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The International Criminal Court in Africa:

Analysis of the cases of the ICC in Uganda, Sudan and Kenya



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“If [the twentieth century trend of wars, war crimes, misery and hardship] is not to continue into the twenty-first century, then the international community will have to take positive steps to arrest it. One effective deterrent would be an international criminal justice system, sufficiently empowered to cause would-be war criminals to reconsider their ambitions, knowing that they might otherwise be hunted for the rest of their days and eventually be brought to justice.”¹

¹ Richard J. Goldstone. *For Humanity: Reflections of a War Crimes Investigator*. (New Yale University Press, Haven, 2000).

I. Introduction

A. The establishment of the International Criminal Court

The idea to create an international criminal court to prosecute global crimes had already been raised in the Middle Ages.

The very first international criminal trials took place in 1268 in Naples where Conradin von Hohenstaufen, Duke of Suabia, was tried, convicted and executed for 'waging an unjust war' and in 1474 where Peter Von Hagenbach was put on trial and sentenced to execution for war crimes before an Ad Hoc Tribunal of the Holy Roman Empire.

"In the 1840s, more than 20 countries, of which Britain, Spain, Portugal, The Netherlands, the United States, Brazil and other Latin American countries signed international treaties to abolish slave trade."² These treaties led to the establishment of international anti-slavery courts, in which the Latin American and Caribbean region played a major role. Courts were created in different countries, including in Cuba, Brazil and Suriname. Through the creation of these courts, international judges were appointed for the first time, and international law came into existence. In 1841, Chile, the Argentine Confederation, Uruguay, Bolivia and Ecuador joined in ratifying the international treaty against slave trade. In a couple of years time, more than 80.000 slaves had been returned their liberty.³

The twentieth century has been important in the further development of international criminal law. In 1993 and in 1994, the Security Council of the United Nations, used its authority under Chapter VII of the UN Charter, for the first times in history, to respectively establish the Ad Hoc International Criminal Tribunal for the Former Yugoslavia (ICTY) and the Ad Hoc International Criminal Tribunal for Rwanda (ICTR).⁴ Later on in 2002, the UN created the Sierra Leone Special Court (SCSL). That same year, and more than 150 years after the first anti-slavery court had been founded, on 1 July 2002, the International Criminal Court (ICC) came into existence as a permanent institution to investigate and prosecute international crimes of genocide, war crimes and crimes against humanity.

² J.M. Martinez, 'Anti-Slavery Courts and the Dawn of International Human Rights Law', 117 *Yale Law Journal* (2008) 550, at 556.

³ *Ibid.*

⁴ C.C. Jalloh, *International Criminal Law Review* 9 (2009) 445-499.

B. Africa and the International Criminal Court

Following data of the United Nations, “since 1970, well over 30 wars have been fought in Africa. Of these, the vast majority were *within*, as opposed to *between*, states.”⁵ “Between 1980 and 1994, 10 of the 24 most war tormented countries were in Africa.”⁶ And by 2007, “the African region still played generous host to the majority of the world’s conflicts.”⁷

Africa and the ICC: From cooperation...

In the 1990’s, Africa played a significant role during the Rome negotiations for the establishment of the ICC. Due to its centuries-long history of slavery, colonialism and wars, still continuing until today, “Africa expressed a great interest in establishing the ICC.”⁸

Senegal was the first country to ratify the Rome Statute of the ICC on 2 February 1999,⁹ which was symbolic for the strong support of Africa for the ICC.

With the aim of preventing, managing and resolving conflict - as noted under Article 2 of its Constitutive Act - the African Union adopted the “Protocol Relating to the Establishment of the Peace and Security Council of the African Union” on 9 July 2002 in Durban, South Africa.¹⁰ In the Constitutive Act as well as in the Peace and Security Protocol it was mentioned that the African Union would include assistance from other governments, civil society and international organizations in order to attain its goals of peace and security.

Today, “123 countries are States Parties to the Rome Statute of the International Criminal Court. Out of them 34 are African States, 19 are Asia-Pacific States, 18 are from Eastern Europe, 27 are from Latin American and Caribbean States, and 25 are from Western European and other States.”¹¹

With 34 out of 53 Members States, two-thirds of the African Union are State Parties to the Rome Statute. This strong African representation is also visible in the staffing of the ICC: of the 18 judges 5, or almost one-third, come from Africa as well as the current Prosecutor, Mrs. Fatou Bensouda. The largest part of the cases before the ICC are also related to African countries. 9 situations, all concerning African States, are currently under investigation of the ICC, with trials

⁵ Report of the Secretary-General to the United Nations Security Council: The causes of conflict and the promotion of durable peace and sustainable development in Africa, UN doc. A/52/871-S/1998/318, 16 April 1998, at para.4.

⁶ Cabinet Sub-Committee on Conflict Prevention in Africa, ‘Causes of Conflicts in Africa’, Consultation Document – March 2001, online at: <http://www.dfid.gov.uk/pubs/files/conflict-africa.pdf> (visited 15 May 2009).

⁷ L. Harbom and P. Wallensteen, Uppsala Conflict Data Program, ‘Frequently Asked Questions: How Many conflicts were there in the world in 2007?’, online at: http://www.pcr.uu.se/research/UCDP/links_faq/faq.htm#4 (visited 15 May 2009).

⁸ Professor T. Maluma, Legal Adviser, OAU Secretariat, Statement at 6th Plenary, 17 June 1998. See *Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, UN doc. A/CONF.183/13 (Vol.II) 104, 115-118 at para. 116.

⁹ UN doc. A/CONF.183.9.

¹⁰ AU Commission Conflict Management Division, *Meeting the Challenge of Conflict Prevention in Africa: Towards the Operationalization of the Continental Early Warning System* (Addis Ababa: AU, 2008), Foreword.

¹¹ http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx.

going on for 7 of them. Although the African Union has been expressing more and more critique towards the focus of the ICC on Africa lately, Africa still remains the continent where the highest amount of atrocities against humanity are committed.

...to opposition

Since the famous Arrest Warrant Case of the International Court of Justice of 2002, tensions between Africa and the ICC started to arise. After Belgium issued an arrest warrant against the then Minister of foreign affairs of the DRC, Abdoulaye Yerodia Ndombasi, the ICJ ruled that “serving Heads of State enjoy absolute immunity from prosecution in foreign national courts”,¹² although the ICJ added that they may be tried before international tribunals when they have jurisdiction.¹³ “In 2008, France issued a warrant of arrest against Chief of Protocol to President Paul Kagame of Rwanda, Rose Kabuye, in connection with the shooting of the former Rwandan president’s plane, which triggered the 1994 genocide.”¹⁴ After this, Paul Kagame, accused European States of abusing the principle of universal jurisdiction at the United Nations.

But the real turning point in the relationship between Africa and the ICC came with the arrest warrant against Sudanese President Omar Hassan Al-Bashir, issued in 2009. Because of this, the criticism of African States and the African Union towards the ICC started to grow. Some African Union Member States argued that the indictment of Al Bashir would stand in the way of the peace process in Sudan. But the most critical point was the challenging of the immunity of a sitting Head of State of a non-State Party to the Rome Statute by the ICC. This has, since then, become a highly controversial issue. It also led to division among Member States of the African Union, between States party to the Rome Statute and States that did not ratify the Rome Statute. As a result, visits of Al-Bashir to several African countries gave rise to diplomatic conflicts. In the recent years, the ICC has extensively been accused by the African Union of having an anti-African bias. As Professor Mahmood Mamdani quoted “the realization that the ICC has tended to focus only on African crimes, and mainly on crimes committed by adversaries of the United States, has introduced a note of sobriety into the African discussion.” The Security Council referred situations against Darfur and Libya, but for example did not refer situations in Israel, Syria or Chechnya. Although this is certainly a reasonable argument for the perceived selectivity of the ICC, it must also be noted here on the side, that it were especially States, who had initially referred situations to the ICC in their own political interest, like Uganda, who now have been

¹² Arrest Warrant (2002) Judgment, para. 61.

¹³ Arrest Warrant (2002) Judgment, para. 61.

¹⁴ Mark Tran, ‘Rwandan President Kagame Threatens French Nationals with Arrest,’ The Guardian, 12 November 2008, <http://www.guardian.co.uk/world/2008/nov/12/rwanda-france>.

taking the lead in the accusations towards the ICC. After the growing opposition of Africa towards the ICC following the issuing of the arrest warrant against Al-Bashir, the court case of the ICC against current President Kenyatta and Deputy President Ruto of Kenya, experienced a lot of difficulties. The African Union started to call on its members to carry out national proceedings, in order to prevent the jurisdiction of the ICC, due to successful lobbying of the Kenyan government. The lobbying of the Kenyan government recently even led to moving the AU members to withdraw from the Rome Statute.

C. Research Question

After more than a decade of existence, I will make an evaluation of the development of the ICC, more particular with regards to Africa, based on a case-study analysis of three of its court cases: the case of Uganda, Sudan and Kenya. The approach is mainly legal. The goal is to make a balance of the main achievements and challenges of the ICC, on the basis of these three cases studies.

A first aspect I will focus on is the relationship of the ICC with Africa. As already discussed, the delegates of the African continent could be seen as the big entrepreneurs during the Rome negotiations to establish the ICC. Because of issuing of arrest warrants against serving senior State officials by European States and the indictment of sitting Head Of State of Sudan Al-Bashir, the African States and the African Union became increasingly skeptical towards the ICC. In this research study, I will get more in detail on how the relationship between the ICC and Africa evolved throughout these cases and more specifically how it influenced the cases before the ICC.

I chose for these three cases mainly because all three of them were the first examples of the way a case can be initiated before the Court.

As indicated by Article 7 of the Rome Statute, there are three mechanisms to initiate the jurisdiction of the ICC. First of all, there is the possibility for a State Party to refer a situation to the ICC. The second option is for the Security Council to refer a situation to the ICC under its Chapter VII authority of the UN Charter. The last option is for the Prosecutor to start an investigation by him/herself, the so-called '*proprio motu*' mechanism.

Uganda represented the very first State referral, while the case of Darfur, Sudan formed the first time the Security Council invoked its Chapter VII powers to refer the situation to the ICC and Kenya was the first court case that got initiated by the Prosecutor.

Another reason to opt for these cases is that the research literature is well-developed on them. The literature has been selected and analysed primarily on its relevance of their discussion of the Rome Statute with regards to the three cases. I will evaluate several principles of the Rome Statute that have shown significant in these cases and the way they developed the case law on these principles.

Every Chapter will begin with an historical overview of the background that led to the conflict and the conflict that eventually lay at the basis of the ICC referral. After this, I will give draw the evolution of the proceedings of the court case before the ICC, from situational phase to case phase. In the last part of each Chapter, I will then discuss the main legal issues of each court case

within the framework of the Rome Statute, as well as relevant political issues regarding the resolution of the conflict and the relationship of the ICC with Africa.

In the final conclusion, I will outweigh the main legal as well as political achievements and challenges of the three court cases before the ICC and how they contributed to the evolution of the ICC.

II. Analysis of the cases of the ICC in Uganda, Sudan and Kenya

A. Uganda: The first State Referral

Uganda ratified the Rome Statute on 14 June 2002.¹⁵

It was the first State to refer a situation to the International Criminal Court on 16 December 2003.¹⁶ For almost thirty years now, the Lord's Resistance Army (LRA) has been fighting against the government of Uganda, thereby committing numerous crimes against humanity, war crimes and serious human rights violations. The Government of Uganda, incapable of defeating the LRA, decided to refer the situation in Northern Uganda to the ICC, in order to make an end to the conflict. However, later on, the Government has publicly stated to be willing to have a deferral of the case before the ICC in order to conclude a peace agreement with the LRA, providing for domestic justice. For this reason, the case has been a very important first test for the ICC of the principle of admissibility. Not only is it disputable whether the self-referral was admissible to the ICC in the first place, questions have arisen whether, in case of a challenge of admissibility by the Government of Uganda, it would still be possible to defer the case if this could better serve the interests of peace and justice.

i. Background and conflict

a. Background

In the 19th Century, the region became a British colony. Under colonial rule, the North and the South became ethnically divided. The Brits designed the South as an agricultural and civic center and the North as a military and labor base. As a result, economic development was concentrated mainly in the South, whereas the North remained a poor and undeveloped region. After having been ruled by Great Britain until 1962, the Republic of Uganda became an independent country. New conflicts and old rivalries soon followed. The conflict was mainly fought between three reigns: the reign of Milton Obote, the reign of Idi Amin and the reign of Obote. The reign of Obote attacked the people in the South, while the reign of Amine organized attacks against the people in the North. Eventually, Milton Obote, with the use of the army in the North, was able to get in power. His army chief, Idi Amin Dada, overthrew Obote's dictatorship in 1971. After the Ugandan-Tanzanian war of 1979, Amin's reign was ended and Obote got re-installed in 1980.

¹⁵ http://www.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/uganda.aspx.

¹⁶ http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200204/Pages/situation%20index.aspx.

The Northern part, with the national army, came to represent the government, while rebel groups started mounting in the South. They executed a number of insurgencies, with the most significant coming from Yoweri Museveni's guerilla's, the National Resistance Army. To cut rural support, Obote, with his Northern Army, launched a counterinsurgency – called Operation Bonanza - in the Luwero Triangle region north of Kampala.¹⁷ Between 1985 and 1986, a government under General Tito Okello came to power. However, in 1985, government forces started losing ground and in January 1986, Museveni's forces took Kampala.¹⁸ After the coup, the government was removed by the National Resistance Army (NRA), which later became the National Resistance Movement (NRM)¹⁹ and Museveni became President of Uganda. However, it was not until 1996 that he got democratically elected for the first time. He got reelected twice, in 2001 and 2006. Museveni and his NRA prohibited any rival political groups. Under Museveni, power shifted to the South and NRA's actions of forced displacement created increasing hostilities among the Acholi in the North. Many Acholi had to flee into Sudan. This situation led to the coming into existence of five major rebel movements. One of them, the Uganda's People's Defense Army (UPDA), formed by soldiers from the North, launched an insurgency in August 1986. They eventually signed an agreement to stop their rebellion in May 1988. Another group, an ally of the UPDA, was the Holy Spirit Movement (HSM), led by Alice Auma 'Lakwena' (Acholi for messenger). She claimed that the Holy Spirit had sent her to overthrow the Ugandan government for its treatment of the Acholi people.²⁰ After some military successes, the HSM got defeated in November 1987.

b. Conflict

The LRA is the last remaining rebel group, given that the others either have been absorbed in the Ugandan Peoples Defense Force (UPDF) or have been defeated. Originally, the LRA belonged to the Acholi tribe. Where the other rebel movements mainly operated in the North of the country, the LRA's operations also have been taking place across the border of Uganda into the Democratic Republic of the Congo and the Central African Republic. Nonetheless, the campaign of the LRA is mainly directed against the Ugandan Peoples Defense Force (UPDF) of Museveni's Government and the people of Northern Uganda. The objective of the LRA has always been to remove the Government of NRM in Kampala and install a government based on the Bible Ten

¹⁷ Ruddy Doom & Koen Vlassenroot, *Kony's Message: A New Koine? The Lord's Resistance Army in Northern Uganda*, 98 Afr. Aff., 5, 9 (1999).

¹⁸ Aili Mari Tripp, *Museveni's Uganda: Paradoxes of Power in a Hybrid Regime* 151-152 (2010).

¹⁹ Lucimaed Okello, *Protracted conflict, Elusive Peace Initiatives to End the Violence in Northern Uganda*, 11 Accord (2002).

²⁰ Heike Behrend, *Alice Lakwena and the Holy Spirits: War in Northern Uganda 1986-1997* (1999).

Commandments.²¹ The leader of the LRA, Joseph Kony, who claims to be related to Lakwena, believes himself to be guided by spirits as well, based on an ideology of Christian, Islamic and animist doctrines. These spirits would give him the ability to watch over LRA members and to predict the future. For example, soldiers refusing to walk into coming fire during an attack are accused by Kony of questioning him, and therefore, questioning the 'Holy Spirit'. A soldier who has been killed, is believed to have angered the Holy Spirit. As a result, Kony's soldiers tend to have a strong obedience to his authority to carry out his brutal orders. The LRA is a military-organized rebel group. The top of the organization is formed by the 'Command Altar', led by the Army Commander –who receives direct orders from Kony -, the Deputy Army Commander and the Brigade Generals. The Brigade Generals are in control of the Stockree, Sinia, Trinkle and Gilva brigades. In the 1990's, the LRA was able to grow significantly because of UPDA commanders refusing to surrender and joining the LRA and because of the military support from Sudan in return for Uganda's support for the Sudan People's Liberation Army. In 1991, the Ugandan government initiated 'Operation North', conducting military operations in the North, thereby sealing off separate zones to prevent movement or communication. This also included the creation of the 'Arrow Groups', self-defense militias of Acholi people. Kony saw the lack of resistance of the Acholi against the creation of the 'Arrow Groups' as a betrayal. This is why the LRA started to address its campaign against the Acholi in the North, where the LRA paradoxically stems from. In this period, the LRA started increasingly abducting children. Following data from UN agencies, up to 26.000 children would have been captured by the LRA.²² These children form the major part of its well-organized army. The Ugandan government responded to these actions with serious human rights abuses. Although some peace negotiations had been taking place, Museveni still seemed to opt for a military solution. In 1994, the Ugandan government and the LRA agreed to a cease-fire. This created opportunities for a settlement of the conflict. Kony demanded for a delay of three-to-six months to demobilize his forces. Museveni offered seven days to disarm, if not military action would follow. Three days later, the war resumed. Chris Dolan, who is the director of the Refugee Law Project in Kampala, claimed that "Museveni consciously undermined negotiations because he preferred a military solution."²³ This is in line with findings of the International Crisis Group, characterizing Museveni's tactics as "a pattern of unconditional ultimatums that guaranteed the failure of peace efforts."²⁴ After the failure of the peace talks of 1994, civil society mobilization led to the creation of Acholi

²¹ Tim Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army* 37-44 (2006).

²² Cited in Akhavan, *supra* note 3, at 407.

²³ Dolan, *supra* note 41, at 97-98.

²⁴ ICG, *Northern Uganda*, *supra* note 34, at 10.

Religious Leaders Peace Initiative (ARLPI) in 1998.²⁵ This movement proposed to grant amnesties in exchange for traditional non-retributive reconciliation rituals, such as ‘*mato oput*’. The ‘ARLPI’ advocated the Amnesty Act in 1999 in the Ugandan Parliament, which was being enacted in January 2000, although Museveni opposed to it.²⁶ The Amnesty Act led to the surrender of more than 15,000 LRA rebels. Political and religious groups started to view the Amnesty Act as a possible solution. Museveni, from his side, tried to undermine it. In 1999, the relationship between Uganda and Sudan improved, leading to an agreement to stop support for rebel groups on each side. This increased the likelihood for Museveni to reach a military solution by destroying LRA bases in Sudan. Furthermore, meetings, organized by the ‘ARLPI’, between LRA fighters and Acholi notables, were often interfered by UPDF soldiers. In March 2002, the government passed an anti-terrorism law that penalized contacts with LRA fighters ‘as acts of treason.’²⁷ Military operations continued, as the Government launches ‘Operation Iron Fist’, with Ugandan troops crossing the border with Sudan to eliminate the LRA.²⁸ This pushed the LRA back into Northern Uganda. However, it worsened the situation of the Acholi and other people in the North. There, the LRA began attacking the food-seeking civilian population. This situation enabled Museveni to oppress any political disagreement in the name of national security and increased international military support to counter-terrorism against the LRA, especially from the United States, which had added the LRA to its terrorism list after 9-11.²⁹

Eventually, as military operations kept on failing and international pressure to find a negotiated agreement increased, Museveni decided to ratify the Rome Statute of the International Criminal Court. He did this with the aim of bringing the LRA to the negotiation table, thereby reducing his own military actions. Lacking the support of other states to get hold of the LRA, Museveni referred the LRA to the ICC on 16 December 2003.

²⁵ Kasaiji Philip Apuuli, Peace over Justice: The Acholi Religious Leaders Peace Initiative (ARLPI) vs. the International Criminal Court (ICC) in Northern Uganda, 11 Stud. Ethnicity & Nationalism 116, 121-22 (2011).

²⁶ See The Amnesty Act, 2000, pt. 2 (Uganda) [hereinafter Amnesty Act], (last visited 24 Jan.2006) (granting immunity to those who participated in the conflict, collaborated with perpetrators, committed any crime in furtherance of the war effort, or aided the conduct of the war, in exchange for the amnesty seeker's surrender and renouncement of the rebellion).

²⁷ Tripp, *supra* note 36, at 166; Kasaiji Philip Apuuli, *The ICC Arrest Warrants for the Lord's Resistance Army Leaders and Peace Prospects for Northern Uganda*, 4 J. Int'l Crim. Just. 179, 184 (2006).

²⁸ Dolan, *supra* note 41, at 54.

²⁹ Brewer, *supra* note 66, at 146.

