensions by arming the Arab tribes and neglecting the core issues underlying the conflict over resources, the need for rule of law and socio-economic development in the region.

In the course of 2001 and 2002 two rebel groups in Darfur, the Sudan Liberation Movement/Army(SLM/A)[604] and the Justice and Equality Movement (JEM) began organizing themselves in opposition to the Khartoum Government, which was perceived to be the main cause of the problems in Darfur. The rebel groups were initially mainly composed of three ethnic groups: Zaghawa, Fur and Masaalit but were later joined by members of some smaller tribes such as the Jebel and Dorok. While only loosely connected, the two rebel groups cited similar reasons for the rebellion, including socio-economic and political marginalization of Darfur and its people (Early political demands included socio-economic development for the region, an end to tribal militias, and a power share with the central government).[605] Khartoum called the groups “bandits” and refused to negotiate.

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[604]The SLA emerged in February 2003. It was initially called the Darfur Liberation Front.
[605]Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General at *para.* 62.

The current conflict in Darfur has deep roots, being the latest configuration of a protracted problem, yet there are key differences between this conflict and prior bouts of fighting. One of the differences is that the current conflict developed serious racial and ethnic overtones.[606] A number of ethnic groups previously neutral positioned themselves along the Arab/African divide, aligning and cooperating with either the rebel movements or the government and its allied militia.[607] Remaining neutral and outside the conflict is becoming impossible, though some groups have tried to do so.

Having insufficient military resources to deal with the threat posed by the African rebels, the Government of Sudan called upon Arab nomadic tribes to assist in fighting them.[608] It was mostly the Arab nomadic tribes without a traditional homeland and wishing to settle, given the encroaching desertification, which responded to this call. Those Arabs became known as the "Janjaweed", a traditional Darfurian term denoting an armed bandit or outlaw on a horse or camel, a term which has become synonymous with a militia conducting attacks on civilians rather than rebels.[609]

The conflict escalated in July 2003, with fighting concentrated in North Darfur. Regardless of the fighting between the rebels on the one hand, and the Government and *Janjaweed* on the other, the most significant element of the conflict has been the attacks on civilians, which

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[606]Human Rights Watch, Darfur in Flames: Atrocities in Western Sudan at 8.
[607]Human Rights Watch, Darfur in Flames: Atrocities in Western Sudan at 8.
[608]The Sudan government considered the Darfur rebellion as a "regime threat" since the Darfur rebels posed far greater menace to their hold on office than the SPLA rebellion which was confined to the south. The prospect of JEM, the SLA, and a united Darfurian coalition that could garner support among other tribes in the west, and states such as Kordofan was deeply worrying to the Khartoum government, given that these groups are Muslim, and thus not as easily objectified or inveighed against as the southern "infidels." See-Human Rights Watch, *Darfur in Flames: Atrocities in Western Sudan* at 10.
[609]See-Human Rights Watch, Darfur in Flames: Atrocities in Western Sudan at 10.

has led to the destruction and burning of entire villages, and the displacement of large parts of the civilian population.[610]

Despite its entanglement in the situation, the first international negotiations took place in and were mediated by Chad in September 2003-following several failed internal attempts to mediate by Sudanese officials.[611] The Chadian talks produced an agreement between the government of Sudan and the SLA that provided for a ceasefire, relocation of forces, control of militias, and pledges to increase social and economic development in the region. Although fighting between government forces and the SLA stopped temporarily after the agreement was signed in September 2003, *Janjaweed* militia attacks continued in some areas.

The ceasefire was extended for one month but by early December 2003 but further ceasefire talks scheduled in the Chadian capital of N'djamena collapsed without any serious dialogue.[612] Shortly afterwards, Sudanese president Omar El Bashir vowed to annihilate the rebellion[613] and in mid-January 2004 the government launched a major offensive against rebel-held areas in North Darfur, hoping for a military solution. Attacks by *Janjaweed* militia on villages and towns in West Darfur also increased in December 2003, causing new waves of displaced persons to flee villages from along and south of the road between el Geneina and Nyala.

By late February 2004, estimates of displaced persons from Darfur were of more than750, 000 people, the majority of whom continued to experience attacks and looting even after

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[610]Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General at *para.* 72.
[611]Human Rights Watch, Darfur in Flames: Atrocities in Western Sudan at 10.
[612]Human Rights Watch, Darfur in Flames: Atrocities in Western Sudan at 12.
[613]Agence France-Presse, "Sudanese president vows to annihilate Darfur rebels", December 31, 2003.

fleeing their homes.[614] In Chad the number of refugees almost doubled to more than 110,000, with close to 30,000 new refugees arriving in December 2003, and more than 18,000 arriving in late January following the government offensive. On February 9, 2004, President Al Bashir announced victory and stated that the war was over and that refugees could be swiftly repatriated. On 2 April 2004, after briefing the UN Security Council, then Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator Mr. Egeland stated that a coordinated, "scorched-earth" campaign of ethnic cleansing by *Janjaweed* militias against Darfur's black African population was taking place.[615] United Nations co-ordinator for Sudan, Mukesh Kapila on the other hand said the conflict had created the worst humanitarian situation in the world.[616] To date, the fighting between government forces and the rebel groups has continued.

7.3.2 UN referral of the Sudan situation to the ICC

On 3 July 2004, the UN and Sudan signed a joint communiqué in which they both made pledges to alleviate the conflict in Darfur. Khartoum vowed to lift all restrictions on humanitarian access, bring to justice those responsible for human rights abuses, disarm the *Janjaweed*, protect IDPs from further attacks and resume peace talks with the rebels. The UN promised to help the African Union (AU) quickly deploy ceasefire monitors and to provide more humanitarian relief. The two sides also agreed to set up a Joint Implementation Mechanism (JIM) to monitor the agreement**.** On 30 July 2004, the UN Security Council

[614]Human Rights Watch, Darfur in Flames: Atrocities in Western Sudan at 12.
[615]See- "Sudan: Envoy warns of ethnic cleansing as Security Council calls for ceasefire" available at http://www.un.org/apps/news/storyAr.asp?NewsID=10307&Cr=sudan&Cr1= (accessed 11 August 2011).
[616]BBC NEWS, "Mass Rape Atrocity in Western Sudan", March 19 2004, http://news.bbc.co.uk/2/hi/africa/3549325.stm (accessed 29 August 2011).

adopted resolution 1556 with China and Pakistan abstaining, paving way for action against Sudan if it did not make progress on the pledges it made in the communiqué.[617]

In early September 2004, then United States Secretary of State Colin Powell in a testimony before the United States Senate Foreign Relations Committee, called upon the United Nations Security Council (hereinafter UNSC) to take action with regard to what he described as genocide underway in the Darfur province of western Sudan.[618] Powell explicitly invoked article 8 of the 1948 *Genocide Convention*, which authorises States parties to "call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III".

On 18 September 2004, the UNSC adopted resolution 1564 which determined that the Government of Sudan had not fulfilled its commitments to disarm the *Janjaweed* and to bring those leaders responsible for atrocities to justice. The Council also resolved that the situation in Sudan constituted a threat to international peace and security, and requested that the Secretary-General establishes an International Commission of Inquiry (hereinafter "the Commission") in order to "investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring

[617]UN Doc. S/Res/1556 (2004) available at http://www.un.org/press/en/2004/sc8160.doc.htm (accessed 10 June 2014).
[618]Secretary Colin L. Powell, Testimony before the US Senate Foreign Relations Committee, Washington, 9 September 2004. Available at http://2001-009.state.gov/secretary/former/powell/remarks/36042.htm (accessed 11 August 2011).

that those responsible are held accountable".[619] The Secretary-General established the Commission under the Chairmanship of Professor Antonio Cassese in October 2004 and required it to report by 25 January 2005.

The Commission reported back to the Secretary-General on 25 January 2005 and in its report disagreed with Powell, concluding that the atrocities that had been committed in the Darfur region of Sudan were not acts of genocide but rather crimes against humanity. The Commission called for prosecution by the ICC.[620]

The UNSC, acting under Chapter VII of the UN Charter, responded to the report on 31 March 2005 by referring "the situation in Darfur since 1 July 2002" to the ICC through UN Resolution 1593.[621] The Darfur Referral was the Security Council's first use of its powers under Article 13(b) of the Rome Statute, and it is an application to the most important aspect of the relationship between the two institutions. The resolution stated that the Government of Sudan and the other parties to the conflict are under an international obligation to 'cooperate fully with and provide any necessary assistance to the Court and the Prosecutor'.[622] Other States were 'urged' to assist the Court with respect to enforcement of the resolution. This resolution is binding on Sudan because it is a member of the United Nations and decisions of the UNSC bind all members.

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[619]UN Doc. S/RES/1564 (2004), *para*. 12.
[620]UN Doc. S/RES/1564 (2004), *para*. 569. Optimistic voices anticipated that the ICC's involvement would contribute to the marginalization and de-legitimization of the Sudanese government and pressure it to cut support for the Janjaweed. See- P. Kastner "Armed Conflicts and Referrals to the ICC: From Measuring Impact to Emerging Legal Obligations" (2014) 12 *Journal of International Criminal Justice*, 471 at 478.
[621]See- UN Security Council press release "Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court", 31 March 2005 available at http://www.un.org/News/Press/docs/2005/sc8351.doc.htm (accessed 11 August 2011).
[622]UN Doc. S/RES/1593 (2005) *para*. 2.

Sudanese authorities have however been persistent in their rejection of Resolution 1593. Immediately after its adoption, Sudan stressed that it is not a party to the Rome Statute and therefore the implementation of the resolution will be problematic[623], thus bringing to the fore the practical difficulties which the OTP was going to face regarding this UN Security Council referral.[624]

On 21 April 2005, ICC President Kirsch assigned the Darfur situation to Pre-Trial Chamber I[625] and on 1 June 2005, the Prosecutor determined that there was a reasonable basis to initiate an investigation.[626] He then notified the Chambers and the Presidency accordingly. A week later, Sudan unsurprisingly created its own tribunal to try one hundred and sixty individuals suspected of war crimes.[627] The Sudanese minister of justice declared the tribunal to be a substitute for the ICC.[628] One commentator believes that considering the timing of the

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[623]Sudan's Council of Ministers declared its "total rejection" of UN Security Council Resolution 1593, which called The Sudanese council, said the ICC lacked "justice and objectivity". See Irin News, "Sudan: Judiciary challenges ICC over Darfur cases" available at http://www.irinnews.org/report.aspx?reportid=55068 (accessed 11 August 2011).

[624]Unlike Uganda, DRC, C.A.R and Kenya, Sudan is not a party to the Rome statute. Sudan signed the Rome Statute on 8 September 2000, before the eruption of the conflict in Darfur but it has not yet ratified the statute. It has also not made a declaration under article 12(3) of the Rome Statute accepting the jurisdiction of the ICC over crimes committed on its the territory or by its nationals. Nevertheless, Sudan, as a signatory to the Rome Statute, is under an obligation to refrain from acts that would defeat the objects and purpose of the Statute pursuant to art. 18 of the Vienna Convention on the Law of Treaties.

[625]Decision Assigning the Situation in Darfur, Sudan to Pretrial Chamber I, 21 April 2005.

[626]See- Press Release, ICC, "The Prosecutor of the ICC Opens Investigation in Darfur" available at http://www.icc-cpi.int/press/pressreleases/107.html (accessed 5 March 2015)

[627]Irin News, "SUDAN: Darfur War-Crime Suspects Won't Go to ICC, Government Says", April 4 2005, http://www.irinnews.org/print.asp?ReportID=46436 (accessed 5 March 2015).

[628]Irin News, "SUDAN: National Courts to try suspects of war crimes", June 15 2005, available at http://www.irinnews.org/report.asp?Report ID=47654 (accessed 5 March 2015).The Sudanese Government even provided the OTP with information regarding the establishment of this tribunal and the OTP noted that it will follow the work of the tribunal as part of its "ongoing admissibility assessment" to determine if it is investigating or has investigated cases of relevance to the ICC and whether such proceedings meet Rome Statute standards-See First report of the ICC Prosecutor to the UN Security Council pursuant to UNSCR 1593.

creation of the new Sudanese domestic courts and the government's rhetoric, the new institutions appear to be a direct response to the ICC's investigation in an effort to block the admissibility of cases pursuant to article 12 through a domestic prosecution.[629]

7.3.3 The ICC Darfur investigation

The International Commission of Inquiry on Darfur presented a sealed list of 51 names to the ICC Prosecutor on April 2005. The Prosecutor subsequently emphasized that this list represented the conclusions of the Commission and was in no way binding on the Prosecutor.[630] He emphasized that the OTP will conduct its own independent investigations in accordance with the Rome statute and policies of the OTP in order to identify persons to be prosecuted. The evidence collection/investigation focused on a series of incidents that occurred in 2003 and 2004 when the highest number of crimes were recorded.[631]

As of December 2005, the OTP had issued requests for assistance to eleven states and seventeen NGOs and IGOs for the provision of information and other forms of assistance. Witnesses to the crimes under investigation had been identified in seventeen countries, over a hundred potential witnesses had been screened and a number of formal statements taken. Further, the Office had established 'a semi-permanent presence in the region, which provides logistical, security and other support to the process of witness identification and interview'.