- ii. Court case
 - a. Situational phase

Museveni limited his referral to the LRA, although under the Rome Statute only ‘situations’ can be referred. This to prevent any kind of politicization. When Museveni received permission from Sudan to attack the LRA deeper into Sudanese territory, he launched Operation Iron Fist II on 29 July 2004.³⁰ This operation led to the capture of many LRA fighters. On the same day, the ICC Prosecutor, Luis Moreno-Ocampo, decided that there is reason to believe that the LRA leadership is responsible for crimes against humanity.³¹ At a press conference in London, Moreno-Ocampo suggests that only the LRA, not UPDF will be the subject of investigation. This led to critiques of Ugandan as well as international non-governmental organizations who saw in this a one-sided justice approach. Moreno-Ocampo from his side, defended his position, by arguing that he both investigated the UPDF and the LRA crimes, but that the LRA crimes were more numerous and of much more gravity than the UPDF crimes. Therefore it was reasonable to focus his investigations on the LRA. Museveni furthermore guaranteed that he would prosecute (domestically) any UPDF crimes. This suggests that there was no question of inability of the national courts of Uganda to prosecute. Rather, there was the inability to take the LRA leaders in custody. We will come back to this point more extensively in the discussion. The crimes put under investigation of the ICC concern the crimes committed between mid-2003 and mid-2004. The leadership of the LRA is held responsible by the ICC for “devising and implementing LRA strategy, including standing orders to attack and brutalize the civilian population.”³² The crimes the LRA is accused of include “attacks against civilian populations, including rape, enslavement, inhumane treatment, pillaging, enlisting children through abduction, and murder.” These crimes, resorted under crimes against humanity and war crimes, are believed to have taken place between mid-2003 and mid-2004. Crimes committed earlier do not fall under the jurisdiction of the ICC, since the ICC can only prosecute crimes that are committed after the Ugandan ratification of the Rome Statute, unless Uganda submits a declaration in which Uganda “accepts ICC jurisdiction starting from the date the Rome Statute came into force, namely 1 July 2002.”³³ Uganda later on sent in such a request.

³⁰ Matthew Brubacher, *The ICC Investigation of the Lord's Resistance Army: An Insider's View*, in the Lord's Resistance Army, supra note 69, at 270.

³¹ See Press Release, International Criminal Court, Statement by the Chief Prosecutor on the Ugandan Arrest Warrant (14 Oct. 2005).

³² Warrant of arrest of Joseph Kony, supra note 1, at 8.

³³ Rome Statute, supra note 17, at Art. 12(3).

Under Article 15(3) of the Rome Statute, the Office of the Prosecutor decided that ‘there is reasonable basis to succeed with his investigation.’³⁴

In April 2005, a delegation of leaders of the Acholi went to the ICC in The Hague. Although the official purpose of the visit was to learn about the court, the intent was to delay investigation seen that “the mediation was showing the best chances of peace in decades.”³⁵

In July 2005, the Pre-Trial Chamber II issued arrest warrants for five members of the LRA. With one suspect in custody and another deceased, the other suspects remain still at large. The Pre-Trial Chamber has asked the Republic of Uganda to notify the ICC of any possible agreement between the Government and the Lords Resistance Army (that could challenge the admissibility of the case before the ICC).

Initially, the Pre-Trial Chamber stated “to be satisfied of admissibility in the arrest warrant of the LRA leadership.”³⁶ However, on 21 October 2008, the Pre-Trial Chamber started a proprio motu reassessment of the admissibility of the case. After submission of observations of all parties, in accordance with the Rome Statute, the Pre-Trial Chamber II declared the case to be still admissible. The Chamber reasoned that the fact that the case had been referred to the ICC by the Ugandan government suggests that Uganda was not intending to pursue any investigations. Moreover, no other State with jurisdiction seemed to consider to investigate or prosecute the situation.³⁷ Besides this, the crimes under investigation, all fell within the jurisdictional scope of the ICC. On 10 March 2009, the ICC found that “there was no reason to revisit the issue of admissibility of the case. The subsequent Defense Appeal was dismissed.”³⁸

³⁴ ICC Press Release, President of Uganda Refers the Situation Concerning the Lord's Resistance Army (LRA) to the ICC, ICC-2004o129-44, available at www.icc-cpi.int (last accessed 12 June 2009).

³⁵ See Stephanie Nolen, *Peace First, justice Later?*, GLOBE & MAIL, 7 May 2005, at F9.

³⁶ Arrest Warrant for Joseph Kony, *supra* note 1, at §37.

³⁷ Prosecution's Observations regarding the Admissibility of the Case against Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen, International Criminal Court Public Document with Public Annexes A, B and D and Confidential, Ex Parte Prosecutor and Defence Annex C, ICC-o2/04-o1/05 (18 Nov. 2008).

³⁸ Judgment on the appeal of the Defense Against the "Decision on the Admissibility of the Case under Article 19(1) of the Statute" of 10 March 2009, International Criminal Court Public Document, ICC-02/04-01/05-408 (16 Sept. 2009).

b. Case phase

*The Prosecutor v. Joseph Kony*³⁹

Mr. Kony is allegedly responsible for 33 counts of crimes against humanity and war crimes under articles 25(3)(a) and 25(3) (b) of the Rome Statute.

A warrant of arrest has been issued against him on 8 July 2005. He remains at large.

*The Prosecutor v. Vincent Otti*⁴⁰

Mr. Otti is held responsible as a direct perpetrator for 32 counts of crimes against humanity and war crimes under article 25(3)(b) of the Rome Statute.

A warrant of arrest has been issued against him on 8 July 2005. He remains at large.

*The Prosecutor v. Okot Odhiambo*⁴¹

Mr. Odhiambo is held responsible as a direct perpetrator for ten counts of war crimes and crimes against humanity under article 25(3)(b) of the Rome Statute.

A warrant of arrest has been issued against him on 8 July 2005. He remains at large.

*The Prosecutor v. Raska Lukwiya*⁴²

As Mr. Lukwiya is believed to have died, the proceedings against him have been terminated.

*The Prosecutor v. Dominic Ongwen*⁴³

Mr. Otti is held responsible as a direct perpetrator for 7 counts under article 25(3)(b) of the Rome Statute.

He has been taken into custody and has been transferred to the ICC on 21 January 2015. His initial appearance hearing took place on 26 January 2015. The opening of the confirmation of the charges hearing is scheduled for 21 January 2016.

³⁹ http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200204/Pages/situation%20index.aspx

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid.

iii. Discussion: *Admissibility, legality of national amnesties and the justice vs. peace dilemma*

The Ugandan government initially referred the situation to the ICC, but later has declared to be willing to have the ICC arrest warrants deferred, on the condition that the accused would undergo traditional tribal justice rituals.

a. *Admissibility*

It is questionable if the self-referral by Uganda was valid under the admissibility requirements of the ICC in the first place. It could be argued that, specifically under Article 17 of the Rome Statute, the requirements of unwillingness and inability would not have been met. The Ugandan government did not seem to be unwilling to investigate and prosecute. The Amnesty Act of 2000, the anti-terrorism act to include the LRA in international standards, the modification of the Amnesty Act by the government of Uganda to exclude the LRA leadership, are all initiatives that demonstrate the willingness to handle the situation. Furthermore, by referring the case to the ICC, this in itself can be seen as an indication of willingness to prosecute. With regards to inability, it must be noted that the activities of the LRA did not affect the functioning of the judicial system of Uganda. During the Rome negotiations, it had been agreed that inability would have to imply that the infrastructure of the State's judicial system is incapable of operating. Interpreting the 'inability' provision in this way, it can hardly be said that this was the case with the Ugandan judicial system. However, the reason mentioned by the Ugandan government to refer the case was the inability to take the LRA leadership into custody.

In 2005, the Prosecutor of the ICC issued arrest warrants against the leadership of the LRA. However, these arrest warrants seemed to hinder possible peace agreements of 2007 and 2008.⁴⁴ In June 2006, the LRA declared to be willing to take part in new peace negotiations, if its leaders would be exempted from ICC prosecution. Article 53 of the Rome Statute does not offer clarity on the possibility for the Prosecutor to withdraw these arrest warrants. On the one hand it formulates that 'the Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution' based on new facts or information⁴⁵, while on the other hand it reads that 'arrest warrants, once issued, shall remain in effect until otherwise ordered by the Court.'⁴⁶ In June 2007, an agreement was made between the Ugandan government and the LRA that would combine domestic proceedings with traditional justice mechanisms. However, the Prosecutor of the ICC stated that the arrest warrants could not be withdrawn on this basis. The

⁴⁴ <http://www.ecfr.eu/ijp/case/uganda>

⁴⁵ Rome Statute, supra note 7, art. 53(4)

⁴⁶ Rome Statute, supra note 7, art. 58(4)

Ugandan government then tried to seek a solution that would meet both its Rome Statute requirements and would be feasible for the LRA to return to the negotiation table. In February 2008, the LRA and the Ugandan government concluded an Annexure to the 2007 Agreement, which proposed the establishment of a special division of the Ugandan High Court for the prosecution of the LRA leadership. In theory, if the LRA leaders were to return from Congo to Uganda, and were to be submitted to domestic proceedings under the Peace Agreement, their case before the ICC might become inadmissible. After all, the ICC gives preference to domestic proceedings. This point was made clear by Moreno-Ocampo during his swearing-in ceremony that “as a consequence of complementarity, the number of cases that reach the Court should not be a measure of its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.”⁴⁷

Based on the demand by Uganda to assert domestic jurisdiction over LRA leadership through a special division of the Ugandan High Court, the Pre-Trial Chamber II, on 21 October 2008, decided to reassess the admissibility of the case under Article 19(1).

The question we will here address further is whether Uganda can still challenge admissibility after a self-referral. The first question that arises is whether the Prosecutor and the PTC have to decide on admissibility before opening an investigation or at the issuance of arrest warrants. A second question we have to ask is whether admissibility can change during the course of a trial. Can a case that was initially admissible be rendered inadmissible due to a change in circumstances? And, finally, if a State makes use of self-referral, does it not lose its right to challenge the admissibility?

Articles 17-19 of the Rome Statute explain us the circumstances under which admissibility can be challenged.

Unwillingness to prosecute is described under Article 17(2)(a) of the Rome Statute as the situation where ‘proceedings are undertaken... for the purpose of shielding the person concerned from criminal responsibility’⁴⁸ and further under Article 17(2)(b) of the Rome Statute as ‘cases of unjustified delay or the proceedings are independent and impartial in a manner inconsistent with an intent to bring the person concerned to justice’.⁴⁹

Inability is defined under Article 17(3) of the Rome Statute as ‘whether due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused to carry out its proceedings’.⁵⁰

⁴⁷ Luis Moreno-Ocampo, Prosecutor of the Int’l Criminal Court, Statement at the Ceremony for the Solemn Undertaking of the Chief Prosecutor of the International Criminal Court 2 (June 16, 2003), available at <http://www.iccnw.org/documents/MorenoOcampo16June03.pdf>.

⁴⁸ Rome Statute, Article 17(2)(a).

⁴⁹ Rome Statute, Article 17(2)(b).

⁵⁰ Rome Statute, Article 17(3).

To come back to our first question, this evaluation of admissibility has to be made at different stages of a case and must be made both by the Prosecutor and the Pre-Trial Chamber. Before starting an investigation, the Prosecutor must evaluate if a situation is admissible as is instructed under Article 53(1)(b).

In the situational phase, the Prosecutor must make a ‘general’ check on whether there is willingness and ability of national authorities to investigate and prosecute in order to decide for the initiation an investigation. If this is not the case, the situation becomes admissible before the ICC. If it concerns a State referral or a Security Council referral, than the Prosecutor has to inform the Pre-Trial Chamber when he would not start an investigation because of inadmissibility of the case.⁵¹ When the Prosecutor wants to initiate a ‘*proprio motu*’ investigation, he needs to get approval from the Pre-Trial Chamber.⁵² Article 53(2) further indicates that the Prosecutor must continuously evaluate if there are no national proceedings taking place which could make the case inadmissible and has to inform the Pre-Trial Chamber of this.

In the case phase, the Prosecutor must check ‘in more detail’ if the case before the ICC, is also being investigated or prosecuted by national authorities. If there is no question concerning the same person/same conduct test, then the case remains admissible before the ICC.

On its turn, the Pre-Trial Chamber has to make the same evaluations as the Office of the Prosecutor. In the situational phase, the Pre-Trial Chamber has the possibility to defer a situation in case of inadmissibility considerations.⁵³ In the case phase, the Pre-Trial Chamber has to assess the admissibility requirements before issuing arrest warrants. Here, the Pre-Trial Chamber must exclude that the crimes have not already been investigated or prosecuted by national authorities. If the Pre-Trial Chamber allows a deferral, the Prosecutor can request a review of the decision after six months based on either a ‘change in circumstances’ or in case of ‘the State’s ability or willingness to ‘genuinely’ investigate or prosecute the situation, under the provisions of Article 18(3).⁵⁴ If the Pre-Trial Chamber assesses, either in the situational phase or in the case phase, that a case is inadmissible, the Prosecutor has to terminate the investigation. These are the general admissibility requirements.

However, the Rome Statute does not provide specific guidelines on how to deal with admissibility in case of self-referral. Both the Rome Statute as well as general principles of international law point at several problems with admissibility in the case of a self-referral, in particular the earliest opportunity requirement, the prohibition on shielding an accused and the general principle of estoppel.

⁵¹ Rome Statute, Article 53(1).

⁵² Rome Statute, Article 15(3) and 15(4).

⁵³ Rome Statute, Articles 18 and 19.

⁵⁴ Rome Statute, Article 18(3).

Article 19(5) of the Rome Statute states that a State must ‘make a challenge to admissibility at the earliest opportunity.’⁵⁵ One can argue that when a State has referred a case, this means that the State was not able to investigate or prosecute the case by itself at the earliest opportunity.

Another problem is that a State has to be able to demonstrate that domestic proceedings do not have the intent to shield the accused, as required under Articles 17(2)(a) and 20(3)(a) of the Rome Statute.⁵⁶ The last issue concerns ‘the principle of estoppel’ and the legal obligation of good faith. The ‘principle of estoppel’ means that, ‘when State A makes a commitment with another State B, State B is relying on State A its good faith, to act as agreed upon.’⁵⁷ Article 26 of ‘the Vienna Convention of the Law of Treaties’⁵⁸ and ‘the Draft Declaration on the Rights and Duties of States’⁵⁹ provide in this matter that States have the obligation of “what has been promised be performed without evasion or subterfuge, honestly, and to the best of the ability of the party which made the promise.” A State referring a case, can be expected to act in good faith. However, a State, that commits itself to the ICC through a self-referral and then afterwards challenges admissibility to undermine its commitment with the ICC, would possibly violate its international obligation to act in good faith.

When reading the Rome Statute, we can differentiate three visions on the purpose of admissibility. Admissibility can be seen as a fundamental right of the accused, a means to protect state sovereignty or a limitation on the power of the Court.

Article 14(7) of ‘the International Covenant on Civil and Political Rights (ICCPR)’ declares that “an accused has to right to a free and fair trial.”⁶⁰ During the investigations on the Rome Statute there had been made an agreement that “an accused should have the right to challenge the admissibility of a case against him.”⁶¹ Eventually, there had been opted for the possibility of the accused to challenge an admissibility ‘when a warrant of arrest or summons to appear has been issued.’⁶²

The second interpretation of the goal of admissibility is to view admissibility as “the right of a state to protect its sovereignty.”⁶³ By ratifying the Rome Statute, a State transfers certain rights to the jurisdiction of the ICC. If the ICC would act beyond its jurisdiction, this would be a breach of the sovereignty of a State. During the Rome negotiations, certain states insisted on maintaining their sovereignty as much as possible. Therefore, they were in favour to restrict the jurisdiction of

⁵⁵ Rome Statute, Article 19(5).

⁵⁶ Rome Statute, Article 17(2)(a) and Article 20(3)(a).

⁵⁷ D.W. Bowett, ‘Estoppel Before International Tribunals and Its Relation to Acquiescence’, 33 *British Year Book of International Law* (1957) 176.

⁵⁸ Vienna Convention on the Law of Treaties, 1115 UNTS 331, Art. 26 (emphasis added).

⁵⁹ Draft Declaration on Rights and Duties of States, GA Res. 375(IV), Annex, A, Art. 6, December 1949.

⁶⁰ Art. 14(7) ICCPR.

⁶¹ See M. Cherif Bassiouni, *Legislative History of the International Criminal Court: An Article-by-Article Evolution of the Statute from 1994-1998* (Vol. 2, Ardsley, NY: Transnational Publishers, 2005), 155-160.

⁶² Rome Statute, Article 19(2)(a).

⁶³ Art. 2(7) UN Charter.

the ICC to these cases where a State was unable to act by itself. Other states, who saw the ICC as the only way to prosecute grave crimes, were in favour of a broader admissibility of cases before the ICC, and advocated to include the aspect of unwillingness in addition to inability. The initial formulation of admissibility read: “The Court has no jurisdiction where the case in question is being investigated or prosecuted, or has been prosecuted, by a State which has jurisdiction over it.”⁶⁴ This view, however, was rejected by the majority of the states. The delegation of the United States proposed that the admissibility evaluation should be made at the beginning stage, in order to protect a State’s sovereignty to investigate and prosecute the case itself.⁶⁵ This was a crucial matter for the majority of the states to accept the complementarity principle and the role of the Prosecutor. Then, there was disagreement whether any State or only State Parties should be able to challenge admissibility. At the Rome Conference, eventually, agreement had been found that any State should be able to challenge the admissibility of a case.

The last interpretation on the purpose of admissibility is to serve as a limitation to the power of the ICC. The jurisdiction of the ICC was eventually limited up to the point where a trial actually begins. But, it is unlikely that admissibility was mainly foreseen as to restrict the power of the ICC given that a State can only challenge the admissibility of the case once, and it has to be at the earliest opportunity as already mentioned.

The first test of admissibility originates from the case against Thomas Lubanga Dyilo in the situation of the Democratic Republic of Congo.⁶⁶ Lubanga Dyilo had been arrested in Kinshasa and was charged with the murdering of nine MONUC peacekeepers in March 2005. Parallel to this, he was charged by the ICC with ‘genocide, crimes against humanity, murder, illegal detention and torture.’⁶⁷ The Democratic Republic of Congo did not challenge the admissibility of the case before the ICC. The ICC argued that the case before the ICC remained admissible on the grounds that Lubanga Dyilo had been charged with different crimes before the ICC. Inadmissibility could only be invoked when the national proceedings against Lubanga Dyilo would have concerned the same charges, as required by the same person/same conduct principle. When we now return to the case of Uganda and the peace negotiations of 2007 and 2008 between the LRA and the Ugandan government, implementation of the negotiated agreements would make an admissibility challenge by Uganda possible. However, the 2007 agreement did not

⁶⁴ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, ‘Draft Statute of the International Criminal Court’, UN Doc. A/CONF.183/2/Add.1 (1998), at Art. 15(3), available at <http://www.un.org/law/n9810105.pdf> (visited 12 March 2009).

⁶⁵ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, ‘Summary Records of the meetings of the Committee of the Whole’, UN Doc.A/CONF/183/13, (1998), at 189, available at http://untreaty.un.org/cod/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf (visited 11 March 2009).

⁶⁶ Decision on the Prosecutor’s Application for a Warrant of Arrest, Art.58, Lubanga Dyilo (ICC-01/04-01/06), Pre-Trial Chamber I, 10 February 2006, §§ 30-40.

⁶⁷ Warrant of Arrest, Lubanga Dyilo (ICC-01/03-01/06), Pre-Trial Chamber I, 10 February 2006, at 4.

specify the penalties and therefore risks to fail the requirements of Article 17 of the Rome Statute. Furthermore, traditional justice mechanisms, such as '*mato oput*', rely rather on forgiveness than on criminal sanction. These would probably not be consistent with the Rome Statute's provision to 'bring to justice', under Article 17(c). In the Annexure of February 2008, the establishment of a 'special division of the High Court of Uganda' had been proposed. This special division would prosecute the responsible for war crimes and crimes against humanity. In addition, they might also imply traditional justice mechanisms. Because this special division could challenge admissibility, the Pre-Trial Chamber of the ICC requested the government of Uganda for more information. In October 2008, the Pre-Trial Chamber requested, acting under Article 19(1), the Office of the Prosecutor, the counsel of Defense and Uganda "to submit their observations on the admissibility of the case."⁶⁸ The Office of the Prosecutor eventually decided that "the on-going negotiations did not affect the admissibility of the case as no national proceedings had been initiated."⁶⁹ The agreements indicate that the Ugandan government wants to pursue the most responsible for international crimes with domestic justice and alternative sentences and those who committed lesser offences would be held accountable by traditional justice ceremonies. In case of an admissibility challenge by the Ugandan government, this would only apply to the LRA members who are being prosecuted before the ICC and this for the same charges as the ones they are charged for by the ICC. The Amnesty Act of 2000 is still applicable. We should also note here that the possibility of amnesties was not foreseen for the LRA leadership and thus not for the indictees of the ICC. Amnesties can, for this reason, form no challenge of the admissibility of the case before the ICC. This leads us to the issue of amnesties and the legality of amnesties under international law and the Rome Statute. Amnesties could be seen as part of a more restorative approach on justice, based on forgiveness and reconciliation. As we can't go into depth into the full scope of the field of research of restorative justice, we will only touch upon the issue of amnesties, which has been a significant element in the case of Uganda.

⁶⁸ Decision initiating proceedings under Art. 19, requesting observations and appointing counsel for the Defence, *supra* note 1, at 8-9.

⁶⁹ Prosecution's Observations regarding the Admissibility of the Case against Joseph Kony, Vincent Oti, Okot Odhiambo and Dominic Ongwen, Koni, Oti, Odhiambo and Ongwen (ICC-02/04-01/05), Pre-Trial Chamber II, 18 November 2008.

b. National Amnesties

Where some scholars argue that a too strong focus on prosecution where amnesties could bring peace might be detrimental for ending the conflict, others argue that allowing for amnesties would only encourage impunity.

Article 6 of ‘the Protocol Additional to the Geneva Conventions of 12 August 1949’, regarding the Protection of Victims of Non-International Armed Conflicts reads: “authorities are granted the ‘broadest’ possible amnesty in non-international armed conflicts when conflicts cease.”⁷⁰ Meanwhile, this provision has been narrowed down by the International Committee of the Red Cross. However, granting amnesties is still applicable under international customary law. Furthermore, there are numerous examples of state practice of granting amnesty.

South Africa’s Truth and Reconciliation Commission (“TRC”) proved that granting amnesties could be beneficial for conflict resolution. The South African government granted amnesty to perpetrators who had provided full disclosure of their crimes. It was allowed conditionally and solely on individual application. These two factors made it a useful mechanism in providing accountability for human rights violations. However, critics rejected it on the grounds that it exempted perpetrators of responsibility for their crimes and it did not provide reparation for apartheid victims.

The Sierra Leone Truth and Reconciliation Commission and the Special Court of Sierra Leone did not allow for granting amnesties stating that “the grant of amnesty...is not only incompatible with, but is in breach of an obligation of the State towards the international community as a whole.”⁷¹ The Appeals Chamber of the Special Court of Sierra Leone decided in 1999, “that the amnesty provision, that was included in the Lomé Peace Agreement, could not defer jurisdiction of the Special Court of Sierra Leone from prosecution of crimes against humanity and war crimes.”⁷² A disclaimer was added to the Lomé Peace Agreement to declare that “the amnesty provision was not applicable for international crimes of genocide, crimes against humanity, war crimes and other violations of international humanitarian law.”⁷³

The Rome Statute is not clear on the legitimacy of granting amnesties and the provisions are subject for interpretations. This is the result of the divergent opinions during the Rome negotiations. On the one hand, there were State Parties that held the view that a State is obliged

⁷⁰ See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 6, 8 Jun. 1977, 1125 U.N.T.S. 609.

⁷¹ See William A. Schabas, *Amnesty, The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone*, 11 U.C. DAVIS J. INT’L L. & POL’Y 145, 161 (2004).

⁷² See *Prosecutor v. Kallon & Kamara*, Case Nos. SCSL-2004-15-AR 7 2(E), SCSL-2004-16-AR7 2(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 42 (13 Mar. 2004).

⁷³ See The Secretary General, Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, 23, delivered to the Security Council, U.N. Doc. S/2000/ 9 15 (4 Oct. 2000).

to prosecute international crimes and on the other hand, there were State Parties advocating for a broader view on justice, with the allowance of the possibility of granting amnesties, when suitable in certain situations.

The Preamble of the Rome Statute however clearly states that ‘the most serious international crimes must be prosecuted and punished.’⁷⁴

Article 17(1)(b) of the Rome Statute concerning complementarity, provides that States have the primacy to conduct national investigations and prosecutions, and that the ICC is only meant to investigate and prosecute, when a State fails to do so. However, the Article also gives strict conditions to the application of alternative judicial mechanisms.

It is the first time this matter is invoked since the existence of the ICC.

The Amnesty Act of 2000 provided a ‘blanket amnesty’ to all rebels who had combatted against the government since 1986. This led to the surrender of about 15.000 soldiers, although it did not result in the surrender of the LRA leadership. The U.N. Commissioner for Human Rights at that time also insisted on the government that the LRA leadership would not be allowed to be granted amnesty. After referring the LRA to the ICC, the Ugandan government decided to exclude the leadership from the possibility of amnesty. In May 2012, the Ugandan government decided to end the amnesty for fighters of the LRA.⁷⁵ Either way, even if the Amnesty Act would have been applicable, including for the LRA leadership, it would probably not have met the requirements set out in the Rome Statute. Article 17(1)(b) on complementarity states that ‘the case should be investigated by a State’⁷⁶ to be found inadmissible. The word ‘investigation’ clearly supposes some kind of inquiry into the crimes. Blanket amnesty however, does not provide for inquiry and thus would not stand the test of Article 17(1)(b). Additionally, in Article 17(2)(a) is mentioned that a case is admissible before the ICC ‘when the purpose of national proceedings is to shield a person from criminal responsibility.’⁷⁷ Blanket amnesty cannot arguably be seen as holding a person criminal responsible and can consequently be interpreted as shielding the responsible from prosecution. Only on Article 53 there could be discussed that allowing for amnesties would serve the ‘interest of justice’. The South African Truth and Reconciliation Commission (TRC) provided an example where granting amnesties seemed to have contributed to the interest of conflict resolution. In Uganda, this might prove a successful solution, especially given the large amount of child soldiers involved. Nonetheless, the ICC and the Ugandan government should prosecute those responsible for the most serious international crimes to bring justice.

⁷⁴ Rome Statute, supra note 3, pmb1.

⁷⁵ <http://www.enoughproject.org/files/GuluDispatch.pdf>.

⁷⁶ See Rome Statute, supra note 3, art. 17(1)(b); see also Stahn, supra note 74, at 710 (observing that the underlying principle of Article 17 is that amnesties must be accompanied by some inquiry mechanisms into the crime of the putative offender).

⁷⁷ See Rome Statute, supra note 3, art. 17(2)(a); see also Sarkin, supra note 100, at 709 (asserting that in order to meet the high threshold of inadmissibility, a state must satisfy Article 17 (b)'s strict conditions).

c. Peace vs. justice

If the Ugandan government would succeed in having Kony to sign a peace agreement, and if the LRA leadership would return to Uganda, Uganda would be able to submit a challenge of admissibility to the ICC. However, the Special Division of the High Court would then have to charge the same persons for the same conduct as the ones before the ICC and will have to translate the charges into charges under Uganda's Penal Code Act.

If a 'regime of alternative penalties and sanctions', as mentioned in the June 2007 Agreement, would imply lighter sentences, this could be viewed as an intent to shield the person from the ICC and could therefore fail to meet the requirements. Similarly, the use of traditional justice, such as '*mato oput*', could be interpreted as lacking the ability of bringing a person to justice, as required under the Rome Statute. As a result, the Ugandan government should clearly distinguish formal justice proceedings from traditional justice mechanisms.

Thus, before submitting a challenge, the Ugandan government should make the necessary legal adaptations to the initial agreements in line with the requirements of the Rome Statute, conclude the peace negotiations to implement the agreements and bring the LRA leadership to justice.

In case of an admissibility challenge by the Ugandan government, the ICC will be put in a difficult position. By refusing admissibility, the ICC could undermine the peace process. By allowing for admissibility of the case by the Ugandan government, the ICC risks to fail to achieve that justice will be served. The Court will have to balance between its two primary goals of peace and justice.

B. Darfur, Sudan: The first Security Council Referral of a non-State Party to the Rome Statute

Sudan is not a State Party to the Rome Statute. The situation in Darfur represents the first time that the Security Council referred a situation to the ICC, using Chapter VII of the UN Charter. Sudan also represents the first case where a sitting Head of State is being prosecuted by the ICC. Given the fact that Sudan is not a State Party to the Rome Statute, this is a highly controversial issue. It still stays a subject of much debate whether Article 27 of the Rome Statute, after passing of Resolution 1593⁷⁸ by the Security Council which obliges “non-ICC parties to cooperate fully”, can remove the immunity of President Al-Bashir. Sudan has clearly stated that it will not cooperate with the ICC. The African Union has also opposed itself strongly against the decisions of the ICC and has requested its Member States not to cooperate with the ICC to arrest Al-Bashir.

The case is ongoing and all the suspects remain at large.

i. Background and conflict

a. Background

Sudan is a former British colony. Darfur became part of Sudan in 1916. In the 1920's, the British tried to create two confederations in Darfur: one “Arabs”, the other “Black (Zurga)”.⁷⁹ The “Arab” group was not a homogenous racial group. These Arabs did not come as immigrants from the Middle East, but were “indigenous groups that became Arab in the 18th Century.”⁸⁰ However, the colonial period racialized the population and divided it into “Arabs” and “Africans”.⁸¹ Sudan became an independent country in 1956. The population of Darfur is mainly Muslim and the government in Khartoum is mainly led by the Arabs. Since independence, the government of Sudan spent very little money on Darfur, through which it became a very poor region.⁸² Due to decreasing resources of land and water, both sides, the “Arabs” and the “Africans” started to arm themselves.⁸³ Since the 1980's, the country has been marked by armed conflicts, because of ethnicity and the economic situation. The first revolts against the

⁷⁸ <http://www.icc-cpi.int/NR/rdonlyres/85FEBD1A-29F8-4EC4-9566-48EDF55CC587/283244/N0529273.pdf>.

⁷⁹ M. Mamdani, ‘Beware of human rights fundamentalism (Part one)’, Daily Monitor, 1 April 2009, available at <www.monitor.co.ug/artman/publish/opinions/Beware_of_human_rights_fundamentalism_Part_one_82434.shtml>.

⁸⁰ M. Mamdani, ‘Beware of human rights fundamentalism (Part one)’, Daily Monitor, 1 April 2009, available at <www.monitor.co.ug/artman/publish/opinions/Beware_of_human_rights_fundamentalism_Part_one_82434.shtml>.

⁸¹ See A. de Waal, *Famine Th at Kills: Darfur, Sudan* (Oxford University Press, Oxford, 2005) p. xiv.

⁸² “The government refuses to allow Darfur’s people to take development into their own hands. The people of Um Seifa built their own school because the government never provided them with any services. Shortly after it was built the Sudanese army and the Janjaweed burned the school down and killed eight children.” *The Economist*, April 2-8, 2005.

⁸³ http://www.brookings.edu/fp/projects/idp/200511_au_darfur.pdf.

government took place in 1963 and 1983.⁸⁴ A strict Islamic regime came in power in 1989, led by current President Omar Hassan Al-Bashir. In this period, the “Arab” group started to receive support from Colonel Muammar Gaddafi of Libya. The support of Gaddafi led to an increasing feeling of Arab supremacy and many of the leaders of the Arab militia, the ‘Janjaweed’, are believed to have been trained in Libya.⁸⁵ In 2002, the Naivasha Peace Agreement was made to end the 20-years war. The African rebels, fearing that Darfur would become even more marginalized through the Agreement, returned to violence.

b. Conflict

“In 2003, the conflict escalated in Darfur.”⁸⁶ In 2003, two local African rebel groups, the Sudan Liberation Movement and the Justice and Equality Movement (“JEM”) launched an attack against the Sudanese government. After an attack on the El Fasher airport in April 2003, the Government of Sudan mobilized the ‘Janjaweed’ militia, who launched a counter-insurgency throughout the Darfur region against the African armed rebel groups.⁸⁷ The counter-insurgency mainly targeted the African civilian population of Darfur, which consists of the ‘Fur’, ‘Masalit’ and ‘Zaghawa’ tribes. The ‘Janjaweed’ destroyed hundreds of villages and killed thousands of people. At the moment when talks for a peace agreement were being initiated, the Government of Sudan further kept on mobilizing ground and air forces. The Peace Agreement eventually failed in May 2006 and the systematic violence further continued.

President Al-Bashir, who is in control of the Sudanese Armed Forces, the Janjaweed Militia, the Sudanese Police Force, the NISS and the HAC, is allegedly believed to have coordinated the counterinsurgency.

Since the beginning of the violence in 2003, hundreds of thousands of people have already died and millions of people have been displaced from their homes. Following numbers of Amnesty International of 2008, “more than 90.000 people would have died directly in the conflict and another 200.000 as a result of disease and malnutrition and about 2.3 million would have been displaced.”⁸⁸ American field investigators concluded that “the government of Sudan and the Janjaweed militia are guilty of committing genocide against the Fur, the Masalit, Zaghawa and other Black African tribes of Darfur.”⁸⁹

⁸⁴ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 25 January 2005, at 18.

⁸⁵ De Waal, “Counter-Insurgency on the Cheap,” 4.

⁸⁶ Helen Young, Abdalmonium Osman and Rebecca Dale, *Darfurian Livelihoods and Libya: Trade, Migration, and Remittance Flows in Times of Conflict and Crisis*, 41(4) INT’L MIGRATION REV. 826 (2007).

⁸⁷ 44 Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, *supra* note 7, paras. 61–62, 70.

⁸⁸ Amnesty International, *Sudan: Displaced in Daifur: A Generation of Anger* (2008).

⁸⁹ Samuel Totten and Eric Marcusen, *The US Government Daifur Genocide Investigation*, 7 (2)J. GENOCIDE RESEARCH 285 (2005).

The situation in Darfur was seen as the worst humanitarian crisis in the world and the international community condemned the situation as genocide.

On 18 September 2004, The Security Council of the United Nations passed Resolution 1564 to establish a Commission of Inquiry 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 that those responsible are held accountable.”⁹⁰

The Commission found evidence that “the government of Sudan and the government-backed Janjaweed and rebel forces conducted indiscriminate attacks, including killing of civilians, torture, enforced disappearances, destruction of villages, rape and other forms of sexual violence, pillaging and forced displacement throughout Darfur.”⁹¹ However, the Commission of Inquiry concluded that there was no genocide in Darfur.⁹² The Commission also found that the Government of Sudan was unable or unwilling to investigate or prosecute crimes committed in Darfur, seen that “the Government failed to prosecute persons allegedly responsible and that the Sudanese justice system lacked ‘adequate structures, authority, credibility and willingness to effectively prosecute’ crimes committed in Darfur.”⁹³ The Commission noted also in this regard that “the broad powers of the executive undermine the effectiveness and independence of the judiciary, therefore rendering prosecution nearly impossible.”⁹⁴

Consequently, the Commission requested the Security Council to refer the situation to the International Criminal Court.⁹⁵

⁹⁰ SC RES. 1564/2004, 18 Sept. 2004, available at <http://daccessdds.un.org/doc/>.

⁹¹ The Secretary-General, Report of the International Commission of Inquiry on Darfur to the Secretary-General: Pursuant to Security Council resolution 1564 (2004) of 18 September, at 3.

⁹² *Ibid.*

⁹³ The Secretary-General, *supra* note 45, at 455.

⁹⁴ The Secretary-General, *supra* note 45, at 6 & 568. Cf. Kastner, *supra* note 56, at 165.

⁹⁵ The Secretary-General, *supra* note 45, at 5.

ii. Court Case

a. Situational phase

On March 31, 2005, the Security Council invoked Chapter VII of the UN Charter to refer the situation, by passing Resolution 1593⁹⁶ (in accordance with Article 133(b) of the Rome Statute), to the ICC and the Security Council sent a sealed envelope with a list of names of suspected responsables of the crimes committed in Darfur.⁹⁷ The Security Council passed Resolution 1593 based on Resolution 1556 of 30 July 2004, thereby linking its decision to prosecute the crimes in Darfur to the need of maintenance of international peace and security. Two African States, Tanzania and Benin, voted in favour of the Resolution, while Algeria, Brazil, China and the US abstained.

After having received the referral to open an investigation into the situation in Darfur from the Security Council, the Prosecutor started with his investigation, based on Article 53(1). Relying on the information of the International Commission of Inquiry the Prosecutor concluded that “there is a significant amount of credible information disclosing the commission of grave crimes within the jurisdiction of the Court having taken place in Darfur.”⁹⁸

After assessing that an investigation would serve the interests of justice based on the fact that the situation had been referred by the Security Council as a threat of international peace, the Prosecutor decided on 1 June 2005 to open a full investigation. On 7 June 2005, several days after the Prosecutor’s decision to open an investigation, Sudan created the Special Criminal Court on the Events in Darfur.⁹⁹ It should be noted that the Sudanese government did not investigate or prosecute any crimes committed in Darfur for two years long.

Followingly, as required in Article 53(2)(b) of the Rome Statute, the Prosecutor evaluated if under Article 17 the case is admissible.

Article 17(1) (a) of the Rome Statute, proscribes for the complementarity principle that ‘a case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.’¹⁰⁰

In order to be able to challenge the admissibility of the case before the ICC under Article 17(2) of the Rome Statute, the case before the Sudanese Court must apply to the same person/same conduct. In 2004, Sudan established the National Commission of Inquiry to investigate crimes

⁹⁶ S.C. Res. 1593, 1, U.N. Doc. S/RES/1593 (31 Mar. 2005).

⁹⁷ See Report of the International Commission, supra n. 198 at paras 525-9.

⁹⁸ Report of the Prosecutor, supra n. 202 at 2.

⁹⁹ Human Rights Watch, Lack of Conviction: The Special Criminal Court on the Events in Darfur, Briefing Paper No. 1, 8 June 2006, <www.hrw.org/node/77885>, visited on 20 February 2013; and Report of the African Union High-Level Panel on Darfur (AUPD), supra note 11, paras. 215 et seq., which, expressing a lack of confidence in the independence of the Sudanese legal system, went on to recommend, inter alia, a hybrid court system.

¹⁰⁰ Rome Statute, Article 17(1)(a).

committed in Darfur and in 2005 the Government established the Special Court for Darfur to prosecute crimes committed in Darfur. The Special Court put six low-level perpetrators on trial. In this matter the Prosecutor concluded that “the work of a Special Criminal Court on the Events in Darfur does not suggest that cases likely to be prosecuted before the International Criminal Court [pursuant to the Security Council referral of the situation in Darfur] would be inadmissible in terms of Article 53(2)(b) of the Statute”.¹⁰¹ As it is defined in Article 53(2), the legal test of admissibility concerns the specific cases selected for prosecution, not the State of the Sudanese judicial system.

The Special Court for Darfur was subsequently divided into three different courts for each of the three regions: North, West and South Darfur. By 2007, the Sudanese courts had convicted two Sudanese military officers for the murder of a Darfur local and the Special Court had only tried a small number of perpetrators. However, none of the suspects were charged with crimes of the same gravity as the crimes charged by the ICC. According to government officials, the new special prosecutor for Darfur investigated the alleged crimes of three men, among them, Kushayb, one of the suspects named in the ICC arrest warrant. The government officials also claimed that “Kushayb had been arrested and taken in custody.”¹⁰² But, the crimes where Kushayb was charged of were not the same crimes as the crimes where Kushayb was prosecuted for before the ICC. Another suspect of the ICC is Ahmad Harun, Sudanese Minister of State for ‘Humanitarian’ Affairs. There is evidence that Harun conspired with the Janjaweed at the time Harun was still minister of Internal Affairs. Not only did the Government not prosecute Harun, he even got promoted to the higher-level government position of Minister of State for Humanitarian Affairs. Therefore, the Office of the Prosecutor decided that “the case against Harun and Kushayb was admissible before the ICC because the government had not investigated or prosecuted either suspect in relation to the charges put forth by the Prosecutor”.¹⁰³ As the government of Sudan controls the judiciary system, it is unlikely that the Government will carry out independent and impartial proceedings. In his report to the U.N. Security Council, the Prosecutor stated that “A Government’s complicity in the alleged crimes is often a factor in a State’s unwillingness to investigate or prosecute a case.”¹⁰⁴

Article 17(3) adds following specification to inability: ‘due to a total collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence

¹⁰¹ Address by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, to the United Nations Security Council, 13 December 2005 at 4.

¹⁰² Human Rights Watch et al., *supra* note 59, at 15.

¹⁰³ Kastner, *supra* note 86, at 167.

¹⁰⁴ Report of the ICC Prosecutor on Darfur to the U.N. Security Council, Highlights and Analysis, Citizens for Global Solutions, p. 2, www.globalsolutions.org.

and testimony or otherwise unable carry out its proceedings.”¹⁰⁵ Following Chibueze “Inability generally results from the breakdown or unavailability of legal enforcement institutions.”¹⁰⁶ When the Office of the Prosecutor evaluated the inability of the State of Sudan following factors were taken into consideration: “lack of necessary personnel, judges, investigators, prosecutors, lack of judicial infrastructure, lack of substantive or procedural penal legislation rendering system ‘unavailable’, lack of access rendering system ‘unavailable’, obstruction by uncontrolled elements rendering system ‘unavailable’, amnesties, immunities rendering system ‘unavailable’.”¹⁰⁷ Antonio Cassese, the former head of the Darfur Commission stated that “Sudan’s Special Darfur Courts have no credibility and that there is no way for proper trials to be conducted in Sudan.”¹⁰⁸

Consistent with this finding, the Office of the Prosecutor concluded to succeed with its investigation and prosecution given that “Sudan was both unwilling and unable to prosecute the crimes”.¹⁰⁹

There is discussion whether the interpretation of the principle of admissibility, and most specifically the principle of complementarity, is treated differently by the Prosecutor when a case has been referred by a State or by the Security Council. Some argue that the case of Sudan has shown that the Prosecutor accepted almost any argument of unwillingness or inability in order to take jurisdiction over the case and rejected almost any argument of ableness or willingness to prevent losing jurisdiction over the case. This consideration is also consistent with how Article 18 is explained in the Rome Statute. In Article 18(1) it is described that: ‘admissibility only applies to cases referred to the Court by State parties and cases initiated by the Prosecutor.’¹¹⁰ This means that the admissibility principle would not apply to cases referred by the Security Council. However, the Darfur Commission concluded that “a referral by the Security Council is normally based on the assumption that the territorial State is not administering justice because it is unwilling or unable to do so. Therefore, the principle of complementarity will not usually be invoked... with regard to that State.”¹¹¹ However, this does not mean that the principle of complementarity is not applicable anymore.

Still, the issue of admissibility seemed to get more consideration than in the self-referral cases of Uganda, DRC and CAR, suggesting that rather self-referrals by States need not to be evaluated equally thorough on admissibility.

¹⁰⁵ Rome Statute, supra note 4, art. 17(3).