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[629] W.W. Burke-White, "Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice" (2008) 49 *Harvard International Law Journal,53 at 71-72;* Human Rights Watch has also described these efforts at prosecution by the Sudanese Government as mere "window dressing" aimed at blocking ongoing ICC investigations, see - *Sudan: Khartoum War Crimes Investigations* , available at http://www.hrw.org/news/2008/10/20/sudan-khartoum-war-crimes-investigations-are-mere-window-dressing (accessed 22 August 2011); see, further *Lack of Conviction* a Human Rights Watch report examining the first one year of the courts established by the Sudanese government to deal with the widespread crimes in Darfur available at http://www.hrw.org/reports/2006/06/08/lack-conviction. (accessed 22 August 2011).

[630] Second Report of the Chief Prosecutor of the ICC, Luis Moreno-Ocampo, to the Security Council Pursuant to UNSC 1593 (2005) at 3.

[631] Fifth Report of the Chief Prosecutor of the ICC, Luis Moreno-Ocampo, to the Security Council Pursuant to UNSCR 1593 (2005).

Lastly, the office had registered and analyzed more than 2,500 items collected by the International Commission of Inquiry on Darfur, identifying potential evidence and evidential leads.[632]

In the fourth report to the UNSC, the Prosecutor noted that he had collected evidence from a wide range of sources, "thoroughly investigating incriminating and exonerating facts in an equal independent and impartial manner"[633] Some of the sources were mentioned as being victim statements, documents from the Sudanese Government at the request of the OTP, documents from the International Commission of Inquiry, information from the National Commission of Inquiry and material generated by states and organisations like the UN.

At a diplomatic briefing held on 23 March 2006, the Prosecutor observed that Darfur presents new challenges for the Court. He explained that the security situation in Darfur meant that any national or international investigations in Darfur at would cause risks for victims. "No one can conduct a judicial investigation in Darfur. A comparative advantage for the ICC is that we can more easily investigate from the outside. We have interviewed witnesses in more than ten countries. We are planning to present a clear picture of the crimes in our next report to the Security Council, in June. We have recently conducted two missions to the Sudan, in November last year and in February. We have discussed cooperation and admissibility. We have interviewed persons. The Sudan will be sending us further information that we have requested." [634]

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[632]Second Report of the Prosecutor of the International Criminal Court, Luis Moreno Ocampo, to the Security Council Pursuant to UNSCR 1593 (2005).
[633]Fourth Report of the Chief Prosecutor of the ICC, Mr. Luis Moreno- Ocampo to the UN Security Council pursuant to UN Resolution 1593 at 3.
[634]Sixth Diplomatic Briefing of the International Criminal Court, Compilation of Statements, 23 March 2006.One commentator argues that it seems that the Security Council regarded the ICC as a politically convenient and financially inexpensive tool when it referred the situation to the Prosecutor but did not have a

As of December 2014 the ICC Chief Prosecutor had gotten greatly frustrated by both the Sudanese Government and the UN Security Council and decided to shelve investigations in the Darfur region. The Chief Prosecutor told the UNSC that it was becoming increasingly difficult for her to appear before it and purport to be updating when all she was doing was to repeat the same things over and over again, most of which are well known to the Council. She concluded that: "Given this Council's lack of foresight on what should happen in Darfur, I am left with no choice but to hibernate investigative activities in Darfur as I shift resources to other urgent cases, especially those in which trial is approaching."[635] The decision by the Chief Prosecutor was celebrated by Omar el Bashir who accused the ICC of having tried to "humiliate and subjugate" his country.[636]

7.3.4 General admissibility of the situation

For purposes of initial determination of admissibility, the OTP studied Sudanese institutions, laws and procedures. The Sudanese Government provided information relating to the Sudanese justice system, the administration of criminal justice in Darfur, modes of alternative dispute resolution.[637]Information was also gathered from interviews of diverse individuals and on the basis of all this information the OTP concluded that there are cases that would be admissible in the Darfur situation. The OTP was however quick to emphasise that this didn't equate to a determination on the quality of the Sudanese judicial system. The OTP never

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genuine interest in holding accountable those who are most responsible for the worst crimes committed in Darfur. See- P. Kastner at 475.

[635]UN News Centre, "Security Council inaction on Darfur 'can only embolden perpetrators' – ICC Prosecutor", 12 December 2014, http://www.un.org/apps/news/story.asp?NewsID=49591#.VL5EKiuUexU (accessed 20 January 2015).

[636]The Guardian, "Omar al-Bashir celebrates ICC decision to halt Darfur investigation", 4 December 2014, http://www.theguardian.com/world/2014/dec/14/omar-al-bashir-celebrates-icc-decision-to-halt-darfur-investigation (accessed 20 January 2015).

[637]Report of the Prosecutor of the ICC Mr. Moreno Ocampo to the UN Security Council pursuant to UN Resolution 1593 at 3.

analysed whether the prosecutions in Sudan were genuine or if there had been a total or substantial collapse of the Sudanese judicial system. The finding of admissibility was based solely on the fact that no evidence had been found of any proceedings in respect of the cases that the OTP was interested in. The criterion was inaction on the part of Sudan rather than inability or unwillingness.

In November 2006 the OTP requested for an update from the Government of Sudan on their national proceedings and none was received although there were indications of developments including the arrest of 14 individuals suspected of serious violations of international humanitarian law.[638] The OTP concluded that the said indications didn't appear to render any of the current cases inadmissible.

7.4. Cases

Below, I will analyse the cases emanating from the situation in Darfur.

1. ***Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")***

Ahmad Harun was first appointed as a Director of the Popular Defence Force (PDF) and later, from April 2003 he served as a Minister of State for the Ministry of the Interior of the Government of Sudan. As a State Minister of the Interior, he was in charge of the "Darfur Security Desk" working together with all other bodies of the state and coordinating the efforts of the Police Forces, Armed Forces, and the National Security Service. He was allegedly prominent in the management of, and personal participation in, the recruitment, funding

[638]Fourth Report of the Prosecutor of the ICC Mr. Moreno Ocampo to the UN Security Council pursuant to UN Resolution 1593 at 1.

and arming of Militia/*Janjaweed* as well as coordination of Sudanese Government counter-insurgency operations against rebels.[639]

Ali Kushayb, a member of the PDF, allegedly commanded thousands of *Janjaweed* militia from on or about August 2003 until on or about March 2004. Ali Kushayb is alleged to have implemented the counter-insurgency strategy of the Government of Sudan that also resulted in the commission of war crimes and crimes against humanity in Darfur, Sudan. Ali Kushayb is perceived to be the mediator between the leaders of the *Janjaweed* militia in Wadi Salih and the Government of Sudan.[640]

Charges

The OTP accuses Harun and Kushayb of being criminally responsible for committing acts constituting war crimes under article 8 (2) (c) and 8 (2) (e) of the Statute between August 2003 and March 2004 including mass murder, rape, pillaging. They were also charged with having committed crimes against humanity, for having implemented a policy of attacking the civilian population by committing acts including rape, murder or forcible transfer. It was alleged that Ahmad Harun and Ali Kushayb personally contributed to "a common plan to pursue a shared and illegal objective of attacking civilian populations in Darfur," and are therefore together responsible under article 25 (3) (d) of the Statute for war crimes and crimes against humanity. [641]

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[639] *Prosecutor v. Ahmad Muhammad Harun and Ali Kushayb*, Decision on the Prosecutor's Application under Article 58(7) of the Rome Statute, ICC-02/05-01/0, *para*.83-94.

[640] *Prosecutor v. Ahmad Muhammad Harun and Ali Kushayb*, Decision on the Prosecutor's Application under Article 58(7) of the Rome Statute, *para.* 95-107.

[641] *Prosecutor v. Ahmad Muhammad Harun and Ali Kushayb*, Warrant of Arrest for Ahmad Harun, ICC-02/05-01/07-2 and Warrant of Arrest for Ali Kushayb ,ICC-02/05-01/07-3-Corr.

The Sudanese Government has not cooperated with the ICC in its pursuit of apprehension of Harun and Kusyab.[642] It prompted the OTP to seek a declaration of non-compliance from PTC I and for the matter to be referred to the UNSC.[643] The UN Security Council has however to date never taken any formal action in response to incidents of non-cooperation.

Admissibility / Complementarity pre-trial determinations

In its 27 April 2007 decision PTC I considered the issue of admissibility, finding that, on the basis of the evidence and information provided to the chamber in relation to both Ahmad Harun and Ali Kushayb and without prejudice to any challenge to the admissibility of the case under article 19(2) (a) and (b) of the Statute or any subsequent determination, the case against Ahmad Harun and Ali Kushayb falls within the jurisdiction of the Court and appears to be admissible.[644]

Ali Kushayb had been arrested on 28 November 2005 on the basis of an arrest warrant issued by Sudanese authorities in relation to five separate criminal incidents in South and West Darfur. The OTP argued that the investigation being carried out by the Sudanese authorities did not relate to the same conduct which was the subject of investigations and an application before the ICC and no prosecution had ensued from the said investigation.[645] PTC I agreed with the OTP position.

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[642]Following the issuance of the warrants against Harun and Kushayb, the Sudanese government refused further engagement with the ICC, despite repeated demands from the Security Council and calls from supporters of the court such as France and the UK. It reasserted that the ICC had no jurisdiction over any alleged crimes in Sudan and stated that under no circumstance would Sudanese officials be handed over for trial to an international court. See- International Crisis Group, *Sudan: Justice, Peace and the ICC*, (Africa Report No.152) 17 July 2009 at 6.

[643]*Prosecutor v. Ahmad Muhammad Harun and Ali Kushayb*, Decision on the Prosecution's Request for a Finding of Non-Compliance, ICC-02/05-03/09-641.

[644]*Prosecutor v. Ahmad Muhammad Harun and Ali Kushayb*, Decision on the Prosecutor’s Application under Article 58(7) of the Rome Statute, *para*.25.

[645]*Prosecutor v. Ahmad Muhammad Harun and Ali Kushayb*, Decision on the Prosecutor’s Application under Article 58(7) of the Rome Statute at *para*.19-24.The same conduct test was first applied in the case of *Prosecutor v. Thomas Lubanga* in the DRC situation. See chapter 4 of this thesis for further discussion on the same conduct test.

The chamber agreed with the Prosecutors submission that there was no indication that Ahmad Harun is under investigation nor was there any indication that any prosecution had been initiated against him before national jurisdictions for any crime relating to the Situation in Darfur, Sudan. The PTC adopted the same "inactivity" criterion that was used in admitting the DRC self-referral.[646]

2. *Prosecutor v. Omar Ahmad Hassan Al Bashir*

Omar Al Bashir being the *de jure* and *de facto* President of the State of Sudan and Commander-in-Chief of the Sudanese Armed Forces from March 2003 to 14 July 2008, allegedly used that position to play an essential role in coordinating, with other high-ranking Sudanese political and military leaders, the design and implementation of Government of Sudan counter-insurgency campaign.[647]

Charges

Omar Al Bashir was indicted with five counts of crimes against humanity under Article 7(1) of the Rome Statute for directing the murder, extermination, forcible transfer, torture and rapes of various ethnic groups; and two counts of war crimes under Article 8(2) of the Rome Statute for attacking civilians and pillaging towns.[648]

Three counts of genocide under Article 6 of the Rome Statute for encouraging action to kill members of the Fur, Masalit and Zaghawa ethnic groups were later added on 12 July 2010

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[646]For further discussion of admissibility and complementarity with focus Harun and Kushayb, see- J. Pichon,"The Principle of Complementarity in the Cases of the Sudanese Nationals *Ahmad Harun* and *Ali Kushayb* before the International Criminal Court"(2008) 8 *International Criminal Law Review*,185.
[647]*Prosecutor v. Omar Al Bashir*, First Warrant of Arrest, ICC-02/05-01/09-1 at 6.
[648]*Prosecutor v. Omar Al Bashir*, First Warrant of Arrest, ICC-02/05-01/09-1 at 6.

after the Appeals Chamber reversed the first decision of the PTC not to issue a warrant of arrest in respect of the crime of genocide in view of an erroneous standard of proof.[649]

The indictment of President Bashir marked the first time the ICC has indicted a sitting head of state, and it was a watershed moment for the Court. It negated the criticisms that had been laid on the Court that it was focusing on rebel groups, as the persons indicted in DRC, Uganda and the C.A.R were rebel leaders who had been self-referred to the Court by sitting governments. This marked departure regarding the persons targeted for prosecution is in my view as a result of the way the situations got before the ICC. The fact the Darfur situation was referred to the ICC by the UNSC gave the OTP an opportunity to carry out independent investigations without having to rely on the sitting government and it also freed the OTP from the awkward position of indicting a president who had referred a matter to it.

Like in the Harun and Kushayb case, there has been no cooperation by Sudan and most African states in the apprehension of Omar Al Bashir. PTC I informed the UNSC about non-cooperation by Chad[650] and Kenya[651], both of which have an obligation to cooperate with the Court as State Parties to the Rome Statute. Findings of non-cooperation were also made

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[649]*Prosecutor v. Omar Al Bashir*, Arrest Warrant decision *para.* 206 and later the appeals chamber judgment on appeal,ICC-02/05-01/09.For further discussion on the request for the inclusion of genocide charges, See-A.Cayley, "The Prosecutor's Strategy in Seeking the Arrest of Sudanese President Al Bashir on Charges of Genocide" (2008) 6 *Journal of International Criminal Justice*, 829.