¹⁰⁶ Chibueze, supra note 1, at 195.

¹⁰⁷ I.C.C. Office of the Prosecutor, supra note 20, at 50.

¹⁰⁸ Hewett, supra note 32, at 279.

¹⁰⁹ The Secretary-General, supra note 45, at 5.

¹¹⁰ Rome Statute, Article 18(1) and Article 13(a).

¹¹¹ The Secretary-General, supra note 45, at 608.

b. Case phase

*The Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman*¹¹²

On 2 May 2007, the Pre-Trial Chamber I issued two arrest warrants. One against current Sudanese Minister of State for Humanitarian Affairs, Mr. Ahmad Muhammad Harun, the other against the leader of the militia Janjaweed, Mr. Ali Abd-Al-Rahman, also known as Ali Kushayb. The Pre-Trial Chamber found reasonable grounds to believe that Harun and Kushayb committed crimes against humanity and war crimes.

The suspects remain are still at large.¹¹³ Since the ICC has to rely on cooperation of State Parties to the Rome Statute, it has not been possible so far to bring the suspects before the Court. Therefore, acting under Article 87 of the Rome Statute, the Pre-Trial Chamber decided to “send a finding of non-cooperation to the UN Security Council in order to pass it to the Assembly of States Parties.”¹¹⁴

*The Prosecutor v. Omar Hassan Ahmad Al Bashir*¹¹⁵

On 4 March 2009, the Pre-Trial Chamber issued a warrant for arrest against President Al-Bashir and declared that “Under Article 25(3) of the Rome Statute, he has been accused of being responsible for crimes against humanity and war crimes, committed starting from March 2003 in Darfur against members of the Fur, Massalit and Zaghawa.”¹¹⁶ “Due to lack of evidence for the intent of genocide, the crime of genocide was not included in the accusations.”¹¹⁷ The judges of the Pre-Trial Chamber found 2-1 that the prosecution failed to demonstrate that the government of Sudan acted with the intent to destroy the Fur, Masalit and Zaghawa groups. The two judges argued that nationality, race and/or religion could not have been the ground to commit the crimes given that “all three groups have Sudanese nationality, similar racial features and a shared Muslim origin.”¹¹⁸ However, one judge, Judge Anita Usacka, did not agree with this opinion for several reasons. She interpreted the counter-insurgency as an attack on a single ethnic group of the ‘African tribes’, the Fur, Masalit and Zaghawa. Furthermore, she used a lower evidentiary

¹¹² http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/Pages/situation%20icc-0205.aspx.

¹¹³ Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman, Pre-Trial Chamber I, Warrant of Arrest for Ahmad Harun, 27 April 2007, ICC-02/05-01/07-2, and Warrant of Arrest for Ali Kushayb, 27 April 2007, ICC-02/05-01/07-3.

¹¹⁴ Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman, Office of the Prosecutor, Public Redacted Version of “Prosecution request for a finding on the non-cooperation of the Government of the Sudan in the case of The Prosecutor v Ahmad Harun and Ali Kushayb, pursuant to Article 87 of the Rome Statute”, 19 April 2010, ICC-02/05-01/07-48-Red.

¹¹⁵ *Ibid.*, at 103.

¹¹⁶ Prosecutor v. Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC-02/05-01/09-1.

¹¹⁷ Prosecutor v. Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC-02/05-01/09-3, para. 158.

¹¹⁸ ICC-02/05-01/09, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, *supra* note 7, para. 204(v). But see Ušacka dissent, *supra* note 84, who was satisfied that there were reasonable grounds to issue an arrest warrant on the basis of the existence of reasonable grounds to believe that Al Bashir committed the crime of genocide.

treshold, seen that different tresholds must be met at each stage of the trial, becoming gradually higher. She argued that at the arrest warrant stage, the Pre-Trial Chamber can be 'satisfied with reasonable grounds to believe' that a person committed a crime within the jurisdiction of the Court.¹¹⁹ However, it remains difficult to prove 'an intent to destroy a group as a whole'.

So, initially, the Pre-Trial Chamber did not accuse President Al-Bashir of crimes of genocide. However, the Appeals Chamber afterwards decided that this decision was based on an erroneous standard of proof, and therefore, after review of the case, the Pre-Trial Chamber I argued in July 2010, that President Al-Bashir was to be accused as an 'indirect perpetrator'¹²⁰ of acts of genocide. Consequently, on 12 July 2010, the Pre-Trial Chamber I issued a second warrant of arrest against Al Bashir, considering that "there were reasonable grounds to believe that he has been responsible for three counts of genocide committed against the Fur, Masalit and Zaghawa ethnic groups."¹²¹

*The Prosecutor v. Bahr Idriss Abu Garda*¹²²

On 7 May 2009, the Pre-Trial Chamber I issued a summons to appear against alleged rebel leader Bahr Idriss Abu Garda under Article 25(3)(a) of the Statute for the commitment of war crimes in Darfur on 29 September 2007.¹²³ His confirmation hearing took place before the Pre-Trial Chamber from 19 to 31 October 2009¹²⁴ Due to lack of evidence, the Pre-Trial Chamber I declined the charges against Mr. Abu Garda on 8 February 2010.¹²⁵ The decision was based on 'the sufficient gravity treshold of admissibility under Article 17(1)(d) of the Statute, the standard of confirmation of charges under Article 61(7) of the Statute, the application of the in dubio pro reo principle, the impossibility to use as evidence a suspect's unsworn oral statement under Article 67(1) of the Statute and the understanding of objective and subjective requirements of the modes of liability of co-perpetration and indirect perpetration under Article 25(3)(a).

¹¹⁹ Rome Statute, Article 58(l)(a).

¹²⁰ Note that al-Bashir is described as an 'indirect perpetrator' in all the criminal charges brought against him, a legal concept that has not been much tested in international criminal law, see J. Jessberger and J. Geneuss, 'On the Application of a Theory of Indirect Perpetration in Al Bashir - German Doctrine at The Hague?', S Journal of International Criminal Justice (2008) pp. 853-869. Of course, it could be argued that in an authoritarian country the head of State is ultimately involved in all government policies of any significance.

¹²¹ Prosecutor v. Bahr Idriss Abu Garda, Pre-Trial Chamber I, Summons to Appear for Bahr Idriss Abu Garda, 7 May 2009, ICC-02/05-02/09-2.

¹²² The Prosecutor v. Omar Hassan Ahmad Al Bashir, Second Decision on the Prosecution's Application for a Warrant of Arrest, No. ICC-02/05-01/09 (12 July 2010), <www.icc-cpi.int/iccdocs/doc/doc907i42.pdf>.

¹²³ Ibid., at 103.

¹²⁴ Prosecutor v. Bahr Idriss Abu Garda, Pre-Trial Chamber I, Summons to Appear for Bahr Idriss Abu Garda, 7 May 2009, ICC-02/05-02/09-2.

¹²⁵ Prosecutor v. Bahr Idriss Abu Garda, Pre-Trial Chamber I, Decision Amending the Schedule for the Confirmation Hearing, 16 October 2009, ICC-02/05-02/09-182 and ICC-02/05-02/09-182-Anx1.

¹²⁶ Prosecutor v. Bahr Idriss Abu Garda, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 8 February 2010, ICC-02/05-02/09-243-Red, para. 236.

iii. Discussion: *Head of State Immunity, Article 16 Deferral and the political consequences of the indictment of President Al-Bashir*

a. *Head of State immunity*

We will now discuss the indictment of Head of State of Sudan, Omar al-Bashir and the problem of Head of State immunity.

On 31 March 2005, the Security Council referred the situation in Darfur to the ICC through means of Resolution 1593. The Pre-Trial Chamber of the ICC argues that Sudan is bound to the ICC through Resolution 1593 and Sudan's obligations under Chapter VII of the UN Charter. However, the Pre-Trial Chamber did not specify how Resolution 1593 binds Sudan to the Rome Statute. In Resolution 1593 it had been proscribed that "the Government of Sudan and all other parties to the conflict in Darfur, *shall cooperate fully* with and provide any necessary assistance to the Court and the Prosecutor pursuant to his resolution". Under Articles 24(1), 25 and 103 of Chapter VII of the UN Charter, it is mentioned that Resolutions are binding upon all Member States. Chapter VII authority also formed the initial legal basis for the Pre-Trial Chamber to claim jurisdiction. Two years later, the Pre-Trial Chamber, now – with two of the three judges changed in the meantime – made only reference to a single line of the Security Council Resolution and argued in 22 paragraphs that it had jurisdiction over Al-Bashir through a separate rule of international law.

President Al-Bashir claims that his immunity as a Head of State cannot be removed by the ICC, whereas the ICC claims that there is a rule of customary international law that lifts his immunity and that the Security Council's Chapter VII waives Bashir's immunity as well.

We will subsequently analyze the provisions of Head of State Immunity under customary international law, the way Sudan is bound to the Rome Statute and whether the exception of the rule under customary law can waive Bashir's immunity.

Head of State immunity is part of customary international law and is based on the principles of state sovereignty and sovereign equality. The UN Charter is also founded on these principles.

In customary international law two types of immunity must be distinguished: immunity *ratione personae* or personal immunity and immunity *ratione materiae* or functional immunity. Government officials execute official functions and therefore enjoy functional immunity for the fulfillment of their mandate. Nonetheless, government officials can be prosecuted when they act beyond their mandate, for example when they are involved in international crimes. Personal immunity is in that respect broader than functional immunity as it protects all the acts of a person during the entire period of his/her mandate. It is also intended to protect senior government officials from

criminal prosecutions during their term in service. Head of State immunity falls under the category of personal immunity. Whether this personal immunity should be considered as a *jus cogens* rule is debatable, but it surely forms part of customary international law. The immunity senior state officials enjoy domestically depends also on their respective Constitution. Following the Interim Constitution of Sudan of 2005, the President and the Vice-President have immunity from all legal proceedings unless three-fourths of the National Legislature votes to charge them before the Sudanese Constitutional Court. Immunities can at any time be waived by the Government. They belong to the State, not to the individual. The personal immunity under international customary law applies “when the Head of State is traveling, whether for government business or private purposes.”¹²⁶ Once the Head of State is no longer in office, he/she loses his/her personal immunity as a Head of State, but not necessary his/her functional immunity.

There are three ways how Resolution 1593 might bind Sudan to the Rome Statute. First of all, if the Security Council would be able to delegate its authority to the ICC, the ICC could force Sudan to co-operate. The second way would be that a Chapter VII resolution would bind Sudan to Article 27(2) of the Rome Statute. Finally, the Security Council could directly lift the immunity of Al-Bashir. The last two possibilities depend on Article 103 of the UN Charter. However, it is important to note that the ICC is not part of the UN. Therefore, neither Article 103, neither Chapter VII of the UN Charter are able to extend the jurisdiction of the ICC.

The first option of delegation would imply that “the ICC is competent to receive Chapter VII authority.”¹²⁷ To be competent to receive this authority, the ICC must belong to one of the following categories: UN Member States, ‘regional arrangements’¹²⁸ or UN organs. The ICC is not a Member State of the UN. It is neither a regional arrangement of the UN. And even if it would fall under this category, than “the only authority that could be mandated to it would be military enforcement powers.”¹²⁹ The last possibility of receiving Chapter VII authority from the Security Council would be as a UN organ. But, the ICC is nor a principal body of the UN, nor is it a subsidiary organ of the UN. The Treaty of the Rome Statute has been negotiated apart from the UN. In the preamble and Article 2 of the Treaty of the Rome Statute, the UN and the ICC

¹²⁶ The ICJ described the scope of the immunity as follows: “ A Head of State enjoys in particular ‘ full immunity from criminal jurisdiction and inviolability’ which protects him or her ‘ against any act of authority of another State which would hinder him or her in the performance of his or her duties’ .” See *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)*, Judgment, ICJ Reports 2008, 177, 236– 237, para.170 (quoting from *ArrestWarrant*, above n.17).

¹²⁷ See Danesh Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers* (2000), 247 (“ [T]he competence of the Council to delegate Chapter VII powers to an entity does not in itself mean that the entity has the institutional competence to be able to exercise those powers”), and 252– 253 (“ The delegation of Chapter VII powers to a regional arrangement gives the arrangement— and thus its organs— the right to exercise those powers but not in disregard of its constituent treaty”).

¹²⁸ Article 51 of the UN Charter, for example NATO is a regional arrangement.

¹²⁹ Article 53(1) of the UN Charter.

agreed that the Court is independent from the UN system.¹³⁰ This differentiates the ICC also from the ICTY and the ICTR which were established by the Security Council and therefore were able to exercise Chapter VII authority.

The second argument argues that Sudan, as a Member of the UN, which has given its consent to Article 103 of the UN Charter, must comply with the Security Council. Article 103 of the UN Charter states that “in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”¹³¹ This means that the UN Charter is given primacy over international treaties, but not over customary international law rules such as Head of State immunity. Therefore, it could be argued that the immunity under customary international law or immunities under national legislation could exempt Al-Bashir from prosecution. In this context, it has also been stated in the Declaration on Friendly Relations of the General Assembly that “only obligations under international agreements valid under the generally recognised principles and rules of international law, not obligations under the generally recognised principles and rules of international law” were superseded by the UN Charter.¹³² This has also been confirmed through several declarations of the General Assembly¹³³ and by the International Court of Justice (ICJ)¹³⁴ and more specifically, the ICJ’s decisions in the Lockerbie case.¹³⁵ In the Lockerbie case, the ICJ argued that “sanctions against Libya for its failure to surrender two suspects in the 1988 Lockerbie bombing of Pan Am Flight 103, violated the treaties and rules of international law that ought to have governed the Security Council and International Court of Justice.”¹³⁶ Therefore it is not allowed to make a Resolution under Article 103 that prevails over legal norms. Furthermore, the UN is a Treaty-based organization, and therefore bound by the Vienna Convention of the Law of Treaties. In Article 34 of the Law of Treaties is stated that “*pacta tertiis nec nocent nec prosunt*”¹³⁷, which means that treaties cannot

¹³⁰ Negotiated Relationship Between the International Criminal Court and the United Nations, ICC— UN, ICC-ASP/ 3/ Res.1 (4 October 2004).

¹³¹ <http://www.un.org/en/documents/charter/chapter16.shtml>.

¹³² Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, GA Res 2625 (XXV), UN Doc. A/ RES/ 25/ 2625, 121, 124 (24 October 1970).

¹³³ See the Declaration on the Strengthening of International Security, GA Res 2734 (XXV), UN Doc A/ RES/ 25/ 2734 (16 December 1970), para.3; the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, GA Res 42/ 22, UN Doc A/ RES/ 42/ 22 (18 November 1987) para.4; and the Preamble of Respect for the Purposes and Principles Contained in the Charter of the United Nations to Achieve International Cooperation in Promoting and Encouraging Respect for Human Rights and for Fundamental Freedoms and in Solving International Problems of a Humanitarian Character, GA Res 55/ 101, UN Doc A/ RES/ 55/ 101 (2 March 2001).

¹³⁴ Interpretation of the Agreement of 25 March 1951 Between the World Health Organization and Egypt, Advisory Opinion, ICJ Reports 1980, 73, 89– 90, para.37 (all international organizations are bound by the rules of general international law). See also Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. UK), Provisional Measures, [1992] ICJ Reports 1992, 3, 15, para.39 (“ in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention”).

¹³⁵ See Rob McLaughlin, above n.50, 402 (the Lockerbie decisions “ generally assert that the Article 103 trump is exercisable over treaty law”); Christian Tomuschat, The Lockerbie Case Before the International Court of Justice, 48 Rev Int’l Comm Jurists (1992), 38, 43–44; and Bernhard Graefrath, above n.1, 198–199 (criticizing the Court’s initial Lockerbie decisions for their inadequate analysis of art. 103 as it relates to non-treaty matters).

¹³⁶ Bernard Graefrath, Leave to the Court What belongs to the Court: The Libyan Case, 4 EJIL (1993), 184.

¹³⁷ <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>.

confer rights to and impose obligations on third parties and Article 35 further elaborates “that obligations only arise for third party states if those states expressly accept the obligation.”¹³⁸ Although the Security Council insists on Sudan’s cooperation, this last principle is consistent with the referral notes of the Security Council Resolution 1593 of March 2005 noting that “States not Party to the Rome Statute have no obligation under the Statute.”¹³⁹ In other words, it is not possible to bind non-members to a Treaty without their consent. Binding the State of Sudan to the jurisdiction of the ICC by Resolution 1593 can in this way be interpreted as a violation of customary international law. In this respect, by waiving of the immunity of Al-Bashir, the Security Council would be acting ‘*ultra vires*’ under international customary law rules.

Only an exception to the Head of State immunity of customary international law would be able to lift this immunity. This is the claim that the Pre-Trial Chamber makes and follows the argument of Paola Gaeta, which suggests that “the ICC, lends its jurisdiction to the exception of customary international law that Heads of State do not enjoy immunity for international crimes before international courts.”¹⁴⁰ But, this exception of customary international law can only come into existence when there is state practice and *opinio juris*, the ‘belief in the validity’ of the rule. Contrary to the position of the ICC, that claims that “customary international law already has changed in this regard”¹⁴¹, there is little evidence of state practice. There are four previous examples where the Pre-Trial Chamber relies on: Laurent Gbagbo, Muammar Gaddafi, Charles Taylor and Slobodan Milosevic. Laurent Gbagbo’s immunities had been ‘waived by Gbagbo’s Government’¹⁴² and ‘at the time of his arrest’¹⁴³ he was no longer President of the Ivory Coast. Muammar Gaddafi was in the same dubious, unsettled legal position as that of Al-Bashir. Charles Taylor was indeed a sitting Head of State at the time of his indictment,¹⁴⁴ but at the time of his arrest and transfer to the SCSL, he had been already nearly three years out of office and thus lost his personal immunities.¹⁴⁵ And finally, Slobodan Milosevic, at the time of his indictment, was still

¹³⁸ <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>.

¹³⁹ <http://www.un.org/press/en/2005/sc8351.doc.htm>.

¹⁴⁰ Paola Gaeta argued that the ICC only had jurisdiction because, as a rule of customary international law, head of State immunity did not protect perpetrators of international crimes before international courts. See Paola Gaeta, Does President Al Bashir Enjoy Immunity From Arrest?, 7 J. Int’l Criminal Justice (2009), 315.

¹⁴¹ To be clear, the ICC has not adopted the position that it is creating a new exception and therefore changing customary international law. Rather, the PTC has been unambiguous about its belief that customary international law has already changed and that the necessary precedents already exist. To adapt Wolfke’s phrasing, the PTC is trying to “justify [its] conduct as allegedly permissible exceptions of a valid general customary rule.” See Karol Wolfke, Custom in Present International Law (1993), 65–66.

¹⁴² That self-referral was for any crimes that had been committed during an armed rebellion against Gbagbo’s rule that started on 19 September 2002. See Déclaration de reconnaissance de la Compétence de la Cour Pénale Internationale, Letter from Bamba Mamadou, Minister of State (CIV) to ICC (18 April 2003) (www.icc-cpi.int).

¹⁴³ Gbagbo surrendered his claim to winning the 2010 Ivory Coast presidential election on 11 April 2011. The ICC was not authorised to open its investigation into post-election violence until 3 October 2011. Situation in the Cote d’Ivoire, ICC-02/11-14, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire (3 October 2011). A warrant for Gbagbo’s arrest was issued on 23 November 2011, nearly 7 months after he had lost any claim to immunity: Prosecutor v. Laurent Koudou Gbagbo, ICC-02/11, Pre-Trial Chamber III, Warrant of Arrest for Laurent Koudou Gbagbo (23 November 2011); and Public redacted version of Decision on the Prosecutor’s Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo (30 November 2011).

¹⁴⁴ A sealed indictment was issued in March 2003. Prosecutor v. Charles Ghankay Taylor, SCSL-2003-01-I, Indictment (7 March 2003) (on file with author). Taylor resigned as President of Liberia on 11 August 2003, and was not arrested until 29 March 2006.

¹⁴⁵ As noted by the court. See Prosecutor v. Charles Ghankay Taylor, SCSL-2003-01-I, Appeals Chamber, Decision on Immunity from Jurisdiction (31 May 2004), para. 59 (Taylor Immunity Decision).

President of the Federal Republic of Yugoslavia, but later on resigned¹⁴⁶ and was arrested for domestic corruption and abuse of power charges at the time he was brought to trial before the ICTR.¹⁴⁷ So, none of the above examples can serve as established state practice for the exception of Head of State immunity for international crimes. The PTC further relies on historic statutes. In the 1919 Commission Report of the Preliminary Peace Conference after World War I, it is stated that “immunities should not apply for international crimes”. However, States failed to implement the proposal of the Commission. This Report led to Article 227 of the Treaty of Versailles, which stated “the Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties.” Also here, this concerns a former Head of State. Furthermore, instead of obliging the Netherlands to transfer the former Emperor, the Allies could only ‘request’ his transfer.

We can conclude that there is no individual who ever lost his or her personal immunity and the Tokyo and Nuremberg Charters only removed functional immunities, although there are examples of prosecutions of Heads of State by international criminal tribunals.¹⁴⁸

Therefore, the indictment of Al-Bashir is an unprecedented situation.

b. Article 16 Deferral

Sudan claimed that issuing a warrant of arrest for President Al-Bashir would undermine the Comprehensive Peace Agreement (CPA). The African Union as well defends this position. It should be mentioned here that the warrant of arrest followed after a “memorandum of understanding between the Justice and Equality Movement and the Sudanese government in the Qatari capital, Doha, had been signed.”¹⁴⁹

Therefore, the African Union requested a deferral of the case before the ICC, relying on Article 16 of the Rome Statute, in the importance to bring peace in the region.