[650]*Prosecutor v. Omar Al Bashir* , Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to the Republic of Chad, ICC-02/05-01/09-109.

[651]*Prosecutor v. Omar Al Bashir* , Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's presence in the territory of the Republic of Kenya ,ICC-02/05-01/09-107.

against State Parties Chad, Djibouti and Malawi for their failure to arrest Omar Hassan Ahmad Al Bashir while present on their respective territories.[652] The most embarrassing episode has however been South Africa allowing Bashir to enter and exit its territory, despite a provisional Court order from its Courts barring him from leaving South Africa, and an outstanding arrest warrant which South Africa as a state party was duty bound to enforce.[653]

Admissibility/Complementarity pre-trial determinations

PTC I declined to use its discretionary *proprio motu* power to determine, at this stage, the admissibility of the case against Omar Al Bashir as: (i) the Prosecution Application still remained confidential and *ex parte*; and (ii) there is no ostensible cause or self-evident factor which impels the Chamber to exercise its discretion pursuant to article 19(1) of the Statute.[654] This was akin to the reasoning PTC II in its decision regarding the issuance of arrest warrants against Joseph Kony and others wherein it held that the cases "appeared to be admissible".[655]

PTC I further noted that the materials presented by the Prosecution in support of the Prosecution Application offer no indication that: (i) national proceedings may be conducted, or may have been conducted, at the national level against Omar Al Bashir for any of the crimes

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[652]See- *Prosecutor v. Omar Al Bashir* , Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-140-tENG; *Prosecutor v. Omar Al Bashir* , Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al Bashir's recent visit to Djibouti, https://www.legal-tools.org/doc/f799cd/ ; *Prosecutor v. Omar Al Bashir* , Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and surrender of Omar Hassan Ahmad Al Bashir, https://www.legal-tools.org/doc/476812/ (All accessed January 2016).

[653]Aljazeera News, "Why South Africa let Bashir get away" http://www.aljazeera.com/indepth/opinion/2015/06/south-africa-bashir-150615102211840.html (accessed January 2016). Being a member state of both the ICC and the AU, South Africa faced dilemma of either honouring the AU decision to boycott the ICC, or cooperating with the ICC. After weighing its diplomatic options, South Africa went for the former and this speaks volumes on how seriously the ICC is taken on the African continent.

[654]Decision on the Prosecution's Application for a Warrant of Arrest against *Omar Hassan Ahmad AlBashir*, ICC-02/05-01/09-3, *para.* 51.

[655]See- *Prosecutor v. Joseph Kony* decision on admissibility.

contained in the Prosecution Application; or that (ii) the gravity threshold provided for in article 17(l) (d) of the Statute may not be met.[656]

Having declined to handle the admissibility of the case in detail, it made some observations regarding territorial, temporal and personal jurisdiction. The PTC I found that, insofar as the Darfur situation was referred to the Court by UNSC resolution 1593 adopted under Chapter VII of the Charter of the United Nations (article 13(b) of the Statute), this case falls within the jurisdiction of the Court despite the fact that it refers to the alleged criminal responsibility of a national of a State that is not party to the Statute, for crimes allegedly committed on the territory of a State not party to the Statute.[657]

PTC I also found that in light of the material presented by the Prosecution in support of the Prosecution Application, and without prejudice to a further determination of the matter pursuant to article 19 of the Statute, the current position of Omar Al Bashir as Head of a State not a party to the Statute has no effect on the Court’s jurisdiction over this case.[658]

3. *Prosecutor v. Bahr Idriss Abu Garda*

Bahr Idriss Abu Garda, a member of the Zaghawa tribe of Sudan, is the current Chairman and General Co-ordinator of Military Operations of the United Resistance Front. From January 2005 until September 2007, Abu Garda was the Vice-President of the Sudanese armed group known as the Justice and Equality Movement (JEM). On 4 October 2007, he declared,

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[656] *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest, *para.*50.

[657] *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest. *para.*40.

[658] *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest *para.*41.

together with others, the formation of a new armed faction called JEM Collective Leadership ("JEM-CL").[659]

He was allegedly in command of the splinter forces of JEM during an attack carried out on 29 September 2007 on the African Union Mission in Sudan (AMIS) stationed at the Military Group Site Haskanita in North Darfur, Sudan. Some 1,000 rebels, armed with anti-aircraft guns, artillery guns and rocket-propelled grenade launchers, attacked the Haskanita camp, killing 12 peacekeepers serving with the AMIS and wounding eight others.[660]

Charges

Pre-Trial Chamber I of the ICC considered that there are reasonable grounds to believe that Abu Garda is criminally responsible as a co-perpetrator or as an indirect co-perpetrator for three war crimes under article 25(3)(a) of the Rome Statute to wit violence to life, in the form of murder, whether committed or attempted, within the meaning of article 8(2)(c)(i) of the Statute; intentionally directing attacks against personnel, installations, material, units or vehicles involved in a peacekeeping mission, within the meaning of article 8(2)(e)(iii) of the Statute and pillaging, within the meaning of article 8(2)(e)(v) of the Statute.[661]

On 18 May 2009, he appeared before the ICC voluntarily in response to a summons becoming the first *indictee* to do so and also the first to appear in relation to the investigation into the situation in Darfur.[662] However, on 8 February 2010, PTC I of the ICC declined to confirm charges in the case. The Chamber found that there was insufficient evidence to establish

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[659]*Prosecutor v. Bahr Idriss Abu Garda*, Decision on the Confirmation of Charges, ICC-02/05-02/09-243-Red at 5.
[660]*Prosecutor v. Bahr Idriss Abu Garda*, Decision on the Confirmation of Charges at 11 *et.seq*.
[661]*Prosecutor v. Bahr Idriss Abu Garda* decision on confirmation of charges at 5.
[662]See- ICC Press release, "Bahr Idriss Abu Garda arrives at the premises of the Court" available at https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050209/press%20release/Pages/abu%20garda%20arrived%20at%20the%20premises%20of%20the%20court.aspx (accessed 18 June 2013).

substantial grounds to believe that Abu Garda was responsible as a direct or indirect co-perpetrator of the crimes of which he was charged.[663]

Admissibility / Complementarity Pre-Trial Determinations

With respect to admissibility, PTC I adopted the inaction approach, holding that according to the information provided by the Prosecution, no State with jurisdiction over the case against Abu Garda is acting, or has acted, in the manner described in article 17 of the Statute in relation to the facts alleged in this case. The chamber found it not necessary to address any issues relating to the unwillingness or inability of any given State to investigate or prosecute the case in the absence of any State action.[664]

PTC I also accepted a new impact dimension to gravity presented by the OTP, which was a marked departure from the previous “numbers game” adopted in the Uganda situation. The OTP submitted that: "the issues of the nature, manner and impact of the [alleged] attack are critical”.[665] PTC I concurred with the OTP, and held that the gravity of a given case should not be assessed only from a quantitative perspective, *i.e.* by considering the number of victims; rather, the qualitative dimension of the crime should also be taken into consideration when assessing the gravity of a given case.[666]

4. *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*

Abdallah Banda Abakaer Nourain is the Commander-in-Chief of the Justice and Equality Movement (JEM) Collective-Leadership, one of the components of the United Resistance

[663] *Prosecutor v. Bahr Idriss Abu Garda*, Decision on confirmation of charges at 97.
[664] Prosecutor v. Bahr Idriss Abu Garda at 15.
[665] Prosecutor v. Bahr Idriss Abu Garda at 16.
[666] Prosecutor v. Bahr Idriss Abu Garda at 16.

Front while Saleh Mohammed Jerbo Jamus is a member of the Zaghawa tribe of Sudan, and is currently integrated into the Justice and Equality Movement. He was former Chief-of-Staff of the Sudan Liberation Army Unity (SLA-Unity).[667]

Charges

The two indictees faced the same charges as Abu Gadar, stemming from the attack on AMIS peacekeepers in Haskanita. The attack on Haskanita was allegedly carried out by forces of the Justice and Equality Movement– Splinter Group, Sudan Liberation Army Unity and SLA-Abdul Shafie, led by Abdallah Banda and Saleh Jerbo and other commanders.

The two suspects appeared voluntarily before Pre-Trial Chamber I on 17 June 2010. On 7 March 2011, Pre-Trial Chamber I unanimously decided to confirm the charges of war crimes against both indictees and committed them to trial. Proceedings against Saleh Mohammed Jerbo Jamus were terminated by Trial Chamber IV on 4 October 2013 after receiving evidence pointing towards his death.[668]

Admissibility/ Complementarity Pre-Trial Determinations

PTC wholly adopted its findings in the case of Abu Gadar when considering admissibility of the case against Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus in the absence of additional information being submitted by either party in the case.[669]

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[667] *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Decision on confirmation of charges.
[668] *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Decision terminating the proceedings against Mr. Jerbo, ICC-02/05-03/09-512.
[669] Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Decision on confirmation of charges at 13.

5. *Prosecutor v. Abdel Raheem Muhammad Hussein*

Abdel Raheem Muhammad Hussein is the current Minister of National Defence and former Minister of the Interior and former Sudanese President's Special Representative in Darfur.[670]

It is alleged that in his role as Minister of the Interior and Special Representative of the President in Darfur and as an influential member of the Government of the Republic of the Sudan, Mr Hussein made essential contributions to the formulation and implementation of a common plan to attack that part of the civilian population perceived by the Government of the Republic of the Sudan as being close to the rebel groups – belonging largely to the Fur, Masalit and Zaghawa groups.[671] His alleged participation was *inter alia* through his overall coordination of national, state and local security entities and through the recruitment, arming and funding of the police forces and the *Janjaweed* militia in Darfur.[672]

Charges

Abdel Raheem Muhammad Hussein faces seven counts of crimes against humanity and six counts of war crimes emanating from attacks perpetrated by the Sudanese armed forces and/or the Militia/Janjaweed, acting together as part of the counter insurgency campaign. An arrest warrant issued by PTCI on 1 March 2012 is yet to be executed.[673]

The crimes are identical to those for which warrants of arrest were previously issued against Ahmad Harun and Ali Kushayb on 27 April 2007, and also overlap with those crimes for

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[670]Sudan Tribune, "Abdel-Rahim Mohamed Hussein" available at http://www.sudantribune.com/spip.php?mot593 (accessed 25 December 2014)
[671]*Prosecutor v. Abdel Raheem Muhammad Hussein*, Warrant of Arrest, ICC-02/05-01/12-2 at 6.
[672]*Prosecutor v. Abdel Raheem Muhammad Hussein*, Warrant of Arrest, ICC-02/05-01/12-2 at 6.
[673]*Prosecutor v. Abdel Raheem Muhammad Hussein*, Public redacted version of "Decision on the Prosecutor's application under article 58 relating to Abdel Raheem Muhammad Hussein" ICC-02/05-01/12-1-Red at 3.

which Omar Hassan Ahmad Al Bashir is wanted. Likewise, there was information that Abdel Raheem Muhammad Hussein intended to travel to Chad and the C.A.R. The OTP sought findings of non-compliance against both states but, unlike in the Al Bashir case, PTC II received the respective Governments explanations in good faith and declined to make a finding of non-compliance.[674]

Admissibility / Complementarity Pre-Trial Determinations

PTCI in its decision agreeing to the Prosecutor's request for an arrest warrant declined at that stage to exercise its discretionary *proprio motu* power to determine the admissibility of the case against Mr Hussein as it deemed there to be "no ostensible cause or self-evident factor which impels the Chamber to exercise its discretion pursuant to article 19(1) of the Statute".[675]

7.5 Conclusion

This chapter sought to make a comparative analysis of the Kenya and Sudan situations before the ICC *vis a viz* state referrals.

This chapter has traced the history of the conflicts in Kenya and Darfur, detailed the developments that led to the referral by the UN Security Council to the ICC and the exercise of the Prosecutor of his *proprio motu* powers, shown the general admissibility issues surrounding the situations and also analysed the cases emanating there from.

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[674]*Prosecutor v. Abdel Raheem Muhammad Hussein*, Decision on the Cooperation of the Central African Republic Regarding Abdel Raheem Muhammad Hussein's Arrest and Surrender to the Court, ICC-02/05-01/12-21 and *Prosecutor v. Abdel Raheem Muhammad Hussein*, Decision on the Cooperation of the Republic of Chad Regarding Abdel Raheem Muhammad Hussein's Arrest and Surrender to the Court, ICC-02/05-01/12-20.
[675]*Prosecutor v. Abdel Raheem Muhammad Hussein*, Decision on the Cooperation of the Central African Republic Regarding Abdel Raheem Muhammad Hussein's Arrest and Surrender to the Court. at 6.

Of worthy note is that these two situations have seen the indictment of both state and non-actors including the current presidents of Sudan and Kenya ,as well as non-state actors-unlike the self-referrals which have seen only the indictment, and prosecution of non-state actors. In Kenya the original "Ocampo six" summoned by the Court represented both sides of the political divide during the election and post-election violence. Charging perpetrators on both sides is a notable difference in the prosecutorial strategy from cases that follow self-referrals.

The collapse of the Kenya cases and the Darfur investigation due to lack of cooperation however raises serious questions as to whether it is worth it to be antagonistic to governments of states where international crimes have committed by indicting state officials.[676] It may serve the interests of those who believe in idealism of the Court operating without state interference, compromises, pragmatism and expedience but ultimately either leave the Court with no actual suspects to try or with suspects minus incriminating evidence.[677] Indictments will be made and arrest warrants issued but of what use are they when unexecuted and with no realistic prospect of execution? Omar al Bashir has to date travelled to several countries without being arrested and The Arab League, moderate African states (including South Africa), and the African Union as a whole all oppose the arrest warrant.

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[676]In the Darfur situation, it has been suggested that the OTP should have sought a less controversial and potentially more productive option of first going after lower-ranking, but still senior officials for easier-to-prove atrocity crimes without giving credence to the claims of those who asserted that the court's objective was not justice but regime change. This approach would have reduced the risks of a public dispute with the AU and some African states that are parties to the Rome Statute. See- International Crisis Group, *Sudan: Justice, Peace and the ICC* at 27.

[677]Louise Arbour former Chief Prosecutor of the ICTY, ICTR and an idealist, has stated that: "The political spirit of accommodation and compromise, which is so crucial for the peaceful resolution of all conflicts, is entirely inappropriate when it comes to compliance with the law. It is an affront to those who obey it and a betrayal of those who rely on its protection." Introductory Statement by Justice Louise Arbour, Prosecutor ICTY and ICTR at the Launch of the ICC Coalition's Global Ratification Campaign (May 13, 1999), available at http://www.icty.org/sid/7767/en (accessed 12 December 2015).

Lastly, in summation, PTCI and PTCII did not come up with any new jurisprudence on admissibility when handling the cases emanating from the Darfur and Kenya, save for analysis of gravity as an admissibility component in the *Prosecutor v. Abu Garda* case. There was overreliance on the “inaction” theory that came up in the DRC cases and a sole reliance on evidence presented by the Prosecutor to determine admissibility.

CHAPTER EIGHT: CONCLUSIONS AND RECOMMENDATIONS

General Conclusions

Each of my preceding chapters have had their own conclusions and most of the conclusions made earlier will not be repeated here. However, the following general conclusions and observations merit attention.

Self-referrals were a quick, lawful and convenient way of making the ICC operational but from my critical analysis have been dogged by inevitable state interference, selective prosecutions and pragmatism. Out of self-interest, states have oscillated from supportive to obstructionist and downright belligerent if the work of the ICC diverges from their interests. Commentators who warned of the dangers of self-referrals at the onset were not false prophets of doom after all.

My study of self-referrals also highlighted the complexities in striking a balance between maintaining prosecutorial independence and having cooperation of the territorial state. It further showed that it has been the practice of the OTP to accept self- referrals based on mere inaction minus an attempt to encourage domestic prosecutions for international crimes. Critics have even argued that the ICC solicits for self-referrals from states in order to justify its expensive existence.[678]

Notwithstanding the dangers and shortcomings of self-referrals highlighted above, my comparative analysis of other trigger mechanisms *i.e proprio motu* and Security Council referral

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[678]P. Clark, "Chasing Cases: The Politics of Self-Referral" at 1186. He contends further that: "The ICC is caught between an idealist vision of a global Court designed to prosecute the cases that domestic jurisdictions cannot or will not prosecute and the pragmatic concerns of a new institution seeking judicial results to secure its legitimacy" .

in Kenya and Sudan respectively has shown that the same problems (and sometimes worse) arise. One cannot ignore the fact that Security Council members may also have geostrategic, domestic, reputational other considerations in mind when referring situations and directing investigations while the ICC Chief Prosecutor has also been shown to have more than legal considerations in decision making.

The grave challenges the OTP has faced in getting cooperation from both Kenya and Sudan tilt the scales in favour of self-referrals in my view. The ICC got grand headlines when it indicted a sitting head of state in Sudan and a presidential candidate-turned-president in Kenya but it all came to naught minus cooperation of those states. This turns the ICC into an expensive paper tiger geared towards posturing.

Ultimately self-referrals are the hallmark of the cooperation regime envisaged by the Rome statute and they should be encouraged. The problem is therefore not self-referrals, but one of general practical challenges which international criminal justice must overcome. In the words of D. Robinson: "… the root of the problem is the intractable paradox of independence and dependence, which is inherent to all international justice efforts. That paradox engages yet another paradox, that of detachment and engagement: the Prosecutor must be analytically detached, in order to select situations and cases in a principled manner based on Statute criteria, yet the Prosecutor must also engage with the world, in order to build and maintain cooperation from various actors."[679]

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[679]D. Robinson, "The Controversy over Territorial State Referrals and Reflections on ICL Discourse" (2011) 9 *Journal of International Criminal Justice*, 355 at 368.

The ICC Prosecutors will ultimately find themselves in a dilemma of being at the whims of state cooperation in the absence of an enforcement mechanism or independent investigator. The ICTR Prosecutor found herself in a similar dilemma in the Jean-Bosco Barayagwiza case.[680] The outcome of the case demonstrates the degree to which a Prosecutor of international crimes is dependent on the state where the crimes occur in order to conduct her investigations. Ultimately a prosecutor must be pragmatic in the face of all the political pressures in order to have a properly functioning Court. It may not be an ideal situation for the Prosecutor to dabble in politics, but we after all do not live in an ideal world-there would be no international crimes if the world was ideal. As two commentators assert, the ICC must navigate a "sea of political realities" and the ICC allowing various points of entry for politics may actually facilitate the attainment of even the most sacred of the ICC's mandates-the promotion of retribution and reconciliation in ways that preserve order and stability in the international community.[681]

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[680] He was charged by the Prosecutor of the ICTR with genocide and other crimes in connection with the Rwandan genocide. Barayagwiza's case was the subject of a number of pre-trial irregularities, and he filed a motion seeking to nullify his arrest and detention on the grounds of excessive pre-trial detention. The trial chamber dismissed his motion. The appeals chamber, however, accepted Barayagwiza's argument and found that the length of his pre-trial detention violated both human rights standards and the Tribunal's rules. The appeals chamber described the Prosecutor's conduct in Barayagwiza's case as "egregious," and concluded that "the only remedy available for such prosecutorial misconduct is to release the Appellant and dismiss the charges against him. This decision infuriated the government of Rwanda, which suspended cooperation with the ICTR. The European Union and Human Rights Watch also condemned the Tribunal's decision. Without Rwanda's cooperation, the Prosecutor was unable to pursue any of her ongoing investigations into the Rwandan genocide. Rwanda also denied the ICTR Prosecutor Carla del Ponte a visa to enter the country, and one of the Tribunal's trials had to be suspended because Rwanda refused to allow witnesses to travel to Tanzania, where the ICTR is located. In response, the ICTR Prosecutor submitted a motion to the appeals chamber asking it to reconsider its decision and submitting "new facts" in connection with the case. At the hearing on her motion, the Prosecutor noted that "the government of Rwanda reacted very seriously in a tough manner" to the appeals chamber's decision. In addition, the attorney general of Rwanda threatened "the non-co-operation of the peoples of Rwanda with the Tribunal if faced with an unfavourable Decision by the Appeals Chamber on the Motion for Review."' The appeals chamber eventually granted the Prosecutor's motion to reconsider. It found that Barayagwiza's rights had indeed been violated, but that the new facts brought to light by the Prosecutor rendered the prior appeals chamber's remedy of dismissal of the case "disproportionate."' The tussle between Del Ponte and Rwanda culminated in her ouster in 2003 from the position of Chief Prosecutor of the ICTR. See generally, V. Peskin, "Beyond Victor's Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda" (2005) 4 *Journal of Human Rights*, 213.

[681] G.M. Gallarotti and A.Y. Preis, "Politics, International Justice, and the United States: Toward a Permanent International Criminal Court", (1999) 4 *University of California, Los Angeles Journal of International Law and Foreign Affai*rs, 1 at 28 *et.seq.* The ICC founders had hoped to eliminate the political manipulations that crop up when political bodies like the UN Security Council are in charge of international criminal justice. It

Recommendations

Whereas self-referrals have proved to be a quick and expedient way of making the ICC operational, they have had the effect of having the OTP wade into dangerous political waters. The first ICC Prosecutor Moreno-Ocampo became the face of the ICC and overshadowed all the other organs. Without his innovative interpretation of the Rome Statute that allowed for self-referrals we wouldn't have had the Court coming into operation as early as it did.

The Chief Prosecutor's innovativeness has however cast him into a sphere of diplomacy, political manoeuvring and machinations.[682] The Rome Statute does guarantee the independence of the OTP but when it is involved in diplomacy and politics it is hard for the general public to accept that he does remain independent.[683] Independence is critical to any justice system having credibility and legitimacy.

With the reality of the significance politics plays in the attainment of any form of international criminal justice, I recommend removing the function of investigations from the OTP.

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was felt that the Security Council- and in particular the opportunistic votes of veto-wielding permanent members-was part of the problem. The permanent member veto would make the permanent five (U.S., France, United Kingdom, Russia, and China) and their close allies immune from prosecution-see- J.Goldsmith, "The Self-Defeating International Criminal Court" (2003) 70 *The University of Chicago Law Review*, 89.

[682]Luis Moreno-Ocampo has been described as at times "... [appearing] torn between the roles of prosecutor and public advocate seeking to create political leverage". See- International Crisis Group, *Sudan: Justice, Peace and the ICC* at 27.

[683]Evidence led by the OTP in the pre-trial hearing of *Prosecutor v. Dominic Ongwen* was principally obtained from the Uganda People's Defence Forces [Ugandan Army] and it included *inter alia* logs of intercepted radio communications between the rebel leader Joseph Kony, his deputy Vincent Otti and Dominic Ongwen, as well as FM radio recordings and video footage taken by Ugandan authorities of the aftermaths of the attacks. Whereas government provided evidence does and should make the prosecution job easier, it raises doubt on the impartiality of the Court considering there are actors on the Government side who may also be culpable. See- Chimpreports, "Ongwen Case: LRA Claimed to Learn its Operations from NRA – Prosecution" available at http://www.chimpreports.com/ongwen-case-lra-claimed-to-learnt-its-operations-from-nra-prosecution/ (accessed 25 January 2016).

A model along these lines is proposed by Higgins. She proposes establishment of an independent commission to assist in the investigation process .It would be staffed by independent investigators experienced in conducting complex investigations who would act in the interests of the whole community and gather evidence for both the prosecution and the defence in respect of the alleged crimes and subsequently present its dossier to the trial chamber. The defence and the prosecution would have the right to request the commission to conduct particular witness interviews or seek to obtain specific material. They would also retain the right to conduct their own investigations and seek the admission of such evidence at trial.[684]

Finally, in line with the principle of complementarity, national prosecutions should come first, and the Prosecutor should remind the referring State to take action in the absence of such prosecutions instead of basing on its inaction to solicit and accept referrals like in the DRC situation. It also brings into question the intention of states ratifying and domesticating the Rome Statute and then cede their duty to prosecute to the ICC through inaction.

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[684]G. Higgins, "Fair and Expeditious Pre-trial Proceedings: The Future of International Criminal Trials" (2007) 5 *Journal of International Criminal Justice*, 394 at 396.

BIBLIOGRAPHY

A. PRIMARY SOURCES

I. STATUTES

Rome Statute (adopted 17th July 1998, entered into force 1st July 2002.

ICC Rules of Procedure and Evidence.

Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948 78 U.N.T.S. 277.

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 Aug. 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (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, 6 U.S.T. 3217, 75 U.N.T.S.85 (Geneva Convention II).

Geneva Convention Relative to the Treatment of Prisoners of War, 12 Aug. 1949,6 U.S.T. 3316, 75 U.N.T.S. 135 (Geneva Convention III).

Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 Aug. 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287(Geneva Convention IV).

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, June 26, 1987).

Vienna Convention on the Law of Treaties, entered into force 27 January 1980, 1154 U.N.T.S. 331.

II. CASES

Cayara Case, (Preliminary Objections), Judgment of February 3, 1993, 26, Inter-American Court of Human Rights. (Ser.C) No. 14 (1993).

Cesar Chaparro Nivia and Vladimir Hincapie Galeano v. Colombia ,Case 11.026, Report No.30/99, OEA/Ser.L/V/II.95 Doc. 7 rev. at 83 (1998).

Democratic Republic of the Congo v. Uganda (Armed Activities on the Territory of the Congo) Judgement, ICJ Reports 2005, http://www.haguejusticeportal.net/eCache/DEF/2/206.html .

Prosecutor v. Thomas Lubanga Dyilo, Decision on the Prosecutor's Application for a Warrant of Arrest, ICC-01/04-01/06-1-US-Exp-Corr.

Prosecutor v. Thomas Lubanga, PTCI decision on confirmation of charges, http://www.icc-cpi.int/iccdocs/doc/doc266175.PDF .

Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on confirmation of charges, ICC-01/04-01/07-717.

Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute) ICC-01/04-01/07-1213-tENG.