¹⁴⁶ Milošević lost to Vojislav Koštunica. While his term was not set to end until June 2001, he resigned on 7 October 2000 after public protests at alleged manipulation of electoral results by his allies.

¹⁴⁷ While Serbia transferred Milošević to the ICTY in violation of a domestic court order (see Konstantinos D. Magliveras, *The Interplay Between the Transfer of Slobodan Milošević to the ICTY and Yugoslav International Law*, 13 *EJIL* (2002), 661, 663–668), this should not be interpreted as a waiver of immunity. For one, Milošević had no immunity to waive at the time, since he had ceased to be President of Serbia in 1997, and President of the FRY in 2000. Second, Serbia, as a provincial entity within the federal State of Yugoslavia, was not competent to waive any immunity Milošević might have had as President of the FRY.

¹⁴⁸ The justiciability of certain international prosecutions of incumbent heads of state/government was confirmed, by implication, by the ICJ: Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), Judgment, ICJ Reports 2002 at para. 61. However, the basis for this reasoning remains relatively opaque, and has not always been confronted with the clarity it deserves: see, for example, Prosecutor v Charles Ghankay Taylor, Decision on Immunity from Jurisdiction, SCSL Appeals Chamber, 31 May 2004. See generally Cryer et al., *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2007) at 435-45; and Koller, ‘Immunities of Foreign Ministers: paragraph 61 of the Yerodia Judgment as it pertains to the Security Council and the International Criminal Court’, (2004) 20 *American University International Law Review* 7, at 30-42.

¹⁴⁹ See Agreement of Good Will and Confidence Building, signed in Doha on 17 February 2009 between the government of Sudan and the Justice and Equality Movement.

So far, the Security Council has not decided on deferring the case, although it passed Resolution 1828 on 31 July 2008, which mentioned the possibility of a deferral.

The Preamble of the Resolution declared that: “Taking note of the African Union (AU) communiqué of the 142nd Peace and Security Council Meeting dated 21 July, having in mind concerns raised by members of the Council regarding potential developments subsequent to the application by the Prosecutor of the International Criminal Court of 14 July 2008, and taking note of their intention to consider matters further...”. In this Resolution, a suspension of the case against Bashir and other Sudanese government officials and Janjaweed tribal leaders for one year was suggested, in the belief that this deferral could improve chances for peace and could guarantee safe deployment of UNAMID workers in Darfur. The United States abstained, for the reasons that it preferred a hybrid tribunal to be established in Africa and because of the fact that it remains opposed to jurisdiction of the ICC over nationals of non-State Parties to the Rome Statute. But, instead of voting against the Resolution, the United States decided to abstain given “the need for the international community to work together in order to end the climate of impunity in Sudan.”¹⁵⁰

During the Rome conference to establish the Rome Statute, the power of the Security Council to refer situations had been intensely debated. Some States saw this Security Council referral as a breach of state sovereignty. The ICC is a judicial organization and the Security Council is a political body, and because of the importance of the independence of the ICC, there should be no involvement of the Security Council in it. India was one of the main proponents of this point of view. Nonetheless, finally it had been decided to lend the Security Council the possibility to refer cases under Chapter VII of the UN Charter and Article 13(b), in order to be able to guard over international peace. As it was originally foreseen, there would either be the possibility to refer a case through the Security Council or on request of a State Party to the Rome Statute, whereby the Security Council still had to give its consent. Eventually, because many Member States requested for it, there had been chosen for a broader referral mechanism with inclusion of the possibility for the Prosecutor to initiate an investigation ‘proprio motu’. During the negotiations, eventually a compromise had been made by introducing Article 16. This would then still allow the Security Council to suspend investigations or prosecutions, before they would be initiated on request of State Parties or by the Prosecutor, if this would benefit international peace and security. Article 16 was thus foreseen as a control mechanism for the Security Council. However, Article 16 was not intended to defer Security Council referrals. This would also be unlogic to create Article 16 as a possibility for the Security Council to defer a situation that it had

¹⁵⁰ US Mission to the UN Press Release, Explanation of Vote by Ambassador Anne WV.Patterson, Acting US Representative to the United Nations, on the Sudan Accountability Resolution, in the Security Council, 31 March 2005.

previously referred. David Scheffer, who led the delegation of the United States during the Rome conference, also argues that “if the situation with Darfur, where there is a request to defer a Security Council referral, Article 16 would never have been approved by the vast majority of governments attending the U.N. talks on the Rome Statute for it would have been viewed as creating rights for the Security Council far beyond the original intent of the compromise.”¹⁵¹ Following Scheffer, there had been no discussions on how to handle a deferral either, for the simple reason that “the original intent behind Article 16 was for the Security Council to act preemptively to delay the application of international justice for atrocity crimes in a particular situation in order to focus exclusively on performing the Council’s mandated responsibilities for international peace and security objectives.”¹⁵² In other words, the intent of the Article 16 was to block investigations before they even got started, not when already ongoing, and therefore Scheffer argues that this was the reason why it was not necessary to discuss about the consequences of procedures of a deferral of a case before the ICC, since the case would not have started anyway.

c. Non-cooperation

Although under Articles 86 and 89, ICC Parties to the Rome Statute are obliged to cooperate to execute an arrest warrant, Article 98(1) also states that “the ICC is precluded from requiring such assistance where it would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person.”

The Sudanese minister of justice (Abdel Basit Sabdarat) said that Sudan would not cooperate with the Court’s “political decision”.¹⁵³ Al-Bashir himself declared that “he would not kneel to colonialism”¹⁵⁴ and that Sudan would be ready for any battle “against this new colonialisation.”¹⁵⁵

The Arab League has opposed itself to the indictment of President Al-Bashir announcing on the Summit of 2009: “we stress our solidarity with Sudan and our rejection of the ICC decision.” We can understand this kind of position when we put it in the perspective of the fact that the most African and Arab heads of State are (potential) suspects in the eyes of the ICC.

In the Security Council some members are in favour of the arrest of Al-Bashir, while other members are opposed to the indictment of Al-Bashir by the ICC. The United States, despite its

¹⁵¹ David Scheffer, *The Security Council’s Struggle over Darfur and International Justice*, *The Jurist* (20 August, 2008).

¹⁵² David Scheffer, *The Security Council’s Struggle over Darfur and International Justice*, *The Jurist* (20 August, 2008).

¹⁵³ Abdel Basit Sabdarat told Al-Jazeera “[w]e will not deal with this court ... It has no jurisdiction, it is a political decision.” See Al Jazeera, ‘World reacts to Bashir warrant’, 5 March 2009, available at <english.aljazeera.net/news/africa/2009/03/2009341438156231.html>.

¹⁵⁴ See BBC News, ‘Bashir vows to defy Darfur charge’, 5 March 2009, available at <news.bbc.co.uk/2/hi/africa/7925445.stm>, noting that following the warrant Al Bashir told a rally in the city’s Martyrs Square, Sudan: “We are telling the colonialists we are not succumbing; we are not submitting; we will not kneel; we are targeted because we refuse to submit.”

¹⁵⁵ See ‘Bashir Defies War Crime Arrest Order’. *New York Times*, 5 March 2009, at <www.nytimes.com/2009/03/06/world/africa/06sudan.html>.

opposition to the Court in the past, supported the arrest of Al-Bashir declaring that “the US should work with our US partners in Africa and Europe to ensure indicted criminals are arrested and turned over to the ICC if they travel outside of Sudan....”¹⁵⁶ This position is not surprising given that US-Sudan relations are poor. On the other hand, China, who has vast economic interests in Sudan opposed itself to the arrest warrant against Al-Bashir and abstained from Resolutions 1556, 1591, 1593 and 1706. China has even opposed more clearly by welcoming Al-Bashir with a full State ceremony.

But most significant has been the opposition of the African Union. It is claimed by the AU that, by rejecting the immunity of state officials, European States undermine the sovereign equality principle of customary international law, thereby disrespecting sovereignty and territorial integrity of States. Therefore, the African Union decided that “Sudan had no obligation to surrender Al-Bashir to the ICC, since it had not ratified the Rome Statute.”¹⁵⁷ This position can be interpreted as being consistent with the principle of ‘*pacta tertiis nec nocent nec prosunt*’ of the Vienna Convention on the Law of Treaties.

In 2009, the African Union demanded from its Member States not to cooperate with the ICC as a result of the denial of deferral, which the African Union had requested to the Security Council. However, this decision had not been supported by all African States, like for example South Africa and Botswana. There are also some AU Member States (Burkina Faso, Comoros, Kenya, Senegal, South Africa and Uganda) that have implemented the Rome Statute in their national law and are thus obliged to arrest President Al-Bashir.

Chad was the first African State which Al-Bashir visited in July 2010. Earlier that year, in January 2010, Chad and Sudan, had made an agreement to stop supporting rebels fighting each State. Therefore, Chad did not have any intent to arrest Al-Bashir.

In August 2010, Al-Bashir visited Kenya, invited for the celebration of Kenya’s new Constitution. As a consequence, the ICC informed the Security Council and the Assembly of States Parties. As Al-Bashir planned to visit Kenya again in October 2010, the ICC urged Kenya to report an issue that would stand in the way of arresting him. Eventually, the Summit was moved to Ethiopia, a non-State Party to the Rome Statute, which prevented Al-Bashir from being arrested. The ICC decided to refer the non-compliance of Kenya to cooperate to the Security Council under Article 87(8) of the Rome Statute. The Assembly of State Parties of the UN is obliged to address this issue of non-compliance under Article 112(2) of the Rome Statute. In mid-September 2010, the

¹⁵⁶ See Genocide Intervention Network, ‘ McCain and Obama Speak out on Darfur and More –Summary’, available at <www.askthecandidates.org/files/Obama_McCain_questionnaire.pdf>.

¹⁵⁷ Decision on the Report of the Commission on the meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), Assembly/AU/Dec. 245(XIII), Thirteenth Ordinary Session, 1-3 July 2009, para. 10. Some writers had been of the view that, as implied by Article 87(5) Rome Statute, non-Parties are under no obligation to co-operate with the ICC, Bantekas and Nash, *supra* note 13, p. 392. Decision on the Implementation of the Assembly Decisions on the International Criminal Court, AU Doc Assembly/AU/Dec.366(XVII), Seventeenth Ordinary Session, 30 June-1 July 2011, para. 6.

Kenyan foreign minister had a meeting with the President of the Assembly in New York in which the Kenyan foreign minister relied upon his obligations towards the African Union and stated that Kenya “handled with the aim of regional peace.”¹⁵⁸ In December 2010, the ICC started an investigation against six Kenyan officials for crimes during the post-election violence in 2007-2008. When the charges got confirmed by the Pre-Trial Chamber II, the Kenyan Parliament voted on withdrawal from the ICC. In 2011, the High Court of Nairobi decided that Kenya should arrest Al-Bashir if he would set foot in Kenya again. The Kenyan High Court consequently granted an application to issue a warrant of arrest for President Al-Bashir. The Minister of State for Provincial Administration was demanded to execute the warrant of arrest in case Al-Bashir would visit the Republic of Kenya. Sudan reacted to all this by expelling the Kenyan ambassador to Sudan.

In October 2011, Al-Bashir visited Malawi - a State Party to the Rome Statute since 1 December 2002 - for a Summit Meeting of the Common Market for Eastern and Southern Africa (COMESA). Followingly, the Pre-Trial Chamber I of the ICC referred the Republic of Malawi to the Security Council and to the Assembly of States Parties for not arresting Al-Bashir.¹⁵⁹ Malawi, in its defence argued that “interpretation of Article 98(1) of the Rome Statute *inter alia* states that “a State would act inconsistent with its obligations under international law with regards to immunity of a national of a third State unless the ICC obtains the cooperation of the third State to waiver immunity.”¹⁶⁰ In other words, Malawi argued that the ICC would first need the cooperation of the State of Sudan in order to waive the immunity of Al-Bashir, to be able to get him arrested. This argument was however rejected by the Pre-Trial Chamber I claiming that it is not justifiable to rely on municipal law to negate international obligations and that “it is inconsistent of Malawi to accept waiver of State immunity under Article 27(2) of the Rome Statute, but at the same time rejecting to arrest a Head of State. The Pre-Trial Chamber stated that Chad “had a responsibility to cooperate with the ICC as instrument for the enforcement of the *jus puniendi*’ of the international community.”¹⁶¹ Malawi accepted this decision of the ICC on 12 June 2012. However, the African Union supported the initial non-cooperation of Malawi

¹⁵⁸ ICC Assembly of States Parties, Press Release ICC-ASP-20100921-PR575, 21 September 2010.

¹⁵⁹ Malawi case, supra note 52, para. 36. Note that the same Chamber reached an identical conclusion as regards the Republic of Chad, which in August 2011 had allowed al-Bashir to attend the swearing-in ceremony of its President Idriss Deby to a new five-year term. However, as only the Malawi case is fully reasoned, no references to the Chad Decision will be made, Pre-Trial Chamber I, The Prosecutor v. Omar Hassan Ahmad Al Bashir, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure of the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with respect to the Arrest and Surrender Omar Hassan Ahmad At Bashir, ICC-G2/05-01/09, 13 December 2011, <www.icc-cpi.int/iccdocs/doc/doc1287888.pdf>, visited on 20 February 2013. The first such case concerned Kenya, which was also unreasoned, Pre-Trial Chamber I, Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar At-Bashir's presence in the territory of the Republic of Kenya, 27 August 2010, <www.iccpi.int/iccdocs/doc/doc930979.pdf>, visited on 20 February 2013.

¹⁶⁰ See P. Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?', 7 *Journal of International Criminal Justice* (2009) pp. 315-332, arguing that the ICC requests to States Parties for his surrender constitute ultra vires acts.

¹⁶¹ Malawi case, supra note 52, para. 46.. Some of the cases the Pre-Trial Chamber relied upon include the Milosevic case, supra note 81, the Taylor case, supra note 4, and Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Warrants of Arrest ICC-oi/u-oi/ii, P.-T. Ch. I, 27 June 2011, <www.icc-cpi.int/iccdocs/doc/doc1101339.pdf>, visited on 20 February 2013.

stating that it was “implementing various AU Assembly Decisions on non-cooperation with the ICC on the arrest and surrender of President Omar Hassan Al Bashir of the Sudan.”¹⁶²

The African Union has been calling upon its Member States to start making bilateral agreements to ensure ‘the immunities of their Senior State officials’ to prevent cooperation between the ICC and States.

In January 2012, the African Union Assembly stated that “Article 98(1) of the Rome Statute was created to protect immunity of officials of non-State Parties.”¹⁶³ However, by defending the immunity of head of state officials, the African Union sends out a signal that government officials of non-State Parties are untouchable. In its growing resistance to the ICC, the African Union also forbade to the ICC to open a liaison office in Ethiopia.

The ICC keeps being reliant on the cooperation of State Parties to be able to surrender Al-Bashir. The UN Security Council could also consider initiating non-forcible measures against Sudan under Article 41 of the UN Charter. But, this is rather unlikely, given that this has never been done before due to opposition of permanent members like China and the United States.

¹⁶² Assembly/AU/Dec.397(XVIII), para. 7.

¹⁶³ Decision on the Progress Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court (ICC), Assembly/AU/Dec. 397(XVIII), Eighteenth Ordinary Session, 29-30 January 2012, para. 6.

C. Kenya: The first Prosecutor or '*proprio motu*' Referral

The Republic of Kenya signed the Rome Statute on 11 August 1999 and ratified it on 15 March 2005.¹⁶⁴ Kenya implemented the Rome Statute into national legislation in January 2009 with the International Crimes Act.¹⁶⁵

With a history of ethnic violence to obtain power in government, after the 2007-2008 elections, an intense conflict shook the country. The speediness and gravity of the post-election violence demanded for a diplomatic intervention. Due to lack of action by the Kenyan government to prosecute the responsible, the situation was forwarded to the ICC.

Kenya represents the first time the Prosecutor of the ICC starts an investigation '*proprio motu*'.

i. Background and conflict

a. Background

In 1963, Kenya became an independent country, after having been ruled by the British. Ever since the Declaration of Independence there have been political and ethnic divisions. Kenya's largest group is made up of the Kikuyu. Traditionally, they have been in conflict with the Kalenjin and other minority pastoral tribes.¹⁶⁶ In 1964, Kenya became a Republic and Mzee Jomo Kenyatta, a 'Kikuyu', was appointed as the first President and Jaramogi Odinga Odinga, a 'Luo', as the first Vice-President.¹⁶⁷ The Kikuyu started claiming land, with the help of the government, mainly in the 'White Highlands', which is now called the Rift Valley region. In Kenya's first Constitution, it had been foreseen that Kenya would become a multiparty State,¹⁶⁸ with a bicameral Parliament. The two first main political parties were the Kenyan African Union (KANU) and Kenya African Democratic Union (KADU).¹⁶⁹ Quickly, rivalries commenced between Kenyatta and Odinga.¹⁷⁰ Kenyatta started to adapt the Constitution to empower the central government and the political disputes between Kenyatta and Odinga ultimately led to the resignation of the latter in 1966.¹⁷¹ Odinga then decided to form an opposition party, the Kenya's

¹⁶⁴ http://www.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/kenya.aspx.

¹⁶⁵ <http://www.iccnw.org/?mod=country&iduct=89>.

¹⁶⁶ 70 Open Society Foundations, 'Putting Complementarity into Practice: Domestic Justice for International Crimes in DRC, Uganda, and Kenya', (2010) <www.soros.org>, p. 83.

¹⁶⁷ Jaramogi Odinga Odinga was the father to Kenya's former Prime Minister Raila Odinga.

¹⁶⁸ "Lancaster House conference." The Columbia Encyclopedia (6th ed.2008), Encyclopedia.com.

¹⁶⁹ Kenyan Constitution Amendment Thru Time, <http://wildaboutafrica.wordpress.com/2010/07/13/kenyan-constitution-amendmentsthru-time/> (last visited 8 Jan. 2011).

¹⁷⁰ The 2nd Republic: "Making of a Constitution Pt 2," NTVKenya (14 July 2010).

¹⁷¹ Id. See also Kenyan Constitution Amendment Thru Time, *supra* note 13; see also Issack Otieno, Kenya's Quest for a New Constitution: the Key Constitutional Moments, Institute for Security Studies (2010), www.polity.org.za/article/kenyas-quest-for-a-new-constitution-the-key-constitutional-moments-2010-07-29.

People's Union (KPU).¹⁷² By banning the KPU in 1969, the KANU eventually formed Kenya's only political party.¹⁷³ Upon Kenyatta's death in August 1978, Daniel Arap Moi, a 'Kalenjin', became the second President of the Republic of Kenya. In June 1982, led by Vice President Mwai Kibaki, an amendment was made to the Constitution which made Kenya '*de jure*' a one-party State.¹⁷⁴ From that moment, political opposition groups were marginalized or killed.¹⁷⁵ Serious human rights violations were committed, with 'ethnic cleansing', detention of political prisoners, political assassinations and extrajudicial killings by the police.¹⁷⁶ "Raila Odinga, son of Jaramogi Odinga and opposition leader in the elections of 2007, was the longest-serving political prisoner in Kenya,"¹⁷⁷ after having being accused of organizing the coup of 1982. Due to continuing pressure on the government to restore the multiparty democracy, the Kenyan government supported politically motivated ethnic violence to oppress opposition in 1990.¹⁷⁸ Finally, under increasing pressure, also from the international community, the Constitution was amended to restore the multiparty democracy of Kenya.¹⁷⁹ In December 1992, Kenya held its first multiparty elections, still under President Moi.¹⁸⁰ Moi got elected President in 1992 and re-elected in 1997. Meanwhile, a lot of political parties arose, mainly based on ethnicity. To oppress tribal militias, ethnic groups that supported opposition parties, in particular the Kikuyu in the Rift Valley, got 'ethnically cleansed' by President Moi's own militias.¹⁸¹ More than thousand people died and another 300.000 were displaced.¹⁸² President Moi consistently tried to undermine democracy, when debates over constitution changes increased. In the 2002 elections, Mwai Kibaki, a 'Kikuyu', who lost the elections from President Moi in 1992 and 1997, made a coalition with the party of Raila Odinga, which was called the National Rainbow Coalition (NARC). President Moi lost the elections of 2002 and Kibaki became the new President. After a failed referendum on the Constitution, Odinga did not get the promised position of Prime Minister. Therefore he decided to leave the NARC and create the Orange Democratic Movement (ODM) to run against Kibaki in the 2007 elections.

¹⁷² Making of a Constitution Pt 2, supra note 17.

¹⁷³ Id. See also Kenyan Constitution Amendment Thru Time, supra note 13.

¹⁷⁴ Peter Mwangi Kagwanja, POWER OF UHURU: YOUTH IDENTITY AND THE GENERATIONAL POLITICS OF KENYA'S 2002 ELECTION, 4 (2005), <http://afraf.oxfordjournals.org/cgi/content/full/10s/4/18/1>

¹⁷⁵ The 2nd Republic: "Making of a Constitution Pt 3," NTVKenya (19 July 2010).

¹⁷⁶ Musila, supra note 4, at 447. See also Wanza Kioko, The Place of Transitional Justice in Kenya's Impending Political Transition, in Lawrence M. Mute, Kichamu Akivaga, and Wanza Kioko, eds., BUILDING AN OPEN SOCIETY: THE POLITICS OF TRANSITION IN KENYA (2002); see generally REPORT OF THE TASK FORCE ON THE ESTABLISHMENT OF A TRUTH, JUSTICE AND RECONCILIATION COMMISSION (2003).