Prosecutor v. Germain Katanga, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, ICC-01/04-01/07-4.

Prosecutor v. Germain Katanga, Decision on the Joinder of the Cases against Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07-257.

Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497.

Prosecutor v. Abdel Raheem Muhammad Hussein, Decision on the Prosecutor's application under article 58 relating to *Abdel Raheem Muhammad Hussein,* ICC-02/05-01/12-1-Red.

Prosecutor v. Abdel Raheem Muhammad Hussein, Decision on the Cooperation of the Central African Republic Regarding Abdel Raheem Muhammad Hussein's Arrest and Surrender to the Court, ICC-02/05-01/12-21.

Prosecutor v. Abdel Raheem Muhammad Hussein, Decision on the Cooperation of the Republic of Chad Regarding Abdel Raheem Muhammad Hussein's Arrest and Surrender to the Court, ICC-02/05-01/12-20.

Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Decision on confirmation of charges, ICC-02/05-03/09-121-Corr-Red.

Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Decision terminating the proceedings against Mr Jerbo, ICC-02/05-03/09-512.

Prosecutor v. Bahr Idriss Abu Garda, Decision on the Confirmation of Charges, ICC-02/05-02/09-243-Red.

Prosecutor v. Omar Hassan Ahmad Al Bashir, Decision on the Prosecution's Application for a Warrant of Arrest, ICC-02/05-01/09-3.

Prosecutor v. Omar Al Bashir, Decision on the Prosecutor's Application under Article 58(7) of the Rome Statute, ICC-02/05-01/0, 27 April 2007.

Prosecutor v. Omar Al Bashir , Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to the Republic of Chad, ICC-02/05-01/09-109.

Prosecutor v. Omar Al Bashir , Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's presence in the territory of the Republic of Kenya ,ICC-02/05-01/09-107.

Prosecutor v. Omar Al Bashir , Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-140-tENG**.**

Prosecutor v. Omar Al Bashir , Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al Bashir's recent visit to Djibouti, https://www.legal-tools.org/doc/f799cd.

Prosecutor v. Omar Al Bashir , Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and surrender of Omar Hassan Ahmad Al Bashir, https://www.legal-tools.org/doc/476812/ .

Prosecutor v. Ruto, Kosgey and *Sang*, Case No. ICC-01/09-01/11, Decision on the Applica-tionby the Government of Kenya Challenging the Admissibility of the Case Pursuant to Ar-ticle 19(2) (b) of the Statute, ICC-01/09-01/1170 (May 30, 2011).

Prosecutor v. Muthaura, Kenyatta & Ali, Case No. ICC-01/09-02/11, Decision on the Ap-plication by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2) (b) of the Statute, 66 (May 30, 2011).

Prosecutor v. Sylvestre Mudacumura, Decision on the Prosecutor's Application under Article 58, ICC-01/04-01/12-1-Red. Prosecutor v. Callixte Mbarushimana, Arrest warrant, ICC-01/04-01/10-2-tENG 19-10-2010.

Prosecutor v. Callixte Mbarushimana, Decision on the confirmation of charges, ICC-01/04-01/10-465-Red.

Prosecutor v. Jean-Pierre Bemba Gombo, Judgment on the appeal of Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled "Decision on the Admissibility and Abuse of Process Challenges" ,ICC-01/05-01/08-962.

Prosecutor v. Jean-Pierre Bemba Gombo, Decision pursuant to Article 61(7) (a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424.

Prosecutor v. Jean-Pierre Bemba Gombo, Decision on the admissibility and abuse of process challenges ICC-01/05-01/08-802.

Prosecutor v. Muthaura, Kenyatta & Ali, Case No. ICC-01/09-02/ 11, Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 57 (Mar. 8, 2011).

Prosecutor v. Francis Kirimi Muthaura,Uhuru Muigai Kenyatta and Mohammed Hussein Ali ,Decision on the confirmation of charges pursuant to Article 61(7)(a) and (b) of the Rome Statute,ICC-01/09-02/11-382-Red.

Prosecutor v. Joseph Kony ,*Vincent Otti, Okot Odhiambo* and *Dominic Ongwen*, PTC II decision to terminate proceedings against Raska Lokwiya, ICC-02/04-01/05-248, http://www.icc-cpi.int/iccdocs/doc/doc297945.PDF .

Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and *Dominic Ongwen* , Decision on the admissibility of the case under article 19(1) of the Statute, ICC-02/04-01/05-377.

Re Piracy Jure Gentium [1934] AC 586.

Situation in Darfur, Decision Assigning the Situation in Darfur, Sudan to Pretrial Chamber I, 21 April 2005.

Situation in the Republic of Kenya, No. ICC-01/09-19, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, <http://www.icc-cpi.int/iccdocs/doc/doc854562.pdf> .

Situation in the Republic of Kenya, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2) (b) of the Statute" No. ICC-01/09-02/11 O A, http://www.icc-cpi.int/iccdocs/doc/doc1223134.pdf.

Situation in the Central African Republic, Case No. ICC-01/05, Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic (30 Nov. 2006).

Situation in the Democratic Republic of the Congo, PTC I, Decision on Applications for Participation in the Proceedings of VPRS-1, VPRS-2, VPRS-3, VPRS-4, VPRS-5, VPRS-6 (_Decision on Applications for Participation_).

Situation in Uganda, Decision on the Admissibility of the case by Pre- Trial Chamber II of the ICC under article 19(1) of the Statute. ICC-02/04-01/05.

Situation in Uganda, 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 10 July 2008 ICC 02/04-01/05-305-Anx2.

SS. Lotus (France *v*. Turkey), P.C.I.J. (1927).

Thomas Kwoyelo alias Latoni v. Uganda, Constitutional Petition NO.036/11 [Arising out of HCT-00-ICD- Case No. 02/10] , http://www.ulii.org/ug/judgment/2011/10.

Velasquez Rodriguez Case, Inter-Am. Ct. H.R. 35, OAS /ser. L/V/III. 19, doc. 13, app. VI (1988).

III. OFFICIAL DOCUMENTS/REPORTS

Acting Together for Kenya: Agreement on the Principles of Partnership of the Coalition Government, http://www.dialoguekenya.org/docs/Signed_Agreement_Feb281.

Amnesty International Report, *Central African Republic: Five months of war against women,* 10 November 2004, http://www.amnesty.org/en/library/asset/AFR19/001/2004/en/30341d13-d57e-11dd-bb24-1fb85fe8fa05/afr190012004en.pdf .

CCL No.10 (Official Gazette Control Council for Germany No. 3, 31 January 1945.

Crisis States Working Papers Series No.2, *The Tormented Triangle: The Regionalisation of Conflict in Sudan, Chad and the Central African Republic*.

Forensic Investigations into Post-election violence Related Deaths: An investigative report by the Independent Medico-Legal Unit (IMLU), 24 February 2008, http://www.pambazuka.net/actionalerts/images/uploads/Forensicrep.pdf .

Fifth Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the Security Council Pursuant to UNSCR 1593 (2005).

Fourth Report of the Prosecutor of the ICC Mr. Moreno Ocampo to the UN Security Council pursuant to UN Resolution 1593.

Hague Justice Portal, *Justice in the Democratic Republic of Congo: A Background*, http://www.haguejusticeportal.net/eCache/DEF/11/284.html .

Human Rights Watch, *Darfur in Flames: Atrocities in Western Sudan*, April 2004, https://www.hrw.org/reports/2004/sudan0404/sudan0404.pdf .

Human Rights Watch, *Ballots to Bullets:*

Governance, Marc 2008, https://www.hrw.org/report/2008/03/16/ballots-bullets/organized-political-violence-and-kenyas-crisis-governance .

Human Rights Watch, *Unfinished Business: Closing Gaps in the Selection of ICC Cases*, September 15 2011, http://www.hrw.org/print/reports/2011/09/15/unfinished-business.

Human Rights Watch, *DR Congo: M23 Rebels Committing War Crimes: Rwandan Officials Should Immediately Halt All Support or Face Sanctions*, September 11 2012, http://www.hrw.org/news/2012/09/11/dr-congo-m23-rebels-committing-war-crimes .

Human Rights Watch, *Playing with Fire: Weapons Proliferation, Political Violence, and Human Rights in Kenya*, 2002, http://www.hrw.org/reports/2002/kenya/Kenya0502-06.htm .

Human Rights Watch, *Ituri: Covered in Blood: Ethnically Targeted Violence in North-eastern DR Congo*, July 2003, https://www.hrw.org/reports/2003/ituri0703/ .

Human Rights Watch, Policy Paper, *The Meaning of the Interests of Justice in Article 53 of the Rome Statute*, 2005, http://www.hrw.org/sites/default/files/related_material/2005_ICC_Interests_%20of_Justice.pdf? .

Human Rights Watch,

, http://www.hrw.org/news/2008/10/20/sudan-khartoum-war-crimes-investigations-are-mere-window-dressing.

Human Rights Watch, *Lack of Conviction*, June, 2006, http://www.hrw.org/reports/2006/06/08/lack-conviction .

ICC-OTP,

Referrals and Communications (Policy Paper, September 2003) http://www.icc-cpi.int/ library/organs/otp/policy_annex_final_210404.pdf.

ICC-OTP, Situation in the Republic of Kenya: Request for Authorisation of an Investigation Pursuant to Article 15, ICC Doc. ICC- 01/09.

ICC-OTP Situation in the Central African Republic Fact Sheet.

ICC Jean-Pierre Bemba case Fact sheet.

ICC-OTP , *OTP Draft Policy Paper on Case Selection and Prioritisation*, https://www.icc-cpi.int/iccdocs/otp/29.02.16_Draft_Policy-Paper-on-Case-Selection-and-Prioritisation_ENG.pdf .

Institute for War and Peace, *DRC: ICC Investigative Strategy under Fire*, http://www.ictj.org/en/news/coverage/article/2075.html.

International Crisis Group, *Northern Uganda: Understanding and Solving the Conflict* (Africa Report No.77, 2004).

International Crisis Group, *Kenya in Crisis* (Africa Report No. 137, 21 February 2008).

International Crisis Group, *From Kabila to Kabila: Prospects for Peace in the Congo*, 16 March 2001, http://www.crisisgroup.org/en/regions/africa/central-africa/dr-congo/027-from-kabila-to-kabila-prospects-for-peace-in-the-congo.aspx .

International Crisis Group, *Sudan: Justice, Peace and the ICC* (Africa Report No.152, 17 July 2009).

International Crisis Group, *Central African Republic Anatomy of a Phantom State* (Africa Report No.136 – 13 December 2007), http://www.crisisgroup.org/~/media/Files/africa/central-africa/central-african-republic/Central%20African%20Republic%20Anatomy%20of%20a%20Phantom%20State.pdf .

Kenyan Dialogue and Reconciliation-Truth Justice and Reconciliation Commission http://www.dialoguekenya.org/docs/KenyanNationalDialogue_Truth&Justice.pdf.

Luis Moreno-Ocampo, Prosecutor of the ICC, Statement of the Prosecutor to the Diplomatic Corps (February 12, 2004), available at http://www.icc-cpi.int/library/organs/otplLOM-20040212-En.pdf.#.

Luis Moreno-Ocampo, Chief Prosecutor of the ICC, 'Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court' (Statement, Informal Meeting of Legal Advisors of Ministries of Foreign Affairs, 24 October 2005), http://www.icc-cpi.int/library/organs/otp/speeches/LMO_20051024_English.pdf.

MONUC Special Report on the events in Ituri (January 2002-December 2003) http://reliefweb.int/sites/reliefweb.int/files/resources/93F81A37C5B409E785256EEC00679CE1-unsc-drc-16jul.pdf .

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

OHCHR report, *Making Peace Our Own: Victims' Perceptions of Accountability, Reconciliation and Transitional Justice in Northern Uganda* (2007) www.unhcr.org/.../country,,OHCHR,,UGA,456d621e2,46cc4a690,0.

Open Society Justice Initiative, *The Trial of Bemba et al. before the International Criminal Court*, https://www.opensocietyfoundations.org/sites/default/files/briefing-bembaetal-20150929.pdf .

OTP, *Report on the Activities Performed During the First Three Years* (June 2003–June 2006)', 12 September 2006.

PTC I, "Situation in the Democratic Republic of the Congo, In the case of *Prosecutor v. Thomas Lubanga Dyilo*: Prosecutor's Information on Further Investigation", Doc. ICC-01/04-01/06-170, The Hague: ICC, 28 June 2006.

Prosecutor v. Callixte Mbarushimana, Warrant of Arrest, http://www.icc-cpi.int/iccdocs/doc/doc954979.pdf .

Prosecutor v. Ahmad Muhammad Harun and Ali Kushayb, Warrant of Arrest for Ahmad Harun, ICC-02/05-01/07-2.

Prosecutor v. Ahmad Muhammad Harun and Ali Kushayb, Warrant of Arrest for Ali Kushayb, ICC-02/05-01/07-3-Corr.

Prosecutor v. Thomas Lubanga Dyilo, Warrant of Arrest, http://www.haguejusticeportal.net/Docs/Court%20Documents/ICC/Lubanga-Warrant-of-arrest.pdf .

Prosecutor v Bosco Ntaganda, Warrant of Arrest, http://www.haguejusticeportal.net/Docs/Court%20Documents/ICC/Ntaganda%2C-Warrant-of-Arrest.pdf .

Prosecutor v. Germain Katanga, Warrant of Arrest, http://www.haguejusticeportal.net/Docs/Court%20Documents/ICC/Katanga-Warrant%20of%20arrest.pdf .

Prosecutor v. Mathieu Ngudjolo Chui, Warrant of Arrest, http://www.haguejusticeportal.net/Docs/Court%20Documents/ICC/Ngudjolo_warrant-arrest.pdf .

Prosecutor v. Jean-Pierre Bemba, Arrest warrant, ICC-01/05-01/08-1-tENG.

Prosecutor v. Vincent Otti, Warrant of Arrest, ICC-02/04-01/05-54.

Prosecutor v. Raska Lukwiya, Warrant of Arrest, ICC-02/04-01/05-55.

Prosecutor v. Okot Odhiambo, Warrant of Arrest, ICC-02/04-01/05-56.

Prosecutor v. Omar Al Bashir, Warrant of Arrest, ICC-02/05-01/09-1.

Prosecutor v. Dominic Ongwen (Warrant of Arrest) ICC-02/04-01/05-57.

Prosecutor v. Joseph Kony (Warrant of Arrest) ICC-02/04-01/05-53.

Prosecutor v. Joseph Kony and others ICC case information fact sheet, http://www.icc-cpi.int/NR/rdonlyres/E7F674DF-C2D8-4A86-98C1-4C9621050D4B/282225/Kon-yEtAllENG.pdf.

PTCII Recommendation to the Presidency to hold the confirmation of charges hearing in the Republic of Uganda, 10 September 2015, https://www.icc-cpi.int/ic-cdocs/doc/doc2056707.pdf .

Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. 1 (Proceedings of the Preparatory during March –April and August 2006).

Report of the Prosecutor of the ICC to the Second Assembly of State Parties, 8 September 2003.

Report of the United Nations High Commissioner for Human Rights to assess the Situation in Northern Uganda with regard to abduction of children, UN.Doc E/CN.4/2002/86.

Report of the Committee on International Criminal Jurisdiction, UN GAOR,7th Session ,Supp.No.12,UN Doc A/26645(1954) .

Report of the Prosecutor of the ICC Mr. Moreno Ocampo to the UN Security Council pursuant to UN Resolution 1593.

Report of the UN Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, UN DOC S/2004/616.

Report of the International Commission of Inquiry on Darfur to the United Nations Secretary- General, http://www.un.org/news/dh/sudan/com_inq_darfur.pdf .

Report from OHCHR Fact-finding Mission to Kenya, 6-28 February 2008, http://www.ohchr.org/Documents/Press/OHCHRKenyareport.pdf .

Second Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the Security Council Pursuant to UNSCR 1593 (2005).

Sixth Diplomatic Briefing of the International Criminal Court, Compilation of Statements, 23 March 2006.

The Commission of Inquiry into Post-Election Violence Report of 2008, http://www.communication.go.ke/documents/.

The ICC Presidency "Decision on the recommendation to the Presidency to hold the confirmation of charges hearing in the Republic of Uganda", 28 October 2015,https://www.icc-cpi.int/iccdocs/doc/doc2125380.pdf .

United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome, Official Records, Volume III, A/CONF.183/13 (Vol. Ill), 15 June-17 July 1998.

United Nations General Assembly Resolution 174, UN GAOR, 2d Session. UN Doc. A/519 (1947).

United Nations Security Council Resolution 780 of 1992.

United Nations Security Council Resolution No.955 of 1994.

United Nations Security Council Resolution 1556 of 2004.

United Nations Security Council Resolution 1564 of 2004.

United Nations Security Council Resolution 1593 of 2005.

United Nations General Assembly Resolution 49/53 of 9 December 1994.

United Nations General Assembly Resolution 95/1 of 11 December 1946.

United Nations General Assembly Resolution on 177(II) of 21 November 1947, http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/038/84/IMG/NR003884.pdf?OpenElement.

US State Department Background Note on the Central African Republic, http://www.state.gov/r/pa/ei/bgn/4007.htm#history .

B. SECONDARY SOURCES

I. BOOKS

Bassiouni,M.Cherif and E.M.Wise, *Aut Dedere Aut Judicare, The Duty to Extradite or Prosecute in International Law* (Martinus Nijhoff Publishers, 1995).

Bassiouni,M.Cherif, *Introduction to International Criminal Law* (Transnational Publishers, 2003).

Bassiouni, M.Cherif, *The Legislative History of the International Criminal Court,* Vol's. 1-3 (Ardsley. Ny: Transnational Publishers, 2005).

Black's Law Dictionary, 8th edn. (Thompson, 2004).

Brownlie,Ian, *Principles of Public International Law,* 7th edn. (Oxford, 2008).

Carr,H.Edward, *The Twenty Years' Crisis 1919-1939: An Introduction to the Study of International Relations* (Harper Perennial, 1939).

Cassese,Antonio, *International Law,* 2nd edn. (Oxford University Press, 2005).

Clark,Phil "Chasing cases: The Politics of Self-Referral" in C.Stahn and M.M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice* Vol .II (Cambridge University Press, 2011).

De Smedt,Johan, ' *and Election Violence at the Kibera Grassroots* (Oxford University Press, 2009).

El Zeidy, M.Mohamed, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Martinus Nijhoff, 2008).

Kleffner,K.Jan, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford University Press, 2008).

Hagan,John, *Justice in the Balkans: Prosecuting War Crimes in the Hague Tribunal* (University of Chicago Press, 2003).

Hale,Z.Aaron, "In Search of Peace: An Autopsy of the Political Dimensions of Violence in the Democratic Republic of Congo", Ph.D. Thesis, University of Florida. (Thesis available at http://etd.fcla.edu/UF/UFE0024248/hale_a.pdf).

Lunde,Henriette, *Night Commuting in Gulu, Northern Uganda: From Spontaneous Strategy to New Social Institutions*, Master's Thesis in Peace and Conflict Studies (Fafo – Institute for Applied International Studies, 2006) available at www.fafo.no/pub/rapp/549/549.pdf .

Mamdani,Mahmood, *Preliminary Thoughts on the Congo Crisis* (Duke University Press, 1999).

Mc Goldrick,Dominic, *et al* (eds.), *The Permanent International Criminal Court: Legal and Policy Issues* (Hart Publishing, 2004).

Ndikumana,Léonce and Emizet, Kisangani, *The Economics of Civil War: The Case of the Democratic Republic of Congo* (University of Massachusetts Amherst, 2003).

Olásolo,Hector, *The Triggering Procedure of the International Criminal Court* (Martinus Nijhoff, 2005).

Schabas,A.William, *An Introduction to the International Criminal Court*, 3rd edn. (Cambridge University Press, 2007).

Schabas,A.William, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2010).

Schabas,A.William, Unimaginable Atrocities: Justice, Politics, and Rights at War Crimes Tribunals (Oxford University Press, 2012).

Schabas,A.William, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2010).

Shklar,N.Judith, *Legalism: Law, Morals, and Political Trials* (Harvard University Press, 1964).

Stahn,Carsten, *The Law and Practice of the International Criminal Court* (Oxford University Press, 2015).

Stahn,Carsten and El Zeidy,M.Mohamed (eds.), *The International Criminal Court and Complementarity from Theory to Practice*, vol.1 (Cambridge University Press, 2011).

Stearns,Jason, *From CNDP to M23: The Evolution of an Armed Movement in Eastern Congo* (Rift Valley Institute, 2012).

Stigen,Jo, *The Relationship between the International Criminal Court and National Jurisdictions* (Martinus Nijhoff Publishers, 2008).

Tomuschat,Christian, "The Duty to Prosecute International Crimes Committed by Individuals", in *Cremer et al*, *Festschrift für Steinberger* (Springer, 2002).

Turner,Thomas, *The Congo Wars: Conflict, Myth and Reality* (Zed Books Ltd, 2007).

Werle,Gerhard, *Principles of International Criminal Law*, 2nd edn. (T.M.C Asser Press, 2009).

II. CHAPTERS IN BOOKS

Arsanjani,H.Mahnoush and Reisman,W.Michael, “The International Criminal Court and the Congo: From Theory to Reality” in L.N.Sadat and M.P.Scharf (eds.), *The Theory and Practice of International Criminal Law* (Martinus Nijhoff, 2008).

Allen,Tim, “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* (Royal African Society, 2008).

Burke-White,W.William and Kaplan,Scott, “Shaping the Contours of Domestic Justice: The International Criminal Court and an Admissibility Challenge in the Ugandan Situation”, in C.Stahn and G.Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers, 2009).

Caracciolo,Ida, “Applicable Law” in F.Lattanzi and W.A.Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court* (Il Sirente,1999).

Cassese,Antonio, “From Nuremburg to Rome: International Military Tribunals to the International Criminal Court” in A.Cassese, P.Gaeta and J.W.Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2008).

de Guzman, M.Margaret., “Applicable Law” in O.Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court: Observers Notes*, *Article by Article* (Hart Publishing, 2008).

Guariglia,Fabricio, “The Selection of Cases by the Office of the Prosecutor of the International Criminal Court” in C.Stahn and G.Sluiter (eds.) *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers, 2009).

Hafner,Gerhard, “Article 120: Reservations”, in O.Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers Notes, Article by Article* (Hart Publishing, 2008).

Kaul,Hans-Peter, “Preconditions to the Exercise of Jurisdiction”, in A.Cassese, P.Gaeta, J.R.W.D.Jones, (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002).

Kleffner,K.Jan, “Auto-Referrals and the Complementary Nature of the ICC”, in C.Stahn and G. Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers, 2009).

Kleffner,K.Jan, “Situational Gravity under the Rome Statute,” in C.Stahn and L. van den Herek (eds.), *Future Directions in International Criminal Justice*, (T.M.C. Asser Press /Cambridge, 2009).

Kor,Gerber, “Sovereignty in the Dock” in J.K.Kleffner & G.Kor (eds.), *Complementary views on Complementarity* (T.M.C Asser Press, 2006).

Lattanzi,Flavia, “Concurrent Jurisdictions between Primacy and Complementarity” in R .Bellelli, *International Criminal Justice: Law and Practice from the Rome Statute to its Review* (T.M.C Asser Press,2010).

Leang,Chea and Smith,William, “The Experience of the Extraordinary Chambers in the Courts of Cambodia” in R.Belleli (ed.) *International Criminal Justice: Law and Practice from the Rome Statute to its Review* (Ashgate Publishing, 2011).

Lwanga-Lunyigo, Samwiri, “The Colonial Roots of Internal Conflict” in K.Rupesinghe (ed.) *Conflict Resolution in Uganda* (Ohio University Press, 1989).

Ohlin,D.Jens, “Peace, Security and Prosecutorial Discretion” in C.Stahn and G.Sluiter (eds.) *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers, 2009).

Sadat,L.Nadya, “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).

Schabas,A.William, and Williams,Sharon, "Article 17", in O.Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, *Observers Notes, Article-by-Article* ,2nd edn. (Hart Publishing, 2008).

Schabas,A.William, "The Rise and Fall of Complementarity", in C.Stahn and M.M.El Zeidy (eds.), *The International Criminal Court and Complementarity*: *From Theory to Practice* (Cambridge University Press, 2011).

Schabas,A.William, "Complementarity in Practice: Creative Solutions or a Trap for the Court?" in M.Politi and F.Gioia (eds.), *The International Criminal Court and National Jurisdictions* (Ashgate, 2008).

Schabas,A.William, "Complementarity in Practice: Creative Solutions or a Trap for the Court?" in M. Politi and F.Gioia (eds), *The International Criminal Court and National Jurisdictions* (Ashgate, 2008).

Schabas,A.William, "The International Criminal Court: Jurisdiction, Trigger Mechanism and Relationship to National Jurisdictions", in M.Politi and G.Nesi (eds.), *The Rome Statute of the International Criminal Court*: *A Challenge to Impunity* (Ashgate, 2001).

Schabas,A.William, “Prosecutorial Discretion and Gravity”, in C.Stahn and G.Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers, 2009).

Seils,F.Paul, “Making Complementarity Work: Maximising the Limited Role of the Prosecutor” in C. Stahn and M.M. El Zeidy (eds.), *The International Criminal Court and Complementarity From Theory to Practice*, Vol. II (Cambridge University Press, 2011).

Stahn,Carsten, “Judicial Review of Prosecutorial Discretion: Five Years On” in C.Stahn and G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (2009).

Triffterer,Otto, “The Permanent International Criminal Court-Ideal and Reality” in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers Notes, Article by Article* (Hart Publishing, 2008).

Williams,Sharon, “Article 13: Exercise of Jurisdiction”, in O.Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers Notes, Article by Article* (Hart Publishing, 2008).

Winter,Renate, “The Special Court for Sierra Leone” in R.Belleli (ed.), *International Criminal Justice: Law and Practice from the Rome Statute to its Review* (Ashgate, 2011).

III. ARTICLES

Akande,Dapo, “International Law Immunities and the International Criminal Court” (2004) 98 *American Journal of International Law*, 407.