¹⁷⁷ Musila, supra note 4, at 447.

¹⁷⁸ Making of a Constitution Pt 3, supra note 34.

¹⁷⁹ Otieno, supra note 22; see also Kenyan Constitution Amendment Thru Time, supra note 13.

¹⁸⁰ Making of a Constitution Pt 4, supra note 55.

¹⁸¹ Branch and Cheeseman, supra note 2, at 14.

¹⁸² Kagwanja, supra note 32. See also Stephen Brown, Authoritarian Leaders and Multiparty Elections in Africa: How Foreign Donors Help to Keep Kenya's Daniel Arap Moi in Power, 22 THIRD WORLD Q. 725-39 (2001).

b. Conflict

In December 2007, presidential elections ran between Mwai Kibaki - then current President - of the Party of National Unity (PNU) and his challenger, Raila Odinga of the Orange Democratic Movement (ODM). The Party of National Unity finds its voters mainly among the Kikuyu population, while the Kalenjin, Luo and Luhya tribes traditionally vote for the Orange Democratic Movement. During the election campaign, private armies were used, radio broadcasted hate speeches, mainly in the Rift Valley, and 'Luo' started to refuse to pay their rent to 'Kikuyu' landlords. As a reaction, Kibaki set in the Administrative Police in hostile areas to his PNU Party.¹⁸³ Raila Odinga had been the leading candidate during the polls. In the ballot counting process, Odinga, remained ahead of Kibaki for a long time.¹⁸⁴ Despite this, Kibaki eventually won the elections, in a rather dubious way. Odinga claimed that there had been committed fraude and protests started. With a history of political violence and ethnic tension in mind, new violence erupted immediately after the elections. The speed and the extent of the violence that spread all over the country were significant. Therefore, it cannot have been a purely spontaneous reaction to the elections, but rather must have been planned and organized. It has later on been claimed that a lot of the attacks were organized by senior politicians and businessmen. Following the post-election violence, the African Union established a mediation team, led by former United Nations Secretary General, Kofi Annan. Through intervention at the diplomatic level, a power-sharing agreement was signed between Odinga and Kibaki on February 28, 2008.¹⁸⁵ As part of the power-sharing agreement, a Commission of Inquiry into Post-Election violence had to be established. The new coalition government consequently set up an independent Commission, the 'Waki-Commission'. The Waki-Commission reported that in a period of a little bit more than two months, from December 2007 until March 2008, "1133 people would have been killed, 3561 people injured and over 350000 people would have been displaced."¹⁸⁶ The Waki Commission found evidence that there had been "systematic attacks on Kenyans based on their ethnicity and their political leanings."¹⁸⁷ In its Inquiry, the Waki Commission concluded that "while the post-election violence started spontaneous in some geographic areas, it was a result of planning and organization in other areas, in places 'what started as a spontaneous violent reaction to the perceived rigging of elections later evolved into

¹⁸³ Kanyinga, Okello, and Akech, *supra* note 1, at 13.

¹⁸⁴ 4 David Throup, 'The Count', 2 *Journal of Eastern Africa Studies* (2008) 290-304.

¹⁸⁵ 6 See Monica Kathina Juma, 'African mediation of the Kenyan post-2007 election crisis', 27 *Journal of Contemporary African Studies* (July 2009) 407-430, and Gilbert M. Khadiagala, 'Regionalism and conflict resolution: Lessons from the Kenyan crisis', 27 *Journal of Contemporary African Studies* (2009) 431-444.

¹⁸⁶ Report of the Commission of Inquiry into Post-Election Violence, October 15 2008, (hereafter Waki Report), pp. 345-346.

¹⁸⁷ Waki Report, *supra* note 45, p.22.

well organized and coordinated attacks’.”¹⁸⁸ Therefore, the Waki Commission proposed that “a hybrid tribunal should be created with the mandate to prosecute crimes committed as a result of post-election violence.”¹⁸⁹ It also handed over a sealed envelope to Kofi Annan, containing a list of names of alleged perpetrators, together with evidence. The Commission demanded Kofi Annan to forward the envelope to the ICC, in case the Kenyan government would fail to establish the hybrid tribunal.¹⁹⁰ The proposal for a hybrid tribunal eventually did not get passed through the Kenyan Parliament. While some members of Parliament did not want a hybrid tribunal because this would create the possibility for presidential pardons, other members of Parliament did not want to have a hybrid tribunal because of the risk that it would prosecute allies. The ICC was also seen as the lesser ‘evil’, since the ICC only prosecutes a ‘handful of big fish’ because of which most responsible would not risk to be prosecuted. Furthermore, ICC trials can take years, maybe even more than a decade, like at the ICTY and ICTR. On the contrary, the Tribunal recommended by the ‘Waki Commission’ could prosecute a lot more people a lot faster. Based on the decision of the Parliament, Kofi Annan handed over the envelope to the ICC on 9 July 2009.

¹⁸⁸ Report of the Commission of Inquiry into Post-Election Violence, October 15 2008, (hereafter Waki Report), pp. 345-346.

¹⁸⁹ Report of the Commission of Inquiry into Post-Election Violence, supra note 72, ix.

¹⁹⁰ 7 Waki Commission, supra note 8, at 18.

ii. Court Case

a. Situational phase

After more than one year of inaction through political manoeuvring of the Kenyan government, the Prosecutor, after having had a meeting with Kenyan representatives, decided to send a request to the Pre-Trial Chamber to open an investigation in accordance with Article 15 of the Rome Statute. On 31 March 2010, the Pre-Trial Chamber II, pursuant to Article 15(4) of the Rome Statute, allowed the Prosecutor to initiate an investigation *'proprio motu'*, concluding that “there is reasonable ground to believe that crimes against humanity had been committed on the territory of Kenya from 1 June 2005 until 26 November 2009.”¹⁹¹

At the moment the Pre-Trial Chamber II gave its authorization to the Prosecutor to start the investigation, it argued that it was not necessary to decide if Kenya was unable or unwilling to prosecute, since the evaluation of admissibility only takes place when a situation is actually put under investigation or prosecution, not beforehand. To put a situation under investigation there must be absence of investigations and proceedings and the situation must be considered of ‘sufficient gravity’. For his decision of admissibility, the Prosecutor relied on the evidence of the Waki Commission as well as reports from Kenyan and international NGO’s. Judges then, at their turn, also evaluate the admissibility of potential cases as follows from Article 53(1)(b) of the Rome Statute. The basis for admissibility evaluation are the provisions of complementarity and gravity, as explained in Article 17 of the Rome Statute. To be able to claim jurisdiction over a case the Prosecutor and the Judges need to come to the conclusion that the government is ‘unable’ or ‘unwilling’ to investigate or prosecute and that the situation is of ‘sufficient’ gravity. Article 17(1)(a) describes the principle of complementarity as ‘The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution’.¹⁹² Deciding on complementarity should be based on the presence of actual investigations, not possible future investigations by the State. A point of discussion is whether a Commission of Inquiry, like the Waki Commission, can count as a valid complement to the jurisdiction of the Rome Statute. Opponents however argue that investigations without would not be sufficient as a complement to the ICC.¹⁹³ Article 17(2)(b) of the Rome Statute does neither specify a time frame when action needs to take place, but rather

¹⁹¹ See Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, No. ICC-01/09 (31 March 2010).

¹⁹² Rome Statute, Article 17(1)(a).

¹⁹³ 10 Alexander K.A. Greenawalt, ‘Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court’, 50 Virginia Journal of International Law (2009) 126-131.

refers to ‘an unjustified delay in proceedings.’¹⁹⁴ The Rome Statute is not clear either on what it means that the State is unwilling or unable to investigate or prosecute, but refers in Article 17(2)(c) to ‘proceedings with the aim of protecting a person, or proceedings that are inconsistent with the intent of bringing a person to justice. With regards to the situation in Kenya, the Office of the Prosecutor gave warnings and imposed deadlines after the delays and the eventual failure of the creation of the hybrid tribunal.¹⁹⁵ It was only after the ICC Prosecution had already been started, that people in government began to support the idea of creating the tribunal.

The other criteria to decide under Article 53(1) about the admissibility to start an investigation, is the standard of gravity as explained in Article 17(1)(d), although the Rome Statute does not specify what ‘sufficient gravity’ means. Sufficient gravity does not purely refer to numbers and scope of violations although the Prosecutor defended his decision on gravity in previous situations on numbers. Concerning the alleged abuses of civilians and detainees in Iraq by the United Kingdom, the Prosecutor argued that seen that they were relatively small in numbers, they were not admissible to open a case.¹⁹⁶ He thereby also made reference to the situations in Northern Uganda, the Democratic Republic of Congo and Darfur, as the basis of his decision. In the case of Kenya, the Prosecutor defined “four criteria to decide on gravity: the scale of the crimes, the nature of the crimes, the manner of their commission and their impact on victims and families.”¹⁹⁷ Although, based on the scale of the crimes in Kenya, with over 1.100 people killed and hundreds of thousands displaced, the gravity might not have been ‘sufficient’ to declare the case admissible on these grounds, the Prosecutor argued that the crimes in Kenya did fulfill the four criteria.

In February 2010, the Pre-Trial Chamber asked for additional information from the Prosecutor under Rule 50(4) and Regulation 28(1) of the Regulations of the Court,¹⁹⁸ “regarding the link between the crimes and the perpetrators and a policy of a State under Article 7(2)(a) of the Statute and the admissibility of the situation.” In response, the Office of the Prosecutor delivered the Pre-Trial Chamber a list “with the most serious incidents and the persons who allegedly bore the greatest responsibility”¹⁹⁹ as well as information “on the apparent state and/or

¹⁹⁴ Article 17(2)(b).

¹⁹⁵ 19 International Criminal Court, Decision Pursuant to Article 15 of the Rome Statute, supra note 2, para. 36.

¹⁹⁶ International Criminal Court, supra note 4 at 8-9.

¹⁹⁷ International Criminal Court, Regulations of the Office of the Prosecutor, Regulation 29(2), (ICC-BD/05-01-09) adopted 23 April 2009, <<http://www.icc-cpi.int/NR/rdonlyres/FFF97111-ECD6-40B5-9CDA-792BCBE1E695/280253/ICCBD050109ENG.pdf>>, 27 August 2010; see also International Criminal Court, Office of the Prosecutor, Policy paper on the interests of justice, (ICC-OTP-2007) September 2007, 4-5. In the decision of 31 March 2010 authorizing the investigation, the pre-trial chamber judges interpreted these factors following in significant part the interpretation offered by the OTP submission for the authorization (International Criminal Court, Decision Pursuant to Article 15 of the Rome Statute, supra note 2, paras. 56-59 and 62).

¹⁹⁸ Situation in Kenya, Office of the Prosecutor, Prosecution’s Response to Decision Requesting Clarification and Additional Information, 3 March 2010, ICC-01/09-16.

¹⁹⁹ International Criminal Court, Office of the Prosecutor, Pre-Trial Chamber II, Situation in the Republic of Kenya: Prosecution’s Response to Decision Requesting Clarification and Additional Information (ICC-01/09-16 03-03-2010 1/19 CB PT) 3 March 2010, paras. 7-9 and 31-37, <http://www.icc-cpi.int/iccdocs/doc831129.pdf>, 27 August 2010; interview with officials in the Office of the Prosecutor, International Criminal Court, The Hague, Netherlands (July 2010).

organizational policies promoting violations, as required by the Rome Statute for consideration of possible crimes against humanity.”²⁰⁰ The Prosecutor thereby underlined the manner and the organization of the commission of the crimes in stating that “the senior political leaders of the Party of National Unity (PNU, President Kibaki’s party) and the Orange Democratic Movement (ODM, Prime Minister Odinga’s party) organized, enticed, and/or financed attacks against the civilian population.”²⁰¹ The Pre-Trial Chamber agreed on the organized nature of the crimes, especially the crimes committed by the police. One of the three judges, Judge Hans-Peter Kaul, did not agree on the organised nature, arguing that “there was no indication that the crimes against humanity were the result of a state policy.”²⁰² Relying on the four criteria set out by the Prosecutor, the Pre-Trial Chamber concluded that “it is not the number of victims that matter but rather the existence of some aggravating or qualitative factors attached to the commission of crimes, which make it grave.”²⁰³

Consequently, the Pre-Trial Chamber assessed under Article 15(3) ‘if there was reasonable basis to proceed with an investigation’²⁰⁴ and under Article 15(4) ‘if the case falls within the jurisdiction of the Court.’²⁰⁵

To evaluate Article 15(3), the Pre-Trial Chamber checked if the requirements of Article 53(1)(a),(b) and (c) were fulfilled.

Article 53(1)(a) sets out that there must be ‘reasonable basis to believe that a crime within the jurisdiction of the Court has or is being committed’.²⁰⁶ The Pre-Trial Chamber stated in this matter that “sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court has been or is being committed”.²⁰⁷

Article 53(1)(b) requires that ‘the case is or would be admissible under Article 17’²⁰⁸. In this matter, the Pre-Trial Chamber argued that in this stage of the trial there could not yet be spoken of a ‘case’, but rather a ‘potential case’ and that therefore the judgment should be based on the persons and the crimes creating the subjects of a future case. Given that there were no national proceedings with regard to the persons and crimes subject to ‘the potential case’ of the ICC, it was therefore deemed unnecessary to place doubt at the unwillingness or inability as mentioned under Articles 17(2) and (3). It should be noted that there were some indications of

²⁰⁰ Ibid.

²⁰¹ C.L. Sriram and S.Brown, *International Criminal Law Review* 12 (2012) 219-244.

²⁰² International Criminal Court, Decision Pursuant to Article 15 of the Rome Statute,, dissenting opinion of Hans-Peter Kaul, *supra* note 2, paras. 4 and 22-27.

²⁰³ International Criminal Court, Decision Pursuant to Article 15 of the Rome Statute, *supra* note 2, para. 62.

²⁰⁴ Rome Statute, Article 15(3).

²⁰⁵ Situation in Kenya, Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, ICC-01/09-19, para18.

²⁰⁶ Rome Statute, Article 53(1)(a).

²⁰⁷ ICC-01/09-19, para. 35.

²⁰⁸ Rome Statute, Article 53(1)(b)

national proceedings, but they did not involve the key responsables and the worst crimes committed.

The Article 53(1)(c) criteria handle about the question if there was ‘substantial reason to believe that an investigation would *not* serve the interests of justice’.²⁰⁹ The Pre-Trial Chamber did not give attention to this aspect, since the Prosecutor hadn’t decided that an investigation would not be in the interest of justice either.

Finally, the Pre-Trial Chamber had to evaluate if Article 15(4) was met. The majority of the Pre-Trial Chamber decided that “the crimes allegedly committed after 1 June 2005, fell within the jurisdiction *ratione temporis, ratione loci and ratione personae*.”²¹⁰ *Ratione temporis*, because the crimes were allegedly committed after June 2005, which falls after the ratification of the Rome Statute by Kenya. *Ratione loci* under Article 12(2)(a) was also fulfilled since the crimes had allegedly been committed on the territory of the Republic of Kenya. The fulfillment of the *ratione personae* under Article 12(2)(b) was then seen as made redundant, because fulfilled by the previous criteria.

As a result, the Pre-Trial Chamber II decided to open “an investigation in relation to the crimes against humanity within the jurisdiction of the Court, committed between 1 June 2005 and 26 November 2009 on the territory of the Republic of Kenya”.²¹¹

On 8 March 2011, the Pre-Trial Chamber gave the Prosecutor summons to have six individuals appear before the ICC, as was requested by the Office of the Prosecutor: William Samoei Ruto (Minister of Higher Education, Science and Technology), Henry Kiprono Kosgey (Member of the Parliament and Chairman of the ODM), Joshua Arap Sang (radio host), Francis Kirimi Muthuara (Head of the Public Service and Secretary to the Cabinet), Uhuru Miugai Kenyatta (Deputy Prime Minister and Minister of Finance), and Mohammed Husein Ali (Chief Executive of the Postal Corporation). The Kenyan Government responded to this by challenging the decision on admissibility by the Pre-Trial Chamber under Article 19, whereby Kenya demanded for a conference and an oral hearing.

“On 31 March 2011, the Government of the Republic of Kenya submitted an application to challenge the admissibility of two cases concerning crimes within Kenyan territory.” After the Chamber gave its permission, Kenya filed 22 annexes to support its challenge. Kenya claimed that it was carrying out investigations in relation to specific individuals which were under investigation by the ICC. However, several statements and dates considering low-level perpetrators contradict this. Furthermore, only three of the submitted annexes were related to the post-election violence. As a result, the Pre-Trial Chamber of the ICC concluded that the

²⁰⁹ Rome Statute, Article 53(1)(c).

²¹⁰ ICC-01/09-19, para. 174. , para. 178-179, Judge Kaul agreed on this finding. See Dissenting Opinion of Judge Hans-Peter Kaul, para. 21.

²¹¹ Situation in Kenya, Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya,

information of Kenya did not relate to the same person/same conduct as the cases before the ICC, as required under Article 17, and therefore the case remained admissible before the ICC²¹² due to the fact that “Kenya had failed to provide the Chamber with any details about the asserted, current investigative steps taken”.²¹³ The Appeals Chamber supported this decision in stating that “a State challenging admissibility must provide...evidence of a sufficient degree of specificity and probative value... it is not sufficient to merely assert that investigations are on-going”.²¹⁴ It should also be mentioned that admissibility challenges are only possible “prior to or at the commencement of the trial or exceptionally later if this is based on double jeopardy”.²¹⁵ With regards to the demand for a status conference and an oral hearing, the Pre-Trial Chamber decided, on 4 April 2011, not to give its authorization neither for a status conference neither for an oral hearing.²¹⁶ Kenya then submitted another request for an oral hearing, claiming that it’s initial request had not been considered properly.²¹⁷ The reasons of the Pre-Trial Chamber for not granting these requests would have been mainly with the intent to finish the proceedings fast. This is consistent with the dissent note of Judge Usacka, that the Pre-Trial Chamber did not motivate why it did not grant these requests. The Pre-Trial Chamber and the Appeals Chamber did simply not believe that Kenya was trustworthy in its submissions. This follows also from rejection of arguments by Kenya whereby the Pre-Trial Chamber noted that these were “misleading”²¹⁸ and that “Kenya was not believed to be acting in good faith”.²¹⁹ Referring to Article 93(10) and Rule 194 of the Rules of Evidence, Kenya additionally requested from the ICC to assist in its investigation in providing all the evidence.²²⁰ The Prosecutor did not want to give any information to the Kenyan government to protect witnesses and victims. Before the trial “already five witnesses due to testifying had died, thirteen witnesses had disappeared and the

²¹² Ruto: Pre-Trial Chamber Admissibility Decision, supra note 62, para. 70; Muthaura: Pre-Trial Chamber Admissibility Decision, supra note 62, para. 66.

²¹³ Ruto: Pre-Trial Chamber Admissibility Decision, supra note 62, para. 68; Muthaura: Pre-Trial Chamber Admissibility Decision, supra note 62, para. 64.

²¹⁴ Ruto: Appeal Chamber Admissibility Decision, supra note 35, para. 63; Muthaura: Appeal Chamber Admissibility Decision, supra note 35, para. 62.

²¹⁵ Rome Statute, Article 17(1)(c).

²¹⁶ Prosecutor v. William Somoei Ruto, Henry Kiprono Kosgey And Joshua Arap Sang, ‘Decision on the Conduct of the Proceedings Following the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute’, International Criminal Court, Pre-Trial Chamber II , ICC-01/09-01/11, 4 April 2011, (Hereafter: ‘Ruto: Pre-Trial Chamber Decision on Proceedings’); Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ‘Decision on the Conduct of the Proceedings Following the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute’, Decision on the Conduct of the Proceedings Following the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute , ICC-01/09-02/11, 4 April 2011 (Hereafter: ‘Muthaura: Pre-Trial Chamber Decision on Proceedings’).

²¹⁷ Prosecutor v. William Somoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Application for an Oral Hearing Pursuant to Rule 58(2)’, State Representatives, ICC-01/09-01/11-94, 17 May 2011; Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ‘Application for an Oral Hearing Pursuant to Rule 58(2)’, State Representatives, ICC-01/09-02/11-94, 17 May 2011.

²¹⁸ Ruto: Pre-Trial Chamber Admissibility Decision, supra note 62, para.36 and 50; Muthaura: Pre-Trial Chamber Admissibility Decision, supra note 62, para. 40 and 54.

²¹⁹ Ruto: Pre-Trial Chamber Admissibility Decision, supra note 62, para.33; Muthaura: Pre-Trial Chamber Admissibility Decision, supra note 62, para. 37.

²²⁰ Situation in the Republic of Kenya, ‘Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10) and Rule 194’, State Representatives, ICC-01/09, 21 April 2011 (hereafter ‘Kenya: request for assistance’).

remaining witnesses had recanted their precious incriminatory accounts.”²²¹ One senior official had also been killed in his home in Kenya after his testimony before the Waki Commission.