Akande,Dapo, “The Bashir Indictment: Are Serving Heads of State Immune from ICC Prosecution?” Oxford Transitional Justice Research Working Paper Series, 30 July 2008 http://www.csls.ox.ac.uk/documents/Akande.pdf.

Akhavan,Payam, “The International Criminal Tribunal for Rwanda: The Politics and Pragmatics” (1996) 90 *American Journal of International Law*, 501.

Akhavan,Payam, “The Lord’s Resistance Army Case: Uganda’s Submission of the first State Referral to the International Criminal Court” (1999) *American Journal of International Law*, 403.

Akhavan,Payam, “The International Criminal Court in Context: Mediating the Global and Local in the Age of Accountability’, (2003) 97 *American Journal of International Law*, 712.

Akhavan,Payam, “Self-Referrals before the International Criminal Court: Are States the Villains or the Victims of Atrocities? (2010) 21 *Criminal Law Forum*, 103.

Akhavan,Payam, “The International Criminal Tribunal for Rwanda: The Politics and Pragmatics” (1996) 90 *American Journal of International Law*, 501.

Anderson,Kenneth, "The Rise of International Criminal Law: Intended and Unintended Consequences" (2009) 20 *European Journal of International Law*, 331.

Apuuli,P.Kasaija, "The Politics of Conflict Resolution in the Democratic Republic of Congo: The Inter-Congolese Dialogue Process" (2004) 4 *African Journal on Conflict Resolution*, 65.

Arsanjani,H.Mahnoush and Reisman,W.Michael, "The Law-In-Action of the International Criminal Court" (2005) 99 *American Journal of International Law*, 385.

Arsanjani,H.Mahnoush and Reisman,W.Michael, "Developments at the International Criminal Court: The Law-in-Action of the International Criminal Court" (2005) 99 *American Journal of International Law*, 385.

Baines,K.Erin, **"**The Haunting of Alice**:** Local Approaches to Justice and Reconciliation in Northern Uganda" (2007) 1 (1) *International Journal of Transitional Justice*, 91.

Bassiouni,M.Cherif, "From Versailles to Rwanda in Seventy -Five Years: The Need to Establish a Permanent International Criminal Court" (1997) 10 *Harvard Human Rights Journal*, 11.

Bassiouni,M.Cherif, "The ICC *QuoVadis*?" (2006) 4 *Journal of International Criminal Justice*, 421.

Bassiouni,M.Cherif, “International Crimes: *Jus Cogens* and *Obligat* (1996) 59 *Law & Contemporary Problems*, 63.

Bassiouni,M.Cherif, “World War I: "The War to end all Wars" and the Birth of a Handicapped International Criminal Justice System” (2002) 30 *Denver Journal of International Law and Policy*, 244.

Batros,Ben, “The Evolution of the ICC Jurisprudence on Admissibility” http://ssrn.com/abstract=1537605 .

Batros,Ben, “The Judgment on the Katanga Admissibility Appeal: Judicial Restraint at the ICC” (2010) 23 *Leiden Journal of International Law*, 343.

Bernard,M.Prosper, “The Paradox of Institutional Conversion: The Evolution of Complementarity in the International Criminal Court” (2011) 19 *International Journal of Humanities and Social Science*, 203.

Boyle,James, “The Politics of Reason: Critical Legal Theory and Local Social Thought” (1985) 133 *University of Pennsylvania Law Review*, 685.

Bratton,Michael and Kimenyi,S.Mwangi, “Voting in Kenya: Putting Ethnicity in Perspective” (2008) 2 *Journal of Eastern African Studies*, 272.

Burke-White, W.William, “Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice” (2008) 49 *Harvard International Law Journal*, 53.

Burke-White,W.William and Kaplan,Scott, “Shaping the Contours of Domestic Justice: The International Criminal Court and an admissibility Challenge in the Uganda Situation” (2009) 7 *Journal of International Criminal Justice*, 257.

Burke-White, W.William, “Complementarity in Practice: The International Criminal Court as Part of a System of Multi- Level Governance in the Democratic Republic of Congo” (2005) 18 *Leiden Journal of International Criminal Law*, 557.

Cassese,Antonio, “Is the ICC Having Teething Problems?” (2006) 4 *Journal of International Criminal Justice*, 434.

Cassese,Antonio, “On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law” (1998) 9 *European Journal of International Law*, 2.

Cayley,T.Andrew, “The Prosecutor’s Strategy in Seeking the Arrest of Sudanese President Al Bashir on Charges of Genocide” (2008) 6 *Journal of International Criminal Justice*, 829.

Cheeseman,Nic, “The Kenyan elections of 2007: An Introduction” (2008) 2 *Journal of Eastern African Studies*, 166.

Clark,H.Thomas “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.

Cross,E.Matthew and Williams,Sarah, “Recent Developments at the ICC: *Prosecutor v. Germain Katanga* and *Mathieu Ngudjolo Chui*--A Boost for ‘Co-operative Complementarity’?” (2010) 10 *Human Rights Law Review*, 336.

de Guzman,M.Margaret, “Gravity and the Legitimacy of the International Criminal Court” (2009) 32 *Fordham International Law Journal*, 1400.

de Guzman,M.Margaret, “Gravity Rhetoric: The Good, the Bad, and the "Political"” (2013) 107 American Society of International Law Proceedings, 421.

Edelenbos,Carla, “Human Rights Violations: A Duty to Prosecute?” (1994) 7 *Leiden Journal of International Law*, 5.

Fiss,Owen, “Within the reach of the State: Prosecuting Atrocities in Africa” (2009) 31 *Human Rights Quarterly*, 59.

Fork,J.Jonathan, “Pro-Choice: Achieving the Goals of the International Criminal Court through the Prosecutor's *Proprio Motu* Power” (2011) 34 *Boston College International and Comparative Law Review*, 53.

Friedlander,A.Robert, “The Foundations of International Criminal Law: A Present-Day Inquiry” (1983) 15 *Case Western Reserve Journal of International Law*, 13.

Gaeta,Paolo, “Is the Practice of 'Self-Referrals' A Sound Start for the ICC?” (2004) 2 *Journal of International Criminal Justice*, 949.

Gallavin,Chris, “Prosecutorial Discretion within the ICC: Under the Pressure of Justice” (2006) 17 *Criminal Law Forum*, 43.

Greppi,Edoardo, “The Evolution of Individual Criminal Responsibility under International Criminal Law”1999) 5 *International Review of the Red Cross*, 531.

Gibson,Kate, “An Uneasy Co-existence: The Relationship between Internationalised Criminal Courts and Their Domestic Counterparts” (2009) 9 *International Criminal Law Review*, 275.

Gioia,Federica, “State Sovereignty, Jurisdiction, and ‘Modern’ International Law: The Principle of Complementarity in the International Criminal Court” (2006) 19 *Leiden Journal of International Law*, 1095.

Githinji,Mwangi and Holmquist,Frank, “Kenya’s Hopes and Impediments: the Anatomy of a Crisis of Exclusion” (2008)2 *Journal of Eastern African Studies*, 344.

Glasius,Marlies, “‘We Ourselves, We are Part of the Functioning’: The ICC, Victims, and Civil Society in the Central African Republic” (2008) *African Affairs*, 49.

Hannum,Hurst, “International Law and Cambodian Genocide: The Sounds of Silence”, (1989)11 *Human Rights Quarterly*, 82.

Higgins,Gillian, “Fair and Expeditious Pre-trial Proceedings: The Future of International Criminal Trials” (2007) 5 *Journal of International Criminal Justice*, 394.

Jalloh,C.Charles, “International Decisions” (2010) 104 *American Journal of International Law*, 620.

Jalloh,C.Charles, “Kenya vs. The ICC Prosecutor” (2012) 53 *Harvard International Law Journal*, 269.

Goldstone,A.James, “More Candour about Criteria: The Exercise of Discretion by the Prosecutor of the International Criminal Court” (2010) *Journal of International Criminal Justice*, 1.

Graubart,Jonathan, “Rendering Global Criminal Law an Instrument of Power: Pragmatic Legalism and Global Tribunals” (2010) 9 *Journal of Human Rights*, 409.

Hansen,O.Thomas, “How Will International Criminal Court Prosecutions Impact Kenya’s Legacy of Political Violence?” *Toward Freedom* (Apr. 12, 2011), http://www.towardfreedom.com/africa/2359-how-willinternational-criminal-court-prosecutions-impact-on-kenyas-legacy-of-political-violence.

Kress,Claus, "'Self-Referrals' and 'Waivers of Complementarity' Some Considerations in Law and Policy" (2004) 2 *Journal of International Criminal Justice*, 945.

Kambale,Pascal, "The ICC and Lubanga: Missed Opportunities" (2012) *African Futures*, http://forums.ssrc.org/african-futures/2012/03/16/african-futures-icc-missed-opportunities/#fn-2780-8 .

Kastner,Phillip, "Armed Conflicts and Referrals to the ICC: From Measuring Impact to Emerging Legal Obligations" (2014) 12 *Journal of International Criminal Justice*, 471.

Keller,M.Linda, "Achieving Peace with Justice: The International Criminal Court and Uganda Alternative Justice Mechanisms" (2008) 23 *Connecticut Journal of International Law*, 209.

Kim,S.Young, "The Preconditions to the Exercise of the Jurisdiction of the International Criminal Court: With Focus on Article 12 of the Rome Statute" (1999) 8 *Journal of International Law and Practice*, 47.

Lepard,Brian, "How should the ICC prosecutor exercise his or her discretion? The Role of Fundamental Ethical Principles" (2009-10) 43 *John Marshall Law Review*, 553.

Linton,Suzannah, Cambodia, "East Timor and Sierra Leone: Experiments in International Justice" (2001) *Criminal Law Forum*, 186.

Lynch,Gabrielle “The Fruits of Perception: “ethnic politics” and the Case of Kenya’s Constitutional Referendum” (2006) 2 *African Studies*, 233.

Maged,Adel, “Withdrawal of Referrals –A Serious Challenge to the Function of the ICC” (2006) 6 *International Criminal Law Review*, 419.

Martin,B.Julie, “The International Criminal Court: Defining Complementarity and Divining Implications for the United States” (2006) 4 *Loyola University Chicago International Law Review*, 107.

Marshall,A.Katherine, Prevention and Complementarity in the International Criminal Court: A Positive Approach” (2010) *Human Rights Brief*, 21.

McCormack, L.Timothy and Robertson,Sue, “Jurisdictional aspects of the *Rome Statute* for the new International Criminal Court” (1999) 23 *Melbourne. University Law Review*, 635.

Mc Donald, K.Gabrielle, “Problems, Obstacles and Achievements of the ICTY” (2004) 2 *Journal of International Criminal Justice*, 558.

Mc Namara,Kirsty, “Seeking Justice in Ugandan Courts: Amnesty and the Case of Thomas Kwoyelo” (2013) 12 Washington University Global Studies Law Review, 653.

Moy,H.Abigail, “The International Criminal Court’s Arrest Warrants and Uganda’s Lord’s Resistance Army: Renewing the Debate over Amnesty and Complementarity” (2006) 19 *Harvard Human Rights Journal*, 267.

Muller,Andreas and Stegmiller,Ignaz, “Self-referrals on Trial from Panacea to Patient” (2010) 8 *Journal of International Criminal Justice*, 1275.

Mnookin,H.Robert, “Rethinking the Tension between Peace and Justice: The International Criminal Prosecutor as Diplomat” (2013) 18 *Harvard Negotiation Law Review*, 145.

Moreno-Ocampo, Louis, “Keynote Address: Integrating the Work of the ICC into Local Justice Initiatives” (2005) 21 *American University International Law Review*, 497.

Mueller,D.Susanne, “Dying to Win: Elections, Political Violence, and Institutional Decay in Kenya” (2011) 9 *Journal of Contemporary African Studies*, 99.

Mueller,D.Susanne, “Kenya and the International Criminal Court (ICC): Politics, the Election and the Law” (2014) 8 *Journal of Eastern African Studies*, 25.

Musila,M.Godfrey, “Between Rhetoric and action: The Politics, Processes and Practice of the ICC’s Work in the DRC” ISS Monograph 164, http://www.iss.co.za/pgcontent.php?UID=2736.

Nouwen,M.H.Sarah and Werner,G.Wouter, “Doing Justice to the Political: The International Criminal Court in Uganda and Sudan” (2011) 21 *European Journal of International Law*, 941.

Nsereko,D.N.Daniel, “Triggering the Jurisdiction of the International Criminal Court” (2004) 4 *African Human Rights Law Journal*, 256.

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

Paust,J.Jordan, “The Reach of ICC Jurisdiction Over Non-Signatory Nationals” (2000) 33 *Vanderbilt Journal of Transnational Law*, 1.

Pella,V.Vespasian, “Towards an International Court” (1950) 44 *American Journal of International Law*, 37.

Peskin,Victor, “Beyond Victor's Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda” (2005) 4 *Journal of Human Rights*, 213.

Peskin,Victor, “Caution and Confrontation in the International Criminal Court’s Pursuit of Accountability in Uganda and Sudan” (2009) 31 *Human Rights Quarterly*, 655.

Pichon,Jakob “The Principle of Complementarity in the Cases of the Sudanese Nationals *Ahmad Harun* and *Ali Kushayb* before the International Criminal Court” (2008) 8 *International Criminal Law Review*, 185.

Prinz,Barrett, “The Treaty of Versailles to Rwanda: How the International Community Deals with War Crimes” (1998) 6 *Tulane Journal of International and Contemporary Law*, 553.

Railsback,Kathryn, “A Genocide Convention Action against the Khmer Rouge: Preventing a Resurgence of the Killing Fields” (1990) 5 *Connecticut Journal of International Law*, 457.

Rastan,Rod, “What is a Case for the Purpose of the Rome Statute?” (2008) 19 *Criminal Law Forum*, 435.

Rastan,Rod, “Comment on Victor's Justice and the Viability of *exante* Standards” (2009-10) 43 *John Marshall Law Review*, 569.

Robinson,Darryl, “A Response to William Schabas and a Reflection on Discursive Assumptions: One Vision or Many?” Electronic copy available at: http://ssrn.com/abstract=1640263.

Robinson,Darryl, “The Mysterious Mysteriousness of Complementarity” (2010) *Criminal Law Forum*, 5.

Robinson,Darryl, “Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court” (2003) 14 *European Journal of International Law*, 481.

Roht-Arriaza,Naomi, “State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law” (1990)78 *California Law Review*, 449.

Roht-Arriaza,Naomi, “Combating Impunity: Some Thoughts on the Way Forward” (1996) 59 *Law & Contemporary Problems*, 93.

Rosenne,Shabtai “Poor Drafting and Imperfect Organization: Flaws to Overcome in the Rome Statute” (2000-2001) 41 *Virginia Journal of International Law*, 164.

Roth,Kenneth, “The International Criminal Court Five Years on: Progress or Stagnation?” (2008) 6 *Journal of International Criminal Justice*, 763.

Sácouto,Susana and Cleary,Katherine, “The Katanga Complementarity Decisions: Sound Law but Flawed Policy” (2010) 23 *Leiden Journal of International Law*, 363.

Saul,Ben, “The Legal Response of the League of Nations to Terrorism” (2006) 4 *Journal of International Criminal Justice*, 78.

Schabas,A.William, “Prosecutorial Discretion v. Judicial Activism at the International Criminal Court” (2008) 6 *Journal of International Criminal Just*ice, 731.

Schabas,A.William, “Complementarity in Practice’: Some Uncomplimentary Thoughts” (2008) 19 *Criminal Law Forum*, 5.

Schabas,A.William, “First Prosecutions at the International Criminal Court” (2006) 25 *Human Rights Law Journal*, 25.

Schabas,A.William, “Victor's Justice: Selecting "Situations" at the International Criminal Court” (2009-10) 43 *John Marshall Law Review*, 535.

Scharf,P.Michael, and Dowd,Patrick, “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.

Scharf,P.Michael, “From the exile Files: An Essay on Trading Justice for Peace” (2006) 63 *Washington and Lee Law Review*, 339.

Scharf,P.Michael, “The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes” (1996) 59 *Law & Contemporary Problems*, 41.

Scheffer,J.David, “The United States and the International Criminal Court” (1999) 93 *American Journal of International Law*, 12.

Sellars,Kirsten, “Imperfect Justice at Nuremberg and Tokyo” 2011 (21) *European Journal of International Law*, 1085.

Smith,E.Stephen, “Definitely Maybe: The Outlook for U.S. Relations with the International Criminal Court during the Obama Administration” (2010) 22 *Florida Journal of International Law*, 155.

Ssenyonjo,Manisuli, “The International Criminal Court and the Lord’s Resistance Army Leaders: Prosecution or Amnesty?”(2007) *Netherlands International Law Review*, 51.

Stahn,Carsten, El Zeidy,M.Mohamed and Olasolo,Hector, “Developments at the International Criminal Court: The International Criminal Court’s *ad hoc* Jurisdiction Revisited (2005) 99 *American Journal of International Law*, 421.

Stahn,Carsten, “Complementarity: A Tale of Two Notions” (2008) 19 *Criminal Law Forum*, 87.

Tiemessen,Alana “The International Criminal Court and the Politics of Prosecutions” (2014) *The International Journal of Human Rights*, 1.

Tomuschat,Christian, “The Legacy of Nuremburg” (2006) 4, *Journal of International Criminal Justice*, 830.

Vlassenroot,Koen *et.al*, “Kony’s Message: A New Koine? The Lord’s Resistance Army in Northern Uganda” (1999) *African Affairs*, 98.

Vlassenroot,Koen and Raeymaekers,Timothy, “The Politics of Rebellion and Intervention in Ituri: The Emergence of a New Political Complex?” (2004) *African Affairs*, 385.

Waldorf,Lars,“"A Mere Pretense of Justice": Complementarity, Sham Trials, and Victor's Justice at the Rwanda Tribunal” (2009-2010) 33 *Fordham International Law Journal*, 1221.

Williams,Sarah and Sherif,Lena, “The Arrest Warrant for President al-Bashir: Immunities of Incumbent Heads of State and the International Criminal Court” (2009) 14 *Journal of Conflict and Security Law*, 71.

Yntema,E.Hessel, “The Historical Bases of Private International law” (1953) 2 *American Journal of Comparative Law*, 297.

Zacklin,Ralph, “The Failings of *Ad Hoc* International Tribunals” (2004) 2 *Journal of International Criminal Justice*, 541.

IV. NEWS REPORTS

Agence France-Presse, “Sudanese president vows to annihilate Darfur rebels,” December 31 2003.

Aljazeera News, “Why South Africa let Bashir get away”, http://www.aljazeera.com/in-depth/opinion/2015/06/south-africa-bashir-150615102211840.html .

BBC News, “Odinga Rejects Kenya Poll Result”, 31 December 2007,

BBC News, “DR Congo seeks Nkunda extradition”, http://news.bbc.co.uk/2/hi/africa/7847639.stm .

BBC News, “DR Congo claims defeat of M23 rebels”, 5 November 2013, http://www.bbc.com/news/world-africa-2481524.

BBC News, “Museveni rejects Hague LRA trial”, http://news.bbc.co.uk/2/hi/africa/7291274.stm .

BBC NEWS, “Mass Rape Atrocity in Western Sudan”, March 19 2004.

Chimpreports, “Ongwen Case: LRA Claimed to Learn its Operations from NRA– Prosecution”, http://www.chimpreports.com/ongwen-case-lra-claimed-to-learnt-its-operations-from-nra-prosecution/ .

Daily Nation (Kenya), “Bensouda cites difficulties with Ruto witnesses”, http://mobile.nation.co.ke/news/Bensouda-cites-tremendous-difficulties-with-Ruto-witnesses/-/1950946/2314088/-/format/xhtml/-/mdh9nuz/-/index.html.

ICC Press Release, “President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC”, January 29 2004. https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2004/Pages/president%20of%20uganda%20refers%20situation%20concerning%20the%20lord_s%20resistance%20army%20_lra_%20to%20the%20icc.aspx.

ICC Press Release, "Prosecutor Receives Referral of the Situation in the Democratic Republic of Congo", April 19 2004, https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/press%20releases/Pages/prosecutor%20receives%20referral%20of%20the%20situation%20in%20the%20democratic%20republic%20of%20congo.aspx.

ICC Press Release, "Surrender of Jean-Pierre Bemba to the International Criminal Court", ICC-CPI-20080703-PR335.

ICC Press Release, "Prosecutor Receives Referral Concerning Central African Republic", January 7 2005. https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200105/press%20releases/Pages/otp%20prosecutor%20receives%20referral%20concerning%20central%20african%20republic.aspx .

ICC Press release, "Bahr Idriss Abu Garda arrives at the premises of the Court", https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050209/press%20release/Pages/abu%20garda%20arrived%20at%20the%20premises%20of%20the%20court.aspx.

ICC Press release, "ICC Trial Chamber II acquits Mathieu Ngudjolo Chui" 18 December 2012, http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/news%20and%20highlights/Pages/pr865.aspx .

ICC Press release, “ICC Registry Officials Meet with LRA Delegation”, The Hague, 10 March 2008, http://www.icc-cpi.int/press/pressreleases/344.html.

ICC Press release, “Prosecutor Receives Referral of Situation in Democratic Republic of Congo”, http://www.un.org/News/Press/docs/2004/afr903.doc.htm.

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 .

ICC Press Release, “Statement by Prosecutor Luis Moreno Ocampo”, 6 July 2006, http://www.icc-pi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0204/Press+releases/.

ICC Press Release, “The Prosecutor of the ICC Opens Investigation in Darfur”, http://www.icc-cpi.int/press/pressreleases/107.html.

ICC Press Release, “Interpol Issues First ICC Red Notices”, 1 June 2006), http://www.icc-cpi.int.

Irin News, “Sudan: National Courts to try suspects of war crimes”, June 15 2005, http://www.irinnews.org/report.asp?ReportID=47654 .

Irin News, “Sudan: Judiciary challenges ICC over Darfur Cases” http://www.irinnews.org/report.aspx?reportid=55068 .

ICC Press Release, “Prosecutor receives Sealed Envelope from Kofi Annan on Post-Election Violence in Kenya”, 9th July 2009, https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/press%20releases/Pages/pr436.aspx .

ICC Press release, “DRC: ICC warrant of arrest unsealed against Bosco Ntaganda” , http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200206/press%20releases/drc_%20icc%20warrant%20of%20arrest%20unsealed%20against%20bosco%20ntaganda .

ICC Press release, “Prosecutor Opens Up Investigation in the Central African Republic” 22 May 2007, https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200105/press%20releases/Pages/prosecutor%20opens%20investigation%20in%20the%20central%20african%20republic.aspx

ICC Press release, “Prosecutor Receives Referral Concerning Central African Republic”, January 7, 2005. https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200105/press%20releases/Pages/otp%20prosecutor%20receives%20referral%20concerning%20central%20african%20republic.aspx .

ICC Press release, “ICC Prosecutor Supports Three-Pronged Approach to Justice in Kenya”, 30 September 2009, http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200109/press%20releases/pr456.

Institute for War and Peace Reporting, “Locals Want Patasse to Face Justice”, May 18 2009, http://iwpr.net/report-news/locals-want-patasse-face-justice.

New York Times, “Senior Rebel from Uganda to Be Moved to the Hague”, 13 January 2015 http://www.nytimes.com/2015/01/14/world/africa/ugandan-rebel-commander-to-be-tried-at-international-criminal-court.html?_r=0 .

Relief Web, “Ugandan rebels to appeal ICC warrants”, http://www.re-liefweb.int/rw/rwb.nsf/db900sid/YSAR-7CNTC8?OpenDocument.

Reuters, “UN Flew indicted war criminal to Sudan meeting”, http://af.reuters.com/arti-cle/sudanNews/idAFN1117006320110111?pageNumber=2&virtualBrandChannel=0 .

Reuters, “Exclusive: Congo war indictee says directs U.N.-backed troops”, http://www.reu-ters.com/article/2010/10/06/us-congo-democratic-rebel-idUSTRE6953T120101006.

Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on concluding the preliminary examination of the situation referred by the Union of Comoros: “Rome Statute legal requirements have not been met” http://www.icccpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-06-11-2014.aspx .

“Sudan: Envoy warns of ethnic cleansing as Security Council calls for ceasefire”, http://www.un.org/apps/news/storyAr.asp?NewsID=10307&Cr=sudan&Cr1=

Sudan Tribune, “Abdel-Rahim Mohamed Hussein”, http://www.sudantribune.com/spip.php?mot593 .

Sunday Vision (Uganda), “Rugunda explains Otti phone call”, 27 August 2006.

The Guardian, “Omar al-Bashir celebrates ICC decision to halt Darfur investigation”, 4 December 2014, http://www.theguardian.com/world/2014/dec/14/omar-al-bashir-celebrates-icc-decision-to-halt-darfur-investigation.

The Guardian, “ICC should drop charges against Kenyatta – for now”, http://www.theguardian.com/world/2014/jul/17/icc-uhuru-kenyatta-kenya .

The Guardian, “Congo conflict: 'The Terminator' lives in luxury while peacekeepers look on” http://www.guardian.co.uk/world/2010/feb/05/congo-child-soldiers-ntaganda-monuc.

The Guardian Online, “Obama orders halt to Guantánamo Bay Tribunals”, http://www.guardian.co.uk/world/2009/jan/21/barack-obama-guantanamo-bay-tribunals .

UN News Centre, “Security Council inaction on Darfur ‘can only embolden perpetrators’ – ICC Prosecutor”, 12 December 2014, http://www.un.org/apps/news/story.asp?NewsID=49591#.VL5EKiuUexU .

UN Security Council press release “Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court” , 31 March 2005, http://www.un.org/News/Press/docs/2005/sc8351.doc.htm .

Voice of America, “Japan’s Expected to Support International Criminal Court”, 6 December 2006, www.amazines.com/article_detail.cfm/183987?articleid=183987.

Worldwide Movement for Human Rights Press Release, “Victims question the ICC about lack of proceedings against Jean-Pierre Bemba for crimes committed in the DRC: Judges dismiss the request considering that the Prosecutor’s investigation is still open”, https://www.fidh.org/en/region/Africa/democratic-republic-of-congo/Victims-question-the-ICC-about.