On 7 and 8 April 2011, the six above mentioned Kenyans appeared voluntarily before the Pre-Trial Chamber II. After claims that the admissibility decision of the Pre-Trial Chamber had been based on factual, legal and procedural errors²²², the Appeals Chamber confirmed on 30 August 2011 the decision of the Pre-Trial Chamber that four of the six accused would have to stand trial for crimes against humanity.²²³ After confirmation of charges hearing, the Pre-Trial Chamber II confirmed charges against William Samoei Ruto and Joshua Arap Sang²²⁴ and against Francis Kirimi Muthuara ad Uhuru Muigai Kenyatta²²⁵ and committed them for trial. Following this charges, Kenya handed over a request to the Security Council to defer the ICC investigations and prosecutions under Article 16 of the Rome Statute with the promise of setting up a hybrid tribunal. It is important to note here that Kenya only made such a request for deferral when serving State officials had already been charged by the ICC. However, so far, the Security Council has never passed a Resolution to defer an ICC investigation or prosecution. Furthermore, both the United Kingdom as the United States have stated that they would veto any such request.²²⁶

When Kenya’s request had been denied, Kenya addressed itself to the East African Court of Justice. On 26 April 2012, the East African Legislative Assembly, during its fifth session held in the Kenyan capital Nairobi, adopted a resolution “seeking the EAC Council of Ministers to implore the International Criminal Court to transfer the case of the accused four Kenyan facing trial in respect of the aftermath of the 2007 Kenya general elections to the East African Court of Justice and to reinforce the treaty provisions.”²²⁷ It further noted that “the indictment of the four [accused persons] by the ICC may alone not and will not resolve the underlying issues that led to the said violence that grasped the entire nation of Kenya”²²⁸ and that “a sizeable number of the people of Kenya (including the resolution of Kenya National Assembly to that effect) as well as

²²¹ Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang ‘Corrigendum to the Prosecution’s Response to “Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10) and Rule 194”, Office of the Prosecutor, ICC-01/09-01/11,11 May 2011 (hereafter: ‘Prosecutor’s Response to Request for Assistance’).

²²² Kenya: Article 19 Application, supra note 44.

²²³ Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, ‘Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute’, International Criminal Court, Pre-Trial Chamber II, ICC-01/09-01/11-373, 23 February 2012; and 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’, International Criminal Court, Pre-Trial Chamber II, ICC-01/09-02/11-382-Red, 23 February 2012.

²²⁴ In The Case of The Prosecutor v. William Samoeiruto, Henry Kiprono Kosgey and Joshua Arap Sang, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, No. ICC-01/09-01/22(23 January 2012), <www.iccpi.int/iccdocs/doc/doc1314535.pdf>.

²²⁵ In The Case of The 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, No. ICC-01/09-02/11 (23 January 2012), <www.iccpi.int/iccdocs/doc/doc1314543.pdf>.

²²⁶ Assembly/AU/ Dec.334(XVI), para. 6. See also Assembly/AU/Dec.419 (xix), para. 4.

²²⁷ See Resolution Seeking to Try Kenya 2007 General Elections Aftermath Accused Persons at EACJ, Not ICC, <www.eala.org/oldsiteo41111/key-documents/doc_details/266-resolution-2007-kenya-general-elections-aftermath-case.html>. See in particular, para. 4.

²²⁸ See Resolution Seeking to Try Kenya 2007 General Elections Aftermath Accused Persons at EACJ, Not ICC, <www.eala.org/oldsiteo41111/key-documents/doc_details/266-resolution-2007-kenya-general-elections-aftermath-case.html>. See in particular, para. 11.

the governments of the Partner States of EAC and the African Union were not in favour that this matter should be referred to the ICC but rather be dealt with locally in order to promote reconciliation”.²²⁹

²²⁹ See Resolution Seeking to Try Kenya 2007 General Elections Aftermath Accused Persons at EACJ, Not ICC, <www.eala.org/oldsite041111/key-documents/doc_details/266-resolution-2007-kenya-general-elections-aftermath-case.html>. See in particular, para. 12.

b. Case phase

*The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*²³⁰

Ruto is being accused of being an indirect co-perpetrator of crimes against humanity of murder, forcible transfer of population and persecution. Joshua Arap Sang has been accused of having contributed to the crimes led by Ruto.

On 8 March 2011, a summons to appear has been issued against Mr. Ruto and Mr. Sang. They appeared before the ICC for the initial appearance hearing on 7 April 2011. The Confirmation of charges hearing has been held from 1 to 8 September 2011. On 23 January, the Pre-Trial Chamber decided on the confirmation of the charges. Their trial will start on 10 September 2013.

*The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*²³¹

Muthaura and Kenyatta are alleged to be indirect co-perpetrators of the crimes against humanity of murder, forcible transfer, rape, persecution and other inhumane acts. These crimes would have served to make sure the PNU could remain in power and as revenge attacks against ODM supporters.

The Prosecutor had to withdraw two of his witnesses in the case against Mr. Kenyatta. One witness declared not to be willing to testify anymore, while a second witness declared to have given a false testimony about a critical event.

On 5 December 2014, the Prosecutor filed a notice to withdraw the charges against Mr. Kenyatta.

Given that the evidence of the Prosecutor had become too weak, Mrs. Bensouda had to request on 19 December 2013 for an adjournment of the provisional trial date for three months.

On 13 March 2015, the Prosecutor decided to terminate the proceedings against Mr. Kenyatta.

*The Prosecutor v. Walter Oasapiru Barasa*²³²

Mr. Barasa is being held responsible as a direct perpetrator of intent to corruptly or corruptly influencing three ICC witnesses. An arrest warrant has been issued against him on 2 October 2013.

²³⁰ http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/Pages/situation%20index.aspx.

²³¹ Ibid.

²³² Ibid.

iii. Discussion: *The principles of Complementarity & gravity and the importance of the Waki Commission, Non-cooperation and the 2013 elections*

a. *The principles of complementarity & gravity and the importance of the Waki-Commission*

The situation in Kenya has proven to be particularly relevant for the ICC in elaborating the two core principles to decide on admissibility of a case: complementarity and gravity.

As we have seen in the court case, the Kenyan government continuously tried to challenge the decision on admissibility of the case before the ICC, mainly through claims of complementarity.

In the Preamble of the Rome Statute it is stated that ‘the ICC is to be complementary to national criminal jurisdiction.’²³³

In the strategy of the Prosecutor, the principle of complementarity of the Rome Statute has to be seen as ‘positive complementarity’. This means that the ICC promotes national proceedings over proceedings before the ICC. The ICC also gives information to national judiciaries in order for them to be able to have their own domestic trials. It is preferably for the ICC that a State organizes its own trials domestically, so that the ICC does not have to come in play. This view on the principle of complementarity is similar to what William Burke-White calls ‘proactive complementarity’.²³⁴ This could however also lead to abuses of States of this principle by delaying the proceedings, as we have seen in the case of Kenya. This is what Christopher Keith Hall labels ‘perverse complementarity’.²³⁵ Another example is Uganda, where the government created a Special Division within the High Court to try leaders from the Lord’s Resistance Army allegedly in order to protect them from prosecutions by the ICC and thereby excluding leaders of the own national army from prosecution.

During the investigation, the Chamber also imposed a high standard of proof to Kenya to prove inadmissibility. This could have as effect in future cases that States will try to put as much evidence in their submissions in order to prevent admissibility before the ICC.

In the case of Kenya, the Prosecutor applied “a more comprehensive strategy of justice, in order to include truth commissions, reparations, institutional reform next to traditional justice.”²³⁶ This was called the ‘three-pronged strategy’, “to prosecute top-level perpetrators by the ICC, middle-level perpetrators by a hybrid tribunal and to have truth commissions to address the violations

²³³ Rome Statute, supra note 1, preamble, para. 11 and Article 1.

²³⁴ William W. Burke-White, ‘Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice’, 49 Harvard International Law Journal (2008) 53-108.

²³⁵ Christopher Keith Hall, ‘Positive complementarity in action’, in Carsten Stahn and Mohamed El Zeidy (eds.) *The ICC and Complementarity: From Theory to Practice* (Cambridge University Press, Cambridge, 2010).

²³⁶ International Criminal Court, Policy paper, supra note 36 at 7-8.

more generally.”²³⁷ However, the hybrid tribunal was never established, although the Kenyan government claimed later on in the procedure to be willing to establish a tribunal. This also gave rise to the question whether judges in their decision on admissibility only take into account whether there are at present actual national proceedings taking place or also take into consideration potential future national proceedings. In this matter, the Truth, Justice and Reconciliation Commission (TJRC) was never really taken in consideration to assess on admissibility.²³⁸ This could have shed more light on the fact if the TJRC could have rendered the situation before the ICC inadmissible.

Although the recommendation of the Waki Commission to create a hybrid tribunal was never executed, the Waki Commission did have a certain impact. If the Waki Commission did not forward the envelope with names and evidence to Kofi Annan, who later on passed this information on to the Prosecutor of the ICC, it is uncertain if an investigation would have been started in the first place.

The Waki Commission led to national debates in the cabinet, the parliament, the media and at the local level about international criminal accountability which resulted in civic education campaign. The Waki Commission also contributed to a constitutional review process through which a new constitution was made in August 2010. Nonetheless, although the new constitution has the potential to reinforce the rule of law and could prevent future violence, it is not a guarantee that this constitution will also actually have these desired effects. But, the attention by the Kenyans to address accountability and the establishment of a new constitution has been certainly promising. The Prosecutor of the ICC expected that the ICC trial will work as a prevention on the recurrence of violence at the next elections, which it seemingly did.

In the case of Kenya, the Prosecutor pursued politicians of both political parties contrary to the case of Uganda where only the LRA has been targeted. This is an important issue. If the Prosecutor would only have pursued politicians of one political party, this could have created new violence among its ethnic group. If, for example, only William Ruto of the ODM had been prosecuted, this could have given rise to violence by his ethnic group, the Kalenji, resulting in more deaths and displacement of them who do not belong to this ‘indigenous’ group in the mainly Kalenjin Rift Valley Province, thereby destabilizing the conflict even more. This is an

²³⁷ Press release, International Criminal Court, Office of the Prosecutor, ICC Prosecutor Supports Three-Pronged Approach to Justice in Kenya, (ICC-OTP-20090930-PR456), 30 September 2009.

The Office of the Prosecutor has stated a clear strategy to focus only upon those bearing the greatest degree of responsibility for crimes within its jurisdiction, although in principle it has jurisdiction over any perpetrator. International Criminal Court, Office of the Prosecutor, Policy paper on the interests of justice (ICC-OTP-2007) September 2007.

²³⁸ International Criminal Court, 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” (ICC-01/09-02/11-274), 30 August 2011.

argument some scholars make in general towards the ICC, that the ICC, by intervening in a situation, could also contribute to more destabilization and more conflict.

In its prosecutorial strategy, the ICC suggested that “it would work with NGO’s to maximize preventive impact and that it would engage in capacity building.”²³⁹ During the ICC’s involvement in Kenya, an NGO activist of the Open Society Institute, Mugambo Kiai, declared in an interview “that he was hopeful about the cooperation of the ICC with the Ministry of Justice and NGO’s on topics such as, police oversight, professionalism and accountability.”²⁴⁰ These tasks lie however beyond the competencies of the ICC and it is not possible for the Court to cooperate in these matters at all. It is therefore important that the ICC does not create unrealistic expectations.

b. Non-cooperation

The non-cooperation of Kenya and the opposition of the African Union has been remarkable throughout the case so far.

In 2010, to further undermine the ICC, the African Union amended its Protocol on the Statute of the African Court of Justice and Human Rights to expand jurisdiction over international crimes of genocide, war crimes and crimes against humanity. Against this position of the African Union, Slaughter argues, that the intent of the ICC is not to “weaken states and undermine sovereignty, properly understood the ICC regime does quite the opposite: it ‘strengthens the hand of domestic parties seeking such trials, allowing them to wrap themselves in a nationalist mantle’.”²⁴¹ As we have already mentioned, the ICC, aimed at being a Court of last resort, encourages domestic trials.

When, in January 2012, the ICC confirmed it’s charges against Uhuru Kenyatta, William Ruto and two other defendants, the government of former President Kibaki sought support from the African Union to have the trial referred to a Kenyan court or to have it suspended.

Kenya requested the UN Security Council to defer the ICC investigations and prosecutions under Article 16 of the Rome Statute on 23 March 2011. Kenya sent a new request in October 2013, following the terrorist attacks of a shopping mall in Nairobi. Kenya sent this request for a deferral to be able to perform its national duties. The Resolution for the deferral did not get the required nine votes. For the first time in history, a UN Security Council Resolution did not get passed without a veto of one of the permanent member states. Seven Security Council members voted in favour of the Resolution (Azerbaijan, China, Morocco, Pakistan, Russian Federation,

²³⁹ International Criminal Court, Prosecutorial Strategy, 2009-2012, supra note 30, para. 66.

²⁴⁰ Interview with Mugambi Kiai, Program Officer, Open Society Institute, in Nairobi, Kenya (15 January 2010).

²⁴¹ Slaughter, ‘Not the Court of First Resort’.

Rwanda and Togo), none voted against and eight made use of abstention (Argentina, Australia, France, Guatemala, Luxembourg, Republic of Korea, United Kingdom and the United States). As mentioned before, so far the UN Security Council had never adopted a Resolution under Chapter VII of the UN Charter and is unlikely to do so. Among the reasons for not passing the Resolution, was mentioned that Kenya still had the capability to handle ‘national and regional security affairs’ and ‘combat terrorism and other forms of insecurity despite terrorist attacks’.²⁴² Furthermore, a demand for national proceedings should be requested under the admissibility challenges of Article 17 and 19, not by a request for a deferral under Article 16. We add here again that Kenya only demanded a deferral after charges were put against serving senior state officials. It is very doubtful that Kenya and the African Union would have claimed a deferral if there were no state officials involved in the investigations of the ICC. In the case of Côte d’Ivoire, where no senior state officials are involved in the investigations, no such claim has been made by Cote d’Ivoire or the African Union. In the case of Cote d’Ivoire, only former President Laurent Gbagbo is being pursued.

Kenya later on voted in Parliament to withdraw from the ICC. Under the Rome Statute, it is possible for State Parties to withdraw. Kenya would then have to send a notification to the UN Secretary General. The withdrawal would become effective after one year, as described in the Rome Statute under Article 127(1). Kenya is the first country to have voted in its Parliament to withdraw from the ICC. However, a withdrawal would have no impact on investigations and prosecutions that fall within the time period Kenya has been State Party to the Rome Statute, as is noted under Article 127(2).

Like Sudan, Kenya blames the ICC of being a ‘neocolonialist’ institution, only hunting Africans. One can argument that a case like Kenya is indeed a feasible pray for the ICC, which is a young institution that seeks to develop itself. For this reason, it could not focus on too powerful states, since this would be too costly and ambitious. But, the downside to this is that a sole focus on Africa could undermine the legitimacy of the ICC in the long run.

c. 2013 Elections

The trials of Kenyatta and Ruto had as strong influence on the elections of March 2013. Kenyatta and Ruto were opponents for the 2007 elections, but came together as running mates under the Jubilee Alliance for the 2013 elections, allegedly to bring peace between the respective communities of Kikuyu and Kalenji, although some saw in the political marriage rather a strategic

²⁴² See UNSC Draft Resolution Seeking Deferral of Kenyan Leaders’ Trial Fails to Win Adoption, with 7 Voting in Favour, 8 Abstaining, SC/11176 (15 November 2013), available at www.un.org/News/Press/docs/2013/sc11176.doc.htm accessed 30 December 2013.

move to prevent the two from being indicted by the ICC. Due to the case before the ICC, the two candidates for the 2013 elections became more popular among the electorate, making the elections apparently being rather a referendum on the ICC intervention.

Kenyatta eventually won the 2013 election with a small margin. Kenyatta has been elected President and his running mate, William Ruto, Deputy President. During the elections, Kenyans demonstrated against violence. After the result, Odinga, who lost the elections, called upon his supporters: “Let the supreme court determine whether the result determined by the [Independent Electoral and Boundaries Commission] is the correct one. Any violence now will destroy this nation forever.”²⁴³ So far, everything remained peaceful in Kenya, though there were some reports of police dispersing riots.

In his acceptance speech, Kenyatta announced he would cooperate with the ICC: “To the nations of the world I give you my assurance that ... we will continue to co-operate with all nations and institutions”,²⁴⁴ although he added “we also expect that the international community will respect the sovereignty and the democratic rule of Kenya.”²⁴⁵

Nonetheless, the election of Kenyatta and Ruto would not lend them immunity as state officials. First of all, Kenya is a State Party to the Rome Statute and thus accepted the jurisdiction of the ICC. Secondly, Kenya implemented the Rome Statute in its domestic legislation. Article 143(4) of the Constitution of Kenya states that: “The immunity of the President under this Article shall not extend to a crime for which the President may be prosecuted under any Treaty to which Kenya is party and which prohibits such immunity.”²⁴⁶

The government of Kenya, because of the trial, also risks to receive pressure from aid donors or to have aid dramatically cut. By refusing to cooperate with the ICC, Kenya could receive the label of a pariah state, similar to Sudan. But, where Sudan, as an oil-rich country, can afford to isolate itself from the West, Kenya could suffer economically, as well as diplomatically from this. With regards to the latter, the election of Kenyatta did not receive a lot of enthusiasm among western governments, which may limit diplomatic contacts due to the International Criminal Court charges. Moreover, the capital of Kenya, Nairobi, is home to the UN Headquarters.

²⁴³ <http://www.theguardian.com/world/2013/mar/09/kenyatta-declared-victor-in-kenyan-elections>.

²⁴⁴ <http://www.theguardian.com/world/2013/mar/09/kenyatta-declared-victor-in-kenyan-elections>.

²⁴⁵ <http://www.theguardian.com/world/2013/mar/09/kenyatta-declared-victor-in-kenyan-elections>.

²⁴⁶ <https://www.kenyaembassy.com/pdfs/The%20Constitution%20of%20Kenya.pdf>.

III. General Conclusion: Developments on the ICC

A. Achievements

Positive' complementarity and interpretation of gravity

The situation in Kenya has been an important case for the ICC, especially because it helped to further develop the constituent elements of admissibility. The development of the concept of 'positive complementarity' tries to stimulate domestic accountability. Nonetheless, in the case of Kenya, it has rather proven to result in 'perverse complementarity' or the obstruction of the ICC proceedings by delaying national proceedings. The situation in Kenya was the first real test of the principle of complementarity. By rejecting the claims of the Kenyan government, the meaning of the principle of complementarity got further established. Not only the meaning of the principle of complementarity, also the meaning of the principle of gravity was given a new interpretation by the Prosecutor. In the case of Kenya, the Prosecutor defined new criteria to decide on 'gravity' of a situation. She included four criteria: 'the scale of the crimes, the nature of the crimes, the manner of their commission and their impact on victims and families'. It is likely that these criteria, due to the case of Kenya, will now be utilized in future cases to assess the gravity of a situation.

Two-sided justice approach

In the case of Uganda, Museveni referred the 'LRA' to the ICC, although only 'situations' can be referred. This to prevent political selectivity. Although the UPDF forces of the government of Museveni also committed numerous crimes against humanity, the Prosecutor decided to only investigate the LRA, defending his position by saying that their crimes were 'larger in scale' and of 'more gravity' than these of the UPDF. This provoked a lot of criticism, whereby the ICC got accused of using a 'one-sided' justice approach. In response, Museveni stated that the responsables of the UPDF could be prosecuted domestically. Certainly, it would be more difficult for the ICC to get the cooperation of the government of Uganda to prosecute the UPDF, but as judicial institution, the ICC must retain its impartiality. Furthermore, the ICC, by pursuing only one side of the political spectrum could further destabilize the conflict.

In the case of Kenya, it seemed that the Prosecutor explicitly tried to include both political parties, by charging Uhuru Kenyatta and William Ruto. This seemed to have reduced the risk for new ethnic violence among one of the two sides.

State practice of Head of State Immunity

The case of Sudan contributed significantly to the State Practice of (sitting) Head of State Immunity with the indictment of President Omar Hassan Al-Bashir.

This issue proved to be highly debatable from a legal point of view, given its novelty of indicting a sitting Head of State of a non-State Party to the Rome Statute and has given rise to a lot of controversy. International law is not conclusive on the question whether (personal) immunity of a sitting Head of State can be removed. Under customary international law, it could be argued that Al-Bashir's personal immunity cannot be invoked. However, there is an exception in international customary law to this immunity in case of international crimes, where a tribunal has jurisdiction. This has been used as argument by the ICC to justify its waiving of immunity of Al-Bashir. But, State Practice and *opinio juris* on this rule is not well-established. The examples the ICC relies upon are discutably examples of situations where personal immunity of a sitting Head of State had been removed. Another argument is that Sudan is bound to the jurisdiction of the ICC through the use of Chapter VII Authority of the UN Charter by the Security Council. The UN declared in Resolution 1593, that Sudan is obliged to cooperate with the ICC as a UN Member State. The fact that Sudan is not a State Party to the Rome Statute complicates the case. Under international law, it is not possible to create obligations for States who are not part of a Treaty. The UN Charter of the United Nations does not stand above customary international law principles. In fact, the UN Charter of the United Nations has been founded on the very same principles of state sovereignty and state equality of customary international law. It remains questionable that the immunity of Al-Bashir is waived on the claim that the Security Council can indirectly bind Sudan, as a Member of the General Assembly, through a Resolution using its Chapter VII authority, to the jurisdiction of the ICC.

Even in the United Nations opinions are very divided, whether Al-Bashir's immunity can be removed. Furthermore, it could create an undesirable precedent, which a lot of Heads of State would not be pleased with. As a result, it has led to a lot of politicization between opponents and supporters of the indictment of Al-Bashir.

The United States, as a clear opponent of Sudan, has shown itself favourable of an arrest of Al-Bashir, despite the fact that it remains opposed to the possibility for the ICC to pursue non-member State officials.

China, with economic interests in Sudan, is a strong opponent to the arrest warrant, which it confirmed by receiving Al-Bashir with a State ceremony and by abstaining from Resolutions 1556, 1591, 1593 and 1706.

Visits of Al-Bashir to countries in Africa led to several diplomatic conflicts, where States have been pending between their obligations towards the ICC to arrest Al-Bahsir and their obligations towards the African Union to not cooperate with the ICC. The debate on immunity has also been a symbolic turning point in the relationship between the ICC and African States as well as the African Union, which later on influenced the case of the ICC in Kenya in a significant manner.

Standard of Admissibility depending on type of referral

It has been argued that the standard of admissibility is treated differently whether it concerns a situation that has been referred by the Security Council, a self-referral by a State or a '*proprio motu*' investigation.

As we have seen, during the Rome negotiations to establish the Rome Statute, initially the possibility for the Prosecutor to start an investigation '*proprio motu*' had not been included. Furthermore, a bigger role for the Security Council had been proposed. There would only be the possibility for the Security Council to refer a situation or for States to refer situations, but still with the consent of the Security Council. As the ICC had been foreseen to be an independent judicial body - which is stated in the Preamble of the Rome Statute that lies at its foundation - there could not be a too significant role for the Security Council. Eventually, there had been made an agreement to include the option of '*proprio motu*' investigation by the Prosecutor, but with introduction of Article 16 as a compromise to still give a role for the Security Council to exercise control over the ICC. Article 16 had been introduced to halt a referral of a State or a '*proprio motu*' initiative of the Prosecutor, before investigations would get started.

As laid down in Article 18(1) of the Rome Statute, Security Council referrals did not need to be submitted to evaluation of admissibility. Since the Security Council handles with the aim of international peace and security, by referring a case, it would be unnecessary to evaluate if the ICC should take jurisdiction over the case. Therefore, different criteria are used in evaluating admissibility depending on the way a situation has been referred. Given that we have an example of all three mechanisms, this allows us to compare in which way they have been treated differently.

In the situation of Sudan, on the one hand, little consideration seems to have been given on the admissibility of the situation. On the other hand, it was also seemingly clear that Sudan was both 'unwilling' and 'unable' to prosecute. In the self-referral situation of Uganda, the issue of admissibility seemed even more 'self-evident'. Given that it would not have been necessary for Uganda to refer the situation, if it could have handled it by itself, it did not seem necessary to

question Uganda's motivations for referring the situation. However, there might have been given more attention to the admissibility requirements, as there could be made arguments against the admissibility of the situation.

The situation of Uganda suggests, in contradiction to the set up of the Rome Statute, that a self-referral would have a lower standard of admissibility than a Security Council referral. The highest standard for admissibility was clearly in the situation of Kenya, where the admissibility requirements were evaluated more thoroughly. The test of admissibility regarding the first examples of the three different mechanisms could be decisive for the standard of evaluation of future 'potential' cases, depending on the mechanism which triggered them.

Article 16 Deferral

In the cases of Sudan and Kenya there have been made requests for a deferral, whereas in the case of Uganda, a challenge of admissibility by the Ugandan government still remains a possibility.

With regards to the case of Uganda, admissibility played a significant role, due to changes in circumstances which rose the question of a possibility of a deferral of the situation in case of a challenge of admissibility by the Ugandan government. This evoked fundamental issues about the principle of admissibility. It developed the interpretation of admissibility in case of a self-referral, the issue of a change in admissibility in the course of a court case and the criteria that would need to be met to be able to defer the case.

It would be possible for Uganda to challenge the admissibility of the case before the ICC. However, if the Ugandan government would sent in a request for deferral, it is doubtful at the moment that this would meet the legal requirements as set out in the Rome Statute. Unless Uganda makes the necessary adaptations to the proposed peace agreements and succeeds in having the LRA sign them.

In the case of Sudan, the African Union challenged the admissibility of the case by asking the Security Council to defer the situation, under Article 16 of the Rome Statute.

As already mentioned, Article 16 was not meant to defer Security Council referrals, only for referrals initiated by the Prosecutor or on request of a State.

Nonetheless, the Security Council passed Resolution 1828, which made a suggestion of the possibility of a deferral. A deferral of a Security Council referral would not only be in contradiction with the original intent of Article 16 during the Rome negotiations, it would also lend a more significant role to the Security Council than originally was meant. Additionally, there are no procedural guidelines foreseen on how to handle a deferral of an already ongoing case.

The Kenyan government also sent a request to defer the ICC investigations and prosecutions (after serving State officials had been charged). This has been denied by the SC and the United Kingdom and the United States added that they would veto any request for an Article 16 deferral.

Although the ICC certainly made progress through these cases, mainly on the discussed matters, as they will be decisive for future cases, they have also shown significant challenges for the ICC.

B. Challenges

Peace vs. justice

Some scholars argue that involvement of the ICC could have disadvantageous, undesired effects on conflict resolution.

The possibility of an admissibility challenge in the case of Uganda, has given rise to questions on different views on justice between a more ‘retributive’ model of justice of the ICC, with emphasis on punishment and more traditional ‘restorative’ justice mechanisms, like ‘mato oput’ in Uganda with a stronger focus on forgiveness and reconciliation and the fundamental issue of the peace vs. justice dilemma. Peace and justice are the two primary goals of the ICC, which in the case of Uganda seem to have become rather mutually exclusive.

After the indictment of Al-Bashir, Sudan claimed that the arrest warrant would undermine the Comprehensive Peace Agreement (CPA). The arrest warrant was issued after a Memorandum of understanding between the Justice and Equality Movement and the Sudanese government had been signed in Doha. Sudan declared publicly not be willing to cooperate with the ICC, in which it is supported by the African Union.

In the case of Kenya, the Prosecutor introduced a ‘three-ponged strategy’ to create a broader justice approach with inclusion of hybrid tribunals, truth commissions, reparations and institutional reforms, next to the ICC prosecutions. Although the hybrid tribunal was not created, the so-called ‘Waki-Commission’ proved to play a significant role in the case of Kenya. It resulted in public debates about criminal accountability, educational campaigns and constitutional reforms to reinforce the rule of law in order to prevent future violence. Despite these successes, the strategy of the Prosecutor also led to unrealistic expectations on the role of the ICC.

Unrealistic expectations

The 'three-ponged'-strategy in the case of Kenya, whereby the ICC suggested to assist in capacity-building for the prevention of violence, led to unrealistic expectations, such as cooperation of the ICC with the Ministry of Justice, on issues such as police oversight. These tasks however go beyond the competencies that have been given to the ICC and the aims where it has been created for.

Similarly, in the case of Uganda, the arrest warrant against Kony, created false hope among parts of the Ugandan population. They believed that the ICC would apprehend the suspects and were disenchanted when they encountered that the ICC does not have its own enforcement capacity.

Therefore, it is important to inform what the ICC can and cannot do by use of public education campaigns.

State cooperation

This leads us to what may be the most problematic issue for the ICC, namely its reliability on state cooperation. The biggest deficiency of the ICC is that it lacks means of enforcement, mainly to apprehend suspects. It does not possess over a police force and where the ICTY and the ICTR were able to rely on NATO, the ICC remains entirely dependent on state cooperation. In the three discussed court cases, all, but one suspect, for whom warrants of arrest have been issued, still remain at large. Only in the case of Uganda, Dominic Ongwen has been taken in custody and is now waiting for his trial in The Hague.

Complexity of trials

The previous issue is linked to the problematic duration of trials before the ICC. Given the complexity of international trials, some trials go on for already more than a decade. This complexity is also partly due to the legal framework of the Rome Statute, which is based on Romano-Germanic and common law. Furthermore, the Treaty has been a compromise of divergent legal, political and diplomatic views. As a young Court, the ICC also lacks state practice to rely on. As a result of this, a lot of the provisions of the Treaty remain rather vague, which further complicates the work of the ICC.

Witness protection

Another aspect of the complexity of the trials is the limited witness protection the ICC has at its disposal. Therefore, ICC involvement is paradoxically enough not always in the best interest of the victims. In the case of Kenya, several witnesses disappeared and a State official was killed in

his home in Kenya after his testimony before the Waki Commission. Eventually, after having had to withdraw two of his witnesses in the case against Mr. Kenyatta, Mrs. Bensouda had to drop the charges. The ICC now made charges against Mr. Barasa for having corruptly influenced witnesses. The ICC still lacks the means to guarantee witness protection.

Ending impunity

The ICC is only able to pursue a handful of 'big fish'.

In all cases, only a few responsables are held responsible before the ICC. For the prosecution of lower-level perpetrators, the ICC remains reliable on the 'goodwill' of the domestic judiciaries.

On the one hand, if the main responsables, or even one of them could be prosecuted, this might have a symbolic effect. By holding the main responsables accountable, this could work as a preventive signal to those who might commit future violations of human rights. On the other hand, these 'potential' future perpetrators could also try to adjust their strategies to stay out of grasp of the ICC. Since only the main responsables are put on trial, future perpetrators will probably try to guarantee that they are not seen as 'the big fish' the ICC goes after. Given that lower-level perpetrators who execute the majority of the crimes are often not held responsible, the effect on these lower-level perpetrators might also be minimal. In the case of Kenya, the police forces alone were responsible for more than one-third of the casualties. However, not a single police officer has been convicted domestically. Of the solely six convictions that were made, one was even for the killing of a local police officer. When the ICC fails to convict the main perpetrators, this might also have as negative effect that some victims, disappointed by continued impunity, would become perpetrators.

The potential of the ICC to end impunity remains in this respect questionable.

Selectivity

In the recent years, the ICC has been accused from 'selectivity', and this most sharply by the African Union. International criminal law has always been prone to selectivity. For example, the Nuremberg trials were set up to prosecute Nazi commanders, thereby "leaving out the atrocities of Dresden, Hiroshima and Nagasaki or the Gulags under the Sovjet Union."²⁴⁷ This has been referred to with the term 'victor's justice, where the winner of the war gets to rule over justice.

With regards to the ICC, there is first of all a perceived bias against Africa, by African States and the African Union. Although Africa remains the most conflicted region in the world, it is a fact that other regions seem somewhat to have been neglected by the ICC. Next to that, there has

²⁴⁷ Nils Christie, 'Answers to atrocities, restorative justice in extreme situations', in Ezzat Fattah and Stephan Parmentier, (eds.). *Victim Policies and Criminal Justice on the Road to Restorative Justice* (Leuven University Press, Leuven, 2001) pp. 379-392.

also been a certain amount of selectivity in the investigations and proceedings of the cases of Kenya and Uganda. In the case of Kenya, eventually only six suspects, who have been called the ‘Ocampo six’ had been charged, while not charging other relevant suspects. The self-referral of Uganda on the other hand was highly selective for the reason that only LRA members became subject of investigation and prosecution, while the UPDF government forces of Museveni had not been included, although they have also been committing serious human rights violations.

Legitimacy of the ICC

These previous issues could strongly undermine the legitimacy of the ICC. If the ICC fails to book any successes to put people in prison and hold them responsible for their crimes, the ICC as an international institution to prosecute the responsables of the gravest crimes, cannot be said to be very effective. The effect on perpetrators and future perpetrators might stay minimal.

Due to this, the ICC might lose credibility and be further weakened.

State Parties to the Rome Statute and implementation in domestic legislation

The ICC can only exercise jurisdiction over Member States to the Rome Treaty, unless a third State gives the permission to the ICC to exercise jurisdiction on its territory. With all the great powers in the world still absent from it, there is still a lot of work for the ICC to further get States to ratify the Treaty. Furthermore, in 2006, only 30 out of 100 State Parties had implemented the Rome Statute in national legislation. In this matter, the role of the Coalition for the ICC to persuade States to ratify the Rome Statute and implement the Treaty into domestic legislation is very important.

Relationship between Africa and the ICC

The relationship with Africa remains important to the ICC, or to quote Philippe Kirsch, former President of the ICC: “without Africa the ICC would not exist as it does today; and because of the relationship between the Court and African States, cooperation with the AU is particularly important to the Court.”²⁴⁸ The ICC could have the advantage to develop itself as a well-recognized, legitimate institution, through the cooperation with Africa. Africa, by creating its own Court, could also assist the ICC, given that this would seriously reduce the costs of trials before the ICC. But not only is Africa important to the ICC, Africa could benefit from the ICC as well. The Rome Statute can, by preventing international crimes, contribute to the goals of peace and security of the African Union’s Constitutive Act and Protocol for Peace and Security.

²⁴⁸ As quoted by *Kambudzzi*, supra note 61, at 43.

Therefore, it would be in both the interest of Africa and the ICC to maintain a mutually beneficial relationship.

To conclude, we can say that the ICC is still a struggling Court trying to find its way as an independent, legitimate, judicial institution, operating in a highly political environment, thereby being entirely reliant on cooperation of political actors, with very limited capacities of its own to enforce justice and to prevent and put an end to impunity in this world.

“All of us who are concerned for peace and triumph of reason and justice must be keenly aware how small an influence reason and honest good will exert upon events in the political field.”²⁴⁹

²⁴⁹ Albert Einstein, Miscellaneous, <www.websophia.com/faces/einstein.html#miscellaneous>, June 24,2012.

UN Treaty - Rome Statute of the International Criminal Court

Article 2

Relationship of the Court with the United Nations

The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf.

Article 12

Preconditions to the exercise of jurisdiction

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
 - (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
 - (b) The State of which the person accused of the crime is a national.
3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

Article 13

Exercise of jurisdiction

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

- (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
- (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
- (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

Article 15

Prosecutor

1. The Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court.
2. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.
3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.

4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.

5. The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation.

6. If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.

Article 16

Deferral of investigation or prosecution

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

Article 17

Issues of admissibility

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

- (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely 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 genuinely to prosecute;
- (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;
- (d) The case is not of sufficient gravity to justify further action by the Court.

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

- (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
- (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
- (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

Article 18

Preliminary rulings regarding admissibility

1. When a situation has been referred to the Court pursuant to article 13 (a) and the Prosecutor has determined that there would be a reasonable basis to commence an investigation, or the Prosecutor initiates an investigation pursuant to articles 13 (c) and 15, the Prosecutor shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned. The Prosecutor may notify such States on a confidential basis and, where the Prosecutor believes it necessary to protect persons, prevent destruction of evidence or prevent the absconding of persons, may limit the scope of the information provided to States.
2. Within one month of receipt of that notification, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States. At the request of that State, the Prosecutor shall defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation.
3. The Prosecutor's deferral to a State's investigation shall be open to review by the Prosecutor six months after the date of deferral or at any time when there has been a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation.
4. The State concerned or the Prosecutor may appeal to the Appeals Chamber against a ruling of the Pre-Trial Chamber, in accordance with article 82. The appeal may be heard on an expedited basis.
5. When the Prosecutor has deferred an investigation in accordance with paragraph 2, the Prosecutor may request that the State concerned periodically inform the Prosecutor of the progress of its investigations and any subsequent prosecutions. States Parties shall respond to such requests without undue delay.
6. Pending a ruling by the Pre-Trial Chamber, or at any time when the Prosecutor has deferred an investigation under this article, the Prosecutor may, on an exceptional basis, seek authority from the Pre-Trial Chamber to pursue necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available.
7. A State which has challenged a ruling of the Pre-Trial Chamber under this article may challenge the admissibility of a case under article 19 on the grounds of additional significant facts or significant change of circumstances.

Article 19

Challenges to the jurisdiction of the Court or the admissibility of a case

1. The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.
2. Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:
 - (a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58;
 - (b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or
 - (c) A State from which acceptance of jurisdiction is required under article 12.
3. The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the

Court.

4. The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall take place prior to or at the commencement of the trial. In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial. Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court, may be based only on article 17, paragraph 1 (c).

5. A State referred to in paragraph 2 (b) and (c) shall make a challenge at the earliest opportunity.

6. Prior to the confirmation of the charges, challenges to the admissibility of a case or challenges to the jurisdiction of the Court shall be referred to the Pre-Trial Chamber. After confirmation of the charges, they shall be referred to the Trial Chamber. Decisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber in accordance with article 82.

7. If a challenge is made by a State referred to in paragraph 2 (b) or (c), the Prosecutor shall suspend the investigation until such time as the Court makes a determination in accordance with article 17.

8. Pending a ruling by the Court, the Prosecutor may seek authority from the Court:

(a) To pursue necessary investigative steps of the kind referred to in article 18, paragraph 6;

(b) To take a statement or testimony from a witness or complete the collection and examination of evidence which had begun prior to the making of the challenge; and

(c) In cooperation with the relevant States, to prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest under article 58.

9. The making of a challenge shall not affect the validity of any act performed by the Prosecutor or any order or warrant issued by the Court prior to the making of the challenge.

10. If the Court has decided that a case is inadmissible under article 17, the Prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17.

11. If the Prosecutor, having regard to the matters referred to in article 17, defers an investigation, the Prosecutor may request that the relevant State make available to the Prosecutor information on the proceedings. That information shall, at the request of the State concerned, be confidential. If the Prosecutor thereafter decides to proceed with an investigation, he or she shall notify the State to which deferral of the proceedings has taken place.

Article 20

Ne bis in idem

1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.

2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.

3. No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 bis shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or

(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner

which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

Article 25

Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.
3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
 - (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
 - (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
 - (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
 - (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
 - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
 - (ii) Be made in the knowledge of the intention of the group to commit the crime;
 - (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;

8 As amended by resolution RC/Res.6 of 11 June 2010 (adding paragraph 3 bis).

Article 27

Irrelevance of official capacity

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Article 53

Initiation of an investigation

1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:
 - (a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
 - (b) The case is or would be admissible under article 17; and
 - (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the

interests of justice.

If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.

2. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:

(a) There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;

(b) The case is inadmissible under article 17; or

(c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime; the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion.

3. (a) At the request of the State making a referral under article 14 or the Security Council under article 13, paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision.

(b) In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1 (c) or 2 (c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.

4. The Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.

Article 86

General obligation to cooperate

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

Article 87

Requests for cooperation: general provisions

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

Subsequent changes to the designation shall be made by each State Party in accordance with the Rules of Procedure and Evidence.

(b) When appropriate, without prejudice to the provisions of subparagraph (a), requests may also be transmitted through the International Criminal Police Organization or any appropriate regional organization.

2. Requests for cooperation and any documents supporting the request shall either be in or be accompanied by a translation into an official language of the requested State or one of the working languages of the Court, in accordance with the choice made by that State upon ratification, acceptance, approval or accession.

Subsequent changes to this choice shall be made in accordance with the Rules of Procedure and Evidence.

3. The requested State shall keep confidential a request for cooperation and any documents supporting the request, except to the extent that the disclosure is necessary for execution of the request.

4. In relation to any request for assistance presented under this Part, the Court may take such measures, including measures related to the protection of information, as may be necessary to ensure the safety or physical or psychological well-being of any victims, potential witnesses and their families. The Court may request that any information that is made available under this Part shall be provided and handled in a manner that protects the safety and physical or psychological well-being of any victims, potential witnesses and their families.

5. (a) The Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis.

(b) Where a State not party to this Statute, which has entered into an ad hoc arrangement or an agreement with the Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may so inform the Assembly of States Parties or, where the Security Council referred the matter to the Court, the Security Council.

Article 89

Surrender of persons to the Court

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

2. Where the person sought for surrender brings a challenge before a national court on the basis of the principle of ne bis in idem as provided in article 20, the requested State shall immediately consult with the Court to determine if there has been a relevant ruling on admissibility. If the case is admissible, the requested State shall proceed with the execution of the request. If an admissibility ruling is pending, the requested State may postpone the execution of the request for surrender of the person until the Court makes a determination on admissibility.

3. (a) A State Party shall authorize, in accordance with its national procedural law, transportation through its territory of a person being surrendered to the Court by another State, except where transit through that State would impede or delay the surrender.

(b) A request by the Court for transit shall be transmitted in accordance with article 87. The request for transit shall contain:

(i) A description of the person being transported;

(ii) A brief statement of the facts of the case and their legal characterization; and

(iii) The warrant for arrest and surrender;

(c) A person being transported shall be detained in custody during the period of transit;

(d) No authorization is required if the person is transported by air and no landing is scheduled on the territory of the transit State;

(e) If an unscheduled landing occurs on the territory of the transit State, that State may require a request for transit from the Court as provided for in subparagraph (b). The transit State shall detain the person being transported until the request for transit is received and the transit is effected, provided that detention for purposes of this subparagraph may not be extended beyond 96 hours from the unscheduled landing unless the request is received within that time.

4. If the person sought is being proceeded against or is serving a sentence in the requested State for a crime different from that for which surrender to the Court is sought, the requested State, after making its decision to grant the request, shall consult with the Court.

Article 98

Cooperation with respect to waiver of immunity and consent to surrender

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

Article 112

Assembly of States Parties

2. The Assembly shall:

- (a) Consider and adopt, as appropriate, recommendations of the Preparatory Commission;
- (b) Provide management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court;
- (c) Consider the reports and activities of the Bureau established under paragraph 3 and take appropriate action in regard thereto;
- (d) Consider and decide the budget for the Court;
- (e) Decide whether to alter, in accordance with article 36, the number of judges;
- (f) Consider pursuant to article 87, paragraphs 5 and 7, any question relating to non-cooperation;
- (g) Perform any other function consistent with this Statute or the Rules of Procedure and Evidence.

Article 127

Withdrawal

1. A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.

2. A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued. Its withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective.

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